

Determination Number: WA 154/05

File Number: WEA 165/05

ATTENTION IS DRAWN TO THE
ORDER AT PARAGRAPH 4
PROHIBITING PUBLICATION
OF CERTAIN INFORMATION REFERRED
TO IN THIS DETERMINATION

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Amy FitzGerald (applicant)
AND	IHC NZ Inc (respondent)
REPRESENTATIVES	Geoff O'Sullivan for the applicant Paul McBride for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 16 September 2005
DATE OF DETERMINATION	21 September 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Ms Amy FitzGerald says she was wrongfully, i.e. unjustifiably, dismissed by the IHC – statement of problem (SOP) received on 2 May 2005. She seeks compensation for the dismissal and the affront to her good character, and (as was confirmed during the investigation) compensation for lost wages and costs.
2. The IHC says Ms FitzGerald was lawfully dismissed for committing serious misconduct including holding a pillow over an IHC service user's face. The decision

to dismiss was made following a full and fair investigation process – statement in reply (SIR) received on 12 May.

3. The parties were unable to settle this employment relationship problem at mediation. Agreement was then reached on a 1-day investigation in Wellington on Friday 16 September. The parties usefully provided witness statements in advance of the investigation. Efforts during the investigation to settle the matter were not successful.

Prohibition

4. During the investigation the parties agreed that the Authority should prohibit the publication of any details leading to the identity of any IHC's service-users. I accept that request and accordingly apply Clause 10 (2) of Schedule 2 of the Act.

Dismissal

5. The relevant facts are largely agreed and can be summarised as follows.
6. The IHC is a well-known society that provides support for people with intellectual disabilities throughout New Zealand.
7. The IHC operates what it describes as a non-aversive approach to behaviour support and regards failures to apply this technique as in serious breach of its policy.
8. Ms FitzGerald was first employed by the IHC in January 2001 as a part time home support worker. She was principally engaged in assisting parents, family and individuals with an intellectual disability in their own home on work of a domestic, minding and supportive nature.
9. In June 2004 Ms FitzGerald was offered and accepted further part time employment as a community support worker at an IHC home in Levin. She resigned her home support hours. Her primary function was to support, care, educate and encourage individuals and groups of people with an intellectual disability in their daily living situations, in the home.

10. On 8 August 2004 the IHC's then area manager, Ms Diane Bell, was advised by her then residential services manager, Ms Marion Simpson, that two service users – A & B – had made allegations of abuse against Ms FitzGerald. If proven the allegations would amount to a serious breach of the respondent's non-aversive approach to behaviour support policy. The complaints were communicated to Ms Simpson by a team leader at the Levin IHC home.
11. A alleged Ms FitzGerald has stopped him from making himself a hot drink, would not let him turn a heater on and had yelled at him. B alleged the applicant had slapped her and held a pillow over her face.
12. Ms Bell asked Ms Simpson to talk to A & B, to ascertain whether there was any substance to the allegations. Ms Simpson did so. She reported back to Ms Bell with the advice that B had confirmed that she had been hit by the applicant. Ms Bell instructed Ms Simpson to contact the applicant and advise her that a serious allegation had been made against her and that a meeting was sought before her next shift. Ms FitzGerald was subsequently asked not to work her next shift for which she was paid. The applicant says that, in effect, she was suspended without consultation and in a way that disadvantaged her.
13. Ms Bell then set out a written summary of the allegations against the applicant. Her letter was dated 10 August (applicant's document 7). In particular, it was alleged that

*... you tried to **smother** (B) with a pillow and that on other occasions you have hit her.*

(emphasis added, applicant's document 7)
14. A meeting was sought. In the meantime Ms Bell looked into the allegations. She had two colleagues, X & Y, whose opinions and experience she trusted, interview A & B: during their interview they were told by B that Ms FitzGerald had "*thrown a pillow at her face – whilst she was in her bed – and hurt her*" (interview record produced at the Authority's investigation). Ms Bell said that X & Y "*were firmly of the view that (B) was telling the truth, which coincided with the views of both Marion Simpson and (the team leader)*" (par 17 of Ms Bell's statement).

15. Ms FitzGerald says she was so alarmed by the allegation of attempting to smother B that she went to seek advice from the Levin Police. This was, she explained, because of her perception of the gravity of the allegation: she saw the matter as an accusation of attempted murder.
16. The parties met on 13 August. Ms FitzGerald denied all of the allegations. At the conclusion of the meeting, and after consulting with her, Ms Bell determined to suspend the applicant for three working days on full pay.
17. During that time Ms Bell met with A & B, to inquire further into their allegations. She recorded her interview with B in the following way:

I introduced myself to (B). She didn't remember me. (B) became anxious when I spoke to her and was constantly wringing her right hand in her left. I tried to talk to her about the weekend concerned, but all she would say that Amy had thrown a pillow at her. I asked her how she had felt, and gave her a menu i.e. happy/sad/afraid/tired/sleepy. She said she was afraid. She then told me she couldn't breathe. I asked her why Amy would throw a pillow at her, and she said she didn't know. (B) then said she wanted to have her morning tea

(applicant's document 9)

18. Ms Bell confirmed to the Authority that B's claim she could not breathe was in respect of the pillow throwing incident: it was not how B felt during her interview with Ms Bell.
19. The parties met again on 18 & 20 August. At their final meeting Ms Bell dismissed Ms FitzGerald. A letter dated 23 August set out the reasons for the summary dismissal in the following way:

I am writing to advise that your employment with IHC is terminated on the grounds of serious misconduct. The misconduct is to take effect immediately and without notice, and confirms the decision that was conveyed to you when we met on 20th August 2004.

...

The findings of the investigation have led me to believe, after having fully considered the matters under investigation, that on the balance of probabilities you assaulted (B) with a pillow to such a degree that she is now frightened of you and fearful of your return to Highbury Drive. In this respect, your actions constitute serious misconduct in breach of IHC's Staff Policy.

(emphasis added, applicant's document 11)

20. During the Authority's investigation Ms Bell said that the exclusive reason for dismissing the applicant was her finding that she had improperly used a pillow against a service user in breach of its non-aversive policy.
21. While there were some performance issues involving Ms FitzGerald and the IHC during her employment the parties agree that the allegations levelled against the applicant by A & B were without precedent.

Applicant's Position

22. Amongst other arguments and claims, Ms FitzGerald says she was unjustifiably suspended. There was no consultation and no reasons were given.
23. The investigation that resulted in her summary dismissal was so flawed as to make the dismissal both substantively and procedurally unjustified. No proper inquiry was undertaken by the respondent. B was purported to have said or demonstrated something to imply the applicant had tried to smother that person. While interviews of sorts were conducted with B, that person did not confirm the incident at all.
24. Both the Employment Court and the Court of Appeal have held that where a serious charge is the basis of the justification for the dismissal then the evidence of it must be as convincing in its nature as the charge is grave, i.e. the test was a balance of probability to a high degree of proof: *Whanganui College Board of Trustees v Lewis* [1999] 2 ERNZ 1006 and [2000] 1 ERNZ 397.

Respondent's Position

25. The applicant is well out of time in raising her claims she was unjustifiably suspended. The only matter properly before the Authority is the complaint of unjustified dismissal.
26. The IHC fully and fairly investigated the allegations and, as a result, actually and reasonably concluded that Ms FitzGerald had committed the misconduct alleged which was of a type warranting summary dismissal.
27. Credibility was a substantial issue for the decision maker at the time and it was resolved against the applicant.
28. In the event that the Authority finds against the IHC then any award of compensation to Ms FitzGerald for humiliation, etc should be substantially reduced for contributory behaviour.
29. Any award of compensation for lost remuneration should recognise the lack of evidence of the applicant attempting to mitigate her losses, particularly by her failure to apply for work outside of the care-giver area: *Battin v Western Bay Health* [1998] 1 ERNZ 462.

Discussion

30. The parties are largely in agreement as to the relevant law in respect of dismissal personal grievances. It can be summarised by reference to the following.
31. In *Northern Distribution Union v BP Oil* [1992] 3 ERNZ 483 the Court of Appeal described the kind of conduct that will justify summary dismissal as, "... conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship" (p. 487).
32. In *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448 the Court of Appeal said:

The burden on the employer is not that of proving to the Court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct. ... An employer can justify dismissal without having to prove (the offence) by showing that, after a full and fair investigation, it was at the time of the dismissal justified in believing that serious misconduct had occurred.

(457)

33. The Court had to be satisfied that *"the decision to dismiss was one which a reasonable and fair employer could have taken"* (457). And

In a case of summary dismissal, if the employer showed that the conduct was such that a fair and reasonable employer could see it deeply impaired basic trust and confidence, it would hardly be necessary to consider, as a separate step, whether in all the circumstances the employee ought to have been dismissed. That depended on whether the fair and reasonable employer took into account all the relevant circumstances of the conduct and the particular relationship in determining that the necessary confidence and trust had been deeply impaired.

(458)

34. In *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, the Court of Appeal endorsed, at 330, the observations of Richardson J in *Air New Zealand v Johnston* [1992] 1 ERNZ 700:

A dismissal is unjustifiable if it is not capable of being shown to be just in all the circumstances. Justifiability is directed at considerations of moral justice. Whether a dismissal is justifiable can only be determined by considering and balancing the interests of worker and employer. It is whether what was done and how it was done ... is just and reasonable to both parties in all the circumstances including ... the reason for the dismissal.

Findings

35. I am satisfied that Ms FitzGerald has established that she was unjustifiably dismissed for the following reasons.

36. This is an instance where the parties very much dispute what happened. Ms FitzGerald denies outright holding a pillow over or against B's head or of throwing a pillow at the service-user, or of assaulting B in any way. It is very much her word against B's as interpreted by the respondent.
37. The evidence against Ms FitzGerald is underwhelming: it does not meet the requirement that when a serious charge is the basis of the justification for the dismissal then the evidence of it must be as convincing in its nature as the charge is grave: *Lewis* (above).
38. The IHC was in a difficult, if not invidious, position. It was faced with serious allegations in respect of Ms FitzGerald to which there were no eye witnesses. To determine what happened on a balance of probabilities basis the IHC was obliged to attempt to make sense of what B said and demonstrated to the team leader. That necessitated the IHC interviewing its intellectually disabled service users and others who worked in the area and who knew A & B, so as to assess the likelihood of A & B's claims.
39. It is accepted that B displays attention seeking behaviour from time to time. A is alleged to act disruptively, on occasions.
40. As a result of her investigation Ms Bell says she concluded that the allegation of Ms FitzGerald slapping B could not be sustained. This was because of the lack of evidence in support of those allegations. She similarly accepted that Ms FitzGerald has hearing difficulties that may have resulted in her unintentionally speaking too loudly to A.
41. In reply to a question from the Authority, Ms Bell confirmed that – in the end – the finding Ms FitzGerald had somehow used a pillow against B was the exclusive basis of her decision to dismiss the applicant. That conclusion was reached, Ms Bell explained, in reliance on the evidence she had from B, the team leader and X & Y, who interviewed both B. Ms Bell says she was confident B was telling the truth. The difficulty with that conclusion can be put in the question, what truth? If Ms Bell did not accept B's allegations of being slapped by the applicant, how could Mr Bell accept B's allegation of being in some way assaulted with a pillow?

42. The respondent's position against Ms FitzGerald has always been tenuous: this is because of how the matter was first put to the team leader. B seemed to be communicating (by demonstrating) a claim that the applicant had placed a pillow over her face. However, that claim then changed. Ms Simpson was the next person to become involved, on 8 August 2004. Her evidence is that the matter was first raised with another staff on shift, not the team leader (par. 12.1 of her statement). Ms Simpson attempted to talk with B, who was lying on her bed. B did not demonstrate what she was reported to have demonstrated to the team leader (that Ms FitzGerald placed a pillow over her face while she was lying on the bed). B declined to talk about the pillow over her face. Instead she said the applicant had hit her and she did not want Ms FitzGerald back in the house. There seems to have been no comment by B about a pillow.
43. The next IHC representatives to involve themselves were X & Y: they interviewed B on 10 August. In their interview B said the applicant had thrown a pillow at her face, while she was in her bed and hurt her (report produced at the Authority's investigation).
44. Ms Bell was the final IHC representative to interview B. B repeated her claim that Ms FitzGerald had thrown a pillow at her (applicant's document 9).
45. These are, objectively, not modest changes in what it was that the IHC was obliged to investigate: they represent major variations in the scope of an alleged assault. They must also have raised doubts about the reliability of B's claims, because of their vagueness and the changes she communicated. A pillow thrown at someone is unlikely to cause them to have difficulty breathing. The variations in B's account are reflected in Ms Bell's terminology: she first raised the allegation of "*smother*" (above). Ultimately she dismissed on the ground that Ms FitzGerald had "*assaulted (B) with a pillow to such a degree ...*" (above). The differing degrees of seriousness between someone holding a pillow over the face of a service user and throwing a pillow at them (both of which Ms FitzGerald denied) do not appear to have been addressed in the IHC's investigation.
46. However, the change of terminology is significant because, I find, it reflects the uncertain evidence disclosed by the respondent's investigation and is ultimately

reflective of the absence of evidence with which to conclude the applicant was guilty of serious misconduct. If the evidence did not support the allegation of slapping and of smothering, it could no more effectively support the allegation of assault by a pillow.

47. The applicant was unjustifiably dismissed because IHC was, I find, unable to prove to the Authority that it had conducted a full and fair investigation disclosing conduct capable of being regarded as serious misconduct (*Oram*, etc, above): instead its investigation disclosed that all but one of the allegations could not be proven, and the final matter – the claimed use of the pillow – had undergone a significant change, to that of assault with a pillow “*to such a degree that (B) is now frightened of you and fearful of your return*” (applicant’s letter of termination). There are of course several possible explanations for B’s fear of Ms FitzGerald’s return: one is that she had been assaulted and it could happen again. The second is that her attention-seeking behaviour had caused a great deal of trouble for somebody else and there might be repercussions. I am satisfied that the IHC could not have come to an honestly held belief on the evidence available to it, at the time, to justify Ms FitzGerald’s summary dismissal.
48. Furthermore, the respondent’s claim that, in coming to a decision to dismiss Ms FitzGerald, it only had regard to B’s complaint about the pillow, is contradicted by the evidence set out in the minute of the disciplinary meeting resulting in the applicant’s termination. It records Ms Bell clearly saying, on two occasions, to the applicant that she preferred what A & B had said and, accordingly, no longer had trust and confidence in Ms FitzGerald (4th & 5th pages, applicant’s document 10). I am satisfied this is evidence of Ms Bell determining to dismiss the applicant for reasons over and above the ground set out in her letter of dismissal to Ms FitzGerald (which does not withdraw the earlier statement).
49. Ms Bell’s statement to Ms FitzGerald also contradicts the former’s evidence to the Authority (see pars 18 & 20 above). The consequence is that Ms FitzGerald was denied a fair and reasonable opportunity to address all of her employer’s concerns, and having reached the position of saying it was disregarding the other allegations, the IHC did in fact – and unjustifiably – find against the applicant in respect of those matters.

50. The respondent's investigation failed to turn up evidence in support of the rest of A & B's claims. It also failed to turn up reliable evidence in respect of B's claims, in respect of the pillow and her claims of other assault. I am satisfied that the respondent had no basis with which to prefer what the two service users said or, separately, what B claimed, over and above the explanation provided by the applicant. The respondent has failed to establish it had reasonable grounds to believe the applicant had assaulted a service user such as to amount to serious misconduct.
51. Having found for Ms FitzGerald in respect of her substantive allegation I am satisfied it is not necessary to address the disputed claim that the applicant was unjustifiably suspended, albeit in respect of one shift only. That is because there is little if any evidence of humiliation, etc arising out of that incident. I am satisfied that compensation for the applicant is best addressed by damages for the major offence to Ms FitzGerald in respect of which there is very clear evidence of its impact.

Remedies

52. Ms FitzGerald seeks lost salary and unspecified compensation for humiliation, etc and costs.
53. Lost salary claimed is for the period from her summary dismissal until the date of the Authority's investigation: Ms FitzGerald says she has been unable to find employment during the intervening period. The applicant says she has applied for 3 positions in the area of caring for people because that is her preferred area of employment. Ms FitzGerald agrees she has had modest part time employment during this period, including that as a housekeeper. She has otherwise gotten by on a Widow's Benefit.
54. I am not satisfied that Ms FitzGerald should be remunerated for more than 3-months: s. 128 (2) of the Act applied. This is because the applicant has clearly not fully attempted to mitigate her losses. Instead, without good reason and with one exception, she restricted her reemployment initiatives. Ms FitzGerald was able to continue her housekeeping work and do other work for a client (see the reference dated August 25, 2005 in the applicant's document 13): there is no evidence why she

could not have sought more of both elsewhere. It is also not clear why Ms FitzGerald did not seek to return to employment in the area indicated by her reference dated 26 August 2005 (above).

55. Ms FitzGerald says in par 23 of her statement that the effect of the dismissal on her was “*devastating*” and that it caused her to lose “*all confidence*”, to withdraw into herself and seldom go out. The Authority’s investigation disclosed no reason to doubt those claims. I am therefore satisfied that compensation for humiliation, etc is properly set at \$13,000: s. 123(1)(c)(i) of the Act applied.

Contributory Behaviour

56. The Authority’s investigation disclosed no basis for linking any conduct on the applicant’s part to her unjustified dismissal: s. 124 of the Act applied.

Determination

57. For the reasons set out above I find in favour of Ms Amy FitzGerald’s claim that she was unjustifiably dismissed by IHC NZ Inc. The respondent is therefore directed to pay Ms FitzGerald the following monies:
- a. Lost remuneration equivalent to 3-months, less any income earned during that period; leave is reserved to the parties if they are unable to reach agreement on the relevant amount; and
 - b. Compensation for humiliation, etc of \$13,000.00 (thirteen thousand dollars).
58. The parties are to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

Denis Asher

Member of Employment Relations Authority