IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 124/10
File Number: 5296015

	BETWEEN	Debbie Priston Applicant
	AND	Sexual Abuse Healing Centre (Whanganui) Incorporated Respondent

Member of Authority:	Denis Asher
Representatives:	Jills Angus Burney for Ms Priston Beverley Pearce for the Centre
Investigation Meeting	Whanganui, 25 June 2010
Submissions Received	By 13 July 2010
Determination:	15 July 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Ms Priston says she was unjustifiably disadvantaged and unjustifiably dismissed by the respondent (the Centre). A key question to this employment relationship problem is, did the parties enter into a final and binding agreement whereby, amongst other things, Ms Priston resigned her employment?

[2] Mediation did not resolve this problem.

The Investigation

[3] During a telephone conference call on 21 May 2010 the parties agreed to an investigation on 25 June. Timelines were agreed for witness statements.

[4] During the investigation the parties were unable to settle this matter on their own terms. Timelines were set in place closing submissions.

[5] From the evidence presented by the parties I am satisfied that the following are the key matters in their employment relationship problem.

Background

[6] Ms Priston was employed by the respondent (the Centre) as their manager for five years, up to 24 March 2010.

[7] The Centre is a non-profit incorporated society whose purpose is that of providing education, information support and counselling for those who have been raped or sexually abused in the Whanganui area. It is registered under the Charities Act 2005. It has a trust board made up of six volunteers.

[8] In late January this year Ms Priston attended a meeting with the Centre's chair and treasurer/secretary where it was confirmed there had been a complaint about the applicant's management of the Centre: the respondent's representatives outlined a performance review process it wanted to follow, including obtaining feedback from other staff members.

[9] Then and later, Ms Priston made it clear to the Centre's representatives that she wanted to know the identity of the complainant and the nature of their complaint. The Centre's representatives declined to provide those details and instead sought to focus on the performance plan; Ms Priston declined to discuss that plan or enter into it without obtaining the information she had asked for.

[10] The applicant says she was unjustifiably disadvantaged by the respondent's approach.

[11] Ms Priston was stressed by the turn of events and took periods of leave.

[12] Meetings subsequently occurred between the parties. Ms Priston was invariably represented. Mediation occurred on 23 February but was unsuccessful.

[13] A further meeting between the parties took place on 22 March. By then the parties' positions were deadlocked. Ms Priston's then representative advised that matters would proceed either by way of the applicant bringing a grievance or the parties agreeing to departure arrangements. The respondent agreed to exploring the latter and, shortly thereafter and on the same day, Ms Prison and the Centre signed off a record of settlement (the record). The record was drawn up from a template document and in the form typically used by Department of Labour mediators.

[14] Amongst other provisions, the terms included payment of compensatory monies to Ms Priston and that the applicant's last day of employment with the Centre would be 24 March.

[15] The record also contained the following:

> *We also confirm that before the Mediator signed the agreed terms of settlement that:*
>
> *1. The Mediator explained to us that:*
>
> *(a) Those terms are final and binding on, and enforceable by us; and*
>
> *(b) Except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether by action, appeal, application for review, or otherwise; and*
>
> *2. We confirmed to the Mediator that we understood that explanation and affirmed our request.*

[16] Space is then provided for signatures again by the parties as well as for a mediator's signature. Ms Priston's signature is present on the settlement but not that of a mediator.

[17] The record goes to include the standard information that the mediator is employed by the chief executive of the Department of Labour, has authority from the

chief executive to sign agreed terms of settlement for the purposes of s. 149 of the Employment Relations Act 2000 and that,

> *I have been requested by the parties to sign the attached agreed terms of settlement; (etc)*

[18] As already noted, the parties' record was not signed off by a mediator as, overnight, Ms Priston resiled from her agreement and advised her representative not to deliver it, as previously agreed, for signing by a mediator. The applicant also advised a Department of Labour mediator, on 23 March, not to sign off the record as she, Ms Priston, would not accept the terms as final and binding.

[19] By letter dated 23 March Ms Priston's counsel filed notice of personal grievance, including a claim of unjustified disadvantage (attachment J, statement of problem). The letter also advised Ms Priston *"does not wish to resign in these circumstances"* (above) and proposed she be placed on paid garden leave.

[20] By letter dated 25 March the Centre's representative advised it did not accept the grievance and Ms Priston's *"resignation has been accepted with effect from 24 March 2010"* (attachment K, statement of problem).

[21] The respondent seeks to rely on the record on the ground that Ms Priston has received accord and satisfaction: the applicant says she is not bound by the record and that the Centre has unjustifiably disadvantaged her and unjustifiably dismissed her.

[22] During the investigation I drew the parties' attention to the Employment Court's decision, *Abernethy* v *DYNEA New Zealand Ltd (No 2)* [2007] ERNZ 462 and asked that they attempt to settle this employment relationship problem on their own terms in light of that decision, failing which they were to provide me with their submissions including comment in respect of *Abernethy*.

[23] In *Abernethy*, Judge Travis found that:

> *[57] Where, as here, the parties have agreed to (the s 149 procedure) there is no binding accord until that process has been completed. It is analogous to a situation where the parties have either expressly or impliedly agreed that*

there will be no binding contractual obligations until a formal document is signed or a procedure has been completed. In such circumstances it has been held not to matter that the party denying the existence of a binding contract prepared the draft contract and sent it to the other side: see Carruthers *v* Whitaker *[1975] 2 NZLR 667 (CA).*

[58] The agreed process was not completed in this case because the plaintiff did not approve the record of settlement and did not submit it to the mediation service for the completion of the process as the parties understood it. Unlike (Graham v Crestline Pty Ltd [2006] 1 ERNZ 848*) the parties agreed to their understanding of the s 149 process in advance and the orally agreed terms were subject to the due completion of the process. I therefore find there was no binding accord and the challenge must succeed.*

Discussion and Findings

Unjustifiable Dismissal Claim

[24] What the record plainly makes clear was confirmed by both Ms Priston and the Centre's witness: that, having signed it off, they intended the record in turn to be signed off by a mediator. While the Centre's witness said she regarded the agreement *"as a done deal"* (oral evidence), she also accepted that the mediator's signature was required.

[25] What happened next was unusual: Ms Priston agreed to resign but – as her counsel's letter of 23 March makes clear, later that evening she changed her mind.

[26] Relying on the record, the Centre's response was to advise it did not accept the personal grievance and the applicant's resignation was accepted with effect from 24 March 2010.

[27] At the time neither she or her representatives, nor the respondent, were aware of the *Abernethy* (above) decision. Ms Priston otherwise made no further effort to return to her employment. And, as set out in her statement of problem, *"Due to her loss of confidence in her former employer, the applicant does not seek reinstatement"* (par 3 (a)).

[28] It follows that, despite the parties' signatures on the record, but consistent with *Abernethy* (above), as the record was not signed off by a mediator the process was not completed. There was therefore no binding accord.

[29] In determining this matter, and in respect of s. 103 A of the Employment Relations Act 2000 (the Act), I bear in mind the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[30] Because of *Abernethy* (above), I am satisfied a fair and reasonable employer, as envisaged by the test set out in *V* (above), would not rely on a nonbinding accord to terminate a worker's employment. Ms Priston therefore has been unjustifiably dismissed.

Unjustifiably Disadvantage Claim

[31] I do not accept that Ms Priston was disadvantaged by the performance review process contemplated by the Centre, and its refusal to disclose the identify of the complainant and details of the complaint. I reach this conclusion on the basis that the matters of concern to the applicant were prospective and in fact never realised, and that the basis of the employer's intended review was sufficiently particularised. Failure to disclose the original complaint and the identity of the complaint may have disadvantaged Ms Priston but the effect of that was mitigated by the respondent's willingness to meet with her, on several occasions, and undertake mediation, during which it addressed the applicant's legitimate concerns (and its own) in good faith. The impasse reached by the parties did not extend to Ms Priston being unjustifiably disadvantaged.

[32] The review also never escalated to disciplinary action.

[33] As a result, and notwithstanding her concerns as to why the review had arisen and where it might lead, Ms Priston never experienced any actual unjustified

disadvantage, and it cannot be said whether any disadvantage would have resulted and if so, whether it would have been unjustified.

[34] In the alternative, if the applicant was unjustifiably disadvantaged by the performance review process contemplated by the Centre and its refusal to disclose the identity of the complainant and details of the complaint, I find that the compensation awarded her in respect of her unjustified dismissal adequately compensates Ms Priston for any humiliation and hurt resulting from the intended review.

Remedies

[35] Ms Priston seeks compensation of $15,000 for injury to feelings and all remuneration lost as a result of her dismissal.

[36] The thrust of Ms Priston's evidence as to distress, as set out in her statement of problem, witness statement and as expanded on in her oral evidence to the Authority, was in respect of the Centre's intended performance review process and related events leading up to 22 March. For example, at par 37 of her witness statement, at the meeting on 22 March, Ms Priston says she felt *"backed into a corner by my employer … was extremely distressed and had heightened anxiety … I was hugely under a lot of pressure and stress as a result of events leading up to an including this meeting. In the end I felt bombarded into the settlement … "*. As I make clear above, I am satisfied that process did not result in any unjustifiable disadvantage to the applicant.

[37] In comparison, little evidence was given by Ms Priston in respect of the impact of her actual termination, e.g. her response to the Centre's letter of 25 March (attachment K, statement of problem). Termination was actively contemplated by Ms Priston, by way of prospective departure arrangements. As the applicant's evidence makes clear, she expressed at the time some frustration about the sum recorded to be paid as compensation to her – she had thought agreement had been reached on a slightly higher amount. It is idle speculation to contemplate whether the applicant would not have resiled from the record, had the sum been at that level, or even higher. Suffice to conclude, the termination could not have come as a complete surprise given the extent of discussions between the parties.

[38] In all the circumstances I am satisfied an award of $5,000 compensation for humiliation and hurt is appropriate.

[39] Because of its voluntary basis, and in the absence of evidence as to its ability to pay, it may be appropriate if the parties look at payment of this sum over a period of time.

[40] During the Authority's investigation the applicant confirmed that, for two-weeks following her termination and because of family care obligations, she was unable to work full-time.

[41] As is made clear in her witness statement (par 45), Ms Priston is currently employed two days a week: shortly, she will be increasing that to 3 days a week and has an expectation of working four days a week from October, this year.

[42] At par 45 of her witness statement the applicant explains that these arrangements are because, *"… in April the first job I could get in consideration of the care of my daughter and her baby was this part time one in* (location)*, and the care arrangements are currently on the basis that I don't work full time"*.

[43] Because of Ms Priston's personal family care arrangements, no compensation for lost wages is appropriate.

Contributory Fault

[44] The evidence before the Authority has not disclosed actions by Ms Priston that contributed toward the situation giving rise to her personal grievance.

Determination

[45] I find in favour of Ms Priston's claim of unjustified dismissal and award her $5,000 (five thousand dollars) compensation for humiliation and hurt.

[46] As requested, costs are reserved.

[47] I note here that, subject to the parties' submissions, and as foreshadowed during the investigation, it took half a day. Consistent with the Authority's normal approach, a contribution to fair and reasonable costs of $1,500 can be anticipated.

Denis Asher
Member of the Employment Relations Authority