

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 168
5470726

BETWEEN

DEBORAH CLIFF
Applicant

A N D

THE BAY OF PLENTY
DISTRICT HEALTH BOARD
Respondent

Member of Authority: T G Tetitaha

Representatives: W Reid, Advocate for the Applicant
G Bingham, Counsel for the Respondent

Investigation Meeting: 9 and 11 March 2015 at Tauranga

Submissions Received: 17 March 2015 from the Applicant
16 March 2015 from the Respondent

Date of Determination: 11 June 2015

DETERMINATION OF THE AUTHORITY

- A. Deborah Cliff was unjustifiably dismissed by the Bay of Plenty District Health Board.**
- B. I decline to grant reinstatement because it is neither practicable or reasonable to do so in the circumstances.**
- C. An order the Bay of Plenty District Health Board pay lost remuneration equivalent to one week lost wages less PAYE to be reduced by 50% for Deborah Cliff's contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**
- D. An order that the Bay of Plenty District Health Board pay compensation of \$2,500 which includes a reduction of 50% for Deborah Cliff's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**

E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Deborah Cliff was employed by the Bay of Plenty District Health Board (the respondent) until 12 September 2014. Ms. Cliff alleges the dismissal was unjustified.

Facts leading to dispute

[2] Ms. Cliff was employed as a registered nurse in the Surgical Admissions Unit at Tauranga Hospital on 5 January 2009.

[3] On 4 July 2011, Ms. Cliff wrote a letter on behalf of the nursing staff in the Surgical Admissions Unit to Ali Fraser, her clinical nurse manager.

[4] During this period, a complaint was filed by another work colleague, Kathy Mancer. Ms. Fraser became involved and initiated a mediation which resolved the complaint.

[5] On 2 April 2012, Ms. Cliff found a diamond ring in the pocket of surgical scrub pants. She gave the ring to Ms. Fraser who gave it to the dry cleaning agency the respondent used.

[6] On 8 April 2013, Paul Matthews became Ms. Cliff's associate clinical nurse manager. He reported to Ms. Fraser.

[7] Between April and November 2013, Mr. Matthews raised various performance issues with Ms. Cliff.

[8] On 19 August 2013, a watch, earrings and ring were found in a specimen bag dropped outside the hospital. Ms. Cliff placed the jewellery in a locked drug cupboard, put an advert in the classifieds about the jewellery and sent an email to all staff at the Tauranga Hospital.

[9] On 12 September 2013, Mr. Matthews raised with Ms. Cliff issues about her late arrival at work on 4 September and her leaving early on 10 September 2013.

[10] On 5 November 2012 Ms. Cliff emailed Paul Matthews seeking a 'catch up' meeting.

[11] On 12 November 2012, Ms. Cliff met with Mr. Matthews. She raised concerns he was harassing her. Mr. Matthews terminated the meeting. Unbeknown to Mr. Matthews, Ms. Cliff secretly recorded the meeting.

[12] On 13 November 2013, Mr. Matthews filed a reportable event form (REF) complaining about Ms. Cliff's pattern of behaviour and yesterday's meeting. He advised Ms. Cliff to file an REF regarding her alleged harassment concern which she did not do.

[13] On 21 November 2013, Ms. Fraser was appointed to investigate Mr. Matthews' REF and Ms. Cliff's allegations about Mr. Matthews's conduct. A letter seeking a preliminary investigation meeting was sent to Ms. Cliff. Annexed were the investigation and disciplinary process policies but not the REF.

[14] On 28 November 2013, the preliminary investigation meeting was adjourned to allow Ms. Cliff to seek legal advice and representation. During the investigation meeting Ms. Cliff was provided with a copy of Mr. Matthews's REF.

[15] On 1 December 2013, Ms. Cliff provided a written statement about Mr. Matthews' REF.

[16] On 3 December 2013 a further preliminary investigation meeting was held. Unbeknown to the respondent, Ms. Cliff secretly recorded the meeting.

[17] On 3 March 2014, the draft investigation report was sent to Ms. Cliff's representative. The report recommended disciplinary action.

[18] On 9 April 2014, Ms. Cliff wrote to Ms. Fraser raising concerns about her decision making ability. Ms Fraser continued to be the investigator.

[19] On 5 May 2014, the investigation report was finalised and a copy was sent to Ms. Cliff by Rosalind Jackson, nurse manager. Ms. Jackson invited Ms. Cliff to a further disciplinary meeting.

[20] The disciplinary meeting was held on 22 May 2014 but was adjourned because Ms Cliff's representative, Rachel Rolston, insisted upon recording the meeting. Ms

Rolston had been previously advised the respondent did not consent to the recording occurring. Ms. Cliff later provided written feedback.

[21] On 6 June 2014, Ms. Jackson provided a disciplinary process outcome report. She considered that Ms. Cliff's actions were serious misconduct in terms of the respondent's disciplinary policy and would issue a final written warning.

[22] On 7 June 2014, Ms. Cliff raised a personal grievance of unjustified disadvantage regarding the final written warning.

[23] On 8 July 2014, the respondent acknowledged receipt of the grievance letter, did not accept there were grounds for a personal grievance but indicated its willingness to attend mediation.

[24] Between 10 and 17 July 2014, the parties corresponded regarding a performance development plan.

[25] On 22 July 2014, the performance development plan was finalised. Ms. Cliff was required to sign the performance development plan and return one copy by 25 July 2014.

[26] On 25 July 2014, Ms. Cliff stated she was not happy to sign "*an agreement to this performance plan*". She stated she was happy to discuss this at mediation on 29 July 2014.

[27] On 28 July 2014, Ms. Jackson wrote to Ms. Cliff advising that she had lost trust and confidence in Ms. Cliff to take reasonable management instruction and had written to the Chief Operating Officer recommending that Ms. Cliff's employment be terminated.

[28] On 29 July 2014, the parties went to mediation. This did not resolve matters.

[29] On 31 July 2014, the Chief Operating Officer, Helen Mason, wrote to Ms. Cliff seeking a meeting about Ms. Jackson's recommendation to terminate her employment.

[30] On 6 August 2014, Ms. Cliff and her representative, Warwick Reid, and Nick Cockroft from Human Resources, met with Ms. Mason to discuss the recommendation of termination of employment.

[31] On 12 August 2014, Ms. Mason advised she had made a decision to support the recommendation to terminate Ms. Cliff's employment. Ms. Cliff was to remain on paid suspension until further notice from the Chief Executive. The Chief Executive was the only respondent employee with the authority to dismiss an employee.

[32] On 14 August 2014, the Acting Chief Executive, Janet McLean, wrote to Ms. Cliff seeking a further meeting with the respondent Chief Executive, Phillip Cammish.

[33] On 29 August 2014, Ms. Cliff and her representative met with Mr. Cammish. She provided a written statement which she read out at the meeting.

[34] On 2 September 2014, Mr. Cammish wrote to Ms. Cliff asking if she "*might reconsider complying with the request to complete the performance plan as drafted and to accept the 'final warning'*". The letter stated that if she was prepared to take this action, the recommendation to terminate her employment would not progress.

[35] On 5 September 2014, Ms. Cliff's representative responded stating the impact of the 2 September 2014 letter:

... is to advise Debbie that she will be dismissed if she exercises her right to challenge the disciplinary outcome. Such an action is not consistent with the duties of a fair and reasonable employer.

[36] On 10 September 2014, Mr. Cammish wrote to Ms. Cliff. He advised her that her representative's letter made it clear that she did not accept the outcome of the investigation and the associated disciplinary processes that had occurred to date. As a result, he was obliged to again consider the recommendation he had received to terminate her employment. He advised his decision was to accept the recommendation to terminate her employment effective from 12 September 2014.

[37] On 2 October 2014, a Statement of Problem was filed in the Employment Relations Authority. This was later amended on 18 November 2014. The matter is now before me for determination.

Issues

[38] There are the following issues for hearing:

- (a) Whether Ms. Cliff's conduct was conduct a fair and reasonable employer could have dismissed her for?
- (b) Whether the actions of the employer leading to the dismissal on 10 September 2013 were what a fair and reasonable employer could have done in all the circumstances?

Whether Ms. Cliff's conduct was conduct a fair and reasonable employer could have dismissed her for?

[39] The applicant submits that although she showed poor insight regarding the manner in which she brought her concerns about Mr. Matthews, those concerns were genuinely held. A fair and reasonable employer would have dealt with those issues by way of mediation and discussion. The applicant's behaviour was a performance issue not serious misconduct.

[40] The parties' relationship is governed by the New Zealand Nursing Organisation and the Bay of Plenty District Health Board's nursing and midwifery multi-employer collective agreement for 1 March 2012 to 28 February 2015 (the MECA).

[41] Clause 28.1 of the MECA provided that all employees covered "*shall comply with the employer's policies and procedures in force from time to time, to the extent that such policies and procedures are not inconsistent with the terms and conditions of this agreement*".

[42] Conduct which may be the subject of disciplinary action is defined within the respondent's disciplinary process policies. For these purposes the relevant grounds for disciplinary action appear to be either an alleged "*breach of policy/protocol*" or "*misconduct/serious misconduct*".¹

[43] Ms. Cliff's alleged conduct giving rise to the dismissal is set out in the investigation report and Mr. Cammish's letter dated 10 September 2014. The investigation looked at two allegations - firstly an allegation of harassment by Mr. Matthews toward Ms. Cliff and secondly an allegation of Ms. Cliff undermining Mr. Matthew's authority and a pattern of this behaviour. Ms. Cliff had not made any

¹ Common Bundle of Documents (CBD) at p73, Disciplinary Process Clause 1 Grounds for Disciplinary Action

formal notification about the allegation against Mr. Matthews. Mr. Matthews had filed an REF setting out the alleged conduct by Ms. Cliff.² The REF specifically refers to the above incident between 5 and 12 November 2013.

[44] Mr. Matthews was concerned this incident showed a pattern of behaviour. He referred to her ignoring previous discussions regarding bringing support persons to meetings and she had raised serious allegations against him in front of other team members.

[45] The investigation report was not limited to the conduct described in the REF. It referred to other conduct by Ms. Cliff including a complaint about bullying by Ms. Fraser and her responses during the investigations that undermined Mr. Matthew's authority. The report concludes Ms. Cliff breached the respondents Shared Expectations, Code of Conduct Policy Principles One and Three.

[46] Mr. Cammish's letter dated 10 September 2014 set out the grounds for dismissal as Ms. Cliff's lack of insight, covert recording of meetings and consequential loss of trust and confidence.

Bringing of support persons to meetings without notification

[47] Mr. Matthew's evidence was Ms. Cliff came to a simple operational meeting on 19 August 2013 with a support person and this was not usual. He then states:³

"I advised her that she should have provided notification [about the attendance of the support person] so I could decide whether to continue with the meeting in those circumstances."

[48] This appears to be the basis for his complaint about Ms. Cliff subsequently bringing a support person to the meeting on 12 November without prior notification.

[49] Clause 36 of the parties MECA provides for that the employee "*is entitled to seek representation at any stage during the process*" and "*where an employment relationship problem arises the parties will in the first instance seek to resolve it between the immediately affected parties.*" There was a problem between Mr. Matthews and Ms. Cliff. She sought to resolve it between the parties at first instance.

² CBD at pp246-247

³ Brief P Matthews para. 12 sworn 09/03/15.

She was entitled to bring a support person. There is no requirement for prior notification. The respondent's policies also require during any preliminary investigation that an employee be advised of their right to have a support person.⁴ Prior notification may be a courtesy but neither the MECA nor respondent policies make it mandatory. Rather the MECA and policies infer a support person is expected to be present any time an employment relationship problem arises.

[50] Although the employment relationship problem Ms. Cliff raised 12 November may have been a surprise for Mr. Matthews, she was entitled to raise it with him directly and to have support or representation. If he was uncomfortable he was entitled to terminate the meeting which he did. I cannot see how the conduct complained of in the REF is an example of her undermining Mr. Matthew's authority.

Allegations about Ms. Fraser

[51] This appears to relate to allegations about Ms. Fraser's previous dealings with Ms. Cliff about a ring she found.

[52] The investigation report notes the allegation against Ms. Fraser was not substantiated because Ms. Cliff failed to produce evidence. Given Ms. Cliff did not make any formal bullying allegation against Ms Fraser, I do not understand how the report could conclude she failed to produce evidence about it. Ms. Fraser refers to being made aware of "*a bullying allegation towards Perioperative management about the handling of the [ring] incident*".⁵ This evidence is heresy. Further it does not state there was an allegation made against Ms. Fraser specifically and most importantly does not state the allegation was dismissed because Ms. Cliff failed to produce any evidence.

[53] Ms. Cliff had given sworn evidence on 11 October 2013 to the Police about the ring in which she explains why she decided not to file any formal complaint about Ms. Fraser by way of REF. I am unsure if she provided this to the respondent at the same time. She included emails between herself and Gail Bingham, General Manager Governance and Quality (and Respondent representative). These emails indicate Ms. Bingham was concerned about the ring incident to commence a review of the handling of valuable property. There are emails between herself and Ros Jackson,

⁴ CBD Document 3 at p69 Para 2.1.

⁵ Brief A Fraser para. 35 sworn 09/03/15.

Nurse Leader for Surgical and Anaesthesia Services. These emails state she decided not to proceed with any bullying allegation.⁶ This does not evidence an unsubstantiated allegation.

[54] There was some merit to Ms. Cliff's concerns about the ring incident. The respondent's "found property" policy states property shall be retained for a minimum of 90 days before being delivered to the Police for disposal or return to the finder.⁷ This was a prima facie breach of the respondent's "found property" policy by Ms. Fraser returning the ring to the drycleaners instead. The ring was eventually given to the Police and no damage from the breach occurred. However this did not justify the report's conclusion there were unsubstantiated previous allegations by Ms. Cliff.

Conduct during investigation

[55] The investigation report set out other conduct by Ms Cliff disclosed during the investigation. This conduct included that Ms. Cliff made statements about Mr. Matthews length of service and his lack of understanding of how things are done. It referred to Ms. Cliff's written statements in Appendix 5 alleging Mr. Matthew's discussion with her "*seemed rehearsed*", asking Mr. Matthew's who had asked him to question her and commenting about Mr. Matthew's "*being new and not understanding how things were done around here*".

[56] The report also concluded Ms. Cliff demonstrated difficulty acknowledging and accepting any new employee's prior experience, knowledge and input leading to a direct impact on the team culture. It referred to evidence from other staff about Ms. Cliff "*discounting prior experience and input due to being new to the department*"

[57] Most significantly the report concluded Ms. Cliff fabricated her statements about Mr. Matthews, Robyn Wackrow, Abi Noonan and Kathy Mancer behaving inappropriately. This demonstrated an alleged pattern of not taking responsibility for her behaviour and blaming others.

[58] The report went on to conclude Ms. Cliff was highly sensitised to the work environment and being addressed by a person in authority. It points to her behaviour and allegations made during this investigation as demonstrating an undermining of authority.

⁶ CBD Document 2 at pp20, 54-55.

⁷ CBD at p38.

[59] The report then concludes Ms. Cliff's allegations against Mr. Matthews demonstrated a pattern of behaviour of:

- a) Making allegations about a Manager that are not substantiated by evidence;
- b) Undermining management authority;
- c) Not taking responsibility for her behaviour and blaming others when challenged.

[60] I cannot see where Appendix 5 refers to the above alleged comments. Appendix 5 contains Ms. Cliff's two written submissions in respect of the first allegation about Mr. Matthew's behaviour towards her. There is no mention Mr. Matthew's discussion with her "*seemed rehearsed*" or a comment about Mr. Matthews "*being new and not understanding how things were done around here*". There is a comment in Appendix 5 that another staff member was still "*quite new to us at that point*" in relation to a specific incident but no mention of Mr. Matthew's recent employment and its effect on any decision he may have made as a result.

[61] The allegation Ms. Cliff made statements about Mr. Matthews length of service and his lack of understanding of how things are done may arise from Ms. Fraser's notes of the investigation meeting in Appendix 4:⁸

DC [Deborah Cliff] raised an incident where PM [Paul Matthews] brought a complaint to her about how staff felt she was checking up on them and was a bit short. PM declined to give details and commenced an investigation without informing DC.

DC said that she had moved on from this incident. DC claimed that she was willing to let the incidents with PM go to start with because he was new and may not know how to do things but not any longer.

AN [Angela Neil Union Delegate] said that situation seemed like a communication problem and suggested formal investigation be dropped and that DC and PM meet to discuss how to work together moving forward. DC agreed that this was what she wanted and was what she always wanted.

[62] This alleged comment about Mr. Matthews experience appears to have been taken out of context. Ms. Cliff makes it in reference to why she did not complain earlier about the forgoing incident. It does not appear to have been made with the express purpose of undermining Mr. Matthews. Her subsequent willingness to use mediation does not seem consistent with any intention to undermine his authority.

[63] I cannot see how Ms. Cliff's request for detail about an alleged complaint Mr. Matthews raised with her undermines his authority. She would be entitled to know detail about any complaints to be able to provide an informed response. I also cannot see how this conduct shows a lack of responsibility for behaviour.

[64] There is little evidence to conclude Ms. Cliff did not accept any new employee's prior experience, knowledge and input. She commented on one new staff member needing education.⁹ This is the same employee other staff comment on being part of the 'divide' in the staff. The report appears to rely upon the statement of one staff member in reaching this conclusion.¹⁰ No other staff member corroborates this conclusion. Staff did comment on antagonism between the staff member who complained and Ms. Cliff.¹¹

[65] The differences between Ms. Cliff's and Mr. Matthews versions of events relates to the allegation she was bullied by him. Both Ms. Cliff and Mr. Matthews agree the incidents she sets out in her statement occurred. They disagree about his behaviour towards her during those incidents. Two other staff had given evidence about one meeting between these two saying "*if she had been spoken to like that she would have been upset*"¹² and confirmed Mr. Matthews had raised his voice and said "*you know we could dock your pay*" paused then said "*but we won't.*"¹³ Mr. Matthews denies he did or said any of this but acknowledges the meeting was "*fraught*".¹⁴ There is no explanation why Mr. Matthew's version was preferred in these circumstances.

⁹ CBD at p263

¹⁰ CBD at p284

¹¹ CBD at p290; at 292

¹² CBD at p280

¹³ CBD at p340

¹⁴ CBD at p272

[66] The most serious allegation is one of fabrication by Ms. Cliff. There is no evidence of fabrication of events about Abi Noonan and Kathy Mancer.¹⁵ Abi Noonan was not even interviewed.

[67] Despite evidence from other staff about the conflict between Ms. Cliff, Ms. Mancer and Ms. Wackrow Ms. Fraser prefers their evidence over Ms. Cliff's.¹⁶ Ms. Wackrow agreed the incident she was involved in occurred but disagreed with Ms Cliff's view of her conduct. This is not evidence the incident was made up or fabricated. There was corroborating evidence Mr. Matthews may have behaved in the manner described by Ms. Cliff. There is little evidence to support the conclusion of fabrication or any pattern of not taking responsibility for her actions.

[68] There is no evidence supporting the conclusion Ms. Cliff is 'highly sensitised' to the work environment and being addressed by someone in authority. This is especially in view of the fact she worked for the respondent for 5 years without making any formal complaint or being subject to disciplinary action.

[69] Overall the evidence relied upon for the report's conclusions is either equivocal, wrong or does not exist.

Covert recording/Lack of insight

[70] Mr. Cammish gave oral evidence at the hearing he is authorised by a delegation from the respondent to terminate employment. He confirmed he had all of the material leading to the recommendation to terminate before him.

[71] He had concerns about her lack of insight into the effect of her behaviours upon her managers including her covert recording of meetings, his lack of confidence that trust can be rebuilt and her failure to accept or acknowledge that her behaviours have led to the situation. His practice was to question whether the recommendation to terminate was reasonable. To him Ms. Cliff's attitude appeared to be that her view was more right than the organisation. He felt in her type of job it was critical that the organisational hierarchy and process and protocol was observed. He was particularly concerned about the covert recordings. Ms. Cliff had been directed not to record the meetings yet did so. She then attempted to justify her position based upon the covert recordings.

¹⁵ CBD at p263

¹⁶ CBD at p292-293 Statement of H Mortleman; p282 Statement of A Pennell

[72] The issue of whether the covert or secret recording of a meeting by an employee with her manager constitutes serious misconduct has not been determined within this jurisdiction. The majority of case law has revolved around the recording or surveillance of employees by employers and its admissibility as evidence.

[73] Serious misconduct “... will generally involve deliberate action inimical to the employer’s interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.”¹⁷ It is conduct which “deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.”¹⁸

[74] There is an implied mutual obligation on the part of both employer and employee not to act in contradiction to the trust and confidence that are inherent attributes of the contract of employment.¹⁹ Each case must turn on its particular facts. In some circumstances the surreptitious recording of conversations may undermine the confidence and trust that is at the heart of good continuing working relations between employer and employee and their representatives and breach acceptable standards in employment relations.²⁰

[75] It is not unlawful for a participant to tape record a conversation without the knowledge of the other party. Nor is there necessarily anything unfair about doing so; it all depends on the circumstances.²¹ Circumstances which may give rise to unfairness were:²²

- a) The suggestion that the conversation was intended to be confidential or off the record.
- b) The employee who was recorded was told that others were all listening to the conversation.

¹⁷ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

¹⁸ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

¹⁹ *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275, [1992] 1 ERNZ 711 (CA) at 285, 722 per Richardson J

²⁰ *Talbot v Air New Zealand Ltd* [1996] 1 NZLR 414 (CA); [1995] 2 ERNZ 356, 369 per Richardson J

²¹ *Harder v Proceedings Commissioner* [2000] 3 NZLR 80 citing *R v A* [1994] 1 NZLR 429 and *Talbot v Air New Zealand* [1995] 2 ERNZ 356 (CA)

²² See n 20 at [1995] 2 ERNZ 356, 368 per Cooke P

- c) The employee did not give evidence and the lack of evidence of any complaint about the recording or that he would not have expected it or regarded it as either unfair or inaccurate.

[76] The covert recording by Ms. Cliff of her meeting with Mr. Matthews on 12 November 2012 was made in circumstances that in my view were misleading and deceptive behaviour. Mr. Matthews was induced to attend a meeting with Ms. Cliff under false pretences – he was told it was a ‘catch up’.²³ The purpose of the meeting was for Ms. Cliff to tell Mr. Matthews to stop harassing her. Harassment was serious misconduct under the respondent’s policies²⁴ and could result in disciplinary action up to and including dismissal. Mr. Matthews complained about the meeting and when he was made aware of the recording, he complained about that as well.

[77] I cannot see how the recording of this conversation was for the purposes of ensuring ‘accuracy’ as alleged by Ms. Cliff. It appeared more likely to be a record of her attempt to ambush Mr. Matthews with her concerns. My impression of the evidence was Ms. Cliff believed she was entitled to act in this manner. She was not.

[78] Her behaviour would have been a breach of her implied duty not to act in contradiction to the trust and confidence that are inherent attributes of her employment contract. It may also have been a breach of her duty of good faith not to mislead or deceive. However it was not necessarily serious misconduct.

[79] The recording itself did not disclose anything harmful to the employer’s interests. Here there is no clear policy about the recording allowed to occur on the respondent’s premises. The MECA encourages employees to deal with grievances directly between the people involved. The issue of whether this conversation could be considered confidential is unclear. Ms Cliff was a participant in this conversation. She was not acting unlawfully by recording it. The covert nature of her recording may have caused disharmony between the employees involved but there is little evidence it could have on its own destroyed trust and confidence between the parties.

[80] I take the same view about the recordings of the disciplinary meetings with Ms Fraser. They were also disharmonious but not harmful to the employer’s interests. It

²³ CBD at p63

²⁴ CBD at p77

is also a common feature for many disciplinary meetings to be recorded and transcribed by employers. Ms Cliff was also a participant.

[81] Lack of insight about her behaviour upon other staff is not serious misconduct. It may warrant corrective action, but is not necessarily destructive of the trust and confidence warranting dismissal.

[82] I have recorded my views about the investigation report above. It was imperative Mr. Cammish had reliable information upon which to form his opinion there was serious misconduct. Given my conclusions about the investigative report above, this was not the case. Mr Cammish's evidence was that he relied upon others to ensure accuracy in the investigation process. Unfortunately this was not the case here. He had no basis to rely upon the investigation report in concluding Ms Cliff's conduct was serious misconduct.

[83] In the circumstances Ms. Cliff's conduct was not conduct that a fair and reasonable employer could have dismissed her for.

Whether the actions of the employer leading to the dismissal on 10 September 2013 were what a fair and reasonable employer could have done in all the circumstances?

[84] The applicant submits there were 'serious process concerns' by the appointment of Ali Fraser as an investigator and Mr Cammish's dismissal of Ms. Cliff because she declined to accept the final written warning and the performance plan. No other process issues have been raised.

[85] Ali Fraser was the investigator not the decision maker. Therefore Ms. Cliff's complaint must be around the sufficiency of her investigation given the resources available to the respondent pursuant to s103A(3)(a) of the Act.

[86] Given my above conclusions about the investigation report, I find the investigation was insufficient in the circumstances. The respondent had access to a human resources department and other managers whom could have investigated this matter. It was particularly unwise to have Ms. Fraser investigate Ms. Cliff's complaint. This is because Ms. Fraser alleged evidence of a pattern of behaviour towards managers that included a complaint against her by Ms. Cliff which had no

evidential basis. This may have contributed to the inadequate investigation about her conduct but I make no finding about this.

[87] I do not accept Mr Cammish dismissed Ms Cliff because she would not accept the final written warning and performance plan. He dismissed her for the conduct set out in his letter dated 10 September 2014.

[88] The investigation was insufficient in the circumstances. Ms Cliff was unjustifiably dismissed by Bay of Plenty District Health Board.

Remedies

[89] Having found there was a personal grievance, I am required to consider remedies.

Reinstatement

[90] Ms. Cliff seeks permanent reinstatement. She says it is a pragmatic solution to her current employment difficulties.

[91] The Authority may provide the remedy of reinstatement if “*it is practicable and reasonable to do so*” (s125 Employment Relations Act 2000). That assessment must be made at the time the Authority is considering the evidence of practicality and reasonableness.

[92] The evidence about Ms. Cliff’s lack of insight regarding her behaviour towards other staff interaction with her work colleagues raises concerns about her reinstatement to her job with this unit. Two of the three managers in her Unit were the subject of complaints from her and she was in conflict with three other staff within her Unit. This comprised the majority of her work colleagues.

[93] There was evidence from Mr Matthews that she did not follow reasonable instructions about her clinical practice. This gave rise to Mr Cammish’s concerns about her ability to safely practice in the hospital environment.

[94] Finally there was Ms. Cliff’s covert recording of the meeting with Mr. Matthews. He believed he could not trust her to return to work with him as a result. Where there was an irretrievable breakdown in the relationship between the

parties due to conduct such as covert recording, the Court has indicated it would decline reinstatement.²⁵

[95] There was no evidence from Ms Cliff about how she had addressed the issues of concern while out of the workplace. Similarly there was no evidence about how it could be done if she was returned to the workplace.

[96] I decline to grant reinstatement because it is neither practicable nor reasonable to do so in the circumstances.

Lost remuneration

[97] Where the Authority determines an employee has a personal grievance and has lost remuneration as a result, the Authority must order the employer pay to the employee the lesser of a sum equal to the lost remuneration or three months' ordinary time remuneration pursuant to s.128 of the Act. In pursuing an order for remuneration, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether she seeks reinstatement²⁶.

[98] An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. Where remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement²⁷.

[99] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like²⁸.

[100] From her evidence, Ms Cliff only applied for four jobs in the three months since dismissal. In November 2014 Ms Cliff went to Auckland to care for her daughter. This breaks the chain of causation given she stopped looking for employment from November 2014. Any award of lost remuneration is confined to the period 12 September to 1 November 2014.

²⁵ *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 202, [2013] ERNZ 553 [at \[100\]](#)

²⁶ *Carter Holt Harvey v. Yukich* (CA, 05/05)

²⁷ *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

²⁸ *Alan v. TransPacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 540 para.[78]

[101] Her evidence shows two job applications in September 2014 and two job applications in October 2014. I have no explanation why so few applications were made and the reasons for the delays between those made in September and those made in October. At best it represents one week of efforts to mitigate loss and I intend to confine the award to that amount only subject to any reduction for contributory behaviour.

Hurt and humiliation

[102] Compensation should not be used as a penalty to indicate disapproval of an employer's conduct. Rather, it is to compensate the employee for the effect of the grievance²⁹.

[103] Ms. Cliff's evidence of hurt and humiliation arising from the effect of this grievance is sparse. She refers to shock at the injustice of her dismissal, suicidal thoughts and prescribed anti-depressants.

[104] It is difficult to assess the severity of her alleged hurt from the evidence. There are no medical or other professional reports giving any clear diagnosis, treatment and the length of time she was impaired or whether this was caused by her job loss or other factors. Similarly her claim for financial redress is not quantified.

[105] In the circumstances the appropriate award can be no more than the average award made in the Authority of \$5,000 subject to any contributory behaviour.

Contributory Behaviour

[106] I must consider the extent to which Ms Cliff's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded.³⁰ Contributing behaviour is behaviour which is causative of the outcome and blameworthy.³¹ Subsequently discovered misconduct can also be taken into account in reducing remedies.³²

²⁹ *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC).

³⁰ Section 124 Employment Relations Act 2000.

³¹ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

³² *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155 at [104].

[107] Ms. Cliff's behaviour was both causative and blameworthy. Her meeting with Mr. Matthews on 12 November 2013 and her accusation of harassment gave rise to the disciplinary process leading to her unjustified dismissal.

[108] Her complaint of harassment arose because Mr Matthews regularly spoke to her about minor performance issues. His behaviour was appropriate and within his managerial functions. Ms Cliff simply did not agree with the method he used to manage her. That was not harassment. Criticism or feedback from an employer is not bullying³³ and neither can it be harassment in my view.

[109] Ms Cliff's behaviour justifies a 50% reduction in remedies.

Orders

[110] Deborah Cliff was unjustifiably dismissed by the Bay of Plenty District Health Board.

[111] I decline to grant reinstatement because it is neither practicable or reasonable to do so in the circumstances. The application is dismissed.

[112] An order the Bay of Plenty District Health Board pay lost remuneration equivalent to one week lost wages less PAYE to be reduced by 50% for Deborah Cliff's contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

[113] An order that the Bay of Plenty District Health Board pay compensation of \$2,500 which includes a reduction of 50% for Deborah Cliff's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

[114] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

³³ *Isaac v Chief Executive of the Ministry of Social Development* ERA Auckland AA200/08, 5 June 2008

