

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Joy Margaret Hay (Applicant)
AND Waitaki District Health Services Limited (Respondent)
REPRESENTATIVES Sasha Dolby, Counsel for Applicant
Joseph Enright, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 8 April 2005
SUBMISSIONS RECEIVED Applicant, 18 April 2005
Respondent, 18 April 2005
DATE OF DETERMINATION 19 May 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Joy Hay, has 30 years general and specialised nursing experience at Oamaru Hospital.

[2] The respondent, Waitaki District Health Services Limited (“WDHSL”), is a local authority trading enterprise, wholly owned by the Waitaki District Council. It was created in 1999 after the old Oamaru Hospital closed. The hospital has a 30 bed ward and a high dependency unit. It also has an emergency department providing a 24 hour service seven days a week.

[3] Ms Hay’s work is covered by the WDHSL collective employment agreement 1 July 2003-30 June 2005.

[4] At the heart of this problem is Ms Hay’s expectation, and WDHSL’s intention, that from 15 March 2004 Ms Hay would complete a period of orientation and then as part of her duties, in her position as Special Duties/Duty Nurse, be rostered on to perform the after hours duty nurse shifts which included responsibilities for the emergency department.

[5] Ms Hay says that her employment was affected to her disadvantage by the following unjustified actions of WDHSL:

- (i) That she was unjustifiably removed without consultation and/or agreement from the draft roster for after hours duty nurse shifts. The removal was to enable a meeting to take place to resolve the issues following a complaint by a medical officer about Ms Hay’s competence to perform after hours duty nurse responsibilities. The hours for that period

were replaced with special duties shifts which were within Ms Hay's terms and conditions of employment but attracted a lower hourly rate.

- (ii) That she lost an important training opportunity to participate in the Trauma Nurse Course.
- (iii) That although the hospital manager, Robert Gonzales, was satisfied that she should continue with the process toward undertaking the after hours duty nurse responsibilities Ms Hay has not been rostered on to perform after hours duty nurse duties aside from two shifts in June 2004.

[6] Ms Hay seeks reinstatement to full rostered duties together with compensation for the expected five shifts per fortnight that Ms Hay says she could have expected at the higher hourly rate in the sum of \$1,584.00 for a 48 week period. Ms Hay also seeks compensation for humiliation and loss of dignity in the sum of \$5,000.00 and costs.

[7] WDHSL say that it was justified in not extending Ms Hay's role to include after hours duty nurse responsibilities and does not accept that she has suffered any disadvantage. WDHSL say that Ms Hay's actions after the meeting with the medical officer on 18 June 2004 caused it to lose the trust and confidence that it required from someone in the position of after hours duty nurse.

The medical officer complaint and removal from draft rosters for after hour duty nurse shifts.

[8] The draft roster from which Ms Hay's name was removed was the first roster she was on duty alone for the after hour duty nurse shift rather than undergoing orientation to the role. Ms Hay was removed from the draft roster on the basis that it would be difficult for her working with the medical officer who had complained and the desirability to have the issues raised by the medical officer discussed and resolved. The instruction to remove Ms Hay's name from the rostered duties came from Mr Gonzales. I found the inpatient co-ordinator Barbara McCallum who had responsibility for the rosters to be an impressive witness. Ms McCallum felt it was important for the safety of Ms Hay that she be removed from the roster as she would have been in the emergency department often alone with the particular medical officer.

[9] The minutes from the meeting subsequently held state that the medical officer did not want to work alongside Ms Hay. Ms Hay said that she would have been prepared to work with the medical officer but I do note in a later letter Ms Hay said that the medical officer *bullies, intimidates and humiliates nurses....*

[10] Ms McCallum did discuss the situation with Ms Hay and although Ms Hay was unhappy, I am not satisfied there was a complete absence of any consultation. The roster was only in a draft form and did not fall within the requirements of clause 3(a) of the collective employment agreement in terms of any changes being agreed to. It was anticipated by WDHSL that removal was only going to be for a short period of three or four weeks and whilst the meeting took slightly longer to arrange the blame for that cannot be levelled at WDHSL. It was not, as alleged by Ms Hay, a demotion.

[11] I do not consider the action in removing Ms Hay from the draft roster pending a meeting to discuss issues raised by the medical officer to be an action that was not done in accordance with fairness or justice so as to be unjustified. There was some discussion with Ms Hay before her name was removed. I do not consider that the medical officer's concerns and allegations could be dealt with by Mr Gonzales without having a meeting.

The Trauma Nurse Course

[12] Ms Hay's application to attend this course was accepted in or about June 2004 and WDHSL approved payment. Ms Hay felt that she could not undertake this course because she did not have the necessary experience as set out in the application form as she was prevented from undertaking the after hours duty nurse responsibility. Dawn Kidd, nursing/quality coordinator with responsibilities amongst other matters for the emergency department, advised Ms Hay that she could make an application for dispensation for her to attend the course. I accept that this has been done in the past successfully and that Ms Kidd considered Ms Hay's work in both in the higher dependency unit and day duty roles would have been accepted.

[13] Ms Hay withdrew from the course but I do not find the WDHSL can bear any responsibility for her decision. There was encouragement for Ms Hay to do the course. It is unclear when there will be another opportunity for Ms Hay to do a course like that in the future.

The meeting on 18 June and the decision reached at the meeting on 18 June to proceed to full rostering for Ms Hay which has still not occurred

[14] Minutes were taken of the meeting on 18 June 2004 and I accept that they are accurate. I accept Mr Enright's submission that the minutes of the meeting support that Mr Gonzales was unconvinced by the medical officer that Ms Hay should not be rostered on for after hours duty nurse responsibilities.

[15] Mr Gonzales was satisfied at the end of the meeting that Ms Hay should continue with the process towards undertaking the after hours duty nurse responsibilities and the decision from the meeting reflected that.

[16] It was recorded in the minutes of the meeting that Ms Hay was to meet with both Ms Kidd and Ms McCallum to complete a post orientation assessment. Ms Hay was then to be rostered to the after hours duty nurse responsibilities subject to the completion of the orientation assessment along with the other nurses. For a two month period Ms Hay was to be rostered on with medical officers other than the medical officer who had raised the issues. That medical officer was then to confer with the other medical officers on their experience with Ms Hay and then full rostering would follow. It was specifically noted that the decision was to be robust to protect Ms Hay's practice and reassure the medical officer. It was agreed that the meeting would be confidential.

[17] I would have expected that to have been the end of the matter. Mr Gonzales had concluded that there was no basis for the medical officer's allegations and there was a process which viewed objectively in the circumstances was a sensible one to have Ms Hay fully rostered. Unfortunately it was not the end of the matter although post orientation was completed on 23 June 2004 and Ms Hay did perform a further two duties after the meeting.

[18] Ms Hay, in my view incorrectly, saw the outcome of the meeting constituting the taking of action against her for the purpose of reassuring the medical officer and having her performance reviewed by another employee. She was very unhappy and whilst I accept it was clearly a difficult period for her rather than seek clarification on the matter she wrote a letter to Mr Gonzales on 20 June 2004.

[19] In the letter Ms Hay expressed her disappointment with Mr Gonzales acting on the medical officer's complaints and she further said that there was no reason for her to keep the meeting confidential and that she would be discussing it with her peers. She questioned Mr Gonzales about who he was trying to protect with the confidentiality. The letter was clearly an emotional reaction

by Ms Hay but it directed the blame for the situation to Mr Gonzales although it was the medical officer who had made the complaint. Interestingly there was no mention in that letter of the fact that Ms Hay had been removed from the roster pending that meeting. Ms Hay then raised a personal grievance on 30 June.

[20] I am satisfied that Mr Gonzales at that point instructed Ms McCallum not to roster Ms Hay on as after hours duty nurse.

[21] He maintains that the justification for that was a loss of trust and confidence in Ms Hay in that he must be able to raise sensitive issues with her in a confidential way without issues being misconstrued. He said that management must have a high level of trust in the after hours duty nurse who has responsibility for the running of the ward after hours and is called to the emergency department if a case comes in. There was no suggestion that there were issues with Ms Hay's clinical ability.

[22] I am not satisfied that Mr Gonzales was justified at that point in unilaterally varying the decision reached at the meeting to proceed to roster Ms Hay for after hour duty nurse shifts. He should have initially met with her to discuss the matter. I accept that there were attempts by way of correspondence and mediation to try to resolve the matter but the matter remained unresolved and Ms Hay has not been rostered since that time for the after hours duty nurse shifts.

[23] I find that the decision that Ms Hay was not to be rostered on as after hours duty nurse from late June 2004 was an unjustified action by WDHSL in breach of the decision reached at the meeting on 18 June and that it disadvantaged Ms Hay. There was no certainty about the number of shifts which Ms Hay could expect to be rostered on per fortnight as an after hour duty nurse but an average of five shifts per fortnight does not appear unrealistic. The hourly rate for after hours duty nurse shifts is higher by \$1.65 per hour than for the performance of special duties so on the basis of five shifts a fortnight there is a loss of \$66.00 per fortnight for Ms Hay if she is not rostered on.

[24] Ms Hay has a personal grievance that her employment was affected to her disadvantage by an unjustifiable action of WDHSL when Mr Gonzales instructed that she was not to be rostered on for after hour duty nurse duties in late June 2004.

Remedies

Reinstatement

[25] I consider that reinstatement to full rostering for Ms Hay is practicable given that there are no concerns about Ms Hay's clinical ability. I have taken into account the decision of those present at the meeting on 18 June 2004.

[26] There will have to be re-orientation to the position given the lapse of time since Ms Hay last undertook the duties. Ms Hay should also undergo training in areas where Ms Kidd deems it to be necessary. Part of the orientation must address the significant but not insurmountable, communication difficulty between Mr Gonzales and Ms Hay. Clearly that relationship has been damaged. Ms Hay must understand that Mr Gonzales and indeed Ms Kidd and Ms McCallum have to from time to time raise issues with her. It is important that conversations that take place are not taken out of context and that confidentiality is respected. Every employment relationship has its ups and downs but there does come a point in time at which the parties must put the past behind them and move on. That has to happen here.

[27] Ms Hay is to meet with Ms Kidd and Ms McCallum before Friday 27 May 2005 to discuss

orientation, appropriate lines of communication and training needs. There will have to be reference back to the post orientation document dated 23 June 2004. After 27 May 2005 and subject to any orientation requirements Ms Hay is to be fully rostered to include after hours duty nurse responsibilities.

Compensation

[28] I am not prepared to make any compensatory award to Ms Hay for humiliation and loss of dignity. I take into account there has been reinstatement to full rostering and Ms Hay must also be taken to have contributed to some of the matters that have caused her humiliation and loss of dignity. The more appropriate award in my view is reimbursement for loss of the higher hourly rate.

Reimbursement

[29] Ms Hay should be reimbursed for loss of the expected higher hourly rate. I have taken into account the difficulty in assessing the exact amount of loss due to the uncertainty of rostering patterns and the fact that I have found that there was only unjustifiable action by WDHSL from on or about 1 July 2004. In those circumstances I consider that it would be fair to make an award to Ms Hay for 20 fortnights on the basis of an expected five shifts per fortnight. Mr Enright submits that Ms Hay could have mitigated her loss by taking shifts with allowances. The difficulty however with that is that Ms Hay could arguably have also been rostered on for the after hours duty over the course of a fortnightly period.

[30] Ms Hay is entitled to payment of the sum of \$1320.00 gross being calculated on the basis of 5 shifts per fortnight of 8 hours duration x \$1.65 for 20 fortnights and I so order.

Costs

[31] I reserve the issue of costs. There has been a suggestion that Ms Hay should not be able to obtain any contribution toward her costs because she could have instructed her union to undertake the case on her behalf. I do not accept that argument. Ms Hay is entitled to obtain a representative of her choice and it is not for another party to question that. I would encourage the parties to attempt to reach agreement on the matter of costs before applying to the Authority.

Summary of Order

[32] The following is a summary of orders made.

- There is to be a reinstatement of full rostering of Ms Hay to include after hours duty nurse responsibilities.
- I have not made an award for compensation for humiliation and loss of dignity.
- I have ordered Waitaki District Health Services Limited to pay to Joy Hay the sum of \$1320.00 gross for reimbursement for loss of higher hourly rate.
- I have reserved costs.

Helen Doyle
Member of Employment Relations Authority