

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 119/08  
5079171

BETWEEN                      MALIA TALATAINA  
   Applicant  
  
AND                              GUARDIAN HEALTHCARE  
   TRUST  
   Respondent

Member of Authority:      Yvonne Oldfield  
  
Representatives:            Tim Oldfield for Applicant  
   Shelley Eden for Respondent  
  
Investigation Meeting:     21 November 2007  
  
Submissions received:     6 December from Applicant  
   5 December from Respondent  
  
Determination:              31 March 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This employment relationship problem concerns a dismissal for serious misconduct. The respondent employed Ms Talataina as a caregiver for the elderly including dementia sufferers. After receiving two complaints that Ms Talataina had physically abused residents it suspended and then dismissed her. Ms Talataina denies the allegations against her. She says that the respondent did not conduct a full and fair inquiry into the complaints and that her suspension and dismissal were unjustified.

**Issues**

[2] The issues for determination are as follows:

- i. Whether the suspension amounted to an unjustified action to Ms Talataina's disadvantage;

- ii. Whether the respondent conducted a full and fair inquiry into the complaints about Ms Talataina, and
- iii. Whether it was open to the respondent to conclude that serious misconduct had occurred.

[3] If it is determined that Ms Talataina does have a personal grievance the following further issues will arise:

- i. Whether her actions contributed towards the situation that gave rise to the personal grievance, and
- ii. What if any remedies she is entitled to.

### **Was the suspension fair and reasonable?**

[4] On 2 October 2006 two staff members approached facility manager Carol Lee and told her that in the previous week they had each witnessed an incident in which Ms Talataina had mistreated a resident. In one incident she was alleged to have punched a dementia sufferer in the arm and in the other she was alleged to have spoken rudely to an elderly man and, when he remonstrated with her, bent his finger back.

[5] Ms Lee's evidence is that she asked the individuals who had approached her to put their complaints in writing, which they did immediately. She then interviewed each of them separately to clarify the allegations being made. After seeking advice from the respondent's human resources manager she telephoned Ms Talataina and advised her that she had received serious complaints about her and wanted to meet with her. She advised her to bring a support person with her.

[6] Ms Talataina arrived at work at her normal start time later that day. With Ms Mandava (a registered nurse at the facility) as her support person she met with Ms Lee and Clinical Manager Janice White. Ms Lee outlined the allegations and asked Ms Talataina how she felt about suspension. Ms Talataina denied the allegations and indicated that she did not want to be suspended because her husband was facing heart surgery and she wanted to avoid extra stress on him. After a short adjournment Ms Lee told Ms Talataina that she was suspended on full pay and was not permitted on

site. The names of the residents allegedly assaulted (though not the written complaints) were provided to her and arrangements made (by agreement) for a further meeting on 5 October. On 3 October Ms Lee wrote to Ms Talataina confirming the allegations, the fact of suspension, the time of the next meeting and the fact that disciplinary action including dismissal could result from the inquiry.

[7] Mr Oldfield has argued on behalf of Ms Talataina that the suspension was unjustified because there was very little discussion of the reasons for it, the applicant was not given all available details of the allegations, and there was no indication to her of the likely duration of the suspension.

[8] It is correct that (prior to being suspended) Ms Talataina was not given all available details of the allegations nor were the reasons for the consideration of suspension spelt out to her. However Ms Lee did explain the nature and seriousness of the allegations. This made it self evident why suspension was being considered: conduct of the type alleged seriously endangers residents. When Ms Lee asked for her response, Ms Talataina raised nothing to outweigh these considerations of risk to residents. I am satisfied that Ms Talataina was provided with all the information relevant to the issue of suspension, was given an opportunity to respond, and put forward no good reason why she should not be suspended.

[9] It is also correct that Ms Lee did not give Ms Talataina an indication of how long the suspension would be. However before the suspension meeting ended she did discuss and agree with Ms Talataina the timing of the next meeting. This is not a case where an employee has simply been sent home and left to wonder what was going to happen and when.

[10] I am satisfied that the respondent was justified in suspending Ms Talataina while it conducted an inquiry into the allegations.

### **Was the inquiry full and fair?**

[11] Between 2 and 5 October the respondent's inquiry into the allegations against Ms Talataina was conducted by Ms Lee however she herself left the facility on 6

October and relieving manager Pauline Fell took over. It was Ms Fell who eventually made the decision to dismiss.

[12] The complainants had told Ms Lee that no one else (other than the alleged victims and Ms Talataina) was present when the alleged incidents took place. Apart from interviews with them (conducted by Ms Lee and Ms Fell) and with Ms Talataina herself the respondent's inquiry consisted of interviews with the residents involved (conducted by Ms White) interviews with the registered nurses on duty at the time of the allegations (conducted by Ms Lee and Ms Fell) inspection of the incident register, and inspection of the personnel files of the applicant and the complainants.

[13] When interviewed neither of the residents concerned reported any mistreatment. However Ms White reported to Ms Lee and later to Ms Fell that she did not feel that this was conclusive. Both were very frail and confused and could not remember much from one day to the next. The resident who had allegedly been punched did have a bruise on her arm but it was not known how or when this was caused and she was prone to bruising.

[14] I asked Ms Fell what signs might normally indicate that someone with dementia had been abused. She told me that it was rare to be able to get a clear account but that typically they might become more restless and sometimes aggressive, particularly if frightened. These signs were not, she told me, observed in the residents concerned in this case.

[15] The registered nurses had no knowledge of anything untoward having occurred on their watches in the week of the alleged incidents and the incident register contained nothing either (that is until the complaints were made on 2 October.)

[16] The complainants were interviewed three times altogether. The first interview, as we have seen, was conducted by Ms Lee the day they made the complaints. Her primary concern at that stage was to find out exactly what was being alleged rather than to determine how much substance the allegations had.

[17] When Ms Fell took over and reviewed the written complaints she noted and was concerned by the fact that they were on the same sheet of paper. She told me that

*“Being aware that there could be collusion between the two complainants, I therefore decided to meet with each of them separately to discuss their complaints.”*

[18] Ms Fell spoke to the complainants just after she took over on 6 October and again, briefly, on 10 October before she made the final decision to dismiss. She told me that she found both women adamant about what they had seen, and sincere. Her impression of their credibility did not change.

[19] Ms Talataina was interviewed by Ms Lee and Ms White on 5 October and then by Ms Fell (twice) on 10 October.

[20] At the meeting of 5 October Ms Lee outlined what had been alleged but did not provide the written complaints. Early in the meeting she identified that the alleged punching incident had happened *“last Friday on the last round.”* Ms Talataina denied this incident, and according to the meeting notes, became upset. Ms Lee then moved on to the other incident but did not state when it occurred. Ms Talataina responded with her recollections of the care she had given the second resident during the previous week.

[21] Ms Lee moved to wind up the meeting by saying that her next step would be to consult with human resources. Ms Talataina asked for the names of her accusers but (out of what she says was a concern to protect the complainants from possible repercussions) Ms Lee refused to disclose this information. She said only: *“I can tell you the time and shift it relates to... late shift last week...”*

[22] Ms Talataina inferred from this that the alleged incidents were said to have occurred on the same night. Although this is not correct, she laboured under this misapprehension right up to my own investigation meeting with her. Parts of her witness statement focus on the accurate but ultimately irrelevant contention that she did not attend to both of the residents on the night in question.

[23] Before she left her job Ms Lee supplied Ms Fell with a draft of a letter calling Ms Talataina to a further meeting at 11.00am on 10 October. Ms Fell sent the letter out over her own signature and picked up the investigation where it had been left off.

[24] At the meeting of 10 October Ms Mandava was once again Ms Talataina's support person. This time, instead of Ms White, Jan Hansen was present to assist Ms Fell. Ms Fell informed Ms Talataina that she had spoken to the two complainants and that they were prepared to stand by their statements that the abuse had taken place.

[25] Scrutiny of the meeting notes shows that in response Ms Talataina referred to "*this shift*" and "*the night it happened.*" Then the notes record the following from Ms Hansen and Ms Fell:

*"Jan: asked that the day the incidents happened be clarified*

*Pauline advised Friday 29 September was the date the incident occurred"*

[26] The notes contain no other references to dates or times. I am satisfied that the second meeting served to reinforce Ms Talataina's misperception that the two allegations related to the same night.

[27] Ms Hansen also asked Ms Talataina if during her career she had "*ever been in Managers office to discuss any serious incidents.*" Ms Talataina stated that she had not.

[28] At the end of this process, Ms Fell suggested that they schedule a further meeting to follow up. Ms Talataina asked that a decision be made that day. As a result the meeting was adjourned until 4.30pm that afternoon.

[29] Meanwhile, Ms Fell talked to the complainants again, and again found them credible. By this time (although she was not able to tell me exactly when she did so) she had also reviewed their files and Ms Talataina's file. She told me she found nothing on the complainants' files. However, despite Ms Talataina's denial of being involved in any previous "serious incidents" she found from her file that Ms Talataina had been the subject of similar complaints in the past. Although these had not been conclusively established and no disciplinary action had been taken at the time, Ms Fell felt their existence, and the fact that Ms Talataina had denied them, weighed against her credibility.

[30] Ms Fell told me that she was very conscious of the possibility that a false and malicious complaint could be made by two workers colluding against another. However she said that she had heard of nothing (such as a past history of conflict) to indicate that this might be happening in this case. Ms Talataina confirmed in her evidence to the Authority that she know of no reason why the complainants would make false assertions about her.

[31] For Ms Fell, the question whether serious misconduct had occurred came down to whom she found more credible: Ms Talataina, or the two complainants. She told me that she was “*quite certain that the allegations were true...due to the certainty with which the complainants had made their complaints and also from Malia’s failure to dispute that the incidents were genuine.*” In her evidence to me Ms Fell clarified her last comment by saying that there was “*no emphatic denial*” from Ms Talataina.

[32] When the meeting resumed on the afternoon of 10 October Ms Fell told Ms Talataina that she had concluded that the allegations were true. Ms Talataina asked to be kept on as she was the only one working in her family. Ms Fell told her that she felt she had no alternative but to dismiss.

[33] Ms Talataina was a certificated caregiver and had been with the respondent for eleven years. She told me that after being dismissed, and being unable to get a reference, it was very difficult to find other work. Eventually, after several months and through personal contacts, she was able to find work in a rest home. She also told me that the stress associated with her dismissal was made worse by the fact that her husband was ill at the time and by the fact that he was not working.

[34] Mr Oldfield claims that there were several serious flaws in the process leading up to the dismissal. He says that to answer the allegations properly Ms Talataina needed to know who she was working with at the time of the alleged incidents, and Ms Lee and Ms Fell had no good reason to withhold those names. The complainants, he says, did not ask for their names to be protected, were willing to stand by their assertions, and were not in a position of particular vulnerability. If there were any risk of Ms Talataina confronting them, he said, it was minimised by her suspension.

[35] He also notes that even if withholding the names of the complainants were justified by the circumstances, it would be incumbent on the employer to take extra care that the process was fair in other respects, which it did not in this case. Instead:

- i. the respondent failed to provide the applicant with all the material gathered in the investigation. Specifically it failed to give her copies of the written complaints, incident reports, and information about the interviews with the registered nurses and residents;
- ii. it misled her into thinking that the incidents occurred on one shift;
- iii. it took her past record into consideration without advising her of this or giving her an opportunity to comment on it;
- iv. Ms Fell relied on a belief that Ms Talataina had not denied the allegations when in fact, in the meeting of 5 October she expressed a clear denial, and
- v. Ms Fell failed to take into consideration the fact that the residents exhibited no distress or fear or any of the other signs of abuse.

[36] Very simply, I accept these submissions. All are well supported by the evidence. The respondent has made a number of errors in conducting its inquiry and it is not possible for me to say that it was “full and fair.” It was not open to it to say, at the conclusion of the investigation, that serious misconduct had occurred and it follows that the dismissal was unjustified.

### **Remedies and contributory conduct**

[37] Pursuant to s. 124 of the Employment Relations Act I must now consider the extent to which Ms Talataina’s actions contributed towards the situation that gave rise to the personal grievance and consider whether those actions require a reduction in remedies.

[38] Like the present case, the leading case of *Ark Aviation Ltd v Newton* [2001] 1 ERNZ 133 concerned a situation where the dismissal was unjustified because the

employer had not conducted a fair and reasonable inquiry into its concerns. The relevant issue on appeal was whether matters of which the employer had knowledge at the time of dismissal, but concerning which it had not heard the employee's version of events, should be excluded from consideration in remedies. The Court of Appeal stated at paragraph [42] of that decision:

*“matters of which an employer was aware at the time which, directly or indirectly, impacted on its decision to dismiss may be shown to be actions contributing to the situation, or fault on the part of the employee resulting in the dismissal. They then will form part of the “situation which gave rise to the personal grievance”...There is no threshold...that requires such knowledge or awareness to be derived from a sound process, provided it is of sufficient substance to be the basis for legitimate concern at the time of dismissal.”*

[39] Mr Oldfield has argued that there can be no question of contributory conduct in this case because *“there is simply no credible evidence that the applicant was guilty of serious misconduct.”* By this I take him to be arguing that Ms Fell's conclusion that there was misconduct was not (in the words of the Court of Appeal) *“of sufficient substance to be the basis of legitimate concern at the time of dismissal.”*

[40] I do not accept this submission. The respondent received two eye witness accounts of very serious misconduct. Ms Fell did not take them at face value. She formed a belief in the complainant's credibility only after interviewing each of them twice. I accept that her belief was genuine and reasonable, and that her conclusion was of *“sufficient substance”* to be the basis of legitimate concern at the time.

[41] Nothing has emerged since then to suggest any new lines of inquiry or anything more that should be taken into consideration. Nothing I heard, from Ms Talataina or any of the other witnesses, indicates any reasonable basis for me to say that Ms Fell was wrong to believe the two complainants.

[42] I accept therefore that the applicant's conduct was blameworthy and that the seriousness of her actions warrants a significant reduction in remedies. I do not however go so far as to reduce remedies by 100%. As set out already Mrs Talataina went through the whole disciplinary process without being clear about what was

alleged. This confusion added to the stress of the process and meant that any chance of her acknowledging and addressing her behaviour was lost. In these circumstances, a modest level of remedy is called for.

[43] Section 124 requires me to consider contributory conduct in deciding both the nature and the extent of the remedies to be provided. I have concluded that the sole remedy in this case should be a compensatory sum for the distress that the process (as distinct from the dismissal itself) caused the applicant.

[44] **I therefore order the respondent to pay to Mrs Talataina the sum of \$2,500.00 pursuant to s. 123(c) (i).**

### **Costs**

[45] This issue is reserved. Should the parties be unable to resolve it between themselves they have a period of 28 days from the date of this determination to lodge any application for costs.

Yvonne Oldfield

Member of the Employment Relations Authority