

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Laura Tangiora Brown (Applicant)
AND The Waiapu Anglican Social Services Trust Board (Respondent)
REPRESENTATIVES GW Calver for Applicant
G Tayler for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION Napier, 6 October 2006
MEETING
FURTHER INFORMATION 10 October 2006
PROVIDED
DATE OF 10 October 2006
DETERMINATION

DETERMINATION OF THE AUTHORITY OVER INTERIM REINSTATEMENT

Background

1. Ms Brown considers that she was unjustifiably dismissed by the respondent, (“Anglican Social Services”) and seeks interim reinstatement. Anglican Social Services opposes the application on the basis that Ms Brown was justifiably dismissed.
2. This matter was filed with the Authority on 20 September 2006 and a directions conference held on 21 September. The parties agreed to mediation on 28 September, which unfortunately was not successful in resolving the problems between them. A further conference call was held on 29 September. Ms Brown wished to pursue her claim for interim reinstatement, despite being offered a substantive investigation by the Authority into the matter on 5 and 6 December, because she had no income and no savings and was looking after one child on her own.
3. Accordingly an investigation meeting into the application for interim reinstatement was heard on 6 October. Further information was provided on 9 and 10 October.

Employment Relationship Problem

4. The sequence of events in relation to Anglican Social Services' investigations into Ms Brown's employment with it as a caregiver is clear. Whether Ms Brown was justifiably treated by Anglican Social Services is the matter at issue, however.
5. Ms Brown reported to a local co-ordinator, who in turn reported to the Regional Manager, Ms Trish Giddens. Ms Giddens became concerned about Ms Brown's time keeping and her relationship with at least one of the elderly folk she looks after. She raised these concerns with her in a letter dated 19 June and, amongst other things, raised information she had received that Ms Brown had taken substantial sums of money from a client as gifts or otherwise. Ms Brown's response was sought in order to determine whether a disciplinary investigation was required.
6. Ms Brown replied through her lawyer on 28 June. She denied the broad allegations made and sought further information on the detail of the allegations, albeit that she considered that she knew who the person of concern may have been.
7. Anglican Social Services met with the elderly gentleman complainant, whose name, and any information likely to lead to the discovery of his name, is prohibited from publication, on 4 July. He claims to have given over \$35,000 to Ms Brown and that she had told him that "*if anyone got to hear about this I would go jail*". A list of cash and other gifts was given to Anglican Social Services, but it was indicated that the gifts were paid for in cash, other than a canteen of cutlery and a car. The complainant also indicated that he had changed his will making Ms Brown a 50% beneficiary of the value of his flat. He also alleges there was a sexual element to the relationship between the two. The complainant wanted at least \$10,000 of his money back and for Ms Brown's employment to be terminated.
8. A file note of this meeting was sent to Ms Brown on 7 July, together with a letter indicating that there would be a full disciplinary investigation, which could lead to dismissal. It was proposed, if Ms Brown was in agreement, to receive her response to the specific allegations in writing and then to meet to discuss matters further, depending on the requirement to do so.

9. Ms Brown responded on 13 July stating that she was very friendly with the elderly gentleman but that the only gifts she took were small ones, on sufferance. She accepted that she knew she had been made a beneficiary of his will, but had told him that she did not want to be the cause of any family problems. He told her, however, that it was his money to do with as he wished. Finally, she accepted that she was the owner of a car that the client had previously owned, but that she had paid a fair price in cash for it. She denied all the other allegations. She noted that she and her lawyer wanted to be present at any disciplinary meeting.
10. Ms Brown was then asked for evidence of the withdrawal of cash from her account to pay for the client's car. Ms Brown responded that her estranged husband had sold a vehicle at the time for \$3,000, of which \$2,000 was used to buy the complainant's vehicle.
11. Ms Brown later declined to meet Anglican Social Services if the complainant was present. An email letter was sent to Ms Brown on 11 August, stating that the investigation would continue as far as it could without a meeting, focussing on the car allegation and one that the complainant had paid for an overseas trip by Ms Brown.
12. Ms Brown responded on 15 August underlining the reasons why she did not want to meet with the complainant and noting again that it was Ms Brown's estranged husband who was responsible for the sale of the family vehicle.
13. On 16 August, Anglican Social Services responded noting that Ms Brown had accepted that she was a significant beneficiary of the patient's will. The letter noted that that would be subject to "*some further questioning when we finally meet to discuss the outcome of the investigation in full*". Further information was again sought in relation to the vehicle purchase and sale and how she financed a trip to Australia.
14. Ms Brown responded on 21 August, advising that she was considering lodging a personal grievance.
15. On 23 August, Anglican Social Services wrote stating it wanted information about the sale of the car so that it could check the LTA vehicle register. It indicated that

Ms Brown had taken ownership of the car in 2005 but that Ms Brown had not sold any cars that year.

16. On 29 August, Ms Brown responded noting the make of the car and the name of her husband. On 1 September, Anglican Social Services then sought transfer of ownership documents or the driver's licence number and other sale details. It was noted that "*we do however need to bring this investigation to a close and so would be pleased if you could provide the details requested herein by next Wednesday*".
17. On 6 September, Ms Brown responded again stating that as she was estranged from her husband she did not intend to ask him for any more information and a personal grievance was then formally raised.
18. On 6 September Anglican Social Services responded stating that:

"...despite repeated requests, your client continues to refuse to provide the necessary documents in support of her assertions that she paid for [the client's] car from the proceedings of the purported sale of a Ford Courier motor vehicle.

The employer has now reached a decision as to whether to believe [the client's] version of events or those of your client".

19. Anglican Social Services preferred the client's version of events on the basis that he were clear, unshaken and convincing whereas Ms Brown resorted to threats and was less than helpful in providing supporting evidence.
20. The letter continued, stating:

"When asked again for further details of the sale of the Ford Courier, no response was received. As no such sale has been located on the national motor vehicle register under either your client's or her husband's name, our client does not believe your client.

Accordingly, our client has made a finding that your client, with full knowledge that what she was doing was a serious breach of policy, coerced [the client] to gifting his money and a significant portion of his estate to her ..."
21. This was categorised as serious misconduct and Ms Brown was told that dismissal was being considered. Anglican Social Services therefore determined to hold a meeting the following week to hear Ms Brown's submissions. The letter then concludes:

"At this meeting our client will allow your client to provide any factual evidence that shows that its findings are factually incorrect."

22. Ms Brown did not accept that Anglican Social Services could make a finding of credibility on the basis of simply interviewing the other party. Ms Brown concluded that, having regard to how the matter had been conducted, there was no possibility that she could obtain a fair hearing. In any event, the parties' representatives could not meet at a mutually convenient time until after the date set by Anglican Social Services.
23. On 12 September, Anglican Social Services wrote to Ms Brown noting that the date suggested by her was not an option and that further investigations into the sale of Mr Brown's vehicle showed that it remained in the name of Mr Brown to this day. Anglican Social Services decided to dismiss Ms Brown immediately, but to pay her an ex gratia payment of two weeks' wages.
24. Ms Brown responded on 13 September indicating that Anglican Social Services had dealt with the matter on the basis of incomplete evidence with disastrous results. Further information was given that the vehicle had been later sold to another Mr Brown, not Ms Brown's estranged husband. Concerns were also raised about the testamentary freedom of a person making a will and about how an excerpt from a letter between the client and Ms Brown had been misconstrued.
25. This was accompanied by a letter claiming a personal grievance for unjustifiable dismissal. A claim was made there for interim reinstatement and indemnity costs.
26. Anglican Social Services responded, indicating that Ms Brown had not answered questions fully and properly throughout the investigation, that Ms Brown had had every opportunity to answer questions candidly and honestly and that it was to her detriment that she elected to withhold crucial corroborating evidence until after the decision was made.
27. Since then Age Concern, which now represents the complainant (who has at its instigation has now filed a criminal complaint against Ms Brown) has also become involved in the matter. As the matter has been unable to be resolved by mediation, it falls to the Authority to make a determination.

The Law

28. I summarise the Authority's approach to these applications below, based on *Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424. Because of the urgency of the matter, these applications are dealt with more by way of affidavit evidence than the examination of witnesses. The Authority must, however, form some view of the facts if it is able to do so, albeit that it must only be a provisional view, subject to change at a substantive investigation. The Authority must determine if there is an arguable case and if so whether there is an adequate alternative remedy. If not, it must determine where the balance of convenience lies and what the overall justice of the case is.
29. In determining the balance of convenience, the Authority needs to assess the relative hardship between the Authority declining interim reinstatement if it later emerges that Ms Brown should have been reinstated, against the Authority granting the interim reinstatement but it later concluding that Ms Brown should not be granted full reinstatement. Important here are any undertakings as to damages, the relevant interests of people other than the parties, and the prior relevant conduct of the parties.
30. In terms of overall justice, the Authority needs to stand back from the detail and have regard to the whole situation disclosed, including potential strength or weakness of the substantive case. It also needs to take into account the likely duration of any interim relief granted.

Determination

31. It is clear that Ms Brown has an arguable case in that it is disputed whether she is guilty of the misconduct alleged and she was dismissed on a matter relating to credibility between two people when she never met face-to-face with the employer to put forward her side of the story.
32. Damages would not be an adequate remedy here because Ms Brown takes great comfort from being at work and is genuinely seeking reinstatement, the primary remedy for an unjustified dismissal. The fact that the Authority can investigate and determine the matter before Christmas is, however, a factor to be taken account of under the balance of convenience and overall justice factors.

33. In considering the balance of convenience, it is important to judge factors of relative hardship, and of justice to other people and the previous dealings between the parties. Here Ms Brown would suffer more economic and personal hardship than Anglican Social Services, especially given the difference in economic power between them and the fact that if reinstated Ms Brown could again work for the wages her employer would pay her, given that clients other than the complainant could be allocated to her.
34. On the other hand, Ms Brown could borrow to cover the shortfall of wages until Christmas if she were not reinstated.
35. Furthermore, the parties' employment agreement provides that workers are never to accept any property as a gift or loan and that workers are to inform their co-ordinator of difficulties with clients. Where workers are caring, in an unsupervised environment, for some of the most vulnerable members of society, the highest degree of trust is required. It is relevant that interim reinstatement would see Ms Brown again caring for vulnerable members of society in an unsupervised environment, although I equally acknowledge that there is nothing in her previous dealings with clients that would give any cause for concern.
36. In the circumstances here, more could have been expected from Ms Brown in terms of communication with Anglican Social Services about the potential difficulties she was having with the complainant. Ms Brown has admitted to breaching the house rules by accepting gifts, albeit that they were small and accepted on sufferance.
37. Ms Brown also deposed that she was a most reluctant beneficiary of the complainant's will. She did not, however, inform her employer of this occurrence. In addition, she went through, on her own admission, with a commercial transaction with the complainant, again without informing Anglican Social Services. I find, on a provisional basis, that these acts and omissions are material to the issue of interim and full reinstatement.
38. I therefore conclude, by a narrow basis, that the balance of convenience favours Anglican Social Services.

39. I turn now to assess the overall justice of the case. The only new factor is the relative strengths of each party's case. Ms Brown appears to have a strong case for unjustifiable dismissal, given that she was never personally interviewed in circumstances where very serious allegations were made against her without evidence other than that of the complainant's, and thus the matter was one involving two persons' credibility. In this regard, neither the employer nor the Authority should simply assume that such allegations are correct, but instead should require more convincing proof the more serious the allegation. Here we now know that the utility vehicle in question was in fact sold by Ms Brown's husband. Furthermore, we do not know what evidence, if any, the complainant has to back up his allegations against Ms Smith. If vindicated, Ms Smith is entitled to be fully reinstated to her position.
40. On the other hand, Ms Smith's claim for full reinstatement may be prejudiced by the factors set out above concerning her accepting gifts from him, her failure to inform Anglican Social Services of the complainant's generosity towards her, and her commercial dealings with him. Coupled with the fact that this matter will be determined by Christmas, I find that the overall justice of the matter favours Anglican Social Services.
41. I therefore dismiss Ms Brown's application for interim reinstatement.

Costs

42. Costs are reserved.

G J Wood
Member of Employment Relations Authority