

Attention is drawn to an order
for suppression referred to in
this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 180
5360971

BETWEEN

MARGOT GAZELEY
Applicant

AND

OCEANIA GROUP (NZ)
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Anjela Sharma, Counsel for Applicant
Kylie Dunn, Counsel for Respondent

Investigation Meeting: 15 November 2011 at Nelson

Determination: 18 November 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Margot Gazeley was employed as facility manager at Woodlands Rest Home in Motueka from about 22 July 2009 until she was dismissed on 30 September 2011. Mrs Gazeley had been suspended from her employment on 11 July 2010 pending an investigation into allegations of serious misconduct. There followed much correspondence and several lengthy meetings between Mrs Gazeley, her representative and Oceania Group before she was told of the decision to dismiss her.

[2] Mrs Gazeley says that her employer dismissed her without justification and in this application she is seeking interim reinstatement pending a full investigation into her personal grievance and claim for permanent reinstatement. As usual, the claim for interim reinstatement has been investigated by considering the affidavits lodged in support and in opposition and by giving the parties an opportunity to make

submissions based on the substantial volume of material provided. The findings expressed in this determination are solely for the purposes of resolving the claim for interim reinstatement. Final findings of fact and law will have to wait the opportunity to fully test all the evidence relevant to this problem.

[3] Despite mediation the parties were not able to resolve this problem.

[4] Both parties agree on the proper approach to problems such as this. Counsel for Oceania Group referred me to *Cliff v Air New Zealand* [2005] ERNZ 1. I also note the recent judgment of the Employment Court in *McKean v Ports of Auckland Limited* [2011] NZEmpC 128 where the Court said regard must be had to:

- *whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s 103A of the Act;*
- *whether the plaintiff has an arguable case for interim reinstatement in employment under s 125 of the Act if he is found to have been dismissed unjustifiably;*
- *where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and*
- *the overall justice of the case*

[5] To resolve this problem I will explain more about what led Oceania Group to suspend Mrs Gazeley before outlining the disciplinary investigation undertaken. I will then apply the test just mentioned.

Non publication order

[6] By consent I make an order prohibiting the publication of the names of any of the residents identified in the materials before the Authority.

Suspension

[7] Mrs Gazeley says that she was asked in December 2010 to assist at Oceania Group's Otumarama Rest Home in Stoke and she then spent about 60% of her time there until late February 2011. In late February 2011, following the Christchurch earthquake, Mrs Gazeley was asked to set up emergency admissions at Omaio Retirement Village, an Oceania Group facility also in Stoke that had been closed for a period of time. From late February until 11 April 2011 Mrs Gazeley spent 80% of her time at Omaio and 20 % of her time at Otumarama.

[8] From 11 April 2011 Mrs Gazeley returned to her role at Woodland until 31 May 2011 when she went on leave. Mrs Gazeley was due to return to work on Monday 11 July 2011.

[9] There is a contractual relationship between Oceania Group and the Nelson Marlborough District Health Board with respect to the operation of Woodlands. The contract permits NMDHB to audit the services provided under the agreement and appoint a temporary manager in the event of certain breaches of Oceania Group's obligations. On 7 July 2011, during Mrs Gazeley's absence on leave, NMDHB conducted a spot audit. That resulted in communications with Oceania Group to the effect that the staff and residents spoken to were *very scared* about Mrs Gazeley's imminent return to work and a decision by NMDHB to exercise its powers under the contract to appoint a temporary manager to Woodlands.

[10] Ms Sangster is a senior manager for Oceania Group. She was involved in at least some of these exchanges with the NMDHB. Mrs Gazeley returned to work at about 6.30 am on 11 July 2011. Ms Sangster suspended her from her employment pending an investigation into issues identified by the audit. Ms Gazeley went home and apparently heard nothing further except from an associate who was told when he called Woodlands that Mrs Gazeley no longer worked there. Mrs Gazeley sought legal advice and there was some correspondence between her lawyer and Oceania Group. It is apparent that there are significant disputes over whether Mrs Gazeley was justifiably suspended from her employment. Apart from the factual disputes, Oceania Group also says that no grievance about the suspension was raised within time. It is not necessary to analyse these issues further for present purposes since an unjustified disadvantage grievance over the suspension could not support interim reinstatement to the employment for the subsequent dismissal.

Oceania Group's investigation

[11] There was correspondence between Mrs Gazeley's lawyer and Oceania Group much of which I will not detail here. There were also meetings on 11 August 2011 and 13 September 2011 and a phone conference on 30 September 2011 involving Mrs Gazeley, her lawyer, Oceania Group's chief executive officer (Geoff Hipkins) and a

human resources manager (Kate Hoyle). By agreement the meetings were recorded and I have been provided with a transcript. The recordings were not provided as part of the evidence and counsel for Oceania Group noted that they had not been able to compare the transcript with the recording.

[12] It is useful to summarise the allegations. They were first comprehensively set out in correspondence dated 22 July 2011. It was alleged that Mrs Gazeley had repeatedly made intimidating and threatening remarks to staff and residents; had physically and verbally abused residents; had repeatedly yelled at staff and residents and made rude and derogatory to them; and had failed to rectify an issue that arose in a September 2010 audit. The correspondence included appendices A – K with material said to support the allegations. All that was the basis for Oceania Group's concern that the overall management of Woodlands appeared to have fallen far short of its and NMDHB's standards. It was also noted that Mrs Gazeley had in February 2011 been formally warned for assisting others to medicate and restrain a resident in a manner in breach of that person's code of rights, a warning that remained in force.

[13] Following the 11 August 2011 meeting with Mrs Gazeley Oceania Group again wrote to her setting out its proposed outcome of the disciplinary process. That letter first noted the need for Oceania Group to have the highest level of trust and confidence in its facility managers. It appeared from Oceania Group's investigation that Mrs Gazeley had failed to demonstrate her commitment to and had at times breached company values, especially treating individuals with respect and dignity. Oceania Group considered that Mrs Gazeley had *failed to demonstrate effective leadership and drive positive cultural change within the Facility where that was required*. Further, it was Oceania Group's view that that Mrs Gazeley had *failed to take ownership of the Facility as a whole and, in particular, its clinical safety*. That conclusion was influenced by Mrs Gazeley's admission that she had never reviewed a care plan but simply left clinical matters to her clinical staff. That all led Oceania Group to think that the employment relationship might be unsustainable particularly in light of NMDHB's decision to appoint a temporary manager and the adverse media attention the matter had caused. All this was raised to give Mrs Gazeley a further opportunity to comment before any decision.

[14] The letter went on to comment on the specific allegations. Regarding the allegation of physical or verbal abuse of residents, Oceania Group concluded that Mrs Gazeley had attempted to or at least indicated an intention to restrain the resident by her reported comments, which, even if said in jest, were unacceptable. The conclusion, contrary to Mrs Gazeley's denial, was influenced by knowledge of Mrs Gazeley's actions several days later that had led to the warning mentioned above. Regarding the allegation of repeatedly making intimidating and threatening remarks to staff and residents, Oceania Group concluded that there was insufficient evidence to make a clear finding on the point. Regarding the allegation of repeatedly yelling at staff and residents and making derogatory comments to them, Oceania Group concluded that there was insufficient evidence that Mrs Gazeley had yelled at staff or residents. However, the company concluded that Mrs Gazeley had made derogatory comments to staff and residents by calling residents to dinner by saying *teatime, teatime, jellimeat for dinner*. That, even used in jest, was said to be offensive with the connotation that residents are animals. Oceania also concluded that Mrs Gazeley had not treated staff with respect by calling one of the maintenance men a *dirty hua* in the hearing of another staff member who was offended by this language. Regarding the allegation of failing to rectify a partial clinical attainment, Oceania Group concluded that Mrs Gazeley remained responsible for the failure despite her role with Otumarama at the time. The company was extremely concerned to hear that Mrs Gazeley had never reviewed any care plans and left clinical issues to the clinical team as it demonstrated a failure to safely and effectively manage the facility. Oceania Group was influenced in its views by the NMDHB's appointment of a temporary manager demonstrating its loss of trust and confidence in the safety of Woodlands under Mrs Gazeley's management. Similarly Oceania Group thought that Mrs Gazeley's explanation that there were staff who did not support and who undermined her indicated her lack of accountability and ownership over the facility.

[15] There was more correspondence, a disciplinary meeting on 13 September 2011 and further correspondence. Following that there was a phone conference on 30 September 2011 when Mrs Gazeley was told that she was dismissed. Oceania Group also wrote to Mrs Gazeley the same day setting out the reasons in writing. I should summarise those reasons.

[16] Regarding the statutory management of Woodlands Oceania Group concluded that NMDHB's actions demonstrated how serious the situation at Woodlands was and that it detrimentally impacted on the company's relationship with NMDHB and the company's reputation. Oceania Group concluded that Mrs Gazeley's lack of clinical oversight was unacceptable and resulted in significant clinical failings. Regarding the allegation of physical and verbal abuse of a resident, Oceania concluded that Mrs Gazeley had mentioned restraining or tying up the resident, something prohibited by company policies. Regarding the allegation of making rude and derogatory comments to staff and residents, Oceania Group concluded that by saying *teatime, teatime jellimeat for dinner* Mrs Gazeley failed to treat residents with dignity and respect; and by calling one of the maintenance men a *hua/dirty hua* in front of another staff member who took offence, Mrs Gazeley demonstrated a failure to communicate appropriately and professionally. Oceania Group was disappointed with Mrs Gazeley's explanations about a lack of support from staff and the (Auckland based) support office which it concluded demonstrated a lack of accountability for the management of Woodlands and Mrs Gazeley's effectiveness as a manager. All that resulted in Oceania Group's loss of trust and confidence in Mrs Gazeley and a decision to terminate her employment with immediate effect.

Arguable case?

[17] It is accepted that Oceania Group must justify Mr Hipkins' decision on the law as applicable from 1 April 2011. Oceania Group's view is that there is not even an arguable case for a personal grievance.

[18] For Mrs Gazeley, there are some criticisms about the adequacy of Oceania Group's investigation into the allegations.

[19] Rolene Gardiner is a long serving employee at Woodlands. There is an affidavit from her to the effect that she was present during a number of the incidents referred to in the appendices to the 22 July 2011 letter. She says that there was nothing improper in how Mrs Gazeley dealt with any of those incidents. Mrs Gardiner provided a letter of support for Mrs Gazeley that formed part of Mrs Gazeley's explanations to the allegations. Despite Oceania managers visiting the facility to talk to other employees during the disciplinary process, no-one spoke to

Mrs Gardiner. The difficulty with basing an arguable case of unjustified dismissal on this evidence is that none of the incidents mentioned by Mrs Gardiner appear to have been relied on by Oceania Group in either the 19 August 2011 preliminary decision or the 30 September 2011 dismissal letter.

[20] Belinda Palmer is a healthcare assistant at Woodlands. In her affidavit Ms Palmer gives evidence about the alleged restraint incident. She says that the resident, a person at risk of falling over, while in Ms Palmer's care was attempting to get out of a chair when Mrs Gazeley in an ironic way said something about tying up the resident. Ms Palmer responded also in an ironic fashion saying that they could not do that. Ms Palmer provided statements to this effect that were conveyed to Oceania Group as part of Mrs Gazeley's explanation. Ms Palmer says that she was spoken to by an HR manager during the disciplinary investigation and confirmed that there was nothing malicious or abusive in Mrs Gazeley's comments at the time of the incident. She was spoken to a second time later in the disciplinary process when she confirmed an absence of anything improper in Mrs Gazeley's conduct but the questioner took little account of her views. The submission is that Oceania Group failed to further clarify Ms Palmer's statement. However, it appears that Oceania Group generally accepted that Ms Palmer's account of the words used during the incident might be accurate but still in breach of expected standards. I do not see that the evidence indicates a lack of investigation on Oceania Group's part.

[21] In January 2011 Mrs Gazeley was involved with several other staff in restraining a resident in order to orally administer the resident with prescribed antibiotics. That conduct came to the attention of Oceania Group's HR manager who raised it with Mrs Gazeley in a disciplinary context. Mrs Gazeley accepted responsibility and was given a formal warning as a result. This is the warning mentioned in Oceania Group's correspondence regarding the later allegations that resulted in Mrs Gazeley's dismissal. Mrs Gazeley's evidence is that she is now aware of Oceania Group's written policy about restraint minimisation. She says it excludes from the definition of restraint her actions in January 2011. Mrs Gazeley says she should have been given this document both before the warning and the dismissal. I accept that Mrs Gazeley is right about that, at least to an arguable standard. If so, that would call into question the validity of the February 2011 warning. The existence of the warning was material to the later decision to dismiss Mrs Gazeley. Absent the

warning, Oceania Group may have reached different conclusions about the conduct or its seriousness that later resulted in the dismissal. Overall, to an arguable standard, this may make a difference to justification for the dismissal. However I note that there was other information relied on by Oceania Group to reach its conclusion about the restraint comment that formed part of the dismissal.

[22] There is some evidence that suggest the possibility that Oceania Group pre-determined its decision to dismiss Mrs Gazeley and did not consider her explanations with an open mind. At this stage the point is arguable but not strongly so.

[23] There are a number of issues raised which go to the substance of Oceania Group's decision to dismiss Mrs Gazeley.

[24] There was initially an allegation that Mrs Gazeley had repeatedly made intimidating and threatening remarks to staff and residents. Eventually Oceania Group concluded that Mrs Gazeley had demonstrated a failure to communicate professionally in calling one of the maintenance men a *hua/dirty hua* in front of another staff member (Janeen Rogers) who took offence. Ms Rogers reported to the NMDHB audit that Mrs Gazeley had used the word *whore* when talking to both maintenance men. There is evidence from both Mrs Gazeley and Alan Joyce about their exchange. They both say (as they said during the disciplinary process) that the word used by Mrs Gazeley was not *whore* but rather *hua* or *hoar* meaning grey haired. That appears to have been accepted by Oceania Group who remained concerned about the offence taken by Janeen Rogers. What appears to have happened, to a strongly arguable standard, is that Ms Rogers misunderstood the communication between Mrs Gazeley and Mr Joyce. If that is so, it is strongly arguable that there was nothing improper in Mrs Gazeley's conduct and certainly nothing to warrant any disciplinary sanction by a fair and reasonable employer.

[25] The other point relied on for the dismissal under this head of complaint was the admitted use of a particular phrase when calling residents to dinner. One can understand how residents might be offended rather than amused by this although the evidence of residents' reactions (including a family member) is about amusement rather than offence. As in *Angus v Ports of Auckland* [2011] NZEmpC 125, the real problem at this point is whether in context (including the express contractual obligations applicable to Mrs Gazeley) the admitted behaviour could be regarded as

sufficiently serious to justify dismissal by a fair and reasonable employer. It is arguable that the admitted conduct falls short of that standard.

[26] Oceania Group concluded that Mrs Gazeley's lack of clinical oversight was unacceptable and resulted in significant clinical failings. That contributed to the NMDBH's decision to appoint a temporary manager and detrimentally impacted Oceania Group's relationship with NMDHB and other DHBs. However, it appears that Mrs Gazeley's lawyer was told by a NMDHB manager that it had not told Oceania Group that the Board lacked confidence in Mrs Gazeley in her role as facility manager at Woodlands and that the temporary manager was appointed to assist Woodlands to meet service standards and not specifically as a result of allegations made against Mrs Gazeley. If those comments were made they seem to have been carefully crafted not to cross over into matters that were properly the concern of Oceania Group. For that reason the submission that there is no evidence of any loss of trust or confidence by NMDHB probably misses the point that the assessment about trust and confidence was for the employer.

[27] There is evidence from the chief executive (Mr Hipkins) that the appointment of a temporary manager was exceptional and very serious, it meant that they had a major issue with the NMDHB, that the audit identified some very serious issues on site and identified Mrs Gazeley as an issue in several important respects and that he took these matters very seriously. In general, Mrs Gazeley says that she relied on her clinical team, that she was deployed elsewhere for some of the relevant period and that the complaints are connected with long standing difficulties (pre-dating her employment) with a few staff members. While Mrs Gazeley denies culpability, if Mr Hipkins' assertions are eventually proven they will likely comprise substantial justification for a dismissal or at least significant contribution to the circumstances giving rise to any established grievance. Mrs Gazeley's bare denials do not go very far to dispel these concerns. At this point, on this aspect of the problem for Mrs Gazeley, there is at least an arguable case but I put it no stronger than that.

[28] The Employment Court in the *Angus* case, in reference to the 1 April 2011 statutory amendments, stated:

[5] *...Parliament has changed the previous position, and in very general terms, has both sought to make it easier for employers to justify dismissals and to make it more difficult for employees to be reinstated if they have been unjustifiably dismissed.*

[29] However the Court went on to discuss the potential effect of the added requirement in the new s.125 that the Authority may provide for reinstatement if it is *practicable and reasonable to do so* (emphasis added). The Court said:

[15] What the requirement of reasonableness adds to the requirement of practicability is not clarified by the legislation and will have to be determined by the Court and the Authority as appropriate cases arise. It is likely to mean that the decision to reinstate must be supportable objectively by reasons as opposed to being an arbitrary decision. ...So in this sense the new s.125 may stipulate expressly the previous practice of the Court and the Authority. If that is so, s.125 joins a number of other new or amended sections that affirm practice rather than effect change.

[30] I take from this that it is unlikely to be sufficient for Mrs Gazeley merely to establish a personal grievance in order for reinstatement to emerge as a likely remedy. It will be necessary for her to establish that it is practicable and reasonable in the sense of there being good reason to support such an order. That will have to address the concerns raised by Mr Hipkins about a loss of trust and confidence in Mrs Gazeley in light of the significant clinical issues identified by the audit of the facility of which she was the manager.

[31] In light of all this I find for present purposes that Mrs Gazeley has an arguable but not strongly arguable personal grievance and an arguable but not strongly arguable case for permanent reinstatement.

Balance of convenience

[32] There is a submission that damages or compensation would not be an adequate remedy. The way that is put seems to be on the basis that permanent reinstatement would be the only adequate remedy because of the difficulty for Mrs Gazeley of obtaining other employment within her field of expertise. The true significance about damages at this point is whether any harm from not providing interim reinstatement could be remedied by a later award of damages. Sometimes it is necessary to provide for interim reinstatement because not doing so undermines the prospects for permanent reinstatement. That is not this case. Sometimes, the loss caused or potentially caused by not providing for interim reinstatement falls outside of the statutory provisions for compensation; or the party might not be able to meet a later award of damages. That is not this case. Overall, if Mrs Gazeley later establishes a

personal grievance Oceania Group will be able to fully compensate her for any proven loss.

[33] To some extent the interim case for Mrs Gazeley is based on her loss of income because of the dismissal. I accept that Mrs Gazeley has not been able to find any replacement employment in the meantime and may find it difficult to do so in the short term at least in light of the publicity surrounding this matter. There is evidence that Mr Gazeley works part-time and will have to take time off in February 2012 for an operation and to recuperate. His inability to work fulltime and the requirement for time off will no doubt create a significant shortfall between household expenses and household income. There is evidence that Mrs and Mr Gazeley own their home freehold. Otherwise there is no evidence of Mrs Gazeley's financial circumstances such as savings and investments and expenses. Overall the evidence does not show consequences from the loss of Mrs Gazeley's income pending final disposition of the personal grievance so serious that the situation demands the remedy of interim reinstatement.

[34] There is evidence of the importance for Mrs Gazeley of work within her chosen field. Mrs Gazeley has been excluded from her work for more than three months given the lengthy suspension that preceded the dismissal. I accept that Mrs Gazeley finds this difficult but her concerns can properly be remedied by an award of compensation if a grievance is eventually established.

[35] The final balance of convenience point raised in support of the application for interim reinstatement is that Mrs Gazeley feels that she has been pilloried in the media without being heard and that her very good reputation has been destroyed as a result. Interim reinstatement will not restore Mrs Gazeley's reputation or clear her name in the manner she seeks. That is a function of the substantive proceedings when the merits or otherwise of Oceania Group's decision to dismiss can be properly and conclusively determined.

[36] There is evidence for Oceania Group that the period of temporary management has now ended, the audit issues have been addressed and that things are now working well at Woodlands under a new facility manager. There is concern that interim reinstatement may derail that progress, especially in light of the complaints from some

staff and residents that emerged during (and possibly before) the spot audit. There is also evidence for Mrs Gazeley from staff and for residents supporting her continued stewardship of Woodlands. It is not possible to resolve the stark differences at this point. However, the potential negative consequences for Oceania Group are not immaterial, perhaps even beyond Mrs Gazeley's capacity to cover by her undertaking for damages. The same can be said of the potential negative consequences for third parties such as the residents and other staff. I do not want to put this too strongly since there is information and evidence from only a few of the total complement of staff and residents.

[37] Overall I find that the balance of convenience favours Oceania Group.

Overall justice

[38] At this point I must stand back from the considerable detail of the materials presented to the Authority and assess whether overall justice requires interim reinstatement.

[39] It seems that there were significant clinical and other problems at Woodlands that caused the NMDHB to exercise rarely used powers and appoint a temporary manager who under the terms of the contract between Oceania Group and NMDHB assumed management of the facility. It took some months for the NMDHB to be satisfied that Woodlands was meeting the standards required. There is nothing to suggest that Oceania Group was complicit in NMDHB's actions. In those circumstances an employer would naturally look to its manager to shoulder responsibility for the failings. At a very general level that is what happened here.

[40] I cannot say that Oceania Groups' actions and how it acted as presently apparent differ fundamentally from those of a fair and reasonable employer; or that Mrs Gazeley's case of unjustified dismissal requiring permanent reinstatement is compelling. These will be issues of fact and degree that could turn out to favour either party. In the meantime, the appropriate option is not to disturb the present management arrangements for the facility.

Conclusion

[41] For the foregoing reasons I decline Mrs Gazeley's application for interim reinstatement.

[42] Costs are reserved.

Progress towards a substantive investigation

[43] There is an application to remove the substantive matter to the Court. Now that Oceania Group has lodged its reply to this application, the Authority will convene a phone conference to discuss how to progress that application.

[44] If the matter remains with the Authority it will require perhaps a four day investigation meeting. It will be difficult to accommodate that before March or perhaps April next year. It would also take not a little time to complete a substantive determination although by then I hope to have cleared a substantial part of the backlog of determinations caused by the February 2011 earthquake and the disruption to the Authority's facilities. I mention this because of one of the grounds in the removal application.

Philip Cheyne
Member of the Employment Relations Authority