IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 526
5415668

	BETWEEN	ALANA BROWN Applicant
	A N D	BOB OWENS RETIREMENT VILLAGE LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Warwick Reid, Advocate for Applicant Heather McKenzie, Counsel for Respondent
Investigation Meeting:	17 October 2013 at Tauranga
Date of Determination:	15 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Brown) alleges that she was unjustifiably dismissed by the respondent (Bob Owens) and Bob Owens resist that claim.

[2] Ms Brown was employed as a caregiver at the Bob Owens facility in Tauranga from 6 August 2012. Initially the employment was casual but with effect from 19 November 2012, Ms Brown became a member of the permanent staff. A written employment agreement was executed by the parties with effect from that last date.

[3] It is common ground there were no disciplinary or performance issues in the employment prior to 19 February 2013.

[4] On that date, Ms Brown was advised by Bob Owens that there had been a number of complaints about her role as caregiver and she was handed a document headed up *Discussion with Staff re Alana Brown 19/02/13.*

[5] A letter dated 21 February 2013 summoned Ms Brown to a disciplinary meeting which took place on 6 March 2013. Ms Brown attended with her representative on that occasion.

[6] The following day on 7 March 2013, Bob Owens wrote to Ms Brown advising their preliminary decision was to dismiss and that decision was confirmed by a further letter dated 11 March 2013.

[7] A personal grievance was raised by Ms Brown on 19 March 2013.

Issues

[8] The Authority agreed with the parties that this determination would be limited to the question of justification only and what followed thereafter would depend on the outcome of the Authority's deliberations.

[9] The Authority was assisted by the representatives for both parties and pays tribute to both of them for their skill. Counsel for the respondent is perhaps particularly to be applauded for appearing in this matter at very short notice but still doing a commendable job for her client.

[10] The fundamental issue in this case is whether Bob Owens did enough to investigate the alleged wrongdoing and whether it provided sufficient particularity to Ms Brown to enable her to adequately respond to the allegations. In particular, this case is illustrative of the challenges inherent in a disciplinary process informed exclusively by *secret witnesses.*

[11] Accordingly, the Authority proposes to adopt the scheme suggested by the advocate for Ms Brown and address the following questions:.

(a) Was there an adequate inquiry?

(b) Was there a reasonable opportunity to respond?

Was there a proper inquiry?

[12] The essence of the case for Ms Brown is that Bob Owens conducted no inquiry at all and simply relied on the secret statements of six colleagues of Ms Brown all of whom complained about various aspects of Ms Brown's treatment of patients. Ms Brown says that Bob Owens simply relied upon unchallenged gossip and took no steps to independently verify what those persons actually claimed.

[13] It is apparent from the evidence given by witnesses for Bob Owens that the focus of the employer's assessment of the complainant evidence, for want of a better description, was to assess whether there was any prospect of collusion. The Authority is satisfied on the evidence it heard that Bob Owens properly directed itself on that aspect and satisfied itself that there was no particular evidence of a common cause amongst the six complainants. They were not from a particular group, they were not habitually working together, they were not all close friends, they were not all antagonists of Ms Brown and in summary in the words of Ms Sheely, the Clinical Manager at Bob Owens, the complainants had *no particular attachment to one another.*

[14] When pressed during the investigation meeting as to what management actually did to inquiry into the allegations, the impression the Authority was left with was that Bob Owens' focus was on ensuring that there was no collusion between the complainants rather than actually investigating what the complainants were alleging.

[15] For example, aside entirely from the oral evidence given by Bob Owens management at the Authority's investigation, the documentary evidence tends to confirm the impression that Bob Owens simply balanced the six complainants against the bare denial of wrongdoing by Ms Brown and Bob Owens took few steps to investigate if the allegations made by the six complainants were in fact truthful or not.

[16] In a document entitled *Full Summary of Investigations to Date* and supplied as a pdf document to Ms Brown's representative on 28 February 2013, Bob Owens breakdown the information available under the four different types of allegations which featured in the initial disciplinary letter dated 7 March 2013.

[17] The first of those allegations is of Ms Brown allegedly hitting residents. That is the way the allegation is described in the document the Authority is commenting on; in the disciplinary letter of 7 March 2013, it is expressed as *physically abusing*

residents but for present purposes the Authority will assume that both descriptors relate to the same complained about behaviour.

[18] The analysis under that head is in the following terms:

> *Any witness reports?*
> *Statements made by six staff that Alana (Ms Brown) hits residents/is rough with residents.*
> *Any evidence of residents having unexplained bruising etc?*
> *Three records of unexplained bruising on resident A, one record of unexplained bruising on resident B Reports attached.*
> *Was Alana working at the time of the incidents. Yes …*

[19] The analysis continues with annotations about when Ms Brown was working relative to the dates the incidents allegedly took place.

[20] In relation to the accusation of stealing, the analysis reports there are no official reports or complaints about items missing.

[21] In relation to the third aspect, behaviour that was unpredictable and intimidating of other staff, the analysis reports four staff alleging foul language by Ms Brown, statements including references to *different personalities* of Ms Brown and a reference to the fact that none of the complainants would put their name to the complaint for fear of retribution.

[22] In relation to the final aspect the damage to the electric hoist, the analysis simply records that the hoist was damaged, that Ms Brown was working at that time, but there is no other information to support the contention.

[23] So, on the basis of that document, it is fair to say that there has been a modicum of inquiry into the facts alleged by the complainants at least to the extent of establishing if Ms Brown was on duty at the time that residents were allegedly hurt and to identifying that, in relation to two identified residents, there was unexplained bruising.

[24] Further, in relation to the other allegation that survived the employer's investigation, that of intimidating staff, the analysis is even more minimalist, relying as it does on the weight of allegations made and not identifying any independent verification of those allegations.

[25] In terms of the complainants themselves, these were reduced to writing by Bob Owens management based on oral reporting from the complainants. No complainant would go on the record and none was even prepared to file a written complaint even if the complaint was anonymous.

[26] Bob Owens say that they did their very best to provide a full and transparent investigation, but that in the absence of complainants who were prepared to go on the record, that was very difficult. Further, they make the point (entirely properly) that the nature of their clientele made investigation problematic because many of the vulnerable elderly people that Bob Owens cares for have reduced faculties of one sort or another which limits their ability to provide accurate and timely information to support an inquiry of the sort that would normally be undertaken by an employer in these situations.

[27] But in the end, Bob Owens seemed to accept that the essence of the investigation for them was balancing six consistent complaints generated from people they were satisfied had not colluded with what subsequently became Ms Brown's bare denials. In simple terms, Bob Owens say that is enough.

[28] But is it? There is a paucity of analysis and aside from the matters already referred to by the Authority in this section of the determination, no evidence at all when any other inquiries were undertaken. Perhaps of the most significance is the fact that even aside from the employer's own duty to inquire into and establish the facts of an allegation, the nature of the complaints is so broad and general as to be almost completely devoid of any relevant specificity. In particular, there is virtually nothing about dates and times when the alleged wrongdoing is supposed to have happened.

[29] Indeed, on the Authority's analysis of the complaints, there is not one single example where a particular incident is described accurately and with sufficient particularity to enable the party complained about to turn their mind to the actual circumstances and give a measured response. Only one of the complaints gives a general time and an actual date (28 January 2013). Ironically that is the best investigated of the allegations because the resident was examined and a bruise found in the spot where the complainant claimed that resident had been hit by Ms Brown.

[30] Bob Owens say that they disclosed to Ms Brown all of the evidence they had save for the names of the complainants. But that is not enough. In order for Ms Brown to be able to respond appropriately to these very serious allegations, there must be a degree or particularity which identifies on a time and date basis at the very least what is supposed to have happened and to whom.

[31] Because Bob Owens concentrated so much on the alleged retribution that would be meted out to the complainants by Ms Brown if those complainants went on the record, it is almost as if that aspect took centre stage and the particularity of the complaints was overlooked.

[32] Certainly it is true that Bob Owens spent some time investigating whether the complainants were justified in their view that Ms Brown would retaliate if she was complained about.

[33] Ms Anderson for example, told the Authority that the complainants were *terrified* about talking to management about Ms Brown and about being named as having complained about her. But although Bob Owens management tried to satisfy the Authority that they were satisfied the threats were real, there was little specificity about that either. The fact that people say they are frightened of retaliation does not mean that that fear is rational. The only incident that the Authority was told about was an allegation that a staff member had their tyres slashed by Ms Brown but again, there were no steps taken to investigate that allegation, even to the extent of establishing if there was any reason to link an episode where a staff members tyres were slashed, with Ms Brown.

[34] The Authority is satisfied that a staff member did have their tyres slashed when their vehicle was parked outside the home but there was nothing to suggest Ms Brown had done it and no investigation by Bob Owens to demonstrate if Ms Brown was linked to that incident in any way.

[35] What does seem to be the case is that Ms Brown claimed to have been the tyre slasher, at least according to the witnesses for Bob Owens but even that may be no more than urban myth.

[36] The Authority must observe that Ms Brown gave her evidence appropriately, made appropriate concessions when necessary, and gave no indication whatever that she was capable of or indeed interested in trying to intimidate anybody. No doubt all

parties try to be on their best behaviour when appearing before the Authority but it does seem that Bob Owens simply accepted what the complainants said about the fear of retribution without taking the matter any further.

[37] Even in the disciplinary meeting, Bob Owens make no effort to invite Ms Brown to comment on the allegation that she has intimidated colleagues. They simply state it as a given that the complainants are all intimidated by Ms Brown and not prepared to go on the record.

[38] In the Authority's considered opinion then, the allegations made against Ms Brown were not sufficiently well investigated by Bob Owens to enable them to be put to Ms Brown with a degree of particularity that would enable her to respond appropriately.

[39] This finding is not just legal pedantry. It is based on the very sensible precept that the accused person is entitled to have the detail of what she is accused of put before her in such detail as to enable her to properly defend herself, if she is able to.

[40] The Authority is persuaded that Bob Owens ought to have established exactly when and where the incidents it proposed to rely upon happened and to whom, and then it ought to have put those specific matters to Ms Brown so that she could respond appropriately.

[41] Even if the initial investigation, flawed though it was were to be accepted, the Authority is persuaded that, particularly given the lack of specificity in the claims, a fair and reasonable employer would not simply balance the six secret complaints against Ms Brown and say they prefer the evidence of the six secret complainants. A fair and reasonable employer would follow the principles enunciated by Judge Couch in *Timu v. Waitemata District Health Board* [2007] ERNZ 419 where His Honour concluded that it was unreasonable of a decision maker to rely on one version of events when, by asking further questions it would have been straight forward to resolve some of those issues anyway. While the Authority is not persuaded *Timu* is directly on point here, (*Timu* relies amongst other things on the remoteness of the decision maker and two different versions of what had happened advanced by people other than the affected employee) given the adequacy of the material that was actually put to Ms Brown to respond to, in the Authority's judgment a fair and reasonable

employer would have conducted further inquiries when they received Ms Brown's bare denial.

[42] This is particularly the case when reliance is had exclusively on the evidence of secret witnesses. Ms Brown's able advocate referred to the Authority to the well known dictum of Goddard CJ in *Dallas v. Wellington Newspapers Limited* [1998] 2 ERNZ 456 when His Honour, in taking a jaundiced view of secret witnesses, opined:

> *It also gives witnesses coming forward in this way a guarantee that what they say will not be contradicted which enables them to say whatever they like.*

[43] The Authority is satisfied that the law in respect to secret witnesses does not preclude the reliance on secret witnesses per se but does require such witnesses to be treated with caution. In particular, the use of secret witnesses where that secrecy is justified can result in a safe process where the employer provides significant other information such that the affected employee has a proper opportunity to be informed of the extent of the allegations made against them and can give a reasonable response to the allegation, notwithstanding that the names of the complainant or complainants are withheld. These principles have been enunciated in a number of decided cases, including *New Zealand Food and Textile Workers Union v. Bay Milk Products Limited* [1991] 2 ERNZ 231, Judge Palmer, *AFFCO New Zealand Limited v. Nepia* (Employment Court, Wellington) WC 25/07, 28 September 2007, Judge Shaw, and *Wikaira v. Hokianga Health Enterprises Trust* (ERA AA123/05) 8 April 2005, Member Monaghan.

Was there a reasonable opportunity to respond?

[44] With one exception that the Authority will come to shortly, it is not persuaded that Ms Brown had any proper opportunity to respond to the allegations made against her because the nature of the material gathered by the employer simply lacked detail sufficient to enable a proper response to be given. Indeed, the only response that Ms Brown could make was one of bare denial because there was a complete lack of the detail which would have enabled her to provide context and her own information to either explain her behaviour or completely deny the allegations.

[45] But by virtue of the way in which the allegations were formed up, all Ms Brown was able to do was issue a bare denial and because the investigation undertaken by Bob Owens was itself so deficient, they were left to place reliance on either a singleton employee who denied wrongdoing or six other employees who maintained there had been wrongdoing but were either not prepared to or not able to provide any details of that wrongdoing save at the most macro of levels.

[46] No doubt one can have great sympathy for Bob Owens and their self-evident obligation to keep their vulnerable residents safe from harm. As counsel for Bob Owens made clear in her closing submissions to the Authority, Bob Owens was effectively dammed if it acted but equally dammed if it did not. Bob Owens had an absolute obligation to ensure its residents were safe and clearly that was a principal focus of its inquiries into the allegations against Ms Brown.

[47] But that requirement cannot override the employer's obligation to treat its employees fairly and in particular give them the proper opportunity to understand the detail and extent of the allegations against them in order that they can fully and frankly respond. It advantages no one if an unsatisfactory investigation results in an unsafe dismissal.

[48] If, given the self evident challenges of inquiries where secret witnesses were involved, an in-house investigation proves too challenging, the option of having an outside party conduct the investigation has significant merit. That suggestion was made by Ms Brown's advocate during the course of the investigation meeting and it is a sensible suggestion.

[49] Whether that is necessary or not is beside the point; the short point is that the investigation must be sufficiently robust to produce actual quantifiable allegations of wrongdoing which can be responded to one by one.

[50] The only allegation on which there could have been an individual response is the allegation alleging wrongdoing on 28 January 2013 where a particular incident is described, which allegedly happened on that date, and which appears to be supported by an assessment of a bruise on a resident who was allegedly the victim. In the Authority's opinion, Ms Brown could well have responded to that allegation particularly because it contained sufficient particularity to invite a particular response.

[51] That allegation aside, none of the other allegations were sufficiently detailed to invite anything other than a broad brush acceptance or denial. There was simply nothing else that Ms Brown would have been able to do relative to what was put in front of her.

[52] In the Authority's opinion, Bob Owens ought also to have sought from Ms Brown comment about the allegation that she had intimidated other staff to the extent of discouraging them from going on the record in respect to complaints about her. The allegation that she had so frightened her colleagues as to preclude them from saying anything against her is a very serious one and Ms Brown ought to have been given the opportunity to respond to that.

[53] It is true that the matter was referred to in the disciplinary meeting but there was no direct question from Bob Owens' representatives about that matter and there ought to have been. Ms Brown ought to have been given the opportunity to comment on why the staff that complained about her were so frightened of her.

[54] To underline these points, s.4 of the Employment Relations Act 2000 by sub-section 1A(c)(i) creates an obligation on both parties to provide information relevant to the continuation of the employment and requires an opportunity to comment on that material before any decision is made.

[55] The broad requirements of that section were discussed in the leading case of *Vice Chancellor of Massey University v. Wrigley and Ors* [2000] NZ EmpC 37 where the Court accepted that the obligation to provide information included in the context of disciplinary investigations although the case is primarily about a redundancy situation.

[56] The short point is that the effect of the statutory provision is to require parties to be *active and constructive* with each other while the employment relationship continued. That openness is to some extent compromised by a reliance on secret witnesses and the only way that that can be balanced is by ensuring that the specificity of the information is such as to ensure that the effected staff member has a proper opportunity to be heard.

[57] The Authority is satisfied that there was no proper opportunity for Ms Brown to be heard given the inadequate nature of the investigation conducted by Bob Owens

and therefore the self-evident difficulty Ms Brown had in responding to very generalised, but nonetheless highly damaging complaints about her work.

Determination

[58] For reasons that the Authority has already canvassed, the conclusion reached is that the dismissal of Ms Brown is not safe because a fair and reasonable employer could not have concluded that it was appropriate to dismiss Ms Brown in the particular circumstances of this case: s.103A Employment Relations Act 2000 applied. In the Authority's considered view, none of the responses of a fair and reasonable employer in the particular circumstances of this case could have included dismissal when the inadequacies of the investigation and therefore the absence of any proper opportunity for Ms Brown to be heard, are taken into account.

[59] In accordance with the undertaking given to the parties, this determination is only about questions of justification. Given that the Authority has found the dismissal lacks legal justification, it will be necessary for the parties to engage with the Authority again to determine what steps are undertaken next.

[60] To that end, the Authority will direct its support officer to arrange a telephone conference with the representatives.

Costs

[61] Costs are reserved.

James Crichton
Member of the Employment Relations Authority