

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Tupou Tu'itupou (Applicant)
AND Guardian Healthcare Limited (Respondent)
REPRESENTATIVES Amelia Schaaf (Counsel for Applicant)
Bruce Wall (Advocate for Respondent)
MEMBER OF AUTHORITY Robin Arthur
SUBMISSIONS 4 January and 20 February 2006 (Respondent)
18 January and 10 March 2006 (Applicant)
DATE OF DETERMINATION 3 May 2006

DETERMINATION OF THE AUTHORITY

[1] There is a 'threshold' issue to be determined in this matter. It is whether the applicant's personal grievance action was filed with the Authority within the three year period provided under s114(6) of the Employment Relations Act 2000 ("the Act")?

[2] The respondent says it was not and that consequently the Authority cannot investigate the applicant's claim. It has applied for a determination of this issue. Both parties have provided written submissions.

[3] The applicant says her personal grievance was raised by a letter on 28 August 2002 and that the filing of her action in the Authority on 26 August 2005 was within three years of that date.

[4] The respondent says the applicant's personal grievance was raised by a letter from her lawyer on 14 June 2002 and that from 15 June 2005 any action would be out of time. It does not waive its right to rely on the statutory time limit.

Background

[5] Mrs Tu'itupou was employed as a caregiver at Cornwall Park Hospital from around May 2000 until her dismissal on 13 June 2002.

[6] At that time the hospital was owned by Havencare Hospitals Limited ("Havencare") but is now owned by Guardian Healthcare Operations Limited, the respondent. Although I have

not yet confirmed this aspect, for the purposes of this determination I have presumed that the respondent assumed the liabilities of Havencare at the time of purchasing its business, including the hospital.

[7] Mrs Tu'itupou alleges warnings given to her prior to dismissal were unjustified as was the dismissal itself. She seeks compensation for hurt and humiliation.

[8] On 13 June 2002 Mrs Tu'itupou and her lawyer attended a disciplinary meeting with the hospital's principal nurse manager. Mrs Tu'itupou was advised in advance, by way of a letter to her lawyer, that the meeting was to get her response to a report from a patient that she was seen sleeping on duty.

[9] Following the meeting the manager considered Mrs Tu'itupou response to the accusation – that she denied sleeping but was sitting at a table with her head resting on her hands – and resolved to dismiss her for serious misconduct. The manager dismissed her that night.

The issue

[10] The matter for determination here turns on when the applicant subsequently raised her personal grievance. Was it in a letter from her lawyer on 14 June 2002 or a later letter on 28 August 2002? Either date brings the applicant within the 90 days period to raise a grievance. A finding as to which of these two dates the applicant raised her grievance is required to identify when time began to run for the three year statutory period to start an action in the Authority.

The law

[11] The Act defines the initiation of a grievance at s114(2) in this way:

a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative aware that the employee alleges a personal grievance that the employee wants the employer to address.

[12] The necessary elements are (i) an allegation of a personal grievance, (ii) made by the employee, (iii) known to the employer, (iv) and a desire by the employee to have the grievance addressed by the employer.

[13] The Employment Court has found the meaning of the term “raised” in this section of the Act to be “virtually synonymous” with the requirements of the previous legislation to “submit” a grievance.¹ In this light, the case law of that period remains of assistance in interpreting the present statute. Some relevant propositions include:

- The test for raising a personal grievance to an employer is a liberal one and a formal or written submission is not required.²
- The legislature intended grievances to be dealt with promptly and informally in exchanges between the employee and employer, so raising a grievance must give an employer something to respond to in writing or orally.³

¹ *Ruebe-Donaldson v Sky Network Television Ltd (No 1)* [2004] 2 ERNZ 83 at [9] (EC, Travis J)

² *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503, 511 Finnigan J

³ *Farmers Trading Limited v Opuariki* [1998] 1 ERNZ 313, 321 (EC, Colgan J)

- The communication must – to an objective observer – be clear enough and sufficient to elicit a response from the employer or enable the employer to remedy it or the parties to settle the matter.⁴

The letters

[14] On 14 June 2002 the applicant's lawyer sent the nurse manager a letter headed "Tupou Tu'itupou – Personnel File" which stated in part:

As indicated to you yesterday, Mrs Tupou Tu'itupou will be lodging a personal grievance action against Havencare Hospitals Ltd. I have firm instructions from Mrs Tu'itupou to pursue a personal grievance action against Havencare. I had intended to notify Havencare of this today, but will now await the receipt of the information requested below before doing so.

[A paragraph follows requesting the applicant's personnel file, employment agreement, house rules and information about the employer's investigation]

Once I receive the information requested and the letter confirming Mrs Tu'itupou's dismissal, then I will then formally notify Havencare Hospital Ltd of Mrs Tu'itupou's personal grievance.

[15] The nurse manager responded the same day with a letter sent by facsimile to the applicant's lawyer which stated in part:

Further to our meeting with you and Tupou last night, as agreed, we now confirm the outcome of that meeting.

...

We carefully considered Tupou's response and weighed it up against the patient's clear view that she was asleep. We concluded that Tupou's behaviour did constitute serious misconduct under our handbook.

We then considered what the appropriate outcome should be. We decided that dismissal was appropriate in this case. In making this decision we considered Tupou's employment record and, in particular, the fact that she was on a final warning. We also took into account the seriousness of nurses sleeping while on duty in a hospital environment, and the potential danger this poses to patients.

I am faxing this to you on the 14th June the (sic) original along with the copy of Tupou's personnel file will be sent to you on Monday 17 June 2002.

[16] On 28 August 2002 the applicant's lawyer sent the nurse manager a letter stating in part:

Tupou Tu'itupou – Raising of personal grievance action

I write to notify HavenCare Hospital Limited of Mrs Tupou Tu'itupou's personal grievance action in accordance with section 114 of the Employment Relations Act 2000. This is a summary of her claims. The full details will be outlined in a letter that will be sent tomorrow.

...

⁴ *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503, 511 (EC, Finnigan J); *Goodall v Marigny (NZ) Limited* [2000] 2 ERNZ 60, 70

[17] The grievances are stated to be two unjustified actions on earlier dates and then unjustified dismissal on 13 June 2002.

[18] A more detailed letter with same heading was sent by the applicant's lawyer to the nurse manager on 29 August 2002. It asked the employer to agree to attend mediation.

[19] On 12 September 2002 HavenCare's solicitors advised they were instructed to act on the matter. In a letter from those solicitors dated 10 October 2002, the employer comprehensively denied the allegations but agreed to attend mediation. Mediation occurred on 31 January 2003 but the matter was not resolved. The letter refers to the letter of 29 August as "*advis[ing] that Mrs Tu'itupou wishes to raise a personal grievance*".

Analysis and conclusions

[20] The 14 June 2002 letter of the applicant's lawyer declares the intention of her client to "*pursue*" a personal grievance against her employer. It emphatically states that her client "*will be lodging a personal grievance*". It also appears to draw a distinction between the intention of pursuing a grievance and notifying the employer of the grievance. Mrs Schaaf refers in the first paragraph to having "*intended to notify*" the employer that day but deciding to wait for information requested. In the last paragraph she refers to an intention to "*formally notify*" the employer after receiving the requested information.

[21] The 28 August 2002 letter includes a heading referring to "*raising a personal grievance*". It states that its purpose is to "*notify*" the employer of the applicant's grievance.

[22] The respondent submits that the letter of 14 June is "clear advice" of raising the grievance in accordance with s114(2) and it was clearly intended to notify the employer of that grievance.

[23] The applicant says that the reference in the 14 June letter to formally notifying the employer means that the grievance was not raised at that point. The applicant was waiting for requested information before going ahead with a grievance. She says the requested information was provided on 21 and 28 June 2002 but the employer did not treat the 14 June letter as raising a grievance. Rather it was the letters of 28 and 29 August that were treated by the employer as raising the grievance.

[24] As the case law makes clear, it is not the subjective intention of the party raising the grievance that determines when it has been raised. A liberal test applies. It was clear here that there was a grievance on foot. I find the language used in the 14 June letter to be an unequivocal raising of a personal grievance. At that point each of the elements required by s114(2) had been met: the necessary allegation of a grievance had been made by the employee (through her representative) and made known to the employer in a way that the employer could address. That the applicant's lawyer requested further information was simply part of the subsequent process to enable her and her client to better pursue the grievance.

[25] The 14 June letter suggests that the grievance was in fact raised orally with the employer on 13 June. However I do not have evidence at this stage on that point but am satisfied that the terms of the 14 June letter unequivocally raised the grievance.

[26] This is confirmed by the language of the 28 and 29 August letters which are providing further detail of the nature of the grievance.

[27] Mrs Tu'itupou's representative has neither suggested there is any discretion of the Authority to extend the three year limit contained in s114(6) nor, if there were such a discretion, any reason to do so in this particular case. As discussed by the Authority in its determination on *Harington and Fletcher Challenge Forests Ltd* (unreported, ERA Auckland, AA 181/04, 21 May 2004, Member Oldfield) neither the Employment Court nor the Authority have conclusively addressed whether there is any discretion for the Authority to extend the statutory time limit set by s114(6) through the provisions of sections 219 and 221.

[28] Even if such a discretion existed, there is no information before the Authority that there is anything in the particular circumstances of Mrs Tu'itupou's case that warrant an extension beyond the statutory time limit.

Determination

[29] Having found that the applicant's personal grievance was raised on 14 June 2002, the provisions of s114(6) of the Act precluded any action in the Authority on that grievance being started after 15 June 2005. I find that Mrs Tu'itupou's action was filed out of time and cannot be determined by the Authority.

Costs

[30] Mrs Schaaf told me that Mrs Tu'itupou had applied for legal aid in this matter but I am not aware whether this has been granted. The parties are encouraged to resolve any issues of costs between themselves. If they are unable to do so, either party may apply to the Authority for a determination on costs.

Robin Arthur
Member of Employment Relations Authority