IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 87/09
5131243

	BETWEEN	RICHARD VOSPER Applicant
	AND	NELSON MARLBOROUGH DISTRICT HEALTH BOARD Respondent

Member of Authority:	Philip Cheyne
Representatives:	Jane Vosper, Advocate for the Applicant Geoff Davenport, Counsel for the Respondent
On the papers:	Affidavit of Heather Ann Smith received on 1 May 2009 Submissions of the respondent received on 9 June 2009
Determination:	25 June 2009

DETERMINATION OF THE AUTHORITY

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[1] Richard Vosper worked for the Nelson Marlborough District Health Board. The DHB suspended him and initiated a disciplinary investigation into various concerns. In response, Mr Vosper sought orders revoking his suspension, declaring void the respondent's disciplinary investigation and prohibiting it from continuing its investigation. The suspension was said to amount to an unjustified disadvantage personal grievance, to be unlawful and in breach of good faith. In determinations *CA 160/08* and *CA 160A/08* I declined to make any orders restricting the DHB's disciplinary investigation. Whether there was a personal grievance in connection with the suspension was reserved for later investigation and determination.

[2] At the time of the two determinations referred to I prevented the publication of the parties' names because doing so might have undermined their employment relationship. Costs arising on these determinations were reserved.

[3] Whether there is an employment relationship problem such as a personal grievance arising from the suspension of Mr Vosper has not yet progressed to a

substantive determination. Mr Vosper's employment terminated on 5 November 008. Mr Vosper now seeks to pursue a personal grievance claim about the termination of his employment. That was lodged with the Authority on 12 February 2009 by way of an amended application. The DHB says that Mr Vosper has not raised with it any grievance about the termination of his employment within 90 days so he cannot proceed with that claim in the Authority. As well as raising that point, the DHB seeks costs arising from determinations *CA 160/08* and *CA 160A/08*. The continuation of the non-publication order naturally arises because of the need to determine these issues.

Arrangements for the investigation

[4] There was a directions conference on 30 March 2009 involving Mrs Vosper, Mr Davenport and the Authority. With the agreement of the parties it was decided to investigate the following issues: whether Mr Vosper raised a grievance about the termination of his employment within 90 days, whether the non-publication order made in *CA 160/08* should be continued and what (if any) costs should follow from the earlier determinations. It was agreed that the respondent would lodge and serve any affidavits and submissions by 1 May and 9 June 2009 respectively, the applicant to lodge and serve any affidavits and submissions by 2 June and 23 June 2009 respectively, with the Authority to then determine these issues based on that material.

Non compliance by the applicant

[5] Counsel for the DHB lodged with the Authority on 1 May 2009 the affidavit of Heather Smith, the DHB's district manager of human resources. This was done by email which was also sent to the email address given by the applicant in his amended application. The email was received by Mrs Vosper because on 11 May 2009 she sent an email to the Authority confirming receipt of the respondent's email but saying that she could not open the affidavit attached in pdf format. The support officer arranged for counsel to send by post to the applicant's Blenheim address a copy of the affidavit. I am satisfied that counsel did so on 13 May 2009.

[6] On 29 May 2009 the Authority received a further email from Mrs Vosper saying that she had not received the posted copy, that she assumed it would catch up with her in the United Kingdom, that the applicant's other papers were in a container enroute to the UK and seeking an extension to the agreed timetable of 12 weeks. That

was the first it was known to the Authority that Mrs Vosper was departing New Zealand. Records subsequently received by the Authority show that Mrs Vosper departed on 14 May 2009 so it is likely that she knew of her imminent departure on 11 May when she contacted the Authority but she never mentioned this.

[7] Having satisfied myself that counsel had served the affidavit by sending it to the notified email address I declined to grant any extension and that was communicated to both parties by email. Mrs Vosper had received and opened pdf files previously, she was aware of the timetabling arrangements and had given no indication that she would not be in New Zealand.

[8] On 9 June 2009, again by email, and in accordance with the directions referred to above, counsel lodged and served submissions in support of the respondent's position on the three issues for determination.

[9] Nothing has been received from the applicant.

90 day issue

[10] On 5 November 2008 at about 9.00am counsel for the DHB received an email from Mrs Vosper's email address which announced a resignation *forthwith* by Mr Vosper. He promptly replied saying that the DHB still intended to proceed with consideration of whether to dismiss Mr Vosper in accordance with its earlier announced timetable which allowed Mr Vosper until midday 5 November 2008 for any comment. Nothing more was received from or on behalf of Mr Vosper so the DHB determined to summarily terminate Mr Vosper's employment and announced the reasons by letter the same day. Whether Mr Vosper's employment ended by resignation or by dismissal, it was on 5 November 2008. That must be the starting point for assessing whether Mr Vosper raised a grievance within time.

[11] 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 of the employer aware that the employee alleges a personal grievance that they want the employer to address: see s.114(2) of the Employment Relations Act 2000.

[12] Mr Vosper's email resignation did not present any grievance about the termination of his employment so as to let the DHB know sufficiently of his complaint to be able to begin to address it with a review to resolving it: see *Board of*

Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds [2008] 1 ERNZ 139. The only thing that Mr Vosper requested was that no press statement be made in consideration of his daughter's poor health.

[13] In compliance with an earlier direction to mediation over the suspension, the parties attended mediation in Blenheim on 3 December 2008. It is apparent from subsequent correspondence that Mr and Mrs Vosper declined to personally meet with the DHB's representatives who attended and the mediation process lasted less than half an hour. There is no evidence to support the notion that a grievance about the termination of Mr Vosper's employment was raised on this date.

[14] On 19 December 2008 the Authority received from Mr Vosper a document headed *Re Amended – 17th December 2008 Form 1 APPLICATION TO EMPLOYMENT RELATIONS AUTHORITY*. The word-processed document includes tracked additions and deletions to the original application concerning the suspension. If this document had been sent to the DHB it would have validly raised Mr Vosper's termination grievance. The filing was rejected and Mr Vosper was asked to redraft a statement of problem *as if there had been no previous one filed* so as to allow it to be read without the tracked changes. He was also directed to serve a copy of any amended statement of problem on counsel. The letter rejecting the filing was copied to counsel but not the document itself.

[15] Next, on 12 February 2009, the Authority received another document also headed *Re Amended – 17th December 2008 Form 1 APPLICATION TO EMPLOYMENT RELATIONS AUTHORITY*. This document complied with the direction as to its form. The support officer contacted counsel to see if the filing had been served on the respondent as directed. When told by counsel that it had not been the support officer faxed him the new *Form 1* document and several attachments. The support officer also faxed the applicant with serving all the newly filed material on the respondent. There is an envelope post marked 23 February 2009 that contained the new *Form 1* and some other material which was received at counsel's office on 25 February 2009.

[16] The material served on 25 February 2009 included an unsigned letter dated 15 January 2009 addressed to the Authority that reads:

I refer to previous correspondence in respect of this matter.

> *My employment was terminated on 5th November. I enclose amended pleadings which now include a claim for damages in relation to my summary dismissal on 5th November and a request for reinstatement.*
>
> *Yours faithfully*
>
> *Richard Vosper*

[17] This letter was not received by the Authority until the respondent later provided it. However there was an email exchange between Mrs Vosper and the support officer commencing at 1.10 pm on 5 February 2009 about whether an amended *Form 1* had been received. The support officer confirmed that no such form had been received. As mentioned the new *Form 1* was received on 12 February 2009. In light of the history on the applicant's part (or that of Mrs Vosper) of a failure to actually copy correspondence to the respondent I am not prepared to assume that the 15 January 2009 letter and the enclosure referred to were ever sent.

[18] The period of 90 days beginning with 5 November 2008 ended on 2 February 2009. Within that period Mrs Vosper sent to the Authority but not to the respondent an amended *Form 1* that would have raised a grievance if it had been received by the respondent. However, as noted, the document was rejected with a clear instruction to reformat it and serve it on the respondent at the same time as lodging it with the Authority. The new *Form 1* was not lodged with the Authority until 12 February and the same day the Authority faxed it to the respondent.

[19] From the above sequence I find that no grievance regarding the termination of his employment was raised by or on behalf of Mr Vosper with the respondent within the statutory 90 day period.

Leave

[20] The Authority may grant leave for a late grievance if the delay was occasioned by exceptional circumstances and it is just to do so.

[21] Mr Vosper was in New Zealand between 17 November 2008 and 11 March 2009, almost the whole of the period during which he was entitled as of right to raise a grievance. Mrs Vosper used to be a solicitor in the United Kingdom. She must or should have known that time limits apply in litigation. I do not accept that the delay in raising the grievance was occasioned by exceptional circumstances. Rather, there was simply a failure to do what could and should have been done in a timely manner.

[22] This is not a case where it would be just to grant leave even if there were exceptional circumstances. Mr Vosper took the extraordinary step of leaving New Zealand on 4 October 2008 while suspended on full pay without any notice to his employer. Mr Vosper's unauthorised absence while suspended impeded the disciplinary investigation. There are other examples of the applicant's failure to respond to the disciplinary investigation is a timely manner that mirror his failure to take timely steps in this litigation. Mr Vosper was not even present in New Zealand for the investigation meeting at which he sought orders overturning his suspension so he could not have attended work even if his application had been granted.

[23] For the foregoing reasons there can be no grant of leave for Mr Vosper to raise a late grievance.

Costs

[24] The DHB incurred legal costs of $13,526.00 (plus GST) and disbursements of $422.00 in defending the application for orders to revoke the suspension and prevent its disciplinary investigation. I am referred to *PBO Ltd (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808. In particular, it is submitted that each case must be considered on its own merits.

[25] I agree that the applicant's conduct of the litigation resulted in unnecessary extra costs for the respondent. He was essentially trying to permanently stifle through legal process his employer's attempt to obtain and consider his response to concerns that had arisen outside the employment. Counsel describes the application as a *shot gun approach* – it was wide ranging, lacked precision or focus but sought general orders cutting across the employer's rights and obligations. The application had to be taken very seriously by the DHB and it cannot be criticised for engaging experienced counsel from out of town and marshalling a fulsome defence, all of which needed to be with some urgency. The applicant did not always include the respondent in communications with and the provision of information to the Authority, causing the counsel to waste time checking. The investigation meeting that preceded determinations *CA 160/08* and *CA 160A/08* took less than a day but we canvassed a considerable amount of documentation.

[26] In the circumstances I am asked to depart from applying a daily tariff approach to fixing costs and order the applicant to pay $5,000.00 as a contribution to legal costs

and a further $422.00 to cover counsel's travel. This is a reasonable contribution in the circumstances so it is ordered.

Conditions attaching to the costs order

[27] I am asked to order that no further steps be taken in investigating Mr Vosper's remaining claim about the illegality of his suspension until costs as now ordered are paid to the respondent. I am referred to *Tropotova v OCS Ltd* CA 66/09, 25 May 2009, a determination of the Employment Relations Authority, where the Member relied on s.137 of the Employment Relations Act 2000. S.137(2) empowers the Authority by order to require certain persons to do or cease doing any specified thing for the purpose of preventing further non compliance with a provision, order, determination, direction or requirement. The power to order compliance only arises where there has been non-compliance with an employment agreement or specified statutory provisions (s.137(1)(a) - not presently relevant) or Authority rulings of the types specified (s.137(1)(b)). In short, a compliance order is a remedy where there has been a substantive breach of a type listed in s.137(1) in order to prevent a further breach. Here, it cannot be said that there has been a breach of any order or determination of the Authority yet because the order to pay costs is contained in this determination. While it might be said that the applicant's (or Mrs Vosper's) poor conduct of the litigation constitutes a breach of the Authority's directions or requirements, it would be completely out of proportion to use that to make a compliance order to pay costs. I note that breaching a compliance order creates the risk of imprisonment or other serious sanctions. For these reasons I doubt there is power under s.137 to make a compliance order and I would decline to do so even if there was power.

[28] I am also referred to s.160(1)(f) and s.157(1) and (2). I do not read these provisions as empowering the Authority to order a litigant to pay up on a costs detemination before the Authority proceeds further with its investigation. There are explicit processes to enforce determinations: see s.141 which permits determinations to be enforced in the same manner as judgments of the District Court and s.137 mentioned above; bankruptcy or insolvency proceedings are also available. There is therefore no need to infer the power argued for. The present situation is something like *Employment Relations Authority v Rawlings* [2008] ERNZ 26 where the Court of

Appeal doubted whether the Authority had power to make an *unless* order deeming proceedings to be withdrawn in the event of non-compliance with a procedural order.

[29] I should note that this is not a case where the Authority is asked to order security for costs and a stay of proceedings until such security is provided: see for example *Whitehead v Scott* [1994] 2 ERNZ 461. A Full Court overruled *Whitehead* regarding the Tribunal's powers: see *Reid v NZ Fire Service Commission* [1996] 1 ERNZ 228. I am not aware of any decision concerning the Authority's power.

[30] In the absence of a specific power to order payment of the costs order made in this determination as a condition of proceeding further with the remainder of the investigation, the DHB is left to the usual enforcement mechanisms if Mr Vosper does not meet his obligation to pay.

Continuation of the non publication order

[31] The reason for the original non-publication was to avoid damaging the then existing employment relationship. Mr Vosper's employment by the DHB is now ended so there is no reason to continue any non-publication order. The order is rescinded and this and the earlier determinations may be reported without restriction.

Communications with potential witnesses

[32] As part of its investigation the DHB received affidavits from two people resident in England. In April 2009 Mr Vosper wrote to those people saying that he was pursing a claim of defamation against them as a result of their affidavits. The respondent characterises these as *threatening letters*. I am asked to order Mr Vosper and any representative of his not to contact potential witnesses in these proceedings so as to prevent any intimidation.

[33] I have decided not to make any order. All that remains for investigation by the Authority is the lawfulness of the suspension. The deponents will not need to give evidence in any ensuing investigation as the truth or otherwise of their claims is not material to whether Mr Vosper was lawfully suspended from his employment during the disciplinary investigation.

Summary

[34] Mr Vosper cannot proceed with a personal grievance about the termination of his employment because no grievance was raised within 90 days and there is no basis for granting leave to raise the grievance out of time.

[35] Mr Vosper is to pay the DHB costs totalling $5,422.00 arising from determinations *CA 160/08* and *CA 160A/08*. No other orders are made in respect of this award.

[36] The non-publication order made in determinations *CA 160/08* and *CA 160A/08* is rescinded.

[37] No order is made preventing Mr Vosper or his representative from contacting deponents who have sworn affidavits for the DHB.

[38] Costs are reserved.

[39] The Authority will contact the parties shortly to discuss arrangements for proceeding with the investigation into the lawfulness of the suspension.

Philip Cheyne
Member of the Employment Relations Authority