

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 71
5444804

BETWEEN JOANNE GUNDRY
Applicant

A N D BAY OF PLENTY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
G Bingham, Counsel for Respondent

Submissions received: None from Applicant
11 March 2015 from Respondent

Date of Investigation Meeting: 11 March 2015

Date of Oral Determination: 11 March 2015

Date of written Determination: 12 March 2015

ORAL DETERMINATION OF THE AUTHORITY

A. The application for a personal grievance is dismissed.

B. The parties are to meet their own costs.

Employment Relationship Problem

[1] This is a matter that deals with the expression of religious belief within a secular workplace.

[2] Joanne Gundry submits she was discriminated against in her employment by reason of her religious beliefs. This occurred due to her employer standing her down and requiring her to undergo a mental health assessment prior to being offered any further work. Alternatively, Ms Gundry submits she was unjustifiably disadvantaged in her employment or unjustifiably dismissed by the same actions.

Issues

[3] The issues I have to determine are firstly whether Ms Gundry was discriminated against in her employment by reason directly or indirectly of her religious belief by the respondent's actions in standing her down and requiring her to undergo a mental health assessment prior to being offered further work pursuant to s.104(1)(a) of the Employment Relations Act 2000.

[4] Secondly, in the alternative, the issue is whether Ms Gundry's employment or one or more terms of her employment were affected to her disadvantage, again by the same actions above.

[5] Thirdly, in the alternative, whether Ms Gundry was unjustifiably dismissed by the respondent's above actions.

Facts leading to dispute

[6] The facts are as follows. Ms Gundry is 43 years old with school aged children. She has a strong Christian faith and is an experienced healthcare worker.

[7] On 22 October 2013, Ms Gundry started work as a casual healthcare assistant in mental health services for older people with the respondent. This employment relationship is covered by the New Zealand Nurses Organisation and the respondent's multi-employer collective agreement (MECA).

[8] Patrick White was her manager at all relevant times. He had previously worked as a Minister and also held common Christian beliefs to Ms Gundry. During their time together in the workplace, they had various conversations about their shared faith.

[9] Prior to December 2013, Ms Gundry would email Mr White about her availability for shift work. The tone and content of those emails expanded from

7 December onwards. The emails from Ms Gundry included what I call “spiritual commentary.”

[10] Mr White did not reply to the “spiritual commentary” except to ask Ms Gundry not to send those emails especially when they at times referred to confidential patient information.

[11] Around 14 December 2013, staff noted Ms Gundry had become the subject of some intimidation and bullying by another staff member. They raised this with Mr White. He spoke to Ms Gundry who was reluctant to raise the issue formally. He organised a meeting for 14 December 2013 with the staff member involved and Ms Gundry at the workplace. The meeting ended when Ms Gundry became upset and left.

[12] Between 14 and 16 December 2013, Ms Gundry sent a large number of emails to Mr White.

[13] By 16 December 2013, Mr White was becoming concerned about Ms Gundry’s behaviour and raised this with his manager, Sharon Linwood. Ms Linwood reviewed 46 emails Mr White had received from Ms Gundry and believed this matter required further intervention. She spoke to her HR department and then together with another nurse contacted Ms Gundry about the possibility of meeting with the Wellness Review Panel.

[14] The Wellness Review Panel is a low-level intervention by the respondent intended to identify the reasons for an employee’s impairment or prolonged sickness and to promote some positive solutions. The Panel comprised three persons - a manager, a specialty nurse and an HR adviser.

[15] The Panel met with Ms Gundry on 20 December 2013. Ms Gundry was asked to undergo a mental health assessment which she refused. The Panel determined Ms Gundry would be stood down to consider what she was to do and they would meet again at a later date. Ms Gundry received payment for two weeks of rostered shifts she was due to start.

[16] On 10 January 2014, the Panel reconvened but Ms Gundry did not attend.

[17] No further work has been offered to Ms Gundry since 18 December 2013.

[18] Ms Gundry raised a personal grievance through her then advocate with the respondent on 4 February 2014. Mediation has occurred but has been unsuccessful.

Law

[19] The law around personal grievances of unjustified disadvantage and dismissal is well known and is set out in s103 and 103A of the Employment Relations Act 2000 (the Act) which I do not need to repeat here.

[20] A personal grievance due to discrimination arises under ss.103 (1) (c), 104 and 105 of the Act. This is a claim that an employee has been discriminated against in their employment, if the employer, by reason directly or indirectly of any of the prohibited grounds of discrimination, refuses or omits to offer the employee the same terms of work offered to other employees of the same skills. One of the prohibited grounds is religious belief.

[21] The Supreme Court in *Macalister v. Air New Zealand*¹ held the phrase “*by reason of*” raised the question of whether the prohibited ground of discrimination was a material ingredient in the respondent’s decision to take action.

Determination

[22] Taking into account the evidence I have heard, I determine that the respondent did not discriminate against Ms Gundry by reason of her religious beliefs. I have also further determined Ms Gundry was not unjustifiably disadvantaged or dismissed by the respondent’s same actions. My reasons are as follows.

[23] Ms Gundry’s religious beliefs were not the material ingredient in the respondent’s decision to stand her down or require a mental health assessment prior to offering work. I accept the evidence of Mr White and Ms Linwood. The reason for the respondent employer’s action was Ms Gundry’s health and patient safety. This was evidenced by the tone, content and number of Ms Gundry’s emails.

[24] I have considered those emails. Ms Gundry accepted at hearing there were some 46 emails she described as a “*good effort*”.

¹ [2009] NZSC 78, [2010] 1 NZLR 153, [2009] ERNZ 410.

[25] Despite being told to stop emailing, she believed it was more important for her to tell Mr White by email that she was “*still there*” and this was more important than her job. She had not intended the emails to be used in this process.

[26] Having considered the emails, they would appear to me to give grounds for concern by an employer and a basis to refer Ms Gundry to the Wellness Review Panel on the basis of possible impairment.

[27] The emails I have considered were at times “directive” warning Mr White of possible harm if he did not listen to Ms Gundry. They referred to matters such as Ms Gundry’s status as a prophet, warnings about the rise of the anti-Christ and reference to the “*spirit of intimidation*” running through the workplace. They also contained explicit personal details of her relationship with her parents and confidential patient information.

[28] I also accept Mr White’s and Ms Linwood’s evidence about the lack of boundaries around spirituality. They referred to the inappropriateness of Ms Gundry sitting and praying with a patient. It was outside of her job description. The spiritual needs of patients were being met by the respondent’s chaplain. Although I accept some staff may consider it a personal matter whether they prayed with a patient, it did not appear to me to be appropriate for Ms Gundry to do so in those circumstances. I accept the vulnerability of these patients given their age and health.

[29] I also accept the evidence of Mr White about the meeting on 14 December 2013 with Ms Gundry and her work colleague. Ms Gundry told her work colleague that she believed her colleague hated her and yet still forgave her. It was at that stage Mr White stopped Ms Gundry from further speaking which resulted in her leaving the meeting.

[30] Ms Gundry was very upfront and frank in her evidence. She understood that at various times Mr White gave her a directive or “*was telling her off*” for being overly spiritual. She told me she did not listen to that directive. My impression of her evidence was her spiritual beliefs overrode this directive.

[31] It is common ground this employer has an impairment policy. It is entitled to put in place policies under the applicable employment agreement or MECA that governs the relationship between the parties. The impairment policy allows for the reference of matters which fall within it to the Wellness Review Panel. This matter

fell within the policy. There was evidence supporting a reference to the Panel. This did not create any disadvantage. The subsequent action taken was due to health and safety concerns not religious belief. She remains employed. There has been no dismissal.

[32] At the time, Ms Gundry refused to engage with the Wellness Review Panel after the meeting on 20 December 2013. She explained that she has now moved on. She gave evidence to me that her personal situation now has changed including her expression of her spiritual beliefs. At the time of the 10 January 2014 meeting she was also unable to get legal representation. She had up until then engaged some five legal representatives, all of whom refused to continue acting.

[33] There still are opportunities to resolve this matter. The Wellness Review Panel is charged with reviewing an employee's status, especially when they are the subject of impairment. There is an opportunity for a further review of Ms Gundry's situation including some consideration now with this determination of whether she is in a position to regain or go back to employment with the respondent. That, however, is not a matter for me. My role in this application has now ended with this determination.

[34] As a consequence this application is dismissed.

[35] The respondent has indicated it is not seeking costs. The parties are to meet their own costs in this matter.

TG Tetitaha
Member of the Employment Relations Authority