

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 310
5428013

BETWEEN ETHEL WILSON
Applicant

AND COMMUNITY LIVING TRUST
Respondent

Member of Authority: P R Stapp

Representatives: Carleton Mateer, advocate for Applicant
Glenys Steele, advocate for Respondent

Investigation Meeting: 21 and 22 May 2014 at Hamilton

Submissions: By 10 June 2014 (in writing)

Date of Determination: 17 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Wilson claims that her dismissal on 4 July 2013 was unjustified including claims that the process was unfair. She claims that she was disadvantaged. It was agreed that any disadvantage arose from the claim for unjustified dismissal as opposed to separate causes of action relating to anything else in Ms Wilson's employment, such as suspension. In addition Ms Wilson claims that she was treated differently from other employees (for disparity of treatment) and that the decision to dismiss her was predetermined. Ms Wilson is claiming lost wages, compensation and costs.

[2] All the claims are denied by the Community Living Trust (the Trust).

[3] The parties attended mediation. It now falls on the Authority to determine the matter.

Legal issues

[4] This is a matter that involves the Trust deciding to believe a client¹ (the client) who complained that Ms Wilson slapped her and yelled and swore at her, without any other witnesses. Ms Wilson has always denied the allegations. She accepts that there was an altercation between her and the client, but adamantly says that she did not slap the client. The central issue on this point is whether or not the employer came to an honestly held belief that Ms Wilson slapped and yelled and swore at the client.

[5] The next issue is whether a fair and reasonable employer could have dismissed Ms Wilson for serious misconduct? In other words, was the dismissal in the range of options available to the employer?

[6] The last issues are: was the dismissal predetermined and was there any disparity of treatment?

The facts

[7] The Trust is a Charitable Trust. It was previously known as the Waikato Community Living Trust and was formed by the Waikato Area Health Board (now the Ministry of Health). The Trust is a service provider and incorporates behaviour support, family, residential, vocational and therapy services across the central North Island. It has specialised services in the Waikato and Bay of Plenty areas.

[8] On 28 April 2013 there was an incident between Ms Wilson and the client at the client's cottage in Hamilton when Ms Wilson was assisting her. Subsequently the client complained about Ms Wilson's behaviour. This involved Ms Wilson's alleged reaction to the client's escalating behaviour, which had to be managed.

[9] The client told other people first what had happened and then met with Pam Smith, the service manager, and others from the Trust, whereupon an incident report on the matter was completed by the Trust's managers, including Sarah James, a team leader and service coordinator and Robyn Picknell team leader. The complaint was escalated to an internal investigation, and on 1 May 2013 Ms Wilson attended a meeting that had been arranged earlier in regard to in regard to a separate matter about some missing pork. The complaint about how Ms Wilson reacted to the client and

¹ The client's name has been prohibited from publication to protect her privacy as she was not at the investigation meeting.

that she slapped the client were raised with Ms Wilson in the second part of the meeting.

[10] Ms Wilson denied the allegation and was suspended, which she acknowledged as being “*okay*” at the time (Minutes 1 May 2013 and Karyn Hughes’ evidence), but that she denied the allegations. There has been no separate complaint about the suspension and it is only background in the matter, albeit that there is a provision for the Trust to suspend on full pay.

[11] Interviews were then conducted by various managers with staff members that may have heard and/or seen something. Minutes were kept of each of the interviews. The interviews occurred between 3 and 14 May 2013. During the interviews staff members raised other concerns about Ms Wilson. Unfortunately these became part of the mix of matters in the investigation, until they were disposed of. Also, one of the staff members disclosed that Ms Wilson had confided in her about what had happened that supports the complaint. This was referred to later in the respondent’s findings on 28 June 2013 (document 12).

[12] Next a letter of invitation to a disciplinary meeting was sent to Ms Wilson. She arranged for a representative to assist her. Ms Wilson was advised that the matter was serious and that her job could be in jeopardy if the allegations were proved. The full details of the central allegations were presented including full copies of all the interview notes.

[13] On 29 May 2013 a disciplinary meeting was held. At that meeting Ms Wilson was represented by Mr Mateer. In attendance was Pam Smith, the decision-maker.

[14] Ms Wilson had an opportunity to fully respond to the allegations and it was decided that the meeting would be adjourned to get more information for Mr Mateer. The information (recorded in the Minutes) was sent to Mr Mateer for any comments, and he responded on 12 June 2013. Mr Mateer then requested more information in regard to a medication sheet, which was provided. He then provided a full explanation in writing on 18 June 2013 on behalf of Ms Wilson. An issue did arise about the time Ms Wilson said that she went home at 3pm and where her timesheet subsequently had the time at 7.30pm according to the roster. The respondent did reach a finding on this matter at the time in regard to credibility.

[15] Ms Smith then deliberated on the information and sent a preliminary decision to Mr Mateer on 28 June 2013. He was invited to respond and provide any input. Ms Smith accepts full responsibility for the correspondence, although it was signed off in her name by someone else. I am satisfied that she had delegated authority and this has not been challenged.

[16] The parties met on 4 July 2013 where Ms Wilson's response was received. There was consideration given to the response and the decision was made to dismiss Ms Wilson. Ms Wilson was dismissed on 4 July 2013.

[17] On 18 July 2013 Mr Mateer raised a personal grievance, and after being requested for more detail as to the substance of the grievance, he responded with a letter of grievance dated 23 July 2013.

[18] The termination of employment was confirmed in a letter dated 19 July 2013 and received by Mr Mateer on 5 August 2013. There is no issue on the delay as it related to an incorrect email address.

[19] The parties attended mediation. It rests with the Authority to make a determination.

Determination

[20] On the substance the employer came to an honestly held belief that the client had been slapped and sworn at by Ms Wilson during an altercation when the client's behaviour escalated. I accept the reasoning provided for the decision, which was supported by Robyn Picknell's evidence (the team leader and she had evidence of a professional nature about why the client was believable). In other instances where an independent evaluation would have been helpful the involvement of Ms Picknell meant that it was unnecessary and therefore any criticism of the lack of an independent evaluation of the client was not fatal in the decision-making, I hold. Ms Smith as the decision maker also had first-hand knowledge of the client and Ms Smith's and Ms Picknell's evidence was consistent. Ms Wilson accepted that there had been an altercation involving the client's behaviour escalating and that there was yelling and swearing between them. This is consistent to support the respondent's finding that there had been swearing and yelling during the incident, despite Ms Wilson's denial. Interview notes disclose the language in the altercation that while it did not involve swearing as such, the language was disrespectful, and that the Trust

relied upon it in its disciplinary process. Also it was found that Ms Wilson was contradictory on the time she says she left at 3pm, and that she was clear at the time that she did leave at 3pm on the day, but filled out her time sheet for 7.30pm.

[21] I accept the Trust's findings meant that it was open to a fair and reasonable employer to dismiss Ms Wilson, considering the Trust's hand book on practices and procedures in regard to discipline. It had a reasonable expectation that Ms Wilson would follow the care and support plan for the client and how Ms Wilson reacted was contrary to the plan. In other words the decision to dismiss was in the range of options available to the employer for serious misconduct. It is not for me to substitute my view for that of the employer and it is not for me to conduct an investigation for the employer now. As such I note that Ms Wilson always denied the allegation and this was considered by the Trust at the time. Ms Wilson genuinely believes what she says and genuinely has denied what was alleged. However, the Trust has been able to justify its action based on a reasonable held belief by assessing the client and the diagnosis that the client was not able to maintain a lie. The assessment involved both Ms Wilson and Ms Picknell. I am satisfied that they were in a professional position to make such an assessment given their direct involvement with the client. There is common ground that the client did not change her accusations afterwards and maintained the accusations throughout.

[22] Moreover, Ms Smith was faced with a credibility issue that she was permitted to make a decision on. She made the decision based on her own experience of the client's behaviour and this was permissible, because Ms Smith interviewed the client and had the benefit of the information provided to her from the incident report and other interviews including a matter that involved the client confiding in another staff member about her version of events. Ms Smith was fully aware that Ms Wilson denied the allegations and was aware that the client did not change her mind on the allegations. Ms Smith's professional assessment, along with Ms Picknell's assessment was that the client would have changed her mind quickly if the allegations were an exaggeration and/or not true and that did not happen.

[23] I now turn to the process followed by the employer. The employer has shown that there was an investigation and that it was fairly conducted. An employer's investigation is not required to meet the standards of a trial with cross examination of witnesses, but has to be fair. In this case the full interview notes were provided and

Ms Wilson had the opportunity to comment and reply to them at the time. In making its decision the Community Living Trust provided Ms Wilson with its concerns and the allegations. It put her on notice that her job could be in jeopardy if the allegations were proved. Ms Wilson's representative acted for her. The Trust also followed best practice by providing a tentative and preliminary decision for Ms Wilson and her representative to comment on, including commenting on a finding that Ms Wilson's behaviour meant that trust and confidence in her had been lost.

[24] I hold that despite the process being difficult because of the inclusion of other unrelated concerns from employees, it was not complex. The Trust was entitled to suspend Ms Wilson and had Ms Wilson's consent. Ms Wilson agreed not to attend work, although she did help out at the client's cottage on the next shift to administer meds. This only became known at the Authority's investigation meeting. I hold that although there were a number of concerns raised by other people during the employer's process these were not considerations in the decision. Indeed they were put to one side and were not referred to at the time when the disciplinary process was underway. Indeed some matters were found that could not be proved because of the absence of sufficient details and dates and times and were not pursued. Ms Smith has only recorded and has referred to the matters alleged that the Trust has relied upon in making its decision. In other words there were no irrelevant considerations in the Trust's decision-maker's mind when the decision was made.

[25] On other claims I have no hesitation to find that there was no disparity of treatment as claimed, because there was no one else involved in the incident and whom the employer needed to investigate. The examples provided by Ms Wilson were all matters involving other people at entirely different times in the past and in matters that involved their own facts and context. On the basis of existing evidence it is not possible to determine what the facts and context of those matters were. It is unreasonable to expect that an employer should be put to the extra costs and time to defend them all in regard to a claim for disparity.

[26] Finally, I hold that the decision by Ms Smith was not predetermined. This is because of the letters provided to Ms Wilson about what was happening and the detail being relied upon that was given to Ms Wilson, the process that was followed allowing Ms Wilson the opportunity to comment and reply, the findings that were reached during that process, that there was a preliminary decision made, and critically

Ms Smith disposed of other concerns that were not part of her decision. I hold that the central issues as outlined in the allegation letter were what led Ms Smith to the decision she reached in the preliminary decision and ultimately the final decision.

Conclusion

[27] It follows that the respondent has justified the decision and supported that it had an investigation before making the decision and acted fairly. The mixing of other concerns in the process without incorporating them in a separate investigation could have caused a problem, but it was not fatal because the concerns were not upheld, and in any event Ms Wilson had every opportunity to comment in regard to credibility matters, which she did and her denial was taken into account. The suspension is only background and I do not accept that the employer can be accused of failing to be fair because of the suspension. This is because suspension was permissible under the handbook and Ms Wilson agreed to stay away from work. In addition Ms Wilson was informed of the interviews and the content to enable her to comment and reply and she with her representative entered into the process.

[28] Ms Wilson's claims are dismissed.

Costs

[29] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority