

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2021] NZERA 468  
3092632

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| BETWEEN | LIANA KELLY<br>Applicant                         |
| AND     | THE ORAL SURGERY CENTRE<br>LIMITED<br>Respondent |

Member of Authority: Geoff O’Sullivan

Representatives: Michael McAleer, advocate for the Applicant  
David McLeod, advocate for the Respondent

Investigation Meeting: 18 November 2020

Submissions [and further Information] Received: At the investigation meeting from the Applicant  
At the investigation meeting from the Respondent

Date of Determination: 21 October 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Liana Kelly was employed as a clinical coordinator/theatre scrub nurse with The Oral Surgery Centre Limited (OSC). She commenced her employment with OSC in May 2015 and the current employment agreement was signed on 31 May 2015.

[2] It is common ground between the parties that on 1 October 2019 there was an incident involving Ms Kelly and OSC’s director, Luke Adsett. On 9 October 2019 Ms Kelly was dismissed from her employment on two weeks’ notice with her final day of employment being 23 October 2019.

[3] Ms Kelly claims that her dismissal was unjustified because she was not guilty of any serious misconduct, rather the incident to the extent it had occurred was a performance concern. She also claimed that a ground given by OSC to justify dismissal, namely that her actions seriously damaged the employer's reputation, was not properly investigated and in any event could not have formed the basis for her dismissal. Ms Kelly also claims that for extended periods of time she was bullied by OSC's Director and this formed a backdrop for her actions on 1 October 2019.

[4] Ms Kelly has claimed remedies comprising lost wages, compensation for humiliation, distress and hurt feelings, and legal costs.

[5] OSC denies that Ms Kelly was unjustifiably dismissed and refute other claims set out in the statement of problem that she was bullied by OSC's director over the course of her employment. OSC confirms (para 2.19 of the statement in reply) that the reason for the dismissal as set out in its letters of 7 and 9 October 2019 were because Ms Kelly's actions seriously damaged the reputation of the respondent. OSC further advised that the dismissal was what a fair and reasonable employer could do in the circumstances.

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

[6] Pursuant to s 174E of the Employment Relations Act 2000 (the Act) I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders, but I do not record all the evidence. I have however carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant.

[7] This determination has been issued outside the timeframe set out in s 174C(3) of the Act. In circumstances the Chief of the Authority has decided, as he is permitted to do by s 174C (4), are exceptional.

[8] I heard from two witnesses, Mr Kim as the applicant and Mr Adsett as the director of OSC.

### **Issues**

[9] The issues to be investigated are:

- (a) Against the standards set out in s 103A of the Act, was OSC's investigation fair?
- (b) What grounds did OSC rely on in dismissing Ms Kelly?

- (c) Could a fair and reasonable employer conclude that the actions of Ms Kelly constituted serious misconduct justifying dismissal?
- (d) Did Ms Kelly's actions in any way contribute to her dismissal?

**What caused the employment relationship problem?**

[10] Both parties agreed that on 1 October 2019 an incident occurred at the workplace. Ms Kelly says that on the day of the incident, she was assisting Mr Adsett in surgery whilst he attended to the removal of a patient's wisdom teeth. She says that for various reasons aggression was building up during the surgery. Generally in surgery such as this, Mr Adsett would have handed her the X-ray machine once he had finished with it but in this case, he held it longer than he should have. She said to him, "*I'm here,*" and felt that when the X-ray machine was handed to her, it was done with aggression and she felt attacked.

[11] Ms Kelly's response was to say I need to get out and as she was walking out, Mr Adsett said, "*Yeah, and leave your uniform and keys too*". Ms Kelly responded, "*I'm going to swap out of the surgery and get Nicola in*". She says that Mr Adsett kept saying, "*No, leave your uniform and key*". Nicola then went in and assisted Mr Adsett while he concluded the surgery.

[12] Although acknowledging Ms Kelly walked out, Mr Adsett stated he had completed surgery and just needed to suture a surgical site. He said he did not know what prompted Ms Kelly to walk out and said that he was not behaving in an aggressive or confrontational way. He said that having Ms Kelly walk out in such circumstances was very damaging to his business reputation, was unjustified and does not build a pleasant experience for patients. He said he found it very difficult with Ms Kelly acting in an agitated way and making damaging accusations in the clinic and felt this entirely inappropriate when he was in a position of trying to care for his patient, and surgery had not yet been completed.

[13] Whilst I accept the CCTV footage doesn't support Ms Kelly's evidence in respect of Mr Adsett thrusting the portable x-ray machine at her, I consider he would have been aware of the building tension hence his comment about Ms Kelly leaving her uniform and key.

[14] Mr Adsett gave evidence that following the incident, he did ask Ms Kelly to leave the premises because he believed that was the most suitable way to prevent further disruption to operations and to ensure the quality of patient care.

[15] He says after the surgery was complete he met with Ms Kelly in the staffroom and made it clear to her that a significant issue had occurred and he believed a cooling off period was the best approach. He felt that Ms Kelly had an opportunity to reply and object if she did not wish to go home. Ms Kelly gave evidence she agreed with that aspect. He noted that when she did text him that evening to suggest she had been dismissed, he corrected that view and advised her he would be in touch regarding the next steps. He then wrote to Ms Kelly on 2 October 2019 setting out the issues.

### **OSC's procedure**

[16] Following the 1 October 2019 incident, and following Ms Kelly being suspended, OSC wrote to Ms Kelly on 2 October 2019 (Doc 4.4.1). The letter invited Ms Kelly to a disciplinary investigation to discuss "*the following concerns/allegations regarding:*

- On Tuesday 1<sup>st</sup> October 2019, I witnessed what appeared to be unprofessional behaviour and statements that you are "out" and "I'm done" during a surgical procedure on a patient who was conscious and lying in a vulnerable position in the dental chair at approximately 2:45 pm.
- This occurred following being handed a portable x-ray unit.
- I am concerned because this potentially seriously damages the employer's reputation.
- Following your statement, you left the operating room and then began to defend your actions with allegations that I had thrown equipment at you at that moment and earlier that morning.
- This was an inappropriate time to discuss matters given that a patient was in the dental chair, I had no option to continue and finish the surgery, and more patients were entering the waiting room.
- To diffuse the situation and protect the reputation of the clinic and myself I requested that you leave and you have taken this opportunity."

[17] OSC's 2 October letter also stated that Mr Adsett had not yet drawn any conclusions but that if any allegation was upheld, there was the potential for disciplinary action up to and including termination of employment.

[18] A disciplinary meeting was held on 4 October 2019 which Ms Kelly attended with her representative (Doc. 4.4.2). Mr Adsett summarised what occurred at that meeting as follows:

- On Tuesday 1<sup>st</sup> October 2019, I witnessed what appeared to be unprofessional behaviour and statements that you are "out" and "I'm done" during a surgical procedure;

- You accepted that this had occurred as described and I acknowledge that you apologised for your actions, and that you “said the wrong things”;
- You told me that you were upset by my actions and that you felt intimidated;
- You said that I was aggressive at the time;
- You said that I had “thrust” the portable x-ray unit at you, and that this action had been “the last straw”;
- I played you the video recording of this activity, and despite this recording revealing that there was nothing unusual about my passing this unit to you, you said that the video did not record accurately what you said;
- We asked if there was anything outside work that might be impacting on your reaction, but you said there was not.

[19] OSC’s 7 October letter finished by stating the preliminary decision was to terminate Ms Kelly’s employment on two weeks’ notice, however this was not a fully concluded view and Ms Kelly could make any further submissions or attend a further meeting or text, email or call provided she did so before the end of business on Tuesday 8 October 2019.

[20] On 8 October 2019, Ms Kelly emailed Mr Adsett stating:

Firstly, I need to let you know that in the heat of the moment I didn’t express myself professionally and I apologise. What I should have said was that I needed to swap out with Nicola, as I sensed that this situation was becoming stressful and this had been an acceptable strategy in the surgery in the past. It was not my intention to cause damage to the reputation of the business or yourself, if this has been the case I sincerely apologise for the way I acted.

[21] The email ended stating, “Thank you for giving me the opportunity to respond and I look forward to hearing from you”.

[22] On 9 October 2019 OSC wrote to Ms Kelly terminating her employment (Doc 4.4.4). In the letter, Mr Adsett advised he had finished his considerations, stating:

- On Tuesday 1st October 2019, your actions were unprofessional and damaging to the reputation of my business;
- You told me that you were upset by my actions and that you felt intimidated, but this is simply not supported by the CCTV evidence;
- You said that I was aggressive at the time but I do not accept that;
- You said that I had “thrust” the portable x-ray unit at you, and that this action had been ‘the last straw’, but again I do not accept that;

- There was nothing particularly unusual about the procedure being performed on Tuesday 1st October 2019 and that this was just one of many during the ordinary flow of work;
- The independent evidence of my actions does not reveal anything I would regard as aggressive or intimidating and I certainly don't accept that I thrust this instrument at you.

[23] The dismissal letter went on to provide "the business is exposed to an unacceptable level of risk if this is going to be your reaction during a procedure, and I have decided that your employment cannot reasonably continue due to the very real doubt I now have for your reliability. From my perspective, serious damage has been done to the necessary relationship of trust and confidence which must exist for our employment relationship to continue". The letter then provided for Ms Kelly's dismissal on two weeks' notice. Mr Adsett's reference to independent evidence, was a reference to the CCTV footage of the alleged incident.

### **Analysis**

[24] Ms Kelly acknowledges that she walked out of the surgery prior to its completion. She justifies this by saying:

- (a) She knew it was a time she could have left because Mr Adsett had removed the last bit of tooth, had taken the final x-ray and was suturing up;
- (b) She wasn't really walking out, she was swapping out for another employee at the end of the procedure.

[25] Her further justification for her action was because she said Mr Adsett was often angry and aggressive and would blow up at her for small mistakes. She said that as time went on during her employment, Mr Adsett's aggressive behaviour became consistent and she felt she had learned to handle it well. However, it is noted that if indeed this was the case, and Mr Adsett vehemently denied it, then there was no record of any formal complaints being made.

[26] Mr Adsett also commented that when Ms Kelly walked out, he had not yet examined the x-ray and although as it transpired the only task left was suturing, that may not have been the case and there could have been complications.

[27] There is however a difficulty for OSC because the 2 October letter inviting Ms Kelly to a disciplinary meeting whilst referring to an allegation of unprofessional behaviour, focuses

on other matters such as her conduct “potentially seriously damages the employer’s reputation”.

[28] The dismissal letter of 9 October also mentions that a ground for the dismissal seems to be damage to the reputation of the business. In her explanation regarding walking out, Ms Kelly states that the portable x-ray machine was thrust at her in an aggressive way. This is her main justification for walking out. The Authority was provided with a USB stick of the CCTV footage of the incident. The footage supports Mr Adsett’s view that nothing untoward was happening at the time. Certainly it does not evidence Mr Adsett thrusting the portable x-ray unit at Ms Kelly and at best seems to indicate that he may have been going to put the x-ray unit down before changing his mind and passing it to Ms Kelly.

[29] I find it was open to OSC to view Ms Kelly walking out of surgery under these circumstances as a misconduct issue which could lead to a loss of trust and confidence as opposed to a performance issue.

[30] Ms Kelly submitted that OSC could have restored any relationship difficulties by working through a performance management plan designed to protect Ms Kelly’s employment. Whilst that option may have been open to OSC, under these circumstances, it was open to OSC to construe that behaviour as misconduct. This is because Ms Kelly has not offered a credible explanation for swapping out with another staff member other than her view that Mr Adsett was acting in an intimidatory way, including thrusting the x-ray machine at her. Without the so called incident, Ms Kelly would not have swapped out. Further, Ms Kelly’s own evidence regarding swapping out was that this was generally premeditated and arranged prior to surgery. Her actions on 1 October were not premeditated and her walking out was spontaneous.

[31] In his evidence, Mr Adsett referred to a previous episode where Ms Kelly abandoned her role in a similar manner, referring to an incident some 12 months earlier in November 2018. That begs a question as to why this time did he decide to dismiss. The answer is found in the dismissal letter which states:

I accept that swapping out with Nicola was a possible strategy should you feel a situation was becoming stressful for you. **I also accept that it was not your intention to cause damage to the reputation of the business, but in the final analysis that is what did occur and despite your apology, I must consider the risk to the business of this occurring again.** (emphasis is mine)

[32] It follows therefore that a major reason for the decision to dismiss, was because Mr Adsett considered reputational damage to the business as a major reason for the dismissal.

[33] However evidence of reputational damage was less than compelling. Further, no proper investigation into this aspect occurred. Ms Kelly did not have a proper opportunity to rebut this allegation.

[34] The parties also confirmed that 12 months prior in November 2018, Ms Kelly had walked out before. That action did not result in dismissal. Whilst I am prepared to accept OSC's evidence that they see the latest example as serious misconduct, nonetheless, treating it in a different way only 12 months earlier without a formal written warning in place, leads to some disquiet. I however conclude from the evidence that the employment relationship had become increasingly strained.

[35] After considering all the evidence, I find Ms Kelly's dismissal unjustified. Dismissal was a too severe a penalty under the circumstances and was not the action of a fair and reasonable employer. Similar behaviour previously had been treated more leniently. OSC had previously had the opportunity to make it clear such behaviour was unacceptable and hadn't taken it. Further, OSC relied heavily on its view of reputational damage as a justification for dismissal. There was no proper investigation into this allegation nor was Ms Kelly given a proper opportunity to address it.

### **Contribution**

[36] Section 124 of the Act states I must assess the extent to which Ms Kelly's actions contributed to the situation which gave rise to her personal grievance. I then need to assess whether any calculated remedy should be reduced. In considering this, I have looked at the relevant factors summarised by the Employment Court in *Maddigan v Director-General of Conservation*.<sup>1</sup> Ms Kelly has engaged in reactive blameworthy behaviour through walking out during the surgery as an ill-considered response to what she incorrectly interpreted as Mr Adsett's aggressive manner in passing her the portable x-ray machine. It is clear from the CCTV footage that at best she misinterpreted what she saw. Her actions were capable of being construed as serious misconduct, although in this case I considered the sanction of dismissal to be too extreme. I have not accepted the justification for her actions put forward by Ms Kelly.

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<sup>1</sup> *Maddigan v Director-General of Conservation* [2019] NZEmpC 190

No evidence of improper behaviour by Mr Adsett was forthcoming. I assess Ms Kelly's contribution at 40 percent and remedies will be reduced accordingly.

### **Conclusion and orders**

[37] I find that Ms Kelly has been unjustifiably dismissed however she has contributed significantly to the circumstances giving rise to her personal grievance. OSC was entitled to regard the matter as a serious misconduct. This is especially so when although a year earlier it had been more lenient in its approach to a similar incident, nonetheless Ms Kelly should have been on notice that her employer disapproved of this sort of behaviour. Also to the extent it appears that a driving force behind the dismissal was perceived reputational damage to OCA when there was little investigation into this aspect, dismissal was an over-reaction. In the circumstance The Oral Surgery Centre Limited must pay Liana Kelly the sums below:

- (a) Compensation pursuant to section 123(1)(c)(1) of the Act – \$9,000<sup>2</sup>
- (b) Lost Wages – \$3,112.80<sup>3</sup>

### **Costs**

[38] Costs are reserved and Ms Kelly as the successful applicant has 14 days within which to file cost submissions should she so wish. The Authority generally adopts a tariff based approach to costs which at the present time would be \$4,500 per day. It is noted that this case took approximately half a day and accordingly the applicable tariff would equal \$2,250.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**

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<sup>2</sup> \$15,000 less 40% equals \$9,000.

<sup>3</sup> \$5,188 less 40% equals \$3,112.80.