

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 137/08
5093963

BETWEEN NICOLA O'NEIL
 Applicant

AND ILAM LIFECARE LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Kate Tomkinson, Counsel for Applicant
 Jeff Goldstein, Counsel for Respondent

Investigation Meeting: 24 and 25 June 2008

Submissions received: 30 June and 31 July 2008 from Applicant
 24 July 2008 from Respondent

Determination: 18 September 2008

DETERMINATION OF THE AUTHORITY

[1] Nicola O'Neil was employed as a laundry assistant by Ilam Lifecare Limited (Ilam Lifecare) from 26 March 2006 until her dismissal on 22 March 2007. Ms O'Neil who is profoundly deaf was dismissed for leaving her workplace earlier than rostered and recorded on her timesheet, without authorisation and with outstanding work on two occasions, failing to comply with Ilam Lifecare's policies and procedures including health and safety standards and infection control, and failing to take directions from or carry out proper work instructions from Margaret Bray, the housekeeper.

[2] Ms O'Neil says she was discriminated against in her employment by virtue of her hearing disability and her dismissal was unjustified. She seeks reimbursement of lost earnings, compensation for humiliation and loss of dignity and costs.

[3] Ilam Lifecare carries on business as an aged care facility which provides planned care for dependent residents. Ilam Lifecare does not accept that Ms O'Neil was discriminated against and says that her dismissal was justified and she is not entitled to any remedies.

[4] The Authority was assisted during the investigation meeting by interpreters to hand sign for Ms O'Neil.

The Issues

[5] The following issues arise from that background:

- Was Ms O'Neil discriminated against in her employment?
- Was Ms O'Neil's dismissal from her employment justifiable?
- If there was discrimination and/or the dismissal was not justifiable then what remedies is Ms O'Neil entitled to and are there issues of contribution?

Was Ms O'Neil discriminated against in her employment?

[6] At the start of the investigation meeting, Ms Tomkinson said that the allegation of discrimination was *in all likelihood absorbed in the unjustified dismissal claim rather than a stand alone claim* and no separate remedies were claimed.

[7] I accept Ms Tomkinson's view of the problem with respect to discrimination. I have not treated the claim of discrimination separately or heard separate evidence about it. I have considered Ms O'Neil's hearing disability along with other matters in terms of the justification for the dismissal.

Was Ms O'Neil's dismissal from her employment justifiable?

[8] Ms O'Neil was initially employed part time at Ilam Lifecare on alternative shifts in the laundry. She was on a two week cycle of shifts alternating with another

employee, Sally. During that time Ms O'Neil had a second part time position elsewhere to supplement her income.

[9] In February 2007, after undertaking additional hours over the December 2006/January 2007 period to cover for another employee, Ms O'Neil was asked to work full time by the facility manager at the rest home.

[10] Ms O'Neil's mother, Deslee, telephoned Ilam Lifecare and spoke to Trish who was involved in the administration of the rest home to confirm that it was safe for her daughter to resign from her other part time role. Deslee was reassured that her daughter's position at Ilam Lifecare was permanent and full time and Ms O'Neil started working 40 hours per week from Thursday to Monday at Ilam Lifecare from February 2007.

[11] On 20 March 2007, a few weeks after Ms O'Neil had started working full time at Ilam Lifecare, she received a letter from the General Manager Andrena Williams. The letter advised Ms O'Neil that there was to be a disciplinary meeting on 22 March 2007 for her to respond to very serious allegations that if substantiated amounted to serious misconduct and could lead to her dismissal. Attached to the letter was the following:

- Two time sheets from 15 and 19 March 2007;
- Two complaints/concern forms dated 8 and 15 March 2007 from the house keeper Margaret Bray;
- A copy of Ms O'Neil's individual employment agreement and the house rules dated 30 March 2006. The letter referred to 11 subclauses in the house rules.

[12] Ms O'Neil telephoned her mother and sent the letters and attachments to her by facsimile. On receipt of these, Deslee telephoned Ilam Lifecare to talk about the letter her daughter had been sent. She was advised by the person who answered the phone that she would need to talk to Ms Williams.

[13] The following day, 21 March, Deslee telephoned the rest home again and spoke to the quality manager, Martine Iggo as Ms Williams was not available. There is a conflict in the evidence about one aspect of the conversation between Deslee and

Ms Iggo as to whether there was any reference about Ms O'Neil's hearing disability. Deslee said in her evidence that she informed Ms Iggo that her daughter was profoundly deaf and entitled to an interpreter although she agreed she did not go so far as to ask Ms Iggo to arrange one. Ms Iggo said that there was no discussion on the telephone about Ms O'Neil being deaf or requiring an interpreter for the meeting.

[14] I conclude that it was more likely than not that Deslee would have made some reference to her daughter's profound deafness during her telephone call to Ms Iggo as it was to the forefront of her mind. Ms Iggo, who was not aware of the contents of the letter to Ms O'Neil, and had not been requested to take any steps herself with respect to organising an interpreter is less likely to have remembered that part of the conversation.

[15] Ms Iggo said that she left a note for Ms Williams about the call but did not see her at work that day. Ms Williams made no further contact with either Ms O'Neil or her mother before the disciplinary meeting on 22 March 2007.

The meeting on 22 March 2007

[16] Ms Williams attended the meeting on 22 March 2007 with Ms Iggo. Ms Iggo's role during the meeting was note taker. Ms O'Neil attended with her mother Deslee. The meeting started at 10.30am.

[17] Ms O'Neil was aware because of the attachments to the letter of 20 March 2007 that she had to answer the following allegations:

- On 15 March 2007 she had left the work place at 4.15pm and her time sheet showed her working to 4.30pm. She had left work uncompleted when she left on that day;
- On 19 March 2007 she had left the work place at 4.05pm and the time sheet showed 4.30pm. She had left laundry uncompleted on that day;
- As set out in the complaint form dated 8 March 2007 she had put jerseys in the dryer; did not have machines going at all times despite having been told about this; did not have laundry ready for a nurse who had come to collect it; a laundry door was slammed behind Ms Bray by

Ms O'Neil and Ms Bray had been cleaning out lint that had been left in the driers.

[18] Ms Williams had interviewed Ms Bray on 22 March 2007 before she met with Ms O'Neil and her mother. She had received an additional complaint form to those dated 8 and 15 March which was dated 17 March 2007.

[19] Ms O'Neil and her mother were given copies of that additional complaint form dated 17 March 2007 together with handwritten notes from Ms Williams' interview with Ms Bray that morning. They were given an opportunity to consider the new material.

[20] The complaint form dated 17 March 2007 contained two additional concerns:

- Ms O'Neil, not realising that a washing machine was broken before loading and starting it, meant that Ms Bray had to drain the washing machine;
- Ms Bray stating that she had to hand wash the woollens because Ms O'Neil was too busy.

[21] The interview notes from Ms Bray's meeting with Ms Williams on 22 March 2007 record Ms Bray saying that she had been very tolerant until this time and the following complaints:

- That Ms Bray was spending more time in the laundry;
- That Ms O'Neil did not complete the work or take directions from her;
- That Ms O'Neil goes off duty when it suits her;
- Ms O'Neil does not keep the machines going or check for finishing time and they lie idle;
- That she does not know how to plan her work;
- Does not iron properly and residents are not happy with that;
- Work does not get done and Ms O'Neil complains all the time;

- Ms Bray was recorded as saying *I think her work gets worse by the day.*

[22] After Ms O'Neil and her mother had considered the additional complaint dated 17 March and the record from the interview, the meeting then resumed.

[23] Ms Iggo did not take a full record of what was said but importantly she confirmed in her evidence that the notes contained everything that Ms O'Neil said during the meeting.

[24] Ms O'Neil said by way of explanation to the various allegations in the 8 March complaint form that there was a jacket and a dressing gown in the drier which were different fabric and were not wool as alleged. Ms O'Neil said that Margaret was in a bad mood with her. Deslee referred to the machine stopping and the need because Ms O'Neil is profoundly deaf, for her to use her eyes to see if the machines had stopped. Ms O'Neil denied an allegation that she had slammed the door and said it was windy and the wind blew it shut.

[25] Ms O'Neil is recorded in the notes as saying in relation to the lint that she *did it sometimes*. Ms O'Neil said at the Authority investigation meeting that she meant by that statement that she it did it sometimes in the morning.

[26] Ms O'Neil said to the allegation that she had left early on 19 March 2007 that she had lots of work and that she had worked *right around*. There was mention of the fact that she had no afternoon break and Ms O'Neil said that she did not leave at 4.05pm that day – *I went to the hospital*. My understanding was that was upstairs in the rest home. Ms Williams confirmed that there was no entitlement to an afternoon break.

[27] Ms O'Neil also gave an explanation to the allegation that she had left early on 15 March 2007 but it is recorded in the notes that she could not be understood by Ms Williams or Deslee.

[28] Ms O'Neil with respect to the broken washing machine said that she did not know it was broken as the sign was not on it at that time. It is clear from the record taken at the meeting that the concern for Ms Williams was that Ms O'Neil did not notice the machine was broken.

[29] In terms of the allegation that she did not take direction from Ms Bray, Ms O'Neil is not recorded as saying anything herself by way of explanation. When the notes taken from the disciplinary meeting and the chain of questions is followed it is likely that she did not understand the line of questioning about that matter. On page 6 of the notes in the disciplinary meeting there are some statements from Ms Williams to the effect that Ms O'Neil does not take directions from Ms Bray and that safety is a paramount concern. Deslee comments that *I can see where you are coming from. I don't think Nicola realised Margaret was her boss. Nicola said to me that she didn't think there was a new manager since Gwen.* The only response from Ms O'Neil to that matter is *there is sometimes hand washing – jerseys in the drier when I come to work in the morning.*

[30] Ms O'Neil denied complaining as alleged by Ms Bray during her interview with Ms Williams on 22 March and said she was sorry that Ms Bray was upset. The allegation that Ms O'Neil failed to take directions from Ms Bray was a general allegation which contrasted noticeably with the very specific concerns in the complaint forms.

[31] There was an adjournment of the meeting at 11.25am and the notes record that the adjournment was requested by Ms Williams so that Deslee could talk privately to Ms O'Neil rather than repeating everything that was being said to her.

[32] The meeting resumed at 11.50am. At the resumption of the meeting Ms Williams gave Ms O'Neil a further opportunity to make any statement. There was confirmation that Ms O'Neil had completed a full orientation for her position and was aware of various policies and procedures. Deslee said that Ms O'Neil would like to be given another chance.

[33] Ms Williams requested a further adjournment at 11.55am while she considered all the material, responses and statements.

[34] Ms Williams also met again with Ms Bray at midday to go through some areas of dispute with her. A note was completed with Ms Bray about the discussion. The only new matter that had not appeared in the earlier complaint forms was that Ms O'Neil did not adhere to the infection control policy.

[35] At 12.23pm the meeting resumed again. Ms Williams asked Ms O'Neil again whether she wanted to say anything. No further comment was made. Ms Williams

advised that she had re-interviewed Ms Bray to clarify matters and that there was a non-adherence to the infection control policy.

[36] Ms Williams then advised that she had decided to terminate Ms O'Neil's employment and that she would send a letter and arrange for payment up to and including that day. A letter was prepared by Ms Williams dated 23 March 2007 which set out the reasons for termination. Ms O'Neil did not receive that letter until a few days later by which time she had seen a solicitor about her dismissal. Ms O'Neil managed to obtain a part time position on 16 April 2007 and by May 2007 had increased her hours in that position.

[37] Ms Williams confirmed that the reasons for Ms O'Neil's summary dismissal were those contained in the letter of 23 March 2007 and that the three reasons that appear in that letter have been given equal weight in her decision to terminate Ms O'Neil's employment. The reasons for Ms O'Neil's dismissal were:

- Leaving the work place earlier than rostered and also earlier than recorded on time sheets without the authorisation of the manager and leaving other staff to complete your duties;
- Failure to comply with the company's policies and procedures thus exposing the company to huge risk in breach of Christchurch District Health Board Contract, failing to meet occupational health and safety standards and infection control deficits;
- Failure to take direction from or carry out proper work instructions from the housekeeper.

[38] Ms Williams recorded in her letter that Ms O'Neil had admitted her conduct in terms of the three reasons relied upon for dismissal.

Was there a full and fair investigation by Ilam Lifecare which disclosed conduct by Ms O'Neil that a fair and reasonable employer would regard as serious misconduct?

[39] Ilam Lifecare says that there were good reasons for it to terminate Ms O'Neil's employment after the meeting on 22 March 2007. Ms Williams says that she no longer had faith or trust in Ms O'Neil to work safely and that there were serious breaches of the house rules.

[40] The house rules were signed at the same time as the employment agreement by Ms O'Neil. Ms O'Neil acknowledged when she signed the rules that she had read and understood them and accepted employment under the conditions set out in the rules. The rules refer to examples of serious and ordinary misconduct although it is specifically set out that any incident will be viewed on its own particular facts.

[41] During the Authority investigation meeting, Ms Williams went through the rules that had been set out in the dismissal letter and how she had concluded that each of the rules had been breached by Ms O'Neil.

[42] Ilam Lifecare having been advised of concerns with respect to Ms O'Neil's performance, difficulties in her relationship with Ms Bray, and leaving the facility early on two occasions needed to bring these concerns to Ms O'Neil's attention.

[43] The matters about Ms O'Neil's washing, ironing standards, lint removal, failing to plan work, deterioration in performance and failing to notice a machine was not working are performance issues. Ms O'Neil had not previously been in receipt of any warning that her work performance was inadequate and that if she did not improve her performance her position was at risk. I accept that these matters caused Ms Williams concern but considered objectively a fair and reasonable employer in all the circumstances would have seen them as matters of inadequate work performance using the process under ordinary misconduct in the house rules.

[44] I asked Ms Williams when Ms O'Neil had a proper opportunity to understand the allegations about infection control and to give an explanation about it. Ms Williams directed me to page 9 of the notes. The only reference that I could find on that page was a reference to the manager identifying that Ms O'Neil did not do things according to the operational manual or the policies and procedures that the facility had in place. There was no specific question directed about infection control and what aspects it was alleged that Ms O'Neil was not performing correctly.

[45] There is nothing in the notes taken during the meeting on 22 March 2007 to support an admission by Ms O'Neil in terms of failure to comply with company policies and procedures or infection control. Ms O'Neil accepted during the disciplinary meeting that she was aware of the policy and procedures. Knowledge of policy and procedures is one thing but an admission of a breach is quite another. I do not find that there was an admission by Ms O'Neil about these matters.

[46] Objectively assessed a fair and reasonable employer would not find that these performance issues which formed one of the three reasons for Ms O'Neil's dismissal were matters that in the absence of earlier warnings were sufficiently serious to amount to serious misconduct.

[47] Falsification of timesheets is described in the house rules as serious misconduct and that house rule was referred to in the letter of dismissal. Ms Williams said that Ms O'Neil had downplayed the leaving early matter and that she concluded that there was a deliberate attempt to mislead the company by falsifying information of the timesheets.

[48] A conclusion that Ms O'Neil falsified her timesheets in my view was significant in how Ms Williams viewed the seriousness of Ms O'Neil's conduct.

[49] I have considered objectively whether reasonable conclusions were reached about the leaving early. In doing so I have accepted Ms Williams' evidence that Ms O'Neil in all probability gave the impression during the disciplinary meeting that she had left early on 15 March 2007.

[50] An employer inquiring into the early departure on that day in a fair and reasonable manner would have wanted to understand Ms O'Neil's explanation. Ms Williams said that at no time did Ms O'Neil mention she had gone without breaks that day. However, given that it is recorded no one could understand what Ms O'Neil said in explanation to the events of that day, it may have been that she gave that explanation but could not be understood.

[51] Ms O'Neil denied leaving early on 19 March 2007 at the disciplinary meeting and said she was upstairs in the hospital. Ms Williams said in her evidence that she looked for Ms O'Neil and her car that day and they could not be seen. A fair and reasonable employer would have concluded in all the circumstances that Ms O'Neil had left early that day although would not have concluded with any degree of certainty that she left the facility at 4.05pm. Ms O'Neil's explanation given at the disciplinary meeting referred to the amount of work she had that day and to no afternoon break.

[52] A fair and reasonable employer would have wanted to know if Ms O'Neil understood that she was to remain on the premises until 4.30pm and why she left prior to that time particularly where there appeared to have been work left to do.

Ms Williams said that she asked if Ms O'Neil did leave but not whether she understood that she was required to stay on the premises.

[53] Ms O'Neil said at the Authority investigation meeting that she put her times worked for the week in as a block for each day. Ms Williams said that staff were required to record the times when they start and when they finished and Ms O'Neil never raised this in the explanation to her conduct at the disciplinary meeting. A fair and reasonable employer approaching the matter with an open mind would have wanted to know how Ms O'Neil completed her timesheets for the two days in question. This is because the answer to such a question goes to the heart of the conclusion reached by Ms Williams that Ms O'Neil falsified information on her timesheets.

[54] Ms Williams would need to be satisfied in terms of an allegation of falsification of information on timesheets that Ms O'Neil intended to make the record inaccurate so as to deceive Ilam Lifecare.

[55] Although this was not a matter that was raised at the time of the disciplinary meeting with Ms O'Neil, it is clear from the evidence that Ms O'Neil said goodnight to Ms Bray when she left the facility at 4.15pm on 15 March 2007. She did not attempt to hide the fact that she was leaving the premises early on that day. Understandably, Ms Bray was concerned when she went into the laundry on that day and found that Ms O'Neil had not completed her work.

[56] Ms O'Neil did not request an interpreter or ask for an adjournment during the disciplinary meeting. I am not satisfied though that a fair and reasonable employer would have felt confident after the meeting on 22 March 2007 that Ms O'Neil had a proper opportunity to explain or make herself understood about the allegation that she had left earlier on two occasions than her timesheets reflected. I do not find an employer would be in a position to make proper conclusions about the seriousness of the conduct on those two occasions.

[57] Falsification of time records can amount to serious misconduct but intent is an important part of that allegation. In this case, because of the investigation process about the two occasions Ms O'Neil left early and the surrounding circumstances, I am not satisfied that a fair and reasonable employer would have felt themselves in a

position to have reasonably concluded that Ms O'Neil falsified her time records rather than left early without permission.

[58] The third reason for Ms O'Neil's dismissal was that she failed to take direction from or carry out proper work instruction from Ms Bray. Ms Williams said that there was an admission of this during the meeting on 22 March 2007 from Deslee. Deslee did not accept that she had made an admission in terms of this allegation but said she was attempting to relay to her daughter the nature of the allegation about not following instructions.

[59] I do not find that a fair and reasonable employer would have concluded from the meeting on 22 March 2007 that there was an admission about this matter. Deslee was simply trying to explain to her daughter what Ms Williams' concern was in this regard. A fair and reasonable employer would have investigated further whether Ms O'Neil's profound deafness was part of the problem in terms of communication between Ms O'Neil and Ms Bray. An investigation should have been carried out as to whether Ms O'Neil actually understood the directions that Ms Bray was giving.

[60] I accept that there was a need to deal with the difficulties between Ms Bray and Ms O'Neil. Ms O'Neil's explanation was that she did not think Ms Bray was *her boss*. Ms Williams simply concluded that she must know that she was.

[61] I do not find that a fair and reasonable employer would conclude that there was serious misconduct in terms of Ms O'Neil failing to take directions from or carry out proper work instructions from Ms Bray. This was a particularly general allegation that did not refer to any specific instance.

Conclusion

[62] Considering the matter objectively, I am not satisfied that Ilam Lifecare for reasons set out conducted a full and fair inquiry that enabled them to reach the conclusion that there was serious misconduct on the part of Ms O'Neil. There was no basis on which a fair and reasonable employer would conclude that the foundation of trust and confidence that is essential in an employment relationship was undermined to such a serious degree to justify the summary dismissal of Ms O'Neil.

[63] A fair and reasonable employer would conclude that there was misconduct in Ms O'Neil leaving earlier than her rostered time on two occasions and that there were

some performance and relationship issues that required addressing. A warning could have been issued but a fair and reasonable employer would not have dismissed Ms O'Neil in all the circumstances of this case.

Determination

[64] Ms O'Neil has a personal grievance that she was unjustifiably dismissed and she is entitled to remedies.

Remedies

Lost wages

[65] Ms O'Neil gave evidence about her claim for lost earnings in net rather than gross figures. The total amount Ms O'Neil claims is \$3,129.50 net. That sum is made up of 24 days without income while Ms O'Neil was seeking employment between 22 March and 16 April 2007. The sum claimed for that period is \$1,209.77 net based on average weekly net earnings from Ilam Lifecare of \$352.85.

[66] On 16 April 2007, Ms O'Neil obtained a part time position and after a relatively short period was able to secure an increase in hours which reduced the difference between her earnings in the new position and her previous position at Ilam Lifecare. The balance of lost earnings are claimed for the period between 16 April 2007 and 6 January 2008 being the difference in earnings between the new and old position, the sum of \$1,919.73 net.

[67] This is a case where I consider it would be appropriate to exercise my discretion and make an order for a sum greater than three months' lost wages. I am satisfied that Ms O'Neil attempted to mitigate her loss by actively seeking work. I have taken into account that Ms O'Neil is profoundly deaf which could put her at a disadvantage in terms of securing other employment quickly.

[68] Subject to any findings I may make about contribution, Ms O'Neil is entitled to an award under s.123(1)(b) of the Employment Relations Act 2000 for reimbursement of lost wages in the sum of \$3,129.50.

Compensation

[69] Ms O'Neil and her mother gave evidence of some shock and dismay at the dismissal. Ms O'Neil quickly sought some advice after her dismissal and the main issue that I find caused Ms O'Neil humiliation and loss of dignity was the lack of financial security which I accept is particularly important for her. Ms O'Neil had given up her second part time position when she accepted the full time role at Ilam Lifecare and was only in that role for some three weeks before the dismissal.

[70] I conclude that a suitable award in all the circumstances, subject to any finding with respect to contribution, would be the sum of \$5,000 without deduction.

Contribution

[71] Where it finds a personal grievance, the Authority must consider the extent to which the actions of an employee contributed to the personal grievance. If the Authority finds that there was some blameworthy contribution on the part of an employee, then it must reduce remedies accordingly.

[72] There was a process in Ms O'Neil's employment agreement in the house rules to be used to deal with performance concerns in a fair way. Given that the performance concerns had not been brought formally to Ms O'Neil's attention, then I do not find that she contributed to the situation in a blameworthy way.

[73] I do find, however, that Ms O'Neil contributed in a blameworthy way by leaving her workplace early before she had fully completed her work. Ms O'Neil should have asked permission before leaving her workplace before the time reflected on her timesheet. I am not satisfied, however, on the balance of probabilities that Ms O'Neil falsified her timesheets.

[74] The remedies that I have awarded should be reduced by 20%.

Application of contribution to lost wages and compensation

[75] Applying the contribution assessed, I order Ilam Lifecare Limited to pay to Nicola O'Neil the sum of \$2,503.60 net being reimbursement of lost wages under s.123(1)(b) of the Employment Relations Act 2000.

[76] Applying the contribution assessed, I order Ilam Lifecare Limited to pay to Nicola O'Neil the sum of \$4,000 being compensation for humiliation, loss of dignity and injury to feelings under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[77] I reserve the issue of costs. The applicant is to lodge and serve her submissions as to costs by Wednesday, 1 October 2008 and the respondent is to lodge and serve any submissions in response by Wednesday, 22 October 2008.

Summary of findings and orders made

- I have found that Ms O'Neil was unjustifiably dismissed.
- I have assessed contribution at 20%.
- Taking contribution into account, I have ordered Ilam Lifecare Limited to pay to Nicola O'Neil lost wages in the sum of \$2,503.60.
- Taking contribution into account, I have ordered Ilam Lifecare Limited to pay to Nicola O'Neil the sum of \$4,000 without deduction being compensation for humiliation, loss of dignity and injury to feelings.
- The issue of costs has been reserved and a timetable for the exchange of submissions has been made.

Helen Doyle
Member of the Employment Relations Authority