

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Tania Butcher (applicant)
AND	Presbyterian Support Central (respondent)
REPRESENTATIVES	Alan Millar for the applicant Cliff Daly for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North, 21 December 2005
DATE OF DETERMINATION	22 December 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Ms Butcher says she was unjustifiably disadvantaged by way of a unilateral suspension. She also claims that the respondent (PSC) has continued to harass her by means of *“a false disciplinary process (and) a pre-determined outcome”* – statement of problem received on 11 October 2005. Ms Butcher seeks as remedies a written apology on agreed terms, an agreed memo to all staff in her immediate work environment, compensation for humiliation, etc of \$7,000 and costs.

2. PCS accepts Ms Butcher's suspension "*was not strictly in accordance with the procedure that may have been followed had conditions been ideal, but considers that the action was reasonable in all the circumstances that applied at the time*" but otherwise denies the applicant's allegations and the relief sought – statement in reply received on 9 November.
3. Mediation did not settle the parties' employment relationship problem. They subsequently agreed to a one-day investigation on Wednesday 21 December. Witness statements were usefully provided in advance. Efforts during the investigation to settle the problem were also unsuccessful.

Key Facts

4. I am satisfied from the evidence disclosed during the investigation that the key facts and events can be summarised as follows.
5. This is an ongoing employment relationship.
6. PSC is registered under the Charitable Trust Act 1957 and, amongst other things, operates a residential facility for elderly people in Palmerston North.
7. Ms Butcher commenced employment at the facility as a caregiver on 24 November 2003. She has a Dementia Care Certificate and specialises in the care of residents suffering from that condition. Up until 17 September Ms Butcher had always worked in the facility's Kiwi/Kingfisher Wing looking after residents suffering from dementia.
8. In a letter dated 28 February 2005 PSC advised Ms Butcher of several complaints from other staff regarding her behaviour toward them. A meeting about the complaints followed on 3 March. The meeting's outcome is recorded in the PSC's letter of 14 March. Amongst other things, the letter records the following:

Whilst you have answered specifically the task concerns from your own perspective, and we certainly appreciate that each person will perceive a situation differently, we remain concerned that you have not demonstrated through your correspondence or throughout the meeting that you are able to work in a collaborative manner with other staff members.

...

We appreciate that you work 'very hard' and that you do 'stick to policy'. We do however feel that after meeting with you and investigating the surrounding issues that you need to be more aware of people that you are working with, their own opinions and ways of doing things. Taking an autocratic approach when working with other team members is not useful for a good team environment.

We remain concerned that staff are reluctant to work with you and have requested that they are not rostered on a shift with you.

Although this matter was verbally discussed with you in November 2004, this is the first time it has formally been brought to your attention. We will therefore not be taking these issues to (the) disciplinary stage at this time. We do however expect a significant improvement in the way you work with other staff, that you take the time to consider that there may be other ways of doing things and that you show more respect for others' views, skills and abilities.

Should we continue to receive complaints from staff, we will consider disciplinary action at that time.

We look forward to a significant improvement in the area of team and people skills.

(attachment to Christine Wood's witness statement)

9. Ms Butcher did not challenge PSC in respect of the matters set out in the latter's letter of 14 March.
10. The next significant event between the parties was PSC's request, by letter dated 19 August, that Ms Butcher meet with it in respect of allegations she burst into a resident's room and belittled staff members there by yelling at them. For various reasons the parties were unable to meet promptly and the matter was overtaken by events on the evening of Saturday, 17 September.
11. Because the facility was seriously short staffed the applicant's manager, Ms Christine Wood, was working in a care giving role on 17 September. At 5.00 p.m. that evening she was approached by a distressed and tearful staff member. That person was working with Ms Butcher in the Kiwi/Kingfisher Wing. The staff member made

serious allegations as to what the applicant had been reported as saying to others about that staff member. Before taking action, Ms Wood spoke briefly by telephone to the relevant wing team leader about the allegations. She also consulted the PSC HR Manual and sought advice from another manager. She reached a decision to separate Ms Butcher and the other employee for the rest of that duty for health and safety reasons. Ms Wood believed the initial evidence suggested Ms Butcher was creating an unsafe work environment for the other staff member. However, she was not able to deal with the issue effectively in all the circumstances of that evening. Ms Wood decided to suspend the applicant.

12. In reaching her decision Ms Wood had regard to the following: the facility was very short staffed. Ms Butcher was rostered to work a short shift, the other worker a longer shift. There was a risk that, unless separated, the other worker would not be able to complete her shift. Ms Wood faced the risk that, had the other worker left the workplace, she would be unable to meet the requirement of always having two staff members in the dementia unit so as to ensure safe care.
13. Ms Butcher was instructed to report to Ms Wood: the latter asked the applicant to accompany her to the office while getting her bag and things on the way. Ms Wood says she did this because she was mindful of the applicant's privacy and because she did not want Ms Butcher to have to go back to the wing after she had spoken with (i.e. suspended) her. In her office Ms Wood told the applicant she was being stood down on pay on health and safety grounds: Ms Butcher was asked to leave and to meet with Ms Wood at 11.00 a.m. on the following Monday morning. Ms Butcher was told she could bring a support person to that meeting.
14. A conversation ensued between the parties but there is dispute as to what was actually said. It is accepted that Ms Butcher declined her manager's offer to set out in writing the reasons for her suspension. In an attempt to maintain the applicant's privacy, Ms Wood says she then accompanied the applicant to her car. Unfortunately, as they were approaching the vehicle, another staff member from Ms Butcher's wing approached and asked what was happening: Ms Wood asked that person to leave.

15. No meeting took place on 19 September because by that time Ms Butcher's advocate, Mr Allan Millar, had filed notice of a personal grievance on the applicant's behalf. Meetings and mediation followed later that month and in October and November. The parties were unable to settle their employment relationship problem.
16. In the meanwhile Ms Butcher has resumed working for PSC but not in the Kiwi/Kingfisher Wing: PSC says that will not happen until it is able to satisfactorily investigate and resolve various allegations about the applicant so as to ensure it is safe for her to return to that wing. It agrees that, shortly after 17 September and following Ms Butcher's resumption of duties in another wing, and while Ms Wood was on leave, it issued a memo to the effect that the applicant was not to issue medication. It accepts it did not consult Ms Butcher before removing one of her duties. PSC says it took this step because of staff perception that the employee holding the keys to the medical cabinet is the "senior" staff person on duty and therefore in "control" of the wing (Ms Wood's oral evidence). By taking that duty from Ms Butcher Ms Wood said she was minimising the risk of incidents while she was on leave.

Parties' Positions

17. Amongst other things, Ms Wood and the PSC's advocate, Mr Cliff Daly, say part of the reason for the parties' failure to settle their problem is Mr Millar's refusal to allow his client to discuss any matter other than the events of 17 September. PSC says there is a wider problem between the parties: it has allegations to investigate about Ms Butcher in respect of events on 4 August, 17 September and – according to advice from the respondent provided during the investigation – a more recent matter.
18. On his client's behalf, Mr Millar advances various submissions. These include the claim that the proof of his client's disadvantage and the unfair disciplinary process being applied by PSC lie in the events of 17 September: he says Ms Wood's decision to suspend the applicant was unfair because his client was not consulted, that Ms Wood's decision was predetermined and that it is inappropriate – having made the decision to suspend Ms Butcher – for Ms Wood to attempt to then manage the respondent's subsequent disciplinary process. His client has been disadvantaged

also by the respondent's unilateral issuing of a memorandum taking one of her duties from her.

Discussion and Findings

19. The Object of the Act, as amended in 2004, now require "*parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*" (ss. 3(1A)). These qualities are conspicuous by their absence in the parties' present employment relationship. Both parties blame the other for their failure to maintain a productive employment relationship, etc.
20. Given the environment in which the parties are working, and their stated shared commitment to the special needs of PSC's residents, the requirement to be active and constructive is particularly important.
21. I reject Ms Butcher's claims that the respondent predetermined her suspension, that it is seeking to apply an unfair disciplinary process and is continuing to actively harass and humiliate her. In evaluating PSC's actions to date, a fair and reasonable perspective is required. That perspective should have regard to the following: there is no evidence to support a claim of predetermination, as I make clear below. PSC is also entitled to have Ms Wood conduct a disciplinary investigation into the events of 17 September (and other allegations in respect of the applicant) even though it was her decision to suspend the applicant at that time. This is because there is no reason to believe Ms Wood has anything other than an open mind toward Ms Butcher. She will any way be advised during PSC's investigation by Mr Daly. There is no reason to anticipate a process prejudicial to the applicant's interests. There is no basis to expect that Ms Wood and Mr Daly will be anything other than open minded in considering the various allegations against Ms Butcher.
22. Any damage resulting from the medication memo was temporary and insubstantial, particularly when set against PSC's obligations to provide a safe and healthy environment for both residents and staff. I do not accept it is evidence of ongoing animus by Ms Wood to the applicant.

23. PSC accepts, in suspending Ms Butcher, that it did not do so “*strictly in accordance with (its) procedures ... had conditions been ideal, but considers that the action was reasonable in all the circumstances that applied at the time*” (par 1, statement in reply). By way of stating the obvious, I observe here that PSC has obligations to its staff as well as its residents. PSC is effectively acknowledging it did not meet its obligation to Ms Butcher but says, in mitigation, that regard should be had to the circumstances at the time. What were those circumstances? There is no evidence of Ms Wood seizing an opportunity to disadvantage Ms Butcher, or of the suspension being part of a campaign to rid PSC of Ms Butcher. Instead, what the background circumstances show is that PSC, since November 2004, has had legitimate concerns about Ms Butcher’s team work. The applicant is on notice from her employer that it will consider disciplinary action if it continues to receive complaints from staff (letter of 14 March 2005). In coming to a decision to suspend the applicant, Ms Wood was mindful of the discussion in November 2004, the letter of 14 March 2005, the allegations of 4 August and the fact that similar allegations were being put to her again, on 17 September. Ms Wood was also under powerful obligations to ensure resident care and safety.
24. The Employment Court has recently made clear there “*is no immutable rule requiring that an employee must be told of the employer’s proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so*” (*Graham v Airways Corporation of New Zealand* unreported, Colgan J, 14 July 2005, AC 40/05).
25. In all the circumstances, it is difficult to imagine what argument Ms Butcher might have advanced so as to prevent Ms Wood legitimately reaching a decision to suspend the applicant, had consultation occurred.
26. What damage was occasioned the applicant? Ms Butcher says she was deeply distressed by being abruptly cut off from the clients she cared for. “*Caring for the sick and dying elderly folk is more than a money earning occupation for me, it is (a) deeply spiritually rewarding personal experience. I genuinely feel for these clients*” (par 20, witness statement). She now feels shamed and humiliated every day that she goes to work as other staff are aware of what has happened and Ms Butcher feels she is being gossiped about. The applicant says she has become depressed and, as a consequence, has been unable to finish her masters’ thesis on time.

27. I have no independent evidence to support Ms Butcher's claims but, also, no reasons to doubt their sincerity. Ironically, it could be said that the choice of the applicant's approach to this employment relationship problem has clearly caused it to lengthen and, arguably, deepen her sense of anguish as, to date, the employer's legitimate wish to explore all matters of concern has been stymied by Ms Butcher's insistence on focusing only on, and resolving, her suspension grievance. It may be that Ms Butcher has perfectly adequate explanations to offer in respect of the allegations arising out of 4 August and 19 September. The fact is, however, there has been no discussion by the parties on these matters. But, at some point, PSC is entitled to inquire into, and reach conclusions about, those events: should she continue to insist on her order of proceedings Ms Butcher's views may never be put to her employer before it is entitled to reach a view. This would be regrettable as it was clear during the investigation that Ms Butcher wished to share views about her employer with PSC and to "*settle everything before Christmas*".
28. For over 100 years the employment jurisdiction has required the application of equity and good conscience (s. 61 of the Industrial Conciliation and Arbitration Act 1894). This is in recognition of the special nature of the relationship between employers and employees: that relationship entails mutual obligations of confidence, trust and fair dealing (*Telecom South Ltd v Post Office Union* [1992] 1 ERNZ 711). The only qualification on this wide discretionary power, now conferred on the Employment Relations Authority, is that it cannot be exercised in a manner which is inconsistent with the Act or any other statute or with any applicable employment agreement: s. 157 (3) of the Act.
29. In this instance PCS concedes it did not act strictly in accordance with its procedures but considers its action was reasonable in all the circumstances that applied at the time. I agree: *Graham* (above) applied. I am therefore not prepared to accept that the respondent's actions were unjustified. To do so would amount to the application of a technical point without demonstrating real prejudice. In these circumstances the Authority's obligation is to seek to achieve justice between the parties according to the equity and merits of the case (*Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558).

30. In the alternate, were I to find in Ms Butcher's favour, I would not be prepared to accept that Ms Butcher was damaged to the extent that monetary compensation other than of a nominal sum should be paid. In addition, because of Ms Butcher's commitment to care other than for monetary gain, the fact that PSC is a non-profit charitable trust, and therefore any award would be potentially to the detriment of those that Ms Butcher is commendably committed to caring for, I decline to make any monetary award.
31. As was explained to Ms Butcher during the investigation, the Authority has no power to grant the other remedies she seeks, i.e. to require or direct PSC to enter into agreed apologies and/or memoranda: such outcomes can only be achieved by the parties settling their problem on their own terms.

Determination

32. I determine that the applicant, Tania Butcher, has no grievance against the respondent, Presbyterian Support Central. In the alternative, were I to find in the applicant's favour I would decline to grant any financial compensation.

Costs

33. As requested by the parties, costs are reserved. However, for their assistance, in light of Mr Daly's comment at the conclusion of his witness statements, consideration should be given to costs lying where they fall.

Denis Asher

Member of Employment Relations Authority

