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Gifkins v Iglewood Welfare Society (Wellington) [2018] NZERA 2023; [2018] NZERA Wellington 23 (22 March 2018)

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Gifkins v Iglewood Welfare Society (Wellington) [2018] NZERA 2023 (22 March 2018); [2018] NZERA Wellington 23

Last Updated: 9 April 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 23
3011752

BETWEEN KATHRYN GIFKINS Applicant

AND INGLEWOOD WELFARE SOCIETY

Respondent

Member of Authority: Michele Ryan

Representatives: Sandra Dodunski, Counsel for Applicant

Megan Gundeson, Counsel for Respondent

Investigation Meeting: 31 October 2017 and 1 November 2017

Submissions Received: Written submissions from both parties on
1 November 2017

Determination: 22 March 2018

DETERMINATION OF THE AUTHORITY

[1] There is a prohibition order as to the name and/or identity of persons referred

to in this determination as “the resident” or as a “patient”.

Employment relationship problem

[2] Kathryn Gifkins’ personal grievance claim before the Authority follows events that she says led her to resign from her position as a Health Care Assistant at the Marinoto Rest Home (the Rest Home) based in Inglewood. She claims her resignation was a constructive dismissal, and was unjustified.

[3] The Inglewood Welfare Society (the Society) operates the Rest Home. It rejects Ms Gifkins’ claim and says she resigned from her employment without any impetus from it.

Background to Ms Gifkins’ claim

[4] In July 2016 Ms Barbara Kay was employed by the Society to manage the Rest Home. Ms Gifkins began her employment with the Society shortly after, having been recruited by Ms Kay. The pair had worked together in other aged care facilities and enjoyed a positive working relationship.

[5] In various ways each of the witnesses who worked with Ms Gifkins report she is a compassionate and conscientious Health Care Assistant.

[6] The Rest Home is a small facility. At that time the Rest Home employed a

Registered Nurse (RN) for 30 hours per week.

[7] Ms Gifkins says that soon after her employment began two issues arose, each of which she says was of significant concern for her.

[8] Firstly, she became aware that Health Care Assistants (HCAs) were expected to dispense medication to residing patients. That activity had always been the responsibility of RNs in her previous jobs. Ms Gifkins says she had clearly informed Ms Kay on “*on several occasions*” that she would not take part in dispensing medication, but was given no choice in the matter.

[9] The second issue involved a resident with dementia who became infatuated with Ms Gifkins. The individual is referred to as the “the resident”. Ms Gifkins says she complained to Ms Kay about being harassed by the resident. She claims her concerns were never addressed.

[10] Ms Gifkins took leave without pay for a three month period beginning in October 2015 for reasons unrelated to her claims. She returned to the Rest Home on or about 31 January 2016.

[11] On 30 May 2016 Ms Gifkins drafted a letter addressed to Ms Kay and the Society's Board. She referred to an incident earlier that day and alleged Ms Kay had, in front of another staff member, falsely accused her of "*dragging [a] patient*" when Ms Gifkins and another HCA were seeking to lift a patient off the floor and into a chair.

[12] The purpose of the letter was said to put Ms Kay on formal notice that her actions were "*totally unacceptable*". Ms Gifkins noted "*this has happened ... three times to me in the last year*".

[13] The letter did not elaborate on those events alleged to have occurred over the year but they formed part of Ms Gifkins' evidence at the Authority's investigation meeting. Ms Gifkins says in two of the instances she had been distressed and Ms Kay had not listened to her and had been unresponsive. The third instance is the event which Ms Gifkins complains of in her correspondence of 30 May 2016 and is characterised as the final straw.

[14] Ms Gifkins' letter went on to state that Ms Kay's actions, coupled with an expectation that she undertake duties usually assigned to a Registered Nurse but for which she was not comparably remunerated, was both unsafe and intolerable. The following morning Ms Gifkins inserted a final statement in the letter informing Ms Kay and the Board that she was resigning from her position. She advised her last day of work would be 14 June 2016. She gave the letter to Ms Kay later in the day.

[15] Ms Gifkins' employment finished on 8 June 2016 when she was advised she would be paid out wages in lieu of notice and no longer required to attend work. It was later claimed on Ms Gifkins' behalf that this action was an unjustifiable dismissal. However the parties' employment agreement allowed for Ms Gifkins' employment to end in this way and the claim was withdrawn prior to the Authority's investigation meeting.

The Authority's investigation

[16] Ms Gifkins and her husband both attended the Authority's investigation meeting. The Acting Chair of the Society, Ms Denise Loveridge, provided evidence to the Authority as did Ms Kay. Ms Maree Whitmore and Ms Natalie Johnson-Tohi both worked at the Rest Home during the period Ms Gifkins was employed and attended the investigation meeting.

[17] I have not recorded all the information received by the Authority concerning this employment relationship problem but have stated findings of fact and law

necessary to dispose of the matter.¹

1 As permitted by s 174(C)(4) Employment Relations Act

The law

[18] A constructive dismissal occurs where an employee resigns from employment but, in reality, the resignation was forced or initiated by the action(s) of the employer.

[19] In *Auckland Shop Employees etc IUOW v Woolworths (NZ) Ltd* the Court of Appeal set out categories of cases where a constructive dismissal may arise, as follows.²

(i) the employee was given a choice between resigning or being dismissed.

(ii) the employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign.

(iii) a breach of duty by the employer caused the employee to resign.

[20] Ms Gifkins relies on the third category of constructive dismissal. In *Auckland Electric Power Board*³ the Court of Appeal examined circumstances where the constructive dismissal is said to have arisen out of a breach of duty on the part of the employer.

[21] The Court found two questions need to be considered; first, whether the employee's resignation has been caused by a breach of duty owed to the employee by the employer. Second, whether the breach of duty was of sufficient seriousness to make it reasonably foreseeable that the employee would no longer be prepared to work under the conditions prevailing. The Court expressed the second question in the following terms: "*In other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*"⁴

[22] In *Wellington etc Clerical etc IUOW v Greenwich*⁵ it was held that:

"It is essential to examine the actual facts of each case to see whether the conduct can be fairly and clearly said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness and resentment to the employee from conduct dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship"⁶

² *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA)

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 1 ERNZ 169

⁴ *Ibid* at n3 pg 172

⁵ *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95

⁶ *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cas 95

[23] The law accepts there are cases which may involve a series of breaches to an employee's express or implied terms of employment but which are not individually sufficient to establish the employer has repudiated the contract but the cumulative effect of those events may. One form of these types of cases may involve an event characterised as the "final straw". Notably:

"The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence but, it must, when taken in conjunction with the earlier acts, contribute something to the breach and be more than utterly trivial."⁷

The issues

[24] To establish whether Ms Gifkins was constructively dismissed it is necessary to examine the factual matrix regarding;

- the requirement to dispense medication,
- the management of the infatuated resident, and

- the incident of 30 May

[25] The Authority needs to determine whether any or all of those events constituted a breach to Ms Gifkins' employment. If so whether, either individually or collectively, the breaches were so serious it was foreseeable Ms Gifkins would resign.

Did the Society breach Ms Gifkins' terms of employment obligations by its requirement to have Ms Gifkins dispense medication and/or fail to respond to her concerns regarding the task?

[26] The evidence as to how medication was administered at the Rest Home is as follows:

[27] External pharmacists prepare and place the residents' medication into individualised time/dated blister packs. The blister packs are delivered to the Rest Home and the content of each is cross-checked by a Registered Nurse.

[28] When the RN is either not on duty or attending to other matters HCAs are required to count the number of tablets in a blister pack against the medication chart,

give the contents of the blister pack to the patient at the time specified, and ensure the medication was taken.

[29] An HCA was not able to dispense medication until s/he had been inducted and trained in 'Medication Administration' protocols by an RN. It was not until the RN was "absolutely convinced" the HCA was able to administer medication unsupervised and safely, that a signed declaration is executed, which permits the HCA to give medications to residents. Ms Kay said Ms Gifkins was "very competent" at providing medication and there were no concerns about her confidence.

[30] The exact nature of the duty the Society is said to have breached was not well articulated by Ms Gifkins other than to allege the Society failed to address her concerns regarding its requirement she dispense medication.

[31] The first concern Ms Gifkins says she had regarding the requirement to administer medication is that neither her employment agreement nor her job description indicated that her duties included the task. The Society accepts there is no reference to medication tasks in the job description but cl.2.2 of the parties' employment agreement provides under the heading 'Position and Duties' that "...you agree to carry out all other duties as required by the employer which are reasonably incidental to your position." Ms Gifkins agreed her job description did not set out every activity she performed. I am satisfied the requirement to dispense blister pack medications was a reasonable activity associated with the position of a HCA.

[32] Next, Ms Gifkins referred to one of the instances obliquely mentioned in the letter of resignation, as proof of her opposition to the requirement to dispense medication. The incident occurred in August 2015. Ms Gifkins was undertaking training on medication protocols from the Registered Nurse. She says she found the tuition so distressing that an argument ensued between them in the medication room. At some point during the dispute Ms Kay entered the room and asked if everything was okay. Ms Gifkins acknowledges that both she and the registered nurse advised it was and Ms Kay left the room. Ms Gifkins now says Ms Kay should have known from that event and from her early departure from work that day that she was upset at the prospect of dispensing medication and should have returned to discuss the matter.

I do not accept that position. Having indicated there was no issue when asked, the

7. *Omikaju v Waltham Forest London Borough Council* [2004] EWCA Civ 1493; [2005] 1 All ER 75 (CA) and referred to in *Pivott v Southern Literacy Inc* [2013] NZEmpC 263 at [61]

onus fell back on Ms Gifkins to have informed Ms Kay if the case was otherwise. There is an inference that Ms Gifkins

considered she was bullied during the event but the matter was not raised as a personal grievance or pursued before the Authority.

[33] Ms Gifkins' written evidence stated her GP had advised her to stop administering medication because she was unqualified to do so. She produced a medical certificate during the Authority's investigation in support of her contention. However, the document is dated 14 October 2016 – 5 months after she left her employment with the Society. The certificate referred to Ms Gifkins' account to her GP that she considered the task was unreasonable and felt stressed by it. Ms Gifkins accepts she did not furnish a medical certificate while she worked at the Rest Home to establish she was unfit for the task.

[34] Ms Gifkins says she was worried about the level of responsibility that came with dispensing medication and was afraid of making a mistake.

[35] Ms Kay agrees Ms Gifkins conveyed, early in her employment, some discomfort with the obligation to dispense medication. Her evidence that Ms Gifkins had been told she could contact the RN or Ms Kay after hours by phone if there were problems with medication was not challenged. Nor did Ms Gifkins dispute evidence that HCAs were advised they would not be held accountable if administration errors occurred as a result of incorrect tablets having been placed in the blister packs.

[36] Ms Gifkins accepted during cross examination that she had not raised any concerns with Ms Kay that she was fearful of adverse consequences if a mistake was made.

[37] Ms Kay says Ms Gifkins' primary objection to dispensing medication was that she considered the task was the responsibility of RNs who were paid significantly more. Ms Whitmore and Ms Johnson-Tohi both also gave testimony that Ms Gifkins complained from time to time that HCAs weren't paid enough to give out medication.

[38] Ms Gifkins' initial denial during the Authority's meeting, that her concern about medication stemmed from her view that the administration of medication was exclusively a nursing task, is at odds with the content of her resignation letter, which stated amongst other things that:

I undertake many other duties outside of my job description, many of which are RN duties. ... This level of responsibility is not reflected in my pay.

Conclusion

[39] Ms Gifkins struggled to express, even in a general way, what she had said to Ms Kay to indicate the task of administering medication remained unsafe or was, in and of itself, an unreasonable instruction which she wanted Ms Kay to address. Much of her evidence rested on a belief that Ms Kay knew of her apprehensions, but she was unable to point to any tangible evidence to demonstrate that Ms Kay was aware of the safety concerns Ms Gifkins now seeks to rely on to establish her claim.

[40] It follows that I do not accept the Society breached an express or implied term of employment to conduct itself in a reasonable manner towards Ms Gifkins or that it failed to respond to complaints regarding medication. There is simply no evidence that Ms Gifkins complained of those matters before she tendered her resignation. Ms Gifkins' final statement to the Authority on the issue; *"I just didn't want to do it"* is telling. I accept Ms Gifkins did not wish to dispense medication, particularly when she considered the task beyond her pay-scale, but that does not constitute a breach of her terms of employment.

[41] I would note that, even if the Society was in breach of a duty as to its requirement to dispense medication or its failure to deal with Ms Gifkins' concerns, I find Ms Gifkins must be taken to have affirmed the contract in late January 2016 – 4 months'

before she resigned 2016. At that point she had returned to work following a

3 month hiatus knowing that the administration of medication was a prevailing condition of her employment.

[42] There is no evidence that the issue of medication was discussed at all on her return.

Did the Society breach Ms Gifkins' terms of employment obligations by failing to respond to Ms Gifkins concerns regarding the resident.

[43] To support her claim that the Rest Home was unresponsive to her concerns regarding the resident, Ms Gifkins refers to the other instance mentioned briefly her letter of resignation. This event also occurred in or around August 2015.

[44] Ms Gifkins says while attending the resident he advised he wished to marry her and proposed to that effect. She quickly reported the matter to Ms Kay. Ms Whitmore was in the office at the time. Ms Gifkins alleges that the combined response of Ms Kay and Ms Whitmore was to laugh and make derisory comments about the resident. She agrees she did not expressly ask Ms Kay to address the matter with the resident at the time. Nevertheless Ms Gifkins says Ms Kay's failure to take action on the matter made it clear to her that any concerns she had about the resident's behaviour would not be taken seriously.

[45] Ms Gifkins says over the course of her employment the resident continued to purposely seek her out; propose to her; give her gifts; make phone calls to her home; and follow her to the car park. She says nothing was done by Ms Kay to prevent those actions.

[46] All of the witnesses who worked at the Rest Home freely acknowledged the resident's behaviour towards Ms Gifkins was persistent and intrusive. Each of them provided testimony of their respective attempts to have Ms Gifkins remove herself from contact with the resident.

[47] In cross examination Ms Gifkins accepted that she had been advised by Ms Kay (and other staff) that she did not have to go to that part of the facility where the resident was assigned; attend to his cares; talk to the resident; and ask the resident to leave her alone when he approached her. Ms Gifkins says she did not want to treat him differently from other residents. She says it was difficult to distance herself from him due to the size of the Rest Home.

Conclusion

[48] It is clear Ms Gifkins was in receipt of unwanted attention from the resident and that his attentions were significant. While it is admirable that she wanted to provide continuity of care to the resident in what can only be described as trying circumstances, she cannot apportion blame to the Rest Home where options to reduce her interaction with him were made available to her by it. By her own concessions Ms Gifkins was unwilling to action the recommendations made to resolve the problem.

[49] I note in final submissions Ms Gifkins sought to extend the nature of the breach to include a claim that the Rest Home had also failed provide a safe workplace.

The additional claim is not sustainable in any event. Ms Gifkins agreed during questioning that there was nothing more the Rest Home could have done to support or assist her in the management of the resident. I am satisfied the Rest Home took reasonable steps to reduce the impact of the resident's behaviour towards Ms Gifkins.

[50] Ms Gifkins has not established a breach of duty of any kind towards her by the

Rest Home regarding its response to the behaviour of the resident.

Were the events of 30 May a breach of Ms Gifkins' terms employment?

[51] As noted, Ms Gifkins handed her resignation to Ms Kay on 31 May 2016. The day before Ms Gifkins and another HCA discovered a patient on the floor of his bedroom at the beginning of the shift. They struggled to return him to a chair and Ms Gifkins sought assistance from Ms Kay. She says instead of helping while the two HCAs were trying to manoeuvre the patient Ms Kay yelled "are you dragging him or lifting him?" Ms Kay concedes that she spoke the words alleged but denies that she yelled at Ms Gifkins or that the statement was aimed solely at her. In her written evidence Ms Gifkins notes the other HCA tried to tell her later that the comment was not directed towards her alone but she believes it was. Ms Gifkins confided in another staff member later that day that she was sick of being yelled at and was considering quitting her role.

[52] Ms Gifkins went to work on 31 May despite it being her day off and gave Ms Kay her letter of resignation. It is common ground Ms Gifkins was upset but was persuaded to sit and talk with Ms Kay. Ms Kay did not read the letter until after Ms Gifkins had left. Ms Gifkins said she was unhappy with the way that she had been treated the day before and that she was resigning. Both parties agree Ms Kay asked Ms Gifkins to reconsider her resignation and told her she was a valued employee. She told Ms Kay that her reasons for leaving were contained in a letter and left shortly after.

Conclusion

[53] It may be that Ms Kay's manner coupled with the words used at the time of the incident was insensitive and unhelpful in the moment. Ms Gifkins was unable to advise the basis for her view that she was the target of Ms Kay's frustration and I am unwilling to conclude she was. I accept however that Ms Gifkins was unhappy and resentful as a consequence. But I am not at all persuaded that the interaction could be

regarded as a breach of Ms Gifkins' employment let alone one that could be fairly characterised as dismissive or repudiatory conduct that would make it reasonably foreseeable Ms Gifkins would resign. An employer is under no contractual obligation to behave sensitively towards its employees.

[54] Finally, there was a suggestion raised during the Authority's investigation and recorded in final submissions that the Society breached a duty to investigate the matters set out in Ms Gifkins' letter of resignation. I do not accept that position. There was no request of that nature in the body of the letter nor did Ms Gifkins request Ms Kay take action when the pair discussed Ms Gifkins intention to leave. I note Ms Gifkins told the Authority that when she provided Ms Kay with her written resignation there was nothing Ms Kay could say or do at that point to persuade her to stay.

Summary

[55] Ms Gifkins has been unable to establish the Society has breached duties owed to her as an employee. It follows that the Society's actions over the course of events referred to the Authority do not, either individually or together, amount to conduct which could be objectively regarded as a serious and significant breach of contract such that it was reasonably foreseeable she would resign.

[56] Ms Gifkins' resignation was not a constructive dismissal and the claim is dismissed.

Comment

[57] Evidence was provided to the Authority concerning events that occurred after Ms Gifkins had left the Rest Home. The resident was distressed at Ms Gifkins' departure from the Rest Home. He continued to contact her and in one instance sent money to her. It is clear Ms Gifkins sought to return the money immediately. The resident's family became increasingly concerned with his behaviour and the Rest Home referred the family to an organisation for assistance.

[58] The organisation subsequently made allegations against Ms Gifkins, the thrust of which is that she had taken advantage of the resident. The allegations were not established and there is no evidence that Ms Gifkins has acted improperly. Ms Gifkins feels aggrieved by these matters but the Authority has no jurisdiction to

determine matters that occurred outside her employment relationship with the Society. Should Ms Gifkins wish to address that matter with the organisation or the Society she will need to do so in an alternative forum.

[59] This determination has been issued outside the timeframe set out at s

174C(3)(b) where the Chief of the Authority has decided exceptional circumstances exist.⁸

Costs

[60] Costs are reserved

Michele Ryan

Member of the Employment Relations Authority

⁸ Pursuant to s 174C(4)

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