

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 65
5392389**

BETWEEN CAROLYN FITZPATRICK
Applicant
AND ELDERCARE SERVICES
LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Stan Austin, Advocate for Applicant
No appearance by, or for, Respondent
Investigation Meeting: 22 January 2013 at Whakatane
Submissions received: 22 January 2013 from Applicant
None from Respondent
Determination: 25 February 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Carolyn Fitzpatrick, claims that she has been unjustifiably dismissed and unjustifiably disadvantaged by being suspended from employment by the Respondent, Eldercare Services Limited (Eldercare).

[2] Eldercare denies that it unjustifiably dismissed or unjustifiably disadvantaged Ms Fitzpatrick, claiming that she was justifiably dismissed and suspended from employment.

Issues

[3] The issues for determination are whether Ms Fitzpatrick was:

- Unjustifiably dismissed from her employment
- Unjustifiably disadvantaged by being suspended from her employment

Non-appearance by Eldercare

[4] Mr Stephen Clews, Counsel for Eldercare, had participated in the telephone conference on 29 October 2012 at which the parties agreed with the scheduling of the Investigation Meeting to be held on 22 and 23 January 2013.

[5] On 10 January 2013 Mr Clews sent an email to the Authority advising that Eldercare did not intend to file any witness statements, or to participate in the Investigation Meeting.

[6] I was satisfied that Eldercare was aware of the Investigation Meeting and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

Background Facts

[7] Ms Fitzpatrick commenced employment at Eldercare's residential facility based in Whakatane as a Kitchen Hand in February 2009. Ms Fitzpatrick was employed in accordance with an individual employment agreement (IEA) which she had signed on 9 February 2009.

[8] During the weekend of 24 March 2012 Ms Fitzpatrick said she had been made aware by Ms Sarah Haira, Cook, that there were rumours that she had previously stolen some biscuits.

[9] Ms Fitzpatrick said she had been very upset to learn of the rumours as she had never stolen anything, and as a result in the afternoon of 28 March 2012 she had gone to see Ms Denise Pearson, Nurse Manager, to ask her to put an end to the unfounded rumours which had put her honesty in question.

[10] Ms Fitzpatrick said that Ms Pearson had informed her that she had been aware of the rumours for some time, but had not carried out any sort of investigation in connection with them. Ms Fitzpatrick said that she had been shocked that Ms Pearson had known about the rumours, but had taken no action in connection with them.

[11] During the meeting, Ms Fitzpatrick said she had told Ms Pearson that she understood the rumours originated from Lisa, a caregiver, and that she herself would speak to her, however Ms Pearson had asked her not to do so, saying that she would talk to Lisa. Ms Fitzpatrick said she had accepted this and returned to the kitchen and finished her shift.

29 March 2012

[12] At approximately 7.45 a.m. the following morning, 29 March 2012, Ms Fitzpatrick said she had been informed by Ms Haira that Ms Pearson wanted to see her, so she went to Ms Pearson's office. When she had arrived at the office Ms Fitzpatrick said she had found Ms Pearson talking to Lisa, and had been asked by Ms Pearson to come back when she had finished talking to Lisa.

[13] Following her return to the kitchen, Ms Fitzpatrick said that Ms Pearson had called her back to her office and told her that she was going to speak to a couple of employees, and that she was not to have any contact with Lisa or discuss the issue with other members of staff. Ms Fitzpatrick continued to work in the kitchen until approximately 1 p.m. when Ms Pearson had asked her to come to her office.

[14] Ms Fitzpatrick said that Ms Pearson had told her she would be suspended on pay until further notice while she (Ms Pearson) investigated the matter. Ms Fitzpatrick explained that she had broken down when told that she was to be suspended, and confirmed that she had not been asked whether or not she had any comments about the proposal to suspend her prior to it being implemented.

2 April 2012 meeting

[15] Ms Fitzpatrick said she had been telephoned at home by Ms Pearson and asked to attend a meeting on 2 April 2012. Ms Fitzpatrick said she had not been told the nature of the meeting, just to bring a support person with her.

[16] Ms Fitzpatrick, accompanied by Ms Haira as her support person, had attended the meeting with Ms Pearson and Ms Judy Ruijine held on 2 April 2012. Ms Fitzpatrick said that during the meeting, which had been very short, she had denied taking any biscuits and subsequently putting them into a backpack on her bicycle as had been alleged. Ms Fitzpatrick said she had explained to Ms Pearson that she always took her bag into the kitchen, which Ms Haira had confirmed was the case.

[17] Ms Fitzpatrick said she had been informed by Ms Pearson that her suspension on pay would continue as she wanted to interview other employees, however she had not told Ms Fitzpatrick who these employees would be. Ms Fitzpatrick said the meeting had lasted only a few minutes, and she had not been given a copy of the minutes taken.

4 April 2012 Meeting

[18] Ms Fitzpatrick said she had been telephoned at home and asked to attend a further meeting to be held on 4 April 2012. Ms Pearson and Ms Ruijine were both present and Ms Haira again attended as Ms Fitzpatrick's support person. Ms Fitzpatrick had been given a copy of the minutes of the previous meeting.

[19] Ms Fitzpatrick said Ms Pearson had told her she had continued with the investigation and that she had been told that she (Ms Fitzpatrick) left her main backpack on the bicycle and brought a smaller backpack into the kitchen. Ms Fitzpatrick said she had not been told who had provided this information, and Ms Haira had again told the meeting that it was not true, but that Ms Fitzpatrick always brought the backpack into the kitchen with her hand bag.

[20] Ms Fitzpatrick stated that she had again denied having stolen any biscuits, but in response Ms Pearson had said that she had no reason to disbelieve what she had been told by other employees.

[21] Ms Fitzpatrick said Ms Pearson had also referred to her taking gravy mix home, which proved she was a thief. Ms Fitzpatrick said she had denied that she had ever taken gravy mix home and said she had at the time thought that this particular accusation was strange as Ms Pearson had not raised it previously.

[22] Ms Fitzpatrick said the meeting had ended with Ms Pearson saying that she would obtain legal advice, and that Ms Fitzpatrick's suspension would continue.

[23] Ms Fitzpatrick explained that she had been in tears at this stage and had felt devastated because she had no means of proving that she had not stolen anything except by telling the truth to which Ms Pearson was not listening, seeming to prefer what other employees were telling her.

[24] Ms Fitzpatrick said that because she heard nothing further from Ms Pearson and was extremely worried, she had telephoned Ms Pearson on 23 April 2012 and asked when another meeting would be held. In response, Ms Pearson had told her that there would be a meeting the following day with Mr Ross Lowry, the owner of Eldercare.

24 April 2012 meeting

[25] Ms Fitzpatrick said she had attended the meeting with Ms Pearson and Mr Lowry accompanied by Mr Mark Tutua as her support person. Ms Fitzpatrick had been given a copy of the minutes of the previous meeting.

[26] Mr Tutua said that Mr Lowry had commenced the meeting by saying that it would be in the best interests of the residents if Ms Fitzpatrick was to be dismissed.

[27] Ms Fitzpatrick said she had told Mr Lowry that she thought this to be unfair and had asked if that meant she would have a criminal record for theft, but Mr Lowry told her this would not be the case as he had not informed the police.

[28] Mr Tutua said Ms Fitzpatrick had denied taking any biscuits but Mr Lowry said that other employees supported the allegations, and agreed that he believed the other employees rather than Ms Fitzpatrick.

[29] Mr Tutua said Mr Lowry had informed Ms Fitzpatrick, who had been very distressed during the meeting, that she would be suspended but this time without pay while the investigation continued.

[30] Mr Tutua explained at the Investigation Meeting that the bicycle referred to had been his bicycle which Ms Fitzpatrick borrowed occasionally and that the allegation that Ms Fitzpatrick had kept a backpack on it sounded strange to him since there was no means of keeping a backpack on the bicycle.

[31] Ms Fitzpatrick said she had been devastated by what had occurred at the meeting and had contacted Mr Austin as she was desperate at losing her income. Ms Fitzpatrick said Mr Austin had contacted Mr Lowry by letter dated 26 April 2012 to ascertain the situation and had requested a copy of Ms Fitzpatrick's employment agreement together with all the information pertaining to her suspension and Eldercare's investigation.

[32] A reply in response had been received from Mr Clews on 3 May 2012 attaching the whole file relating to the matter, and including an unsigned handwritten letter dated 19 March 2012 which stated:

*To whom it may concern,
Approx a moth ago I was doing morning tea at Golden Pond for the residents. I then went into the kitchen to get a packet of chips for one of the residents, which are in the pantry. I asked Caroline to get them for me. Caroline gave me the chips then I carried on making the tea. I happened to turn around to see Carline with 2 packets of biscuits in her hands. She was trying to hide them behind her back. She then ran out of the kitchen I thought something was wrong so followed to find her putting the biscuits into her back pack. I returned and walked back to the kitchen as didn't want her to see me.*

[33] Ms Fitzpatrick said this was the first time she had seen the unsigned document, and that it was silly and untrue on the basis that she had not run out of the kitchen at any time, moreover she had always kept her backpack in the kitchen because there were no lockers and no means of securing a backpack on Mr Tutua's bicycle.

[34] Ms Fitzpatrick said she had discovered on or about this time that her salary payment had not been made for a couple of weeks, so she had made contact with WINZ to try to obtain emergency benefit.

[35] Ms Fitzpatrick, who had been having monies deducted from her salary and remitted directly to the District Court in respect of fines she owed, became concerned that these deductions may have ceased also, so she contacted the District Court on 2 May 2012 to explain her situation.

[36] Ms Fitzpatrick said District Court employees had advised her that Ms Pearson had contacted them and told them that Ms Fitzpatrick was no longer employed by Eldercare and there would be no more remittances to the District Court from Ms Fitzpatrick's salary payments. Accordingly, a warrant to seize Ms Fitzpatrick's property had been arranged.

[37] Ms Fitzpatrick said she had advised the District Court employees that deductions had been being made from her salary payments until very recently, and she could prove this by producing her pay slips. Ms Fitzpatrick said that she had subsequently been contacted by District Court employees and advised that the deductions had been received, and that the Bailiff action would be halted until her situation was clarified.

[38] Ms Fitzpatrick said Mr Lowry had not reconvened the disciplinary meeting and because she was becoming very upset, she had instructed Mr Austin to raise a personal grievance in respect of her suspension, which he had done by letter dated 16 May 2012.

[39] At the Investigation Meeting Ms Fitzpatrick explained that she had heard nothing further from Eldercare until Mr Austin received a letter dated 29 May 2012 which advised that her employment had been terminated. Ms Fitzpatrick said as a consequence, she had instructed Mr Austin to raise a personal grievance in respect of her dismissal.

Determination

Was Ms Fitzpatrick unjustifiably dismissed from her employment?

[40] The test of justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- iii. In applying the test in subsection (2), the Authority or the court must consider –*
 - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- iv. In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- v. The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
 - (a) minor; and*
 - (b) did not result in the employee being treated unfairly.*

[41] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Eldercare must therefore show that it carried out a full and fair investigation into the issue of whether Ms Fitzpatrick's alleged actions constituted serious misconduct, taking into consideration the factors in s 103A(3), statutory good faith requirements and natural justice. Eldercare must also establish that dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Procedural Justification

[42] Whilst I accept that Eldercare was a relatively small employer and as such lacked the resources normally available to a larger employer when dealing with disciplinary matters, I consider that there were major rather than minor flaws in the procedure Eldercare adopted in terminating Ms Fitzpatrick's employment which cannot be explained merely by the fact that Eldercare lacked these resources.

[43] I find that the dismissal of Ms Fitzpatrick fell far short of the requirements of procedural fairness and the concept of natural justice. Specifically I find that Eldercare:

- Failed to investigate in a timely manner rumours that Ms Fitzpatrick had stolen some biscuits. This was a failure of the duty of good faith it owed to Ms Fitzpatrick who had been accused of a serious offence, and which prevented Ms Fitzpatrick of the opportunity to clear her name at an early stage;
- Failed to provide Ms Fitzpatrick with an opportunity to discuss the proposed suspension which was in breach of clause 21.3 of her IEA;
- Failed to advise Ms Fitzpatrick of the nature of the meeting to be held on 2 April 2012, and in particular of what allegations had been made against her and by whom. In this context I note that Ms Fitzpatrick's first sight of the unsigned letter relating to the complaint which had been made against her was not until 3 May 2012 following the request by Mr Austin to Eldercare for all the information pertaining to its investigation;
- Failed to take into consideration the evidence of Ms Haira given in support of Ms Fitzpatrick's explanations regarding the backpack at the meetings on 2 April and 4 April 2012;

- Failed to provide any evidence that the bicycle referred to by Ms Pearson and Ms Fitzpatrick had been examined to confirm Ms Fitzpatrick's explanations that no backpack could be stored on it;
- Failed to provide any evidence that items of food such as biscuits had been removed from the facility, or by whom;
- Failed to provide Ms Fitzpatrick with any evidence regarding the allegation of stealing gravy mix, which was also not introduced until the meeting on 4 April 2012. There is further no evidence of a complaint in respect of this allegation, or that any investigation into it ever took place;
- Failed to give due consideration to Ms Fitzpatrick's explanations, Ms Pearson stating that she had no reason to disbelieve the statements made by other, unidentified, employees;
- Failed to behave in a good faith manner towards Ms Fitzpatrick by not being '*communicative and responsive*' and not keeping her advised of its investigation or arranging to meet with her following the meeting on 4 April 2012, until Ms Fitzpatrick herself contacted Ms Pearson on 23 April 2012;
- Failed to behave in a good faith manner towards Ms Fitzpatrick by Mr Lowry indicating at the commencement of the meeting on 24 April 2012 that he had decided dismissal was appropriate, prior to giving Ms Fitzpatrick an opportunity to provide any explanation as regards the allegations against her, a clear indication that the dismissal decision had been pre-determined;
- Failed to behave in a good faith manner towards Ms Fitzpatrick by leaving her on unpaid suspension for more than a month before advising her of the outcome of its process, being her dismissal.

Substantive Justification

[44] I find no evidence of substantive justification for Ms Fitzpatrick's dismissal.

[45] Ms Fitzpatrick consistently claimed throughout the investigative and disciplinary process, such that it was, that she had not taken the biscuits, or the gravy mix which had been raised without advance notification during the meeting on 4 April 2012.

[46] The allegations made against Ms Fitzpatrick were very serious, attacking her reputation and her honesty, indeed Ms Fitzpatrick was so alarmed by learning of the rumours that she immediately went to see Ms Pearson for assistance in addressing them..

[47] Ms Pearson informed Ms Fitzpatrick that she had known about the rumours for some time, in this context I note that the unsigned letter provided to Mr Austin on 3 May 2012 which had by inference formed the source of the rumours was dated 19 March 2012. However despite this serious nature of such an allegation, notwithstanding that it was unsigned and anonymous, Ms Pearson had taken no action in the matter. I consider that the lack of any action to be indicative of the fact that Ms Pearson had considered the rumours to be unfounded and of no importance.

[48] I find that the investigation by Eldercare was seriously inadequate and failed to establish that it had any reasonable grounds for its belief that Ms Fitzpatrick had taken either biscuits or gravy mix.

[49] Further there is no substantive evidence that the investigation established that any items of food such as biscuits or gravy mix had been removed from the facility and if so, by whom.

[50] Ms Fitzpatrick, who had gone to see Ms Pearson on 28 March 2012 for assistance and the aim of clearing her name, found herself in the invidious position of facing disciplinary action and of having to defend her reputation against allegations for which Eldercare provided her with no evidence.

[51] I determine that in the circumstances of this case Eldercare did not behave as a fair and reasonable employer could have done in all the circumstances, but rather it fell far short of what would be expected. I determine that Ms Fitzpatrick was unjustifiably dismissed.

Was Ms Fitzpatrick unjustifiably disadvantaged by being suspended from her employment?

[52] Ms Fitzpatrick is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the

employee's disadvantage by some unjustifiable action by the employer;

[53] The elements of s103 (1) (b) are:

- An action
- The action was unjustifiable
- The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[54] In *Sefo v Sealord Shellfish Ltd*¹ Chief Judge Colgan stated:

Section 4 ("Parties to employment relationship to deal with each other in good faith) requires an employer contemplating possible suspension to be active and constructive, responsive and communicative : s4(1A)(b). If a suspension decision is one that will or is likely to have an adverse effect on the continuation of employment of an employee, the employer must provide the employee with access to appropriate and relevant information about the proposed decision and an opportunity to comment on the information before the decision is made: s4(1A)(c).

[55] Clause 21 of the IEA is headed 'Suspension' and states:

21 Suspension

21.1 The Employer reserves the right to suspend the Employee

a. During the course of an investigation into suspected misconduct; or

b. Where, because of a condition, illness or injury, the Employer has sound reason to believe that the Employee constitutes an immediate hazard to himself or herself, or to others.

21.2 The Employer may suspend either on pay or without pay at its discretion.

21.3 Suspension will only occur after the Employer has discussed the reasons for the proposed suspension with the Employee and received and considered any comment the Employee may wish to make with regard to the suspension.

¹ [2008] ERNZ 178 at para [37]

[56] I consider that a fair and reasonable employer would have followed a fair process in which Ms Fitzpatrick was provided with an opportunity to have an input into the decision to suspend her prior to its being made. This provision is reflected in clause 21.3 of the IEA.

[57] I find that Ms Fitzpatrick was not given access to relevant information or an opportunity to persuade Eldercare not to suspend her which was in breach of clause 21.3 of the IEA and the dictates of natural justice.²

[58] Ms Fitzpatrick was suspended for a lengthy period, almost 9 weeks in total. During this period there was significant delay by Eldercare in proceeding in a timely manner with the process, in breach of the good faith requirement in s4(1A) (b) of the Act to be '*responsive and communicative*'.

[59] This resulted in Ms Fitzpatrick being subjected to unnecessary stress which I find constituted a disadvantage in her employment to her.

[60] Further the decision to alter the decision of suspension with pay to that of without pay was not supported by evidence, occurred after a period of significant delay in the process, and had been made without Ms Fitzpatrick being given the opportunity to comment on the decision prior to it having been made. Whilst clause 21.2 of the IEA allows for suspension without pay, I take this to mean the commencement of the suspension, and any subsequent change would have to be substantiated.

[61] In all the circumstances I determine that the act of suspension of Ms Fitzpatrick by Eldercare was an unjustifiable action. As such it constitutes a disadvantage pursuant to s.103A of the Act.

[62] I determine that Ms Fitzpatrick was unjustifiably disadvantaged in her employment as a result of the suspension.

Remedies

[63] I find that Eldercare did not comply with either the basic tenets of natural justice or with the statutory good faith obligations. The decisions by Eldercare to suspend and dismiss Ms Fitzpatrick were not decisions an employer acting fairly and reasonably could have made

² *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice* [1993] 2 ERNZ 546

in all the circumstances. Ms Fitzpatrick has been unjustifiably dismissed and is entitled to remedies.

Unjustifiable Suspension

Lost Earnings

[64] I have found that Ms Fitzpatrick was not responsible for the lengthy period of her suspension and she is entitled to be paid for the whole period of the suspension.

[65] **I order that Eldercare pay Ms Fitzpatrick the sum of \$4,157.16 gross in respect of lost earnings** calculated at the rate of 6 weeks pay from 24 April 2012 until 29 May 2012 utilising the average rate of \$692.86 per week earned by Ms Fitzpatrick during the period from 18 December 2011 to 8 April 2012.

Compensation

[66] I have found that Ms Fitzpatrick was unjustifiably suspended and this caused her significant stress, exacerbated by the false information provided by Eldercare to the District Court by Ms Pearson.

[67] **I order Eldercare pay Ms Fitzpatrick the sum of \$5,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i).**

Unjustifiable Dismissal

Lost Earnings

[68] I am satisfied on the evidence provided at the Investigation Meeting that Ms Fitzpatrick has made a satisfactory effort to mitigate her loss following her unjustifiable dismissal by Eldercare, and that lost earnings should be paid in respect of a period of 6 months.

[69] **I order Eldercare pay Ms Fitzpatrick the sum of \$18,014.36 gross, less the sum of \$941.85 gross earned through short term employment during that period.**

Compensation

[70] Ms Fitzpatrick is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Ms Fitzpatrick suffered significant distress.

[71] The allegations that Ms Fitzpatrick may have been stealing food stuffs from the facility, I consider to have had the effect of unjustifiably besmirching Ms Fitzpatrick's honesty and reputation

[72] I have found that Eldercare carried out an inadequate investigation, and that Ms Fitzpatrick was deprived of any opportunity to clear her name of what was a most serious accusation of theft.

[73] I order Eldercare pay Ms Fitzpatrick the sum of \$15,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i).

Costs

[74] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority