

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 295/08  
5102759

BETWEEN                      FRED PETERSEN  
   Applicant  
  
AND                                THE SALVATION ARMY  
   Respondent

Member of Authority:        James Wilson  
  
Representatives:              Mr Pettersen in person  
   Anthony Drake for the Salvation Army  
  
Investigation Meetings:      22 May & 4 June 2008  
  
Determination:                18 August 2008

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**DETERMINATION OF THE AUTHORITY**

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**Mr Pettersen's employment relationship problem**

[1]     The applicant, Mr Fred Pettersen says that his dismissal by the Salvation Army (the Army) was unjustified. He also says that after he was dismissed, a senior employee of the Army gave "vindictive" verbal references to employment agencies and by doing so stopped him from gaining new employment. Mr Pettersen says that both the dismissal and subsequent behaviour of the Army's senior staff member have caused him a good deal of distress, resulting in him suffering from depression to such a great extent that he contemplated suicide. Mr Pettersen initially sought a total of \$60,000 by way of compensation for work lost and stress and anxiety caused by the Army's actions. He subsequently amended this claim to compensation of the equivalent of two years wages and the provision of a "clean" reference.

[2]     The Salvation Army says that Mr Pettersen's dismissal was justified and that references given to prospective employers and employment agencies reflected the written references provided to Mr Pettersen. They say that, when asked, they gave

succinct, factual, reasons why he was dismissed. If asked whether they would recommend Mr Pettersen as an employee the Army say that they indicated that they would recommend Mr Pettersen except for positions in which he would be required to administer medication or undertake similar duties. In any event the Army says that Mr Pettersen did not raise his personal grievance with them until over 12 months after his dismissal, well outside the 90 day statutory limit for raising a grievance, and he is therefore unable to pursue his claim.

### **Background and chronology**

[3] Mr Pettersen was employed as a supervisor at the Salvation Army's Epsom Lodge in Auckland. Epsom Lodge is a 90 bed hostel for homeless men. He was appointed to this position in November 2003 and was one of a team of four supervisors who worked alone on individual shifts -- either from 4 p.m. to midnight or from midnight to 8 a.m. Mr Pettersen's duties included overseeing meals, administering medication, tending to light duties and being available for discussion and support for the men at the lodge as needed. Although considered to be a good employee in other respects Mr Pettersen's manager (Major Brent Diack) says that Mr Pettersen had quite consistent issues in following procedures for administering medication. In his evidence Major Diack says:

*This was evident in several incidents involving medication during Mr Pettersen's employment at the Lodge, where he either dispensed medication to the wrong person or dispensed the incorrect dosage. These mistakes were a serious safety concern and could be potentially life-threatening for clients. After each incident, an incident report was prepared.... This would be based on discussions that I had had with Mr Pettersen and the nurse involved about what had occurred. I would then discuss the report with Mr Pettersen. My goal was always to use these incidents as opportunities to learn. In my discussions with Mr Pettersen, I emphasised the importance of residents safety, and we would discuss how to avoid similar mistakes in future. However I was concerned that Mr Pettersen's continued mistakes indicated that he was not learning from these incidents or discussion.*

[4] Mr Pettersen says that some 12 months prior to his dismissal he and one of the other supervisors wrote to Major Diack seeking to change the way in which medications were distributed at supper time. He says that there were a number of issues which made the distribution of medication at that time confusing. However, he says, Major Diack refused to change the routine.

[5] On 21 March 2006 Mr Pettersen dispensed the wrong evening dosage of warfarin to a client in the morning. [Giving the wrong dose of warfarin is, according to the evidence presented to me, potentially life threatening.] The appropriate incident report was completed and once again it was made clear to Mr Pettersen that this was a serious matter that he should take more care when dispensing medications.

[6] On 5 April 2006 Mr Pettersen again dispensed the same client's warfarin at the wrong time. As soon as he realised his mistake he completed an incident report detailing what had happened. The appropriate doctor and nurse were immediately notified and the incident report forwarded to the new (interim) Director of the Lodge, Major Raphael Aspeitia.

[7] There is some disagreement between the parties about the timing, and the detail of what happened next. Mr Pettersen says that he was asked to come back into the Lodge and as he approached Major Aspeitia's office he overheard a heated discussion between Major Aspeitia and one of the nurses during which the nurse said something to the effect that Mr Pettersen should be dismissed. Mr Pettersen says that he then met with Major Aspeitia who indicated that there would be an investigation, that Mr Pettersen would be entitled to a representative but that he would be dismissed. Major Aspeitia says that he does recall being confronted by the Lodge's doctor, who described Mr Pettersen as "incompetent", but does not recall noticing Mr Pettersen in the vicinity. Major Aspeitia's recollection is that having consulted with the Human Resources Manager (Mr Paul Geoghegan) he met with Mr Pettersen later that day (6 April 2006). Major Aspeitia says he advised Mr Pettersen that the Army considered the incident to be very serious and could result in Mr Pettersen being dismissed. He says he invited Mr Pettersen to a meeting to discuss the incident and the disciplinary process that might follow. He says he suggested Mr Pettersen bring a support person with him to that meeting.

[8] Although the details are a little sketchy the parties agree that it was then agreed that Mr Pettersen should not return to work immediately but should remain off work until his previously planned holiday in Australia 2 days later. Before leaving for Australia Mr Pettersen wrote several letters to the Army including one to Major Aspeitia, dated 6 April 2006, which said:

*It is with great regret that I write this letter to confirm that I wish you to go ahead with termination procedures, or whatever procedures you may have to undertake as a result of my accidentally giving (the client) his evening medication in the morning yesterday.*

*I hope that (the client) does not suffer any side-effects, and that his health is not affected by my error.*

*I feel completely devastated by the event and do not have a representative to accompany me to any meeting. I would therefore, rather not attend any meeting, as it would distress me even more.*

*I therefore give you permission to go ahead with whatever measures you have to, in respect of this incident.*

[9] Mr Pettersen says he wrote his letter because he was distraught and because, from what he had overheard and what Major Aspeitia had said, he believed he would, inevitably, be dismissed. However he says that it was not until later, when he had difficulty getting another job and he believed the Army were giving him poor references, that he realised that the actions of the Army in dismissing him were unfair.

[10] Having received Mr Pettersen's letter the Salvation Army reviewed what had happened. In his evidence Mr Aspeitia says:

*I discussed (Mr Pettersen's) letter with (Mr Geoghegan). As Mr Pettersen refused to meet with us regarding the second incident, we decided to proceed with the termination of Mr Pettersen's employment, as he had invited. We had lost confidence in Mr Pettersen's ability to perform proper dispensing of medication, which was a major part of his job. We also felt that the safety of the residents of Epsom Lodge required that we terminate his employment.*

Major Aspeitia advised Mr Pettersen of his dismissal in a letter dated the 13th of April 2006 sent to Mr Pettersen's address in Australia

[11] Mr Pettersen says that shortly after he arrived in Australia and after he was advised of his dismissal, he started applying for employment. As part of the application process he was asked to provide references and he contacted the Army on several occasions in an attempt to get written references from them. A reference dated 7 June 2006 and signed by Major Diack was provided although Mr Pettersen says this reference did not arrive until some time after that date. [Mr Pettersen believes that the Army deliberately delayed providing a reference to shorten the time during which he could raise a personal grievance].

[12] Mr Pettersen says that he contacted a number of agencies regarding employment in Australia. He says, by way of example that he sent a copy of the Army's reference to a representative of one of the agencies, "Dora", and spoke to her in person. When he had not heard from her for a while he contacted her again and she advised that she *had taken him off the book's* because of a verbal reference she had got from Major Diack. She said she couldn't recommend him for employment in any role.

[13] Both Major Aspeitia and Major Diack say that they were contacted by more than one agency in Australia in mid 2006. Major Aspeitia says that when he was specifically asked whether he would re-employ Mr Pettersen he responded that he would recommend him as an employee *for roles that did not involve dispensing medication or having responsibility for the safety of vulnerable clients*. Major Diack says that the agencies asked him several questions regarding Mr Pettersen's suitability for roles including the supervising and administering of medication. He says that he felt duty bound to give honest responses when specifically asked whether he would reemploy Mr Pettersen and the reasons why he would not do so. Major Diack is adamant that at no time has he given anything other than an honest verbal reference regarding Mr Pettersen's employment. He says he has certainly not been vindictive.

[14] It is also relevant to note that about this time, mid 2006, Mr Pettersen prepared a written statement regarding the reasons he had left his employment in New Zealand including a full and honest outline of what had occurred, including the medication

errors. This statement is dated 7 July 2006 and it is clear that Mr Pettersen provided it to employment agencies to put the written and verbal references into some perspective

[15] In August 2006, having been unable to secure new employment in Australia, Mr Pettersen returned to New Zealand and he continued to seek employment. Over the next few months he became severely depressed. As he recovered from his depression, he says his depression turned to anger and he wrote to both Major Diack and Major Aspeitia seeking a more positive certificate of service/reference and a fair verbal reference. In response Major Diack and Major Aspeitia wrote almost identical letters, apparently drafted by Mr Geoghegan, to Mr Pettersen saying:

*If you nominate me to a prospective employer and I am contacted for a telephone reference, either by that employer or the recruiting agency, I am duty bound to answer their reference checking questions with an honest evaluation about your work and this will include answering any questions about your safety in dealing with medication and your ability to follow designated procedures.*

*..... if you apply for any positions with responsibilities for caring for vulnerable people or dispensing medication or similar safety of client issues involved and I am contacted for reference comments about your suitability for such work then you need to be aware that I will give honest evaluative comments in any confidential reference I provide.*

*If you apply for some different type of work that does not involve client safety or in which the following of procedures set by the employer is not a critical skill then I can assure you that if a telephone reference call is received I will be able to make positive comments similar to those which have already been written in the written reference you have already been provided. In such a telephone reference I will not bring up or draw to the prospective employer's attention the reason for your termination unless I am asked specific questions. But you need to be aware that if asked whether you resigned or were dismissed or whether we would reemploy you I am duty bound to answer honestly. In light of that you may wish to consider not nominating me for a telephone reference.*

[16] Over the next few months Mr Pettersen sought, unsuccessfully, to have his grievances addressed by the Salvation Army. When he did not receive satisfaction he contacted the Department of Labour seeking formal mediation and on or about 11 October 2007 filed a statement of problem in the Authority

[17] In a covering letter to its statement in reply the Salvation Army indicated that they had previously been aware, from correspondence from Mr Pettersen that he was unhappy with the references the Army had been prepared to provide. According to Mr Geoghegan the statement of problem was the first time Mr Pettersen had claimed that his dismissal had been unjustified. He pointed out that the statement of problem was well outside the 90 day statutory time frame for raising a personal grievance.

### **The 90 day issue: Is Mr Pettersen able to pursue his grievance**

[18] Before I discuss the merits or otherwise of Mr Pettersen's claims it is necessary first of all to deal with the preliminary point regarding his failure to raise his personal grievance with the Salvation Army within the 90 day time frame provided by the Employment Relations Act (the Act). If he did not do so then, regardless of whether or not the actions of the Army were justified, the Authority is unable to determine whether or not Mr Pettersen has a personal grievance against the Salvation Army

[19] Mr Pettersen was dismissed by way of a letter dated 13 April 2006. It is probable that he received this letter before the end of April 2006. His last day of employment with the Salvation Army was 2 May 2006. 90 days from 2 May would expire in early August 2006. Even accepting Mr Pettersen's assertion that he was not made aware that he would have a great deal of difficulty gaining new employment (because of the verbal references provided by Major Diack) until some time in June, he was aware that he had been dismissed by late April or early May. It is the dismissal which potentially gives rise to a personal grievance. The provision, or non-provision, of references cannot give rise to a grievance as Mr Pettersen's concerns relate to alleged actions which took place after the termination of the employment relationship. Mr Pettersen gave no indication to the Army, until his letters to Major Aspeitia and Major Diack in April 2007 that he believed he had any form of grievance against the Army. Even then his concerns were regarding the references he believed

Major Diack was providing to prospective employers. Mr Pettersen did not raise his grievance with the Army until well outside of the statutory timeframe. The Salvation Army has not consented to Mr Pettersen raising his grievance out of time and the Authority has received no application in terms of section 114(3) of the Act for leave to raise the grievance outside of the 90 day period. **Mr Pettersen is therefore unable to pursue his claims in the Authority.**

### **Costs**

[20] Mr Pettersen is a sickness beneficiary and even if I was of a mind to award costs against him he would not be in position to meet even a modest award. There will be no order for costs.

James Wilson

Member of the Employment Relations Authority