

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 111
5325796

BETWEEN DIANE BROOME
 Applicant

AND SPRINGVALE MANOR
 LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Diane Broome in person for Applicant
 Peter Rodriguez, owner for the Respondent

Investigation Meeting: 12 May 2011 at Whanganui

Determination: 17 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Diane Broome was dismissed from her employment with Springvale Manor Limited (SML) on 1 September 2010 for serious misconduct.

[2] SML admitted Ms Broome was dismissed on 1 September 2010 when a letter informing her of her dismissal was placed in her letterbox. The reason for the dismissal was based on a number of complaints about Ms Broome's behaviour in the work place and her refusal to transfer/cross credit her dementia certificate qualification. Ms Broome denied the complaints and says she had her own reasons for not transferring her qualification.

[3] Also, SML admitted that Ms Broome had not been provided with an investigation report dated 1 September 2010 prior to being informed of the decision to dismiss her. She had no opportunity to have any input and comment on the proposed disciplinary action.

[4] Ms Broome claimed that her dismissal was unjustified.

[5] SML denied Ms Broome's claims for remedies for lost wages and compensation for hurt and humiliation.

Issues

- What were the reasons for Ms Broome's dismissal?
- Would a fair and reasonable employer have dismissed Ms Broome for serious misconduct (in all the circumstances): s.103A of the Employment Relations Act applied?
- What, if any remedies apply?
- Has Ms Broome contributed to her personal grievance?

The facts

[6] Diane Broome was employed by SML as a caregiver. The parties had a written employment agreement which included a job description.

[7] Ms Broome obtained a dementia care qualification in training provided by another rest home (run by another business). She obtained this qualification during her employment with SML and in her own time. At that time (2006) SML did not have a dementia care wing.

[8] In January 2010 SML announced that it had decided to look into the possibility of opening a dementia care wing and plans were put in place to go ahead. The employees were informed of the possibility of opening a dementia wing at a meeting held on 13 January 2010 (minutes provided). Ms Broome was in attendance.

[9] SML obtained advice from the DHB and the Ministry of Health that the minimum requirement for staffing a dementia care wing was four dementia trained staff.

[10] In April 2010 the rest home General Manager discovered through a training provider that two employees at SML had their training certificates for dementia care, including Ms Broome. Training was offered to the other employees, and Ms Broome and the other employee were asked to cross credit their qualifications.

[11] Ms Broome refused to cross-credit her qualification by delaying to provide any authority to do so. In other words, she did not complete the forms that she had been provided with for this purpose. I am satisfied Ms Broome had been asked, but delayed at first signing any forms to transfer and cross credit her qualifications, and secondly she admitted that she later refused to do so “*because she had her reasons for doing so*”. She confirmed during the Authority’s investigation that she had indeed refused to cross-credit her qualifications. Her reason, she says, was because she had not been told by SML what her role would be. The stance of both parties was unreasonable because of s 4 of the Employment Relations Act and clause 16.4 of the employment agreement. Ms Broome’s refusal to cross credit her qualification was a belligerent reaction to her employer because it had not paid for the training. I hold that SML’s request was a reasonable request given Ms Broome’s role as a caregiver, her duties, and the qualification relating to her employment. SML should have been more responsive and communicative about the role it envisaged for Ms Broome and any pay increase to undertake the duties rather than assuming she would have known.

[12] The Employment Relations Act requires:

4. *Parties to employment relationship to deal with each other in good faith*

...

1A ...

(b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative; and*

...

[13] Ms Broome’s and SML’s employment agreement makes provision for:

2.1 *Titles and Duties*

It shall be the duty of the employee to carry out all reasonable instructions and to undertake any work reasonably required by the employer.

6. *Policy and Rules*

The employee will be subject to and must observe and comply with all rules, policies and procedures enforced from time to time as set out in the Employer’s policy and procedure Manual/House Rules. The Employer is entitled from time to time to amend, cancel or introduce such rules, policies and procedures as it considers necessary. Any employee who breaches any of the rules, policies or procedures in the Employer’s policy and procedure Manual/House Rules may be

subject to disciplinary action, which may result in the termination of the Employee's employment.

16.3 Employee Obligation

Employees shall carry out their duties well, faithfully and diligently, providing the Employer the full benefit of the Employee's experience and knowledge.

16.4

Employees shall use best endeavours to promote, develop and extend the Employer's business interests and reputation and not do anything to its detriment.

[14] Under the provisions of the employment agreement it was clearly reasonable for SML to request Ms Broome to assist and provide her qualification relevant to her employment. Clause 16.4 is a key provision relating to an obligation to promote, develop and extend the employer's business that Ms Broome had agreed to, I hold.

[15] I am supported in this finding in that a dementia wing would include duties associated with part of the work reasonably expected of Ms Broome in her employment. Therefore it is reasonable to conclude that she was not responsive to her employer's request.

[16] I accept that Ms Broome was entitled to have discussions with her employer about concerns in regard to her role. She claimed that she was never informed as to what her role would be. There is some uncertainty in the evidence about the extent of this happening because:

- (a) Ms Broome did not know her pay would increase. There were no written details about this provided by SML. Minutes of meetings do not confirm that Ms Broome would obtain a pay increase. The General Manager "assumed" that Ms Broome would have been aware her pay would increase. There has been no satisfactory evidence provided as to why Ms Broome would have assumed that, I hold.
- (b) Clearly there were communications problems in the employment relationship, at least between Ms Broome and the rest home manager.
- (c) The rest home manager held a negative impression about Ms Broome's behaviour and attitude and considered that she was difficult to deal with. This

was supported by adverse comments in a number of performance reviews. However there is no record of any disciplinary action over the matters relating to performance and these were never a part of the consultant's investigation.

[17] Ms Broome was put on notice of the allegation over her failing to provide a transfer of her qualification. Also, she was put on notice that any breach to provide this could amount to serious misconduct and involve her dismissal. This was done in writing. SML was relying on the provisions of the employment agreement that relate to discipline and serious misconduct.

[18] The parties met on 6 August 2010 at a meeting where Ms Broome was informed of a number of complaints about her behaviour in the workplace that had been put in writing (involving two residents and one family member of a resident and two other employees). This was a short meeting because SML needed to further investigate these complaints. SML engaged the services of a human resources consultant to undertake an investigation. The investigation encompassed the issue of Ms Broome's refusal to cross credit her qualification and sign the required forms and the employee and residents' complaints about her behaviour in the workplace.

[19] In the consultant's investigation two more meetings followed. The first on 13 August and the second on 24 August. At these meetings Ms Broome was provided with the written complaints taken from the residents and staff. She was not provided with minutes of interviews involving the consultant and the complainants and residents he interviewed at the time.

[20] I hold that following the last meeting (24 August) it would have been anticipated by SML that the human resources consultant would prepare a report. Ms Broome was not informed of what was to happen. Whilst a report was provided it was not made available to Ms Broome until after the decision to terminate her employment had been made. There was no other procedure put in place as to what would happen. SML, upon receiving the human resources consultant's report, then immediately dismissed Ms Broome (on the same day, 1 September 2010) relying on advice. A fair and reasonable employer would have made the report available to Ms Broome.

[21] The decision to dismiss Ms Broome was put in a letter dated 1 September, and the letter was put in Ms Broome's mailbox (with a copy of the report) by hand. My summary of that letter is as follows:

- a. The allegations were:
 - (i) Alleged behaviour towards residents;
 - (ii) Alleged behaviour towards staff and management;
 - (iii) Failure to comply with a fair and reasonable request to supply written consent in regards to the certificate for dementia;
 - (iv) The delay to do so has resulted in approximately \$30,564.40 estimated loss of income.

- b. The results of the investigation (upon considering Ms Broome's input were):
 - (i) A significant difference on how Ms Broome's behaviour was considered by her and others;
 - (ii) A raft of complaints regarding her treatment of staff. A number of residents complained;
 - (iii) No plausible explanation for refusing to consent to transfer the dementia certificate. This caused delay in opening the centre. There was significant financial loss. Ms Broome failed to follow a reasonable and lawful instruction;
 - (iv) Ms Broome's delay caused considerable revenue loss.

- c. It was decided to uphold the allegations of serious misconduct. Ms Broome's behaviour undermined the relationship of trust and confidence and that the relationship was irreparable. The letter stated:

"...please accept this letter as formal termination of your employment for serious misconduct".

Determination of the Authority

[22] Ms Broome has a personal grievance because:

- a. The procedure was seriously flawed. When the employer received the findings and recommendation of the human resources consultant it had an obligation to put the report, the findings and the human resources consultant's recommendation to Ms Broome for input, comment and any mitigation. That was not done.
- b. The human resources consultant's report was inadequate on the detail in regard to the findings and the conclusions reached about the complaints from other employees and residents. The human resources consultant's conclusions were not fully supported by the evidence. During my questioning of the consultant he was not able to provide me with the required detail on the allegations of what it was that involved any abuse and inappropriate language. A fair and reasonable employer would not have relied upon all the findings in the report given that it was too broad and holistic, particularly where Ms Broome had denied the allegations from employees and residents.
- c. It was unfair that Ms Broome was not provided with the minutes of the human resources consultant's interview's taken with the employees and residents at the time. This is because those minutes did not adequately highlight specific allegations of abusive and inappropriate language being used by Ms Broome. When the consultant was questioned by me he could not answer the direct question about what the abusive and inappropriate behaviour was. He was given time to answer, but after a long pause he conceded that he could not respond with information.
- d. The consultant's findings in his report were not able to be backed up by an account from that person as to what he was relying on for his findings when he was asked questions about the detail during the Authority's investigation. This related to the allegations about Ms Broome's behaviour towards residents that she had no input into. Thus, the minutes could not be relied upon for findings in the consultant's report. A fair and reasonable employer would have provided the minutes to Ms Broome to enable her to have the full knowledge of what the allegations were, especially as the detail was lacking

and would have supported her. This was important because Ms Broome had disputed the complaints from the start, and the minutes would have assisted her denials.

- e. The figures for the losses were only ever based on estimates, which have not been substantiated as actual losses. Moreover despite Ms Broome's actions I learnt during the Authority's investigation meeting that the dementia wing went ahead irrespective of Ms Broome's behaviour, and the decision to build a dementia wing was not solely based on Ms Broome's involvement.

[23] Ms Broome does have a personal grievance in that the dismissal has not been able to be justified on all the grounds relied upon by SML. I hold that the failings above were more significant than just being mere technicalities. However, Ms Broome's conduct was significant in that she refused to provide the authority to cross credit her qualification that had been reasonably requested by SML during the employment. This failure to be responsive gave rise to part of the reasons relied on for the dismissal. There must be a portion of contribution in regard to this, I hold.

[24] I hold that this refusal would involve a 30% reduction in all remedies claimed where SML has not been able to justify its decision to dismiss her in regard to the allegations about the complaints.

[25] In regard to the complaints I required Ms Broome's personal file to be produced. That file disclosed that there were a number of performance difficulties that had been assessed during her employment in her relationships and communications, especially with the rest home manager. It was not an entirely satisfactory relationship. Those performance matters are not sufficient on their own to establish that Ms Broome was abusive and used inappropriate language, I hold. In addition a number of witnesses were called by the respondent to try and support the complaints about Ms Broome. One of the witnesses did not write her written statement produced for the investigation meeting, and thus I have given it no weight. The other matters raised by other witnesses all related to issues that had more to do with performance, and in the absence of any disciplinary action I hold did not have any linkage to the dismissal, I hold.

[26] Ms Broome's hourly rate was \$13.16 for 8 hours per day (40 hours per week). Ms Broome's employment ended on 1 September 2010. She obtained a new part time

job in February 2011. However she has not satisfied me that she did sufficient to mitigate her loss looking for work. I accept that she went to the Department of Labour and applied for jobs using a c v, but has not provided any summary of details and information to satisfy me that she did all she could. Therefore I have limited her lost wages to 3 months. This amounts to \$6,843.20 I have to deduct 30% for contribution. The total loss is \$4,790.24.

[27] Ms Broome has claimed compensation for hurt and humiliation. Her evidence was that there had been a huge impact on her having to look for a new job, a financial impact and she lost her self-esteem. She had a supporting witness. I award her \$3,000 under s 123 (1) (c) (i) of the Act for hurt and humiliation. A deduction will be made in the order of 30% for contribution.

[28] Costs involve only the filing fee. Springvale is to pay Ms Broome the filing fee of \$71.56 (payable from 1 October 2010). This application was filed on 10 January 2011.

[29] Springvale Manor Limited is to pay Dianne Broome:

- a. \$4,790.24 lost wages due to her dismissal.
- b. \$2,100 compensation.
- c. \$71.56 filing fee.

P R Stapp
Member of the Employment Relations Authority