

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 1
5366307

BETWEEN IAMAFANA LEALAOGATA
Applicant
AND TIMATA HOU LIMITED
Respondent

Member of Authority: Trish MacKinnon
Representatives: Peter Cranney, Counsel for the Applicant
Paul McBride, Counsel for the Respondent
Investigation Meeting: 12 and 13 November 2012
Submissions received: 13 November 2012
Determination: 8 January 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Iamafana Lealaogata was employed by Timata Hou Limited as a Community Support Worker (CSW) on its permanent staff from October 2007 until his dismissal in December 2011. He says his dismissal was unjustifiable and his employer discriminated against him by dismissing him for his disability.

[2] Mr Lealaogata has difficulty standing for long periods or walking any distance due to damaged knees and other health issues. He says he had these problems from the start of his employment with Timata Hou, although one knee became more problematic following a workplace accident in 2010. He says he was able to undertake his CSW duties until May 2011 without apparent complaint or concern from his employer over his restricted mobility.

[3] Mr Lealaogata received a letter from his employer notifying him of his dismissal on 1 December 2011, and giving his last day of work as 16 December 2011. He says when he arrived at work on the morning of 2 December 2011 his Team Leader came up to him in the car park and abruptly told him that he no longer had a job. Mr Lealaogata says this was in the presence of his wife and was upsetting and distressing to him. He says his employment had started with an interview in an office and he thought it should end the same way.

[4] Timata Hou is a subsidiary company of IHC New Zealand Incorporated. It provides residential and rehabilitative support to people who have an intellectual disability and have been involved in the criminal justice system. Most of them are there by Court order for their own, and the public's, protection. They have been involved in criminal offending for which they cannot be convicted because of their intellectual disability. If their Court orders permit, they take part in planned and structured day activities comprising sport or other physical exercise, and vocational activities. The role of the CSW is to work with and provide support to these clients.

[5] Timata Hou says it was justified in terminating Mr Lealaogata's employment because he was unable to undertake the essential duties of his role as a CSW. It considered available alternative duties prior to terminating his employment but says there was no realistic prospect of any alternative duties being available at that time or becoming available in the foreseeable future.

[6] Timata Hou says it did not discriminate against Mr Lealaogata. It says his inability to carry out the full range of CSW duties made his continued employment a potential health and safety issue for himself and his colleagues. Timata Hou says it followed a fair and extensive process before making the decision to terminate his employment.

Issues

[7] The issues for the Authority to determine are:

- (i) Whether Mr Lealaogata was unjustifiably dismissed by Timata Hou; and
- (ii) Whether Timata Hou discriminated against Mr Lealaogata in his employment on the grounds of disability.

Background

[8] In May 2011 Alison Hand, Timata Hou's Life Skills Manager, became aware of an incident in which Mr Lealaogata and a client had received a lift in a private vehicle after a session off-site. This was against Timata Hou policy and was not in accordance with that particular client's rehabilitation plan which specified walking to and from the site.

[9] Mr Lealaogata says the client was tired after a swimming session, did not wish to walk, and was becoming upset. There was no work vehicle available so he asked a relative to transport them. He says he told this to Ms Hand and also mentioned his problem with damaged knees. Ms Hand says Mr Lealaogata told her his health issues were the reason for using a private motor vehicle. Mr Lealaogata's Team Leader advised Ms Hand that Mr Lealaogata was not doing the full requirements of the CSW role, and decisions about the clients Mr Lealaogata supported were made taking his mobility problems into account. The Team Leader understood this was to be temporary and short-term.

[10] Ms Hand says she was concerned over Mr Lealaogata's ability to support some clients or cope with the physical demands of the CSW role. In June 2011 she asked Mr Lealaogata to obtain a report from his GP at the employer's expense outlining what he was, and was not, physically able to do. Mr Lealaogata's GP provided a report in July 2011 referring to a number of medical problems suffered by Mr Lealaogata, including heart problems and severe arthritis of both knees. He could not do heavy lifting, fast activities, walk long distances or go up/down stairs. The GP's report ended with a request to the employer to arrange suitable work for Mr Lealaogata according to his physical limitations.

[11] Ms Hand was not satisfied the GP's report gave enough information to determine the likelihood of Mr Lealaogata returning to normal duties. She wrote to Mr Lealaogata on 4 August 2011 expressing her concerns over his health and wellbeing and the safety of the people he was supporting. Ms Hand told Mr Lealaogata she had formed the tentative view he was unlikely to return to full duties in the near future. She said Timata Hou intended carrying out a review of his employment and that *termination of your employment on the grounds of your ongoing health and wellbeing is a possibility*. Ms Hand invited Mr Lealaogata to attend an appointment with a medical adviser nominated by the employer.

[12] Dr David Hartshorn, a Specialist Occupational Physician, examined Mr Lealaogata and reviewed his ability to perform the duties of his position as a CSW, as contained in the job description for the position. Dr Hartshorn found Mr Lealaogata's health issues limited his ability to walk more than short distances or stand for more than short periods. He could not squat or kneel; would not be able to track absconding clients on foot; and was unlikely to be able to engage in significant control or restraint activity.

[13] Mr Lealaogata's condition was likely to deteriorate gradually over time resulting in increasing discomfort and functional limitation. Dr Hartshorn said Mr Lealaogata was highly unlikely to return to full duties without knee joint replacements. If he had those operations it would be another 9 – 12 months before he could return to largely unrestricted duties. He had the capacity to perform fulltime work within these restrictions.

[14] After receiving Dr Hartshorn's report, Ms Hand wrote to Mr Lealaogata on 5 October 2011 noting her tentative view *that the requirements and competencies required of a Support Worker will place Timata Hou clients and yourself at risk*. She informed Mr Lealaogata Timata Hou was considering terminating his employment effective Friday 4 November 2011. Ms Hand invited Mr Lealaogata to respond no later than 17 October, so this could be considered before a final decision was made.

[15] Over the next weeks there were meetings and exchanges of correspondence. Mr Lealaogata put forward two alternative employment options for consideration by his employer, one of which was Residential Support Worker.

[16] Ms Hand wrote to Mr Lealaogata on 11 November 2011 presenting her findings as a result of the meetings and correspondence exchanges. She concluded that both Mr Lealaogata and Timata Hou clients would be placed at a very significant risk whether Mr Lealaogata continued in his current role or whether he was placed in a Residential Support Worker role. Ms Hand also noted Mr Lealaogata's general health gave her serious concerns he was not physically able to undertake a number of aspects of his current job.

[17] Ms Hand's letter said termination of employment with two weeks notice was a possible outcome, given her findings. Ms Hand invited Mr Lealaogata to respond to those findings before she made a final decision on the outcome, and she requested his

input no later than 22 November 2011, a deadline subsequently extended to 29 November 2011 following correspondence with Daele O'Connor, Mr Lealaogata's union representative.

[18] Ms O'Connor, in her response dated 29 November 2011, expressed disappointment at Timata Hou's proposal to terminate Mr Lealaogata's employment and raised her concern that the employer was discriminating against Mr Lealaogata in his employment because of his disability. She reiterated that Mr Lealaogata participated in all activities that were required of him and said the manner of his support to his clients de-escalated the need for restraint. Ms O'Connor considered Timata Hou could accommodate Mr Lealaogata within the organisation.

[19] Ms Hand responded by letter dated 1 December 2011, which was couriered to Mr Lealaogata at his home, informing him of the decision to give notice of termination of employment, effective from Friday 16 December 2011. Ms Hand said the employer considered Mr Lealaogata's health situation to be such that it was not able to continue to employ him in his role as support worker, and it had not been able to identify a suitable alternative employment option. Ms Hand assured Mr Lealaogata there was no discrimination involved in the decision. Mr Lealaogata's final pay would be calculated, including outstanding holiday pay, and this would be paid into his account as soon as possible.

[20] The following morning, 2 December 2011, Mr Lealaogata went to work as usual. He had received the letter of termination but had understood it to mean that he would work out his notice until 16 December. He arrived by car with his wife and was met in the car park by his Team Leader, Robert Petratos, with whom he had a brief exchange of words which resulted in Mr Lealaogata leaving immediately.

First Issue - was Mr Lealaogata unjustifiably dismissed?

[21] The test of whether a dismissal is justifiable is 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 or action occurred¹.

[22] Timata Hou was entitled to raise and investigate concerns over Mr Lealaogata's ability to perform the duties of his CSW role. There was a suggestion

¹ Section 103A Employment Relations Act 2000

from Mr Lealaogata that management had changed the duties of the job during his employment and that it was not fair to dismiss him for not being able to perform the new functions of the role. I find that suggestion has little merit. Some of the activities in which Timata Hou clients participate have changed over time but there was no compelling evidence this significantly changed the role of the CSW.

[23] Mr Lealaogata acknowledges he would not be able to pursue a client who absconded but says this is not important because that situation had not arisen in the whole of his employment with Timata Hou. He also says he had only been involved in one incident where a client had to be physically restrained. He had his own method of keeping clients calm by taking a low key approach and never raising his voice when talking to them.

[24] I have no reason to doubt Mr Lealaogata's calming influence which may explain why he never had to pursue an absconding client. However I am not convinced that his client-management skills mitigate the requirement for him to pursue a client should the need arise. Timata Hou is entitled to expect that every CSW it employs is capable of carrying out all their duties including tracking and restraining a client where necessary.

[25] Ms Hand says there are no *low needs* clients at Timata Hou and the need for physical restraint of clients is not uncommon. I prefer her evidence that all staff must be able to rely on other staff having the mobility, fitness and ability to undertake restraint. Paul Moles, a long-serving manager with the organisation, reiterated the importance of staff being prepared at any time to undertake restraint of clients. Mr Moles acknowledged a calm and low-key manner is one of the techniques that could avoid the need for restraint in some cases, but said it was not always possible to prevent behaviour from clients that required restraint. He also noted an employee would sometimes be required to help another staff member whose client required restraint.

[26] Ms Hand carried out an investigation over several months before Mr Lealaogata's employment was eventually terminated in December 2011. She consulted Mr Lealaogata throughout the process and he had representation at every critical step. He had the opportunity to put forward proposals for alternative employment, and did so. His employer considered his proposals but rejected them on reasonable grounds. One position he proposed had no lesser a requirement for

physical capability than his own CSW role. His other proposal was for a position for which Timata Hou had no need. The organisation, which was under statutory management at the time, is a not-for-profit charity and has to take a cautious and prudent approach to the use of its limited resources. I accept the employer's view it would not have been prudent to create a position for which no sound business case could be made.

[27] Ms Hand had medical evidence from a specialist occupational physician that Mr Lealaogata was, for a range of medical reasons, medically unfit to perform the duties of the CSW role. He could not realistically or safely undertake the requirements of the job, in particular the physical activities required of it, and there was no realistic prospect of that situation changing at least within a 9 – 12 month period of Mr Lealaogata undergoing operations on his knees. At the time Mr Lealaogata was not on the waiting list for those operations, which would have extended the time frame even further.

[28] In *Barnett v Northern Region Trust Board of the Order of St John*² Colgan J (as he then was), referred to the law applicable to such situations:

The law is that after a fair investigation, an employer may dismiss an employee justifiably where its reasonable needs cannot be met by an employee who is not fit and able to perform the work required and is not in a position to be able to do so within a reasonable time in all the circumstances.

[29] I find Timata Hou was justified in terminating Mr Lealaogata's employment on the basis that he was unable to carry out fully the functions of his position. This made his continued employment risky for himself and his colleagues.

[30] I also find the process carried out by Ms Hand for Timata Hou to have been largely fair. It proceeded over a period of some seven months during which time Mr Lealaogata and his representatives were consulted appropriately, and their views properly considered before decisions were made. Ms Hand considered the redeployment options put forward by Mr Lealaogata but did not find them acceptable for reasons conveyed to him. I find no fault with the process although it was unfortunate the letter notifying Mr Lealaogata of the termination of his employment was somewhat ambiguous over his final day at work. The letter referred to his final

² [2003] 2 ERNZ 730 at 738

payment being made as soon as possible but was not explicit that Mr Lealaogata was not required to work out the notice period to 16 December.

[31] Ms Hand was not at work on 2 December 2011. She was aware of the possibility Mr Lealaogata might turn up for work and had instructed his Team Leader to make it clear he was not expected to work out his notice period, should Mr Lealaogata arrive. I accept Mr Lealaogata's evidence about the distress he felt when his Team Leader came up to him in the car park and told him in an abrupt manner that he no longer had a job.

[32] I doubt Ms Hand intentionally created ambiguity for Mr Lealaogata over his last day at work. However, her failure to ensure his departure from Timata Hou was managed in a way that preserved his dignity is disappointing. Mr Lealaogata was not being dismissed for any fault or misconduct and there was no reason to exit him from the grounds of the organisation so tersely. It would have been more appropriate for Ms Hand to convey her decision to terminate Mr Lealaogata's employment in person with an acknowledgement of his service. It would also have been courteous to give him the opportunity to say goodbye to his colleagues and explain the reason for his departure to them.

[33] Section 103A(5) of the Employment Relations Act 2000 (the Act) provides that I must not determine a dismissal to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly. I find Timata Hou could have been more considerate in its treatment of Mr Lealaogata by avoiding ambiguity in the letter of dismissal and by facilitating a dignified departure for him. However, I find these to be defects of compassion rather than fairness, and they had no impact on the outcome for Mr Lealaogata, although he may have found the loss of his employment easier to accept if he had received more considerate treatment.

Second issue - was Mr Lealaogata discriminated against by his employer on the grounds of disability?

[34] The Act provides³ the prohibited grounds of discrimination set out in section 21(1) of the Human Rights Act 1993 also apply to an employee's personal grievance

³ Sections 104 & 105

for discrimination in employment. Those grounds include discrimination for disability.

[35] The Human Rights Act exceptions in relation to discrimination also apply⁴ in a personal grievance situation. Section 29 of that Act sets out the exception in relation to disability as follows:

(1) Nothing in [section 22](#) shall prevent different treatment based on disability where—

(a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or

(b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

(2) Nothing in subsection (1)(b) shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

[36] Mr Lealaogata's situation comes within the exception in section 29(1)(b) above. His inability to undertake the full range of duties of the CSW position compromised his own safety and that of his co-workers. This was not a situation where the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

[37] The evidence before the Authority was that Mr Lealaogata's Team Leader had for some time accommodated his restricted mobility in the allocation to him of clients who were supposedly less challenging than those allocated to other CSWs. Mr Lealaogata saw no reason why that could not continue. Senior management was unaware that such accommodations were being made until May 2011 when the private transport incident came to Ms Hand's attention.

[38] I accept the employer's view of the importance of all CSWs being able to rely on the capability of their colleagues should situations arise which require it. The nature of the Timata Hou clientele is such that health and safety factors are of major importance. The environment in which the organisation operates is not one in which

⁴ Section 106

accommodations can safely be made on any long-term basis for an employee who is unable to perform the duties required of him. I find Timata Hou did not unlawfully discriminate against Mr Lealaogata in his employment.

Summary of Findings

[39] Mr Lealaogata was justifiably dismissed and was not discriminated against by reason of disability.

Costs

Costs are reserved.

Trish MacKinnon
Member of the Employment Relations Authority