

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 44/09
5118667

BETWEEN

THOMAS HIKI
Applicant

AND

KATE SHEPPARD LIFE
CARE (2005) LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Ian Thompson, Advocate for Applicant
Peter Anderson, Counsel for Respondent

Investigation Meeting: 13 February 2009 at Christchurch

Determination: 9 April 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Hiki) alleges that he was unjustifiably disadvantaged and unjustifiably dismissed by the respondent (Kate Sheppard). Kate Sheppard resist Mr Hiki's claim on the basis that Mr Hiki's position was terminated at the end of a probationary period of employment because he had failed to reach the required standard. The claim that Mr Hiki was disadvantaged by unjustified actions of Kate Sheppard is also denied.

[2] Mr Hiki was employed on an individual employment agreement as a caregiver at Kate Sheppard. That agreement was signed on 10 September 2007. Mr Hiki worked on the evening shift in the hospital wing of Kate Sheppard.

[3] Mr Hiki made some complaints about the way that other staff treated some residents. He wrote about these issues in a document provided by Kate Sheppard called *The Communication Book*.

[4] On 29 October 2007, Kate Sheppard warned Mr Hiki about these communications indicating that other staff found Mr Hiki's style aggressive and told Mr Hiki that his communications of this nature ought not to be written in the Communication Book but in the shift report. There was a verbal warning administered to Mr Hiki about these matters on 1 November 2007.

[5] Then on 27 November 2007, Mr Hiki was instructed to attend a meeting on 4 December 2007 to respond to an allegation that on 16 November 2007 he physically restrained a patient when the patient became aggressive resulting in an injury to the patient.

[6] Mr Hiki denied hurting the patient but despite that was issued with a *first and final formal written warning* on that incident.

[7] Mr Hiki responded to the written warning by writing to Kate Sheppard by letter dated 13 December 2007 in which he quarrelled with the final written warning in the following terms:

The severity of your conclusion re the patient incident lacks foresight, integrity and respect.

[8] Furthermore, in the same letter, Mr Hiki made these observations:

My probationary period is due 23 December 2007. The discretion is yours. The industry is right for me. Maybe the institution is not ready for me Hilary (Ms Currie the Manager of Kate Sheppard).

[9] On 14 December 2007 Kate Sheppard wrote to Mr Hiki again, terminating his employment on the basis that his trial period was to end on 23 December 2007 and the performance of Mr Hiki had not been satisfactory.

[10] Mr Hiki then raised his personal grievance.

Issues

[11] It will be useful for the Authority to reflect on whether Mr Hiki has suffered disadvantage as a consequence of unjustifiable action of his employer, and then to consider whether the manner in which the termination of Mr Hiki's employment happened, could constitute an unjustified dismissal.

Was Mr Hiki unjustifiably disadvantaged?

[12] I am satisfied Mr Hiki has suffered no disadvantage as a consequence of any unjustifiable action of Kate Sheppard.

[13] Mr Hiki was concerned to explain to the Authority why he considered that his treatment by Kate Sheppard was unfair particularly in respect to his early attempts to complain about the work of some colleagues at Kate Sheppard. Mr Hiki thought that it was incumbent upon him to draw Kate Sheppard's attention to inadequacies that he perceived in the work behaviour of fellow carers, and he did this by writing notes in Kate Sheppard's Communication Book.

[14] Ms Currie, Kate Sheppard's Manager, gave evidence at the investigation meeting. She told me that while she was perfectly comfortable about being advised of inadequacies in the behaviour of carers, there was a process which Kate Sheppard had developed and which it required its staff to use. The issue for her was not Mr Hiki's enthusiasm for telling her what was wrong, but his refusal to use the required format or process.

[15] Furthermore, Ms Currie made it clear that while she was happy to hear from Mr Hiki in relation to concerns that he might have about the care of residents, she was not happy for that information to be conveyed in an intemperate way so as to upset other carers. In effect that was what was happening. Mr Hiki was warned on 1 November 2007 about these matters and Ms Currie said that she thought that Mr Hiki understood the nature and extent of the warning.

[16] She told me that the Communication Book was an open document and Mr Hiki's written observations about other staff was a flagrant breach of those other staff's entitlement to confidentiality in respect to any complaints about their work. Ms Currie quite properly emphasised the need for human resources issues to be confidential and the using of a clinical document (the Communication Book) for recording complaints about staff was simply inappropriate.

[17] When I talked to Mr Hiki about this issue at the investigation meeting, he described the Communication Book as *a bitch book*. He told me that *he had a different view from the employer*. He said that people (he meant other staff commented on by him) *needed to take responsibility for their actions*.

[18] Mr Hiki acknowledged to me that other staff had complained to Ms Currie about his actions and confirmed that he had accepted the warning.

[19] The employer, Kate Sheppard, is entitled to manage its affairs in any way it sees fit, subject of course to its obligations to treat its employees fairly and reasonably. Kate Sheppard has an obligation not just to Mr Hiki but also to other staff. Insofar as Mr Hiki's activities impinge on other staff, Kate Sheppard has an obligation to act.

[20] They did so and remonstrated with Mr Hiki, explained to him why what he was doing was both wrong and against company policy, and it appeared that he accepted the warning and understood the reasoning for it.

[21] I am satisfied then that there has been no disadvantage suffered by Mr Hiki (he remained in employment having received a verbal warning, which he himself accepted at the time and confirmed his acceptance of later), and I am further satisfied that Kate Sheppard behaved entirely appropriately in dealing with an issue caused by Mr Hiki where Kate Sheppard's obligations were not just to Mr Hiki but to other staff as well.

[22] Accordingly the claim by Mr Hiki for unjustified disadvantage must fail.

Was Mr Hiki unjustifiably dismissed?

[23] Mr Hiki was on an individual employment agreement which had a probationary period of employment clause in it.

[24] The short point is that Mr Hiki was found to have physically restrained a resident and was given a final written warning for that. That may have been the end of the matter were it not for Mr Hiki's letter of 13 December 2007 in which he made it absolutely clear that he disagreed with Kate Sheppard's view on the matter. Mr Hiki accepted that for Ms Currie, no physical restraint of residents was ever appropriate, and Ms Currie confirmed to me in her evidence that that was indeed her position. But Mr Hiki refused to accept that position and told me in the clearest terms that he did not agree with Ms Currie on this point. Indeed he said that he absolutely disagreed with company policy on restraint of residents.

[25] Mr Hiki actually thought about the matter deeply and reached the conclusion that the Health and Safety in Employment Act created obligations on an employer which effectively ran counter to Kate Sheppard's absolute prohibition on the physical restraining of residents.

[26] In effect, Mr Hiki was saying that there must be circumstances where a resident needed to be restrained either for his or her own safety or for the safety of the staff. He claimed that both of those aspects were in play in respect to the matter that he was warned about.

[27] Mr Hiki also sought to rely on *clarifications* which he had sought from Ms Currie when he was first engaged. These clarifications were essentially matters that the two people had discussed of a hypothetical nature when Mr Hiki first applied for employment with Kate Sheppard. But I am not satisfied that they assist me to decide the matter. They plainly did not form part of the employment bargain and the discussions in question were essentially speculative in nature.

[28] The essence of Kate Sheppard's position is that the allegation of physical restraint against a resident by an employee was found proved and resulted in a written warning. Unlike the previous occasion when Mr Hiki was warned, on this occasion he explicitly refused to accept that physical restraint of a resident was never justified, and he did that immediately after receipt of the warning, and in writing, and in the context of further remarks in the same letter in which he drew Ms Currie's attention to the upcoming end of the probationary period.

[29] Ms Currie told me that the receipt of the letter was *significant* because in effect, Mr Hiki was *putting the ball in her court*. By this she referred to Mr Hiki's observation that the probationary period was coming to an end and the decision was effectively hers.

[30] Ms Currie went on to say these words in answer to my questions:

I had the feeling he had pre-empted any further process of considering the probationary period by those observations in his letter especially as the letter also included a failure to accept Kate Sheppard's policy that restraint of a resident was never appropriate.

[31] In the particular circumstances of this case, I am satisfied that Mr Hiki was not unjustifiably dismissed from his position as a caregiver at Kate Sheppard and that it was available to Kate Sheppard to decline to renew his probationary period of

employment because to use Ms Currie's words again, Mr Hiki had *eroded my trust and confidence in him to such an extent that it was not capable of being repaired*.

[32] In those circumstances, bearing in mind Mr Hiki's refusal, as a matter of principle, to accept the employer's position on resident restraint and his own referral of the end of the probationary period to the employer in the same correspondence, I am satisfied that the action taken by Kate Sheppard was the action of a fair and reasonable employer after the completion of proper inquiries.

Determination

[33] That being the position, Mr Hiki's claim fails in its entirety.

Costs

[34] Costs are reserved.

[35] The Authority does note, however, that Mr Hiki is legally aided and the parties may well wish to take that factor into account in addressing the issue of costs between them.

James Crichton
Member of the Employment Relations Authority