IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 110
CRC 4/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KEES DE BRUIN Plaintiff
AND	CANTERBURY DISTRICT HEALTH BOARD Defendant

Hearing: 5-7 June 2012
(Heard at Christchurch)

Counsel: Andrew McKenzie, counsel for the plaintiff
Penny Shaw, counsel for the defendant

Judgment: 11 July 2012

JUDGMENT OF JUDGE A A COUCH

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[1] Mr de Bruin is a very experienced mental health nurse. In the course of managing a difficult patient, Mr de Bruin responded to an attack on him by slapping the patient's face. The employer concluded that, later in the patient management process, Mr de Bruin restrained the patient by kneeling on her. He was summarily dismissed.

[2] Mr de Bruin pursued a personal grievance that his dismissal was unjustifiable and sought reinstatement. The Employment Relations Authority concluded that Mr de Bruin's dismissal was justifiable and rejected his claim[1]. Mr de Bruin challenged the whole of that determination and the matter proceeded before me in a hearing de novo. Reinstatement remains the principal remedy sought.

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[1] [2011] NZERA Christchurch 185, 25 November 2011.

[3] An important feature of this case is that Mr de Bruin was dismissed on 4 April 2011, very shortly after amendments to the test of justification[2] and the remedy of reinstatement[3] in the Employment Relations Act 2000 (the Act) came into effect on 1 April 2011. This case must therefore be decided on the basis of whether the decision to dismiss and how that decision was reached were what a fair and reasonable and employer "could" have done in all the circumstances rather than what it "would" have done. I must also have regard to the standards of procedure now explicitly included in s 103A.[4] If I conclude that Mr de Bruin was unjustifiably dismissed, I must then consider his claim for reinstatement in light of the amended s 125 which no longer declares reinstatement to be the primary remedy. Those changes to the Act were discussed and analysed by the full Court in *Angus v Ports of Auckland Ltd*[5] and this case requires a practical application of the principles enunciated there.

Background

[4] Mr de Bruin commenced his nursing career in 1969 and qualified as a registered psychiatric nurse in 1973. From 1975, he was employed by the Canterbury District Health Board (CDHB) or its predecessors. For many years, he worked at Templeton Hospital but, when that facility was about to close in 1999, he was transferred to Hillmorton Hospital.

[5] Mr de Bruin had a good employment record. The only significant issue which had arisen in recent times concerned his completion of documentation to the required standards. This had been raised with him as a disciplinary issue in June 2009 and, with help from management, his performance in this area had improved.

[6] At Hillmorton Hospital, Mr de Bruin worked exclusively in the inpatient ward of the Psychiatric Services for Adults with Intellectual Disability (PSAID). This unit caters for patients with mild to moderate intellectual disability who also

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[2] Section 103A.
[3] Section 125.
[4] Subsection (3).
[5] [2011] NZEmpC 160.

have psychiatric disorders. Such patients often exhibit challenging behaviour which requires management by staff.

[7] This case concerns the management of a patient whom I will refer to as M. She is a mature woman weighing approximately 100 kilograms. She has borderline intellectual disability and a personality disorder. When unwell, she is extremely intolerant of other patients and of staff. She is prone to assault other patients and, to a lesser extent, staff. At such times, her behaviour must be managed by the nursing staff. Sometimes, she can be reasoned with and persuaded to change her behaviour. If that is not possible, she is managed by restraint and seclusion[6].

[8] Because of her size and particular medical condition, an unorthodox restraint technique has been developed for M. This involves placing her on a stitched blanket[7] on the floor and dragging her on the blanket to the seclusion area. The technique requires three staff, two at the head and one at the feet of the patient. In the first two weeks of March 2011, M had been secluded by this method on 14 occasions.

Sequence of events

[9] The events in question in this case occurred in the evening of 14 March 2011 at about 7.45 pm. Mr de Bruin was on duty in the PSAID unit with two other staff; Lynda Payne, an enrolled nurse, and Debbie Darcy, a registered nurse. Ms Payne had worked in the PSAID unit for approximately 10 years. Ms Darcy had been there for about two months.

[10] The area in which the events in question in this matter occurred needs to be described. The incident began in the foyer which is about 5 metres by 4.5 metres. After the decision to seclude M had been made, she had to be moved from the foyer along a corridor which is about 7 metres long and about 1.5 metres wide to the area where the seclusion rooms are located. There is a door at each end of the corridor.

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[6] Seclusion involves placing the patient alone in a secure room with minimal stimulus to enable him or her to calm down and resume acceptable behaviour.

[7] A "stitched blanket" consists of two layers, one of wool or other insulating fabric and one of canvas, stitched together to prevent it being torn. Such blankets are about 1.3 metres wide.

[11] The incident began when M became agitated and hit another patient. Staff were unable to calm her and the decision was made to seclude her. All three nursing staff mentioned were involved. When Mr de Bruin approached M, she hit him on the arm and spat in his face. He reacted by slapping her cheek.

[12] The three staff then lowered M on to a stitched blanket and began dragging her on the blanket down the corridor. Mr de Bruin and Ms Payne were at the head of the blanket; Ms Darcy was at M's feet. During this process, M was struggling and kicking.

[13] M was also trying to roll off the blanket. Part way down the corridor, she nearly succeeded in doing so and the nurses stopped to enable Mr de Bruin to grab the side of the blanket and roll M back to the centre. He knelt with one knee on the floor to do this.

[14] The group then completed the journey and M was placed in a seclusion room without further incident. While there, regular routine checks were carried out to monitor her welfare and demeanour. M calmed down and was returned to the ward the next morning.

[15] Later that evening, Mr de Bruin and Ms Darcy completed incident forms. Ms Payne acted as a witness to the signing of both of them. Mr de Bruin reported "On approaching patient [M], she spat in my face", that injuries were "nil" and that the action taken was "Patient partly restrained using blanket. Secluded". Ms Darcy reported "While both patients were standing in the corridor, [M] impulsively hit [another patient] on her right arm", that there were "nil injuries sustained" and that "[M] was secluded to maintain both her own safety and the safety of others".

[16] The following morning, M complained to a nurse about the events of the night before. With the assistance of the nurse, M made the following statement:

> 14 03 2011
>
> When I was restrainted Casey[8] thought I spat at him, then he blamed me for hitting someone. Then he gave a big slap across my face Then he got

[8] Although Mr de Bruin's name is Kees, he was known by many people in the hospital as "Casey".

> blanket, outside Liz Millows office or outside clusion Room he put Knee on my chest and pushed hard. I thought I had broken chest bone. I could not stop crying.

[17] Shortly after that statement was made, M was medically examined by a house surgeon who reported:

> Asked to review patient as complaining of chest pain since last night. Says a member of staff "sat on her chest" which has been painful since. Says she's also having abdominal pain.
>
> Chest pain central over sternum. No radiation or palpiations. No associated autonomic features. Worse on palpation.
>
> Abdominal pain diffuse. Bowels functioning as normal. Complains of nausea after drinking milk but no other GI symptoms.
>
> No Hx of CVD.
>
> On inspection, on evidence of trauma or bruising to the anterior chest wall. Apex non-displaced. HS I + II + 0. Vesicular breath sounds.
>
> Abdomen non-distended. Soft, non-tender. No organomegaly. BS active.
>
> Impression : Musculoskeletal chest pain - ? cause – no clear evidence of preceding trauma.
>
> Plan PRN[9] anti-inflammatory medication

[18] That afternoon, Ms Darcy completed a further incident form which was, again witnessed by Ms Payne. Ms Darcy said:

> Whilst restraining [M], she spat in the face of RN de Bruin and hit him on the arm. He slapped her on the face. This appeared to be a reflex action. He said he regretted it immediately after. I said that it is not good to hit patients and he agreed saying "This has never happened to me before."
>
> He did not sit on the patient's chest as she said at the time.

[19] The nurse who assisted M to make her statement also completed an incident form in which she said:

> While nursing [M] in seclusion this morning she informed me initially and then myself and a fellow nurse that "a nurse slapped me in the face and put his knee on my chest" this alleged incident happened while [M] was secluded yesterday @ 1950 hrs. She is complaining of nausea and sore chest.
>
> C/o feeling nauseous and having sore chest this morning (small amount of vomit in handbasin)

[9] In this context "PRN" means "as required".

House surgeon reviewed [M] @ 1020 nil injuries sustained. Prescribed PRN anti-inflammatory & Paracetamol

[20] These documents were progressively forwarded to Cate Kearney, the service manager whose administrative responsibilities included the PSAID. At about 5pm on 15 March 2011, she tried to telephone Mr de Bruin but was unable to make contact. The following morning, she spoke to him at about 10.30 and told him of the allegation that he had hit a patient. Mr de Bruin was then on the first of two days off but he said that he would like to have the matter dealt with as quickly as possible. After his days off, Mr de Bruin was scheduled to work for four days before taking two weeks annual leave. There was no suggestion that Mr de Bruin be suspended during any investigation. Rather, Ms Kearny said she would tell him where he would work for the four days duty he had coming up. As things turned out, that did not happen as, later that day, Mr de Bruin requested stress leave which was granted.

[21] There followed a period of inactivity. It was not until 23 March 2011 that Ms Kearney began actively investigating the matter. That day, she conducted interviews with Ms Darcy and Ms Payne. She was accompanied at the meetings by Harry Duncan who was then a Nurse Consultant to the Psychiatric service of CDHB. Prior to the meetings, Ms Kearny had prepared a list of seven questions and each meeting was limited to her asking those questions and recording the replies. Those questions and answers were typed up and later confirmed by the nurses interviewed.

[22] The record of Ms Darcy's interview was:

PSAID INPATIENT INCIDENT 14 March 2011

Interview at 1100 on 23.03.2011

Debbie Darcy, RN, PSAID

Harry Duncan, NC

Cate Kearney, SM

Notes: Cate Kearney

Cate and Harry thanked Debbie (DD) for her professionalism in reporting this incident. Described interview process: notes taken that will be sent to Debbie to ensure we have accurately recorded comments made during the interview.

1. Can you please describe the event of 14 March?

[M] very agitated, lashing out shouting. Regular behaviour from her. Unable to be calmed. Decision made to seclude. Used stitch blanket as per treatment plan. She was kicking and fighting. She punched Casey and bit him (can't remember where). And then he slapped her, just slapped her in the face. Don't think it was malicious, think he had had enough.

2. It was reported that [M] spat at CDB. Can you describe what happened at this time?

This was outside the nurse's office before going into de-esc and seclusion area. Punching and kicking also occurred in this area.

3. The incident form stats that the hit was a reflex action. What do you remember?

He didn't think about it at all. it was very immediate. When asked if there was a time delay between [M] action's and the strike, DD stated the patient hit and bit and then he hit her.

5. Did anything else happen?

There was a knee on her chest - Caseys. Debbie indicated he placed a knee on the patient's lower chest and abdomen.

6. Was anything else said to you and the other nurse?

After he slapped her he said, "I'm not going to put up with this behaviour, something like that. Or tolerate this behaviour. He said to Lynda, "OMG that's never happened to me. Later in the drug room he said it's never happened to me before". D reported saying to him, "Not very good to be hitting patients". CDB agreed.

7. Anything else?

CDB did not say anything about reporting this incident.

Wanted to reiterate that the hit did not appear malicious.

We need to consider his personal circumstances

DD stated she felt responsible for reporting the incident and the impact it will have on her colleague. Cate and Harry stated Debbie's professionalism had served her well. She had done the right thing in reporting an incident. What happened from there was not her responsibility and over to the Division to review. Encouraged her to speak with her CNM, CNS or NC at any time. Support was available for her.

Meeting ended at 1130

[23] The record of Ms Payne’s interview was:

PSAID INPATIENT INCIDENT 14 March 2011

Interview at 1400 on 23.03.2011

Lynda Payne, RN, PSAID

Christin Watson NZNO[10]

Harry Duncan, NC

Cate Kearney, SM

Notes: Cate Kearney

Cate and Harry thanked Lynda (LP) for her professionalism in reporting this incident. Described interview process: notes taken that will be sent to Lynda to ensure we have accurately recorded comments made during the interview.

1. Can you please describe the event of 14 March?

LP was [M]'s nurse for the day. After tea, [M] was agitated. [M] slapped another patient. Nurses attempted to redirect. It was decided that [M] needed to go to seclusion. The patient then hit RN DEBRUIN on the arm and spat in his face. LP reported that RN De bruin then slapped [M]. The restraint was messy. [M] continued to hit out. LP remembers that RN De Bruin's immediate reaction was something like - Oh God I shouldn't have done that.

LP remembered the patient was quite shocked after the slap. She reported she may have spoken back to RN De Bruin.

In response to the question was any force used, LP stated that the restraint was messy, [M] was rolled in stitch blanket as per her treatment plan. She needed to be handled assertively.

After the event, Lynda remembered that Casey said he "shouldn't have done that. I hate spit in my face".

2. It was reported that [M] spat at CDB. Can you describe what happened at this time?

[M] hit and spat. He slapped her then the restraint commenced. Not sure that anything was said possibly "don't spit at me" but remains uncertain.

3. The incident form stats that the hit was a reflex action. Please tell us what you remember.

There was no red mark left on the patient's face. The force was more than a tap. Seemed a reaction to being spat out. LP indicated that possibly men hit out where women might withdraw.

5. Was anything else said to you and the other nurse?

LP couldn't recall anything other than RN De bruin saying" I shouldn't have done that"

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[10] Ms Watson's presence at this interview was not explained in evidence but it may be inferred that she was supporting Ms Payne as a representative of the New Zealand Nurses Organisation.

> 6. Anything else?
>
> The incident impacted on LP. She couldn't sleep well that night and asked herself where to go from here. She did not wish to witness an event such as occurred on 14 March. Discussed with CNM on Tuesday when she arrived for D shift.
>
> The meeting ended with NZNO reminding LP of confidentiality. Harry reiterated that there was support available at any time for Lynda via the CNM, CNS or himself.
>
> Meeting ended at 16.25[11]

[24] On 25 March 2011, Ms Kearny and Mr Duncan met with Mr de Bruin and his union representative, Janice Gemmell. Ms Kearny only provided copies of the interviews with Ms Darcy and Ms Payne to them at the meeting and they sought time to consider them. The point was also made that CDHB had not clearly informed Mr de Bruin of the allegations being investigated. These difficulties led to the meeting being cut short and a further meeting arranged for 31 March 2011.

[25] On 29 March 2011, Ms Kearny sent Mr de Bruin a letter formally advising him of the allegations being investigated:

> It has been alleged that on Monday, 14th March 2011, you physically restrained patient [M], slapping her and holding her down with your knee on her chest. If this allegation is substantiated, it may be viewed as serious misconduct in that it may amount to assault. Alternatively, it may be construed as misconduct in not maintaining the expected standards of performance.
>
> In addition, you failed to document the incident - this is in violation of both CDHB and Nursing Council competencies, and if substantiated may also be viewed as not maintaining the expected standards of performance.

[26] Mr de Bruin was asked to attend a meeting on 31 March 2011 to respond to these allegations. He did so with Ms Gemmell. Attending with Ms Kearny were Mr Duncan and Louis van Rensburg, a human resources adviser for CDHB. The meeting was lengthy and included several adjournments. Mr de Bruin had a full opportunity to put forward his recollection of events and to explain the context as he saw it. I deal with some specific aspects of what Mr de Bruin said at this meeting later in my decision. Suffice it to say at this point that Mr de Bruin candidly accepted that he had slapped M during the initial part of the seclusion process and

[11] This was acknowledged in evidence to be an error. The meeting took 25 minutes.

that it was a serious error on his part but said that he did so reflexively. He accepted that, when putting M back on the blanket in the corridor, his knee may have touched M but he denied placing any weight on her.

[27] Mr de Bruin and Ms Gemmell also provided the meeting with a good deal of information about the context in which the events in question occurred. Mr de Bruin spoke of the effects on the ward of the 22 February 2011 earthquake, including sustained stress on staff and patients, the latter reflected in many more acute episodes then usual. Ms Gemmell disclosed a number of other personal issues which had added to the stress Mr de Bruin was under. His wife was suffering from a chronic degenerating and debilitating medical condition.[12] They were under unexpected financial pressure as a result of being called on to repay a loan they had guaranteed for a relative. Another fairly close relative of Mr de Bruin had recently attempted suicide.

[28] Ms Gemmell asked Ms Kearny to speak with Sandy Adams, the charge nurse manager for the PSAID unit and to Jane Foley, the clinical nurse specialist, about the conditions on the ward following the February 2011 earthquakes and their opinions of Mr de Bruin as a nurse. In an adjournment taken for that purpose, Ms Kearney did so. Both Ms Adams and Ms Foley confirmed that the level of "acuity"[13] was high following the earthquake and had been high for some time beforehand. Ms Foley said that it was worst during the two weeks following the earthquakes. They reported that Mr de Bruin was a capable and conscientious nurse and that issues about the standard of his documentation had largely been resolved. They also mentioned that, on the day of the incident involving M, Mr de Bruin had appeared to them to be stressed and upset.

[29] There followed a good deal more discussion. At the end of the meeting, Ms Kearny said she needed more time to make a decision and a further meeting was arranged for the following Monday 4 April 2011.

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[12] Mrs de Bruin died on 17 May 2011.

[13] This was the word consistently used by witnesses to mean frequency and severity of acute episodes.

[30] On 4 April 2011, Ms Gemmell was unavailable and Mr de Bruin was accompanied by Martin Cooney, the secretary of his union, NUPE[14]. Otherwise the participants were the same as the previous meeting. At the outset, Ms Kearny said that she had concluded Mr de Bruin's actions constituted serious misconduct. She acknowledged the context in which the events occurred but said that Mr de Bruin ought to have sought help in managing the pressure on him. Mr Cooney sought an opportunity to make written submissions on Mr de Bruin's behalf but this was not acceptable to Ms Kearny.

[31] Both Mr de Bruin and Mr Cooney pointed out the inconsistencies in statements made by witnesses about the events in question and questioned the veracity of M. Ms Kearny took an adjournment during which she spoke again to Ms Foley who told her that M often made complaints about staff conduct but that this was the first formal complaint she had made. When the meeting resumed, Ms Kearny confirmed her view that Mr de Bruin had been guilty of serious misconduct and told him that he was dismissed.

[32] The next day, Ms Kearney sent the following letter to Mr de Bruin:

> 5 April 2011.
>
> Casey De Bruin
> [address]
>
> Dear Casey
>
> RE: NOTICE OF TERMINATION OF EMPLOYMENT
>
> At the meetings on 31st March and 4th April 2011, you admitted to slapping patient [M] in the face. Whilst you also admitted that your knee may have made contact with the patient during the restraint, you did deny holding her down with your knee - given the complaint and a witness statement, I do however conclude that you did restrain the patient by holding her down with your knee. Following due consideration, the panel came to the conclusion that your actions were in breach of your duties and responsibilities as a nurse and constitute breaches of the Canterbury District Health Board's Code of Conduct. Specifically, that it amounts to assaulting a patient.
>
> This breach constitutes serious misconduct and cannot be accepted by the organisation and consequently, we hereby confirm that as from 4pm on 4th April 2011, your employment with the Canterbury DHB is terminated.

[14] The National Union of Public Employees.

> Any monies still owing to you will be included with a final payment to be paid into your bank account on 14th April 2011. As per your request, your annual leave for the period 21st March to 1st April 2011 will be converted to special leave.
>
> You are required to return any Canterbury DHB property that you have been issued with. Please make the necessary arrangements with Sandy Adams, Charge Nurse Manager, to return the applicable items and to collect any personal items that may still remain on Canterbury DHB premises.
>
> You are again reminded of, and encouraged to, approach EAP on telephone number [number].
>
> Yours sincerely
>
> Cate Kearney
> Service Manager

[33] Whenever a health practitioner is dismissed for "reasons relating to competence", the employer is required by s 34(3) of the Health Practitioners Competence Assurance Act 2003 to give notice of the reasons for the dismissal to the authority controlling registration of that profession. In this case, the director of nursing for CDHB, Stu Bigwood, wrote a letter dated 29 April 2011 to the Nursing Council of New Zealand containing a "statement of events" leading to Mr de Bruin's dismissal. Mr Bigwood was not involved in the disciplinary process and said in evidence that he compiled this summary from information contained in the letter to Mr de Bruin dated 5 April 2011 and from discussions with Mr Duncan.

[34] Acting on CDHB's referral, and following input from the Health and Disability Commissioner, the Nursing Council conducted a meeting to consider whether Mr de Bruin's practising certificate should be suspended on an interim basis or conditions imposed on his scope of practice. The Council determined that Mr de Bruin's scope of practice should be conditional on his obtaining employer approval before commencing employment and on his having professional supervision by a Council appointed supervisor. In its reasons for this determination, the Council said:

> The grounds for the decision are as follows:
>
> - Mr de Bruin was alleged to have engaged in conduct that was relevant to an investigation that was pending under the Health Practitioners Competence Assurance Act 2003 and the Council was of the opinion that this alleged conduct casts doubt on the appropriateness of his conduct in his professional capacity.

- The Council was of the view that the allegations against Mr de Bruin were sufficiently serious to provide reasonable grounds for this decision and that they raised public safety concerns.
- In view of the fact that Mr de Bruin admitted one of the allegations, slapping the face of a resident under his care, and took responsibility for his action, the Council was of the opinion that suspension of his practising certificate was not warranted in this case.
- The Council was of the opinion that Mr de Bruin needed to be employed in a workplace with knowledge of the allegations against him, not only to ensure the safety of patients under his care, but also to ensure his employment was supportive, on the basis that the stress of the ongoing investigation may impact negatively on his practice.
- The Council noted that Mr de Bruin had not taken up the opportunity to engage in supervision offered by his employer and that he should therefore be required to have supervision as a condition in his practice.
- The Council noted that Mr de Bruin had been under a significant amount of stress at the time of the conduct complained of and that professional supervision may provide him with the opportunity to deal with stressors associated with his employment, and in his personal life, thereby protecting public safety.

[35] The Nursing Council has yet to make a final determination of Mr de Bruin's professional status as a result of the events of 14 March 2011 but appears content that he remains fit to practise as a registered nurse subject only to the special conditions imposed in the interim determination. His annual practising certificate has been renewed on that basis. Notwithstanding that, Mr de Bruin has not sought alternative employment as a nurse in the meantime and does not intend to do so until this proceeding is decided. Instead, he has obtained work with an engineering company where he receives $18.00 per hour.

Test of justification

[36] Mr de Bruin alleges that his dismissal was unjustifiable. The statutory test of justification is contained in s 103A of the Act. That section was amended with effect from 1 April 2011 and is now:

> **103A Test of justification**
>
> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
>
> (2) 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 dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[37] These revised provisions were considered by the full Court in *Angus v Ports of Auckland Ltd.*[15] In deciding this case, I adopt and apply important aspects of the analysis set out in that decision. In doing so, I bear in mind that the role of the Court is not to substitute its view for that of the employer. Rather, it is to assess on an objective basis whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

Discussion

[38] The test of justification comprises both the substantive decision made by the employer and how the employer arrived at that decision. It is, however, convenient to discuss the process and the outcome separately. In this case, I begin with the process adopted by CDHB.

[39] Section 103A(3) sets out considerations which must be taken into account when considering process. Subsection (4) expressly authorises the Court to also take any other appropriate factors into account. Subsection (5) precludes conclusions

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[15] [2011] NZEmpC 160.

based on minor or inconsequential defects in process. In applying these provisions, I adopt what the Court in *Angus* said:

> [26] Nor, too, does the new statutory provision alter the approach to what is sometimes referred to as procedural fairness exemplified in a number of decisions of the Court. The legislation (in subss (3), (4) and (5)), although expressing this for the first time, continues the emphasis on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor, and to determine that this will not be fatal to justification. A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be take into consideration having regard to the particular circumstances of the case.

[40] The most significant issue is this case is whether CDHB sufficiently investigated the allegations against Mr de Bruin. It was clear from the outset of the investigation that there were potentially two events involving Mr de Bruin's conduct towards M. The first was the slap which occurred in the foyer. The second was the suggestion that he had knelt on her in the corridor. In her letter of 29 March 2011 setting out the allegations, Ms Kearny combined these two events into a single allegation of assault. Similarly, in her letter of 5 April 2011, Ms Kearney again referred to the events as a single instance of serious misconduct and a single breach of CDHB's code of conduct.

[41] From the outset and consistently throughout the investigation, Mr de Bruin acknowledged that he had struck M on the face in the foyer. The issues in relation to that conduct were ones of degree and context.

[42] The information available to Ms Kearney about what happened in the corridor was far from clear. The original allegation by M in her written complaint was that Mr de Bruin had put his knee on her chest and pushed hard. Later that same day, the doctor who attended her recorded that M said Mr de Bruin has sat on her chest. That was contradicted by Ms Darcy in her report, also written that day.

[43] Although this aspect of M's complaint was clearly before Ms Kearny from the outset, and later relied on for the dismissal, she did not include a question about it in the list she compiled to ask Ms Darcy and Ms Payne. Then, although Ms Darcy mentioned that she thought Mr de Bruin had placed his knee on M's chest, Ms Kearny did not raise this with Ms Payne in her interview which took place subsequently.

[44] In his response to this aspect of the allegation, Mr de Bruin accepted that his knee may have touched M in the course of putting her back on the blanket in the corridor but consistently denied placing any pressure on M. There was also the report of the doctor who examined M the morning after the events in question and could find no evidence of trauma.

[45] Despite the incomplete and conflicting nature of this evidence, Ms Kearny did nothing to clarify the situation. In answer to questions in cross examination, she agreed that she never spoke to M[16] and that, although both Ms Darcy and Ms Payne were readily available, she chose not to speak to them again after the initial interviews. In an effort to justify her conduct, Ms Kearny said that she regarded Ms Darcy's evidence as inherently reliable because she was placed at the foot end of the blanket and would have had the best view.

[46] In this regard, this case bears a distinct similarity to the situation in *Timu v Waitemata District Health Board*[17], a case which also involved a disputed allegation of assault by a mental health nurse on a patient. I reiterate what I said there:

> [93] In general, it may well be acceptable when initiating an investigation into suspected misconduct for an employer to simply ask witnesses what they know and to listen uncritically to their replies. Equally, if what the witnesses say is consistent and apparently complete, it may be acceptable to rely on what they have said without further inquiry. Where, however, there are significant differences between the accounts given by witnesses or the responses are unsatisfactory, more will be required of the employer to ensure that the investigation is full and fair.

Evidence that she had been told by the charge nurse manager that it would be inappropriate to talk to [M] and she accepted that advice.

[17] [2007] ERNZ 419.

[47] The circumstances of this case demanded further investigation. Ms Payne was on the spot and obviously in a position to have seen what happened in the corridor. As the other person at the head of blanket, she was closer to Mr de Bruin and, logically, in as good or better position than Ms Darcy to see what happened. There must also have been some doubt about the accuracy of Ms Darcy's recollection of events generally. In her interview on 23 March 2011, she said that Mr de Bruin slapped M in response to her biting him and that M spat at Mr de Bruin some time later. That account was inconsistent with what Ms Darcy had written in the incident form she completed the day after the incident when she said that M spat at Mr de Bruin before he slapped her. It was also inconsistent with what all other witnesses said. In these circumstances, Ms Payne ought to have been re-interviewed and asked about what happened in the corridor and Ms Darcy re-interviewed to get more detail of her recollection of events.

[48] While the fact that Mr de Bruin slapped M was not in doubt, the circumstances in which that occurred were critical to any conclusion reached about the seriousness of his conduct. Two of the key issues were whether the slap was deliberate and the amount of force used.

[49] Ms Darcy and Mr de Bruin both said that the slap was a reflexive action. When she was asked about this in her interview, Ms Payne did not directly answer the question. In reaching the decision to dismiss Mr de Bruin, Ms Kearny concluded that the slap was deliberate. She did so without putting that conclusion to Mr de Bruin or to Ms Darcy and without re-interviewing Ms Payne on the point.

[50] It was also apparent that little inquiry was made about the force with which Mr de Bruin slapped M. Ms Payne said in her interview that it was "more than a tap" but left no mark on M's face. Ms Darcy did not comment on the force used and was not asked. Mr de Bruin also said the slap left no mark on M and added that it would not have hurt her. The failure to re-interview Ms Darcy and Ms Payne left this issue far from clear.

[51] I find that, in respect of each of these important issues, the investigation was distinctly insufficient and failed to meet the standard required by s 103A(3)(a) of the Act.

[52] In reaching this conclusion, I have had regard to the resources available to the employer, as required by the statute. CDHB is a very large employer with a substantial in-house human resources team. Ms Kearny was assisted throughout the investigation process by Mr van Rensburg who said in evidence that he has over 20 years experience in human resources. Such an employer can properly be expected to conduct an investigation fully and thoroughly. Any significant failure to do so will be unjustifiable.

[53] Another issue of process arises under s 103A(b) and (c). In the letter of 29 March 2011 advising Mr de Bruin of the allegations against him, it was said that his failure to document the incident on 13 March 2011 was "in violation of both CDHB and Nursing Council competencies". It emerged in evidence that, although this letter was signed by Ms Kearny, it was written by Mr van Rensburg. When asked what this passage meant, he said that it was intended to be a reference to the CDHB code of conduct. He was unable, however, to satisfactorily explain why the letter did not state explicitly which particular policies or standards were said to have been breached. He took the view that Mr de Bruin should have been able to work it out for himself. When asked why a copy of the relevant document was not attached to the letter, Mr van Rensburg said he thought Mr de Bruin would be provided with that by his union.

[54] This was a thoroughly unsatisfactory approach to informing Mr de Bruin of this allegation and enabling him to properly respond to it. Unless the employer is unable to do so, every allegation should be specific and, where it is based on a document, accompanied by a copy of that document. I find that CDHB also failed to meet the requirements of s 103A(3) in this regard.

[55] I mention another matter which falls outside the specific issues referred to in s 103A(3) but may be considered under s 103A(4). Throughout the investigation process, Mr de Bruin and his representatives were told that Ms Kearney was the

decision maker. That was also the impression given by the CDHB witnesses in their evidence in chief. As that evidence was explored in cross examination and questions from the Court, however, it emerged that Ms Kearney, Mr Duncan and Mr van Rensburg formed a panel which reached conclusions and made the decision to dismiss Mr de Bruin. This was reflected in the letter of 5 April 2011 which explicitly recorded that "the panel" came to the conclusions which led to Mr de Bruin's dismissal. In the deliberations of that panel, key conclusions were initiated by Mr Duncan.

[56] No explanation was given for this apparent deception and it is difficult to see any good reason for it. As Mr de Bruin was actually heard by all three decision makers, however, I place only minimal weight on it.

[57] In the passage from the judgment in *Angus* set out above, the full Court said: "A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified." Subject to that failure exceeding the threshold set by subs (5), that is being more than minor and resulting in actual unfairness to the employee, I agree. A fair and reasonable employer will not adopt a process which is unfair and/or prejudicial to the employee. If such a process is adopted, it will in most cases render the conclusions reached and the action taken by the employer unjustifiable. That is because the scope and quality of information on which they are based will be less than it ought to be. That connection is amply demonstrated in this case.

[58] It was common ground that Mr de Bruin slapped M in the foyer while he and the other two nurses were attempting to initiate the seclusion process. It was also clear from all the evidence before the panel that this followed immediately after M struck Mr de Bruin and then spat in his face. The panel found that this slap was wilful as opposed to reflexive or instinctive. That conclusion was urged on the other members of the panel by Mr Duncan. His view was that the training given to nurses was so comprehensive and effective that it precluded the possibility of any reflexive action. It followed, in his view, that Mr de Bruin must have slapped M deliberately. The other members of the panel accepted that view, even though it was at odds with the evidence before them.

[59] This conclusion was not one which a fair and reasonable employer could reach. Nurses, no matter how well trained, remain human beings subject to the instincts and frailties of the human condition. Through training, nurses learn to modify and constrain their natural responses in stressful situations but to conclude that training necessarily prevents nurses having natural reactions is not credible.

[60] This conclusion that the slap was deliberate was very significant. As Mr van Rensburg readily conceded in evidence, a deliberate action must be regarded as a much more serious matter than a reflexive one.

[61] There is also difficulty with the panel's conclusion that Mr de Bruin's actions in the foyer constituted serious misconduct warranting dismissal. Their reasoning was that, because what Mr de Bruin did was described as a "slap" or as "hitting" M, it inevitably amounted to an assault, that any assault on a patient was serious misconduct and that serious misconduct justified dismissal. This seemed to reflect the criminal law concept of assault which can comprise even the merest touching.

[62] Nursing is a profession in which touching patients is an essential part of the work and, in a unit such as PSAID, nurses need to physically restrain or coerce patients on a regular basis. To properly reach a conclusion that what Mr de Bruin did was serious misconduct warranting dismissal, the panel needed to know how hard the slap was. Not every touch to the face with a hand would constitute serious misconduct. As Mr de Bruin put it in his evidence, there are hard slaps and soft slaps. He said that he gave M a "soft slap". In the course of the investigation, Mr de Bruin immediately accepted that what he had done was wrong but the degree of force used was not discussed with him. Ms Payne said that it was "more than a tap" but that it left no mark. She was not asked to demonstrate or to be more precise. Ms Darcy was not asked at all. This lack of proper investigation rendered the conclusion that Mr de Bruin was guilty of serious misconduct warranting dismissal because of the slap unfair and unreasonable.

[63] I also find that the conclusion that Mr de Bruin held M down with his knee in the corridor was not one which a fair and reasonable employer could have reached in the circumstances of this case. That is for two reasons. Firstly, as discussed above,

the investigation of this aspect of the matter was also insufficient and incomplete. Secondly, on the information available to the panel, that was not a sensible conclusion. M made two differing allegations; that Mr de Bruin knelt on her and that he sat on her. The allegation of sitting was clearly untrue and this must have cast doubt on her reliability but it was never clarified what she really meant. Ms Darcy said that Mr de Bruin "placed a knee" on M's chest but said nothing about any application of force or reaction by M. The doctor who examined M found no evidence of trauma. Mr de Bruin candidly agreed that his knee may have come into contact with M when he knelt on the floor to get her back onto the blanket but he denied applying any force. This was a description of acceptable conduct yet, inexplicably, the members of the panel seemed to regard it as confirmation that Mr de Bruin had held M down with his knee. Overall, the information before the panel did not provide a proper basis for the very serious conclusion that Mr de Bruin had committed an assault on M in the corridor.

[64] The test of justification must be applied having regard to all the circumstances at the time in question. Those circumstances included the recent catastrophic earthquake and the aftershocks which were still continuing. That had a seriously disturbing effect on both patients and staff in the PSAID unit. The panel was also made aware of the several personal factors which were then placing Mr de Bruin under additional serious pressure. This was far from a normal situation and proper account needed to be taken of that fact. Although members of the panel said that they took these circumstances into account, I am not convinced that they did so to the proper extent.

[65] An important factor was Mr de Bruin's length of service and experience as a mental health nurse. The members of the panel all regarded this as an aggravating factor. Effectively, they said that a nurse of his experience ought to know better than to hit a patient and they gave him no credit for more than 40 years of practice without serious incident. I find that was not a view that a fair and reasonable employer could take. Experience as a nurse was not required to know that it was wrong to hit a patient. That is obvious to any reasonable person. Mr de Bruin acknowledged it at the time and afterwards without hesitation. On the other hand, his very lengthy good service showed that, apart from this incident, he was a capable

and reliable nurse. That ought to have been an important factor in assessing the likelihood of his repeating such conduct in future.

[66] In this case, CDHB also needed to be conscious of the professional consequences of dismissal. I agree with what the Chief Judge said in *Lewis v Howick College Board of Trustees*[18] about teachers and adopt it as being equally applicable to the nursing profession:

> [5] As in the cases of other professional employees whose very livelihoods are affected by a dismissal from employment, the consequences for a school teacher of dismissal for misconduct or incompetence and especially, as in this case, a summary dismissal for serious misconduct, affect not only that employment relationship. Whereas many other dismissed employees have opportunities to seek alternative employment within their fields of experience and for which they are qualified, teachers (and others) must also be professionally registered to practise. Dismissals of teachers (and a range of lesser sanctions in employment) trigger automatically a vocational or professional registration investigation. As with many other professions there is little, if any, opportunity for employment in New Zealand without registration. An employer dismissing a teacher is bound by law to advise the Teacher Registration Council. As in this case, it can be expected that there will be a level of inquiry into the teacher's fitness to be registered in light of the circumstances of the dismissal and other relevant considerations. So the effect of the dismissal of a teacher is especially significant. Put simply, allegations of misconduct or incompetence place teachers (and other similarly registered occupations) in double jeopardy of their livelihoods.
>
> [6] Accordingly, employers of teachers must act to a high standard when their decisions can have these consequences. ...

[67] Drawing all these factors together and applying the test in s 103A(2), I find that the decision to dismiss Mr de Bruin and the process adopted to reach that decision were outside the range of what a fair and reasonable employer could have done in all the circumstances at the time. The dismissal was unjustifiable.

Remedies

[68] The principal remedy sought by Mr de Bruin is reinstatement to his former position. Whether that remedy ought to be granted turns on two factors. The first is whether the test in s 125 of the Act is met. If it is, the second issue is whether the

[18] [2010] ERNZ 1.

nature and degree of contribution by Mr de Bruin to the situation is such that he should be denied reinstatement.

[69] Section 125 of the Act provides:

> **125 Remedy of reinstatement**
> (1) This section applies if—
> (a) it is determined that the employee has a personal grievance; and
> (b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).
> (2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.

[70] The key expression in s 125 is "reasonable and practicable". The meaning and application of the term "practicable" in the context of reinstatement is well established. In *Lewis v Howick College Board of Trustees*[19] the Court of Appeal endorsed the view adopted in a previous decision:[20]

> Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully.

[71] Reinstatement was opposed by CDHB. When the reasons for that opposition were explored, however, it emerged that the only reason for opposition was concern that Mr de Bruin might assault another patient. There was no suggestion of animosity towards Mr de Bruin, incompatibility with staff or patients or of practical difficulty in reintegrating him into the workplace. To their credit, Ms Kearney and Mr Bigwood readily agreed that, if reinstatement was ordered, they would ensure Mr de Bruin was provided with all the support he might need. I find that reinstatement would certainly be practicable.

[72] Whether reinstatement would be reasonable is a related but different issue. In *Angus* the full Court, after referring to the Court of Appeal decision in *Lewis*, said:

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[19] [2010] NZCA 320 at [2].
[20] [2010] NZCA 320 at [2]. *Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA).

> [65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.
>
> [66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[73] In this case, deciding whether reinstatement would be reasonable turns on an assessment of the likelihood that Mr de Bruin would assault another patient or commit another equally serious breach of his professional and employment obligations.

[74] The circumstances which prevailed on 13 March 2011, and which I find were a major contributing factor, have substantially changed. The immediate consequences of the major earthquakes are no longer affecting Mr de Bruin. I accept his evidence that he remained troubled by ongoing aftershocks for some time but has now come to terms with them. As noted earlier, Mr de Bruin's wife died in May 2011 and so, by that tragic means, the major concerns he had about her health and well being came to an end. The financial pressure on Mr de Bruin has also been reduced by bringing the unexpected debt he had to meet under management.

[75] There is no question that Mr de Bruin is acutely aware that his action in slapping M on 13 March 2011 was wrong. He acknowledged that immediately after the event and has consistently done so since and I accept his evidence that the subsequent disciplinary process and his dismissal have heightened his awareness of his professional obligations. It is notable that the Nursing Council found this recognition of wrongdoing a persuasive factor in their interim decision.

[76] On the other hand, Mr de Bruin is a very experienced and capable nurse who has a good deal left to contribute as a professional practitioner.

[77] I am satisfied that what occurred on 13 March 2011 was a truly extraordinary, one-off event which is extremely unlikely to occur again. On that basis, I conclude that reinstatement would be reasonable as well as practicable.

[78] In reaching that conclusion, I accept the evidence of many of the witnesses that PSAID patients are particularly vulnerable and, in many cases, unable to advocate for themselves. A heavy obligation rests on CDHB to protect and care for them. Given Mr de Bruin's many years of professional service and the factors I have discussed above, I am satisfied that the risk of unnecessary harm to those patients as a result of his reinstatement would be minute.

[79] Although I have not taken it into account in reaching my conclusion that reinstatement is reasonable, I am reassured in that conclusion by the interim decision of the Nursing Council. It was satisfied that Mr de Bruin could safely continue to practise in the time before his case was substantively determined. I would expect the Council to take a conservative approach to such matters and, had they believed there was an appreciable risk of further harm to patients, they would have suspended his registration in the meantime.

[80] Having concluded that Mr de Bruin was unjustifiably dismissed, I must apply the provisions of s 124 of the Act:

> **124 Remedy reduced if contributing behaviour by employee**
> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[81] There can be no doubt that Mr de Bruin contributed substantially to the situation which gave rise to his dismissal. Slapping M on the cheek was plainly wrong and a breach of his professional obligations. On all the evidence, I find that it was, as Mr de Bruin described it, a "light slap". I also find that it was a reflexive action and that it occurred in extraordinary circumstances arising out of the then recent Christchurch earthquakes and the personal pressure Mr de Bruin was under.

Even on that basis, it was very significant misconduct. Mr de Bruin acknowledged this in the course of the investigation when he described his own conduct as "up there".

[82] Although I have recognised the personal pressure on Mr de Bruin at the time as an important factor, I find that Mr de Bruin was at fault for failing to take appropriate measures to deal with that pressure. He had professional supervision and counselling available to him and erred in deciding he could cope without availing himself of those services.

[83] Mr de Bruin's failure to promptly report the incident was also in breach of his duty to CDHB. This cannot be regarded as particularly significant misconduct, however, as Ms Darcy and Ms Payne had a similar duty which they also failed to discharge and there was no suggestion of disciplinary action in relation to them.

[84] Evidence was also given about the fact that Mr de Bruin did not summon medical attention for M when she was secluded. I am satisfied that, in the circumstances, it would have been prudent to have M examined promptly to ensure that she had suffered no physical harm as a result of the events that evening. In contrast to the issue of reporting the incident, however, it was not established that Mr de Bruin had an affirmative duty to initiate a medical inspection in the particular circumstances of this case. Three other factors are also relevant. Ms Darcy and Ms Payne were in the same position as Mr de Bruin and, as noted earlier, there was no suggestion of disciplinary action against them. Second, there was an established routine that patients who were secluded were examined by a medical doctor as part of that process. Third, M showed no signs at the time of having suffered any physical harm. In the circumstances of this case, I find that Mr de Bruin's failure to have M medically examined immediately after the incident was arguably misjudgement rather than misconduct and, in any event, was no more than minor misconduct.

[85] It is significant that s 124 requires the Court to take contribution into account in deciding both the nature and the extent of remedies to be awarded. Where the Court concludes that there has been serious misconduct, that may well be reflected in

a decision not to award reinstatement, even if that might otherwise be an appropriate option.[21] In this case, I find that the nature and extent of Mr de Bruin's contribution to the situation giving rise to his dismissal was substantial in both respects but that it was not so great as to make reinstatement inappropriate. Rather, he should be denied all other remedies to which he would otherwise have been entitled.

[86] Those other remedies are not insubstantial. Counsel's calculation showed that Mr de Bruin's income during the 14 months following his dismissal was some $44,000 less than it would have been had he not been dismissed. I am also satisfied on the evidence that Mr de Bruin suffered considerable distress as a result of his dismissal and would otherwise have been entitled to compensation for that.

[87] There are likely to be practical issues in reinstating Mr de Bruin to his former position. Mr de Bruin will also need to give his current employer notice of his resignation. The terms of the order for reinstatement will be that CDHB is to commence paying Mr de Bruin two weeks after the date of this decision and he is to be returned to work no later than four weeks after that date. For his part, Mr de Bruin is to cooperate fully with any reasonable requirements by CDHB necessary to facilitate his return to work and is to be available to work from a date two weeks after the date of this decision.

Comments

[88] Although I have not explicitly referred to the submissions of counsel in this judgment, I confirm that I have considered them fully and found them useful in reaching my decision. I commend counsel on their submissions which were thorough and thoughtful. I also commend the commitment of the parties, their witnesses and counsel to completing the hearing of this matter promptly despite a severe snow storm which closed all other courts in Christchurch.

[89] The fact that I have reached a different conclusion to the Authority should not be seen as a reflection on the Authority. This was not an easy case, requiring as it did the application of recently changed legislation. At the time the Authority made

[21] See, for example, *Irvines Freightlines Ltd v Cross* [1993] ERNZ 424.

its determination, the full Court had yet to deliver its decision in *Angus* which I have found to be of considerable assistance. I also had the benefit of key aspects of the evidence being explored in greater depth than they apparently were in the course of the Authority's investigation.

[90] At the conclusion of the investigation on 4 April 2011, Ms Kearney told Mr de Bruin that the reasons for his dismissal were assaulting M, failing to document the incident promptly and failing to obtain medical attention for M immediately after the incident. On Mr de Bruin's behalf, Mr Cooney asked Ms Kearney to record those reasons in a letter. She did so in her letter of 5 April 2011 which refers only to assaulting M by slapping her and holding her down with a knee. This left Mr de Bruin with inconsistent statements of the reasons for his dismissal. As a matter of principle, an employee who has been dismissed is entitled to know with certainty and clarity what those reasons are. While there is an implied criticism in this comment, it is not a matter I have taken into account in reaching my decision.

Summary

[91] In summary, my judgment is:

(a) Mr de Bruin was unjustifiably dismissed.

(b) CDHB is ordered to reinstate Mr de Bruin to his former position on the following terms:

   (i) CDHB is to begin paying Mr de Bruin two weeks after the date of this decision.

   (ii) CDHB is to restore Mr de Bruin to working in his former position no later than four weeks after the date of this decision.

   (iii) Mr de Bruin is to cooperate fully with any reasonable requirements of CDHB necessary to facilitate his return to work and is to be available to work two weeks after the date of this decision.

   (iv) Leave is reserved for either party to seek variation of these terms if circumstances require it.

(c) In recognition of his contribution to the situation giving rise to his personal grievance, Mr de Bruin is awarded no other remedies.

(d) The determination of the Authority is set aside and this decision stands in its place.

Costs

[92] Subject to any factors of which I am currently unaware, Mr de Bruin is entitled to a contribution to the costs incurred in this proceeding by him or by his union on his behalf. The parties are encouraged to agree costs if possible but, failing agreement, memoranda should be provided. Mr McKenzie will have 20 working days in which to do so. Ms Shaw will then have a further 15 working days in which to respond.

A A Couch
Judge

Signed at 9.00am on 11 July 2012.