

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 276/09  
5117221

BETWEEN                      VICKI JANE WALKER  
                                         Applicant  
  
AND                                PROCARE HEALTH  
                                         LIMITED  
                                         Respondent

Member of Authority:        Alastair Dumbleton  
  
Representatives:              Dan Gardiner, counsel for Applicant  
                                         Richard Harrison, counsel for Respondent  
  
Investigation Meeting:        20, 21, 23 and 24 October 2008  
  
Submissions and further      23 December 2008, 12 February, 20 March  
information received:        and 6 April 2009  
  
Determination:                13 August 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The Authority has investigated the personal grievance of Ms Vicki Walker, a claim that her dismissal was unjustified.

[2]     The grievance remained unresolved after mediation.

[3]     Ms Walker was employed by ProCare Health Limited (ProCare) as Financial Controller, a position she held for over two years until she was dismissed on 18 December 2007.

[4]     On termination Ms Walker was paid one month's salary in lieu of notice and outstanding annual leave to which she was entitled.

[5] To resolve her grievance Ms Walker seeks monetary remedies from the Authority. They include substantial compensation, an apology from ProCare and a requirement for her dismissal to be converted to a resignation. She does not seek reinstatement.

[6] To mitigate her loss of the remuneration she had been receiving from her ProCare work Ms Walker found new employment at about the same level of pay, which she started at the end of January 2008.

### **Justification for dismissal**

[7] ProCare relies on incompatibility as the ground present at the time to justify its decision to dismiss Ms Walker.

[8] At law the test of justification is provided by s 103A of the Employment Relations Act 2000, which requires the question of whether a dismissal is justifiable to be determined:

*... on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.*

### **Incompatibility**

[9] The Authority was referred by counsel to a number of cases decided by the Court of Appeal and the Employment Court where incompatibility was argued as a ground for justified dismissal; eg. *Mabry v West Auckland Living Skills Homes Trust Board (Inc)* unreported, Travis J, 19 December 2001, AC 86/01.

[10] The cases recognise that a clash of personalities between an employer and an employee, or similar disharmony in the employment relationship, may render continuance of the employment unworkable.

[11] For dismissal to be justified the cases require that the disharmony must be severe or serious and that the employee must be substantially responsible for the incompatibility. Further, the cases establish that before terminating the employment on this ground, the employer must act in a procedurally fair manner.

[12] The Courts have been careful to emphasise that cases where dismissal is justifiable because of irreconcilable breakdown in the employment relationship will

be rare and that accordingly, in such cases, it may be expected that the facts will be entirely convincing in supporting the outcome of dismissal.

[13] Overall, the test remains that provided at s 103A of the Act. The question is whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. The test is to be applied by the Authority, as s 103A states, on an objective basis.

[14] I note that shortly after final submissions had been received by the Authority, on 6 April 2009 counsel Mr Gardiner asked for the investigation to be resumed to inquire into the reasons or explanation for the recent termination of Ms Sandra Scott, a ProCare employee who was involved in the matters leading to Ms Walker's dismissal.

[15] The Authority declined to investigate further, principally because to do so would require it to look at matters that only came into existence after the employer had made its decision to dismiss. Section 103A of the Act however confines the Authority to considering the employer's actions *at the time the dismissal ... occurred*.

### **Dismissal unjustified**

[16] My finding from the evidence is that ProCare did not act in a procedurally fair way and did not leave itself reasonably able to conclude that incompatibility, which undoubtedly existed in the workplace, was mostly the responsibility of Ms Walker. For those reasons I find that the dismissal of Ms Walker was unjustified.

[17] I find that from mid-2007, ProCare management genuinely believed on reasonable grounds that there existed a serious state of disharmony between Ms Walker and several other employees. Inevitably this situation drew senior management into the problem. ProCare had good reason to believe that as long as it continued the disharmony would adversely affect the performance of several employees including Ms Walker, and consequently would have a bad affect on ProCare's performance as a business.

[18] Further I find that ProcCare management expended considerable resources in time and money, as well as emotion, trying to resolve the interpersonal difficulties

that existed. They went to the ends of the earth, as Mr Ron Hooton the CEO of ProCare said in evidence.

[19] ProCare offered to pay for medical advice to be obtained by Ms Walker, who declined, but she participated in other attempts to fix the problems, such as a lengthy mediation process arranged and paid for by ProCare. She changed her approach to some things that been seen as symptomatic of the problems, but she strongly defended herself against blame for others.

[20] Only a few weeks before Ms Walker was dismissed it seemed ProCare was satisfied that a non-disciplinary way to overcome the problems had been found. Correspondence to Mr Gardiner (Ms Walker's legal representative) from ProCare on 23 and 26 October 2007 showed a positive outlook on the part of management in presenting constructive changes to the finance department in which Ms Walker had a key role and where communication and performance problems had earlier been found to emanate from.

[21] The issue about Ms Walker's communication style was referred to in ProCare's letter to her of 23 October, as follows;

Communications

*For some time now, there have been issues with the manner in which you communicate with others within ProCare. In one instance this has led to a formal complaint from another staff member.*

*Of particular concern is your manner when using email communications which we consider inconsistent with the culture of ProCare. In particular, the tone of your emails and an unnecessary use of emphasis (eg block capitals, bold typeface and red colour) are considered confrontational to most staff.*

*Our expectation is that all interpersonal communication within ProCare will be courteous and show due respect for the way in which the email will be received by recipients.*

[22] On 24 October, Ms Walker and Mr Gardiner met with Mr Hooton and Mr Steve McLean, ProCare's Chief Financial Officer, to discuss some concerns about Ms Walkers performance. The employer's final conclusions in that regard were reserved to allow Mr Gardiner an opportunity to make a further submission in writing.

[23] The letters of 23 and 26 October showed ProCare to be firmly exercising its rights to manage Ms Walker and her position, by introducing an action plan.

[24] Mr Gardiner in a letter in reply on 31 October expressed support for the changes and he said Ms Walker did not wish to stand in the way of the action plan. Her attitude seemed to be conveyed by the last lines of the letter from Mr Gardiner, in referring to the 24 October meeting;

*I also appreciate the approach adopted at our last meeting. The meeting was helpful and productive.*

[25] The feeling seemed to be mutual, because Mr McLean wrote back to Mr Gardiner on 7 November 2007, saying;

*.....I do accept that your letter is intended to help clarify and resolve any issues; misunderstandings; or differences to enable the positive action plan to be implemented.*

*Thanks you for your support of Vicki and for your part in helping us reach this point.*

[26] Seemingly constructive and conciliatory advances by both sides then went into sudden retreat, ending with Ms Walker's dismissal by ProCare only six weeks later.

[27] In a detailed and considered letter, on 1 November 2007 Mr Gardiner addressed the concerns discussed previously on 24 October, particularly about Ms Walker's performance. A number of points were made in putting Ms Walker's side. They were expressed objectively in a balanced tone and style, without rancour. Among the matters discussed was the claim that Ms Walker's emails in their presentation amounted to 'shouting.' It was suggested, reasonably in my view, that if it wished ProCare could develop a style or etiquette guide for employees using email, so that it would be clear what was regarded as unacceptable in the use of that form of communication.

[28] Mr Gardiner advised that Ms Walker did accept in retrospect that a small number of her emails could have been better worded and/or constructed.

[29] Near the end of his letter Mr Gardiner addressed complaints that had been formally made by other staff about Ms Walker but which, after the mediation, she was told had been placed on hold.

[30] Mr Gardiner requested all information held by ProCare about one of the complaints - made by Ms Marie Duncan - so as to enable Ms Walker formally "to respond specifically to the original complaint." He said that access by Ms Walker to this information and her being allowed to respond to it;

*.....will enable her view to be on the record should Ms Duncan decide to resurrect the complaint at a later date.*

[31] Mr Gardiner said the situation of an unresolved grievance able to be revived by Ms Duncan at any time would leave Ms Walker with a Sword of Damocles hanging over her. With reference to the second complaint, Mr Gardiner wrote;

*As regards Ms Sandra Scott's complaint Ms Walker is prepared to reply to that specifically should it be required and especially if she is to be judged against it in the absence of reply.*

[32] Mr McLean replied to this in a second letter on 7 November, which included the following;

*..... at least one of the complainant's has made it clear that if Vicki treats her in the manner which prompted the complaint, then she will complain again and expect that complaint to be considered formally or she will lodge a personal grievance.*

And,

*We believe that Vicki's intention to reopen those complaints, require all correspondence, and the opportunity to make counter claims and arguments will be provocative, and will escalate feelings beyond where they were when the complaints were initiated. There will be no choice but to initiate a formal investigation and involve all those included in the events or relied upon in some way.*

[33] From Mr Gardiner's reply it is clear that the matter of the complaints, their unresolved status and the requirement to reopen them, from that point on caused a major divergence in the attitudes of Ms Walker and ProCare to each other after they had seemed to be close to resolving the problems.

[34] This is confirmed by the letter from Mr Harrison (acting for ProCare) written on 30 November. After reviewing the history of attempts by ProCare to address deteriorating working relationships in a non-disciplinary way, and after referring to the various initiatives taken to try and resolve compatibility and behavioural issues in relation to Ms Walker, he wrote;

*.....I have advised ProCare that the only way forward is to consider whether or not it is tenable to continue [Ms Walker's] employment on the grounds of incompatibility.*

And,

*You are also invited to make proposals about a way forward as an alternative to termination.*

[35] In his letter Mr Harrison said it appeared that Ms Walker did not accept there was any issue for her to address concerning her behaviour. It is clear to the Authority from the correspondence that in relation to the complaints Ms Walker had felt she was not in a position to address that issue until the employer had heard her responses, and had presumably reached a conclusion as to whether she was at fault in respect of Ms Duncan's and/or Ms Scott's complaint.

[36] The formal investigation that ProCare had earlier said would need to be initiated was not conducted. Consequently no conclusion was reached, or could fairly have been reached, about Ms Walker's level of responsibility with regard to the complaints. If a conclusion was reached, Ms Walker was not advised of it.

[37] The correspondence on behalf of Ms Walker could be read as a suggestion to the employer that it ought to take hold of the complaints and consider and determine them, whether for or against Ms Walker, if there was to be any advance from the impasse reached. As her employer ProCare needed to do that, because the complaints were unlikely to be sidestepped any longer if the incompatibility issue was going to be brought to conclusion.

[38] Mr Harrison in his correspondence had confirmed that Ms Walker was entitled to respond to the issues. It seems though that simply by requesting that entitlement she also came to be regarded by ProCare as having provided another reason for determining that she was substantially responsible for the existing state of incompatibility. Mr Harrison made it clear in his letter that even before her response had been received and considered, ProCare was "*now required to consider whether there is incompatibility.*" This indicates some predetermination by ProCare, or that ProCare took the view that whether the complaints were well founded or not was irrelevant to the question of incompatibility.

[39] Mr Gardiner wrote another lengthy letter on 13 December addressing all matters discussed to date and putting forward, as an alternative to termination, the retention of Ms Walker in her employment and addressing her concerns, with an opportunity to respond being given for her to respond. He strongly refuted the suggestion that Ms Walker was trying to "*blow anything open*" by re-visiting the complaints, and cogently put forward the argument that;

*It surely must be the case in any fair and reasonable workplace that a person who has been affected by a complaint which has been left unanswered, should have the ability to reply to that complaint before having a letter [of censure - criticising her performance] sent to her by her CEO.*

[40] Mr Gardiner said this would lead to a “*sad*” state of affairs where an employee could not articulate grounds they considered reasonable for a grievance and have management deal fairly with them.

[41] Ms Walker and ProCare management, together with their legal advisers Mr Gardiner and Mr Harrison, met for the last time on 13 December, for discussion and to give further consideration to the situation. Mr Gardiner was given an opportunity to respond again by letter and did so on 17 December. In it he argued strongly that the complaints of Ms Duncan and Ms Scott had no substance and had not been dealt with fairly. He requested ProCare to review any decision to terminate Ms Walker for incompatibility, as she wished to keep her job.

[42] In his letter Mr Gardiner pointed out that the complaint by Ms Scott which Ms Walker had sought to “revive” appeared to be different from the one Ms Walker had originally been shown in writing. It had been updated and expressed in different terms. On that basis alone it is hard to justify ProCare’s claim that Mrs Walker was acting provocatively by insisting on seeing a claim she had not previously been made fully aware of by her employer. The refinements in the complaint which produced the disparities between the first and second versions were not explained. They included in the later complaint a list of people whom Ms Walker had allegedly mistreated, an allegation she would not have become aware of if she had not sought to answer Ms Scott’s original complaint.

[43] Mr Gardiner reasonably asserted in his letter, at paragraph 35, that;

*It offended natural justice for Ms Walker to have these complaints [by Ms Scott] such as they are, hanging over her head as a possible basis for future punitive action. She was clearly within her rights and acting entirely reasonably in requesting the ability to respond to these complaints.*

[44] ProCare had expressly promised in the employment agreement (Our working Relationship – at clause 11) that in dealing with any problem in the relationship with Ms Walker it would observe the principles of natural justice and would be ‘fair in all the circumstances.’

[45] Next day 18 December 2007, despite the last minute plea by Mr Gardiner on Ms Walker's behalf, an email from Mr Harrison advised that the decision had been made to terminate Ms Walker's employment.

[46] Although incompatibility as the ground for dismissal was not expressly stated in the letter, that reason could readily be inferred from the earlier meetings and the letters that had immediately preceded Mr Harrison's 18 December letter.

[47] I find that after 1 November when the complaints were reopened at Ms Walker's request, those complaints or their resurrection became the determinative matter for ProCare in deciding whether to dismiss her. All the other matters seemed to have been addressed and conclusions reached, or plans had been made and agreed to.

[48] In my view a fair and reasonable employer would not have found fault with an employee for seeking to revive the complaints. They were not determined or resolved, one way or another. ProCare expressed no conclusion to Ms Walker as to whether she was held responsible for any of the complaints or whether the complainants were in each case, or whether perhaps they were equally at fault. The fact that they were revived at all from their state of suspension seems to have unfairly and unreasonably counted against Ms Walker finally.

[49] It seems that the balance of responsibility for the incompatibility was seen by ProCare as having shifted in Ms Walker's direction because she sought to respond to the complaints. In my view it was fair for her to seek and be given an outcome, good or bad, rather than leaving a possibility that she would be judged to have been at fault simply because she had been complained about. The employer had the information in the complaint and it was a reasonable request for the record to be balanced with Ms Walker's view or response to that. Providing a response by itself should not have tipped the balance toward dismissing her.

[50] Alternatively, ProCare acting as a fair and reasonable employer could have received Ms Walker's responses and, without determining the complaints, taken no further action against her. She could not reasonably insist they be determined if no unjustifiable disadvantage in her employment occurred.

[51] Had ProCare reasonably reviewed and determined the complaints against Ms Walker, it could have justifiably added its conclusions in that regard to any other

material indicating she was substantially responsible for the disharmony in the work place, although what other material concerns there had originally been would seem to have been addressed up to 1 November in a “non-disciplinary” way that contemplated the continuation of the employment.

### **Determination**

[52] For the above reasons I find that viewed objectively, ProCare’s actions and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time ProCare decide to dismiss Ms Walker. A neutral observer would have considered it unfair and unreasonable for the decision to be grounded, substantially if not entirely, on the reopening at Ms Walker’s request of the complaints made by Ms Duncan and Ms Scott and without any final conclusion being reached by ProCare about the merits of those complaints.

[53] But for Ms Walker’s “provocative” request, as ProCare viewed it, on the basis of the accommodations made up to the time of the request, and also the ability the employer had to give directions or issue warnings, taking the ultimate step of dismissal was unfair and unreasonable and therefore was not justified under s 103A of the Act. I find that a fair and reasonable employer would not have regarded the request to respond formally to unresolved complaints as being a matter of fault or blame that shifted the responsibility for incompatibility to Ms Walker.

### **Remedies - Contribution**

[54] Undoubtedly Ms Walker’s interaction with other employees of ProCare contributed to the state of serious disharmony in the workplace. I accept that in some respects she was at fault in this regard, as Ms Walker herself conceded. However I do not consider her fault or blame was causally connected to the unjustified dismissal so that it is to be treated as contributory fault under s 124 of the Act. Up to the point immediately before Ms Walker requested the reopening of the Duncan and Scott complaints, the disharmony had been addressed in a non-disciplinary way that had not contemplated dismissal or any disciplinary action. She had received no warnings.

[55] The trigger of the dismissal decision made by ProCare was the request to reopen the complaints. I have found that Ms Walker’s request was reasonably made by her in the circumstances. It was not a blameworthy action of Ms Walker and therefore no basis exists for reducing the remedies she is entitled to.

[56] Ms Walker is to be reimbursed lost wages for the period of about two weeks between the expiry of the notice period - 18 January 2008– and her commencement of new employment – 29 January 2008. The amount is \$2,638.61. She is also to be reimbursed for a further period of 11 weeks the difference between her ProCare salary and her pay in the new employment, if the latter was lower than the former in any of the 11 weeks. Reimbursement is therefore for a total period of 13 weeks, or three months. If there is any dispute over the actual sum to be paid (approximately \$3,000) the Authority can be asked to resolve that with directions made.

[57] I find that Ms Walker suffered considerable hurt feelings, humiliation and distress at being singled out by the act of dismissal as the person largely if not solely responsible for the disharmony at ProCare. Her suffering in this regard was increased by the employer failing to determine the complaints, which Ms Walker firmly maintained were unwarranted.

[58] Ms Walker’s performance as Financial Controller was not criticised. ProCare acknowledged that she had been a capable and competent accountant in her work. Her diligence, commitment, single-mindedness and purposefulness with regard to getting the job done may explain to some extent why friction with others outside the finance department developed. Her strong work ethic also explains why sudden loss of job in the unfair and unreasonable way that occurred came as a severe blow to her. In my assessment, for the harm caused to Ms Walker through her unjustified dismissal an award of \$11,500 is appropriate compensation under s 123(1)(c)(i) of the Act.

[59] The remedies of apology and conversion of dismissal into resignation are unavailable under the Act from the Authority. Procare is ordered to pay Ms Walker the sums awarded above for lost remuneration and compensation.

### **Costs**

[60] Costs are reserved. If the parties are unable to resolve the question themselves a costs memorandum on behalf of Ms Walker is to be filed and served, and ProCare shall have 14 days from the date of service to provide any written response.