

**Attention is drawn to the order  
prohibiting publication of  
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 55  
5415426

BETWEEN	ASHA LATA Applicant
A N D	OCEANIA CARE COMPANY LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Gregory Bennett, Advocate for Applicant Richard Upton, Counsel for Respondent
Investigation Meeting:	11 December 2014 at Queenstown
Submissions Received:	At the investigation meeting with further submissions on 18 December 2014, 18 and 19 January 2015.
Date of Determination:	30 April 2015

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] The applicant, Asha Lata, claims she was unjustifiably dismissed by the respondent, Oceania Care Company Limited (Oceania) on or about 18 January 2013. Ms Lata also claims she was unjustifiably disadvantaged by virtue of the manner in which Oceania conducted its investigation into her conduct and an unjustified suspension.

[2] Oceania accepts it dismissed Ms Lata but contends its actions were justified. It denies the other claims have validity.

[3] Oceania also lodged a counterclaim. It says Ms Lata breached her employment agreement and, as a result, Oceania suffered loss. It seeks a penalty payable to itself and reimbursement of the cost of a forensic report (see [14] and [15] below).

### **Background**

[4] Ms Lata was employed as a healthcare assistant in an aged care facility in Gore. It is alleged that just after midnight on the morning of 4 November 2012 a photograph was taken of Ms Lata posing with one of the residents. The photo was allegedly taken by a colleague, Ms Naidu. The image was described by the facility's manager, Raewyn Healey, as completely inappropriate and *a fundamental breach of the trust we (and the residents) require of our staff*.

[5] Neither Ms Healey nor any other supervisor became aware of the photos existence till 10 January 2013 when Ms Naidu confided in a colleague. The colleague reported it to Ms Healey who spoke to Ms Naidu, viewed the photo and obtained a copy. She also suspended Ms Naidu pending further investigation.

[6] Ms Healey says she then telephoned Ms Lata. She says she did so as Ms Lata lived an hour away and worked a night shift. It was therefore unlikely their paths would cross that day. Given she was contemplating suspension she felt she should discuss the issue before Ms Lata embarked on a long journey to work when that might not be necessary.

[7] Ms Healey says she advised Ms Lata she had seen the photo, that she was very concerned about it and was proposing a suspension while she investigated further. Ms Healey says she asked Ms Lata to comment on the suspension but the latter chose not to do so.

[8] Ms Healey then sent Ms Lata a letter confirming the suspension. The letter also advised Oceania would be investigating further and that would lead to advice as to whether or not a disciplinary process would follow.

[9] Later that day, Ms Naidu returned to the workplace. During an ensuing discussion with Ms Healey Ms Naidu described the circumstances under which the photograph had been taken. She then tendered her resignation and it was accepted.

[10] Here it should be noted Ms Lata alleges there was another incident involving herself and Ms Naidu on 2 December 2012. Ms Naidu accused Ms Lata of physically abusing a resident. The claim was investigated and no action taken. Ms Lata claims Ms Naidu then produced the photo in a continued attempt to have Ms Lata dismissed so that Ms Naidu could then obtain additional work.

[11] On 14 January 2013, Ms Healey wrote to Ms Lata advising she wished to meet and 17 January 2013 was suggested. Ms Lata was advised the allegations about her alleged conduct were considered serious and, if proven, could result in dismissal.

[12] Ms Lata, having been advised to obtain assistance, arranged for Mr Robertson, an advocate from Southland Community Law Centre, to accompany her. Prior to the meeting he sought and received a copy of the photo.

[13] In the interim, and in response to a comment Ms Lata had already apparently made when she and Ms Healey initially discussed the photo, Ms Healey sought an opinion about the photo's origins and whether it was possible it had been photo-shopped. She consulted a Dr Ian Calhaem of Forensic Imaging Limited who provided his report on the morning of 17 January 2013. His report contains an executive summary which, in part, reads:

*Analysis of the internal data within the image indicates that the image has not been altered. It was captured on a Vodafone 546 mobile phone on the 4th November 2013 [typo - should have read 2012] at 10min 14 sec after midnight.*

*A physical examination of the image itself did not reveal any inconsistencies in the direction of the lighting onto the two faces, indicating that it is unlikely to be a composite of two image files.*

*An examination of the colour of the overexposed white areas was also consistent, indicating that the image has not been altered.*

[14] The report raised an issue in respect of the date as to when the photo was taken which emanates from the fact the camera used the American system to record dates, i.e. month before day as opposed to day before month. That initially led the parties to believe it was potentially taken on 11 April and this is recorded in various letters when in fact it was taken on 4 November.

[15] The report was handed to Mr Robertson when he arrived some 15 minutes before the meeting. He then discussed it with Ms Lata and the meeting proceeded without a request for further adjournment.

[16] Ms Healey outlined her concerns and Ms Lata was given an opportunity to respond. Oceania says the response came in four parts:

- (a) She maintained she was not the person in the photo though subsequently resiled from that position;
- (b) The jacket being worn by the person in the photo was not hers. While she accepts she has a similar jacket, she maintains the one in the photo appears grey while hers is green;
- (c) She was on light duties at the time; and
- (d) She had been instructed to work elsewhere at the time and would not therefore have been working with the resident in question.

[17] Ms Lata accepts she raised (b), (c) and (d) above. She does not accept Oceania's claim she said she was not the person in the photo. She says she accepted it was her but claimed throughout she had not been present when it was taken and knew nothing about it.

[18] There was an adjournment during which Ms Healey considered the responses. She concluded they had no validity for a number of reasons outlined in a subsequent letter of dismissal.

[19] After the adjournment, which lasted some 30 minutes, she returned and advised Ms Lata she considered the accusations proven and was considering dismissal. Ms Healey says she then asked whether Ms Lata wished to comment or argue against that outcome but Ms Lata chose not to. Ms Healey then advised Ms Lata would be dismissed to which the latter responded by asking whether she could resign.

[20] Ms Lata disagrees that she was given an opportunity to comment before being told of her dismissal. She accepts she asked about a resignation but says only on Mr Robertson's advice.

[21] There is agreement between the parties Ms Healey then advised *no, we are going to sack you* (or words to that effect). That is what occurred and written confirmation followed on 18 January 2013.

**Determination**

[22] Essentially Ms Lata's position is that Oceania is not entitled to dismiss her as she did no wrong and the evidence supporting the allegation against her is fraudulent (photo-shopped).

[23] Ms Lata's approach faces one critical impediment, I am not required to decide whether or not she actually committed the indiscretion for which she was dismissed. I am tasked with deciding, on an objective basis, whether or not Oceania could reasonably have reached the conclusion it did – right or wrong.

[24] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and procedural perspective. While issues of substance and process overlap and there is no firm delineation separation provides a useful means of analysis especially as some of the requirements of s.103A have a procedural focus.

[25] Putting aside Ms Lata's claim the activity portrayed in the photo never occurred I conclude what is shown would, from a substantive perspective, have justified dismissal. When answering questions Ms Lata readily accepted that to be so.

[26] Turning to procedure. Section 103A of the Act requires an employer at least put its concerns, allow an opportunity to respond and consider the response with an open mind.

[27] The evidence clearly shows Oceania put its concerns. Putting aside a disagreement as to the explanation offered ([16] and [17] above) it also shows there was an opportunity to explain. Indeed, the disagreement over the detail of the explanation tended to support this conclusion.

[28] Crucially the evidence also shows Oceania considered the explanation with Ms Lata's prime contention (that she was not present when the photo was taken and it was photo-shopped) being fully investigated via Oceania's consultation with Dr Ian Calhaem. His report was then given to Ms Lata and Mr Robertson so that they had an opportunity to consider it and comment.

[29] Finally the evidence shows Ms Healey considered the responses. Attempts to undermine her assertions in this regard by questioning during the investigation were

unsuccessful and the letter of 18 January shows Ms Lata's explanations were investigated and considered. Reasons as to why each was rejected are outlined therein.

[30] Here I comment on Ms Lata's rejection of Oceania's claim she denied it was she in the photo. On this I prefer Oceania's evidence. Firstly Ms Healey's evidence was delivered in a far more persuasive manner during the investigation but, more importantly and notwithstanding her claim, Ms Lata again suggested it was not her in the photo when talking about the colour of the jacket.

[31] For the above reasons I conclude Oceania did adhere to the requirements of S.103A of the Act. It enquired into and considered Ms Lata's responses. It went so far as to obtain a forensic report addressing her prime defence and in my view the content of that report gave Oceania grounds for rejecting Ms Lata's explanation and reaching the conclusion it did.

[32] There is then the initial confusion about when the photo was taken. For two reasons I conclude that does not change the situation or undermine Oceania's decision. First Ms Lata's defence is the image was photo shopped. If it was taken as such the date upon which that allegedly occurred becomes somewhat irrelevant. Second, and more importantly, an employer can only consider the information before it at the time it made its decision. There is no evidence or suggestion Ms Lata raised this as an issue at the time of Oceania's investigation.

[33] Finally there as a claim Oceania had failed to interview a key witness but given the evidence it was conceded that was incorrect and the claim was not pursued.

[34] Turning to the suspension. Ms Lata now claims it was unjustified as she was not given an opportunity to comment prior to Ms Healey's decision to impose it. The claim was undermined by answers she gave when questioned at the investigation and I conclude the issue was discussed. Finally I note the conversation occurred over the phone and was not face to face. I conclude that was a practical way of addressing the issue given the distance Ms Lata lived from work. I take no issue with it.

[35] For the above reasons I conclude Oceania has discharged the onus it carries. It had justified both the suspension and the dismissal. Ms Lata's claims therefore fail.

[36] Oceania asks that Ms Lata be penalised for breaching her employment agreement and that the penalty be payable to itself. It also seeks reimbursement of the cost of the forensic report.

[37] For three reasons I take the penalty application no further. The alleged breaches relate to the conduct portrayed in the photo and, as Ms Lata concedes, the fact it would clearly constitute a significant breach of Oceania's house rules. First, and while I must say I find the evidence of wrong doing is strong, I am not, as already said, tasked with deciding whether or not it actually occurred. Second, and even if the photo was real, the consequences suffered by Ms Lata have been sufficiently severe. She lost her job. Third the claim seems ancillary. It was hardly referred to in submission and there was no argument as to why a penalty, if imposed, should be payable to Oceania. In those circumstances I find little merit in contemplating a penalty that would undoubtedly be payable to the Crown.

[38] Turning to the cost of the forensic report. That is not in my contemplation. To me it is a cost of doing business. It was required to properly investigate the allegations against Ms Lata and, given her explanation, properly comply with the requirements of S.103A. It is a cost that would have been incurred irrespective of the reports' conclusions and obviously the cost would not have been recoverable had Dr Calhaem concluded the image was photo-shopped.

[39] For the above reasons Oceania's counterclaims also fail.

### **Non publication orders**

[40] Finally there was a request for the non-disclosure of Oceania's identity and the industry in which it operates. Prior to the investigation these requests were granted on an interim basis. Both Ms Lata's identity and that of the resident were also suppressed.

[41] The interim order nothing be published which might identify the resident portrayed in the photo will continue on a permanent basis.

[42] Oceania now asks that the order precluding its identity being disclosed continues though it no longer seeks continuation of the order the industry in which it operates be suppressed.

[43] Oceania also advised that if it successfully defended Ms Lata's application it would ask that the temporary order pertaining to her be lifted and her identity be made public.

[44] As Oceania concedes, a request for such an order must be made out to a high order if it is to overcome the starting point of *open justice*.<sup>1</sup>

[45] Ms Lata supports Oceania's request but on the proviso her identity also be permanently suppressed.

[46] Having considered the parties submissions I conclude neither order should continue for three reasons.

[47] While various arguments are tendered in support of Oceania's request the reality is it is commercially driven. Oceania is considering a Stock Exchange listing. It is, quite correctly I suspect, concerned this is the type of salacious incident the press will report. It is concerned such reporting may reflect adversely on it thus affecting its share value. A commercial consideration such as this does not, in my view, meet the high threshold required for continuation of the interim orders. Indeed to make such an order may actually mislead the market.

[48] Second Oceania's request is undermined by the fact disclosure of Ms Lata's identity means it is very likely to be easily identified within the local community. To me it would lead to what is in effect selective suppression. It further emphasises the commercial imperative behind this request and undermines the propriety of granting it.

[49] Third I do not accept this will reflect badly on Oceania. Once it became aware of the photo's existence it acted decisively and appropriately in order to protect its residents and their wellbeing.

[50] That said I accept Oceania may well take issue with this conclusion and once publication occurs it cannot be reversed. To that end and to allow the parties to properly consider this conclusion I order a continuation of the existing order that neither Oceania nor Ms Lata's identity be published for a further 35 days beyond the issuing of this determination.

---

<sup>1</sup> H v A Ltd [2014] NZEmpC 92

**Conclusion**

[51] Oceania has discharged the onus it carries and justified both the suspension and the dismissal. Ms Lata's claims therefore fail.

[52] Oceania's counterclaims are also dismissed.

[53] There is a permanent order preventing the publication of anything that might identify the resident portrayed in the photo.

[54] There is a temporary order preventing the publication of anything that might identify either the Oceania Care Company Limited or Ms Lata in respect to the matters discussed in this determination which shall remain in force until 4 June 2015.

[55] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority