

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 583
5419752

BETWEEN

JUDITH LEE
Applicant

A N D

AUCKLAND DISTRICT
HEALTH BOARD
Respondent

Member of Authority: T G Tetitaha

Representatives: P Golden, Advocate for Applicant
P Chemis, Counsel for Respondent

Investigation Meeting: 3, 11 and 12 September 2013 at Auckland

Submissions Received: 12 September 2013 from Applicant
12 September 2013 from Respondent

Date of Determination: 19 December 2013

DETERMINATION OF THE AUTHORITY

- A. Judith Lee was unjustifiably dismissed by the Auckland District Health Board;**
- B. Reinstatement is neither reasonable nor practicable having regard to the recurring competency issues and the impact of reinstatement upon staff and patients. The application for reinstatement is declined.**
- C. The Authority declines to award any remedy under s123(b) because Ms Lee has not proven to the required standard she has lost remuneration.**

- D. There is an order that the Auckland District Health Board pay to Ms Lee compensation of \$2,500 including a reduction of 50% for Ms Lee's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- E. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] Judith Lee was employed by the Auckland District Health Board as a haemodialysis technician at the Haemodialysis Unit at Auckland City Hospital (the Unit). She was dismissed following concerns about competency and her behaviour. She alleges the dismissal was unjustified due to a pattern of bullying, harassment and discrimination by her manager and was procedurally flawed.

[2] The Auckland District Health Board (the ADHB) denies the allegations. It says the dismissal was justified and it followed a fair process.

Facts leading to dismissal

[3] Ms Lee has been employed since 1998 firstly in Waitakere, then subsequently at the Unit in Auckland. Her manager at the Unit was Suzanne Joynt.

[4] In May 2009 Ms Lee received two patient complaints but no disciplinary action was taken.¹

[5] On 13 May 2010 Ms Lee received a written warning for sleeping at work, high non-work internet usage and not following sterility procedures.²

[6] On 18 February 2011 Ms Lee received a final warning for sleeping at work, not following sterility procedures and lateness to work.³ She was required to undertake a three month performance improvement plan, undertake an audit for a particular procedure and prohibited from working overtime for three months.⁴

¹ Joint Bundle of Documents (JBD) document 9

² JBD documents 11 and 12

³ JBD documents 13 and 16

⁴ JBD documents 15 and 16

[7] Between December 2012 and February 2013 patients and staff complained to Ms Joynt about Ms Lee's competency and behaviour including lateness to work, inappropriate behaviour towards and in front of patients, failure to follow correct procedures and disregard for sterility.⁵

[8] Some of these concerns were set out in a letter to Ms Lee dated 7 March 2013. These included failing to correctly disconnect dialysis tubing resulting in blood on the floor and Ms Lee's shoes, being rude to a patient and telling them to "*steri strip yourself*" and displaying aggressive unprofessional behaviour. Ms Lee was invited to attend a disciplinary meeting on 10 April. She was told the allegations were serious and the outcome "*may include ADHB taking disciplinary action.*"⁶

[9] A meeting was held on 10 April 2013 about the allegations. The delay in holding the meeting was due to Ms Lee being on leave. Ms Joynt, another colleague, Ms Lee and her Union representative attended. The meeting was recorded and transcribed.⁷

[10] Ms Lee gave an explanation for the complaints. She believed the complaints were based upon misinterpretation due to language difficulties⁸, referred to her 15 years of experience in dialysis⁹ and questioned the credibility of a complainant with mental health concerns.¹⁰ She accepted she lost her temper and may have raised her voice, but did not kick the trolley or sharps bin. She had apologised to the patient's family and explained she had been taking tramadol for pain relief and was called into work unexpectedly. She accidentally pricked her hand and moved the sharps bin with her foot to dispose of the needle.¹¹ She denied telling a patient to 'steri-strip' himself and believed this was a miscommunication.

[11] At the conclusion of the meeting, there was a short adjournment. Ms Joynt then informed Ms Lee she was "*quite concerned about [her] competency issues*" and recommended dismissal.¹² Ms Joynt prepared a report dated 30 April 2013 which was given to Andrew Leigh Davies, the Performance Director for Adult Healthcare Services Group at the ADHB.

⁵ JBD documents 1-2,17,19-20,22 -23

⁶ JBD document 24

⁷ JBD document 25

⁸ JBD document 25 p.5 and 14

⁹ JBD document 25 p.6

¹⁰ JBD document 25 p.7

¹¹ JBD document 7 p.7-8

¹² JBD document 25 p.25

[12] Ms Lee received an invitation to meet with Mr Davies the same day. The letter stated Mr Davies would “*be the final decision-maker in this matter*” and “*the outcome may include ADHB taking action ... up to and including dismissal*”. Ms Lee was provided with a copy of Ms Joynt’s report and attachments. The report set out patient complaints, unprofessional behaviour, failure to follow correct procedures and risks to patient safety. As a result some patients at the Unit refused to be cared for by Ms Lee. The report covered alternative outcomes from training to warning to dismissal. It recommended dismissal because of previous warnings and performance improvement plans and repeated incidences and concerns about competency.¹³

[13] Ms Lee raised a personal grievance on 14 May 2013. She filed an application with the Authority on 17 May 2013. The parties were directed to mediation. The mediation was unsuccessful.

[14] A meeting was held on 18 June 2013 with Mr Davies. Delay in holding the meeting was because Ms Lee was on sick leave. The meeting was recorded and transcribed.¹⁴ Ms Lee attended with her representative. She accepted she was under an educational plan but says she was never given a copy of it. She believed she failed a tunnel line audit for not tying back her hair and wearing a mask. She acknowledged a failure to follow basic hand hygiene. She referred to the length of time she had worked there and believed she just needed updating. She complained about the lack of performance appraisals by Ms Joynt. She repeated her previous replies about the patient complaints. She also gave reasons for using a different technique of disconnecting the dialysis tubing from a patient and denied causing any bruising. She accepted some blood fell on the floor and her shoes. She also raised concerns Ms Joynt was generating the patient complaints. At the end of the meeting it was agreed Ms Lee could remain on paid sick leave.

[15] Following the meeting, Mr Davies made further inquiries. The results of those inquiries were placed in his letter dated 11 July 2013 to Ms Lee¹⁵. Mr Davies concluded he did not have confidence in Ms Lee to practise safely and consistently or that further training and management would make a difference. Ms Lee was subsequently dismissed.

¹³ JBD document 26

¹⁴ JBD document 28

¹⁵ JBD document 29

[16] On 12 August 2013 Ms Lee filed an amended statement of problem and affidavit seeking urgent reinstatement. A hearing was set down for 3, 11 and 12 September 2013.

Issues

[17] The following issues arise:

- (a) Was Ms Lee's dismissal what a fair and reasonable employer could have done in the circumstances?
- (b) If the Authority finds the dismissal was unjustified, what remedies should be awarded?
 - Is reinstatement practicable and reasonable?
 - Has Ms Lee lost remuneration (s123(1)(b))?
 - What award (if any) should be made under s123(c)(i)
 - Are there issues of contribution (s.124)?

Legal Framework

[18] The fact Ms Lee's employment was terminated is accepted. The onus falls upon the ADHB to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A.

[19] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.¹⁶

[20] It was common ground this employment relationship was governed by a collective agreement.¹⁷ The collective agreement provides for the ending of employment including a four week notice period (clause 33). The collective

¹⁶ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

¹⁷ Auckland Region District Health Boards/PSA Allied, Public Health & Technical Multi Employer Collective Agreement 28 October 2011 to 30 April 2014.

agreement requires employees to comply with ADHB's policies and procedures (clause 23).

[21] The ADHB has a discipline and dismissal policy. The grounds for disciplinary action included incompetence or poor performance. Employees were expected to have competency for the position and performance to an acceptable standard. If an employee *"fails to reach and/or maintain this standard, even after counselling, coaching or training, then there are grounds for disciplinary action."*¹⁸

[22] The disciplinary process is in 6 stages from incident to complaint to preliminary investigation to disciplinary interview(s) to consideration of facts to action plan. The investigation must include collection and recording of witness accounts (if available), verification of records and facts (if possible) and advice from a suitably qualified professional when relevant. The employee to be interviewed was to be given amongst other things *"prior warning of the nature and subject of the allegations being investigated and the type of disciplinary action that could result."*¹⁹

Was Ms Lee's dismissal what a fair and reasonable employer could have done in the circumstances?

[23] Ms Lee submits that the investigation was unfair because it was conducted by her manager, Suzanne Joynt, who she accused of bullying and harassing her. Ms Lee alleged there was pre-determination, no investigation, no reasonable opportunity to reply to the employer's concerns and her concerns were not genuinely considered by the ADHB prior to dismissal. She accepts there were performance concerns but these weren't serious enough to warrant dismissal. The ADHB disagrees.

[24] Ms Lee filed generic evidence of bullying and harassment namely being prevented from speaking her native language, being called into Ms Joynt's office, shouted at in front of patients, breaches of her confidentiality and unfavourable treatment as a parent. No dates or details were provided about what was said or done and when this occurred.

[25] Due to Ms Joynt's unavailability for the substantive hearing on 11 and 12 September, the parties agreed to have her evidence taken on 3 September 2013. Ms

¹⁸ Document 4 Statement in reply (SIR) at p5
¹⁹ Document 4 SIR pp 6 to 7

Joynt denied the allegations, although she accepted she may have raised her voice occasionally.

[26] At the hearing on 11 September Ms Lee gave greater detail of the dates and times she alleges Ms Joynt harassed and bullied her. None of the detail of these allegations had been set out in her brief filed in advance of the hearing. None of the detail of these allegations were put to Ms Joynt in the week prior. Neither party wished to recall Ms Joynt to have these new allegations put. Ms Lee accepted she never raised the harassment allegations until after dismissal.

[27] In the circumstances, the Authority can give little (if any) weight to Ms Lee's evidence of harassment and bullying because Ms Joynt was never given the opportunity to answer them.

[28] Ms Lee accepted she had been subjected to prior warnings and an education plan. A haemodialysis educator was providing support to Ms Lee under the education plan. Ms Joynt gave evidence Ms Lee did not complete the tasks assigned by the educator under the plan. Despite the education plan and assistance, Ms Lee continued to show incompetency and poor performance evidenced by the complaints, some of which she accepted.

[29] The employers concerns were set out in the letter dated 7 March 2013. The concerns were primarily incompetence and poor performance. The letter did not specify an outcome of dismissal. At hearing Ms Lee stated she was not aware she may be dismissed and thought she may get a warning. She received the complaints two days prior to the meeting and was unable to meet with her Union representative to discuss them.

[30] At the first meeting there was confusion whether it was an investigation or disciplinary interview.²⁰ The letter specified it was a disciplinary meeting held under the ADHB's Discipline and Dismissal Policy. At the meeting this changed. Ms Lee was told ADHB were *seeking ... to present the complaints to [Ms Lee] and get her feedback ... then it may become disciplinary. So it's not definitely disciplinary now ...*²¹ The meeting then ended with the recommendation of dismissal.

²⁰ JBD document 25 p.4

²¹ JBD document 25 pp 4 - 5

[31] This process was unfair to Ms Lee. It did not comply with the ADHB Discipline and Dismissal Policy and resulted in confusion. Ms Lee did not apprehend dismissal was a possible outcome until the end of the meeting. She had no opportunity to address alternatives to dismissal because she did not know this was a disciplinary meeting or that dismissal was a possible outcome. Ms Joynt's role was equally confusing. It was both investigatory and partly decision maker.

[32] The second meeting involved a different decision maker, Mr Davies. Ms Lee had a copy of Ms Joynt's report recommending dismissal. During her interview with Mr Davies she alleged Ms Joynt had solicited the complaints. There was only one written complaint from a patient whose first language was not English. The remainder were based in notes taken by Ms Joynt of conversations she had with others, emails and Risk-Pros – computerised notes of staff risk concerns. Ms Lee's allegation undermined the majority of the evidence of the employers concerns. At the very least, further investigation was required.

[33] At hearing Mr Davies admitted the extent of his further enquiries was speaking to Ms Joynt only. Ms Joynt's credibility was being questioned and her evidence was relied upon to show the employers concerns. The dismissal letter dated 11 July 2013²² inferred wider enquiry had occurred when it had not. He did not speak to any of the complainants, some of whom were staff. He should have made enquiries about the written complaint from the patient for whom English was a second language. His letter inferred he had spoken to a staff member, Tamsyn Li, and confirmed she raised with Ms Joynt a patient complaint. He had not spoken to Ms Li at all. Ms Lee produced at hearing a letter from Ms Li dated 4 May 2013 inferring she had not made a complaint to Ms Joynt and disputing what Ms Joynt had recorded.²³ It was inferred this letter had been made available to Mr Davies as well.

[34] A fair and reasonable employer could not have relied upon the evidence of Ms Joynt alone in the circumstances. The allegation and evidence raised concerns about the validity of some of the concerns. The failure to make enquiries prevented Mr Davies from genuinely considering Ms Lee's responses under s103A(3)(d).

²² JBD document 29

²³ JBD document 33

[35] These defects were not minor and did result in Ms Lee being treated unfairly (s.103A(5) of the Act). The Authority determines Ms Lee was unjustifiably dismissed by the Auckland District Health Board.

What remedies should be awarded?

[36] Ms Lee seeks reinstatement. She alleges the ADHB is capable of employing her in one of the satellite units, away from Ms Joynt. If not, she submits the ADHB could give her reduced hours on days when Ms Joynt was not present.

[37] The ADHB disagrees. It states that it is not reasonable or practicable to reinstate Ms Lee to a unit where she alleges dysfunctional behaviour by her manager. It has concerns about patient safety given the competency issues. There are no openings in satellite units and, even if there were, they would be inappropriate because they had reduced supervision.

[38] Reinstatement is no longer the primary remedy and the Authority may grant reinstatement “*if it is practicable and reasonable to do so*” (s.125(2) of the Act). Reinstatement is ordered for a “*truly extraordinary, one-off event which is extremely unlikely to occur again*”²⁴.

[39] Whether it is practicable to reinstate involves a balancing of the interests of the parties and the justices of their cases with regard to the past and future. Practicality is both about whether it can occur and the consequences²⁵. Reinstatement has been declined because of contributory conduct including safety issues.²⁶

[40] A high degree of competency is needed to ensure patient safety in the Unit. Failure to follow proper sterility procedures directly impacts upon patient safety. Ms Lee had warnings and admitted breaches of the sterility procedures. Despite a performance improvement plan and education plan, her incompetency continued. The evidence showed she lacked the ability to consistently maintain safe practice.

[41] Patients are vulnerable to staff behaviour. They must remain connected to the dialysis machine for a minimum of four hours. Ms Lee admitted inappropriate behaviour towards and in front of patients. There was evidence patients are not

²⁴ *De Bruin v. Canterbury District Health Board* [2012] NZEmpC 110 at [77]

²⁵ *Lewis v. Howick College Board of Trustees* [2010] NZCA 320 at [2]

²⁶ *Villegas v Visypak (NZ) Ltd* [2010] NZEmpC 154, (2010) 8 NZELR 362

comfortable with her caring for them, some reportedly terrified and scared of her.²⁷ Reinstatement would be to the Unit under Ms Joynt's management. She admits to difficulties in having to resume work with Ms Joynt.

[42] Reinstatement is neither reasonable nor practicable having regard to the recurring competency issues and the impact of reinstatement upon staff and patients. The application for reinstatement is declined.

[43] In the event she is not reinstated, Ms Lee sought an agreed reference. The Authority does not have the power to order an employer to provide an agreed reference and declines to do so.

[44] Ms Lee seeks lost wages of one month under s123(b). This remedy is capped at "... *the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*" (s128(2)). In considering an order for remuneration under s128, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether she seeks reinstatement.²⁸ An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance (s128(1)(b)). If the remuneration has been lost because of a failure to mitigate, there is no statutory requirement to order reimbursement.²⁹

[45] No evidence has been provided to support Ms Lee's claim to one month wages, other than the fact of dismissal. A notice period of four weeks following termination was paid. Accordingly the Authority declines to award any remedy under s123(b) because Ms Lee has not proven to the required standard she has lost remuneration.

[46] Ms Lee seeks compensation for hurt and humiliation. The grounds are unnecessary delays and refusal to communicate causing suffering. The delays in the employment relationship problem appear to have been at Ms Lee's request or by agreement. If there is delay which has caused further costs to be incurred, that is an issue for a costs award not compensation. There was little (if any) evidence of a failure to communicate before the Authority. Other than Ms Lee's obvious distress at losing her job, there was no other evidence which supported more than a modest damages award. An award of \$5,000 is appropriate.

²⁷ JBD documents 1-2, 17

²⁸ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

²⁹ *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

[47] The Authority must consider the extent to which Ms Lee's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded (s.124). Contributing behaviour is behaviour which is causative of the outcome and blameworthy.³⁰ Ms Lee's behaviour was causative and blameworthy. There were admitted breaches of sterility procedures and inappropriate behaviour. A reduction in compensation of 50% is appropriate.

[48] There is an order that the Auckland District Health Board pay to Ms Lee compensation of \$2,500 including a reduction of 50% for Ms Lee's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

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

T G Tetitaha
Member of the Employment Relations Authority

³⁰ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82