IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 124/09
5135001

	BETWEEN	VINCENT PAUL FLEMING Applicant
	AND	DELAMORE & REIDY MENTAL HEALTH COMMUNITY SUPPORT SERVICES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Mr Fleming in person Mark Lawlor, Counsel for Respondent
Investigation Meeting:	23 and 24 February 2009 at Auckland
Determination:	17 April 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Fleming) alleges a breach of the good faith obligation, together with personal grievances on the grounds of unjustified dismissal and disadvantage by unjustified actions of the employer.

[2] The respondent (Delamore & Reidy) deny breaching the good faith obligation in the statute, resist both personal grievances and contend that the eventual dismissal of Mr Fleming was conducted in a procedurally fair manner and was substantively justified in all the circumstances.

[3] Delamore & Reidy conduct a business in Auckland providing mental health psychiatric disability services. As such, Delamore & Reidy provide residential support services for people over the age of 18 who have ongoing mental health disabilities and other life disabilities which are sufficiently serious to need 24 hour

residential care. They provide this service across five houses in the Auckland region, one of which is entitled "Jon's House" which was set up in 2000. There are 50 residents across the five houses, five of which live at Jon's House. Jon's House which is in Te Atatu, was at the time of this employment relationship problem, managed by Mr Fleming. His title in that role was Service Manager. Mr Fleming had worked for Delamore & Reidy at least since 2002; the copy of a job description for that role has been provided to the Authority as has an employment agreement.

[4] Mr Fleming was a trained social worker. However, his role as Service Manager went rather further than that created by the term social worker. As Service Manager, Mr Fleming had all of the care staff at his residence (Jon's House) reporting to him. Mr Fleming's report line was to the CEO of Delamore & Reidy, Ms Jordan.

[5] By all accounts the employment relationship between the parties was good from the point at which Mr Fleming was engaged in 2001 down to late 2007. From that latter date on, there were issues raised by Mr Fleming about the employer's process towards him.

[6] On 21 August 2008, there was a meeting between Mr Fleming and Delamore & Reidy to discuss an issue with a patient. Mr Fleming claimed that an unfair allegation had been levelled against him by one of the care workers reporting to him at Jon's House. Delamore & Reidy never characterised the issue as a complaint by the care worker against Mr Fleming, but simply saw it as the care worker seeking to obtain assistance so that that care worker could improve his own performance of his duties.

[7] It was said that a care worker Vinay had asked the registered nurse about Mr Fleming's practice of removing a client's clothes so that the client could be washed. While Delamore & Reidy denied that this intimation ever constituted a complaint, and denied that they ever treated the matter as a complaint, Mr Fleming regarded it as a complaint about his practice and sought an addressing of the matter in the meeting with the employer on 21 August 2008.

[8] At that meeting, Mr Russ Revell, a very experienced Union official from the Service and Food Workers Union, attended as Mr Fleming's support person.

[9] As a consequence of that meeting, Delamore & Reidy *thought that the matter had been resolved*. That view of matters is supported by Mr Revell's own

conclusions. In his evidence before the Authority he said that Ms Delamore (a director of Delamore & Reidy and Ms Jordan's mother) *expressed confidence in the way Vince (Mr Fleming) was dealing with that client. The meeting concluded on very good terms between all parties – no disciplinary action was taken against Vince and we then partook of toasted sandwiches and coffee.*

[10] On the face of it then the matter was resolved satisfactorily without any negative impost on Mr Fleming and both the employer's evidence and Mr Revell's evidence (both of which I accept) was that there was no further issue requiring attention.

[11] Both Mr Revell and Delamore & Reidy were plainly surprised when four days later (and without involving the Union at all) Mr Fleming wrote to the employer by letter dated 25 August 2008 claiming that he felt unsupported due to *misconduct* by his staff members and broadly that he was not getting the level of support from management to which he was entitled. Mr Fleming sought mediation to resolve these apparent concerns.

[12] The essence of Mr Fleming's allegations which underpinned the referral to mediation, was a claim that there had been a succession of complaints made by him about the behaviour of his direct reports, the caregivers at Jon's House. The complaint involving Vinay, which I detailed above and which was the subject of the meeting between the parties on 21 August 2008, was just an example of what Mr Fleming was concerned with. Mr Fleming said that he had made numerous complaints about his staff to Delamore & Reidy and that they had done nothing about those complaints. Delamore & Reidy absolutely deny that allegation.

[13] I am satisfied that the evidence for Delamore & Reidy given both by Ms Jordan and by Ms Delamore was that each of Mr Fleming's allegations were investigated when they were received, and that Mr Fleming was properly and formally advised of the result of those inquiries. I am further satisfied that Delamore & Reidy formed a proper view that the allegations made by Mr Fleming were generally without substance and that the only conclusion that Delamore & Reidy could properly reach from about August 2008 was that Delamore & Reidy's conclusions were simply not accepted by Mr Fleming.

[14] However, and entirely properly in my view, because Delamore & Reidy were concerned about Mr Fleming's inability to accept their assurances that there was no wrongdoing by the staff reporting to him, they readily accepted the opportunity to attend mediation to put to rest once and for all Mr Fleming's continued belief about his staff's various inadequacies.

[15] After Mr Fleming filed his request for mediation, he subsequently sought the assistance of the Union to prosecute it. According to Mr Revell's evidence (which I accept absolutely) *the Union did not believe that the issues needed to be referred to mediation. Vince* (Mr Fleming) *was advised that the Union would not get involved with the claim he had referred to mediation*.

[16] By all accounts, that mediation was unsuccessful and later the same day Mr Fleming filed a claim with the Authority alleging unjustified disadvantage.

[17] The Presiding Member at that time was the Chief of the Authority, Member Wilson, and he directed the parties back to mediation once he was seized of the unjustified disadvantage claim brought by Mr Fleming.

[18] That second mediation took place on 22 October 2008 and was again unsuccessful.

[19] The very next day, 23 October 2008, Ms Delamore received a telephone call from Ms Willetts who ran another similar mental health provider service. Ms Willetts reported that Mr Fleming had verbally abused one of the residents of her residential facility during a support group that Mr Fleming provided for another entity again, but which Ms Willetts' residents attended.

[20] It was alleged that Mr Fleming had verbally abused one of Ms Willetts' residents as being *dumb* and *a homo*. This was alleged to have happened at the session run by Mr Fleming on 10 October 2008. Not surprisingly, Delamore & Reidy took the matter seriously, and amongst other things prepared a letter dated 24 October 2008 to Mr Fleming setting out the nature of the allegations in some detail and indicated the nature of the employer's process. In particular, Delamore & Reidy included a statement from Ms Willetts which they had obtained as a consequence of asking their lawyer to attend on Ms Willetts and take a formal statement from her.

[21] This information was provided to Mr Fleming and he was asked to attend a meeting to discuss matters.

[22] The meeting took place on 30 October 2008 and Mr Fleming was again supported by Mr Russ Revell from the Union. I have the benefit of Mr Revell's clear and concise testimony about that meeting and I am happy to rely upon it. Mr Revell says that the meeting was effectively conducted by the employer's lawyer, Ms English, and that she went through the issues one by one and asked Mr Fleming to respond. Mr Fleming did in fact respond to each issue and on the significant allegation alleging that he had verbally abused a client of Ms Willetts, Mr Revell records that Mr Fleming *absolutely denied* the allegations made. Mr Revell goes on to say that he and Mr Fleming questioned the credibility of the complaints given the mental and/or intellectual disability of the complainant himself and of the supporting witnesses.

[23] Both Mr Revell and the employer's witnesses are absolutely clear that Mr Fleming precluded them from having any further inquiry into the matter. All three of the witnesses giving evidence for the employer (and Mr Revell, who gave evidence for Mr Fleming) confirmed that at the meeting, Mr Fleming had, to use the words of his own witness Mr Revell, *rejected any further inquiry*. Again, there is the record of an exchange in Ms English's brief of evidence which goes as follows:

> *I then asked Vince how he felt about Linda (Ms Delamore) seeking more information from Maureen (Ms Willetts) and from other people who could vouch for him. Vince replied 'I have no interest in this, I'm, finished with Mauranga House and I don't want you to speak to Maureen'. I asked if he wanted us to speak to anyone? Vince said 'no I don't want you going to anyone at all'. He said this in a clear and loud voice and as he spoke he lent towards me and raised both his hands to add emphasis to his refusal.*

[24] When the employer's representatives adjourned the disciplinary meeting to consider matters, their evidence is unequivocal that they felt they could not proceed further with any inquiries because of Mr Fleming's asserted rejection of any further inquiries being undertaken. All Mr Fleming seemed prepared to do was to suggest the matter be referred to the Police. Mr Revell had used his best endeavours to settle the matter by agreement and had tried very diligently to get a successful resolution of the matter by agreement and it seeMs Would have been successful had Mr Fleming not been so intransigent.

[25] After a period of mature reflection, the employer parties returned to the meeting and advise Mr Fleming that their provisional view was that he had been guilty of verbal abuse and that verbal abuse in principle amounted to serious misconduct. They told Mr Fleming they were considering termination and they asked for responses. There were no responses from Mr Fleming or his advocate, Mr Revell.

[26] I interpose at this point that the reason Mr Revell declined to take the opportunity to make those responses was he was precluded from doing so by Mr Fleming, who *stated that he would just let the employers do what they wanted and he would do what he had to*.

[27] There was a further adjournment and Delamore & Reidy wrote to Mr Fleming on 31 October 2008 (the following day) notifying Mr Fleming of the termination of him employment for serious misconduct. In the result, the termination of Mr Fleming's employment was based exclusively on the 10 October incident and not on the myriad of other issues which were covered off in the 24 October disciplinary letter.

Issues

[28] There are three issues for the Authority to investigate:

(a) Did Mr Fleming suffer disadvantage as a consequence of unjustified actions of Delamore & Reidy?

(b) Was Mr Fleming unjustifiably dismissed?

(c) Does it matter that the conduct complained of was not during the employment?

Was Mr Fleming disadvantaged?

[29] I am satisfied on the basis of the evidence I heard that Mr Fleming was not disadvantaged in any way by unjustified actions of his employer, Delamore & Reidy.

[30] It seems to me the evidence supports the conclusion that Mr Fleming was a regular user of the continuous improvement forms to draw attention to the alleged inadequacies of his staff and as I have already made clear, I am satisfied on the evidence I heard that each and every one of Mr Fleming's concerns was received, investigated and properly responded to by the employer. In the end, I must conclude

that Mr Fleming simply did not want to accept that he was mistaken about the myriad of allegations he made about the people who worked for him.

Was Mr Fleming unjustifiably dismissed?

[31] I am satisfied Mr Fleming was not unjustifiably dismissed either. Mr Fleming behaved in such a way at the final disciplinary meeting so as to ensure that the employer had no possible alternative course of action but to dismiss.

[32] If Mr Fleming had allowed the employer to continue with its inquiries (as the employer wanted and as Mr Revell, the Union official was clear the employer sought to do) then it is conceivable that further information might have come to hand which would have at least moderated the potential penalty that might have been applied or perhaps even caused some real doubt about the veracity of the original complaint.

[33] Mr Fleming absolutely precluded any prospect of a further inquiry into the matters before the employer by vehemently denying them the opportunity of talking to people who might have made a difference to his claim. I am not satisfied that in those circumstances the employer behaved improperly in declining to override Mr Fleming and go against his clearly expressed wishes.

[34] Mr Fleming denied on oath at my investigation meeting that he had precluded the employer from taking the further obvious steps that the employer wanted to take. That claim on oath does Mr Fleming no credit. Even Mr Fleming's own Union official acknowledges that Mr Fleming was adamant that there were to be no further inquiries and each and every one of the employer's witnesses who attended the final meeting were similarly clear about Mr Fleming's wishes.

[35] In the end, the question that must be asked is whether the decision the employer made is the decision that a fair and reasonable employer would make after they had conducted a proper inquiry. I am satisfied that the answer to that question in the present circumstances is yes, but I make it clear that the answer might be different if there had been further inquiries made as the employer quite properly contemplated, but which Mr Fleming so adamantly opposed. The suggestion Mr Fleming made of referring the matter to the Police is fanciful. The matter was not a matter for the Police; it was an employment issue and required to be dealt with in that context.

There was no criminal activity which the Police would have been in any way interested in.

Behaviour outside work

[36] It is clear law that misconduct which takes place outside of the aegis of the employment relationship can ground a dismissal for cause. In particular, this will be the case where the behaviour complained of undermines the employer's trust and confidence in the employee to such an extent as to make the restoration of a normal employment relationship impossible.

[37] Furthermore, there are cases which have been decided on the footing that the conduct complained of brought the actual employer into disrepute. This was the case in *Swann v. ACI New Zealand Ltd* [1993] NZILR 262. Similarly, in *DB Breweries Ltd v. Hodgson* 14 October 1996, AC68/96, Judge Travis upheld a dismissal where Mr Hodgson, the employee of Dominion Breweries Limited (DB) was dismissed for assaulting the manager of a customer of DB notwithstanding that the assault took place away from work. Mr Hodgson had been employed by DB amongst other things to deliver beer to various hotels and taverns. One of the hotels that he delivered to was managed by the man that he assaulted in his own time. DB came to hear about the assault and considered that the assault constituted serious misconduct notwithstanding it was not during work time. The Court held that the dismissal was justified as there had been serious misconduct that could potentially damage DB's business.

[38] Again in *Smith v. Christchurch Press Co Ltd* [2000] 1 ERNZ 624 the employer dismissed the employee for serious misconduct for making unwelcome sexual advances at a co-worker outside of working hours. The Court determined that the issue was whether the conduct complained of would affect or potentially affect the employer's business and as long as there was a clear relationship between the conduct complained of and the employment relationship, a finding of serious misconduct justifying dismissal was available.

[39] In *Craigie v. Air New Zealand Ltd* [2006] 1 ERNZ 147 the Employment Court upheld in part a decision made earlier by the Authority at first instance. The case involved the out of work behaviour of a pilot employed by the airline. In the Authority, Member Dumbleton reached the conclusion that the dismissal of Mr

Craigie by the airline was justified on two bases – one a conviction for assault, and two a breach of the Civil Aviation Act directly related to airmanship. On challenge to the Court, only the issues relating to Mr Craigie's airmanship were held to be relevant to the decision to dismiss, the Court reaching the conclusion that the airmanship convictions sustained by Mr Craigie had a direct relationship to, and a potential impact on, Mr Craigie's employment by the airline. The Court said that the Civil Aviation Authority convictions and the adverse findings of credibility made against Mr Craigie, amongst other things, completely destroyed the relationship of trust and confidence between employer and employee.

[40] Those cases are illustrative of the law on misconduct outside the workplace. In particular, the Courts have tended to consider each case on its merits. However, there do seem to be a number of common trends, two of which are in my opinion relevant in the present case. The first is the attack on the necessary trust and confidence that must exist between employer and employee, and the second is the relationship between the behaviour complained of and the nature of the vocation or calling of the individual employed. Further, where those two principles are interlinked, as I consider they are in this case, the result is even stronger.

[41] My considered view in the present case is that Mr Fleming's misconduct away from the workplace was so serious as to fundamentally attack the necessary trust and confidence that must exist between the parties to an employment relationship. He was at the relevant time a professional social worker. Notwithstanding that, he was accused of a serious breach of the professional ethics of a social worker and in the course of defending himself against that allegation made observations which strongly suggested a wish to belittle the integrity of vulnerable persons who had been (albeit temporarily) under his care. The allegations against Mr Fleming, in my view, go to the root of the professional obligations of a social worker and the breakdown in trust and confidence which resulted from the complaint made against Mr Fleming was such as to be absolutely determinative of the end of the employment relationship.

[42] Further, the fact that the complaint arose in a professional environment not dissimilar to the one in which Mr Fleming was actually employed, made the situation all that much worse. It was, in my view, analogous to the *Craigie* decision in that here was a situation where Mr Fleming acted in an environment which might just as well have been his workplace for reasons of the similarity between the environment in

which he misconducted himself and his normal day-to-day employment. It is difficult to see how Delamore & Reidy could have persevered with Mr Fleming's employment having received and found sustained the complaint against him from Ms Willetts. For Mr Fleming to continue in employment in those circumstances would have materially affected the credibility of Delamore & Reidy, and that would have had a direct impact or a potentially direct impact on their business.

[43] It follows then that I am satisfied that it was available to Delamore & Reidy to dismiss Mr Fleming for misconduct outside the work environment because of the close nexus between work environment and the environment in which the misconduct took place, because of the seriousness of the misconduct and the impact that might have on the ability of Delamore & Reidy to have trust and confidence in Mr Fleming, and because the misconduct must have had the effect of causing Delamore & Reidy to lose trust and confidence in Mr Fleming.

Concluding observations

[44] In this employment relationship problem, Mr Fleming has truly been the architect of his own misfortunes. He formed a doctrinaire view that his staff were incompetent and malevolent and was unshakeable in that regard notwithstanding the careful and measured efforts of Delamore & Reidy, his employer, to disabuse him of that view.

[45] Mr Fleming made numerous complaints about his staff which I found as a fact were all investigated by his employer and the result of such investigation advised to him. I was satisfied on the evidence I heard that there was no reason at all for Mr Fleming to regard his staff with the distrust he obviously felt for them and despite the good offices of Delamore & Reidy in trying to disabuse him of that view, he clung to it despite the evidence. Indeed, by the time of the final disciplinary meeting, Mr Fleming was openly confirming that he had no trust and confidence in his staff and he accepted that they did not want to work with him either.

[46] In relation to the contention that Mr Fleming was unjustifiably dismissed, I have found that there is no reason at all to disturb the employer's conclusion that Mr Fleming was guilty of serious misconduct outside of the work environment and that that serious misconduct fatally blighted the employment relationship such that the only course of action for a fair and reasonable employer was to dismiss.

[47] However, that latter result might potentially have been different if Mr Fleming had not chosen to exercise his right to preclude the employer from conducting further inquiries. I am absolutely satisfied on the evidence I heard that Mr Fleming actively and assertively insisted that the employer not further inquire into the allegations against him. This seems an extraordinary decision for him to take as it effectively precluded any prospect of the employer obtaining further and better particulars of the allegation and the circumstances surrounding it. Indeed, the employer was left in the invidious position, as a consequence of Mr Fleming's insistence, that the only matters they had to rely on in making a decision to dismiss was the clear evidence of the allegation levelled by Ms Willetts, Mr Fleming's bald denial, his doubts about the integrity of the complainant and various muddled conspiracy theories about where the complaint may have come from.

[48] Any reasonable and fair employer would have wanted to conduct further inquiries when faced with that matrix of issues. Indeed, this fair and reasonable employer wanted to do that as well, but quite properly felt constrained by the insistence of Mr Fleming that they were not to talk to anybody else. As I made clear in my earlier observations, Mr Fleming did himself no service by denying on oath that he had precluded those further inquiries. The evidence that he did preclude those further inquiries is absolutely incontrovertible and includes evidence from his own witness. Again, it has to be said that Mr Fleming seems to have affirmatively chosen a course of action which gives him the least possible change of the result he seeks. He has again, as with the allegation of disadvantage by unjustifiable actions of his employer, been the architect of his own misfortunes.

[49] Even when confronted with the advice of an able and experienced Union advocate, advice which might well have resulted in the matter being resolved by agreement with the employer, on the Union official's own evidence, Mr Fleming chose to proceed to allow the employer to dismiss him (if that was to be the employer's decision) and he (Mr Fleming) would then deal with the consequences of that. On Mr Revell's evidence, Mr Fleming expected the Authority to vindicate him in his stance. Sadly, this decision will be no comfort to Mr Fleming.

[50] However, Mr Fleming clearly remains a man of many skills who on the testimony of his former employer, was particularly talented at dealing with

challenging clients. Mr Fleming needs to take this opportunity as a teachable moment and move on in his profession, learning from the experience.

Determination

[51] Mr Fleming's claim for breaches of good faith, and personal grievances by reason of unjustified disadvantage and unjustified dismissal, all fail in their entirety. I am not persuaded there is any evidence to support any of Mr Fleming's allegations. I think Delamore & Reidy were patient, measured and sensible in their responses to Mr Fleming and at all times acted in good faith in dealing with the myriad of matters that he confronted them with.

Costs

[52] Costs are reserved.

James Crichton
Member of the Employment Relations Authority