

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 153

File Number: 5290991

BETWEEN NATALIE ATKINSON
 Applicants

AND VET CARE LIMITED
 Respondent

Member of Authority: Denis Asher

Representatives: Peter Cullen & Jenny Jermy for Ms Atkinson
 Dr Heidi Ward-McGrath for the Company

Investigation Meeting Masterton, 28 & 29 July 2011

Submissions Received 19 September 2011

Determination: 7 October 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Did the respondent (the Company) breach its contractual obligations to Ms Atkinson on multiple occasions, as alleged, including its obligation to provide her with a safe and healthy working environment? Did it also unjustifiably constructively dismiss the applicant? If so, what if any remedies are available to Ms Atkinson?

[2] Or, as the Company claims, did Ms Atkinson fail to attend disciplinary meeting to discuss performance issues and engage in harassment and bullying so as to

halt any disciplinary action? Did Ms Atkinson resign rather than discuss those matters? And are there any other issues in respect of Ms Atkinson's performance?

[3] Mediation did not resolve the parties' employment relationship problem.

The Investigation

[4] Following a telephone conference on 11 May 2011 the parties subsequently agreed to a one-day investigation of their problem in Masterton on 28 July 2011 and to a timeline for the provision of witness statements. Because of witness numbers and subsequent allegations by the respondent I advised the party that I would reserve the following day, 29 July in the event it would be required to complete what I described as a snowballing employment relationship problem.

[5] As it happened, more than two days were required for the investigation although a significant portion of that time was spent by the parties, unsuccessfully, in attempting to settle matters on their own terms.

[6] The parties agreed to a closing submissions timetable during the investigation.

Chronology

[7] I am satisfied from the evidence that the following is an accurate chronology of key events:

5 May 2008 Ms Atkinson commences employment with the respondent as a veterinary nurse.

9 July 2009 Verbal warning issued in writing re deliberate administration by the applicant of a medication other than that prescribed by Dr Ward-McGrath.

10 July Via two letters on the same day, Ms Atkinson acknowledges her action in writing and accepts full responsibility.

3 August	Verbal warning issued in writing by respondent alleging a failure to comply with instructions.
3 August	Ms Atkinson disputes allegation.
15 September	Verbal warning issued in writing by respondent alleging a failure to comply with instructions and procedures.
16 September	Ms Atkinson disputes allegation and alleges unfair treatment and bullying.
2 October	Commencement by the applicant of maternity leave.
November	Ms Atkinson seeks legal representation.
25 November	Written advice by applicant's counsel to respondent advising of a personal grievance and proposing mediation.
7 December	Written warning by respondent alleging a failure to comply with lawful and reasonable instructions.
9 December	Counsel for the respondent reply denying any grounds for a grievance; a meeting is sought.
10 December	Meeting date proposed by counsel for Ms Atkinson.
14 December	Meeting date agreed by counsel for the respondent; notice also given of disciplinary matters the Company intended raising.
15 December	Meeting declined by counsel for the applicant; mediation proposed instead.
28 December	Letter from respondent to Ms Atkinson alleging defamation, that she improperly visiting the veterinary clinic and illegally downloaded clinic files; included in the same letter was a

trespass notice and a request to meet on 6 January 2010 to discuss the allegations.

- 27 January 2010 Mediation; same date written advice from respondent to applicant's counsel of a warning for failure to follow instructions.
- 4 February Respondent seeks a meeting with applicant on 8 February in respect of allegations of continued failure to follow instructions. Ms Atkinson's counsel replies on the same day advising of her wish to progress matters at mediation instead.
- 20 July Ms Atkinson resigns alleging constructive dismissal.

Summary of Parties' Positions

[8] I am satisfied that the following is an accurate summary of the parties' respective positions.

[9] Dr Heidi Ward-McGrath is one of the Company's two directors and is the respondent's senior veterinarian.

[10] The applicant says all went well at the outset at the outset of her employment but from February 2009 she noticed a change in Dr Ward-McGrath's attitude toward her. Ms Atkinson says it was around this time that she "*confronted Heidi regarding an animal welfare issue*" (1st page, attachment A to the statement of problem).

[11] Ms Atkinson says that, from the time of the confrontation, Dr Ward-McGrath's attitude toward her was no longer professional, that she no longer trusted the applicant and "*constantly treated me unfairly and spoke to me abusively and aggressively*" (above).

[12] Ms Atkinson cites as examples of Dr Ward-McGrath's harassment of her:

- Three official warnings within three months, which – in breach of correct procedures – were not preceded by verbal warnings and were never followed up on;
- A letter from Dr Ward-McGrath that included a report of another employee’s negative feelings toward the applicant who, when contacted, denied making the statement;
- Dr Ward-McGrath asking a volunteer worker “*to spy*” on the applicant (above);
- Confiscation by Dr Ward-McGrath of the applicant’s personal belongings;
- Issues over changes to rostered hours;
- Being sent home before the completion of her shift;
- Accusations of theft;
- Accusations by Dr Ward-McGrath that Ms Atkinson was lying to her; and
- Issues over lieu hours and holiday pay owed and money payable being withheld.

[13] Ms Atkinson says that, because of Dr Ward-McGrath’s treatment of her she broke down. As she was pregnant, she was taken to a doctor who immediately placed her on maternity leave (2 October 2009).

[14] The applicant says that since she left on maternity leave she received numerous letters from Dr Ward-McGrath that she found to be harassing and the cause of continuous stress.

[15] The Company says Ms Atkinson:

- repeatedly failed to follow instructions;

- failed to follow clinic protocols regarding patient medications;
- failed to follow nursing regulations in respect of the same;
- knowingly delivered incorrect medication to a client despite express and repeated instructions from her employer;
- failed to adhere to the staff work roster as instructed, and on several occasions changed it unilaterally and without authority so as to claim more work hours; and
- in breach of her employment obligations, entered into communications of a commercial nature with a former employee who had complained to the Veterinary Council about the Company.

[16] The Company also states that all warnings given to Ms Atkinson were justified and followed a proper process.

[17] The Company claims that at least one of the matters was serious enough to support summary dismissal but the employer instead showed good faith by drawing matters to Ms Atkinson's attention and worked with her to resolve them.

[18] Most of the employment issues the Company had with Ms Atkinson occurred from June 2009 onwards when she was pregnant: it is the Company's interpretation of events that the applicant's pregnancy impacted on her ability to perform her duties. But as the Company was not informed of her condition until 2 October 2009 (by way of a note left on Dr Ward-McGrath's door/desk) it was unable to take the pregnancy into account in its dealings with Ms Atkinson.

[19] The Company believes personal issues were at the forefront of any stress experienced by Ms Atkinson.

[20] The Company implemented steps to attempt to resolve the problems by way of consultation and by having a counsellor available to Ms Atkinson (I note here that the counsellor proposed by the respondent was Dr Ward-McGrath's mother).

[21] Because of her accessing Company records without authority, working unauthorised hours, defaming Dr Ward-McGrath to the staff and working unauthorised hours, Ms Atkinson was asked to stay away from the work premises. Only after ignoring that request was she trespassed, on 28 December 2009.

[22] The Company has no knowledge of any disagreement between Dr Ward-McGrath and the applicant concerning the care of an animal.

[23] The Company provides a safe and healthy working environment by maintaining a policy on bullying and dispute resolution.

[24] The Company has a twelve year history of being a family friendly supportive employer including providing pregnant staff with less onerous duties and post pregnancy support; Ms Atkinson declined the offer of alternate duties.

[25] Ms Atkinson says she felt she had no option other than to resign her employment, on 20 July 2010. She says her requests for holiday pay and payment for lieu hours have gone ignored. The Company agrees it withheld Ms Atkinson's holiday (for set off reasons), denies that she is owed any other wages and says the applicant resigned for reasons personal to herself.

Discussion and Findings

Breach of Contract Allegations: Failure to Pay Holiday Pay

[26] As admitted by Dr Ward-McGrath during the investigation, the respondent had not paid Ms Atkinson holiday pay owed to her because of allegations the actions of the applicant may have cost the Company. As I make clear below, there was no basis for that conclusion and, as I made clear to the respondent, its concerns did not provide an exemption from its obligations under the Wages Protection Act to pay Ms Atkinson the money it owed her. It has no right to set off claims against an employee from wages owing.

Breach of Contract Allegations: Other Unpaid Wages

[27] I do not accept from Ms Atkinson's evidence that she is owed unpaid wages for time in lieu: in particular I am not satisfied that the time worked was authorised by the respondent and therefore should be remunerated, or that there are other grounds for payment. I am therefore not satisfied that the time claimed for was outside of the give and take of a small workplace.

Breach of Contract Allegations: Unjustified Warnings

[28] As Dr Ward-McGrath's acknowledgement during the investigation confirmed, the written warnings of 3 August, 15 September, 7 December 2009, and 6 and 27 January 2010 issued to the applicant were in breach of due process, in particular the employer's good faith obligations to first put its concerns fairly and reasonably to an employee and – amongst other requirements – provide the employee with a fair and reasonable opportunity to respond before making a finding. Dr Ward-McGrath agreed that, in respect of the correspondence, disciplinary findings were made without a prior investigation involving Ms Atkinson and/or her representative, or an opportunity for her to respond in advance to her employer's concerns.

[29] The warnings therefore were in serious breach of fundamental procedural requirements and – as evidenced by the applicant – seriously disadvantaged Ms Atkinson.

[30] For completeness' sake I record here that the various meetings held by the respondent with Ms Atkinson, during which performance concerns were raised, followed on from the initial disciplinary findings, and – in breach of due process – did not precede the warnings.

Breach of Contract Allegations: Other Matters

[31] Other alleged breaches for which substantial damages are sought include: claims that other staff found the applicant difficult to work with; expectations to work unpaid overtime during scheduled breaks; criticisms of the quality of rabbit meat

supplied by the applicant for pet consumption and which she was not properly paid for; confiscation of personal belongings; sending the applicant away before the end of scheduled work, without pay; and false accusations of theft and of lying.

[32] I am satisfied from a close scrutiny of the evidence that these claims do not prevail either because the applicant has not succeeded in her allegations, or the circumstances complained of arose out of genuine misunderstandings and confused communication to which both parties equally contributed, or are sufficiently trivial such as to warrant no compensation for disadvantage.

[33] I am also satisfied that these allegations, measured objectively, should be seen in the context of a deteriorating employment relationship characterised by failures common to both Ms Atkinson and Dr Ward-McGrath to speak frankly to one another, to listen fairly and reasonably to what the other had to say and to take a measured approach to the genuine concerns they held in respect of the other.

Constructive Dismissal Allegations

[34] I accept Ms Atkinson's counsel's fundamental submission that the respondent "*acted unfairly and unreasonably in respect of the applicant in her employment and that as a result, the applicant suffered mental harm and significant disadvantage*" (par 1.1 submissions on behalf of Ms Atkinson received on 30 August 2011). I reach this conclusion because of my findings of serious contractual breaches by the respondent as detailed above and below: I accept that those breaches, and other actions by Dr Ward-McGrath, meet the test of an unjustified constructive dismissal.

[35] I also accept Ms Atkinson's counsel's submission that the respondent's trespass notice "*irrevocably destroyed the employment relationship between the parties*" (par 5.20, above). My conclusion is based on the fact that the findings relied on by Dr Ward-McGrath in issuing the notice did not derive from a proper investigation, and the scope of the notice (2-years) went well beyond the likely duration of Ms Atkinson's maternity leave and effectively brought her employment to a close. It is, as counsel submitted, "*inconceivable that someone can be an employee yet commit an offence if they enter the workplace*" (par 5.23, above).

Remedies

[36] Ms Atkinson succeeds with two claims of unjustified disadvantage and her claim she was unjustifiably constructively dismissed. I am satisfied from her evidence that the respondent's undue process has caused significant humiliation and distress such that an award of \$5,000 is appropriate for each breach causing unjustified disadvantage (i.e. a total of \$10,000) and that, after having regard to the evidence of distress caused the applicant by her unjustified constructive dismissal, I am satisfied that compensation should be set at \$10,000, i.e. I find Ms Atkinson is entitled to a total of \$20,000 compensation for humiliation.

[37] I do not accept the submission on behalf of Ms Atkinson that, as a result of her unjustified constructive dismissal, she lost wages from the time of commencing maternity leave (2 October 2009) until the date she intended to take that leave, mid-March 2010. I reach this conclusion because of the effect of the trespass notice issued on 28 December 2009 and because the medical evidence (pages 99 & 100 of the agreed bundle) are based on self-reporting and do not establish a causal link between Dr Ward-McGrath's conduct and Ms Atkinson's undoubted stress condition. It is not for me to speculate on the extent to which Ms Atkinson's deception of her employer contributed to that stress, if at all.

[38] Lost wages are therefore to be paid from 28 December 2009 until the date the applicant intended to take maternity leave, mid-March 2010.

Respondent's Counter-Claims

[39] No reliable evidence has been advanced by Dr Ward-McGrath in support of any of her claims in respect of Ms Atkinson, whether in respect of personal matters involving the applicant or other allegations. Other than the applicant's fulsome acknowledgement of her error in respect of prescribing medication, there is nothing in the copious but vague documentation and statements provided by Dr Ward-McGrath that establishes her claims against Ms Atkinson. Indeed, a good deal of the 'evidence' provided by Dr Ward-McGrath appeared at the Authority's investigation, and was put to the applicant there for the first time. It is a case of too little, too late.

[40] Again, in fairness to the applicant, because of the absence of evidence it would be unfair and unreasonable to publicise the unnecessary detail of those claims.

Contributory Fault

[41] I am satisfied for the following reasons that Ms Atkinson's actions contributed significantly to the events culminating in her unjustified disadvantage and dismissal such that the remedies awarded her should be reduced by 50%.

[42] I note that - as acknowledged by the applicant in her letters of 10 July 2009 (pages 27 & 28 onwards in the agreed bundle) – Ms Atkinson deliberately elected not to prescribe medication as directed by Dr Ward-McGrath, but substituted another at her own initiative. The applicant had no authority to do so and her actions were a fundamental breach of her obligations to the respondent, to her profession and to the client, for which summary dismissal would have been entirely justifiable. Dr Ward-McGrath elected to overlook that breach but, I find, clearly held ongoing concerns about the applicant as a result of the latter's actions.

[43] I also note that Ms Atkinson elected to tell other employees of her pregnancy but not Dr Ward-McGrath. Her explanation for excluding the respondent was simply not credible and it would be unfair to Dr Ward-McGrath to publicise the applicant's implausible and unsubstantiated claim.

[44] The effects of this failure to communicate were significant: not only was Dr Ward-McGrath denied the opportunity to meet her statutory obligation to ensure a safe and healthy working environment, but Ms Atkinson's related conduct clearly raised a significant uncertainty in the mind of Dr Ward-McGrath in respect of her employment relationship with the applicant and her ability to be confident she was properly informed by Ms Atkinson in respect of day to day developments.

[45] As explained to the parties during the investigation, the Authority operates in a 'clean hands' or equity and good faith environment: it is plainly unjust to find fault on this occasion only with Dr Ward-McGrath while overlooking Ms Atkinson's egregious failings and destructive conduct.

Observation

[46] It is to be regretted that significant legal input has not aided the parties thus far in appreciating the need for substantial evidence to match the seriousness of their allegations, nor the risks and costs of pursuing those increasingly bitter and personalised claims.

Determination

[47] Ms Atkinson succeeds with her claim of unjustified constructive dismissal; she also succeeds with two claims of unjustified disadvantage. The respondent is therefore to pay a total of (taking account of contributory fault) compensation for humiliation, etc to the applicant of \$10,000 (ten thousand dollars) as well as lost wages from 28 December 2009 until mid-March 2010 (also to be reduced by 50%).

[48] The holiday pay owed the applicant is to be paid immediately (it of course is not reduced by contributory fault).

[49] Leave is reserved to the parties to resubmit the matter to the Authority in the event agreement is not forthcoming on the quantity of both outstanding holiday pay and lost wages.

[50] Costs are reserved. I note here that, subject to submissions from the parties, costs normally follow the event and in 'normal' cases such as this a contribution to fair and reasonable costs of \$3,000 per day typically occurs. In this instance, and discounting for the time spent by the parties trying to settle matters on their own terms and because of serious health issue limiting Dr Ward-McGrath's ability to participate in the time allocated, two days costs is likely to be one of the multipliers.

Denis Asher

Member of the Employment Relations Authority