

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 51
3031103

BETWEEN

DEBBIE WAITOA
Applicant

AND

THE CHIEF EXECUTIVE OF
THE MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: M B Loftus

Representatives: Alan Halse, advocate for Applicant
Inna Zadorozhnaya and Alexa Reid, counsel for the
Respondent

Investigation Meeting: 10 July 2019 at Palmerston North

Submissions Received: In writing and then spoken to by telephone on
29 July 2019

Date of Determination: 4 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Debbie Waitoa, claims she was unjustifiably dismissed by the respondent (MSD) on or about 19 August 2018.

[2] The Ministry of Social Development (MSD) accepts it dismissed Ms Waitoa. In doing so accepts it is required to justify its decision and believes it can do so.

[3] The application as originally filed cited the Ministry of Vulnerable Children as the respondent. The transitional arrangements for the Ministry's establishment meant responsibility remained with MSD. The citation was changed by agreement.

[4] MSD sought an order suppressing the publication of any information which might identify a young person who was resident at Te Au rere a te Tonga Youth Justice Residence, Palmerston North, at the time of the events canvassed here. Ms Waitoa agreed that was appropriate as do I. It follows there is an order prohibiting the publication of anything which might lead to the identity of young people at the Residence.¹

Background

[5] Ms Waitoa was employed by MSD at Te Au rere a te Tonga in May 2007. She initially worked as a casual employee before commencing a series of fixed term arrangements in October 2008. Due to what she says was dissatisfaction with some things she witnessed while working days she subsequently applied for, and received, a night shift appointment in November 2012. On attaining it Ms Waitoa was appointed the permanent staff.

[6] Ms Waitoa also acted as a union delegate and complains she witnessed and reported various issues but was frequently dissatisfied with MSD's response. One of the issues dear to her was what she considered deficiencies in risk management and incident reporting. It is fair to say she considers her views influenced her behaviour during the event which led to her dismissal.

[7] The path toward dismissal commenced on 19 April 2015. Ms Waitoa says on that day she was completing the daily risk schedule and saw a youth had received head injuries from an incident in which it appears he invited staff to have a fight. Ms Waitoa says she interpreted the paperwork as indicting two staff used force in response to a verbal threat in contravention of applicable protocols.

[8] Ms Waitoa goes on to say she had serious concerns for the wellbeing of the youth as he had a suspected concussion. This meant night staff were expected to check on him every five minutes and she is of the view this raised two potential issues. The first was night staff training might be inadequate given the potential issues which might arise. The second was she questioned why the youth had not been sent for a concussion test.

¹ Clause 10 of schedule 2 of the Employment Relations Act 2000

[9] Ms Waitoa goes on to say *This was the straw that broke the camels back for me as I had raised previous concerns about the treatment of the youth and this had gone too far.*

[10] Ms Waitoa arrived at work on 21 April 2015 but says she felt incapable of working having seen an internal report about the youth who had suffered concussion. She says she asked to speak to Kyle Kuiti, the residences manager, with whom she says had a good working relationship. Ms Waitoa says the conversation, in his office, started soon after 3.00pm. She says it went well initially but then degenerated.

[11] Ms Waitoa says she raised various personal problems before moving to the issue of the youth. She says Mr Kuiti refused to engage and was very dismissive which heightened her concerns. Ms Waitoa says Mr Kuiti advised she could raise a complaint if she wished but refused to tell her how when asked. Ms Waitoa says she then asked if she could use Mr Kuiti's phone but the request was refused.

[12] Ms Waitoa goes on to say:

He said 'leave my office!' I replied 'no I'm not going anywhere'. I informed him it was a peaceful protest. 'If you don't leave I will call the Police' Kyle said to me.

[13] Mr Kuiti denies he refused to tell Ms Waitoa how to complain – indeed he says he asked if she wished to raise the matter with a more senior manager and Ms Waitoa concedes Mr Kuiti suggested she phone a more senior manager though perhaps later in the discussion. She did but that conversation did not go well as that manager suggested yet another was more appropriate. She says she then realised she could not talk to the second manager for a couple of days and concluded that was inappropriate as she *wanted it sorted as she had to work that night.*

[14] Another employee then entered and Ms Waitoa was again asked to leave. She refused saying she would have to be carried out. That was followed by the arrival of two team leaders and some further conversation about work practices. Essentially Ms Waitoa accepts she decided she was not going anywhere and refused to adhere to repeated requests she leave.

[15] Mr Kuiti agrees the conversation initially centred on personal issues which was what he initially thought she wished to discuss. He accepts it then moved to the youth and his restraint a couple of days earlier. He says he explained the matter had, in his view, been properly handled. Here it should be noted a subsequent external investigation by the Office

of the Children's Commissioner supported that contention and also found an injury sustained by the youth was accidental.

[16] Mr Kuiti goes on to say Ms Waitoa did not accept his explanations and things degenerated from there with Ms Waitoa becoming visibly upset and agitated. He says that once she started swearing at him he told her the conversation was over and she should leave the office. She denies she swore but accepts she refused to leave.

[17] Eventually Mr Kuiti told Ms Waitoa that if she continued to refuse to leave he would call the police but in the interim arranged a final attempt at convincing Ms Waitoa to go by contacting her sister who arrived around 6.00pm. That was unsuccessful and the Police arrived around 6.30pm.

[18] Ms Waitoa's position is perhaps summarised by the following paragraph:

In the Police report it said I was 'disgruntled'. I was not a disgruntled employee I was upset about how a youth was being treated and was standing up for him and the other youths. I had a duty in employment and it was my own personal moral duty to ensure no harm or further harm came to the youth in our care.

[19] Ms Waitoa was subsequently trespassed. She was also the subject of disciplinary action and on 23 April 2015 received written notification MSD considered her behaviour may have breached the standards required under its code of conduct. She was asked to attend a meeting on 6 May 2015 to respond to the allegations. The letter was followed on 29 April by another to which were attached various statements MSD had obtained from people who had been present.

[20] Ms Waitoa attended the meeting assisted by her union, the Public Service Association. MSD was represented by Ana Su's Hawkins (a senior Wellington based manager) and Phillip Aydon (Human Resources Consultant).

[21] In her Statement of Problem Ms Waitoa says that during the meeting she:

- (a) Provided a context as to why she had decided to stage a *sit in*, namely concerns about several incidents of what she considered inappropriate care of young people by Residence management and frustration that her concerns were ignored when voiced, as with the latest incident;

- (b) Stated she felt MSD processes meant incidents were not fully or accurately recorded;
- (c) Said Mr Kuiti showed no support for her concerns about the latest incident and offered no surety that the strategies and responses were appropriate. Ms Waitoa felt medical intervention/advice should have been sought and her assertions to that effect were improperly ignored;
- (d) Raised other alleged breaches of young person's rights and commented on incidents of restraint which she believe could have been avoided;
- (e) Outlined her domestic situation and her issues her husband was having which were having a serious impact on her; and
- (f) Commented about an extant personal grievance she had with MSD and which remained unresolved thus causing additional stress though this was not an issue that featured during either the disciplinary process or my investigation. Indeed, and when questioned, Ms Waitoa dismissed this as an issue.

[22] In summary, Ms Waitoa had genuine concerns for the safety and well-being of young people in the residences care and felt frustrated at what she saw as negative/dismissive responses, and a lack of empathy by the manager to what she believed were serious concerns.

[23] Following the meeting Mr Aydon forwarded his notes to Ms Waitoa who replied with various comments. She followed this with further written comments which were appended to the written report prepared by Ms Hawkins and Mr Aydon for the eventual decision maker, Ms Salomen (now Banaghan), the responsible General Manager. A copy of the report was forwarded to Ms Waitoa on 5 June and she was asked to provide any further comment prior to it being sent to Ms Banaghan. Ms Waitoa was also told she and her representative could meet the decision maker and asked if she wished to do so.

[24] She did and the meeting went ahead on 18 June. Once again Ms Waitoa put her position which essentially amounted to a reiteration of comments she had previously submitted in written form and which were appended to the investigation report.

[25] Ms Banaghan says she advised Ms Waitoa of her expectations and, in particular, that as staff deal with young offenders it is crucial they provide the right environment and demonstrate appropriate behaviours. She goes on to say:

I explained that the incident compromised the young person's safety because the residence Manager and staff were required to attend the incident with Debbie. The incident caused disruption to the operation of the Residence. This compromised the care and protection of the children in the Residence.

[26] Interestingly this meeting was not mentioned in either Ms Waitoa's statement of problem or her brief though her oral evidence indicates no significant criticism of the employer evidence about it.

[27] Ms Banaghan then sought HR advice about the options open to her and ultimately chose dismissal. In choosing that over a lesser penalty she says was swayed by various factors. Significant amidst these was Mr Waitoa's acceptance she knew she was doing wrong and that her actions were deliberate. Ms Banaghan was also concerned Ms Waitoa exhibited a total lack of insight about the effect of her actions and that they compromised the care of children in the Residence. She says the lack of insight raised serious doubts about whether or not she could be trusted not to reoffend. She says against that she had to balance Ms Waitoa's personal situation and the fact this may have affected her response but ultimately concluded the children's welfare was paramount.

[28] Ms Waitoa was advised of the decision dismiss by letter dated 19 June 2015.

Discussion

[29] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[30] Ms Waitoa's claims she was unjustifiably dismissed. In doing so, and by way of summary, she says MSD will be unable to justify the dismissal as it was the result of *a biased investigation and that her dismissal only serves to suppress the systemic failings of the organisation; failings that are placing New Zealand's most vulnerable children at further risk.*²

[31] The issue of biased investigation I will address later as once MSD accepts it dismissed, as it has here, it is required to justify its actions. That it conducted its investigation in an appropriate unbiased manner is integral to that justification.

² Closing submission at 4:1

[32] The allegation the dismissal was an attempt to suppress the discussion of systemic failings succinctly summarised Ms Waitoa's approach to this matter. She is of the view there are significant deficiencies which were not being properly addressed. That was a reoccurring theme throughout her evidence. Essentially Ms Waitoa exhibited what I would call a crusading passion and she sees herself as an advocate for, and protector of, young people in MSD's care at Te Au rere a te Tonga.

[33] This approach faces some problems the most significant of which is Ms Waitoa offered little evidence in support of this approach. Other than the April 2015 incident specifics were not discussed or evidenced though that may not be surprising given the focus was on a dismissal that emanated from one event. With regard to MSD's conduct in respect of that event I can only reiterate the proper authority, the Office of the Children's Commissioner, investigated and found that in the circumstances a physical intervention had been appropriate and the restraint was carried out in accordance with MSD's policies and procedures.

[34] The other problem is that if there is foundation to Ms Waitoa's concerns there are other, more appropriate, channels through which they can be addressed. Again there is the Office of the Children's Commissioner. There is also the Protected Disclosures Act 2000 and Ms Waitoa's union (of which she was a delegate) but no evidence any of these avenues were used.

[35] These comments however miss the main point. MSD has admitted the dismissal. It is therefore required to justify the dismissal and Ms Waitoa need not prove it unjustified. In this respect s 103A of 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.

[36] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and a procedural perspective. Whilst it is clear issues of substance and process overlap and there is no such thing as a firm delineation, separation still provides a useful means of analysis.

[37] Considering substance first. Ms Waitoa was dismissed for repeatedly and deliberately refusing to carry out a lawful and reasonable instruction given by the Residence Manager, Mr Kuiti. As the evidence showed, that potentially breached MSD's code of conduct and constituted a serious breach. In particular there was a requirement she comply with all reasonable and lawful instructions given by her Supervisor/Manager.

[38] Ms Waitoa freely admitted she was asked to leave on at least three occasions. She also clearly admitted her failure to do so was intentional and she was trying to make a point. Nor does she challenge MSD's position her actions breached the code but instead tries to justify them as warranted in order to protect young people in MSD's care. That approach has already been discussed.

[39] The only possible argument is that dismissal was too severe a consequence and not therefore open to a fair and reasonable employer. Aside from the fact this was not specifically argued I have to recognise the fact I cannot supplant my opinion for that of the employer. The question is whether or not the employer could reasonably conclude the breach was serious.

[40] In this regard Ms Banaghan gave fulsome evidence about her thought processes and the reasons why she concluded the breach was serious. She concluded that despite the fact Ms Waitoa was motivated by concern for the young people her action actually created an environment where their care and protection was compromised as she was in the office for a considerable time during which the attention of staff members was diverted. This in turn caused disruption and meant staff were not focusing on their duty and the provision of a safe, secure and supportive environment for the young people in their care. As she said in answer to one of Mr Halse's questions Ms Waitoa's actions created *just too many risks*.

[41] In the face of the evidence and such a succinct explanation I find myself incapable of concluding the employer did not consider the situation and reach a conclusion open to it with regards the severity of the breach.

[42] Turning now to process. In essence the Act requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. 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.

[43] This is a large organisation with a substantial human resource advisory function which is reflected in the chronology above and the various documents which, as MSD submitted, illustrate a thorough investigation.

[44] With respect to putting its concerns there is the letter of 23 April advising a potential breach and explaining what it was. That was followed with the forwarding of the statements MSD had gathered so as to allow Ms Waitoa to comment comprehensively during the investigatory meeting. Finally a comprehensive report was furnished before Ms Waitoa met with the decision maker which detailed the concerns and evidence to date.

[45] That Ms Waitoa was also given an opportunity to explain is also clear. There were two meetings at which she had professional representation from her union and at which she freely admits she was allowed to explain the context in which events had occurred. In addition she was also furnished additional written comment.

[46] I also conclude, notwithstanding the allegation the investigation was bias, that the decision maker, Ms Banaghan, approached this with an open mind. It was her uncontested evidence she sought advice about, and then considered, alternates to dismissal. The reasons for choosing dismissal were also explained with Ms Banaghan explaining she was aware Ms Waitoa had been a good long-serving employee and it was clear dismissal would have a significant impact on her. Against that was the significant effect of Ms Waitoa's actions which were significant and undermined MSD's to properly care for those in its charge. There was also no indication of sufficient insight to give Ms Banaghan confidence there would not be a reoccurrence. Again the evidence shows a considered approach and I am therefore precluded from replacing my views or judgement for that of the employer.

[47] Before closing comment is required on seven specific failures Mr Halse raises when arguing MSD has failed in its duty to be reasonable and consider relevant factors which might have mitigated against a decision to dismiss.³

[48] Ms Waitoa's genuine concern for the health and well-being of the injured resident and her frustration at the Managers apparent disregard for that has been well canvassed. The evidence is these views were considered but MSD concluded other conflicting factors were more significant. That was a conclusion open to MSD.

³ Paragraph 23 of the applicants closing submission

[49] Similarly the evidence is Ms Waitoa's honesty and clean record was also considered by Ms Banaghan.

[50] The claim Mr Kuiti was conflicted as he had been a participant in the restraint that gave rise to these events also fails to convince. He was neither an investigator or decision maker and the evidence shows he took no part in the disciplinary process. In any event he was exonerated of wrongdoing by the Office of the Children's Commissioner.

[51] To suggest Ms Waitoa *was not adequately represented* and the PSA is *not equipped to / nor do they have a practice of challenging unjustified dismissal cases at the ERA*⁴ is just patently wrong. In any event no evidence was offered to support this contention and Ms Waitoa did not allege it.

[52] Finally there is an argument MSD failed to consider advice about Ms Waitoa's husband's situation and the dramatic impact it had on her emotional and physiological state along with her decision making ability. Again Ms Waitoa's evidence did not support a submission of this strength but in any event the evidence also shows MSD was aware of the issues and did take them into account.

[53] In other words the submission MSD failed in seven ways fails to convince.

Conclusion

[54] For the reasons above I conclude the Ministry of Social Development has discharged the onus it carries and established the decision to dismiss was one open to a fair and reasonable employer in the circumstances.

[55] Ms Waitoa's application therefore fails.

[56] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

⁴ Paragraph 22 of the applicants closing submission