

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 39/09  
ARC 21/09**

IN THE MATTER OF     a challenge to a determination of the  
                                  Employment Relations Authority

BETWEEN                 VINCENT PAUL FLEMING  
                                  Plaintiff

AND                         DELAMORE & REIDY MENTAL  
                                  HEALTH COMMUNITY SUPPORT  
                                  SERVICES LIMITED  
                                  Defendant

Hearing:           2 and 3 November 2009  
                          (Heard at Auckland)

Appearances: Vincent Fleming in person  
                  Mark Lawlor, Counsel for Defendant

Judgment:       12 November 2009

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**JUDGMENT OF JUDGE M E PERKINS**

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**Introduction**

[1] Mr Fleming has commenced an application for a hearing de novo in this Court following an unsuccessful application made by him to the Employment Relations Authority (the Authority). The claim is based on allegations that the defendant has breached good faith obligations by way of an unjustifiable dismissal and disadvantage by unjustifiable actions as employer of Mr Fleming. The original statement of claim filed in this matter on 22 April 2009 challenged the determination of the Authority dated 17 April 2009. That determination rejected Mr Fleming's allegation that he had been disadvantaged in his employment and that he was unjustifiably dismissed.

[2] Following a further determination of the Authority as to costs dated 15 July 2009 Mr Fleming filed an amended statement of claim. He elaborated upon the facts contained in the earlier statement of claim and included a challenge to the determination as to costs.

[3] The remedies Mr Fleming seeks by way of relief are the sum of \$15,000 as compensation for “...hurt, humiliation, being placed at a [sic] unfair disadvantage and unfair dismissal.” He also seeks a reference outlining “...the qualities I held in the role of manager.” This is a remedy outside the jurisdiction of the Court. In addition he seeks a recommendation that the alleged behaviour of the defendant is brought to the attention of “...proper authorities to ensure client safety.” Again this is a remedy totally outside the jurisdiction of this Court. He further states that the \$15,000 which he seeks is to cover:

*..lost wages, costs to my professional character, loss of ability to access management positions because of termination, the added stress & psychological weight of having to argue my case against lies from the lawyers and hurt from the bullying and threats from staffs [sic].*

[4] During the course of the hearing Mr Fleming gave evidence by reading a very lengthy pre-prepared brief. The original brief of evidence he filed in advance of the hearing was even longer. Following an application by counsel for the defendant prior to the hearing, it was agreed that Mr Fleming would redraft his evidence in a more pertinent form deleting those matters which were strictly submission as opposed to allegations of factual matters. Mr Fleming clearly spent considerable time in preparation for the hearing.

[5] In addition to giving evidence on his own behalf Mr Fleming called Mr Russ Revell, an experienced union official from the Service and Food Workers Union. Evidence for the defendant was led from Ms Claire English who is a solicitor consulted by the defendant, Ms Cerise Jordan, the chief executive officer of the defendant company, Ms Lynda Delamore, a director of the defendant company and Ms Maureen Willetts, the owner and manager of Hinemoa Lodge. Mr Fleming faced allegations of verbal abuse of a patient. The person allegedly abused by Mr Fleming resided at Hinemoa Lodge.

## **The facts**

[6] While the evidence was relatively lengthy I shall endeavour to summarise the key facts of the case. Mr Fleming was employed by the defendant as a social worker in 2002. The defendant company Delamore & Reidy Mental Health Community Support Services Limited is a provider of full-time care for mental health patients. The patients are people who suffer from disabilities arising from mental health issues generally in combination with being intellectually impaired.

[7] The defendant runs five homes in the Auckland Region where such full-time care is provided. One of these is Jon's House in Te Atatu. Mr Fleming was employed as the service manager of that house where his obligations were to manage four mental health workers and to oversee the necessary care and support for the patients. Ms Jordan, who gave evidence in a fair manner, indicated that while Mr Fleming was excellent in his relationship with the patients stemming from his long experience as a social worker, the company soon identified the need to up-skill his management ability, particularly his management of staff. The working relationship, which began in 2002, between Mr Fleming and the defendant had been initially good. Apparently, following his return from a lengthy holiday, Mr Fleming's attitude on a number of matters appeared to have changed and the relationship deteriorated to the point where proceedings were commenced.

[8] The defendant considered that Mr Fleming would benefit from undertaking a course towards the New Zealand Diploma in Business at the Manukau Institute of Technology. Despite initial reluctance from Mr Fleming he was eventually encouraged to enrol in the course and the defendant paid his tuition fees. Incidentally the defendant had also made a reasonably substantial cash contribution towards the expenses of the holiday Mr Fleming had taken.

[9] Unbeknown to the defendant, Mr Fleming got into a dispute with the administration at the Manukau Institute of Technology. Mr Fleming somewhat surprisingly indicated during the course of his evidence that the reason for this was that he was asked to attend tutorials in combination with a number of fellow female students at private residences. He indicated that the dispute arose because he

complained to the authorities at the institute that he considered this unsafe. I am still unsure whether he meant unsafe to him or the fellow female students but in any event the basis for the dispute seems incomprehensible.

[10] The bundle of documents produced at the hearing, which Mr Fleming refers to as "*disputed documents*", includes a copy of a letter written to him by the solicitors acting for the Institute confirming settlement of civil proceedings Mr Fleming had commenced against it in the District Court at Manukau. The defendant was not aware of either the dispute or the civil proceedings until the present claim was presented to the Employment Relations Authority following mediation. Mr Fleming had remained in the employment of the defendant during the course of the dispute.

[11] In addition to the clearly unsatisfactory position, which had developed at the Manukau Institute of Technology, Mr Fleming indulged in other objectionable behaviour. He became antagonistic towards the chief executive officer, Ms Jordan. This was evidenced mainly by a large number of continuous improvement forms with which she was swamped by him. In these he referred to problems he alleged in administration by the defendant and behaviour he regarded as unacceptable by the staff who were managed by him. He alleged lack of support from the company for management of Jon's House in providing what he called, "*boundaries*" and "*interventions*" in the disciplining of staff.

[12] It needs to be said that having perused these continuous improvement forms many of the matters raised seem to me to be within his own management responsibilities. His behaviour in this way appeared to be an abrogation of those responsibilities by visiting them upon the chief executive officer who clearly had other functions within the company to attend to. To Ms Jordan's credit she patiently dealt individually with each of the numerous complaints. She recorded in writing on each form the way that she had handled the matters. Mr Fleming accused her at the hearing of falsely and fraudulently completing these forms. I do not accept that allegation.

[13] The fact is, however, that Mr Fleming never appeared to be satisfied with the responses made to his complaints. He became obsessive about one of the staff beneath him downloading inappropriate material on to a company computer during work hours. This appears to have been handled sensitively by Ms Jordan and Ms Delamore. However, Mr Fleming continued to agitate that something further needed to be done when it was clearly inappropriate for him to insist on that.

[14] Mr Fleming also made allegations that the same employee had stolen his cell phone from his motor vehicle and went to the extent of lodging a police complaint about that. He also apparently complained to the police with allegations inferring that other staff had stolen his driver's licence. He made allegations to the chief executive officer and director of the company that staff were behaving in a way designed to bully him and undermine his position. The point was reached where the staff he was administering became so concerned that they indicated to the officers of the company that they could no longer work with Mr Fleming. In respect of the complaints by Mr Fleming, Ms Jordan investigated them and found they were without basis. However, Mr Fleming appeared unable or unwilling to accept the defendant's judgement or resolution.

[15] In August 2008, one of the staff raised an issue relating to Mr Fleming's care of a patient. Mr Fleming suggested that this amounted to an allegation of abuse being made against him. The matter was investigated by the defendant. It soon came to the conclusion that any suggestion of abuse on Mr Fleming's part was completely without foundation. A meeting was convened at which Mr Fleming had representation by Mr Russ Revell, the union official. Mr Fleming was advised that there was no allegation being made of abuse against him and it appeared to all present that the matter was then resolved. However, a few days later Mr Fleming applied for mediation assistance claiming that the staff beneath him were guilty of serious misconduct towards him, undermining him and that he was receiving inadequate support or fortification from the defendant.

[16] The mediation attempt was unsuccessful in resolving Mr Fleming's concerns. He then filed the present claim with the Authority. A Member of the Authority referred the matter back to mediation, which occurred on 22 October 2008. That

mediation failed to resolve matters. However, the next day on 23 October 2008 the defendant received advice from another mental health provider that Mr Fleming had verbally abused its resident patient. This was alleged to have occurred during a weekly support group meeting led by Mr Fleming. This support group work was secondary to that performed for the defendant and Mr Fleming was employed by the ProActive Trust for this work.

[17] It was at this time the defendant discovered that Mr Fleming was in employment disputes with the ProActive Trust, during which employment the allegation of abuse was made, another employment dispute with his part-time employer known as Affinity and the dispute with the Manukau Institute of Technology, which I have already mentioned.

### **The disciplinary process**

[18] When the defendant received information regarding the allegations of abuse it arranged for its solicitor to interview Ms Willetts, the manager of Hinemoa Lodge where the person who was the subject of the alleged abuse resided. Some of Ms Willetts' residents, as well as residents from the defendant's houses, attended mental health support group meetings which Mr Fleming led at the Maranga House operated by the ProActive Trust. It was at such a meeting that the verbal abuse was alleged to have occurred.

[19] The lawyer, Ms English, as part of her enquiry observed how Ms Willetts managed her residents. She was also able to observe the caring relationship between Ms Willetts and her residents. As she was being given a tour of the residence she met several of the residents herself. The allegation was that Mr Fleming had called the resident "*dumb*" and a "*homo*" in front of other members of the group that he was leading.

[20] Following Ms English reporting back to Ms Jordan and Ms Delamore, the defendant decided to convene a disciplinary meeting on 30 October 2008. On 24 October 2008 the defendant wrote a letter to Mr Fleming outlining the matters of concern. These were the complaint itself, the unfounded allegations Mr Fleming had made against the staff under his management, the incompatibility issues which had

arisen between Mr Fleming and the staff, an allegation that Mr Fleming had provided patient details without authority to his union representative and finally the breakdown in the relationship between Mr Fleming and the chief executive officer. This included the use of the continuous improvement forms to swamp her. Clearly the most serious complaint was that involving the alleged abuse of the patient. Mr Fleming was given the opportunity to have a union representative present and he arranged for Mr Revell to accompany him to the disciplinary meeting.

[21] Having reached the view that there was some substance to the complaint following Ms English's enquiries, the basis of the complaint was put to Mr Fleming. The reaction from both him and his union representative was that there were credibility and capacity issues relating to the statements, which had been made to Ms Willetts, by the actual complainant and other residents who observed the incident. Mr Fleming and Mr Revell raised this on the basis that these people being of intellectual impairment may have lacked the capacity to be able to make a complaint of this nature and accordingly their credibility was in question. This allegation in itself caused concern to Ms Jordan and Ms Delamore and later Ms Willetts when she was informed of it. Ms Jordan in her evidence was of the view that the allegation that the complainant and other observers lacked credibility solely because of their intellectual impairment ran totally counter to her experience with patients of this kind. She was very concerned at Mr Fleming's attitude as a qualified social worker in expressing it in this way.

[22] Mr Fleming completely denied the allegations. As part of due process Ms Delamore and Ms Jordan then decided that they would make further enquiries of Ms Willetts having received Mr Fleming's response. It was at this point that things went sadly awry for Mr Fleming. He took the view that the defendant should not be permitted to make further enquiries and he did not wish them to do so. He indicated that he required the further enquiries to be either carried out by the police or the Child, Youth and Family Service within the Ministry of Social Development. Such a reaction was totally unrealistic in the circumstances as there was clearly no allegation of any criminal act, which could be referred to the police for investigation. Also, as the complainant was an adult, it would not have been within the jurisdiction of the Child, Youth and Family Service. Quite apart from this the obligation rested

on the defendant as employer to carry out a proper investigation of its own as part of the disciplinary process in order to consider in an appropriate way the denial and the expressions of concern as to credibility, which had been raised by Mr Fleming and Mr Revell.

[23] In view of the fact that Mr Fleming was insistent that further enquiries not be carried out, the defendant had no other alternative but to draw an inference from Mr Fleming's actions at that point. It decided to dismiss him without further discussion of the other matters, which had been contained in the letter of 24 October 2008.

[24] It appears that at that point, Mr Revell, clearly seeing the way things were developing, endeavoured to negotiate with Ms Jordan and Ms Delamore on Mr Fleming's behalf. However, as a result of intransigence on the part of Mr Fleming, attempts to negotiate continuation of his employment or some other form of settlement broke down and the meeting concluded on that basis.

[25] On 31 October 2008 Ms Delamore wrote to Mr Fleming giving him a reasoned formal notification of the termination of his employment for serious misconduct. That letter pointed out that the basis for termination was that the company had come to the conclusion that the abuse had occurred. Further that in the face of Mr Fleming's refusal to allow further investigations to be carried out in view of his denial and allegations as to credibility, the point had been reached where the employer could no longer have trust and confidence in him and in the performance of his duties.

[26] Ms Delamore also expressed some concern at the allegation that the complainant and other witnesses to the alleged abuse lacked capacity to make a valid complaint. She further indicated that in view of the decision reached she did not believe that it was necessary to reach any firm conclusions on the other allegations. She did indicate that it was clear that the employees whom he managed had lost trust and confidence in him and she also referred to the fact that Mr Fleming himself agreed that he had little or no confidence in either Ms Delamore as the company director or her daughter, Ms Jordan, as the chief executive officer.



## **Primary issues**

[27] Mr Lawlor in his final submissions on behalf of the defendant has in my view isolated the primary issues, which arise in this case. As Mr Lawlor highlighted, the main issue in the case is not only whether the plaintiff verbally abused the complainant, although on the balance of probabilities that seems likely, but whether in all the circumstances the defendant's decision to dismiss Mr Fleming and the process were what a fair and reasonable employer would have done. Mr Lawlor submitted that in the surrounding circumstances and having regard to the nature and seriousness of the plaintiff's conduct a fair and reasonable employer would have dismissed the plaintiff.

[28] There are of course other issues arising in that consideration. The primary one is whether as a matter of law an employer is entitled to consider the conduct outside the workplace as a justifiable basis for termination. Mr Lawlor submitted that with the plaintiff's position as both manager and social worker and the alleged abuse occurring at a secondary workplace where he was carrying out similar functions to those with the defendant, the conduct was sufficiently grave and connected to destroy the necessary relationship of trust and confidence between Mr Fleming and his primary employer, the defendant.

[29] While the other matters as to conduct were not used as a basis for termination, they provide a background. Similarly, the other disputes with the Manukau Institute of Technology and the two other employers were not known to the defendant at the time of termination. They could not be taken into account as a basis for termination. Nevertheless, those matters are relevant evidence from a corroborative point of view.

[30] Under s103A of the Employment Relations Act 2000 the question of whether the dismissal is justifiable must be determined on an objective basis. The section requires that the Court considers 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 of the dismissal.

[31] A useful explanation for the test is contained in the following statement at paragraph 120 in *Air New Zealand Limited v Hudson*:<sup>1</sup>

*[120] This approach effectively restores to the Authority and the Court what Williamson J called the duty of inquiry and the right of judgment. However, the s 103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer's actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer's actions by that objective standard. It may mean that the Court reaches a different conclusion from that of the employer but, provided this is done appropriately, that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.*

[32] Mr Lawlor referred me to the numerous authorities dealing with the issue of whether an employer is only entitled to take into account categories of conduct restricted within the actual workplace giving rise to serious misconduct. The Court of Appeal in *Smith v Christchurch Press Company Ltd*<sup>2</sup> held that there is no such restriction but there must be a connection between the conduct and the employment:

*[25] Mr Couch submitted that the categories of cases in which the employer can be said to have a legitimate interest in conduct outside the workplace must be very limited in the interests of restricting intrusion into employees' private lives. That is fair comment, but we are not persuaded of any need for categories of conduct as suggested. Such situations can be so variable. Nevertheless there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employees' duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.*

[33] Illustrations of the variable situations in which such categories of conduct can be taken into account have been discussed in *Craigie v Air New Zealand Limited*,<sup>3</sup> *DB Breweries v Hodgson*,<sup>4</sup> *NZ Bank Officers IUOW v Databank Systems Ltd*,<sup>5</sup> *New Zealand Bank Officers IUOW v Bank of NZ*<sup>6</sup> and *Fuiava v Air New Zealand*

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<sup>1</sup> [2006] ERNZ 415, 438

<sup>2</sup> [2000] 1 ERNZ 624, 631

<sup>3</sup> [2006] 1 ERNZ 147

<sup>4</sup> AEC 68/96, 14 October 1996

<sup>5</sup> [1984] ACJ 21

<sup>6</sup> [1984] ACJ 641

*Limited.*<sup>7</sup> In all of these decisions there was a connection alleged between the unacceptable conduct occurring outside the workplace and the nature of the employment carried out for the particular employer concerned in the dismissal. In *Fuiava*, for example, there was a direct relationship between the conduct and the special nature of the business carried on by the employer. That is similar to the present circumstances. The behaviour by Mr Fleming, wherever he was employed as a social worker, towards patients or residents under his supervision was important to the defendant by virtue of the very specialised nature of the employment he carried out for it.

## **Conclusion**

[34] I find that in the circumstances of the present case the defendant was entitled to take into account Mr Fleming's conduct with a secondary employer. The allegations made, if established, would certainly have an impact on the business and would be incompatible with the proper discharge of Mr Fleming's duties. It had the clear potential to undermine trust and confidence between employer and employee. That, however, in this case only leads to the commencement of the enquiry. The defendant made preliminary investigations through the services of its solicitor, Ms English, and reached the view that there was sufficient substance in the complaint to put the matter properly to Mr Fleming. It did that. He then refused to allow the normal process to continue. Following his denial and the raising of issues as to credibility the employer could not then test the veracity of the complaint by carrying out further enquiries of the complainant and other witnesses, perhaps using the services of Ms Willetts.

[35] Another issue which caused concern to the defendant at that point was the very contention by Mr Fleming and Mr Revell that the complainant and witnesses were inherently unreliable as a result of their intellectual disabilities. Ms Jordan and Ms Delamore expressed in evidence considerable concern at the unfortunate position which Mr Fleming, as a social worker, was taking. This was because an important part of Mr Fleming's role as a social worker was in the protection and respecting of the rights of patients such as the complainants and their right to complain.

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<sup>7</sup> [2006] ERNZ 806

[36] In this regard Mr Lawlor referred to the job description and Social Workers' Code of Ethics contained in the agreed bundle of documents. These were put to Mr Fleming during the course of cross-examination. The concern of Ms Jordan and Ms Delamore was that the position taken by Mr Fleming was at odds with his professional obligations although it should be emphasised that this was only one factor taken into account in Ms Delamore's stated position: that Mr Fleming's employer had lost trust and confidence in him.

[37] So far as the dismissal is concerned, at the point where Mr Fleming and Mr Revell refused to allow the employer to continue the process by making further enquiries, the defendant was left in an invidious and untenable position. The complaint against Mr Fleming involved serious allegations. The suggestion by Mr Fleming that the matter should be put in the hands of police or Child, Youth and Family Service was completely unrealistic. In any event, that in my view would have been in breach of the obligation of the employer. The decision it took to terminate employment at that point was an action which a fair and reasonable employer would have taken in all the circumstances. As the member of the Authority has stated in his decision, Mr Fleming was "*the architect of his own misfortunes.*"

[38] Mr Fleming in his final written submissions did not consider his claim to unjustified disadvantage under a separate heading. It is clear nevertheless from the nature of the submissions and indeed his evidence that his claim to unjustified disadvantage arises out of the other factors, which were to have been raised at the disciplinary hearing but were not taken into account because of his attitude on the further investigation into the allegation of abuse.

[39] Mr Fleming's evidence and submissions dealt at some length with the behaviour of staff towards him. There was the specific incident where he perceived that he was being accused of abuse of a resident and where a separate meeting was conducted with the union representative present. On the employer's evidence it never regarded this as an abuse incident from the outset and indeed the outcome of the meeting was to reinforce Mr Fleming's position. Nevertheless he did not let matters rest there. He also dealt at length with other episodes where he perceived

that his staff were bullying him or harassing him and endeavouring to undermine his position. This evidence included the unsubstantiated allegations as to the cell phone and the driver's licence. There is also what Mr Fleming considered to be inappropriate responses from Ms Jordan, the chief executive officer, to the multitudinous reports that he was making through the continuous improvement forms. He accused her of falsely and fraudulently completing these although nothing specific was put forward. There was an incident, which is not denied by Ms Jordan, where she reacted sharply to him when she was under personal pressure and he had refused her request to leave her office.

## **Decision**

[40] Having heard all of the evidence I consider that the employer in this instance was unduly patient with Mr Fleming's complaints. A perusal of the large number of complaints produced in the bundle of documents discloses that many were trivial and within Mr Fleming's jurisdiction as manager to remedy. Regrettably some of the complaints disclose how obsessive and unreasonable Mr Fleming had become in relation to his staff and towards the chief executive officer. It was clear that by the time of his dismissal he had lost the trust and confidence of his employer and his fellow workers and indeed he considered that those feelings from his point of view were mutual. His odd and unreasonable behaviour towards the defendant has some corroboration from the fact that he was also in dispute with the educational institute, which the employer had kindly financed him into attending to better his qualifications, and other disputes he had got into with secondary employers. I do not place too much weight on those matters but nevertheless in combination with what transpired with the defendant something had gone amiss with Mr Fleming's attitude over this period.


[41] I accept Mr Lawlor's submission that there is simply no basis to the plaintiff's claim of unjustified disadvantage. I further accept his submission that the defendant was a patient and supportive employer. From the evidence before me, Ms Jordan went to significant lengths to try and resolve the problem, which was clearly escalating.

[42] As far as remedies are concerned Mr Fleming conceded in his final submissions that he no longer seeks reinstatement. In view of the deteriorated relationship there would be no prospect of that in any event. He does not seek any reimbursement of wages or other benefits. His claim at this stage is solely for compensation for unjustifiable dismissal and unjustified disadvantage.

[43] Out of an abundance of caution Mr Lawlor has made submissions on Mr Fleming's conduct as contributing to the dismissal. In view of my findings there is no need to consider that issue. It is clear to me that at the point reached in the circumstances presented, the defendant had no alternative but to terminate Mr Fleming's employment. Throughout the course of what must have been a very difficult position for it, the employer endeavoured to negotiate a sensible conclusion to the deteriorating relationship between Mr Fleming and his fellow employees resulting from his unjustifiable criticism of, and allegations against, them. There is no basis whatsoever for any compensation for unjustified disadvantage.

[44] Accordingly, I confirm the decision of the member of the Authority and refuse the remedies which Mr Fleming seeks in this de novo hearing.

[45] I note that the Member of the Authority has already made an award of costs against Mr Fleming in respect of the proceedings before the Authority. Mr Fleming is ordered to pay those costs. I am sure that the defendant in this case, in view of my decision, will seek additional costs against Mr Fleming for the proceedings in this Court. Submissions on a simultaneous basis are to be made by Mr Fleming and Mr Lawlor within the next 14 days if they wish to be heard on the matter of further costs.

  
M E Perkins  
Judge

Judgment signed at 9.30am on 12 November 2009