

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Deborah Elizabeth Galbraith (Applicant)

**AND** Anglican Care (Waiapu) Limited Hodgson House Aged Care Home and Hospital (Respondent)

**REPRESENTATIVES** Deborah Elizabeth Galbraith In person  
Kate Barry-Piceno, Advocate for Respondent

**MEMBER OF AUTHORITY** Vicki Campbell

**INVESTIGATION MEETING** 21 March 2005

**DATE OF DETERMINATION** 31 March 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Ms Debbie Galbraith was employed as a Caregiver in the hospital section of Hodgson House Aged Care Home and Hospital (“Hodgson House”). Ms Galbraith was subject to a written individual employment agreement and the policies of Hodgson House.

[2] On Saturday 10 July 2004 Ms Galbraith attended work at her usual start time of 7.00am. At about 12.20pm Ms Galbraith left the employers’ premises and went home. Ms Galbraith says she left the premises as she was not prepared to put up with intimidation from her supervisor, Ms Cecily Williams, a Registered Nurse. Ms Galbraith did not advise Ms Williams she was leaving work.

[3] On Sunday 11 July 2004 Ms Galbraith attended work at 7.00am and left at approximately 9.30am. Once again, Ms Galbraith did not advise her supervisor she was leaving the work site.

[4] Ms Galbraith was dismissed from her employment for walking off the job on 10 and 11 July 2004. Ms Galbraith claims the dismissal was unjustified.

[5] Hodgson House denies the dismissal was unjustified. Mr Joop Wieringa, the manager of Aged Care Services at Hodgson House told me that walking off the job was provided for in the Employment Policies as serious misconduct and that summary dismissal was an appropriate response.

[6] The issues for determination in this matter are:

- whether Hodgson House conducted a full and fair investigation; and
- whether the decision to dismiss was one a fair and reasonable employer could make.

### **Did Hodgson House conduct a full and fair investigation?**

[7] There are three distinct areas of enquiry under this head:

- the events leading up to the disciplinary enquiry
- the suspension
- the disciplinary enquiry

#### *Events leading up to the disciplinary enquiry*

[8] Ms Galbraith completed an Incident/Accident report form on Saturday 10 July 2004. Ms Galbraith claims Ms Williams had been intimidating her all morning and that the final straw was when Ms Williams asked her [Ms Galbraith] to remove some socks from a rubbish bin and take them to the nursing station.

[9] At the investigation meeting Ms Galbraith told me that Ms Williams' mood wasn't very good when she arrived at work that morning. They were short staffed as staff had called in sick. Ms Galbraith told me the intimidation by Ms Williams which caused her to leave work that morning included:

- Ms Williams asking Ms Galbraith to get a weigh chair (normally the staff member would get it themselves; and

- Ms Williams asking Ms Galbraith why the beds weren't made (Ms Galbraith had fallen behind on her duties).

[10] On that same day Ms Williams also completed an Incident/Accident Report form. In her report Ms Williams says Ms Galbraith had left work without notifying her [Ms Williams] she was leaving.

[11] On Sunday 11 July 2004 Ms Williams completed another Incident/Accident Report form after Ms Galbraith had left the premises at 9.30am without notifying her. Ms Williams also contacted Mr Wieringa and advised him of the situation.

[12] Ms Sigi Wiese, an RN supervising the afternoon shift from 3.00pm to 11.00pm, also completed an Incident/Accident Report form stating she had received a telephone call from Ms Galbraith who told her she would not be in on Monday morning but would ring Mr Wieringa at 9.00am the following day.

[13] When Mr Wieringa arrived at work on Monday 12 July 2004 he received all four Incident/Accident Report forms. He immediately set about meeting with all the relevant staff members. He interviewed Ms Williams, Ms Barbara Rankine, Ms Dellceea Maxwell and Ms Nachida Saibi.

[14] At about 4.00pm that afternoon Mr Wieringa contacted Ms Galbraith at home as she had not made contact. He invited Ms Galbraith to attend a meeting the following day at 3.30pm which she did.

#### *The suspension*

[15] The employment agreement allows for suspension on pay pending investigation of serious misconduct. Suspension of an employee is a serious matter. Suspension without a prior opportunity for the employee to comment on the appropriateness of the suspension can constitute an unjustified action (see *Tawhiwhirangi v Attorney-General* [1993] 2 ERNZ 546).

[16] At the meeting on Tuesday 13 July 2004 Mr Wieringa advised Ms Galbraith that he considered the two matters: her complaint about Ms Williams; and Ms Williams's complaints about Ms Galbraith, two different matters. He advised her that walking off the job was serious and he suspended her.

[17] Mr Wieringa did not consult with Ms Galbraith about the suspension. He had decided suspension would be prudent and advised Ms Galbraith of that fact. He then confirmed the suspension in writing.

*The disciplinary enquiry*

[18] Although Mr Wieringa had interviewed staff he considered relevant, he did not advise Ms Galbraith who he had interviewed nor did he provide Ms Galbraith with any information which came out of the interviews.

[19] A copy of a document entitled "Incident Report Investigation". At the investigation meeting Mr Wieringa confirmed that this document was never provided to Ms Galbraith and was compiled after the final decision to dismiss was made.

[20] When Mr Wieringa interviewed the staff on Monday 12 July 2004 he had not spoken with Ms Galbraith. On the Sunday after Ms Williams found out that Ms Galbraith had left work, she spoke with Charmaine, who had been working with Ms Galbraith that morning. Charmaine told Ms Williams that she had been too frightened to tell her that Ms Galbraith had left work because Ms Galbraith had told Charmaine; she [Ms Williams] had been intimidating. Ms Williams never disclosed this conversation to Mr Wieringa during his investigation.

[21] Mr Wieringa did not check who Ms Galbraith had been working with on the Sunday consequently never interviewed Charmaine. Neither did Mr Wieringa provide Ms Galbraith with the names of the staff he had interviewed. As a result Ms Galbraith had wrongly assumed he had spoken to everyone of relevance, including Charmaine.

[22] The disciplinary meeting which led to Ms Galbraith's dismissal was held on 14 July 2004 lasted about 15 minutes. Mr Wieringa did not consider the intimidation complained of by Ms Galbraith justified her walking off the job. However, he never told Ms Galbraith that and so Ms Galbraith was not able to expand on the issues raised in her original Incident/Accident Report.

[23] At the commencement of the disciplinary meeting Mr Wieringa advised Ms Galbraith that he had looked into the situation and that he could see no option other than to dismiss her. He then asked her for any comment. Ms Galbraith was not aware of the enquiries made by Mr Wieringa and so relied on the information provided in her original Incident/Accident Report form.

[24] Mr Wieringa had an obligation to provide Ms Galbraith with all the information available to him. He also had an obligation to disclose who he had spoken to and what he had found out as a result of his enquiries to allow Ms Galbraith a full opportunity to respond. He failed to do this.

**Was the decision to dismiss was one a fair and reasonable employer could make in all the circumstances?**

[25] In the absence of a full and fair investigation the employer could not reasonably have come to a conclusion that Ms Galbraith was guilty of serious misconduct and therefore the decision to dismiss was not one open to Mr Wieringa to make.

[26] The Employment Policies document lists items which constitute serious misconduct and less serious misconduct. Under misconduct there are no less than three entries which relate to an employee who is not at work or leaves the job without permission. Under Serious Misconduct there is one. It seems to me that the very policy Mr Wieringa wishes to rely on allowed him the discretion to consider Ms Galbraith's conduct to be less serious misconduct for which a warning would have been appropriate. I am not satisfied that in this instance the decision to dismiss was one that was open to Mr Wieringa to make.

**Conclusion**

[27] I conclude that both the suspension and the dismissal were unjustified, the former because of lack of consultation. However remedies are best addressed in relation to the dismissal as the primary or major grievance.

**Remedies**

[28] I am required by section 124 of the Employment Relations Act 2000 to consider the extent to which the employee's actions contributed towards the personal grievance.

[29] Ms Galbraith had become friends and ultimately partners, with Mr Robert Dilloway. Mr Dilloway was employed by Eurest Catering. Eurest Catering provided catering services under

contract to Hodgson House. Mr Dilloway was working in the Kitchen at Hodgson House at the time Ms Galbraith was dismissed.

[30] Mr Dilloway acknowledged at the investigation meeting that his relationship with Ms Williams was not good and the two had a personality clash. He told me that he has since been dismissed from his position with Eurest Catering as a result of a complaint by Ms Williams. That complaint was as a result of an incident that occurred about two weeks before Ms Galbraith was dismissed. The complaint against Mr Dilloway was under investigation by Eurest Catering at the time Ms Galbraith was dismissed.

[31] Ms Galbraith told me at the investigation meeting that Ms Williams's behaviour on the Saturday was out of character for her and not how she would normally be. During the investigation meeting it was conceded by Ms Galbraith that other problems she had experienced during her employment with Hodgson House and which she had attributed to Ms Williams were actually issues raised and discussed by Mr Wieringa.

[32] Ms Galbraith's actions in walking off the job twice were actions that would have justified a warning. This was combined with her failure to contact her employer on Monday 12 July 2004 at 9.00am as she had previously arranged. It follows that this conduct was blameworthy and in part caused the situation that gave rise to the grievance. The degree of that contribution I assess at 50%. The awards made are therefore reduced correspondingly.

#### Lost wages

[33] Ms Galbraith has had two interviews since her dismissal. She told me she found finding an alternative job difficult as she had no reference to assist her in obtaining work. Ms Galbraith has done some craft work for which she has received \$135.00 in total.

[34] Lost wages are to be reimbursed to Ms Galbraith for a period of 13 weeks. The amount is \$4,847.70 gross. This amount is to be reduced by 50% to \$2,423.85 and further reduced by the earnings she received in that period of \$135.00 to a total of **\$2,288.85**.

#### Compensation

[35] There was no evidence of humiliation and loss of dignity advanced to the Authority by Ms Galbraith that would support a high award for compensation. The Authority can not assume that because a dismissal has occurred that humiliation and distress has necessarily occurred.

[36] I assess the level of compensation to be \$5,000 which after reduction by 50% means Ms Galbraith is to be paid \$2,500 pursuant to section 123(c)(i) of the Act.

**Costs**

Costs are reserved.

Vicki Campbell  
Member of Employment Relations Authority