

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 116
5388948

BETWEEN

GLORIA ANN BOOTH
Applicant

AND

ABBNEYFIELD PALMERSTON
NORTH INCORPORATED
Respondent

Member of Authority: P R Stapp

Representatives: Mark Dobson, Counsel for the Applicant
Bruce Stewart, Counsel for the Respondent

Investigation Meeting: 16 August 2012 at Palmerston North

Determination: 28 September 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem emerged from a complaint that Gloria Booth made about a matter in her employment that turned into an investigation by her employer in regard to five allegations about her behaviour.

[2] Abbeyfield Palmerston North Inc (Abbeyfield) relied on four reasons to justify dismissing Ms Booth. The reasons for the dismissal were:

- (a) That several relief housekeepers left Abbeyfield as they felt harshly treated by her, and that their major reason for leaving was Ms Booth's treatment of them.
- (b) That Ms Booth told a resident who took her dinner plate down to the kitchen area, as the resident was walking away, to *starve then* in regard to a fish and chip meal.

- (c) That on 24 April 2012 Ms Booth visited the committee Chairperson's place of business unannounced and without notice with a resident who went as a support person, and that Ms Booth delivered a tirade in an unprofessional manner in a place which was inappropriate.
- (d) That Ms Booth was unhelpful and unco-operative towards a visitor while he was going about his business spraying the premises for pest control.

[3] Ms Booth claims that the procedure to investigate the allegations and Abbeyfield's deliberations on reaching findings and penalties were biased and unfair.

[4] Abbeyfield denies all Ms Booth's claims. It vigorously denies her claim for reinstatement. It says it complied with the requirements of s.103 A (3) of the Employment Relations Act (the Act) in meeting the procedural requirements for a dismissal. It relies on s.103 A (5) of the Act to defend this matter and that if there are any procedural defects they are minor having regard to the resources of the employer.

The issues

[5] The issues in this matter are:

- (a) Whether the employer could rely on the grounds given to the applicant to justify dismissal?
- (b) Were the employer's actions, and how the employer acted, what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred?
- (c) If there is a personal grievance, is it practicable and reasonable to reinstate Ms Booth?
- (d) What other remedies apply?
- (e) This will be a matter for costs and both parties have agreed for costs to be reserved.

[6] In applying the test to justify the dismissal, I am required to assess:

- a. That having regard to the resources of the employer there was a sufficient investigation.
- b. That Abbeyfield raised its concerns with Ms Booth.
- c. That there was an opportunity for Ms Booth to respond.
- d. That Abbeyfield considered Ms Booth's response.

[7] Also, I am required to assess whether or not any defects in Abbeyfield's procedure were minor and did not result in the employee being treated unfairly.

[8] The law requires that where independent grounds for justifying summary dismissal exist, the failure to prove other grounds relied on for dismissal (such as the reasons in [2] (a-d) above) does not necessarily render a dismissal unjustified: *Zendel Consumer Products Ltd v Henderson* [1992] 2 ERNZ 377

Abbeyfield Palmerston North

[9] Abbeyfield owns and administers Roslyn House, a rest home in Palmerston North, which has been described as a "flating for seniors" facility. There are ten bedrooms, each of which has an en suite. There is a guest room and common areas which are used as a lounge and dining area.

[10] Ms Booth's job as house keeper involved her cooking lunch and dinner for the residents, cleaning the common areas, making sure residents were up and about each morning and generally supporting the residents. She reported to the house manager. Two part time weekend housekeepers were employed to cover the weekend work when Ms Booth would be away.

[11] Abbeyfield is run by a committee of volunteers. The committee is fully responsible for the running of the facility and in addition, employment relations matters. This included Ms Booth's employment. There was a signed-off employment agreement and Ms Booth was paid fortnightly, required to work 80 hours per fortnight and paid \$15 per hour (pay slip documents produced).

Ms Booth's employment at Abbeyfield

[12] Ms Booth's employment agreement required four weeks notice in writing or by mutual agreement in the event of any termination of employment, except for cause

for any serious misconduct. The agreement also made provision for the employee to be entitled to an interview with the employer in which the employee must be given an opportunity to explain any alleged conduct which might give rise to a summary dismissal. For matters of less serious misconduct, there is the option of two written warnings prior to dismissal and an opportunity to improve.

[13] Ms Booth had no prior warnings, and had a 2011 performance review that concluded she met the requirements of her position. There had been issues with Ms Booth in the past, but these appear to have been resolved, or at least, an outcome reached. No formal complaints about her had been received by the committee until this matter.

[14] On 27 April 2012 Ms Booth wrote to Mr Cliff Parker, the house manager, with a complaint concerning Mrs Carol Shaw, the chairperson, on the subject of a conversation with a resident involving Mrs Shaw. Ms Booth's complaint was that she had not been given a fair hearing in regard to her side of a problem relating to a conversation between the resident and another person about health and safety. Ms Booth believed that she had been treated unfairly and wanted the issue over the conversation resolved (SOP document F 27 April 2012).

[15] Instead the complaint morphed into a disciplinary process, because of information that Mrs Shaw became aware of about Ms Booth from other people. Mr Parker wrote to Ms Booth on 7 May 2012 to inform Ms Booth that the committee had decided to schedule a meeting in regard to the matter raised by her. He informed her that the committee also had a number of other issues to discuss that included the smooth running of Roslyn House. Ms Booth was informed of her right to have an advocate of her choice to be present at the meeting.

[16] On 7 May 2012 Abbeyfield's secretary at the time also wrote to Ms Booth acknowledging her letter to the house manager and that she was not happy with certain discussions. The secretary confirmed with Ms Booth that the arranged meeting was to talk that matter over and come to a satisfactory conclusion on it. The secretary envisaged that the meeting would take no more than 2 hours and identified that there were also a number of other issues the committee wanted discuss relating to the smooth running of Roslyn House without telling Ms Booth any details. In addition, the secretary commented that the committee felt this was a serious employment matter which could lead to her dismissal.

[17] Upon taking advice, Abbeyfield accepted that its approach to the matter was incorrect. Acting on that advice, it sought to correct the matter, and instructed its lawyer to write to Ms Booth on 14 May 2012 with details of the issues. The letter sent to Ms Booth advised her that there would be a change of time for the meeting and instead of being held on 14 May it was rescheduled for 18 May 2012. She was advised that the meeting would be in regard to an employment related matter which could lead to her being disciplined or being dismissed. She was invited to bring a support person. There were five matters that were listed for discussion. These matters were, and I quote verbatim:

1. *There have been several relief housekeepers who left the employment of Abbeyfield. It has been determined after they have left Abbeyfield that they have felt harshly treated by you and that the major reason for them leaving is your treatment of them.*
2. *That on 17 February 2012 one of the residents (name withheld) took her dinner plate down to the kitchen area at approximately 4.50pm. She has advised the Committee that she was regaled with a tirade from you about a Committee member (the Chairperson). As a separate but connected matter it is alleged by that same resident that when she said that she would not bother about dinner that you said to her "starve then".*
3. *That on 24 April 2012 you visited Carol Shaw's place of business "Carolann's Collections" unannounced and with a resident. You delivered a tirade at Carol in an unprofessional manner in a place which was inappropriate.*
4. *That you have failed in your duty to "be aware" of whether residents are "up and active" each morning. In particular, that you have failed consistently to check on one resident.*
5. *That when Abbeyfield was visited by A A Pest Arrestors that you were unhelpful and unco-operative with him while he was going about the business that he was employed to do, namely spraying of the premises for pest control. Not only was he not made to feel welcome, but your actions directly led to the spraying taking much longer than it needed to thus inconveniencing the contractor as well as the residents.*

[18] Ms Booth did not reply. She arranged for a support person to attend the meeting with her. I have not gone in to the background of the allegation that Ms Booth failed in her duty to "be aware" of whether residents were "up and active" each morning and that she failed consistently to check on one resident, because the matter was subsequently not upheld by the committee.

[19] At the meeting it is common ground that Abbeyfield's lawyer chaired the meeting. He made the opening statement and went through the preliminaries. He then handed over to Mrs Shaw, and Mrs Shaw read out five documents in their entirety. These documents were:

- (a) The letter dated 3 May 2012 (from the first housekeeper).
- (b) The letter dated 3 May 2012 (from the second housekeeper).
- (c) The report from a resident dated 5 May 2012.
- (d) The copy of Mrs Shaw's report concerning Ms Booth's attendance at Mrs Shaw's place of business which occurred on 24 April 2012.
- (e) The report from the pest controller.

Background to the allegations and the written documents

[20] First it came to Mrs Shaw's attention that there were concerns regarding the resignation of at least two housekeepers. The first house keeper intended resigning and tendered her resignation in writing on 29 April 2012. The second house keeper had resigned already. Mrs Shaw made contact with both of them to obtain their reasons for leaving, and both of them provided letters dated 3 May 2012. However, there had been no exit interviews held previously with either of the house keepers and there is no exit policy and or arrangements in place for feedback when somebody leaves.

[21] Second Mrs Shaw felt that she should investigate Ms Booth's complaint and interview the resident involved, notwithstanding that the subject of the complaint was her self (Shaw brief of evidence para.8). Mrs Shaw says she went to see the resident referred to in the complaint to tell her of the complaint and to see what would come out of that. It was at that time she discovered the incident the resident had with Ms Booth in regard to the alleged tirade in the kitchen and Ms Booth's "*starve then*" comment.

[22] Third, Mrs Shaw wrote her own report for the committee in regard to her recollection of the events of 24 April 2012 about Ms Booth's visit to her workplace/business. Mrs Shaw accused Ms Booth of delivering a tirade, which Ms Booth denied.

[23] Fourth Mrs Shaw became aware of AA Pest Arrestors' visit in early April 2012. She rang the person who visited Roslyn House and requested him to put his complaint in writing on 6 May 2012.

The next steps in the employer's procedure

[24] Mrs Shaw then convened a special committee meeting to relay her concerns to the committee about Ms Booth. Whilst the committee got the first part of the process wrong, it decided to correct the process upon getting legal advice. However Ms Booth's complaint by this time had been completely lost sight of because of Mrs Shaw's complaints and issues about Ms Booth.

[25] Ms Booth's support person deposed that when Mrs Shaw finished reading out each of the five documents, the lawyer turned to her and said "*now it's your turn*". The support person also did not mention anything about there being a break. Mrs Shaw denies that the lawyer said "*now it's your turn*" and says there was a break. Mr Parker confirmed in his evidence that the lawyer did make the comment "*now it's your turn*" to Ms Booth, and he says that at that point Ms Booth was given an opportunity to retire and think about her reply. This I will refer to as the "first cup of tea break". Ms Booth never commented on the matter in her original affidavit and subsequent statement of evidence. Also, Ms Booth's support person never mentioned there being a break and was not available for cross examination. It is more likely than not that the lawyer did make the comment and the first cup of tea break did occur because of Mr Parker's evidence on the matter.

[26] After the first cup of tea break the meeting was resumed and with the lawyer's assistance, Ms Booth addressed each of the five points which had been referred to in the letter dated 14 May 2012 and outlined above.

[27] I am satisfied that Ms Booth had an opportunity to address each of the points. In particular, it was very clear that she made a response in reply to point 4, which involved the committee later deciding to accept Ms Booth's explanation on the point. First I am satisfied that the committee listened, but I am not convinced that it was fair to rely on Mrs Shaw having just read the documents with so much information in them when there was time available for them to have been given to Ms Booth before the meeting. There has been no adequate explanation about why the documents were not provided in advance for MS Booth to consider them.

[28] The committee's decision was to not accept Ms Booth's explanations on points 1, 2, 3 and 5.

[29] Ms Booth was informed of the committee's conclusion and there was a discussion on the disciplinary options that were then available.

[30] It is common ground that Ms Booth did not want to be dismissed and that she did not think some of the issues were serious.

[31] There was another adjournment (the second adjournment) when the committee considered Ms Booth's submissions, and made its decision to dismiss her. Ms Booth's dismissal was confirmed in writing on 18 May 2012. She was given one month's notice from the date of the letter and extended the opportunity not to work out the notice period. However, Ms Booth decided to work out her notice and her employment ceased on 18 June 2012.

Determination

[32] I hold that Abbeyfield's decision to dismiss Ms Booth has not been justified. This is because there is an absence of any reasoning for the decisions that were reached in regard to the four complaints that were upheld. Furthermore Ms Booth was treated unfairly because Mrs Shaw had a direct interest in the outcome that she initiated, was involved in investigating and involved in making a decision on an outcome. This was fundamentally unfair, I hold. First Mrs Shaw procured the feedback from two house keepers who had left. They had never complained beforehand in a formal way. Ms Booth's response was never put back to the house keepers for the committee to assess their responses. The issues involving the house keepers have never been investigated properly and in a timely manner. Indeed one of the house keepers referred in her letter of complaint that "*in the most part the incidents are trivial, hearsay and Gossip*". However she did write that they added up to being detrimental to a happy professional relationship. Given that Ms Booth challenged a number of the incidents referred to it is hard to discern exactly what had been decided with out any reasons being given and without some full inquiry of both housekeepers, I hold. Furthermore there were no exit interviews involving the house keepers and there was no exit interview policy to apply for any issues arising from any employees leaving Abbeyfield that a fair and reasonable employer could be expected to apply and rely on. As such, the impression is left that the committee has

relied on matters deliberately set out by Mrs Shaw to build up the issues against Ms Booth. Indeed a minute of a committee meeting produced at the Authority's investigation contradicted the reasons for one of the house keepers leaving. A fair and reasonable employer could not dismiss for this reason I hold.

[33] Second there was no internal policy and procedure for any resident/employee complaints. There does not have to be such, but where there is no policy and procedure a fair and reasonable employer could be expected to have a proper enquiry. In this matter the issue was more likely than not a performance related matter. The issue from the resident about the incident in the kitchen had been escalated by Mrs Shaw when she found out about it when she made an enquiry in regard to Ms Booth's complaint. Mrs Shaw appears to have been selective with the matters involved because she only pursued one of the matters the resident raised. The alleged tirade that Ms Booth was supposed to have made at the time in the kitchen to the resident about the chairperson appears to have been completely ignored. There were no findings actually reached on the context in which Ms Booth made her comment to the resident to "*starve then*". This involved the same resident that Ms Booth had had issues with before. The committee left it to Mrs Shaw to get a report from the resident concerned. Also, there was the finding in the dismissal letter that "... *[T]he Committee however is sympathetic to the position in which you were at the time in the course of the preparation of the evening meal. You should always remember that Abbeyfield exist for its members.*" This has the ring of a reprimand and as such with the qualification hardly could amount to a fair and reasonable employer deciding to dismiss an employee over, I hold.

[34] Third Mrs Shaw was directly involved in Ms Booth's unannounced visit with another person to Mrs Shaw's place of business. Ms Booth admitted she attended Mrs Shaw's business and place of work, but denied delivering a tirade. She was upset about her earlier complaint in regard to the one sided conversation where she wanted her side heard. A fair and reasonable employer could be expected to exclude Mrs Shaw from a leading role in the employer's investigation and making any findings and deliberating on a penalty because of an apparent conflict. I do not accept that just because Mrs Shaw was the chair of the committee that other arrangements could not have been put in place, especially since the committee was able to arrange a lawyer to chair the meetings.

[35] The last matter in regard to the pest controller is an issue that has been included because Mrs Shaw pursued it against Ms Booth, I hold. At the time only an oral complaint was made. It involved what might loosely be called best practice arrangements about performance of duties, nothing that could amount to serious misconduct, I hold. A fair and reasonable employer could have treated this as a performance management issue, but would not have escalated it to serious misconduct. It certainly was not in the category of serious misconduct, I hold.

[36] Even in Mrs Shaw's evidence there is no mention about what the findings actually involved in any detail given the detail of the complaints. A fair and reasonable employer could not uphold complaints involving matters that had been challenged without making detailed findings I hold. This is because Ms Booth had challenged some of the issues and explained her role in the other issues.

[37] As such the employer's reasons for the dismissal do not justify the dismissal, I hold.

Summary

[38] The semblance of a fair process exists, but it is affected by the lost opportunity that Ms Booth had to properly prepare for the employer's meeting. Also the employer's failure to make clear the detail of the findings in regard to upholding the complaints about the house keepers, Mrs Shaw's complaint about Ms Booth's behaviour at her workplace and business, and the matter in regard to the pest controller was unfair, I hold. Ms Booth was entitled to know the basis of the employer's findings.

[39] Mrs Booth was not given the documents the employer had in its possession and was relying upon earlier enough. A fair and reasonable employer could be expected to give the documentation that contained the detail of the allegations to an employee before a meeting to enable the employee to properly prepare. There was plenty of time to provide them in advance, and no reasons have been advanced to withhold them, I hold. Ms Booth would have been under a grave disadvantage at the time when she had to rely solely on the detail being read to her, and being prompted, and to remember every instance and nuance, especially given the strongly held views and familiarity of the detail that Mrs Shaw had.

[40] I conclude that the investigation was inadequate given the resources of the employer with a lawyer and committee structure. The procedural defects above were more than minor and resulted in Ms Booth being treated unfairly.

[41] I do not accept Mrs Booth's claim that she reasonably expected to discuss her complaint at the meeting because the employer's allegations and issues were clearly out lined in the lawyer's letter. Her complaint was completely lost sight of. A fair and reasonable employer could be expected to have incorporated that in the discussion and investigation and/or kept it separate, but on track. That is a separate matter and now that the employment has ended has not been pursued. Even so it was very minor, I hold. I also hold that the employer's failure to pursue it properly does not affect the other issues raised and on its own can not be a factor for a procedural defect in the dismissal.

[42] Abbeyfield considered Ms Booth's response on a penalty, but the involvement of Mrs Shaw, who clearly had a role and interest in the outcome, meant that the deliberations were unfair. Abbeyfield's failure to investigate properly and to impartially assess the outcome and any penalty means that the decision to dismiss was unfair.

Personal grievance and reinstatement claim

[43] I hold that Ms Booth has a personal grievance. I hold that it is not practicable and reasonable to reinstate Ms Booth to her position for the following reasons:

- a) That there is enough of a risk for a difficult working relationship involving Ms Booth in the workplace and her employer. Although a number of residents have given information and evidence of their wish to have her return, I am not satisfied that their wishes are necessarily balanced by the concerns of her employer. This involves the treasurer signalling that she will resign. This will potentially have a financial impact with the loss of the free accounting services previously supplied to Abbeyfield.
- b) That the information and evidence including Ms Booth's admission that she did make the "*starve then*" comment and visited Mrs Shaw's workplace indicate that Ms Booth's reaction to issues at Abbeyfield will be of a concern and there is no certainty that she will not react inappropriately again.

- c) That the size of the employer and the role that Mrs Booth previously carried out will not ensure a successful relationship.
- d) That Mr Parker wrote a testimonial and reference for Ms Booth, but as Mr Parker said in his evidence he carefully worded the reference to be helpful, and qualified it that she was not always even handed in dealing with a diverse mix of elderly residents and that she left her employment through difficulties in this aspect of her work-(Gloria Booth's affidavit dated 24 July 2012 document "D"). The testimonial was written for an entirely different purpose than employment. Ms Booth cannot therefore rely on these documents to support reinstatement given the circumstances. Mr Parker did qualify his position in regard to what had occurred, and I hold that Ms Booth would need to work with him that could be trying and difficult as they relate to this matter and her on-going performance.

Other remedies for personal grievance

[44] Ms Booth has claimed lost wages. She has also claimed future lost earnings of \$48,360 (for 18 months) as I understand the claim if it is without reinstatement. It is not apparent that Ms Booth would have worked an extended period of any time with Abbeyfield if the matters had been properly dealt with by Abbeyfield. Her evidence indicated that there is some likelihood and confidence that she will shortly get alternative employment that she has currently applied for. There was no other evidence to support future lost earnings. Therefore I have limited her claim to the three months (13 weeks): \$7,800. I have taken into account that she did not mitigate her lost wages sufficiently although she did try. In addition I have to assess Ms Booth's contribution in the situation giving rise to her personal grievance: (s 124 of the Act). She can not be blamed for the procedure followed by the employer. However, there are two issues relating to Ms Booth's contribution, and they are: Ms Booth's conduct in making an inappropriate comment to a resident, and visiting Mrs Shaw's place of work unannounced and to confront Mrs Shaw. Her actions are blameworthy, but given they are at the low end of the threshold I have not made any deduction. Ms Booth is entitled to be paid \$7,800 lost wages.

[45] I now turn to the claim for compensation. She has claimed up to \$15,000 if she is not reinstated. The evidence for compensation is the same for whatever amount

is considered. I have to say that Ms Booth's claim based on her evidence only warrants \$5,000.

The Authority's orders

[46] Abbeyfield Palmerston North Incorporated is to pay Gloria Booth:

- a. \$7,800 lost wages.
- b. \$5,000 compensation for hurt and humiliation under s 123 (1) (c) (i) of the Act.

[47] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority