

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 126/10
5051727

BETWEEN ANTONIA SONIA SHAW
 Applicant

A N D CANTERBURY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Helen Doyle

Representatives: Kevin Murray, Advocate for Applicant
 Penny Shaw, Counsel for Respondent

Investigation Meeting: 16 February 2010 at Christchurch

Submissions On the day

Determination: 19 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an amended statement in reply dated 21 September 2009, the Canterbury District Health Board (CDHB) asked the Authority to strike out the claims in the applicant's amended statement of problem which included and added to the claims in the original statement of problem lodged with the Authority for the following reasons:

- Personal grievances as alleged by Antonia Shaw were raised out of time;
- Ms Shaw had no standing to bring a claim in the Employment Relations Authority in relation to new matters raised after the employment ended;
- Ms Shaw has failed to pursue her claim and that has caused prejudice to the CDHB.

[2] The Authority held a telephone conference with Mr Murray and Ms Penny Shaw on 3 November 2009 to discuss how the matter would proceed.

[3] Mr Murray agreed during the telephone conference to advise the Authority whether his client wished to maintain a claim of discrimination for a period after Ms Shaw's employment with the CDHB had ceased. It was further agreed that there would be an investigation meeting to investigate whether the personal grievances were raised with respect to the claims of unjustified constructive dismissal, unjustified actions causing disadvantage and discrimination within the statutory framework. The Authority also indicated that it would consider any application for leave to pursue a grievance outside of the 90 day period that may be filed.

[4] The following timetabling directions in preparation for an investigation meeting on 16 February 2010 were made:

- The applicant was to lodge with the Authority and serve statements of evidence by 4.00pm 15 December 2009 together with any application to extend time for raising a personal grievance.
- The respondent was to lodge with the Authority and serve statements of evidence and any statement in reply to the application to extend time by 4.00pm, 26 January 2010.

The directions notice also provided that if parties experienced difficulties in terms of any of the directions they were to communicate directly with the support staff at the Employment Relations Authority and a further directions conference may be convened if there were any issues of concern.

[5] On 16 December 2009 the Authority received an email from Ms Penny Shaw expressing concern in light of previous delays and non compliance with directions that there had not been compliance by the applicant with the 15 December 2009 timeframe. She noted that although the delay was not a significant one, it was of concern because of the historical delays in this matter. Ms Penny Shaw on behalf of her client wanted an order that the applicant not be allowed to lodge evidence or any other matters relating to her employment without leave and also asked that the investigation meeting on 16 February 2010 proceed on the papers already before the Authority and submissions.

[6] The Senior Support Officer wrote to Mr Murray by email on 18 December 2009 and inquired why the timetable set out in the directions notice had not been

complied with. No response was received from Mr Murray and another email was sent to him on 22 December 2009. The Employment Relations Authority office was then closed for the Christmas/New Year period without a reply having been received from Mr Murray as to why the directions had not been complied with.

[7] On 7 January 2010 submissions were lodged and served by Mr Murray on the issue of whether the grievances were raised within 90 days. There was also reference within the submissions to case law relating to applications to extend time within which to raise the grievances. This created some confusion as the lodging of the submission was not preceded by any warning or explanation.

[8] The Authority held a further telephone conference with Mr Murray and Ms Penny Shaw on 18 January 2010. Mr Murray said when asked, that the directions had not been complied with because of family illness. Mr Murray confirmed that he was comfortable with the Authority dealing with the preliminary matters on the basis of submissions. The Authority made it very clear to Mr Murray that that would mean dealing with the issue as to whether grievances were raised within time without evidence and on papers it already had and was satisfied that Mr Murray understood this. Ms Penny Shaw agreed to lodge and serve her submissions in relation to this matter on or about 8 or 9 February 2010. Mr Murray indicated that he wanted to treat his submissions as the application for leave to extend time for raising grievances.

[9] Ms Penny Shaw duly lodged her submissions. She confirmed in her submissions that the employer did not consent to the raising of personal grievances after the expiration of the 90 day period. Although somewhat irregular in terms of an application for leave to extend time particularly in circumstances where the Authority had specifically timetabled for the same, the Authority was prepared to consider the matter on the basis proposed by Mr Murray, having regard to the Authority's ability to resolve employment relationship problems without the need for technicalities and a need for finality in terms of this matter. Ms Penny Shaw had dealt with the application to extend time in her submissions.

[10] Mr Murray confirmed that the allegations that Ms Shaw had been discriminated against following the ending of her employment relationship with the District Health Board on 1 December 2006 would not be pursued in the Employment Relations Authority.

The issues

[11] The issues before the Authority therefore are:

- Were personal grievances alleging discrimination on grounds that Ms Shaw refused to do work under s.28A of the Health and Safety in Employment Act 1992 and because of age raised within 90 days of 25 November 2005 and 12 June 2006?
- Was the personal grievance alleging unjustified action causing disadvantage raised within 90 days of 25 November 2005, 31 May 2006 or 12 June 2006?
- Was the personal grievance alleging unjustified constructive dismissal raised within 90 days of 1 December 2006?
- If the Authority finds that the personal grievances were raised after expiration of the 90 day period from the date on which the action alleged to have led to a personal grievance occurred or came to the notice of the employee, then should leave to raise the personal grievances after the expiry of that period be granted.

Were personal grievances alleging discrimination on grounds that Ms Shaw refused to do work under s.28A of the Health and Safety in Employment Act 1992 and because of her age raised within 90 days of 25 November 2005 and 12 June 2006?

[12] Ms Antonia Shaw commenced her employment with the CDHB on or about 10 January 1998 in the role of a Hospital Aid at Christchurch Hospital on a casual employment contract.

[13] Ms Shaw was appointed to a permanent position as a Hospital Aid from 26 February 2001 and was employed on an individual employment agreement with the terms and conditions based on the Canterbury Health Limited Nurses Collective Employment contract.

[14] Ms Shaw had undertaken training to become a registered nurse while employed as a Hospital Aid. She applied for a position in the graduate nurse programme with the CDHB.

[15] On 25 November 2005 Ms Shaw was advised that her application for a position in the graduate nurse programme was unsuccessful. Mr Murray relies on a series of letters that he says raises the personal grievance at that time.

[16] The first letter in the series from Mr Murray is dated 9 December 2005. This letter advises the then Director of Nursing, Sue Hayward, at the CDHB that he has been appointed by Ms Shaw as her representative and notes the following:

This letter is to give you notice that a employment issue may exist in relation to Ms Shaw becoming a Registered Nurse in the foreseeable future, thus, effecting her duties at the hospital. As of today's date there has been no discussion with our client as to her duties upon her successful completion of her studies and becoming a "Registered Nurse".

[17] Some meeting dates were proposed in that letter and there was a meeting on 15 December 2005 between Ms Hayward, a Human Resource Coordinator, Jane Clarke, Mr Murray and Ms Shaw.

[18] Mr Murray then wrote to Ms Hayward by letter dated 15 December 2005 to record some matters that had arisen during that meeting. In his letter Mr Murray refers to a discussion about issues pertaining to the continued employment of Ms Shaw and he gave notice of a health and safety issue pursuant to s.7 of the Health and Safety in Employment Act 1992 that the instructions Ms Hayward had verbally given to Ms Shaw had created a hazard in her place of work. As I understand it the concern was that Ms Shaw could be required to perform duties outside of her Hospital Aid role as a registered nurse that could potentially bring her into difficulty with the Nurses Council.

[19] In his letter Mr Murray advised that his client would not be attending at her place of work under s.28 of the Health and Safety in Employment Act 1992 until protocols were put in place to ensure her.

[20] Ms Hayward responded to Mr Murray by letter dated 16 December 2005 and referred to two matters. The first was that the CDHB had no obligation to appoint Ms Shaw to a registered nurse position or to give her automatic entry to the graduate nurse programme. Ms Hayward noted in her letter that Ms Shaw could submit an application for any future programme and that would be considered in accordance with CDHB policies. Ms Hayward advised that it was not accepted that there was a

hazard at work and referred Mr Murray to the New Zealand Nursing Council Code of Conduct for clarification of the Council's jurisdiction. Ms Hayward stated in her letter that Ms Shaw was employed as a Hospital Aid and that there was an expectation that she would perform duties outlined in her position description and not go beyond.

[21] Mr Murray responded to Ms Hayward by letter dated 16 December 2005 and advised about a number of issues that were causing Ms Shaw concern with respect to the health and safety issue. Mr Murray advised again that Ms Shaw, under s.28A of the Health and Safety in Employment Act 1992 would not be attending her place of work until the CDHB addressed the issues raised to ensure that Ms Antonia Shaw could perform her duties at work in a safe manner.

[22] In a letter dated 20 December 2005 Ms Hayward wrote again to Mr Murray and advised, amongst other matters, that it would not accept that Ms Antonia Shaw had a valid reason to refuse to turn up for work and the ongoing nature of the employment relationship would have to be considered should her absence continue.

[23] Mr Murray made a request on 23 December 2005 for some material under the Official Information Act 1982.

[24] On 31 January 2006 Mr Murray wrote to Ms Hayward and in a short letter advised the following:

We are concerned that you failed to address the Health and Safety issues identified by us at our meeting on December 15 2005. It is obvious that you have no intention to act in "good faith".

Notice is hereby given that our client considers that a personal grievance exists.

[25] The letter makes no mention of discrimination in terms of the first unsuccessful application for a graduate nurse position at the CDHB. If, as Ms Penny Shaw submits, the alleged failure to address health and safety issues was an alleged unjustified action causing disadvantage grievance, then the first time that type of grievance was clearly set out was in the amended statement of problem which was not lodged until 7 September 2009, outside of the three year period for commencing proceedings from the time a grievance was raised.

[26] Ms Shaw remained off work from on or about 15 December 2006 and in fact did not physically return to work before the relationship between the parties ended.

Mediation took place in May 2006 after which the CDHB issued a memorandum to all duty managers on 23 May 2006 clarifying Ms Shaw's Hospital Aide role and directing that she not perform duties outside of the role.

[27] Ms Shaw again applied for a position in the graduate nurse programme in late May 2006. She was unsuccessful in her application for a position in the programme and was advised of the same in a letter dated 12 June 2006. On 14 June 2006 Mr Murray wrote to Ms Haywood and said amongst other matters:

Our client believes that you have breached the good faith provisions according to the proposed actions settled in the mediation conference in fact are now actively discriminating against our client because of the action taken in applying the section 28 in identifying a hazard in her workplace.

[28] CDHB expected Ms Shaw to return to work on or about 3 July 2006. She did not do so.

[29] From that date there were many attempts to arrange a meeting with Mr Murray and Ms Shaw to discuss and identify her issues. I have formed an impression from the correspondence between the parties that the CDHB made a genuine effort to have a meeting so that it could understand Ms Shaw's issues.

[30] There was no meeting before the original statement of problem was lodged with the Authority. It was undated but was date stamped as received by the Authority on 25 September 2006. The statement of problem was then sent to Ms Hayward at the CDHB under cover of letter dated 27 September 2006. For present purposes I will then take the date of receipt of the letter at 28 September 2006.

[31] The claims set out in the original statement of problem were that Ms Shaw was discriminated against by the CDHB under s.103 (1) (c) of the Employment Relations Act 2000. Further, that the actions of the respondent amount to a breach of good faith pursuant to s.4 of the Employment Relations Act 2000. The claims of discrimination was clarified in terms of the grounds relied on in para. 2.24 that the CDHB has, and is, aggressively discriminating against her because of her age and because she took a stand on issues of health and safety.

[32] After the statement of problem was received Ms Penny Shaw was instructed by the CDHB and lodged a statement in reply on 20 October 2006. The reply noted

that Ms Shaw was expected to return to work on 3 July 2006 but, as at the time of the statement of problem being lodged, had not returned to work. The statement in reply noted in para.16 that

The Respondent has attempted to investigate the Applicant's claim of discrimination; however, the Applicant has failed and/or refused to attend any meetings to discuss it.

And in para.17:

The Applicant has been advised that it is the Respondent's view that she has an obligation to be at work as required and to be absent from the workplace only with the proper authorisation.

[33] Ms Penny Shaw wrote to the Authority on 3 November 2006 and asked for urgency for an investigation of the matter because Ms Shaw had not attended any rostered shifts since 11 December 2005 and had refused to confirm whether or not she ever intended to again.

[34] The Authority held a telephone conference with Mr Murray and Ms Penny Shaw on 10 November 2006 to discuss the matter. The Authority directed that the applicant lodge with the Authority and serve the respondent by 20 November 2006, with a letter advising whether she intended to return to work with the CDHB as a Hospital Aid, or to clarify what the issue is that prevents her from doing so.

[35] Mr Murray duly attended to lodging a letter on behalf of the applicant that referred to, amongst other matters:

The issue is that the CDHB has a long history of having Hospital Aids performing duties of registered Nurses and that on numerous occasions Hospital Aids from "The Pool" where our client works have been given duties that are commensurate with those of a Registered Nurse.

[36] Ms Penny Shaw duly responded by letter dated 23 November 2006. She enclosed with her letter a copy of an email from the Nursing Council and advised that the CDHB had clarified that Ms Shaw would not be asked, and should not be required, to perform any tasks outside the role of a Hospital Aid. Ms Penny Shaw did not accept as correct that Hospital Aids are given duties that are commensurate with those of a registered nurse. She advised that unless confirmation was received that Ms Antonia Shaw would return to work immediately on or before Friday 1 December 2006 her client would deem Ms Antonia Shaw's employment at an end.

[37] Ms Penny Shaw raised a concern that Mr Murray had attempted in his letter to raise entirely new issues that had not been pleaded. She advised that these matters were denied.

[38] On 1 December 2006 Mr Murray copied a letter to the Authority that had been sent to Ms Penny Shaw advising that he had received instructions from Ms Shaw that she cannot work as a Hospital Aid because of her legal responsibilities as a registered nurse that holds a current practising certificate.

[39] The Authority heard nothing else from Mr Murray after that date although it understood from an earlier telephone conference with the parties that Mr Murray would keep the Authority advised of any progress in relation to the hopeful final sentence of the 1 December letter that issues could be resolved and there could be some meaningful discussions with the District Health Board.

[40] The file was administratively closed by the Senior Support Officer when nothing was heard by late 2007. That means that the file was not actively monitored and no further communications were received in relation to the file until 2009.

Conclusion

[41] I do not find that a personal grievance was raised about discrimination on grounds with respect to a refusal to do work under s.28A of the Health and Safety in Employment Act or on the basis of age within 90 days of advice of the first unsuccessful application for a graduate nurse position on 25 November 2005.

[42] Ms Penny Shaw submits that in relation to the second unsuccessful appointment that the 14 June 2006 letter did not amount to the raising of a grievance because it lacked relevant specifics in order for the CDHB to respond. I find however that when that letter is read in full, it is clear that the reference to discrimination on the basis of a refusal to work is in relation to the non appointment advised in June 2006.

[43] I find that there were sufficient specifics about the raising of a personal grievance of discrimination in relation to Ms Shaw's second non appointment that it was for reasons under the Health and Safety in Employment Act to enable the CDHB to respond. I find that a personal grievance was raised within 90 days of 12 June 2006 of discrimination on that ground.

[44] I do not find that a personal grievance was raised in relation to discrimination on the basis of age before the statement of problem was lodged with the Authority on 25 September 2006 and served on the CDHB on or about 28 September 2006 which was outside the 90 days. In relation to this matter, I am strengthened in my view because of the CDHB making several attempts in correspondence after June 2006 to meet with Mr Murray and Ms Shaw to understand the nature of the discrimination allegation that they were unaware that it related to age.

[45] In conclusion, therefore, I find that the only grievance raised with the CDHB within 90 days of the action occurring was a grievance of discrimination based on a refusal to work under s.28A of the Health and Safety in Employment Act in relation to the second non appointment to the graduate nurses' programme. The grievance of discrimination on the basis of age was raised outside of the 90 day period.

Was the personal grievance(s) alleging unjustified action causing disadvantage raised within 90 days of 25 November 2005, 31 May 2006 or 12 June 2006?

[46] The first time a grievance of unjustified action causing disadvantage was referred to was in a statement of problem lodged with the Authority on 7 September 2009. Preceding the lodging of the statement of problem, an Authority Support Officer had been contacted by Ms Shaw in or about January 2009 to see what had happened with respect to this matter. On 3 February 2009 the Senior Support Officer wrote to Mr Murray advising him that Ms Shaw had contacted the office in January 2009 and that she wished to proceed with the case and had tried to contact him on a number of occasions. The Senior Support Officer asked that Mr Murray seek his client's instructions.

[47] On 26 February 2009 Mr Murray advised that Ms Shaw's instructions were that she wished to proceed with the matter and on 9 March 2009 a telephone conference was arranged with the Authority for 27 March 2009. During that telephone conference Mr Murray was of the view that he thought the matter could go back to mediation. Ms Penny Shaw advised that she needed to know what the applicant wanted and it was agreed that Mr Murray would have something to Ms Penny Shaw by 3 April so that she could talk to her client. The Authority advised Mr Murray that it wanted to be kept informed of progress with respect to the matter.

[48] On 15 April 2009 Ms Penny Shaw wrote to Mr Murray about the applicant, advising that she was still unsure of the nature of the applicant's claim and that if Ms Shaw wished to proceed with her claim then the statement of problem would need to be substantially amended. Ms Penny Shaw advised that her client was not prepared to attend mediation because they had no idea of what the applicant's claim was.

[49] The Authority then held a further telephone conference with Mr Murray and Ms Penny Shaw on 29 May 2009. As a result of that discussion, the Authority directed the applicant to lodge and serve the respondent an amended statement of problems setting out the issues as seen by the applicant, including details of remedies sought, by Tuesday 30 June 2009 at 4pm. The respondent was to lodge with the Authority and serve its amended statement in reply by Tuesday 21 July 2009 at 4pm.

[50] The applicant did not lodge the amended statement of problem until 7 September 2009 outside of the timetable direction. One of the new allegations in the amended statement of problem was that Shaw had been subjected to a series of unjustified actions that caused her disadvantage.

[51] I do not find that a grievance in relation to unjustified action causing disadvantage had been raised within 90 days of 25 November 2005, 23 May or 12 June 2006. Even if I am wrong in that one of the letters sent in late 2005 could be seen to raise a grievance of this nature then such action was commenced in the Authority in relation to a personal grievance more than 3 years after the date on which it was raised – s. 114 (6) of the Employment Relations Act 2000. In my view given the attempts by the CDHB to meet and understand the concerns in what was at that time an ongoing relationship then that is the end of the matter.

Was the grievance of unjustified dismissal raised within 90 days of it occurring?

[52] Ms Shaw ended her employment formally with the CDHB on 1 December 2006, having not physically presented at work since at least 15 December 2005.

[53] The first time the personal grievance for unjustified constructive dismissal was raised by Ms Shaw was in the amended statement of problem which was received by the respondent on or about 7 September 2009. That was close to three years outside when the event had occurred.

[54] The grievance for unjustified constructive dismissal was not raised within the 90 day time period.

Should leave be granted to raise the personal grievance outside the 90 day period?

[55] The Authority has to be satisfied in terms of leave that the delay in raising the personal grievance or grievances was occasioned by exceptional circumstances and that it considers it just to grant leave.

[56] In relation to the grievance that Ms Shaw had been discriminated against on the basis of age, she was represented from 9 December 2005 and throughout the period during which she was advised in June 2006 that her application for a position as graduate nurse programme was unsuccessful. There were also several opportunities for Ms Shaw and Mr Murray to have attended at least a meeting in relation to the issue of discrimination with respect to the second non-appointment, but such a meeting did not take place before the lodging of the statement of problem.

[57] In terms of the unjustified action causing a disadvantage grievance, I am not satisfied that the delay in raising a personal grievance of that nature was occasioned by any exceptional circumstance.

[58] In terms of the unjustified constructive dismissal, the only reason for the delay that Mr Murray could give the Authority was that he thought it was enough that the matter was before the Authority. Mr Murray, however, also advised that he did not have instructions to raise the personal grievance of unjustified constructive dismissal prior to lodging the amended statement of problem so this is not a circumstance where he unreasonably failed to ensure it was raised within the required time.

[59] I am not satisfied that there is anything before the Authority to enable a conclusion that the failure to raise the personal grievances was occasioned by exceptional circumstances and further in circumstances where there was failure on the part of Mr Murray to comply with nearly every timetabling requirement and lengthy delays I would not have been satisfied that it was just to grant leave. Leave to extend the time in terms of the personal grievances I have found were not raised within 90 days is declined.

[60] The following grievances in the amended statement of problem are dismissed as they were not raised in accordance with s. 114 (1) and (2) of the Employment

Relations Act 2000 and leave has not been granted to extend time outside the expiration of the period in the above sections:

- Discrimination on the basis of age.
- Unjustified actions that caused Ms Shaw disadvantage on the part of the CDHB.
- Unjustified constructive dismissal.

[61] That leaves therefore a personal grievance of discrimination based on the ground under s.104 of the Employment Relations Act 2000 that Ms Shaw June 2006 was discriminated against because of her refusal to do work under s. 28A of the Health and Safety in Employment Act 1992 and not appointed to a position and a penalty claim for a breach of good faith.

[62] Ms Penny Shaw refers the Authority to prejudice suffered by the CDHB because there have been many breaches of timetabling orders of the Authority and that there has never been leave to lodge documents outside of the timetabling orders. Ms Penny Shaw submits that if any of the grievances are allowed to proceed, any investigation meeting will occur at least four years after the event due only to the delay and breaches of the applicant. She also refers to the key witnesses for the respondent including Ms Haywood having left the CDHB some years ago and that the chance of success of the applicant is slim and even if successful, any award is likely to be at the lower end of the scale.

[63] I accept there is prejudice to the CDHB because of the delays in terms of progressing this matter and the timetabling breaches. I am not satisfied though, that I should simply dismiss a grievance that I have found was raised within 90 days and for which proceedings have been lodged within three years. In any event there is still a penalty claim that falls to be resolved one way or the other.

[64] As a first step I direct the parties to mediation in terms of the matters set out in para. 61 hereof. There needs to be some careful assessment and thought of the reduced claims before the Authority and any potential outcomes and of course for both parties the costs in terms of pursuing the matters. The Authority will provide the mediation service with a copy of this determination.

[65] Mr Murray is to immediately advise the Authority of the mediation outcome in terms of whether Ms Shaw needs further assistance from the Authority. The Authority will then set the matter down for a directions conference. Any further unnecessary delays in bringing this matter to a conclusion will not be viewed favourably by the Authority.

Costs

[66] I reserve the issue of costs and these can be dealt with once matters have been finalised.

Helen Doyle
Member of the Employment Relations Authority