

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 404
5404524**

BETWEEN HASHEEM KAMAL
 Applicant

AND HORIZON RADIOLOGY
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Bill Manning, Counsel for Applicant
 Emma Butcher, Counsel for Respondent

Investigation Meeting: 30 & 31 August and 1 September 2013 at Auckland

Submissions received: 1 September 2013 from Applicant and from Respondent

Determination: 6 September 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Hasheem Kamal, claims that he was unjustifiably dismissed by the Respondent, Horizon Radiology Limited (Horizon) as a result of an incident which took place at Horizon's Dawson Road premises on 5 September 2012.

[2] Mr Kamal further claims that he was unjustifiably disadvantaged by actions of Horizon in their closing of the Dannemora clinic and requiring him to work from the Dawson Road clinic; and/or by Horizon failing to provide him with training on the radiography equipment located at the Dawson Road clinic.

[3] Mr Kamal is also claiming disparity of treatment in respect of the treatment of colleague, Ms Tracey Shanta.

[4] Horizon denies that Mr Kamal was unjustifiably dismissed and says that it carried out a full and fair investigation into the incident, and that Mr Kamal was found to have committed serious misconduct such as to destroy the necessary trust and confidence in the employment relationship.

[5] Horizon claims that its actions in requiring Mr Kamal to work from the Dawson Road clinic following the closure of the Dannemora clinic were justifiable and did not cause Mr Kamal disadvantage, and further claims that Mr Kamal was adequately trained at all times.

[6] Horizon further claims that any disparity of treatment was justifiable.

Issues

[7] The issues for determination are whether Mr Kamal was:

- Unjustifiably dismissed by Horizon, in particular:
 - If there had been serious misconduct, was dismissal an appropriate outcome?
 - Was there disparity in the treatment of Mr Kamal such as to render the decision to dismiss him one which was not available to Horizon as a fair and reasonable employer?
- Unjustifiably disadvantaged in his employment by Horizon failing to :
 - consult him about the decision to close the Dannemora premises and the transfer of his place of employment to the Dawson Road premises
 - train him on the use of the radiographic equipment at the Dawson Road clinic

Background Facts

[8] Mr Kamal, a qualified Medical Radiation Technologist (MRT), explained that in 2002 he had initially been employed by Radiographers Bureau Limited as a bureau MRT and had commenced working at the Otago clinic, which was owned at that time by East Tamaki Healthcare Radiology Ltd (ETHC).

[9] Approximately 16 months later ETHC had opened a second clinic, the Dannemora clinic, and Mr Kamal said that he had worked approximately 60% of his time at the Otago clinic and 40% of his time at the Dannemora clinic.

[10] In or about November 2006 Mr Kamal had been offered, and had accepted, employment with ETHC, signing an individual employment agreement. Mr Kamal's initial hours of work of Monday to Friday 9 a.m. to 7 p.m. and on Saturday from 10.00 a.m. to 6.30 p.m. were amended with effect from 5 July 2007 to work 8.00 a.m. to 8.00 each day.

[11] As an experienced MRT, Mr Kamal had responsibility for the training of all radiography staff and provided mentoring, training and guidance to locum staff.

[12] Mr Kamal said he had received a letter from Dr Bruce Allen, the director of Horizon, now Chairman of the Board, on 15 December 2009 advising him that the x-ray business of ETHC located at the Otara and Dannemora clinics had been purchased by Horizon and that Horizon would continue his employment on the existing terms and conditions of employment.

[13] Mr Kamal said he had raised concerns with Dr Allen in Horizon's first month of operation concerning the use of certain chemicals used in processing x-ray film which had in the past caused him a health problem, namely Acute Bronchitis. Dr Allen said that as soon as Mr Kamal had made him aware of the problem, he had stopped Mr Kamal mixing the chemicals and had phased out the use of the offending chemicals.

[14] During June 2010 Mr Kamal said he and Dr Allen had discussions over a draft Horizon employment agreement. The discussions continued during 2011 and 2012; however Mr Kamal said he would not agree to the proposed terms in the draft employment agreement concerning hours of work, flexibility to work at any of Horizon's Auckland clinics, and the rate of pay.

[15] Mr Kamal confirmed that he had also received and signed a copy of Horizon's protocols including the Horizon Radiation Safety Plan (RSP). The RSP stated:

- *Any abnormality in the running of x-ray generators must be reported immediately to Dr Bruce Allen.*
- *In the event of any accident or emergency the Dr Bruce Allen must be contacted immediately.*

All accidents or incidences where an individual is exposed to levels of radiation exceeding what is normally expected must be reported to the principal licensee, or a delegated authority, who will then conduct an investigation.

[16] Mr Kamal also had, in addition to the RSP, familiarity with the Radiation Incident protocol, the purpose of which is stated to be: *“To document the dose of radiation received by a patient through either machine fault or Radiographer error”*.

[17] In accordance with the protocol, the employee concerned was to: *“Identify the dose by checking the number of films taken and recording the mAs value.”* and contact the physicist: *“who will assess the dose and therefore the risk to the patient”*.

[18] Mr Kamal said that on 2 March 2012 he had received a further draft employment agreement from Ms Mary Gordon, the new Managing Director of Horizon, however this had not been acceptable to him, and on 2 April 2012 he had written to Horizon expressing his concerns.

[19] On 16 April 2012 Mr Kamal had met with Ms Jenny Painter, MRT Manager, and Ms Cathy Martin, Operations Manager, to discuss the draft employment agreement, but Mr Kamal said that the meeting had failed to resolve the outstanding issues regarding hours of work, flexibility in respect of working locations and a flat rate of pay to apply to Saturdays.

Formal written warning

[20] On 7 March 2011 Mr Kamal received an email from Dr Allen in which Dr Allen addressed a complaint raised by Ms Gayle Sim, the group Charge MRT to whom Mr Kamal reported, about images which had been taken of a wrist fracture by Mr Kamal. In the email Dr Allen had written:

Once again you have failed to follow the correct protocols as listed in the protocol manual. See visit 513541.

.... This is basic radiography Hasheem.

...I will send you a formal letter about this as a formal written warning that will be retained in your personnel file.

[21] On 21 March 2011 Dr Allen sent Mr Kamal an email stating:

Regarding radiography errors in xray of wrist in visit 513541. ... Hasheem, we have has(sic) several conversations both verbally and on Spark about the radiography errors you have previously made in the imaging of the forearm and wrist. You have been given the opportunity to respond, and you have indicated several times that you

have reviewed both the protocol and the standard reference text available at the Otara branch.

Despite these corrective actions this visit is yet another example of inadequate radiography that does not meet the most basic requirements.

I have given this a lot of thought and must issue you with this formal warning. Your radiography has not met the required standards and must be improved immediately.

[22] Dr Allen said that he appreciated that he had not issued the formal warning in accordance with accepted procedural requirements, but stated that had he followed such procedures, the written warning would still have been issued.

Performance Review

[23] On 19 July 2011 there had been a performance appraisal carried out for Mr Kamal by Ms Sim. The completed performance appraisal summary had stated in the 'Manager Summary' section: "*I am pleased you have agreed to be adaptable with shifts and working at other south Auckland Horizon sites*". In the 'Employee Summary' section Mr Kamal had stated: "*As for adaptability & flexibility of different shifts and sites, and I need this documented in the contract, as there are several undocumented changes to the job description, hence these all needs to be 'tidied up'*".

[24] Following the performance review with Ms Sim, Mr Kamal had emailed Dr Allen and Ms Sim to register his concern that his salary had not been reviewed, despite other employees having received salary increases.

[25] Mr Kamal had attached to the email a three page justification for his submission for a salary increase. Under the section headed 'Personal Attributes' Mr Kamal had written:

- *Excellent commitment, flexibility, and availability of my services when requested by management to cover Sick days, availability to cover on Public Holidays*
- *Very flexible and mobile between centres, whereby I move between centres in case of breakdowns and as & when requested.*

Closure of the Dannemora Clinic on 3 September 2012

[26] Ms Painter said that on 3 September 2012 she had been informed that the x-ray equipment at the Dannemora clinic was not working. Having discussed this with Ms Gordon, it had been decided to close the Dannemora clinic for the day pending an investigation being completed.

[27] A report by an x-ray service technician concluded that the x-ray equipment would need to be replaced, and Ms Painter and Ms Gordon had discussed what action to take in light of the cost estimate for replacement.

[28] Ms Gordon said that having considered the replacement cost of the x-ray equipment, which had been extremely expensive, against the fact that the Dannemora clinic was only open in the afternoons and had been operating at a loss, it had decided to close the Dannemora clinic.

[29] Ms Gordon said she had considered the two employees who worked at the Dannemora clinic, Mr Okezue Dike and Mr Kamal. Ms Gordon said that she understood that they both had agreed to work flexibly between clinics, and ascertained that they could work the same hours from other Horizon clinics, including the Dawson Road clinic.

[30] Ms Painter said she had emailed Mr Dike and Mr Kamal in accordance with Ms Gordon's instructions on 4 September 2012 and notified them that they were being relocated to work at the Dawson Road clinic. In the email Ms Painter advised that Mr Dike was to work at the Dawson Road clinic, and that training on the x-ray equipment would be provided to him.

Incident on 5 September 2012

[31] Mr Kamal arrived at the Dawson Road clinic on the following afternoon, 5 September 2012, where he met Ms Painter who had proceeded to show him various house-keeping matters. However Mr Kamal said Ms Painter had not provided him with any training on the x-ray equipment before leaving.

[32] Ms Painter said that she had started to explain the x-ray equipment to Mr Kamal, however he had seemed very comfortable with it, did not ask questions, and had told her that he had worked at the Dawson Road clinic previously. Ms Painter also stated that there were two exposure charts in the room which could be used to set the exposure.

[33] Ms Painter said that she had not shown Mr Kamal the control panel as he appeared to be familiar with the x-ray equipment and this had not surprised her on the basis that he was a senior and experienced MRT.

[34] At the Investigation Meeting Mr Kamal confirmed that he had worked at the Dawson Road branch previously and had previously used x-ray equipment not dissimilar to that at the Dawson Road clinic, and said he had felt confident to use the x-ray equipment at Dawson Road by utilising the experience he had previously gained.

[35] When the first patient arrived, a 15 year old boy requiring a hand x-ray, Mr Kamal said he had encountered difficulty in setting up the desired functions and the x-ray equipment had kept defaulting to settings other than the ones he needed. However he had eventually been able to complete the set-up to his satisfaction and he had proceeded to take the first of the three exposures required.

[36] Mr Kamal said he had immediately heard a sound as if the machine was cutting out which he had attributed to either a malfunction of the machine, or to incorrect set-up.

[37] On the basis that he considered that the hand x-ray represented such a small exposure to radiation, he decided that it was appropriate to proceed with a repeat x-ray providing he was able to set up the machine satisfactorily.

[38] Mr Kamal said he had re-set the exposure settings correctly once more, and had then checked again that they were correct before taking the second x-ray. Mr Kamal said that once again he had heard a sound as if the machine had been cutting out. At the investigation Meeting Mr Kamal said that he had been "*baffled*" as to what was happening with the machine.

[39] Having calculated that the patient's total exposure to the two failed x-rays was such that he considered it safe to proceed with the examination, Mr Kamal had switched the x-ray equipment off, waited a few minutes, and then switched it back on.

[40] Mr Kamal said he had removed the cassette from the x-ray equipment in case that was causing the problem, replaced it with a new cassette and placed the first cassette to one side for later investigation.

[41] The next exposure was successful and Mr Kamal said he had proceeded to take a further two exposures so that he had been able to achieve three exposures of good diagnostic quality from a total of five exposures.

[42] Mr Kamal said he had examined a further three patients that afternoon and had been able to complete their exposures without any problems.

[43] Mr Kamal said he had believed that the total x-ray exposure to the first patient to have been well within acceptable limits and explained that he had not immediately reported the over-exposure as he needed to first ascertain what had caused the problem, and he had not had the time to do that on 5 September 2013. Accordingly he had set the cassette to one side for later examination.

Thursday 6 September 2012

[44] Mrs Painter said that the following morning she had conducted a routine daily Quality Assurance check at the Dawson Road clinic. In doing so, she had randomly selected a cassette from the cassette storage holder and placed it on the monitor. Ms Painter said that normally she would have expected to see an unexposed image on the monitor, but in this case an image of a hand had appeared.

[45] Ms Painter said that the image had been burnt into the image plate so that the erasure cycle did not erase the entire image, and she had considered the over-exposure to be extremely concerning. Ms Painter explained that over-radiation is a very serious matter which is reportable to the National Radiation Laboratory (NRL), and that if an MRT or Horizon failed to report such an incident, the MRT and/or Horizon could lose their ability to practice.

[46] Ms Painter said that normally an incident of possible over-radiation or unnecessary exposures would be immediately reported to her or to Dr Allen as Horizon's principal licence holder. However in this case the incidence of over-exposure she had discovered had not been reported to her.

[47] Upon checking, she ascertained that the exposure had been taken by Mr Kamal, following which she had telephoned Ms Gordon to inform her of the over-exposure and it was agreed that she would discuss the matter with Mr Kamal when he arrived at Dawson Road clinic that afternoon.

[48] Mr Kamal said he had received a message from Ms Painter on 6 September 2012 requesting that he come to see her at the Dawson Road clinic after he finished his morning shift at the Otara clinic. When he had arrived at the Dawson Road clinic Ms Painter had informed him that she wanted to discuss some images he had taken the previous day.

[49] Ms Painter said that when Mr Kamal had arrived she had shown him the over-exposed image of the hand that she had discovered on her Quality Assurance check and had asked him how it had happened. Ms Painter said she had been surprised when Mr Kamal had responded that he had not had training on the relevant x-ray equipment, and she had reminded

him that he had worked at that clinic previously, and that he had not indicated that he had required training.

[50] Ms Painter said she had also been very surprised that Mr Kamal had not telephoned her if he had encountered any problems with the operation of the x-ray equipment, and she had asked Mr Kamal if he had filled in a report as required, to which he had replied that he had not.

[51] Ms Painter said that Mr Kamal had then taken her through what had happened the previous day on the x-ray equipment. Ms Painter said that Mr Kamal had appeared to be familiar with the equipment and she had not had to prompt him, and at the conclusion of the demonstration she had told Mr Kamal that he must have known the image was over-exposed.

[52] Ms Painter explained that she and Mr Kamal had discussed whether or not a report to NRL was required and she had told him to complete the RSP report and then once the RSP report had been received, a decision could be made as to whether a NRL form would need to be completed. Mr Kamal had then left to return to the Otara clinic.

[53] Ms Painter said she had telephoned Ms Gordon after her meeting with Mr Kamal and had informed her that Mr Kamal had accepted there had been an over-radiation of a patient the previous day and that he had attributed the problem to the fact that he had not been properly trained on the X-ray equipment and had not been sure how to use it.

[54] Ms Gordon confirmed that Ms Painter had also told her that Mr Kamal had not reported the incident, and that he intended to erase the cassettes. Ms Gordon said she had instructed Ms Painter to record the discussion she had had with Mr Kamal after which they would review the reports and decide upon any further action.

[55] Mr Kamal said that he had had the impression from his meeting with Ms Painter on 6 September 2012 that she held him responsible for the two failed exposures which had left him feeling rather anxious, and therefore he had telephoned his union, the Association of Professional and Executive Employees (APEX), to seek assistance.

[56] As a result of his telephone call, Mr Kamal said Ms Jenny Beer, Advocate for APEX, had sent an email to Ms Painter advising that Mr Kamal required information before completing the incident form, namely:

- *A detailed explanation as to the allegation(s), if any, against Hasheem;*

- *A detailed explanation as to the training provided to Hasheem yesterday, 6 September 2012 when he was directed to work at the Dawson St centre at short notice;*
- *A detailed explanation as to the training provided to other staff members who were directed to work at the Dawson St centre at short notice;*
- *Please advise as to how many times Hasheem has worked at the Dawson St centre; and*
- *Any other information that Horizon will rely on.*

[57] Ms Gordon said that Ms Painter had forwarded to her the email from APEX as a result of which she had sought legal advice. As a result of this advice, Ms Gordon said she had responded by email to APEX and advised that:

This incident relates to a clinical matter that occurred with the treatment of a patient. Hasheem is required as part of our quality compliance and health & Safety to complete an incident report which he has so far failed to do.

We require him to complete this incident report and this is a directive from the company for him to do so. If he fails to do this it may be treated as misconduct and may lead to serious disciplinary action.

[58] Ms Painter said that after the meeting with Mr Kamal she had recalled that there had been some recent quality problems with his work and that Dr Allen had been involved, so she had checked Mr Kamal's personal file and found a number of emails from 2011 which culminated in Dr Allen giving Mr Kamal a warning.

Friday 7 September 2013

[59] Ms Painter had also sent Mr Kamal an email dated 7 September 2012 instructing him to complete by 5 p.m. that day the: "*incident report as per Horizon's quality assurance and health and safety requirements as well as the NRL (National Radiation Laboratory) incident form*".

[60] Ms Gordon said that Ms Painter had met with her and shown her the email correspondence between Dr Allen and Mr Kamal, and informed her that she had instructed Mr Kamal to complete the Horizon RSP report by 5 p.m. that day.

[61] Ms Gordon said she had then received an email from APEX seeking reinstatement of the Dannemora clinic for Mr Dike and Mr Kamal, and stating that Horizon had acted unreasonably in asking Mr Kamal to complete the reporting requirements on the over-radiation incident.

[62] Ms Gordon responded to APEX by email dated that same day in regard to both issues. In respect of the non-reporting issue Ms Gordon pointed out that there were two distinct aspects, the first being Mr Kamal's professional obligations to report and the second being possible disciplinary action for which APEX could represent him.

Monday 10 September 2012

[63] Mr Kamal said that when he had returned to work on Monday 10 September 2012 he was very anxious about the situation and the impasse which seemed to be developing between Horizon and APEX, and he had decided to complete the RSP report and the NRL notification rather than wait for the receipt of the information requested by APEX from Horizon.

[64] Mr Kamal had requested permission from Ms Painter to go to the Dawson Road clinic and view the x-ray images, following which he had completed the RSP report and emailed it to Ms Painter that evening. At the same time, Mr Kamal said he had asked Ms Painter if she wanted him to proceed with the NRL notification.

[65] Ms Painter said Mr Kamal had apologised for the delay and had completed the RSP report and the NRL forms that day, and provided these to her.

[66] Ms Gordon said details of the incident had been provided to Horizon's physicist to determine whether there was likely risk of harm to the patient and the advice had been that, based on the information available, there had been no harm caused to the patient.

Disciplinary investigation and decision

[67] Ms Gordon said she had reviewed the matter to decide whether or not it was a disciplinary issue, Ms Gordon said there were a number of issues of concern for her:

- a. The fact that an employee of Mr Kamal's seniority and experience may have over-radiated a boy, which she considered to be a potentially grave error.
- b. Further that Mr Kamal appeared to be saying that either he knew the equipment was not working properly, or that he had had difficulties with it, or

that he lacked the requisite training; however he had proceeded with the procedure on the patient despite this.

- c. The failure to report, Mr Kamal having signed a copy of Horizon's Radiation Safety Plan which clearly set out that the reporting of incidents was required immediately, yet Mr Kamal had not done so.

[68] Ms Gordon said she had started her investigation into the issues by writing to APEX on 21 September 2012 and inviting Mr Kamal to attend a meeting on 25 September 2012 in order to provide an explanation. The meeting had in fact taken place on 5 October 2012.

[69] Mr Kamal said that the letter dated 21 September 2012 advised him that his decision to continue with the patient examination after the first two exposures had failed might amount to serious misconduct as could his failure to immediately report the incident and stated:

Also relevant to my considerations is the previous warning that Hasheem received in March 2011 for x-ray errors. While this warning has expired and will not be relied on in relation to any disciplinary action that I might take in relation to the matters set out above, I believe this is relevant in that it suggests Hasheem does not have a spotless record in terms of standards of patient care and breach of protocols.

[70] On 27 September 2012 Ms Gordon said she received a transcript of her meeting with Mr Kamal on 6 September 2012 from Ms Painter, and she sent a copy of this to APEX.

[71] During the period between 21 September 2012 and 5 October 2012 Ms Gordon said there had been communications between herself, APEX and Horizon's lawyers.

Meeting on 5 October 2012

[72] The meeting on 5 October 2012 was attended by Ms Gordon, Ms Emma Butcher of LangtonHudsonButcher, Horizon's lawyers, and Mr Kamal accompanied by two representatives from APEX.

[73] Ms Kamal said that during the meeting on 5 October 2012 he had responded to the concerns raised by Ms Gordon in the letter of 21 September 2012 and he had answered questions raised with him.

[74] Following the meeting, Ms Gordon said she had carried out further investigation into the points made by Mr Kamal and APEX during the meeting. In particular she:

- i. Had looked at the history of the x-ray machine to determine whether there had been any problems with it in the past as claimed and found that it had not been

altered, there were no faults logged for it, and it had passed the annual audit by the physicist.

- ii. Checked with the physicist to ensure the initial advice that the incident was reportable pursuant to NRL guidelines, and his advice had been that it was reportable
- iii. Asked Ms Painter:
 - Why she had not arranged training for Mr Kamal when she had done so for Mr Dike? Ms Painter had responded that (i) she had intended to be at Dawson Road when Mr Kamal worked there for the first time, (ii) she had taken Mr Kamal through the basics with the x-ray equipment and he had not mentioned that he was unfamiliar with it or that he would require training, (iii) he had told her that he had worked at Dawson Road clinic previously, and (iv) there were 2 exposure charts on the wall, one above the control panel and one on the bench in front of it.
 - Why her notes of the discussion with Mr Kamal did not appear to be very long? Ms Painter had responded that the discussion had taken 45 minutes but the time taken for Mr Kamal to read the information which she had provided and for him to take her through the operation of the equipment had not been recorded in the minutes.
 - If there had been complaints from other employees about the Dawson Road clinic equipment? Ms Painter had responded that she had asked Ms Tracey Shanta, the other MRT who used it, if there were any issues with the equipment and she had said there were not.
- iv. Asked Dr Allen whether he thought Mr Kamal would require training on the equipment and he had advised that he did not believe so, based on the fact that the equipment was standard and given Mr Kamal's level of experience with similar equipment.

[75] Ms Gordon said that she had given the information she received careful consideration to decide whether or not it satisfactorily explained the over-irradiation, the actions in continuing to repeat the x-rays rather than desisting and seeking assistance, and the failure to report until instructed to do so.

[76] Ms Gordon said she had formed a preliminary view about the allegations and whether or not Mr Kamal's actions created a trust issue in the employment relationship, and had reached the conclusion that they had created a trust issue. At this stage Ms Gordon said her views were preliminary only as she wanted to provide Mr Kamal with an opportunity to respond to the further information she had obtained in the course of her investigation.

[77] Mr Kamal said that on 12 October 2012 Mr Rhys Walters of APEX received a letter from Ms Gordon setting out Horizon's preliminary decision that his employment be summarily terminated for serious misconduct and advising that he was to be provided with an opportunity to respond to the proposed decision. Mr Kamal said that this letter was the first time he had been advised that Horizon had obtained the advice of a physicist.

[78] Mr Kamal said he had been deeply distressed by Horizon's proposed decision to terminate his employment, and he had the impression that there was some animosity between Horizon's management and his APEX representation. As a result he had sent Ms Gordon an email on 14 October 2012 requesting that he and his wife meet with her. Ms Gordon had agreed and the meeting took place on 16 October 2012.

[79] When Mr Kamal and his wife had met with Ms Gordon, he had read out a letter which he had expressed his work history with Horizon, his commitment to Horizon, and asked Ms Gordon if she was willing to consider any alternatives to dismissal.

[80] Ms Gordon said she had received a response letter from APEX dated 18 October 2012. Ms Gordon said she had reviewed the letter carefully and considered that the main points appeared to be that:

- (i) Mr Kamal was blaming the x-ray equipment for the error;
- (ii) Ms Painter's record of the meeting on 6 September 2012 should not be relied upon;
- (iii) the physicist report obtained by Horizon had not demonstrated that the patient had suffered any harm; and
- (iv) Mr Kamal did not need to report the incident immediately and it was reasonable for him not to do so once he had had advice from APEX.

[81] The letter further stated that Mr Kamal had felt pressurised to follow Ms Painter's instruction to work at Dawson Road despite his lack of training and that he had been too intimidated by the circumstances to ask for further training.

[82] Attached to the APEX letter was an email in support of the claim that other MRT's had made complaints about the x-ray equipment. The attached email had been sent to Mr Kamal from Ms Shanta, and detailed two examples of examinations in which the x-ray equipment S values had been incorrect and stated:

The inaccurate S values are not uncommon at Dawson Road, especially with PA chest images and lateral lumbar spines.

This matter has been raised with Jenny Painter and she suggested that the machine may need to be re-calibrated or looked at/serviced by a physicist.

[83] Ms Gordon said that after consideration of the letter dated 18 October 2012 from APEX she had carried out further investigation. In particular she had:

- i. Asked Ms Painter if Ms Shanta had made any complaints about the x-ray equipment at Dawson Road clinic as a result of which Ms Painter had provided her with a written note of her discussions with Ms Shanta on 20 September 2012, and this did not support what Mr Kamal was alleging in the APEX letter of 18 October 2012.
- ii. Provided Mr Kamal's version of the meeting on 6 September 2012 to Ms Painter and asked for her comments, and Ms Painter had maintained her original version of events.
- iii. Presented the comments about the physicist to the Horizon physicist and asked him to respond, he had done so and she had been satisfied with his response.

[84] Ms Gordon said she had carefully considered all the information and had decided that summary dismissal was too harsh given Mr Kamal's representations about his personal situation. Accordingly her decision had been that dismissal on notice should be the outcome, but with a payment in lieu of notice. Ms Gordon said she had sent a letter outlining her conclusions and the reasons for them to APEX and to Mr Kamal by email.

[85] Mr Kamal said that just prior to his leaving work on 24 October 2012 he received a text message from Ms Painter telling him to check his personal emails. Upon doing so, he found the letter from Horizon dated 24 October 2012.

[86] In the letter from Horizon dated 24 October 2012 Ms Gordon had addressed each of the three areas of concern:

1. Over-radiation

My finding is that the patient was over-radiated during the procedure that Hasheem performed. ...

You have said that hardware and software faults could have been to blame rather than the fault for the over-radiation being with Hasheem. ...

To investigate this I have checked and rechecked the records available for this machine. .. I have also asked Jenny Painter to comment on Tracey's email. I attach a copy of Jenny's comments. Having weighed this information, I do not believe the machine was to blame for the over-radiation in question.

...

You have also placed blame for this event on Horizon, for the alleged failure to train Hasheem on the machine

...

My finding is that whether or not Hasheem did know what he was doing in fact, the fault for the over-radiation lies with him. If he didn't know what he was doing, he should have asked for assistance before proceeding (see reason #2 below) and if he did know what he was doing, then the mistake he made in this instance was a serious one which, I find, cannot be blamed on the machine or on actions or inactions by Horizon.

2. Continuing with procedure despite uncertainty that he could do so safely

Hasheem says that he performed the procedure using the machine, despite knowing that he needed more training. He says he was under pressure from Horizon to continue and it was unreasonable therefore to expect that he would refuse to proceed in the circumstances or ask Jenny for assistance.

I do not accept that to be correct. ... patient safety must be an MRT's priority in any situation. ... There was no justifiable

reason, I find, for Hasheem not to speak up if he had concerns about the safe operation of the machine.

3. *Failure to report*

My finding is that Hasheem failed to report this incident and had no intention of reporting it, until it was discovered by Jenny Painter.

...

Further I find that there was an unreasonable delay in reporting the incident once Hasheem had been directed to do so. ... The report is not an allegation and is not part of the disciplinary process.

[87] Ms Gordon stated towards the conclusion of the letter that: *“I cannot make a decision to continue to employ Hasheem if I find that the trust and confidence in the employment relationship has been destroyed. In all the circumstances I find that it has.”*

[88] Mr Kamal’s employment was terminated on 24 October 2012. On 22 February 2013 Mr Kamal filed a Statement of Problem with the Authority. The parties attended mediation but this did not resolve the issues.

Determination

Was Mr Kamal unjustifiably dismissed by Horizon?

[89] Mr Kamal was dismissed on 24 October 2012. The test of justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is 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 or action occurred.*

[90] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Horizon must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[91] In accordance with s 103A (3) of the Act the Authority must also consider whether:

(a) ... *the employer sufficiently investigated the allegations against the employee ...*

(b) ... *the employer raised the concerns that the employer had with the employee ...*

(c) ...*the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*

(d) ... *the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[92] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*¹. The Employment Court stated:²

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[93] Ms Gordon considered that the over-radiation to the patient had been significant, that Mr Kamal had been responsible for the over-exposure, and that it had not been reasonable for him to have delayed reporting the matter.

[94] I find that this had been a conclusion that a fair and reasonable employer could have reached in all the circumstances at the relevant time.

[95] In accordance with s 103A (3) of the Act, Ms Gordon was required to carry out a fair investigation and follow a fair procedure.

¹ [2011] NZEmpC 160

² *Angus at para [23]*

[96] I find that Ms Gordon had carried out a fair process in respect of the allegations against Mr Kamal, in particular she had carried out a full investigation which had involved checking and rechecking the information provided during the meetings held with Mr Kamal and his representatives, and she had given full consideration to those explanations before reaching a decision.

[97] Having completed the disciplinary process, taken full consideration of all the information and explanations provided, Ms Gordon had reached the conclusion that Mr Kamal's actions constituted serious misconduct.

[98] I find Ms Gordon's conclusion to have been one that might have been applied by a fair and reasonable employer in the circumstances.

If there had been serious misconduct, was dismissal an appropriate outcome?

[99] In *Angus v Ports of Auckland Limited*³ the Employment Court observed:⁴

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... The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established ... The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and then the employer's response to those conducts.

[100] Mr Kamal had over-radiated the patient on 5 September 2012 and the over-radiation had been discovered by Mrs Painter the following day, 6 September 2012 during a routine Quality Assurance visit. From that date until the decision to terminate Mr Kamal's employment had been advised to him on 24 October 2013 there had been a period of seven weeks.

[101] Further there had been a two week period from the date that Ms Gordon had reached her preliminary decision on 12 October 2012 until the date of the final decision on 24 October 2012.

[102] During these weeks Mr Kamal had continued to work as usual, and although there had been some supervision from Ms Painter, this had not been of a full-time nature and no authorisation restrictions had been imposed. Whilst it does not mitigate any failure of Mr

³ [2011] NZEmpC 160

⁴ Ibid at para [24]

Kamal to follow procedures, I also note that Dr Allen accepted that the over-exposure in question could not have harmed the patient.

[103] The failure to complete and return the incident reporting form to the NRL was rectified by Mr Kamal on 10 September 2012, some 5 days after that incident. The NRL response to Horizon did not criticise the timing involved and recorded the event as “*lack of training*”.

[104] I consider that had Horizon believed that it could no longer have trust and confidence in Mr Kamal, and especially given its health and safety concerns, it would have suspended him from employment during the investigation process, or at least have ensured that there was full supervision and restrictions on his authority levels at all times.

[105] I also take into consideration the letter written by Mr Kamal to Ms Gordon. Whilst I accept that the letter does not contain an apology as such, Mr Kamal does assure Horizon of his: “*utter commitment to work with Horizon by any means of options .. rather than termination ... showing my utter commitment to a plan which you may deem fit ..*”

[106] Further Mr Kamal had significant service with Horizon and taking that into consideration with the above factors, I find that a fair and reasonable employer would not have made a decision to dismiss Mr Kamal.

[107] I determine that Mr Kamal was unjustifiably dismissed by Horizon.

Was there disparity in the treatment of Mr Kamal such as to render the decision to dismiss him one which was not available to Horizon as a fair and reasonable employer?

[108] Even where grounds for dismissal have been established, the Employment Court⁵ has confirmed that it is the prerogative of the employer to decide whether to dismiss or not. However this right must be exercised in accordance with the principles of fairness and reasonableness.

[109] This was further confirmed in the Employment Court’s decision *Angus v Ports of Auckland Limited*⁶ where it was stated that: “*Employees in like circumstances should be treated alike unless there are good reasons for different treatment*”.

⁵ *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610

⁶ [2011] NZEmpC 160 at para [55]

[110] The Court of Appeal judgment in *Chief Executive of the Dept of Inland Revenue v Buchanan*⁷ outlines three separate issues to be considered in relation to the question of disparity of treatment:

- i. *Is there disparity of treatment?*
- ii. *If so, is there an adequate explanation for the disparity?*
- iii. *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*⁸

[111] The first issue is the establishment of disparity of treatment. Should disparity be found then the employer may be found to have dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

[112] In *Samu v Air New Zealand*⁹ the Court of Appeal stated:

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.

[113] Mr Kamal claimed that he had suffered disparity of treatment in respect of the disciplinary outcome for Ms Shanta, who had been issued with a first and final warning on 13 September 2012..

[114] On 14 August 2012 Ms Shanta had performed four Lumbar spine view x-rays on a patient instead of the two knee view x-rays required. Once Ms Shanta had realised her mistake, she had proceeded to take the two knee view x-rays as a result of which the patient had received a dose of radiation which was higher than necessary. Additionally the views taken had resulted in radiation of radio sensitive parts of her body.

[115] Ms Shanta had reported the incident to Ms Painter who had been present at the Dawson Road clinic at the time the incident occurred, and she had completed a Horizon RSP

⁷ [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

⁸ Ibid at para [45]

⁹ [1995] 1 ERNZ 636 (CA)

report. Although Ms Painter had been present on the day the incident occurred, Ms Shanta said that she would have completed the form even if Ms Painter had not been present since she was aware of the incident reporting requirements.

[116] This incident, together with some other incidents relating to lateness and a patient complaint, formed the subject of a disciplinary meeting held on 3 September 2012, the outcome of which had been a first and final written warning on disciplinary issues.

[117] Having considered these issues, which are similar in nature, I find that there were reasons for the disparity of treatment being (i) Ms Shanta had reported the incident in a timely manner such that the incident could be investigated immediately, and (ii) there had been no x-ray equipment malfunction such that the dosage given to the patient could be determined relatively accurately.

[118] I find that there was an adequate explanation for the disparity of treatment.

Was Mr Kamal unjustifiably disadvantaged in his employment by Horizon failing to consult with him about the decision to close the Dannemora premises and transferring him to work at the Dawson Road clinic?

[119] Mr Kamal is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable the disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[120] The elements of s 103(1)(b) are:

- a. An action
- b. The action was unjustifiable
- c. The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[121] The Employment Agreement issued to Mr Kamal by ETHC stated at clause 19 that Mr Kamal's normal hours were: "9.00 a.m. to 7.00 p.m. at Bairds Road and 2.30 pm to 5.30 pm Monday to Friday at Dannemora". I note that at the time the Employment Agreement

had been entered into ETHC operated only the two clinics named at clause 19, and further that there is no location clause.

[122] It is clear from the submission provided by Mr Kamal to Horizon on 20 July 2011 in support of his application for a pay increase, that he accepted that he was flexible in his employment and prepared to work between clinics: “*in case of breakdowns and as & when requested*”.

[123] I find the decision to close the Dannemora clinic had been a commercial business decision based on reasonable grounds, and as such it was justifiable.

[124] I find that consultation with the two affected employees, Mr Kamal and Mr Dike, would not have altered the employer’s decision to close the Dannemora clinic; however I consider that it would have been more appropriate for Ms Painter to have informed the affected employees personally about the clinic closure rather than by way of an email.

[125] Mr Kamal said that the Dawson Road clinic was situated in an unsafe part of Auckland, and that he had concerns for his safety. Ms Painter said that she worked at the Dawson Road clinic and had no concerns for her safety, nor had she been made aware that any other employee based at the Dawson Road clinic had safety concerns in respect of the location. I also find it significant that the Dawson Road clinic is only 5 minutes’ drive from the Dannemora clinic.

[126] As observed, the Dawson Road clinic is located not more than 5 minutes’ drive from the Dannemora clinic, and that Mr Kamal’s hours of work, days of work, and rate of pay were unaffected by the change in location.

[127] I find that the relocation to the Dawson Road clinic had not disadvantaged Mr Kamal in respect of his terms and conditions of employment.

[128] Having considered all the circumstances, I determine that Mr Kamal had not been unjustifiably disadvantaged in his employment by Horizon failing to consult with him about the decision to close the Dannemora premises and transferring him to work at the Dawson Road clinic.

Was Mr Kamal unjustifiably disadvantaged in his employment by Horizon failing to train him on the use of the radiographic equipment at the Dawson Road clinic?

[129] Mr Kamal was:

- an experienced MRT who had been provided with radiographic equipment training throughout the course of his employment with Horizon, and he had had experience in using a wide range of x-ray equipment during the course of his employment.
- regarded as a senior member of staff by Horizon, and this was recognised in the level of his salary.
- a professional MRT who had to apply each year for a practising certificate.
- responsible for training radiography staff and locums in the use of the radiography equipment, as outlined in the job description attached as Schedule B of the Employment Agreement, and as highlighted by Mr Kamal in the 20 July 2011 submission to Horizon in which one of his supporting factors for a pay increase was stated to be: *“Training of all Radiography staff – Train staff in Radiography work & Comrad usage and take responsibility for performance, volume and quality”*.

[130] Taking all these factors into consideration, I consider that given Mr Kamal’s level of training and competency, he would have alerted Ms Painter to the fact that he required training on the Dawson Road equipment had he felt he required this, rather than put patients and/or his professional registration as an MRT at risk. However he did not do so which I consider indicated that he did not consider he required any training to use the equipment.

[131] I determine that Mr Kamal was not unjustifiably disadvantaged in his employment by Horizon failing to train him on the radiography equipment at Dawson Road.

Remedies

[132] Mr Kamal has been unjustifiably dismissed and he is entitled to remedies.

Lost wages

[133] Mr Kamal said that he had not been able to obtain alternative permanent employment following his dismissal and he had only managed to obtain part-time employment on 8 April 2013.

[134] Mr Kamal is to be reimbursed for lost earnings for a period of 3 months pursuant to s 128(2) of the Act. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

[72] I accept on the evidence presented to the Authority that Mr Kamal has suffered significant distress as a result of the termination of his employment, and that his dismissal has resulted in financial hardship to his family.

[73] Horizon is ordered to pay Mr Kamal the sum of \$10,000.00 pursuant to s 123(1) (c) (i) of the Act.

Contribution

[135] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[136] Mr Kamal had been responsible for over-radiating a patient. Mr Kamal said he did not consider that he was adequately trained to use the radiography equipment at Dawson Road due to a lack of training; however despite this he had chosen to continue with the x-ray examination of the patient.

[137] Following the difficulties encountered taking the first and then the second exposure which Mr Kamal said he had attributed to a “*machine malfunction*” I consider that there were various options available to Mr Kamal which would have avoided any unquantifiable risk to the patient including contacting Ms Painter for assistance, asking the patient to wait, or rescheduling a further appointment while the problem was reported and investigated.

[138] Mr Kamal delayed completing a RSP report. Although there was no definitive time set out in the Horizon protocol, I consider that there was an expectation that this would occur in a timely manner and that Mr Kamal as an experienced and qualified MRT would have been aware of this expectation and the reasons for it. Moreover he was aware that the over-radiation of a patient constituted a health and safety issue.

[139] I find no convincing reason for Mr Kamal to have delayed making a RSP report for some days, particularly after having been issued with an instruction to do so.

[140] I find the actions of Mr Kamal to have been blameworthy and causative of the outcome¹⁰.

[141] I find contributory fault on the part of Mr Kamal and reduce the remedies awarded by 70%.

¹⁰ *Goodfellow v Building Connection Ltd t/a ITM Building Centre* [2010] NZEmpC 82

Costs

[142] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority