

**Attention is drawn to the prohibition on publication
of the names of any clients of the respondent
contained in paragraph 7 of this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 53
5563567

BETWEEN	PATRICIA FERGUSON Applicant
AND	PRESBYTERIAN SUPPORT EAST COAST Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Shabnum Rashid and David Oliver, for Applicant Dave Robb, for Respondent
Investigation Meeting:	27 and 28 January 2016 at Hastings
Submissions Received:	14 December 2015 and 11 February 2016, from the Applicant 22 December 2015 and 11 February 2016, from the Respondent
Determination:	9 May 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Patricia Ferguson claims to have been disadvantaged in her employment by a number of unjustifiable actions of her employer. She says her employer compelled her to leave the workplace on 21 April 2015 and this resulted in an effective suspension of her employment without consultation. Ms Ferguson, who has been employed as a Generic Social Worker by Presbyterian Support East Coast for approximately eight years, says her pay was stopped from 11 May 2015. Although it was later restored, she says she was disadvantaged by having the time she spent off work at her employer's election deducted from her sick leave entitlement.

[2] Ms Ferguson also claims her employer unfairly categorised her as incompetent; expressed concerns about her mental and emotional health without foundation; made inappropriate comments made about her physical appearance; denied her the opportunity to upskill and retrain; and subjected her to undue pressure by calling her to meetings without sufficient time to prepare. In addition, Ms Ferguson says her employer breached an understanding it reached with her in March 2015 that she would be appointed to deliver an externally funded programme in the second part of the year.

[3] As remedies for the personal grievance she claims to have suffered, Ms Ferguson seeks monetary compensation and the restoration of her sick leave. Additionally, she seeks reinstatement to the role of facilitator for the externally funded programme, and reimbursement of income she lost from not being appointed to deliver the July to December 2015 programme.

[4] Presbyterian Support East Coast (PSEC) denies all of Ms Ferguson's claims and says none of its actions towards her were unjustifiable or disadvantaged her in her employment. PSEC says it had good reason to send Ms Ferguson home in April 2015 and its actions resulted from its concerns both for Ms Ferguson and for its clients.

[5] PSEC says Ms Ferguson suffered no loss of pay throughout the time she was away from work between 21 April and 7 July 2015. During this time it says the only periods for which leave was deducted from her sick leave entitlement were those for which she provided medical certificates. PSEC says Ms Ferguson has not been denied the opportunity to upskill and retrain. It denies there was an understanding with her that she would be appointed the facilitator of the externally funded programme.

[6] The parties have attended mediation twice and have attempted to resolve matters between themselves but have been unable to do so. Ms Ferguson's employment with PSEC is ongoing and she remains a Generic Social Worker undertaking the full range of social work as provided in her individual employment agreement.

Prohibition on publication

[7] Over the two days of the Authority's investigation many clients of PSEC were referred to by name in relation to the matters affecting the employment relationship

problem between the parties. In order to protect the privacy of those clients I have imposed a prohibition on publication of their names and of any details that might identify them. That prohibition remains in place as a permanent order of the Authority.

Relevant events

[8] The events leading to Ms Ferguson's claims occurred between late March and July 2015 and started when she and another Social Worker, Leanne Isaacson, made a home visit. During the visit, which lasted approximately 1.5 hours, Ms Ferguson became concerned for her safety in relation to a person whom I will refer to as M.

[9] She later expressed her concerns to Ms Isaacson who, while not experiencing such concerns herself, respected her colleague's uneasiness. Ms Ferguson requested a meeting with her Practice Manager, Maryrose Tweedie, and the Manager of their unit, Pamela McCann. Ms Isaacson also attended the meeting, which was held on 2 April 2015, as did another Social Worker, Carlene Nahu who, although not invited by Ms Ferguson, was there at the request of Ms McCann and Ms Tweedie.

[10] During the meeting Ms Ferguson was questioned about the cause of her concerns for her personal safety in dealing with M. She was unable to identify the source, other than by referring to M's "culture, ethnicity, gender and resistance". The only physical action she identified was that M had tapped his toes during the visit. Ms Ferguson became upset and tearful in the meeting with her managers and left at least once to contact her partner, and her clinical supervisor, by telephone.

[11] At some point during the meeting, when Ms Ferguson was temporarily outside, the notes of the meeting record Ms Tweedie's decision that Ms Ferguson would no longer be required to work with M. Due to Ms Ferguson's increasingly distressed state, it is unclear whether she understood this on her return to the meeting as she continued to voice her concerns about a further meeting she thought she was expected to conduct on an urgent basis in relation to M.

[12] Some days later, Ms Ferguson met with Ms McCann and Ms Tweedie who raised concerns with her that she may not be meeting all the ten core competencies that are required of all social workers. Their concern arose from Ms Ferguson's reference to culture, ethnicity, gender and resistance, in relation to M. In a meeting described as amicable by Ms Tweedie, Ms Ferguson agreed to undertake some further

training. She asked if that training could be specifically in the area of dealing with potential violence and resistance.

[13] In the days following that meeting Ms Ferguson changed her mind, according to Ms Tweedie, and continually questioned the validity of her employer's concerns over her competency. Ms McCann and Ms Tweedie viewed Ms Ferguson as becoming increasingly distressed and emotional during this period.

[14] On Friday 17 April 2015 Ms Ferguson was sent home early as a result of a meeting she had had earlier in the day with Ms Tweedie during which voices were raised by both. When Ms Ferguson returned to work on Monday 20 April she sought out Ms McCann and informed her she did not want conflict and wanted to move forward in her employment. Her evidence is that, when she spoke with Ms Tweedie to relay the same message, she was told matters had gone beyond that and advice was being sought from an external human resources agency.

[15] On 21 April Ms Ferguson was called to a meeting with Ms McCann and Ms Tweedie. She had no prior notice or warning of the meeting or its content. The managers informed her she was to be sent home on special paid discretionary leave and could not return to work until she had undergone a psychological assessment.

[16] Ms Ferguson initially agreed to go home and to undertake such an assessment. However, she informed her employer on 28 April she was not willing to keep the appointment that had been made for her for that purpose. By this time she had taken legal advice. Her representative's letter of 28 April sought an explanation from PSEC for sending her away from the workplace and requiring a psychologist's report before she could return. It also requested advice regarding the contractual provisions her employer was relying on for its actions towards her.

[17] On 30 April 2015 Ms McCann wrote to Ms Ferguson formally raising what she described as "*potentially a serious employment relationship problem*". Ms McCann's letter referred to Ms Ferguson's concerns over the meeting she and Ms Isaacson had attended in March, and her conduct since that time. Ms McCann said in her letter this gave rise to very serious concerns about her state of well-being and her ability to perform her social work duties.

[18] Ms McCann also referred to the "*professional intervention*" she had organised involving Ms Ferguson going home on special paid sick leave and being assessed by a

specialist psychologist, which Ms Ferguson had initially agreed to before changing her mind. Ms McCann described Ms Ferguson's decision not to participate in that process as unfortunate, noting the significant impact of her behaviour on some other staff members.

[19] She invited Ms Ferguson to attend mediation through the Ministry of Business, Innovation and Employment (MBIE), which she had arranged for 8 May 2015. Ms McCann ended her letter by referring to the letter she had received that morning from Ms Ferguson's representative, advising she was pleased Ms Ferguson had sought such assistance and support. She said the mediation could also provide the opportunity to discuss the matters raised in that letter.

[20] In ensuing correspondence Ms Ferguson sought, and was provided with, further information about the nature of her employer's concerns and its response to the issues she had raised in her representative's letter of 28 April. Ms Ferguson did not attend mediation on 8 May, and nor did she attend a meeting her employer sought to have with her on 11 May. Mediation took place on 18 May 2015 but did not resolve the issues of Ms Ferguson or her employer.

[21] PSEC, through its HR Advisor, wrote to Ms Ferguson on Friday 22 May 2015, requiring her attendance at a meeting with PSEC on Monday 25 May. The letter identified a number of "*matters and allegations which her employer now needs to formally investigate*" and informed Ms Ferguson these were considered to be extremely serious and potentially put her employment in jeopardy. It detailed those matters, identifying questions Ms Ferguson's conduct had raised for her employer over her ability to continue performing the duties of her role.

[22] The letter was sent to Ms Ferguson's representative after her office had closed for the day and it was not possible for Ms Rashid to discuss it with Ms Ferguson before the time specified for the meeting to occur. Testy correspondence between the representatives for PSEC and Ms Ferguson followed, in which one party was attempting to meet with Ms Ferguson and the other was seeking further information.

[23] PSEC scheduled a meeting for 12 June 2015 which Ms Ferguson did not attend, instead submitting a medical certificate the day before. In Ms Ferguson's absence her employer met to review and consider all the correspondence and related information at its disposal. Its representative wrote to Ms Ferguson on 16 June 2015

conveying the result of its deliberations. PSEC confirmed its preliminary view that it lacked confidence in Ms Ferguson's ability to carry out the duties it required of her as a social worker dealing with clients and families of different cultures, ethnicities and gender.

[24] Additionally, a comment Ms Ferguson had made in the meeting of 2 April 2015 in which she referred to herself and Ms Isaacson as "*two white chicks*" had been found to have "*seriously damaged and undermined the imperative professional standards, and collegial and trusted relationships, so very necessary between her and other social work colleagues.*" The letter informed Ms Ferguson that a continuing employment relationship with her was tenuous in light of these matters and that PSEC considered there to be a serious and fundamental breakdown in her relationships with her social worker colleagues.

[25] Ms Ferguson was invited to comment on these matters by 18 June before her employer reached any decision on the future of the employment relationship. She provided a response and also lodged personal grievance proceedings in the Authority seeking urgency. Following a telephone conference with the Authority PSEC invited Ms Ferguson to return to work. She recommenced her employment on 7 July 2015 and attended training in the following days which her employer had organised to assist her and other employees to deal with resistance and potentially violent situations. Ms Ferguson remains an employee of PSEC.

Issues

[26] The issues for determination are:

- (a) Whether PSEC acted unjustifiably towards Ms Ferguson; and
- (b) if so whether she was disadvantaged by those actions.

Test of Justification

[27] Whether or not an action is justifiable is to be determined on an objective basis by applying the test in s.103A of the Employment Relations Act 2000 (the Act). The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

Did PSEC suspend Ms Ferguson on 21 April 2015 and, if so, was it justified in doing so?

[28] The employer's evidence is that it was concerned about Ms Ferguson's behaviour in the weeks following the 2 April 2015 meeting. Ms McCann says this resulted in the discussion she and Ms Tweedie had with Ms Ferguson on 21 April. She said they suggested Ms Ferguson take a period of paid discretionary leave during which Ms McCann would arrange a specialist psychological assessment of Ms Ferguson; her suitability to be at work; and any support she required.

[29] Ms McCann agreed under questioning that it was not accurate to depict the paid discretionary leave as a "*suggestion*" made to Ms Ferguson and that it was in fact a requirement. She said the organisation knew how to address issues of competency but needed a psychological assessment in order to address Ms Ferguson's emotional state. They had not considered any other form of assistance such as offering counselling to her.

[30] Ms McCann said the decision to send Ms Ferguson home in this way was done out of concern for the employee's ongoing welfare and wellbeing. She said she asked Ms Ferguson to submit to a psychological assessment because internal resources had been exhausted and the employer needed to address Ms Ferguson's concerns with some urgency. It was her view that a psychological assessment would provide the information and advice needed to help reintegrate Ms Ferguson back into the workforce as quickly as possible with the right support from her employer.

[31] Ms Tweedie gave evidence of Ms Ferguson's erratic emotional behaviour following the 2 April meeting, and her fixation over the risk she perceived to her personal safety. She described the motivation behind sending Ms Ferguson home on leave as a means of supporting her as a good employer should. Both managers said that Ms Ferguson agreed to take paid discretionary leave and undergo a psychological assessment before returning to work.

[32] Ms Ferguson acknowledged that the two managers were concerned about her but believed there was no basis for their concern. She said her main concern at the time was that they were not listening to her. She had raised an issue of her safety with her employer which had turned that issue into an inquiry into her competency. Ms Ferguson agreed under questioning she had not resisted her employer's intention to send her home and had engaged in a discussion of who should conduct the

psychological assessment. However, she said she felt she had no choice but to agree in order to keep her job.

[33] I am satisfied from the evidence Ms Ferguson had no ability to dissuade her employer from the course of action it had decided upon, which was to remove her from the workplace immediately. Furthermore she had been given no forewarning of the meeting or of what her managers wished to discuss with her. She had no advance notice that the outcome of the meeting would be her immediate and indefinite removal from her duties, and isolation from her colleagues. The process PSEC followed lacked any semblance of fairness. It also entailed the employer acting in antithesis to its own disciplinary policy.

[34] In that situation Ms Ferguson's agreement to go on leave and to undergo the psychological assessment deemed necessary by her employer was not agreement freely given. I find PSEC effectively suspended Ms Ferguson from her employment when it sent her home on 21 April 2015.

[35] For a suspension to be justifiable the general rule is that there must be an express provision in the employment agreement sanctioning suspension. There is no such provision in Ms Ferguson's employment agreement or the Employee Handbook referred to in that agreement. Mr Robb submitted on behalf of PSEC that, given the particular and unique circumstances and the time span over which Ms Ferguson's actions caused worry and consternation for her managers and colleagues, sending her home was the only realistic option open to the employer.

[36] In support of that submission he referred to *Graham v Airways Corporation of New Zealand*.¹ The Court in that case recognised there is “*no immutable rule requiring that an employee must be told of the employer’s proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so*”² The court stated:

Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer’s conduct. In many

¹ [2005] ERNZ 587

² n1 at 613

*cases that will call for advice and discussion before determining to suspend; in others, it may not.*³

[37] I am not persuaded that PSEC had reached a stage in its interactions with Ms Ferguson where it was justified in suspending her without giving her proper opportunity to be heard about its intention. Ms McCann acknowledged under questioning she had not considered other options such as counselling or EAP for Ms Ferguson at that time. While I appreciate the difficulty of the situation PSEC was facing, I find its suspension of Ms Ferguson to have been unjustifiable.

[38] I further find this disadvantaged Ms Ferguson in that she was removed from her workplace and colleagues and, for the period of her suspension, denied the opportunity to address her concerns in any meaningful way. She suffered no lasting financial disadvantage, as she eventually received remuneration for the entire period of her suspension.

Was PSEC's raising of competency issues with Ms Ferguson unjustified?

[39] Ms Ferguson has taken issue with the concerns she raised about her personal safety in the meeting of 2 April 2015 being used by her employer as a means to question her competency. Her statement of problem claims her employer unfairly and unreasonably asserted her to be incompetent.

[40] I view that as an overstatement in that, while PSEC raised concerns over her ability to meet all ten of the core social worker competencies, I have not seen evidence that it asserted her to be incompetent. The employer's questions occurred as a result of Ms Ferguson's inability to articulate the basis for her concerns for her personal safety in April 2015, other than to refer to issues of culture, ethnicity, gender and resistance in relation to her meeting with M in March.

[41] It is the prerogative of an employer to raise concerns over performance and/or competence and PSEC was entitled to exercise that prerogative. It was faced with a situation where a social worker was attributing her personal safety concerns to the very issues her duties required her to navigate and manage with clients on a day to day basis.

[42] Ms Ferguson's return to work on 7 July 2015 was immediately followed by the provision of training she had requested which addressed some of her own concerns

³ n1 at 614

about her ability to deal with particular situations. This suggests the competency issue has been managed in a manner that has benefitted both parties. I find no unjustifiable action on the part of PSEC with regard to this issue.

Did PSEC make unjustified assertions about Ms Ferguson's emotional and mental health and appearance?

[43] Ms Ferguson has taken offence at comments made by PSEC managers in the period between 2 and 21 April 2015. Ms McCann and Ms Tweedie acknowledged comments had been made about Ms Ferguson's paleness and the dark circles around her eyes. They say they were concerned for her wellbeing as she appeared to be overwrought, exhausted and unwell.

[44] Ms Ferguson acknowledged that she was distressed and tearful at times during this period. I find it likely any comments made by Ms Tweedie and Ms McCann were made out of concern for an employee who was showing signs of distress and fatigue. They were not made out of malice and, while Ms Ferguson may not have welcomed their comments, she did, as noted above, acknowledge that Ms McCann and Ms Tweedie were concerned about her. Such comments do not constitute an unjustifiable action and nor did they disadvantage Ms Ferguson in her employment.

Was Ms Ferguson entitled to the role of facilitator of an external programme?

[45] Ms Ferguson had been offered the role of delivering this programme, which is funded by a Public Service department, for four years from 2011. She was not appointed to the role for the delivery of the July to December 2015 programme. Ms Ferguson said the programme started after her return to work on 7 July 2015 and there was ample time to appoint her.

[46] She acknowledged under questioning it is her employer's right to decide who to appoint to the facilitator's role but said she should have been offered it because she has done it before and has the necessary accreditation. She acknowledged PSEC had employed another social worker who was also accredited to facilitate the programmes.

[47] At the time of being sent from the workplace Ms Ferguson was facilitating the programme that ran from January to June 2015. Her involvement ceased from 21 April 2015, although she continued to receive the additional remuneration paid for the extra hours the role entailed. That programme had been completed by the time of her return to work on 7 July.

[48] Ms Ferguson said she understood she had been offered the facilitator's role for the second programme of 2015, which was due to run from July to December. She referred to a conversation she and another employee had in March 2015 with Ms Tweedie. The other employee did not attend the Authority's investigation.

[49] Ms Tweedie recalled a brief conversation in the hallway which took place in mid-March 2015 with Ms Ferguson and another employee. She said this concerned the programme but rejected the suggestion that the conversation amounted to an offer to Ms Ferguson to undertake the facilitator's role. Ms McCann's evidence was that, although she knew of the Public Service department's intention to offer two programmes in 2015, separate contracts were signed with the department for each programme. In March 2015 PSEC had not been offered a contract for the second programme and was in no position to offer the facilitator's role until it had confirmation the department would fund it.

[50] PSEC's practice was to offer the delivery of the programme by way of a written variation to the employee's employment agreement for a specified fixed term. As noted above, the programme entailed additional hours for the employee for which remuneration was paid over and above normal salary. Those details were recorded in the variation document. Evidence was provided of previous variation documents signed by Ms Ferguson between February 2011 and January 2015.

[51] It was Ms McCann's evidence that, when Ms Ferguson was unable to complete the January to June 2015 programme, PSEC needed to ensure it had another person trained and accredited who could deliver it. The situation had made PSEC consider appropriate succession planning. Accordingly, it had recruited another social worker who could deliver the programmes. It had arranged in June 2015 for that person to deliver the programme for the second half of that year. At that time Ms Ferguson was on paid leave.

[52] I find no evidence PSEC had given any undertaking to Ms Ferguson that she would be offered the facilitator's role for August to December 2015. In June 2015 when, by Ms McCann's evidence, she was in discussions with the Public Service department over the programme, Ms Ferguson was not at work and PSEC had been trying unsuccessfully to meet with her for several weeks to discuss its concerns with her, and Ms Ferguson's concerns about her employment. There was nothing to

prevent PSEC from offering the role to another accredited facilitator for the programme.

[53] I find no basis to this claim by Ms Ferguson.

Did PSEC unjustifiably debit Ms Ferguson's sick leave entitlement?

[54] Ms Ferguson was paid discretionary leave from 21 April to 11 May 2015. PSEC notified her on 11 May that she would be placed on unpaid leave from that day as she had twice refused to attend mediation it had arranged for 8 May, and had refused to attend a meeting with her employer on 11 May to discuss and resolve a number of issues. When she submitted a medical certificate on 11 June covering the period to 18 June, PSEC notified her it would pay her sick leave for that time.

[55] After Ms Ferguson had provided written responses on 18 June to concerns PSEC had notified on 22 May, PSEC's Human Resources Manager wrote to Ms Ferguson on 29 June informing her that she would be paid sick leave for the period from 12 May to 19 June and then on an ongoing basis until either her sick leave ran out or the matter was resolved. That situation remained until Ms Ferguson's return to work on 7 July 2015.

[56] I have found that Ms Ferguson was effectively suspended on 21 April 2015 although her employer did not describe its action of sending her away from the workplace in those terms. I find her employer acted unjustifiably in stopping her pay on 11 May and, although it rectified that by restoring payment backdated to 12 May, it disadvantaged Ms Ferguson by deducting the period from her sick leave entitlement. Although no immediate financial disadvantage ensues, if Ms Ferguson requires sick leave in the future she will have fewer days available to cover her absence as paid leave.

Remedies and contribution

[57] Having found Ms Ferguson to have been disadvantaged by two unjustifiable actions of her employer, I need to determine what remedies are appropriate and whether Ms Ferguson contributed to the situation that led to her personal grievance.

If I find she did contribute, I am required to consider to what extent the remedies should be adjusted to reflect that.⁴

[58] Ms Ferguson gave evidence about the effect these matters have had on her. She said the culmination of all of the events and the continuation of the process had been traumatising on her and the effects had flowed on to her family. When asked why she was seeking a large sum as compensation for hurt and humiliation Ms Ferguson acknowledged the money was not so important: her concern was about how things should have been done differently.

[59] Ms Ferguson has not lost financially as a result of her grievance as she remains in employment. At the time of the Authority's investigation the employment relationship between Ms Ferguson and PSEC presented some challenges but was viable. She and her employer agreed it was improving. In the circumstances I find a modest award for hurt and humiliation to be appropriate.

[60] I do not find that Ms Ferguson contributed to the situation that led to her suspension. Her distress and tearfulness during the two to three week period leading up to her suspension should have been managed with greater consultation in a manner that did not involve suspension.

[61] Nor do I find she contributed to the situation leading to the stopping of her pay on 11 May, which was later remedied. Her refusal to attend the mediation PSEC had organised for 8 May, and her subsequent refusal to attend a meeting with her employer on 11 May, was undoubtedly frustrating for PSEC and prompted it to take that action. However, on both occasions little notice of the meetings was given to her representative. While her later refusals to attend meetings did seem obstructive and unreasonable, in the two instances that led to PSEC stopping her pay on 11 May, I find Ms Ferguson was justified in wanting more notice.

Determination

[62] Presbyterian Support East Coast is ordered to:

- (a) Pay Ms Ferguson \$2,500 without deduction under s. 123(1)(c)(i) of the Employment Relations Act 2000; and, if it has not already done so,

⁴ Section 124 Employment Relations Act 2000

- (b) Restore Ms Ferguson's sick leave entitlement for the period from 12 May to 6 July 2015.

Costs

[63] Ms Ferguson has been successful in that she has been found to have been disadvantaged by the unjustifiable actions of her employer, although not all her claims have been validated. Her representation was provided by the Hawke's Bay Community Law Centre and no costs were sought in the statement of problem.

[64] PSEC did not initially seek costs. Although it has done so belatedly through its submissions, I do not accept that to be an appropriate avenue for claiming costs. In the circumstances, it is appropriate for each party to bear its own costs.

Trish MacKinnon
Member of the Employment Relations Authority