

**Attention is drawn to paragraph 4 containing
an Order Prohibiting Publication of certain
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 431
3102752

BETWEEN DIANE WATERMAN
Applicant
AND MASONIC CARE LIMITED
Respondent

Member of Authority: Trish MacKinnon
Representatives: Peter McKenzie-Bridle, counsel for the Applicant
Paul McBride, counsel for the Respondent
Investigation Meeting: 14 September 2021 at Wellington
Submissions Received: Orally by Zoom on 17 September 2021, and in writing,
from the Applicant and from the Respondent
Date of Determination: 31 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Diane Waterman claims she was unjustifiably dismissed from her role as a caregiver at the Woburn Masonic Home (the Home) on 2 June 2020 following an investigation into an incident involving a resident on 26 March 2020. Mrs Waterman seeks remedies including lost wages and compensation.

[2] Masonic Care Limited (MCL), which operates the Home and employed Mrs Waterman, denies her claims and says she was justifiably dismissed following a full and fair investigation.

[3] At the outset of the investigation meeting, an order was sought prohibiting the publication of the name of the resident referred to in evidence and/or documentation provided by the parties and their witnesses. There was no disagreement between the parties that such an order was appropriate.

[4] I was satisfied there was no public interest in having such information made publicly available and that it was in the interests of justice to make the order, which I accordingly made under clause 10(1) of Schedule 2 of the Employment Relations Act 2000 (the Act). I now confirm the order and make it permanent.

Background

[5] Mrs Waterman had been employed at the Home for approximately 23 years when she was dismissed.

[6] On 26 March 2020, a resident who had put himself on the toilet, but needed help to get off it, asked Mrs Waterman for assistance. A standing hoist was required for that and the Home's policies, and the resident's care plan, required two people to operate the hoist. Mrs Waterman, who said she could find no one to help her, eventually operated the hoist by herself to lift the resident from the toilet and into his adjacent wheel chair.

[7] Mrs Waterman was observed hoisting the resident on her own by Fiona McKay, the then manager of the Home. Ms McKay wrote an incident report about it and suspended Mrs Waterman on pay from her employment while she investigated the matter. In April 2020, Ms McKay stepped back from the investigation, which was taken over by Denise McAlpine, the Facility Manager of another institution operated by MCL.

[8] In the course of her investigation, Ms McAlpine interviewed Mrs Waterman and others. She conducted a Zoom interview with Mrs Waterman on 4 May 2020. Mrs Waterman's counsel, Mr McKenzie-Bridle, who also attended by Zoom, recorded most of the interview. He made Ms McAlpine aware of this part way through the interview and she expressed no concern, commenting that she expected he would be recording it.

[9] Ms McAlpine issued a draft report of her investigation on 15 May 2020 and invited Mrs Waterman to provide any comments she had about the report before she proceeded further.

[10] Mrs Waterman made her response through counsel, and on 25 May 2020, Ms McAlpine issued her investigation report with a preliminary proposed outcome of dismissal. Mrs Waterman had a further opportunity to comment on that proposal before Ms McAlpine made her final decision.

[11] Following Mrs Waterman's response, Ms McAlpine issued her final report on 29 May 2020, confirming her view that dismissal should be the outcome. On 2 June 2020, Ms McAlpine wrote to Mrs Waterman to inform her she was dismissed with immediate effect.

[12] The parties attended mediation but were unable to resolve the matter.

The Authority's investigation

[13] Mrs Waterman and two other witnesses gave evidence on her behalf: John Ryall, a Union official, and Rasela Mulitalo, a caregiver at the Home at the time. Three witnesses gave evidence for MCL: the decision maker in the matter, Ms McAlpine; Warick Dunn, the Chief Executive of MCL; and Angela Walker, a director of the company that provided advice to MCL during the process that led to Mrs Waterman's dismissal.

[14] I have not set out all the evidence and submissions I received from the parties, and am not required to do so.¹ I have, however, carefully considered all such material before making findings on facts and relevant issues of law, and reaching conclusions in this determination.

[15] The determination has been issued outside the timeframe at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Issues

[16] The primary issue for determination is whether Mrs Waterman's dismissal was justifiable.

[17] If her dismissal was not justifiable, issues of remedies and contribution will require determination.

¹ In accordance with s 174E of the Act.

Dismissal justifiable?

Legal considerations

[18] Whether or not a dismissal is justifiable is to be determined on an objective basis by applying the test specified in s 103A of the Act. The test is whether the employer's action, and how it acted, was what a fair and reasonable employer could have done in all the circumstances at the relevant time.

[19] A dismissal is not to be found unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

Evidence of the parties

[20] Mrs Waterman's evidence was that she responded to a call bell ringing in the resident's room on the afternoon of 26 March 2020. The resident, who suffers from painful muscle spasms, needed assistance to get off the toilet and on to his wheel chair which was adjacent. Mrs Waterman looked for another person to help her with the hoist that would be required to lift him but could not find anyone who could help. She said the Home was short-staffed that day, and there were only two other people in the vicinity, one of whom was doing the afternoon teas while the other was already providing assistance to a resident.

[21] Ms Mulitalo, who was one of the other care givers on duty that day, also gave evidence about the short-staffing in the Home on 26 March 2020. The Home normally had Tea Assistants to do the afternoon teas, which would mean the three care givers on duty were free to tend to residents' needs. However, there were no Tea Assistants working that day, for reasons that appeared to relate to the Covid-19 Alert level 4 lockdown which had commenced that day.

[22] Mrs Waterman returned to the resident's room and told him she was unable to find anyone who could help her lift him. She said that by this time the resident was in excruciating pain and begged her to move him. She saw her choices as being to leave him in pain until someone else arrived to help her or to help him as best she could. Mrs Waterman said she quickly assessed the risks and chose the second option, using the standing hoist on her own to help the resident move sideways onto his wheel chair.

[23] When Mrs Waterman was asked in the Home's investigation into the incident why she had not rung the emergency bell, Mrs Waterman said to the best of her knowledge there was no such bell by the toilet. She accepted Ms McAlpine's statement that there was an emergency bell there and said it would not have occurred to her to use it.

[24] As I have already noted, Ms McKay observed Mrs Waterman using the hoist on her own in the resident's room and suspended her from her employment that day. Ms McKay commenced an investigation into the matter as part of which, on 17 April 2020, she interviewed Mrs Waterman, who had her legal representative with her. Ms McKay stepped back from the investigation during the interview when it became clear she would also need to give evidence to it as a witness to the 26 March 2020 event. Mr Dunn then appointed Ms McAlpine to undertake the investigation as an experienced MCL manager who was independent from the Home.

[25] Ms Mulitalo's evidence was that she had been doing the afternoon teas on 26 March 2020 and was walking down the corridor when she heard Ms McKay shouting at someone in a resident's room. Ms Mulitalo realised it was Mrs Waterman who was the subject of the shouting. By the time Ms Mulitalo entered the room, the resident was already in his wheel chair.

[26] Ms Mulitalo said she believed it was not uncommon for staff at the Home to lift residents by themselves. She had been the E tū Union's health and safety representative in the Home in 2019 and had written an incident report about it in December 2019, but said that nothing had been done.

[27] Ms Mulitalo also said she had talked to the Registered Nurse in charge on a night shift in 2020 about a staff member hoisting alone the same resident Mrs Waterman had been dismissed for hoisting. Ms Mulitalo said the Registered Nurse had said she knew the staff member had done it before, and she did not really care. Ms Mulitalo was aware that some staff members who had been reported for hoisting residents on their own had been "*talked to*" but there had been no repercussions for them and Mrs Waterman was the only person who had been disciplined for this.

[28] When interviewed by Ms McAlpine on 4 May 2020, Mrs Waterman acknowledged what she had done contravened the Home's policy. She said it was the first and only time she had used a hoist on her own. When asked if she would ever lift a resident again, Mrs Waterman

answered emphatically that she would not. When Ms McAlpine asked her why she would not do so, Mrs Waterman said for health and safety reasons and because it was against the Home's policy. She reiterated she had not wanted to hoist the resident on her own but said the pain he was in, and his pleading for her help, had broken her heart. She acknowledged it was the wrong decision.

[29] Ms McAlpine is a registered nurse with more than 40 years' experience. By her evidence, over 30 of those years have been in the aged care industry, and more than 25 years have been in management roles. At the time of the Authority's hearing, Ms McAlpine was managing approximately 57 employees. She told the Authority she has had a number of previous experiences of investigating performance issues.

[30] Ms McAlpine gave evidence of the documents with which she had been provided before and during her investigation, and of the steps she had taken during the investigation. She noted that Covid-19 had influenced how the process was conducted. Among those she interviewed was Ms Mulitalo, with whom she communicated by phone and follow-up emails.

[31] Ms McAlpine also had email correspondence from the resident concerned in the 26 March 2020 incident. He confirmed that, when he had asked Mrs Waterman to move him as he was in pain, she had advised him she could not, as two people were required. She had tried unsuccessfully to find someone to assist her and, when she returned alone, the resident said he was almost sobbing with the pain and had begged Mrs Waterman to lift him. He was very grateful to her for having done so.

[32] Before interviewing Mrs Waterman, Ms McAlpine forwarded all the information she had been provided with, and that which she had recently received, to Mrs Waterman and her counsel. Following their Zoom interview, Ms McAlpine undertook further investigation into matters raised by Mrs Waterman. She sent the further information she had gathered to Mr McKenzie-Bridle, inviting any comments he or Mrs Waterman wished to make.

[33] Ms McAlpine sent a copy of her draft report to Mrs Waterman on 15 May 2020. She had concluded Mrs Waterman's action in deliberately hoisting a resident on her own on 26 March constituted serious misconduct. At that stage, she had not reached any conclusion over the outcome that should follow. Ms McAlpine invited Mrs Waterman to provide any comments she and/or her legal representative wished her to consider before she progressed the matter.

[34] Mrs Waterman responded, through her counsel, that she did not believe it to be either fair or reasonable to classify her conduct as serious misconduct and that she believed she had done what was necessary in the circumstances to alleviate the resident's pain. She expressed her belief that other staff had done the same or similar, in similar circumstances, and had not been disciplined. Mrs Waterman said she did not want to name those other staff for fear of retaliation against them by the Home's manager in the same way she believed herself to be targeted.

[35] On 25 May 2020, Ms McAlpine provided her preliminary report to Mrs Waterman. In the report, she referred to having become aware, during her investigation, of other incidents of staff hoisting residents on their own. Ms McAlpine had ascertained two such incidents had been identified as staff starting to lift a resident when discovered by a registered nurse. Management had not been informed. Another incident she uncovered had been reported to the Clinical Manager who, faced with conflicting reports, had not been able to establish the staff member had lifted alone.

[36] Ms McAlpine incorporated into the preliminary investigation report the comments Mrs Waterman had made on the draft report. She noted Mrs Waterman had stated in their interview of 4 May 2020 that she knew it was wrong to have lifted the resident alone but she had felt very pressured by the resident. She had said, in hindsight, she would not do it again. Ms McAlpine stated her view that Mrs Waterman did not "*appear to hold this view consistently as her response to the draft report very bluntly states she did what was necessary in the circumstances to alleviate (the resident's) pain.*"

[37] Ms McAlpine noted her concern that Mrs Waterman did not accept her action was wrong, as indicated by her response to the draft investigation report. She said she had considered at length whether the incident warranted dismissal or whether a lesser outcome such as a final written warning should apply. On the basis of Mrs Waterman's response to the draft report, Ms McAlpine concluded that Mrs Waterman had not "*learnt from this incident and therefore there is a risk that she would do it again given similar circumstances.*" That led Ms McAlpine to the preliminary view that dismissal should be the outcome.

[38] Before making that decision final, Ms McAlpine gave Mrs Waterman the opportunity to respond. Mrs Waterman, in her response, stated her view that Ms McAlpine had misinterpreted her comments on the draft report. She reminded Ms McAlpine she had told her

during their interview the resident was the only person she had ever lifted alone and that, when Ms McAlpine asked her whether she would ever do it again, she had responded very definitely that she would not.

[39] Mrs Waterman also noted that, in her response to the draft report, she had just repeated what she had told Ms McAlpine during the MCL investigation, which was that the resident was in pain and she had done what she thought was necessary to help him with that. Ms Waterman said it was unfair of Ms McAlpine to twist her words to mean something different to what she had said about never lifting a patient on her own again. Mrs Waterman ended her response by saying she did not believe she should lose her job *“for a one off incident that I have said I will not repeat.”*

[40] Ms McAlpine was not persuaded by Mrs Waterman’s assurances and shortly thereafter issued her final report confirming dismissal as the outcome. In referring to Mrs Waterman’s response, she said she believed that, in their interview, Mrs Waterman believed her own statement that she would not lift on her own again. This was not, however, *“the same thing as really feeling it was the wrong thing to do and put her and (the resident) at risk and that she should have taken a different course of action.”* Ms McAlpine said she did not have confidence and trust that (Mrs Waterman) would not do this again.”

[41] Ms McAlpine, who was the sole decision maker, spoke with Mr Dunn before she confirmed her decision.

Submissions and discussion

[42] Mr McKenzie-Bridle submits the decision to dismiss Mrs Waterman was not one a fair and reasonable employer could have reached in all the circumstances at the time and she was dismissed without good reason and/or unfairly. In his submission Ms McAlpine should have taken Mrs Waterman’s assurances that she would never lift a resident on her own again in good faith. She should have given her a formal warning at most, rather than purport to understand better than Mrs Waterman what she was likely to do in the future, should similar circumstances occur.

[43] Further, he submits MCL was influenced by irrelevant factors, including Mrs Waterman’s union membership, in deciding to dismiss her.

[44] With regard to the conduct for which Mrs Waterman was dismissed, Mr McKenzie-Bridle submits it was one-off conduct that was unlikely to be repeated. He disputes it could be categorised as serious misconduct, citing the Court of Appeal in *Northern Distribution Union v BP Oil New Zealand Ltd* where the Court said:

Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.²

[45] In Mr McKenzie-Bridle's submission, Mrs Waterman's action of using the hoist on her own in the particular circumstances was arguably not serious misconduct in terms of the employer's disciplinary procedures: it was not "*deliberate action inimical to the employer's interests.*"³ It was a one-off reaction to a situation in which the Home was short-staffed and Mrs Waterman had to deal with a resident in severe pain who was pleading with her to help him.

[46] Mr McKenzie-Bridle says Mrs Waterman's swift acknowledgement to Ms McAlpine in their 4 May 2020 interview that she knew there were health and safety reasons behind the requirement for two people to be involved in hoisting a resident indicates that she was unlikely to undertake the same action again.

[47] Further, Mr McKenzie-Bridle submits the treatment Mrs Waterman received from the employer was different from that other caregivers received for the same action. He said Ms McAlpine was made aware of other cases in the Home where no disciplinary action had been taken when other caregivers had hoisted residents alone. The resident whom Mrs Waterman had hoisted had provided a written statement in which he asserted two other caregivers had hoisted him on their own in the two weeks immediately preceding Mrs Waterman's action.

[48] In terms of procedure, Mr McKenzie-Bridle submits the investigator failed to interview all relevant people. These included the persons named by Ms Mulitalo and Mrs Waterman as having lifted residents on their own without being disciplined. Nor had the resident concerned in the 26 March 2020 incident been asked to identify the two staff who had lifted him alone.

[49] A further procedural flaw raised by counsel was Ms McAlpine's failure to provide all the relevant material to Mrs Waterman. He asserted Ms McAlpine had not provided Mrs Waterman with copies of an incident report and statements from an unnamed Registered Nurse

² *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA) at 487.

³ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ (EmpC) 311 at 319.

and the Clinical Nurse Manager that were referred to by Ms McAlpine in her final report. They were important as they were material to Ms McAlpine's consideration of the disparity of treatment issue that Mrs Waterman had raised, and to her final decision regarding dismissal.

[50] MCL, through its counsel, submits the investigation process was fair and thorough and that Ms McAlpine was fully justified in reaching the conclusion that Mrs Waterman's dismissal was the appropriate outcome. Mrs Waterman had acted in contravention of the Home's policy and the guidelines for the particular resident's care. She was an experienced care giver who had been trained in the use of the hoist and knew it was dangerous to operate that equipment alone.

[51] In Mr McBride's submission, there is no doubt Mrs Waterman's deliberate action of lifting the resident on her own was serious misconduct and, despite her assurances that she would not do it again, there was no obligation on Ms McAlpine to accept those assurances where she had reason to doubt them. In his submission, the value judgement Ms McAlpine made, not to uncritically believe Mrs Waterman's assurances about her future conduct, was within a range of reasonable value judgements open to her in the circumstances.

[52] MCL rejects Mrs Waterman's assertion of being targeted because she was a union member and also rejects her claim that there was disparity of treatment in her being dismissed for conduct other employees were alleged to have undertaken. It highlights the serious nature of Mrs Waterman's actions and the fact she acknowledged she knew it was against the Home's policy, but did it anyway. In MCL's view, this was clearly serious misconduct and Ms McAlpine was entitled to form the view that dismissal was warranted.

[53] I accept Mr McBride's submissions in respect of Mrs Waterman's claim to having been targeted because of her union membership. There was no evidence provided to support that view.

[54] After carefully considering the parties' respective views, however, I find that MCL has not satisfied the test of justification and dismissal was not an option available to a fair and reasonable employer in all the circumstances at the time. While the case is finely balanced, I have concluded that, although disciplinary action was warranted, dismissal was not.

[55] Ms McAlpine's investigation, which was constrained by the Covid-19 restrictions in force at the time, met some of the requirements of s 103A, in terms of giving Mrs Waterman

the opportunity to be heard and to make further comments on the two iterations of her investigation report before it was finalised. I agree with Mr McKenzie-Bridle, however, that some relevant documents were not provided to Mrs Waterman, in particular those I have referred to at [49] above. These were documents Ms McAlpine referred to when investigating the disparity of treatment issues Mrs Waterman and Ms Mulitalo had raised.

[56] I find it surprising Ms McAlpine, having decided to investigate those issues, did not interview the care givers alleged to have lifted residents on their own, receiving reports only from a Registered Nurse and the Clinical Nurse Manager. By not interviewing the carers, Ms McAlpine was receiving only one side of a situation – that of an observer or a person in a position to decide whether to progress or stifle any investigation of an incident. The reports of the Registered Nurse and Clinical Nurse Manager were not disclosed to Mrs Waterman. I agree with Mr McKenzie-Bridle that this denied Mrs Waterman the opportunity to comment on the employer’s treatment of similar conduct by persons in similar roles to her own. I am not satisfied that these defects in the process were minor and did not result in Mrs Waterman being treated unfairly.

[57] Nor am I satisfied that Ms McAlpine could reasonably conclude she had no confidence that Mrs Waterman would not lift a resident alone again, despite Mrs Waterman’s emphatic denials that she would ever do so. Mrs Waterman’s evidence, which was not disputed, was that the 26 March 2020 incident was the one and only time she had lifted a resident alone. She had a 23 year history as a care giver with the Home and there was no evidence that she was an inveterate rule breaker.

[58] In those circumstances, I find Ms McAlpine’s conclusion to lack a rational basis and to be unduly harsh on an employee who transgressed once, acknowledged she was in the wrong and undertook not to do it again. I accept Mr McKenzie-Bridle’s submission that this was a one-off occurrence and find it was not sufficient reason to justify Mrs Waterman’s dismissal.

[59] I find, in short, Mrs Waterman was unjustifiably dismissed.

Remedies and contribution

[60] Mrs Waterman seeks the payment of lost wages from the date of dismissal to “*the age of retirement*” as well as an order that MCL pays for any increase in tax she faces as a result of

receiving wages in a lump sum. Additionally Mrs Waterhouse seeks compensation of \$40,000 for hurt, humiliation and injury to feelings.

[61] While there is no age of retirement age under New Zealand law, I understand from submissions on behalf of Mrs Waterman that she seeks lost wages to the age at which she will be eligible for New Zealand Superannuation. As she was 61 years of age at the date of dismissal, she is seeking four years' pay. I am not persuaded this is warranted and note that, in all likelihood, Mrs Waterman would have been made redundant when the Home closed its doors for two years while the facility was rebuilt. Even if that had not been a factor, I am doubtful the employment relationship would have survived another four years, taking into account evidence relating to Mrs Waterman's health concerns before the incident that led to her dismissal.

[62] The Act provides for the payment of three months' wages where an employee is found to have a personal grievance and to have lost remuneration as a result of that grievance.⁴ Mrs Waterman's evidence was that she was suffering from stress and anxiety amongst other matters and felt unable to seek alternative employment at the time of the Authority's hearing of her claims. In the circumstances I find, subject to any contribution that may be found, an award of three months' wages to be appropriate. There is no case for the order sought by Mrs Waterman with regard to tax and it is declined.

[63] Mrs Waterman's claim for compensation rests on the physical and mental effects she suffered from her dismissal. In support of her claim she provided medical evidence in the form of a letter dated 25 February 2020 from her General Practitioner. This predated the 26 March 2020 event that resulted in Mrs Waterman's suspension and ultimate dismissal. Her evidence is that her health started to deteriorate from late 2019 when she was under investigation by the then manager of the Home for incidents that allegedly occurred in October and December 2019. The GP's letter refers to a timeframe beginning around February 2019.

[64] Neither of those investigations resulted in any disciplinary action being taken against Mrs Waterman. I accept they would have been stressful for her and it is likely the stress she experienced would have been exacerbated by her suspension and dismissal. I am not satisfied a causative link was established between those investigations and the event that led to Mrs Waterman's dismissal. Her distress cannot be solely attributed to her unjustifiable dismissal

⁴ Section 128 of the Act refers.

as some level of it clearly predated that event according to her GP. That is a relevant consideration in an assessment of compensation. Subject to any contribution that may be found, I consider an award of compensation of \$20,000 to be appropriate to recognise the effect of her dismissal on Mrs Waterman.

[65] MCL submits there was a substantial degree of contribution by Mrs Waterman. I agree that her actions contributed to the situation that gave rise to her personal grievance. She acknowledged that hoisting a resident alone was wrong and that she should not have done it. I consider in the circumstances a fair assessment of Mrs Waterman's contribution to be 40 percent.

Summary and orders

[66] Mrs Waterman was unjustifiably dismissed from her employment. Masonic Care Limited is ordered to pay to her:

- (a) Seven weeks and five and a half days ordinary time remuneration under s 128 of the Act, being three months' (thirteen weeks) ordinary time remuneration less forty percent.
- (b) Compensation of \$12,000, being \$20,000 less forty percent.

Costs

[67] Mrs Waterman is legally aided. Mr McKenzie-Bridle seeks only the reimbursement of the filing fee and the costs of preparing the statement of problem, the amount of which he did not specify. MCL has requested that costs be reserved. I reserve costs and encourage the parties to resolve any issue of costs between themselves.

[68] If they are not able to do so and an Authority determination is needed, the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum the respondent will have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Trish MacKinnon
Member of the Employment Relations Authority