IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 199/09
5126618

	BETWEEN	A Applicant
	AND	B LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Jenny Beck, Counsel for Applicant Eleanor Robinson, Advocate for Respondent
Investigation Meeting:	9 June 2009 at Dunedin
Submissions received:	17 July 2009 and 19 August 2009 from Applicant 3 August 2009 from Respondent
Determination:	20 November 2009

DETERMINATION OF THE AUTHORITY

Prohibition of publication

I prohibit from publication the name of the applicant and the respondent, the identity of the client of B Limited who is referred to in this determination as the resident, and the employees' names who made complaints to B Limited about A, under clause 10(1) of Schedule 2 of the Employment Relations Act 2000.

For easier reading I shall use the following letters:

A	is the applicant,
Mary	was the applicant's support person throughout the disciplinary process
J	is a Charge Nurse at B Limited's facility
B Limited	is the respondent
R	is the Facility Manager
W	is the Chief Operating Officer of B Limited
M, T and S	are the three employees who made written complaints about A

A fourth employee who also filled in a complaint form and made a subsequent statement is AS.

Employment relationship problem

[1] A says that she was unjustifiably dismissed from her employment as a Hospital Aide at a rest home on 28 May 2008. A had worked at the rest home since October 2005 and says that the conduct relied on by her employer as justification for her summary dismissal did not occur.

[2] A seeks lost wages for the period it took her to find further employment from 28 May 2008 until 7 July 2008, compensation in the sum of $20,000 and costs.

[3] B Limited say that A was not unjustifiably dismissed from her employment and that following disciplinary meetings in an attempt to resolve matters short of dismissal, she was justifiably dismissed for an inappropriate request by her for other staff to view her genitalia, putting undue stress on other staff and inappropriate physical contact with a resident.

Test of justification

[4] The Authority is required to assess the justification for the dismissal in terms of s.103A of the Employment Relations Act 2000. The Authority is required to determine on an objective basis whether B Limited's actions and how B Limited acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

The issues

[5] The following issues require determination:

- Did B Limited carry out a full and fair investigation into the conduct of A that it relied on as serious misconduct?
- Was the decision of B Limited to summarily dismiss A justifiable in all the circumstances?
- If A was unjustifiably dismissed, then what remedies is she entitled to and are there issues of contribution or mitigation?

Did B Limited carry out a full and fair investigation into the conduct of A that it relied on as serious misconduct?

Disciplinary investigation

Suspension

7 May 2008

[6] On 7 May 2008 A reported as usual for duty, although her evidence is that she noticed her name had been omitted from the daily diary and that another Aide had been allocated patients she had previously cared for. A was asked to attend a meeting by the Facility Manager at the Centre, R. A Union representative attended with A, although A did not feel she had a choice in terms of that representation because it was in essence arranged by R.

[7] A was advised that R had received formal complaints by other staff members on that date and I am satisfied that she understood at that stage there were two concerns. The first was that A was suicidal and the second was that A had made inappropriate comments of a sexual nature causing offence to other staff members.

[8] I am satisfied that R was concerned at that stage about A's wellbeing because of the nature of the allegations from other employees. I find that she wanted, in my view reasonably, to make sure that A had support at that time. I am satisfied that it was reasonable for R not to go into too much detail about the allegations in all the circumstances. I accept that it would have appeared to R that A agreed to a suggestion that she go home until further notice, or, in legal terms, that her employment was suspended although A thought she had no real choice in the matter. There is no separate claim in terms of the actions of B Limited with respect to suspension although there is reference to the process and substance leading up to and at the time of suspension in the applicant's final submissions.

[9] A's employment agreement provides, in clause 11, that the employer may suspend the employee where serious misconduct is alleged or being investigated. The clause provided that the employer will seek the employee's input before suspension and that suspension will be on full pay.

[10] I accept there was a real possibility that B Limited was unlikely to be persuaded to a course of action other than suspension but A's input was still sought. In *Graham v. Airways Corp of NZ* [2005] ERNZ 587 (para.104) it was held there was

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. *Tawhiwhirangi v. Attorney-General in respect of Chief Executive of Department of Justice* [1993] 2 ERNZ 546, was referred to in *Graham* as confirming a case by case, flexible and sensible approach. It was held in *Graham* that the test in each case was the fairness and reasonableness of the employer's conduct. A test in s.103A requires an objective inquiry into what a fair and reasonable employer would have done in all the circumstances at the time A was suspended.

[11] Whilst I do not find the process around the suspension was ideal the initial and significant concern was A's well being. There is no claim that any unfairness in this regard be separately compensated for and in all the circumstances the suspension falls to be considered as part of the overall process undertaken by B Limited leading to the dismissal.

[12] After she was suspended A went to see a friend who was able to give her support at that time as she was distressed. I shall refer to that person from hereon as Mary. Mary supported A and represented her throughout the disciplinary meetings from that point on.

[13] From 7 May 2008 A was suspended on full pay pending the investigation and outcome of allegations which were clarified when she picked up a letter from R on 8 May 2008. She did not return to work after this date.

Letter dated 8 May 2008

[14] The letter of 8 May 2008 provided, amongst other matters, that there were five complaints which were regarded as serious. These complaints were as follows:

(a) Fear of A's mental wellbeing/threatening self harm.

(b) Staff harassment by text messaging (27 times in one day), telephoning/sitting outside of staff members' homes.

(c) Inappropriate requests by A for other staff members to view her genitals.

(d) Putting undue stress on other employees.

(e) Inappropriate physical contact with residents.

[15] Attached to the letter were copies of four written complaints from other employees.

[16] A was invited to attend a disciplinary meeting at 1.30pm on 13 May 2008 in R's office and she was advised that W, the Chief Operating Officer, would also be present at the meeting. A was reminded that the investigation process was confidential and that she was asked not to approach the complainants in relation to the matter. She was further advised that should she do so disciplinary proceedings may be commenced in relation to the breach of confidentiality which could result in termination of her employment.

[17] I have set the complaints from M and S out in full and what I consider to be the relevant part from both the AS complaint and from T's written note. The complaints were received by R in writing on 7 May.

M's complaint

> *I was asked by A to inspect her genital area to see if it was normal. I refused and A became unstable. She txt me 47 times in 4 hours telling me she would commit suicide. A texted me that she wants to die. I feel as though the impact on my work and home life is suffering as a consequence. I have taken sick leave due to the pressure at work when on the same shift. I have asked A to go for help and said I would go with her but she refused. I have witnessed A overdose her medication on shift.*

S's complaint

> *I have been offended by a staff member because we didn't want to see her private part. To me this is a rude and shameful thing to talk about it at work.*

AS's complaint

> *Overheard T, M and S saying something funny about A A text M asking why they said it but then heard from T she text 37 times some saying she wishes "she woke up in hell"……..*

T's complaint

> *A month ago there was a resident who wasn't well at all. She was always on her bed. This day the resident was incont of faeces and was waiting to be catheterised again. Because she was so heavy to turn it took 3 caregivers to clean her up. There was M, A and myself. As we had finished cleaning resident up A got her gloved finger and stuck it straight in her vagina to see if it was clean. I couldn't believe*

> *my eyes of what I had witnessed. I'm glad that I wasn't alone in the room when that had happened.*

Further interviews with complainants

[18] B Limited undertook further interviews with three of the complainants in person between 7 May 2008 and the disciplinary meeting on 13 May 2008.

[19] The extent of any discussion with AS was limited, I find, to ascertaining whether she knew what the other complainants M, T and F had been laughing about on 3 May 2008. R concluded as a result of that discussion with AS that AS did not know what they were laughing about.

13 May 2008

[20] A attended at this meeting with Mary and an NZNO Organiser. R attended with W, the Chief Operating Officer. A had prepared to answer the allegations. In terms of objectively assessing the actions of B Limited as to whether there was a full and fair investigation the nature of an employee's explanations are obviously important both in terms of assessing the fairness and reasonableness of further investigations and conclusions about the nature and/or seriousness of the conduct.

[21] A disputed the number of text messages sent as set out in the complaint by M. She provided a transcript of the texts. To the extent that W said Mary accepted that she had changed the meaning of the text by editing, this was not accepted by Mary in her evidence provided to the Authority investigation meeting because she said that she had simply extended the abbreviations. I am satisfied comparing as best I can the text messages supplied by M to R and W and the transcript provided at the 13 May 2008 meeting by A where the texts are the same that the abbreviations were extended but that in effect was the only editing.

[22] A denied that she had ever requested M and/or S view her genitals. She said that the employee M had initiated the conversation in the nurses office with her about genitals by saying that her daughter had the same issue as A. A did not dispute that there had been a discussion about her genitalia on 1 May 2008 and that S would have overheard. She explained that she had talked about her concerns as whether she was normal in that regard with M sometime earlier on a confidential basis and that she considered M to be a friend.

[23] A did not accept that the text messages supported that she intended self harm. A explained that she thought M,S and T had been making fun of her condition on 3 May 2008 because she had been told by AS that they had been laughing at A's flaps all that night. A said that she became distressed because of this but there was no reference in the text to suicide or self harm. The number of text messages in M's complaint was incorrect. The first text message at 1854 hours on 4 May 2008 from A to M provides:

> *So what's this about my flaps that you all laughed about last night? that's real personal M and to be told that my work mates are laughing about it HURTS.*

M responds by text and denies that that was the subject of the laughter.

[24] There is an important dispute that I am required to resolve in terms of A's explanation about the alleged inappropriate conduct with the resident. It is whether A acknowledged, as R and W thought she had, during the meeting on 13 May 2008 that she was undertaking personal care of the resident one month prior with M and T. There is no dispute that A at the 13 May 2008 meeting denied that the incident took place and denied that there was any inappropriate contact. A said in her written evidence provided for the purposes of the Authority investigation meeting and in her other evidence, that her words had been twisted and she did not as R and W maintain *acknowledge she was engaged in the personal care for the resident some one month prior*. Mary supported that and said in her evidence that A quite clearly said she could not recall the incident they were referring to with respect to the resident.

[25] I did not have the assistance in resolving this dispute of notes taken at the disciplinary meeting about this matter. I do, however, have the benefit of A's written statement that was provided to and considered by R and W at the meeting on 23 May 2008 and also some notes that A prepared in advance of the meeting of 13 May 2008 which are attached to Mary's statement of evidence as document "D". A's written statement that was available by 23 May provided in relation to that allegation *With regard to the allegation of sexual inappropriateness made by T and since supported verbally by M. I strongly deny that the discussion they claim they had with me about the alleged behaviour ever took place. It simply did not happen!* R and W said that A's written statement that was available to them at the 23 May meeting provided no new information.

[26] A's notes that she prepared and spoke to for the first meeting on 13 May 2008 therefore become important. They provide:

> *I do not recall any such situations referred to by T. When performing a resident's personal hygiene care I do as a matter of practice ensure all skin folds are clean and dry. I can however categorically state that I have never performed an invasive procedure as described by T on any resident.*

[27] I am not satisfied from the evidence that A did acknowledge that she was engaged in the personal care of the resident a month prior. It may have been that R and W genuinely thought that she had but I am not satisfied objectively assessed that a fair and reasonable employer would have concluded this without further investigation in light of the nature of the explanation. I do not find that it was clearly established in the absence of an acknowledgement from A or in any other way aside from the statement from T which was verbally supported by M that A was present at the time with T and M when the resident was being cared for.

[28] There was an adjournment during the meeting on 13 May 2008 of what I find to be about 15 to 20 minutes duration. R and W telephoned M and S in light of A's explanation that she did not request they view her gentials and A was advised that both women still maintained that on 1 May 2008 A had requested, or tried to show them her genitalia.

[29] At the end of the meeting on 13 May 2008 A was given time to provide a handwritten statement and this was either emailed prior to or produced at the next meeting, which was scheduled for 23 May 2008.

Meeting 23 May 2008

[30] A attended this meeting with Mary and there was also another NZNO organiser present. R attended with W. There was discussion about some new information that R and W had obtained. Between 13 May and the meeting on 23 May, R and W had discussed the allegation concerning inappropriate physical contact with the resident with T and M.

[31] The allegation involving the elderly resident had changed after discussion with R and W from the insertion of one finger into the elderly resident's vagina to three fingers.

[32] Mary asked R and W to speak to a registered nurse at the facility about the possibility of any person being able to insert three fingers into the resident's vagina due to the resident's size and physical condition. W said that this had already been discussed with another registered nurse and that W herself, as a registered nurse, knew that it was feasible for this behaviour to have occurred regardless of the size and condition of the patient. It was not considered necessary by R and W to talk to the registered nurse that Mary had referred to.

[33] R and W advised at that meeting in terms of the five allegations, there was insufficient evidence to conclude that there had been serious misconduct in terms of the staff harassment by text messaging and threatening self harm so as to justify dismissal.

[34] R and W advised Mary and A that B Limited concluded there was serious misconduct in terms of:

- Request to view genitalia;
- Causing undue stress to other employees;
- Inappropriate physical contact with the resident.

[35] R and W, after discussion with the NZNO organiser, provided an offer to A on a without prejudice basis in letter form. This was unacceptable to A. Attached to the letter was the investigation outcome with findings in terms of each complaint.

28 May 2008

[36] Some discussion had taken place around the offer between 23 and 28 May 2008. On 28 May 2008 Ms Beck was been instructed by A and she contacted B Limited and stated that she had further information available in the form of two statements. One statement was from the registered nurse who worked at B Limited about the impossibility, in her view, of a person being able to insert three fingers into the resident's vagina and there was further a statement from AS in terms of her recollection of some events.

[37] R and W decided that the statements did not require further consideration. On 28 May 2008 A received a letter from R which advised that she was dismissed from

her employment. I accept that the reasons for the dismissal were as set out in that letter:

(a) Inappropriate request for other staff members to view your genitals;

(b) Putting undue stress on other employees;

(c) Inappropriate physical contact with residents.

Analysis and discussion

[38] The standard of proof which is the amount of evidence required to persuade a fair and reasonable employer the conduct occurred is a civil standard of the balance of probability. A fair and reasonable employer would want to say at the end of a full and fair investigation that it is more probable than not there was conduct by an employee that it would regard as serious misconduct.

[39] There is no requirement on the employer to prove the conduct it says is serious misconduct occurred, but where there are serious and grave allegations, although the civil standard of proof still applies, the evidence should be convincing: *Honda NZ Ltd v. NZ Boilermakers ETC IUW* [1991] 1 NZLR 392.

[40] R and W say that they carried out full and fair investigations, at the end of which they believed misconduct alleged in terms of the three allegations that dismissal was based on occurred and that it was serious misconduct. Ms Beck on behalf of A submits that the investigation was unfair in that there was predetermination, bias, lack of an open mind and a failure to consider the relevant evidence.

[41] A fair and reasonable employer would have placed weight as part of a fair investigation on the timing and content of text messages sent between A and M on 4, 5 and 6 May 2008.

[42] Mary said during the investigation meeting at the Authority that during the meeting on 13 May 2008, when it was suggested that the text messages be considered, W responded *this is ridiculous. I am not going through this rubbish.* W denied that and I conclude it is unlikely she made a statement in the strong terms maintained by Mary. I am not satisfied, however, that sufficient regard was had to the text messages,

which I consider a fair and reasonable employer would view as important and relevant.

[43] M's written complaint provides that when she refused to inspect A's genital area A became unstable and texted her 47 times in 4 hours telling her she would commit suicide. R and W concluded that the request was made about the gentials on 1 May 2008. The only information relating to text messages that was available to R and W during the disciplinary investigation was in relation to text messages sent and received between A and M on 4, 5 and 6 May 2008. There are a number of text exchanges, but what is clear from them is that A was distraught and distressed because she believed that M, S and T had been laughing about her condition on the evening of 3 May 2008 as reported to her by AS.

[44] The dates of the text messages and their content is inconsistent with the part of M's complaint which states that it was because M refused to inspect A's genitals that A became unstable and texted 47 times in 4 hours saying she would commit suicide. There is nothing in the messages that were provided to R and W about inspecting genitals or any concern that that had not occurred.

[45] Whilst A and/or Mary put forward this inconsistency to show that this was incorrect in the complaint, and to show that the number of text messages were exaggerated, no weight appeared to have been placed on this as to the credibility of the complaint in its entirety. Instead R and W preferred the statement by M that there had been a request by A to view her genitals over A's statement that she had never made such a request.

[46] I am satisfied that R and W considered at least the possibility that the statements from M and S about this allegation may not be true. I am not satisfied that sufficient weight was placed on the text exchanges in terms of any motive that M and S may have had. In this case a fair and reasonable employer would have been alive to the possibility of a motive given the timing of the complaints as to whether M and S were annoyed at A because she blamed them for laughing at her expense when they were laughing at something else, or because they were caught out for doing so. Timing of the complaints, in my view, was a matter that a fair and reasonable employer would have placed some weight on.

[47] One of the text messages from M to A did seem to support A's explanation that M had said her daughter had the same thing, although did not confirm, obviously, whether that had started the conversation about genitals or not. M's explanation about that simply seems to have been accepted and A's rejected. Mary and A also pointed out the text from A to M (5 May 2008), *You need to talk to AS to M she also told me that you put the pad between your legs and said look at my flaps and that I showed you my flaps or was going to* and M's response *That's a fucking lie believe what you want.* Whilst I accept as W and R said in their evidence that that response is not conclusive in terms of whether A asked M to view her gentialia there is no suggestion in the text exchange by M that regardless of what the three employees were laughing about A had actually made that request. A fair and reasonable employer would weigh that exchange with the statement from M.

[48] I am not satisfied that the conclusion as set out in the investigation outcome document para.2 about gentials that it was a topic of conversation A admits having discussed with other staff members previously was available to R and W following their investigation. It was not a conclusion properly put to A for comment. The only staff member A said she discussed her genitals with previously was M and her statement was clear that she did so on a confidential basis.

[49] There seems to be little weight placed on the fact that A was concerned that her genitalia were not normal. As a young, and I formed the view trusting employee, she had talked to M about this condition previously. R and W considered the conduct they were investigating to be serious misconduct. The conduct has to be considered in the light that there was no suggestion that M actually saw A's genitals and R and W accepted M's statement that she told A to see a doctor after the alleged request which was sensible advice. There was clear information for R and W to investigate that there was a medical book after the alleged request either given to A for consideration or as A said M looked at the book herself. In a care facility it seemed to me that M and A saw the issue as a medical matter not a sexual issue as such. S said she was offended by the talk about private parts. R and W have obligations to protect employees from being offended by other employees conduct but it was clear from A's explanation that she did not set out to offend and that the conversation turned to a medical consideration of the condition. Any offensive conduct would have to be weighed in terms of intention and/or whether it would have been obviously offensive to a reasonable person.

[50] A's employment agreement does not categorise serious misconduct as such but there was reference in the employment agreement to A being bound by rules set out in policies and procedures. I have considered the employee handbook and the code of conduct provided by B Limited in relation to classifying conduct like this as serious. There is discretion on the part of B Limited as to what constitutes serious misconduct. There is conduct described in the code of conduct as serious misconduct being abusive language or actions causing offence to another person on B Limited premises. I find however that the circumstances would have to be carefully weighed in terms of establishing conduct of that nature.

[51] It is open to an employer to accept one account of events over another where there is conflict, but in this case I find that even if this conduct could be regarded in all the circumstances as serious, there were some matters in regard to the allegations that R and W, in effect, closed their eyes to and did not properly take into account. I do not find that the investigation into this allegation was approached as a fair and reasonable employer would approach an investigation of this nature. The circumstances under which A was alleged to have asked M to inspect her genitals were not properly weighed and considered. There was more information available to be considered in the text messages alongside the complaints of M and S and I do not find that this information was properly weighed in terms of finding one account more credible than another or in terms of possible motive. Part of M's complaint was inconsistent with the available information to the extent that it could be shown to be wrong. If these matters had been properly weighed in the circumstances of the alleged conduct then in all possibility that may have changed the way the matter was viewed by R and W and their conclusions about A's conduct and its seriousness.

[52] In all the circumstances I find that the conclusion that A made inappropriate requests for others to view her genitals and that that was serious misconduct is not sustainable because the actions of the employer in investigating this allegation were not those of a fair and reasonable employer.

Inappropriate physical contact with residents

[53] This was a serious allegation of inappropriate physical contact with a resident in a care centre which if found to be substantiated would amount to serious misconduct. Shortly before the written complaint from T the resident had died. R and W were justified in taking the written complaint from T seriously.

[54] Although the allegation was described in the dismissal letter as *inappropriate physical contact with residents*, I am satisfied that the allegation pertained only to one resident. After T had submitted her written complaint on 7 May 2008 she had a follow up interview with R on 8 May 2008 and was asked why she had not reported this sooner. She responded – *"I wish I had". I feel so bad about this. it has been playing on my mind.* Further, T said *A is always coming in and wanting to help clean residents up. This happened when M and I were cleaning … on this occasion … was being cleaned after being incont of faeces. A then put her gloved finger into … vagina to see if it was clean.* As to the reasons why T had not reported this at the time, she said that the registered nurse J is a close friend of A and if anything is said against her J will not be happy in that they have to work with her.

[55] R records in her notes taken at the time that she stated to T that you must have said something to her at the time. T is recorded as responding *I couldn't believe my eyes. M said that she must not do that*.

[56] A fair and reasonable employer, given the fact that there was no date on the initial written complaint, but reference to the incident occurring the previous month, would have wanted to clearly establish either by independent evidence or from A herself whether A accepted actually undertaking cleaning of the resident with M and T at that time. That was a fundamental part of investigating the allegation. I have not found that A did accept that she undertook the cleaning of the resident with M and S and this was a significant flaw in the investigation process because the process of investigation proceeded on the basis after 13 May 2008 that she had. I am not satisfied there was any further discussion at the final disciplinary meeting on 23 May 2008 about whether A could recall taking care of the resident about a month prior with M and T because W and R did not consider that the statement provided by A contained any new information.

[57] A fair and reasonable employer would find T persuasive and firm about the contact she alleged A had engaged in with the resident. I do not find that a fair and reasonable employer would find that that on its own was enough in investigating and reaching a conclusion on the balance of probabilities that conduct of this seriousness had occurred.

[58] A fair and reasonable employer would have also had regard to, and questioned, inconsistencies in statements given by T in weighing up whether or not

this conduct had occurred. There is no requirement on an employer to carry out an investigation in the nature of a trial, however the sort of inconsistencies that I am about to set out would have been obvious in simply reading the original complaint and hearing the changes.

[59] In her first two statements, one written and one made orally to R on 7 and 8 May 2008 T said that A put one finger into the resident's vagina whilst cleaning her. At a subsequent meeting, which took place on 14 May 2008 with R, a minute taker and T and M, the following discussion was recorded:

> *… was not well. On the night she was going to be catherterized. She was very stiff to roll, M and T were cleaning her up after she had been feacally incontinent. M was by the window and T by the door. A walked in and helped with cleaning her up. Seen by both M and T "she put three fingers into her vagina in a scooping motion to clean her". M and T told her at the time that it was not appropriate and not to do it.*

[60] R said in her evidence that she did not feel that the change from one to three fingers was fundamental and there was no real investigation as to why T had changed the description of the conduct. Discussion can jolt an individual's memory about the events and there are times when the original description of events may change. In this case, T though had twice referred to the insertion into the resident's vagina by A of one finger, on one occasion in writing and then the description of the conduct had changed.

[61] It was also recorded that M and T had told A at the time it was not appropriate and not to do it, although in an earlier statement T is not recorded as having said anything to A, instead telling R that M made a comment to A.

[62] A fair and reasonable employer would have questioned the basis for the change in the conduct because that was significant to the credibility of T and her recollection of the events, and indeed whether in fact the events had occurred at all. A fair and reasonable employer would weigh carefully why the allegation had changed and would have wanted to discount any ulterior motive such as an attempt to increase the seriousness of the allegation.

[63] I accept that R and W in all probability felt that they were approaching their investigation in a fair and reasonable way with an open mind. I find the fact that this change in terms of the description of the conduct was not questioned supports that this

was not in fact the case and R and W had in effect closed their minds to the possibility that A may be telling the truth that she never engaged in this conduct.

[64] There was another inconsistency in terms of the way that T said A came to be involved in cleaning the resident although it may have been that because R and W were of the view that A acknowledged that she was involved in the cleaning of the resident about a month earlier, there was no questioning about this. In her first statement T stated:

> *Because she was so heavy [the resident to turn over] it took three caregivers to clean her up. There was M, A and myself.*

[65] In the second oral statement that T made to R on 8 May, it states that A came into the room after M and T had commenced cleaning the resident and in the third statement minuted on 14 May that is also the way in which A's entry into the room is described, being after M and T had commenced cleaning the resident A walked into help. I find a fair and reasonable employer would have wanted to establish how A came to be in the room and also why this had changed from the original statement. This does not appear to have been questioned.

[66] R and W were appropriately concerned about the period of time it had taken to lay a complaint about this behaviour. This was certainly raised as a question by A at the investigation meeting on 13 May 2008. The response to this was that the registered nurse was a close friend of A's and if anything was said against A then the registered nurse would not be happy and they would have to work with her. I am not satisfied there was any further investigation with the registered nurse about this because on the notes of the 14 May 2008 meeting there is no follow-up or action to take, simply it is recorded that J had had a close relationship with A and was often the support person for A.

[67] Mary and A put forward as part of the explanation their concern that this incident had not been reported further and/or to the Elder Abuse Team at the Police Station. Interestingly, when M came to give her evidence at the Authority's investigation meeting, she said that she had in fact reported this incident shortly after it occurred to a person at the Elder Abuse Team at the Police Station. She had not at any time during the disciplinary investigation advised R and W of this, notwithstanding being asked, as is clear from the 14 May notes, a clear question *why didn't you tell anyone.*

[68] I did indicate to the parties at the end of my investigation meeting that I may make further inquiries in this regard. Somewhat unfortunately, Mary took it upon herself to make these inquiries and through Ms Beck I was provided with statements on which I have placed no weight in all the circumstances. I did not consider undertaking further inquiries would assist me.

[69] A fair and reasonable employer would not wish to discourage complaints or not take them seriously simply because of the delay in reporting matters. That delay however would need to be properly assessed and weighed in terms of a fair and reasonable employer reaching a conclusion that the conduct had occurred. It could properly be expected in the environment of a rest home that inappropriate conduct of this nature would be reported particularly in circumstances where T and M describe feelings of shock The forms filled in by M, S and AS on 7 May 2008 are headed *Complaint, Compliment, Suggestion* and it was specifically stated on those forms that they were to be forwarded to the Facility Manager through the internal mail. That would have thereby avoided any need to talk to the registered nurse. I am not satisfied that those matters, apart from a question being asked, were given any weight.

[70] Ms Beck provided a statement of AS which R and W did not consider on the basis that AS was not a witness to the conduct with the resident. I accept that she was not a witness to the conduct with the resident, but in my view a fair and reasonable employer would have considered AS's statement about the events of 3, 4, 5 and 6 May in terms of any possible motive that T could have in terms of making a complaint. AS's statement that was provided to R and W by Ms Beck was related to the incident or complaint form that AS submitted on 7 May 2008.

[71] AS wrote in her statement that on Monday 5 May she was working in the rest home area and she refers to an interaction that she had with T in which she found T was pretty angry and AS recalls T's manner upset her. T allegedly told AS *If this gets out to A we'll be after you.* AS said in her statement she went straight to A to tell her what had happened and that T overheard her discussion with A and became angry. She recalls T saying to her *you just told A everything I said to you and also you said A rang M when it was you.* She also said that T said *now this has gotten out of hand and has to go to management*.

[72] In all the circumstances a fair and reasonable employer would have wanted to talk to AS, and then again to T to discount the possibility of any motive that T may have had. That did not occur.

[73] Although R and W did consider the medical possibility of an employee inserting three fingers into a resident's vagina a fair and reasonable employer would, in my view, have wanted to talk to J when she provided her statement that this was physically impossible to understand why she thought that was so and form some sort of balanced view on that.

[74] I conclude that objectively assessed, the investigation undertaken by R and W into this serious allegation was not what a fair and reasonable employer would have done. R and W did not in reaching a conclusion about the inappropriate conduct with the resident:

- Establish clearly whether A did or did not recall cleaning the resident a month ago with M and T and in the absence of establishing that proceeded to investigate on the basis that A did acknowlege that she did recall being present.

- Properly weigh and consider inconsistencies as to the description of the conduct and the delay in reporting the conduct in all the circumstances.

- Undertake further questioning in light of statements provided by AS in terms of any possible motivation and in terms of another view.

I find that these matters were fundamental to a full and fair investigation and because the investigation was not conducted in the way that a fair and reasonable employer would have conducted it, it raises serious doubts that a conclusion would be reached by a fair and reasonable employer that the conduct occurred and that a finding of serious misconduct was justified.

Putting staff under undue stress

[75] The three staff members S, M and T received counselling funded by B Limited as described in the investigation outcome to facilitate them coming to terms with this situation. I am not satisfied in terms of my conclusions with respect to the other two

allegations that this allegation was fairly and fully investigated and that the finding of serious misconduct can be sustained.

Was the finding that there had been conduct of the nature complained of and the conclusion that it was serious misconduct justified?

[76] In conclusion objectively viewed I am not satisfied that the investigation B Limited carried out was what a fair and reasonable employer would have done in all the circumstances. This raises doubt that there was conduct of the nature alleged and that the finding of serious misconduct in terms of the three allegations was justified.

Was the decision of B Limited to summarily dismiss A justifiable in all the circumstances?

[77] In order to justify a decision to summarily dismiss A, B Limited was required to justify its decision that A had committed serious misconduct. I have not found that the investigation carried out by R and W was that which a fair and reasonable employer would have conducted and that therefore the decision to dismiss could not properly be reached.

[78] I do want to acknowledge that R and W were in a difficult situation because they had complaints from other employees, one particularly serious one and the complaints were denied. B Limited has duties and obligations to its residents and are very accountable for actions of employees. Their obligations to A who had a blemish free record, and the evidence supported warm relationships with the residents, cannot simply be overlooked.

[79] The decision to dismiss A cannot be justified and on that basis A has a personal grievance that she was unjustifiably dismissed and is entitled to remedies.

Remedies

[80] I am required to consider under s.124 of the Employment Relations Act 2000 the extent to which A contributed to the situation which gave rise to her personal grievance. If I find that there was contribution on the part of A then I am required to reduce the remedies that would otherwise have been awarded.

[81] Although I have not been required, prior to this point, to reach conclusions about A's conduct, I now have to reach a conclusion in terms of whether she contributed to her personal grievance.

[82] I am not satisfied on the balance of probabilities that A requested M or S to view her genitals and I am further not satisfied that she intended to be offensive or indeed knew or thought that she was being offensive. Indeed there is strong evidence to suggest that that would not have occurred to A at all, rather that she thought she was continuing discussing in confidence with a friend and was somewhat embarrassed to have S present.

[83] I am not satisfied on the balance of probabilities that there was inappropriate physical contact with a resident and I do not find contribution in that regard.

[84] There was some concern expressed about the number of text messages sent during work time. However, what is clear is that A was very distressed about the fact that she thought that M, S and T had been laughing about her condition and those text messages have to be viewed in light of that. I do agree that the more appropriate course of action for A would have been to lay a complaint about that with management and not try to resolve it as she attempted to do through text messaging when she suggested a meeting to talk about the concerns. I do not, however, consider in all the circumstances that to be contributing conduct to the personal grievance.

[85] I do not find that A contributed to the events that gave rise to her dismissal. A had asked for a certificate of employment and a reference but they are not remedies I am able to award under the Employment Relations Act 2000.

Lost wages

[86] A said that she was too upset to start looking for jobs after her dismissal. Mary gave evidence that she assisted A in finding a new position and A was fortunate to commence that on 7 July 2008. A does suffer from depression and I accept that given the allegations made against her, her feelings that she in fact had been the subject of ridicule and contempt as advised to her by AS, and the findings, she was understandably upset.

[87] I am satisfied that there was, however, some attempt on her behalf to look for a new position and in those circumstances I find that she is entitled to reimbursement

of lost wages for the period from 28 May 2008 until 7 July 2008. That is a period I calculate to be just short of six weeks and I shall leave it to the parties to calculate the amount that is owed to A, failing which either party can return to the Authority for assistance in that regard.

Compensation

[88] I accept that A was very upset to be dismissed in circumstances where she considered she had done nothing wrong and yet had been made out, as she put it, to be *perverted and sick*. A had previously a blemish free exemplary record with B Limited.

[89] I have carefully considered this claim and I accept that A was distressed because of the way the matter was investigated and also because of what she considered to be the behaviour of M, S and T. A appeared to me to be a very trusting and young individual who loved working with the residents. I cannot compensate A for the behaviour of M,S and T but I can for the consequences of dismissal.

[90] A was fortunate to obtain another position quite quickly and I take that into account. In all the circumstances I am satisfied that a fair award of compensation would be the sum of $7,000.

[91] I order B Limited to pay to A the sum of $7,000 without deduction under s.123 (1)(c)(i) of the Employment Relations Act 2000.

Costs

[92] I reserve the issue of costs.

[93] The parties should attempt to reach agreement about costs. Failing which Ms Beck has until 22 December 2009 to lodge and serve submissions as to costs and the respondent, taking into account the Christmas/January period, has until 20 January 2010.

Helen Doyle
Member of the Employment Relations Authority