

Special Bulletin for “Care” Agencies

Commission finds improper restraint of client valid and fair reason for summary dismissal¹

This decision is supportive of an organisations policies and legal obligations, and should be of interest to all organisations that have responsibility for the care of people.

At the time of her dismissal, Ms Joseph was employed as a Disability Instructor at the Respondent’s Mill Park site in a permanent part-time capacity.

For privacy reasons, the client is referenced as “Ms JJ”.

In relation to the incident, The Commissioner found:

- Ms JJ left the program room shortly after 10:00 AM, without anyone knowing that fact, or to escort her.
- When Ms Joseph realised Ms JJ had left the program room she followed after her.
- As Ms JJ left the room she was in a “heightened state”, being agitated and stressed; she moved quickly along the corridor.
- As Ms Joseph followed Ms JJ both were perceived by Ms Gray (another employee) to be rushing. As Ms Joseph followed Ms JJ she was speaking loudly to Ms JJ to “come back to the program room now” and “come back here” and calling out to Ms JJ by both her first and last names.
- When Ms Joseph saw Ms JJ in the counsellors’ room, she saw Ms JJ endeavour to pick up a cup. Ms Joseph tried to prevent her from doing that, including by putting her arm in front of Ms JJ which, because of the combination of Ms Joseph and Ms JJ’s movements, lead to Ms Joseph’s arm being wrapped around Ms JJ’s shoulders and neck. Such action was seen by Ms Gray, who by that time was in the same room as Ms Joseph.
- Ms Gray said words to Ms Joseph to the effect of “stop, don’t grab her like that just let her go”. Those words were also heard by Ms Gravatt who was still in the corridor but had an unimpeded view of what was happening in the counsellors room through a glass window.
- Ms Gravatt was shocked about what occurred and reported it within her management chain, initially being of the view that disciplinary action short of dismissal might be required.
- Ms Gravatt’s consultation with Ms Fois (HR) led in turn for Ms Fois to investigate what had happened by speaking with management.
- She relayed the product of the investigations, as well as further conversation with Ms Gravatt and emails provided by her, to Ms Cox the interim Chief Executive Officer. Between the two they decided that they could not support the continued employment of Ms Joseph.
- Ms Gravatt and Ms Hall went into the meeting on 25 June 2014 with the authority and intention to dismiss Ms Joseph. In that meeting, Ms Gravatt told Ms Joseph she would be dismissed. While Ms Joseph did not deny or put forward an alternative version of events, she did say she should be given another chance.
- After being dismissed, on 27 June 2014, Ms Joseph went to see Ms Fois, and the two had a discussion, in which Ms Joseph said to Ms Fois she had not restrained Ms JJ, even though that is what had been reported, and that she should be given another chance.
- A letter of termination, dated 27 June 2014, was prepared by Ms Fois and signed on behalf of the Acting CEO and sent to Ms Joseph.

The particular conduct that led to Ms Joseph’s dismissal is set out in the termination letter of 27 June 2014 as follows;

“...you were observed restraining a client by your Manager, Jackie Gravatt. You were observed grabbing a client around the shoulders and eventually around the neck as you tried to move the client away from a desk.”

¹ Mini Joseph v Plenty Valley Community Health Ltd. (U2014/10943) [2015] FWC 5327. WILSON, C. 6 AUGUST 2015.

The commissioner concluding:

“PVCH submit that this is a restraint that which justified disciplinary action, since it was contrary to the organisation’s policies; the laws under which it operated and that it potentially put Ms JJ at risk.

“On the basis of the foregoing, I am satisfied that, upon the balance of probabilities, the misconduct as alleged by PVCH took place. The evidence supports first that the actions took place, as I have found in the analysis above, and second that within the context of PVCH’s policies and obligations Ms Joseph’s conduct amounted to misconduct.

“I am satisfied also that Ms Joseph was terminated for the reasons advanced by Ms Gravatt, namely that Ms Joseph was terminated for restraining a client and that her dismissal was not for some collateral purpose, such as bringing to an end what PVCH thought was her probationary period.

“The impression I have taken of her overall evidence is that she has little insight as to her actions, or preparedness to accept what occurred. Further, when questioned or challenged about her actions, Ms Joseph has repeatedly sought to deflect the subject, endeavouring to have her actions explained by other matters, or to deny outright what is being put to her about her actions. as in the meeting on 20 June 2014, the question of Ms Joseph’s actions.

“The whole of the evidence leads, on the balance of probabilities, to the findings of fact I have made above.

“Ms Gravatt recollects Ms Joseph as providing the following responses;

‘I asked her why she grabbed the Client. She simply asked for another chance and said it would never happen again. There was no denial of the conduct’; and

“At no point during the conversation did Ms Joseph deny that what I had seen had occurred or provide a different version of events. Instead, Ms Joseph said that she was sorry and that it would never happen again. She said that she thought she was helping the Client. She said she did not do anything wrong. She also said that I had often role-modelled for her but that there could have been poison in the cup. However, I pointed out to Ms Joseph that she knew that there was no poison in the cup on this occasion and that all poisons are locked away as we are required to do.’

“The totality of Ms Gravatt’s evidence on this subject indicates that in this meeting Ms Joseph was firstly unwilling to accept that the behaviour had even occurred; and secondly desiring to build and maintain the argument that she was helping Ms JJ by keeping her from imminent danger.

“Ms Gravatt’s evidence about the meeting of 20 June 2014, which I accept, indicates questioning to Ms Joseph about what had happened that morning. Ms Gravatt put to her that “unless it was life or death a client should never be grabbed or restrained in any way”, with Ms Joseph dissembling – she didn’t know that was the case or that it was not acceptable; she hadn’t read relevant meeting minutes.

“The operating context of PVCH, including its legislative context, allows that the misconduct I have found is to be viewed seriously...

“On the one hand, Ms Gravatt conceded, and quite properly so, that the conduct she had witnessed was not a malicious act but instead an unsolicited restraint, and that she would treat the two differently;

“Taken collectively, these concerns on the part of Ms Gravatt plainly indicate circumstances that are, from the perspective of PVCH, not tolerable. At the very least, PVCH is entitled to say that disciplinary consequences must be considered in respect of behaviour of this type, once it is established that it has taken place. Such is apparently consistent with the organisation’s operating context.

“Treatment by an employee of a disabled client that was disrespectful, cruel and degrading, has been considered sufficient to justify summary dismissal, even though it may be an isolated act of misconduct or negligence. Further, it has been observed that an employer cannot take the risk of leaving an employee in charge of vulnerable client where there is a reasonable concern that the employee may not react appropriately in all situations. It has also been accepted that a valid reason for termination of employment could arise in relation to an employee of an aged care facility who had used the incorrect manual handling equipment, with a consequential risk to residents, even though the evidence did not establish that the applicant was responsible for causing certain injuries.

“Ms Gravatt’s evidence about restraint indicates both that she considers it unacceptable, as well as that she is endeavouring to change behaviour. Her email about the meeting with Ms Joseph on 20 June 2014 includes this reminder to Ms Joseph of what she had been doing to correct behaviour;

‘I told Mini that unless it was life or death a client should never be grabbed or restrained in any way. Mini said that she did not know.

‘I reminded Mini that I have mentioned it many times and have even stood in the hall way shouting out to staff not to grab this particular client and to support her without touching her and being rude to her.’”

“At the time it made its decision to dismiss her, PVCH had established misconduct on the part of Ms Joseph. Further, it saw a complete unpreparedness on Ms Joseph’s part to accept her actions; an unwillingness to rationally discuss what might have been done by her. It also held background concerns about Ms Joseph’s abilities and skills.

“When combined, these matters are sufficient to be a valid reason for dismissal.”

Until next time...

Greg Reiffel
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