

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 160
5338612

BETWEEN JUDITH JONES
 Applicant

A N D PACT
 Respondent

Member of Authority: James Crichton

Representatives: David Carruthers, Counsel for Applicant
 Barry Dorking, Counsel for Respondent

Investigation Meeting 13 October 2011 at Hokitika

Date of Determination: 19 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Jones) alleges that she was unjustifiably dismissed by the respondent employer (Pact) on 17 December 2010. Pact resists that contention and indeed in responding formally to Ms Jones' statement of problem, Pact applied to strike-out Ms Jones' claim.

[2] In arguing for the strike-out application, Pact draws the Authority's attention to a number of concessions which Ms Jones has quite properly made about the way in which Pact handled the matter, and Pact concludes in consequence that Ms Jones cannot possibly succeed in her personal grievance claim.

[3] Because of the strike-out application and the nature of it, I proposed to counsel in a telephone conference that I might speak initially to the applicant without the respondent involved, in order to establish whether the applicant had sufficient grounds to put the respondent employer to proof. Through the courtesy of counsel for the applicant, that discussion took place in counsel's offices at Greymouth on 14 July 2011 and as a consequence of that discussion, I subsequently reported to counsel for

the respondent to indicate my conviction that an investigation meeting needed to proceed in the usual way with evidence being given and taken and counsel having the opportunity to ask questions of the witnesses presented by each side.

[4] Ms Jones was employed as a part time carer in a home caring for residents with mental illness or intellectual disability. The home is in truth just that, the home of the clients and the purpose of Pact and its staff is to assist the clients to live meaningful lives despite their disability.

[5] The particular home where Ms Jones worked had five clients resident in it and was serviced by staff working a roster such that during the morning there would typically be two staff on duty and for the afternoon and evening only one. Ms Jones was working the night shift when the events complained of happened. That was her habitual duty. This involved her commencing her duties at 10pm, taking over from the afternoon worker, settling the clients down for the night and then hopefully going to bed herself. Ideally, Ms Jones would work the first hour of her duty, then sleep over, and then work another hour on awaking before signing off.

[6] On Saturday, 27 November 2010, at around 11pm, Ms Jones had an altercation with an elderly client. There were no independent witnesses. Ms Jones was working alone at the time. Ms Jones herself reported the altercation to the on call service coordinator who arrived at the home at around 11.15pm. Reports on the incident were filed by the on call service coordinator and by Ms Jones. In her report, Ms Jones alleges that she was assaulted by the client and sustained a sore cheek as a consequence of being struck by the client.

[7] By Tuesday, 30 November 2010, events were starting to crystallise somewhat. Two further reports came to Pact on the incident. The first was from an acting service coordinator who had had a telephone discussion with the client's sister in which the client's sister reported the client's anxiety about living in the home with Ms Jones still working there. It was also alleged that Ms Jones had called the client names.

[8] Also on that same day, a formal complaint form was filed with Pact by one of Ms Jones' co-workers, Kim Mahuika. Ms Mahuika (who gave evidence at the Authority's investigation meeting and impressed as a credible and sensible woman) filed a complaint form which recited that the complainant had noticed bruising on the subject client's arms, had asked her about that and been told about a physical

altercation between the client and Ms Jones in which the bruises were made. Next, the complaint form recites the visit by the client to the doctor (in fact her regular three monthly check) in which the client told the doctor what had happened again. The complaint form concludes with an eloquent statement indicating why everybody would be safer if Ms Jones was not employed by Pact in the house any more.

[9] On 3 December, Pact's regional manager met with Joe Hall who is the mental health consumer adviser for the West Coast region. The adviser advocates on behalf of all mental health consumers and the intelligence provided by the mental health adviser was that Ms Hall had received contact from the affected client and had subsequently met with her. The written documentation of that exchange was also provided to Pact.

[10] On 7 December, Pact's regional manager met with the affected client and spoke to her directly about the incident. In essence, the client said that Ms Jones would not let her have her tea, that she was told she must go to her room and could not take anything to eat. The client told Pact's regional manager that she went outside for a smoke and, while she was there, Ms Jones came and pulled her by both arms out of a chair, after which there was a physical altercation where each hit the other, with Ms Jones calling the client names.

[11] A disciplinary meeting took place on 15 December at which the assembled material was put to Ms Jones and an explanation sought. The essence of her response was to maintain her position that she had been struck by the client but to deny that she had retaliated in any way and to express no view about how the client became bruised save to say that it was not by her doing.

[12] Pact, being dissatisfied with those responses from Ms Jones when compared with the evidence of an alternative view from others, then wrote to Ms Jones' counsel indicating that dismissal was the likely outcome and, having considered counsel's response to that letter, dismissal was finally effected. A personal grievance was promptly raised, essentially on the footing that, while the process adopted by Pact was fair and just, its response to the alleged offending was extreme (a warning would have sufficed rather than dismissal) and that Pact's interpretation of the evidence available to it was fundamentally flawed.

Determination

[13] The issue for determination by the Authority is simply whether a fair and just employer, having conducted a proper investigation, would, in the particular circumstances of this case, have reached a decision to dismiss. I am satisfied on the evidence before the Authority that the answer to that question is yes, and that in consequence, Ms Jones does not have a personal grievance based on her allegedly unjustified dismissal.

[14] As I have already noted, the issue around the process adopted by the employer in its investigation is not in issue; Ms Jones has properly accepted that the employer undertook a careful and thorough investigation. Her complaint is that the employer gave improper weight to the evidence for the complainant and insufficient weight to the evidence from Ms Jones herself.

[15] I reach the conclusion I do because, first, there is no criticism of the employer's investigative process. It is apparent on the face of the matter that the employer carefully collected evidence from a variety of sources about the events complained of and then used that body of material to inform the allegations that were put to Ms Jones at the disciplinary meeting. Ms Jones' complaint is simply that the assessment of the evidence by Pact is mistaken.

[16] I do not agree. Pact told me that it was impressed at the consistency of the evidence advanced for the complainant client. In effect, there was a variety of different sources of that evidence in that the client spoke directly to Pact's area manager on 7 December, had previously spoken to Ms Joe Hall, the mental health consumer adviser, still earlier had spoken with Ms Mahuika and, in addition, there was evidence gathered from a discussion between one of the acting coordinators and the client's sister. The area manager told me in her evidence at the Authority's investigation meeting that she was impressed with the consistency of the client's story. She said in effect that the story was maintained throughout each of those interview processes despite the mental health issues that the client suffered.

[17] Pact was adamant that there was no reason to believe that the client was dishonest. It drew my attention to reports from psychiatrists and mental health workers about the client's behaviour and none of that, I was told, reflected any tendency to exaggerate or elaborate.

[18] Having said that, Pact readily acknowledged that the client was a regular complainer. But to put that in context, Pact said that that was true of many of its clients and that this particular affected client was no more than average in terms of the number of complaints it had received from her. Furthermore, and critically, this was the only complaint it had received from her involving an allegation of violence by a staff member.

[19] Not surprisingly, counsel for the applicant, Ms Jones, put a great deal of energy into undermining Pact's reliance on the complainant. He pointed out (correctly) that there were no independent witnesses. It was literally one woman's word against another's. The woman whose word was believed was, by common consent, a woman with mental health issues. Further, counsel produced a witness under subpoena (a current employee of Pact), who gave evidence to the effect that the client concerned was manipulative, violent and untruthful. However, and this is the tipping point for the Authority's decision, no one said that the client affected by this event was dishonest at the time that Pact was conducting its disciplinary investigation.

[20] The test for the Authority to apply in s.103A requires the Authority to reflect on the circumstances at the time that the employer makes its decision. I am satisfied on the balance of probabilities that it was never in Pact's contemplation that the subject client was somehow an unreliable witness. I have already noted that the psychiatric reports on this lady and the mental health social worker's reports both suggest that she is honest and Pact's own dealings with her never suggested otherwise. Ms Jones never advanced the proposition that the client was untrustworthy during the disciplinary meeting. It follows that the Authority can only judge Pact on the circumstances that were present at the time it made its decision.

[21] Having said that, the Authority ought to also make clear that the suggestion that the subject client was dishonest or unreliable or violent or manipulative were all hotly contested by Pact which thought that the witness advancing those views about the client was simply mistaken in her conclusions.

[22] In the end, Pact was left with two versions of the event, one told by its staff member and one told by its client and there was no independent objective physical evidence to support either view, save for the bruises. Pact says (and I accept as reasonable and fair), that the evidence of the bruises on the client's wrists and the apparent inability to find an explanation for those bruises other than the one that the

client herself advanced, tipped the balance in favour of the client's view rather than the staff member's view. That, coupled with the consistency of the client's telling and re-telling of her story and the absence of any conviction that the client was somehow untrustworthy, put together a conclusion that it was available to a fair and reasonable employer to decide that the staff member concerned had indeed assaulted the client by pulling her out of a chair and had denied her basic rights to sustenance in refusing the meal that she chose on the same occasion, that those two events, taken together, constituted serious misconduct and that the appropriate response for that was dismissal.

[23] I am not attracted by Ms Jones' contention that she should simply have got a warning; given that she was in a sole charge situation with vulnerable clients, the need for Pact to have absolute trust and confidence in its staff in those circumstances would seem to me to preclude the prospect of any alternative, less draconian response.

[24] On that basis then, Ms Jones' personal grievance fails entirely.

Costs

[25] Costs are reserved.

James Crichton
Member of the Employment Relations Authority