

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Teresa Wasilewska (Applicant)
AND Otago District Health Board (Respondent)
REPRESENTATIVES Jock Lawrie, Counsel for Applicant
Barry Dorking, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING Dunedin
18 -20 October 2005
24 November 2005
10 February 2006
DATE OF DETERMINATION 10 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant commenced employment with the Otago District Health Board as a breast nurse specialist in July 1993. Following a communication on 11 February 2005 with a radiology nurse about which that nurse complained, Ms Wasilewska was advised of an allegation of serious misconduct in relation to the incident. Following an investigation, the applicant was dismissed for serious misconduct on 21 February 2005. The applicant raised her personal grievance contesting the dismissal and claiming reinstatement to her former position.

[2] In an interim determination dated 15 July 2005, I reinstated the applicant to her employment with the respondent, but declined to reinstate her to a position in the Breast Care Unit. She has continued in her employment with the respondent in another capacity.

[3] The applicant claims reimbursement of income lost as a result of the alleged unjustified dismissal in the sum of \$8,251.94. She claims compensation for hurt and humiliation in the sum of \$50,000 and also seeks costs.

[4] The respondent denies the dismissal was unjustified. It says the incident with the radiology nurse was sufficiently grave to constitute serious misconduct. Accordingly, it declines to meet the applicant's claims.

[5] The parties have attended mediation but despite their earnest efforts they have been unable to reach agreement.

The relevant facts

[6] In the course of 1994, a number of issues arose in the workplace between the applicant and the respondent and the parties attended mediation in the latter part of that year. The mediation process was inconclusive. However, the parties attempted to identify a range of agreed outcomes in order to resolve and address the workplace issues in question. It is the applicant's view that these issues remained unresolved as at the date of the applicant's dismissal.

[7] The respondent says it spoke to the applicant in 2003 in regard to her interactions with other staff. After a number of attempts to resolve the difficulties, Deborah Lawry was asked to provide support for the applicant and for her colleague in the Breast Care Unit, Chris James. The respondent says that between 2003 and February 2005 the complaints made about the applicant's behaviour by a number of colleagues had considerable similarity. The complaints essentially were that the applicant was keeping necessary information to herself, took few steps to provide documented procedures in the Breast Care Unit to assist new or relieving nurses, failed to provide appropriate information for others when leaving work which gave rise to errors on the part of the applicant's colleagues. The respondent says it was these errors that were criticised by Ms Wasilewska who then complained that the other nurses in the Unit lacked the ability to operate in the area.

[8] Ms Wasilewska worked 25 hours a week, and with the extension of the Breast Screening Programme in 2004, Breast Care Services came under considerable pressure. This required at least one other nurse to work with the applicant so that the two made up a full time team. The respondent sought to provide additional help to assist the applicant but experienced considerable difficulties because other staff declined to work with the applicant. The applicant's view is that she acted in a professional manner, was solicitous for her patients and was at all times dedicated to their care.

[9] Chris James worked with the applicant for 18 months beginning in early 2003. She told the Authority that the applicant's behaviour gave her concern after only a few months in the role. After six months in the position, Ms James approached her manager complaining that the applicant was undermining her professionally. She also expressed concern at the applicant's criticism of her attempts to create documentation and of the applicant's failure to provide Ms James with the material herself. In spite of efforts to resolve the situation, Ms James decided she could no longer work with the applicant and tendered her resignation.

[10] Margrette Simpson was approached to replace Ms James. Ms Simpson worked as a nurse for a breast surgeon in private practice and had considerable contact with the applicant in a professional setting. Ms Simpson declined the opportunity as she said she was unprepared to work in the breast care services area while Ms Wasilewska was employed there.

[11] Ms Wasilewska was due to take six weeks' leave in April and May 2005 and the respondent approached Sarah Randall, a nurse experienced in breast care in England. Ms Randall worked those six weeks and experienced difficulties with lack of documentation however, was sufficiently committed to the work to apply for permanent appointment to a breast care role when the applicant returned from leave.

[12] Ms Randall had a not dissimilar experience to that of Ms James and after some four weeks of working with the applicant upon her return from leave, Ms Randall withdrew her application for the full time position explaining this by stating it was due to the way in which she had been treated by Ms Wasilewska.

[13] In the course of June, the respondent met with the applicant to encourage her to modify her behaviour. It also says it took issue with her failure to that point to provide orientation material for

Ms Randall and there were issues relating to hand-over procedures, regularising the applicant's hours of work and the need for cooperation with data entry procedures. On the issue of hours of work, Lorraine Lobb, the Nurses Organisation organiser, became involved in trying to broker a solution between the applicant and the Board. Ms Wasilewska had said she wanted as much work as possible and the applicant says she verbally agreed to working the hours stipulated. The respondent says that despite this verbal agreement, Ms Wasilewska later denied that any such agreement had been reached. By the end of June, a further resignation was received when Joanne Walker, a medical radiation technologist, also resigned citing the applicant's attitude towards her as the prompt for this action.

[14] A meeting was convened and held on 2 July 2004 involving Trish Templeton who had been appointed in 2004 as Service Manager of Radiology and Breast Care Services, Sonja Dillon, Group Manager Support Services, Grant O'Kane from human resources, the applicant and Ms Lobb. The record shows that the issues cited above were covered and in particular the issues of hours of work and the respondent's behavioural concerns. The minutes of the meeting that are relevant read as follows:

- *Clarification around hours of work. It was agreed that these would be Monday 9am to 5.30pm, Wednesday 9am to 5.30pm and Friday 9am to 6.30pm. Any variations to this must have approval of the direct report (currently Trish). This was not to undermine Teresa's professional ability or limit capacity to respond to urgent events. It was about ensuring appropriate staff are on duty during core hours.*
- *Sonja brought to Teresa's attention that there has been feedback from staff suggesting that her behaviour undermines them professionally. My understanding is that this is through your manner and approach, eg: openly questioning actions in front of patients, comments regarding other team members' abilities/skills. These comments have not been substantiated and we are not going to take this any further. Teresa thanked Sonja for bringing this matter to her attention, as she had been aware for some time that accusations had been made along these lines and, despite asking directly, had been denied the opportunity to address them. Sonja noted that this behaviour is not acceptable and if such behaviour did occur in future then disciplinary action would be taken.*

[15] Towards the end of that month, the applicant undertook her Performance Development Review (PDR). The applicant says at this review the issue of Ms Wasilewska's behaviour was raised again and the respondent says that Ms Wasilewska *could have been in no doubt as to the precise nature of the behaviour which various colleagues had cited as being the cause of their leaving BCS.*

[16] In mid-August 2004, Glenys Mitchell began orientation into the CT Department of Radiology and having completed that was told that she would need to orientate to BCS. She says there was no formal orientation package offered to her to work through and that much of what she learned was done in such a way that it made it very difficult to understand how Breast Screen Aotearoa and ODHB BCS worked together. She told me that for the next four weeks until 17 September 2004 she spent working with the applicant on Monday, Wednesday and Friday. She said that on Tuesdays and Thursdays she was left to her own devices, often assisting with diagnostic biopsies. Ms Mitchell says that she notified her direct report that because of the way the applicant had treated her, she would not continue to work with her. She did, however, agree to cover or relieve in BCS as and when required, providing the applicant was absent. In the course of her employment in BCS, Ms Mitchell wrote two letters of concern to Lee Taylor, the then Clinical Charge Nurse Radiology and Breast Care Services. In the last letter, Ms Mitchell said she was no longer prepared to have any part of BCS while the applicant was still employed in the Unit.

[17] At the beginning of December 2004, the Board appointed Kim Caffell to support the applicant in achieving goals the Board had set for her.

[18] The applicant's view of these matters is that they were a result of her own high standards, the time pressure placed on her by what she regarded as the under-resourcing of BCS, the limited ability of those appointed to work alongside her in BCS, and suggested that the complaints from other staff were a result of *tall poppy syndrome*.

[19] There were ongoing discussions and meetings on a range of other issues which need not delay us here. On 11 February 2005, Ms Mitchell was asked to assist with a hook wire localisation procedure in the Breast Unit.

On arrival in the Breast Unit, I was dismayed to find Teresa in the Breast Care Nurse office (which is where we also need to set up for procedures). Teresa told me she knew nothing about the woman from the previous day and that I needed to organise the results. I tried to explain to her why I had not done this and I also stated that it was my understanding that I only needed to assist with procedures. This was also the case when Katrina McCutcheon would assist with procedures.

Teresa became very confrontational and said she didn't have time to do these sorts of things either and then I felt she was interrogating me with questions like:

- *What had the patient been expecting with regard to results?*
- *What was on her request form?*
- *What was the biopsy for?*

The questions went on. I felt quite intimidated by her questioning and felt like a small child for not having the answers. All this was done in front of another colleague who was with me and was going to observe the procedures.

At that stage I saw many radiological request forms every day and the reason for each individual requiring a procedure does not stand out in my memory. So being asked to recall one of the many forms I had seen on that Thursday and the way in which it was asked was quite demeaning.

In the same conversation I also asked Teresa where the woman was to go following the hook wire localisation procedure, as it was my understanding that the BCN escorted the woman back to Day Surgery Unit (DSU), or the ward to ensure the hook is not bumped or dislodged. Teresa had told me this when I was orientating and I had also written it into my own information notebook.

Teresa denied ever telling me this and said that the nurse did not have to escort the patient. I wasn't about to argue the case any more, but have since found on the hook wire procedure that escorting a patient to DSU or the ward was the BCN responsibility.

[20] On 14 February 2005, Ms Mitchell emailed Lee Taylor recounting the incident as above. The email concludes *I am aware I have been employed for Radiology/Breast Unit but following Friday's experience I am no longer prepared to put myself in this position and will decline any further requests to work in the Breast Unit while Teresa Wasilewska is employed there. Regards Glenys Mitchell.*

[21] On Wednesday, 9 February 2005, Kim Caffell met with the applicant, Ms Lobb and Mr O’Kane. The aim of that meeting was to review progress to date against NHI (National Health Index)/DOB (date of birth) as patient identification and to develop hand over mechanisms ensuring patient information was transferred safely and appropriately and at a standard that would enable audits to be carried out. At the close of this meeting a further meeting time was set for the following Friday by the applicant and her representative. The time was set for 4.30pm. Ms Caffell says that much the same issues were discussed as in the previous meeting and says she provided the applicant with responses to her various requests. Ms Caffell acknowledges that the applicant was unhappy with the response, however, says the applicant agreed to undertake the orientation package, procedures and guidelines but also stated that she would not take responsibility for *cock ups*. Ms Caffell says she reiterated to the applicant that she would not be held accountable for events beyond her control. Prior to the close of the meeting, a further meeting was set for Monday, 14 February.

[22] A further meeting was held with the applicant on 14 February 2005 at which a tentative plan was discussed and what the applicant would need to do to free up some time to work on the goals as required. The following day, the applicant responded to Ms Caffell with a lengthy assessment of what the long term staffing needs of the service were. Ms Caffell says this did nothing to answer the relevant questions.

[23] On 16 February 2005, Ms Caffell, having now become aware of the complaint from Glenys Mitchell, requested the applicant to attend a meeting relating to an alleged breach of the code of conduct. Ms Caffell began an investigation on the incident with Glenys Mitchell and confirmed her version of events. She also spoke to a witness who confirmed an incident had taken place and that Ms Mitchell had been upset by the events.

[24] A meeting was held on 18 February 2005 attended by Ms Lobb, the applicant, Ms Dillon and Mr O’Kane with Ms Caffell also present. The applicant presented the respondent with a letter acknowledging that she had spoken to Ms Mitchell in an unsupportive manner and went on to apologise. In her defence, the applicant said that her behaviour was the result of the conditions in which she had been forced to work and that comments made by Ms Mitchell gave rise to her reaction. Ms Caffell says she made it clear to the applicant that she had no confidence that there would be a change in the applicant’s behaviour which meant the Board was facing a situation where service provision and contract requirements were at risk because the Board was not able to adequately staff the BCS.

[25] An arrangement was made to meet on 21 February to seek any further response from the applicant in light of what had been said and *otherwise to inform her of the outcome*. The long and the short of the meeting of 21 February was that the applicant added nothing to her explanation. She was then advised that she was dismissed for serious misconduct in failing to carry out expected standards of performance in the way she behaved with other staff and for refusing to carry out lawful instructions in this respect despite repeated requests for the behaviour to cease and considerable efforts having been put into helping her correct her behaviour.

The issues

[26] The matters to be resolved by the Authority in this case are:

- Was the event of 11 February 2005 capable of being considered serious misconduct; and
- Was the investigation of the incident full and fair; and

- Was the dismissal of the applicant unjustified; and
- Did the applicant contribute to the circumstances giving rise to the dismissal; and
- If the applicant is successful in her claim, what, if any, remedies are due to her?

The investigation meeting

[27] At the investigation meeting I heard from the applicant in person and six supporting witnesses. For the respondent I heard from ten witnesses in person and from Sarah Randall by way of affidavit and questioning by way of teleconference from the UK. All witnesses participated fully in the investigation and the Authority thanks them for their assistance.

[28] A significant aspect of an Authority investigation is the opportunity it gives for the Authority to observe the parties during its interface with them. This was particularly useful in this case in that it gave me the opportunity to compare the interactive style of the applicant and those of the senior nursing personnel involved in both the attempt to remedy situations and in the investigation and decision-making process. This investigation meeting was marked by frequent interruptions by the applicant when her counsel was putting questions to the respondent's witnesses and by several attempts by the applicant to debate issues under examination. The time taken to investigate the whole matter was considerably extended by this behaviour. The Authority has no difficulty in providing the opportunity to all parties to have their say and to put their case squarely before it. However, having set the matter down for three full days on the basis of the applicant's counsel's estimate, a further full day was required in November and even at the close of that the Authority still had unfinished business. That was concluded by teleconference in Christchurch in February 2006.

[29] I would particularly like to thank the doctors who made themselves available to the Authority despite their heavy surgical commitments. Finally, I should like to express my appreciation to counsel for their assistance and their final submissions.

The legal test

[30] The appropriate test in this matter is set out in s.103A of the Employment Relations Act 2000. The section reads:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[31] In the recent decision in *Air New Zealand Ltd v Andrea Hudson* AC30/06, the Court stated:

*The first element of this section confirms expressly the justification for dismissal must be determined on an objective basis. This means that the matter must be viewed from the point of view of a neutral observer. This element of objectivity is expanded on in the second part of the section. To decide whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances the Court must judge all the circumstances objectively. This is in contradistinction to the approach taken in *Oram* where the Court of Appeal said that the Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could rather than*

would have taken because there may be more than one correct response open to a fair and reasonable employer.

[32] In paragraph [119] the Court goes on:

In the light of the wording of the amendment and the Parliamentary expressions of intent, I find that the effect of section 103A is to separate out the employer's actions for consideration. It requires the Authority or the Court to consider those actions against what a fair and reasonable employer would have done. Although the amendment does not expressly prevent employers having recourse to a range of options from which it can choose, Parliament has legislated for the Authority or the Court to evaluate this choice against a specified objective standard: what would a fair and reasonable employer have done in the circumstances?

[33] The Authority has been guided by this judgment in determining the current matter.

Analysis and discussion

[34] Ms Wasilewska was dismissed for serious misconduct being in breach of the respondent's code of conduct. The relevant sections of that code to this case are:

General Expectations

You have an obligation to: ...

- (c) *Respect the rights of the ODHB, patients, colleagues, visitors and the public. In meeting this obligation, you are expected to:*
- *Avoid behaviour which endangers or causes distress to other people or otherwise contributes to disruption in the workplace;*
 - *Unreasonable behaviour towards other people: eg, abusive, threatening or offensive language, sexually suggestive behaviour or any other conduct which is likely to cause distress.*

Serious Misconduct

Serious misconduct includes, but is not confined to: refusing to perform specified duties or to carry out lawful instructions, or walking off the job.

- *Breach of protocols or standards whether established by the ODHB or the relevant professional body.*

[35] The code clearly establishes a level of general expectations for all staff in the workplace and lists specifically under the misconduct heading, unreasonable behaviour towards others or any other conduct which is likely to cause distress. It is fairly clear, given the upset and distress occasioned by the applicant's in respect of Glenys Mitchell that the applicant was in breach of this section of the code. The document then goes on, under the serious misconduct heading, to cite refusal to perform duties or to carry out lawful instructions and breach of professional protocols or standards. While it may be that the behaviour of the applicant was approaching failure to carry out lawful instructions, I am not of the view that that point had been reached at the time the decision to dismiss was taken. However, it is clear that Ms Mitchell was extremely distressed at

Ms Wasilewska's verbal attacks in front of another colleague. This falls clearly within the specific section of misconduct.

Determination

[36] Returning to the issues set out above:

- I find the incident of 11 February 2005 was not capable, on its own, of amounting to serious misconduct. Distressing as it clearly was to Ms Mitchell, the incident, objectively viewed, was a minor breach of the code of conduct. It warranted a formal warning in a disciplinary setting but summary dismissal was not appropriate.
- I find the inquiry into this incident itself was full and fair. However, the respondent erred in relying on earlier incidents which it had previously stated were not substantiated and which it advised the applicant would not be taken further.

[37] The Authority views the respondent's actions and decisions as fitting into the *last straw* category. The applicant's behaviours over a considerable period had directly given rise to serious difficulties staffing the BCS, had directly contributed to resignations from BCS, had absorbed very considerable resources and in the process, engendered a very high level of frustration among senior clinical personnel.

[38] I accept that Ms Wasilewska was put on notice that if she failed to correct her behaviour disciplinary action would follow. However, the action taken was over-severe.

- I find the behaviour of Ms Wasilewska did contribute to the circumstances giving rise to her dismissal. While the respondent's decision to dismiss the applicant was flawed, there is no doubt that an objective observer would readily accept that Ms Wasilewska's behaviour towards her peers and superiors gave rise to the circumstances leading to her dismissal.
- I find the applicant was unjustifiably dismissed and turn to the remedies due to her.

Remedies

[39] I order the permanent reinstatement of the applicant to the employment of the respondent.

[40] I decline to reinstate the applicant to her former position in the Breast Care Unit as I do not accept, at this time, that such an order will be in the interests of the Board's patients and staff.

[41] This determination is not a bar to the applicant's eventual return to a role in Breast Care Services. However, it is at the election of the respondent to determine, and under what agreed conditions, the applicant takes up a position in the Breast Care Unit. The assistance of the Department of Labour's Mediation Service should be sought by the parties in respect of this.

[42] The applicant lost remuneration between the time of her dismissal and the issuing of the Authority's order for interim reinstatement. The Authority is satisfied with the documentary evidence provided to it and accepts that the applicant lost the sum of \$8,251.94.

[43] The applicant sought compensation pursuant to s123(1)(c)(i) of the Act in the sum of \$50,000. Having considered the evidence put before the Authority, I think the appropriate sum under this head of the applicant's claim is \$10,000.

[44] Under s124 of the Act, the Authority must consider the contributory conduct of an applicant and if it makes a finding of contributory conduct, it must reduce the remedies awarded. After due consideration, I assess Ms Wasilewska's contribution to be 40%.

[45] I order the respondent to pay the applicant the sum of \$4,951.16, this being under s123(1)(b) of the Act.

[46] I order the respondent to pay the applicant the sum of \$6,000 pursuant to s123(1)(c)(i) of the Act.

Costs

[47] Costs are reserved. The parties are urged to resolve this matter between themselves. If unable to do so, counsel are to provide their respective memoranda to the Authority 30 days from the date of issue of this determination.

Paul Montgomery
Member of Employment Relations Authority