Determination Number: WA 86 /07
File Number: 5077329

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Alice Tamati (applicant)
AND	New Zealand Life Care Limited (in receivership) t/a Glenbrook Lodge Limited (respondent)
REPRESENTATIVES	Robert Foitzik and Siobhan Simpson for the applicant No appearance by or for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 17 May 2007
DATE OF DETERMINATION	28 May 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In her statement of problem filed on 23 February 2007 Ms Tamati says she was unjustifiably dismissed on 19 January. Various remedies were sought.

2. In its statement in reply received on 14 March the Company says Ms Tamati's summary dismissal was both substantively and procedurally justified. It also says that the Authority has no jurisdiction to award some of the remedies sought. The Company also says that if the Authority considers the applicant was unjustifiably dismissed then an allowance should be made for Ms Tamati's contribution to her dismissal.

3. Mediation on 12 February did not resolve this employment relationship problem.

4. By way of an amendment filed on 28 March Ms Tamati advised she now sought $1800 nett loss of wages, $25000 compensation for humiliation, etc and $1500 costs. No issues of jurisdiction arose in respect of the amended claim for remedies.

5. The parties agreed to a one-day investigation in Wellington on Thursday 17 May. The applicant usefully provided witness statements in advance. Ms Tamati asked for, and was granted, two separate witness summons.

6. By letter dated 26 April counsel for the respondent, Ms Anne Shirley, advised that the respondent's business and assets were sold on 2 April 2007. The receivers had advised her that the Company had insufficient funds to defend Ms Tamati's claim and there was no money left for unsecured claims, so there would be no funds to pay any awards made in the applicant's favour. The respondent therefore did not intend to file any statements of evidence or attend the investigation but did attach what it described as documents relevant to the Authority's investigation including notes of the disciplinary investigation meeting and correspondence between the parties. I note here that much of that material was already appended to the statement of problem.

7. Ms Tamati was advised of the Company's position and its implications before, during and at the end of the Authority's investigation and elected to proceed with her application. A draft of this determination was also circulated to the parties following the conclusion of the investigation: by telephone advice received today Ms Tamati asked that it be issued.

Background

8. Ms Tamati was employed as a caregiver with the Company since 1997 (see last page of the minutes of the meeting of 18 January).

9. On 12 January 2007 the Company received a complaint from a resident alleging Ms Tamati had physically and verbally abused him.

10. Company representatives met with Ms Tamati on 15 January and told her, amongst other things, of the complaint, that it was serious and that the respondent would be investigating it. The Company suspended the applicant on pay at that point: she was not consulted prior to its decision to suspend.

11. On 15 January, and the following day, the Company met with other staff and the complainant again, as part of its inquiry.

12. A letter was forwarded to Ms Tamati on 16 January advising of, amongst other things, its wish to meet with her on 18 January, the details of the allegation, her right to bring a representative and the possibility of dismissal.

13. Following the 18 January meeting the Company concluded that Ms Tamati had admitted verbally abusing the resident, that the incident amounted to serious misconduct, that it had lost all trust and confidence in her and that summary dismissal was reasonable taking in all the circumstances. The decision to dismiss was conveyed to the applicant at a meeting on 19 January and by letter of the same day.

Discussion

14. Rather than prohibiting the publication of relevant details, in the context of this determination I am satisfied there is no need for me to name either the resident who complained of Ms Tamati's actions, or the names of other employees who have given evidence in this investigation. These individuals are clearly identifiable on the documents jointly held by the parties.

15. Ms Tamati accepts, as she explained to her then employer at the time, that after finding the resident had soiled himself, she verbally abused the resident **if** that speaking to him in a loud voice and saying, amongst other things, *"Oh my gosh, get up* (name)*, get up, you're lazy, why didn't you ring?"* (oral evidence to the Authority's investigation) amounted to verbal abuse.

16. In other words, the applicant's agreement was significantly qualified. When questioned on this matter it was clear that, in fact, Ms Tamati did not accept she had verbally abused the resident. Ms Tamati also denies swearing at the applicant or of shouting at him. I am satisfied a fair and reasonable scrutiny of her position, by the respondent, would have made clear the applicant did not accept she had in fact abused the resident as it was put to her by the Company and it was not open to the latter to rely on this 'admission'.

17. Ms Tamati adamantly denies assaulting the resident; she does accept her loud tone was caused by being upset at discovering the resident playing with his faeces.

18. The evidence of two other Company employees taken at the time by the respondent and confirmed during today's investigation supports the applicant's position. It was that, while the applicant's voice was raised and she sounded frustrated and that she called the resident something like a 'nuisance', she did not swear at him nor was she seen to physically assault him as he claimed (a claim made only in his second interview with the respondent's management). One of the witnesses heard the applicant use the term *"shit"* in respect of the resident soiling himself, but not as a term of abuse (statement of 15 January 2007 attached to respondent's letter of 26 April).

19. The statement in reply states that the Company dismissed Ms Tamati on the ground that the incident of verbal abuse amounted to serious misconduct, and that it did not reach a conclusion regarding the allegation of physical abuse. Apart from Ms Tamati's alleged admission, it is not clear why it therefore relied on part of the resident's complaint, but not all of it, in coming to a decision to dismiss the applicant for serious misconduct, particularly when the evidence it had obtained from others supported Ms Tamati's version of events.

20. It is also not clear why the respondent has forwarded, in its letter of 26 April, evidence of disciplinary matters that predate, by several years, the event culminating in the applicant's dismissal. However, this material does indicate that, in respect of similar past events, the respondent saw fit to warn the applicant and not to dismiss her.

Findings

21. I am satisfied Ms Tamati was unjustifiably dismissed for the following reasons.

22. The dismissal letter of 19 January states that Ms Tamati was dismissed *"… on the grounds that your actions on 10 January 2007 amount to serious misconduct. Your actions towards* (the resident) *have seriously undermined the trust and confidence that we are able to place in you."* (attachment to statement of problem).

23. Whereas Ms Tamati's *"actions"* are not particularised in the Company's letter of dismissal, the record of the 19 January meeting records the respondent coming, *"to the conclusion that Alice had admitted verbal abuse of a Resident, which is against Glenbrook House Rules, therefore there is no option but to terminate …"* (attachments to statement of problem and respondent's letter of 26 April).

24. The same record confirms that *"the decision was taken on Alice's admitted verbal abuse"* (above).

25. I do not accept that Ms Tamati admitted to verbally abusing the resident. I am satisfied from the evidence before the respondent at the time that it could not support any such conclusion, either.

26. I am also satisfied the respondent has not made out its claim that Ms Tamati's admitted loud voice was in breach of its employee policy. Neither party provided a copy of the respondent's house rules nor do they appear to have been used (except by indirect reference) by the respondent during its investigation. Clause 2 of the applicant's employment agreement provides for the *"Employer's Policy"* making up the terms and conditions of the employee. In the absence of specific evidence as to house rules or any other employer policy I am satisfied the Company has not made out its claim in reliance on those rules of serious misconduct, and in particular whether Ms Tamati's admitted loud voice amounted to a breach of those terms.

27. I now turn to the more general test of whether the dismissal was:

> *justifiable … , 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.*
>
> (s.103A of the Act)

28. I do not accept that speaking in a loud voice, in this instance, and as measured by the evidence available to the Company at the time, amounts to serious misconduct. I am satisfied Ms Tamati's behaviour amounted to misconduct, albeit at a lesser level – a finding I address shortly by way of determining contributory conduct. I reach this conclusion because of the objective reality of gradations of abuse and an expectation a fair and reasonable employer would have regard to the same. Abuse is defined as, *"use to bad effect or for a bad purpose. 2 treat with cruelty or violence. 3 address in an insulting and offensive way"* (10th Ed. Concise Oxford Dictionary). Ms Tamati's frustrated outburst clearly had some of these elements of abuse, but not – on the evidence before the Authority – to the degree or extent claimed by the respondent as amounting to serious misconduct warranting summary dismissal. Put another way, Ms Tamati's behaviour did not amount to concentration camp treatment but nor did it represent best practice: her conduct lay somewhere in-between.

29. Evidence in support of the applicant's position was borne out by the reports obtained by the Company from two other eye and ear witnesses to the event. In her original interview one of those witnesses also offered the opinion that the applicant did not abuse residents,

that she was always helpful and willingly swapped shifts to even out workloads. These observations were based on having worked together on the same shift for many years. Those views were reiterated under oath or affirmation by the same individuals, summonsed as they were to give evidence at the Authority's investigation. It is not clear why the respondent elected to ignore that evidence, and to rely on only part of the claim advanced by the resident.

30. In its letter of 26 April the Company asks the Authority to have regard to *IHC New Zealand* v *Fitzgerald*, unreported, Shaw J, 19 October, WC 19/06. I am satisfied that decision is of little assistance in determining this employment relationship problem. That is because, and amongst other distinguishing factors, the degree of alleged abuse in *Fitzgerald* was at a far more serious end of the spectrum; s. 103A of the Act now applies (unlike the law prevailing in *Fitzgerald*) and – unlike this instance – there was considerable evidence of IHC undertaking an extensive investigation of a resident's complaint, extending to obtaining the assistance of parties outside of IHC to interview, and review the evidence of, that complainant. That evidence supported IHC whereas the Company's evidence supports Ms Tamati.

31. Another difficulty confronts the respondent in justifying its decision to dismiss Ms Tamati: the Company's decision maker was asked, but declined, to investigate a claimed similar incident at around the same time that resulted in no disciplinary action. Evidence was given to the Authority by the caregiver in respect of that incident: she admitted speaking in a similar way to the same resident, and of confirming her behaviour to the same manager, but that no action was taken by management despite its knowledge of it. I am satisfied this was a significant disparity of treatment and that no satisfactory explanation has been provided by the respondent for its inconsistent treatment of employees in apparently identical circumstances.

32. This was a matter that should have gone into its decision making as to what a fair and reasonable employer would have done in all the circumstances at the time: s.103A applied.

33. I am also satisfied that Ms Tamati was unjustifiably suspended on Monday 15 January in that, contrary to well-known case law, her agreement was not sought, she had no opportunity to comment on the Company's intention and there was no provision in her employment agreement for unilateral suspension.

34. I am satisfied that, while the applicant was not properly notified in advance of the 15 January meeting as to its purpose, nor given an opportunity to obtain representation (and therefore significantly disadvantaged by her employer's decision to suspend her), the Company made right these shortcomings – other than the matter of unlawful suspension – by putting in writing, and giving her sufficient prior notice, of the purpose of future meetings.

Remedies

35. It follows from the above, and other evidence provided, that Ms Tamati is entitled to recover her lost wages, particularly as she set about promptly to mitigate her losses.

36. I do not accept, however, that the applicant has made out her claim for $25,000 compensation for humiliation, etc. Evidence by Ms Tamati in support of that claim is light. What the applicant did make clear is the stigma she suffers because of her employer' unjustified action and the difficulty it is causing her to find full-time permanent employment.

37. In all the circumstances, and having particular regard to her length of service and her sense of injustice arising out of the gross disparity described above, I am satisfied that an award of $10,000 is appropriate.

Contributory Fault

38. Ms Tamati accepts she raised her voice although does not accept her volume amounted to verbal abuse. She candidly accepts describing the resident, several times, as lazy. A witness heard the applicant use the word shit, although not as to apply to the resident. These are professional errors that contributed to the circumstances that gave rise to the applicant's successful personal grievance. That is because the resident was in Ms Tamati's care and – according to evidence produced at the investigation – suffered from cognitive dementia. The extent of that condition is not clear. Dementia is an organic mental disorder characterised by the general loss of intellectual abilities beyond what might be expected from normal aging. Particularly affected areas include memory, attention and problem solving.

39. Given his condition and situation the resident, and the respondent, were entitled to more considerate behaviour from Ms Tamati. I am therefore satisfied her contributory fault is properly assessed at 30%.

Determination

40. Despite the clear evidence of the cupboard being bare but bearing in mind the value to Ms Tamati of a public determination that she was unjustifiably dismissed, I direct the Company to pay to the applicant:

a. Lost wages of $1,800 nett (one thousand and eight hundred dollars) less 30%; and

b. Compensation for humiliation, etc of $10000 (ten thousand dollars) less 30%; and

c. Subject to submissions in respect of any additional costs incurred, the costs claimed in the applicant's email to the Authority of 28 March of $1,500 (fifteen hundred dollars).

Denis Asher
Member of Employment Relations Authority

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