

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 54

File Number: 5054367

BETWEEN Deborah Houston
Applicant

AND Attorney-General in respect of
the Chief Executive of the
Ministry of Social Development
Respondent

Member of Authority: Denis Asher

Representatives: Elizabeth Briggs for Ms Houston
Edrick Child for the respondent

Investigation Meeting On the papers

Submissions Received 6 April 2011

Determination: 8 April 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Ms Houston unjustifiably dismissed or, alternatively, unjustifiably disadvantaged? Or, as submitted by the respondent (now the Ministry of Social Development; the Ministry), is her personal grievance out of time and/or has been delayed so long that it would be unjust to permit it to continue or to grant any remedies?

[2] The applicant is in receipt of legal aid.

[3] Each party seeks costs.

The Investigation

[4] This employment relationship problem has a long history, the originating statement of problem being filed on 27 October 2006. Suffice to say, after a number of changes of counsel, issues relating to legal aid applications and the filing of several amended statements of problem (the latest being received on 3 February 2011), and by way of a telephone conference on 20 December 2010, the parties agreed to various matters being determined on the papers and to a timeline for the provision of submissions.

Background

[5] The Ministry is content for the Authority to regard as broadly correct the basic facts pleaded by Ms Houston. However, the respondent also says this will not be its position if the matter proceeds to substantive hearing. In particular, the Ministry will deny the claims that it caused or contributed to Ms Houston's illness and inability to work and that it did not adequately support her over the illness.

[6] Ms Houston was employed by the then Department of Child, Youth and Family Services as a social worker from 3 January 1990 to 17 April 2005.

[7] Employment issues began to arise from 1999. In September 2000 Ms Houston was diagnosed with post traumatic stress disorder said to be derived from a violent incident in 1995 which the respondent says it was unaware of. In January of that year Ms Houston was held at knife point by a client in a hostage situation.

[8] The diagnosis, set out in a report, included a number of other observations and recommendations including how Ms Houston should be treated and supervised at work.

[9] A further incident occurred in October 2001 when, during a client home visit, a family member of the client threatened Ms Houston and her colleague with a knife.

[10] Ms Houston began taking increasing periods of paid sick leave. She was on paid sick leave for most of 2002. She worked reduced hours and tasks on full pay from late-2002 to mid-2003. Ms Houston took further continuous paid leave from 10 July 2003 and did not return to work thereafter.

[11] Ms Houston attributed her illness and inability to work to the respondent; the Ministry has consistently denied liability for the applicant's illness and inability to work.

[12] In May 2002 a follow-up report by the psychologist identified that the Ministry's treatment of Ms Houston since the 2000 report had contributed to the serious deterioration of the applicant's condition; further recommendations were made.

[13] The respondent says it engaged actively with Ms Houston in respect of her illness, in a number of ways, and over a lengthy period, in an effort to provide her with appropriate therapeutic and financial support.

[14] A medical case conference in July 2003 recommended that Ms Houston not return to work with the respondent.

[15] A further medical case conference in September 2003 concluded, on the basis of a clear consensus, that Ms Houston could not return to work with the respondent and should not return to a similar work environment, for example, as a front line social worker. Medical advisers stated it was not safe for Ms Houston to return to her previous job, and that there were no other suitable jobs with the respondent that would not compromise her well-being.

[16] Ms Houston had legal representation from the beginning of 2004.

[17] Throughout this period there were numerous dealings between the applicant, the respondent, their advisers and relevant medical professionals. These dealings

covered a range of matters around Ms Houston's diagnosis, treatment and prognosis, opportunities for return to work or other employment options and other assistance and support. As time passed the issue arose of whether the applicant's employment with the respondent should end.

[18] The respondent twice deferred a decision on medical retirement at the applicant's request so that the parties could engage in alternative dispute resolution.

[19] On 14 January 2005 the applicant's solicitor sent submissions to the Ministry in relation to its proposed medical retirement of Ms Houston.

[20] On 17 January 2005, and pursuant to provisions within her collective employment agreement, the Ministry wrote to Ms Houston giving her 3-months notice of medical retirement.

[21] Mediation took place on two separate occasions before termination; a third occurred after Ms Houston's application was filed in the Authority.

Applicant's Position Summarised

[22] The nature of the applicant's personal grievance has not changed since Ms Houston's then counsel notified the respondent of her grievance by letter on 12 April 2005. Nor has it changed since the first statement of problem was filed on 24 October 2006.

[23] Rather than creating new employment relationship problems, Ms Houston has reduced what she is claiming, including dropping the allegation of breach of contract for failure to provide a safe workplace.

[24] The factual context leading up to the applicant's dismissal is relevant to the claim of unjustified dismissal. The context cannot be limited to those matters that occurred in the 90 days before the grievance was raised.

[25] The applicant's vulnerable state at the time the Ministry decided to terminate her employment and how she came to be in that state is relevant to her claim.

[26] Ms Houston says the Ministry failed to follow a fair process, including one that was appropriate to the applicant given she was suffering from post traumatic stress disorder as a result of her work.

[27] Ms Houston was in such a fragile state in January 2005 that it was incumbent on the Ministry to consider alternatives to dismissal: it failed to do so.

[28] Compensation of \$75,000 for distress and humiliation is sought, as well as lost wages from 2005 until the applicant's return to work at a similar level or until retirement, together with reimbursement of the value of personal effects not returned to Ms Houston.

[29] The delay in proceedings has not been excessive and is excusable as it was beyond the applicant's control. Through no fault of her own her first two lawyers advised they could no longer act for her. This placed Ms Houston in the difficult position of finding a new lawyer who was prepared to work on legal aid.

[30] In the alternative, it is submitted that Ms Houston's post traumatic stress disorder was a relevant factor in delay (refer to her attached affidavit).

[31] The Ministry has not been seriously prejudiced by the delay. It has been aware of Ms Houston's grievance and the issues arising from her claim since it was first raised. Her claim has not altered. The respondent has had the benefit of consistent legal advice throughout, and the majority of relevant documents have already been discovered and filed.

[32] It is in the interests of justice that Ms Houston should be able to proceed with her application. It would offend good conscience for the applicant's claim to be struck out as the respondent would effectively be benefitting from a problem it created by using Ms Houston's disability against her in its claim of delay.

Respondent's Position Summarised

[33] Ms Houston's initial statement of problem, and her amended statements until the latest filed on 18 November 2010 (note: subsequently superseded by another

amended statement filed on 3 February 2011), covered a large number of allegations relating to events spanning the period 1995 to 2005.

[34] The amended statement of problem filed on 18 November now limits her claims to allegations that the respondent failed to consider alternatives to dismissal and failed to follow a fair process including one that appropriate to the applicant given that she was suffering from post traumatic stress.

[35] Ms Houston was terminated on the ground of medical retirement, effective 17 April 2005.

[36] At that time Ms Houston had been off work continuously since mid-2003, and had been off work for most of 2002, and she had also worked reduced hours for a period on full pay.

[37] The Ministry provided nearly four years salary to Ms Houston in circumstances where she was not able to attend work and from at least July 2003 would not be returning to work.

[38] The Ministry conducted an exhaustive process before terminating the applicant's employment. The process spanned years and was sensitive to Ms Houston's circumstances and involved generous assistance.

[39] That assistance included comprehensive medical (including psychological) support and rehabilitation services under independent clinical direction of a University of Auckland professor. It included psychological counselling and gym membership.

[40] Professionals involved in the applicant's assessment and care over 2001-2005 included a professor of medicine, an occupational medicine specialist, three registered psychologists and a psychiatrist.

[41] In respect of the termination of Ms Houston's employment, the Ministry provided her with the contractual notice period (one month), an additional two months' paid notice that was entirely discretionary (\$7,828), annual leave of 78 days

which had accrued while the applicant had been on extended sick leave, retiring leave of 65 days in accordance with her contractual entitlement, paid her legal costs for the period May 2004 to January 2005 (\$22,782.15 GST inclusive) and continued medical, rehabilitation and vocational support to Ms Houston after her termination.

[42] The consideration given to Ms Houston's circumstances was thorough and included mediation (on two occasions before her termination), ample notice and a reasonable opportunity to comment before a decision was made to dismiss her, access to independent vocational advice and assistance and the successful completion by Ms Houston of a work trial in suitable alternative employment.

[43] Ms Houston resisted the suggestion she consider moving from paid to unpaid leave.

[44] Ultimately, termination was the only reasonable option.

[45] Ms Houston has not shown how the respondent failed to follow a fair process.

[46] Despite numerous opportunities to do so both before and after her termination, Ms Houston has not explained what reasonable alternatives to dismissal should have been considered but were not.

[47] In any event Ms Houston's personal grievance is out of time and/or has been delayed by the applicant for so long that it would be unjust to permit it to continue or to grant any remedies.

[48] The only document or statement that could be said to assert a personal grievance is a letter from Ms Houston's lawyer dated 12 April 2005, after notice had been given of the decision to terminate. It claimed that notice was a breach of Ms Houston's employment agreement, was an unjustified action constituting a personal grievance and was also a breach of the respondent's statutory obligations. Those claims were based on an assertion that Ms Houston's inability to work was a result of actions on the respondent's part. The notice claimed the Ministry had an ongoing obligation to keep Ms Houston on paid sick leave until she was fully rehabilitated or until payments were made to her to reflect her ongoing losses.

[49] To the extent that the letter purported to raise a personal grievance it was founded on matters that were well out of time.

[50] To the extent that other matters are now being raised in documents filed with the Authority they are not within the scope of any personal grievance that was properly raised within time. They amount to notice of a new grievance and are well out of time.

[51] Ms Houston has not progressed her claim expeditiously: nearly 6-years have elapsed since the decision to terminate the applicant's employment was made and her proceeding is not well advanced.

[52] The respondent says, on any view of the present proceedings, they are old:

- a. The decision to terminate Ms Houston is 6 years old;
- b. The substantive events leading to that decision are significantly older, reaching back 16 years; and
- c. Proceedings were filed in the Authority more than 4 years ago.

[53] It also says that Ms Houston has not progressed her claims expeditiously. The delays are inordinate. Even if allowances are made for the applicant's illness (and it may not be safe to do so as there is no current medical evidence before the Authority) the length of time is too long. It is not reasonable to excuse Ms Houston's sluggishness on 6-year's worth of difficulties with the various lawyers she has dealt with over this time. There have been prolonged periods of inactivity by the applicant (e.g. August 2008 to September 2009), and it is largely due to the diligence of the Authority in scheduling telephone conferences that the matter remained alive at all.

[54] Ms Houston has failed on several occasions to comply with previous directions of the Authority including meeting agreed timetables for filing documents; hearings have been scheduled and vacated on 3 occasions because of the applicant's inability to be ready.

[55] A full and fair hearing into the detail of the applicant's claim would now be impossible because of the importance of evidence from witnesses the reliability or value of which is now compromised by the passage of time: memories would not be reliable and many staff no longer work for the respondent.

[56] Standing back, and by way of an overall view, the Authority must consider whether it is in the interests of justice to attempt to adjudicate fairly on a claim as stale as the present application. It is unreal to seek to debate and fairly resolve events that occurred between 6 and 16 years ago. These delays are entirely Ms Houston's responsibility. It is unlikely justice would be served by attempting to hear and determine the substantive allegation. It is therefore in the public interest to end this litigation.

[57] If the proceeding is not struck out or dismissed the Ministry seeks certain further orders clarifying the scope of the proceeding.

Discussion and Findings

Is the Original Notice of Personal Grievance Out of Time?

[58] As set out above, Ms Houston's amended statement of problem filed on 3 February 2011 confirms that the problem she wishes the Authority to resolve is a personal grievance claim based on the grounds of unjustifiable dismissal and, in the alternative, unjustifiable action.

[59] An accompanying memorandum of counsel for the applicant says Ms Houston's grievance has not changed since her then solicitor notified the respondent of the same on 12 April 2005 and since the first statement of problem was filed on 24 October 2006. That submission is repeated in counsel's submissions received on 25 February 2011. I accept the proposition for the following reasons.

[60] The letter of 12 April 2005 states amongst other things:

*As you will appreciate from the content of my letter to you dated 14 January 2005 and other advice from me throughout this matter, **Debbie does not accept that you***

are entitled to terminate her employment (by way of medical retirement). Accordingly, *she claims that the purported notice of termination is a breach of her employment agreement, is unjustified action constituting a personal grievance and is also in breach of your statutory obligations.*

...

For several reasons Debbie has decided not to proceed with ... an application of injunction at this time. However, she reserves her right to apply at any time after 17 April to seek reinstatement to continue to be paid sick leave ... pending resolution of any claims she brings against the Department, or as one of the remedies in substantive proceedings against the Department.

It is Debbie' position that the Department has an ongoing obligation to keep her on paid sick leave until she has been fully rehabilitated to return to employment ... or ...until Debbie's ongoing losses have been identified, so that there can then be payment by the Department to reflect (those) losses

(emphasis added; bundle of documents provided by the parties received on 3 March 2011)

[61] The letter then proceeds separately to address in some details related matters concerning termination payments, rehabilitation arrangements and personal effects.

[62] That notice would have come as no surprise to the respondent because, in the earlier letter of 14 January 2005, Ms Houston's counsel anticipated the above in the following way:

As you are aware from extensive previous communications ... Debbie claims that her current inability to work, her future inability to return to work ... and her current emotional and mental state is as a result of unjustified actions and/or breaches of contract and/or breaches of statutory duty (by) the Department.

Accordingly, the Department can only retire Debbie on medical grounds if it puts in place a safety net to support her ... for any loss and damage that she has suffered.

...

If the Department proceeds with termination in these circumstances such termination would be a breach of contract, unjustified action and breach of statutory obligation.

(above)

[63] Because of the clarity of the 12 April notice, I accept the applicant's submission that a grievance was clearly advised at the time. The requirements of s. 114 of the Act have been met. The grievance is clearly stated as unjustified dismissal.

[64] What are actions within the 90-day statutory framework and what are historical events that inform those actions will be determined in the context of a substantive investigation: *Waikato District Health Board v Wendy Clear*, [2010] NZCA 305 applied.

Does the Delay Warrant Striking Out the Proceeding?

[65] As is made clear above, the respondent also seeks to have the proceedings struck out on the more general basis that it is stale.

[66] The usual principles for striking out an employment proceeding on the ground of delay or want of prosecution are well established. They are, whether:

- a. The delay is inordinate or excessive;
- b. The delay is inexcusable;
- c. The delay has seriously prejudiced the respondent; and
- d. The interests of justice can be served and justice can be done despite the delay.

(Lovie v Medical Assurance Society New Zealand Limited [1992] 2 NZLR 244, at 248)

[67] The essential nature of what is in the interests of justice was set out in the Court of Appeal's judgement in *Commerce Commission v Giltrap City Limited* (1997) 11 PRNZ 573 at 579:

In cases of delay and alleged want of prosecution, the right of all citizens and organisations to have access to the Courts for the determination of the issues they have raised should be denied only if that important right is outweighed by a stronger right vested in the defendant to have the case dismissed because justice can no longer be done in the light of the delay.

[68] I accept Ms Houston's submission that, while the delay has been considerable, it is not yet excessive. I also accept her argument that the delay is excusable and (largely) beyond her control: Ms Houston has had difficulty in securing and retaining legal representation, a problem worsened by her post traumatic stress condition. I do not accept that the respondent will be seriously prejudiced (as opposed to prejudiced) by the delay, particularly because the discovery process is seemingly complete or near so. The resulting extensive documentation will assist witness recall. Costs for the investigation will be considerable for the parties, but that was always going to be the case.

Next Step

[69] I do accept the respondent's submission that, if the proceeding is not struck out, then further orders clarifying its scope are required. I invite the parties to attempt to formulate those orders in the first instance.

[70] I anyway place the parties on this notice that this matter is to proceed promptly and, subject to their submissions, require a telephone conference at the end of the 28-day challenge period so as to confirm a substantive investigation date for the week commencing 25 July 2011. That conference will address the likely duration of the investigation, the identity of witnesses, a timetable for filing witness statements and the preparation of an agreed bundle of documents.

[71] Finally, I invite the parties to consider the value of further mediation. In particular, and in that context, I urge them to undertake a rigorous risk assessment,

including realistic best-case/worst case outcomes, in an endeavour to find a sword (funded as it is by the tax-payer) to cut this knot.

Determination

[72] For the reasons set out above the respondent's application that this proceeding should be struck out or dismissed because the personal grievance is not within the limitation period established by s. 114 (1) of the Act or, alternatively, the delays in prosecuting the proceeding are so significant it would not be in the interests of justice to permit it to continue, does not succeed.

[73] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority