IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 199/08
5083821

	BETWEEN	TINA WELLS Applicant
	AND	RESCARE MANAGEMENT LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Ross France, counsel for Applicant Paul Tremewan, advocate for Respondent
Investigation Meeting:	14 December 2007
Submissions Received	20 December 2007 and 3 January 2008
Determination:	4 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated problems that arose in the employment relationship between Ms Tina Wells and Rescare Management Limited.

[2] Rescare provides residential care support services for people who have intellectual difficulties. Ms Wells worked with small groups of young men and women, assisting them to live together in one of a number of houses provided by Rescare for about 100 people having varying degrees of disability.

[3] The employment relationship lasted from July 2004, when Ms Wells was employed as a Community Support Worker, until she was summarily dismissed on 21 February 2007.

[4] By then Ms Wells held the position of Team Leader, to which she had been promoted about a year earlier. The dismissal was confirmed by Rescare in a letter

dated 21 February 2007 which was signed by employer's HR Manager, Ms Tania Shine. The letter advised Ms Wells that her dismissal was of immediate effect and was being imposed because:

> *… we have lost trust and confidence in your ability to carry out the tasks associated with your role. This lack of trust and confidence has arisen as the result of two separate complaints made about you by the families of residents in your care.*

[5] Ms Wells had been the main caregiver for the four residents of one particular house that will be called House 10. Those residents required less support than others and they had more independence and ability, allowing them to so some work either outside Rescare or in the office there.

[6] A few days after receiving confirmation of her dismissal, Ms Wells, through her advocate at that time Mr Brian Spong, notified Rescare of a personal grievance. She claimed the dismissal was both procedurally and substantively unjustifiable and that it had been a predetermined action following a flawed and unfair investigation into her conduct or performance.

[7] A statement of problem was lodged in the Authority on 4 April 2007, although the parties had not at that time undertaken mediation to try and resolve the grievance. The remedies then sought for Ms Wells were compensation for hurt feelings, distress and humiliation and the reimbursement of lost wages, and costs. In a statement in reply Rescare rejected the claim.

[8] Following directions from the Authority the parties attended mediation in May 2007 but were unable to resolve the grievance.

[9] Ms Wells then engaged counsel Mr France and was granted legal aid to pursue her claim. An amended statement of problem filed in August 2007 extended it to cover:

- The unjustifiable suspension of Ms Wells;
- Her unjustifiable summary dismissal; and
- The "*harassment*" of Ms Wells by Rescare after her dismissal.

[10] The remedies claimed were also extended to include, as well as compensation and reimbursement of lost wages, reinstatement of Ms Wells to her former position, a penalty for breach of the employment agreement and compensation for breaches of the duty of good faith.

[11] Rescare maintained its rejection of all the claims and remedies sought in respect of them.

[12] Ms Wells abandoned her quest for reinstatement after the investigation meeting, having then realised that her relationship with Rescare had broken down so much as to make the remedy impracticable.

[13] Ms Wells employment problems arose from her work in caring for two particular residents of House 10 where she was team leader. Although not their real names, John and Susan will be used in this determination to refer to the young man and the young woman.

[14] Separate complaints were made by the families of John and Susan about the care they had received from Ms Wells. They were the two complaints referred to by Rescare in the letter of 21 February 2007 advising Ms Wells of her dismissal.

John's parents' complaint

[15] The first complaint was written to the management of Rescare in October 2006 by John's mother and father. They were critical of aspects of Ms Wells care of their son and expressed the hope that she would be removed from their son's house and given responsibility for different residents who had personalities and requirements more suited for her to manage.

[16] Without being shown the letter from John's parents, Ms Wells was called to meet with Ms Shine to discuss the complaint. Following that meeting Ms Shine wrote to Ms Wells on 27 November 2006 stating, with reference to the purpose of the meeting;

> *We believe that your management of John was hampered by your relative lack of experience and wished for this meeting to be an opportunity for you to learn and develop.*

[17] Ms Shine's letter went on in detail to discuss the criticisms made by John's parents of Ms Wells, noting that in one respect her conduct could be deemed to be

"*gross misconduct and subject to disciplinary proceedings against you"*, but at the same expressly accepting that Ms Wells had not intended any malice by her actions because she had misguidedly believed she was doing the right thing. Ms Shine also noted that Ms Wells had seemed to be regretful about what happened.

[18] John's parents in their letter (which Ms Wells was not shown until two months later) had noted that his behaviour had changed alarmingly while under the care of Ms Wells. In this regard the parents wrote;

> *There are lots of negatives about John so what is happening in House* [10] *to make him like this. Nobody else is having these problems with John. Our only conclusion is that it is Tina* [Wells].

[19] This change noted by John's parents was referred to as a "*breakdown"* by Ms Shine in her letter, when she wrote the following;

> *I understand that you feel upset by the* [parents'] *belief that you were the catalyst for his breakdown and that you do not believe that you did anything wrong. However, as I said today, we must respect the wishes of John's family and you need to accept that whether you feel responsible or not, John's behaviour only deteriorated when you began working in House* [10] *and these incidents only occurred when you were on duty.*

[20] Ms Shine concluded her letter of 27 November 2006 by repeating that the purpose of the meeting with Ms Wells had been "*a learning experience*." Ms Shine referred to her intervention as being for the purpose of giving "*constructive criticism."* She expressed the hope that the meeting had left Ms Wells with greater insight.

[21] It has not been contended that the intervention by Rescare in 2006 straight after the complaint from John's parents, was in any way a disciplinary occasion. No disciplinary action of any kind was taken against Ms Wells immediately following the meeting she had with Ms Shine, although there was a further meeting about John's care at the beginning of December 2006 which was the subject of a second letter from Ms Shine to Ms Wells.

[22] In that letter dated 8 December 2006, Ms Shine said that the earlier meeting had been to *"clarify any outstanding issues you had with regard to John"* and she expressed the hope that it was clear to Ms Wells that John's family "*believe you were the catalyst for John's breakdown*." Ms Shine repeated the view she had expressed earlier that:

> *… John's deterioration in behaviour only occurred when you began managing House* [10]. *We must therefore deduce that something about the way in which you managed John caused his behaviour to change.*

[23] In her second letter Ms Shine said she accepted that Ms Wells had not acted with malicious intent towards anyone and she reiterated Rescare's belief that her lack of experience had been a key factor in what had happened. She noted that Rescare had made a commitment to Ms Wells to continue to support and guide her, as it was believed Ms Wells had some good qualities as a team leader.

[24] The letter concluded by noting that management would continue to meet with Ms Wells on a regular basis to monitor her progress and discuss any issues.

[25] Again, there was no suggestion arising from the later meeting in December 2006 or from the letter following it, that disciplinary action of any kind was being taken against Ms Wells in relation to her work with and for John.

[26] Over the 2006 Christmas/New Year period John and Susan left House 10 and lived with their parents, and Ms Wells took some leave.

Susan's parents' complaint

[27] In a letter dated 31 January 2007 addressed to Ms Donna Hegarty the CEO of Rescare, Susan's parents noted that in the 12 months since Ms Wells had been a caregiver in Susan's house, they had seen some disturbing changes in her behaviour. They referred to three particular instances which concerned them and expressed their view that it would be detrimental for Susan to continue having contact with Ms Wells.

[28] The three instances of particular concern were expressed to be in relation to;

- Lack of grooming in Susan.

- Susan being permitted to eat a dessert at Christmas that was contrary to her particular dietary regime.

- Susan being allowed to have a birthday barbeque after her official birthday which had been celebrated by her family at the time.

[29] Following receipt of this second letter of complaint Ms Shine wrote to Ms Wells on 31 January 2007, requesting an urgent meeting to discuss "*matters of concern"* with regard to her management of House 10.

[30] The meeting was required for the following day, 1 February 2007. Before that meeting Ms Wells was not advised what it was to be about. Nor was she shown the letter of complaint from Susan's parents.

[31] She attended the meeting and was told that the matters of concern were the separate complaints from the families of both John and Susan. She was told by Ms Shine that there would be an investigation and that she was to be suspended on pay until it had been completed.

[32] From the evidence I find as a fact that Ms Wells was not asked for her views about being suspended. That action was taken by the employer without discussion with her. She was not given an opportunity before the meeting to engage a representative who might have asked Rescare to reconsider the suspension, at least until "*input"* had been sought from Ms Wells about that action, as was expressly required by clause 11 of the employment agreement. Instead a letter from Ms Shine dated 1 February 2007 confirmed the suspension and advised that Rescare had had no other option;

> *As both these families have requested that you do not have any further contact with their family member we have no choice other than to suspend you on pay until this investigation is completed.*

[33] Ms Shine went on in her letter to inform Ms Wells that her employment was in jeopardy and asked her to meet again on 5 February, accompanied by a support person if she wished.

[34] The day after the suspension meeting Ms Shine sent Ms Wells a copy of the letter of complaint from Susan's parents and advised that permission was being sought from John's parents to disclose their October 2006 letter of complaint.

[35] The meeting proposed for 5 February was deferred until the 8th, when Ms Wells attended with Mr Spong as her advocate. Ms Wells was presented with a written statement which amongst other things advised her that because of the concerns arising from the complaints, and especially as the families of John and Susan had

asked that their son and daughter have no further contact with her, "*we have lost trust and confidence in your ability to carry out the responsibilities of your position.*"

[36] A further meeting was held on 15 February at which Mr Spong proposed ways of addressing the parents concerns on the basis that they were about Ms Wells' performance rather than misconduct by her. He proposed training and professional supervision, and also mediation with the families of John and Susan to be provided by the Health and Disabilities Commission. Ms Wells added that she would consider redeployment within Rescare as an option to address the concerns.

[37] I find that Rescare, at the meeting of 15 February, undertook to consider the proposals made. Rescare agreed that mediation provided by the Department of Labour would be undertaken on 20 February, and the date and time for this was confirmed in writing by the Mediation Service beforehand.

[38] In the amended statement of problem it was alleged that on 19 February during a telephone conversation, Rescare had advised Ms Wells' representative that a decision to dismiss her had been made. In its statement in reply Rescare denied that Ms Shine at any stage during the telephone conversation with Mr Spong had said that Ms Wells would be dismissed, as a predetermined outcome of the investigation into her conduct.

[39] Mr Spong and Ms Shine were examined before the Authority about the conversation that had occurred on 19 February. I accept Mr Spong's sworn evidence as the truth. As would any experienced and careful advocate, Mr Spong made a note of what he had heard Ms Shine say. He produced the note to the Authority. It begins;

Tania 19/2/7 ……T – going to dismiss!!

[40] The note records settlement proposals that were exchanged during the conversation. They were structured around a resignation or agreed termination of employment in return for a sum of money to be paid to Ms Wells. As often happens in employment disputes, the amounts sought and offered varied considerably. The note also refers to a message from Ms Shine requesting urgent mediation, which was subsequently arranged by Rescare for the following day.

[41] In her evidence Ms Shine did not seriously contradict what Mr Spong had said in his. She said that he had asked her whether Ms Wells was going to be sacked and she had replied by asking *"what alternatives do we have?"* She said that this apparently rhetorical question had been intended to convey the message that Recare had no choice but to dismiss Ms Wells.

[42] Mr Spong wrote to Ms Shine on 20 and 21 February referring to her statement that Ms Wells was going to be dismissed. In a reply on the latter date Ms Shine said that Rescare wanted to make it clear, *"that no decision has been made with regard to Tina Well's continued employment."* She confirmed that a disciplinary meeting would proceed that day, with Ms Wells and Mr Spong expected to attend.

[43] Immediately before the mediation that had been arranged for 20 February, Rescare decided suddenly to withdraw from it and that fixture was cancelled. Mr Spong was understandably surprised by this unexplained reversal on the part of Rescare.

[44] The disciplinary meeting of 21 February proceeded. Ms Shine began to speak to Ms Wells as if a decision about any disciplinary action had not yet been made by Rescare. Ms Wells interrupted her and said that she had attended the meeting on the understanding from what Mr Spong had told her that the meeting was to be held so that Rescare could dismiss her. There was then an adjournment for about five minutes after which Ms Wells was advised that she was summarily dismissed.

[45] A grievance was immediately raised by Mr Spong who protested in his letter that there had been predetermination of the dismissal, an absence of good faith on Rescare's part in abandoning the mediation it had arranged and that had been agreed to by Ms Wells. Mr Spong also complained that Rescare had adopted an investigation process that had been flawed and unfair. He advised that Ms Wells had been deeply hurt by the dismissal.

[46] Shortly after the dismissal Rescare twice wrote to Ms Wells, on 26 February and on 5 March 2007, advising that she no longer had any right to contact Rescare residents or their families and threatening in both letters to have a *"trespass order"* taken out against her if she made any contact. One letter referred to Ms Wells as having contacted a particular resident (who shall be called Peter) at or near the place

where he worked. It has not been suggested that Peter complained about the contact.

[47] The actions of Rescare in writing to Ms Wells in this way when she was no longer employed, gave rise to her claim that Rescare had harassed her.

[48] Ms Wells admitted she had bumped into Peter, for whom she had been a caregiver, while she was in a supermarket where he worked. I accept her evidence as to how she had come into contact with Peter after her dismissal and the nature of that contact. There was no justification for Rescare deciding that she posed a threat or a nuisance that needed to be controlled by a trespass notice restricting her access to a public place. Rescare did not explain in its letter what standing it had to obtain such an order in respect of supermarket premises or any place other than its own land and buildings. Neither did it explain how it thought it could curtail her freedom to speak in a public place to any member of the public such as Peter.

Test of justification

[49] There is no dispute that Rescare dismissed Ms Wells. The Authority must determine her grievance with regard to that action in accordance with s 103A of the Employment Relations Act 2000, which provides the test of justification for an employer's actions including dismissal.

[50] Although I consider a grievance was also raised by Mr Spong with regard to the suspension (the complaint in his letter of 23 February 2007 of a flawed and unfair investigation), the remedy sought for that action in this case is a penalty under s 134 of the Act. The question is whether the suspension was unlawful as being in breach of the employment agreement, rather than whether it was unjustified for the purposes of s 103A and the remedies available under s 123 of the Act. The penalty claim is to be determined by an appropriately higher standard of proof being applied to such evidence as there may be of a breach of clause 11 of the employment agreement.

[51] The claim for damages or compensation for breaches of the duty of good faith is to be determined upon any proof that Rescare breached the statutory and/or contractual obligations owed to Ms Wells in this regard, and also upon any proof that she suffered some measureable harm or loss as a consequence of such breach.

Failure by Rescare to give due weight to interests of an employee, as well as those of parents and residents

[52] In determining this case I find it to be a clear and strong feature of it that the management of Rescare acted and made decisions to give effect to the wishes of parents, but without having sufficient regard to its obligations as the employer of Ms Wells. I find in this regard that Rescare did not properly balance the rights and interests of an employee such as Ms Wells with those of residents such as John and Susan and also their parents.

[53] It was no excuse for breaching a contract to say that other parties with whom Rescare had a separate relationship, such as the residents and their parents, deserved to be treated as having greater or better rights. The parents personally were not Ms Wells' employer. Some attempt needed to have been made, as far as possible, to do right by all those with whom Rescare had a legal or other relationship.

[54] The overriding importance of the families' views and wishes was made plain several times in the evidence given to the Authority for Rescare. Ms Shine said that Rescare placed a great deal of stock on what the families said about what was best for their son or daughter. She said that families have the final say in what happens to residents, including in relation to the selection of who cares for them. Ms Shine also said that her approach had been to accept without question what the families said.

[55] Ms Jill Burrows, the Service Manager for Rescare and a registered psychopaedic nurse with over 20 years' experience of working with people with intellectual disabilities, put it that "*the families are the experts.*"

[56] From the evidence it seems to me that Rescare abdicated its responsibilities as an employer in favour of the parents, allowing them in effect to become the "*experts"* as to how the employment relationship needed to be handled in the circumstances. There is nothing in the employment agreement or associated position description and policies and procedures, making the Team Leader position directly accountable to parents.

[57] The almost total deference shown by Rescare management to the parents, whose obvious and understandable wish it was to protect John and Susan from harm, can be seen in the logic applied by Ms Shine in her letter of 27 November 2006 where she stated that the wishes of John's family had to be respected and that Ms Wells

needed to accept that whether she felt responsible or not for his "*breakdown*," John's behaviour had only deteriorated when Ms Wells began working in House 10 and the incidents had only occurred when she was on duty. Ms Wells was not told what John's *"breakdown"* was exactly.

[58] I do not accept it was a necessary conclusion that because there had been close interaction between the two, whatever Ms Wells had done in her work must have been wrong or bad to have caused the deterioration shown in John's behaviour. Ms Wells denied she had done anything wrong and John was not asked if he could explain why his behaviour had changed.

[59] Rescare was not able to escape its obligations as an employer to Ms Wells by, in effect, passing the decision-making about employment matters over to the parents or guardians of residents. Rescare's responsibilities in this regard may well have meant that on occasions it had to stand up for the rights of an employee against the particular wishes of a parent in relation to how the employment agreement was to be performed.

[60] This is particularly so in relation to the threat by a parent to obtain a non-molestation order against Ms Wells. I find that Ms Shine advised Ms Wells during their meeting on 1 February that this threat had been made by one or more of the parents to obtain such an order against her if she was allowed to continue to have contact with John and/or Susan, which was required of her by the terms of the employment agreement.

[61] It seems to me that Rescare management heard that threat uttered and simply passed it straight on to Ms Wells, without saying to the parent who made it that the threat had the potential to interfere in a contractual relationship and that there needed to be a proper basis for seeking such an extreme order, over and above the dislike of the parents for the care they believed Ms Wells had given to their son or daughter.

[62] Another disturbing feature of this case is that in most respects of the care by Ms Wells given to John and Susan and as complained about, those three were the only witnesses of it. Ms Wells denied that she had acted wrongly or in a bad way in giving care to John and Susan, who were not interviewed or asked about these things. Rescare management, it seems, did not try to seek the approval of their parents to

interview them. The parents had not seen for themselves much of the care given by Ms Wells and of which they were critical in their letters.

[63] There was no suggestion made to the Authority, in the evidence at least, that in some way it would have been detrimental to the welfare of John and Susan for them to have been asked about the care they had received from Ms Wells.

[64] The reason given to the Authority by Rescare for not wanting to interview John and Susan was that they would have said what they thought the interviewer wanted to hear, just to please the interviewer. Even if that were so I do not consider it an adequate reason for not at least trying to find out from John and Susan what they believed had taken place. Anything they said could then have been weighed up against a consideration that the answer was influenced by the nature of their disabilities and may not have been an accurate answer, or alternatively that what they said was consistent with other information obtained from different sources such as Ms Wells.

Whether the suspension was unlawful

[65] A part of the employment relationship problem is the claim that the suspension of Ms Wells, on pay, from 1 February 2007 was carried out in breach of the employment agreement. I uphold that claim. Clause 11 of the employment agreement allowed Rescare to suspend Ms Wells if necessary where serious misconduct had been alleged or was being investigated, but clause 11 also required that "*the employer will seek the employee's input before suspension*."

[66] I find that input from Ms Wells was not sought by Rescare and that therefore the employer did not comply with the employment agreement in this regard. It follows that the employer's action was unlawful.

[67] The explanation for the suspension given by Ms Shine was that the parents of John and Susan had expressed the strong wish that Ms Wells not be involved in the care of their son and daughter, whatever else might be decided. I find this is not a sufficient reason why input could not have been sought from Ms Wells as required. As with any consultation, the agreement of the person consulted, or from whom input had been sought, was not a requirement.

[68] There was no good reason why Ms Shine could not have explained to Ms Wells that the parents held very strong views about further contact and that this might make suspension a reasonable course to take in the circumstances. Ms Wells may have disagreed but in the end Rescare could still have made a decision to suspend once it had heard what Ms Wells wanted to say about that proposal.

[69] I also find that Rescare could not reasonably have viewed the allegations against Ms Wells as amounting to serious misconduct, as required before clause 11 permits suspension from the employment. Rescare was clearly influenced in taking that particular view by its retrieval of the October 2006 complaint, which had been dealt with then as a training issue. Nothing new had been raised about that matter to justify reviving it as a matter for disciplinary investigation.

[70] I find that the breach of clause 11 by Rescare was a deliberate action. Accordingly Ms Wells is entitled to recover a penalty for the breach. There is no duplication of remedies with regard to this part of the employment relationship problem, as it has not been treated as an unjustified disadvantage grievance although it could have been, and amenable to an award of compensation.

Whether the dismissal was unjustified

[71] There are three principal reasons for the Authority finding, as it does, that the dismissal of Ms Wells was unjustified;

1. Dismissal was predetermined.

2. One of the reasons for dismissal was the October 2006 complaint by John's parents, which was resurrected after it had been dealt with at the time as a training matter.

3. Ms Wells complained of actions could not reasonably have been viewed as amounting to serious misconduct justifying dismissal.

[72] I have found that Ms Shine said to Mr Spong on 19 February that Ms Wells was going to be dismissed. The remainder of the investigation was a sham in which, as recorded by Ms Mrina Hol, Rescare purported to give Ms Wells a further opportunity to respond to the allegations so that Rescare could review its position.

The employer then took a break, pretending that this was to give it time to consider what action was to be taken.

[73] By its actions Rescare has acknowledged that the investigation was incomplete at the time it decided to dismiss. That investigation was flawed and unfair, as Mr Spong had quickly complained on 23 February.

[74] There was no new information about the October 2006 complaint which could have justified reopening it as a matter for disciplinary investigation. Putting Ms Wells in a position of double jeopardy in this way was unfair to her.

[75] Despite the claim by Ms Shine on 19 February that Rescare had no choice but to dismiss Ms Wells, the employer did have other alternatives available. One alternative was not to dismiss Ms Wells unless that action could be justified. Another was to take up the proposal made by Mr Spong for training, supervision and specialist mediation with the families. A further alternative was to proceed with the mediation as arranged with the Mediation Service, instead of unreasonably repudiating that process.

[76] I find that Rescare approached the investigation into Ms Wells conduct with a closed mind, as its sole objective was appeasement of the parents. Rescare responded to pressure from the families to remove John and Susan from the care of Ms Wells and did not consider whether what she had done amounted to serious misconduct or any misconduct.

[77] Summary dismissal was an unreasonable action, as it was a punishment out of all proportion to the matters complained of by Susan's parents. Under the employer's Policies and Procedures Manual disciplinary action for *"incompetence or poor performance"* is to be preceded by counselling, coaching and training to give the employee an opportunity of achieving and maintaining the required standard. I am not satisfied that what was given in this regard was adequate or that there was enough time between December 2006 and January 2007 for that opportunity to be given.

[78] The dismissal was not justified within the requirements of s 103A of the Act. Viewed objectively, I consider that Rescare's actions and how Rescare acted were not what a fair and reasonable employer would have done in all the circumstances present at the time of the dismissal.

[79] I find that Ms Wells has a sustainable claim of personal grievance arising from her unjustified dismissal. She is entitled to remedies under s 123 of the Act.

Whether Rescare breached its obligations of good faith

[80] I do not consider there was any misleading or deceptive conduct in relation to the October 2006 complaint or the fact that Rescare did not at that time show Ms Wells the letter. I find no evidence that Rescare misrepresented to her the contents of that letter or tried to deceive her as to what it said.

[81] As to the letters written by Ms Shine to Ms Wells after that complaint had been investigated, I do not consider they were misleading or deceptive at the time they were written. At that time Rescare considered the matter did not require disciplinary action and it is likely to have been left that way if the second complaint had not later been made. The employers conduct in 2006 should not be viewed with hindsight from what happened later in 2007, when it decided to revisit the first complaint.

[82] In relation to its unilateral withdrawal from proceeding with the arranged mediation, this action of Rescare was unreasonable and I find it was also a breach of good faith. In requesting the mediation Rescare had clearly recognised that process as a means for it as an employer to discharge the duty under s 4(1A) of the Act to be;

> *…..active and constructive in …..maintaining a productive employment relationship in which the parties are …..responsive and communicative.*

[83] I consider there was also a breach of good faith on the part of Rescare when it tried to pretend that it had not yet decided to dismiss Ms Wells, at the beginning of the meeting on 21 February. As I have already found, Ms Shine had told Mr Spong on 19 February that Ms Wells was going to be dismissed but Rescare tried to maintain the pretence that it was engaging in a fair investigation process. Ms Wells knew that was not true from what Mr Spong had told her of his telephone conversation with Ms Shine.

[84] I consider that these breaches of the duty good faith flowed from Rescare closing its mind before 21 February to the question of whether dismissal or other disciplinary action was justified. Predetermination by Rescare is one of the reasons why the Authority has found that dismissal was unjustified. Ms Wells is entitled to remedies for that under s 123(1)(c)(i) of the Act and in assessing those remedies the

breaches of good faith can be taken into account, as they clearly added to the humiliation experienced by Ms Wells from her treatment.

[85] I therefore make no separate award of damages or compensation for this part of the claim.

Harassment

[86] I find that Rescare did harass Ms Wells, after it had unjustifiably dismissed her, by threatening legal action without good cause to do so. Rescare I find did not act maliciously but was misguided as to how it could protect the interests of a resident. Although those actions occurred after dismissal had taken place the harassment was closely and directly linked to that dismissal. Therefore they are able to sound in the remedy of compensation under s 123 which is to be awarded for the unjustified dismissal.

Contribution

[87] As submitted, in assessing any remedies Ms Wells may be entitled to for her successful claim of unjustified dismissal, due allowance must be made for any fault on her part which contributed to the situation that gave rise to the grievance.

[88] I find that Ms Wells did not contribute to Rescare's failure to consult her before imposing the suspension, or to the decision by Rescare to resurrect the October 2006 complaint as a ground for disciplinary action, and she did not contribute to the predetermination by Rescare of her dismissal.

[89] Any fault on the part of Ms Wells must arise only in respect of her conduct as complained of Susan's parents in January 2007. I consider that her conduct could not reasonably be viewed by Rescare as serious misconduct but was performance related. I am not satisfied that in the few working weeks between December 2006 and January 2007 when the second complaint was made, Ms Wells had been given sufficient training and supervision, as Rescare had promised to give to address this deficiency identified after the first complaint. Her conduct or performance cannot be regarded as blameworthy for that reason and therefore I assess her contribution as nil, requiring no reduction in remedies.

Remedies

[90] I accept that Ms Wells lost considerable earnings directly as a result of her unjustified dismissal. Two different calculations of these have been provided. In her brief of evidence received by the Authority in September 2007, the claim by Ms Wells was to recover 12 weeks lost income less a small amount earned over a four week period in that time. On that basis the claim was for $9,037.

[91] At the investigation meeting Mr France claimed $11,712.68 as being the total lost earnings over an additional period of 22 weeks, also taking into account actual earnings in that period.

[92] I consider that the claim should be allowed for $9,037 in respect of the 12 week period of loss. I am not satisfied that during all of the extended period of 22 weeks Ms Well's fully discharged her obligation to mitigate her loss. There also appears to have been a period from late May until July when Ms Wells was unable to work because of a back problem and was in the care of ACC.

[93] Pursuant to s 123(1)(b) of the Act, Rescare is therefore ordered to pay $9,037 to Ms Wells in reimbursement of lost earnings for a 12 week period after dismissal.

[94] I also accept the evidence of Ms Wells as to the humiliation, hurt feelings, distress and general anguish she suffered as a result of the unjustified dismissal and the harassment that followed. That treatment shattered her self esteem and confidence in her ability to do the kind of work she had shown an aptitude for, and in losing her job this way she suffered the usual feelings of shame and guilt in facing her own family including her four children. She has been able to resume employment only recently.

[95] In this regard her suffering was serious. It is to be compensated pursuant to s 123(1)(c)(i) with a payment of $16,000 which Rescare is ordered to make to Ms Wells.

[96] As a penalty for breach of clause 11 of the employment agreement Rescare is ordered to pay $3,500 pursuant to s 135 of the Act. This was a deliberate breach of a provision that Rescare itself had required to be in the employment agreement. The whole investigation conducted from 1 February was undermined by this unlawful action. While seeking to call Ms Wells to account under the terms of employment

agreement, Rescare regarded itself as not bound by all the conditions of the same agreement.

[97] Pursuant to s 136(2) of the Act I order that Ms Wells is receive $2,000 of that penalty with the balance of $1,500 to be paid into the Authority to go to the Crown.

[98] For the reasons given there will be no award of damages for the breaches of good faith. This has been covered by the compensation Rescare has been ordered to pay.

Costs

[99] Costs are reserved. If the question cannot be settled between Mr France and Mr Tremewen on behalf of their clients, application is to be made by memorandum from Mr France, and Mr Tremewen may have 14 days to reply.

A Dumbleton
Member of the Employment Relations Authority