

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 1
3194819

BETWEEN ROSEANNE SHERIDAN
Applicant

AND PACT GROUP
Respondent

Member of Authority: Peter van Keulen

Representatives: Emily Griffin, counsel for the Applicant
Fiona McMillan, counsel for the Respondent

Investigation Meeting: 4 September 2024 in Dunedin

Submissions Received: 4 September and 25 September 2024 from the Applicant
4 September and 4 October 2024 from the Respondent

Date of Determination: 6 January 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Roseanne Sheridan was employed by Pact Group as a community support worker. In January 2021 Ms Sheridan was involved in a serious incident at work. Whilst Ms Sheridan returned to work in the days following the incident after a short period of time she took time off on sick leave.

[2] After Ms Sheridan had been away from work on sick leave for a period of time, Pact undertook a process with her to ascertain her fitness for work. As a result of this process Pact terminated Ms Sheridan's employment on 11 August 2021.

[3] Ms Sheridan was unhappy with Pact's process and its decision to terminate her employment; Ms Sheridan raised a personal grievance for unjustifiable dismissal through her union on 8 November 2021.

[4] Ms Sheridan's personal grievance was not resolved and she lodged a statement of problem in the Authority claiming unjustifiable dismissal.

The Authority's investigation

[5] Ms Sheridan lodged a statement of problem in the Authority on 13 October 2022 and a statement in reply was lodged by Pact on 28 October 2022. In the statement in reply Pact raised a preliminary issue of whether Ms Sheridan's personal grievance had been raised within the requisite 90-day period.

[6] I investigated this preliminary issue, receiving written submissions from the parties through April 2023. My determination was issued on 12 May 2023, finding that Ms Sheridan had raised her personal grievance in time.

[7] Pact lodged a challenge in the Employment Court and Judgment was issued on 20 December 2023 also finding that Ms Sheridan has raised her personal grievance in time.

[8] After this the parties agreed to go to mediation which was held in the first part of 2024. Mediation was unsuccessful and I then proceeded with my investigation of the employment relationship problem.

[9] I investigated Ms Sheridan's employment relationship problem by receiving written evidence and documents, holding an investigation meeting in Dunedin and assessing the oral and written submissions of the parties' representatives.

[10] I received witness statements from Ms Sheridan and from Karla Butler and Sylvia Wouters both from Pact. In my investigation meeting, under oath or affirmation, these

witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

What happened?

[12] Pact is a Charitable Trust that provides care services to vulnerable clients. Pact's services include the provision of a home in Oamaru for clients, who have physical and intellectual disabilities, where Pact staff support these clients so they can live as independently as possible.

[13] Ms Sheridan was employed by Pact and she worked as a Community Support Worker in this Oamaru home.

[14] On 14 January 2021 Ms Sheridan was involved in an incident with one of the residents. The incident involved a threat to harm Ms Sheridan by the resident. The threat was serious; the police attended and Pact management were advised.

[15] Ms Sheridan was able to complete her shift on 14 January 2021 and then attended work on 15 and 16 January 2021. Ms Sheridan then took pre-arranged leave until 26 January 2021.

[16] Ms Sheridan had almost completed a further two weeks of work when Thomas Cardy, Pact General Manager, wrote to her. This letter, dated 4 February 2021, raised concerns with Ms Sheridan about her conduct at work during and immediately after the incident. Pact sought to meet with Ms Sheridan to discuss its concerns.

[17] Ms Sheridan then went on a period of sick leave from 5 February 2021 and the meeting to discuss the concerns with Ms Sheridan never took place.

[18] By the end of March 2021, Pact changed tack and began enquiring of Ms Sheridan about a potential return to work. All of the key communications occurred through letters and email, as follows:

- (a) 30 March 2021: Mr Cardy wrote to Ms Sheridan advising her that she had been absent from work for a considerable length of time and Pact was finding it increasingly difficult to fill her shifts. Further, Ms Sheridan's recent medical certificate advised that she would be unfit for work until 11 April 2021 and there was no indication of a return-to-work date. For these reasons Pact wanted to meet with her to discuss her medical status as Pact needed some certainty about her return to full duties in the near future. Pact also advised that it might not be able to hold Ms Sheridan's job indefinitely without certainty of her return to work.
- (b) 6 April 2021: Ms Sheridan responded to Pact's request to meet, advising it that until her ACC assessment had been completed a return-to-work plan could not be implemented, so without the assessment there was nothing to discuss in a meeting.
- (c) 13 April 2021: Ms Sheridan, through her union, wrote to PACT advising it that once the ACC assessment was received it would be forwarded to PACT, with 9 June 2021 being the latest date it was expected.
- (d) 19 April 2021: Mr Cardy wrote to Ms Sheridan requesting a meeting to discuss her sickness absence. Pact advised that Ms Sheridan had been absent since 14 February 2021 and was, at that time, signed off as unfit for work for an indefinite period. Again, Pact advised that it was becoming increasingly difficult to fill her shifts and that, due to business requirements, it might not be able to keep her job open without any certainty of when she might return and it might have to end her employment for incapacity.
- (e) 20 April 2021: Ms Sheridan emailed Pact and advised that ACC had to make a decision by 9 June 2021 and it would be reasonable to attend a meeting only

when this information was available as she would be able to discuss her health condition and a return-to-work date.

- (f) 20 April 2021: Ms Wouters, Workforce Development Manager for Pact, emailed Ms Sheridan and advised that the proposed meeting had been rescheduled to 27 April 2021.
- (g) 21 April 2021: Ms Sheridan emailed Pact and advised that she was expecting the ACC report very soon and would provide it as soon as possible but that meeting without the report was unfair.
- (h) 13 May 2021: Ms Wouters wrote to Ms Sheridan confirming that Pact would wait for the ACC report due 9 June 2021 before meeting with her. Pact requested Ms Sheridan's attendance at a meeting on 14 June 2021. Pact identified four things it wished to discuss in that meeting: Ms Sheridan's return to work date; whether a return-to-work plan would be required; any support that Ms Sheridan might find helpful; and, if there was no return-to-work date when the medical specialists anticipated being able to provide a date.
- (i) 11 June 2021: Ms Sheridan, through her union, advised Pact that Ms Sheridan was still waiting to meet her medical specialists and to receive their report. And, further that any meeting to discuss Ms Sheridan's employment should be delayed until 30 June 2021, the date Ms Sheridan's latest medical certificate signed her off work until, and the date by which time the ACC report was expected.
- (j) 23 June 2021: Pact, through its lawyers wrote to Ms Sheridan's union setting out key issues for Pact arising out of Ms Sheridan's continued absence and ongoing delays with any specialist medical assessment. Pact's lawyers advised that:
 - i. Ms Sheridan's absence was becoming unsustainable due to the impact on staff.

- ii. It was unclear to Pact why the specialist assessment had been delayed.
 - iii. Despite requests for Ms Sheridan to get an appointment with her doctor so that the necessary medical information would be available for the proposed meeting all that happened was Ms Sheridan provided further medical certificates.
 - iv. Pact would schedule a meeting with Ms Sheridan on 8 July 2021 in the expectation that the ACC specialist report would be received on 30 June 2021
 - v. After 9 July 2021 Pact would determine whether it would continue to hold Ms Sheridan's position open, and that Ms Sheridan's employment might be terminated due to medical incapacity.
- (k) 29 June 2021: a further medical certificate confirmed Ms Sheridan's unfitness for work until 31 July 2021.
- (l) 5 July 2021: Ms Sheridan, through her union, advised Pact that the ACC investigation into Ms Sheridan's claim had been further delayed and Ms Sheridan would be unable to meet.
- (m) 7 July 2021: Pact, through its lawyers, responded to Ms Sheridan advising that Pact needed certainty of Ms Sheridan's return and it could not simply wait until whenever an ACC specialist report might be available; Pact needed some certainty and it could not wait indefinitely. Pact then advised that as a result, after 9 July 2021, it would make a decision about whether it could keep Ms Sheridan's position open for her or whether it would end her employment for medical incapacity. In this regard Pact sought any comments from Ms Sheridan.
- (n) 9 July 2021: Ms Sheridan's union advised Pact that there was now information from the CTU ACC advocacy service supporting a return-to-work plan for Ms

Sheridan and that there was belief that Ms Sheridan would be able to return to work and she was very keen to get a plan in place.

- (o) 14 July 2021: Pact through its lawyers confirmed a brief extension and asked for the date by which Ms Sheridan would be able to provide the information it had previously sought from her.
- (p) 15 July 2021: Ms Sheridan, though her union advised Pact that Ms Sheridan's ACC claim was complex and the final report, which would allow rehabilitation and a return-to-work process to be implemented, had now been provided.
- (q) 16 July 2021: Pact through its lawyers advised that there was still no actual timeframe and certainty about any return to work for Ms Sheridan. The health and safety implications for other staff arising from Ms Sheridan's absence meant Pact would need to proceed with making a decision.
- (r) 16 July 2021: Ms Sheridan, through her union, advised that she had done all she could to ensure her ACC claim was progressed in a timely way and essentially any delay through ACC was not her fault; Ms Sheridan continued to do all she could to ensure the medical specialists had the information they needed so a return-to-work plan could be developed. Ms Sheridan requested an extension until the first week of August 2021 to meet with Pact so that she would have time to meet relevant specialists to work on any return-to-work plan.
- (s) 19 July 2021: ACC advised Ms Sheridan that her claim had been approved on the basis of Post-Traumatic Stress Disorder.
- (t) 20 July 2021: Pact, through its lawyers stated:

In our March and April letters to you we explained that it sometimes became difficult to keep employees jobs open during lengthy absences. We said that without certainty of your return to full capacity in the near future we may have to consider ending your employment on the grounds medical incapacity.

Since then we have had extensive correspondence with your representative, and we have provided a number of extensions to the timeframes for making that decision. Unfortunately we cannot continue to delay. We understand your explanation that there have been delays at ACC, and we accept that you are genuinely unwell. But the fact is that not having someone in your position for such a long period of time has put significant stress on our other staff who have needed to cover your duties. We are concerned that they are at risk, and have been at risk for some time, and this exposes our clients to risk. It seems that even when you are able to meet with all your advisors and develop a potential return to work plan, there will be no certainty about how much work you will be able to do or the time frame for when that might be. Our preliminary view is that we can [no] (sic) longer accommodate this uncertainty, and that we must consider the needs of all of the staff and of the service we provide.

Accordingly we now propose to end your employment on the grounds of medical incapacity. If you would like to meet with us this week we can arrange that. Any written response should be provided by close of business Friday 23 July and we will advise you of a decision early next week. We invite you to make any further comments and to provide any further information that you do have available before we reach a final decision.

(u) 28 July 2021: In a letter confirming dismissal, Pact stated that the timeframe for provision of feedback to the proposal to end Ms Sheridan's employment had expired and Pact had not received any comment from Ms Sheridan. Pact then stated that it had reviewed earlier correspondence and reflected on the needs of the Oamaru staff, clients, and overall service. Further, PACT stated that given the 6 months' absence, pressure on staff and ongoing uncertainty about a return-to-work date Ms Sheridan's employment was terminated.

Issues

[19] Ms Sheridan did not accept that her dismissal was justified and she raised a personal grievance for unjustifiable dismissal through her union on 8 November 2021. This is the basis of the employment relationship problem.

[20] The issues for an employment relationship problem based on unjustified dismissal, are:

(a) Was the employee dismissed; and

(b) If so, were the actions of the employer in deciding to dismiss the employee, justifiable?

[21] Ms Sheridan was dismissed by Pact in the letter dated 28 July 2021, with Pact giving Ms Sheridan with two weeks' notice; this is not contentious. Ms Sheridan was dismissed for medical incapacity. Pact said it was unable to manage without Ms Sheridan at work and it had no certainty about any return to work, including when and how much work Ms Sheridan would be able to undertake. This largely flowed from limited medical information being made available on any diagnosis and therefore any recovery timeframes and possible return to work.

[22] So, the question I must answer in order to resolve Ms Sheridan's employment relationship problem is, were Pact's actions in deciding to dismiss Ms Sheridan justifiable. This question applies to both the steps taken by Pact to reach the decision to dismiss and the reason for the decision.¹

[23] Whether Pact acted justifiably is informed by s 4(1A) and s 103A(3) of the Act, with the underlying test for justification being an assessment of whether an employer's actions were those that a fair and reasonable employer could have taken in all the circumstances. So, I must be satisfied that Pact acted as a fair and reasonable employer could whilst meeting the requirements of the Act.

[24] In a no-fault dismissal for medical incapacity the factors set out in the Act do not directly translate or apply as set out. Based on this, in *Lal v The Warehouse Limited*, the Court set out a broad framework that applies.² In other cases, the Court has worked with this framework, applying the principles of s 4(1A) and s 103A(3) of the Act into the particular context of the employment relationship problem to establish the appropriate steps.³

[25] In light of these cases and applying the principles of s 4(1A) and s 103A(3) of the Act I conclude that the steps to address for assessing the justification of Pact's actions are:

¹ *Lal v The Warehouse Limited* [2017] NZEmpC 66 at [30].

² *Lal v The Warehouse Limited* [2017] above n1 at [32] – [36].

³ *Idea Services Ltd v Crozier* [2017] NZEmpC 77; *Lyttleton Port Co Ltd v Arthurs* [2018] NZEmpC 9; and *Ancor Flexibles (New Zealand) Ltd v Gillan* [2018] NZEmpC 147.

- (a) Did Pact give Ms Sheridan a reasonable opportunity to recover or at least provide a prognosis of recovery and return to work?
- (b) Did Pact undertake a fair and reasonable enquiry into Ms Sheridan's incapacity and prognosis for return to work?
- (c) Did Pact engage appropriately with Ms Sheridan over her incapacity and either a return to work or dismissal?
- (d) Did Pact fairly consider what Ms Sheridan had to say about any possible return to work before it dismissed her, including balancing Ms Sheridan's needs against the needs of its business?

[26] To conclude the assessment I must then decide if the decision to dismiss was substantively justified in the circumstances; was the decision to dismiss one that a fair and reasonable employer could have come to in the circumstances.

Analysis

[27] Before I turn to the four steps outlined, I must address an inference that may appear based on the timing of Ms Sheridan's absence from work. Ms Sheridan commenced sick leave as a result of the incident on 14 January 2021 on 5 February 2021, this being the day she received the first letter from Pact that raised issues with her conduct on 14 January. During the time between 14 January and 5 February Ms Sheridan worked approximately two weeks and took annual leave over a period of ten days. Based on the circumstances it might appear that Ms Sheridan took sick leave in response to the 5 February letter from Pact. However, it is clear and accepted that Ms Sheridan suffered from PTSD as a consequence of the incident on 14 January and her inability to attend work from 5 February was genuine. It is notable that Ms Sheridan continued to receive ACC earnings related compensation based on her PTSD until she retired in April 2023.

Did Pact give Ms Sheridan a reasonable opportunity to recover or at least provide a prognosis for recovery and return to work?

[28] The time period from Ms Sheridan leaving work on sick leave until the notice of termination of her employment was just short of six months. During this time Pact engaged with Ms Sheridan over her incapacity and possible return to work and delayed making any decision, including postponing meetings to discuss this.

[29] The reasonableness of this time frame is to be assessed against Pact's business circumstances. Pact says, and I accept, that it could not readily find suitable personnel to cover Ms Sheridan's shifts. This appears to have been because of a combination of the work, the skills required, a limited employment market in Oamaru and that any employment offered to new personnel would have been temporary. As a result, Pact required its existing staff to work additional shifts to accommodate Ms Sheridan's absence. Managing Ms Sheridan's absence through its existing staff working additional shifts was not ideal and created concerns for Pact about the employees' welfare and their tolerance for undertaking the additional work.

[30] The additional and significant concern for Pact throughout was that there was no clear deadline as to when a diagnosis of the medical incapacity and consequently a prognosis for recovery and return to work would be provided. The reasons for the continued delay were not clear either, with references simply being made to ACC specialists advising of new deadlines. It was never clear to Pact if it was the diagnosis or prognosis that was problematic and required further work or whether it was simply availability of specialists and/or Ms Sheridan for medical assessments.

[31] In the circumstances I am satisfied that Pact acted as a fair and reasonable employer could in giving Ms Sheridan the time it did to firstly recover and when that was clearly not feasible in a reasonable time frame, then to provide a prognosis on recovery and return to work.

Did Pact undertake a fair and reasonable enquiry into Ms Sheridan's incapacity and prognosis for return to work?

[32] Again, the circumstances play heavily into the assessment of this. With limited information available Pact undertook the enquiry it could. Throughout the process it tried to meet with Ms Sheridan notwithstanding the limited information that might have been

available as then it would at least have been able to get some information from her as to what was going on. And in doing this Pact made its position on what its concerns were and the information it would like to receive, clear to Ms Sheridan.

[33] All that Pact received was regular medical certificates from Ms Sheridan's doctor certifying her as unfit for work. And in some instances the certificates were open ended.

[34] To be critical of Pact's enquiry would be unfair to it; it did what it was able to do in the circumstances. Ultimately Pact did what a fair and reasonable employer could do in terms of an enquiry into Ms Sheridan's medical incapacity and possible return to work.

Did Pact engage appropriately with Ms Sheridan over her incapacity and either a return to work or dismissal?

[35] Of the four steps I am considering this is the clearest and easiest to determine. Pact's actions in engaging with Ms Sheridan over her medical incapacity and any return to work or dismissal was what a fair and reasonable employer could do.

[36] The communication trail that I set out in detail above confirms that Pact was in constant communication with Ms Sheridan over its concerns and what it was seeking from her and why.

[37] Further, Pact was responsive to Ms Sheridan's needs including rescheduling meetings for various reasons including Ms Sheridan's health, the timing of information, the availability of Ms Sheridan and/or her union representatives.

[38] Pact was very clear on the key issue being its ability to hold Ms Sheridan's job open for her with no prognosis on recovery and return to work and the competing interest of its business, particularly the staff covering Ms Sheridan's work.

[39] Ms Sheridan had every opportunity to engage with Pact on the issues it raised and did so through her union representatives.

Did Pact fairly consider what Ms Sheridan had to say about any possible return to work before it dismissed her, including balancing Ms Sheridan's needs against the needs of its business?

[40] I am satisfied on the evidence I heard and the correspondence I have considered that Pact did consider fairly what Ms Sheridan said about any return to work, including the timing for producing a plan for her possible return to work. Pact did consider Ms Sheridan's needs and accommodated those for as long as it was able to but ultimately its business need outweighed its ability to continue to accommodate those needs when they were not connected to a return to work for Ms Sheridan.

Substantive justification

[41] Based on the circumstances of Ms Sheridan's incapacity and the progression of her prognosis and return to work plan a fair and reasonable employer could have concluded that dismissal was the appropriate outcome.

[42] This is supported by two aspects:

- (a) Pact has properly assessed its business need against Ms Sheridan's needs and the known likely progression of a return to work.
- (b) Ultimately it appears Ms Sheridan was unlikely to be able to complete a return to work. Whilst a retrospective application of justification is not ideal as the decision is assessed on the circumstances at the time, in medical incapacity it can be used to support a substantive justification.⁴ And in this case it is clear that Ms Sheridan continued to suffer from PTSD and this impacted such that she remained eligible for ACC earnings related compensation until she reached the age of retirement.

⁴ *Lal v The Warehouse Limited* [2017] above n1 at [28].

Conclusion

[43] I am satisfied that Pact acted as a fair and reasonable employer could in deciding to dismiss Ms Sheridan for incapacity. Ms Sheridan's dismissal was justified.

[44] As an additional note to the parties, I record that this decision and outcome was difficult to reconcile with the practical realities of what occurred for Ms Sheridan. Ms Sheridan was devoted to her work, she enjoyed supporting the residents, took great satisfaction from doing so and was proud of her work. Ultimately, she lost her job because of the actions of one of the residents; she was not at fault in any way for what occurred and whilst Pact was not at fault either it seems it would be appropriate that Ms Sheridan be compensated for the impact of the incident on her.

[45] However, this employment relationship problem was not about the incident and whether any remedies should be awarded to Ms Sheridan because of it and it could not be as a matter of law.

[46] In my opinion the incident is where the harm for Ms Sheridan lay and ultimately she has been compensated for that through ACC; any further remedies for the consequent loss of her employment cannot fall to Pact.

Summary

[47] Pact's dismissal of Ms Sheridan was justified in the circumstances and Ms Sheridan's claim arising out of the employment relationship problem is unsuccessful.

Costs

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. I note here that Ms Sheridan was successful in the interim application and given the circumstances of Ms Sheridan's injury that was sustained at work and that there was a no-fault dismissal, I suggest that Pact consider letting costs lie where they fall.

[49] However, if despite this one of the parties seeks costs and the parties are unable to agree on the amount Pact may lodge, and then should serve, a memorandum on costs within

28 days of the date of this determination. From the date of service of that memorandum Ms Sheridan will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[50] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁵

Peter van Keulen
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1