

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 28/07
ARC 31/06**

| | |
|------------------|--|
| IN THE MATTER OF | an election to have the matter heard in the Employment Court |
| BETWEEN | ELIZABETH WILSON Plaintiff |
| AND | THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Defendant |

Hearing: 29 and 30 March 2007
(Heard at Auckland)

Appearances: Mark Ryan, Counsel for Plaintiff
Michele Ryan, Counsel for Defendant

Judgment: 23 May 2007

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff was casually employed by the defendant as a social worker at the Youth Justice Upper North Residence at Wiri. On Waitangi Day 2005, whilst the plaintiff was so employed, an altercation erupted between two young inmates. The plaintiff and another employee attempted to intervene and were injured.

[2] Following the incident the defendant put procedures into place in an effort to deal with the trauma suffered by the employees. The plaintiff alleges these were inadequate. She alleges she suffered an unjustifiable disadvantage as a result of the reactions to the incident by the defendant. She did not return to work after the incident and her employment either lapsed or she resigned. No separate claim is made that such termination of employment was unjustifiable.

[3] Ms Wilson lodged an employment relationship problem with the Employment Relations Authority. Following the investigation the Authority rejected Ms Wilson's allegations and in its determination dismissed her claim to a personal grievance. Costs were ordered to lie where they fell.

[4] Following the determination, Ms Wilson lodged a challenge in this Court. She elected to have a de novo hearing of the entire matter and against the whole of the determination. She sought a finding that she has a personal grievance based on unjustified disadvantage. In addition, she sought reimbursement of lost remuneration as a result of her resignation, and compensation for humiliation, loss of dignity and injury to feelings. Costs were also sought. Ms Wilson now concedes that as a result of the steps taken by her to mitigate, she has suffered no economic loss from her resignation. I need make no finding as to whether, in circumstances such as those pertaining in this case, reimbursement would have been an available remedy. The Court has been informed that Ms Wilson is in receipt of a grant of legal aid for these proceedings.

[5] In the proceedings the defendant is named as the Department of Child, Youth and Family Services. I note that in briefs of evidence filed by the defendant, the defendant is named as the Ministry of Social Development. It is clear from the documents that what was formerly the Department of Child, Youth and Family is now part of the Ministry of Social Development. However, for the purposes of proceedings in respect of an employment contract, loosely describing the defendant in the way that the parties have done, does not take account of the fact that under the State Sector Act 1988 it is the chief executive of the appropriate government department who is the employer of Ms Wilson. Accordingly, the correct description of the defendant should be the Chief Executive of the Ministry of Social Development. Since concluding the hearing, I have asked the Registrar to confirm with counsel that they have no objection to my amending the name of the defendant. There will be an order accordingly, by consent, that the name of the defendant be changed to The Chief Executive of the Ministry of Social Development.

The Altercation

[6] On 6 February 2005 Ms Wilson reported for work at 6.30 am. She was to work that day in unit 4 of the residence. There was some initial concern at staffing

numbers. This was shortly resolved. At approximately 11.30 am Ms Wilson, along with two other staff including a gym instructor were in the gymnasium with the young persons, who were resident in unit 4. As a result of behaviour towards the gym instructor by one youth, the balance of gym time was cancelled and the young persons were taken back to the unit. There was some disorder in this process but eventually they were all escorted back to the unit.

[7] The cancellation of the gym time as a result of the actions of one of the young persons led to dissension. An altercation took place between two of the youths as Ms Wilson entered the unit. She secured the door behind her and endeavoured to intervene to separate the two youths. The altercation then escalated and all three staff, including Ms Wilson, endeavoured to restrain the youths. One of the staff was forced to the floor suffering injury. Ms Wilson was punched about her head, arms and back.

[8] Eventually the altercation ceased. It appears that backup staff arrived after it had concluded. There was conflict in the evidence as to how long it took support staff to arrive. The time estimates range from 1 minute to 45 minutes. This conflict may be explained by witnesses being confused as to exactly which part of the incident they were being asked to estimate. Ms Wilson said in her brief of evidence that from the time of commencement of the altercation, 20 minutes had elapsed before help arrived. Mr John Tuisamoa, one of the supervisors on the day concerned, said that from the time he was first advised on his radio telephone that an incident was occurring to the time he arrived at the unit door, about a minute had elapsed. It seems inconceivable to me that 20 minutes elapsed as stated by Ms Wilson. The estimate of up to 45 minutes was given by Ms Wilson while answering further questions from Mr Ryan but she may have misunderstood exactly what she was being asked at that point.

[9] Ms Wilson suffered bruises to her arms and back and developed anxiety. She described herself as being in shock after the incident.

The complaints

[10] Ms Wilson has a number of complaints about what transpired during and after the incident, which constitute her claim to a grievance:

- (a) The failure to assign a full complement of staff to the unit on this day;
- (b) the representatives of her employer treating the incident as being less serious than it was;
- (c) the length of time taken for assistance to arrive;
- (d) failure to properly debrief after the incident;
- (e) failure to place the two youths involved in the separate secure care unit (i.e. in custody);
- (f) failure to have the youths charged by the police;
- (g) requiring her to return to work while on stress leave;
- (h) failing to notify her that a Critical Incident Stress Management (CISM) meeting was being convened.

[11] These matters are virtually as pleaded. I shall deal with each in turn.

(a) *Staff complement*

[12] On the day in question one of the rostered staff did not arrive for work. The supervisors arranged for staff assigned to other units to work in unit 4 that day. Again there is some conflict in the evidence as to the minimum complement required for the unit and whether the unit was short-staffed that day. Ms Wilson makes some complaint on this point. Ms Angela Simpson, the manager of the residence, stated that the unit was one staff member short of what she would prefer but the units are designed to have three staff per shift as a minimum health and safety requirement and there were three staff on that day.

[13] I regard Ms Simpson as a reliable witness in this matter. She is a person with considerable qualifications and experience. She has made concessions in her evidence that are fair and appropriate. She explained to me that staff complement is established for the entire residence. If there is a need in a particular unit then staff may be moved from elsewhere in the residence. That appears to have occurred on this particular day.

[14] I accept that Ms Wilson may have regarded the unit as being under-staffed on that day. She indicated that if one more person had been present, the outcome may have been different. Ms Simpson conceded the situation was not ideal but I think there were more basic reasons why this matter deteriorated as it did. It is likely that the same outcome would have occurred even with another staff member present.

(b) Downplaying the incident, failure to place the youths in a separate secure unit, failure to ask police to prosecute

[15] I have gathered these complaints together because it seems to me that in Ms Wilson's mind they are connected. I gathered from her evidence that she was angered that the youths were not punished. What she effectively alleges is that, because of the nature of the injuries she and other workers received, there was an incident of such seriousness that the youths should have been immediately isolated and punished in some way by seclusion and prosecution.

[16] After the incident the two supervisors, Mr Tuisamoa and Ms Marianne Bartlett, put in place procedures for dealing with it. This appears to have been done in accordance with the procedures established for such an eventuality. Mr Tuisamoa remained in the unit with one of the staff members involved in the altercation. Ms Wilson and Ms Tufue Fatu went with Ms Bartlett for a defusing. I will deal with that more specifically shortly.

[17] The two supervisors had by this time made an assessment that the youths had settled their differences and no further action was required. In view of the steps taken to assist Ms Wilson and her fellow employees to deal with their trauma, I am not prepared to accept Ms Wilson's contention that the incident was downplayed or treated as unimportant.

[18] Ms Wilson's demands that the youths be placed in a separate secure care facility (which would be tantamount to custodial confinement) and to notify the police seem to me to be misguided. Ms Simpson made it clear in her evidence, and I understand she and both the supervisors made it clear to Ms Wilson, that there are statutorily defined limitations on the occasions when young persons under the jurisdiction of the Children, Young Persons, and Their Families Act 1989 may be confined in a purely custodial sense.

[19] In answer to these allegations, the evidence of both Ms Bartlett and Ms Simpson is conclusive. There are clear statutory requirements governing the holding of the young persons on remand. The criteria for placing the youths in a secure care unit had not been made out by the circumstances in this case. I also regard a complaint to the police as not being appropriate in this instance. There is no evidence that the youths involved actually assaulted each other. The intervention by Ms Wilson and the other staff member appears unwise and also breached the Non-Violent Crisis Intervention (NVCi) procedure for dealing with such situations. Ms Wilson demonstrated a lack of understanding of the statutory policy requirements. However, I consider that as a result of a misunderstanding at the time of her engagement she was not adequately trained. I shall deal with that more fully shortly.

(c) *Failure to properly debrief*

[20] The strategy for dealing with critical incidents is contained in the Critical Incident Stress Management Policy and Guidelines. The document deals with the mission of the CISM standards and principles to be applied. The mission of the service is to provide support to all child, youth and family staff who have experienced critical incidents during the course of their work, which have a potential to cause personal stress. When an incident such as that which has occurred in this case arises, a system of defusing, demobilisation and debriefing applies. The strategies also include pre-incident training and education needs in addition to support to the staff member during and immediately after the incident.

[21] Ms Bartlett informed me that she provided the plaintiff with the defuse meeting following the incident. The other staff member involved in the altercation also attended. That meeting lasted 1½ to 2 hours. Ms Bartlett said she listened to what the two had to say about the incident and allowed them to express their feelings in a safe environment. Following the meeting she asked them to complete an incident report. Ms Wilson is somewhat confused about this meeting. I think it is her evidence that she denies that a defuse meeting took place following the incident. However, she refers in her report to debriefing, which I have already noted is part of the CISM strategy. I think she is using the term “debriefing” in a wider sense. She concedes that she did have a meeting with Ms Bartlett but denies that it was a defuse meeting. I prefer the evidence of Ms Bartlett on this point. There does not appear to

be any dispute as to the time this meeting took. I am of the view that it was conducted in accordance with the policy and guideline strategies.

[22] On the day following the incident and the defuse meeting I have just described, a further meeting was held at the residence. This I perceive was the demobilisation meeting, which is also referred to in the policy guidelines. Under the guidelines it is required to be conducted the following day if the incident occurred after hours. Again Ms Bartlett refers to this in her brief and Ms Wilson also confirms in her evidence that this meeting took place.

[23] Ms Bartlett's perception was that Ms Wilson was spokesperson for the group of staff affected by the incident. In furtherance of some of the matters raised by her at the defuse meeting the day before, she expressed dissatisfaction with the youths not being admitted to the secure unit. It is clear from both Ms Bartlett's evidence and Ms Wilson's evidence that Ms Wilson regarded the reaction of the residence to the incident as inappropriate. Ms Bartlett stated that Ms Wilson had said on more than one occasion at this further meeting that the residence should be run more like a "boot camp". Ms Wilson did not deny that she felt that the youths should have been punished.

[24] Following the demobilisation meeting it was agreed that the staff involved in the incident should take one week of paid leave. The CISM meeting as part of the debriefing process was to be arranged using a CISM coordinator.

(d) Requiring Ms Wilson to return to work while on stress leave and failing to notify her that a CISM meeting was being convened

[25] Ms Wilson alleges that while she was on the week of stress leave following the demobilisation meeting she returned to the residence to make a gift of some McDonalds food to one of the young persons who had assisted her after the incident. While she was there the unit manager, Ms Ana Tuigamala, spoke to her and asked whether she could return to work on Saturday 12 February as the unit was short-staffed. Ms Wilson agreed to this although in fact she never returned to work. Ms Tuigamala is no longer available to give evidence and so I did not hear her evidence in respect of this incident. There is some suggestion in a written report from Ms Tuigamala that Ms Wilson told her that she was ready to come back to work on the

weekend. However, I can give very little weight to such evidence and it seems unusual in any event that, on the one hand, the employer would acknowledge the need for the persons involved to receive a week's leave and then ask them to return to work during that week.

[26] I understand it is also alleged that Ms Tuigamala set up a CISM meeting for Wednesday 9 February 2005 and invited Ms Wilson to attend. Ms Wilson alleges that she was never informed of this meeting. It is clear from the evidence of Ms Eileen Palmer, the coordinator for CISM Services for Auckland, that such a meeting was set up and that Ms Wilson did not attend. I must accept the evidence of Ms Wilson in the absence of any evidence from Ms Tuigamala that she was not invited.

[27] What is clear, however, is that once it was realised that Ms Wilson would not be attending the meeting on 9 February a further meeting was scheduled for Friday 11 February and Ms Wilson was definitely informed of this meeting but refused to attend. Ms Wilson actually resigned her position on that day and did not return to work. She had previously provided a medical certificate as to her unfitness for work but this was superseded in any event by the granting of the week's leave at the demobilisation meeting.

Non-Violent Crisis Intervention (NVCI)

[28] Ms Simpson in her evidence referred to the technique for de-escalating incidents such as that which had occurred in this case. NVCI is part of social work practice and is designed to divert the young people involved in incidents such as this by distracting or diverting their attention and using mediation and isolation techniques. It is clear that through oversight Ms Wilson did not receive the training in this practice prior to taking on employment at the residence. The other two staff members involved in the altercation, according to Ms Simpson, were in fact trained in NVCI techniques. As Ms Wilson had joined the residence following employment as a social worker at the Children, Young Persons, and Their Families Service at Papakura it was assumed that she had been trained in those techniques there. It was frankly accepted by Ms Simpson that was not the case.

[29] As a result of the failure to train Ms Wilson, the employer has unwittingly placed her in a situation to her danger and disadvantage. As I have said, Ms

Simpson accepted this oversight in her evidence and this concession is also properly stated by Ms Ryan, counsel for the defendant, in her submissions. It is conceded that this failure unjustifiably disadvantaged Ms Wilson in her employment.

Contributory conduct

[30] However, Ms Ryan also submits that even though the plaintiff has been unjustifiably disadvantaged in this way, any remedies should be reduced on the grounds of Ms Wilson's contributory conduct pursuant to s124 of the Employment Relations Act 2000. The basis for this submission is that Ms Wilson, at the time of her employment, held herself out to be a Child, Youth and Family statutory social worker, which led the defendant to assume that she had received the department's NVCI training. Further, Ms Wilson, even though she had not received the training, was not required by the defendant to physically intervene between the young persons and that such intervention in this case was against social work practice. Finally, it is submitted that the plaintiff contributed to the consequences of her actions by failing to properly participate in the CISM procedures and strategies designed to provide proper counselling and debriefing. It seems to me somewhat harsh to submit that the plaintiff contributed in this way when, without the proper training in NVCI, she would not be aware that intervention physically in such a situation was totally contrary to accepted practice. While Ms Wilson's failure to participate in CISM procedures and instead resign, is regrettable, I cannot accept that was contributory conduct justifying any reduction in remedies.

Conclusions

[31] The residence where this incident occurred provides a combination of services to young persons. They may be placed in the residence as a result of care and protection placement, remands by the Youth Court in custody of The Chief Executive and to a lesser extent custody where the Youth Court has sentenced the young person to Supervision with Residence. In such a variety of circumstances some of the young persons will not only be a security risk but also may pose a danger to other residents and staff as a result of violent disposition. Young persons on remand or under sentence may have admitted to or had proved against them the commission of serious offences.

[32] While I was listening to the evidence in this matter I felt a concern as to the methods by which security and order was maintained. This was particularly so when I learned that supervision was effected by social workers. It is clear from the evidence of Ms Simpson and Ms Bartlett that reinforcement of models of behaviour is achieved by planned programmes, activities and education while minimising the custodial nature of the residents. Ms Simpson referred to it as the “*pro-social model*”. As I have indicated NVCI is the method by which violent outbursts by the young persons are dealt with.

[33] It seems to me that the conflict between Ms Wilson and her employer in this case arises to a large degree, from their different perceptions as to how the secure residence should be run. Ms Wilson made it plain that, following the incident, punitive measures and police involvement should be instigated. During defusing and at the demobilisation meeting she does not dispute that these were her views. However, it is clear, following the evidence of Ms Simpson and Ms Bartlett and from a perusal of the produced documents, that such a reaction would be contrary to the clear mission and objectives of the way that the residences are operated.

[34] I do not doubt that Ms Wilson suffered considerable trauma from the incident. However, a lot of the problem in this case has arisen from inadequate instruction and training by her employers at the outset of her employment. I am not sure either whether Ms Wilson was properly appraised in advance as to whether she was sympathetic to the mission and objectives and was a person who possessed the necessary empathy with the philosophy of the Ministry as to how its residences were managed. I believe this divergence in outlook became quite starkly apparent during the aftermath of the incident and when management was putting into effect the post-trauma strategies contained in the policy and guidelines.

[35] I have to say that after my initial concerns as to security of inmates and safety of staff, I was persuaded as to the efficacy of these procedures by the clear enthusiasm of the manager Ms Simpson and the supervisors Mr Tuisamoa, Ms Bartlett and the senior health and safety adviser Ms Palmer. All appeared to me to be very dedicated people with a clear vision as to the way in which young persons should be detained and with the ultimate purpose of education and rehabilitation. It is necessary therefore, to take care not to be critical in comparing the way this

residence for young persons is run with purely corrective and custodial philosophies, which may pertain for adult prisoners.

[36] I believe that this also informs on the basic difference in approach between Ms Wilson and the witnesses for the employer. Of course, if Ms Wilson had wanted to, she could have laid a complaint with the police herself. She chose not to do so. I can see why the managers did not do so. In addition, they were statutorily restrained from placing the youths in secure custody.

[37] While I have commented on such matters, I have done so to point to the reasons why I think this employment conflict has arisen. It is not for the Court to interfere in or set standards by which management are directed as to how a difficult workplace such as this is to be controlled. That is the prerogative of the employer and not the Court.

[38] While Ms Wilson denied that the defusing had taken place, it is clear that it did. It is possible that she did not fully understand the effect of the meeting with Ms Bartlett on the day of the incident. This could be explained by her being in a considerable state of distress at the time or the fact that she may not have been familiar, for the reasons I have mentioned, with the policy and guidelines for dealing with such incidents. It is clear that the employer proceeded with its policies to defuse and demobilise and then continue with debriefing by use of the CISM model. Ms Wilson chose at the end not to avail herself of this opportunity. I accept that she may not have been properly informed of or invited to the first CISM meeting but that is not the case in respect of the second meeting, which the employer set up to rectify what may have been its earlier omission.

[39] I am satisfied therefore that Ms Wilson's complaints as to the failure to assign a full complement of staff to the unit on this day, the length of time taken for assistance to arrive and failure to properly debrief after the incident are unfounded. I am not satisfied that, in this case, the employer has treated the incident as being less serious than it was. In relation to that, there was a clear conflict in philosophy as to whether the youths should have been placed in secure care and the police notified. The evidence of Ms Simpson and Ms Bartlett satisfies me that the treatment of the two youths involved complied with the established policies and also the law.

[40] The allegation that Ms Wilson was requested to return to work while on stress leave does concern me. Ms Tuigamala did ask Ms Wilson to return to work. However, the circumstances surrounding that from Ms Tuigamala's point of view are not before me. As I have indicated it seems rather odd that, when there was an agreement following the demobilisation meeting that Ms Wilson and the other staff members should take a week's leave, she should then be asked to return to work.

[41] It became apparent during the course of the hearing that managers of the residence had misunderstood Ms Wilson's background as a social worker. It is clear that they thought that she had undergone training in NVCi when in fact that was not the case. This I believe is also compounded by the failure of the defendant to indoctrinate Ms Wilson at the outset of her employment into its philosophies and missions, which applied.

[42] It seems to me that in this case the employer has acted to Ms Wilson's disadvantage in two respects. The first is in seeking her return to work during the period when she was on what was effectively stress leave. The second is the failure to adequately train her in NVCi and thereby place her in a position of danger when she was called upon to deal with the altercation, which occurred on Waitangi Day 2005.

[43] In her final submissions Ms Ryan has fairly conceded that the failure to provide NVCi training to the plaintiff gives rise to a personal grievance in that the plaintiff was unjustifiably disadvantaged in her employment. I am not satisfied that there was behaviour or actions of Ms Wilson, which contributed towards the situation giving rise to that personal grievance. Ms Wilson may have exacerbated her subsequent distress following the incident by failure to cooperate with debriefing. That may be material to the level of compensation, which should be awarded. However, it was not causative of the situation giving rise to the personal grievance and does not provide grounds for making a reduction for contributory behaviour or conduct.

Disposition

[44] I have noted that following the investigation into this matter, the Member of the Employment Relations Authority issued a determination rejecting Ms Wilson's claims in their entirety. It is likely that the Member did not have the benefit of the

fair concessions Ms Simpson made in her evidence before me or the concessions counsel has properly included in her final submissions.

[45] Nevertheless, this is not a case where substantial compensation should be awarded. A difficult situation arose. I am of the view that the employer responded properly and in accordance with established policy and guidelines and also in accordance with the statutory requirements upon it. Unfortunately, when Ms Wilson was initially employed, there was oversight in giving her adequate training and indoctrination. This was not a purposeful or careless oversight. It seems to me to have arisen from a misunderstanding and assumption as to the exact nature of Ms Wilson's employment with the predecessor to the Ministry and the extent of her qualifications.

[46] In the circumstances a moderate award of compensation is appropriate. I fix this at \$4,000. As indicated earlier, no other remedies are sought. Ms Wilson acted appropriately and responsibly following the termination of her employment with the residence by seeking a job elsewhere with the Ministry. There was some break between the two periods of employment but in circumstances where any award of reimbursement, should it in any event be an available remedy, would be unjustified.

Costs

[47] So far as costs are concerned, I will reserve costs to enable the parties to endeavour to settle this between themselves. Ms Wilson is on legal aid in respect of these proceedings and if no agreement can be reached, then an application for costs should be made. Any application will need to be before the Court in the form of a memorandum from counsel for Ms Wilson on or before 8 June 2007. Counsel for the Ministry will have a further 14 days thereafter to file any memorandum in response.

ME Perkins
Judge

Judgment signed at 1pm on Wednesday 23 May 2007