

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Glenys Maree Hann (Applicant)
AND Silbury Home Limited (Respondent)
REPRESENTATIVES Michael Kirkland, Advocate for Applicant
Adam D M Gallagher, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 1 September 2005
DATE OF DETERMINATION 7 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, who had been absent from the workforce raising a family, was employed by the respondent as a rest home worker. Previously, Mrs Hann had worked as a nurse aide in Christchurch rest homes. She began her employment at Silbury Home on 8 February 2004.

[2] Mrs Hann says that she was constructively dismissed and unjustifiably disadvantaged in her employment with the respondent.

[3] The respondent denies that the applicant was disadvantaged and denies breaching any terms of the employment agreement.

[4] The parties attempted to resolve their differences in mediation but were unable to do so.

What caused the problem?

[5] Mrs Hann applied to an advertisement in a local paper and was interviewed by Mrs Blackburn, the manager, on 29 January 2004. Mrs Blackburn says that the applicant was unsuccessful in securing the advertised permanent part time position but was employed as a casual worker to assist when required.

[6] On 3 February 2004, the applicant met with Mrs McNeill, a registered nurse, for an orientation session which covered the care plans for individual residents and drug orientation.

[7] Mrs Blackburn took the applicant around the home and introduced her to the residents. Mrs McNeill says that in the course of the orientation meetings, the applicant expressed no concerns regarding the administration of medication.

[8] Mrs Hann began her first shift for the respondent on 8 February 2004. Mrs Blackburn says that the position offered and accepted by the applicant was that of a casual worker to work alongside her *for four hours on Sunday mornings*.

[9] On Sunday mornings between 8 February 2004 and 14 March 2004, with the exception of one, Mrs Hann attended at the home. Initially the applicant was engaged mainly in showering, cleaning, making beds, shaving and general duties at the home.

[10] On 7 March 2004, which was the applicant's fifth shift at the home, Mrs Blackburn says she offered Mrs Hann the opportunity to assist with administering routine medication to two of the residents at breakfast. Mrs Blackburn also says that she did not tell Mrs Hann that from that day on she was going to be administering medication as a matter of course to the residents. She says there was no pressure on the applicant to carry out this task, but that Mrs Hann had made very good progress over her first four shifts and Mrs Blackburn believed the applicant was more than capable of carrying out this task with her assistance.

[11] Before undertaking this task, Mrs Blackburn says that the pair discussed what was involved with administering medication from blister packs and that she showed Mrs Hann a blister pack, explaining how to identify the name at the top of the sheet, take out the individual blister, identify the name on the back and identify the number of tablets in the blister by counting up the numbers written on the back. Mrs Blackburn then went to the dining room with Mrs Hann and Mrs Blackburn administered the medication from the pack. She then says she took the applicant through the process step by step as she gave the resident the medication talking the applicant through what she was doing by way of checks and in this case using tweezers, dropping the medication on to the resident's food. Mrs Hann then returned to Mrs Blackburn's office where Mrs Blackburn says the applicant was shown where to sign the appropriate name signing sheet and that Mrs Hann observed her throughout this process.

[12] Following that demonstration Mrs Hann, under the supervision of Mrs Blackburn gave medication to the next resident going through each step of the process. Mrs Blackburn says she watched each step of the process and does not recall the applicant being in an agitated state. In fact she says, *I recall being impressed with the manner in which she executed this task*.

[13] Mrs Hann says that on the 7 March she made a mistake. Mrs Hann says that she failed to give the appropriate medication to one of the residents who advised her of this. Mrs Blackburn says that this particular resident required medication contained in two separate blister packs and when the resident indicated this to Mrs Hann it was simply a matter of taking the medication from the second blister pack. Mrs Blackburn says she was in the office immediately adjacent to the dining room and said that she did not consider this to be an error as the resident received the correct dose at the correct time.

[14] Mrs Blackburn says that the applicant's last shift with the home was on Sunday 14 March 2004. She says Mrs Hann returned to her duties with her usual vim and vigour and gave no indication that she was stressed, nor did she raise any concerns in relation to her employment at the home. On the other hand, Mrs Hann says on that final day she was still in a very agitated and worried state. She says that she accepts that on that particular day she had only menial tasks to perform. The applicant says that partway through the shift Mrs Blackburn went to her and told her that she was to take charge for some 2-3 hours. The applicant interpreted this to mean that she, Mrs Hann would be in sole charge of the total rest home. The applicant in her evidence says that she was in a very distraught state thinking *I have no hope of being able to run the rest home on my own. If an emergency arose, I simply would not know how to cope*.

[15] Mrs Hann telephoned Mrs Blackburn on about 16 March 2004 and told her that she had obtained a full time job and that she was resigning her position at Silbury. It is not disputed that during the course of this conversation Mrs Hann did not raise the reason for her resignation being

the duties she was carrying out at the home. The evidence of Mr and Mrs Blackburn is clearly that the first they knew of the concerns the applicant had is following receipt of the solicitor's letter raising the personal grievance on 6 April 2004.

[16] For sake of completeness it needs to be noted that Mrs Hann had in fact not obtained alternative employment but said that she did not wish to appear a failure.

The issues

[17] The Authority needs to determine the following questions;

- Was the applicant employed as a casual or a permanent part time worker; and
- Was the orientation and training given the applicant in accordance with the approved practice in the industry; and
- Was the anxiety the applicant felt over the administering of resident's medication clearly made known to the home's management; and
- Was the applicant disadvantaged in her employment; and
- Was the events of any expressed or implied term of the employment agreement; and
- Was the applicant left in sole charge of the home on 13 March 2004; and
- What, if any remedies, are due to the applicant should she establish her claim?

The investigation meeting

[18] The Authority heard evidence from the applicant and her husband John, and for the respondent from Mr and Mrs Blackburn and from Mrs McNeill, the registered nurse employed by the home. All spoke openly about the events and their views of their significance.

[19] In this case the Authority derived considerable benefit in observing the witnesses' demeanour during the meeting. In particular I found Mrs McNeill, Mrs Blackburn and Mr Hann calm and measured, while I detected a distinct anxious quality in Mrs Hann. That is certainly not a criticism of her but could have contributed materially to her concerns over dispensing medication at the home, and probably gave rise to her drawing her lack of experience of accepted procedures to the employer's attention early in the employment relationship. I also think it is probable that Mrs Hann's anxiety was heightened by the fact that this was her first paid employment for 18 years and she was naturally keen for it to be a successful return to the work force.

Discussion and Analysis

[20] At the heart of this matter is whether Mrs Hann clearly and unequivocally stated to the respondent that not only was she concerned about administering routine medication to residents, but that her concern about this was sufficiently serious to bring about a resignation. In order to be able to provide Mrs Hann with any assistance or to adjust her duties at the home the management needed to be aware of the concerns which eventually they were advised, led to her resignation.

[21] To establish a breach of the employment agreement which is sufficiently serious to justify an employee repudiating that agreement requires that prior to resigning, the employee must notify the matter to the employer and provide the employer with the opportunity of rectifying the alleged breach. As part of her claim the applicant is required to produce evidence of repudiatory conduct on the part of the respondent, in fact that evidence in this case seems particularly sparse. Mr

Blackburn's evidence was *if the applicant had expressed concerns I would have been more than willing to address these, whether by way of further explanation of what is required of her position, the reassurance that if she is uncomfortable carrying out certain tasks then we would have considered, as we have with other staff members ways of alleviating those concerns.* While it is clear to the Authority that the applicant was apprehensive about administering routine medication possibly as she had not been required to do this in her earlier employment some 18 years previous, that needs to be weighed against the process of on the job training which Mrs Blackburn had undertaken with the applicant. The key question is what is an employer able to do to assist an employee in circumstance such as this when the employee fails to voice his or her concern even stridently. Perhaps in this particular case Mrs Hann's approach was dictated to a large extent by a fear of failure.

Determination

[22] Returning to the issues to be determined, I find the applicant was employed as a permanent part time employee as, in the absence of a written agreement, I must rely on Mrs Blackburn's evidence that the applicant was hired to assist her on Sunday mornings. That, is clear to me, is a permanent part time position.

[23] I find that the training given to the applicant was consistent with approved practices namely, *on the job* and progressive. I accept that the respondent was training Mrs Hann in this way and therefore meeting its obligations under the Disability Services (Safety) Act 2001.

[24] I find that the applicant did signal her concerns over dispensing medication. However, at no time did Mrs Hann make it plain to the respondent that she was so dissatisfied with the training and that she was intending to resign if this concern was not addressed. Neither did Mrs Hann refuse to perform this task. Had she done so and explained why, the matter could have been remedied in a number of ways. In short, I find that the actions of the respondent do not constitute a breach of any contractual term whether expressed or implied.

[25] I find that Mrs Hann was not left in sole charge of the rest home on the final day of her employment, but rather left in the residents' areas while Mrs Blackburn attended to other matters within the home. I accept that the applicant misunderstood the situation but was able to summon her employer using the alarm/staff call buttons in the areas she was working in.

[26] I find that Mrs Hann was not unjustifiably disadvantaged in her employment nor was she unjustifiably constructively dismissed from it.

[27] While I have some empathy with the applicant's dilemma, it is the Authority's role to apply the law to the relevant facts. I have done so in this case and find that while aggrieved, Mrs Hann does not have a personal grievance against the respondent and I am unable to assist her further.

Costs

[28] Costs are reserved. I urge the parties to attempt to resolve the issue of costs between themselves. Should resolution not be achieved Mr Gallagher is to lodge and serve his memorandum within 28 days of the date of issue of this determination. Mr Kirkland has a further 14 days from receipt of the applicant's memorandum to lodge and serve his memorandum.