

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 46  
5464598

BETWEEN            LESLIE ALEXANDER WATT  
                                 Applicant

A N D                NELSON MARLBOROUGH  
                                 DISTRICT HEALTH BOARD  
                                 Respondent

Member of Authority:     Peter van Keulen

Representatives:         Steven Zindel, Counsel for Applicant  
                                 Paul McBride, Counsel for Respondent

Investigation Meeting:    11 March 2016 at Nelson

Submissions Received:    Orally and in writing for both the Applicant and the  
                                 Respondent on 11 March 2016

Date of Determination:    15 April 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     In his statement of problem dated 21 July 2015 the applicant, Mr Watt, requested that the Authority resolve two problems:

- (a)     His personal grievance for unjustified dismissal arising on 2 April 2014 when his employer, the respondent (NMDHB) failed to roster him on to any further shifts;
- (b)     His personal grievance for NMDHB's unjustified actions that caused disadvantage to his employment, arising from the circumstances leading up to and culminating in NMDHB's failure to roster him on to any further shifts.

[2] NMDHB denies that it unjustifiably dismissed Mr Watt; rather it states that Mr Watt remains a casual employee who is simply not being rostered for work, as he is not certified as fully fit.

[3] Further, NMDHB asserts any grievance for unjustified action causing disadvantage relates to events that occurred earlier than 90 days prior to the date of Mr Watt's personal grievance letter. As a result, these events cannot form any actionable personal grievance.

[4] Mr Watt's personal grievance for unjustified dismissal was raised within the 90-day period.

[5] NMDHB requested that the issue of whether the personal grievance for unjustified action causing disadvantage has been raised out of time be considered as a preliminary matter.

### **The issues**

[6] In order to resolve this preliminary matter I must consider the following:

- (a) What does Mr Watt say are the events that might give rise to his alleged personal grievance of unjustified action causing disadvantage?
- (b) For each of the events identified which might give rise to Mr Watt's alleged personal grievance of unjustified action causing disadvantage, was a personal grievance raised within the 90-day period of the event occurring?
- (c) If a personal grievance was not raised within the 90-day period, should I grant leave for the grievance to be raised out of time?

### **Events that Mr Watt alleges give rise to his personal grievances**

[7] Mr Watt is qualified as a mental health nurse. On 20 February 2012 Mr Watt commenced employment with NMDHB in the Mental Health Admission Unit (MHA). That position was a casual position.

[8] As part of his work for NMDHB Mr Watt also did a number of shifts in the Tepahi Mental Health Unit (TMH).

*Agreement for permanent employment*

[9] Mr Watt claims that in May 2012 he had discussions with Ms van Iddekinge, the manager of TMH regarding ongoing permanent work at NMDHB in the TMH unit. Mr Watt asserts that he had a discussion with Ms van Iddekinge during which she promised him that he would be given at least three nine hour shifts per week on a permanent basis. Mr Watt said he understood that Ms van Iddekinge would draw up a contract but the agreement regarding permanent work was not subject to that contract being finalised. Mr Watt says he shook hands with Ms van Iddekinge over this.

[10] The contract for this alleged permanent position was never completed. Mr Watt says that in August 2012 Ms van Iddekinge told him she had “*dropped the ball*” and not completed the required paper work. She then told him that with the staffing restrictions in place at that time she could no longer finalise the contract.

*Fixed term part-time employment not made permanent*

[11] In January 2013, Mr Watt accepted a fixed term part-time employment role with TMH. He says this was a fixed term permanent position at .8FTE to cover an absence.

[12] In August 2013, Mr Watt’s fixed term role within TMH ended. The employee whose role was being covered by Mr Watt did not return. Mr Watt was not offered this role that he had been covering as a permanent position.

*Unsuccessful application for permanent role*

[13] In April 2013 Mr Watt applied for a permanent role in TMH which was similar to the fixed term role that he was covering. Mr Watt was not awarded that permanent position.

*Rostered work from 2013*

[14] From August 2013, Mr Watt continued to be rostered on for work. Mr Watt asserts that he was rostered on “*advance rosters*” indicating he was fulfilling a permanent position.

[15] Mr Watt says that in March 2014 “advance rosters” began appearing without shifts allocated for him. He was allocated shifts and placed into the roster to cover gaps.

[16] From April 2014, Mr Watt was not given any further work by NMDHB as he was not rostered either on the “advance roster” or subsequently placed into the roster to cover gaps.

[17] In May 2015, Mr Watt raised a personal grievance.

### **Possible grievances for unjustified action causing disadvantage**

[18] For the purposes of this preliminary matter, it is not necessary for me to determine whether the events outlined above occurred or not. I note that I have not recorded the NMDHB position in respect of the allegations.

[19] These are the events that are alleged by Mr Watt and they form the basis of his personal grievances. Mr Watt relies on these events in the statement of problem he has lodged with the Authority.

[20] The various facts alleged provide a basis for possible unjustified action causing disadvantage grievances. These grievances include:

- (a) The agreement that Mr Watt be employed in a permanent position, which the NMDHB through Ms van Iddekinge failed to implement in a written contract;
- (b) The failure to convert a fixed term role to a permanent role when the fixed term came to an end and there was ongoing work in that position;
- (c) The failure to appoint Mr Watt to a permanent role when one became available at TMH.

[21] In his evidence, Mr Watt was quite clear that at the critical point in relation to the three possible unjustified actions complained of above, he was aware that he could have raised a personal grievance, but he chose not to do so. I am satisfied that he knew he only had a 90-day period to raise any personal grievance. His evidence is that he simply decided that it was better not to as this might cause more problems and, in any event, he continued to be rostered on a permanent basis.

### **Were personal grievances raised within 90 days**

[22] I am satisfied that personal grievances for unjustified action causing disadvantage were not raised for the three possible grievances outlined above or any other possible unjustified action causing disadvantage grievance that may have arisen out of those facts.

[23] Any personal grievance for unjustified action causing disadvantage that Mr Watt alleges he has for failure to roster him onto “advance rosters” from March 2014 and then at all from April 2014 was raised within the 90-day period.

### **Leave to raise personal grievances out of time**

[24] Section 114 of the Employment Relations Act 2000 (the Act) provides:

*(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer with the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*

*(2) ...*

*(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.*

*(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –*

*(a) Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and*

*(b) Considers it just to do so.*

[25] Section 115 of the Act provides:

*For the purposes of section 114(4)(a), exceptional circumstances include –*

- (a) *where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or*
- (b) *where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or*
- (c) *where the employee's employment agreement does not contain the explanation concerning the resolution of the employment relationship problems that is required by section 54 and section 55, as the case may be; or*
- (d) *where the employer has failed to comply with the obligations under section 120(1) to provide a statement of reasons for dismissal.*

[26] On the evidence before me I am satisfied there are no exceptional circumstances which would justify the granting of leave in relation to raising a personal grievance for unjustified action causing disadvantage outside of the 90-day period.

[27] Mr Watt was aware of his rights and knew of the obligation to raise any personal grievances within the 90-day period. The evidence before me was clear in this regard and Mr Watt quite rightly conceded that he made a conscious decision not to raise personal grievances at the time, as he would rather protect the status quo.

[28] Accordingly, there is no basis to allow personal grievances for unjustified action causing disadvantage to be raised.

[29] Mr Watt's claim for unjustified dismissal from employment as a Mental Health Nurse with NMDHB as he was not rostered on further shifts from 2 April 2014 can continue.

[30] In the alternative, if the Authority finds that Mr Watt was not unjustifiably dismissed and he remains a casual employee, as contended by NMDHB, then there remains the personal grievance which has been raised for unjustified action causing disadvantage pertaining to the failure to roster Mr Watt on to further shifts appropriately.

[31] The events set out in the evidence for the preliminary matter may be relevant to the question of whether Mr Watt was in fact a permanent employee rather than a casual employee as NMDHB asserts. On this basis, the evidence is relevant to the unjustified dismissal grievance and the Authority should consider it in the substantive determination of this matter.

[32] As the scope of this matter has now been determined, I encourage the parties to consider using mediation to see if this narrower claim can be resolved.

### **Costs**

[33] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority