

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 204
5600793

BETWEEN ROBYN JONES
 Applicant

AND SOLWAY TRUST
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Margaret Robins for Respondent

Investigation Meeting: 21 June 2016

Oral Determination: 21 June 2016

Record of Oral
Determination: 21 June 2016

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms Jones was not unjustifiably dismissed.**
- B. Costs are reserved.**

Employment relationship problem

[1] Ms Robyn Jones claims she was unjustifiably dismissed from her employment as a Support Worker for Solway Trust (the Trust) by reason of redundancy on 14 January 2015. The Trust denies the claim.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Jones and the Trust but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] Ms Jones was employed as Support Worker on 23 May 2014 having previously worked for the Trust for a period between 2011 and 2013. The Trust provides services to clients who have suffered head injuries or mental health problems with high complex needs and who require ongoing residential support and supervision. For the majority of these clients, this is their last chance at having a life where they can be nurtured. Because the client's needs are so highly complex other organisations are not able to accept them or cannot provide a sufficiently supportive environment for them.

[4] On 2 August 2014 Ms Jones was assaulted by a resident she had taken out shopping. The resident left the scene of the incident and the Police were called. This is not the first time Ms Jones has been assaulted when undertaking her work. This has occurred on at least two other occasions, however, this is the most serious assault she had experienced. The Trust told me that the client who assaulted Ms Jones was not really that different from the typical client cared for by the Trust.

[5] When Ms Jones arrived at work on 4 August 2014 she was assured she would not have to care for the client who had assaulted her. Despite these assurances Ms Jones was required to come into contact with the resident after she was returned to the residence on 20 November 2014.

[6] The Trust operated largely on funds received from the Ministry of Health. In 2014 the Trust was advised that unless it restructured the way it operated its business no further funding would be provided. The Ministry of Health required the Trust to restructure itself as a limited liability company.

[7] Mr John and Mrs Patricia Noble, the trustees of the Trust determined that their business would operate under Solway Vision Limited, a company registered on the Companies Register in July 2013 and of which Mr and Ms Noble are the directors and shareholders.

[8] On 2 December 2014 Mr Noble addressed the employees of the Trust and advised them of the situation including that the work of the Trust would be taken over by Solway Vision Limited from 15 January 2014.

[9] Proposed employment agreements were provided to all Trust employees including Ms Jones. Of the 30 employees employed by the Trust three, including Ms Jones, opted not to sign the proposed employment agreements and their employment ended on 14 January 2015.

Issues

[10] The issue for determination is whether the action of terminating Ms Jones employment was an action an employer acting fairly and reasonably could take in all the circumstances.

The assault

[11] There is no dispute that on 2 August 2014 Ms Jones was assaulted by a resident in her care. The assault was reported to the Police but was not pursued due to the client's circumstances.

[12] The assault consisted of Ms Jones being punched numerous times in the face resulting in contusions and wounds to her head, neck and trunk. As a result of her injuries Ms Jones was not fit to work for a period of 7 days.

[13] Ms Jones has provided photographs of her injuries to the Authority which show Ms Jones suffered from two black eyes and extensive bruising to her face.

[14] On her return to work the resident had been moved to another property operated by the Trust. However, on 20 November 2014 the resident was returned to the property, albeit to an adjoining house.

[15] Ms Jones had to deliver some papers to the Trust's head office. While she was there she took the opportunity to describe her unhappiness at having the resident back at the property. The discussions did not go well and Ms Jones says she was told off and patronised during the discussion.

The Dismissal

[16] On 2 December 2014 after a meeting of all staff, Ms Jones received information in the form of a standard letter sent to all staff confirming the contents of the meeting that the Trust would cease to trade on Wednesday 14 January 2015. The

letter confirmed that Solway Vision Limited would be taking over the operations of the Trust from Thursday, 15 January 2015.

[17] At the same time Ms Jones was given a letter from Solway Vision Limited attaching a proposed employment agreement.

[18] This letter referred to a Memo sent to all staff the previous week advising staff that they were required to sign the new agreement. Mrs Noble corrected this and advised Ms Jones that it was up to her whether she accepted the offer of employment with Solway Vision Limited or not. If Ms Jones wished to accept the offer of employment with Solway Vision Limited she was to sign the agreement before 10 December 2014.

[19] Ms Jones was further advised that if she did not return the signed agreement by 10 December 2014 Mrs Noble would consult with her about the impending redundancy of her position with the Trust.

[20] Ms Jones read through the proposed employment agreement and took issue with a clause requiring employees to work at any location as directed by Solway Vision Limited. Ms Jones acknowledges that under the employment agreement with the Trust she could be requested to work at any location. At the investigation meeting Mrs Noble conceded that Ms Jones had never refused to work at any of the Trust's locations.

[21] Ms Jones contacted Mrs Noble and expressed her concern that she could be required to work with the resident who had assaulted her. Ms Jones was advised that the company needed to have its employees work wherever they were directed to work. Ms Jones advised Mrs Noble that she could not go anywhere near the resident because she was concerned she would be assaulted again.

[22] In coming to my conclusions in this matter I have considered Subpart 3 of Part 6A of the Act.¹ Section 69OH of the Act sets out the objectives of this subpart of the Act which is to provide protection to employees where, as a result of a restructuring their work is to be performed by or on behalf of another person.

¹ Ms Jones position did not fit the definition of a vulnerable employee and therefore did not come under the provisions of Subpart 1 of Part 6A.

[23] A restructuring includes the transferring of the employer's business to another person.² In contravention of section 69OJ of the Act the employment agreement between Ms Jones and the Trust did not provide an employee protection provision. I am satisfied that the Trust was transferring the whole of its business to Solway Vision Limited.

[24] Given that this was a restructuring in terms of the Act I have considered Ms Jones to be an affected employee. As a result of the restructuring Ms Jones would no longer be required to perform work for the Trust and the work she had carried out for the Trust, was to be performed on behalf of another person, being Solway Vision Limited.

[25] Ms Jones therefore had the right to choose whether to transfer to the new employer or not. In this case I am satisfied that Ms Jones was provided adequate information about the reasons for the need for the restructuring including the terms and conditions that would apply after the transfer of the business occurred.

[26] Ms Jones appropriately raised concerns she had about a wording change in the proposed employment agreement. She raised her concerns with Mrs Noble. Mrs Noble provided Ms Jones with the reasons why the change was necessary and advised her that the wording in the proposed agreement would not be changed.

[27] Ms Jones was concerned that the proposed agreement, if accepted, would allow Solway Vision Limited to direct her to work in any location even in a location where the client who had assaulted her resided. Mrs Noble's evidence is that while the employment agreement Ms Jones had with the Trust allows the Trust to "request" Ms Jones to work at any location, it was generally accepted that she would work wherever she was required and apart from expressing some concerns from time to time, never refused to work at any location at which she was rostered.

[28] I find Ms Jones concerns to be overstated. The evidence shows that Ms Jones worked in the same location that the client who assaulted her was residing from 20 November 2014.

[29] The location had two houses joined by a common deck. The residents of both houses would move freely between each house and onto the deck during the day

² Section 69OI.

and/or night and the support workers would also work together including cooking meals together for all of the residents. I have accepted the evidence from the Trust that being within the same area of the house as the client who assaulted her was unavoidable.

[30] Based on all of the information she had available to her Ms Jones chose not to accept employment with Solway Vision Limited. Her employment ended on 14 January 2014 as a result of the fact that no position with the Trust existed due to the restructuring.

[31] I am satisfied the Trust has acted in this matter as a fair and reasonable employer could have acted. Ms Jones was not unjustifiably dismissed and I am unable to be of further assistance to her.

Costs

[32] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Trust shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Jones shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[33] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Vicki Campbell

Member of the Employment Relations Authority