

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Pamela Plimmer (Applicant)

AND Hawksbury Community Living Trust (Respondent)

REPRESENTATIVES Graeme Riach, Counsel for Applicant
Martin Harris, Advocate for Respondent

MEMBER OF AUTHORITY Paul Montgomery

INVESTIGATION MEETING Christchurch, 12 December 2006

DATE OF DETERMINATION 28 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mrs Plimmer, claims she was unjustifiably dismissed from her position as Senior Support Worker at the respondent's residential care facility in Pages Road, Christchurch. Mrs Plimmer seeks remedies of lost remuneration from 13 June 2005, compensation for hurt and humiliation in the sum of \$15,000 and costs. The respondent denies the dismissal was not justified and declines to meet the remedies sought by the applicant.

What caused the problem?

[2] Mrs Plimmer began employment with the respondent in December 2000. At the time this matter arose she was working 40 hours per week at an hourly rate of \$16.65. On 1 July 2004 Nicki King began working at the home in the role of Manager.

[3] Difficulties arose between the two women and as a result, the assistance of the Department of Labour's mediation service was enlisted. At the mediation on 9 December 2004 the issues were discussed and a Record of Settlement was signed by Mrs Plimmer, the respondent and the mediator. The Record of Settlement varied the terms of the applicant's employment in respect of steps and process to be followed by the employer and the employee.

[4] Soon after the mediation the applicant disclosed to a colleague that a mediation had taken place. In the course of that conversation Mrs Plimmer also mentioned that Ms King and the applicant's son were among those who attended the mediation and that at one stage, Ms King had burst into tears and left the mediation room.

[5] On 3 June 2005 Ms King wrote to Mrs Plimmer issuing the applicant with notice of a disciplinary inquiry. The letter cited the conversation the applicant had had with the colleague and alleged that the applicant had disclosed confidential information to that colleague, in particular that Ms King had been in tears and she had also disclosed the names of those who attended.

[6] The letter advised that the applicant's disclosures to the colleague were a breach of the confidentiality and alleging a breakdown of trust that had "irreparably damaged" the employment relationship between the applicant and Ms King.

[7] On 13 June 2005 Mrs Plimmer and her representative and the respondent represented by Mr Harris, Ms King and Ms Jo McGavin attended a disciplinary meeting at the premises of the respondent.

[8] During this meeting the applicant agreed that she had discussed the mediation with her colleague. However, she disputed the contents of that discussion. Mrs Plimmer said that her disclosures to the colleague were not boastful or malicious and did not breach confidentiality and ought not to lead to a breakdown in trust and confidence on the part of her employer.

[9] The respondent continued to maintain that the disclosures were a breach of confidentiality and that trust had broken down between the parties. The meeting concluded with the respondent advising Mrs Plimmer that a decision would be communicated to her by 5pm.

[10] By letter dated 13 June 2005 the respondent summarily dismissed Mrs Plimmer.

[11] In a letter of 26 July 2005 Mrs Plimmer raised a personal grievance with the respondent alleging she had been unjustifiably dismissed but seeking reinstatement to another home operated by the respondent where the relationship difficulties between herself and Ms King would not be a difficulty.

[12] In a letter dated 8 August 2005 the respondent stated that the matter had been reviewed and it considered the decision it had made on 13 June 2005 to be final.

[13] On 30 August 2005 the applicant requested mediation assistance through the Employment Relations Service. The parties attended mediation on 30 September. However, they were unable to reach an agreement.

The issues

[14] In order to determine the applicant's claim the Authority needs to decide the following issues:

- Did the disclosure of Mrs Plimmer to Ms Reid breach the confidentiality of the mediation; and
- Was the respondent entitled to consider the alleged breach of sufficient gravity to warrant the respondent's conclusion that its trust and confidence in the applicant had been "irreparably damaged" and to attract the sanction of summary dismissal; and
- Did the respondent conduct a full and fair inquiry into the alleged breach before arriving at its decision; and
- If the applicant was unjustifiably dismissed what, if any remedies, are due to her.

The investigation meeting

[15] At the investigation meeting the Authority heard evidence from the applicant herself, and on behalf of the respondent Mr Martin Harris and Ms Nicki King gave evidence.

[16] Mrs Plimmer withdrew her application for reinstatement.

[17] In her evidence the applicant accepted that the conversation with Ms Reid she had disclosed that she, Ms King and others had attended mediation and that Ms King at one point left the meeting in tears. Mrs Plimmer resolutely denied disclosing any of the issues of the discussion which occurred in the mediation, and said the reference to Ms King crying was in the context of describing and illustrating a *stressful day*.

[18] The applicant also gave evidence on the effects the dismissal had on her personal circumstances. She said:

The dismissal (at my age) was a devastating blow. I had been a carer for many years – since 1997. I needed the job to pay my mortgage. ... I was so stressed out by the whole course of events I had to go on to an invalids benefit as I was not for sometime fit for work. My confidence had been dealt a huge blow. I remain to this day on anti depressant medication which I went onto following my dismissal.

As a result of the dismissal and consequent lack of income I was forced to sell my nice new home at Carmana Gardens at Rangiora and move in with my son and daughter in law. I did not like intruding in this way but had no real choice. I remain with them to date.

[19] Mrs Plimmer said that in October 2005 she obtained a new job. However, this was initially casual position in which she worked an average of approximately 12 hours per week. She is now a permanent part time employee working 23 hours per hour at an hourly rate of \$11.00.

[20] The applicant finished her evidence by saying: *Given my age (62) and financial circumstances, I ask that the Authority exercise its discretion to award more than the three month limit under s.128 of the Act and indeed consider the full amount as I would have earned this but for the dismissal.*

[21] Mr Harris, in his evidence, told the Authority he had made the decision to summarily dismiss the applicant and referred to his view that the breach of confidentiality was related to the *business affairs* of the respondent. This, he said, thoroughly destroyed the trust and confidence of the respondent in Mrs Plimmer.

[22] Ms King's evidence was largely focused on the background of the difficulties the two women experience in working together. I do not intend to detail these as they are largely irrelevant given the reason for dismissal.

[23] On the matter of the disclosures Mrs Plimmer had made to Ms Reid, Ms King said:

Firstly, I was shocked to find that another staff member even knew about the mediation. The mediation was requested by Pam because she felt the verbal warning placed on her file was unjust. Therefore I did not speak to anyone (apart from those directly involved in the mediation) about the fact that it had taken place. I believe the whole meeting to be confidential and in the practice of good faith. I was committed to maintaining a positive ongoing working relationship with Pam, I did not think it would have been professional of me to discuss anything related to this. I also expected that Pam would treat me with the same respect. However, as I found out from Cathy Reid, I was very wrong.

I very strongly believe that it was most definitely an attempt by Pam to undermine me or show other staff that I was weak. I was very upset to hear that a senior support staff had been talking about me in such a negative way to another staff member. In my letter to Mr Harris I stated that I believed our working relationship had been irreparably damaged. I could no longer trust that Pam would be supportive of me in any way, and I could not trust her ability to retain confidentiality.

[24] Further on down in her evidence this witness said:

It is my view that, the fact that any discussion occurred, and who was in attendance, was a breach of the confidentiality surrounding mediation. I also have strong doubts that if Pam discussed the fact that the mediation was taking place then it is very likely that she told Cathy Reid why it had taken place also. ... Once again I cannot stress enough how betrayed I felt by Pam regarding this breach of confidentiality.

Analysis and discussion

[25] At the heart of this matter is the respondent's position as set out in statement in reply:

- (1) *Pam's disclosure of discussion at mediation was reported back to Nicki King by Cathy Reid. The employer is adamant that all events and even the fact that mediation had taken place to be confidential in order for the continuation of an effective working relationship. Due to the above mentioned circumstances and following a thorough investigation to all matters a decision was taken by Martin Harris (Operations Manager) to dismiss.*

[26] The relevant section of the Employment Relations Act 2000 setting out the extent of confidentiality in respect to mediation assistance Reids as follows:

s.148 Confidentiality

- (1) *Except with the consent of the parties or the relevant party, a person who –*
- (a) *provides mediation services; or*
 - (b) *is a person to whom mediation services are provided; or*
 - (c) *is a person employed or engaged by the Department; or*
 - (d) *is a person who assists either a person who provides mediation services or a person to whom mediation services are provided – must keep confidential any statement, admission or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.*

[27] The words of the statute are quite clear. Under its terms Mrs Plimmer needed to keep confidential any statement or admission made in the course of a mediation or a document created or made for the purposes of mediation and any information that was disclosed orally in the course of the mediation process. There is no prohibition regarding who attended the mediation nor of disclosing reactions of a participant in the mediation process. In this context, it is insufficient that Ms King thought it *very likely that she (Mrs Plimmer) told Cathy Reid why it had taken place also*. There was no evidence before the Authority that the applicant's disclosure was in fact of discussions held at mediation or details of what was agreed.

[28] The onus on the respondent was to conduct a full and fair inquiry into the alleged breach and to arrive at a conclusion based on established facts. In carrying out its investigation, an employer must ensure that the principles of nature justice are complied with.

[29] I find the participation of Ms King in the investigation in any role other than as a witness, to be a breach of those principles. Ms King was the complainant, the one aggrieved by the action of the applicant. She was convinced that Mrs Plimmer had deliberately sought to belittle her to a fellow employee. Ms King, as the applicant's manager, was in a position to influence the outcome of the inquiry even to the extent of (possibly) recommending a penalty to Mr Harris.

[30] The failure of the respondent to review Ms Reid is quite astonishing. When asked if Ms Reid had been interviewed in the course of the inquiry, Mr Harris told the Authority that he

could not recall whether she had been interviewed. On the balance of probabilities, I find that he did not, as no evidence was before the Authority indicating she had even made a statement to the investigation.

[31] These two facts indicate that the investigation was tainted by bias and thus was unfair to the applicant.

[32] The test of justification is set out in s.103A of the Act. In *Air New Zealand v. Hudson* AC 30/06 Shaw J found that the effect of s.103A was to separate out the employer's actions for consideration and required the Court or the Authority to consider those actions against what a fair and reasonable employer would have done. The Court concluded that although the amendment does not expressly prevent employers from having recourse to a range of options, Parliament has legislated for the Authority or the Court to evaluate the employer's choices against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[33] Turning first to the conduct of the applicant, while I find she was not guilty of a breach as alleged, it was injudicious of her to have even raised the mediation with other employees. That said however, an injudicious statement does not in itself constitute a breach of the statute. Nor was it serious misconduct.

[34] Turning now to the conduct of the employer, I find the employer was unjustified in simply basing its conclusions as to the applicant's trustworthiness on a false premise. I am also of the view that the respondent was influenced by Ms King's absolute conviction that the applicant made the statement to undermine her position in the eyes of other staff.

The determination

[35] Standing back and looking at the overall picture, I find that a fair and reasonable employer would not have found the incident to be serious misconduct, would not have concluded that the applicant was unworthy of its trust and would not have summarily dismissed the applicant in these circumstances.

[36] Returning to the issues as set out earlier in this determination. I find that the disclosure by Mrs Plimmer to a colleague:

- Did not breach the confidentiality of the mediation; and
- The respondent was not entitled to consider the alleged breach sufficiently grave to constitute serious misconduct and thus was not capable of attracting summary termination; and
- The respondent failed to conduct a full and fair inquiry into the alleged breach before considering the penalty to be imposed; and
- The applicant was unjustifiably dismissed; and I now turn to the remedies due to her.

Remedies

[37] The applicant sought full recompense for lost remuneration from the date of dismissal to the date of the investigation meeting. Mrs Plimmer asked me to exercise my discretion to award more than three months wages and to consider the total sum she would have earned but for the dismissal.

[38] I have carefully considered this issue. I am of the view that given the rocky relationship between the two women, the employment relationship would likely have foundered at some

point had the dismissal not occurred. The styles and approaches of the two women were considerably diverse and given the respondent's declining the applicant a transfer to another home, the situation was in my view, far from stable.

[39] I have decided to exercise the discretion afforded me under s.128(3) and award the applicant 17 weeks wages, namely, \$11,322.00 gross.

[40] From the evidence put before the Authority the applicant suffered very considerable detriment resulting from the dismissal. Although not provided independent medical evidence, the Authority has weighed the effects on her health and also the loss of her home when considering the appropriate level of compensation.

[41] I order the respondent to pay the applicant the sum of \$12,000 without deduction under s.123(c)(i) of the Act.

Contribution

[42] As observed above, the actions of the applicant were somewhat ill-considered, but I find they fall short of constituting contribution under s124.

Costs

[43] Costs are reserved. The parties are urged to attempt to resolve the matter of costs between themselves. If that is unable to be achieved leave is granted for the parties to return to the Authority to resolve this issue.

Paul Montgomery
Member of Employment Relations Authority