IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 282
5345701

	BETWEEN	JULIE BAIN Applicant
	A N D	OCEANIA GROUP (NZ) LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Jock Lawrie, Counsel for Applicant Kate Hoyle, Advocate for Respondent
Investigation meeting:	19 October 2011 at Christchurch
Submissions Received:	14 and 29 November 2011 from Applicant 28 November 2011 from Respondent
Date of Determination:	19 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Julie Bain, has raised three personal grievances as a result of the alleged actions of her employer, Oceania Group (NZ) Limited (Oceania).

[2] The first is a claim she was unjustifiably disadvantaged by the issuing of an inappropriate warning. She claims she was unjustifiably disadvantaged a second time when, upon receiving her challenge to the warning, Oceania refused to participate in mediation as was required by the terms of the employment agreement between the two.

[3] Ms Bain's third grievance is that she was unjustifiably dismissed by Oceania on 31 March 2011.

[4] Oceania contends the decision to issue the final warning was both procedurally and substantively justified. It claims its refusal to attend mediation does not amount

to an unjustifiable disadvantage and was a decision entirely within its discretion. Finally, Oceania contends its decision to dismiss Ms Bain was justified in the circumstances.

Background

[5] Ms Bain was engaged by Oceania as a health care assistant (HCA) at a rest home it operated in Rangiora. At the time of her dismissal, she had been so employed for approximately eight years.

[6] Oceania claims Ms Bain failed to ensure a resident in her care was looked after in a manner which allowed him an appropriate level of respect and dignity. When advised of the allegation, the rest home's manager, Ms Kyla Hurley, investigated the claim. She concluded it was sufficiently serious to warrant a disciplinary meeting which was held on 20 December 2010. The meeting resulted in the issuing of a final written warning. The warning resulted from a conclusion Ms Bain had neglected her duty by leaving a resident in such a way he was unsafe and undignified and then attempted to cover her conduct by being untruthful.

[7] Ms Bain denies the allegation has substance. It involved an incident which occurred on 4 December 2010. Shortly before she was due to finish her shift she found a resident in a disrobed state in communal lounge. Ms Bain says he was fairly new to the establishment and she had not had any direct involvement with him before as his primary care was provided by another team. She also claims the briefing she was given about his capabilities led her to understand he was significantly less mobile than he actually was. Ms Bain says she returned him to his room and attempted to redress him but was unsuccessful due to the patient's agitation. She made him comfortable in his room and covered him as best she could. She then advised her oncoming replacement of the situation and completed an incident report form.

[8] The disciplinary process was, however, initiated as a result of a further indecent report which was completed by another HCA, , approximately forty minutes later. It says the resident was found on the bedroom floor having injured himself in a fall and that he *no(sic) be redressed as previously believed*. This is a reference to the fact Ms Bain's report states *Taken back to room, redressed*.

[9] The warning was formally challenged by letter dated 21 February 2011. The letter ends by saying:

> *We look forward to receiving your written response to this letter, including an indication of Oceania's willingness to attend mediation on this matter, should we not be able to resolve it ourselves.*

[10] The suggestion the parties mediate was rejected by Oceania (though mediation subsequently occurred after the dismissal). Ms Bain claims the refusal contravenes the terms of her employment agreement. The agreement is a collective one which contains a procedure for resolving employment relationship problems as an appended schedule. Toward the end of the process, which is fairly standard, is a provision which reads:

> *If the problem cannot be resolved through discussion, then either you or the employer can request assistance from the Department of Labour which may provide mediation assistance.*

[11] Oceania's position is it did not consider mediation appropriate given a view the matter was clear cut and there was nothing to compromise on.

[12] In the interim, there had been a further incident. On 14 February 2011, two staff complained Ms Bain was bullying/harassing Ms Reardon. Ms Reardon was one of the complainants and her flatmate the other. Ms Reardon's complaint was that Ms Bain told staff to stop talking when she came into a staff room one morning and *this happens everytime I am on with her. I am concern that I am being harassed*. The second complaint was that Ms Bain had said to the flatmate *I hear you got a new flatmate … don't trust her or say anything that you don't want anyone else to know.*

[13] Ms Hurley says this was not the first time she had heard such allegations but previous concerns had not been raised in a manner which allowed formal investigation.

[14] As a result of the complaint, Ms Bain was sent a letter requiring her attendance at a disciplinary meeting. It was alleged:

> - *you appear to have breached our code of conduct (clauses 8.16: discrimination or harassment in any form against a resident, fellow employee or the employer and 8.17: discriminatory, offensive or intimidating behaviour) copy attached.*
> - *Both staff members are upset and offended by the behaviours displayed by you. Copies of the two staff complaints are attached.*

[15] A disciplinary meeting was originally scheduled for 18 February but that did not occur. As events transpired there was a considerable delay which was largely attributed to disruptions caused by Christchurch's 22 February earthquake. The meeting eventually took place on 31 March 2011 and resulted in Ms Bain's dismissal. Written confirmation was given the same day and the dismissal was, given its alleged seriousness, without notice.

[16] In the interim and also on 18 February there was a further allegation. This one came from yet another employee and accused Ms Reardon of being disloyal, untrustworthy and inaccurately repeating personal conversations, thus creating tension in the workplace. Ms Hurley says she was conscious the complaint was written after Ms Bain had been notified there would be a disciplinary meeting, felt its content ambiguous and deficient on detail. She therefore took the claim no further.

Determination

The warning

[17] It is well established an employee can be considered to have been unjustifiably disadvantaged in their employment if they are the given an inappropriate or unjust warning (see for example *Van der Sluis v Health Waikato* [1996] 1 ERNZ 514).

[18] The question is whether the action of the employer was unjust – that is to say not in accordance with justice or fairness (*Auckland City Council v Hennessey* (1982) ERNZ Sel Cas (CA) at 9. In essence the requirements are the same as those which apply when deciding to dismiss. The concerns must be properly investigated and the decision fully and properly informed.

[19] Ms Bain contends Oceania acted unfairly in that it failed to carry out a full and fair investigation into the allegations. She claims Oceania failed to interview relevant staff and it dealt inappropriately with others. She also alleges the investigation was not impartial as a member of the investigating team had provided a prejudicial statement against her which was relied upon in order to establish the finding of misconduct.

[20] Having considered the evidence, I agree.

[21] While Oceania did raise and discuss a failure to use either a sensor mat or a lapbelt to restrain the resident after Ms Bain returned him to his room, Ms Hurley concedes these were ancillary issues and the prime concern was the alleged failure to dress the resident which left him at risk of the fall which subsequently occurred.

[22] It is clear Oceania was of the view Ms Bain was to blame for the state the resident was found in, with the clinical leader recording Ms Reardon could not be blamed as Ms Bain had sufficient time to dress the resident. That statement was contained in a four page report written on 4 December.

[23] That the decision maker, Ms Hurley, felt the same is admitted but the problem is she also admits to having come to that conclusion after reading the clinical leaders report and no later than the 6th or 7th of December. This was before Ms Bain was even advised of the disciplinary process, let alone allowed to answer the concerns and have her explanations considered. Evidence of a preordained outcome such as this must undermine the subsequent decision and the fairness of the warning, especially given the following.

[24] Ms Bain's explanation is she tried to dress the resident but was unable to do so as he was uncooperative. She therefore applied best endeavours to leave him in an acceptable state before advising her replacement (Ms Reardon) he had to be attended to immediately. Ms Hurley's evidence is she relied on the clinical leader's explanation the resident was *very placid* and therefore discounted the explanation. Aside from the fact Ms Bain and the clinical leader are referring to different points in time, there was also the evidence of another HCA on the shift and who had assisted Ms Bain to remove the resident from the communal area. She says the resident had, a little earlier, been agitated and non-compliant during initial attempts to dress him in the communal area. That HCA was not, however, formally interviewed. She only received a cursory phone call during the disciplinary meeting as a result of Ms Bain's insistence. During the call she reiterated her view that while the resident was not aggressive at the point she had been involved, he was agitated.

[25] That HCA claims she also told Ms Reardon the resident needed immediate attention but given the cursory nature of the call that did not come out at the time and there is no evidence the issue was investigated despite Ms Bain's identical claim. That raises questions as to why Ms Reardon did not attend upon the resident immediately as it is alleged she was told. Instead she attended a half hour handover

which she would not normally do but with the permission of the clinical leader. Had she gone to the resident immediately it may well be the fall would not have occurred and the alleged degradation avoided.

[26] Indeed, Ms Reardon now accepts Ms Bain probably did not know she was attending the handover and accepts she was partly responsible for what occurred. The second admission totally undermines the conclusion which led Ms Hurley to jump straight to a final warning – namely that Ms Bain was totally wholly responsible for what occurred. The reasons Ms Hurley jumped to such a conclusion is, given the evidence discussed above, clear. The outcome was tainted by a preconceived notion Ms Bain was wholly responsible and the notion could not be dislodged due to an inadequate investigation which failed to properly question pertinent witnesses such as the second HCA on Ms Bain's shift and a third suggested by Ms Bain who was not spoken to at all.

[27] There is then the allegation Ms Bain was untruthful. Yes, there were discrepancies between what Ms Bain initially said and subsequent explanation but they are, I conclude, minor and had been corrected well before the disciplinary interview. Indeed, Ms Hurley now concedes this allegation was *perhaps unfair* but it is clear it remained in her mind at the time she decided to give the warning. To consider an unfair allegation, without fully investigating, is not the action of a fair and reasonable employer.

[28] This is not the investigation of a fair and reasonable employer and its conduct totally undermines the result. I conclude the warning was unjust.

Non attendance at mediation

[29] Ms Bain's second claim is she has been disadvantaged as Oceania refused to attend mediation in breach of the requirements of the employment agreement between the two. While the Act makes it clear mediation is both desirable and a preferred means of resolving employment conflict, there is nothing in the Act to state it is compulsory. Likewise Ms McLeod's employment agreement says either party *can* request assistance from the Department of Labour. Again these are not words of compulsion. Finally the letter which originally raised the possibility of mediation simply asks for an indication of willingness to attend. Again these words suggest there is an option.

[30] Given the content of the Act, the agreement and the letter I conclude the refusal was an option open to Oceania. This claim fails.

The dismissal

[31] Ms Bain contends the dismissal to be unjustified given her belief:

- The evidence in support of the allegation was not sufficiently convincing given the seriousness of the allegation;
- The penalty was disproportionate to the alleged wrongdoing;
- Oceania's decision to dismiss was not what a fair and reasonable employer would have done in all the circumstances, especially given ongoing attempts between the union and Oceania to resolve workplace issues and previous difficulties between Ms Bain and Ms Reardon; and
- Reliance on an unjustified final written warning undermined the decision to dismiss.

[32] Bullet point 3 above is a reference to discussions that were ongoing at the time over staff concerns about *employment practices and health and safety issues*. Included therein were allegations of bullying etc along with concerns about inter-staff relationships.

[33] I must express some sympathy with Ms Bain's view the conduct did not warrant the resulting sanction. To go there on the strength of two accusations in a workplace riddled with dysfunctional inter-staff relationships of sufficient seriousness to warrant union interest is, in my view, the move a brave employer. That said, it is not my role to place myself in the position of the employer and make such judgments – it is my job to ascertain why and how the employer reached the decision it did and evaluate whether or not the resulting decision was that of a fair and reasonable employer.

[34] In this case the answer is simple. First, the substance is lacking. Ms Hurley conceded when answering questions that the allegations made in the complaints of 14 February did not amount to discrimination, harassment or intimidating behaviour as alleged. Second, Ms Hurley accepts she decided to dismiss because Ms Bain was already in receipt of a final warning. Had the warning not been there, dismissal would

not have ensued. The conclusion the warning was unjust completely undermines the foundation upon which the decision to dismiss is based and renders it unjustified.

Remedies

[35] The conclusion the dismissal was unjustified raises the question of remedies.

[36] Ms Bain seeks $7,500 as compensation for hurt and humiliation resulting from the unjustified warning and both lost wages a further $15,000 as compensation for the dismissal.

[37] Notwithstanding the pleading I will consider the question of compensation holistically. One of the reasons the dismissal was unjust was because the warning was unjust. In my view the two are not, therefore, separable.

[38] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration though a larger sum may be awarded at the discretion of the Authority.

[39] Ms Bain was out of work for a period of just over three months (15 weeks and one day) and asks that I exercise the discretion and award that loss in full. The amount involved is $8,799.13.

[40] Ms Bain gave considerable evidence about her efforts to obtain work and the applications she made. The amount sought is also less than that she would have earned had she remained employed by Oceania with the reduction being attributable to a calculation concerning benefits she would have received which is not necessary. In the circumstances I consider it appropriate she be recompensed for that loss in full.

[41] She also seeks recompense for the fact that while she now has a new job, it pays less than she received from Oceania. I choose not to exercise the discretion further and consider this claim for two reasons. The first is the actual loss is again clouded by the effect of benefits and it is debatable whether or not an exact computation is possible. The second is the admission referred to in 43 below.

[42] Next there is the issue of compensation pursuant to s.123(1)(c)(i). Ms Bain supported he claim with evidence that clearly shows she was hurt and humiliated. That evidence went unchallenged. Having considered the evidence I conclude an award of $8,000 to be appropriate.

[43] The conclusion remedies accrue means I must, as required by s.124 of the Act, address whether not Ms Bain contributed to her demise in a significant way. The answer must, I conclude, be no. While there is a suggestion the care she offered was less than adequate and that is perhaps confirmed by her admission she should, in hindsight, have stayed and sorted things out. That however, is to balanced with the deficiencies in the investigation which are so great there is no evidence supporting a conclusion the suggestion has merit or, if it has, to what extent. In any event I have already considered this issue when choosing not to exercise the discretion of awarding the full wage loss sought.

Conclusion and Orders

[44] For the above reasons I conclude Ms Bain has a personal grievance in that she has been both unjustifiably disadvantaged by the issuing of an unjust warning and unjustifiably dismissed. As a result the respondent, Oceania Group (NZ) Limited, is ordered to pay the applicant, Ms Julie Bain, the following:

i. $8,799.13 (eight thousand, seven hundred and ninety nine dollars and thirteen) gross as recompense for wages lost as a result of the dismissal; and

ii. A further $8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[45] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority