

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 191
5346549

BETWEEN SALLY-ANN DALLIESSI
Applicant
AND ISS FACILITY SERVICES
LIMITED
Respondent

Member of Authority: M B Loftus
Representatives: Tim Oldfield, Counsel for Applicant
Stephen Langton, Counsel for Respondent
Investigation Meeting 12 August 2011 at Dunedin
Submissions Received: At the investigation meeting
Date of Determination: 2 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Sally-Ann Dalliessi, claims that she was unjustifiably dismissed by the respondent, ISS Facility Services Limited (ISS), on 11 May 2011.

[2] ISS accepts that it dismissed Ms Dalliessi but contends the dismissal was justified by virtue of serious misconduct on her part.

Background

[3] Ms Dalliessi was employed as a cleaner to assist in fulfilling a contract ISS had at Dunedin Hospital. She had been working there as a cleaner for some 15 years.

[4] The event that led to her dismissal occurred on the morning of 20 April 2011.

[5] About the incident Ms Dalliessi says:

... I was doing my cleaning duties on the lower ground floor. I was coming out of a set of toilets at 0620 when the lift opened and a bed was pushed out.

To my horror I realised that the person in the bed was deceased and that person was A, the manager of the kitchen. I was shocked to see this because her face was not covered.

[6] Ms Dalliessi continued to do her duties and they subsequently took her to the kitchen area. She entered the kitchen office, which is separated from the main kitchen by a door that stays closed and then, according to Ms Dalliessi:

Donna Knudson, someone I considered a friend, was there. I blurted out to her that A had passed away. She put her hands up and said "I will pretend I didn't hear that Sally". I didn't say anything else.

[7] It would appear another employee, Lyndon Marriner, was present but Ms Dalliessi was not aware of that until after she had, to use her own words, *blurted out* her comment.

[8] According to the unchallenged evidence of Ms Averil Turner (a fellow cleaner and union delegate with the Service and Food Workers Union (SFWU)) one of the chef's, Michael, advised the kitchen staff, who are all employee of the DHB, of A's death at about 0645.

[9] At around 8.30am Ms Sonja Dillon, the DHB's General Manager – Diagnostic and Support Services Directorate, also went to advise kitchen staff of the passing of their manager.

[10] The evidence of Mr Timothy Auld, ISS's Health Services Manager in Dunedin, is that Ms Dillon:

... told me she had gone to the main kitchen at Dunedin Hospital with the Executive Chef to tell kitchen staff that their manager, A, had passed away... Ms Dillon told me that when she told kitchen staff about A's death she was immediately told that they already knew, because Sally-Ann Daliessi had been in and told them.

Ms Dillon told me that Sally-Ann's behaviour was inappropriate, and that she had breached confidentiality. She told me that it was not good enough, and that she was going to follow up with a written complaint. Although Ms Dillon was very composed throughout our conversation, she was clearly angry at what had happened. I apologised to Ms Dillon for the incident and said I would follow up straight away.

[11] Mr Auld then sought out Ms Dalliessi and advised her of his conversation with Ms Dillon. He asked whether the allegation that Ms Dalliessi had told staff of A's death was correct and she advised it was, before being told that a written complaint would be coming and that Mr Auld considered the matter serious.

[12] Ms Dillon's letter, dated 3 May 2011, was received by Mr Auld the following day – the 4th. It reads:

Further to our phone conversation of 20 April 2011, this letter is to confirm the version of events that I have been told.

On Wednesday 20 April, Kostya Cherkun (Executive Chef) and I met in the main kitchen to advise staff of the sad passing of their manager, A, who had passed away overnight. We were advised by Donna Knudson (Food Supervisor) that the staff already knew as "Sally" the cleaner had appeared in the kitchen earlier and announced "A is dead". I understand that this was observed by Donna, Lyndon Marriner (Kitchen Assistant) and Cathryn Herd (Kitchen Assistant).

The alleged statement by Sally is of significant concern to me as not only would this show a lack of judgement and respect for A and her staff, it would also be a breach of patient confidentiality.

I enclose copies of the Otago DHB Code of Conduct and Code of Procedure and the Southland DHB Code of Conduct Policy that form part of ISS Facility Service's contract with Southern DHB. As per the contract, all staff working on our premises are required to follow these codes.

I would appreciate your appropriate investigation of this matter and ask that you provide me with a summary of your findings and outcome.

Managing patient confidentiality is a serious matter and we expect both our staff and contracted staff to uphold our obligations within the Privacy Act.

Kind regards,

[13] Mr Auld goes on to say:

I was extremely concerned to hear this allegation. The maintenance of patient confidentiality is an important requirement that applies to all ISS employees who work in hospitals. It is of fundamental importance that the SDHB has confidence in our staff abiding by this obligation. Accordingly, if the allegation was substantiated, I was concerned that this would put ISS's relationship with the SDHB at risk.

[14] Mr Auld then prepared a letter that was delivered to Ms Dalliessi on the morning of 5 May. It confirms receipt of the complaint (attached to the letter),

outlines the allegation and that ISS consider it to require investigation before inviting Ms Dalliessi to a meeting aimed as ascertaining what occurred. It then advises that should disciplinary action result, there would be a separate process at a later date and that *in view of the seriousness of the allegations*, representation was recommended.

[15] Given he was aware that Ms Dalliessi was an SFWU member Mr Auld then contacted Ms Turner, advised her of what had happened, that an investigation meeting was taking place, that the matter was considered serious and that it might result in disciplinary action. Ms Turner passed the information to a Union Organiser, Mr Stevan Briggs.

[16] Mr Auld also sought advice. He telephoned Mr Mike Mulholland, ISS's National Human Resources Manager at the time. He read Ms Dillon's letter and that he was advised that an investigation was unnecessary and he could move straight to the disciplinary phase as Ms Dalliessi had admitted she disclosed the relevant information to an SDHB employee. Mr Auld then called Mr Briggs; told him of the matter and advised that whilst he had invited Ms Dalliessi to an investigation meeting he now intending changing that to a disciplinary meeting.

[17] Mr Briggs accepts the call was made and adds that Mr Auld passed the comment *this is as serious as it gets*.

[18] Mr Briggs also states that he advised Mr Auld that notwithstanding the advice of Mr Mulholland, it was his (Briggs') view that before any disciplinary meeting there needed to be an investigation meeting.

[19] The meeting of 6 May was attended by Mr Auld and a Beverly Connolly representing ISS, Ms Dalliessi, Mr Briggs and Ms Turner. The meeting opened with Mr Briggs questioning why it was to be disciplinary and not investigatory and, after a brief discussion, the parties agreed to revert to the initially advised process and continue with an investigatory meeting.

[20] Mr Auld reiterated that they were considering the possibility that serious misconduct had occurred and that disciplinary action could result before Ms Dalliessi gave an outline of events that is consistent with that contained in paragraphs 5 to 7 above. There was then a discussion about the fact a third SDHB employee (Cathryn Herd) had been present. Mr Auld says that Ms Dalliessi advised that Ms Herd would not have heard her remarks, just Ms Knudson's reply and Mr Briggs added that he had

spoken to Ms Herd who had told him that she had only come into the kitchen at the end of the conversation and heard nothing. Mr Briggs claims that despite this:

... Tim seemed more concerned with the fact that there was more than one person in the kitchen reception at the time when Sally-Ann had blurted it out and because of this it had gotten all round the kitchen.

[21] Mr Briggs goes on to say:

Despite asking Tim where the breach of confidentiality was, given the fact that A's partner had chosen to leave the body uncovered, this didn't seem to make any difference in Tim's eyes. Tim responded by saying that its an understood thing in the hospital that confidentiality is paramount and we all know that.

Averill (Turner) and I advised Tim that the only person Sally-Ann said it to was Donna Knudson and that Sally-Ann didn't pass it on to other kitchen staff and any such breach was not Sally-Ann's doing.

[22] Mr Auld adds:

I asked Sally-Ann why she had told Ms Knudson about A's death. Sally-Ann said that she was shocked to see that it was A, and because she considered Ms Knudson to be her friend, it was her way of coping with a sad event. She said she needed to confide in a friend.

[23] Mr Auld followed this up with Ms Knudson on 9 May. He says:

Ms Knudson told me that she had been in the kitchen office, and that Sally-Ann had unlocked the outer door. She said that Sally-Ann had then flung open the inner door and said "A is dead" or "A has died". Ms Knudson said that she motioned that she didn't want hear about it, or said something like "we aren't able or allowed to talk about this". Ms Knudson also said that she told Sally-Ann that she couldn't talk about a malicious rumour. Ms Knudson showed me where she was standing, and the other two employees (Ms Marriner and Ms Herd) were standing, at the time of Sally-Ann's announcement.

[24] On 10 May Mr Auld telephoned Ms Dalliessi to advise her he intended holding a disciplinary meeting to discuss a breach of confidentiality, and that the allegation was serious. He says he also told her she had the right to bring a representative before telephoning Mr Briggs and telling him about the meeting.

[25] This was followed by the preparation of a letter formalising the arrangement. It was dated 10 May 2011 but not handed to Ms Dalliessi until the meeting commenced the following day. It read:

I am writing to advise the need to hold a disciplinary meeting with you about concerns that have arisen in relation to your conduct at work.

The specific concerns under the ISS Code of Conduct are:

Breach of confidentiality,

Conduct that effects or in ISS Facility Services reasonable opinion is likely to prejudicially affect its interest.

This allegation relates to:

On Wednesday the 20th April you breached confidentiality, and privacy by sharing information relating to the circumstances of another hospital employee.

Specifically you advised kitchen staff that the other employee is dead.

ISS will present the following evidence or information:

A letter from Sonja Dillon ...(attached).

You have also admitted to the ISS Health Services Manager that you did announce to kitchen staff that A is "dead".

We have to advise that these allegations, if proved, are serious misconduct and may result in disciplinary action up to and including summary dismissal being taken against you.

We propose a meeting at ...

[26] The meeting commenced at approximately 11.25am on 11 May 2011. It was attended by Mr Auld, Ms Dalliessi, Ms Dalliessi's daughter, Ms Turner and Mr Briggs. Mr Auld passed the letter of 10 May (25 above) before speaking to notes that he had made at the meeting of 6 May. He then spoke about his discussion with Ms Knudson and expressed a view that there was some discrepancies between her story and that of Ms Dalliessi. He says that Ms Dalliessi reiterated the previous explanation that she had told Ms Knudson about A's death because she was upset and wanted to confide in Ms Knudson as a friend.

[27] The meeting then adjourned for about an hour. During that time Mr Auld telephoned Mr Mulholland to seek advice. He also telephoned Ms Knudson to ask about Ms Dalliessi's demeanour when she had come into the kitchen. He advises that Ms Knudson said that Ms Dalliessi did not look upset, that she wasn't crying, and that she seemed to be her normal self.

[28] The meeting then recommenced. About that Ms Dalliessi says:

[Mr Auld] returned to the meeting and told me that he believed that I thought A's death was hot news and that I was not upset by the events of 20 April 2011. He said that he considered my actions to be serious misconduct, that I could no longer be trusted and that he was terminating my employment effective immediately.

[29] Ms Dalliessi claims she was unaware that Mr Auld spoke to Ms Knudson during the adjournment.

[30] Mr Auld's view is that:

I reconvened the meeting and told Sally-Ann and the others present what Ms Knudson had told me; specifically, that Ms Knudson did not believe Sally-Ann was upset when she told her about A's death. It is therefore incorrect to say (as alleged in Sally-Ann's witness statement) that I didn't tell Sally-Ann what Ms Knudson had said, or allow her to comment on it before making the decision to dismiss her.

I told Sally-Ann that I believed the way she had told Ms Knudson about A's death, in particular by flinging open the door and blurting the information out, indicated that Sally-Ann was simply broadcasting or gossiping about A's death rather than looking to confide in a friend.

[31] There was then a discussion about the DHB's code of conduct and its relevance or otherwise to Ms Dalliessi with Mr Auld adding that Ms Dalliessi at least recognised that she was aware of the privacy and confidentiality requirements of the DHB. Mr Auld goes on to say:

Mr Briggs then stated that he believed this was a witch hunt. I advised him that if the matter had involved different people it would most likely have the same outcome. ... I advised that I did not accept Sally-Ann's explanation, and that I would have further concerns about her trustworthiness in relation to confidentiality.

[32] This last comment is a reference to the fact that in January 2009 staff of the DHB's records department had complained about Ms Dalliessi making unprofessional comments about a staff member and the relaying of personal information about that employee to other staff. The parties accept that that resulted in a formal discussion and advice to Ms Dalliessi about her responsibilities in respect to confidentiality. Mr Auld goes on to express the view that the repetition *demonstrated a pattern of behaviour*.

[33] The meeting ended with advice of Ms Dalliessi's dismissal and this was confirmed by letter dated 13 May 2011. Contained therein is advice that:

We have concluded that the allegations are proved on the balance of probabilities. Your conduct amounts to serious misconduct under the Code of Conduct.

As a result of this misconduct we consider that we can no longer have the confidence, and trust in you that is required in an employment relationship, and that termination of employment is an inevitable consequence of your actions.

Determination

[34] The fact ISS accepts it dismissed Ms Daliessi means it also accepts the onus of justifying the dismissal.

[35] The letter advising dismissal states that it is the result of serious conduct on Ms Dalliessi's part in that she breached a confidence and engaged in conduct that effects, or is likely to prejudicially affect ISS' interests by *sharing information relating to another hospital employee*.

[36] Notes of the meeting of 11 May indicate that the decision was influenced by:

- a. A finding that Ms Dalliessi had breached privacy and confidentiality;
- b. A view her explanation was unreasonable;
- c. A concern that she could no longer be trusted in relation to confidentiality; and
- d. The fact a similar concern had been discussed with her in January 2009.

[37] Pursuant to s.103A of the Employment Relations Act 2000 (the Act), the question of whether a dismissal is justifiable *must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred*

[38] In applying that test the Authority must, in accordance with the provisions of s.103A(3), consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;

- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[39] Traditionally the objective review has been performed by considering the employers actions from both a substantive and a procedural perspective. Whilst it is clear that issues of substance and process overlap and that there is no such thing as a firm delineation, separation still provides a useful means of analysis, especially as the elements referred to in 46(b) to(d) appear to have a procedural focus.

[40] The test cited above is that which came into force by virtue of an amendment to the Act which took effect on 1 April 2011. A key change is that the word “could” has been substituted for the “would” that previously applied.

[41] In *Air New Zealand v Hudson* [2006] ERNZ 415, 435 the Employment Court held that in the context of considering justification of dismissal the Court of Appeal’s use of the word “could” in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 widened the range of responses open to an employer. In *Hudson* the difference between “could” and “would” was explained as:

The difference between whether a person is able to respond in a certain way or whether a person who is able to respond would actually respond in that way.

[42] Notwithstanding that wider range of possibilities available to ISS, I have concerns about whether an employer in its position could have acted as it did.

[43] My initial concern relates to frequent references to privacy and the Privacy Act 1993. For example it was raised in Ms Dillon’s letter and the agreement between the DHB and ISS contains a requirement that:

OSDHB requires that the providers employees, sub-contractors or agents complete and sign the provided documentation that ensures ... The providers employees understand that information concerning the OSDHB and its clients is confidential and agree to conform with the statutory obligations set out in the Privacy Act 1993. ...

[44] I have concerns that upon death, the provisions of the Privacy Act no longer applied to A (refer s.2 and the definition of individual). Reference to the Act has the potential to create confusion about the requirements and the alleged infraction. That said, I was asked by Mr Langton to ignore this when I raised it, focus on the fact that both codes of conduct (ISS's and the DHB's) refer to confidentiality without mentioning the Privacy Act and that Ms Dalliessi admitted knowledge of the requirements. There is also the fact that A's next of kin was also an employee of the DHB, that she was affected and that the privacy requirement may well still have remained in respect of her and it may have been breached, though I note this possibility does not appear to have been discussed during the investigatory process. Whilst Mr Langton's points are valid the potential for confusion remains, as does the possibility that an irrelevant consideration influenced the decision given Mr Auld's references to privacy when answering questions.

[45] Another concern arises from the provision referred to in 43 above and that is ISS's admission that it had failed to comply. Ms Dalliessi never acknowledged receipt of the documents as required and the evidence goes so far as establish that she never acknowledged receipt of ISS's handbook and code of conduct and actually claims never to have seen them. Again though, the effect of these deficiencies is mitigated by the fact that Ms Dalliessi acknowledges an understanding of the requirements and it is accepted by her witnesses, and in particular Ms Turner, that she should not have acted as she did and that her actions could be considered inappropriate and detrimental to ISS's interests.

[46] What can not, however, be dismissed are apparent deficiencies in the investigation. The first relates to the fact A's face was uncovered. That occurred at the request of A's partner. While seen by Ms Dalliessi in a part of the hospital not open to the public, there is the distinct possibility that A was similarly uncovered in a public place. If so, it is arguable that confidentiality has been waived, there is not, on Ms Dalliessi's part, a breach. There is absolutely no evidence this was considered or questioned.

[47] Similarly there is evidence that another employee announced A's death to all kitchen staff soon after Ms Dalliessi told Ms Knudson, yet there is no mention of this during the investigation process; indeed no evidence of any inquiry into this possibility. If this is correct (and the allegation was not challenged) then the

allegation that it was Ms Dalliessi's advise to staff that breached the confidence is severely undermined. The fact this was not mentioned let alone investigated raises questions about the breadth of the inquiry and its sufficiency.

[48] Likewise there is the fact that the notes indicate that the previous discussion about a beach of confidentiality influenced the decision. That occurred two and a half years before this incident and while there is no general rule of thumb as to the period a previous warning or caution may remain valid, the normal point of discussion is around 12 months. The period here, 30 months, is considerably greater and, in my view, renders it an inappropriate consideration. Here I note that Mr Auld states at paragraph 48 of his brief that dismissal would have occurred regardless but I consider this assertion was undermined by the content of the notes and his view that Ms Dalliessi's actions demonstrated a pattern of behaviour. The issue was clearly in his mind.

[49] Finally I note the second breach which is said to have justified dismissal – namely that Ms Dalliessi's conduct could prejudicially affect ISS interests. This would be by having a detrimental affect on the relationship with the DHB. Mr Auld was clearly concerned about this and made more than one reference to Ms Dillon's obvious anger and her allegation that Ms Dalliessi's conduct was unacceptable, which his responses when questioned indicate he accepted at face value and did not question. There is also the fact that DHB witnesses were lining up (but not ultimately heard) to evidence their disapproval and the fact that Ms Dalliessi's presence was no longer acceptable to the DHB. Having heard and considered the evidence and notwithstanding Mr Auld's denial, I conclude that his appraisal of the DHB's reaction meant that dismissal was all but a *fait accompli*.

[50] There are then the procedural requirements of s.103A(3)(a). A simplistic summary of the requirements of s.103A(3)(b) to (d) is that an accused employee should be advised of the allegation, has a right to respond and should have that response genuinely considered.

[51] Putting aside the concerns I have already expressed about how genuinely Ms Dalliessi's explanation was considered (see 49 above), I note that a key factor in the decision was that Mr Auld did not believe her excuse. That conclusion was, according to the evidence, formed as a result of his discussion with Ms Knudson and that aside from *broadcasting* the information, she did not appear upset and appeared

her normal self (paragraph 41 of Ms Auld's brief). While she accepts she was told she did not appear upset, the meeting notes do not show that the specifics were put to Ms Dalliessi for response.

[52] Likewise the first time trust and confidence is mentioned in the notes is during Mr Auld's summation of the factors he had taken into account as he delivered the decision. There is no evidence of an ability to respond to this specific.

[53] When I consider the above factors I conclude that the decision to dismiss Ms Dalliessi was not one a fair and reasonable employer could reach in the circumstances. There are factors that suggest the inquiry was narrow in scope, procedurally deficient and that the outcome was, effectively, a fait accompli.

[54] The conclusion that the decision was not fair and reasonable means that Ms Dalliessi has a personal grievance. A consideration of remedies is therefore required.

Remedies

[55] Ms Dalliessi seeks reinstatement, lost wages and compensation for hurt and humiliation.

[56] Since 1 April reinstatement has ceased to be a prime remedy. It is something to be considered when practicable and reasonable. I do not consider it to be practicable and reasonable for the following reasons:

- a. The evidence offered in support of the claim was minimal (see paragraph 17 of Ms Dalliessi's brief);
- b. The issue of confidentiality is considered extremely important in the hospital environment;
- c. Ms Dalliessi was well aware of that yet breached the requirement in a manner her own witnesses concede as inappropriate and likely to affect ISS's interest to its disadvantage;
- d. This was not the first time she had acted in such a way and this occurred despite counselling from both ISS and Ms Turner. The fact of repetition must give credence to ISS's evidence that it no longer

trusts Ms Dalliessi and a lack of trust must undermine the practicality of reinstatement; and

- e. Likewise, and while the DHB witnesses did not appear, it was accepted by Mr Oldfield that they would oppose reinstatement. Again, this reluctance from the only client must undermine the practicality of reinstatement.

[57] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. It is clear that Ms Dalliessi has sought to mitigate her loss but has found it difficult and has only got some part time work as a replacement. The evidence would suggest that as at the date of hearing her loss was \$6,983.80. She is entitled to that amount but nothing shall accrue after 12 August as it is clear Ms Dalliessi was looking for work. I have no evidence of success or otherwise and can not therefore calculate a loss, if any.

[58] The evidence tendered in support of the claim for compensation was brief yet there is mention of anti-depressant medication and an inability to sleep. Whilst the evidence is brief, it is therefore clear that Ms Dalliessi was hurt by her dismissal. In the circumstances I consider an award of \$4,000 to be appropriate.

[59] Finally, the conclusion Ms Dalliessi has a personal grievance and that remedies are appropriate means I must consider whether or not she contributed to the situation in which she found herself (s.124 of the Act). In this case there is the obvious issue that she admits acting in a way that even her own witnesses accept may be considered inappropriate. That said, she has suffered a heavy penalty for one brief act of omission and has failed to attain reinstatement which appears to have been genuinely sought. I consider that penalty enough and will not reduce the remedies further.

Orders

[60] For the reasons given the following orders are made:

- (i) The respondent, ISS Facility Services Limited, is to pay to the applicant, Ms Sally-Ann Dalliessi, the sum of \$6,983.80 (six thousand, nine hundred and eighty three dollars and eighty cents) as

reimbursement of wages lost as a result of Ms Dalliessi's unjustified dismissal; and

- (ii) The respondent is to pay the applicant a further \$4,000.00 (four thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[61] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that Ms Dalliessi wishes to seek costs, she is required to file her application within 28 days of this determination. A copy shall be served on ISS who is to file any response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority