

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 98
5294873

BETWEEN KATHRYN DONNA BAYNES
Applicant
A N D RADIUS RESIDENTIAL
CARE LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Dr Martin Round, Advocate for Applicant
Sally Leftley, Advocate for Respondent
Investigation Meeting 12 May 2011 at Christchurch
Submissions Received: 19 May 2011 from Applicants
19 May 2011 from Respondent
Date of Determination: 6 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kathryn Donna Baynes says that she was unjustifiably dismissed on 7 October 2009 from her position with Radius Residential Care Limited (Radius) as an enrolled nurse at Radius' St Ives Care Centre in Christchurch (Radius St Ives) on the grounds of redundancy. Ms Baynes also says that Radius failed to provide her with her time and wage records when requested on 14 December 2009.

[2] Radius does not accept that the dismissal was unjustified. It says that the redundancy was substantively justified because of the need to restructure the staffing complement of the facility in accordance with clinical requirements, resulting in the reduction of one enrolled nurse position. It further says that the process it used, both in consultation and selection, was fair and in accordance with good faith requirements.

[3] Radius says that the failure to respond to the request for time and wage records was simply an oversight and regard has to be to the application for leave to raise the grievance out of time because it never received the letter raising the personal grievance. It says that the records were provided when Radius was directed by the Authority to do so. The Authority has issued an earlier determination in this matter finding there were exceptional circumstances to raise a grievance outside of the timeframe provided in the Employment Relations Act 2000 by virtue of s.115 (b) of the Act - CA 194/10.

[4] Ms Baynes seeks the following by way of remedy:

- Compensation for loss of income;
- Compensation for hurt and humiliation;
- A penalty for failing to provide her with the time and wage records; and
- Costs.

The issues

[5] The Authority is required to determine:

- Was the dismissal for the genuine reason of redundancy;
- Was the process followed fair and reasonable?
- If it gets to the point of remedies, what remedies should be awarded?
- Should there be a penalty imposed on Radius?

[6] The Authority must objectively consider the decisions made by Radius and the manner of making the decisions and whether it was what a fair and reasonable employer would have done in all the circumstances at the relevant time – the former test for justification in s.103A under the Employment Relations Act 2000. That section has now been repealed and the new s.103A was substituted on 1 April 2011. This dismissal, however, took place before 1 April 2011 and proceedings were lodged before that date.

[7] The statutory obligations of good faith in s.4 of the Employment Relations Act 2000 required Radius to deal with Ms Baynes in good faith throughout the process. These statutory obligations inform the decision under s.103A about how an employer acted – *Simpson's Farm Ltd v. Aberhart* [2006] ERNZ 825.

Was the dismissal for the genuine reason of redundancy?

[8] Radius is a private health provider for the elderly. It has 20 facilities located throughout New Zealand comprising rest homes, hospitals and dementia care units. Five of these are in the South Island, including the facility in which Ms Baynes was employed.

[9] Wendy Turner was employed by Radius in 2005 initially as the National Operations Manager and then in 2007 she was promoted to Chief Operating Officer. In that role, she was involved in the process and decision involving Ms Baynes' position.

[10] Ms Turner gave evidence about the commencement of a review of clinical staffing requirements at Radius St Ives in Christchurch as a direct result of a comprehensive review of the services provided at the centre commissioned by the Canterbury District Health Board. The review identified the need to increase registered nurses' hours at the facility. Ms Turner said that in order to comply with this requirement within the financial constraints the organisation had, there was a proposal to reduce enrolled nurses' hours from the current 80 per week to 40 per week. At that time, Radius St Ives had two enrolled nurses working 40 hours per week each; Ms Baynes and Trudy Hegan.

[11] Ms Turner said that she knew that if the proposal to reduce enrolled nurses' hours went ahead, it could result in a possible redundancy and that in fact was what occurred.

[12] I am satisfied, having heard the evidence, that the reduction of the enrolled nurses' hours from 80 to 40 hours per week, in effect one position, was for a genuine reason and that there was no ulterior motive in making such a decision. Ms Baynes did not present a real challenge to the underlying reason for the review and decision to reduce enrolled nurses' hours. Her primary concern was that her position was selected and not Ms Hegan's and that she was then made redundant.

[13] In conclusion, therefore, I find that the dismissal was for the genuine reason of redundancy.

Was the process followed fair and reasonable?

[14] On 3 September 2009, Ms Baynes and Ms Hegen were both given letters advising that Ms Turner wanted to hold a meeting with them at 11am on Tuesday, 10 September 2009 to discuss the ongoing requirements for enrolled nurse positions. The letter advised that Melissa Angus, the facility manager of Radius St Ives, would also be at the meeting. Ms Baynes was advised in the letter that it was possible, as a result of the meeting and review of staffing, ongoing employment may be affected and that she was welcome to bring a support person or adviser of her choice to the meeting.

[15] Ms Baynes acknowledges that advice but says that prior to the meeting she had a discussion with Ms Angus in which Ms Angus told her she did not believe that it was necessary at that stage for her to contact the New Zealand Nurses Organisation (NZNO). Ms Baynes says that, relying on that advice, she did not contact the NZNO. In support of the conversation, she obtained an email from Ms Angus who wrote, amongst other matters, the following:

*Donna did ask me before the first meeting if she needed to get in touch with the NZNO. I informed her that I did not believe it was necessary at this stage (the first meeting) as at the first meeting we were only presenting our proposal to both her and Trudy. **She was of course welcome to bring a support person to the next meeting (as entitled) and we would listen to her feedback in relation to the proposal before making a decision on what pathway to take.***

[16] I asked Ms Baynes if she recalled Ms Angus using the words that were not in bold as set out in the email in terms of whether it was necessary for her to contact the NZNO. Ms Baynes says that she did recall Ms Angus using those words. I accept that Ms Baynes was informed by Ms Angus that it was Ms Angus' belief that it was unnecessary to get in touch with the NZNO for the first meeting that was to take place on 10 September 2009 because it was to present a proposal only. I accept Ms Baynes relied on that advice for that first meeting. I do not find though that Ms Angus' belief, that contacting NZNO was unnecessary at that stage was intended to extend beyond that first meeting. As will become clear Ms Baynes was at each other step of the process again invited to bring a support person and/or representative. Ms Baynes said she continued to

rely on that one discussion with Ms Angus at every stage of the process and did not bring a representative to any meeting.

[17] I do not find that the continued responsibility for Ms Baynes making a decision not to bring a representative or support person with her to any of the later meetings can be attributed to Radius. I shall consider any disadvantage to Ms Baynes in relation to the first meeting on 10 September 2009 only.

10 September 2009

[18] Ms Baynes and Ms Hegen both attended this meeting with Ms Turner and Ms Angus. The proposal was presented. Dr Round raised an issue as to whether the proposal was presented for consultation or, as a decision already made, a fait accompli. I accept his submission to the extent when certain parts of the typed notes of the meeting on 10 September are considered in isolation they could support a firm view on the part of Radius about the reduction of hours and therefore the end of one enrolled nurse position. When read as a whole, however, it is clear that a proposal was being presented at the meeting. I accept Ms Turner's evidence that no decision was made until feedback was received after the next meeting as inherently more likely.

[19] Ms Turner, as is clear from the minutes, put the proposal in terms of enrolled nurses' hours to be reduced from 80 to 40 hours per week. The notes also record "*if we go ahead with it*", there was to be an interview process to follow if both wanted the role.

[20] Ms Baynes asked some questions at the meeting. She asked whether, if she was not chosen for the enrolled nurse position, she could be considered as senior caregiver. I find she was advised that she would be entitled to a position if one was available. Ms Baynes also asked what would happen if she did not get the role and if she needed time to obtain another position. The notes reflect Ms Turner explaining the notice requirements for Radius in the employment agreement. Ms Baynes asked whether the position was full time and morning or afternoon and her questions were also answered.

[21] Ms Baynes accepted that the typed notes provided by Radius from the meeting were an accurate record of what was said. Toward the end of the meeting, Ms Turner advised that there was to be a further meeting on

17 September 2009 at 11am to receive any feedback prior to any definite decision being made regarding the proposal. She advised she would put the content of the proposal into a letter which she duly did dated that same day and an identical letter was provided to both Ms Baynes and Ms Hegen following the meeting. It set out that feedback was required on two main proposals. The first was the proposal to reduce the number of enrolled nurse positions from two full time roles to one fully time role with such role proposed to be predominantly a Monday to Friday morning role. The second was a proposal to advertise the position internally and that enrolled nurses currently employed at Radius St Ives would be entitled and encouraged to apply. Ms Baynes was also advised in the letter that she was welcome to bring a support person or representative with her to the meeting on 17 September 2009.

[22] Ms Baynes felt that, having no representative at the meeting on 10 September, disadvantaged her. Ms Baynes, elaborating on the disadvantage, said she felt it prejudicially affected her position because a representative could have said that she had more nursing experience than Ms Hegan. The first meeting was for the purposes of putting the proposal and there was then an opportunity to consider the proposal and give feedback at another meeting. Ms Baynes clearly felt she could ask questions and these questions were satisfactorily answered on the face of the minutes of that meeting. It would have been premature at this first meeting to have made any representations about nursing experience and there was an opportunity for Ms Baynes to do this at a later date.

[23] In those circumstances, I am not satisfied that Ms Baynes was disadvantaged in relying on Ms Angus' view that it would not be necessary for her to involve NZNO at the first meeting.

17 September 2009

[24] On 17 September 2009, Ms Baynes attended a further meeting with Ms Hegan, Ms Turner and Ms Angus. Ms Baynes agreed that the typed minutes of the meeting record provided by Radius were accurate.

[25] Ms Baynes offered some feedback in relation to hours for the position regarding morning/afternoon shifts and duties. The notes confirm that no

alternative proposals were made by either Ms Baynes or Ms Hegan. I am satisfied that that is consistent with the evidence I heard.

[26] Ms Turner concluded the meeting by advising that comments that had been made primarily by Ms Baynes would be taken into consideration and she would hope to have a decision about the proposal to both Ms Baynes and Ms Hegan by Monday. Ms Turner explained that if both Ms Baynes and Ms Hegan decided to apply for the role, then that was good and they were both encouraged to do so. There was further advice that if there was a decision to proceed, that Ms Baynes and Ms Hegan would be notified in writing and asked to apply for the role and interviews would be scheduled in accordance with the usual recruitment process. The notes provided that if the organisation decided against restructure, then nothing would happen. Ms Turner advised that she was onsite and happy to answer any questions after the meeting.

[27] The meetings on 10 and 17 September 2009 were consultation meetings. On the face of the evidence, the proposal appears to have been fairly put both in relation to the proposed reduction of enrolled nurses' hours and what would happen if that took place in terms of making a selection.

[28] Ms Baynes said that she did not believe that the consultation was full and fair. She put forward that she believed that there had been predetermination of the decision. If established, that would mean that the process that appeared to be fair and undertaken in good faith was not. I shall turn to consider the evidence in relation to the allegation of predetermination after I set out the process that then followed to consider the allegation in terms of the process assessed as a whole.

21 September 2009

[29] Ms Baynes and Ms Hagan both received identical letters dated 21 September 2009 from Ms Turner advising them that there had now been a decision made to proceed with the proposal to reduce the number of enrolled nurse positions at Radius St Ives from two full time to one full time position. The letter advised that the role would be advertised internally. Attached to the letter was a copy of the advertisement and job description. The letter noted the closing date for the applications for the enrolled nurse role was 25 September 2009 and that interviews would be scheduled for the following week. Ms Baynes and Ms Hegan

were both advised in the letter that an up-to-date curriculum vitae and covering letter were the requirements to make the application.

22 September 2009

[30] Ms Baynes duly applied for the enrolled nurse position and provided a covering letter with her curriculum vitae attached to Ms Turner. The receipt of her application was acknowledged by Ms Turner on 28 September 2009.

[31] Ms Baynes was advised that her interview was scheduled for 2pm on Thursday, 1 October 2009 and that she could bring a representative or support person with her to the interview.

[32] Ms Hegan also applied for the position and was invited to attend an interview but for 9am on 1 October 2009. Ms Hegan explained in evidence that she handed her application over to Ms Turner who was at the facility on 24 September 2009 and was then written to about when her interview was scheduled. Curiously, the letter to Ms Hegan from Ms Turner acknowledging her application is dated 21 September 2009. I am satisfied this is simply a typing error.

1 October 2009

[33] Before the interview, Ms Turner prepared a selection of questions that she said were designed to specifically test the clinical skills, awareness and experience of each candidate. She said that she was aware there needed to be a fair and equitable process. Ms Turner and Ms Angus conducted the interviews of both the nurses and in doing so used the pre-prepared questions in which they recorded in handwriting the answers given by each applicant. The Authority was provided with the interview sheets.

[34] Ms Turner said that after due consideration, she decided that Ms Hegan was the best person for the one remaining position. When asked at the Authority investigation meeting to expand on this she said that Ms Hegan's curriculum vitae information was more comprehensive and her answers to the questions at the interview were more comprehensive and demonstrated more current, up-to-date knowledge.

5 October 2009

[35] On 5 October 2009, Ms Turner wrote to both Ms Hegan and Ms Baynes asking to meet them at separate times on 7 October 2009 to discuss the outcome of the interview process. They were both advised they could bring a support person or representative.

7 October 2009

[36] On 7 October 2009, Ms Baynes attended a meeting with Ms Turner and Ms Angus. Ms Baynes was advised of the outcome of the interview process and that her application had not been successful. She was advised that there were no alternative positions and that although her employment agreement only provided for two weeks' notice, the company would give her four weeks' notice and that it was her decision whether she worked that out or was paid in lieu of notice. Ms Baynes was given a letter setting out the matters that had been discussed so that she could take that away with her and she was asked to advise by 9 October 2009 whether she preferred to work out her notice period or whether she would like payment in lieu of working the four weeks.

9 October 2009

[37] Ms Baynes emailed Ms Angus and advised her that she would take four weeks' pay in lieu of notice which would end on 2 November 2009. She advised that her last working day at Radius St Ives was Wednesday, 7 October 2009.

Predetermination

[38] Ms Baynes said in her evidence that the decision to make her position redundant rather than Ms Hegan's was predetermined. In making that allegation, she relied on two matters.

[39] The first was that she believed, as a result of making at least four complaints to management about a caregiver who she said was verbally and physically violent towards patients, she had come to be seen as an annoying employee.

[40] The second matter was that, between the first meeting in the redundancy process on 10 September 2009 and the second meeting on 17 September,

Ms Baynes said she was told by another employee, Laetitia Olivier, that that employee had had a discussion with Ms Hegan. In that discussion, Ms Baynes said that Ms Olivier told her that she was told by Ms Hegan, that, over coffee, Ms Turner had advised Ms Hegan that it was Ms Baynes' position that was going to be made redundant.

Preconceived view of Ms Baynes

[41] Ms Baynes said that she started making complaints verbally about one caregiver's conduct towards patients from about February 2009. She said she complained to various managers after that time and in her evidence said that she did so to facility manager Judith twice, facility manager Andrea three times and then to Ms Angus when Ms Angus commenced her employment at the facility as manager.

[42] Ms Turner said that Ms Angus never indicated to her at any time any concerns that may have been raised by Ms Baynes. She said that the comments made by Ms Baynes in her statement of evidence came as a surprise to her and that she did not see Ms Baynes as an annoying or difficult employee. She said that later, when these allegations came to be known, she spoke to Ms Angus who was adamant that Ms Baynes had made no complaints.

[43] I am not satisfied that there was a view of Ms Baynes as a troublemaker from the evidence that I was presented with. I therefore do not find such a view existed to impact on the selection process.

Did Ms Turner advise Ms Hegan after the first consultation meeting on 10 September that Ms Baynes' position was the one to be made redundant?

[44] Ms Baynes said that Ms Olivier talked to her some time after the first meeting on 10 September 2009 but before the second meeting on 17 September 2009. Ms Baynes said that she did not talk to Ms Angus or Ms Turner about what had been said to her.

[45] Although Dr Round supplied a statement from Ms Olivier before the investigation meeting, she was not present to give evidence. Dr Round advised that Ms Olivier was now residing in Auckland and an attempt was made during the Authority's investigation meeting to contact her by telephone but that was unsuccessful.

[46] An agreement was made that there would be an attempt to talk to Ms Olivier by conference call after the Authority's investigation meeting. Ms Leftley and Dr Round to be connected to the call as well as Ms Olivier and the Authority Member. A date was arranged for a conference call on 31 May 2011 at 12 noon. The Senior Support Officer at the Authority was advised of the telephone number and attempted to contact Ms Olivier. He took a note at the time that records that the phone number he telephoned rang and rang and then cut off. The note taken by him at that time also records that he had another support officer verify that the number on the display when he attempted to put the call through was the number that had been provided by Dr Round in his email of Friday, 27 May 2011.

[47] At the end of that attempt, Dr Round asked that there be a further attempt to contact Ms Olivier by telephone. Ms Leftley agreed to that and a time was made to try Ms Olivier again at 1pm on 1 June. The Senior Support Officer attempted again to put the call through. With both Ms Leftley and Dr Round connected to the call, they were able to hear the phone again ring and ring and then cut off.

[48] The Authority was of the view after that that sufficient attempts had been made to contact Ms Olivier and would therefore have to reach conclusion on this allegation without having heard her evidence in person or having spoke to her by telephone.

[49] Ms Hegan in her evidence denied that she had ever had coffee with Ms Turner on or off site and categorically denied that a conversation on the issue had ever taken place with Ms Olivier. She said that she was not aware that Ms Olivier knew anything about the process that she was going through with Ms Baynes and said that she was completely surprised by the allegation that was made. Ms Hegan further said in her written evidence that she had no idea until she received a letter on 5 October asking that she attend a meeting on 7 October that she had been successful in her application for the one enrolled nurse position. She set out in her written evidence that that came as a huge relief to her and it was only then that she knew Ms Baynes' position would be redundant and not hers.

[50] Ms Turner emphatically denied that she had informed Ms Hegan that it was Ms Baynes who would be made redundant and not her.

[51] This was a serious allegation. I am not satisfied that there is evidence to the..... required standard that Ms Turner gave any such advice to Ms Hegan.

[52] In conclusion, I am not satisfied that the allegation of predetermination has been made out.

[53] The one other matter that was raised in relation to the process was that Ms Baynes was not aware why Ms Hegan was selected and further that she was not provided with any counselling or support. I have considered whether those matters would vitiate an otherwise fair process.

[54] Ms Baynes did not ask for information about the interview so as to find that the failure to provide copies of the written notes to the questions asked at the interview process was unfair. The selection process was identical for both Ms Baynes and Ms Hegan. They were both provided with a copy of the advertisement and the job description that set out details in relation to the enrolled nurse position. They were both told the requirements for applying and both asked the same questions at interview. They were on the face of the evidence before the Authority treated equally as neither knew what questions were to be asked and the answers that were given. Obviously Ms Baynes was very disappointed with the selection and felt that as she had more nursing experience then she should have been selected. Ms Turner however did not see that as a focus for appointment just as she did not see length of service with Radius as a focus in the application. Ms Hegan had been longer at Radius St Ives than Ms Baynes. A selection was then made for reasons that I accept were as I have outlined earlier in this determination that I am not persuaded were unlawful or pre-determined.

[55] In those circumstances, I am not satisfied that there was any unfairness to Ms Baynes in relation to the selection.

[56] The matter of counselling was not raised by Ms Baynes with Radius and whilst that would not mean that a claim for such could not be considered, in this case I have also placed weight on the fact that Ms Baynes did not remain at Radius after being told of the decision because she wanted to be paid four weeks' notice in lieu of working out her notice. There was nothing in her employment agreement that provided that assistance would be available and in all the

circumstances I am not satisfied that such a failure was unfair so as to find an unjustified action on the part of Radius.

Determination

[57] In conclusion, I am not satisfied that the personal grievance of unjustified dismissal is made out and there is nothing further I can do to assist Ms Baynes in that regard.

Failure to provide time and wage records

[58] Dr Round in additional submissions asked that Radius be penalised for a delay in providing copies of Ms Baynes wage and time records. Radius say that it never received the letter of 14 December 2009 and therefore could not respond to such a request until the statement of problem was received on 10 February 2010.

[59] The Human Resource Manager of Radius at that time was Eleanor Robinson. Ms Robinson was then appointed as a Member of the Employment Relations Authority from in or about June 2010 and ceased dealing with this matter. Ms Leftley then became the representative for Radius.

[60] Dr Round is severely critical of the company for failing to provide the records until 12 August 2010. Ms Leftley says that it was an oversight because the company was concentrating on the failure to have the grievance raised within the statutory timeframe at the time the statement of problem was lodged. She says that the payroll for Radius is fully computerised and it is an easy matter to produce the records. She says that the request was not repeated by Dr Round until a telephone conference with the Authority in August 2010 when the records were then produced.

[61] I conclude that the failure to provide the records was not a deliberate or a wilful omission. That the records were provided as soon as the request was formalised by the Authority supports that. Dr Round is entitled to be critical of the failure but the circumstances surrounding that failure are not such that I am not minded to award a penalty and I do not do so.

Costs

[62] I reserve the issue of costs. Ms Leftley has until 29 July 2011 to lodge and serve submissions as to costs and Dr Round has until 19 August to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority