

**Attention is drawn to the order
prohibiting publication of certain
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 190
5306938

BETWEEN TANIA MARIE SMITH
Applicant

AND McGLYNN HOMES LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
Susie Staley, Counsel for Respondent

Investigation Meeting: 10 February 2011 at Dunedin

Submissions Received 23 March 2011 from Applicant
18 February 2011 from Respondent

Determination: 2 December 2011

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] I prohibit from publication the names and/or any information about residents in the homes that McGlynn Homes Limited operates.

Employment relationship problem

[2] I wish to express my regret to the parties for the delay in determining this matter. Following the Christchurch earthquake on 22 February 2011 the Authority did not have access to its building in Christchurch until late July 2011. This meant that the file in this matter and the notes of evidence were not available to the member until comparatively recently and, at a time, when the Authority was still required to deal with ongoing matters some requiring urgent attention. I sincerely regret any inconvenience this has caused to the parties.

[3] Tania Smith commenced employment with McGlynn Homes Limited (McGlynn) in April 2009 as a support worker. McGlynn provides residential care in accordance with contracts with the Southern District Health Board, Ministry of Health and ACC for a variety of individuals. Ms Smith was party to an individual employment agreement with McGlynn signed on 27 May 2009. From the time of Ms Smith's appointment, she worked at a home operated by McGlynn. I shall refer to that home as 15. The residents at that home have multiple sclerosis and Parkinsons. When Ms Smith commenced her employment, she was working between 8am and 1pm Monday to Friday. This later changed to 7am to 3pm morning shifts.

[4] Ms Smith raised a personal grievance, alleging unjustified actions on the part of McGlynn that caused her disadvantage, for the first time in a statement of problem lodged with the Authority on 8 June 2010. At that time, Ms Smith was still an employee at McGlynn although, before the matter could be investigated by the Authority, she resigned from her employment giving two weeks' notice from 23 August 2010. That resignation is not the subject of a separate personal grievance.

[5] After McGlynn lodged a statement in reply, the Authority held a telephone conference with the parties. Ms Smith attended that call as did Ms Staley and Timothy Hannagan the owner of McGlynn. The parties had already attended mediation during the disciplinary process following a request by Ms Smith's solicitor, Sharon Lont. The disciplinary process was put on hold whilst mediation took place. Ms Staley and Mr Hannagan said during the telephone conference that it was unclear what conditions Ms Smith believed to have been affected to her disadvantage by its alleged unjustified actions. Ms Smith agreed during the telephone conference to provide further details about these and she duly did in a letter dated 30 August 2010. McGlynn then provided a further response to those matters.

[6] An investigation meeting was originally scheduled for 17 November 2010, however at the respondent's request it was adjourned. Ms Smith said that such adjournment caused her loss of wages because she was unable to undertake a bar managers course that would have resulted in an increase in her hourly rate. I shall return to this later. A further meeting was scheduled and took place on 10 February 2011.

[7] Ms Smith seeks \$15,000 compensation and \$3,000 for her lawyer's fee during the disciplinary process and mediation.

[8] McGlynn does not accept that its actions during the investigation process were unjustified or such that they caused Ms Smith disadvantage.

The issues

[9] The alleged unjustified actions that Ms Smith says caused disadvantage were set out in her letter of 30 August 2010 and by agreement became the actions to be investigated by the Authority.

[10] They are set out below:

- Ms Smith was provided with a letter containing allegations for her to respond to that she says caused her stress resulting in her having to take sick leave;
- There were changes to Ms Smith's conditions of employment without her agreement being hours, place of work and that she worked in a place where she felt that she could not trust the staff or management;
- Ms Smith was required to work in an unsafe environment and was bullied and intimidated by McGlynn's manager, Suzanne Connor, while under investigation;
- Ms Smith was not able to return to 15 because it was no longer safe because of a breach of confidentiality by Ms Connor;
- Additional allegations were added to those already made throughout the process that impacted on Ms Smith's ability to continue to undertake her role with the same degree of enthusiasm because of a lack of concentration;
- That Ms Smith had to lie to staff and residents at the place she was transferred to [about the reasons she was there].

[11] The Authority needs to consider evidence in relation to each of the allegations that Ms Smith alleges were unjustified during her employment. Under the test of justification in s.103A of the Employment Relations Act 2000, the Authority is required to objectively determine whether the actions complained of, and how

McGlynn acted, were what a fair and reasonable employer would have done in all the circumstances at the time the action occurred. The Authority is also required to consider whether the conditions of Ms Smith's employment were affected to her disadvantage by the action of McGlynn if it is found to be unjustified.

The employment agreement

[12] The hours of work provision:

3) Hours of Work

- (a) *The ordinary hours of work per week shall be stated on the third schedule to this agreement.*
- (b) *Such normal hours may be varied by agreement between the employer and the employee and such agreement shall not be unreasonably or arbitrarily withheld by the employer and/or the employee.*
- (c) *Ordinary hours shall be continuous and worked within a span of 10 hours from the time of commencement.*
- (d) *Rosters will be available for an employee a fortnight in advance of their commencement. Once posted rosters will only be changed with due cause and the mutual agreement of the employer and employee.*

[13] The third schedule attached to Ms Smith's employment agreement referred to the following:

4. Place of Work

The employee will work at McGlynn Homes Limited

5. Hours of Work

The parties agree that the employee's hours of work shall be 25 hours per week, 5 hour shifts per day.

[14] An updated third schedule was signed by Ms Smith on 10 June 2010 and will assume some importance in this determination. That schedule had been sent to Ms Smith on 17 February 2010 to be signed but she had not signed and returned it. This was followed up by McGlynn with Ms Smith in a letter dated 7 May 2010. The third schedule advised Ms Smith of her right to take independent advice on the agreement. Ms Smith signed the new third schedule on 10 June 2010 and McGlynn signed it on 26 June 2010. The updated third schedule contained a new hours of work provision:

Hours of work

The parties agree that the employee's hours of work shall be 4 on 2 off 7.5 hour shifts as rostered.

[15] The updated schedule also provided for an increase in Ms Smith's hourly rate from \$14.00 per hour to \$14.50 per hour.

Background to the statement of problem being lodged

[16] Ms Smith was on her last few days of a period of annual leave when she received a letter from Ms Connor dated 6 April 2010 asking her to attend a meeting on 12 April at 11am to discuss some alleged issues. The letter recommended that Ms Smith bring a support person with her to the meeting and the alleged issues were described as related to the employment agreement and the code of conduct under gross misconduct and that, if proven, they could result in instant dismissal.

[17] The allegations were that Ms Smith:

- Contacted a friend, fellow employee Donna Flaws, and discussed personal and confidential information about a resident;
- On 30 March, Ms Smith received a call from Ms Flaws and spoke to her for a considerable period of time in work time;
- On 31 March 2010, there was a complaint from a new staff member, Annie, that Ms Smith was unwelcoming, intimidating and negative, left a resident on a shower/toilet chair for more than an hour and talked to a resident for a long period of time who also treated the complainant with some contempt and this resident stated to the complainant *this place is going to lose staff, mark my words because of management.*

[18] Ms Smith said the receipt of this letter caused her stress and she had to take two weeks sick leave as a result of a chest infection and feeling physically sick with a headache.

[19] After Ms Smith received the letter she decided that, given the possible disciplinary outcome, she would instruct a solicitor. Ms Smith instructed Ms Lont. Ms Lont confirmed to McGlynn that she had received these instructions but advised that the date set of 12 April 2010 for a meeting was not suitable. Ms Lont also requested a copy of Ms Smith's employment agreement and code of conduct.

[20] Arrangements were made by McGlynn to provide these documents to Ms Lont and, when they were provided, there was reference made to the unsigned updated third schedule that had been provided to Ms Smith in February 2010. Ms Connor also emailed Ms Lont and advised her that a further issue had arisen and this was then set out in a letter dated 13 April 2010. Ms Connor said in the email that she believed it was important Ms Smith not return to 15 until the investigation meeting occurred and the alleged incidents had been investigated. Ms Connor said that when Ms Smith was to start work, she was to go to an alternative workplace that I shall refer to as 40, another McGlynn facility and that Ms Smith's roster of four on and two off was to continue.

[21] On 13 April 2010, Ms Connor sent a letter to Ms Lont with an additional allegation to those in the letter of 6 April 2010. In her letter, Ms Connor advised that a staff member, Janice, was anxious about her welfare and was feeling intimidated and stressed at having received two phone calls and a text message from Ms Smith on 8 April about matters that were the subject of the disciplinary letter. There was also reference in the letter to some concerns about Facebook conversations and entries.

[22] Ms Lont advised Ms Connor that Ms Smith was suffering from stress and was very uncomfortable about returning to work in the interim period. Ms Lont asked that as Ms Smith had exhausted her sick leave she be able to remain off work on full pay until the investigation was completed.

[23] By letter dated 19 April 2010, Ms Connor responded to this request. She advised that McGlynn was not prepared to pay Ms Smith while she was unwell but had exhausted her sick leave. She noted in her letter that McGlynn had the right to investigate the alleged issues and Ms Smith had a right of reply. She acknowledged that this could be difficult for both parties but that McGlynn needed to ascertain what had occurred and to deal with the situation before it got out of hand. A meeting date was confirmed in the letter for Thursday, 22 April 2010.

[24] On 22 April 2010, Ms Smith attended the meeting with Ms Lont and Ms Connor attended with Tim Hannagan the owner of McGlynn. There was discussion about allegations that had been received and Ms Smith had an opportunity to give an explanation to each of them. Ms Connor and Mr Hannagan advised that another staff member, senior house supervisor Amanda Tait, would carry out an investigation into the allegations. Ms Smith, in her letter advising of alleged

unjustified actions, complained about the lack of independence of Ms Tait as she was a staff member at McGlynn. Ms Connor and Mr Hannagan said that Ms Smith did not raise the concern about Ms Tait at the time of the meeting and neither did Ms Lont. I accept Ms Smith only raised this concern after Ms Tait had completed her investigation.

[25] The change of workplace for Ms Smith from 15 to 40 was also discussed at the meeting. There is no dispute that Ms Smith did not want to work at 40. Ms Connor said that in making that decision she took into account that there had been a complaint made against Ms Smith by another staff member at the same residence and there were also some boundary issues with a resident at 15.

[26] Ms Smith said that she was told to lie to other employees at 40 who asked her why she was working there from 15. Ms Connor denies that there was an instruction to lie. She said that she recognised there was a need for all parties to maintain some confidentiality about the matter. Mr Hannagan in his evidence said that Ms Smith asked what she should tell people at 40 and he responded that she should say she was there for rehabilitation training. Ms Smith did not accept that she asked that question. I am not satisfied that there was a clear direction or instruction to lie. Instead I find rehabilitation training was in all likelihood put forward given the need for confidentiality and maintenance of dignity in a temporary change of workplace for Ms Smith.

[27] Ms Smith complained that Ms Connor was intimidating during the meeting and she would put her hand up when Ms Smith was talking to stop her doing so. Ms Connor accepted it was possible she did raise her hand and she and Mr Hannagan both referred to the meeting as a challenging one. Ms Connor denied that she raised her hand to stop Ms Smith talking but rather did it if Ms Smith interrupted her. I am not satisfied that this had any significant impact on the overall fairness of the meeting.

[28] One of the other complaints at that meeting was that Ms Smith said it was evident that Ms Connor had surfed through her Facebook entry. Ms Connor denied this and said she was obliged to follow up a complaint that had been made about the entries as was outlined in the 13 April 2010 letter. I do not find anything in particular turns on that matter. Ms Smith was hurt by reference to her mother who had recently passed away. Although I accept that Ms Smith was not happy about this, Ms Connor in all likelihood was simply trying to empathise with her. Mr Hannagan in his

evidence could not recall anything hurtful or unnecessary being said to Ms Smith about that. I am not satisfied that it was Ms Connor's intention to be hurtful.

[29] On 26 April 2010, Ms Connor sent a letter to Ms Smith and Ms Lont setting out the allegations and the explanations given by Ms Smith to each of them. There was no response to that letter and from that Ms Connor could accept that there was agreement with what was recorded by way of explanation. It was set out in that letter that until the investigation was completed by Ms Tait; Ms Smith would be placed at 40 and would return from sick leave into the roster she was on at 15 working from 7am to 3pm. In the letter, Ms Connor advised that McGlynn would get back to Ms Smith as soon as possible and within a two week period. On 26 April 2010 Ms Smith commenced at 40.

[30] On 27 April 2010, Ms Connor wanted to talk to Ms Smith about a restructuring at 15. She proposed a meeting the following day on 28 April 2010 and explained that as far as she was concerned she still saw Ms Smith as an employee at 15 and that this restructuring was going to impact on the shifts at that workplace. Ms Connor said that a similar restructuring had already taken place at 40. Ms Connor asked to see Ms Smith in the manager's office at 40. Ms Connor said she found nothing unusual about the exchange but Ms Smith set out at some length that during what was a short exchange she found Ms Connor intimidating and bullying including standing over her. Ms Smith said that she was left with a clear view that Ms Connor wanted to make life so unpleasant for her that she would leave. Ms Smith decided that at any future exchange with Ms Connor, she wanted to have a support person present.

[31] A meeting to discuss the restructuring and changes to shifts/hours was rescheduled for 29 April 2010 at which a support person for Ms Smith was present. During the investigation meeting I was handed a copy of two letters about the restructuring. The first of these was provided at the time of the discussion with Ms Smith – letter dated 27 April 2010. Ms Connor wanted to discuss the need to restructure the roster at 15 to enable the needs of the residents to be met. The proposal as set out included that each person would complete their share of am and pm shifts. This was a change to the hours that Ms Smith had been doing as she had only been undertaking morning shifts. The discussion apparently went without incident and although it was made clear that Ms Smith would prefer mornings, she

said if she had to do afternoons she would. In her evidence Ms Smith said that when she made that concession she was talking about being prepared to do afternoon shifts at 15 only and not at 40.

[32] Ms Smith was concerned that staff at 15 had a meeting to give feedback but the invitation to such a meeting had been crossed out in her letter. Ms Connor explained that she thought it would be inappropriate to put Ms Smith in a position where she had to attend a meeting with the other staff at 15 and that she decided to consult one on one with Ms Smith.

[33] Ms Smith did not provide any further feedback to Ms Connor between that meeting on 29 April and 10 May 2010 although I accept she was invited to do so if she wanted to. There is a dispute in the evidence about when Ms Connor made contact with Ms Smith to advise that the proposed changes were proceeding. I think it likely that there was a telephone discussion between 13 and 17 May 2010. Ms Smith was subsequently provided with a letter dated 10 May 2010 that confirmed the changes and in relation to her situation provided:

Tania, as you have been requested to work at 40 until further notice these changes will take effect on the 40 roster. You have indicated to me verbally that morning and afternoons was an option. This has now been put in place.

[34] Although Ms Smith was advised that the manager at 40, Shona, would talk to her about the change in the rosters and when they would occur such a discussion did not take place. There was then what was generally agreed to be a *muck up* with the rosters at 40. The evidence supports that rosters were not placed with up at the times required and on occasion there was no reference to Ms Smith on the rosters. Matters came to a head when Ms Smith appeared on the roster doing afternoon shifts. Ms Lont was asked by Ms Smith to assist. Ms Lont questioned Ms Connor about the matter. I find that Ms Connor then spoke to Ms Smith and advised that there had been some miscommunication with Shona and she apologised and said that there was to be a two week period before the change. There was a dispute as to whether Ms Connor had mentioned this two week period earlier although nothing turns on it.

[35] I requested copies of the relevant rosters to establish when the hours changed to afternoon and was able to confirm that the change to afternoon/evening scheduling

of hours for Ms Smith occurred for the week ending 6 June 2010 and this was after the mediation took place on 28 May 2010.

[36] Ms Smith in her letter referred to another incident when Ms Connor passed a resident's room at 40 and asked Ms Smith to shut the door possibly saying *Privacy*. Ms Smith felt that she was being *picked on*. I accept Ms Smith may well have felt like that but Ms Connor had little knowledge of the effect of this on Ms Smith. The evidence did not support that any such interaction was deliberately designed to bully Ms Smith and even if the exchange was less than satisfactory I am not satisfied that it was unjustified or such that I could conclude it was bullying in nature.

[37] Whilst these discussions about hours of work and rosters were underway Ms Tait duly undertook her investigation into the allegations and on 6 May 2010 provided a written report with her findings to Ms Connor. There were some additional new matters referred to in the report that Ms Tait described as boundary issues. These had not previously been referred to.

[38] On 7 May 2010, within the two week timeframe promised, Ms Connor wrote to Ms Smith outlining the outcome of the investigation. In relation to some of the issues, Ms Smith's explanation was accepted. In relation to other issues, this was not found to be the case. New issues that the investigator was informed of were also included in the letter as was the need for Ms Smith and McGlynn to have a discussion about the issues and to reach a resolution regarding the investigation. Ms Smith was asked to remain working at 40 until the matter was resolved.

[39] Ms Lont then wrote to Mr Hannagan and advised that, having read the letter containing the investigation outcomes; Ms Smith felt stressed and anxious and wanted to have mediation with a Department of Labour mediator.

[40] The process therefore was placed on hold. Mediation was agreed to and took place on 28 May 2010. Ms Connor did not attend the mediation and in fact had no further contact with Ms Smith after that date. Mr Hannagan attended mediation and he said that, at the end of that process, he expected there to be some continuation of discussions but shortly thereafter the statement of problem was received and he did not think it would be appropriate to take any further steps.

[41] At the point therefore that Ms Smith resigned there had been no outcome to the disciplinary process.

Determination

6 April 2010 letter and new allegations

[42] McGlynn had complaints from two employees; one was in writing and one verbal involving Ms Smith and needed to discuss these issues with Ms Smith. Ms Smith was advised to bring a support person to the meeting to enable that to take place. The use of the word *gross* in relation to misconduct in the letter was somewhat unfortunate because the code of conduct annexed as the first schedule of Ms Smith's employment agreement referred to actions as serious misconduct and misconduct. Some of the initial issues may if established have amounted to serious misconduct but others such as excessive use of the telephone would, if established, have been misconduct. I am not satisfied that the terminology used makes a justified action unjustified. I do not find that the sending of the letter by McGlynn on 6 April 2010 was unjustified or that Ms Smith was disadvantaged by the issues being raised in the letter. Although the disclosure of additional allegations was upsetting to Ms Smith she had an opportunity to answer the allegations from Janice and would have, had the process not been put on hold, had that opportunity in terms of the new issues Ms Tait referred to in her report.

[43] Ms Smith said she believed that Ms Connor wanted her to leave McGlynn because Ms Smith had witnessed two or so weeks prior to the 6 April 2010 letter a key throwing incident involving Ms Connor. Ms Connor adamantly denies that and/or any allegation of predetermination. The Authority did not have evidence before it to be satisfied that there is a link between any such earlier incident and the letter being written and allegations raised. I find it less likely that there was a manufactured complaint or complaints where there was a letter in writing from another employee raising concerns and Ms Tait as investigator investigated the complaints independently and had clear instructions from Ms Connor that Ms Connor did not wish to be involved in the investigation of the issues.

Changes to conditions of work

Place of work

[44] Ms Smith's place of employment is not described specifically in her employment agreement but she had worked at 15 since her appointment and there would need to be some justification for a change. I do not find that the fact another

staff member had complained would in itself have been adequate justification for a change in workplace. I do find though that when combined with the further allegations from Janice about the text message and phone calls and the boundary concerns regarding a resident, a temporary change of work place whilst an investigation was undertaken was justified. I acknowledge that Ms Smith in all probability felt disadvantaged by being required to work at 40 but I am not satisfied such a requirement on a temporary basis was an unjustified action. I do note that a performance review undertaken by the Manager at 40 was generally positive about Ms Smith.

Hours of work

[45] Ms Smith's employment agreement provided that normal hours may be varied by agreement and that such agreement shall not be unreasonably or arbitrarily withheld by the employer and/or the employee. Ms Smith had been working morning shifts only and this continued until 2 June 2010. I am satisfied that the morning shifts had become Ms Smith's ordinary normal hours of work under her employment agreement.

[46] Ms Connor spoke to Ms Smith about a restructuring of the roster at 15 in late April 2010. The proposed change was to enable the needs of the residents to be met and cover the house for 24 hours per day. A significant part of the proposal for Ms Smith was that there was to be no set days or shifts except for night shifts. Ms Smith whilst stating clearly that she preferred morning shifts agreed to undertake afternoon shifts if she had to. Ms Smith now limits such agreement to the roster at 15 and not at 40.

[47] I find that consultation, although on a one on one basis with Ms Smith and not as part of an all up meeting, was nevertheless adequate. Ms Smith was supported at the meeting about the changes to the roster and had an opportunity to provide feedback to the proposal. The restructuring proposal was then adopted and changes made to the rosters that impacted on the hours worked. Ms Smith agreed to vary her hours if she had to at 15 within the terms of her agreement.

[48] The issue then becomes whether it was an unjustified action for McGlynn to require such change to take place at 40 where she was until the investigation was concluded. 40 had already undertaken the restructuring that was being implemented

at 15. In terms of justification I take into account that if Ms Smith been working at 15 there would have been a change to the hours that she worked. The other matter that I have taken into account is that the change to Ms Smith's hours was not implemented until after the parties had attended mediation. She then worked for a little over a week on the afternoon shift at 40 before signing a new third schedule that provided the parties [employer and employee] agreed to the hours of work being 4 on 2 off 7.5 hour shifts as rostered. In final submissions Ms Smith says that she could not really recall signing this and was being harassed by Ms Connor. That I find is less likely. The evidence is that Ms Connor and Ms Smith had no contact after 28 May 2010 and given the importance to Ms Smith about the hours of work I find it less likely that she would have signed the variation if she did not agree to it. Even if I am wrong and the change to hours at 40 was unjustified then I would have found no disadvantage to Ms Smith because they were the hours that she would have been working at 15.

[49] There was an issue over the timeliness and indeed the content of the roster at 40 as it affected Ms Smith. I am satisfied that Ms Connor after being advised of this by Ms Lont took steps to resolve this and given that these steps were prompt and successful then I am not satisfied that this was a disadvantage or an unjustified disadvantage. One of Ms Smith's issues was that she worked more four than five day weeks under the new system and therefore this impacted on her payments received. The analysis of the rosters subsequently provided does not support this and in fact shows Ms Smith gained more hours at 40.

Unsafe environment and was bullied and intimidated by McGlynn's manager, Sue Connor, while under investigation.

[50] I heard evidence from Donna Flaws and Brenda Whiteman both of whom had previously worked at McGlynn. Ms Flaws provided a statement in which she referred to Ms Connor as a bully. Ms Flaws may well have had her own issues with Ms Connor but I am required to reach my conclusions about this allegation on the basis of interactions between Ms Connor and Ms Smith. Ms Connor put some allegations to Ms Smith in April 2010 and held a meeting to hear Ms Smith's explanations to them. Ms Smith was represented at that meeting. That sort of process is going to be difficult and stressful for any employee. The evidence however about the meeting was no different to the sort of processes that are regularly before the

Authority. It would be an impossible situation if an employer could not put any allegations to an employee for fear of being accused of bullying.

[51] After 28 May 2010 Ms Smith had no further contact with Ms Connor and the investigation process was put on hold and there was no outcome to it. There was no evidence that Ms Connor was aware of the effect she had on Ms Smith until later in the process. Ms Connor said that she had heard from other staff that Ms Smith had referred to her as a *bully* and a *bitch* and she found this distressing. Ms Smith denied that she referred to Ms Connor as a *bitch*. Objectively assessed the interactions that Ms Smith gave evidence about with Ms Connor do not support bullying or intimidation.

[52] Ms Smith also complained that she spoken confidentially with Ms Connor about Janice and that Ms Connor had then spoken to Janice and that this prevented Ms Smith returning to 15. Ms Connor denied that. The evidence about this was limited and appeared to have arisen as a result of a conversation between Ms Whiteman and Janice. Janice did not give evidence but denied that she had said the things Ms Whiteman accused her of in a written statement provided to the Authority. This was a serious allegation and I am not satisfied that there is evidence to support it. Ms Smith clearly viewed any discussion with or comment made by Ms Connor after 6 April 2010 very negatively but I am not satisfied that Ms Connor engineered or pre-determined the allegations or their outcome.

[53] There was an issue about Ms Smith being asked to stay on the floor during a staff meeting at 40. I was not satisfied that this was an unjustified action of exclusion. It is likely that someone had to remain on duty whilst the meeting continued on. If there was some misunderstanding then this is the sort of day to day issue that occurs in workplaces. It can usually be quickly resolved by discussion with the manager. There was an issue about Ms Smith being unhappy about working with a support worker on the 3pm to 11pm shift at 40. Ms Smith accepted that she did not formally raise her concerns. I do not find in those circumstances that a continued requirement to work those hours was an unjustified action. I have already found that Ms Smith was not directed to lie about the reason she was at 40.

[54] In conclusion I am not satisfied that this allegation of bullying, intimidation and unsafe environment is made out.

Process put on hold

[55] I have considered whether the placing on hold of the disciplinary process after the lodging of the application with the Authority was unjustified and disadvantaged Ms Smith. The statement of problem referred to victimisation, stress, intimidation, assassination of character, bullying and a flawed process. There had been no discussion about the findings of the investigator at that time. There had been one meeting in the disciplinary process.

[56] After the mediation and the lodging of the statement of problem with the Authority the disciplinary process was simply put on hold. In all the circumstances I am not satisfied that placing the process on hold was unjustified. There could have been an outcome to this matter shortly after 7 May 2010. Instead Ms Smith wanted to attend mediation and then she raised a personal grievance. I am not satisfied that Ms Smith was disadvantaged by not having an outcome to the process. She did not in her statement of problem ask to be returned to 15 and/or for such an outcome to be provided.

Determination

[57] I do not find that Ms Smith has made out her claims that she was disadvantaged by some unjustifiable action by McGlynn and there is nothing further I can do to assist her.

Costs

[58] I have considered costs in relation to the adjournment. I had a letter from the Manager of the Ocean Beach Hotel about the Bar Managers Course. She advised that it was to have taken place on 9 November 2010 and that had Ms Smith undertaken such a course then she would have received an additional \$316.50 gross. The meeting that was to take place with the Authority was on 17 November 2010. Ms Smith in her final submissions said that the exam was on 16 November and she felt her concentration would not have been great with a meeting with the Authority the next date. I do note that an email sent by Ms Smith opposing the adjournment at the time refers to a clash with the hearing. I am not satisfied that there should be any award against McGlynn for the adjournment.

[59] I reserve the issue of costs for the substantive matter. McGlynn have until 23 December 2011 to lodge and serve submission as to costs and Ms Smith has until 27 January 2011 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority