Determination Number: CA 22/07
File Number: 5045881

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY OFFICE

BETWEEN	Carol Fraser (Applicant)
AND	The Vice Chancellor, University of Otago (Respondent)
REPRESENTATIVES	Jen Wilson, Counsel for the Applicant Barry Dorking, Counsel for the Respondent
MEMBER OF AUTHORITY	Helen Doyle
INVESTIGATION MEETING	Dunedin, Tuesday 27 February 2007
DATE OF DETERMINATION	9 March 2007

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment relationship problem

[1] This determination deals with a preliminary issue. That is whether the applicant, Carol Fraser, raised her grievance that she was unjustifiably constructively dismissed with her employer, the Vice Chancellor, University of Otago (*the University*) within the period of 90 days from the date on which the action alleged to amount to a personal grievance occurred.

[2] In the event that the Authority was to find that the grievance had not been raised within 90 days, then Ms Fraser has applied for leave to raise it after the expiration of that period.

[3] The respondent says in its statement in reply to the statement of problem that was lodged by the applicant in this matter:

> *The first notification of the personal grievance provided by the applicant is the filing of this claim, and accordingly the grievance has not been notified within the 90 day time limit. The respondent does not accept the notification out of time.*

[4] The date on which the time for submission of the personal grievance begins to run is the date Ms Fraser ceased to work and not the date on which she gave notice to terminate her employment: *Charlton v. Colonial Homes Ltd* [2001] ERNZ 759. Ms Fraser's last day of employment was 30 June 2006 and the 90 day period should therefore be calculated from that date.

[5] The statement of problem was received by the Authority on 11 October 2006. An Authority support officer posted the statement of problem to the University on 11 October 2006 and it would have been received by the University a day or so after this date. This is outside the 90 day period but Ms Fraser says that she raised her grievance in an appropriate manner within the 90 day period.

[6] Ms Fraser was represented by a lawyer, Jenny Beck at mediation. Ms Beck gave evidence at the meeting and the applicant was represented during the investigation meeting about this preliminary matter by Ms Wilson, another solicitor from Ms Beck's law firm.

[7] The issues to be determined in this matter are the following:

- Was the personal grievance of unjustifiable constructive dismissal raised within the period of 90 days from 30 June 2006? This will involve considering the admissibility of statements made in a telephone conversation of 17 August 2006 and the contents of a letter of the same date.

- If the grievance was not found to have been raised within 90 days then should leave be granted to raise a personal grievance after the expiration of that period?

Was the grievance raised within 90 days?

[8] Ms Fraser tendered her resignation verbally in February 2006 and in writing on 6 March 2006. She gave three months' notice. During her notice period, Ms Fraser raised with other people, including her Head of Department and human resources adviser, Simone McNichol, the reasons for her resignation and the responsibility she felt the University had about her situation. Ms Fraser put forward some options for resolving the matter on a financial basis. This was not a situation where the University had no knowledge of the fact that there was an employment relationship problem.

[9] On 30 June 2006, Ms McNichol wrote to Ms Fraser. There is no privilege claimed in terms of that letter which contains, amongst other matters, an offer to extend Ms Fraser's resignation date by one month as a gesture of goodwill.

[10] Ms Fraser's employment duly ended on 30 June 2006.

[11] On 4 July 2006, Ms Fraser wrote to Ms McNichol and asked if the University would be prepared to attend mediation with a Department of Labour mediator. Ms Fraser set out the issues that she wished to discuss at mediation and there was no objection taken to the admissibility of that document. Ms Fraser said that she wished to discuss the following with the University:

- What led to me having to resign from the University of Otago;

- Why my supervisor, Dr Pat Cragg, did not fully support me in the work environment and why she did not seek advice and assistance from the University over the period 2003-2006;

- Why the University will not take any responsibility for me now that I have resigned;

- Why I am being replaced by two full-time workers and approximately a quarter of my job being disbursed to either the physiology computer support team or the academics of the Department?

[12] Mediation took place between the parties on 10 August 2006.

[13] Mr Dorking, on behalf of the University, submits that any statement from the mediation that took place on 10 August 2006 between the parties is inadmissible under s.148(1)(b) and (d) of the Employment Relations Act 2000. Mr Dorking submits that if Ms Beck used the term constructive dismissal and talked about a claim of that nature then it was a statement made for the purposes of mediation and no evidence can be given about that.

[14] For reasons that will become apparent, I advised the parties that I did not consider it necessary to hear statements about what was said at mediation and determine the admissibility of such statements.

[15] Following mediation, a telephone conversation took place between Ms Beck and Ms McNichol on 17 August 2006. Mr Dorking submits that the discussion which was initiated by Ms McNichol was simply a continuation of mediation and the communications were protected from disclosure to the Authority because they were without prejudice and therefore privileged.

[16] In relation to the telephone discussion of 17 August, Ms Beck gave evidence that she did not understand the conversation to be held on a without prejudice basis. Ms Beck gave evidence that she advised Ms McNichol, to the effect that Ms Fraser's constructive dismissal claim subsists. There was no challenge to that evidence because the University took the position that the conversation was on a without prejudice basis and any evidence of what was discussed was not admissible. Ms Beck's evidence about raising a grievance is supported by a letter from the University dated the same date as the telephone conversation which I shall refer to shortly.

[17] Ms McNichol provided three lines from her typed notes of the conversation that took place on 17 August to support that there was a discussion on a without prejudice basis. The rest of the notes were not provided on the basis they were privileged. Ms McNichol clarified that during that conversation the offer made on 30 June 2006 was withdrawn *on the record*. I understood her to mean that her advice about the offer contained in the letter of 30 June 2006 was not privileged. The three lines that I was provided with support that was the position because there is a clear distinction in the notes between that offer and any reference to the mediation which is prefaced with *on a without prejudice basis.*

[18] Ms Beck said that she was not expecting certain things to be said by Ms McNichol during the telephone conversation on 17 August 2006 and that she was taken by surprise. In those circumstances, there is a strong probability that she did not hear Ms McNichol say that she considered the statements during the conversation regarding the mediation matters to be on a without prejudice basis. I am of the view though it is more probable that any reference to mediation was on a without prejudice basis. It should be made clear that Ms Beck did not see the statements made during the telephone conversation to be the sort that would in any event have the protection of the privilege arising from without prejudice communications.

[19] Mr Dorking, also submits that a letter which the University wrote to Ms Beck on 17 August 2006, which is not headed without prejudice, is clearly intended to be without prejudice. He said that privilege attaches to that letter in the way it does to a series of letters where some, including the first, are headed without prejudice and some are not.

[20] I set out the part of the letter that refers to a personal grievance below:

> *Dear Ms Beck*
>
> *re: Carol Fraser*
>
> *----------*
>
> *I confirm our discussion this morning that the University is not of the opinion that Ms Fraser has grounds for a claim for constructive dismissal.*
>
> *----------*
>
> *Yours faithfully,*
>
> *Simone McNichol*

Determination

[21] I am satisfied that Ms Beck raised a personal grievance on Ms Fraser's behalf with the University on 17 August 2006 that Ms Fraser had been unjustifiably constructively dismissed.

[22] The University did not accept that Ms Fraser had grounds for her claim of constructive dismissal and recorded that in its letter of 17 August 2006 to Ms Beck.

[23] The issue is whether the statements that were made on 17 August 2006 and the contents of the letter of 17 August 2006 can be admitted as evidence to support that the grievance was raised.

[24] It is necessary to look at what the privilege attached to without prejudice communications is based on. The Court of Appeal in *Hammond Land Holdings Ltd v Elders Pastoral Ltd* 2 PRNZ pg 232 at pg 236 said:

The privilege attached to "without prejudice communication is based to a large degree on considerations of public policy. It is intended to encourage and facilitate the negotiation and settlement of disputes, by preventing any possible admission of liability being raised against the party making it….

[27] There is considerable doubt in my mind as to whether the letter of 17 August 2006 attracts the privilege which arises from without prejudice communications. There was nothing in that letter which could properly be said to have any bearing whatsoever on negotiation or an attempt to settle a dispute between the parties. There was nothing which could be construed as an admission of liability by the University in that letter.

[28] I have considered Mr Dorking's submission that the communications on 17 August 2006 were simply a continuation of mediation and therefore subject to confidentiality under the Employment Relations Act 2000. I do not accept the communications to be a continuation of the mediation process even if the initiative for the telephone call arose from that process. The privilege attached to without prejudice communications is there to encourage and facilitate negotiation and settlement of disputes and if the communications are of that nature it provides all the protection that is required.

[29] I find that Ms Beck's raising of Ms Fraser's personal grievance during the telephone conversation on 17 August 2006 was not a communication intended to encourage and facilitate the negotiation and settlement of a dispute. Ms Beck was notifying Ms McNichol that Ms Fraser had a personal grievance. Privilege attached to without prejudice communications only applies if there is a dispute between the parties and could not in my view extend to exclude proof that there was a claim, raised by one party. Privilege is intended to prevent potential admissions of liability in terms of a claim being disclosed but not to prevent disclosure of the fact a claim exists. Ms Beck made a statement that was independent of any negotiations and privilege does not extend to the raising of a personal grievance during the 17 August 2006 conversation. Even if that was not the situation I am not satisfied that the letter written on 17 August 2006 is covered by the without prejudice privilege. That letter contains a response to a personal grievance claim by Ms Fraser and is admissible evidence that a personal grievance was raised.

[30] Evidence about without prejudice communications can also be admissible if it would avoid the Authority being misled or deceived on an issue before it – *Cedenco Foods Ltd v State Insurance Ltd* [1996] 10 PRNZ 142. This would in my view clearly be the result if evidence about the 17 August telephone discussion and the contents of the letter of 17 August 2006 are not deemed to be admissible. It would also be most unjust to Ms Fraser if the University was, as stated in the Statement in Reply able to maintain to the Authority that there was no notification of the personal grievance until the statement of problem was lodged. I note that the University also opposed the application for leave to raise the grievance out of time.

[31] For these reasons I find that the evidence that the personal grievance was raised in communications on 17 August 2006 is admissible and can be taken into account by the Authority.

[32] Ms Beck raised Ms Fraser's personal grievance in her telephone call with Ms McNichol on 17 August 2006 within the period of 90 days. I find that it was raised in such a manner so as to satisfy the requirements under s.114(1) of the Employment Relations Act 2000. Further, the raising of the grievance enabled the respondent to be in a position to consider and respond in relation to its view of Ms Fraser's grievance on 17 August 2006.

Costs

[33] Ms Wilson asked that costs on this preliminary issue be determined and fixed. I suggested during the investigation meeting that Mr Dorking takes instructions from his client about that matter because often costs are reserved until the substantive matter has been determined. It was agreed that the parties would attempt to reach agreement with respect to costs and failing which submissions from the applicant should be provided to the Authority by Friday, 30 March 2007 and the respondent's submissions as to costs should be lodged and served with the Authority by Friday, 13 April. The Authority will then proceed to determine costs in terms of this preliminary matter.

Helen Doyle
Member of Employment Relations Authority