

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Fiona Jane Sharp (Applicant)
AND Lowe Corporation Limited (Respondent)
REPRESENTATIVES Dinah Kennedy for the Applicant
Jim Ferguson for the Respondent
MEMBER OF AUTHORITY P R Stapp
ON THE PAPERS 12, 20, 21 and 22 October, 3 November, 7, 8, 9, 14, 16 and 17
December 2004 and 10 January & 3 February 2005
PREVIOUS DETERMINATION 5 January 2005 (name suppression)
**DATE OF THIS
DETERMINATION** 9 March 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The applicant has applied for an inquiry into a personal grievance matter that is subject to a 90 day rule determination. The parties have attended mediation where the matter was not resolved. The parties have agreed for me to determine this matter on the papers including affidavits and submissions. I have agreed to do so.
2. Name suppression for the applicant was not granted in an earlier determination by the Authority. Both parties have subsequently confirmed that the Authority proceed with the 90 day matter.

The facts

3. The applicant began work as a Laboratory Assistant for the Napier Tanning Company Limited in June 1998. Lowe Corporation Limited purchased the tannery in about October 2001 and the management within the tannery did not change.

4. In the course of her employment the applicant reported to her superior at the tannery who was Kelvin Pritchard, the Technical Manager, John Watson the Production Manager and John Porter, her direct Manager. She worked alongside another person a Senior Supervisor (later also referred to as “co-worker” and “defendant”).
5. During the year 2000 the applicant became concerned about the supervisor’s activities involving the borrowing of equipment from the laboratory and taking it home at night. She says she raised this matter with senior management, who did not seem in the least concerned.
6. In 2001 the supervisor’s use of equipment increased and he began to order chemicals through work. The applicant says she raised this subject with a number of management personnel, including Kelvin Pritchard, John Watson and some others. She says she was told on each occasion that they had no concerns.
7. The applicant says that in late January 2002 the supervisor embarrassed her in front of a drug representative; she complained but says nothing happened. She followed this up, she says, with a complaint to Kelvin Pritchard and John Watson who, she says, went to John Porter with a request for him to intervene and that nothing happened. The applicant says that on becoming increasingly concerned about the situation she decided to help Police inquiries that were being made into the supervisor’s activities, but this was done on a totally confidential basis between her and the Police. The applicant says that on 7 February 2002, following a verbal attack against her from her co worker she became increasingly afraid and concerned for her personal safety and complained to her employer about the co worker’s behaviour
8. On 18 April 2002 the co-worker was arrested. The applicant’s identity was kept confidential but she says that she told John Porter of her involvement in the Police operation the day that her co-worker was arrested and requested him to keep it confidential. She says she also told Kelvin Pritchard and John Watson.
9. She learnt on 23 April 2002 from John Porter that there were gang connections involved with the people concerned. She was also informed by the Police that there were gang connections with the operation and a history of violence and arrangements were made for her to contact the Police at any time if she needed to. She says that during this time other people at work did not know of her involvement in the person’s arrest and that she hoped John Porter and senior management would keep her confidence.
10. On 24 April 2002 she says John Porter had a discussion with her in a public place about her involvement in the arrest. This, she says, concerned her and she rang Stephen Randal, the

company's operation manager and requested a private meeting with him where she told him everything, including how very concerned she was. She was also concerned that other staff may have become aware of her involvement.

11. The applicant's co-worker was granted bail, but a condition of the bail was that he was not to associate with his co-workers which meant that he could not appear at work. He, however, challenged the bail condition. Because there was some mention that this might allow him back at work, the applicant says she rang Mr. Randal on 23 May to inform him of her intention not to work alongside of the accused and that she would go home if he was allowed back at work. She also says that she informed John Watson and John Porter of this. A full account of the applicant's testimony was revealed to the defence solicitor prior to depositions. Thus her involvement would have become known to her co-worker. The bail condition was subsequently lifted. She says that, on being told by the Police, her first reaction was to get a protection order because she was petrified. It did not eventuate that the co-worker returned to the work place and the co-worker reached a settlement in regard to any employment relationship problem between him and the company.
12. In the meantime, the applicant continued her responsibilities at work.
13. In June and July 2002 the applicant and the employer commenced negotiations about a new employment agreement. Meetings were held between the applicant, John Porter and John Watson about this. About the same time the applicant decided to seek legal representation and another meeting was arranged on 6 August 2002. The applicant says that in the course of her instructions to her lawyer, she gave the instruction for the issues to be raised about how she felt but did not want to formally commence a personal grievance process because of the public nature, she says, that that would attract. She wanted to sort out her employment agreement.
14. Negotiations continued between Lowe Corporation Limited and the applicant's solicitors in September and October and the matter was finally resolved towards the end of October. At the end of October 2002 the applicant says she had another meeting with her solicitors to discuss a personal grievance. She says she reluctantly gave instructions for a formal claim letter to be written. She was sent a draft on about 19 October for approval and a final letter raising her personal grievance was sent to Lowe Corporation Limited on 1 November 2002. She got a response on 4 December 2002 in which the company would not consent to her grievance out of time.

The parties' submissions

15. The applicant claimed that her personal grievance only effectively came to her notice on the occurrence of one of the following events:
- “(i) When the Police began their undercover operation in February 2002; or alternatively*
 - (ii) In April 2002 when the co-worker was arrested by the Police; or alternatively*
 - (iii) In August 2003 when the co-worker entered a plea of guilty to the criminal charges and was convicted.”*
16. The applicant submitted that her personal grievance would be in time on the occurrence of event (iii) above. However, in relying upon exceptional circumstances her argument is that those circumstances revolve around the involvement of the Police and her involvement with the Police required the matter being kept confidential. She says the situation caused her extreme fear and stress because the co-worker was allowed bail.
17. The respondent says that it cannot be held responsible for any action or any inaction amounting to a personal grievance prior to October 2001 when the respondent became the applicant's employer. The respondent contends that the allegation that the applicant relies upon in establishing a personal grievance relate to action or inaction by the respondent between 2000 and February 2002 and that the applicant must have been aware of each of the actions or inactions by her employer as it occurred between those dates. In this regard, the respondent says that the very latest date that the action giving rise to personal grievance came to the applicant's attention was in February 2002 because she made it perfectly plain that she alleged that she complained about the co-worker's activity between 2000 and February 2002 and that her employer failed to properly respond again between 2000 and February 2002.
18. The respondent has questioned the delay in the applicant raising her personal grievance and opposes the application for exceptional circumstances. The respondent says that there were no exceptional circumstances that could have prevented the applicant from raising a personal grievance. It says the applicant was able to tell her immediate supervisors, Kelvin Pritchard and John Watson, about her concerns in regard to the co-worker acting illegally in purchasing chemicals and using work equipment in late January/early February 2002. It says she insisted

that she was the appropriate person to contact the chemical company about that. She made her choice in that regard. She also told Kelvin Pritchard and John Watson of her involvement, but did not elaborate on providing any particulars other than that. She also discussed with John Watson that the chemical company would be contacting the Police and from February 2002 the applicant spoke regularly to John Watson about work issues and the Police investigation.

19. On 18 April 2002 the applicant told John Porter of her involvement with the Police operation and that there were discussions between John Porter and the applicant on 23 April 2002 about the gang connections, along with other discussions in the period. On 24 April 2002 the applicant telephoned Stephen Randal about her concerns in regard to the confidentiality and met with him. On 23 May 2002 she spoke with Mr. Randal in regard to her co-worker coming back to work and what she would do.
20. The respondent accepted that there were discussions between the applicant, John Porter, Stephen Randal and the company's Chief Executive's secretary. The applicant also attended the company nurse and sought counselling, which the respondent paid for.
21. Then there are the June and July employment agreement negotiations involving meetings between the applicant, John Porter and John Watson and the applicant's solicitors through until October 2002.
22. The respondent says that the applicant refused during this time to elaborate on safety issues that she raised and therefore the applicant chose not to raise a grievance during this period for what the respondent claims was tactical reasons, not to comprise the prospects of negotiating more pay. The respondent says further that there are two points in regard to the applicant's issue of not wanting to be identified in public proceedings. First, her concern has a lack of credibility because she knew from 22 April 2002 that her co-worker was on bail and that her identity as a witness was known to him after her testimony was provided to the defence solicitor. The second point is that her concern about public identification in relation to a personal grievance process is without foundation. There is nothing, the respondent says, public about a notice of personal grievance when it would have been a matter between her, the company and kept confidential in the first stages of the process involving mediation before the Department of Labour Mediation Service. In this regard, the applicant was not prevented from being able to file proceedings in the Authority and at the time sought interim suppression on her name. Her situation was also affected by the fact that her name was disclosed to the defence solicitor.

Determination

23. The application is unusual in as much as the applicant does not seem to know when she first became aware of a personal grievance. Three options have been raised in her submissions. The applicant's statement of problem filed in the Authority was vague and equivocal on the matter.
24. The applicant is out of time in raising her personal grievance because it was not until the Authority's intervention that the applicant filed an application for leave out of time for exceptional circumstances and endeavoured to frame her grievance as being raised in time. I find that she more than likely knew of the circumstances relating to her personnel grievance before 1 November but decided to not raise it. Because of the earlier events she claims are the basis of her grievance (paragraphs 5-7 above). It is implausible that the grievance came to her knowledge when the defendant pleaded guilty in August 2003. Her grievance was raised on 1 November 2002. Therefore she simply cannot rely on the guilty plea that occurred afterwards in August 2003 since she had already raised her grievance.
25. At the latest the 90 day period for raising the applicant's personal grievance commenced from the end of February 2002 (paragraphs 5-7 above) and possibly the end of April 2002 (when her co worker was arrested).
26. The circumstances are certainly extremely unusual. The applicant chose to co operate with the Police and keep her involvement confidential. She says she was involved with the Police because of the action or inaction of her employer about her complaints and concerns and she says nothing was done - that is the basis of her claim for personal grievance by the end of February 2002. But her position is affected by her raising with her employer: a complaint about her co worker on another occasion, her involvement with the Police operation on the day her co worker was arrested and her concerns about the likelihood of the bail conditions being lifted. In turn the employer settled with the defendant: that enabled the applicant to continue at work without him along side her. The applicant was also represented from some time in September 2002. The applicant instructed her representative to mention to the company that there were safety issues but not give any details. The applicant had informed management of her involvement in the Police investigation and had established a direct line of communication with Mr. Randal, a senior manager. The applicant decided that she wanted to conclude the negotiations on her employment. These factors do not support the applicant's representative's submissions that the grievance was not raised because of the applicant's trauma and stress and fear (at the time of bail being granted).

27. I accept that the applicant says she was affected by trauma, stress and fear relating to her involvement in the Police operation. However her decision not to raise a personal grievance, so as to avoid any publicity and complete her negotiations, undermines this as a basis for claiming exceptional circumstances. Indeed it appears to have only been raised in hindsight. The applicant could have raised a grievance - that would have been a matter between her and her employer, without publicity, while not unreasonably expecting it to be treated in a confidential manner by senior management, especially when the employer became aware of the Police operation.
28. The applicant has alleged that there has been a breach of confidence by senior management when she told them of the Police operation. This is a claim in the proceedings and not linked to the raising of the personal grievance considering the options made in submissions.
29. It seems that sometime in August the applicant raised her concerns with her lawyer but elected not to raise a grievance because of any publicity it could attract (that on the facts is not sustainable) and because she wanted her negotiations completed. These are not exceptional circumstances. Even in the event that there were exceptional circumstances the delay was not occasioned by exceptional circumstances.
30. The application is dismissed.
31. Costs are reserved.

P R Stapp
Member of Employment Relations Authority