

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Julia Marama Van Der Zwan
AND Royal New Zealand Plunket Society
REPRESENTATIVES Alex Hope for Applicant
Andrew Scott-Howman for Respondent
MEMBER OF AUTHORITY Vicki Campbell
DETERMINATION ON 19 and 25 October from Applicant
PAPERS 18 and 25 October from Respondent
DATE OF DETERMINATION 3 November 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination deals with a threshold issue of whether the applicant has raised her personal grievance within the statutory 90 day period.

[2] Ms Van der Zwan says she was unjustifiably disadvantaged in her employment when the Royal New Zealand Plunket Society Inc ("Plunket") undertook an unfair investigation of allegations into serious misconduct. She says that unfair investigation then led to her unjustified dismissal.

[3] Plunket says a complaint was received from one of Ms Van der Zwan's co-workers in mid 2004 in relation to Ms Van der Zwan's behaviour. The complaints were investigated and on 4 October 2004 Plunket advised Ms Van der Zwan that serious misconduct was found to have occurred. Between 4 October and 22 November the parties attended mediation and entered into confidential, without prejudice discussions but did not resolve the issues between them. Ms Van der Zwan was dismissed on 22 November 2004.

[4] Ms Van der Zwan filed her claim for alleged personal grievances in the Authority on 26 September 2006. Plunket says Ms Van der Zwan has failed to raise her personal grievance within the requisite 90 day time limit and as such she is out of time to have her grievances dealt with by the Authority.

[5] Ms Van der Zwan was dismissed on 22 November 2004. The 90 day period ended on 20 February 2005.

Raising a personal grievance

[6] Section 114 of the Employment Relations Act deals with the raising of a personal grievance and requires the grievance to be raised within 90 days of the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee. A grievance is raised:

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

[7] The necessary elements of raising a grievance are:

- an allegation of a personal grievance;
- made by the employee;
- known to the employer; and
- a desire by the employee to have the grievance addressed by the employer.

[8] An employer should be given sufficient information to enable it to address the grievance. The information, either provided orally or in writing, should allow it to respond to the grievance on its merits with a view to resolving it soon and informally, at least in the first instance (see *Creedy v Commissioner of Police*, unreported, 23 May 2006, AC 29/06, Colgan CJ; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 60).

[9] The test is whether to an objective observer the communication was sufficient to elicit a response from the employer (*Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 60).

[10] Ms Van der Zwan was dismissed on 22 November 2004 for serious misconduct. The letter of dismissal sets out Ms Van der Zwan's entitlement to submit a personal grievance. Two weeks later, on 3 December 2004 Ms Van der Zwan's lawyer wrote to Plunket and advised:

We write to formally raise a personal grievance in relation to Ms Van der Zwan's dismissal on 22 November 2004. In brief, Ms Van der Zwan claims that her dismissal was unjustified and that the investigation into the allegations of misconduct was carried out in an unfair manner and she was therefore disadvantaged in her employment by unjustifiable actions by the employer. Ms Van der Zwan also claims prior unjustifiable acts that disadvantaged her which acts are linked to the unfairness of the investigation and these also give rise to her claim that she was unjustifiably disadvantaged in her employment.

[11] Further details were to be provided in due course.

[12] In response, on 20 December 2004, Plunket, through its representative, advised Ms Van der Zwan's representative that in order to raise her employment relationship problem in the appropriate way Ms Van der Zwan should provide the details relating to the personal grievances within the 90 day period prescribed by legislation.

[13] The further details promised in December 2004, were received by Plunket on or about 10 October 2005, some 322 days after the dismissal.

[14] In February 2006 the respondent advised Plunket of its view that Ms Van der Zwan had failed to provide full particulars of her claim for unjustified disadvantage and dismissal within the 90 days. In response Ms Van der Zwan disagreed with Plunket's stance and reminded it that on 1 November 2004 the matters giving rise to the alleged disadvantage grievance were raised with Plunket during mediation and then again at the disciplinary meeting on 3 November 2004.

[15] In his submissions Mr Hope, on behalf of Ms Van der Zwan submits that the letter of 3 December 2004 was a culmination of a series of letters and oral discussions with the respondent prior to, and up to, the point of dismissal. And that during those discussions, including mediation, Plunket became fully aware of the facts giving rise to Ms Van der Zwan's grievance.

[16] I have reviewed the letter of 10 October 2005 and have compared it with the two letters written by Ms Van der Zwan on 17 and 29 September 2006.

[17] The 17 September 2004 letter was Ms Van der Zwan's response to the complaint. The letter raises concerns about the complainant's conduct at work and raised with her employer her belief that the requirement to work from the Hamilton Area Office was unacceptable.

[18] The 29 September 2004 letter is a further and fuller letter of response to the complaint. This letter acknowledges that there are issues between Ms Van der Zwan and the complainant. The letter also identifies issues relating to the workplace which Ms Van der Zwan says contributed to the issues between herself and the complainant.

[19] The 10 October 2005 letter sets out the contended grounds for the personal grievance as being:

- The society failed to encourage dialogue between Ms Van der Zwan and the complainant contrary to Plunket's complaints procedure;
- During Plunket's investigation witnesses were questioned in an unfair and biased manner which indicated pre-determination;

- Plunket refused Ms Van der Zwan a real opportunity to explain her version of dealings with the complainant when Plunket refused to take into account the concerns raised by Ms Van der Zwan about the complainants conduct;
- Ms Van der Zwan's removal to the Hamilton office was unfair and without consultation;
- Plunket failed to disclose the identity of complainants before making a decision that serious misconduct had been established.

[20] Ms Van der Zwan was advised on 4 October 2004, Plunket's view that serious misconduct had been established. On 7 October 2004 Plunket again wrote to Ms Van der Zwan and advised her that discussions need to take place regarding the appropriate disciplinary action and mediation was a suggested forum in which these discussions could take place.

[21] For more than one month the parties with their representatives, were engaged in dialogue, including mediation in an effort to resolve the issues relating to Ms Van der Zwan's employment. These discussions and mediation were conducted on a confidential, without prejudice basis.

[22] In his letter of 10 October 2005, Mr Hope expresses his view that the issues giving rise to Ms Van der Zwan's personal grievances had been well established during all the interactions between the representatives during 4 October and 22 November 2004. At best those issues could only relate to the personal grievance for disadvantage. There is no evidence that a personal grievance had been raised before 22 November 2004. I have concluded that the purpose of the discussions and mediation between 7 October and 22 November 2004 was to determine the disciplinary action to be taken against Ms Van der Zwan and was not in the nature of resolving a personal grievance.

[23] A liberal test applies to the raising of a personal grievance. However, the timeframes have been set to ensure matters are progressed diligently and within a timeframe that will allow employment relationship problems to be disposed of promptly. Where there are inordinate delays in raising a personal grievance there is a real possibility of prejudice to a respondent due to the lapse of time, loss or disposal of relevant documentation and key witnesses moving on.

[24] The first notification of a personal grievance by Ms Van der Zwan was the letter of 3 December 2004. That letter contained what can only be described as a general indication of the personal grievance and promised more particulars. Plunket, through Mr Scott-Howman requested those particulars be provided within the 90 day period. They were not provided until 10 October 2005.

[25] I find that while the letter of 3 December 2004 specifies the statutory types of grievances Ms Van der Zwan alleges, it did not provide sufficient information to allow Plunket to respond. Plunket was entitled to receive sufficient information to enable it to respond to the grievances on their merits with a view to resolving it quickly and informally, at least in the first instance.

I have concluded Ms Van der Zwan did not raise her personal grievances within the requisite 90 day period.

Costs

[26] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Vicki Campbell
Member of Employment Relations Authority