IN THE COURT OF APPEAL OF NEW ZEALAND

CA237/2009
[2010] NZCA 305

	BETWEEN	WAIKATO DISTRICT HEALTH BOARD Appellant
	AND	WENDY ANNE CLEAR Respondent

Hearing: 30 March 2010

Court: Chambers, O'Regan and Ellen France JJ

Counsel: G D Bevan for Appellant
M J Hammond for Respondent

Judgment: 19 July 2010 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis plus usual disbursements.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] Wendy Clear was employed by the Waikato District Health Board (the Board) as a midwife at Tokoroa Hospital. She was dismissed from her employment as from 22 January 2005.

[2] Ms Clear brought proceedings in the Employment Relations Authority (the Authority) for unjustified dismissal and disadvantage. The proceedings raised issues about the way in which the Board had dealt with complaints made by Ms Clear over a three-year period from 2000. A common thread running through those complaints was Ms Clear's claim she had been bullied by her Unit Manager, Margaret Parata, and that as a result her workplace was unsafe. Ms Clear's proceedings also focused on the effect of the Board's actions on her health, which deteriorated to the point that from early September 2003 she stopped work.

[3] The Authority upheld Ms Clear's disadvantage grievance in relation to a complaint Ms Clear made to the Board in late August 2003 but otherwise found for the Board.[1] Ms Clear's challenge in the Employment Court was largely successful.[2] The Employment Court found that the Board had affected her conditions of employment to her disadvantage and breached its duty to provide her with safe working conditions. The Employment Court also found that Ms Clear's dismissal was unjustifiable.

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1 *Clear v Waikato District Health* ERA Auckland AA33/07, 13 February 2007.
2 *Clear v Waikato District Health* [2008] ERNZ 646 (EmpC).

[4] The Board sought and obtained leave from this Court to appeal the decision of the Employment Court.[3] The two questions on which leave was granted were as follows:

(a) Did the Employment Court err in law by imposing on the Board a duty to undertake a full and fair investigation into the complaints made to it by Ms Clear?

(b) Did the Employment Court err in law in holding the Board liable for breaches that were not raised before the Authority within the limitation period in s 114(6) of the Employment Relations Act 2000 (the Act)?

[5] After setting out the background in more detail, we deal with these two questions of law. Because of the way in which the case was argued, it makes more sense to deal with the limitation issue first.

Background

[6] The background facts can be taken from the decision of the Employment Court.

[7] Ms Clear started work at Tokoroa Hospital in 1969. She began as a registered nurse, becoming a midwife in the maternity ward from September 1987. The maternity unit was managed by Ms Parata. Midwives like Ms Clear did not report directly to Ms Parata but Ms Parata audited the practice of midwifery. From at least 1999 onwards, the working relationship between Ms Clear and Ms Parata was not good. Ms Clear complained of bullying and negative behaviour towards her. Ms Parata rejected these allegations and blamed the poor relationship on Ms Clear's attitudes to her. Ms Parata denied much of the evidence that was critical of her behaviour but she accepted the need for a process so the two could work together. There was no issue about the abilities of both Ms Clear and Ms Parata to practise their midwifery profession.

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3 *Waikato District Health Board v Clear* [2009] NZCA 112, (2009) 7 NZELR 1.

Earlier complaints

[8] By mid-August 2000, matters had got to the point where Ms Clear felt that Ms Parata had a vendetta against her. In October 2000, she made her first formal complaint about Ms Parata's conduct to her employer. There was a second formal complaint in April 2001 and a third complaint in May 2002.

[9] The first complaint focused on the stress Ms Clear said had been caused her by Ms Parata's management style. The hospital manager, Peter Campbell, investigated. He told Ms Clear that there would be changes in the way cases were allocated amongst the midwives and that other improvements would follow.

[10] In the second (April 2001) complaint, Ms Clear said that the position had not improved. She referred to what she described as Ms Parata's belittling conduct. Ms Clear discussed the matters with Mr Campbell. She said he was supportive. Mr Campbell spoke to Ms Parata again. After this, Ms Clear noticed an initial improvement but she said that this was short-lived.

[11] The third (May 2002) complaint was dealt with by Janice Osborn, who was by then the area manager. The essence of the complaint was that the work environment was unchanged. Numerous matters were raised by Ms Clear all of which, bar one, Ms Osborn saw as historical. Ms Osborn had been advised by the Board's human relations personnel to address complaints as they arose rather than try to fix historical matters. She therefore dealt only with the one new matter, which related to the shredding of a document.

[12] Ms Clear accepted that her relationship with Ms Parata was in an "irreparable" state by June 2003.[4]

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[4] At [32].

Ms Clear's health

[13] By mid-2003, issues relating to Ms Clear's deteriorating health were beginning to feature. We should interpolate here that the evidence was that Ms Clear had been treated for hypertension since 1999. That condition worsened in 2002 and her doctor sent her to a cardiologist. By April 2003, her doctor said he was aware that her medical condition was linked to work-related stress.

[14] On 28 July 2003, Ms Clear met with Thia Priestly, who was the acting manager of Tokoroa Hospital from February 2003, and the Board's human relations consultant, Kate Cotterall. Ms Priestly was of the view that Ms Clear's behaviour at the meeting was not normal. That view was supported by Ms Cotterall who said she was very concerned about Ms Clear's health.

[15] At this meeting, Ms Priestly suggested that Ms Clear consider practising as an independent midwife or as a caseload midwife with the Board. The evidence was that Ms Clear was not amenable to these suggestions or to the possibility of a position outside of Tokoroa. It was suggested that Ms Clear take some of the three months annual leave owing to her. Ms Priestly considered it would be sensible to have a plan to separate the shifts of Ms Clear and Ms Parata. Ms Clear was offered and later undertook a course on managing difficult situations. It seems that Ms Clear took these various suggestions as indicative of the Board's attitude that the solution was for her to leave or change her role not for Ms Parata to be made accountable for her behaviour.

[16] By August 2003, Ms Clear was suffering severely from stress and her doctor described her as having "hit the wall". At that point, Ms Clear took some pre-arranged leave but she shortly became quite ill and took the time off as sick leave.

The fourth complaint

[17] The Board received Ms Clear's fourth formal complaint on 25 August 2003. This complaint was dealt with by Ms Priestly. Ms Priestly and Ms Cotterall began investigating. The Employment Court noted that it was "apparent that they had very

sketchy if any knowledge of the extent of the history of dysfunction when they began".[5]

[18] Ms Clear returned to work on 30 August 2003. Her manager had organised that she and Ms Parata would work different shifts although occasionally they were there at the same time.

[19] Ms Clear was told on 8 September 2003 that the 32 points in her complaint would be investigated, that Ms Parata and other staff would be interviewed and that the information coming from the investigation would be made available to her. On 9 September 2003 Ms Clear left on indefinite sick leave. Her personal grievance was raised on 12 September 2003. Ms Cotterall in acknowledging the personal grievance said that a full investigation into her complaint was being undertaken.

The Board's investigation

[20] Ms Priestly duly interviewed Ms Parata and two other staff members. Other staff members, particularly those who had left, were not interviewed because Ms Priestly considered their views were not relevant as they could only discuss previous complaints which had already been investigated. One other midwife who was still employed in 2003 was away and was not interviewed. As a result of the interviews undertaken, Ms Priestly came to the view that, although genuinely believed, Ms Clear's allegations against Ms Parata were not correct. The investigators concluded that the 32 individual complaints were not made out but the enquiry into the allegations of bullying was not completed.

[21] There was evidence that shortly after leaving work, by 14 September, Ms Clear had reached the lowest point of her illness. She was described as acutely distressed. She was seeing a counsellor under the Board's scheme for employees, was prescribed anti-depressants and was extremely unwell. A second opinion was obtained from a psychiatrist in October 2003. Her medication was changed in October 2003 and from then on her symptoms abated.

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5 At [73].

[22] At a meeting on 6 November, the Board representatives suggested that Ms Clear see a Board-nominated psychiatrist. There was ongoing debate about that issue but no resolution was reached as Ms Clear wanted an independent consultant. At a meeting on the 27 November, Board representatives considered that Ms Clear's behaviour and health had deteriorated.

[23] Over the Christmas period, Ms Clear wrote a letter complaining to the Chief Executive Officer of the Board. This letter repeated the allegations already made to Ms Priestly and referred to the delays that had occurred. The Board's employment relations consultant, Greg Peploe, became involved. He took over the matter in February 2004.

[24] Essentially, Mr Peploe indicated that there would be an investigation and he took some steps in this regard. He ultimately reached the view that no further investigation was warranted or likely to be of benefit. Mr Peploe concluded that although the major issues related to the conflict with Ms Parata there were some patient and staff concerns as well and the level of complaints about Ms Clear was almost "unheard of".[6]

[25] However, Mr Peploe did not communicate any of this to Ms Clear despite her regular emails to him. Mr Peploe in his evidence said that he did not respond to any of Ms Clear's requests for information because by then her solicitor was dealing with Ms Cotterall over a mediation. Mr Peploe accepted that he should have responded to Ms Clear directly rather than relying on Ms Clear's lawyer to pass on information.

[26] Mr Peploe's inquiries led to the Board's decision that Ms Clear's allegations of bullying were not justified. The Board then turned its focus to trying to find an acceptable solution so that Ms Clear could return to work. Ms Clear was not told of Mr Peploe's adverse findings about her performance, based on the number of complaints about her, nor that her claims of bullying were not accepted.

[27] An unsuccessful mediation was held in October 2004. What then followed was an inquiry into the possibility of other positions for Ms Clear.

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6 At [97].

[28] On 21 December 2004 Ms Clear's employment was terminated effective from 22 January 2005. The reason for the termination was her "continued absence from work with little hope that the situation will be resolved in the near future".

The Employment Court's decision

[29] As we have said, the Employment Court upheld Ms Clear's complaint. We will come back to the detail of some of the Court's findings. For present purposes, we note the summary of the Employment Court's findings on the disadvantage which was as follows:[7]

> By failing properly to address Ms Clear's complaints and by failing to reach conclusions on the complaints that were properly communicated by her the [Board] seriously affected her conditions of employment to her disadvantage. It also breached its duty to provide her with safe working conditions. On any account the conditions of work in the Tokoroa Maternity Ward were not safe either for Ms Clear or Mrs Parata.

Was the Board held liable for actions outside the limitation period?

[30] Section 114(1) of the Act provides that every employee who wishes to raise a personal grievance must, generally, raise that grievance 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 employee's notice, whichever is the later, unless the employer consents to the personal grievance being raised after that period has expired. Further, s 114(6) of the Act provides as follows:

> No action may be commenced in the Authority or the [Employment] Court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[31] There is no dispute in this case that the limitation cut-off date is 19 September 2002. In other words, that the Board cannot be liable for breaches occurring prior to that date.

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[7] At [128].

The competing contentions

[32] The Board says, in essence, that it has been held liable for the effects of Ms Clear's illness although Ms Clear was ill before 19 September 2002, ie, before any actionable breach arose. The Employment Court has therefore breached s 114. Mr Bevan for the Board emphasises the Employment Court's finding that Ms Clear's illness was a result of her working conditions and frustration about the inadequate responses of the Board to her complaints which led to "sustained stress over several years".[8] Further, reliance on the complaints means that the Employment Court has taken into account actions of the Board prior to the 19 September 2002 cut-off date as only one of Ms Clear's complaints was made within time. In particular, the Employment Court's findings on liability must entail criticism of the way in which Ms Osborn handled the May 2002 complaint, a matter arising prior to the limitation cut-off date. Similar issues are said to arise in relation to the claims based on Ms Clear's return to work in August 2003.

[33] The response of Mr Hammond on behalf of Ms Clear is that the Employment Court has been careful to record that it was only the failure to properly handle the fourth complaint of August 2003 that is actionable.[9] Further, Mr Hammond points out that the alleged disadvantages both arise after the 19 September 2002 cut-off date. All the Employment Court has done, Mr Hammond submits, is to take into account the factual context leading up to the time at which the action alleged to comprise a personal grievance occurred as is permitted by the authorities, in particular, *Jack v Attorney-General.*[10]

Discussion

[34] We have found this issue rather difficult. The Employment Court has ranged fairly widely in its discussion of the issues and there are some findings which, viewed on their own, could give rise to the concerns voiced by the Board.

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8 At [134].
9 At [5](1).
10 *Jack v Attorney-General* [2002] 1 ERNZ 720 (EmpC).

[35] It is necessary to analyse the matter against the way in which Ms Clear's claim was advanced in the Employment Court.

[36] Ms Clear advanced three causes of action. The first was an allegation of disadvantage in terms of s 103(1)(b) of the Act. Ms Clear said that her conditions of employment had been affected to her disadvantage by the unjustifiable actions of the Board in relation to her fourth complaint and to her return to work in August 2003. The second cause of action was for the claim for unjustified dismissal. The third cause of action related to unpaid time in lieu. There is no challenge to the Employment Court's dismissal of that claim and we say no more about it.

[37] The statement of claim identified that any disadvantage claim based on the handling of the third complaint (16 May 2002) was out of time but that the problems arising from the Board's treatment of that complaint had relevance to the disadvantage and unjustified dismissal causes of action.

[38] The particulars relating to the heading of the fourth complaint stated that although a process was commenced to deal with that complaint, it was never completed despite requests from Ms Clear for finality.

[39] The other aspect of the disadvantage grievance related to Ms Clear's return to work at the end of August 2003. In particular, it was said that Ms Clear was required at this point to return to work with Ms Parata without the Board having taken any steps to address the problem. Further it was said that:

> It was or should have been evident to the [Board] that [Ms Clear] was medically unwell and that it was unsafe to return her to the same working environment in both August and September 2003. A fair and reasonable employer would not have done this.

[40] We take first those particulars that relate to the handling of the fourth complaint.

[41] The relevant findings in the Employment Court are as follows:

(a) The Board breached its duty to Ms Clear to take all reasonable and practical steps to provide her with safe working conditions. This was an ongoing duty which only Mr Campbell fulfilled.[11]

(b) The Board failed to properly communicate with Ms Clear about the steps being taken to address her complaints and "in particular to finalise its investigations and report the outcomes" to her.[12]

(c) The Board failed in not providing Ms Clear with a "formal conclusion" to its investigation.[13]

[42] We see no error in the Employment Court's reference, without more, to the ongoing nature of the Board's duty. That is an accurate statement of the position. So long as the breach is founded on the conditions as they were after 19 September 2002, there is no limitation problem. We consider the key point being made by Judge Shaw was that the working conditions were not safe.

[43] It is the case that the Employment Court refers to the way in which Ms Osborn handled the May 2002 complaint. In particular, the Court says she "was hampered by the advice not to address the historic issues" and so she focused on "specific events" not the "overall dynamics" of the workplace.[14]

[44] If the Employment Court was imposing liability on the basis of Ms Osborn's actions, that would be wrong. But the judgment has to be read in context. When it is, we consider the thrust of the finding is that when the Board came to deal with the one "in-time" complaint, the Board did not deal with it properly because it had not been viewed contextually. Hence, the Court's references to the resultant "onesided nature of the investigations" and the focus on "changing Ms Clear".[15]

[45] There is no dispute about the third finding, that is, that there was a failure to provide a formal conclusion to the investigation. The Board accepts that as from late

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11 At [120].
12 At [121].
13 At [123].
14 At [122].
15 At [119].

November 2003 there was a breach as found by both the Authority and the Employment Court.

[46] We turn then to the findings relating to the particulars about Ms Clear's return to work in August 2003. Again, the matter is not without difficulty. As with the previous part of the claim, there are a number of occasions in the judgment in which parts of the narrative are run in with the findings, which sometimes makes it hard to distinguish the two. However, in the end, we see the matter in this way.

[47] First, the key findings of the Employment Court in this context are these:

(a) The Board was aware of the dysfunctional nature of Ms Clear's workplace because it had received her complaints.

(b) The Board knew the gist of Ms Clear's allegations, particularly, that bullying was an issue for her. The Board was therefore on notice.

(c) The Board also knew that Ms Clear was unwell.

[48] Secondly, against those findings, the Employment Court made a finding that the Board erred in late August 2003 in requiring Ms Clear to return to work where Ms Parata was not required to "review her management style" and "no attempt at conciliation had been made".[16]

[49] The latter finding is a factual finding. It may seem a somewhat surprising finding given Ms Clear's acceptance that her relationship with Mrs Parata was by then "irreparable" and the absence of any finding upholding the complaint of bullying. But those are matters of fact, not an error of law over which we have any jurisdiction.

[50] There was a basis, albeit fairly slim, on which the Employment Court could conclude that the situation was such that a fair and reasonable employer would take the steps of attempting conciliation and of requiring Ms Parata to review her

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[16] At [124].

management style. Ms Priestly accepted in evidence that the Board had not suggested that Ms Parata might change her role and that no consideration was given to implementing any kind of mechanism to help the two women through their problems. Further, the Employment Court recorded as follows:[17]

> [Ms Priestly] agreed that mediation between the two women or mutual counselling might have helped. [Ms Priestly] accepted also that a pattern had developed whereby Ms Clear's complaints were investigated to a greater or lesser extent and then she was returned to the same situation of inherent unhappiness between her and Mrs Parata. ...
>
> [Ms Priestly] agreed that it might have been helpful if some proactive steps had been taken to give Mrs Parata a leadership course or counselling or mentoring. The most that was done was the setting up of a communication book.
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> ... Ms Priestly agreed that if the complaint had been concluded that whatever the outcome it could have been followed by a process of some kind including counselling, mediation or professional assistance for both Ms Clear and Mrs Parata which might have enabled to the two to work together.

[51] Mr Bevan argued that there should have been some apportionment of responsibility for harm flowing from the Board's "within time" breaches. Another approach was for Ms Clear to have run an argument that her condition was exacerbated by what occurred after the limitation cut off date. Putting those possibilities to one side, we accept that if the Employment Court had purported to impose liability on the Board for Ms Clear's illness per se, that would be an error of law. The finding to which Mr Bevan refers, namely, that Ms Clear's illness was a result of her perception of the working conditions and frustration at inadequate responses to her complaints leading to "sustained stress over several years" does prima facie support his submission there has been an error.

[52] However, two points can be made about this. First, the finding is made in the context of the conclusion of unjustified dismissal and has to be seen in that light. There is no challenge to the finding of unjustified dismissal.

[53] Secondly, the way in which we read the judgment is that Judge Shaw found that Ms Clear's problems in the workplace had led to the position where she was so

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[17] At [89]–[92].

ill that additional steps were required by her employer given the Board's knowledge of her fragile state. On that analysis, there has been no error of law. Obviously, this means that when questions of quantum are determined, the Board's liability in terms of Ms Clear's return to work in August 2003 is limited to the failure of the Board to take the two identified steps on her return. We say a little more about this later.

Nature of the duty imposed on the Board

[54] The Board makes two main submissions on this topic. First, it is said that the Employment Court asked the wrong question. The question is whether the Board's actions were those of a reasonable and fair employer, not whether an investigation was undertaken. Secondly, Mr Bevan submits that by imposing a duty to investigate on the Board, the Employment Court has placed on the employer an improper onus of justifying its actions to the standard in *W & H Newspapers v Oram*.[18] Imposing a burden on the employer was appropriate in *Oram* because that was a case involving dismissal in a disciplinary context but, Mr Bevan says, that is not the present case. Mr Bevan says the appropriate test is that in *Attorney-General v Gilbert*,[19] where this Court concluded that the loss claimed by Mr Gilbert arising from his health problems was within the scope of his employer's contractual obligations because the employer failed to take all reasonable steps to avoid the foreseeable risk of harm to Mr Gilbert.[20]

[55] The submission for Ms Clear is that the Employment Court's approach was correct. Mr Hammond emphasises that the Board had accepted that it should conduct an investigation and told Ms Clear that it would do so. Having assumed that responsibility a reasonable and fair Board had to take various steps. If the Employment Court was purporting to impose an independent duty, Mr Hammond says this Court could make it clear that the test in *Gilbert* was the applicable test.

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18 *W & H Newspapers v Oram* [2001] 3 NZLR 29 (CA).
19 *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA).
20 At [100] and [102].

Discussion

[56] We accept there are some problematic passages in the judgment. The Employment Court said that:[21]

> An employer who receives complaints from employees about the behaviour of other employees such as sexual harassment or bullying has particular obligations. First, it must undertake a full and fair investigation into that complaint, second the complainant is entitled to be told the outcome of the investigation and third if the employer is satisfied that the alleged behaviour it must advise the complainant what steps the employer has taken or proposes to take to prevent a repetition of the behaviour.

[57] As put, this observation might be seen as giving rise to an independent duty which Mr Bevan says goes beyond what was required by *Gilbert*. However, we consider Mr Hammond is correct to emphasise the context, that is, the acceptance by the Board of an obligation to investigate the complaint. Further, this passage is essentially a step in the path towards the findings we have already discussed about the safety of the workplace. It leads on to the Employment Court's conclusion that the Board would have acted differently if it had a better view of the dynamics of the workplace. We see the observation we have cited as having no real practical effect in these circumstances.

[58] Despite these extraneous comments, ultimately the Employment Court does properly direct itself as to the question in issue. Judge Shaw put it this way:[22]

> The Court's role is to objectively review the circumstances as they existed at the time and to judge whether in all of those circumstances the employer acted fairly and reasonably.

[59] It is also relevant that the Board, although disputing the time at which the breach occurred, accepts that it did not do the right thing in terms of the August 2003 complaint. The ultimate conclusion reached by the Employment Court is that the Board breached its duty to Ms Clear to take all reasonable and practical steps to provide her with safe working conditions.[23] That conclusion does not give rise to an error of law.

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21 At [12].
22 At [14].
23 At [120].

Disposition

[60] For these reasons, the appeal is dismissed.

[61] Ms Clear seeks costs. There is no reason why costs should not follow the event. The Board is to pay Ms Clear costs for a standard appeal on a band A basis plus usual disbursements.

A concluding comment

[62] The Employment Court did not deal with remedies because it was envisaged that further submissions and possibly further evidence may be needed. The parties indicated to us that any new evidence would be confined to quantum. We hope that a further hearing does not prove necessary. There has already been considerable delay and significant costs in the resolution of this matter. The likely damages award for the breaches identified does not appear to justify another hearing. In these circumstances, we would hope that the parties can resolve the matter themselves.

Solicitors:
Chapman Tripp, Auckland for Appellant
Tompkins Wake, Hamilton for Respondent