

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 91
5532685

BETWEEN MARGARETHA MARIA
JOHNSON
Applicant

A N D WAITEMATA DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Peter Johnson, Counsel for Applicant
Anthony Russell, Counsel for Respondent

Investigation Meeting: 16-18 February 2016 at Auckland

Submissions Received: 25 February and 8 March 2016 from Applicant
4 March 2016 from Respondent

Date of Determination: 22 March 2016

DETERMINATION OF THE AUTHORITY

- A. The applicant, Ms Margaretha Johnson was unjustifiably dismissed from her employment by the respondent, Waitemata District Health Board (WDHB).**
- B. There is no order for reinstatement.**
- C. Within 21 days of the date of this determination, WDHB must settle Ms Johnson's personal grievance claim as follows:**
- (a) \$15,000 as compensation for humiliation, loss of dignity and injury to her feelings in respect of her unjustifiable dismissal.**

(b) **three months' income (gross) as reimbursement of lost wages.**

(c) **The above amounts are reduced by 30% as a result of Ms Johnson's contribution to her dismissal.**

D. Costs are reserved.

Employment relationship problem

[1] The applicant, Ms Margaretha Johnson was employed as a registered nurse by the respondent, Waitemata District Health Board (WDHB) for 12 years.

[2] Ms Johnson was dismissed by WDHB for serious misconduct with effect from 5 September 2014.

[3] Ms Johnson raised a personal grievance claiming her dismissal was unjustified.

[4] Despite attempts by the parties to settle the grievance, including mediation assistance, no resolution was reached and the matter proceeded to an investigation by the Authority.

[5] Ms Johnson seeks a declaration that her dismissal was unjustifiable and asks to be reinstated to her former position. Ms Johnson also seeks reimbursement of lost remuneration and compensation for hurt feelings, humiliation and distress suffered as a result of the dismissal.

[6] WDHB resists Ms Johnson's claim that she was unjustifiably dismissed. WDHB states its overriding responsibility is to ensure patient safety. Ms Johnson's nursing practice posed a significant risk to patient safety, accordingly WDHB states her dismissal by it was justified.

The investigation meeting

[7] The investigation meeting took three full days in the Authority. Lengthy submissions were filed by counsel for both parties following the investigation meeting.

[8] For the Authority's investigation meeting, a witness statement was filed by Ms Johnson. Thirteen witness statements were filed on behalf of WDHB.

[9] Each of the witnesses giving evidence before the Authority confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[10] As permitted under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

The issues

[11] The issues for the Authority to determine are:

- (a) Was Ms Johnson's dismissal by WDHB justified?
- (b) If the answer is no, what remedies, if any, including reinstatement is Ms Johnson entitled to?
- (c) Did Ms Johnson contribute to her dismissal?

Test of justification

[12] By raising a grievance about her dismissal by WDHB and bringing it to the Authority for investigation and determination, Ms Johnson has required the Authority to apply the test of justification under s.103A of the Act.

[13] Under this test, the question of whether Ms Johnson's dismissal was justifiable must be determined, on an objective basis, by considering whether WDHB's actions, and how WDHB acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred¹.

[14] In applying s.103A, the Authority must also consider four particular factors set out at s.103A(3), as well as any others it thinks appropriate. The four particular factors relate primarily to the way in which complaints about an employee are investigated, whether the employee concerned has been properly notified of the

¹ *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [22]

complaints, provided with a proper opportunity to respond to them and whether the employer has genuinely considered the employee's responses.

[15] The test in s.103A is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly (s.103A(5)).

[16] The Authority has had the benefit of extensive evidence on all matters material to the resolution of this grievance, and it has received lengthy submissions from Mr Peter Johnson and Mr Anthony Russell in relation to the law to be applied, particularly under s.103A of the Act.

Was Ms Johnson's dismissal by WDHB justified?

[17] Ms Johnson's behaviour, which WDHB concluded amounted to serious misconduct, occurred during the period of time following her return to work on 28 July 2014 until her suspension from duties on 6 August 2014.

[18] The conduct which WDHB says amounted to serious misconduct was the outcome of the 'competency point in time assessment' (point in time assessment) undertaken by WDHB on 1 August 2014 together with "Risk Pros" identifying safety risks and filed in relation to Ms Johnson's nursing practice between 30 July and 6 August 2014.

[19] Ms Johnson failed the point in time assessment. This failure together with Risk Pro-incidents which occurred and which involved Ms Johnson, led to the conclusion by WDHB that an investigation in to her conduct was necessary.

[20] Following WDHB's investigation, it concluded that Ms Johnson had committed serious misconduct. Dismissal on notice was determined to be the appropriate penalty.

WDHB

[21] WDHB is the largest District Health Board by population in New Zealand. WDHB provides health services to more than 580,000 people throughout the

communities of Rodney, North Shore and Waitakere. WDHB is responsible for the North Shore and Waitakere Hospitals and 30 community sites².

Ms Johnson's work at North Shore Hospital

[22] Ms Johnson began working as a registered nurse with WDHB in November 2001 at its North Shore Hospital. Ms Johnson worked throughout the hospital and in its emergency department.

[23] From December 2008 until December 2013, Ms Johnson worked permanent night duty on Ward 7 at North Shore Hospital. Ward 7 is acute orthopaedics. Patients are aged between 70 and 102 years and most require full time care.

Previous complaints about Ms Johnson

[24] In his submissions on behalf of WDHB, Mr Russell refers to four complaints about Ms Johnson dating back to 22 November 2010. Later in his submission, Mr Russell makes a broad submission that there were:

... significant issues with the nursing practice of [Ms Johnson] prior to July 2014. These issues had been raised with [Ms Johnson], and although in most cases no formal warnings had been instituted, processes had been put in place to address such.

[25] The initial complaint in 2010 was referred to mediation and settled. A confidential record of settlement was entered into by the parties.

[26] The parties accepted that it was the dismissal on 5 September 2014 that was the subject of my investigation, not any previous complaints. Some detail was provided to the Authority regarding a complaint by patient X. This was because it was this complaint and its attempted resolution that led to Ms Johnson's return to work in July 2014. It was during the short period of time Ms Johnson returned to work that she was dismissed for serious misconduct.

Patient X complaint

[27] On 4 December 2013, patient X complained about Ms Johnson and an investigation was undertaken by WDHB.

²

www.waitematadhb.govt.nz/aboutus

Investigation into complaint by Patient X

[28] An investigator was appointed and conducted the investigation. Ms Johnson was suspended from duties on 6 December 2013 while the investigation was conducted.

[29] The outcome of the investigation was that patient X's complaint could not be substantiated. However, several concerns about Ms Johnson's nursing practice were identified which WDHB wished to have addressed. A written report from the investigator was provided to the parties on 25 February 2014.

Outcome of complaint by Patient X

[30] As a result of the investigation, WDHB informed Ms Johnson that there would be no disciplinary action against her, she was no longer suspended and that she could return to work on certain conditions. Ms Johnson's suspension had been for almost 3 months.

[31] Ms Johnson did not return to work immediately. Following the lifting of her suspension, Ms Johnson took some time off on sick leave for stress as a result of the patient complaint and investigation, and took annual leave to visit her parents.

Personal grievance claim filed in the Authority - mediation

[32] Ms Johnson filed a personal grievance claim in the Authority as a result of the investigation by WDHB into patient X's complaint. The parties attended mediation in July 2014 in an attempt to resolve the claim. However, despite terms of settlement being drafted, no record of settlement was entered in to by the parties under s.149 of the Act.

[33] However, the parties agreed that Ms Johnson would return to work on 28 July 2014 on certain conditions. By this time, Ms Johnson had been away from work for approximately 8 months.

WDHB's expectations in respect of Ms Johnson's return to work

[34] Ms Kate Gilmour, Acting Head of Division, Nursing Surgical and Ambulatory Services, sent a letter to Ms Johnson on 24 July 2014. The letter confirmed Ms Johnson's date of return to work and noted that there still remained concerns

relating to her nursing practice. Ms Gilmour recorded the support that WDHB would provide Ms Johnson when she returned to work. Ms Gilmour stated:

To support you in the workplace there are expected recommendations ... which comprise of reviewing your current nursing practice and developing a programme of training, supervision and advice, where necessary.

[35] Expectations for the three month period upon Ms Johnson's return to work included that she undergo:

- (a) A "point in time" assessment of practice against the Nursing Council of New Zealand Competencies;
- (b) Supervision prior to the assessment to offer guidance, support and advice;
- (c) Training to be prioritised as part of a plan with specific activities and timeline;
- (d) Ongoing feedback and communication with a three month review to determine whether any further activities and support were required;
- (e) A performance appraisal process and a requirement that Ms Johnson represent a Registered Nurse Level 2 portfolio within three months "*with particular reflection on your practice relating to the WDHB values and how these apply to your practice as a nurse*".

[36] The letter was clear that WDHB was committed to supporting Ms Johnson to achieve its expectations and concluded by noting that if there were any further complaints, this could result in a formal investigation process.

Ms Johnson's return to work on 28 July 2014

[37] Ms Roslyn Bell, the Charge Nurse Manager in Ward 7 and Ms Gilmour met with Ms Johnson on the morning of her return. Ms Johnson was informed that she would assist registered nurse Ms Kelly Yang, one of her supervisors on the first day, and that from her second day she would pick up her own patient workload.

Supervision

[38] Ms Kelly Yang was to supervise Ms Johnson for the first week back and registered nurse, Ms Ann Xu, was to supervise Ms Johnson in the second week of her return.

[39] It was clear from the evidence of both Ms Yang and Ms Xu at the Authority's investigation meeting that neither was to provide guidance, training, advice or instruction to Ms Johnson. Because Ms Johnson was an experienced registered nurse their role was to observe Ms Johnson's nursing practice and to report any safety issues.

Risk Pro System

[40] Risk MonitorPro is WDHB's online system for reporting, rating and managing incidents affecting patients or staff. WDHB has Guidelines for Incidents/Events on Risk MonitorPro.

[41] Risk Pros include a wide variety of incidents or events. Some Risk Pros involve patient safety such as an injury arising from restraint of a patient, strains or sprains from manual handling, falls, trips. Other Risk Pros arise from damage to property, theft. Risk Pros are rated in accordance with the guidelines and depend on the severity of risk.

[42] The guidelines require that staff performance issues that have not harmed patients or other staff members should be discussed with a Manager before submitting a Risk MonitorPro file. Risk Pros that are submitted are entered and logged into the central online system.

Risk Pros submitted in respect of Ms Johnson

[43] Eight Risk Pros were filed in relation to Ms Johnson's nursing practice between 30 July 2014 and 6 August 2014.

[44] Risk Pro 152535 on 30 July 2014 documented the incident as follows:

The pain team had changed the epidural prescription but this did not match what had been administered on the epidural pump by Ms Johnson.

[45] Risk Pro 153063 on 31 July 2014 recorded Ms Johnson failing to sign out the patient's medication. Medicine was removed from the pyxis machine but the failure to sign out meant there was uncertainty as to whether the medication was administered.

[46] These are two examples of eight Risk Pros filed in respect of Ms Johnson's practice during the first two weeks of her return.

[47] The final Risk Pro 152902 was regarded particularly seriously by WDHB. The Risk Pro in question concerned a patient who appeared to be in respiratory distress and that Ms Johnson did not respond appropriately.

Point in time assessment – 1 August 2014

[48] On 1 August 2014, the point in time competency assessment was conducted by Mr Rupert Murch. Mr Murch is a nurse educator at WDHB and has been a registered nurse for 24 years.

[49] Mr Murch conducted the point in time assessment over a period of approximately 5 hours on one day. Mr Murch observed Ms Johnson's nursing practice over that time.

[50] Ms Johnson failed in all four domains of nursing practice that were assessed by Mr Murch. Mr Murch summarised his assessment as demonstrating that Ms Johnson's nursing practice was:

18. *... fundamentally inadequate to keep up with the demands of patients. She failed in all four domains of nursing practice that were assessed. These were:*
 - *Professional responsibility;*
 - *Management of nursing care;*
 - *Interpersonal relationships;*
 - *Interprofessional healthcare and quality improvement.*

As a consequence, she was unsafe in her practice and patients were considered to be at risk.

19. *Moreover RN Johnson had no insight to the risk she was posing to patients and that was a fundamental concern. ...For RN Johnson to rectify these fundamental problems would require a significant amount of time and training invested in her. Without insight into this behaviour, I would be concerned as to whether these fundamental problems were rectifiable.*

[51] Because of the Risk Pros filed in respect of Ms Johnson's nursing practice and her failure of the point in time assessment, WDHB decided to undertake an investigation which ultimately lead to Ms Johnson's dismissal for serious misconduct.

Investigation by WDHB

Letter of 5 August 2014

[52] Following the point in time assessment, Ms Bell and Ms Gilmour wrote to Ms Johnson expressing concern that Ms Johnson had failed "*a significant number of nursing competency domains*". A meeting was requested with Ms Johnson to discuss the failed assessment. The proposed meeting did not occur because Ms Johnson was ill.

Letter of 8 August 2014

[53] On 8 August 2014, Ms Gilmour wrote to Ms Johnson stating at the time of the letter of 5 August 2014, she was aware of three Risk Pro incidents but that a further five Risk Pro submissions had been raised.

[54] Ms Gilmour stated in her letter of 8 August 2014 that there were eight Risk Pro submissions in relation to Ms Johnson's nursing practice between 30 July and 6 August 2014 and requested a meeting to discuss these along with the point in time assessment.

[55] A meeting was requested for 14 August 2014. Ms Gilmour informed Ms Johnson that she was considering suspending her whilst an investigation was undertaken into the matter. Ms Gilmour informed Ms Johnson that her employment "*is currently at risk due to the potential serious breaches of the WDHB Discipline and Dismissal Policy*". Ms Johnson was requested not to attend Ward 7 or to contact any staff in relation to the issues being investigated.

Meeting on 14 August 2014

[56] At the meeting the Risk Pros and the point in time assessment were discussed. Ms Johnson attempted to respond to questions concerning the point in time assessment and the Risk Pros.

[57] The meeting notes record Ms Johnson's concerns about being "out of practice", that "she did not feel up to speed", "hard being off for a long time", "... nurses are intolerant of me as I am slow; I've been through a trauma".

[58] Ms Johnson was on sick leave at the time of the meeting and was informed that she was not to return to work and would be suspended pending the outcome of the investigation by WDHB.

Letter of 18 August 2014

[59] Ms Leith Hart, WDHB General Manager (Acting), Surgical and Ambulatory Services, wrote to Ms Johnson on 18 August 2014. Ms Hart had not been at the meeting on 14 August 2014. Ms Hart stated that she was concerned at the level of risk presented in the point in time assessment and the Risk Pros and stated that:

If any or all of the issues reported are substantiated, they may constitute a serious breach of the WDHB discipline and dismissal policies, specifically you may:

- *Be unsafe to practice in a health service situation;*
- *Have breached your professional nursing competencies and the patient code of practice;*
- *Have acted in a way that could cause injury endangering the safety of patients;*
- *Have deliberately or negligently acted in a way which seriously affects the quality of service or delivery of care.*

[60] A further meeting was proposed and Ms Johnson was informed that in the event she was found to have seriously breached the WDHB Discipline and Dismissal Policy, WDHB may take disciplinary action including termination of her employment.

Meeting of 25 August 2014

[61] The point in time assessment and Risk Pros were discussed again. At the conclusion of the meeting, following an adjournment, Ms Hart informed Ms Johnson that she had reached a view that Ms Johnson:

- *Is unsafe to practice in a health service situation;*
- *Has breached her nursing competencies and code of practice;*
- *Acted in a way that could cause injury to or endanger the safety of patients; and*
- *Deliberately or negligently acted in a way which seriously affect the quality of service or delivery of care.*

[62] Ms Hart told Ms Johnson that she viewed this to be a serious breach of the Discipline and Dismissal Policy and that termination of her employment was an option open to her.

Letter of 27 August 2014

[63] Ms Hart followed the meeting up by writing a letter to Ms Johnson on 27 August 2014.

[64] Ms Hart stated that she was satisfied with the rigour of the point in time assessment and relayed her extreme concern at Ms Johnson's failure to meet the majority of the competencies.

[65] Ms Hart stated:

A supportive programme was established for your return to duty on 28 July 2014 to assist you address the concerns arising from patient complaints which were raised with you. ... You are an experienced nurse and I am seriously concerned, not only by the fact that these significant gaps in the fundamental expectations of your role exist, but by your responses to the issues raised with you. You show no reflection on your standards of care. ...

[66] Ms Hart confirmed her findings in the letter, that Ms Johnson's actions constituted a serious breach of the WDHB Discipline and Dismissal Policy and that based on her finding of serious misconduct she was considering terminating Ms Johnson's employment.

Meeting of 5 September 2014

[67] A meeting was held on 5 September 2014, to consider alternative penalties to dismissal. WDHB confirmed its view that dismissal was appropriate.

Grounds for dismissal

[68] In its letter of 9 September 2014, WDHB set out four grounds of serious misconduct by Ms Johnson which it says justified her dismissal. The letter stated that Ms Johnson:

- Was unsafe to practice in a health service situation;
- Breached ... professional nursing competencies and the Patient Code of Practice;

- Acted in a way that caused injury or endangered the safety of patients;
and
- Deliberately or negligently acted in a way which seriously affected the quality of service or delivery of care.

[69] WDHB considered the failure by Ms Johnson of the point in time assessment and the Risk Pros constituted serious misconduct and following an investigation decided dismissal was appropriate.

[70] In his closing submissions, Mr Russell states that Ms Johnson's employment was terminated for unsafe practice. In view of WDHB's obligations to the general public under the New Zealand Public Health and Disability Act 2000, Mr Russell contended that Ms Johnson's "unsafe practice" went to the heart of WDHB's obligations and her dismissal was substantively justified.

[71] I do not consider, in reaching the conclusions above, WDHB acted in a way that a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

Was there serious misconduct?

[72] In assessing whether a finding of serious misconduct and a consequent outcome of dismissal is fair and reasonable, I must consider whether Ms Johnson's conduct was such that "*deeply impairs or is destructive of that basic confidence or trust*". This will be a matter of degree in the circumstances³. In *Makatoa v. Restaurant Brands (NZ)Ltd*⁴, it was held:

... negligence on its own cannot ordinarily justify a dismissal unless it is gross, or amounts to recklessness, or is repeated after warnings and despite training...

[73] And further⁵:

The mere fact that consequences are very serious does not mean that the act which produced or contributed to those consequences necessarily amounts to serious misconduct. That kind of misconduct will generally involve deliberate action inimical to the employer's interests. It will not generally consist of mere inadvertence,

³ *BP Oil NZ Ltd* [1992] 3 ERNZ 483(CA))

⁴ *Makatoa v Restaurant Brands(NZ)Ltd* [1992] 2 ERNZ 311 at para [50]

⁵ *Ibid* p.319

oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.

WDHB's Discipline and Dismissal Policy

[74] WDHB has a Discipline and Dismissal policy. The policy contains a non-exhaustive list of behaviours that may amount to serious misconduct.

[75] The list includes behaviours such as assault, threats, harassment, theft, consuming alcohol, conviction of a criminal offence. The list also includes:

- Being unsafe to practise in a health service situation, including non-presentation of a current Annual Practising Certificate;
- Breach of professional/clinical Code of Practice or Code of Ethics;
- Causing injury or endangering the safety of staff or the public;
- Deliberately or negligently committing any act which seriously affects the quality of service or delivery of care ...

[76] I am not satisfied that Ms Johnson's actions when she returned to work can be categorised as serious misconduct as described by Goddard CJ in *Makatoa* above or indeed by the Court of Appeal in *BP Oil*. Ms Johnson was not acting in a deliberate manner inimical to WDHB's interests, nor was she grossly negligent. Such elements elevate conduct from misconduct to serious misconduct and are missing in this case.

Conditions of Ms Johnson's return

[77] When Ms Johnson returned to work on 28 July 2014, she was to receive support, supervision, to have training needs prioritised and ongoing feedback and communication. This did not occur. Rather, Ms Johnson's practice, following almost 8 months away from the workplace, was monitored over a period of less than 2 weeks, by two registered nurses, respectively. Neither of the supervising nurses was prepared to offer guidance or support because they regarded Ms Johnson as an experienced nurse. They saw their role was to observe Ms Johnson's nursing practice and to report any issues relating to patient safety.

[78] Ms Johnson was required to undergo a point in time assessment. This was a snapshot of her nursing practice and was conducted over a timespan of approximately 5 hours on one day.

[79] Further, the point in time assessment was conducted when Ms Johnson had been away from work for 8 months, some of which time she was on suspension while an investigation was carried out into a complaint from patient X which was not substantiated. This was a stressful time.

[80] WDHB had an obligation, in my view, to put in place the training, supervision, advice and support that were promised by it in the letter of 24 July 2014 as a condition of Ms Johnson's return to work. This did not occur. In such circumstances, Ms Johnson was bound to fail when she returned to work.

Substantive justification

[81] Clearly there were serious issues arising from the point in time assessment and the Risk Pro submissions concerning Ms Johnson's nursing practice. These issues arose in a period of less than 2 weeks following Ms Johnson's return to work in circumstances referred to above.

[82] It was as a result of its investigation that WDHB concluded that Ms Johnson was unsafe to practice in a health service situation, breached her professional nursing competencies and the patient code of practice, acted in a way that could cause injury endangering the safety of patients and deliberately or negligently acted in a way which seriously affected the quality of service or delivery of care.

[83] Applying the test of s.103A of the Act, I consider that the dismissal of Ms Johnson in the overall circumstances known to WDHB at the time it made its decision was not what a fair and reasonable employer could have done.

Procedural fairness

[84] WDHB did not sufficiently comply with the factors set out in s.103A(3) of the Act. It did not, in my view, sufficiently investigate the allegations against Ms Johnson. The point in time assessment was a snapshot of Ms Johnson's nursing practice and was an indicator to WDHB, that the training, supervision and guidance

promised was required. It was not sufficient in my view to base a disciplinary investigation into Ms Johnson's conduct.

[85] I consider further that WDHB did not genuinely consider Ms Johnson's explanations in relation to the point in time assessment and the Risk Pros. WDHB accepted the point in time assessment and the validity of the Risk Pro submissions as indicating serious misconduct on the part of Ms Johnson which justified an investigation by it.

[86] I do not consider such a course of action was open to it in the context of Ms Johnson's return to work subject to conditions which were not fulfilled by WDHB.

[87] The dismissal was therefore not justifiable and Ms Johnson has established her personal grievance in that regard.

Alternatives to dismissal

[88] I find that the dismissal of Ms Johnson was not what a fair and reasonable employer could have done in the circumstances.

[89] In my view, a warning issued to her and counselling together with the support envisaged in the return to work programme were what was required and could have been justified in the circumstances.

Remedies

[90] In considering the appropriate remedies to resolve the grievance, including reinstatement sought by Ms Johnson, the Authority must also examine the extent to which her actions or conduct contributed to the situation that gave rise to her unjustified dismissal.

Reinstatement

[91] Reinstatement is no longer the primary remedy under the Act, but it is an important remedy for an employee⁶. Section 125 of the Act provides for reinstatement "*if it is practicable and reasonable*".

⁶ *H v A Ltd* [2014] NZEmpC 189 at para.[108]

[92] In *Lewis v. Howick College Board of Trustees*⁷, the Court of Appeal affirmed the view that:

... practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully.

[93] The Employment Court in *Angus v Ports of Auckland Ltd*⁸ stated in respect of “*reasonableness*” that the requirement for reasonableness invokes a broad inquiry into the equities of the parties’ cases so far as the prospective consideration of reinstatement is concerned.

[94] This approach has been adopted by the Employment Court in the decision of Judge Ford in *H v. A Ltd*⁹.

[95] Mr Peter Johnson on behalf of Ms Johnson submits that, given the size of WDHB, it could easily accommodate a return by Ms Johnson. Mr Johnson says that there are other nursing areas that Ms Johnson could integrate into and that Ms Johnson has spent her working life as a registered nurse.

[96] Mr Anthony Russell on behalf of WDHB says that reinstating Ms Johnson is not practicable or reasonable. Mr Russell says that factors including the time that has elapsed since the termination of Ms Johnson’s employment, Ms Johnson’s fraught relationship with and treatment of other staff, the views of Ms Johnson’s managers that she has an unsafe practice and her lack of insight are all important reasons for refusing reinstatement.

[97] There were a large number of witnesses called by WDHB, including colleagues and managers who opposed Ms Johnson’s reinstatement. The evidence demonstrated that there were issues between Ms Johnson and her colleagues and on a number of occasions there had been conflict between Ms Johnson and her colleagues.

[98] There were also a number of complaints about Ms Johnson that were the subject of investigation by WDHB in her final few years. While the resolution of some of those conflicts had been on a confidential basis, the fact that there had been a number of conflicts and complaints discloses real concerns about the practicability of

⁷ [2010] NZCA 320

⁸ [2011] NZEmpC 160

⁹ *Supra* para.[112]

reintegration by Ms Johnson into the workplace. Further, Ms Johnson did demonstrate anger and resentment towards her managers and colleagues at WDHB at the Authority's investigation meeting.

[99] Balancing the equities of the parties' cases, in this instance, I am not persuaded that reinstatement is appropriate. Accordingly, there is no order for reinstatement.

Reimbursement of lost wages

[100] Ms Johnson has established that she has a personal grievance and that she has lost remuneration as a result of her personal grievance. Under s.128 of the Act, Ms Johnson is entitled to reimbursement.

[101] Ms Johnson is seeking reimbursement for the full loss of her earnings from the date of dismissal under s.128(3) of the Act.

[102] Ms Johnson is obliged to mitigate any losses as a result of her dismissal. There was no evidence that Ms Johnson took any steps to mitigate her loss. Ms Johnson's evidence was that she had not applied for any other position as a registered nurse or in any other role. In such circumstances I am not prepared to exercise my discretion under s128(3) of the Act and award Ms Johnson compensation for remuneration losses greater than 3 months.

[103] Therefore, I award Ms Johnson three months' loss of gross income pursuant to s.128(2) of the Act. I expect the parties can resolve the actual amount. If there are any issues, leave is granted for either party to seek directions from the Authority.

Compensation pursuant to s.123 of the Act

[104] Ms Johnson also claims compensation for humiliation, loss of dignity and injury to her feelings.

[105] Ms Johnson gave evidence about the considerable stress she felt as a result of the disciplinary process and her ultimate dismissal. Ms Johnson also gave evidence of feeling humiliated and persecuted.

[106] I have no doubt that Ms Johnson found her suspension and dismissal hurtful and humiliating. She had worked at WDHB for 12 years. In all the circumstances, I consider compensation of \$15,000 appropriate.

Contribution

[107] As both counsel submitted, s.124 of the Act requires that I consider the extent to which Ms Johnson's actions contributed to the situation that gave rise to the personal grievance. In the event I consider that Ms Johnson's behaviour contributed to her dismissal, then compensation awarded must be reduced.

[108] There had been complaints about Ms Johnson and conflicts between Ms Johnson and her colleagues, particularly in her last few years of employment at WDHB.

[109] Ms Johnson failed the point in time competency assessment and there were eight Risk Pros filed in relation to her nursing practice when she returned to work. Ms Johnson lacked insight with regard to her nursing practice. Viewed objectively, I consider Ms Johnson's conduct was partly to blame for her dismissal.

[110] In the circumstances, I consider a 30% contribution by Ms Johnson to her dismissal is appropriate and accordingly the amounts of lost wages and compensation are to be reduced by 30%.

Costs

[111] Costs are reserved. If the parties are unable to agree on costs, Ms Johnson has 14 days within which to file a memorandum as to costs in the Authority. WDHB has 14 days upon receipt in which to file a memorandum as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority