Determination Number: AA 27/07
File Number: AEA 897/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Veisinia Molimau Pulu (Applicant)
AND	Guardian Healthcare Group Limited (Respondent)
REPRESENTATIVES	Amelia Schaaf for Applicant Joanne Douglas for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	1 February 2007
DATE OF DETERMINATION	9 February 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant claims she was unjustifiably dismissed from her job as a caregiver at the Cornwall Park Hospital, a hospital for the elderly, on 18 June 2002. She says she was also unjustifiably disadvantaged by the actions of the employer in issuing her with a final written warning around two weeks before her dismissal. She seeks reimbursement of lost wages for six months and compensation of $10,000 for hurt and humiliation.

[2] Authority determination AA 153/06 (3 May 2006) found that the applicant had properly lodged her claim within the three year period allowed for under the Employment Relations Act ("the Act") to commence an action following the raising of a grievance.

[3] The respondent's position, in its statement in reply, was that it was not the applicant's employer at the material time and was not liable if the warning and dismissal of the applicant were held to be unjustified. Alternatively, if it were liable, the respondent says the warning and dismissal were fairly carried out and were justified.

[4] The parties did not resolve this matter in mediation. The investigation meeting considered written statements and answers to questions from the applicant and a manager Jean Colbeck. Cornwall Park Hospital's principal nurse manager in 2002, Kim Jolly, also gave evidence under a witness summons issued on the application of the respondent. She is now a manager in the public health service. A former co-worker of the applicant, Tupou Tu'itupou, provided a written statement, the relevant portion of which largely repeated key points of the applicant's evidence and I did not need to put any questions to her. Counsel had additional questions of the applicant, Ms Jolly and Ms Colbeck. Counsel provided oral submissions at the conclusion of the meeting.

[5] Counsel for respondent suggested some prejudice to her client arose because the events of the warning and dismissal occurred almost five years ago; however I detected no real disadvantage from the passage of time. The two managers who were involved with the disciplinary procedure in 2002 both gave evidence.

[6] Ms Jolly, who was able to refresh her memory by referring to notes taken at the time and other papers, was sure enough to state that she remembered some events which occurred prior to the applicant's warning "like it was yesterday". The events included the discovery and subsequent inquiry into an injury to a patient. Ms Jolly described the injury as one of the

"grizzliest" she had seen in her time as a nurse. As a result of those circumstances I am confident – having heard Ms Jolly recall and describe her actions and events at the time – that she had a clear memory of key details.

[7] Ms Colbeck, as she did then, manages another hospital for the respondent. She attended one disciplinary meeting with the applicant and her notes taken at that time are a more important part of the evidence than her present memory of that meeting. I was also satisfied that Ms Colbeck was properly frank when she could not recall particular details. However much of her evidence was about the general training of staff in required procedures and not subject to the usual problems of recall of particular details.

[8] The issues to be resolved include:
- Whether the respondent is liable for the actions of the company which was the applicant's employer in 2002?
- Whether the allegations against the applicant were properly investigated?
- Whether it was open to the employer to dismiss in all the circumstances?
- If the warning and/or dismissal were unjustified, what remedies should be awarded to the applicant and what account should be made of any contribution by her to the situation?

The employment relationship problem

[9] The applicant worked as a caregiver at the Cornwall Park Hospital from 12 May 1999 to 18 June 2002.

[10] During this time the hospital was owned and operated by HavenCare Hospitals Limited ("HavenCare"). The applicant had already worked for the same employer at another hospital in the preceding two years. In that time she was trained in procedures and practices for providing care to elderly patients.

[11] The applicant had a written individual employment agreement with HavenCare which included the following provisions:

> *12. Disciplinary Procedure*
>
> > *It is HavenCare's policy to give employees a reasonable opportunity to remedy any problems before proceeding with the formal disciplinary process. However, where HavenCare considers disciplinary action may be appropriate in the circumstances, the following procedure will act as a guide.*
> >
> > *Before any disciplinary action is taken, HavenCare will carry out an appropriate investigation. This will include communicating its concerns to the employee and giving him/her an opportunity to obtain representation and to respond.*
> >
> > *HavenCare will then consider all relevant facts and advise the employee of its decision, together with the corrective action that is required (if any) and the consequences of non-compliance. In the normal course an employee will receive an initial verbal warning, a written warning and then a final written warning. Following a final written warning an employer may be dismissed if the misconduct or non-performance occurs again.*
> >
> > *Depending upon the circumstances, HavenCare may decide to proceed immediately to a written warning, a final written warning or dismissal. For example, in cases of serious misconduct an employee will be dismissed without notice and without prior warnings.*
>
> *13. Termination*
>
> *…*
>
> *Serious misconduct, serious non-observance of the terms of your employment*

(including House Rules and Company Policy) or serious neglect of your duties are grounds for instant dismissal.

…

17. HavenCare's Policies and Rules

HavenCare has a Policy and Procedures Manual and House Rules which form part of your terms of employment and you must comply with them at all times.

…

[12] On 31 May 2002 the applicant was issued with a final written warning. This followed an investigation by the employer of an incident when an elderly patient (whom I shall refer to only as "Patient B") suffered a broken leg.

[13] The written warning stated that the applicant had lifted and turned patients alone in contravention of HavenCare's House Rules and lifting policy. The applicant was required to comply with the lifting policy. The warning concluded:

Failure to do so, or the occurrence of any other breaches or performance concerns, will result in dismissal.

[14] Fourteen days later – on 14 June 2002 – the applicant was asked to attend a disciplinary meeting regarding a report that she was late to work a night shift on 11 June 2002.

[15] That disciplinary meeting occurred on 18 June 2002. At the end of the meeting the employer's representatives dismissed the applicant. Her dismissal was confirmed in writing the next day.

[16] On 28 August 2002 the applicant's lawyer notified Havencare of personal grievances under the Act. The grievance letter alleged both unjustified disadvantage – for the final written warning – and unjustified dismissal. It said correct procedures were not followed in issuing the final written warning and that the dismissal was unjustified because the applicant was not late on 11 June and the matter was not properly investigated.

[17] Both grievances were raised within the 90-day statutory period.

[18] The applicant did not lodge her application in the Employment Relations Authority until 26 August 2005.

[19] The applicant's explanation of the delay in commencing her action is that she was waiting for the conclusion of court proceedings regarding criminal charges against a former co-worker, Salote Koloi.

[20] Ms Koloi was charged with 15 counts of assault on patients while working at Cornwall Park Hospital between October 2000 and July 2001. The case went to trial in the District Court in October 2003 where Ms Koloi was convicted on two counts and acquitted on 13 counts. She was sentenced to six months imprisonment and later granted leave to serve that sentence on home detention. In August 2004 the Court of Appeal quashed one of those counts and substituted a three month sentence.

[21] The applicant alleges that her warning and dismissal were, in part, motivated by the management of the hospital being unhappy that she gave information to a Police investigation that resulted in the laying of charges against Ms Koloi with the risk of negative publicity for the hospital. I will deal with that allegation in due course.

[22] Whatever its relevance, it does not really explain the full extent of the applicant's delay in

commencing her action in the Authority. It was lodged a year after the Court of Appeal had dealt with the Koloi case – and only two days shy of the end of the three-year statutory period. However it was within the limits of that statutory period and – whatever may be said about its inconvenience – it has not caused any real prejudice to the respondent's case because of the availability of Ms Jolly, Ms Colbeck and the relevant documents.

Is the respondent liable for the actions of Havencare as an employer?

[23] The statement of problem named Guardian Healthcare Operations Limited ("GHOL") as the respondent. I am satisfied that was the correct entity to name at the time of lodgement although it now requires amendment.

[24] Companies Office records confirm that HavenCare was the subject of a 100 per cent share purchase by GHOL in July 2004. That share sale created no change to the status or identity of the legal entity of HavenCare as a registered company, or its liablities – including the applicant's personal grievance notified in August 2002.

[25] On 31 March 2005 HavenCare, along with other companies, was amalgamated under the Companies Act 1993 to become part of its parent company, GHOL. On 8 May 2006 GHOL was amalgamated with its parent company Guardian Healthcare Group Limited ("GHGL").

[26] Section 225 of the Companies Act 1993 provides that the amalgamated company succeeds to all the liablities and obligations of each of the amalgamating companies on the date shown on the certificate of amalgamation issued by the Registrar of Companies.

[27] In reviewing the scope and effect of this provision as identically stated in the previous companies legislation, the Court of Appeal in *Carter Holt Harvey Limited v McKernan* [1998] 3 NZLR 403, 414 confirmed that existing employment agreements – including provisions for pursuing a personal grievance against that company as an employer – were obligations of an amalgamating company 'inherited' by the amalgamated company. Although the amalgamating company is then struck off the register, the amalgamated company is not a different entity. It stands in the same position as each of the amalgamating companies in respect of all their rights and obligations. As the High Court put it in another case, "all that occurs is, in reality, a change of name": *Trade Mart Limited v B A Wilkinson* (unreported, HC Hamilton, CP 38/01, 6 August 2002, Master Faire).

[28] In the present matter the effect is that the respondent is liable for the actions of Havencare in 2002 in respect of the applicant. However the relevant legal entity is now GHGL which has succeeded GHOL which in turn had succeeded Havencare.

The final written warning

[29] The discovery of an injury to Patient B resulted in an internal investigation. Patient B was a very frail elderly woman who was unable to speak. Ms Jolly described her as being in a virtually vegetative state. Her family were deeply distressed by news of their relative's injury. They wanted to know which staff member was responsible for it and for that staff member to be dismissed by the hospital.

[30] Ms Jolly's inquiries revealed that it was most likely that the applicant was the last member of staff to attend to Patient B prior to the discovery of her injury. This was based on a schedule prepared by the registered nurse responsible for the night shift that evening.

[31] As part of that investigation Ms Jolly held a meeting with all the night staff and individual meetings with each staff member. Information provided by staff in those meeting revealed that they routinely turned patients on their own. This was in breach of the hospital's policy which required two staff to attend to the lifting and turning of each patient. The reason for that policy – as explained by Ms Colbeck – was that turning a patient alone involved pulling a drawsheet under the patient. This risked the patient rolling out of bed or hitting the wall if the bed was adjacent to a wall. There was also the risk that a frail patient with contracted legs

would be twisted in the sheet and break a leg.

[32] I do not accept the applicant's evidence that the lifting policy applied only to 'transfers' – that is activities such as moving a patient from a bed to a chair. Rather I consider it clearly – as all staff more likely than not well understood, regardless of their actual practice – applied to lifting and turning carried out as part of bed care. The policy stated that it "*includes care of residents in bed*".

[33] Ms Jolly's evidence was that, following her investigation, each member of the night staff was called to a disciplinary meeting to discuss the lifting policy and proper procedure for turning patients. Each was subsequently issued with a warning at various levels – verbal, written or final written – requiring them to comply with the lifting policy.

[34] The applicant alleges that she was not advised of the right to bring a support person or representative to her disciplinary meeting. However I prefer Ms Jolly's evidence, supported as it is by a note made by Ms Colbeck at the start of the meeting, that the applicant had been informed of the meeting and her rights some days before.

[35] I also find that during the meeting the employer's concerns were fairly put to the applicant for her explanation. These concerns were that night staff, including the applicant, were regularly turning patients on their own and that the applicant was the most likely person to have caused the injury to Patient B while turning the patient alone.

[36] In her explanation during the disciplinary meeting the applicant attempted to withdraw an admission made in earlier meetings with Ms Jolly that she did lift and turn patients on her own.

[37] After considering the applicant's explanation Ms Jolly resolved to issue a final written warning.

[38] Ms Colbeck's notes record that the applicant said she should not be given a final warning and should be given a chance. She was told that a final warning gave her a chance to prove her capabilities as a caregiver and that she had the ability to be an excellent caregiver provided she followed policy.

[39] The warning was based on conclusions which were reasonably open for the employer to reach. In 1997 and 1999 the applicant had attended training sessions on proper lifting and turning techniques and must have been aware that the employer's policy required two staff to carry out this procedure in all cases. The employer reasonably considered her explanation that other night staff also ignored this requirement was not a sufficient excuse. There was no unfairness to the applicant in being told, as were all the other staff, to comply with the policy or risk further disciplinary action.

[40] Ms Jolly had reached the conclusion that it was most likely that the applicant was responsible for the injury to Patient B by turning her alone.

[41] However I accept Ms Jolly's evidence about the care she took in considering how far she could take that conclusion. It reflected advice she sought from the respondent's lawyer. It may well have been open, on the balance of probabilities, for Ms Jolly to dismiss the applicant. However she took a path that was more lenient. In the absence of any witnesses to the injury to Patient B – who was not capable of speaking about what happened to her – Ms Jolly decided that it was not proper to yield to the pressure from the patient's family for dismissal of the staff member that she considered most likely to have caused the injury. That was a decision which must reasonably be seen as open to the employer, and one that was fair rather than unfair in the circumstances of a serious injury to a patient.

[42] The warning letter stated that failure to follow the lifting policy breached certain identified houses rules. It stated that failure to comply with the lifting policy "*or the occurrence of any other breaches or performance concerns, will result in dismissal*".

The dismissal

[43] Eighteen days after her final written warning the applicant was dismissed for arriving at work just over one hour late.

[44] There can be no dispute that she was properly notified of a disciplinary meeting about this incident of lateness, the opportunity to bring a representative and that her employment was in jeopardy in light of the final written warning.

[45] There is also nothing in a possible error about whether the lateness occurred on 11 June or 12 June. The applicant admits she was late on one of those nights – and it was on that lateness which the employer acted.

[46] The evidence on the details of the lateness incident is clear. The applicant was due to start work at 11pm. By 11.40pm she had not come to work or rung in to say that she was unable to attend work for sickness or any other reason. One of the registered nurses on duty – Linda Smith – rang the applicant's home and was told by the person who answered the phone that the applicant had already left for work.

[47] The applicant says that it was her son who answered the phone. After hanging up he checked his mother's room and found his mother was still there and asleep. He woke her and she then went to work. She arrived shortly after midnight. She says she clocked in at 12.05am. A nurse manager's report says the applicant arrived for duty at 12.10am.

[48] The applicant says that after waking she rang and spoke to Ms Smith so that the employer knew by shortly after 11.40pm that she would be at work. The employer's evidence is that there was no phone call to the responsible registered nurse – Joanne Herder – and that the applicant's explanation on arrival at work was to say that she was late because she had slept in. The employer did not appear to have checked with Ms Smith about whether she had received a call but I do not find this to be a significant fault in the inquiry on the lateness issue.

[49] Whether the applicant made a phone call after 11.40pm and before 12.05am is of little assistance to her case. Either way, she was running very late for work and her employer did not know why. She had not called before her shift started at 11pm. She was also only able to get to work – more than an hour late – because a call to her home had resulted in her being woken up.

[50] What is of more significance is the basis on which the dismissal was subsequently made. The letter calling the applicant to a disciplinary meeting advised her that being late to work on the particular night was "*a breach of House Rules 1A 2 and 9*". The subsequent letter of dismissal says failing to arrive on time for the night shift was "*a breach of the House Rules*". To justify the dismissal the respondent relies on those rules, a written policy on absenteeism signed by the applicant, and the existence of the final written warning.

[51] House Rule 1A 2 refers to "*poor time keeping, which can include arriving late for work or from meal and tea breaks*". Rule 1A 9 refers to "*demonstrating an unacceptable work pattern (eg failure to arrive on duty without notification or authorisation)*". The House Rules state that breach of a 1A category rule "*without satisfactory explanation, could result in a disciplinary warning being issued*". There are another category of rules – 1B – which are described as serious misconduct but do not apply here.

[52] The Absenteeism policy states that "*should an employee continually fail to meet the accepted standard of attendance then disciplinary procedures will ensue*".

[53] Ms Colbeck accepted that the terms "work pattern" and "continually fail" referred to an occurrence of lateness on more than one occasion. In her role as a manager for the respondent – at another hospital – she had not dismissed any employee for a single incident of

lateness.

[54] However Ms Jolly pointed to the words regarding a "satisfactory explanation" suggesting that simply sleeping in was not an explanation that was satisfactory. She also suggested there may have been earlier attendance issues with the applicant. That is not clear on the evidence. At best there is only an oblique reference to that possiblity in the documents produced from the applicant's personnel file and no earlier written warning on that issue. There is also no indication in the documentary evidence that Ms Jolly relied on other supposed incidents of lateness at the time of making the decision to dismiss.

[55] Rather, Ms Jolly made her decision to dismiss – after taking legal advice on the point –on the basis that she was entitled to do so because of the final written warning and particularly the statement in that warning that <u>any</u> further breach or performance concern would result in dismissal.

[56] As discussed at the investigation meeting, I am not satisfied that this statement accords with the terms of the applicant's employment agreement, or the case law on the extent to which an employer can use an existing warning to justify dismissal for an additional misdemeanour of another character.

[57] The applicant's employment agreement specifically addresses the circumstances of a final written warning and says the employee may be dismissed "if <u>the</u> misconduct or non-performance occurs again" (my emphasis).

[58] In interpreting employment agreements, the Authority must take an objective approach which is not narrowly literal and accords with business common sense. Where the words are clear and have only one possible meaning, the Authority must give effect to the plain and ordinary meaning of a clause unless to do so would result in an absurd result that was unlikely to have been the intention of the parties.

[59] In this particular agreement the parties have specifically addressed the circumstances of an employee being under a final written warning and facing further disciplinary action. The use of the word "*the*" clearly requires repeat of the same kind of misconduct or performance concern that was the subject of the earlier warning.

[60] I was not persuaded by the respondent's submission that this limit on the application of the final sanction of dismissal was intended in earlier words of this clause to "act as a guide" only and that the employer was entitled to go further in this case because of the words of the final written warning letter.

[61] The letter – a unilateral declaration of the employer – does not have a higher status or the ability to override the mutually agreed words of the employment agreement. Neither does the employer have the right to say that because it may have stayed its own hand in delivering a final written warning rather than a dismissal earlier, that it can now go further in making a more severe decision on a minor offence than it otherwise justifiably could. That accords with the general tenor of the cases regarding warnings reviewed by the learned authors of *Brookers Personal Grievances* at 4.4.06 and 4.4.11.

[62] That interpretation does not restrict the employer from dismissing an employee for a breach of its rules or an incidence of serious misconduct that would warrant dismissal in its own lights. That accords with business common sense.

[63] However it does restrict – as I consider was the most likely agreed intention of the parties – an employee on a final written warning from being dismissed for an unrelated minor offence which would otherwise justify only a relatively minor reprimand. The scheme of the respondent's house rules clearly shows that a single incident of lateness would not even necessarily amount to a breach of the house rules. It is a *pattern* of lateness and a *continual* failure to meet timekeeping standards that is slated as a breach attracting disciplinary action.

[64] Ms Jolly's evidence was that she had not considered whether her ability to dismiss was limited by the wording of the employment agreement regarding final written warnings. Rather she relied on her legal advice at the time that the wording of the final written warning allowed her to dismiss the applicant. The final written warning – as Ms Colbeck's notes record – was issued on the basis that the applicant would have the chance to prove her capabilities as a caregiver, not have her employment terminated for a single oversight for which another worker would not be so severely punished. In these circumstances I consider this resulted in a dismissal that was unjustified.

[65] While I have reached that conclusion I record that I was not at all persuaded by the applicant's allegation that her dismissal was actually motivated by the respondent's wish to punish her for complaining about the conduct of Ms Koloi. I listened carefully to the applicant's reasons for that view and concluded that they lacked any substance. Her own evidence, lead in a question from her own counsel, was that only other staff knew of the complaint to the Police and this was kept secret from management. She got the notion that she might be dismissed from a passing comment she says was made to her by a police officer. If such a comment was made, nothing was offered to substantiate it. The applicant was able to point to nothing more than a feeling that it may have been so because the principal nurse manager previous to Ms Jolly holding the role had not, in the applicant's view, done anything about Ms Koloi's conduct towards the patients. I prefer Ms Jolly's evidence that she was not aware at the relevant time that the applicant had provided any information about Ms Koloi's conduct to the Police. Further I accept Ms Jolly's statement that had she known, she would have been more likely to support than condemn the applicant for doing so because it was important that nurses and support staff speak up about anything that threatened the proper care of their vulnerable patients.

Determination

[66] For the reasons given, I find that :

(i) the respondent did not unjustifiably disadvantage the applicant by issuing her with a final written warning on 31 March 2002; and that;
(ii) the respondent did unjustifiably dismiss the applicant on 18 June 2002.

[67] The applicant has a personal grievance which requiries remedies.

Remedies

[68] The applicant's evidence was that she did not find another job until the end of 2002. She says that she was told by one potential employer that she would not get a job because one of the respondent's managers had recommended not employing her. The applicant however provided no evidence to support that allegation or of her job search efforts during the latter half of 2002. On this basis I consider lost wages may reasonably be awarded for only four of the six months sought by the applicant (that is 16 weeks).

[69] Her evidence was that she was paid $10 an hour for a forty hour week. Reimbursement of wages is to be on that basis, that is $400 a week less the relevant tax.

[70] In respect of both her unjustified disadvantage and unjustified dismissal claims the applicant sought $10,000 in compensation for hurt and humiliation. She gave limited evidence of distressing effects of her dismissal. She was angry and felt unfairly blamed for the injury to Patient B. Having found that there was no unjustified disavantage in the warning, compensation may be considered only in respect of the dismissal. While the evidence on its effects was limited, there is an inevitable level of hurt arising being dimissed in such circumstances. That must be compensated for but at an appropriately modest level which I set at $3000.

[71] Section 124 of the Act requires the Authority to reduce remedies awarded if the actions of the employee contributed to the situation that gave rise to the personal grievance. This

takes account of actions of the employee which were "blameworthy". In the circumstances of this case I take account of the final written warning for breach of the lifting policy which most likely resulted in the injury of a frail patient. While I have found that the employer's representative subsequently went too far in respect of a later minor event, that earlier serious breach and final warning is an important part of the context in which the substantiated grievance occurred. The applicant also contributed to the situation by failing, without any good reason, to turn up for work on time – a situation which would have been even worse if she was not woken as a result of a call from her workplace. As Ms Jolly said in her evidence, staff who were late for work failed to to meet their responsiblities to the patients and the requirement to have a certain level of staff on duty at all times meant that some staff from the previous shift could not be released. For these reasons I find that the applicant's conduct was blameworthy and should be taken into account in reducing remedies.

[72] Considering all the circumstances of the case I set the level of reduction of remedies at 25 per cent of the amount awarded.

Orders

[73] Having reduced remedies awarded to the applicant for her contribution to the situation giving rise to her personal grievance, the respondent is ordered to pay to the applicant within 28 days of this determination, the following amounts:

(i) 12 weeks ordinary wages (less tax) in reimbursement of lost wages under s123(1)(b) of the Act, and
(ii) $2250 (without deduction) as compensation for humiliation, loss of dignity and injury to her feelings under s123(1)(c)(i).

Costs

[74] At the investigation meeting the applicant's counsel told me that the applicant had legal aid for earlier stages of this proceeding but had not as of that date made a further application for legal aid but had prepared the paperwork for an extension and would send it to the Legal Services Agency the next day. Ms Schaaf was asked in November and December 2006 to advise the Authority on the position with legal aid but had not done so.

[75] If there are any issues of costs for the Authority to address the parties may apply for determination of that issue with 28 days of this determination. No application will be considered outside that time period.

Robin Arthur
Member of Employment Relations Authority