

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 237/07
5030940

BETWEEN HELEN HEREMIA
 Applicant

AND WILDING INTERNATIONAL
 LIMITED
 First Respondent

Member of Authority: Vicki Campbell

Representatives: Rose Alchin for Applicant
 Barry Pohia for Respondent

Investigation Meeting 11 April 2007 and Hamilton

Submissions Received: 14 May 2007 from Applicant
 27 April 2007 from Respondent

Determination: 8 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Firstly I take this opportunity to apologise to the parties for the delay in providing them with a determination of this matter. Unfortunately work priorities have intervened and not allowed an earlier determination to be completed.

[2] Ms Helen Heremia was employed by Wilding International Limited ("Armourdene") as a Caregiver at Armourdene Resthome. Ms Heremia was subject to a written employment agreement and written house rules. Ms Heremia signed an acknowledgement that she had read, understood and agreed to the house rules.

[3] Following complaints from a fellow employee and a process of meetings and discussions Ms Heremia was dismissed on 26 September 2005. The dismissal was based on a determination by Mr Barry Pohio, Managing Director, that Ms Heremia was responsible for treatment against a fellow worker, Ms Michelle Campbell, the quality control administrator, that was a combination of intimidation, bullying and victimisation. Mr Pohio concluded that Ms Heremia's

conduct constituted serious misconduct and gave her two weeks notice of dismissal.

[4] The key issue for this determination is set out in section 103A of the Employment Relations Act which states:

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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[5] I must scrutinise Armourdene's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

Relevant terms of employment

[6] As already stated Ms Heremia was subject to a written employment agreement. That agreement provided for notice of termination of 2 weeks with the proviso that Ms Heremia could be summarily dismissed for serious misconduct.

[7] The house rules applicable to Ms Heremia provided examples of the types of behaviours which constituted serious misconduct. In particular the list included:

- Acts or behaviour which cause injury or damage or cost to the company or adversely affects quality, productivity or customer relationships;
- Intimidation of another employee or customer on company premises or when attending Company functions;
- Such other matters as the Company may advise from time to time.

Background

[8] Ms Heremia was romantically involved with Mr Barry Pohio, the owner and Director of Armourdene for about 3 months until March 2005. Following the end of that relationship Mr Pohio then engaged in an affair with Ms Heremia's work colleague and friend, Ms Campbell. It eventually came to Ms Heremia's notice that Ms Campbell was using her as an alibi when she was meeting Mr Pohio clandestinely. Ms Heremia contacted Ms Campbell's husband and advised him that

if Ms Campbell said she was with her [Ms Heremia] then it would be untrue. Not surprisingly the working relationship between Ms Campbell and Ms Heremia deteriorated significantly.

[9] Ms Heremia then contacted Mr Pohio and told him that given the circumstances she could no longer work with Ms Campbell. Mr Pohio agreed to separate the two ladies from working with each other and from that point on Ms Heremia worked on the afternoon shift, while Ms Campbell worked on the day shift.

[10] In May, July and August 2005 three events occurred which Ms Heremia says motivated Mr Pohio's thinking when he investigated later complaints made by Ms Campbell against Ms Heremia and which led to her dismissal.

[11] The first event occurred in May 2005. Mr Pohio wrote to all staff advising them that meal breaks for those on afternoon or evening shifts would no longer be paid. On 3 June Mr Pohio again wrote to all staff rescinding his earlier notice and apologising for the error he had made. The original direction from Mr Pohio was in breach of the employment agreements, which provided for paid breaks.

[12] The second event was in July 2005 when Ms Heremia refused to sign a change to her employment agreement, in relation to sick leave. Mr Pohio wrote to all staff and outlined what he considered to be a mistake in the employment agreements which provided for an entitlement to sick leave of five days which crystallised after two months employment and could be taken during the ensuing ten months. The clause then provided for a further five days sick leave entitlement to be taken during each ensuing 12 month period after that. He provided a copy of an amendment to the agreements for each employee to sign and return. The amendment provided for five days sick leave after six months employment and five days sick leave at the end of each ensuing period of 12 months.

[13] Ms Heremia refused to sign the amendment and advised Mr Pohio in writing of her decision not to accept the variation to her agreement. Mr Pohio responded, also in writing, not accepting Ms Heremia's position and asked her to confirm her position once more in writing. Ms Heremia did not respond.

[14] The third event occurred in August 2005 when the staff of Armourdene arranged to meet with representatives from the New Zealand Nurses Organisation to discuss various issues they had with their employment. Mr Pohio told me that

he understood Ms Heremia had taken a leading role in arranging the meeting and that Ms Campbell was unfairly excluded from being involved. He told me he felt if employees were unhappy about any terms and conditions of their employment he would have thought that as a courtesy they should have raised any issues with him before they went to the union.

[15] Ms Heremia denied being the leader of the meetings between the staff and the union or that Ms Campbell was excluded. She told me, and I accept, that Ms Derbyshire, the Nurse Manager, recommended to the staff that they join the Nurses Union and posted an invitation to a meeting on the notice board in the Nurses station. I am satisfied Ms Campbell was not excluded from the meetings. Ms Campbell accessed the Nurses station and was able to view the invitation for staff to attend the meetings along with all other staff members at Armourdene.

[16] It was following these events that Ms Campbell made two complaints about Ms Heremia's behaviour toward her.

First written complaint

[17] On 24 August 2005 Ms Campbell wrote to Ms Derbyshire and submitted a formal complaint regarding the treatment she was receiving from Ms Heremia. In her complaint Ms Campbell says:

When I have spoken to her regarding work, she has responded by either ignoring me or speaking rudely to me. For example when requesting Helen twice, to sign an audit form, she completely ignored me and as a result the Nurse Manager had to get her to sign these forms. I also passed on information concerning a resident (noted in communication diary) and again was ignored, on a third occasion was rudely spoken to in front of other staff members. As a result I feel I am unable to complete my work to a satisfactory level.

[18] On 23 August 2005 Ms Campbell had approached Ms Heremia requesting her to sign some policy documents. Ms Heremia says Ms Campbell shoved the documents at her and expected her to sign them then and there. Ms Heremia says she was not comfortable with that as she had not read them and she explained this to Ms Campbell.

[19] On 24 August 2005 Ms Campbell again approached Ms Heremia to sign some further policy documents and again Ms Heremia refused on the basis that she had not read the documents. Ms Heremia says she told Ms Campbell that she would look through them if she had an opportunity on that shift. Ms Campbell told me Ms Derbyshire intervened and advised Ms Heremia that she must sign the documents as it was a DHB requirement. Surprisingly, given the complaints Ms

Campbell has about Ms Heremaia's conduct, Ms Campbell gave Ms Heremia "...the fingers..." as she headed out the door.

[20] On or about 25 August 2005, Ms Derbyshire visited Ms Heremia at home and advised her that Ms Campbell had made a formal complaint about her not signing the policy documents. Mr Pohio says Ms Derbyshire gave Ms Heremia a verbal warning on that day, something Ms Heremia denies. Unfortunately, and for reasons unknown to the Authority, Ms Derbyshire has not been available to attend the Authority to answer questions in relation to Ms Heremia's application. In answer to questions at the investigation meeting as to Mr Pohio's knowledge of what Ms Derbyshire discussed at the meeting with Ms Heremia, he told me he had instructed Ms Derbyshire to give Ms Heremia a warning.

[21] Ms Heremia says she and Ms Derbyshire discussed her relationship with Ms Campbell and it was agreed that Ms Heremia was to stay away from Ms Campbell and that Ms Derbyshire would tell Ms Campbell to stay away from Ms Heremia.

[22] I am satisfied it is more likely than not that Ms Heremia did not receive a warning on her job on 25 August 2005. If I am wrong about that, any warning would have been issued in the absence of any notion of procedural fairness and therefore the respondent would be unable to rely upon it.

28 August event

[23] On 28 August 2005 the staff signed a joint letter addressed to the management of Armourdene requesting a meeting to discuss concerns the staff had in relation to:

- Accusations of theft;
- Staff vs staff conflict;
- Pay issues for some staff;
- Staff loyalty;
- Miscommunication between staff and management.

[24] The letter sets out suggested outcomes and requests that the issues be addressed as soon as possible.

[25] Ms Heremia's signature is the first of 12 signatures recorded on the second page of the letter. Given that hers was at the top, Mr Pohio concluded Ms Heremia was the major force behind the letter. At the investigation meeting Mr Pohio conceded that Ms Heremia's evidence may be correct that another staff member had written the letter and was responsible for gaining the signatures. Mr

Pohio had reached his initial conclusions without undertaking any investigation to check or confirm that his conclusions were correct.

Second written complaint

[26] On 13 September 2005 Ms Campbell approached Ms Heremia, who had arrived late for the monthly staff training session, to give her some papers. Ms Heremia says Ms Campbell approached her and "...threw the papers at her across the table." Ms Heremia says as the papers came on to her desk she put her arm up to defend herself and the papers landed on the floor. The incident was witnessed by several other staff members.

[27] Ms Campbell says she did not want to get too close to Ms Heremia so she dropped the papers onto the table. Ms Campbell says that when the papers landed on the table they made a loud bang and that Ms Heremia then pushed or threw the papers onto the floor.

[28] I am satisfied it is more likely than not that Ms Campbell did drop the papers onto the desk in front of Ms Heremia from a distance, and that Ms Heremia put her arm up to protect herself from the papers hitting her. Further, that when Ms Heremia put her arm up the papers connected with it and were projected onto the floor. I have concluded that there was nothing malicious in Ms Heremia's actions.

[29] Immediately following that incident Ms Campbell made a verbal complaint to Mr Pohio who felt he had sufficient information to undertake an investigation into serious misconduct.

[30] The following day Mr Pohio met with Ms Heremia and advised her that he had received a further complaint from Ms Campbell relating to intimidation of Ms Campbell and other staff members. No documents were produced for Ms Heremia at that time, but she was advised that she was to attend a meeting on 16 September 2005. Ms Heremia was told that the issue was considered to be serious misconduct and that she would have 48 hours to prepare her defence.

[31] On 15 September 2005, Ms Heremia contacted Mr Pohio by telephone and asked for specific information pertaining to the complaints of intimidation of staff and made a request to postpone the meeting to enable her to obtain legal advice and representation. It was agreed the meeting would be held on 20 September 2005 – however no information was provided.

[32] On 19 September 2005 Ms Campbell confirmed her complaints against Ms Heremia in writing. This letter was not provided to Ms Heremia prior to the meeting on 20 September 2005.

[33] In her letter Ms Campbell refers to the phone call Ms Heremia made to her husband earlier that year and also the issues outlined in her first complaint which she had referred to Ms Derbyshire. In addition Ms Campbell outlines an incident which had occurred on Monday 22 August 2005:

...I had just finished work and was heading out the door at 1625 hrs, when Lorraine Kay said to me "did I know that Bill had headed off on his scooter". I replied that I did not know, but I would let the staff know as I had finished work for the day". I turned and headed back in the front door and up the corridor towards the office. Helen was coming down the corridor from the office, (Helen had just arrived at work, I saw her enter through the green wing door and put her bag in the nurses' station and then turn back towards the dining room) I spoke to her and said "Bill has gone up the road on his scooter". She completely ignored me and turned towards the dining room. The phone then rang and I answered it, Barry was on the phone so informed him of events. He told me to note that Bill had gone out in the staff communication diary, which I then did.

[34] Ms Campbell's then refers to the incident on 13 September where she complains that Ms Heremia had pushed or threw papers onto the floor.

Disciplinary process

[35] The disciplinary meeting went ahead as planned on 20 September 2005 at 4.00pm. Ms Heremia was supported by a fellow work colleague, Ms Karen McCloughen. At the meeting Ms Heremia repeated her request for information relating to the complaints of intimidation by other staff members. Mr Pohio refused to provide that information to her. Instead he read from a ten page document which he had prepared prior to the meeting. A copy of a summary of the document was provided to Ms Heremia at the end of the meeting.

[36] During this initial stage of investigating Ms Campbell's complaints, Mr Pohio had reached some conclusions which he has set out in the ten page document he read through at the disciplinary meeting. By way of example Mr Pohio records:

The process:

We discussed the issues at Management level and have undertaken the following:

- Accepted Michelle's formal complaint as real, because we knew/suspected, in advance, such intimidation was probably real
- We gave the issue time to self satisfy, this failed
- We met with both asking them to understand the issues and try to remove the situation themselves
- Helen was spoken to in some detail and was advised of the severity of the situation. A range of topics were covered between Helen and the

Nurse/Manager offsite. [This is a reference to the meeting Ms Derbyshire had with Ms Heremia at her home in August]

...

Summary of incidents and information gathered includes the following:

- There is no doubt Helen has a serious personal issue with Michelle, and most staff and all Management understand this – she is the aggressor and is leading the assault:

...

The Outcomes Of This Intimidation On Michelle:

The intimidation is real, has occurred on numerous occasions and has created the following impacts:

- Paranoia – Michelle thinks the phone “hang-ups” are Helen – both home and office [this information was not contained within Ms Campbell's letter of complaint]
- Obvious upset, discomfort
- A request to resign so this would be resolved
- Continuous apologies as she feels she is in the wrong, that's (sic) she is guilty of something
- She has been isolated from other “group” employee activity, though a little less now than previously
- She leaves work early on most days Helens (sic) starts a weekday 4.00pm shift
- She goes out of her way to avoid Helen, whenever possible.

...

Additional Activity Of Concern:

Besides the intimidation and/or victimisation of Michelle, there is some evidence Helen has taken some action to create unrest amongst staff, pushing them against management.

Whilst this is a major concern it is not the reason for such action with Helen, but it does add to the position she has created for herself.

...

Specific Allegations against Helen:

1. There is a personal issue that exists between Helen & Michelle
2. That issue has resulted in intimidation against Michelle on a number of occasions – 1:1 and in “public” (*Michelle – Management*)
3. Helen has told other staff that Michelle is a “bitch” (or something similar) and they should not work with her (*Lottie S, Corrin M*) – Both found the opposite (“she's awesome”) (*Lottie S, Corrin M – Sandra D*)
4. Helen has incorrectly advised staff members she is about to be fired – in 48 hours if she fails to “get her act together” (*Sandra F, Lottie S, Loraine L – Sandra D/Barry P*)
5. Helen has created and continued to fuel an anti-Michelle feeling amongst a number of staff (*Sandra F, Dianne N – Sandra D/Barry P*)
6. She has been given time to cease intimidation and “get over it” and she has been personally requested (and advised) to cease this activity and she clearly understands the severity of such activity (*Sandra D*)
7. Helen has consistently and constantly badgered other staff members putting her negative thoughts and feelings on Michelle and Management to other staff members (*Lottie S – Barry P*)
8. It seems quite clear Helen has applied some intimidation to other staff members to support her point of view – with respect to both Michelle & Management
9. She has been primarily responsible/been a driving force/been a leader/been an influencer for the overall unhappiness of staff, who are now asking for action to be taken to eliminate the unhappiness and let them get on with their job at ARH.

[37] Ms McCloughen gave evidence in support of Ms Heremia and told me that the meeting on 20 September was one sided and:

No matter what Helen tried to say in her own defence she was interrupted and talked over, and every point she made would be counteracted or contradicted by a comment from Barry, but those comments were not logical and did not make any sense compared to what Helen was trying to say. My clear impression was that

Helen did not have any chance of a fair hearing or really being given an opportunity to properly defend herself.

[38] Ms McCloughen's observations reflect my own observations of Mr Pohio at the investigation meeting. Mr Pohio's evidence was at best, convoluted and confusing. He was asked to provide specific examples of the behaviour Ms Heremia exhibited which had led him to conclude she had bullied or victimised Ms Campbell or intimidated the other employees working at Armourdene.

[39] Mr Pohio continually referred me to the incidents in August when Ms Heremia had refused to sign the policy documents until she had read them. He also told me, in reference to the allegation that Ms Heremia excluded Ms Campbell from the meetings with the NZNO, that, in his view, to openly exclude someone equates to victimisation.

[40] Further, Mr Pohio considered Ms Heremia's refusal to sign the changes to her employment agreement, encouraging staff to ask for wage increases, organising the staff meeting with the Nurses Organisation, failure to attend staff meetings with acceptable frequency, relocating a resident, mistreatment of ARH property [this is in reference to the 13 September incident where Ms Heremia says she pushed the papers Ms Campbell had thrown on her desk, onto the floor), and advising her supervisor that she had been offered a better paid job with another rest home in Hamilton all as constituting serious misconduct on Ms Heremia's part.

Bias and pre-determination

[41] Fundamental to the question as to whether an employee has been treated fairly in any process that could affect their employment is the concept that the employer will bring an open mind to the issues in question. This calls for a consideration of the law relating to bias and predetermination:

Bias [at law] includes situations where it appears persons charged with the responsibility of making decisions have so conducted themselves to lead an objective observer to conclude that they have closed their minds and were no longer giving genuine consideration to the issues before them. It relates not merely to the existence of some pecuniary or other interest in the subject matter of litigation but also to any predetermination of the issue sufficient to show a real probability that the issue will not be determined in an unbiased or impartial manner. The existence of bias or predetermination may cause a dismissal to be unjustified.

NZ Educational Institute v Board of Trustees of Auckland Normal Intermediate
[1992] 3 ERNZ 197

[42] On 21 September 2005 Ms Heremia contacted Mr Pohio and advised him of her belief that he could not give her a fair hearing and asked him to make use of a mediator from the Department of Labour. Mr Pohio records in his notes that he had not doubt at all that he would give Ms Heremia a fair hearing.

[43] At the investigation meeting Mr Pohio accepted Ms Heremia and Ms Campbell both had a bad attitude toward each other, however he did not believe, that even though he was still in a personal relationship with Ms Campbell, he approached the investigation and decision to dismiss in a biased way.

[44] I find Mr Pohio did approach the disciplinary process and decision to dismiss Ms Heremia in a predetermined and biased way. Subsequent to the meeting on 20 September Ms Sandra Fraser, Ms McCloughen and Ms Hayley Ferguson all provided written statements to Mr Pohio outlining their view of the incident that took place between Ms Heremia and Ms Campbell on 13 September 2005. Each of the three employees attributes the initiation of the incident to Ms Campbell's forceful approach to delivering the documents to Ms Heremia.

[45] At the investigation meeting Mr Pohio told me he did not interview any of the women in relation to their statements. Instead he preferred to rely on the two statements he had already received and which portrayed Ms Heremia in a poor light.

[46] In addition, Mr Pohio had reached several firm conclusions prior to meeting Ms Heremia on 20 September 2005 as noted in the ten page document he used at the meeting on 20 September. By way of example Mr Pohio considered Ms Campbell's complaint was real because he knew or suspected that the intimidation was real and had occurred on many occasions and had concluded that Ms Heremia was the aggressor and was leading the assault.

[47] Further, he was satisfied that there was evidence Ms Heremia had created unrest amongst the staff, and that Ms Heremia had pushed them against management. Although, as was revealed at the investigation meeting had Mr Pohio spoken to Ms Heremia before drawing that conclusion he would have discovered, that Ms Heremia, while she participated in the meetings with the NZNO, did not organise them and neither did she draft the letter to management on 28 August 2005.

[48] A second meeting was held on 23 September 2005 at which Ms Heremia presented a four page document in defence of the allegations made against her. The notes provided from that meeting demonstrate that Ms Heremia's explanations were not accepted.

[49] A third and final meeting was held on 26 September 2005 at the end of which Mr Pohio advised Ms Heremia that she was dismissed for serious misconduct with two weeks notice but that she did not have to work out the notice period.

Determination

[50] In order for Mr Pohio to safely conclude that Ms Heremia was victimising, intimidating or bullying Ms Campbell he needed to be satisfied Ms Heremia's actions were repeated, carried out with the desire to gain power or exert dominance and with the intention to cause fear and distress (see *Evans v Gen-I Limited*, unreported, AA 333/05, 29 August 2005, Member King).

[51] I have no doubt that Ms Heremia and Ms Campbell were uncomfortable in each others presence. However, Ms Heremia took actions to avoid any contact with Ms Campbell in the work place. This does not mean Ms Heremia was intimidating, victimising or bullying Ms Campbell.

[52] Ms Heremia's efforts to avoid Ms Campbell did contribute to Ms Campbell's sense that Ms Heremia was ignoring her. However, Ms Campbell herself sought Ms Heremia out on a regular basis. She even gave Ms Heremia "...the fingers..." following one episode where Ms Heremia maintained her right to read policy documents before signing them off.

[53] I am not satisfied Mr Pohio undertook a full and fair investigation into the allegations made by Ms Campbell. The totality of the evidence presented at the investigation meeting, and which was available to Mr Pohio during the disciplinary meetings, shows that Ms Heremia went out of her way to avoid any dealings with Ms Campbell. As neither employee was employed to work on the same shifts, there was only a very small window of opportunity for either of the employees to have any dealings with each other at all. The evidence shows that Ms Campbell was the instigator of any and all contact made between the two employees.

[54] The entire disciplinary process was dogged by bias and predetermination by Mr Pohio and the procedure adopted in investigating and dismissing Ms Heremia was wholly deficient.

[55] An employer acting fairly and reasonably would have taken steps to investigate the issues and to resolve the concerns within the workplace environment with an intention to have the two employees improve their

relationship at work. The behaviours described by Mr Pohio do not constitute intimidation, victimisation or bullying, but are symptoms of a failed and dysfunctional relationship.

[56] For all the foregoing reasons, I find Wilding International Limited has not met the s.103A requirement on it to show that its actions and how it acted were what a fair and reasonable employer would have done in all the circumstances. Ms Heremia is entitled to remedies.

Remedies

Lost wages

[57] At the time of the dismissal Ms Heremia was working eight shifts totalling 63 hours per fortnight and was paid at the rate of 10.50 per hour. Ms Heremia took steps to mitigate her loss and found alternative employment four weeks after her dismissal.

[58] I am satisfied that Ms Heremia has lost wages as a result of her unjustifiable dismissal. I award her reimbursement for the earnings she has lost from her dismissal on 26 September 2005 until the time she obtained alternative employment on 26 October 2005. Bearing in mind that Ms Heremia was paid out two weeks wages in lieu of notice, that means her lost wages equates to two weeks.

Compensation

[59] I accept Ms Heremia was upset by her dismissal. Ms Heremia described how shocked and upset she was after the first meeting with Mr Pohio. Ms Heremia says she was so upset that she had to attend her doctor who prescribed sleeping pills and tranquilisers to assist her.

[60] Ms McCloughen gave supporting evidence of the effect of the dismissal on Ms Heremia which she witnessed during and after the dismissal. She told me Ms Heremia was nervy and anxious and her self-esteem became very low.

[61] I assess there should be an award of compensation under section 123(1)(c) of the Employment Relations Act 2000 of \$5,000.

Contribution

[62] I am bound by section 124 of the Act to consider the extent to which Ms Heremia's actions contributed towards the situation that gave rise to her personal

grievance and if those actions so require to reduce the remedies that would otherwise have been awarded accordingly.

[63] I am not satisfied it is just to reduce the remedies in this case. Ms Heremia's actions have not contributed towards the situation that gave rise to her personal grievance.

Summary of orders

Wilding International Ltd is ordered to pay to Ms Heremia two weeks loss of wages of \$661.50 (this takes into account the two weeks wages paid in lieu of notice) pursuant to section 123(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Wilding International Ltd is ordered to pay Ms Heremia \$5,000 without deduction under section 123(1)(c) of the Employment Relations Act 2000, within 28 days of the date of this determination.

Costs

[64] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority