

**Attention is drawn to  
the Order Prohibiting  
Publication of certain  
information in this  
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 600  
3037431

BETWEEN            ANGELA CUTTRISS  
                                 Applicant

AND                    PACT GROUP  
                                 Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Jenny Guthrie, counsel for Applicant  
                                 Fiona McMillan, counsel Respondent

Investigation Meeting:    18 July 2019 at Dunedin

Submissions received:    18 July 2019 from both parties

Last information received: 22 July 2019

Date of Determination:    21 October 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]    Angela Cuttriss claims she was unjustifiably disadvantaged by her employer's investigation into, and preliminary decision in relation to, issues relating to her employment. Ms Cuttriss claims compensation for the hurt and humiliation she suffered.

[2] Pact Group (Pact) denies unjustifiably disadvantaging Ms Cuttriss and says she resigned in the course of an investigation into her conduct which it was entitled to carry out. It says its investigation was conducted in a fair and reasonable manner and it had properly put its preliminary decision to Ms Cuttriss for her comment before it arrived at a final decision. It says the process was not completed because Ms Cuttriss resigned without providing that further comment.

[3] Ms Cuttriss also raised a personal grievance for unjustifiable, constructive, dismissal in her statement of problem. However, although the statement of problem was not amended, her counsel confirmed in the course of a telephone conference with the Authority and Pact on 18 March 2019 that the only live claim was that for unjustifiable disadvantage.

### **Prohibition on publication**

[4] The services Pact provides include supported accommodation services for those with mental health, intellectual disability and physical disability in Otago and other centres. At the outset of the investigation meeting Pact sought an order prohibiting the publication of names of all clients of Pact who featured in evidence or documentation provided by the parties and their witnesses. Pact asked that the order also apply to any of its employees referred to in the course of the Authority's investigation who were not attending or giving evidence.

[5] That application was not opposed by Ms Cuttriss. I considered there was no public interest in having such information made publically available and was satisfied it was in the interests of justice to make the order sought by Pact. Accordingly I ordered the prohibition on publication of names of any Pact clients referred to in documentation or evidence in the course of this matter. I extended the order to include any Pact employee referred to in evidence or documentation who did not attend, or give evidence in, the Authority's investigation meeting. The order was made under clause 10(1) of Schedule 2 of the Employment Relations Act 2000 (the Act). I confirm the order and make it permanent.

### **The Authority's investigation**

[6] I have not referred to all the witnesses who attended the investigation meeting. Nor have I set out all the evidence brought to the Authority but have set out the material facts and made findings on issues relevant to the determination of the applicant's claims in accordance with s 174E of the Act.

## **Relevant Background**

[7] Ms Cuttriss commenced her employment with Pact on 28 June 2016 on a part-time basis working one eight-hour shift per week as a support worker. She completed Pact's standard orientation process and applied, successfully, for a full-time position as a mental health support worker with Pact, commencing in that role on 13 November 2016. She was based at one of Pact's community residences where she worked as part of a team supporting residents in their daily lives. Ms Cuttriss reported to the Service Co-ordinator at the residence who in turn reported to the General Manager of Pact, Thomas Cardy. The Service Co-ordinator did not give evidence at the Authority's investigation meeting and I will identify that person as K.<sup>1</sup>

[8] In December 2016, approximately a month after starting her full-time employment with Pact, Ms Cuttriss experienced an assault from a client. Following the assault, she had time off work to recover. She had access to the employee assistance programme (EAP) and a claim was lodged with ACC. Ms Cuttriss said the incident had a long-lasting psychological effect on her and this manifested itself at times during her employment when triggered by certain events.

[9] In January 2017 Ms Cuttriss was the subject of an investigation into her conduct arising from an incident with another client. No formal disciplinary outcome ensued from that investigation, but Ms Cuttriss was provided with further training and was required to attend weekly supervision with K for the following three months.

[10] Ms Cuttriss was away from work on sick leave, special paid leave, and ACC for several weeks from February 2017. The reasons related to the December 2016 incident. When she returned to work it was to a different workplace and it was not until 1 July 2017 that she returned to the residence at which she normally worked.

[11] On 3 October 2017 an incident occurred at that residence affecting two of Pact's employees, neither of whom was Ms Cuttriss. However, her actions and how she conducted herself on her return to the residence and for the rest of that work day resulted in Mr Cardy sending her a six-page letter on 16 October 2017 outlining concerns about her work performance.

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<sup>1</sup> An initial bearing no relation to the person's name.

[12] The concerns related to:

- (a) Ms Cuttriss' reaction to the events that had occurred at the residence;
- (b) Her actions in supporting, or not, her affected colleagues;
- (c) Her conduct and behaviour towards the Service Coordinator, including her responses to questions and her behavioural gestures;
- (d) Her questioning of the Service Coordinator's decisions; and
- (e) Her actions after her shift had ended.

[13] Other concerns raised in the letter of 16 October 2017 related to Ms Cuttriss' conduct at work in the days following the 3 October 2017 incident and her colleagues' reactions to her response. Her interactions with her Service Co-ordinator over the next three days were set out in significant detail in Mr Cardy's letter.

[14] The letter alleged Ms Cuttriss had breached her job obligations by failing to follow Pact's policy and procedures in supporting clients. The letter also alleged she had not displayed the conduct expected from a support worker in discussing her personal issues and her Service Co-ordinator in front of clients and other Pact employees. The letter referred to Ms Cuttriss' staying at work after her shift had ended on 3 October 2017 and accusing her Service Co-ordinator of bullying and targeting her.

[15] Mr Cardy's letter reminded Ms Cuttriss that her bullying and targeting accusations against her supervisor were a serious matter which she would need to raise formally so they could be investigated, allowing the supervisor the opportunity to respond. The letter noted that, if Pact concluded Ms Cuttriss had failed to adhere to its work rules, the organisation would question whether it could have trust and confidence there would not be similar incidents in future. It would also lead to questions over whether her ability to discharge her duties was in the best interests of Pact.

[16] The letter noted this could lead to questions as to whether Ms Cuttriss was in breach of the Code of Health and Disability Services Consumer Rights (the Code) and/or in breach of Pact's misconduct policy. In terms of the Code, Ms Cuttriss was particularly directed to Right 4 and Right 8 (Right to services of an appropriate standard; and Right to support). In terms of Pact's misconduct policy, Mr Cardy cited in particular "acting to adversely affect hygiene,

safety or quality, failure to perform work to the required standard, preventing another employee or employees from undertaking their work or training."

[17] In the letter Mr Cardy said at this stage he was seeking Ms Cuttriss' explanation for the allegations. He noted that the organisation reserved the right to question her further about any other areas of concern at a later stage once they had heard her explanation. He said Pact needed to meet with Ms Cuttriss to hear her version of events, together with any explanation she wished to offer if she accepted the allegations were correct. This would occur before a decision was made as to whether or not there had been misconduct and, if there had been misconduct, what the appropriate outcome should be.

[18] Mr Cardy proposed a meeting with himself and the Senior Work Force Developer, Sylvia Wouters, which would take place eleven days later at Pact's headquarters. He informed Ms Cuttriss of her right to be represented at the meeting and said the time of the meeting was flexible within reason to suit the availability of a representative. He advised that, as she could be facing disciplinary action, she may wish to take independent advice before meeting with her employer or providing any response.

[19] Ms Cuttriss was offered EAP and was asked to maintain strict confidentiality with respect to the matter and not to discuss it with any of her colleagues or clients. Mr Cardy stated that any unauthorised communication with staff or clients about these matters could be considered serious misconduct and could lead to further disciplinary action.

[20] Ms Cuttriss, who had returned to work after receiving the letter of 3 October 2017, went on sick leave after receiving the letter of 16 October.

[21] The timing Mr Cardy had proposed for the meeting was changed to accommodate Ms Cuttriss and her representative's needs: it took place on 7 November 2017. Those in attendance were Ms Cuttriss, her representative, Jenny Guthrie, Ms Cuttriss' mother, Mr Cardy and Ms Wouters, who took notes.

[22] Following the meeting Mr Cardy sent a further letter to Ms Cuttriss on 20 November 2017. In it he referred to the allegations made against Ms Cuttriss and her responses to them. In respect of the events of 3 October 2017, and Ms Cuttriss' response to those events, Mr Cardy noted Ms Cuttriss' support persons had suggested the incident, comprising an assault on two colleagues, had retriggered the stress of her assault in December 2016. They had also

suggested Ms Cuttriss may still not be fit enough to return to work and that she (Ms Cuttriss) had advised that ACC were re-looking into her claim from that time.

[23] Mr Cardy then set out Pact's responses to Ms Cuttriss' explanations to the allegations and Pact's conclusions on those matters. The nine-page letter set out Pact's preliminary view that it could not have trust and confidence in Ms Cuttriss' ability to:

- "Behave and maintain professional conduct and boundaries with clients leading potentially to further serious breaches of boundaries with our clients.
- Conduct a productive and professional working relationship with your Service Co-ordinator as shown by your pattern of poor behaviour towards (K) such that you would not necessary (sic) adhere to instruction without question and causing disruption.
- Perform this role to the required level as your work performance has been below standard and you have not yet been able to demonstrate the sufficient competency in your work required to complete all your core training.
- Undertake all the responsibilities of the role recognising your own behaviour and the impact your work performance has had on your colleagues who have had to stay at the service when you have wanted to go out all the time with clients.
- Manage your own welfare, since you still believe the incident last year is causing you issues that these should have been brought to our attention and you should have sort help (sic).
- Manage your behaviour in response to events happening at work such that there won't be further incidences of this type in the future".

[24] Mr Cardy said Pact had concluded these "issues are part of a pattern of behaviour that is destructive of the necessary relationship of trust and confidence in an employment relationship". He set out the employer's preliminary decision that Ms Cuttriss should be dismissed stating that, in reaching that decision, Pact had considered whether there were any mitigating circumstances or any reason to justify giving Ms Cuttriss a final written warning rather than dismissing her. He said, because of the serious trust and confidence issues referred to in the letter, Pact did not consider a final warning to be appropriate.

[25] The letter stated Pact's preliminary conclusion that the allegations set out in the 16 October (2017) letter were more likely to be true and that there was no reasonable explanation for Ms Cuttriss' conduct.<sup>2</sup> Mr Cardy concluded his letter by stating that, before making a final decision, Pact wished to give Ms Cuttriss the opportunity to "point to any

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<sup>2</sup> Mr Cardy mistakenly referred to the letter as the 16 October 2016 letter.

flaws in our reasoning or other matters, which would support an argument that you should not be dismissed.” He provided a date by which comment should be made stating that a decision would probably then be made by the end of the day following that date.

[26] Ms Cuttriss, through her legal representative, responded by letter dated 28 November 2017 to Mr Cardy's letter and its conclusions. In the same correspondence, Ms Cuttriss notified a personal grievance for unjustified disadvantage arising from her employer's investigation into her and its conduct towards her. She also reserved "the right to raise a personal grievance for unjustified dismissal if her employment (was) terminated without notice on the grounds of serious behaviour/misconduct."

[27] The letter from Ms Cuttriss' representative noted:

"It is my view that, notwithstanding that (Ms Cuttriss) is too unwell to be at work, in the interests of her health, we must resolve this matter of her employment relationship and, if it is to end, how, as matter of urgency. Perhaps we will require the assistance of the Mediation Service..."

[28] The letter concluded with a proposed date the following week for mediation which Ms Guthrie had tentatively made with the MBIE Mediation Service.<sup>3</sup>

[29] Pact did not agree to mediation at that time on the basis that it was part way through a process. On 13 December 2017 Ms Cuttriss notified her resignation on notice from Pact, through her legal representative, who noted that it was now three weeks since Pact had notified Ms Cuttriss of its intention to terminate her employment. She said it was two weeks since Ms Cuttriss had responded fully to Mr Cardy's letter of 20 November; and one week since the parties could have attended mediation. Ms Guthrie referred to the stress and distress being experienced by Ms Cuttriss who had exhausted her sick leave and was struggling to manage while being off work without pay. She enclosed a medical certificate covering the period up to the expiry of Ms Cuttriss' notice.

[30] Pact accepted Ms Cuttriss' resignation. It did not complete the investigation into her conduct and performance and there was no formal conclusion to, or outcome from, its investigation.

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<sup>3</sup> The Ministry of Business, Innovation & Employment

**Relevant Law**

[31] Section 103A of the Employment Relation Act applies. The onus is on the employer to establish that its actions in relation to the investigation it conducted into Ms Cuttriss' performance and conduct, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

**Submissions and discussion**

[32] Ms Guthrie, in submissions for Ms Cuttriss, referred to Pact's staff misconduct policy, which defines misconduct as:

"behaviour that is inconsistent with the behaviours expected of staff, as outlined in Pact's vision, values and attitudes, and position descriptions and behaviours that fail to ensure the safety of staff and/or clients, and/or any behaviour that brings the organisation into disrepute."

[33] The policy lists a number of non-exclusive examples of conduct, including breach of safety codes, non-sexual harassment, and misuse of computers or email. It provides that an employee:

"who is guilty of misconduct will, after appropriate warnings, be dismissed by being given the notice required by their employment agreement. However, depending upon the situation behaviour that constitutes misconduct may be sufficiently serious to justify dismissal without prior warning and/or without notice (summary dismissal)."

[34] The policy defines serious misconduct as:

"any behaviour that fails to ensure the safety of staff and/or clients, and/or any behaviour that brings the organisation into disrepute and that undermines the trust and confidence that Pact have in the employee."

[35] Examples of serious misconduct that are described as always being viewed sufficiently seriously to justify summary dismissal are possessing, consuming or being under the influence of alcohol or other drugs at work; conduct leading to a serious breach of the Health and Disability Consumers Code of Rights; violence or abusive behaviour towards staff or clients; theft or other form of dishonesty; sexual or other assault; breaching work rules; deliberately disobeying a lawful and reasonable instruction from Pact; provision of incorrect or misleading information or any material fact suppressed on the employment application form.

[36] A list of four types of behaviour that could result in termination without notice follows: conviction for a crime involving dishonesty; absenteeism without the employer's prior permission; physical or mental incapacity for a prolonged period; and inability to drive a motor vehicle for more than 6 weeks for any reason, where the employee's role involves driving a motor vehicle

[37] The policy then lists 34 actions/behaviours in order "to more clearly define serious misconduct and the severity with which the organisation views such matters". Those matters, if substantiated, are described as likely to lead to dismissal. They cover a range of matters including performance, attendance, sexual harassment; unpaid parking fines; inappropriate use of computers or email; and smoking in restricted places.

[38] As Ms Guthrie detailed in her submissions, the issues Pact raised with Ms Cuttriss in the 16 October 2017 letter included the visible signs of distress she exhibited in front of clients on 3 October, her crying in front of clients, being negative in attitude and exhibiting an inability to cope the following day, and not leaving the workplace when upset.

[39] Ms Guthrie's submissions referred to the December 2016 assault on Ms Cuttriss by a client, and the effect that had on Ms Cuttriss. She also referred to the January 2017 incident approximately five weeks later where Ms Cuttriss was faced with challenging behaviour by another client. In that instance her response to the behaviour was investigated by Pact, resulting in some further training for Ms Cuttriss. Ms Guthrie submitted that, despite there being no disciplinary action taken, that incident remained "a black mark" on Ms Cuttriss' employment file and played a part in the outcome of Pact's investigation into the 3 October 2017 incident.

[40] Ms McMillan submitted that Pact was entitled, and under a duty, to investigate matters of concern to it with regard to Ms Cuttriss' performance and conduct. The right stemmed from the specific requirements of the work environment, and the strong protections in place for Pact's clients under the Code of Health and Disability Services Consumers' Rights and under Pact's own Code of Ethics.

[41] Ms Guthrie acknowledged the employer was entitled to investigate allegations relating to Ms Cuttriss' conduct and performance. She submitted, however, that Pact's letter of 16 October 2017 did not make Ms Cuttriss aware of the possible implications of the

disciplinary meeting that was held on 7 November 2017. The letter referred to the employer having to make a decision "whether or not there has been misconduct".

[42] The only part of the letter referring to serious misconduct occurred in the penultimate paragraph in which Ms Cuttriss was asked to maintain strict confidentiality with respect to the matters raised in Mr Cardy's 16 October letter and not to discuss the contents with any clients or colleagues. The letter stated that any "unauthorised communication with staff or the clients about these matters could be considered serious misconduct and could lead to further disciplinary action".

[43] It was submitted by Ms Guthrie that this failure to alert Ms Cuttriss to the possibility of her employer making a finding of serious misconduct, other than in relation to confidentiality, misled Ms Cuttriss so that she could not properly consider how she would respond. As a result she responded only verbally at the 7 November meeting to the allegations in Mr Cardy's letter. In Ms Guthrie's submission Ms Cuttriss would have responded in writing had she believed her employment to be in jeopardy.

[44] I find some merit in that submission. Mr Cardy's letter did not explicitly refer to serious misconduct, other than in relation to maintaining confidentiality about the matters raised in the letter. The number of issues raised in the letter, and the cumulative weight of those issues and allegations, should perhaps have alerted Ms Cuttriss to the need for a careful and considered response in writing. That does not, however, relieve Pact of its obligation to put her fairly on notice that it regarded the allegations and issues sufficiently seriously to believe dismissal to be an option open to it if they were upheld.

[45] I am not persuaded the employer's focus on Ms Cuttriss' shortcomings on 3 October 2017 took sufficiently into account the effect on her of the assault on two of her colleagues that day by a client. Pact was aware Ms Cuttriss had been significantly affected by the assault she had experienced from a client in December 2016. It had received her ACC medical certificates containing her diagnosis following that incident and had met with her ACC case manager in mid-2017 to discuss and plan for her return to her normal workplace.

[46] Ms Cuttriss' reaction to the 3 October incident caused the employer concern in terms of the expectations it has of its mental health support workers and it was reasonable for it to raise that matter with her. It chose to do so in a heavy-handed manner rather than assess her reactions in the context of her own relatively recent assault.

[47] The employer's 20 November 2017 letter acknowledged that Ms Cuttriss' support person and her representative had suggested the December 2016 assault had affected Ms Cuttriss' reaction to the events of 3 October 2017. They had raised the possibility of her suffering from some form of post-traumatic stress disorder (PTSD). Pact dismissed this on the basis neither it nor Ms Cuttriss was qualified to make and confirm a diagnosis of PTSD and that it was unable to take such a factor into account without having a certified diagnosis.

[48] I find it was not the action of a fair and reasonable employer in those particular circumstances to dismiss so readily the possibility of PTSD without further investigation. Nor am I persuaded the employer took Ms Cuttriss' explanations properly into account before concluding it could not have trust and confidence in her and reaching a preliminary decision that dismissal was the most appropriate outcome.

[49] The manner in which Pact launched an investigation into Ms Cuttriss's conduct and behaviour was a severe response to a situation that could have been managed in the first instance by an enquiry into why she responded to her colleagues' situation in the way she had. In that respect I find the investigation was unfair to Ms Cuttriss, as was the preliminary decision to dismiss her.

[50] I accept Ms McMillan's submission that this was only a preliminary decision and no final decision had been made before Ms Cuttriss' resignation. However, the conclusion reached by Pact was very robustly stated in Mr Cardy's letter of 20 November. Ms Cuttriss was given the opportunity to "point to any flaws in (Pact's) reasoning..." that would support an argument that she should not be dismissed. While the opportunity to comment was there, it was conveyed in a manner that gave no grounds for optimism that identifying any flaws in the employer's reasoning would have been persuasive.

## **Conclusion**

[51] For the reasons given above I conclude Ms Cuttriss' employment was affected to her disadvantage by the investigation her employer undertook following the 3 October 2017 incident. Pact was entitled to undertake an investigation into that incident. However, how it did so, the range of issues it chose to include, and the conclusions it reached in coming to a preliminary decision to dismiss did not meet the requirement on Pact to act as a fair and reasonable employer in all the circumstances at the time.

**Remedies and contribution**

[52] Ms Cuttriss seeks \$3,000 as compensation for the humiliation, loss of dignity and injury to feelings she sustained. I find that to be a very modest sum and award it in full, subject to any contribution on her part to the situation that gave rise to her personal grievance.

[53] The way in which Ms Cuttriss conducted herself on 3 October 2017 gave rise to her employer's concerns and led to its decision to investigate aspects of her conduct that day and the following day. I have accepted Pact had the right to investigate, but have found it to have taken an unduly severe and heavy-handed approach in light of the relatively recent, and undoubtedly distressing, event Ms Cuttriss had personally experienced.

[54] I have considered that there would have been no investigation without the conduct by Ms Cuttriss that caused her employer concern. I have also taken into account that Ms Cuttriss had no influence over how Pact chose to conduct its investigation. This leads me to conclude there was a level of contribution on Ms Cuttriss' part which I assess at ten percent. The award of compensation is adjusted accordingly.

**Orders**

[55] Pact Group is ordered to pay Ms Cuttriss \$2,700.00 in compensation under s 123(1)(c)(i) of the Act.

**Costs**

[56] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority