



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Katrina Cook

v

Masonic Care Tasmania
(U2019/259)

DEPUTY PRESIDENT BARCLAY

HOBART, 24 JANUARY 2020

Application for an unfair dismissal remedy.

[1] This is an application for compensation arising from the termination of the Applicants employment as a service worker at the Respondents Launceston premises.

[2] The termination was for misconduct relating to a number of incidents, which taken together the Respondent asserts amounted to a breach of its Workplace Behaviour Guidelines, its Values and Standards of Behaviour. The Respondent determined that it had lost trust and confidence in the Applicant to perform her duties in accordance with the expectations of the Respondent and terminated her employment.

[3] The Applicant submits that her behaviour was not sufficient to justify the termination of her employment. She does not seek reinstatement.¹

Issues in Dispute

[4] There is no dispute that the Applicant is protected from unfair dismissal. The Applicant's contention is that her conduct did not justify termination. She does not assert that she was not informed of the reasons for termination; that she was not given an opportunity to respond to the allegations; that she was prevented from accessing the assistance of a support person or that she was not warned about her unsatisfactory performance before dismissal.

[5] It will become apparent from these reasons that these concessions were appropriate, notwithstanding that the Applicant (as was the Respondent) was unrepresented. I should also note at this stage that the matters specified in s. 387 (f) and (g) of the *Fair Work Act 2009* were not directly relevant in these proceedings. The Respondent followed an appropriate process in effecting the dismissal and had dedicated human resources assistance these factors were not significant to the termination of the Applicants employment.

The Evidence

¹ Application exhibit A1, paragraph 2.1; transcript PN 14

[6] The evidence was in the form of the Application and Response, Outlines of Argument, witness statements and documents together with evidence from witnesses at the hearing. I have had regard to all of these materials. Below is my summary of the evidence, which I accept. Where there are issues of credit to be decided I generally prefer the evidence of the Respondent.

[7] When the Applicant gave evidence she was somewhat argumentative. More importantly she did not seem to appreciate when her behaviour at the workplace was inappropriate. In her written materials she asserted that she had never done anything wrong in her employment, yet she had been counselled and at least on one occasion apologised to a member of staff for her behaviour.

[8] The gravamen of the Applicants case is that she was bullied and that the complaints were unfounded. This is notwithstanding that she has accepted that she acted inappropriately on at least two occasions. Overall I find that Applicant has a lack of insight into her behaviour and the fact that her behaviour gave rise to valid concerns for the Respondent. The Applicant also sought to minimise her behaviour and implied some sort of overreaction on the part of the Respondent amounting to bullying.

[9] I also note that the complaints were not made by anyone alleged to have bullied the Applicant. They were made by other members of staff and on at least one occasion by a resident. It was not suggested that these complainants were motivated to make false complaints. Those said to have bullied the Applicant were tasked with investigating those complaints. I can find no evidence of bullying behaviour.

[10] I also note that the Respondent was careful to follow up meetings regarding the Applicants behaviour with letters setting out allegations, responses and what had occurred at the meetings shortly after they occurred. I note the Applicant did not raise any issues at the time with the content of those letters. I have no reason to disbelieve the matters contained in the letters.

[11] The issues with the Applicants behaviour arose, from the evidence, from events commencing on 26 June 2018.² A meeting was held on that day relating to a complaint from a carer regarding alleged poor conduct and inappropriate swearing by the Applicant whilst working in one of the kitchenette and resident dining rooms the previous evening. The allegation was that she was observed to swear and yell loudly at staff members in front of residents.

[12] The notes of the meeting³ disclose that the Applicant admitted that she acted inappropriately. She also admitted wrongdoing on this occasion in her evidence.⁴ I note that these concessions are inconsistent with the Applicants written case that she had done nothing wrong.

[13] The outcome of that meeting was that the Applicant would follow advice given about displaying more appropriate behaviour, that her behaviour would be monitored and that there would be escalation if the behaviour continued.

² R6 – Show Cause Letter 20 August 2018

³ In bundle of documents exhibited as R6

⁴ Transcript PN 109

[14] The next event appears to be the show cause letter of 20 August 2018 which referenced the 26 June meeting and raised new issues.

[15] The letter set out the following:

“Allegations

Further to our meeting of 26th June, I have been advised of further allegations as follows:

5 August 2018 you were pushing the gantry in the corridor in the vicinity of the Clinical Managers office and you were heard from the Charles nurses station yelling very loudly. You were approached by the MCT Clinical Nurse on shift and asked to calm down and keep your voice down. The Clinical Nurse also attempted to discuss this with you and see why you were so agitated. You continued to proceed to yell very loudly and raise your fists in anger. Another staff member also came out of her office to see what the disruption was. Both MCT employees stated to you that this behaviour was very unprofessional, however you continued to push the gantry through the day care centre still talking loudly to yourself and yelling "whatever".

9 August 2018 at approximately 14.05 pm you were yelling at and accusing staff in the main kitchen that someone had stolen your jacket from the lady's locker room. You were advised by your supervisor that a jacket was out the back which was thought to belong to another employee. It was suggested that the jackets may have been mixed up in error.

You were advised that it would most likely turn up tomorrow if someone else had taken it by mistake. It was believed at this stage you were going home. Your supervisor then proceeded to the Wellington wing to see if she could check with the employee concerned that may have taken your jacket In error, so it would be sorted before you arrived for your shift the following .morning.

You then turned up in the Wellington wing talking very loudly that your jacket had been stolen. You then proceeded to advise that you “did not need this job” and “jobs like this are a dime a dozen”.

You were heard raising your voice from the main reception area by the Peace Haven Clinical Manager. You were also overheard after leaving Wellington toward the main foyer yelling "you can shove it up you're arse". This was witnessed by the Peace Haven Clinical Manager who was standing near the time target kiosk at approximately 2:15pm, and was also observed by the day centre attendees visiting the facility that were gathered in the foyer waiting for their transport to arrive.”

[16] The letter set out that the behaviour may be potential misconduct amounting to a breach of the Respondents Workplace Behaviour Guidelines, Standards of Behaviour and values. The guidelines and standards were attached to the letter.

[17] The show cause letter sought a written response to the allegations by 27 August and appointed a meeting for 31 August 2018.

[18] The Applicant did not provide a written response but attended the meeting on 31 August 2018 with a support person.

[19] The Applicant in her evidence accepted that the allegations in respect to the 9 August incident were true⁵ and that, in respect to the 5 August incident that she had raised her voice which had attracted the attention of other employees. The effect of these concessions is that the Applicant inappropriately raised her voice in the corridor near the Clinical Managers office to such a level that other employees had to ask her to calm down, and that she told the Clinical Manager that she could “shove it up your arse” and that she was talking loudly and was agitated about her jacket going missing. I note the explanation for the “shove it” comment was that she believed she had been told she could look for another job and that she felt her position at work had been threatened. Even if that is correct, it is no excuse for language of this sort in a workplace, particularly where residents and members of the public may be present.

[20] On 31 August 2018 the Respondent gave the Applicant a letter setting out a summary of the meeting the Applicants responses and the outcome of the process.

[21] The outcome was expressed as follows:

“OUTCOME:

MCT management have considered the information you have provided to date and at this meeting and your employment record to date. We have formed the view that based on available evidence, and on the balance of probabilities that I accept that you have acknowledged that you acted in an unacceptable manner and have acknowledged the above incidents.

You have given us your guarantee that this behaviour will not happen again, so in line with MCT values we will provide you with the opportunity and support to change your behaviour.

Given the opportunity presented, I take this opportunity to remind you that you should refresh your knowledge of the MCT Standards of Behaviour and MCT Workplace Behaviour Guidelines. I also remind you that the MCT Values is an important part of our MCT culture and nothing less will be acceptable.

Masonic Care Tasmania (MCT) is committed to taking all reasonable steps to provide a safe and inclusive workplace where our employees can contribute to their full potential and be treated, and treat each other, with fairness, dignity and respect. Inappropriate workplace behaviour can cause physical and emotional distress to individuals involved directly and indirectly, and it may also create a work environment that is unproductive and unpleasant. We also note that even when behavior or conduct does not constitute harassment, discrimination or bullying, it may still amount to inappropriate workplace behaviour. Inappropriate workplace behaviour is any behavior which is not reasonably acceptable in the workplace.

⁵ PN 147

In future, we therefore expect you to work within the Workplace Behaviour Guidelines and our Values and treat all people you deal with in a respectful, positive and constructive manner, and to raise issues with myself or your line manager where this becomes difficult. If you are ever in doubt as to how to best approach a situation, please contact me at any time.

This letter will be placed on your personnel file to record the incident. Please note that further incidents of this nature, and/or breaches of the Workplace Behaviours Guidelines or MCT Values, may result in disciplinary action up to and including termination of your employment. We therefore strongly advise you take this matter and caution seriously.”

[22] Subsequently in October 2018 the Respondent was advised of further matters relating to a complaint received from two staff members about the Applicants behaviour. What occurred from receipt of the complaints to a meeting with the Applicant on 24 October is best described by setting out the following of the witness statement of Simon Price, the Respondents Manager People and Culture⁶:

“In or about late-October 2018 one of my co-workers, Ms Zane Healey, advised me that a complaint had been received from two staff members regarding inappropriate conduct by Katrina alleged to have occurred on 20 October 2018. The complaint was received by email and was forwarded to me by Zane Healy.

The complaint outlined within the email was that Katrina was swearing and complaining about the behaviour of another staff member whilst doing the evening tea on 20 October 2018, in front of family members in the dining room. The staff members stated that the katrina re-appeared 3 times in the kitchen ranting and the staff members felt uneasy and embarrassed. The staff members alleged Katrina again returned to the kitchen in Balfour where she began yelling, which could be heard by the two staff members from behind closed doors. The staff members identified that Katrina's behaviour affected a resident, who had to be retrieved from the kitchen.

After the complaint was forwarded to me, I spoke with both Sandra Hazlewood and Alex Sheppard to discuss what they recall occurring. I approached Sandra and Alex on or around 22 October 2018 whilst they were on shift at Peace Haven. I asked them if they had anything further to add to their statements they had emailed through. Both staff said they did not. As is standard practice, I asked if they were comfortable for me to mention their names when presenting this to Katrina for her side of the story and both stated they were reluctant, but ultimately agreed for me to do this. They were reluctant as they did not want to be subjected to any reprisal from Katrina, but both stated they felt they needed to stand up as how she behaved 20 October was out of line. Sandra added that she felt that given this particular event had involved a resident's family member, this was an escalation of the type of behavior that Katrina had displayed on other occasions.

Another two allegations were then received from staff direct to Zane Healey who passed them onto me. According to Zane, one staff member heard Katrina yelling and

⁶ R5 paragraphs 13 to 19

behaving in a poor manner during meal service in, I recall, the Balfour wing. Zane advised me that another staff member stated they were spoken to in a very derogatory manner by Katrina whilst an event was taking place and was simply in the wrong place at the wrong time.

Following discussions with Zane, neither staff member wanted to provide a statement or take the matter further. I don't know the staff member's names.

Zane, on advice from the staff members who witnessed the conduct, also spoke to the resident's family member who witnessed the event. The resident's family member did not want to submit a formal complaint.

As I was in Hobart at the time, I asked Ms Vicki Pollock to arrange for a meeting with Katrina to be held on 24 October 2018. I advised Vicki to tell Katrina that she was entitled to have a support person present."

[23] At the meeting on 24 October 2018 the Applicant denied most of the allegations. Rather than proceed with a more formal disciplinary process the Respondent elected to proceed by way of a performance improvement plan. This was confirmed by a letter of 25 October 2018 headed "Confirmation of formal performance improvement plan". The plan was to be in place for a month and for there to be weekly meetings to discuss the Applicants behaviour and provide information and support to enable the Applicant to change her behaviour to be more appropriate in the work place. It is to be noted however that the letter advised that in the event of lack of improvement the plan might be extended or disciplinary action may be taken.

[24] Noting that the Applicant denied the allegations I should pause to indicate that I find on balance having regard what I have set out above, to the evidence as a whole, the evidence given by the Applicant and her demeanour in the witness box that the events of 20 and 21 October 2018 occurred much as the Respondent alleges.

[25] It is to be remembered that those making complaints had nothing personal to gain. Indeed their reticence in becoming involved speaks to that. The complaints are also consistent with the sort of behaviour of the Applicant since June 2018.

[26] The Applicant also called Ms Eleanor Grigg to give evidence to the effect that the Applicant had not acted as asserted on these days. It transpired that Ms Grigg had only been present for a short period of the time that the Applicant was at work on these days. Ms Grigg could not really have known what the Applicant did nor how she behaved during the majority of the Applicants shifts on 20 and 21 October 2018. Ms Grigg's evidence did not assist the Applicant.

[27] The written records of the weekly performance improvement plan meetings which were completed are in evidence. The first two meetings were on 13 and 20 November 2018 and no issues were identified which needed addressing.

[28] However on 28 November 2018 the Applicant attended a Respect at Work training program. A complaint was received about the Applicants behaviour at that training session. The issues were raised at the third performance improvement meeting on 29 November. The

allegations were that the Applicant had spoken over the top of the facilitator and had generally been rude during the session. It was alleged that during the session the Applicant said words to the effect that “the pay here is shit”.

[29] The Applicant essentially denied the allegations save that she agreed she said something to the effect that the pay at her employment was not good. She however denied using the specific words attributed to her.

[30] During the course of the 29 November performance meeting the Respondent asserts the Applicant became agitated and aggressive. The Applicant accepts that she became agitated but denies she was aggressive. She denied allegations that she was yelling. She does agree however that when asked not to yell she responded to the effect “you will know when I’m yelling”.

[31] In common with the two previous performance meetings the Applicant signed the written record of the meeting. In evidence however she said she did not agree with “exactly what it said”.⁷ It was not made clear what that meant. The notes record that the Applicant agreed that the pay “was shit” and that she should not have said it. They also record that the Applicant was yelling during the performance meeting, that her performance was poor, disrespectful and argumentative.

[32] I note that Applicant gave evidence that she signed the notes because she just wanted to get out of the meeting. It was not explained why she just wanted to get out of the meeting. She must have known that signing the notes was significant. She had done so on two previous occasions. I find she would have known that signing the notes was an acknowledgment of their accuracy.

[33] After the meeting the Respondent followed with a letter of 6 December 2018. It is a lengthy letter which sets out the history since 26 June 2018 up to and including the 29 November 2018 meeting. It set out the inappropriate behaviour at the 29 November meeting, noted that it may constitute a breach of the Respondents policies, standards and values. It sought a written response by 17 December 2018 and appointed a meeting to discuss the issues for 19 December 2018.

[34] The Applicant failed to provide a written response and did not attend the meeting. Her explanation for not attending the meeting was that she had a panic attack. The Applicant did not tell the Respondent that she had been kept from the meeting due to ill health at any time. The Applicant as unable to give an adequate explanation why she failed to let the Respondent know she had not attended due to ill health. When asked why she hadn’t told the Respondent she replied that she didn’t know.⁸ She did say however that she “assumed’ the Respondent had it in for her and whatever she said would have made no difference.⁹

[35] Consistent with what the Respondent set out in its letter of 6 December, that if the Applicant did not provide a response it would determine the matter and future action in the absence of a response it did so and elected to terminate the Applicants employment. It did so by letter of 19 December 2018.

⁷ PN 258

⁸ PN 316

⁹ PN 317

[36] The Applicant was paid in lieu of notice and was paid all her outstanding entitlements.

Consideration

[37] I have set out my findings by way of a narrative of the evidence of what occurred from June until December 2018.

[38] I have found that the allegations made against the Applicant are made out.

[39] I determine that the Respondent had a valid reason to terminate the employment of the Applicant. The Applicant behaved on numerous occasions inappropriately in the workplace. She raised her voice. She shouted. She made inappropriate comments to fellow workers and those senior to her. The behaviour is a breach of the Respondents policies.

[40] In June 2018 the Applicant was warned about her behaviour. Notwithstanding the warning the Applicant repeated inappropriate workplace behaviour in August. A more formal approach was taken on this occasion. A show cause letter was issued and a show cause process followed. The Applicant was provided with copies of the relevant policies governing behaviour. She was provided with an outcome letter which warned that any future incidents could lead to disciplinary action including termination of her employment.

[41] Again in October 2018 there was further inappropriate behaviour. Rather than proceed to impose a sanction such as a final warning or indeed termination of employment the Respondent gave the Applicant another chance by way of the improvement plan. She failed to complete the plan and acted inappropriately to her managers when they raised new issues during the performance process. It seems that Respondent was prepared to deal with the new issues (at the Workplace Behaviour session) as part of the performance plan. However the Applicants behaviour during the performance plan resulted in that becoming inappropriate.

[42] A show cause process was implemented. The Applicant failed to take part in the process. Whilst it may be she was unable to attend the meeting due to ill health she chose not to tell her employer about that.

[43] In my opinion the Applicants behaviour had on repeated occasions between June and November breached the workplace policies and guidelines by:

- Failing to treat her colleagues with fairness, dignity and respect
- Failing to treat staff with respect, courteousness and in a professional manner
- Failing to deal with everyone with politeness
- Failing to ensure her behaviour did not cause offence to anyone
- Failing to speak in an appropriate tone
- Using bad language and making inappropriate comments
- Failing to be accountable for her behaviour.

[44] Cumulatively the behaviour of the Applicant became inconsistent with remaining in the workplace. It was sufficiently serious to justify dismissal. There was a valid reason for the dismissal.

[45] However I must still decide whether the dismissal was harsh, unjust or unreasonable. As indicated above the real dispute was whether the Applicant had acted as the Respondent asserted that she had. In my opinion she had. The Applicants behaviour in the 6 months leading up to the dismissal was poor and worsening. It was inappropriate, rude and repeated.

[46] The Applicant was the author of her own downfall. She had a chance to keep her job and move on via the improvement plan. She was unable to complete it. Her behaviour during the workplace behaviour session was poor (and a repetition of prior poor behaviour). Her behaviour at the 29 November performance meeting was worse. It demonstrated that the Applicants behaviour was not likely to change.

[47] The Respondent had given the Applicant every chance to improve (the performance improvement plan and the workplace behaviour session). She failed to take up those chances.

[48] Notwithstanding warnings that her behaviour could lead to dismissal if repeated the Applicant did repeat inappropriate behaviour. By the end of November 2018 there was no sign that the behaviour would improve. The Applicants cumulative behaviour warranted dismissal.

Outcome

[49] I dismiss the Application.



DEPUTY PRESIDENT

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