

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Teinna Elizabeth Peoples (Applicant)

AND Phyllis Yuill trading as Fencible Manor Retirement Home
(Respondent)

REPRESENTATIVES Teinna Elizabeth Peoples, in person
Phyllis Yuill, in person.

MEMBER OF AUTHORITY Y S Oldfield

INVESTIGATION MEETING 22 August 2002, 2 September 2002

**FINAL SUBMISSIONS
RECEIVED** 10, 21 October 2002

DATE OF DETERMINATION 27 November 2002

DETERMINATION OF THE AUTHORITY

The applicant, Ms Peoples, was employed by the respondent in January 2001 as a caregiver in the *Fencible Manor* rest home. She was appointed to the position by manager Jane Brice. The terms of employment were that Ms Peoples would have 32 hours work per week minimum at \$10.00 per hour but would be offered additional hours at times when more work was available. The core hours were to be worked between 11.00pm and 8.00am Monday and Tuesday and between 4.00pm and 11.00pm Thursday and Friday. Night and evening shifts suited Ms Peoples because of her childcare arrangements. It is relevant that these shifts were sole charge.

In September 2001 the respondent terminated Ms Peoples' employment. Ms Peoples claims that her dismissal was unjustified and comes to the Authority seeking remedies for this.

Chronology of Events

1. The applicant commenced her employment during the holiday season whilst the manager was away. She did not receive a formal induction although she was shown the procedures by another caregiver.
2. Between January and May there were no employment problems. In late May another staff member found pills in a resident's room after the applicant's shift and advised the applicant. The applicant informed Ms Brice and was instructed that in future when administering medication she must ensure that it was taken by residents in her presence.

First disciplinary meeting

3. In the first half of June Ms Brice and Robyn Garner (who is Ms Yuill's daughter and also holds a proprietary interest in the rest home) met with Ms Peoples to discuss:
 - The above-mentioned medication incident;
 - Allegations that Ms Peoples had shouted at a resident;
 - An alleged failure by Ms Peoples to brief incoming staff properly at shift hand-over;
 - Allegations that Ms Peoples had opened and read a letter addressed to someone else.
4. Ms Peoples responded to these points as follows:
 - The incident involving a resident's medication was acknowledged but had arisen because she had never been told the proper procedure. It had not been and would not be repeated;
 - She was not told whom she had shouted at or when, and so could not answer the allegation;
 - One specific hand-over incident was discussed but the applicant maintained that the other worker failed to make herself available for a briefing. Ms Garner and Ms Brice however disagreed and told Ms Peoples that they considered that she as well as the other worker needed to make some changes;
 - She admitted the letter incident.
5. Ms Brice and Ms Garner advised that they wished these issues to be addressed and that they would be following up to see if things improved. A verbal warning was issued at the conclusion of the meeting. **I accept that this warning was justified in relation to the medication and letter incidents.**
6. By way of follow up Ms Brice wrote to the applicant on **21 June** however this letter did not record the fact of the warning or give any details of the improvement sought.
7. Over the next month Ms Peoples took periods of sick and domestic leave as a result of her own and her daughter's ill-health.
8. On **18 July** there was an incident during the applicant's sole charge night shift in which a resident left a hot tap running in her room. This caused a flood, the resulting steam set off the fire alarms and a fire brigade callout ensued. The respondent was concerned both about the failure to notice the running tap, and an alleged failure by the applicant to properly report on the incident.
9. Meanwhile, Ms Peoples' partner had obtained weekend work and could no longer care for their daughter on Saturdays and Sundays. Because of this, Ms Peoples advised the respondent that she could no longer make herself available for additional Sunday work as she had done up until this point. This information was provided sometime between 15 and 21 July.

Second meeting

10. On **31 July** the applicant was called to a further disciplinary meeting. She was accompanied by her partner as a support person and this time Ms Phyllis Yuill was also present, in addition to Ms Brice and Ms Garner. Topics discussed included:
 - The 18 July incident;
 - Non-attendance at work;
 - Incorrect drug administration procedure.

11. I note that I am satisfied that the third item discussed was not new and in fact involved a re-visiting of the incident already dealt with at the previous meeting. With regard to the applicant's non-attendance at work, it was not disputed that she had in fact rung and advised of her illness. **I am satisfied that neither point gave rise to justifiable performance concerns.**
12. I accept however that the incident of **18 July**, and the failure to notify of the fire brigade callout were in a different category. The respondent considered these to be serious matters. The respondent was of the view that the applicant knew the resident had been up in the night and should have checked on her. Had she done so she would have discovered the running tap. Ms Peoples only explanation was that she had not wanted to disturb the resident. **I accept that the respondent was entitled to take the view of this conduct that it did.**
13. The respondent followed up on this meeting by letter (dated 30 July in error) confirming the three concerns. Although the letter is not well worded, **I am satisfied that the applicant understood herself to have received a further warning. I am also satisfied that in respect of the 18 July incident this was justified.**
14. The outcome of the meeting was an instruction from the respondent that the applicant could no longer work sole charge shifts. I accept that this was justifiable in the circumstances. What was problematic however was finding suitable alternative shifts for Ms Peoples. By the end of the meeting only two shifts had been identified that fitted in with her childcare arrangements. These were Thursday and Friday 4.00 until 8.00. This was understandably very unsatisfactory from the applicant's point of view since it drastically reduced her income.

Third Meeting

15. A further meeting was held on **8 August**, this time without Ms Brice. Earlier topics were revisited including the reasons for the original warning on 7 June, the reasons the applicant had been taken off sole charge shifts (which the respondent summarised as being safety and communication issues) and the importance of correct drug administration procedure.
16. The primary purpose of the meeting was however to discuss:
- the applicant's hours of work, which still had not been resolved;
 - an allegation that the applicant had torn a page out of the daily log book. The book was used to record all information relating to the residents health and welfare as well as the general running of the home. The page in question had included entries by other staff members. This allegation was not denied. The applicant's explanation was that she wished to correct a mistake she had made;
 - an allegation that Ms Peoples had inappropriately telephoned other staff at home to discuss her problems at work.
17. The meeting ended with Ms Garner instructing Ms Peoples to provide a written response to the issues. This instruction was confirmed in a follow up letter dated 9 August. It requested that she confirm in writing what hours she was prepared to work. It also identified allegations upon which the respondent sought a written explanation. These were:
- the page torn from the book;
 - telephoning other staff at home regarding the business of the Home.
18. Ms Peoples told me that she had asked for more information, in writing, about the reasons for:
- being taken off sole charge shifts;
 - earlier warnings;
 - why the medication incident was treated so seriously.

19. She felt the letter of 9 August did not adequately answer these points and so, in turn, she did not provide the written response that the respondent had sought.
20. I have considered the letter of 9 August. Some of the incidents it referred to had never been disputed (the medication issue, the matter of reading someone else's letter, and a related telephone call to that person.) Given that the applicant had not disputed these matters, I am unclear as to what further information she wanted or why. It provided no new detail on the issues of shouting at a resident (no time or name were provided) or the alleged failure to communicate at handover.
21. In relation to the two matters that the respondent wanted answers to, I note that the torn page was not disputed, and so the applicant knew what to respond to there. Given the importance of maintaining careful records relating to the health and welfare of the residents, **I accept that the removal of a page from the log book was a serious matter, and that the respondent was entitled to an explanation and to take further disciplinary steps if it did not accept that explanation.**
22. On the other issue, the letter simply stated that Ms Peoples was required to "*answer reports that she had rung other staff members when off or on duty to discuss matters pertaining to the running of the Home.*"
23. I accept that it was reasonable for Ms Peoples to want more specific information before responding to this point.
24. The letter also confirmed what shifts the respondent was prepared to offer her, one of which had already been proposed at the meeting of 30 July and declined.
25. On or about 10 July Ms Peoples told Ms Brice that she was unable to accept the proposed hours, aside from the eight she was already doing. She also proposed alternative hours, but Ms Brice confirmed that these were not available. However, this information was not passed on to Ms Garner or Ms Yuill for some time. Meanwhile the proposed shifts were held open for Ms Peoples for several weeks.
26. From then until she was dismissed, the applicant continued to work only 8 hours per week. The respondent says that it attempted to set up meetings with her without success.

The fourth meeting

27. On 6 September Ms Brice handed Ms Peoples a letter requiring her to attend a further meeting. When Ms Peoples asked the purpose of the meeting, Ms Brice told her it was because she had upset a co-worker, T. Ms Yuill and Ms Garner told me that they called the meeting for two reasons. The first was that the hours issue was still not resolved. At that stage, Ms Brice had not told them of her 10 August conversation with the applicant and so they had been waiting for Ms Peoples to speak directly to them about the issue. Secondly, they told me, other staff had been coming to them asking not to work with Ms Peoples.
28. On the evening of 6 September Ms Peoples was rostered on with T. and again there was conflict between them.
29. On 7 September Ms Peoples rang in sick because, she as she has since explained, she could not face working with T. again.

30. The final meeting took place on 12 September 2001. It was attended by Ms Yuill, Ms Brice, the applicant and her partner.
31. Ms Peoples taped this meeting. I considered a transcript of this meeting as part of my investigation. It ran to 18 pages of wide-ranging and frequently unfocussed discussion which went back over much of the same ground as earlier meetings. The applicant was told that three staff members had refused to work with her because of her rudeness but no other details were provided. Only one working relationship (with T.) was specifically discussed, and this was because the applicant raised it herself.
32. Ms Yuill also raised with the applicant the difficulties they had experienced in arranging a meeting with her, and how they had found Ms People's partner to be negative and aggressive.
33. However the main issue appears to have been the hours of work. The meeting concluded with Ms Peoples partner asking "*what have we resolved?*" and getting the reply: "*Tina is coming on Thursday and Friday nights for the next four weeks under observation and after that we will tell her whether we are prepared to let her come along without observation.*"
34. After a few brief comments from Ms Yuill about training (Ms Peoples was, with the support of the respondent, completing her base training as a caregiver) and dress codes, the transcript ended. The respondent witnesses say that the applicant and her partner then left the meeting without saying goodbye.
35. Ms Yuill's evidence to me of what happened next is as follows:

"After the meeting the manager and owner came to the conclusion that no progress had been made since the first concerns starting some three months before. In fact Teinna's behaviour towards management, staff and residents had continued to deteriorate, leaving no more avenues to go down to try and smooth the way for Teinna to continue in employment at Fencible Manor.

Teinna's partner Chris's confrontational attitude proved difficult to work through..

Concerns [sic] for the physical and mental well being and health and safety of the residents was the first priority."

36. Ms Brice then telephoned the applicant and told her that a letter would be on its way to say her services were no longer required. Ms Peoples says that Ms Brice told her that the reason was in part her failure to say goodbye at the end of the meeting.
37. Ms Yuill duly sent the letter. She began by stating that it was written in confirmation and response to the meeting and went on:

"During this meeting we could find no sign of any intention on your part to alter your recent unacceptable work performance and your attitude towards other staff, which has been deteriorating over the last 2-3 months.

On contact with the Labour Department, they agreed that we have tried enough avenues of mediation and that our resident's well-being and security is our first priority. In reflection, [sic] it was pointed out that any observation of your work could result in upsetting our resident's peace of mind.

Our business is that of running a Retirement Home and we cannot waste any more time trying to persuade you to review your work performance which has not been to the standard required of our staff.”

38. Ms Peoples told me that her dismissal affected her badly both because of the financial hardship that resulted and because of the distress and embarrassment it caused her. This was compounded by discovering, almost immediately after, that she was expecting her second child.

Conclusions

39. The termination of Ms Peoples employment was both procedurally unfair and substantively unjustified.

40. The principal reason for my finding that it was substantively unjustified was that the conduct that gave rise to the respondent's earlier and justified performance concerns did not appear to have been repeated *after the last warning on 9 August 2001*.

41. During the investigation meeting I questioned Ms Yuill and Ms Garner at some length to try and establish what problems were experienced *during the final month of employment* and why they were considered sufficiently serious as to justify dismissal. They explained that the difficulties lay:

- in the applicant's relationship with other staff. When pressed for specifics, they recounted two incidents with one staff member (T.) For the sake of economy these incidents have not been detailed above, but I can record that they concerned the applicant being rude and abrupt to her co-worker;
- With her failure to get back to them in writing and subsequent difficulties in arranging a meeting with the applicant;
- Her unauthorised absence just before she was dismissed.

42. I am not satisfied that the respondent can justify a dismissal on these grounds, because specifics of the allegations were never put to the applicant for comment and there was no opportunity for her to rectify these particular concerns.

43. Also, in relation to the fairness of the procedure, I note that **at the meeting the respondent undertook that it would give the applicant four more weeks under observation before making a decision as to the future of her employment. It then resiled from this undertaking without any further discussion with her. This alone renders the dismissal unjustified.**

Remedies

44. Section 124 of the Employment Relations Act requires me, when setting remedies, to take into consideration *“the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance.”*

45. There are several aspects of the applicant's conduct which have, in my view, contributed to the situation that gave rise to the personal grievance. They can collectively be grouped as problems of attitude.

46. The first aspect of the contributory conduct was the fact that she had never acknowledged the full seriousness of some of the matters that gave rise to the earlier warnings. Right to the investigation meeting her response to the matters of the flood, reading mail that was not

addressed to her and destroying notes made by another staff member in the record book, was that these were minor matters and that the directors and Ms Brice were over-reacting. I do not agree.

47. The second was her failure to respond to the respondent's concerns after the 8 August meeting. She should have sought clarification if it was needed and at the very least acknowledged receipt of the letter.
48. Third was the attitude demonstrated in the final meeting, the transcript of which shows Ms Peoples being very argumentative and attempting to relitigate earlier issues over again.
49. The effect of all this was that Ms Yuill felt defeated. She felt that Ms Peoples was not prepared to co-operate at all. I am satisfied that this reaction was not unreasonable and that Ms Peoples did not engage constructively in attempting to resolve the employment problems between the parties. This led directly to the final decision being made as and when it was.
- 50. For this reason, I consider that Ms Peoples' conduct contributed to the situation that led to her personal grievance. I set the level of contributory conduct at 30% and reduce the remedies that would otherwise be awarded accordingly.**
51. Ms Peoples has claimed lost earnings arising out of the dismissal as well as compensation for hurt and humiliation.
52. In relation to the hurt and humiliation, I accept that the dismissal created enormous stress for Ms Peoples, her partner and their young daughter. Part of this was financial as the family relied on her income, but I accept that she was also very embarrassed by what happened. The situation was compounded for her by finding out that she was pregnant almost immediately after the dismissal. I accept that this was a very black period in her life, and weigh this in the balance along with the fact that she had been in the job less than a year and was only part-time (since I have already accepted that the change in her hours was justified.)
- 53. Taking all factors into consideration, in the absence of contribution I would have awarded the applicant the sum of \$5,000.00. Reducing this by 30% for contributory conduct, I order that the respondent pay to the applicant the sum of \$3,500.00 pursuant to s. 123 of the Employment Relations Act.**
- 54. Turning to loss of earnings, Ms Peoples told me that she did not work after her dismissal. In the early stages of her pregnancy she was ill and depressed and unable to show the sort of attempts to mitigate her loss that we usually expect to see. In the circumstances I cannot make an award for loss of earnings.**

Costs

Neither party was represented. The only cost for the applicant in pursuing the matter was the filing fee of \$70.00. **The respondent is therefore ordered to pay this amount to the applicant in satisfaction of any claim for costs.**

Y S Oldfield
Member of Employment Relations Authority