

amounted to repudiation of significant terms of the contract of employment and constituted dismissal.

Background

[3] Ms Ogilvy worked with Ms Virginia Trail who was also a caregiver. On 2 April 2008 Ms Ogilvy was approached by Ms McGoram who advised her that Ms Trail had made serious allegations about her. This conversation took place at the end of a night shift at 6.30am. It appears there had been a previous complaint made by Ms Trail and Ms Louie Christobel on 28 February to Ms Dale Stewart. Ms McGoram was aware of these complaints when she talked with Ms Ogilvy on 2 April but did not disclose to her the fact that they had been made. However, one of the incidents mentioned in the complaint made by Ms Christobel regarding a patient whose dressings were changed without morphine was discussed. Ms Ogilvy understood that Ms Trail not Ms Christobel had raised the concern about a patient being caused unnecessary pain. She explained to Ms McGoram that as an ex enrolled nurse she was not entitled to do many of the things a nurse is, which included giving morphine.

[4] Ms McGoram told Ms Ogilvy that Ms Trail was very angry and wanted to punch her in the head. Ms McGoram denies she said that (Ms Trail accepts that she made that remark) but I find the evidence shows that she did refer to Ms Trail's comment when speaking to Ms Ogilvy.

[5] At the end of the brief meeting on 2 April Ms Ogilvy was aware that Ms Trail was refusing to work with her because she felt unsafe and Ms McGoram and Ms Ogilvy had discussed some specific examples of incidents which had given rise to this concern. These related to care of patients. Ms Ogilvy was not aware that there was any allegation regarding invasion of personal space or of sexual harassment. Ms McGoram explained that she did not pass on this allegation to Ms Ogilvy because she did not consider the behaviour amounted to sexual harassment.

[6] The behaviour complained of occurred when Ms Ogilvy and Ms Trail were working on night duty. Ms Trail had gone into the lounge where there were plenty of vacant chairs but Ms Ogilvy had pulled up a lazyboy chair so that it was touching the one that Ms Trail was in. She was lying down in it with her face turned to the edge facing Ms Trail's chair. Ms Trail said she stared at her because she was shocked and

felt extremely uncomfortable. She then went and sat in the dining room for the rest of the night.

[7] The following night the same thing happened. I accept that Ms Trail was deeply distressed by what she perceived to be a sexual action on Ms Ogilvy's part.

3 April 2008 Meeting

[8] Ms McGoram arranged for the two women not to work together and arranged a meeting to discuss Ms Trail's complaint at the end of the night shift on Thursday 3 April 2008 at 6am.

[9] Ms Ogilvy said that Ms McGoram described this as a mediation, and not a disciplinary meeting. I find it was not described as a disciplinary meeting and I accept the applicant's contention that if it was a disciplinary meeting it was certainly an unfair and improper one. Ms Trail should not have been present at that meeting and Ms Ogilvy should have been given all the allegations including the one about invasion of personal space prior to that meeting taking place.

[10] The meeting was attended by Ms McGoram, Ms Mele Gordon, Ms Trail, Ms Trish Murray and the applicant, who understood Ms Gordon was there as Ms Trail's support person; and that the purpose of the meeting was to resolve the issues between Ms Trail and herself, not discipline her. Ms McGoram had a handwritten version of a list of complaints. The allegations were:

- Patient handling – Rose is rough with some patients and verbally abuses them
- The round takes up to 2.5 hours
- Rose sleeps on her shift
- Rose is always asking for directions when she is in charge
- Bad tempered
- Belittling patients
- Leaving patients on commodes for excessive time

- Rose invading/violating other staff's personal space.

[11] Ms Ogilvy was not given a copy of these complaints at the meeting. This meeting did not go well. Ms Trail abused Ms Ogilvy, calling her a lying bitch. She threw copies of her certificates on the floor and produced the disciplinary section of the employment agreement which she then threw on the desk. Despite this behaviour Ms McGoram did not intervene. It was Ms Gordon who asked Ms Trail to calm down and act civilly. It should have been apparent at this stage of the meeting that things were not going well and the meeting should have been adjourned.

[12] Ms Ogilvy said the allegations made were very general. She was told other staff had agreed with some of what Ms Trail was saying but wasn't told who they were or what they had agreed with. They did discuss the issue of Ms Ogilvy's nervous laughing. They also discussed sleeping on the job. Ms Ogilvy said that everybody slept on the night shift, including Ms Gordon and Ms Trail. When she point that out there was no response.

[13] Ms Ogilvy deposed that in relation to the issue of her sitting on the lazyboy chair next to the one Ms Trail had been sitting in no sexual component was ever alleged or suggested. Ms Ogilvy said she was quite overwhelmed and felt that there was no point in trying to defend herself. She felt very frustrated and when the meeting ended she was left feeling very upset.

[14] Ms Gordon was present at the meeting purportedly as a support person, but in her evidence she said that she understood that involved supporting the allegation regarding the invasion of personal space. This is not the usual role of a support person. This meeting was inadequate, unfair, inappropriate and counter-productive and it did not provide a fair hearing. Seriously allegations were not systematically addressed in a reasonable environment and Ms Ogilvy found them impossible to address properly. Some of what had been brought up was four to five months old and had not been brought to her attention at the time it occurred.

[15] It is surprising that Ms McGoram did not take the matter of Ms Trail's inappropriate behaviour up with her. I appreciate that Ms Gordon dealt with the matter at the meeting but Ms McGoram should have raised the matter of the inappropriate behaviour with Ms Trail after the meeting.

Subsequent Events

[16] On her way home Ms Ogilvy telephoned Ms McGoram and again when she got home. She told Ms McGoram that if her colleagues felt she was invading their personal space she could rectify that now that she was aware of it, but beyond that she was at a loss to understand how she should change her behaviour to please Ms Trail and other co-workers because she remained uncertain about many of the things she was accused of and what she had done wrong.

[17] Once she had spoken to her husband she called Ms McGoram again and asked for copies of any documents and said she wanted an opportunity to find out what she was allegedly doing wrong, particularly regarding patient handling and also about the laughing. She did not understand these allegations.

[18] When she went in to pick up the papers she was given a letter that she was required to sign, which was attached to the allegations dated 1 April. This was the first time they were provided to her. They were now typed and signed by both Ms Gordon and Ms Trail. Also attached was a copy of her employment agreement with clauses highlighted. Ms Ogilvy said she assumed the highlighting indicated which parts of the employment agreement Ms McGoram thought she was breaching. These included the sexual harassment clause. This was the first indication she had that there was an allegation of sexual harassment.

[19] Ms McGoram says Ms Ogilvy agreed to a variation in hours in the course of the phone conversations. Ms Ogilvy said she indicated she would be prepared to consider it but did not agree. Neither woman says that a reduction in pay was discussed.

[20] On 5 April Ms Ogilvy went to see her doctor who certified that she was unfit for work because of stress.

7 April 2008 Discussion

[21] On 7 April Ms Ogilvy met with Ms McGoram at approximately 9.30am and later made notes. She was told a decision had been made in conjunction with Mr Peter Neumegen, a lawyer and director of the respondent, which was that there would be no more overnights and that she would work three days under supervision. The hours would be 8am – 3pm and 7am – 3pm. This arrangement would be reviewed

within a three month period. She was told this would start the next day but that things were still to be finalised and Ms McGoram would get back to her sometime that day or the following day. Ms McGoram said that nurses she had worked with would be brought in and questioned. Ms Ogilvy then told Ms McGoram that she had seven days off on stress leave.

[22] Ms McGoram said that Ms Ogilvy's husband should not meddle in things he didn't understand, the hospital had done everything correctly and it was really a matter between her and Ms Trail. She told Ms Ogilvy that Ms Trail had been consulting her brother who was a lawyer and had raised with her another serious allegation made that morning. This allegation was about failing to resuscitate patient or call that patient an ambulance. The two women discussed the baselessness of this allegation as it related to an incident in which Ms McGoram had been directly involved. She had been the ambulance officer and manager on duty. Ms Ogilvy had not only telephoned her but followed her instructions.

[23] Ms Ogilvy said that although Ms McGoran agreed with her that she had been acting on her instructions she did not appear to have explained this to Ms Trail and told Ms Ogilvy that she was likely to be forced to investigate the matter. Ms McGoran said she told Ms Ogilvy that the matter had been raised, and that she would not be investigating it.

[24] Ms McGoram also told her that Ms Megan Richards, a nightshift registered nurse who had been approached by Ms Ogilvy to provide a letter in support of her, was going to make allegations against her. The allegations never materialised but when Ms Ogilvy asked Ms Richards she told her that she sometimes felt that Ms Ogilvy was invasive of her personal space.

[25] Ms McGoram told Ms Ogilvy that other staff had agreed with the truth of the allegations made by Ms Trail. Ms McGoram refused to supply details.

[26] On 7 and 10 April Ms McGoram solicited statements from Ms Hamilton and Ms Mills regarding Ms Ogilvy's competence. Ms Hamilton and Ms Mills had not worked with her for many months and these allegations are general in nature. These statements were only supplied to Ms Ogilvy in a letter from Ms McGoram dated 14 April 2008.

Personal Grievance and Sexual Harassment Warning

[27] On 10 April Ms Helen White wrote to the respondent raising a personal grievance regarding the respondent's behaviour. She asked for urgent mediation. Ms White said:

The effect of the conduct described above has been to undermine Rose's confidence and her ability to come back to work. In summary, Rose is concerned that rather than have an opportunity to defend herself when allegations have been made by a colleague of a serious nature, she has found to be at fault without any reasonable investigation. There now seem to be threats of new allegations surfacing and again, there has been no attempt to go through a fair and reasonable process to establish whether there is any merit to the allegations. The result has also undermined the relationship between Rose and her colleagues, which she is concerned may now be irreparable.

[28] Ms McGoram's letter of reply dated 14 April made reference to two areas of concern, the first being allegations that Ms Ogilvy was too rough with the frail elderly patients and the second category concerned unspecified fellow workers complaining of sexual harassment by Ms Ogilvy. Towards the end of the letter Ms McGoram wrote:

Having reached that conclusion I have decided to issue a formal written warning with regard to sexual harassment.

My original plan was to have a further meeting with Rose and issue this warning when Rose was next rostered on to come to work.

Events have overtaken my plan and I now enclose the formal warning with this letter.

I now consider this matter closed.

[29] The warning (which is dated 14 April 2008) attached to the letter states:

Having investigated the allegations of sexual harassment by you against fellow staff members I have reached the conclusion that the allegations are substantiated.

Please note that this letter constitutes a first and final formal warning.

The management of Warkworth Hospital Limited consider the situation to be serious and further occurrence may lead to you being dismissed.

The warning will continue in force for 12 months calculated from the date hereof.

[30] The respondent asserted that this employment warning had not in fact been issued to Ms Ogilvy but it had been supplied in response to Ms White's request for all the information held on Ms Ogilvy. This is an untenable position. The warning was dated 14 April, after Ms White's letter was sent to the respondent; and it was sent to her as Ms Ogilvy's representative. Ms McGoram said she intended to issue the warning when Ms Ogilvy returned to work.

[31] The issuing of the employment warning regarding sexual harassment was clearly unjustified. Not only had this allegation not been put to Ms Ogilvy to answer, but the behaviour complained did not constitute sexual harassment. This was not physical behaviour of a sexual nature. This is not to say that invasion of personal space could not in some circumstances constitute sexual harassment.

[32] Not only was Ms Ogilvy wrongfully issued with an employment warning for sexual harassment, a number of other issues had been raised and not dealt with properly. This understandably caused her considerable concern. These were issues regarding treatment of patients.

Alteration of Hours, Position and Pay Rate

[33] Ms Ogilvy was told that her hours would change from night shift to day shift and that her pay rate would decrease. Clause 4.4 of the employment agreement provides that

The Employer may, after consultation with the Employee, amend duties from time to time. One week's notice in writing will be given by the Employer to the Employee of any alteration to the Employee's duties, following consultation in good faith

[34] What took place was not an amendment of duties pursuant to this clause but a variation of the employment agreement.

[35] Clause 6.4 provides that:

Days of work will be in accordance with the roster and not normally less than two days per week. Hours of work may vary from a minimum of two and half hours to eight hours in each working day as indicated on the roster a minimum of one week in advance.

Negotiated minimum hours subject to those negotiated and entered in the schedule attached to this agreement.

[36] There is no schedule attached to the agreement regarding hours. There is a schedule regarding remuneration details which provides that the normal hourly rate is \$13. There is no job description attached to this agreement.

[37] The agreement also provides that the employer will, where possible provide one week's notice in writing which will be given by the employer to the employee or any alterations in the employee's normal rostered hours of work.

[38] Ms Ogilvy was offered a position in charge of the night shift by Ms McGoram that was compatible with her family responsibilities. She accepted that as a promotion and was paid an increased rate of \$16 per hour in that new position because of the added responsibility.

[39] There was a significant change in the obligations between the parties at the time that variation occurred. Ms McGoram gave evidence she had sent a letter to Ms Ogilvy at the time of the change to night shift supervisor. There was a change to the pay rate in a greater amount, which reflected a change in duties and significant responsibilities.

[40] Ms Ogilvy was offered an inferior alternative on lesser terms and conditions. I agree that this was so significant a breach of her employment agreement that Ms Ogilvy could regard it as terminating the employment agreement. She could not accommodate the new hours offered because of her child care commitments and it was on lesser terms and conditions.

[41] In his submissions for the respondent Dr Henry Plant, a director of Warkworth Hospital, said:

What alternative was there to offering Rose another position where she could be supervised until it was clear that she was acting competently and in an appropriate manner.

[42] The problem with this submission is that there was an insufficient inquiry to establish that incompetence had actually taken place. Furthermore, Ms Ogilvy had indicated to her employer that if she was behaving in a manner that was unsatisfactory

or unacceptable to her colleagues by invading their personal space she would rectify that so there was no need to issue an employment warning.

[43] Furthermore, the disciplinary procedures contained in the employment agreement provide that prior to entering into a formal disciplinary process the employee will be given a reasonable opportunity to improve.

[44] I find that there was a fundamental breach of the employer's obligation towards Ms Ogilvy to act fairly when allegations were made. Employees will sometimes have to face serious unfounded allegations but the employer is obliged to relay those allegations to the person accused and provide a proper opportunity to respond.

[45] The allegations made by Ms Trail were very serious. They were not all relayed to Ms Ogilvy nor were they clearly or adequately investigated. The respondent failed to reasonably manage the difficult situation and undermined Ms Ogilvy's trust in her employer.

[46] I agree with the submission made by Dr Plant that had matters been handled differently, including a consideration that the invasion of personal space may well have reflected cultural differences, a different outcome may have resulted. It is unfortunate that that did not occur. However, the opportunity for people to do that would have been during the mediation when the parties concerned remain in control of the outcome of the proceeding.

[47] Ms Ogilvy was unjustifiably disadvantaged by the issuing of a formal employment warning for sexual harassment. Ms Ogilvy was unjustifiably constructively dismissed.

Remedies

[48] Ms Ogilvy is entitled to compensation for loss of wages. She is also entitled to compensation for hurt, humiliation, loss of dignity and injury to feelings, pursuant to s123 (1) (c) (i) of the Employment Relations Act 2000 for both the disadvantage and the dismissal.

[49] It was very clear to me during the course of the hearing that Ms Ogilvy had been deeply affected by what had happened to her.

[50] The respondent is to pay the applicant the sum of \$8,000.

[51] Ms Ogilvy has earned \$2110 from various sources. I am unable to discount that amount by expenses she incurred in driving that income.

[52] Ms Ogilvy did make efforts to find alternative employment.

[53] I am satisfied that this is an appropriate case to make an award of lost wages past the three month minimum.

[54] The respondent is to pay the lost wages from the date of dismissal to the date of the hearing. They are to be discounted by the earnings of \$2110.

[55] If there is any problem in making the calculations leave is reserved for the parties to return to the Authority

Contribution

[56] While I accept that Ms Ogilvy did sit too close to other people and on occasions invaded their personal space, she was not aware of this until it was pointed out to her. When she did become aware that it was a problem she said she would rectify it. Under the circumstances this is not blameworthy behaviour that contributed to the personal grievance and there will no reduction in remedies.

Costs

[57] If the parties are unable to agree the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority