

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 335  
3114615

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| BETWEEN | TONI PEAKE<br>Applicant   |
| AND     | SENIOR CARE<br>INVESTMENTS LIMITED<br>T/A FRASER MANOR REST<br>HOME<br>Respondent |

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| Member of Authority:                             | Marija Urlich   |
| Representatives:                                 | Warwick Reid and Rachel Rolston, for the Applicant<br>Greg Peploe, for the Respondent |
| Investigation Meeting:                           | 25 May 2021   |
| Submissions and Further<br>Information Received: | At the investigation meeting from both parties  |
| Determination:                                   | 30 July 2021  |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Toni Peake worked as a part time cook at Fraser Manor rest home for five years. Senior Care Investments Limited (SCIL) purchased the rest home in 2018 and Ms Peake worked for SCIL from 4 July 2018 until her resignation on 25 May 2020. Ms Peake says SCIL's failure to investigate a complaint of bullying she raised against a co-worker who had made a complaint about her unjustifiably disadvantaged her in her

employment.<sup>1</sup> She seeks remedies of compensatory damages and lost wages consequent to disadvantage she says was occasioned by this failure.<sup>2</sup>

[2] SCIL denies that Ms Peake has been disadvantaged in her employment. It says it considered Ms Peake's complaint and the other complaint, proposed a way to build a more productive workplace for the staff involved, including Ms Peake, but this was unable to be progressed because Ms Peake was off work during the investigation and did not return before tendering her resignation.

### **The Authority's investigation**

[3] During the investigation meeting the Authority heard evidence from Ms Peake and Camilla Arend the owner and operator of Fraser Manor.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Issues**

[5] The issues identified for investigation and determination are:

- a) Was Ms Peake unjustifiably disadvantaged in her employment?
- b) If so, is Ms Peake entitled to a consideration of remedies sought including:
  - i. Lost wages of 49.25 hours at ordinary time rate pursuant to section 123(1)(b) of the Act?
  - ii. Compensation of \$6000.00 pursuant to section 123(1)(c)(i) of the Act?

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<sup>1</sup> Ms Peake's resignation letter raises a personal grievance for unjustified constructive dismissal. This grievance was not advanced.

<sup>2</sup> For completeness a personal grievance purported to be raised on 29 April 2020 concerning a warning has been resolved between the parties and though referred to in the documents filed is not before the Authority to determine.

- c) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Peake which contributed to the circumstances which gave rise to his grievance?
- d) Is either party entitled to an award of costs?

## **Relevant law**

### *The test for justification*

[6] When the Authority considers justification for the actions of MFL it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions, as in this matter, the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of SCIL and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions.

[7] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. The Authority may take into account other factors as appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Ms Peake being treated unfairly.

[8] SCIL could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

## **Background**

[9] On 13 April 2020 SCIL wrote to Ms Peak setting out allegations that had been raised against her. The letter stated the allegations were serious and could amount to breaches of the House Rules policy document, reminded her she was on a verbal warning dated 15 January, that she had continued “to display a poor attitude” and was required to attend a formal disciplinary meeting on 17 April. The procedure for the proposed meeting was outlined including measures appropriate to a meeting held during the Covid-19 lockdown then in place. Ms Peake was invited to attend with a representative and/or support person and asked to confirm if the proposed date and time

was suitable. The letter ended that because of the serious nature of the allegations a potential outcome of the meeting could be a written warning or dismissal and stressed the matter was confidential and was not to be discussed with staff, residents or residents' family.

[10] The basis of the allegations was a written complaint received from the staff member (the complainant) Ms Peak had worked with on the evening of 9 April.

[11] After two meetings and an exchange of correspondence on 18 May SCIL wrote to Ms Peak saying it would not take any disciplinary action.<sup>3</sup> The reasons given were there was insufficient evidence to conclude the conduct that Ms Peake was alleged to have carried out on the evening of 9 April had occurred, that while none of the witnesses, including Ms Peake, had been “knowingly untruthful” SCIL accepted something had happened during the evening shift in question that had upset the complainant and this was disappointing and below expected standards. The letter acknowledged the events occurred during a COVID-19 lockdown when there was heightened anxiety in and outside the workplace. The letter then expresses expectations for appropriate and professional behaviour and that given the number of teenage members of staff (the complainant included) that senior staff, which could reasonably be understood to include Ms Peake, must “show them the “right” way to do things and to behave”. The letter goes on to outline conduct expectations under the headings of the other allegations which were “slandering other staff”, “breaks” and “performance of duties”. None of these allegations were upheld. The letter concludes:

Having given due consideration to all the issues raised, I trust that my expectations moving forward have been clarified. A copy of this letter will be placed on your personnel file and I consider that no further action on this matter is required. Please sign a copy of the attached form, acknowledging that you are aware of the contents and expectations as detailed in this letter. [...] will be advised only that the matter has been addressed and you are asked not to discuss this matter with your colleagues, or anyone with an interest in Fraser Manor.

Toni, I appreciate that this has been a very difficult time for you; not helped by the pressures we are all feeling under pandemic-related lockdown. You are

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<sup>3</sup> The meetings were held 28 April and 8 May 2020 were conducted by video-conference and Ms Peake was represented. The correspondence was dated 13 April, 4, 6 and 8 May from SCIL and 28, 29 April, 8 and 9 May from Ms Peake through her representative. Attached to SCIL's correspondence were relevant documents – statements of the complainant worker and two supporting statements dated 28 April, 1 May and 5 May respectively, the resident complaints policy and the disputes and disciplinary procedure policy. Ms Peake, through her representative provided a medical certificate dated 7 May certifying her medically unfit to work from 6 to 18 May. A further medical certificate was provided.

a valued member of the Fraser Manor family and I hope that we can move forward positively.

[12] The unjustified action claim Ms Peake has brought does not allege any breach arising from the disciplinary investigation into the 13 April complaint or the conclusions reached by SCIL as expressed in the 18 May letter. Indeed, Ms Peake's representative's reply email to SCIL dated 18 May records the findings that there was no evidence of any failure on Ms Peake's behalf and confirms Ms Peake's knowledge of and commitment to expected standards of behaviour in the work place. Ms Peake's concern is about how SCIL responded to the complaint of bullying she raised against the complainant and the staff members who provided statements concerning events on the evening of 9 April.

*Ms Peake's complaint – 8 May*

[13] In a letter dated 8 May Ms Peake through her representative responded to the 13 April disciplinary letter. The letter was provided prior to a scheduled video conference scheduled later that day as part of the investigation of the 13 April complaint where Ms Peake was to provide a response to additional statements SCIL had received. The final paragraph of the letter raises a formal complaint of bullying alleging the complainant had:

- fabricated the complaint to deliberately cause her trouble;
- provided false information in her second statement that had a "spiteful and malicious intent designed to cause Toni to be the subject of ongoing disciplinary action"; and
- been joined in this conduct by the two witnesses.

[14] The complaint ends that this conduct amounts to bullying because it is "a form of behaviour which in conjunction with Toni's denials of the allegations and the lack of evidence to even suggest that they have merit". The letter continues that Ms Peake expects SCIL to investigate her complaint in accordance with the Complaints Policy and Procedure and asks for a copy to be provided.

[15] During the video conference SCIL confirmed it had received Mrs Peake's 8 May letter and, I find it likely, in the context of both the investigation and Ms Peake's complaint confirmed there was no further information she wished to provide SCIL. I

am satisfied by 8 May Ms Peake had provided all the information she thought was relevant to SCIL to investigate her complaint. She confirmed this in her evidence to the Authority and this is reflected in the letters from her representative dated 9 and 22 May in which she proposes a process for SCIL to follow which does not include her producing further information (other than in response to any further information SCIL may gather).

[16] Following the 8 May meeting and in response to Ms Peake's request for an identified policy SCIL provided both complaint policies – one for staff and one for residents and their families. There was an exchange to clarify the applicable policy which I am satisfied was achieved. At the relevant time SCIL did not have a procedure for staff complaints. The House Rules, which formed part of Ms Peake's written employment agreement and included a definition of bullying, were appropriately used in the investigation of Ms Peake's complaint.

[17] By letter dated 21 May SCIL wrote to Ms Peake responding to the 8 May complaint.<sup>4</sup> The letter sets out the complaint, the applicable definition of bullying and the information under consideration including Ms Peake's view the complainant and other employees were lying and restates the earlier conclusions – that SCIL could not determine with certainty what had happened but the complainant was upset and this was the motivation for raising the concerns. The letter then records the process followed for the investigation of Ms Peake's complaint, that Ms Peake's information had been reviewed, refers to the process and information received in the disciplinary investigation, including the witness statements and from whom they were received, and concludes the conduct does not meet the definition of bullying because the complainant was distressed, it was not unreasonable for her to raise concerns with the co-workers she did and the situation was not repeated or unreasonable. The letter records additional matters raised by one of the staff who provided a supporting statement had been addressed in the original outcome letter. The letter ends:

It is acknowledged that this has been a distressing time for all involved. Fraser Manor is committed to providing a safe and collegial work environment for all their employees. We look forward to having Toni return to work. We will be looking to work with Toni and [...] to provide clarity around our expectations and to encourage a positive working relationship moving forward.

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<sup>4</sup> Ms Arend had been on leave for some of the interim period.

## Discussion

[18] SCIL considered Ms Peake's complaint of bullying but there is no dispute it did not undertake further investigation into the complaint - it relied on the information before it which had been gathered during the investigation of the 13 April complaint. On the basis of that information SCIL concluded that bullying had not been made out as defined in the parties' employment agreement. The submission that a failure to follow a fair process and properly investigate allegations of workplace bullying is entirely accepted.<sup>5</sup> The question before the Authority is whether SCIL failed in that duty owed to Ms Peake.

*Was it unreasonable for SCIL to rely on the information before it to consider Mr Peake's complaint?*

[19] SCIL knew Ms Peake's view was the complainant and the two other staff members who provided statements of their knowledge of events were lying because she had told SCIL this during the investigation of the complaint into the events of 9 April.<sup>6</sup> In addition, SCIL had before it Ms Peake's specific response to the factual issues raised in the allegations – Ms Peake's notes of the events of the evening 9 April written 13 April, her detailed response to the allegations set out in a letter dated 28 April which was written with the knowledge of the complainant and the other two staff members' statements and the 8 May letter which provides a further detailed response to the allegations. I am satisfied the concerns raised in Ms Peake's complaint were squarely before SCIL in its consideration of the original complaint.

[20] In the absence of new information from Ms Peake in support of her bullying complaint or an indication from Ms Peake that there was new information that needed to be investigated and given Ms Peake's complaint was founded in the information gathered through the disciplinary investigation to which she had responded I find there

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<sup>5</sup> *Lillian Waitere v CCS Disability Action Waikato Incorporated* [2020] NZERA 469.

<sup>6</sup> Example, the 8 May letter raises these concerns by way of response to the original complaint at [4] "...the allegation that is the most demonstrably false of all of her vexatious complaints arises out of her second (signed) statement", at [6] "...lends credence to the notion that it is simply not true.", at [7] "It occurs to us that the second statements have potentially been produced with the sole purpose of attempting to bolster the case against Toni.", at [8] "Toni maintains that [the complainant's] complaints about her are untrue, and in fact there is to date no evidence at all to show that they are true. We can have no insight as to why [the complainant] has made up these stories to get Toni into trouble, but we are very concerned that both [the employees who gave statements] appear to be supporting it without question, writing statements accordingly. It would appear that the three...are now colluding together to 'mob' Toni in a concerted bullying effort...".

was no unfairness to Ms Peake in SCIL relying on the original complaint material to consider Ms Peake's complaint of bullying.

[21] The resources available to SCIL including the impact on those resources of the COVID-19 lockdown is a further factor which weighs in favour of the reasonableness of SCIL relying on the information already gathered.

*Was not upholding Ms Peake's complaint one a fair and reasonable employer could have made in all the circumstances?*

[22] Ms Peake says no because it was clear on the face of the information before SCIL that the complainant and the supporting witnesses had lied and conspired in that lie specifically, that Ms Peake had directed the complainant to make supper sandwiches. Ms Peake says SCIL ought to have known she could not have made such a direction because she had very recently discussed the making of supper sandwiches with Ms Arend and one of the staff members who provided statements for the original complaint.

[23] In *George v Auckland City Council* the Court of Appeal discussed dishonesty during a disciplinary investigation:

[36] We emphasise that mere differences in recollection are likely to be commonplace during the course of the disciplinary process including any earlier investigation stage. Differences of recollection or inconsistencies are not in themselves sufficient to support a finding that the employee has lied. An employee may honestly, but mistakenly, have a different recollection of events. In order to establish that the employee has lied, there must be proof of a deliberate untruth on the employee's part. The standard of proof is the civil standard but to a level commensurate with the seriousness of such an allegation.<sup>7</sup>

[24] The principles for assessing an allegation of dishonesty articulated by the Court of Appeal are applicable to this situation. Ms Peake has asked SCIL to find comments by co-workers during a disciplinary investigation are dishonest and amount to bullying. This is a serious allegation. An employer assessing such an allegation could be expected to only be satisfied such a claim had been made out if the evidence in support was equally serious.

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<sup>7</sup> *George v Auckland Council* [2014] NZCA 209 at [36].

[25] The supper sandwich issue had been canvassed during the original disciplinary investigation and SCIL had made findings on the information before it which were accepted by Ms Peake.<sup>8</sup> While it is accepted the findings were broad, that is, no specific findings about the supper sandwich issue were made, I am satisfied the conclusion no one was lying was based on all the information including the supper sandwich issue and the earlier context of Ms Peake's discussion with Ms Arend. Further, I am satisfied SCIL was aware that changes in kitchen processes and routines, including whether supper sandwiches were still required, was a live issue in the investigation of the original complaint. SCIL was aware these changes were a sensitive issue for Ms Peake and I am satisfied appropriately considered the impact on Ms Peake of this issue being raised.

[26] Accordingly, I am satisfied this specific element of Ms Peake's complaint was considered and investigated by SCIL, it was reasonable for SCIL to rely on the information it had already gathered because that information was relevant and comprehensive, including Ms Peake's views on the issues, and proportionate given the resources available to SCIL.

[27] For these reasons I find SCIL followed a fair process and properly investigated Ms Peake's allegations of workplace bullying and that the finding not to uphold Ms Peake's complaint was one open to a fair and reasonable employer in all the relevant circumstances.

## **Outcome**

[28] Ms Peake's personal grievance claim that she was unjustifiably disadvantaged in her employment by the actions of Senior Care Investments Limited in failing to investigate her bullying claim is unsuccessful. She is not entitled to a consideration of the remedies sought.

## **Costs**

[29] Costs are reserved. The parties are encouraged to attempt to resolve the issue of costs themselves. If this is not possible and Senior Care Investments Limited seeks a contribution to costs, it should file and serve a costs memorandum within 14 days of

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<sup>8</sup> Refer Ms Peake's representative's letters 8 and 18 May 2020.

the date of this determination. Ms Peake should file any reply memorandum within 7 days of receipt of such.

Marija Urlich  
Member of the Employment Relations Authority