

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 52/10
5142718

BETWEEN VEENA BHALLA
Applicant
AND THE ULTIMATE CARE
GROUP LIMITED
Respondent

Member of Authority: Paul Montgomery
Representatives: David Beck, Counsel for Applicant
Darren Mitchell, Advocate for Respondent
Investigation Meeting: 26 November 2009
Submissions Received: On the day
Determination: 8 March 2010

DETERMINATION OF THE AUTHORITY

[1] Mrs Bhalla alleges her dismissal from her role as a caregiver with the respondent was unjustified and prior to her dismissal, was subjected to a series of unjustified actions which caused her disadvantage. Further, the applicant claims her former employer breached s.4(1A)(b) of the Employment Relations Act 2000 by not engaging constructively in respect of Mrs Bhalla's rehabilitation to the workplace.

[2] The applicant wants a penalty for the alleged breach of s.4, \$15,000 compensation for hurt and humiliation, an order for lost remuneration to be quantified later and costs.

[3] The respondent denies all the allegations made by the applicant and hence declines to provide the remedies sought. The parties attempted to resolve the issues in mediation but were not successful.

Essential facts

[4] In February 2008, the applicant injured herself while gardening at home. On 3 March 2008 she met with Mrs Sherriff, the then manager of Rose Court Retirement Village, and told Mrs Sherriff she was considering resigning as she was finding the night caregiver role too difficult since her injury.

[5] Mrs Sherriff says she talked with Mrs Bhalla about the injury and her concerns, telling the applicant to think carefully about deciding to resign. She asked Mrs Bhalla to let her know once the applicant had reached a decision and assured her the respondent would do everything it could to assist in managing her workload.

[6] On 5 March 2008, Mrs Bhalla went to her doctor who advised her she needed time off work to allow the injury to heal. A series of medical certificates followed, one of which indicated the applicant should be fit to return to light duties on 14 April. However, another certificate was received on 14 April covering a further two weeks.

[7] A medical certificate issued on 28 April specified Mrs Bhalla would be unfit for a further 90 days. At this point, the respondent became concerned as it had been using bureau nurses to staff the night role at significant expense as it was difficult to find cover from existing staff.

[8] On 28 April, Mrs Malone, the clinical nurse manager, wrote to the applicant to advise the respondent would be in touch with ACC in order to have a workplace assessment done on Mrs Bhalla's position. This was to assess what light duties she could perform and to get an understanding of the extent of her injury.

[9] On 5 May, Mrs Sherriff and Mrs Malone met with Mrs Bhalla and her son, Sidhartha. Also present were Mr Ralston from ACC and Ms Walker, a physiotherapist. Both Mrs Sherriff and Mrs Malone say it was agreed that the applicant would return to work gradually beginning with two hours each day until able to increase those hours. The process was to be monitored by her physiotherapist.

[10] After this meeting, Mrs Sherriff and Mrs Malone met with the applicant and her son to outline the difficulties the respondent was faced with due to the applicant's unavailability, in particular the risk to residents' welfare when employing staff unfamiliar to the residents and with their needs.

[11] On 9 May, Mrs Sherriff wrote to Mrs Bhalla advising that the respondent intended to fill the night care position for the time she was unavailable. Mrs Sherriff is adamant dismissal was not considered at this time. She told the Authority, *effectively, because of the needs of the facility and our business, we were taking her off the night shift roster.* She also said that, at that stage, the company was *supporting* [the applicant] *with her gradual return to work.* Mrs Sherriff told the Authority Mrs Bhalla raised no objections to what was discussed in the 5 May meeting or in the letter.

[12] On 6 August, the respondent received a medical clearance for the applicant to return to work on light duties for two hours a day for two weeks, then four hours a day. The applicant returned to work under these conditions but was unable to do the light duties. Another medical certificate was received on 13 August putting the applicant off work for a further 30 days.

[13] On 11 August, ACC advised it was discontinuing payments to Mrs Bhalla as it held the considered view she was able to return to work. This decision was later reviewed but this was unsuccessful. The respondent then offered the applicant a casual relief position as *a temporary measure to help her with her recovery,* and the situation would be reviewed in a month's time. A little later, Mrs Bhalla advised the respondent that she was not interested in the relief casual work which had been offered.

[14] 25 September brought another medical certificate and Ms Baker (who had succeeded Mrs Sherriff) wrote to Mrs Bhalla requesting a meeting to discuss the additional 60 day absence. The meeting took place on 9 October and Mrs Bhalla said she could now do light duties. Mrs Sherriff says she reiterated that the respondent did not have light caregiving duties available and thought the request strange considering the applicant had been offered alternative light duties twice before. She says:

The first time this had not worked out and the second time she had rejected the offer. I told Veena that the company could not justify holding her employment open indefinitely, and that we now needed a medical clearance for her to return to full night caring duties. I informed her that if she was unable to provide a clearance by 5pm 10 October 2008, the company would have to consider terminating her employment.

[15] On 10 October, Mr Bhalla phoned Mrs Sherriff to ask whether his mother's position could be held open until 9 November and that if she was still unable to return to work at that time she would resign.

[16] Mr Roger Harrison, the company's Human Resources Manager, told the Authority that on 10 October 2008:

Sid Bhalla phoned me to request that UCG hold her job open until 9 November when her current medical certificate expired. He also stated that Veena would resign if she could not return to work on 9 November. I informed Sid that we needed to get a certificate from her doctor indicating the proposed return to work date. Sid emailed me the same day to say that he appreciated how long that UCG had held the position open and again asked that the position be held open until 9 November. In the email he claimed that his mother was getting better. I emailed Sid back to inform him that UCG would consider the points raised and would respond the following week. Sid phoned me again on 13 October to ask about the company's progress regarding the matter. I informed him that this was still being considered and that we would notify Veena of the outcome in writing shortly. Despite being given the opportunity to furnish a further medical certificate, nothing further was received by UCG as requested. The company now felt that the process it adopted to manage Veena's injury and incapacity was all but exhausted and that it had now to make a decision regarding the matter. It also felt that leaving things to drift on to 9 November 2008 was in no one's best interests and it did not want to get to the point where Veena felt forced to resign.

By 14 October 2008, UCG had not received any further medical information from Veena as requested. In my role as HR manager, and having been well aware of the full events surrounding this matter, I was responsible for writing a letter to Veena on behalf of UCG to inform her of the company's decision to terminate her employment on notice.

The issues

[17] To resolve this matter the Authority needs to make findings on the following issues:

- Was the respondent in breach of its good faith obligations under s.4; and
- Was the applicant disadvantaged by any unjustifiable actions of the respondent; and
- Was the applicant unjustifiably dismissed; and
- When did the dismissal occur; and

- If the applicant has a personal grievance, to what remedies is she entitled.

The investigation meeting

[18] The Authority heard evidence in person from the applicant herself and her son. For the respondent, evidence was presented by Mrs Rhonda Sherriff, Ms Catriona Baker, Mrs Marie Malone and Mr Roger Harrison.

[19] The Authority records its thanks to all who assisted at the meeting and in particular its appreciation of the efforts of Mr Beck and Mr Mitchell in maintaining the meeting's focus on the issues.

The test

[20] The test to be applied here is set out in s.103A of the Act and the role of the Authority is to determine the question of whether a dismissal or action was justifiable, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

Analysis and discussion

[21] It is clear Mrs Bhalla was a valued member of the Rose Court staff who undertook considerable responsibilities in her role as night caregiver. There is no suggestion the respondent was attempting to remove her from that role. Indeed, it went to some lengths to attempt to maintain her there.

[22] Mr Beck submits the respondent was *attempting to casualise the applicant's employment by stealth*. I reject that submission as it flies in the face of the facts of the case. I am satisfied on the evidence that the respondent was eager to have Mrs Bhalla return to her duties as soon as she was fit. It cited the applicant's knowledge of the resident's needs and their confidence in her as opposed to the frequent changes arising from using bureau staff as a key issue. It also referred to the additional cost of using such staff.

[23] Counsel also takes issue with the respondent's failure in not convening a formal final meeting with Mrs Bhalla to discuss the decision to dismiss as this denied the applicant the opportunity to contest the reasons for her dismissal.

[24] The reasons for the dismissal were evident to all and given the contacts of Mr Bhalla with Mr Harrison, the opportunity to contest any issues were available via that formal channel. I am satisfied from Mr Harrison's evidence that he was open to any matters that may have been put to him.

[25] The Authority has considered the submissions of both representatives in applying the present test for justification. The evidence before the Authority is that at no time during the course of these unfortunate events did Mrs Bhalla, her son or her representative raise any issues concerning the respondent's actions in respect of the applicant.

[26] For the avoidance of doubt, I do not accept there was an attempt to casualise Mrs Bhalla's employment let alone a dismissal prior to that which was given on notice and conveyed by Mr Harrison's letter.

[27] I am also satisfied that had the applicant had complaints about her treatment by the respondent, her son, an educated and articulate man, would not have hesitated to express those concerns on his mother's behalf.

[28] I am also satisfied that the respondent was acting genuinely in the applicant's best interests and a gradual return to work when, after the failure of the proposed return to work for two hours daily was unsuccessful, it still sought to retain her in some capacity until she was able to return to her full time role.

Determination

[29] Returning to the issues as set out above in this determination, I find:

- The respondent did not breach its obligations in good faith.
- The applicant was not disadvantaged by any unjustifiable action on the part of the respondent.
- The applicant was not unjustifiably dismissed.
- The dismissal occurred on notice and was confirmed in Mr Harrison's letter.

[30] While the Authority has considerable empathy for Mrs Bhalla in the circumstances which gave rise to the breakdown in the employment relationship, she does not have a personal grievance and the Authority is unable to assist her further.

Costs

[31] Costs are reserved. The parties are to confer in an attempt to resolve this issue between themselves. If that is not achievable, Mr Mitchell has 14 days from the date of issue of this determination to lodge and serve his memorandum. Mr Beck is to have a further seven days in which to file his memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority