Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 158
3000411

BETWEEN	STEPHANIE BREEN Applicant	
A N D	KIWI FAMILY OTAGO LIMITED Respondent	

Member of Authority:	David Appleton
Representatives:	Jock Lawrie, Counsel for Applicant Cate Andersen, Counsel for Respondent
Investigation Meeting:	12 and 13 September 2017 at Dunedin
Submissions Received:	20 September 2017, from the Applicant 20 September 2017, from the Respondent
Date of Determination:	25 September 2017

DETERMINATION OF THE AUTHORITY

A. The applicant was unjustifiably dismissed from her employment and is awarded the remedies set out in this determination.

B. The respondent breached ss 64(1) and 64(3) of the Employment Relations Act 2000.

C. Costs are reserved.

Prohibition from publication order

[1] Evidence produced before the Authority contained the names of several residents of the Woodhaugh Rest Home. These individuals played no part in the proceedings, and it is not necessary for this information to be publicised. I therefore prohibit from publication any information which identifies those residents.

Employment relationship problem

[2] Ms Breen claims that she was unjustifiably dismissed from her employment with the respondent. Ms Breen seeks remedies in relation to her alleged unjustified dismissal. She also seeks a declaration that the respondent breached ss 64(1) and 64(3) of the Employment Relations Act 2000 ("the Act") but Ms Breen no longer seeks the imposition of a penalty in respect of these alleged breaches. Mr Lawrie also confirmed at the start of the investigation meeting that Ms Breen no longer argued that she had suffered any unjustified disadvantage in her employment.

[3] The respondent denies that Ms Breen was unjustifiably dismissed. They also deny breaching ss 64(1) and 64(3) of the Act.

Key events leading to the dismissal

[4] Ms Breen worked as the Facility Nurse Manager at the Woodhaugh Rest Home in Dunedin between January 2012 and 10 October 2016, when she was dismissed. Ms Breen is 63 years old and has been a registered nurse for forty two years.

[5] Woodhaugh Rest Home is owned by the respondent and is a graduated care facility with seventy beds, encompassing both rest home and hospital level care. Ms Breen was employed pursuant to the terms of an individual employment agreement between herself and Cressida Healthcare Group, the former name of the respondent company. Ms Breen reported

to the (then) General Manager of the respondent, Janice van Mil, who was based in Auckland. Ms Breen also had dealings with one of the directors and shareholders of the respondent company, Zhanna Kirkland.

First written warning

[6] It appears that the parties are in agreement that, up until late 2015, the respondent was generally pleased with the work performance of Ms Breen. However, on 12 November 2015 Ms van Mil wrote to Ms Breen advising her that a series of issues had come to her attention for which she wanted a response from Ms Breen. In summary, these involved concerns about a failure to ensure that the facility's healthcare database system (called Interaii) contained up to date information. In addition, Ms van Mil expressed concerns about the way that the registered nurse weekly drug checks had been followed up, the way that a monthly schedule had been completed, the fact that a healthcare assistant did medication competencies (instead of a registered nurse) and a failure not to use the respondent's orientation package.

[7] Ms Breen explained her position with respect to the allegations by way of a letter dated 18 November 2015 but Ms van Mil expressed herself to "still have a few concerns" regarding Ms Breen's reply in a letter dated 2 December 2015. This letter ended with the following paragraph:

> We will be placing these letters on file and are to reflect your first warning in regards to your work performance. We expect to see an improvement in your performance over the next six weeks and will then review your performance against both your job description and your KPI's.

No formal disciplinary meeting had taken place between Ms Breen and Ms van Mil prior to the issuing of this first written warning, and Ms Breen had not been advised that the respondent's concerns could lead to the issuing of a warning prior to her giving her responses.

Second written warning

[8] On 28 December 2015 Ms van Mil visited Woodhaugh and found that there was missing information and that residents' records were not up to date. On 31 March 2016, Ms van Mil attended Woodhaugh again to audit the files. She says that she found incomplete information on the five resident files that she audited and so wrote an email to Ms Breen on 1 April 2016 stating that "she was very upset that your Interaii assessments are so far behind". Ms van Mil stated that the maintaining of current residents' records was Ms Breen's responsibility and part of her KPI's. She said that she wanted an explanation why the records again were not to the required standard.

[9] Ms van Mil sent a chasing email to Ms Breen on 11 April seeking a written response to her previous email. Ms Breen responded by way of a short email on 12 April 2016 indicating that she and Ms van Mil had had a discussion and saying that they had been working on an incorrect schedule and saying that the registered nurses were each doing the audit for care plan reviews in accordance with the audit timetable. She also referred to one of the registered nurses not having completed her Interaii training until August the previous year and another registered nurse being off on extended annual leave.

[10] Ms van Mil responded to Ms Breen's email of 12 April stating that she had not received the new schedule of care plan reviews or an audit of care plan reviews and opining that the explanation with respect to the registered nurse completing her training the previous August was no longer an excuse. She also referred to her visit on 28 December 2015 in which she had reminded Ms Breen that there were records still not up to date and that Ms Breen had assured her that she had a plan in place to rectify the situation. The letter of 15 April 2016 ended as follows:

> Despite previous verbal communications your poor work performance has continued and your explanations in response to these issues have been unsatisfactory.
>
> I expect to see significant improvement in your work performance over the next month, when your performance will be reviewed.

> This letter will be placed on your file and reflect your second warning in regards to your work performance.
>
> In the meantime, if you require any assistance with training or if you are in doubt as what is required, please contact me and these needs will be met.

[11] Again, no formal disciplinary meeting had taken place between Ms Breen and Ms van Mil prior to the issuing of this second written warning, and Ms Breen had not been advised that the respondent's concerns could lead to the issuing of a warning prior to her giving her responses.

Ms Breen's application for employment at Dunedin Hospital

[12] In April 2016 Ms Breen applied for a role at Dunedin hospital and told Ms van Mil about her application. Ms Breen's application was unsuccessful. Ms van Mil told her that she had been so sure that Ms Breen would be successful that she had already advertised her position on Trade Me Jobs and Myjobspace.co.nz. She says she had removed the advertisement from the Trade Me Jobs site but had forgotten to do so from Myjobspace.co.nz.

The audit

[13] Ms van Mil says that she remained concerned about the functioning of Woodhaugh home and spoke to the directors, Mrs Kirkland and Mr Graeme Kirkland. They agreed that an independent audit would help them to understand how the hospital was functioning. This audit was to be a spot audit and so Ms Breen was not to be warned of it. The audit took place on 16 July 2016 and was conducted by an external auditor, Ms Elizabeth Lear. The audit report was completed on 30 July 2016.

[14] Ms Breen's evidence is that she became aware that a visitor was coming to the facility on 16 July and asked Ms van Mil if that were true but was told that it was not. Ms Breen says that, on 15 July 2016, she completed a full day shift from 7am to 3pm and, due to short staffing, arranged to cover the night shift herself as well which was between 11pm and 7am. She therefore saw Ms Lear arrive with Ms van Mil on the morning of 16 July and was told by

Ms van Mil that Ms Lear was there to audit the facility. Ms Breen says that Ms van Mil told her to go home and to come back late in the afternoon to speak to Ms Lear. Ms van Mil says that she did not insist Ms Breen went home.

[15] On these two points, I accept first that the respondent wanted to do a spot audit and did not want to warn Ms Breen that that was their intention. Whilst it is unfortunate that this caused Ms van Mil to lie to Ms Breen, no personal grievance for unjustified disadvantage has been raised in respect of that, nor is it being pursued before the Authority. I do not accept in any event that the carrying out of an audit without warning was unreasonable given that Ms van Mil had had long term concerns about the running of the facility for some months.

[16] Second, it is not necessary for me to determine whether Ms van Mil insisted that Ms Breen go home or not, as there is no unjustified disadvantage raised in respect of this allegation. In any event, given that Ms Breen said in evidence that she did not know herself where many of her files were located on the day of the audit, her presence would not have wholly assisted Ms Lear.

[17] Ms Breen says that she could not sleep following her return home from night shift and felt surprise and concern that the audit was happening without her input. She says that her office had recently been emptied due to renovations taking place and that her files were spread throughout the building. She also says that she felt misled by Ms van Mil who had told her that no one was coming down to Dunedin that day.

[18] Ms Breen met with Ms Lear and Ms van Mil later that day, as arranged, and Ms Lear mentioned concerns about the absence of completed staff appraisals, non-adherence to the staff education programme and issues with medication charts.

[19] Ms Breen says that Ms van Mil asked her whether she was motivated to fix the problems but that, as Ms Breen had been up for 36 hours without sleep and had been subject to a surprise audit without any input, she replied "at this particular moment, no". According

to Ms van Mil, she understood Ms Breen to mean she was not motivated to fix the problems generally and says that Ms Breen also said that she knew there were issues with the facility.

Meeting of 8 August 2016

[20] Subsequent to the meeting with Ms Lear, Ms van Mil arranged to meet with Ms Breen to discuss what they could do to implement the changes required to address the issues in the audit. This meeting took place on 8 August. Ms Breen was provided with a copy of the audit report which had been received by the respondent on 31 July 2016. Ms van Mil says that she told Ms Breen that she had serious concerns as to the functioning of the Woodhaugh facility and suggested that Ms Breen undertake some further training at one of the company's facilities in Taranaki. Ms van Mil says that Ms Breen said that she did not want to travel to Taranaki and stated that she was looking for new employment. She says that she told Ms Breen that they would therefore have to start advertising for her position. Ms van Mil says that she understood that and consented to that. Ms Breen denies this.

[21] Ms Breen, on the other hand, says that Ms van Mil made no mention of training at the Taranaki facility and says that Ms van Mil asked her to go there for three months whilst the company was completing renovations at Woodhaugh. She says that she believes that there was no facility manager at the Taranaki facility at the time so no one would have been there to provide hands-on training in any event. As nothing of significance turns on what was said about Taranaki I do not take this any further.

[22] There was also evidence given about whether Ms van Mil advertised for a replacement for Ms Breen's role on 1 July 2016. Ms van Mil denies this, and says that the advert appeared on Myjobspace.co.nz automatically because she had not cancelled it from when she had placed an advertisement in April. I accept this evidence. Conflicting evidence was also given about whether or not Ms Breen told Ms van Mil after the audit that she was looking for alternative employment.

[23] This evidence is pertinent, I understand, because there is a suggestion that the advertising for Ms Breen's position shows that the respondent was planning to dismiss her as early as August 2016. Taking into account the totality of the evidence, including the significant efforts which the respondent made to fix a date for the disciplinary meeting, I do not believe this to be the case. I also accept Ms van Mil's evidence that Ms Breen had said after the audit that she was looking for alternative employment.

[24] Ms Breen and Ms van Mil agreed at the meeting on 8 August 2016 that Ms Breen would draft a corrective plan to facilitate improvements in the management of the facility. By misfortune, Ms Breen received a workplace injury to her shoulder on the evening of her meeting with Ms van Mil and was away from work on sick leave from 9 August to 25 September 2016.

Attempts to fix the date of a disciplinary investigation meeting

[25] There then followed, from 12 August 2016 onwards a series of letters and emails between Ms van Mil, Celeste Crawford, an organiser for the New Zealand Nurses Organisation (the NZNO), Len Andersen, a barrister acting for the respondent, and Lynley Mulrine (lead organiser for the NZNO) in respect of trying to arrange a meeting for Ms Breen to take part in an investigation by the respondent into its concerns arising out of the audit. These letters and emails occurred between 12 August and 7 October 2016 but no meeting ever occurred. As the respondent dismissed Ms Breen on 10 August 2016 in her absence, it is necessary to closely analyse the correspondence passing between these various individuals to ascertain whether the parties' respective actions were reasonable or not.

[26] However, it is also necessary to set out contents of the first letter, dated 12 August 2016 from Ms van Mil to Ms Breen, as it describes the concerns that the respondent wished to investigate with her.

Dear Stephanie

You are required to attend a meeting at Woodhaugh Rest Home on Thursday 18th of August at 2pm to assist in the investigation of the following:

1. That the Clinical Management at Woodhaugh is not up to the required standard and this has been the case over the last two years and again was highlighted in the last audit on the 30th July 2016.

    (i) that the number of medication errors have placed the facility at high risk.

    (ii) that only 2 MDR's have been completed on time for the 36 residents.

    (iii) that five residents either had missing or incorrect medical review forms completed.

    (iv) that intervaii triggers are not reflected in several care plans as per requirements of the MOH, see reference in external audit.

2. That the operational Management at Woodhaugh is not up to the required standard as highlighted at the last audit.

    (v) that out of 36 residents, 10 residents do not have Long Term admission agreements completed and signed for.

    (vi) that the audits have not been fully completed and fail to meet the standards.

3. That the education of the staff has not been followed as per the organisational education schedule. See referenced in external audit.

4. That Staff appraisals have not been completed in a timely manner as per our policy and MOH requirement. See reference in external audit.

5. That at the meeting on the 30th of July following the audit you admitted to Liz Lear and myself that you knew there were issues but lacked the motivation to remedy the systemic failures.

6. That there remains a large number of outstanding receivables due to incorrect information being sent to head office and lack of processes in place when a resident is admitted.

The number of corrective actions identified and required to bring the facility back on track are excessive and would have put the facility under the

surveillance by the DHB and the MOH. With a possible temporary Manager put in place.

Kiwi Family has worked hard to improve the reputation of the group of facilities and with your seeming lack of Oversite [sic] and Management of the facility you have placed us in a very serious position.

I bring your attention to the job description that lists your roles and responsibilities as a facility Manager.

You will be given an opportunity to respond in full to these matters at the meeting. You are entitled to bring a lawyer, union delegate and/or other support person with you to that meeting.

The matters raised in this letter are serious and, if the result of the investigation is that you are guilty of serious misconduct then the most serious consequence could be summary dismissal. You will be advised the result of the investigation and, if the investigation reveals misconduct on your part then you will be given an opportunity to make submissions as to the disciplinary outcome.

It is possible you could be suspended at the conclusion of the meeting and you will be invited to comment on whether you should be suspended and, if you are suspended, whether that is with or without pay.

You are not to discuss this meeting nor the contents of this meeting with any staff member and it is to be treated as confidential, breaking this confidentiality will lead to possible reparations [sic].

Please do not hesitate to contact me if you have any questions or comments about the meeting.

Yours faithfully
Janice van Mil

[27] The following is a summary of the correspondence that followed the letter between the individuals named above:

(a) 15 August 2016, Ms Crawford emailed Ms van Mil, declining the meeting on 18 August due to unavailability, and proposing a meeting on 24 August.

(b) 15 August, Ms van Mil emailed Ms Crawford declining 24 August due to unavailability and proposing a meeting the following week, subject to the availability of Mr Andersen.

(c) 17 August, Ms van Mil proposed the meeting take place in the week of 29 August apart from 31 August, as Mr Andersen was not available on that day.

(d) 24 August Ms van Mil emailed Ms Breen saying that she had not heard back from Ms Crawford, and proposing the meeting take place on 1 September.

(e) 24 August 2016, Ms Crawford emailed Ms van Mil to say that she was trying to confirm the availability of a member of the professional team to attend the meeting.

(f) 31 August 2016, Ms Crawford emailed Ms van Mil proposing the meeting take place on 13 September. Ms van Mil responded the same day saying that she was unavailable on 13 September and said that the request for an adjournment of the meeting would be considered at the meeting which was to take place the following day, 1 September. Ms Crawford replied saying that "we" would not be at the meeting on 1 September. Presumably, by "we" she meant her and Ms Breen.

(g) 1 September 2016, Ms van Mil emailed Ms Crawford agreeing to postpone the meeting and proposing 20 September.

(h) 14 September, Ms Crawford confirmed by email to Ms van Mil that she and Ms Breen would attend the meeting on 20 September.

(i) 16 September, Ms van Mil emailed Ms Crawford to say that she was in hospital.

(j) 19 September, Ms van Mil emailed Ms Crawford to say that she was out of hospital but was unable to fly. She therefore wished to postpone the meeting until the week of 2 October.

(k) 23 September, Ms Crawford spoke to Ms van Mil and said that she was only available on 4 and 5 October of that week, and was available every day the following week except for 10 October.

(l) 26 September, Ms Crawford and Ms van Mil had a conversation during which the respondent advised that it was their preference that Ms Breen did not return to work on 26 September until matters were resolved. She was therefore placed on fully paid leave.

(m) 27 September, Ms van Mil emailed Ms Crawford stating that she was still unable to travel and wondered if she and Ms Breen would travel to Auckland for the meeting.

(n) 29 September, Ms Crawford stated that her calendar and that of Lorraine Ritchie, Professional Nursing Adviser, who was going to accompany her and Ms Breen to the meeting, did not allow them to travel to Auckland. It also emerged in evidence that Ms Breen's shoulder injury would also have prevented her from travelling to Auckland at that time.

(o) 4 October 2016, Ms Crawford emailed Ms Breen to say that she had not heard from the respondent in relation to the proposed meeting dates.

(p) 4 October, Mr Andersen emailed Ms Crawford to say that the two directors of the company would fly to Dunedin for a meeting on Friday 7 October, which would take place in his chambers. He also stated that Ms Breen was required to be present.

(q) 5 October 2016, Ms Crawford replied saying that she and Miss Ritchie could not attend on 7 October and suggested three alternative dates (12, 18 or 19 October). Mr Andersen replied saying *"*it has been too long and the meeting will go ahead. I am sure you can arrange for other representation*"*. Ms Crawford responded setting out a timeline of all the correspondence between the parties showing the different proposals and counter-proposals that had been made with respect to a meeting date. Ms Crawford also stated that Ms Breen was available to meet on 7 October but that she wished to be represented and that her representatives would not be able to attend.

(r) 5 October, Mr Andersen responded saying *"*the problem is that Ms Breen is currently on full pay. If the hearing was to be adjourned to when either the Kirklands were next in Dunedin or Ms van Mil was able to travel, would Ms Breen agree to be being suspended without pay in the interim?".

(s) 6 October, Ms Mulrine responded on behalf of Ms Crawford asking Mr Andersen to confirm a meeting time from alternative dates already suggested by the NZNO.

(t) Mr Andersen responded the same day saying that Ms van Mil could not travel and that Ms Breen would not travel to Auckland "so the directors have come to Dunedin to conduct the disciplinary meeting. While my client has made every effort to allow Ms Breen to be represented by her chosen representative, that does not seem possible and my client cannot be expected to continue to pay Ms Breen until a meeting date suits your organisation".

(u) 7 October Ms Mulrine emailed Mr Andersen to say that "we are unable to meet with you today". She asked that alternative dates be put forward. Mr Andersen responded the same morning stating that "Mr and Mrs Kirkland have travelled to Dunedin for the disciplinary meeting this morning". He also stated that "while every effort had been made to allow Ms Breen to have her choice of

representative at the meeting, that has not been possible. My client would have been prepared to adjourn the meeting to a date that suited your organisation if it did not have to pay Ms Breen during the period of adjournment as she is currently suspended but being paid. You confirmed that Ms Breen was not prepared to agree to not being paid during any adjournment of the meeting. The meeting will be proceeding this morning and Ms Breen is required to attend".

[28] On 10 October 2016, Mrs Kirkland wrote the following letter to Ms Breen:

> **Re: Your Employment**
>
> A letter was sent to you on 12 August 2016 identifying issues of concern following the audit report completed on 30 July 2016 which indicated serious problems in your performance of duties as manager of the Woodhaugh Rest Home.
>
> You were required to attend a disciplinary on Thursday 18 August at 2 pm. For a variety of reasons the date had to be changed and you were required to attend the meeting at 11 am on Friday 7 October 2016. Your representatives indicated that you were able to attend that meeting although your representative was not able to do so.
>
> You failed to attend the meeting on 7 October without excuse despite the fact that you had been suspended on full pay and were required to attend by your employer.
> As a consequence of your failure to attend the meeting, the issues raised in the audit report and the letter of 12 August 2016 have been considered in your absence.
> It is the view of Kiwi Family Otago Ltd that you are guilty of serious misconduct both in relation to the issues raised in the letter of 12 August 2016 and also in your failure to attend the meeting you were required to attend on 7 October.
>
> The decision is that you will be summarily dismissed as a result of your serious misconduct. You will not be paid for 7 October 2016 as a result of your failure to attend the disciplinary meeting.
>
> Your entitlement to holiday pay has been calculated and it will be paid on 7 October 2016.

[29] By way of a letter dated 19 October 2016 addressed to Mr Andersen, Ms Crawford raised a personal grievance for unjustifiable dismissal.

The issues

[30] There are two issues to be determined:

(a) Whether Ms Breen was unjustifiably dismissed;

(b) Whether the respondent breached ss 64(1) and (3) of the Act.

[31] In determining the first matter, it is necessary to consider the circumstances under which Ms Breen was dismissed in her absence. In particular, the following sub issues:

(a) Whether Ms Breen deliberately failed to attend the disciplinary meeting of 7 October 2016;

(b) Whether Ms Breen acted unreasonably in requiring that she be accompanied by her representatives at the disciplinary meeting;

(c) Whether the decision to dismiss Ms Breen on 7 October 2016 was procedurally justified;

(d) Whether the decision to dismiss Ms Breen on 7 October 2016 was substantively justified.

Did Ms Breen deliberately fail to attend the disciplinary meeting of 7 October 2016?

[32] Ms Breen said that she did not know that she risked being dismissed if she did not attend the meeting on 7 October 2016. She was not prepared to attend without her representation she said and believed that the meeting was going to be adjourned when no-one from the NZNO could attend.

[33] Mr Andersen, who was liaising with Ms Mulrine on that day, accepted in evidence that he did not spell out to Ms Mulrine that Ms Breen risked dismissal for serious misconduct if she did not attend. He said that that was not necessary and that the union should have realised this would be the position.

[34] Mr Andersen also said that he had not expected Ms Breen to have turned up, but had hoped she would. He said that if she had turned up without representation, that would have created a dilemma for the Kirklands.

[35] Ms Mulrine's evidence was that she had hoped that the meeting would be adjourned, even though Mr Andersen made it clear that the meeting would go ahead, and that, in 30 years of having been involved with the NZNO, she had never known an employer dismiss an employee in their absence when union representation was unavailable.

[36] Taking all this evidence into account, I conclude that Ms Breen had not been told that she risked dismissal if she did not attend the meeting on 7 October. Furthermore, it is not reasonable to impute to her an expectation that she would have been, given all the attempts that had been made up to that date to agree a meeting where all could take part.

[37] I distinguish the case of *Fox v Hereworth School Trust Board*[1] referred to by Ms Andersen in her submissions, as Ms Breen did not "refuse to participate in any form of dispute resolution." She was, on the contrary, willing to attend the disciplinary investigation meeting along with appropriate representation.

Did Ms Breen act unreasonably in requiring that she be accompanied by her representatives at the disciplinary meeting?

[38] An employee does not have an absolute right to be accompanied by the representative of his or her choice. For example, in most circumstances an employee could not reasonably insist on being represented by a representative who had no free time for several weeks, or who

[1] [2013] NZERA, Auckland 45

refused or consistently failed to indicate their availability, or who imposed unreasonable conditions of representation.

[39] I am not satisfied though that Ms Breen had been acting unreasonably in insisting that she be represented by Ms Crawford and Ms Ritchie. First, she was advised in the letter of 12 August 2016 that the matters raised in it were serious, and that she could be summarily dismissed. Second, the letter also advised her that she was entitled to bring a lawyer, union delegate and/or other support person with her to the meeting.

[40] In addition, the matters Ms Breen had to answer related to clinical management issues as well as administrative issues, and Ms Breen needed assistance from both a nursing specialist (Ms Ritchie) and someone with expertise in the disciplinary process (Ms Crawford). Neither one of them could assist on both matters.

[41] Furthermore, the meeting was going to take place in Mr Andersen's chambers, which Ms Breen said she found intimidating, and Mr Andersen, an experienced barrister, was going to be present at the meeting on 7 October, as well as Mrs Kirkland, with Mr Kirkland and Ms van Mil being available on the telephone. She was entitled not to be outnumbered in that way.

[42] Also, Ms Crawford and Ms van Mil had spent a considerable amount of effort over an extensive period of time in trying to find dates when all relevant individuals were free to attend the disciplinary meeting, and several dates had been proposed over time by both sides. Ms Breen could reasonably infer, therefore, that the respondent accepted her wish to be accompanied by her representatives.

[43] Finally, the NZNO had suggested three alternative dates in the following two weeks when they could have attended to represent Ms Breen.

[44] Taking all these factors into account, I find that it was not unreasonable for Ms Breen to insist on being accompanied at the meeting by her two chosen representatives from the

NZNO in the circumstances that prevailed at the time. I distinguish the case of *Watson v Progressive Enterprises Limited*[2] cited by Ms Andersen.

Was the decision to dismiss Ms Breen on 7 October 2016 procedurally justified?

[45] The decision to dismiss Ms Breen was made by Mr and Mrs Kirkland. Mrs Kirkland said that she did not have any comments from Ms Breen about the respondent's concerns and that she had relied on statements from Ms van Mil and Ms Lear to satisfy herself that the allegations were proven.

[46] Mrs Kirkland also said that she and Mr Kirkland had found that both the audit findings and the failure of Ms Breen to attend the meeting separately constituted serious misconduct.

[47] Mrs Kirkland also said that she had relied on the previous written warnings to decide to dismiss Ms Breen.

[48] Section 103A of the Act sets out what an employer must do to enable the Authority to find that a dismissal or action was justifiable. Section 103A provides as follows:

> **Section 103A Test of justification**
> (1) 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 applying the test in subsection (2).
> (2) The test is 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 or action occurred.
> (3) In applying the test in subsection (2), the Authority or the court must consider—
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

[2] AA 38/10, ERA 29 January 2010

> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
> (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
> (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
> (a) minor; and
> (b) did not result in the employee being treated unfairly.

[49] Mrs Kirkland's evidence discloses several fundamental procedural failings. First, the respondent did not give Ms Breen a reasonable opportunity to respond to its concerns arising from the audit before dismissing her, as it did not get Ms Breen's explanation for the audit findings. This also means it did not reasonably investigate the concerns, and did not genuinely consider Ms Breen's explanations.

[50] Mrs Kirkland also relied upon the previous warnings, which had been imposed without a fair process having been followed. Finally, Ms Breen had not been warned that non-attendance at the meeting on 7 October would itself be regarded as serious misconduct. It was not reasonable to have expected the NZNO to have simply inferred that, as was suggested by Mr Andersen.

[51] The respondent knew as early as 23 September that Ms Crawford could not attend the meeting on 7 October. Even if the only date that Mr and Mrs Kirkland could have travelled to Dunedin was 7 October, they could have asked Ms Breen to give her answers to the concerns in writing first. They did not. It was not incumbent upon Ms Breen to have done so without having been asked, as she was expecting to be able to answer the concerns at a face to face meeting.

[52] In any event, it does not appear to be the case that 7 October was the only date that the meeting could have occurred from the point of view of the Kirklands, even though Mrs Kirkland implied this in her oral evidence before the Authority, when she said it could

have been another month before she could attend Dunedin again, and that she needed the matter dealt with because of the risks to her business.

[53] I conclude that the reason for the rush to get the meeting done on 7 October was the Kirklands' concerns about having to continue to pay Ms Breen during her period of suspension rather than concerns about the delay *per se*.

[54] This conclusion is based on emails from Mr Andersen to Ms Crawford and Ms Mulrine. He refers to Ms Breen's pay on four separate occasions, and spells out the concern that the Kirklands had in his email of 5 October to Ms Crawford when he states:

> The problem is that Ms Breen is currently on full pay. If the hearing was to be adjourned to when either the Kirklands were next in Dunedin or Ms van Mil was able to travel, would Ms Breen agree to be being suspended without pay in the interim?

[55] The individual employment agreement actually gave the respondent the discretion to place Ms Breen on unpaid suspension. Whilst the respondent would have had to have consulted with Ms Breen before exercising such a discretion, ultimately, it had the power to do so. That step would have had less of an impact upon Ms Breen than proceeding with a meeting, and dismissing her in her absence.

[56] I also doubt that the rush to have the investigation concluded on 7 October was based upon a need to address the risks exposed in the audit. First, the audit had uncovered the concerns on 16 July 2016, some 12 weeks before the meeting of 7 October. Second, a temporary facility manager had been appointed in the interim, and the assistance of a quality manager from Auckland utilised. The risks were therefore already being addressed, and dismissing Ms Breen on 7 October was unrelated to the mitigation of those risks.

[57] Analysing the communications between the NZNO and the respondent it is clear that the NZNO declined four proposals for a meeting (18 August, 1 September, an unspecified meeting in Auckland and 7 October) and the respondent declined or cancelled four proposed meetings (24 August, 13 September, 20 September and the three alternative dates proposed

by Ms Crawford on 5 October). Therefore, the delay in finalising the meeting lay equally in the hands of the respondents as it did in the hands of Ms Breen (or rather her representatives). In addition, it was not the fault of Ms Breen that Ms van Mil had become ill and had been unable to attend the meeting on 20 September, and fly to Dunedin subsequently.

[58] Therefore, it is not possible to say that Ms Breen's approach, or that of the NZNO was unreasonable in comparison with the respondent's.

[59] Furthermore, one of the dates proposed by Ms Crawford, 12 October, was only three working days after 7 October which the respondent insisted upon. The respondent never stated at the time that they were unable to attend the meeting on 12 October. Mrs Kirkland said in evidence that she could not have managed to attend Dunedin on that date, but would not elaborate why, other than that her husband was ill. However, he was also ill on 7 October and, as a consequence, did not physically attend the meeting on 7 October.

[60] In conclusion, I find that, in all the circumstances, no fair and reasonable employer could have proceeded with the disciplinary meeting on 7 October 2016 without either Ms Breen or her representative being present, and without first having obtained a full written response from Ms Breen to the concerns. The dismissal was therefore procedurally unjustified.

Was the decision to dismiss Ms Breen on 7 October 2016 substantively justified?

[61] Mrs Kirkland said she had no option but to dismiss Ms Breen because of the risk to the business. However, Mrs Kirkland did not have any idea what Ms Breen's responses to the allegations were. She simply accepted the audit findings and Ms van Mil's comments. It is possible that, if Mrs Kirkland had been acting reasonably, Ms Breen's explanations could have persuaded her that Ms Breen had not committed serious misconduct.

[62] In fact, I am not convinced that the findings of the audit report, even if all correct, reasonably enabled the respondent to find that Ms Breen had committed misconduct at all, as

that implies a wilfulness for which there appears to be little cogent evidence. A better approach would have been to have treated the failings as arising from shortfalls in Ms Breen's performance. A performance improvement programme could then have been implemented that would have taken into account resourcing and other difficulties referred to by Ms Breen.

[63] In conclusion, I am unable to safely conclude that, had the Kirklands heard Ms Breen's explanations, they would still have been able to have concluded that summary dismissal was the only reasonable outcome. I cannot, therefore, find that the dismissal was substantively justified.

[64] My finding is that the dismissal was unjustified.

Did the respondent breach ss 64(1) and (3) of the Act?

[65] Section 64 of the Act provides as follows:

> **64 Employer must retain copy of individual employment agreement or individual terms and conditions of employment**
> (1) When section 63A applies, the employer must retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment (as the case may be).
> (2) If an employer has provided an employee with an intended agreement under section 63A(2)(a), the employer must retain a copy of that intended agreement even if the employee has not—
> (a) signed the intended agreement; or
> (b) agreed to any of the terms and conditions specified in the intended agreement.
> (3) If requested by the employee, the employer must, as soon as is reasonably practicable, provide the employee with a copy of the employee's—
> (a) individual employment agreement or current terms and conditions of employment retained under subsection (1); or
> (b) intended agreement retained under subsection (2).
> (4) An employer who fails to comply with subsection (1), (2), or (3) is liable, in an action brought by a Labour Inspector or the employee concerned, to a penalty imposed by the Authority.
> (5) Before bringing an action under subsection (4), the Labour Inspector must—
> (a) give the employer written notice of the breach of this section; and

> (b) give the employer 7 working days to remedy the breach.
> (6) To avoid doubt, an intended agreement must not be treated as the employee's employment agreement if the employee has not—
> (a) signed the intended agreement; or
> (b) agreed to any of the terms and conditions specified in the intended agreement.

[66] Section 64 applies when an employee and employer have bargained for an individual employment agreement or individual employment conditions (see s. 63A). This was the case here.

[67] The respondent took some considerable time in locating Ms Breen's employment agreement, disclosing it on 26 June 2017. Ms van Mil effectively blamed Ms Breen for this on the basis that Ms Breen was responsible for keeping personnel files. The agreement was eventually found several months after Ms Breen's dismissal. It is not clear where or exactly when it was found, or how assiduously the respondent had looked for it, as Ms van Mil had not been employed by the respondent since December 2016.

[68] Strictly speaking, the respondent did not fail to retain a signed copy of Ms Breen's individual employment agreement. It simply could not find it for several months. However, the section needs to be interpreted purposively, and read in the context of the entire section. That is, the section's main purpose is to ensure the parties have a record of the agreement that has been reached between them which they can refer to when required.

[69] There was a duty resting with the respondent, as opposed to Ms Breen, to ensure it could access the agreement when requested, because it expressly had the duty to retain it. A failure to be able to locate the agreement when requested is, in my view, a practical breach of the duty to retain it.

[70] If that is wrong, the respondent did fail to provide Ms Breen with a copy of the agreement. Whilst it may say that it did so as soon as it was reasonably practicable, a wait of several months is not reasonable. The wait was due to the respondent's failure to ensure it

could locate the agreement, or alternatively, retain it in a known place. It is not reasonable to place the onus on Ms Breen for having lost the agreement. The respondent had the duty to retain it, not her.

[71] So, in conclusion, the respondent has breached ss 64(1) and (3).

Remedies

[72] Having been successful in her claim of unjustified dismissal, Ms Breen is eligible for an award of remedies. Sub-section 123(1)(a) to (c) of the Act provides as follows:

> **123 Remedies**
> (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
> (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:
> (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
> (c) the payment to the employee of compensation by the employee's employer, including compensation for—
> (i) humiliation, loss of dignity, and injury to the feelings of the employee; and
> (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[73] Section 128 provides:

> **128 Reimbursement**
> (1) This section applies where the Authority or the court determines, in respect of any employee,—
> (a) that the employee has a personal grievance; and
> (b) that the employee has lost remuneration as a result of the personal grievance.
> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[74] Ms Breen seeks an award of $36,739.98, being her claimed loss between 7 October 2016 to 12 September 2017, the date of the Authority's investigation meeting. In other words, Ms Breen seeks that the Authority exercise its discretion and award compensation for loss of pay for a greater period than that set out in s 128(2).

[75] When I consider whether that would be appropriate, I must take into account that Ms Breen sought alternative employment in April 2016, and also in or around August 2016. She had therefore displayed a desire to leave the employment of the respondent for some time. It is unlikely that she would have changed her mind about that desire after having been subjected to suspension and a disciplinary investigation. In addition, the respondent had found a number of problems with the running of the facility which had been ongoing for several months. It is possible that the respondent, following a fair performance improvement process with her, may have been able to have justifiably dismissed her within the period of three months.

[76] For these reasons, I cannot confidently exercise the discretion in s 128(2) as it is not more likely that Ms Breen would have remained employed for more than three months.

[77] Ms Breen is therefore entitled to the lesser of a sum equal to her lost remuneration or to 3 months' ordinary time remuneration. Three months' ordinary time remuneration equates to the gross sum of $19,331.04. Mr Lawrie calculated that Ms Breen's loss of remuneration was $36,739. She is therefore entitled to an award of loss of earnings in the gross sum of $19,331.04.

[78] Ms Breen would also have been entitled to have received her weekly on call allowance, and her KiwiSaver contributions, which are benefits falling under s 123(1)(c)(ii) of

the Act. The on call allowance for three months amounts to the gross sum of $394.20. The KiwiSaver contributions for three months amount to the gross sum of $591.69.

[79] Finally, whilst it was not expressly pleaded, Ms Breen also asks via Mr Lawrie's submissions for an award of holiday pay. I believe that it is appropriate to award holiday pay for three months' employment. This is calculated as the gross sum of $1,483.51.

[80] Ms Breen is also entitled to be considered for an award of compensation pursuant to s 123(1)(c)(i) of the Act. Ms Breen seeks compensation in the sum of $20,000. She described in her brief of evidence that it was devastating for her to have been dismissed after a 40 year career. The dismissal put her professional registration at risk she says.

[81] Ms Breen also says that she felt a huge loss of confidence following her dismissal, and she became constantly worried and anxious about undertaking small tasks. She felt that all the joy had gone out of her life, and she found herself withdrawing from social contacts.

[82] She started suffering from insomnia and a constant low mood. In the early part of 2017 she sought medical advice. She was prescribed an anti-depressant, and sleeping tablets. Ms Breen said that all of these effects were a direct result of her dismissal, and that she got "really depressed". She had never suffered depression before, except for post-natal depression.

[83] Ms Breen also said in evidence that the aged care industry in Dunedin is very small, and that she had been well known in the industry. It had been humiliating for her to say that she had been sacked.

[84] None of this evidence was challenged by the respondent in any way. I accept this evidence, and find that the effects of Ms Breen's unjustified dismissal were relatively severe. I believe that an award of $20,000 is appropriate.

[85] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in

respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[86] I do not find that Ms Breen contributed in any blameworthy way towards her non-attendance at the meeting on 7 October 2016. However, I must bear in mind that there were a number of findings of serious shortfalls in the functioning of the Woodhaugh facility after the audit. Some of these shortfalls had been on-going for some considerable time. Whilst I have no doubt that the Woodhaugh facility was a difficult facility to run, with resourcing and infrastructure problems, I have little hesitation in finding that Ms Breen bore a proportion of responsibility for these shortfalls. She cannot wash her hands of them totally. I get the distinct impression from her own evidence, as well as that of the respondent, that she had let the management of the facility get away from her.

[87] I find that she did contribute to the situation that gave rise to the personal grievance and that those actions require a reduction to the remedies that would otherwise have been awarded accordingly. I believe that it is just to reduce the remedies by 25%.

Orders

[88] I order that the respondent pay to Ms Breen, within 7 days of the date of this determination, the following sums (which take into account the reduction of 25%):

(a) The gross sum of $14,498.28 in respect of lost ordinary time remuneration;

(b) The gross sum of $295.65 in respect of on call allowance;

(c) The sum of $443.77 in respect of lost employer KiwiSaver contributions;

(d) The gross sum of $1,112.63 in respect of three months' holiday pay; and

(e) The sum of $15,000 in respect of compensation pursuant to s 123(1)(c)(i) of the Act.

Costs

[89] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. However, if they are unable to reach agreement within 14 days of the date of this determination, Mr Lawrie should, within a further 14 days, serve and lodge a memorandum of counsel setting out what contribution towards Ms Breen's costs she seeks and the basis of that. Ms Andersen will then have a further 14 days within which to serve and lodge a memorandum of counsel in reply.

David Appleton
Member of the Employment Relations Authority