IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 127
5547192

	BETWEEN	CINDY MILLAR Applicant
	AND	FIVE PILLARS LIMITED t/a PORT VIEW REST HOME Respondent

Member of Authority:	M B Loftus
Representatives:	Sandy Dodunski, Counsel for Applicant Antonio Noblejas, on behalf of Respondent
Investigation Meeting:	14 July 2016 at New Plymouth
Submissions Received:	At the investigation meeting
Determination:	11 October 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Cindy Millar, claims she was unjustifiably dismissed by the respondent, Five Pillars Limited t/a Port View Rest Home (Port View), on or about 19 November 2014.

[2] Port View denies dismissing Ms Millar. It says it was awaiting her completion of a competency assessment required by an external certifier and expected her to return once she has done so.

Background

[3] As its name suggests, Port View operates a retirement home. It employed Ms Millar as a registered nurse on 3 July 2013. She was initially part time working 20 hours a week.

[4] Just prior to Ms Millar's commencement a new Facilities Manager, Geraldine Pullen, started at Port View.

[5] At the time there were ongoing issues between Port View and Taranaki District Health Board (TDHB) with TDHB having concerns about Port View's performance. That dissatisfaction led to an audit by Health and Disability Auditing New Zealand Limited (HDANZ) in May 2014. As a result Ms Millar was offered full time hours to allow Ms Pullen to prepare for the audit. Ms Millar retained full time hours after the audit.

[6] On 14 May, Ms Millar was called to work at approximately 4am to tend a resident in distress. After approximately two hours she concluded her interventions were not assisting and called an ambulance. It arrived about 6.45am by which time Ms Pullen was also at work and she spoke to the ambulance officers.

[7] Ms Millar goes on to say that due to rendering assistance to the resident prior to his transfer to hospital, she did not have an opportunity to complete the required documentation and record what she had done. That led to a phone call from an accident and emergency nurse and, ultimately, a complaint by the nurse which resulted in an investigation by TDHB.

[8] Ms Millar was unaware of the complaint or investigation until 29 August 2014 when she received a letter from the Nursing Council advising TDHB had raised concerns about her competence. The details relate to the transfer, the patient's *critical state of health*, a lack of documentation and alleged failures in respect of clinical decision-making. Attached to the Nursing Council letter was one it received from TDHB dated 4 August 2013 [sic] which detailed the DHB's concerns and expressed a view *the competence of Ms Millar needs to be reviewed to establish fitness to practice*.

[9] In the interim, another issue arose. In early August a new resident was admitted to Port View and came with a large stock of medication (OxyNorm). Ms Millar says Ms Pullen allowed the resident to keep the medication in her room. Ms Millar had concerns about this given the possibility of either the resident overdosing or others finding and consuming the medication. Ms Millar persuaded the resident to give her the medication.

[10] Ms Millar says she recorded the number of OxyNorm tablets in the controlled drug register after counting them with another staff member and locked them in a

controlled medication cupboard. She says she intended returning the medication to a pharmacy when she had a chance and that chance did not arise till Thursday, 14 August. Ms Millar says she gave the pharmacist 263 OxyNorm tablets.

[11] It was also around then (either 13 or 14 August) that HDANZ conducted a follow-up audit to ascertain whether deficiencies identified in its May audit had been addressed and recommendations actioned. Ms Millar says the auditors must have completed a medication count before she took the OxyNorm to the pharmacy as one of the issues raised by HDANZ in August was a claim the OxyNorm count did not match that recorded in the controlled medication book.

[12] These events resulted in a meeting called by Port View on 18 August. It was attended by Cora Noblejas (Port View's director nurse), Ms Pullen and Ms Millar. Notes of the meeting indicate it was called to discuss Ms Millar's competency to practice as a registered nurse and was due to TDHB's complaint and the August audit.

[13] Ms Millar says she was told the meeting was about the auditors having found discrepancies in the OxyNorm count in the controlled medication record. It was alleged the count was 251 tablets which was 12 short. Ms Millar says she tried to explain that at the time of the audit she had counted the medication with another staff member then taken it back to the dispensing pharmacy. She says Ms Noblejas then told her she had to improve her medication competencies and needed to find someone to help her do so. Ms Millar says she was then asked by if she had any annual leave available and having answered yes, Ms Noblejas told her to take it. Ms Millar say she then asked if she was being stood down or fired to which Ms Noblejas said no, she was to go on leave.

[14] Ms Pullen and Ms Noblejas then went to a computer and prepared a document they asked Ms Millar to sign. She did so without first looking at it and still has no idea what it said. According to Port View the document purports to be notes of the meeting but its content differs somewhat from Ms Millar's recollection.

[15] The notes say they initially discussed TDHB's concern about the patient transfer and Ms Millar said she completed the necessary documentation. They then refer to the medication count and record Ms Millar as saying it *was an honest mistake* They go on to record that Ms Noblejas then told Ms Millar that TDHB *not happy for her to continue with her role as registered nurse*. They then note:

> Cora suggested to submit a plan of action to rectify this action.
> Action: Cindy wrote a letter regarding her plan of action attached to this report.

[16] The notes then record that Ms Millar agreed she would concentrate on *upskilling* before returning to her RN position and her practice would be reviewed in one month (18 September 2014) by a TDHB nurse educator.

[17] The attached document, also said to be signed by Ms Millar, states:

> To whom this may concern,
> Plan for Cindy Millar's medication competency.
> 1) Training with nurse educator as soon as I can facilitate one.
> 2) For as long as the nursing educator has certified that I am fully confident of my obligations to practice as a registered nurse.
> Thank you and we will keep you informed about the progress.

[18] Port View immediately took action to upskill Ms Pullen so as to allow her to take over Ms Millar's nursing duties.

[19] The following day, Ms Millar went to the pharmacy and spoke to the pharmacist with whom she had left the OxyNorm. That resulted in a fax confirming 263 pills had been left.

[20] Ms Millar says she was unsure about her employment status following the meeting and contacted Taranaki Community Law Trust. She says she was told to obtain a copy of her personal file and subsequently made that request to Ms Pullen on or about 10 September. She says Ms Pullen refused which led to a meeting between the two on Friday, 12 September 2014. A support person also attended. Ms Millar says she asked what was going on and whether Ms Pullen had heard when she could return to work. Ms Millar says Ms Pullen advised she had heard nothing.

[21] On 25 September, Community Law wrote to Port View on Ms Millar's behalf. The letter challenges the instruction Ms Millar take annual leave and sought certain information.

[22] There was no response and Port View ceased paying Ms Millar on 20 October 2014.

[23] On 30 October 2014, Community Law sent a follow up letter. It ends by advising Ms Millar was ready to return to work. She was of the view there was no reason why she should not and asked that Port View confirm a date for her return by 6 November 2014.

[24] Again there was no response and a further letter followed on 18 November 2014. Port View replied the following day. Their letter referred to the audits and advised *… concerns regarding Cindy's practice were raised and a series of correspondences followed*. The letter goes on to advise that during the meeting of 18 August It was agreed that Cindy would upskill herself in medication competency.

[25] Port View's letter goes on to say:

> On the same day Cindy wrote a letter stating that she will seek training with a nursing educator. We have not heard from Cindy since that day. Meanwhile, as required by the service contract and to avoid being in breach of the service agreement, we have to find a new facility manager as Gerry has moved to the registered nurse role. We act as directed by TDHB and have no control on the situation with Cindy.

[26] Ms Millar takes issue with this. She says:

> I have been waiting for the company to contact me to return to work. I approached the company early September asking what was happening with my employment, but heard nothing further from them.

[27] Nothing further occurred until 12 February 2015 when Ms Millar initiated her personal grievance claim.

Determination

[28] The first issue is whether or not Ms Millar was dismissed. Ms Millar says she was. Port View's initial response was no – she was on unpaid leave awaiting the completion of a competency assessment.

[29] At its simplest, the employment relationship is an exchange of labour for remuneration. On 20 October or thereabouts Port View ceased paying Ms Millar. In doing so it ceased to honour its prime obligation under the employment agreement and given it had no ability under this agreement to enforce an unpaid stand-down it effectively brought the relationship to an end. That is a dismissal.

[30] That this was effectively a dismissal is confirmed by two other factors. First Port View essentially abandoned Ms Millar. An employer cannot simply tell someone to use their annual leave in order that they go and rectify a performance deficiency, assuming one actually existed. The employer is under an obligation to assist the employee in addressing and remediating deficiencies yet Port View did not do so as would have been required had the employment continued. It did nothing; not even confirm the employment continued when Ms Millar later enquired about her status.

[31] Second and even more telling was an admission by Mr Noblejas that he had a discussion with a representative of TDHB on either 14 or 15 August during which he was told to remove Ms Millar. He went on to say he felt the instruction meant permanent removal and that he had no option other than to obey. Mr Noblejas then admitted Port View was of the view the employment had really come to an end during the discussion of 18 August.

[32] In other words the evidence is Port View intended ending the relationship. By ceasing to pay or confirm a continuing relationship when Ms Millar asked that is, I conclude, what it eventually did. Port View sent Ms Millar away - that is a dismissal.

[33] The conclusion Ms Millar was dismissed means I must consider whether or not Port View can justify the dismissal.

[34] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal … occurred.*

[35] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated its concerns. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[36] Port View's initial defence – namely that there was no dismissal implies the answer must be no. That this is the case is confirmed by three factors. First the obligation falls on Port View to justify the dismissal yet it did not call Ms Noblejas who led the discussion of 18 August on its behalf. It did call Ms Pullen but her

evidence would lead to a conclusion the investigation, such as it was, was totally inadequate.

[37] Second there is the fact Ms Millar disputes the content of the notes of the meeting of 18 August and says she was not allowed to explain. I accept that for two reasons. First Ms Pullen confirmed when questioned she could not say Ms Millar was given an opportunity to respond to Port View's concerns. Second Ms Pullen stated the major concern was the medication count yet the letter from the pharmacy suggests there was no error and it may have been the auditors who got it wrong. The failure to consider this appears to confirm a closed mind.

[38] Third I again note Mr Noblejas' admission he understood TDHB had told him to remove Ms Millar and that is what he intended doing. It is well established it is fraught to act on the demands of a third party without first undertaking a proper investigation.[1] It is, I conclude, evident Port View has failed to establish it complied with the requirements of s103A and justify the dismissal.

[39] There is then the issue of size and resource. While Port View is a small employer there is no question a lack of resources excuses these deficiencies. Putting aside evidence Port View had access to professional advice I must be cognizant of the Court's conclusions in *The Salad Bowl Ltd v Howe-Thornley.*[2] At paragraphs [94] and [95] the Court noted such all-encompassing failures are neither excusable nor minor (s.103A(5) of the Act).

[40] The conclusion the dismissal is unjustified raises the issue of remedies. Ms Millar seeks lost wages; reimbursement of the annual leave she was ordered to take and $6,000 as compensation pursuant to section 123(1)(c)(i) of the Act.

[41] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis and Ms Millar asks I exercise the discretion and award wages to the date of the investigation.

[42] There is, however, a duty to mitigate loss and here Ms Millar fails. She says she felt so hurt by her treatment she decided not to seek alternate employment but to retire from the workforce and care for her family. While Ms Millar has not failed to

[1] See for example *Allied Investments Limited v Guise* [2015] NZEmpC 181 at [50]
[2] [2013] NZEmpC 152

mitigate by, for example, refusing an offer of reemployment which might remove any entitlement to lost wages[3] her decision to remove herself from the workforce means I cannot justify an increase on the statutorily payable amount. Ms Millar shall receive three months wages as recompense for remuneration lost as a result of the dismissal.

[43] Ms Millar also seeks $6,720 as reimbursement of the six week leave she was forced to take. For two reasons this claim will succeed. First, and as discussed in [30] above, the rationale behind the ordering of this leave was inappropriate. Second and more importantly an employer must give fourteen days notice of a requirement to take annual leave.[4] Port View failed to do so thus rendering the instruction Ms Millar take leave and the resulting deduction from her leave balance invalid.

[44] Finally Ms Millar seeks $6,000 as compensation for hurt and humiliation. She supported her claim with strong evidence and, as already said, felt so hurt she decided to leave the profession in which she had worked for many years. The evidence would support an award exceeding that sought. It would be improper to penalise an applicant for lodging a very reasonable claim by reducing the amount awarded. Given that and the evidence I consider it appropriate Ms Millar receive the amount sought.

[45] The conclusion remedies accrue means I must in accordance with s 124 of the Act address whether or not Ms Millar contributed to her dismissal in a way which warrants a reduction in remedies. The deficiencies in Port View's investigation means there is no evidence she did. Indeed, and as said in [37] above, the evidence suggests the prime allegation may well have been ill-founded.

Conclusion and orders

[46] For the above reasons I conclude Ms Millar has a personal grievance in that she was unjustifiably dismissed.

[47] As a result I order the respondent, Five Pillars Limited t/a Port View Rest Home, make the following payments to the applicant, Cindy Millar:

i. $14,560.00 (fourteen thousand, five hundred and sixty dollars) gross as recompense for wages lost as a result of the dismissal; and

[3] *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971
[4] Section 19(2) of the Holidays Act 2003

ii. A further $6,000.00 (six thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[48] In addition I have found Ms Millar's leave balance was improperly reduced and she is therefore owed money which would otherwise have been payable on cessation. As a result Five Pillars Limited t/a Port View Rest Home is to pay, in addition to the amount awarded in [47] above, a further $6,720.00 (six thousand, seven hundred and twenty dollars) gross to Ms Millar.

[49] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority