

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

**[2020] NZERA 163  
3067152**

BETWEEN

RACHELLE DUNCAN  
Applicant

AND

BAY OF PLENTY DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Allan Halse, advocate for Applicant  
Christie Goodspeed, counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 17 March 2020 from Applicant:  
18 March 2020 from Respondent

Determination: 23 April 2020

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Rachelle Duncan, claims in the Statement of Problem lodged on 16 July 2019 that she was unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, the Bay of Plenty District Health Board (BOPDHB).

[2] BOPDHB denies Ms Duncan was unjustifiably dismissed or unjustifiably disadvantaged.

[3] BOPDHB claims that Ms Duncan did not raise any valid personal grievance during her employment and that she is out of time to raise her alleged personal grievance claims for unjustifiable dismissal or for unjustifiable disadvantage.

[4] BOPDHB does not consent to the grievances being raised after the expiry of the 90 day timeframe.

[5] This determination addresses the preliminary issue of whether or not Ms Duncan raised any personal grievances and if so, of what nature, with BOPDHB within 90 days of the grievance occurring or coming to her notice, whichever is the later in accordance with the requirements of s114 (1) of the Employment Relations act 2000 (the Act), such that she is entitled to pursue her grievances before the Authority.

#### **Note**

[1] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Statement of Problem, the Statement in Reply, documents submitted by the parties, and submissions from the parties.

[2] The evidence has as a consequence not been tested at this preliminary stage.

#### **Issues**

[3] The issues for determination are whether or not Ms Duncan raised:

- A personal grievance in respect of unjustifiable dismissal with BOPDHB within the statutory 90 day time period?
- A personal grievance for unjustifiable disadvantage with BOPDHB within the statutory 90 day time period?

#### **Brief Background Details**

[9] Ms Duncan commenced employment with BOPDHB in 2002, and on or about May 2002 was working as a Registered Nurse.

[4] Ms Duncan was required, as a Registered Nurse, to maintain a valid Annual Practicing Certificate (APC) in accordance with the requirements of the Nursing Council, the New Zealand Nurses Organisation (NZNO) Multi Union Collective Agreement (MECA), and the Health Practitioners Competence Assurance Act 2003 (HPCA).

[5] On 18 July 2014 Ms Duncan suffered a non-work related injury to her knee. In the period between that date and March 2017 Ms Duncan was on ACC and party to a number of Return to Work (RTW) plans devised by her ACC Case Manager.

[6] None of the RTW plans were successful in assisting Ms Duncan to resume her full time role with BOPDHB.

[13] On 15 March 2017 Ms Duncan admitted herself to Tauranga Hospital. Whilst a patient, Ms Duncan fell in a bathroom. Although she received treatment for her injury it impacted upon her recovery and necessitated a further period of time before she would be able to return to work.

[14] In April 2018 Ms Duncan was diagnosed with having Post-Traumatic Stress Disorder (PTSD) resulting from the mental impact of her injuries and provided a medical certificate for the period April 2018 to July 2018.

[15] Ms Duncan contacted the NZNO in April 2018 and reported her physical and mental health diagnoses and advised BOPDHB that she had done so. As a result, on 4 May 2018 BOPDHB also notified NZNO of Ms Duncan's situation.

[16] On 14 May 2018 Ms Duncan received an ACC medical certificate certifying her as fit to work for 2 hours per day, 2 days per week from 14 May 2018 to 3 June 2018, and 2 hours per day, 3 days per week from 4 June 2018 to 24 June 2018.

[17] On 21 May 2018 the Nursing Council wrote to Ms Duncan advising that it had received a notification from BOPDHB, and that it required a comprehensive medical report in relation to her health and ability to work to be provided by a medical practitioner specialising in neuropsychological testing under section 49 of the Health Practitioners Competence Assurance Act 2003.

[18] BOPDHB met with Ms Duncan on 17 July 2018 and discussed its notification to the Nursing Council, also noting that she had self-reported to the Nursing Council.

[19] Ms Duncan was advised that for her to begin a return to work programme BOPDHB would require:

- (a) Medical clearance from her GP;
- (b) Evidence of her mental wellbeing allowing her to function with children in an acute care unit due to BOPDHB's concerns around her mental health;
- (c) Nursing Council clearance to work;
- (d) An agreed ACC RTW Plan in conjunction with her health providers (e.g. Physio, e.g. Occupational Therapist)

[20] On 23 July 2018 Ms Duncan and BOPDHB received an ACC medical certificate certifying Ms Duncan as fully unfit for work from 23 July 2018 to 22 October 2018.

[21] A meeting was held on 10 October 2018 between Ms Duncan, and management and HR members of BOPDHB. Ms Duncan was accompanied by Mr Paul Matthews, her NZNO representative, and her husband as a support person. During the meeting it was discussed that Ms Duncan holding a valid APC was a requirement of her job and that as a result of her having surrendering it, this affected her being able to continue to work with BOPDHB. Various options were discussed at the meeting including medical retirement or the termination of Ms Duncan's employment.

[1] The NZNO arranged for a medical assessment of Ms Duncan and BOPDHB subsequently received a letter from the NZNO dated 15 October 2018 which stated:

... Rachelle agreed with the conclusion reached by the assessor "that she is not currently fit to practise as a nurse" and "would like to take a break from nursing to focus on her recovery".

[2] The letter concluded by advising BOPDHB that it had been advised by Mr Mathews that Ms Duncan agreed with the conclusions of the medical assessor and that she had: "returned her APC and her name has been taken off the online register."

[3] On 15 October 2018 the Nursing Council wrote to BOPDHB advising it that the Acting Chief Operations Officer of BOPDHB had made a recommendation to the CEO on 16 October 2018 proposing the termination of Ms Duncan's employment.

#### *Letter of Complaint*

[4] Ms Duncan sent a letter to the BOPDHB People and Capability Manager on 19 October 2018. In the letter Ms Duncan stated that she wished to make a formal complaint about both her treatment by BOPDHB and her perception that she had been dismissed at the meeting held on 10 October 2018. She stated in the letter:

I kept education, skill and knowledge up to date and have a proficient PDRP valid till June 2019. ...

The BOPDHB has taken all this from me and I am not practicing as a nurse any more, due to treatment injury, requiring an in-depth and extended return to work program. This lead to being psychologically and physically harmed by my employer's interactions. The toxic environment has impacted me so severely, that it is deemed too destructive to my recovery.

I wish to make a formal complaint in regard to the treatment I received from June 2017 – October 2018 ... as well as the handling of my dismissal at the meeting on the 10<sup>th</sup> October 2018.

1. Protocol and policies were not followed during return to work programs in 2017 and 2018. Concerns and issues I frequently raised on the ward, in meetings and via emails over this time were not addressed or actioned. The unsupportive environment, bullying, intimidation, negativity and judgements shown towards me were not professional, conducive or constructive to allow the opportunity to achieve a full return to work. ...

4. Termination of employment lacked protocol, process and structure, leading to unfair dismissal . ...

[26] On 24 October 2018 Ms Duncan was invited to attend a meeting with the Acting CEO to be held on 30 October 2018. The purpose of the proposed meeting was to discuss the recommendation of the termination of her employment and for Ms Duncan to provide any information or submissions in regard to the proposal.

[7] However in light of Ms Duncan's letter dated 19 October 2018 BOPDHB subsequently wrote to Ms Duncan by letter dated 26 October 2018 suggesting that the proposed termination of her employment be suspended in order to discuss her concerns as stated in the letter and instead inviting her to a meeting with the Acting COO and the People and Capability Manager.

*Communications 29 October 2018*

[8] Ms Duncan declined the invitation to meet with the Acting COO and the People and Capability Manager, and insisted that she would attend the meeting with the Acting CEO as proposed.

[9] In response, the Acting CEO wrote to Ms Duncan that same day and advised her that it would be inappropriate for the meeting to proceed prior the concerns she had raised being first addressed.

[10] Ms Duncan responded agreeing that the issues required a full investigation. As a result DHB proceeded to commence a full investigation process with an external investigator being appointed.

*Formal investigation procedure proposal*

[11] On 29 October 2018 Ms Duncan agreed that her concerns should be investigated first and BOPDHB proposed a formal investigation process. BOPDHB advised Ms Duncan that it was in the process of engaging an investigator on 1 November 2018 and that a copy of the Draft Terms of Reference for investigation would be provided to her for review and/or comment. The investigator proposed by BOPDHB was a local barrister and mediation and dispute resolution expert.

[12] On 3 November 2018 Ms Duncan authorised Mr Halse of the organisation CultureSafe to represent her and on 4 November 2018 Mr Halse advised BOPDHB that he was authorised to act for Ms Duncan. Accordingly BOPDHB provided the draft Terms of Reference to him.

[33] On 7 November 2018 the People and Capability Manager contacted Mr Halse requesting his feedback in order that BOPDHB could commence the investigation.

[5] Mr Halse responded by objecting to the proposed investigator, alleging that she lacked independence and had a conflict of interest. In response BOPDHB provided further information, attaching a copy of the investigator's CV in December 2018 and the final terms of reference

[6] The investigation did not proceed at that time due to the parties being unavailable and the Christmas shutdown period.

[7] In light of the inability to progress an investigation, BOPDHB emailed Mr Halse on 21 January 2019 and suggested that, given the difficulties in reaching agreement on the investigation, the parties attempted to resolve matters via mediation.

[8] The parties attended mediation on 22 February 2019. At that date Ms Duncan did not hold a valid APC and had not done so since November 2018.

[9] Mediation did not resolve matters and on 26 February 2019 the Acting CEO made a revised recommendation of termination of employment to the CEO in respect of Ms Duncan. The basis for the recommendation was frustration of contract on the basis that, since Ms Duncan no longer held a valid APC, she could not perform her duties as a registered nurse.

[10] There was a meeting on 8 April 2019 between BOPDHB and Ms Duncan who was accompanied by Mr Halse and her husband. During the meeting Ms Duncan accepted that she did not hold a valid APC which meant her employment was frustrated. Ms Duncan did not raise a personal grievance during this meeting.

[11] By letter dated 23 April 2019 the CEO wrote to Ms Duncan advising her of the termination of her employment with BOPDHB stating:

I ... have made the decision that your employment with the DHB will come to an end on Wednesday 22<sup>nd</sup> May 2019. This is not in reflection on you or your nursing skills. It is the unfortunate consequence of you no longer holding an Annual Practising Certificate, together with your current inability to be present in Tauranga Hospital.

[12] Ms Duncan's employment with BOPDHB ended on 22 May 2019.

[13] On 16 July 2019 Ms Duncan filed a Statement of Problem alleging personal grievances stated as being unjustifiable dismissal arising from BOPDHB failing to follow process and investigate allegations of bullying against Ms Duncan, unjustifiable disadvantage on the same basis, and a failure by BOPDHB to act in good faith.

## Raising a personal grievance

[43] Ms Duncan has raised personal grievances for unjustifiable dismissal and unjustifiable disadvantage. Section 114 (1) and (2) of the Act state:

- (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 within 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) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[44] The personal grievance must be raised within 90 days of the action occurring or coming to the notice of the employee. It must be a personal grievance as categorised in s. 103 of the Act which is raised with the employer and not some other action.

[45] The raising of a personal issue is a question which has been addressed by the Court on a number of occasions and has given rise to some principles as identified in *Chief Executive of Manukau Institute of Technology v Zivaljevic*.<sup>1</sup>

[46] Principles arising include the fact that the grievance process is designed to be informal and accessible.<sup>2</sup> There is no particular formula regarding the words which must be used.<sup>3</sup>

[47] In the case of a series of communications, each communication individually and as a series in total might also constitute the raising of the grievance.<sup>4</sup>

[48] What the employee intended his or her complaint to be, or his or her preference for dealing with it initially and whether or not the employer recognised it as a personal grievance, does not matter. What is relevant is whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if that is the case, whether the employee's complaint complied with s 114 (2) of the Act by conveying the substance of the complaint to the employer.<sup>5</sup>

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<sup>1</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at 35] – [38]

<sup>2</sup> *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112 at [40]

<sup>3</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36]

<sup>4</sup> *Liumaihetau v Alterm East Auckland Ltd* [1994] 1 ERNZ 958 (EmpC) at 963; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139(EmpC) at [45]; *Idea Services Ltd (In Statutory Management) v Barker*[2012] NZEmpC 112 above n 2 at [41]

<sup>5</sup> *Clark v Nelson Marlborough Institute of Technology* 92008) 5 NZELR 628 (EmpC) at [37]

[49] As stated in *Creedy v Commissioner of Police* it is insufficient for an employee to simply advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance that is by responding to it on its merits with a view to resolving it soon and informally, at least in the first instance.<sup>6</sup>

**Did Ms Duncan raise a personal grievance in respect of unjustifiable dismissal with BOPDHB within the statutory 90 day time limitation period?**

[13] Ms Duncan's employment with BOPDHB ended on 22 May 2019. The Statement of Problem was filed on 16 July 2019. It was served on BOPDHB on 19 July 2019. This was within the statutory 90 day time limitation period.

*Submissions by BOPDHB*

[14] It is submitted on behalf of BOPDHB that whilst it is not disputed that the Statement of Problem was filed within the 90 day period, this was not sufficient to constitute the raising of a personal grievance for unjustifiable dismissal.

[15] The Respondent cites *Morgan v Quality Environmental Consulting Limited* in which it was held by the Authority that lodging a statement of problem does not amount to a valid raising of a personal grievance, although the serving of a statement of problem would do so.<sup>7</sup>

[16] The Respondent further submits that Ms Duncan did not take all reasonable steps to raise her personal grievance in respect of unjustifiable dismissal.

[17] The law states that an employee must raise a personal grievance within 90 days of the action which is alleged to amount to a personal grievance came to their attention. Ms Duncan did raise the personal grievance in respect of unjustifiable dismissal within 90 days of 22 May 2019 which was the date she was dismissed by BOPDHB.

[1] I determine that the personal grievance in respect of unjustifiable dismissal was raised by Ms Duncan within the statutory 90 day time limitation period.

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<sup>6</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 above n3 at[36]-[37]

<sup>7</sup> *Morgan v Quality Environmental Consulting Limited* [ERA Auckland AA404/08]

**Did Ms Duncan raise a personal grievance in respect of unjustifiable disadvantage with BOPDHB within the statutory 90 day time period?**

[56] Ms Duncan has raised a personal grievance in the Statement of Problem that she was unjustifiably disadvantaged by BOPDHB's failure to: "follow process and justly and correctly investigate allegations of bullying" against her.

*Submissions by BOPDHB*

[18] It is submitted on behalf of BOPDHB that it has been held that the words "came to the notice of the employee" are synonymous with knowledge. They require that the employee has actual knowledge of the action allegedly giving rise to a personal grievance. In a discrimination claim, time only begins to run under s 114 when both the action which gave rise to the grievance and the alleged reasons have come to the notice of the employee.<sup>8</sup>

[19] The Respondent submits that Ms Duncan did not raise a personal grievance for unjustifiable disadvantage at any time during her employment or within the 90-day statutory limit. The Respondent notes the formal complaint made by Ms Duncan dated 19 October 2018, but submits this was not, and was not intended to be, the raising of a personal grievance.

[20] Whilst it is accepted by Counsel for BOPDHB that Ms Duncan has been at times distressed by her non-work-related injuries, and the ongoing effect that this has had on her, it is submitted that neither these or any alleged grievance has resulted from the actions of BOPDHB.

[21] It is submitted that there were no outstanding or alleged personal grievances discussed at the meeting held on 8 April 2019 but rather that Ms Duncan understood that her employment was frustrated as a result of the surrender of her APC.

*Did the 19 October 2018 letter raise a personal grievance?*

[22] The letter sent by Ms Duncan on 19 October 2018 stated that she was raising a formal complaint in respect of her dismissal and her treatment by BOPDHB during the period June 2017 – October 2018.

[23] In the letter Ms Duncan claimed specifically that (i) protocols and procedures were not followed during return to work programmes in 2017 and 2018; (ii) concerns and issues she had raised during that period had not been addressed mental health or actioned; (iii)

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<sup>8</sup> *Paul v Capital and Coast District Health Board* [2005] ERNZ197 at [42]

recommendations had not been implemented; and (iv) there had been no discussion of recommendations made in the NZNO report in September 2019. Ms Duncan states:

The unsupportive environment, bullying, intimidation, negativity and judgments shown towards me were not professional, conducive or constructive to allow me the opportunity to achieve a full return to work.’

[63] I accept that Ms Duncan did not in this letter refer to a ‘personal grievance’ or to ‘disadvantage’, however I find that it is clear in the letter what the nature of the personal grievance was because Ms Duncan sets out a number of issues clearly.

[24] It is also clear that her purpose in making a formal complaint was in order that BOPDHB address her concerns. This complaint was not limited to her, mistaken, belief that she had been dismissed, but also referred to other concerns as specified in the letter.

[25] Whilst Ms Duncan does not specify what remedy she was seeking from BOPDHB, the Chief Judge stated in *Idea Services Limited v Barker*: “I do not consider that s114(2) imposes an obligation on an employee to particularise the relief he/she seeks in relation to the alleged grievance.”<sup>9</sup>

[26] Under the legislation the process of an employee raising a personal grievance with an employer is envisaged to be an informal and non-technical process in which the employment relationship problem can be resolved quickly by the employee discussing concerns directly with the employer.<sup>10</sup>

[27] Whilst Ms Duncan referred to making ‘a formal complaint’ rather than to raising a personal grievance I find that she set out the concerns in the letter, and BOPDHB sought to address these concerns, initially by means of an investigation process, and when the proposed investigator was objected to by Ms Duncan’s representative, by the parties attending mediation.

[28] The statement of problem lodged on 16 July 2019 attributes the disadvantage grievance as a failure by BOPDHB to: “follow process and justly and correctly investigate allegations of bullying against the Applicant”.

[29] I find these to be issues that Ms Duncan raised in the letter dated 19 October 2018.

[30] I determine that Ms Duncan raised a personal grievance in respect of unjustifiable disadvantage within the statutory 90 day time period.

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<sup>9</sup> *Idea Services limited v Barker* [2012] NZEmpC 112 at [36]

<sup>10</sup> Employment Relations Act 2000 s 101(a) and (b)

### **Next Steps**

[71] A case conference call will be arranged to progress Ms Duncan's personal grievance claims.

### **Costs**

[14] Costs are reserved pending the final determination of the matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**