

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 353/09  
5155995

BETWEEN Pamela-Anne Ngohe-Simon  
Applicant

AND Chief Executive of the  
Department of Corrections  
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Mark Ryan for Applicant  
Jennifer Jones and Vanessa Lakeman for Respondent

Submissions received: 27 August and 2 September from Applicant  
10 September from Respondent

Determination: 7 October 2009

---

**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

---

**Employment Relationship Problem**

[1] Ms Ngohe-Simon was employed by the respondent (Corrections) from 2006; first as personal assistant to the Manager of Ngawha Prison, and then (under secondment) as the prison's "Release to Work" co-ordinator. On 19 March 2009 the applicant lodged an employment relationship problem relating to alleged personal grievances of unjustified disadvantage (a suspension allegedly imposed on 19 February 2008) and unjustified dismissal (the date of which appears to be in dispute.)

[2] Corrections accept that a disadvantage grievance was raised on 4 March 2008, well within the 90 day statutory timeframe, although it says that there was no suspension, justified or otherwise. It says that by agreement Ms Ngohe-Simon took special paid leave from 19 February 2008.

[3] In relation to the second allegation Corrections disputes that Ms Ngohe-Simon was dismissed. It says that she abandoned her employment and that salary payments were stopped on 4 May 2008 only after several unsuccessful attempts had been made (through Mr Ryan) to contact her. It says further that the unjustified dismissal grievance was raised on 24 February 2009, well outside the 90 day time limit for a grievance relating to the termination of the employment.

### **Issues**

[4] Both parties have advised that they wish me to determine “the 90 day issue” in relation to the dismissal grievance as a preliminary matter, in order to establish the scope of the substantive employment relationship problem to be investigated. It was also agreed by the parties that I should proceed to determine this preliminary issue “on papers” which have included an affidavit from the applicant and submissions from both parties.

[5] I note that the applicant’s position on “the 90 day issue” was not entirely clear from the statement of problem or Mr Ryan’s submissions. Initially it appeared that the applicant was arguing that the grievance was in fact raised in time. Then, in submissions, Mr Ryan for the first time sought leave to raise the grievance out of time pursuant to sections 114 and 115(a) of the Employment Relations Act 2000. In its submissions Corrections has addressed both issues and I do the same here.

#### **(i) Was the grievance raised within 90 days?**

[6] In January 2008 Ms Ngohe-Simon disclosed to Corrections (as she was required to do) that she had formed a relationship with a former inmate, and that they were going to be living together. On 19 February the Corrections Inmate Employment Site Operations Manager (Ms Ngohe-Simon’s immediate manager under her secondment) and the Prison Manager met with her. Immediately after the meeting Ms Ngohe-Simon went on paid leave, her agreement to which is a matter of dispute.

[7] By letter dated 21 February 2008 Corrections called Ms Ngohe-Simon to a further meeting to discuss her position however when she did not attend (possibly as a result of misleading information in the letter) Corrections sent her a further letter

setting out its preliminary view that it would not be possible for her to remain in either her current role, or her original role as personal assistant to the prison manager. Ms Ngohe-Simon was invited to comment on this and on the likely consequence that her employment might need to be terminated. Instead, on 4 March, she raised a disadvantage grievance relating to what she alleged was a suspension. Exchanges of correspondence followed, as did a meeting between Ms Ngohe-Simon, Mr Ryan and representatives of Corrections, on 19 March. Meanwhile Ms Ngohe-Simon's paid leave continued.

[8] After that meeting a series of without prejudice communications took place between Mr Ryan and representatives of Corrections. Full details of this have not been disclosed to the Authority but both parties have indicated that it involved proposals to end the employment relationship by agreement. It culminated in an email of 1 April 2008 from Corrections to Mr Ryan containing a counter-offer to settle all matters between the parties. Mr Ryan forwarded it to his client on 4 April. On 8 April Ms Fitzpatrick (of Human Resources) asked Mr Ryan whether he had received instructions from his client. He reported that he had not. She asked the same question on 11 April. This time Mr Ryan reported that he understood his client to be in Australia and did not know when she would be back. He confirmed he would provide her response to the counter-offer by 17 April.

[9] On 16 April, having heard nothing from Mr Ryan, Ms Fitzpatrick advised that if Corrections did not get a response by mid-day on 18 April it would continue paying Ms Noghe Smith up until 4 May 2008, at which time her employment would be terminated. When there was no further response that is what did indeed happen.

[10] Mr Ryan has advised that after forwarding the email of 1 April 2008 to his client he heard nothing more from her until late 2008. As for the respondent, it had no communication from either Ms Ngohe-Simon or Mr Ryan until it received a letter from Mr Ryan (dated 23 February 2009) which said:

*“...My client has now advised me that she was dismissed from her employment with Department of Corrections. Accordingly my client wishes to raise an additional employment problem of unjustified dismissal.”*

[11] Corrections submits that:

- i. the effective date of termination was 4 May, and that since that was when Ms Ngohe-Simon's pay ceased, the termination must have come to her attention on or soon after that date;
- ii. since it is well established that a grievance cannot be raised in advance, any action for unjustified dismissal could only be raised after 4 May, which is when the 90 day timeframe began;
- iii. for this reason alone the without prejudice communications which took place prior to the termination did not and could not constitute the raising of a personal grievance but in addition, they were privileged.

### **Determination**

[12] Corrections submissions on this point are accepted in their entirety. It is not accepted that the grievance was raised prior to Mr Ryan's letter of February 2009, a date well outside the 90 day period which, I accept, ran from 4 May 2008 or soon after.

#### **(ii) Were there exceptional circumstances such that leave should be given to raise the grievance out of time?**

[13] The exceptional circumstance relied on here is that set out in section 115(a) which is:

*“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...”*

[14] In her affidavit in support, Ms Ngohe-Simon deposes of *“self destructive depression”* which led her to *“run away to Australia.”* Selected medical records were

attached. The first entry, dated 18 February 2008, included a reference to her anxiety over very serious problems in her personal relationship. The next, in May 2008 described her as having had depressive symptoms for three months and again, connected these to her relationship problems. Finally in early December (by which time she was living apart from her partner) she was referred for specialist assessment and help for “*depression/relationship problems.*” It was around this time, also, that Ms Ngohe-Simon got back in touch with Mr Ryan.

[15] There is nothing else in the medical records about what might have caused Ms Ngohe-Simon’s depression and anxiety. However, as she states in her affidavit, she is now of the view that “*the problem wasn’t my new partner but was because of the fact that I had lost my job.*”

### **Determination**

[16] There is nothing before me to support the assertion that trauma associated with the ending of Ms Ngohe-Simon’s employment caused the delay in raising the grievance. The evidence indicates that Ms Ngohe-Simon’s anxiety and depression began even before the respondent raised its concerns with her, and was associated with very serious problems in her personal relationship. Her failure to mention her work situation to her doctors is consistent with those other and more pressing problems having pushed to the background the need to give instructions to Mr Ryan (both before and after her salary stopped.)

[17] I am not satisfied that I can say that Ms Ngohe-Simon was so affected or traumatised by the ending of her employment that she was unable to properly consider raising a grievance. Leave to raise the dismissal grievance out of time is declined. The Authority will now arrange a conference call to confirm arrangements for the investigation of the substantive issues which remain between the parties.

Yvonne Oldfield

Member of the Employment Relations Authority