

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 334A/10
5310474

BETWEEN DENEPIYAGE SRIYANI
 STELLA RATHNAYAKA
 Applicant

AND LAB TESTS AUCKLAND
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Lois Black, Counsel for Applicant
 Katherine Burson and Sarah Trenwith, Counsel for
 Respondent

Investigation Meeting: 11 and 12 August 2010 at Auckland

Submissions received: At the investigation meeting

Determination: 26 August 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 16 April 2010 the applicant, Mrs Rathnayaka, was dismissed by reason of redundancy by the respondent, Lab Tests Auckland Limited (Labtests).

[2] At the time of cessation she was engaged as a Work Room Assistant at the Massey Collection Centre but had earlier been employed as a Medical Laboratory Technician at Labtests Carbine Road Laboratory.

[3] It is her removal from that former position (Medical Laboratory Technician) that Mrs Rathnayaka is challenging and to which she seeks to be reinstated. She also seeks compensation for hurt, humiliation and loss of dignity along with lost wages.

Background

[4] Labtests initially engaged Mrs Rathnayaka to work in specimen collection but that never eventuated. Prior to commencement, and as a result of her previous experience, she was interviewed for a Medical Laboratory Technicians role. That role was offered by letter dated 21 May 2009 and Mrs Rathnayaka, having accepted, signed her employment agreement two days later.

[5] Mrs Rathnayaka is a seasoned Laboratory Technician with in excess of twenty years relevant experience in her native Sri Lanka. In November 2007 she obtained New Zealand registration as a Medical Laboratory Technician. She is also seeking New Zealand residency and that process continues.

[6] Notwithstanding acceptance in May 2009, Mrs Rathnayaka did not take up the appointment as a Medical Laboratory Technician until 10 August 2009. In the interim she attended an induction day and underwent two days training on the Advia 2400, a machine she would be using in the performance of her duties.

[7] Over the ensuing months there were four events which were to result in Mrs Rathnayaka's removal from her position as a Medical Laboratory Technician.

[8] The first incident occurred on 15 September. It involved an alleged failure to follow the small sample standard operating procedure (SOP). Mrs Rathnayaka was performing a Bilirubin test on two samples and is said to have switched the outcomes as a result of not having followed labelling protocols.

[9] Labtests accepts that this incident did not result in a formal disciplinary outcome and states there are no notes of the resulting discussion. Indeed, there is now some confusion as to whether or not it is one of the issues referred to in a subsequent warning issued in November (see 10 below). Mrs Rathnayaka now states that she has no recollection of the event or the discussion that Labtests say occurred as a result, though it should be noted that evidence differs from that given during the interim reinstatement application some four weeks earlier. She then said she remembered a

discussion over the incident but did not understand the event to be as serious as Labtests current evidence suggests it considers it to have been.

[10] The second incident occurred on 3 November. It again involved a failure to follow the small sample standard operating procedure and again involved Bilirubin testing. The incident resulted in a written warning, which Mrs Rathnayaka accepts she received, and a requirement that she and her manager meet weekly until 4 December.

[11] The weekly meetings did not occur but Labtests state that Ms Aspin, the head of its Biochemistry Department, provided extra training and supervision after this incident. Mrs Rathnayaka disputes that claim, or at least whether the increased interaction with her manager, which she accepts occurred, could be considered training or simply more stringent oversight.

[12] The next incident is said to have occurred on 12 November. It is alleged that Mrs Rathnayaka again failed to follow a standard operating procedure, though this time it was a procedure concerning quality control. Labtests say that the problem was quickly identified and dealt with informally by the section head, Mr Lee. Ms Aspin did not become aware of it until well after the event and states that if she had earlier knowledge, more formal action may have resulted.

[13] The forth and final incident occurred on 14 November 2009. Labtests allege Mrs Rathnayaka failed to perform a daily maintenance task, namely the cleaning of a dilution bowl and waste nozzle, on one of the four Advia 2400's in her work area. Mrs Rathnayaka accepts that, as alleged, she failed to clean the bowl but the parties disagree about which of the four Advia 2400's was involved. This raises the second issue that influenced Labtests decision to remove Mrs Rathnayaka from the Laboratory Technician position. That was their belief that she deliberately tried to deceive by falsely completing the daily maintenance log and claiming that the bowl had been cleaned. Whether or not that belief has any foundation depends on which machine was involved and there was considerable evidence about this issue. Labtests asserts it was machine one, for which the maintenance log was completed, while Mrs Rathnayaka claims machine three was involved. The maintenance log for machine three was not completed that day.

[14] The failure to clean the bowl lead to a 'salt bridge build up' which affected the accuracy of subsequently performed tests. This ultimately affected some 200 results and the tests had to be repeated. Additional work ensued after the problem was identified that afternoon, as a number of clients had already been advised of their results and the errors had to be reported.

[15] On 17 November Ms Aspin, accompanied by Ms Robinson (the Biochemistry divisions 2IC and Section Head – Automation), met with Mrs Rathnayaka to discuss the issue. Mrs Rathnayaka says the meeting was relatively short with Ms Aspin raising the failure to clean the bowl and nozzle, the 200 incorrect results, a view that the matter was serious and that a formal meeting would follow. Ms Aspin agrees with Mrs Rathnayaka's evidence on this.

[16] An issue that arose in the interim application was whether or not a warning was actually issued at that meeting. Ms Aspin said yes in response to a query about why the meeting notes contain a bullet point reading "*2nd formal warning*". It now appears that both Ms Aspin and Mrs Rathnayaka are in agreement no warning was issued at this time.

[17] Ms Aspin then had Mr Stephen Bradley, the Human Resources Manager at the time, prepare a letter confirming the discussion and inviting Mrs Rathnayaka to attend a 'formal employment investigation'. Ms Aspin says she handed the letter to Mrs Rathnayaka the following day and that they discussed whether or not Mrs Rathnayaka would be suspended pending the meeting which was scheduled for the 20th. She also says that Mrs Rathnayaka requested, and she agreed, that the meeting be brought forward to the 19th.

[18] Mrs Rathnayaka did not initially remember the meeting, suggesting that the discussion about suspension occurred on 19 November (see below). Subsequent discussion would suggest that Ms Aspin's recollection is correct. In any event nothing turns on this possible difference and while it is clear that Labtests did intend to suspend, it would appear that did not actually occur.

[19] The meeting of 19 November was attended by Ms Aspin, Ms Robinson, Mr Bradley and Mrs Rathnayaka. The latter chose not to bring a support person though it is clear she had the opportunity to do so and her decision was discussed at the meetings commencement with her being offered an opportunity to rethink.

[20] The meeting proceeded with Labtests outlining their concerns, the fact that they considered the matter serious and that dismissal was a distinct possibility.

[21] Ms Aspin says:

“I explained to Sriyani that given her failure to follow SOP’s, and the fact that she had misrepresented that checks had been completed, I was considering dismissal.

Sriyani was very upset to hear this and expressed her desire for a second chance. My response was that she’d had a number of chances, and she had still ignored an SOP and misled us by filling in the log as if the start-up had been completed, when this had not been done. At this point, Stephen came up with a suggestion that Sriyani could take up a new position as an alternative.

Stephen explained that the only position that we had available for her at the time was Work Room Assistant- there was a vacancy at our Massey Collection Centre...

When Stephen suggested this I thought it a very generous offer, and a good option for Sriyani, who was otherwise facing dismissal...”

[22] To me, the last couple of sentences sum up Labtests approach to this matter. Having considered the evidence I have to suggest that Mrs Rathnayaka’s removal from the Laboratory Technician’s position was a preordained outcome. The evidence of Ms Aspin and Ms Robinson would suggest that both had lost all confidence in Mrs Rathnayaka’s ability to perform her duties adequately and, especially in the case of Ms Robinson, there was no trust given the belief the maintenance log had been falsified. Mrs Rathnayaka was, as far as they were concerned, gone.

[23] Mrs Rathnayaka’s evidence about the meeting is, with two exceptions, consistent with that given on behalf of Labtests. She is adamant that she did not falsify the maintenance log with that argument revolving around which machine had the unclean bowl and nozzle and says that she referred to her work permit a number of

times and the fact that she required laboratory work to retain it. Both Ms Aspin and Ms Robinson deny the work permit and its relevance was discussed.

[24] The meetings outcome was recorded in a letter wrongly dated 17 November. It states, amidst other things, that:

- a. There has been a decision to issue a written warning for failure to follow procedure;
- b. Labtests no longer had confidence in Ms Rathnayaka's ability to safely operate as a Medical Laboratory Technician; and
- c. As a result of Ms Rathnayaka's personal circumstances and her expressed desire to remain at Labtests, "... *we have found alternate duties for you outside the biochemistry department*".

[25] The letter then continues with advice that the alternate duties were part time and would attract a lower hourly rate, before proffering an offer of employment as a Work Room Assistant. There is advice that this was the only suitable position then available and the offer is characterised, in the letter's heading, as a redeployment.

[26] The following day, a Friday, Ms Rathnayaka remained at home though there were a couple of telephone conversations between herself and Mr Bradley. She says she again reiterated the view that her work permit made laboratory work a necessity and asked, without getting a response, what would now happen with Immigration (meaning the Immigration Service of the Department of Labour).

[27] Mrs Rathnayaka did, however, sign a new employment agreement reflecting acceptance of the Work Room Assistant position on 24 November. She commenced that day, though the reduced hourly rate was never applied.

[28] There is little doubt that the move was, at least in Mrs Rathnayaka's mind, disadvantageous. The new position's ability to assist with the attainment of residency is limited vis-à-vis that of a Medical Laboratory Technician's position and it did not require the maintenance of a practising certificate as a registered technician. Indeed, her practicing certificate lapsed soon after her redeployment. She yearned to return to the laboratory and states that her confusion about what had occurred on the 19th left her with a view that a return to the Laboratory remained possible. She says this belief

was, in her mind, reinforced by the fact that her hourly rate remained that of a Laboratory Technician though the evidence makes it clear that this was an error on Labtests behalf.

[29] In early February 2010 Mrs Rathnayaka approached the resident union delegate, Ms Minhas, and sought her assistance in re-obtaining a Medical Laboratory Technician's position. The delegate then sent an e-mail to Ms Linda Hart who had, by this time, replaced Mr Bradley as the Human Resources Manager. It contains, amidst other content, the following:

“Sriyani Rathnayaka used to work for Biochemistry about 3-4 months ago until she received written warning for failure to follow SOP. This was her second warning and she had other previous informal and documented meetings as well. Because of all this she was deemed unsafe to operate in Biochemistry. She was then offered a position at Massey Collection Centre as a Work Room Assistant which she accepted ... She has now realised that she needs to be working in the laboratory if she wants to hold on to her registration as a Laboratory Technician. So basically she wants another chance to come back to the lab to work ... I have told her she would have to probably reapply for any vacancies that become available. I also suggest that its perhaps best if she talks to you about all this ...”

[30] Ms Hart contacted Ms Aspin who made it very clear that she would not countenance Mrs Rathnayaka's return to the laboratory. Ms Hart met Ms Minhas and advised accordingly. This approach does not appear to have been progressed further and the union played no further part in representing Mrs Rathnayaka.

[31] On 12 March 2010 Mrs Rathnayaka was given a letter advising that Labtests was considering disestablishing her position. While she was not the only Work Room Assistant, Mrs Rathnayaka was the only one affected by this proposal as she was the only Work Room Assistant engaged on a permanent basis. Labtests is a relatively new provider in the Auckland area and the Work Room Assistants position was originally established to assist with work flows while Labtests trialled and embedded its processes. The position, and its continuation, was to be reviewed and incumbents were therefore engaged on fixed term agreements. As events transpired, Labtests concluded that once their processes had bedded in, the position would no longer be required. Therefore, and while some of the agreements had earlier been extended, the

engagement of individual Work Room Assistants was, by this time, ceasing when their employment agreements expired. It was this process that had made the responsible manager, Ms Robyn Siebert, aware that she had one incumbent on a permanent employment agreement, hence the proposal.

[32] The letter closed by advising that should Mrs Rathnayaka have any queries she should approach either Ms Siebert or Human Resources. She chose the later and arranged a meeting with Ms Hart which occurred on 19 March. Both agree that the proposal to disestablish the Work Room Assistant role was not discussed. Mrs Rathnayaka pursued only one issue - her wish to return to the laboratory. She states *"I said I needed to work in the laboratory for my MLS [Medical Laboratory Science] Board registration and work permit"*.

[33] Mrs Rathnayaka states that Ms Hart advised that she would discuss the matter with Ms Aspin and respond. Ms Hart says that she approached Ms Aspin but the answer had not altered since February. She says she also approached Ms Siebert about other possible vacancies but that none existed.

[34] Mrs Rathnayaka complains that the promised response from Ms Hart never came. Ms Hart agrees she did not speak to Mrs Rathnayaka again, but denies she advised it would be her who would respond and states that she considered the answer better coming from Ms Siebert given she was Mrs Rathnayaka's manager and wrote the original letter.

[35] Labtests response was conveyed in a letter dated 24 March which confirmed that the disestablishment would proceed, that no other vacancies had been found and that Mrs Rathnayaka's employment would cease on 16 April 2010 by reason of redundancy. That decision was subsequently implemented.

[36] In the interim Labtests had been corresponding with the Immigration Service about Mrs Rathnayaka and the position she occupied. It appears the Immigration Service was interested in her removal from the Laboratory Technicians position and were investigating whether or not she had *"withheld potentially prejudicial information"*, as loss of the technicians position meant she no longer qualified for the skilled migrant residence visa she held.

[37] On 2 June the Immigration Service wrote to Mrs Rathnayaka advising, amidst other things, that her application for residence had been declined.

[38] That prompted Mrs Rathnayaka to act and, through the offices of her present solicitor, she wrote to Labtests raising her grievance on 15 June 2010. The letter asks for further information about the disestablishment of the Work Room Assistants role, questions the validity of her appointment to that role in November 2009 and challenges what it describes as Mrs Rathnayaka's unjustified dismissal from the Laboratory Technicians position.

[39] Labtests responded by letter dated 25 June denying any wrongdoing. The matter then proceeded, with some urgency, to the hearing of an interim reinstatement application (see AA334/10, 26 July 2010) which was denied, largely because the substantive matter could be dealt with in a timely manner.

Determination

[40] Both parties supplied comprehensive submissions and for that I thank them.

[41] Mrs Rathnayaka suffered two 'removals' – she uses, in both instances, the term 'dismissal'. I say 'removals' given a debate about terminology which shall be discussed later. The first occurred on 19 November 2009 when she ceased to be employed as a Laboratory Technician. The second occurred on 16 April 2010 when her position of Work Room Assistant was disestablished and, with that, her employment with Labtests ended.

[42] This claim, as many are wont to do, evolved as it progressed. That evolution has seen the dismissal of April 2010 cease to be at issue. It is not even mentioned in the introduction section of Ms Black's opening submission which outlines Mrs Rathnayaka's grievance. Mrs Rathnayaka acknowledged in evidence that it is not what her grievance is about and Ms Black conceded that Labtests would successfully justify its decision to declare the Work Room Assistants position redundant.

[43] Mrs Rathnayaka's grievance concerns her removal from the Medical Laboratory Technician position in November 2009. It is that she is challenging and that is the position to which she wishes to be reinstated.

[44] That then returns us to the issue of terminology (41 above). There is one paramount issue that must be addressed – one paramount hurdle that Mrs Rathnayaka must overcome if she is to have any chance of success. The events she challenges occurred between 19 and 24 November 2009. That she considered those events to constitute a possible grievance was not raised before Ms Black's letter of 15 June 2010, and that is not in dispute. Over 200 days had passed, which is considerably more than the 90 allowed for the raising of a grievance under section 114 of the Employment Relations Act 2000.

[45] Many terms have been used by the parties to describe what occurred in November. "Redeployment", "removal" and more lately "dismissal" have all been used. The label dismissal was first used in Ms Black's letter of 15 June 2010 as, she states, that is what she interpreted the events to constitute. Whilst not expressly stated, there is an implicate argument that the application of this label to those events may assist the 90 day argument. When referring to November's events, Labtests first used the term dismissal in Ms Hart's letter of 25 June. That is within 90 days of the grievance being raised and the argument is that Mrs Rathnayaka did not fully comprehend events and did not realise she had actually been dismissed till Ms Hart used the term in her letter. As said earlier, this argument has not been expressly articulated, but it is definitely implied given some of the evidence and submissions.

[46] The confusion is enhanced by a statement by Ms Aspin that she felt she had "*dismissed [Mrs Rathnayaka] from the laboratory*".

[47] The proposition outlined in 45 above is not one with which I can concur. First, I do not accept that the events of 19 – 24 November 2009 constitute a dismissal. A dismissal is an ending – it is a sending away and an absolute ending of the employment relationship. That is not what occurred here. Whilst Mrs Rathnayaka found herself in a different role (albeit in circumstances which afforded her little or no choice), she accepted the change (albeit reluctantly) and her employment relationship with Labtests continued unbroken throughout. That is not a dismissal though it

probably constituted a disadvantage challengeable through the personal grievance process (s.103(1)(b)).

[48] The words used by Ms Aspin and Ms Hart do not sway me to alter that conclusion. When giving evidence Ms Aspin did not say dismissed from Labtests, she said dismissed from the Laboratory and, in any event, it was one of many words she used to describe what occurred. This was not the only instance where she used what a human resources practitioner would consider unusual terminology to describe various occurrences but as she said, and I accept, she is not a human resources practitioner and does not, as she put it herself, understand “*HR lingo*”. Neither do I put any weight on Ms Hart’s use of the term in her letter of 25 June. She was not present in November. She had no direct knowledge of what occurred and was, in any event, replying to Ms Black’s use of the term “dismissal” when describing events.

[49] Even if the above conclusion is wrong, along with my view that the label applied to the events of November is actually irrelevant, the outcome would not alter. Irrespective of whether the events of November constitute a dismissal or a disadvantage, the 90 day problems remains.

[50] The 90 days commences on “... *the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee...*” (section 114(1) of the Act). In *Robertson v IHC NZ* [1999] 1 ERNZ 367 the Court considered what that phrase meant and, at page 381, observed that it was:

“... of the view that the expression “came to the notice of the employee” concerns and contemplates information/facts which:

(i) Actually became known to and made the affected employee aware and/or sufficiently aware that he/she had exercisable personal grievance rights against/affecting his/her employer, or

(ii) Ought reasonably, because this situation was reasonably discoverable/discernible, have made the affected employee aware of the contended basis for his/her alleged personal grievance and consequential exercisable personal grievance rights against/affecting his/her employer.”

[51] The issue was more recently considered in *Wyatt v Simpson Grierson* [2007] ERNZ 489. There the Court noted:

“To properly apply s 33(2) or s 114(1), it is also necessary to deal with the extent of knowledge the employee must have before the 90-day period starts to run... an employee need not have every piece of evidence necessary to prove his or her case in an adversarial Tribunal in order to submit a personal grievance to his or her employer. If the employee has the knowledge necessary to form a reasonable belief that the employer has acted in an unjustifiable manner, that will suffice” [para 28].

[52] Mrs Rathnayaka is challenging her removal from the Laboratory Technicians position. That she was aware of that occurrence in November 2009 is patently obvious from her evidence. There is also the issue of the consequences and, accepting Labtests disputes Mrs Rathnayaka’s evidence in this respect, she claims that at the meeting of 19 November she raised the issue of her work permit and the fact that she required laboratory work to retain it (see 23 above). She says she reiterated the point the next day in her phone conversations with Mr Bradley (26 above). Her evidence shows an awareness of what had occurred and its consequences to a level sufficient to cross the threshold outlined above. I might also add it contradicts her evidence that she was unclear as to what had occurred that day (45 above and 57 below).

[53] Similarly, there is Ms Minhas’ e-mail of 12 February 2010. Labtests expressed the view that the level of detail and terminology used indicated Ms Minhas had seen, and was referring to, their incorrectly dated letter of 19 November. Mrs Rathnayaka denies that, saying she never gave Ms Minhas the letter and that Ms Minhas relied totally on Mrs Rathnayaka’s oral briefing. Again, there is sufficient detail to evidence a clear appreciation of what had occurred and its consequences and, according to Mrs Rathnayaka, the detail had been provided by her.

[54] Accepting Mrs Rathnayaka’s evidence as related above, I must conclude that she had more than enough knowledge to pursue the matter had she so chosen. She chose not to. She accepted and performed the Work Room Assistants role while doing nothing about her changed circumstances. Indeed she did not even act with alacrity when dismissed in April – it was not until the letter from Immigration, and an appraisal of its severe consequences, that she chose to act.

[55] That leaves the last piece of relevant evidence, and that is Mrs Rathnayaka’s view that she understood she would return to the Laboratory (28 above). That is not

credible. Again her evidence in respect to the consequences of her demotion would tend to undermine that claim and Ms Minhas' e-mail definitely does. Even if this conclusion is wrong any remaining doubt should have been removed with Ms Hart's February response to Ms Minhas and/or the final dismissal and its attendant advice that Labtests had no suitable alternates, yet neither of these events prompted a challenge from Mrs Rathnayaka.

[56] The above leads to a conclusion that a challenge to the events of 19 to 24 November 2009 has been raised well out of time. That gives rise to the question of an application to submit the grievance out of time (s.114(3) of the Act). Granting of such an application relies upon the existence of exceptional circumstances which explain the delay.

[57] The only reference to a possible application was Ms Blacks comment toward the end of closing submission that should I conclude the 90 days had been exceeded, the circumstances were exceptional and it would be just and fair to allow the grievance to proceed. This hardly constitutes an application as envisaged by the Act, but even if it did, it would not be granted. The only supporting evidence or argument that has not already been canvassed in 45 to 55 above is that Mrs Rathnayaka's alleged inability to fully comprehend that what had occurred on 19 November was due to the fact that English was not her first language. Aside from the fact that I have concluded Mrs Rathnayaka did understand what had occurred (and, at least at the time, grudgingly accepted the situation), I must state that having spent three days in meetings over her claims (one on the interim and two on this meeting) I am left with a very favourable view of her command of the English language. It was also good enough to give both Ms Minhas and Ms Black a clear understanding of what had occurred.

[58] The issues canvassed above do not constitute exceptional circumstances.

Other matters

[59] Ms Hart, in the last sentence of her brief of evidence and having commented on Labtests having mistakenly continued to pay Mrs Rathnayaka as a Laboratory Technician, says "*Labtests seeks to recover this overpayment from Sriyani*".

[60] I do not consider this to constitute a formal claim and will not consider it further.

Conclusion

[61] For the reasons outlined above, I must conclude that Mrs Rathnayaka's grievance has been raised out of time and the Authority does not have the jurisdiction to grant the remedies she seeks. Her application must, therefore, be declined.

[62] The above conclusion means that I need not discuss the substantive merits of the claim, the attendant issues raised by the parties in evidence and submission, or make the credibility findings I was asked to consider.

Costs

[63] I reserve the issue of costs. The parties should endeavour to resolve that between themselves but should they be unable to do so, either may apply for a determination of the matter provided this is done within 28 days of this determination. Any response should be filed within 14 days of the application.

Mike Loftus
Member of the Employment Relations Authority