

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 479/10
5277163

BETWEEN IONE KARINA REUBEN,
applicant

AND RADIUS RESIDENTIAL
HEALTHCARE LTD,
respondent

Member of Authority: James Wilson

Representatives: Nelson Reuben for the applicant
Peter Kiely for the respondent

Investigation Meeting: 16 July 2010 at Paihia

Submissions received: 3 August 2010 from the applicant
23 July 2010 from the respondent

Determination: 12 November 2010

DETERMINATION OF THE AUTHORITY

Ione Reuben's employment relationship problem

[1] Ms Ione Reuben was employed by Radius Residential Healthcare Ltd (Radius) at the Company's Baycare Home and Hospital (Baycare) in Paihia, from July 2007 until she resigned in late June 2009. Although originally appointed as a part-time caregiver, in October 2008 she was appointed as an acting Duty Leader on the night shift and by the time of her resignation was working on average 40 hours per week. Ms Reuben says that during her employment by Radius she was subject to a number of unjustified actions by her employer which were to her disadvantage. She claims that she has personal grievances against her employer for its unjustified actions, in particular:

- On 20 April 2009 she received a letter from the Facility Manager, Gail Kopa regarding a complaint from a resident, but no follow up action was taken and no explanation was given to her regarding the outcome of Ms Kopa's investigation (Ms Reuben apparently heard from another caregiver that the complaint had been withdrawn)
- On 3 June 2009, while on annual leave in Auckland, Ms Kopa rang asking her to return to work due to a shortage of staff. (Ms Reuben was unable to accede to this request); and,
- On 16 June 2009 when she returned to work from bereavement leave she found that her roster had been changed with only 8 rostered shifts in a fortnight and the removal of the team leader responsibilities.

[2] In her statement of problem Ms Reuben said that Radius had breached her employment agreement, that she had a personal disadvantage grievance and had been discriminated against because she was a union delegate. She sought redundancy payments and \$10,000 compensation for the hurt and humiliation that Radius' actions had caused her. She also sought an apology and a written reference.

[3] Radius' say that all of its actions in dealing with Ms Reuben were fair and reasonable in the circumstances and that they made every effort to resolve matters with her when her concerns were brought to their attention.

The issues for determination

[4] The issues for determination in this matter are whether the actions of Ms Reuben's employer were to her disadvantage and, if they were, whether they were *what a fair and reasonable employer would have done in all the circumstances*. If they were not then Ms Reuben has a personal grievance against Radius for each of the unjustified actions and I will be required to determine what, if any remedies she is entitled to.

The events which lead to Ms Reuben's claims

[5] It is important to note when reading the following chronology that Ms Reuben mainly worked the night shift and her manager, Ms Kopa, worked during the day. Because of the difficulty in communication this caused the practice had arisen over time that if Ms Reuben wanted to communicate with Ms Kopa she would leave note under her office door. Similarly Ms Kopa would leave a note in a sealed envelope on the staff notice board addressed to Ms Reuben.

[6] When she first commenced work at Radius, Ms Reuben was employed on a part-time basis working a maximum of 32 hours per week. However by May 2009 her hours had been increased to an average of 80 per fortnight.

[7] In October 2008 Ms Reuben was appointed to undertake Duty Leader duties on the night shift. These additional responsibilities attracted a small additional payment. Ms Reuben confirmed at the Authority's investigation meeting that both parties had understood that this appointment, and the additional remuneration, would cease when Radius appointed a registered or enrolled nurse.

[8] On 20 April 2009 Ms Reuben received a letter from Ms Kopa advising that a resident had complained about Ms Reuben *for abrupt behaviour verbally and also that you were rude to her*. This letter outlined the complaint in more detail and asked Ms Reuben for an explanation in writing the next morning. Ms Reuben did not supply a written response but subsequently heard, from another staff member, that the resident had withdrawn the complaint. Ms Reuben says that this matter caused her a good deal of stress as she was left not knowing what if anything was to happen regarding the resident's complaint. She made no attempt to contact Ms Kopa to enquire as to what had happened.

[9] In early June 2009 Radius recruited an Enrolled Nurse to work the night shift at Baycare.

[10] On 5 June 2009 Ms Reuben proceeded on annual leave. Although due to return to work on 9 June she did not return to work due to a family bereavement until 16 June 2009. It was on her “rostered off” days immediately preceding this leave that Ms Reuben received a phone call from Ms Kopa asking her to return to work due to a shortage of staff. Because she was already in Auckland Ms Reuben declined the request.

[11] On 8 June 2009 new draft rosters, covering the period 22 June to 5 July were posted on the staff notice board. This new roster incorporated the newly recruited Enrolled Nurse, reduced Ms Reuben’s working hours by one shift per week and ceased the temporary additional Duty Leader allowance which had been paid to Ms Reuben. Radius say that they were in the habit of posting draft rosters to give the staff concerned an opportunity to request any changes that they may wish to make.

[12] Unfortunately due to her bereavement leave Ms Reuben did not return to work until 16 June 2009. Equally unfortunately Ms Kopa was also absent, on sick leave, from 18 to 21 June. However Radius point out that both the Assistant Facility Manager and the Clinical Manager, who regularly deputised for Ms Kopa, were available to discuss the roster with Ms Reuben.

[13] Although on different shifts, Ms Reuben and Ms Kopa both worked on 21 and 22 June 2009. Ms Kopa says she did not consult with Ms Reuben about the roster changes due to pressure of other work and the difference in their shifts. Ms Reuben did not attempt to contact Ms Kopa or the other Managers.

[14] On 23 June 2009 Ms Reuben did not work as she was sick. Her next rostered shift was 26 June 2009. On 26 June Nelson Reuben, Ms Reuben’s husband, phoned Baycare and spoke to the Assistant Facility Manager, Ms Lynelle Ngakuru, advising her that Ms Reuben would not be coming to work that night and would be resigning. Ms Ngakuru immediately telephoned Ms Kopa who shortly afterwards spoke to Mr Reuben. In her evidence Ms Kopa recalls this conversation in the following terms:

(Mr Reuben) answered the telephone and said that (Ms Reuben) was resigning because she had not been consulted about the roster change. I said I was sorry and explained about the safety reasons behind the change and my intending to offer (Ms Reuben) the replacement afternoon shift.

I asked to speak to (Ms Reuben) to explain all this but (Mr Reuben) said that (she) would not speak on the telephone. (Mr Reuben's) manner was quite abrupt and just stated that (Ms Reuben) had lost all interest in the job.

(Mr Reuben) told me that (she) was resigning and I informed him that any resignation would need to be in writing. Later that day when I rang (Ms Reuben) again, (Mr Reuben) told me that (Ms Reuben) still intended to resign and that she had been signed off work for two weeks due to sickness. I reminded him that the resignation needed to be in writing and that I would need a copy of the medical certificate.

I made several attempts to speak to (Ms Reuben) and apologise for the misunderstanding via phone, mail and offering to drive to her home but at no time would she talk to me.

[15] On 26 June 2009 Ms Kopa wrote to Ms Reuben apologizing for not communicating with her regarding the roster changes and offering to discuss any concerns with her in person. Unfortunately this letter was couriered to the address on the Radius file which was no longer correct.

[16] After discussions with a New Zealand Nurses Organizations (NZNO) official Ms Kopa met with Mr Reuben on 1 July 2009. At this meeting Ms Kopa gave Mr Reuben a copy of the letter of apology. Mr Reuben gave Ms Kopa a formal letter of resignation from Ms Reuben together with a copy of a medical certificate stating that she was unfit for work until 10 July. Mr Reuben outlined at length Ms Reuben's distress and loss of trust in Radius. Despite this meeting Ms Reuben did not withdraw her resignation.

[17] Despite the medical certificate provided by Ms Reuben she commenced employment at the Kaikohe Care Centre on 6 July 2009.

Discussion

Constructive dismissal

[18] Ms Reuben did not include a claim in her statement of problem that she had been constructively dismissed. However during the investigation meeting Ms Reuben suggested that she had no option but to resign. Even if, by making this comment, Ms Reuben was raising a specific grievance on the grounds that she had been constructively dismissed, such claim would be well outside of the statutory timeframe

for raising a personal grievance. Radius does not consent to such a grievance being raised out of time and Ms Reuben has not applied for leave to do so.

[19] **As no claim has been raised it is not necessary for me to determine whether or not Ms Reuben was constructively dismissed. However for completeness I would comment that such a claim would be unlikely to succeed.** Even if Ms Reuben was aggrieved at how her employer treated her, she was certainly not in a position of having no option but to resign. In fact her employer went out of its way to apologise to her and to attempt to assuage her sense of grievances and to persuade her not to resign. At the investigation meeting Ms Reuben openly accepted that several factors led to her resignation including the time and cost of the daily travel from her home in Kaikohe. It seems that she was aware that it was probable that a position was available in Kaikohe. She also stated that she did not wish to continue doing aged care. Under all of these circumstances a claim of constructive dismissal would almost certainly fail.

Is Ms Reuben entitled to redundancy payment?

[20] Again Ms Reuben did not pursue this aspect of her claim. In any event, for similar reasons to those set out in [19] above, this claim could not have succeeded as **Ms Reuben was not redundant.**

Discrimination

[21] Another of the claims made in Ms Reuben's statement of problem is that she was discriminated against because of her membership of a union. In the course of my investigation no evidence was produced that any such discrimination occurred. On the contrary it is clear that Radius was quite supportive of her role as a Union delegate and provided paid time off work for her to attend an NZNO conference. **Ms Reuben was not discriminated against because of her role as a union delegate.**

Radius's handling of the resident's complaint

[22] The way in which Ms Kopa managed the complaint from the resident caused Ms Reuben a good deal of unnecessary stress. Given the usual method of communication it was reasonable (although not ideal) for Ms Reuben to be informed of the complaint by way of a letter from Ms Kopa. However this should have been followed up in person and certainly she should have been informed (in writing given that this was the

way that she had been advised) that the complaint had been withdrawn and that there would be no record kept on her file. Instead she was left in limbo, until advised by a colleague, with the possibility of disciplinary action hanging over her head. Ms Kopa's failure to properly communicate with Ms Reuben caused her undue stress. **This oversight on Ms Kopa's part was unjustified and in this regard Ms Reuben has a personal grievance.** On the other hand it is also significant that Ms Reuben did not make any enquiries regarding this complaint at the time and in fact did not raise any concerns regarding how it was handled until after she had resigned. As Mr Kiely points out in his closing submissions the inference can be drawn from this silence that she knew that the complaint been withdrawn and that she was not sufficiently concerned at the time to follow it up. This lack of enquiry contributed to the situation which gave rise to her grievance and must impact on any financial remedies that should be awarded.

The request to return to work from annual leave

[23] Although the Ms Reuben may have felt that the request for her to return to work was an intrusion it can neither be said to have been to her disadvantage nor unreasonable. Ms Kopa was faced with a shortage of staff. She contacted Ms Reuben to see if she was available to work. Ms Reuben declined, as she was entitled to do. There is no evidence that there were any adverse consequences for Ms Reuben. **Ms Reuben does not have a personal grievance against Radius because of the request that she return to work after departing on annual leave.**

The change in roster

[24] Ms Kopa says that due to the unfortunate series of events (Ms Reuben's bereavement leave and her own absence on sick leave) she simply overlooked advising Ms Reuben of the change in roster and that she intended absolutely no malice. She points out that Ms Reuben made no effort to make contact with her or the other available managers to query the changes or to convey her unhappiness. Immediately she became aware of Ms Reuben's concerns she attempted to rectify the situation and offered to apologize both in person and in writing. I accept that Ms Kopa's actions were neither motivated by malice nor intentional but rather a simple oversight on her part. Nevertheless Ms Reuben was entitled to proper consultation regarding a change which was not simply an alteration of her rostered hours but,

according to the posted roster, a reduction of those hours and the removal of an allowance. The new Enrolled Nurse was appointed before Ms Rubin proceeded on annual leave and bereavement leave and Ms Kopa must have known at that point that this would impact on Ms Reuben's roster. While the respective shift arrangements made communicating with Ms Reuben a little difficult it was even more important that her employer make every effort to ensure that she was properly informed of the changes. Radius failed to consult with Ms Rubin and that failure to consult resulted in unnecessary anxiety and stress. **Ms Reuben has a personal grievance against Radius for their failure to consult with her regarding the changes to the roster.**

[25] Once again I am struck by Ms Reuben's failure to make her concerns made known to her employer. The Employment Relations Act (the Act) at section 4, places an obligation on both parties to an employment relationship to deal with each other in good faith. In particular:

(1A) The duty of good faith in subsection (1) –

(a)...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;

While Radius had an obligation to consult with Ms Reuben, the duty of good faith also placed an obligation on Ms Reuben to be *responsive and communicative*. This failure to communicate on Ms Reuben's part contributed to the situation which gave rise to her personal grievance and again will reflect in the level of financial compensation awarded.

Apology and reference

[26] As I advised Ms Reuben at the Authority's investigation meeting, it is not within the Authority's jurisdiction to require an employer to apologise to, or to provide a reference to, an employee. I note that Ms Kopa has provided a fulsome apology to Ms Reuben regarding the miscommunication surrounding the changes to her roster.

Summary of findings

[27] By way of summary of the findings set out above

- **As no claim has been raised it is not necessary for me to determine whether or not Ms Reuben was constructively dismissed. However for completeness I would comment that such a claim would be unlikely to succeed.**
- **Ms Reuben was not redundant.**
- **Ms Reuben was not discriminated against because of her role as a union delegate.**
- **Ms Reuben has a personal grievance due to the failure by Radius to properly communicate with her regarding the outcome of the complaint by a resident, thereby causing her undue stress.**
- **Ms Reuben does not have a personal grievance against Radius because of the request that she returned to work from annual leave.**
- **Ms Reuben has a personal grievance against Radius for their failure to consult with her regarding the changes to her roster.**

Remedies

Contribution

[28] I have found that Ms Reuben has two personal grievances against her former employer, Radius Residential Healthcare Ltd. Before determining what if any remedies she is entitled to, section 124 of the Act requires that I must consider *the extent to which (Ms Reuben) contributed to the situation that gave rise to the personal grievance*. I have already expressed my concerns at Ms Reuben's failure to communicate with Radius regarding both of the issues which led to her grievances. Had she done so I have no doubt that, at very least, her anxiety would have been dramatically reduced. I am left with the uncomfortable feeling that Ms Reuben may have decided to resign from her position, for her own reasons, and that Radius's failure to communicate simply provided the catalyst and excuse for her to do so. Whatever her motivation, Ms Reuben's failure to raise her concerns had a major impact on the situation which gave rise to her personal grievance. The level compensation I would otherwise have awarded has consequently been reduced by 50%.

Compensation for hurt and humiliation

[29] **In terms of section 123(10)(c)(i) of the Employment Relations Act, Radius Residential Healthcare Ltd is to pay Ms Reuben \$1000.00, without deduction of tax, as compensation for the hurt and humiliation caused to her by their unjustified actions.** To avoid any doubt: this amount has already been reduced by 50% to take account of Ms Reuben's contribution to the situations which gave rise to her personal grievances.

Costs

[30] As Ms Reuben was represented throughout the Authority's investigation by her husband, there is no question of costs to be determined,

James Wilson

Member of the Employment Relations Authority