

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 357  
5368177

BETWEEN                      NGAWINI SHORTLAND  
   Applicant

A N D                              THE BOARD OF TRUSTEES  
   OF TE KURA KAUPAPA  
   MAORI O  
   NGARINGAOMATARIKI  
   PRIMARY SCHOOL  
   Respondent

Member of Authority:        James Crichton

Representatives:              No appearance for Applicant  
   Dennis Asher, Advocate for Respondent

Investigation meeting:        On the papers

Submissions Received        No submissions from Applicant  
   28 August 2012 from Respondent

Date of Determination:        11 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     This is an application by the respondent employer (the School) to strike-out the claim made by the applicant employee (Ms Shortland) for want of prosecution.

[2]     Ms Shortland was employed by the School from 2 August 2011 as a fixed term part-time principal release teacher. In practical terms, Ms Shortland typically worked two days each week (normally Tuesday and Wednesday).

[3]     During October 2011, Ms Shortland suffered recurrence of an eye infection and took various periods of sick leave. There was a meeting between the School and Ms Shortland on 2 November 2011 at which Ms Shortland presented two medical

certificates from two different medical providers, one of which declared her unfit for seven days and the other of which declared her unfit for 14 days. The effect of the longer of these two medical certificates would have been to have her return to duty on and from Tuesday, 15 November 2011.

[4] In fact, Ms Shortland did not return to duty on that date and never returned to the School at all. The next contact that the School had from Ms Shortland was the “letter of grievance” dated 23 November 2011. In the Authority’s opinion, that 23 November 2011 letter does not properly raise a personal grievance at all. The only matter on which it is clear is the extent of the remedies sought. There is nothing in the letter which indicates the factual matrix around the alleged dismissal, and indeed nothing at all which would explain the nature of the dismissal that is alleged, save for the bare assertion. The nature of the grievance is particularly difficult to understand when the School flatly denies that there was any dismissal. Indeed, it says that Ms Shortland abandoned her employment by simply failing to present for work at the end of the period of sick leave. On the face of it, no proper personal grievance has been raised because the letter fails to adequately catalogue the facts on which the claimed unjustified dismissal relies.

[5] However, the letter does indicate that Ms Shortland wished to seek to negotiate matters with the School and failing that to resolving matters by agreement. In that spirit, the Authority directed the parties to mediation but that mediation was unsuccessful.

[6] In anticipation that an investigation meeting date might be a suitable inducement to the parties to try to resolve matters by agreement, the Authority directed an investigation meeting would be held on 20 July 2012 and when the mediation failed to resolve matters, counsel then acting for Ms Shortland, by email to the Authority, acknowledged the date for the investigation meeting but indicated that as Ms Shortland was legally aided, there would need to be an extension of the legal aid grant to enable work to be undertaken in respect of the investigation meeting.

[7] Email traffic continued between the representatives and by the end of May 2012, counsel for Ms Shortland was advising that legal aid had still not been granted for the investigation meeting and, as a consequence, he was seeking an adjournment of the fixture date of 20 July 2012. The Authority refused at that point to adjourn the fixture but subsequently on 18 July reluctantly granted the adjournment when counsel

for Ms Shortland continued to report that he was unable to prepare for the fixture because there had been no granting of legal aid for it.

[8] The School, meantime, had been becoming increasingly frustrated by the continuing delay in bringing the matter on for hearing and quite properly drew the Authority's attention to the prejudice to it of the unreasonable delay. This was particularly so when the School indicated that its evidence was that Ms Shortland was in employment and therefore:

- (a) Would not have qualified for legal aid in any event; and
- (b) Could have afforded legal advice from income.

[9] Given those circumstances, when the Authority adjourned the fixture date, it indicated that if the matter was not able to be heard within one month of the date of that adjournment (18 July), the Authority would entertain an application to strike the proceedings out for want of prosecution, should the School wish to make such an application.

[10] That application was duly filed on 28 August 2012 and contemporaneously served both on Ms Shortland and her counsel. Prior to the Authority commencing the preparation of this determination neither has responded. However, after the determination had been prepared but before it issued, the Authority received advice from counsel for Ms Shortland that the application for legal aid had been withdrawn and that he no longer had instructions. On the same day, Ms Shortland advised the Authority that she opposed the strike out application.

[11] The Authority notes that neither of those advices were received within the timeline set for the matter to be considered and disposed of. Nor can it be said that the Authority, or for that matter the School, is any clearer about how and when the matter might be able to proceed. Indeed, these late advices to the Authority raise more questions than they answer. All that is now certain is that legal aid is no longer in issue. But it is unclear if Ms Shortland proposes to run the case herself, whether she intends that fresh counsel be involved or indeed whether she contemplates that the matter should sit in the Authority's list until she is somehow ready to deal with it.

## **The School's application to strike-out**

[12] In essence, the School says that it is an abuse of process for Ms Shortland to purport to raise her employment relationship problem, fail absolutely to identify any proper factual basis for her claim and then, post-mediation, take no steps whatever to prosecute the matter in a reasonable fashion.

[13] The School notes its understanding that Ms Shortland is now in gainful employment and if that is the position, the Authority cannot help but agree with the School's submission that on that footing anyway, Ms Shortland was unlikely to be able to satisfy the Legal Services Agency that she is entitled to an extension of legal aid to cover an investigation meeting. What is more, in order to satisfy the Legal Services Agency that a claimant is entitled to a grant of aid, the Agency must be satisfied that the claimant has a reasonable chance of success. On the basis of the material before the Authority now, even assuming that the contention that Ms Shortland is in gainful employment is mistaken, it seems highly unlikely that the Agency would come to any different view from the view the Authority has already expressed, namely that it is doubtful that a grievance has even been properly raised and that it has no idea whatever of what the terms of that grievance, if raised, are. For the avoidance of doubt, the Authority notes that this aspect of the submissions of the School is otiose as it is now clear, belatedly, that the application for legal aid has been withdrawn.

[14] The School points out that Ms Shortland has an obligation to act in good faith and has failed to do so. It points out that there was no contact from Ms Shortland from the point at which she was supposed to return to duty down to the arrival of the letter of 23 November 2011, allegedly raising a grievance, and notwithstanding the statement in that letter to the effect that Ms Shortland wanted to resolve the matter by negotiation in the first instance, she had taken no steps whatever to honour that purported commitment. Furthermore, Ms Shortland had not taken the proactive step of seeking to go to mediation herself; she was directed to mediation by the Authority.

[15] The School points out (correctly in the Authority's view) that there has been a paucity of information provided by counsel for Ms Shortland as to the reasons for the continuing delay. The question has to be asked, how long is enough in terms of the wait imposed on the School by this continued supposed inability to proceed? Despite Ms Shortland now indicating she opposes the School's application, we are no further

ahead in terms of identifying when the matter might proceed or indeed what it is actually about.

[16] The School is a small institution with modest means and it is submitted that it is grossly unfair for it to be left in a state of limbo in a matter such as the present one.

### **Determination**

[17] The Authority is satisfied that this is a case where it should properly strike-out the proceeding for want of prosecution. The delay is prejudicial to the small employer and given the inadequacy of the raising of the employment relationship problem, it is difficult to see any justiciable basis for the matter to proceed even if it were to be brought on for hearing.

[18] The Authority is satisfied that Ms Shortland has not properly raised a personal grievance. All she has done is raise some sort of imprecisely worded employment relationship problem and then she has failed to engage with the Authority's process, either in person or through counsel, so that the whole Authority investigation has been compromised from the start.

[19] The Authority is not persuaded that the arrival of an email opposing the strike out application assists in any particular. All it does is confirm what would appear to be obvious. Nowhere does it address the deficits in the proceeding, indicate when the matter would be able to proceed, or how precisely the matter was to be argued. At its simplest, nothing in the most recent advices assists the Authority or the School to understand exactly what the grievance is. Prima facie there is no case for the School to answer and it is an abuse of process for the matter to drag on, imposing further strain on a small employer. The history of this matter is lamentable and nothing in the most recent communication gives the Authority any comfort that the future will be any better.

[20] In those circumstances, the proceedings are struck-out and the Authority's file closed.

## **Costs**

[21] If Ms Shortland were legally aided, then the effect of s.40 of the Legal Services Act would preclude any real prospect of obtaining a contribution to the School's costs.

[22] Furthermore, the School has had the benefit of the capable services provided through the aegis of the School Trustees Association for which it makes some contribution through its annual subscriptions.

[23] In those circumstances, costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority