

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 221
3134235

BETWEEN

DIANE WATKINS
Applicant

AND

HOSPICE EASTERN BAY OF
PLENTY
Respondent

Member of Authority: Nicola Craig

Representatives: Stephen Clews, counsel for the applicant
Stephen Franklin, counsel for the respondent

Investigation Meeting: 7 May 2021 by Zoom

Submissions received: At the investigation meeting for the applicant
At the investigation meeting for the respondent

Date of determination: 25 May 2021

DETERMINATION OF THE AUTHORITY

- A. Diane Watkins' application for interim reinstatement is granted. Hospice Eastern Bay of Plenty is to reinstate her to the payroll within three days and allow her return to the workplace within seven days.**
- B. Costs are reserved.**

What is the employment relationship problem?

[1] Diane Watkins was a social worker and counsellor at Hospice Eastern Bay of Plenty (the Hospice). The Hospice is a charitable trust board. Ms Watkins was dismissed on 19 February 2021 for unauthorised disclosure of personal information

about a colleague and not meeting minimum standards of behaviour including shouting and swearing at a meeting.

[2] Ms Watkins claims that the Hospice unjustifiably dismissed her. She seeks reinstatement to her role on an interim basis until her grievance claims can be fully considered. The Hospice asserts that its dismissal of Ms Watkins was justified and strongly opposes interim reinstatement.

[3] Affidavits were provided from Ms Watkins (first and reply), Peter Bassett (Hospice Chief Executive), Hospice staff I refer to as Ms R, Ms T, Ms U, and Ms V and a former staff member Ms Y.

[4] An investigation meeting was held by Zoom connection on 7 May 2021 to hear submissions. I have dealt with this application on the basis of untested evidence and submissions. Disputed matters cannot be decided on the basis of such evidence.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[6] The issues for determination in this interim reinstatement matter are:

- (a) Is there a serious question to be tried, particularly does Ms Watkins have an arguable case for unjustified dismissal and for permanent reinstatement?
- (b) Where does the balance of convenience lie?
- (c) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?¹

[7] Where a factor is relevant under more than one head, I have focused my discussion in one part of the determination.

What was Ms Watkins' work history?

[8] In 2013 Ms Watkins began working for the Hospice, based at Whakatane.

¹ For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863, *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 and *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59.

[9] In March 2020 the Hospice issued Ms Watkins a final written warning for serious misconduct, valid for 12 months. This related to Ms Watkins swearing at another staff member.

What happened in December 2020?

[10] On 17 December 2020 one of Ms Watkins' colleagues (whom I identify as Ms R) did not arrive at work on time, which is said to be out of character. Attempts to contact her by phone failed. Another colleague (whom I call Ms S) said in an open office in front of Ms Watkins and others that Ms R's home life was not good and she hoped Ms R was okay or safe.

[11] Ms Watkins, who had previous work experience in the field of domestic violence, took the implication that Ms R might have suffered domestic violence.

[12] Ms R arrived some 45 minutes late. It transpired she had been at a breakfast meeting with Ms T. Ms T was Ms Watkins' manager at the time of her dismissal.

[13] The following day a clinical team meeting was held, with Ms R attending. The issue of Ms R's absence the previous morning was raised.

[14] Several of those involved later identified another staff member, Ms U, as having started this discussion, although some focused on her doing so to raise the shambles caused by not knowing where Ms R was and trying to find out.

[15] Ms U and Ms Watkins say Ms U mentioned first that Ms S (who was not present) had raised concern the previous day about things not being okay at Ms R's house. They say Ms Watkins then continued along the same line.

[16] Others present say that Ms Watkins was the first at the meeting to raise the safety concern about Ms R, with her adding that Ms R either could have been or was the subject of domestic violence.

[17] Ms Watkins' sense was that Ms R and Ms T dismissed the welfare concerns with Ms R smirking, rolling her eyes and saying Ms Watkins was being irrational. Ms R does not acknowledge any smirking.

[18] Ms Watkins acknowledges that she raised her voice but denies shouting. She said “What the fuck?”, feeling angry that Ms R was not being considerate of the staff’s genuine concern for her wellbeing.

[19] There is wide agreement of raised voices with a few describing Ms Watkins as yelling. She maintains with the benefit of hindsight that she should have let the issue go earlier. She says she was looking for an acknowledgement from Ms R that the group were all concerned. Ms R apologised and Ms Watkins acknowledged it.

[20] Ms S and another staff member Ms W said that after the meeting Ms Watkins told Ms S either that Ms R needed to be taught a lesson or brought down a peg or two. Ms Watkins disputes having used either phrase.

What process did the Hospice follow?

[21] Staff members contacted Mr Bassett regarding the team meeting. Ms R made a complaint to the Hospice that incorrect information had been disclosed which was publically embarrassing. She saw this as a personal attack on her by Ms Watkins.

[22] Mr Bassett sought assistance from an external advisor. On 22 December 2020 he emailed Ms Watkins seeking to meet to get her account. She agreed and later sent her written account. A meeting was held the next day.

[23] Mr Bassett concluded that he needed to commence a formal investigation. This included meetings with other staff members, including the complainant Ms R. She provided a written account. Notes were taken of the meetings.

[24] The Hospice wrote to Ms Watkins on 12 January 2021 seeking another meeting. The letter included the allegation that Ms Watkins had disclosed Ms R’s personal information, which was said to be untrue. Copies of notes and statements were enclosed. The meeting was postponed after Ms Watkins’ lawyer requested additional time.

[25] The parties met on 26 January 2021. Ms Watkins explained the background to the 18 December 2020 incident. She acknowledged that she should probably have let the issue go sooner but had wanted an apology for the complainant not taking Ms Watkins’ concerns seriously. Two other employees’ statements were provided on behalf of Ms Watkins.

[26] Mr Bassett re-interviewed three staff members (Ms S, Ms T and Ms W). They all stood by their statements. Ms U provided a written response. Another staff member Ms X declined to participate further but sought to correct Mr Bassett's interpretation of her earlier statement.

[27] The Hospice provided a preliminary decision with an invitation to respond. It indicated that it had gone back to witnesses to validate or clarify comments. Ms Watkins' lawyer sought full details. The Hospice indicated that Ms Watkins' representative had spoken to employee witnesses himself, effectively refusing to provide the Hospice's material.

[28] In the preliminary decision Mr Bassett concluded that Ms Watkins had taken an opportunity to raise an untrue comment about Ms R and disguise it as a genuine concern for a colleague. He concluded that Ms Watkins' intention was to harm or upset Ms R and this was not consistent with the Hospice's value of respect. Sharing the comment with a wider group was also a concern without having spoken to Ms R individually first.

[29] Ms Watkins' response was provided. The Hospice terminated her employment for serious misconduct in a 19 February 2021 letter. It concluded that Ms Watkins had breached its policies and not acted as an experienced professional of her calibre was expected to behave. The previous warning was taken into account. Mr Bassett concluded that he had lost the ability to trust Ms Watkins to show judgement and behave appropriately.

[30] Although Ms Watkins was not entitled to notice as she was summarily dismissed, the Hospice decided to pay her an amount equivalent to her notice period, being eight weeks.

Is there an arguable case regarding unjustified dismissal?

[31] This is a relatively low threshold.² This is acknowledged for the Hospice although there is no acceptance that the test is met here.

² *Humphrey* at n 1.

[32] Ms Watkins' position is that there was no substantive justification for the dismissal, denying that she disclosed any personal information. She also challenges procedural aspects.

[33] The Hospice relied on a provision in its disciplinary code which listed "unauthorised disclosure of personal information". There is arguably some incongruity in the Hospice's reliance on Ms Watkins disclosing information but then saying the information was untrue.

[34] It is not evident that the Hospice focused on exploring what Ms Watkins actually knew about Ms R. It is arguable on the basis of the affidavit evidence that Ms Watkins knew only what Ms S had mentioned the day before to a group in a shared office. Likewise that the domestic violence comment was only a "what if" suggestion to focus minds on why staff should be concerned about others' safety. There was also some evidence of swearing by staff occurring in this workplace.

[35] It appears no disciplinary action was taken in relation to Ms S or Ms U. Ms Watkins unsurprisingly raises a question about disparity of treatment.

[36] The Hospice obtained information in the second round of interactions with witnesses which it was not prepared to disclose to Ms Watkins. Mr Bassett's response is that he received no new information from the second round of interviews so there was nothing to pass on. However, he spoke to two previous witnesses. He also received an email from one which said that she was concerned that his notes of their meeting suggested she thought Ms Watkins had it in for Ms R, which she did not say and was not her assessment of the situation. Mr Bassett received another staff member's email suggested that he had misconstrued what she was saying.

[37] In light of the good faith duties under s 4 (1A)(c) of the Act it is arguable that these should have been disclosed to Ms Watkins and her representative during the process.

[38] No record of the 26 January 2021 meeting between Mr Bassett and Ms Watkins was provided to her. Her representative asserts that the Hospice attributed facts to her claiming she had admitted them when that was not the case. The preliminary decision letter refers in detail to Ms Watkins' statement/s and appears to rely on her comments for the provisional finding that she acted with malice.

[39] I am satisfied that there is an arguable case that Ms Watkins was unjustifiably dismissed.

Is there an arguable case for permanent reinstatement?

[40] I turn to look at whether it is reasonable and practicable to reinstate Ms Watkins. Reinstatement has again become a primary remedy.³ What is the feasibility or practical workability of re-imposing this employment relationship? It is not sufficient to show resistance and strained circumstances to avoid reinstatement.⁴

[41] The major obstacle to the relationship between Ms Watkins and the Hospice being satisfactorily resumed is whether it is feasible for those involved to work together again.

[42] There is substantial resistance to Ms Watkins' return to the Hospice both from Mr Bassett and Ms T as managers, as well as from some other staff. This is outlined in more detail below. There is much criticism of Ms Watkins's workplace approach and behaviour.

[43] These tensions appear to present something of a barrier to permanent reinstatement however, I mention the timing and responsibilities below.

[44] Another practicability consideration is the ongoing existence of a full time role. Mr Bassett refers to the Hospice's model of care changing since Ms Watkins' employment. Ms T says she has been able to manage the required aspects of the social worker role along with her own. Mr Bassett concludes the organisation does not need a fulltime counsellor. If Ms Watkins is not reinstated Mr Bassett indicates that the role will be disestablished in its current form. No documents were lodged identifying any particular change to the Hospice's structure. By contrast the unmet need for social worker services is referred to by Ms U.

What is the balance of convenience?

[45] I now move to weigh the interests of Ms Watkins against those of the Hospice, including a consideration of the adequacy of damages.

³ Section 125 of the Act.

⁴ *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Ltd v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at p 8.

Ms Watkins

[46] Ms Watkins is the sole income earner in her household. Her husband is unable to work and can be seen as fragile. He became very stressed during the Hospice's investigation, worried about the couple's survival if she had no job. There are likely to be negative impacts on him if Ms Watkins is not reinstated, particularly if she is unable to find another similarly remunerated position.

[47] The couple have a mortgage and have had to take a loan holiday whilst she is no longer being paid. Ms Watkins will have to pay for the costs associated with legal representation. She has had to sell her car to release some cash and has cancelled her life insurance. Her ability to provide for herself and her family has been significantly affected by her dismissal.

[48] Ms Watkins has worked at the Hospice for a number of years. Both parties agree that this is a relatively specialised area with few, if any, similar jobs in the Eastern Bay of Plenty. Mr Bassett describes Ms Watkins as being experienced in domestic violence work which should provide work opportunities in the area.

[49] The time to get the substantive claim heard weighs in favour of reinstating Ms Watkins until that time. It is likely that this matter may not be heard until around very late 2021 or early 2022.

The Hospice

[50] I turn to weigh any detriment which the Hospice would or could suffer if Ms Watkins is reinstated.

[51] Mr Bassett expressed concern that if Ms Watkins is reinstated the Hospice may lose other staff members it cannot afford to lose. It is difficult to recruit experienced palliative care nurses in provincial centres such as Whakatane.

[52] In addition, several witnesses are concerned that having Ms Watkins back may create a very unpleasant working environment at the Hospice. They see the current work environment as being significantly calmer without Ms Watkins. Her big personality and general presence tended to create tension for others; an 'us and them' environment. It is not a large workplace.

[53] Mr Bassett identifies that a majority of staff (eight) signed a letter indicating they did not want Ms Watkins to return. The letter is on Hospice letterhead. It is unclear who initiated this letter or authorised the use of letterhead. The names and designations of those staff who signed are typed in. There is evidence that it was not presented to those who were seen as being supportive of Ms Watkins.

[54] There is evidence from two witnesses of having heard hearsay evidence through a somewhat unspecified chain of Ms Watkins making negative comments about what she would do to Mr Bassett if she is reinstated. Ms Watkins denies this. I can give little weight to the evidence.

[55] Ms R is firmly opposed to reinstatement. She felt humiliated, embarrassed and hurt by Ms Watkins' behaviour. She also describes herself as feeling bullied in the past by Ms Watkins although she did not formally complain. She suggests that Ms Watkins enjoys the upset and drama her behaviour is said to cause although no basis is offered for that view.

[56] Ms R says that she does not believe she could continue to work for the same employer as Ms Watkins. She would "almost certainly" be forced to leave if Ms Watkins returns. Against this I take into account that Ms R managed to work in the same workplace as Ms Watkins for about nine weeks after the 18 December meeting.⁵

[57] Ms Watkins' former manager Ms T describes Ms Watkins' wider behaviour as bullying and abusive. Strong words and yet there is no indication of any action being taken against Ms Watkins, even in the form of adverse comments in a performance review. Despite having been in the role since at least late 2017 the evidence is that Ms T has not completed a written performance appraisal of Ms Watkins. Ms Watkins completed the self-assessment portion of an appraisal in 2019. A 2017 appraisal by a former manager is very positive.

[58] Ms T says she would be considering retiring immediately if Ms Watkins returns.

[59] A couple of Hospice witnesses refer to concern that if Ms Watkins returns she will try to punish those who have stood up to her.

⁵ This did include the Christmas period.

[60] Despite the views expressed in affidavits that Ms Watkins caused an unpleasant environment, there is earlier documentary evidence with a different focus. Ms Watkins provides a letter she wrote to Mr Bassett in December 2017. In it she expresses concerns about his and others' leadership, creating a passive/aggressive environment which comes across as bullying. Ms Watkins wrote that this caused some committed and hardworking staff to leave. A further email from her to Mr Bassett and Ms T in March 2020 describes another manager's "insidious behaviour".

[61] Affidavit evidence focusing on Ms Watkins' positive and worthwhile role in the organisation was provided by Ms U, Ms V and Ms Y. There is a 2017 media article regarding high numbers of staff departures following Mr Bassett's arrival although I give limited weight to this.

Concluding comments on the balance of convenience

[62] On the face of the documentary and affidavit evidence there appears to be two almost equal-sized factions working at the Hospice. Clearly that is not a desirable situation but the evidence supports it having been an existing situation prior to the 18 December 2020 incident and to Ms Watkins' dismissal.

[63] Ms Watkins has provided documentary evidence of her raising questions with management whereas the views expressed of Ms Watkins being divisive, not meeting Hospice values and being challenging to manage were not documented. There is some evidence of others supporting her views although some of that is historic, being from a former staff member.

[64] Given somewhat contradictory evidence on Ms Watkins' clinical skills, I make no comment regarding the effect on Hospice clients and their families of Ms Watkins' reinstatement.

[65] Both parties have the potential to face difficulties which would not easily be remedied by damages so I see this factor as neutral.

Where does the overall justice lie?

[66] In terms of the merits, it is clear that the Hospice sought advice and followed a process which was largely documented. However, some seemingly valid concerns are

identified on Ms Watkins' behalf and these will need to be more closely examined at the substantive investigation.

[67] The possibility of a group of staff struggling to work together in an organisation providing important services to the public is disquietening. However, the group appears to have been able to work together for an extended period prior to the clinical team meeting. They have also been able to work together for nine weeks after the incident as Ms Watkins was not suspended during the investigation and disciplinary process.

[68] The workforce is divided. It would not be right at this point to make a firm finding on whose fault that was. On the evidence before me it does appear that Ms Watkins' interim reinstatement claim is being used as an opportunity to pursue concerns about her which were very largely not raised or progressed previously.

[69] I accept that the Hospice has less resources with which to deal with potential issues arising from a return to work than for example, a district health board does. However, Ms Watkins' role could be seen as one which requires somewhat less frequent interactions with other staff members than some other roles. Ms V who describes working closely with Ms Watkins finds her very easy to work with. The other factor is that the Hospice, as a health sector organisation, should have more soft skill resources to try to ensure people can work satisfactorily together than some other employers have.

[70] I also note the point made by Chief Judge Inglis in the recent *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* decision, that the re-introduction of reinstatement as the primary remedy "reflected a Parliamentary intention to raise the bar that employers would have to negotiate in order to provide that reinstatement was neither reasonable nor practicable".⁶

[71] Looking at the overall justice, I conclude that Ms Watkins' position is stronger. I order the Hospice to reinstate Ms Watkins to the payroll within three days of the date of this determination and to allow her to return to the workplace in her former position of social worker/counsellor within seven days of the date of this determination. Both parties are to co-operate with all reasonable steps taken to return Ms Watkins to work and ensure that working relationships are operating satisfactorily.

⁶ *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* above at n 1, at [42].

[72] The Authority will be in contact regarding the next steps in this proceeding.

Costs

[73] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority