

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 380  
5362923

BETWEEN                      SHAROJA DEVI NAICKER  
Applicant

A N D                              TERRANOVA HOMES  
& CARE LIMITED t/a  
WEST HARBOUR GARDENS  
HOSPITAL  
Respondent

Member of Authority:        K J Anderson

Representatives:              S Sharma, Counsel for Applicant  
M Broadbelt, Advocate for Respondent

Investigation Meeting:        12 July 2012 at Auckland

Date of Determination:        25 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     The applicant, Mrs Naicker, claims that she was unjustifiably dismissed on 5 October 2011. Mrs Naicker asks that the Authority find that she has a valid personal grievance and award her the remedies of reimbursement of lost wages and compensation for hurt and humiliation.

[2]     Conversely, the respondent, TerraNova Homes & Care Limited (TH&C) says that the dismissal of Mrs Naicker was justifiable on the ground of serious misconduct.

[3]     The Authority received evidence from Mrs Naicker and her husband, Mr Muni Chandra Naicker. For TH&C, there is evidence from Mr Jon Amesbury, Mrs Claire Parker, Mrs Elaine Tweed, Ms Sarah Van Zoomerman, Mr Stephen Dancer and

Mrs Julie Stirling. Both parties have provided relevant documents and their advocates made appropriate submissions at the investigation meeting. All of the available material has been closely considered, albeit it may not be specifically referred to in this determination.

### **The final written warning**

[4] Mrs Naicker was employed as a caregiver at the West Harbour Gardens Hospital (the Hospital) commencing her employment on 1 October 2004.

[5] The evidence of Mr Amesbury, the Manager of the Hospital, is that an issue arose pertaining to Mrs Naicker being absent from work without approval. The background to this matter is that Mrs Naicker applied to have annual leave from 18 July 2011 to 7 August 2011. The leave was approved by Mr Amesbury.

[6] The evidence of Mr Amesbury is that he received a phone call from Mr Naicker on 11 July 2011, whereby he requested a further three days' leave on behalf of Mrs Naicker. Mr Amesbury informed Mr Naicker that Mrs Naicker was required to complete another leave application form; she did this on 12 July 2011. However, due to the short notice, the leave (shifts) requested could not be covered by another person and hence Mr Amesbury had to deny the leave requested for 15 and 16 July 2011. This was recorded in a memo from Mr Amesbury to Mrs Naicker dated 13 July 2011. However, leave was approved for the third day, being 17 July 2011. Mrs Tweed, the Hospital Administrator, also spoke to Mrs Naicker and confirmed that she understood that the extra leave requested for 15 and 16 July 2011 was not approved.

[7] However, Mrs Naicker did not attend work for her rostered shift on 16 July 2011 and when she returned to work from her leave on 8 August 2011, Mr Amesbury requested a meeting with her to take place on 10 August 2011.

[8] Mr Amesbury, accompanied by Mrs Tweed, duly met with Mrs Naicker on 10 August 2011. Mrs Naicker was accompanied by her husband. When asked by Mr Amesbury as to the reason for her absence from work on 16 July 2011, Mrs Naicker informed that she had family from Australia staying with her and she did not want to come to work and leave them. The evidence of Mr Amesbury is that Mr Naicker then intervened and stated that his wife was actually ill on the day in question with "woman (gynaecological) problems." When asked by Mr Amesbury if

this was true, Mrs Naicker agreed with her husband. Mrs Naicker then informed that she had visited her doctor; she was requested by Mr Amesbury to provide a medical certificate.

[9] Mrs Naicker duly produced a medical certificate on 15 August 2011. It is retrospective and states that:

The above patient reported to me on 12 August 2011 stating that she has been unfit for work from 15/7/11 to 16/7/11.

[10] Mr Amesbury subsequently wrote to Mrs Naicker on 15 August 2011:

Further to the meeting of 10 August 2011 held in the presence of Elaine Tweed, Administrator and your husband as your representative, we are writing to inform you of our decision based on the information you gave at the investigation meeting in response to the following concern:

- That you requested leave for the period of 15 and 16 July 2011. This leave was not granted but you nonetheless failed to attend for work for the 23.00 to 07.00 shift on 16 July 2011.

You initially stated that you did not attend for work on 16 July as you had friends and family staying with you from Australia. You then changed your explanation and stated that you were actually unwell and not fit for duty. We requested a doctor's certificate from you as you informed us that you had seen your GP at this time. We received the doctor's certificate today which is dated 12 August 2011, stating that you saw your GP on that date and that you retrospectively reported to him that you were not fit for duty from the 15th July 2011 to the 16th July 2011. This would indicate that you had in fact not consulted a doctor at the time of your alleged sickness and that you only attended the surgery following our request for a certificate.

After taking into account your explanation, we have decided to issue you with a final written warning for serious misconduct under the TerraNova Homes & Care 'Standards of Conduct' (House Rules) document.<sup>1</sup> If you are at all unsure about anything in this letter, please contact the manager immediately.

### **The complaint against Mrs Naicker**

[11] The evidence of Mr Amesbury is that on 30 September 2011, Mrs Parker, Clinical Coordinator at the Hospital, reported to him that a resident, Mr [B]<sup>2</sup> was upset and he wished to make a complaint about the actions of a staff member; Mrs Naicker. The evidence is that Mr B is a person who is physically vulnerable due

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<sup>1</sup> This provides that unauthorised absence from work during a period for which a request for leave has been declined, constitutes serious misconduct that may result in instant dismissal.

<sup>2</sup> In order to protect the privacy of the gentleman involved, he is referred to in this determination as Mr B.

to severe limb constrictions as a result of cerebral palsy. While Mr B is physically restricted, he is a mentally bright, intelligent and alert man and able to make himself clearly understood.

[12] Mrs Parker completed a complaint form as dictated to her by Mr B. The complaint was that Mrs Naicker had told him that she was leaving him in his bed on the morning of 30 September 2011. Mr B is normally up and in his wheelchair in the mornings. When Mr B insisted on getting out of his bed, Mrs Naicker placed him in a fall out chair<sup>3</sup>, unwashed, unshaved and without underwear.

[13] An enrolled nurse, Ms Van Zoomerman, had initially found Mr B in a state of distress and she provided a written statement as to her observations of him and her discussion with him; recording the distressed state that Mr B was in.

[14] Upon receiving the information from Mrs Parker, Mr Amesbury interviewed Mr B whom he found to still be in a distressed state. Mr B confirmed to Mr Amesbury that Mrs Naicker had not washed or dressed him that morning (30 September 2011).

#### **A further complaint against Mrs Naicker**

[15] The evidence of Mr Amesbury is that within a similar timeframe to the complaint from Mr B, Mrs Parker received a verbal complaint from Mrs Stirling, a caregiver at the hospital. Mrs Stirling had been asked to assist Mrs Naicker to physically lift a resident from a shower chair into a bed. The resident is paralysed and almost mute and for her safety and that of the hospital staff, she should only be transferred by using a sling and a mechanical hoist. A written statement was obtained from Mrs Stirling who stated that upon being asked to assist Mrs Naicker with lifting the resident [Mrs G] from the shower chair onto the bed, she was “horrified” to see that Mrs G was not in a hoist and upon trying to lift her, she slipped into “an almost lying” position. Mrs Naicker was left to hold onto Mrs G while Mrs Stirling obtained extra assistance from another staff member. Mrs G was then subsequently moved safely onto a bed.

#### **The disciplinary process**

[16] Upon collating the information pertaining to the two complaints, Mr Amesbury along with Mrs Parker, met with Mrs Naicker and informed her of the

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<sup>3</sup> A fall out chair is a large, supportive medical chair used for physically restricted patients.

allegations and gave her a copy of the written statements, along with the complaint from Mr B. Mrs Naicker was also given a copy of the *TerraNova Homes & Care Standards of Conduct* document. Mrs Naicker was advised that due to the seriousness of the allegations he proposed to suspend her from employment on full pay. Mr Amesbury says that Mrs Naicker agreed to this. Mr Amesbury then typed a letter which was given to Mrs Naicker to take away with her. The content of the letter informed Mrs Naicker that a meeting would be held on 5 October 2011 to discuss the following matters of concern:

- That on the 30th September 2011, that you wanted to keep a totally dependent resident in his bed against his wishes. When he insisted on getting up, you placed him in a fall out chair, unwashed and unchanged, wearing the clothes from the night before. Further, when asked to dress the resident in a pair of shorts, you refused his request.
- That on 30th September 2011, you failed to use the correct lifting equipment to transfer a resident for a shower, placing the resident at risk.

[17] The letter concluded with Mrs Naicker being informed that she could bring a representative to the meeting and that she would be given every opportunity to give a response to the above matters and that full consideration would be given to her explanation before any decision was reached. Mrs Naicker was also informed that it was a serious matter and could result in the termination of her employment.

[18] Mrs Naicker left the Hospital premises but later that day her husband came to the Hospital reception and requested to meet with Mr Amesbury. Upon Mr Amesbury inviting Mr Naicker to his office and walking toward there, Mr Amesbury says that Mr Naicker became abusive, swearing at him and calling him a “racist bastard”. Mr Amesbury requested that the Police were called and at this point Mr Naicker left the building, but he then returned and started banging on the outside of the window of Mr Amesbury’s office, with such force that Mr Amesbury thought that it would break. Mr Naicker was shouting at Mr Amesbury, swearing and repeating the earlier racist allegations. He subsequently left. Mr Naicker denies that he behaved in the manner alleged by Mr Amesbury, but I found the evidence of Mr Amesbury to be entirely credible and his evidence is accepted over that of Mr Naicker. In any event, this matter is not about the behaviour of Mr Naicker, albeit I conclude that his involvement on the scene was inflammatory to say the least.

**Meeting on 5 October 2011**

[19] Mr Amesbury and Mrs Parker met with Mrs Naicker on 5 October 2011. The evidence of Mr Amesbury, corroborated by Mrs Parker, is that upon being asked about whether she had a support person, Mrs Naicker indicated that she would be alone. The evidence of Mr and Mrs Naicker is that they arrived for the meeting and Mrs Naicker was taken into Mr Amesbury's office but Mr Naicker was left at the reception area. But I do not accept this to be so and prefer the evidence of Mr Amesbury and Mrs Parker. Indeed, Mrs Parker recalls that Mr Amesbury was relieved that Mr Naicker was not present as he did not want to be abused again.

[20] The evidence of Mr Amesbury and Mrs Naicker is reasonably consistent in regard to the discussion that took place at the meeting. Effectively, the details of the allegations were put to Mrs Naicker for her response; and she denied them. In her evidence to the Authority, Mrs Naicker went into some detail about her involvement with Mr B but the evidence of Mr Amesbury and Mrs Parker is that she was not so forthcoming at the meeting. The situation is similar in regard to the allegations pertaining to the management of the care of Mrs G.

[21] The meeting concluded on the understanding that Mr Amesbury would give consideration to Mrs Naicker's response to the allegations that he had raised with her, and a decision would be made about an appropriate disciplinary sanction.

**The dismissal of Mrs Naicker**

[22] The evidence of Mr Amesbury is that he considered the responses given by Mrs Naicker but decided that the weight of the evidence was against her and that her responses did not demonstrate any mitigating circumstances in regard to her actions. Mr Amesbury says that:

It was my view that Mrs Naicker had failed to deliver an acceptable standard of care, had been untruthful in her continued insistence that she had washed, shaved and dressed a resident when this was obviously not the case and had not used the appropriate safety equipment to transfer another resident, placing herself and the resident at significant risk.

[23] Via a letter dated 5 October 2011, Mrs Naicker was informed of her dismissal due to serious misconduct. The allegations were set out as follows:

The allegations we met to discuss were:

- That on the 30th September 2011, you wanted to keep a totally dependent resident in his bed against his wishes. When he insisted on getting up you placed him in a fall out chair, unwashed and unchanged, wearing the clothes from the night before. His in dwelling catheter line (IDC) was tangled beneath him. Further, when the resident asked to wear underwear, you refused his request.
- That on the 30th September 2011, you failed to use the correct lifting equipment to transfer a resident for a shower, placing the resident at risk.

When asked about the first allegation, you stated that you had washed shaved and changed the resident but could not give an explanation as to why he was wearing the same clothes, required shaving by another staff member and appeared not to have been washed. You could not give an explanation as to why the resident would complain and clearly state that he had not been washed or changed by yourself or why he would be so visibly upset and tearful when making the complaint about the care he had received from you. You stated you ensured the IDC was not tangled but could not explain why it was tangled a short while later when the enrolled nurse took the resident's complaint.

In regards to the second allegation, you stated that you had used a sling to hoist the resident into a chair to take the resident for a shower. You stated that you removed the sling without assistance prior to the resident being showered. When asked if you thought this was safe for the resident, you replied that you thought it was despite the resident being immobile and a serious falls risk.

It is with regret that we are formally advising you that your explanation pertaining to the above events is unacceptable and that as a result, you are being dismissed, without notice, due to serious misconduct. Your actions in these events constitute:

- Failure to perform work to the required standard where the result or risk may present serious or significant consequences to TerraNova, any resident, visitor or fellow employee.
- Failure to follow safety requirements and rules for both employees and residents, including failure to use required safety equipment.
- Dangerous practices likely to result in injury to a resident, visitor, employee or self.

## **Analysis and Conclusions**

[24] Pursuant to s.103A of the Employment Relations Act 2000 (the Act), the question of whether a dismissal was justifiable must be determined by the Authority on an objective basis by applying the following test: Whether the employer's actions,

and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances that the dismissal occurred.

[25] It is submitted for Mrs Naicker that she was not given a copy of the statements pertaining to the allegations involving Mr B and Mrs G. But I do not accept that this is correct. On the evidence available to the Authority, I am satisfied that Mrs Naicker was made fully aware of the basis of the allegations against her and that she was given copies of the relevant statements involved prior to the meeting on 5 October 2011. I prefer the evidence of Mr Amesbury and Mrs Parker on that matter.

[26] Mrs Naicker also says that the meeting on 5 October 2011 only lasted approximately 10 minutes and that she was not given an opportunity to make a proper explanation. The oral evidence of Mr Amesbury is that the meeting lasted 15 to 20 minutes and the explanations given by Mrs Naicker were brief and she did not elaborate on her answers. There has been some suggestion that Mrs Naicker may not fully understand the English language and/or that she may not be able to express herself appropriately. But the evidence of those whom have worked with Mrs Naicker for some years is that they never noticed any issues in regard to her understanding English and expressing herself. I accept that evidence and it accords with my own observations of Mrs Naicker at the investigation meeting.

[27] The submissions for Mrs Naicker are critical of the investigation process adopted by Mr Amesbury but I do not find that there is any validity to that criticism. Criticism has also been made about the fact that Mrs Naicker did not have a support person present at the meeting on 5 October 2011. The evidence of Mr Amesbury and Mrs Parker is that Mrs Naicker was asked if she was going to have a support person present and her response was that she would attend the meeting without one. It appears that Mr Naicker drove his wife to the Hospital but then remained in his car while the meeting took place.

[28] Finally, Mrs Naicker alleges that the employer had a problem with her in relation to the matter concerning her absence whereby she received a final warning in August 2011. But there is no evidence that the employer took into account the existence of that warning when making its decision to dismiss Mrs Naicker, albeit Mr Amesbury would have been entitled to have taken into account that Ms Naicker had only very recently been issued a final warning for serious misconduct.

## Determination

[29] In applying the test provided by s.103A(2) of the Act, I have given consideration to the criteria set out in s.103A(3) and I am satisfied that each of the four factors has been met by the employer. I am also cognisant of the findings of the Court of Appeal in *W&H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448 at 457:

The Court has to be satisfied that the decision to dismiss was one that a fair and reasonable employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to use this in terms of “could” rather than “would” used in the second *BP Oil* case [1992] ERNZ 483 (CA) at 487.

[30] Mrs Naicker was in a position whereby as a person responsible for the appropriate care of the residents of the Hospital, she was required to exercise a high standard of care towards those who relied upon her to provide such. I find that Mrs Naicker failed to exercise an appropriate standard of care in regard to the two affected residents on 30 September 2011. Upon consideration of the evidence available to the employer, regarding the actions and/or inactions of Mrs Naicker, as to the care of the two residents, I am satisfied that the employer was entitled to treat the behaviour of Mrs Naicker as serious misconduct, as provided for under the *Standards of Conduct House Rules*<sup>4</sup>. I find that the decision to dismiss was a response that a fair and reasonable employer could take given all the circumstances. It follows that I find that the dismissal of Mrs Naicker was justifiable and her claims cannot be upheld.

## Costs

[31] Costs are reserved. I understand that Mrs Naicker is in receipt of legal aid and hence the provisions of s.45(2) of the Legal Services Act 2011 most probably apply.

**K J Anderson**  
**Member of the Employment Relations Authority**

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<sup>4</sup> A failure to perform work to the required standard where the result or risk may present serious or significant consequences to TerraNova, any resident, visitor or fellow employee, constitutes serious misconduct warranting dismissal.