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TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 140
5385911

BETWEEN	THANKAMMA GEEVARGHESE Applicant
AND	MID CENTRAL DISTRICT HEALTH BOARD Respondent

Member of Authority:	P R Stapp
Representatives:	Gregory Bennett, Advocate for Applicant Hamish Kynaston and Nicola Ridder, Counsel for the Respondent
Investigation Meeting:	10 September 2013 at Palmerston North
Submissions received	18 and 23 September 2013
Date of Determination:	7 November 2013

DETERMINATION OF THE AUTHORITY

Application for prohibiting publication of names

[1] During the investigation meeting I reserved an application made by Mr Bennett to prohibit the publication of the names of both parties. His application was put forward only at the end of the Authority's investigation meeting as it closed. I required him to provide a memorandum outlining the orders and the grounds relied upon for the application that he wished the Authority to consider. Nothing was filed and therefore I cannot take the matter any further. The names of the parties remain public.

[2] Also, the parties consented to the prohibition from publication of the name of a patient and the patient's family referred to in the evidence. I am satisfied that this is

a matter to protect the privacy of the patient and the patient's family, and I am satisfied that in doing so there is no impact on the public's right to be informed and justice being seen to be delivered. By consent the patient's name and any personal details likely to lead to disclosure of the name are prohibited from publication.

Employment relationship problem

[3] This employment relationship problem is about an allegation that Mrs Geevarghese slapped a patient during her shifts on 11 and 12 November 2011, which she denies. She claims that Mid Central District Health Board's (MCDHB) investigation and disciplinary procedure was flawed. She is seeking reinstatement, compensation for lost wages from the date of dismissal (10 February 2012), compensation for hurt and humiliation and costs.

[4] MCDHB denies all the applicant's claims. It is especially opposed to reinstatement based on it not being practicable and reasonable.

The issues

[5] Could a fair and reasonable employer dismiss Mrs Geevarghese for serious misconduct based on Ms Geevarghese not being honest when she denied slapping the patient as alleged?

[6] Did MCDHB have sufficient evidence to meet the gravity of the allegations from the four people making the allegations, and was their information sufficient to base a decision on?

[7] Did MCDHB come to an honestly-held belief that Mrs Geevarghese slapped a patient based on the information available from four people employed by MCDHB at the time?

[8] Did MCDHB follow the requirements for procedural fairness under section 103A (3) (a)-(d) of the Employment Relations Act 2000 (the Act)? Was MCDHB's process flawed as claimed by Mrs Geevarghese?

[9] Were MCDHB's omissions minor and technical for the outcome not to be any different than the decision that was made: applying s 103A (4) of the Act.

[10] Is Mrs Geevarghese entitled to remedies? If so:

- a. Is it reasonable and practicable to reinstate her?
- b. What amounts of money for lost wages and compensation for hurt and humiliation should be awarded subject to the usual principles of mitigation and contribution.

[11] Which party is entitled to costs and how much?

[12] At the Authority's investigation meeting three matters in MCDHB's process were established:

- i. That MCDHB did not tell Mrs Geevarghese that Ms Jan Dewar, registered nurse and Nurse Director Medicine and the decision maker asked Ms Vivienne Laurenson Human Resources Consultant for input on credibility before making a decision.
- ii. That MCDHB did not disclose the full minutes of the meetings held by the investigator Michelle King, Clinical Specialist, also a registered nurse, with the complainant witnesses.
- iii. That there was no reply and a detailed scrutiny by Lynnette Horgan Operations Director Hospital Services of Mrs Geevarghese's last written response to MCDHB before she made her decision to dismiss Mrs Geevarghese.

The facts

[13] Mrs Geevarghese is a registered nurse and was employed by MCDHB at its Palmerston North public hospital. She commenced employment with MCDHB in December 2005. She was transferred to a new ward (STAR 1) temporarily in July 2008, and was permanently appointed to STAR 1 in September 2008. MCDHB is a district health board that has its own human resources department and consultants and it engages lawyers. It can be described as a large and well-resourced employer.

[14] STAR 1 is a 15 room ward that provides assessment, treatment and rehabilitation for older adult patients. This includes patients with mental health issues. STAR 1 assesses both the physical and mental abilities of older adult patients. The ward has two secure outdoor areas for patients to enjoy and six of its rooms are in a secure setting, in order to allow for a higher level of patient observation and patient

safety. Mrs Geevarghese was on duty in STAR 1 over the weekend of 12 and 13 November (Saturday and Sunday). After that weekend MCDHB received three written complaints about Mrs Geevarghese's behaviour on the ward during 12 and 13 November. Two incident forms were completed by MCDHB staff members working in STAR 1 with Mrs Geevarghese. These were health care assistants Pierre La Main and Judith Reid. MCDHB also received a written complaint from an agency care assistant, Carol Tapa who had been working with Mrs Geevarghese for the first time that weekend.

[15] Their allegations were that Mrs Geevarghese had been *having inappropriate interaction with client such as yelling, slapping, punching and pulled his ears, slapped his face, and had called the patient's name then started to slap the patient in the face twice, then she started to hit him in the chest.*

[16] On 14 November 2011 Mrs Geevarghese's supervisor (Paul Stanton) raised the matter verbally with her, and wrote to her about the allegations on 18 November. He invited her to a meeting on 24 November 2011 to hear her initial response to the allegations. This meeting put her on notice that the allegations had been received by MCDHB. After that meeting MCDHB decided that a formal investigation would be required. Formal terms of reference were finalised on 4 December 2011 in regard to the investigation. Michelle King was appointed to carry out the investigation. MCDHB considered she had the appropriate clinical background and expertise to conduct the review and that she was suitably independent of the events and the allegations and people involved. This has not been challenged.

[17] During the course of MCDHB's investigation two employees (Mr La Main and Ms Reid) and the one agency carer (Mrs Tapa) who had lodged the three initial complaints were interviewed. Other employees were also interviewed who had been working in STAR 1 during the two shifts in question. The important person interviewed was Dr Lucy Raratabu, the senior house officer who was on duty both days. Dr Raratabu had not reported the incident because she thought that the matter would be taken up by the nurses and carers. Paul Stanton, supervisor, was also interviewed although he had not been on duty on the Saturday and the Sunday, but he had been the person initially dealing with the complaints that had been brought to his attention.

[18] For purposes of the investigation Mr La Main, Ms Reid and Dr Raratabu all individually reported witnessing Mrs Geevarghese deliver slaps to the patient with a sufficient degree of force for them to consider that her actions were inappropriate.

[19] Dr Raratabu witnessed Mrs Geevarghese slapping the patient on two occasions on Sunday 12 November 2011 and reported that she had heard a third slap, that she did not see, from outside the patient's room.

[20] Mr La Main and Dr Raratabu reported that they were both present during one of the alleged incidents on Saturday 12 November 2011.

[21] Ms Judith Reid reported that she had witnessed Mrs Geevarghese slap the patient on 12 November.

[22] Ms Tapa reported that she witnessed Mrs Geevarghese slap the patient on Sunday 13 November.

[23] Other people working on the ward at the time did not see any actions, but the information available supports that they heard Mrs Geevarghese talking loudly to the patient and another confirmed hearing Ms Tapa and Mr La Main talking about an incident. The latter person was the person that reported that Mr La Main had spoken to her about what he had seen the day before (Saturday), but says that Ms Tapa had spoken to her about what Ms Tapa had seen on the Sunday, and that Ms Reid had brought what she had seen to the person's attention on Sunday also.

[24] Mrs King, the investigator, reviewed the patient's clinical records, the relevant MCDHB policies and completed her investigator's report ("the investigation and specialist review report") on 12 January 2012. The report concluded:

- a. That Mrs Geevarghese had been sufficiently trained.
- b. That Mrs Geevarghese had delivered inappropriate care to the patient and that she had slapped the patient.
- c. That Mrs Geevarghese denied the conduct alleged and had insisted she had not slapped the patient.
- d. That Mrs Geevarghese's behaviour raised serious issues of trust and competence for MCDHB.

[25] MCDHB on the basis of the report produced decided to invoke the disciplinary procedure in regard to the report's findings that Mrs Geevarghese had not followed the appropriate procedure when she allegedly slapped the patient. The report concluded that the allegations were witnessed at least by two people and that the incident had been reported by them to other people. It was also witnessed by an agency health care assistant and the doctor. From the report it appears that a finding that Mrs Geevarghese slapped the patient involved the word of those people who were witnesses opposed to Mrs Geevarghese's word.

[26] Mrs Geevarghese was provided with a summary of the witness accounts of the allegations and their involvement from their interviews with the investigator, Mrs King. However it has been established that the individual witness interview notes taken at the time of the investigation were not provided to Mrs Geevarghese until MCDHB replied through its lawyers to the applicant's letter raising a personal grievance. Mrs Geevarghese was only provided with a summary of the content.

[27] As part of the disciplinary process a recommendation was made for dismissal and the matter was scaled up to the operations manager to decide on the outcome.

[28] The operations manager, Ms Horgan gave Mrs Geevarghese the opportunity to comment on the dismissal. Mrs Geevarghese responded. First in writing, and she then attended a meeting. Ms Horgan says that she incorporated the written response in all the paperwork for consideration after having read it, but did not respond to further detailed issues raised by Mrs Geevarghese.

[29] After the opportunity to respond had been given to Mrs Geevarghese the decision was made to dismiss her. She was dismissed on 10 February 2012. The parties were not able to settle using the mediation services of MBIE. It falls on the Authority to determine the issues.

Determination

[30] Mrs Geevarghese denied the allegations at the time. Once the investigation had been completed and on the basis of the investigator's report Ms Horgan, the decision maker, had to determine credibility. She discussed it with Ms Laurenson who had been involved as the note taker and witness/consultant in the disciplinary process for MCDHB. Mrs Geevarghese claimed that the allegations had been motivated by "racism and bullying". MCDHB considered the claims and found no

basis existed for them. It reasonably rejected them, I hold. Furthermore no specificity and details had been provided by Mrs Geevarghese to support her claims and she had not properly made any such claims earlier, I hold. A copy of a letter written by Mrs Geevarghese that she has produced during the Authority's investigation has to be treated with caution because it was written two years earlier complaining about Ms Reid, and without any subsequent action being taken on it, no follow up by Mrs Geevarghese, and where it remains unclear that the letter even had been received by MCDHB. There is no explanation as to where the letter went and to whom it was sent and/or delivered. I hold that MCDHB reasonably concluded that the letter was very general and not supported by any other information and evidence.

[31] Ms Dewar believed the three witnesses were credible and genuine, despite discrepancies in their versions of the events alleged. Their genuineness was based on them being well known and trusted employees and there was no reason to doubt their statements.

[32] The fourth witness, the agency health care assistant was believed because she had not met Mrs Geevarghese before and other than working on 13 November did not have any contact with the other witnesses. MCDHB found the four witnesses compelling compared with Ms Geevarghese's denials and claims. It considered that Mrs Geevarghese did not recognise that she was slapping the patient or that she was not telling the truth.

[33] There is no requirement for an employer to record meetings and an employer can rely on notes taken during the meetings. Where the accuracy of the notes is challenged then the decision maker is required to consider that. I am satisfied that the essence of the complaints is sufficient to counter any contradictions and inaccuracies on the detail. I have considered Mrs Geevarghese's representative's submissions:

- (i) That Ms Tapa (the agency health care assistant) said that the document she signed did not include exactly the words she used. There is no indication that she subsequently resiled from what she says she saw happen. It is too much to suggest from this that meanings and information in other interviews has been left out.
- (ii) That there are differences about whether Mrs Geevarghese used a cold flannel and that Ms Tapa could not know whether the water was tepid or not when she

did not feel the water or flannel and where the water came from a mixer tap. This remains unexplained and was not followed up by the parties in the Authority's investigation with any detail examination.

- (iii) That Ms Reid says she relieved Mr Le Main on Sunday around 9 to 9.30, but he did not mention the same, and that he stated that Ms Tapa relieved him at one point.
- (iv) That Ms Reid said in her statement of evidence that she was in the room with Mr Le Main and the doctor, Mr Le Main made no reference of her witnessing Mrs Geevarghese's alleged behaviour in his original incident report or in his statement.
- (i) That Ms Reid contradicted herself about speaking to other people about the incident report then saying it was one of those people that telephoned her and asked if she had seen anything that required an incident report.
- (ii) That Ms Reid information on the timing of an incident on 13 November 2011 must be affected by Mr Le Main's information that she could not have been in the patient's room then.

[34] MCDHB has acknowledged that Mrs Geevarghese had denied the allegations. The very purpose of an investigation and following the required disciplinary procedure is to protect an employee. For this reason I do not accept the submission that the process was predetermined and biased against Mrs Geevarghese. I am supported by the decision to appoint Ms Dewar as the investigator and Ms Horgan as the decision maker. No challenge was made by Mrs Geevarghese to their involvement, and I accept they were independent of everyone involved.

[35] MCDHB satisfied itself that the witnesses were independent and that there had been no collusion between them making their reports and when the information was obtained. It also considered Mrs Geevarghese's explanations including:

- i. That the patient would have bled or been bruised. This was checked out by Ms Dewar after 19 January 2012 and Mrs Geevarghese was given a response on 25 January when the explanation was rejected.

- ii. That the Police should have been involved. There is no requirement for an employer to do this, and it is open to an employer to conduct its own enquiry.
- iii. That Mrs Geevarghese raised an issue about not thumping a patient with a pacemaker. MCDHB did not rely on thumping of the patient's chest as a disciplinary matter. Mrs Geevarghese has subsequently claimed that MCDHB did not check the pacemaker memory in regard to the allegations. This was only raised by Mrs Geevarghese at the Authority's investigation, and on its own, cannot be relied on when Mrs Geevarghese had the opportunity to raise it during the disciplinary process.
- iv. That there were discrepancies in the witnesses' statements that they had not reported what they had seen immediately, including the doctor who needed to be approached, and that the doctor had not intervened to stop any inappropriate behaviour.

[36] Ms Dewar responded to Mrs Geevarghese in writing. She assessed that four witnesses say what they saw happen, and that the discrepancies in their reports at the time did not mean that the witnesses had not seen what happened. The evidence of the witnesses was sufficient to meet the gravity of the allegations given Mrs Geevarghese had no witnesses to support her claims.

[37] The conclusion reached by MCDHB was that it was concerned that Mrs Geevarghese had not been honest about whether she had slapped the patient. This concern was put in the investigation report, Ms Dewar's letters dated 25 January and 3 February when she recommended dismissal. In the disciplinary process Mrs Geevarghese raised a matter of the layout of the patient's room and claimed that the witnesses would not have been able to see her slap the patient. Ms Dewar and Ms Horgan rejected it as they say it would not have precluded the witnesses seeing what they say happened.

[38] I hold that the MCDHB came to an honestly held opinion (i) that Mrs Geevarghese more likely than not did slap the patient; and (ii) that her denial was not being honest about her actions. Dismissal is in the range of options for this offence, I hold.

[39] MCDHB has satisfied me that it has met the requirements of s 103A (3) (a)-(d) of the Act. Given the resources of the employer there was an investigation with a

report produced by a person sufficiently independent of all involved. Witnesses were interviewed and some were re-interviewed for a response to Mrs Geevarghese's explanations; for example the doctor.

[40] Next MCDHB put all of its concerns to Mrs Geevarghese about the allegation, the findings and a recommendation on an outcome and had regard to the standard of care demanded in the role. This included a summary of the witness statements. Unfortunately the actual statements and reports were not given to Mrs Geevarghese at the time, and in hindsight they should have been, but I hold that there was no material difference in the content of the documents.

[41] Mrs Geevarghese had an opportunity to respond. There were meetings. Finally I hold that MCDHB did genuinely consider Mrs Geevarghese's response and did consider other options. Ms Horgan was the decision maker and has accepted the responsibility for her decision. It is not fatal that Ms Laurenson was engaged in a consultation with Ms Horgan. This is because Ms Laurenson had been involved throughout the process and there has been nothing identified in the evidence that was prejudicial to Mrs Geevarghese. There was the one omission that Ms Horgan did not reply to Mrs Geevarghese's last written response which was put in the file after being read before the decision was made to dismiss. The omission was not fatal because Mrs Geevarghese covered the same ground that she had put forward in her earlier explanations, responses and comments in support of her denial of any wrong doing. Indeed her claims were nothing new warranting further investigation.

[42] Mrs Geevarghese genuinely believes that she has done nothing wrong and has consistently denied the allegations and earnestly sought to rebut them. She may be right, but MCDHB did come to an honestly held belief that there had been serious misconduct based on the evidence available at the time. I am satisfied that the evidence did meet the standard for such allegations.

[43] It follows that Mrs Geevarghese's claims are unsuccessful, and I dismiss them.

[44] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority