



whether or not the request from the Emergency Department was urgent, and whether or not the telephonist's message was for him to attend the Emergency Department as soon as possible, or immediately and/or straight away and whether or not these meant that the request was urgent. Mr MacLeod says he was not told the request was urgent and was not told there was any emergency. He says he assessed that it was not busy as he had walked through the ward prior to his break, and he informed the telephonist he was taking his break.

[5] Mr MacLeod was dismissed on 7 August 2008 for serious misconduct.

### **The issues**

[6] What happened on 1 July 2008?

[7] Was the Emergency Department busy?

[8] What do the words immediately and straight away mean?

[9] Was the process fair?

[10] Whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred? More specifically the issue is whether his dismissal was justified by his refusal to attend to duties when he was requested to make himself available to assist in the Emergency Department during his meal break?

[11] Are there any other circumstances impacting on the dismissal?

[12] If Mr MacLeod has a personal grievance did he contribute to the grievance?

### **Mr MacLeod's case**

[13] Mr MacLeod told me that his employment relationship problem was about being unjustifiably dismissed from his employment when he was entitled to have a meal break and because the request for assistance was not urgent. He says he did not

respond to the request because he was on a meal break he was entitled to take at the time and that orderlies do not take instructions from the telephonists. He says there would have been another orderly available and he believed the Emergency Department was not busy, which was supported by the timing of the arrival of ambulances and what he witnessed happening in the Emergency Department at the time.

[14] The Authority was requested to apply s 103A of the Act and have regard to the employer's responsibility to act in good faith under s 4 (1A) of the Act. In this regard the Authority needed to consider and scrutinise all the circumstances involved and determine whether or not a fair and reasonable employer would have dismissed Mr McLeod. This included considering that the incident was a one off incident and that there was no evidence that Mr MacLeod would defy his employer in the future. It was submitted that Ms Wood should have shared her opinion that if he had apologised or accepted any wrong-doing the outcome would have been "completely different".

[15] The Authority was requested to disregard Mark Quin's (nurse manager) Belinda Dolman's (staff nurse) and Lindsey Wood's (hotel service manager) adverse comments about Mr McLeod. Also, the Authority was requested to ignore Trevor Mead's (team leader) assertion that he told Mr McLeod to leave his meal break and do the job. Mr MacLeod denied that Mr Mead asked him to do the job.

[16] Mr MacLeod says his action did not amount to deliberate and wilful disobedience. Mr MacLeod was a long standing, loyal and experienced employee and he had previously returned to work during his meal breaks to attend to urgent tasks and there was no indication that he would refuse to carry out instructions in the future.

[17] Mr McLeod says that Spotless's decision to dismiss him was unjustified because how Ms Wood reached her decision was unclear and her decision was doubtful because of the circumstances surrounding her investigation. He relied upon the role of the telephonists, difficulties with staff numbers, that he was on his meal break and Ms Wood was obtaining evidence to suit her understanding of the facts.

[18] Finally the Authority was requested to consider that Spotless had not acted in good faith because it had not provided all the information available, there was no consideration of alternatives to dismissal or another appropriate penalty.

[19] The Authority has found it unnecessary to repeat Spotless's submissions because they will be covered in my discussion and findings on the claims.

### **Findings of the Authority**

[20] The Emergency Department was busy on 1 July 2008. I am supported in this conclusion by two nurses having to move patients, Mr Quin remaining on the floor working and Heather Dixon, the registered duty manager, also working on the floor, during the pm shift. I hold that there was a shortage of beds and there were patients who needed to be moved. Wanganui Security was called in to help. Heather Dixon also considered that Mr McLeod should have done the job. Finally by his own evidence Mr McLeod understood the request was for him to attend "immediately" and "straight away", words he says were used at the time and which were included by him in his written incident report at the time.

[21] Next I hold that it was entirely proper for a telephonist to communicate an instruction to Mr McLeod in his role as an orderly. This is the accepted way that such communications are carried out, although on other occasions there might be some differences in approach. It is well accepted that the telephonists communicate with the orderlies.

[22] Mr Quin made a complaint on 1 July 2008 by email; and he completed a 'comprehensive incident report'. His complaint was followed up by Ms Wood. She consulted Spotless's Human Resources department and a letter dated 3 July 2008 was sent to Mr MacLeod that read as follows:

*Further to your telephone call this morning I confirm that at your request we have changed the disciplinary investigation meeting to Wednesday 9<sup>th</sup> July 2008 at 11.00 am to be held in my office.*

*The concerns that I need to discuss with you include:*

1. *Refusal to obey lawful and reasonable instruction, and refusal to perform assigned work.*
2. *Failure to follow a fair and reasonable request, which could have resulted in a serious threat to patient safety.*
3. *Failure to perform to required standard.*

*As Spotless treats these matters very seriously, there is the possibility that the outcome of the investigation may lead to disciplinary action, which could include the termination of your employment.*

*You are reminded of your right to bring a representative to this meeting.*

[23] Mr McLeod had a prior telephone call before the letter was sent, and he and Ms Wood subsequently had another conversation, where Mr MacLeod was provided with further statements and Ms Wood told him orally what she had been informed of by Mr Quin, Mr Mead and Nurse Dolman.

[24] The Authority is satisfied that the incident of 1 July was known to Mr MacLeod and that he understood the complaint.

[25] Investigation meetings were held on 9 July and 25 July, and a final meeting was held on 7 August 2008 when Mr MacLeod was dismissed. He was represented throughout. The Authority is satisfied Mr MacLeod had the opportunity to obtain information held by Ms Wood that included all the written statements and oral information she had obtained from Mr Quin and Nurse Dolman and anything else that she relied on to make her findings and decision. Also she committed not to use some personal observations made by Mr Quin and Nurse Dolman that were prejudicial. Mr MacLeod had the opportunity to respond and to comment on the situation before a decision was made. He has not been able to establish that there was any collusion between witnesses and Ms Wood on the statements given at the time. Ms Wood's notes produced during the Authority's investigation meeting support that she did ask for information as part of her enquiry. This was followed up in writing when Mr Quin and Nurse Dolman signed off their statements because Mr MacLeod and Mr Sam Jones (union organiser) would not accept unsigned statements.

[26] Further, the Authority considered the union complaint that Ms Wood got Freda Greenwood (orderly and cleaner) and Kathy Garrett (telephonist) to rewrite their statements to suit what Ms Wood wanted to find. I hold that this claim has no foundation. This is because Ms Greenwood's statement was shortened to focus on the incident and her role. Ms Garrett's additional statement did not add anything new. The fact that there were omissions in these statements was considered by Ms Wood. Ms Wood's approach to her investigation was untidy and potentially exposed to criticism, but I hold was not fatally flawed. This is because all statements had been produced and the union and Mr MacLeod had an opportunity to reply and comment on all the information.

[27] Mr MacLeod's decision to continue his meal break was an error of judgement on his part at the time. This is because his meal break is a paid meal break on the afternoon/evening shift to enable flexibility. Furthermore in answer to one of my questions Mr MacLeod told me that his decision was partly based on Ms Dolman being the person who asked for the assistance of the orderlies. It is common ground that these two had issues between them. Indeed I hold that Ms Dolman had some animosity towards Mr MacLeod, which was supported by her evidence, particularly, when she referred to him being "*objectionable*". But she was not the person who complained first. Also, Mr MacLeod says he had an exchange with Ms Dolman before the incident occurred, and I hold that he unusually queried Ms Garrett about who asked her for the orderlies. In this regard Mr MacLeod has left himself open to criticism that he deliberately decided to finish his meal break and as such he is the author of his own misfortune.

[28] The dispute over whether or not Mr Mead advised Mr MacLeod to do the job is not decisive because it is common ground that the telephonists had already asked for orderly assistance over the radio. Clearly Mr MacLeod was concerned enough to contact Mr Mead because Mr MacLeod knew there was going to be a potential problem arising from his action.

[29] Ms Wood's findings about Mr MacLeod's conduct would involve a fair and reasonable employer categorising his actions as a refusal to carry out a lawful and reasonable instruction. She relied on the company's hand book. It was open to her to do so, I hold. Furthermore the clinicians' concerns about patient safety were

supported by Mr Quin's complaint and that some action was taken to cover the situation by two nurses having to move patients, Wanganui security being called in and Ms Greenwood deciding to work on the floor when she did not have to and even although it was her practice to do so on various occasions. It was entirely open to a fair and reasonable employer to reach the conclusion that Mr MacLeod's action *which could have resulted in a serious threat to patient safety*. Finally, Mr MacLeod's action was such that a fair and reasonable employer would conclude that he failed *to perform to [the] required standard* expected in his role. These three grounds were based on information available to the employer at the time and linked to Mr MacLeod's actions.

[30] Mr MacLeod submitted that the incident was a one off incident and that there was no evidence that he would defy his employer in the future. This was a serious misconduct matter and it was open to a fair and reasonable employer, where the employee had acted deliberately, to disregard such a submission. It was also submitted that Ms Wood should have shared her opinion-that if he had apologised or accepted any wrong-doing-the outcome would have been "completely different". I do not agree that Ms Wood had to put that to Mr MacLeod, but for Mr MacLeod to raise his remorse and own mitigation. He did not do that sufficiently for her to need to raise her opinion at the time.

[31] Finally, the union's claim that a fair and reasonable employer would not have reached the same outcome has no foundation, I hold. I have considered all the circumstances raised by both parties. First, Spotless had dealt with the orderly numbers problem with the telephonist who had raised the problem. There was no formal dispute involved with orderly numbers. Mr MacLeod has not established any basis to rely on that matter. Second, the priority list and telephonists duty document produced during the Authority's investigation have no direct bearing because it is common ground, despite different words being used, that Mr MacLeod understood the request was for assistance to be provided straight away. Third, Mr MacLeod's length of service and previous unblemished record were considered by Ms Wood. There is a dispute about whether or not this was actually raised and that still remains unclear from the notes produced. The witnesses have divergent views on whether or not it happened. Nevertheless I hold that Mr MacLeod's record and service were factors considered by Ms Wood. In addition, I am satisfied that she also considered

retraining and redeployment, but that there were no options available as alternatives to dismissal. All Ms Wood had to do was consider them and I hold that she did so. The law does not require her to raise them formally, although they were matters open to Mr Macleod and his team to raise them if they wanted to. Of course best practice would have involved the employer raising such matters, but not doing so is not fatally flawed. I reach this conclusion because Spotless has satisfied me that the allegation made was established and fits the grounds relied upon to justify the dismissal.

[32] Mr MacLeod's claims are dismissed. He does not have a personal grievance.

[33] Costs are reserved.

P R Stapp  
Member of the Authority