

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 185
5341472

BETWEEN KEES DE BRUIN
 Applicant

AND CANTERBURY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: M B Loftus

Representatives: Andrew McKenzie, Counsel for the Applicant
 Penny Shaw, Counsel for the Respondent

Investigation Meeting: 10 June 2011 at Christchurch

Submissions Received: At the investigation meeting

Determination: 25 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Kees de Bruin, claims that he was unjustifiably dismissed by the respondent, Canterbury District Health Board (CDHB), on 4 April 2011.

[2] CDHB accepts that it dismissed Mr de Bruin but contends that the dismissal was justified by virtue of serious misconduct on Mr de Bruin's part.

Background

[3] Mr de Bruin is a registered nurse specialising in the care of psychiatric patients. As of 4 April 2011 he had in excess of 40 years experience and was engaged at the In Patient ward of the Psychiatric Services for Adults with Intellectual Disability (PSAID) at Hillmorton Hospital, Christchurch.

[4] PSAID is a 15 bed unit providing care and treatment for patients with a dual diagnosis of mental illness and intellectual disability. CDHB considers these patients to be some of the most vulnerable within its care. The manager responsible for the unit, Ms Cate Kearney, advises that while these patients are not generally considered to be acutely unwell, they often have challenging and violent behaviours that may result in incidents requiring restraint and/or seclusion to reduce the risk of harm to either themselves or others.

[5] Unfortunately it would appear that such incidences are reasonably frequent with, for example, 104 incidents being recorded in January 2011 and a further 91 in February.

[6] Ms Kearney concedes that the situation is such that CDHB cannot completely control the environment. She goes on to say:

As difficult as it is patients hitting, spitting or kicking staff or attempting to do, is a regular occurrence in this unit. The nursing staff accept these challenging behaviours and are highly skilled in their responses and ability to defuse these behaviours.

[7] She states staff are appraised of the environment before entering it and, once there, subject to regular training and refresher courses and that:

A key strategy taught during mandatory training is that if nurses feel they are threatened or losing control themselves they are to walk away and seek additional support.

[8] Unfortunately for Mr de Bruin, he did not act in this manner when the event which led to his dismissal occurred on 14 March 2011.

[9] Mr de Bruin states that when unwell the patient concerned (M) is extremely intolerant both of peers and staff and is prone to assault either. He says that when this occurs seclusion (placement alone in a closed room) will often result as this protects both M's safety and that of others. He says M had had to be secluded on multiple occasions in the week leading up to 14 March 2011.

[10] He goes on to say:

The restraint technique for M is unorthodox (yet approved), and involves lowering her onto a stitched blanket and dragging her on the blanket into seclusion. This occurs because of her osteoporosis and is part of her management plan. Using this form of restraint allows her to continue to assault staff through kicking, hitting out and attempting

to bite, in contrast to the established restraint procedures taught by CDHB.

[11] He says that at approximately 7.45pm M hit another patient. She then became agitated and staff were unable to calm her down. A decision was made to seclude her. The staff involved were Mr de Bruin, Debbie Darcy (another registered nurse, though only recently appointed to PSAID) and Lynda Payne, an enrolled nurse.

[12] Mr de Bruin goes on to say:

As I approached M from the front she hit me on the arm. I then was careful to watch her hands and she caught me unawares spitting in my face. My reaction was immediate, instinctive, and reflective. I slapped her cheek. I instantly regretted this saying words to the effect, "oh God, I shouldn't have done that".

[13] The process of moving M to seclusion continued. It was, according to Mr de Bruin, arduous. He says M is a heavy person and the situation was dangerous as she was not physically restrained, and was therefore capable of activity that might otherwise impede the process and this included an ability to kick, hit and bite.

[14] The distance M had to be moved was some 50 feet and this included passing through two doorways and along a 15ft passageway. Mr de Bruin describes the passageway as the most dangerous section as it forced the staff into close proximity with M. He goes to say:

When M tried to roll off the blanket in the passageway I had to grab the side of the blanket to roll her back in the centre. Facing her head I had to kneel on left knee with my right knee hovering over her and grabbed the edge of the blanket to lift it up. At this point my right knee may have lightly touched her upper body. I am quite sure that at no time I lost my balance. Debbie Darcy was at the foot of the blanket approximately three feet away standing up holding onto the blanket. Her view was from approximately 45 degree angle. Lynda Payne was across from me and slightly forward of me bent over holding the top corner low to allow the rolling back of the patient. Lynda made no mention of my knee being placed on M even though she was closer and at a better angle to see.

[15] Ultimately the move was successful. M was placed in seclusion though notwithstanding the various problems that had arisen, none of the staff involved completed an incident report as would normally be expected.

[16] Ms Darcy's recollection varies to that of Mr De Bruin. She states that she does not remember M hitting another patient but accepts that she was agitated and

required seclusion. She states that staff are trained in the process and while generally comfortable with the process, she accepts this occurrence was messy.

[17] Ms Darcy goes on to say:

The “I shouldn’t have done that” came much later after the statement “I won’t put up with that behaviour”. From my position at the foot end of the blanket I could see clearly was happening ahead of me. I saw RN de Bruin place a knee on the patient’s chest. His knee appeared to be on her chest to hold her down. It was held firmly enough to keep her down. I am certain it was more than a “light touch” as RN de Bruin has indicated. The patient complained of a sore chest the next day.

[18] A sore chest was not all M commented on. She raised the occurrence with another nurse who recorded her oral statement in writing . It reads:

When I was restrained Casey thought I spat at him, then he blamed me for hitting someone. Then he gave a big slap across my face then he got blanket, outside Liz Millows office or outside seclusion room he put knee on my chest and pushed hard. I thought I had broken chest bone. I could not stop crying.

[19] The incident was reported to Ms Kearney at approximately 8am the following morning, 15 March 2011. Ms Kearney arrived at the unit at approximately 9am, when she was informed that Ms Darcy had also come forward to say that she had witnessed an event and would complete an incident form. Here it should be noted that Ms Darcy puts her failure to do so at the time to the fact that having witnessed another nurse hit a patient she was too shocked to react immediately.

[20] Ms Kearney was given a copy of M’s complaint along with an incident report prepared by the nurse who had let M out of seclusion. That form, under the heading “Record What Happened” states:

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 at 1950 hours. She is complaining of nausea and sore chest.

[21] A doctor saw M but found no evidence of injury. Anti inflammatory and Paracetamol were prescribed.

[22] Later that day Ms Kearney received a report prepared by Ms Darcy and witnessed by Ms Payne. It states:

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.

[23] Ms Kearney then attempted to telephone Mr de Bruin, advise him of the allegation and that she wished to investigate it. Contact was eventually made at approximately 10.30 the following morning (16 March). That was followed by subsequent calls between Ms Kearney and both Mr de Bruin and his Union representative, Janice Gemmell of the National Union of Public Employees (NUPE). Those discussions led to an agreement that a meeting occur on 25 March and, in preparation, Ms Kearney sent an email to Ms Gemmell on 23 March. Attached, were copies of the complaint and the incident reports.

[24] After sending the e-mail of 23 March, Ms Kearney interviewed first Ms Darcy and later Ms Payne. Ms Darcy stated that M was agitated and required seclusion. She says M was kicking and fighting and that she punched Mr de Bruin and bit him before going on to say ... *and then he slapped her, just slapped her in the face. Don't think it was malicious, think he had had enough.*

[25] Ms Darcy goes on to say that Mr de Bruin had placed his knee on M's lower chest/abdomen and that after he slapped her he had said *I am not going to put up with this behaviour* or something similar. It was also claimed that he later commented that an occurrence like that had never happened to him before or words to that effect.

[26] Ms Payne agrees that M was agitated; that she needed to be secluded and that while they were trying to move her she hit Mr de Bruin on the arm and spat in his face. She says Mr de Bruin then slapped M and made an almost immediate comment along the lines of *I shouldn't have done that*. She said the restraint was messy and that M's actions were such that she *needed to be handled assertively*. Ms Payne states that after the event Mr de Bruin stated *I shouldn't have done that. I hate spit in my face* and that whilst she could not be sure, she thinks he may have told M *don't spit at me* during the restraint. Ms Payne states that the force used was *more than a tap* and appeared to be a reaction to being spat at.

[27] The meeting of 25 March, such as it was, did not progress matters far. Ms Kearney states that she gave Mr de Bruin and Ms Gemmell copies of the notes she had taken when interviewing Mesdames Darcy and Payne and that they then agreed to adjourn until 31 March. Ms Gemmell states that she found the meeting confusing given a breakdown in communication over what would be discussed that day, but she has no dispute with the outcome.

[28] The meeting of 25 March was followed by a letter that constituted a formal summons to an investigation meeting. Two versions were proffered in evidence. The second added Mr van Rensburg as an attendee at the meeting and the most serious consequence of a finding of misconduct on Mr de Bruin's part was escalated from a final written warning in the first version to dismissal in the second. Both advised:

It has been alleged that on Monday 14 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.

[29] The letter goes on to advise a venue for the meeting, the possibility that dismissal might result and the desirability of bringing a support person.

[30] Mr de Bruin's evidence about that meeting, and a subsequent meeting which occurred on 4 April is sparse. He states:

I immediately admitting slapping M's cheek and my profound regret for this. I spoke to the incident as set out above including the extenuating personal circumstances, the acuity of the ward and the difficulties in dealing with M. Towards the end of the first meeting it became clear that Ms Kearney was placing most weight on Debbie Darcy's interview because she would have had a good view of the event from the foot end thereby confirming the patient complaint.

At the second meeting ... I was again asked if I had anything to add. I spoke to the method of restraint used with M. This had been formulated at ward level, is not taught at CDHB control and restraint courses which are detailed and focused on patient and staff safety. As Lynda Payne stated in her interview, the restraint was messy.

Harry Duncan, nurse practitioner consultant, told me that with my experience I should have been able to deal with the situation better.

After a break in proceedings, Ms Kearney again stated that Debbie Darcy had a good view of the incident. She concluded that I had assaulted M and in accordance with CDHB policy, serious misconduct was proved and I was dismissed.

[31] He adds:

As an aside, at one of the meetings I was taken to task for not calling a doctor to check M for injuries. As the slap left no mark and the knee injury never occurred I saw no need to get a doctor. I was also taken to task for not documenting the incident, including the hit to my arm and the slap to the face.

[32] Ms Gemmell states:

The meeting commenced with Kees providing his version of events and essentially stating that the incident form dated the 15th completed by Debbie Darcy and witnessed by Lynda Payne was essentially accurate.

[33] Ms Gemmell goes on to say that the subsequent statements were less accurate with respect to their description and the timing of events. She states that both she and Mr de Bruin pointed out anomalies between the various statements before she expressed the view that she would have expected a reasonable employer to go back and check those anomalies with the witnesses. She takes issue with the fact that did not occur.

[34] Ms Gemmell states that she and Mr de Bruin then raised personal circumstances and factors that may have affected the way Mr de Bruin reacted that day and that they requested that CDHB consult senior nursing practitioners who were au fait with Mr de Bruin's practice for what might be described as a reference check. Issue is taken that while this was done it appeared to be in a very informal manner.

[35] CDHB was represented by three participants: Ms Kearney, Mr van Rensburg (a human resources advisor) and Mr Henry Duncan, a nurse consultant who was present should specialist professional input be required. Their recollection relies on notes that were taken but, in any event, neither the notes nor their recollection suggest any major difference from the evidence provided by Mr de Bruin and Ms Gemmell.

[36] Ms Kearney, in her evidence, discusses the conversations she had with other senior nursing professionals within CDHB (as requested by Ms Gemmell) before addressing the prime allegation; namely that Mr de Bruin had hit M. She says:

Janice [Gemmell] responded that RN de Bruin admits inappropriate behaviour and that he was ashamed. RN de Bruin added he thought it was appropriate that his actions were reported by others and he agreed that the matter was serious.

[37] Ms Kearney goes on to says:

After the adjournment Harry Duncan outlined to RN de Bruin that it was very rare for a nurse to hit a patient. RN de Bruin agreed that hitting a patient was “up there”. I confirm my view that slapping a patient on the face was serious misconduct and his actions amounted to an assault on a patient. I emphasised that I was also concerned that he had not sought medical help for the patient or completed any documentation. I referred to the extenuating circumstances he asked me to consider but said I was concerned that supervision was there to assist him in times of stress but he had not utilised it. I then offered RN de Bruin and Janice an opportunity to comment on those matters and add anything else they wanted me to consider. At their request we had a further adjournment.

After the adjournment Janice added that RN de Bruin had been up front and honest and asked me to consider his honestly and personal circumstances in making my decision. At 1145 we agreed to adjourn until 1330 so I could consider the information and explanation RN de Bruin had provided to me.

I understood that the decision I had to make was a serious one, balancing my obligations to the patients and to RN de Bruin, I did not feel I was going to have sufficient time to consider this properly in the 1 hour 30 minutes I had available to me.

[38] It was that last comment that led to an agreement that the meeting adjourn with a recommencement scheduled for 4 April. Ms Gemmell was not available that day and Mr de Bruin was assisted by another NUPE official, Mr Martin Cooney.

[39] Ms Kearney observes that during the intervening period she gave the matter serious consideration and:

On balance of the information provided to me, the patient complaint and the reports from other witnesses, I concluded that RN de Bruin slapped the patient on the face, as he admitted, and that this action was witnessed by two other staff. I considered seriously that a nurse of 42 years experience should have more than adequate experience and training to ensure he does not hit a patient, even if provoked. I was deeply concerned that a nurse of such experience did not immediately realise the seriousness of his actions and made no attempt to complete an incident form. His length of service was an aggravating rather than mitigating factor. I also considered it was very probable that he had contacted the patient with his knee. I considered that this incident occurred, without immediate

rectification or notification, within a unit where patients are unlikely or unable to advocate for themselves.

[40] Ms Kearney goes on to say that she outlined that tentative conclusion at the meeting on 4 April and asked Mr de Bruin if he wished to comment before a final decision was made. She says he again asked that she consider his long service and personal stressors. She says he also asked that she consider the voracity of M's complaint given she was known for making frequent informal complaints. An inquiry to the acting charge nurse confirmed that M often complained about being starved or not cared for but was not in the habit of making either formal complaints or ones about being assaulted by other staff. Ms Kearney states that after considering the issues she concluded that serious misconduct had occurred and dismissal was warranted. She advised Mr de Bruin and Mr Cooney of that.

[41] Mr Cooney does not disagree with Ms Kearney's evidence to any great extent. He says he emphasised what he calls the Zinidan Zidane defence and the view that *one moment of madness* does not warrant dismissal. He also states that he asked that any decision be provisional and that he be allowed to research what were then recent changes to s.103A of the Employment Relations Act and present a written submission on the effect that may have. He expresses disappointment that his request was not adhered to.

[42] The dismissal was confirmed in writing by letter dated 5 April 2011. That letter states that at the meetings Mr de Bruin had:

... 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.

[43] The letter goes on to advise that the DHB had concluded that Mr de Bruin's actions were in breach of his duties and responsibilities and, effectively, amounted to assaulting a patient. It advises that the breach constituted serious misconduct which could not be accepted and that, as a result, dismissal would ensue.

Determination

[44] The fact CDHB accepts it dismissed Mr de Bruin means it also accepts the onus of justifying the dismissal.

[45] The letter advising dismissal states that it is the result of serious conduct on Mr de Bruin's part, in particular, his having slapped M (admitted) and a conclusion that despite his denial, Mr de Bruin had held M down with his knee.

[46] Pursuant to s.103A of the Employment Relations Act 2000 (the Act), the question of whether a dismissal is justifiable

... must be determined, on an objective basis, [by considering] 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 ... occurred.

[47] In applying that test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[48] The test cited above is that which came into force by virtue of an amendment to the Act which took effect on 1 April 2011. A key change is that the word "could" has been substituted for the "would" that previously applied.

[49] In *Air New Zealand v Hudson* [2006] ERNZ 415, 435 the Employment Court held that in the context of considering justification of dismissal the Court of Appeal's use of the word "could" in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 widened the range of responses open to an employer. In *Hudson* the difference between "could" and "would" was explained as:

The difference between whether a person is able to respond in a certain way or whether a person who is able to respond would actually respond in that way.

[50] Here it should be noted that one issue pursued on Mr de Bruin's behalf was a claim that while CDHB could conclude he slapped M, it could not reach the conclusion that he used his knee to restrain her. This contention is supported with an argument that the *knee incident was clearly a significant factor in the dismissal* yet CDHB failed to adequately investigate the claim. Here reference is made to the fact Ms Payne was not asked about it and Ms Darcy not re-examined. It is stated this should have occurred given Mr de Bruin's denial which, it is submitted, is credible given his admission in respect to the slap.

[51] I do not accept this argument. CDHB is entitled to make a call, whether right or wrong, provided its conclusion is reasonable given the evidence and is reached after fair and proper deliberation. On one hand it had the complaint of M who, the evidence suggests, is not given to making unsubstantiated complaints of this nature – on the other it had Mr de Bruin's denial. In support of the complaint it had Mr de Bruin's admission that his knee may have touched M, though not forcefully as alleged and Ms Darcy's evidence that she had witnessed the event. Her initial comment that he did not sit on M does not, in my view, undermine that – it illustrates some initial confusion over what was being alleged which is understandable given the report was written before Ms Darcy was told of the detailed allegations and, in any event, it is correct – Mr de Bruin did not sit on M.

[52] While CDHB could possibly be criticised for not following up with Ms Payne, I do not consider that omission fatal. It concluded, on the evidence before it, that her view was obstructed and given the independent evidence of Ms Darcy it was entitled to reach the conclusion it did.

[53] In any event I doubt it would have made a difference. Both Ms Kearney and Mr van Rensburg were questioned at length about the effect it may have had on the decision had they concluded that only the slap had occurred. Ms Kearney refused to be drawn, stating that she had concluded the knee was used and that was that but Mr van Rensburg was adamant – had the slap been the only infraction he would still have advised dismissal and I have no doubt from what I heard that his advise would have been followed.

[54] It is here I note that in the context of a “could” test (when, prior to the Acts 2004 amendments, it was previously in vogue) one instance of assault of a psychiatric patient could be considered a *matter ... of the utmost gravity which would inevitably have major consequences*. Even where no assault was found to have occurred, an instance where a psychiatric nurse crossed the line between acceptable and unacceptable behaviour was found to contribute significantly (40%) to the situation in which he found himself (refer *Timu v Waitemata District Health Board* [2007] ERNZ 419). In other words I conclude that the slap alone could have justified a decision to dismiss.

[55] Here mention also needs to be made about a submission that other factors influenced the decision to dismiss – namely Mr de Bruin’s failure to report the matter with alacrity and his failure to obtain immediate medical support for M. I discount this claim. These were not matters relied upon by CDHB in justifying its decision and Ms Kearney’s responses under cross examination tend to belie the claim.

[56] My conclusion that CDHB could conclude that the alleged assault occurred and that ‘could’ justify dismissal is not, however, enough. For that conclusion to be that of a fair and reasonable employer, CDHB must also show compliance with the procedural requirements of s.103A(3). Here, and in reference to s.103A(3)(a) I note that the issue of resources available is irrelevant. CDHB is one of New Zealand’s larger employers and is well resourced. Its investigation should, therefore, be thorough but my conclusion is that it was with the requisite witnesses being interviewed and additional leads suggested by Mr de Bruin and his representatives being followed.

[57] Notwithstanding the initial confusion over the meeting of 25 March, there can be no doubt that Mr de Bruin and his representatives were well aware of CDHB’s concerns and that they were provided with the extant documentation.

[58] In the same way there can be no doubt that Mr de Bruin was, over the course of the two meetings, given an opportunity to explain and that he availed himself of that opportunity. Issue is taken with CDHB’s refusal to grant time to allow Mr Cooney to consider the impact of amendments to s.103A and seek a legal opinion on their impact on Mr de Bruin’s situation. I do not consider this a valid approach. First, Mr Cooney was well aware of the issue prior to attending the meeting, the parliamentary process having taken some time to complete. Second, and as

Mr Cooney conceded, it was a case of how long was a piece of string – clarity may be some way off and CDHB could not wait forever and here I note that the Authority has only recently considered the changes and their effect and the Court is, even today, yet to do so. Third, compliance is, at the end of the day, CDHB's concern and not Mr de Bruin's.

[59] Again there can be no doubt that CDHB considered the explanations tendered both by, and on behalf of, Mr de Bruin though there is one challenge that needs to be commented on. It is clear that Mr de Bruin was under considerable personal stress at the time and this was offered as a mitigating factor particularly by Ms Gemmell. Ms Kearny's response was that she considered the issues raised but ultimately concluded they could not be used to change the outcome. For two reasons I accept this approach.

[60] The first is that the statutory requirement is that the explanations be considered. The evidence is clear, they were. The second is that I consider the reason she rejected the approach valid. Her rationale was that CDHB has numerous means by which staff, suffering personal stressors or problems can seek assistance – Mr de Bruin chose not to avail himself of those opportunities and must therefore suffer the consequences of his decision. This rationale (or at least the failure to avail himself of the supports available) was accepted by Mr de Bruin who admitted knowledge of support mechanisms but stated he did not use them as he wished to keep his personal issues private. He can not, in my view subsequently change his mind to suit the altered circumstances.

[61] There is one last factor that should also be discussed and that is Mr McKenzie's submission that rather than be used against him, Mr de Bruin's long and unblemished service should have been considered a factor mitigating against dismissal. It is what he describes as the *money in the bank* approach approved of by the Court in cases such as *Madden v New Zealand Railways Corporation* [1991] 2 ERNZ 690.

[62] Against that is Ms Kearney's conclusion that those very years worked against Mr de Bruin. Those years should have ingrained in him an automatic response of moving away and his failure to do so was of grave concern. After that time he simply should have known better and, indeed, he admitted so. Ms Kearney's approach also

has judicial support and I again refer to *Timu* and the fact he had in excess of 30 years experience. It was an approach open to her.

[63] For these reasons I conclude CDHB can justify its decision to dismiss. Mr de Bruin does not, therefore, have a personal grievance and his application fails.

Costs

[64] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event CDHB wishes to seek costs, it is required to lodge and serve an application within 28 days of this determination. Mr de Bruin is to file any response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority