

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 19  
5413997

BETWEEN                      POOJA PATEL  
                                         Applicant

A N D                              OCS LIMITED  
                                         Respondent

Member of Authority:      Rachel Larmer

Representatives:            Lawrence Herzog, Counsel for Applicant  
                                         Stephen Langton and Angela Evans, Counsel for  
                                         Respondent

Investigation Meeting:      04 December 2013 at Auckland

Submissions Received:      11 December 2013 from Applicant  
                                         18 December 2013 from Respondent

Date of Determination:      21 January 2014

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**DETERMINATION OF THE AUTHORITY**

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**A. OCS Limited's summary dismissal of Ms Patel for serious misconduct was justified.**

**B. Ms Patel's claims for wage arrears and reimbursement for use of her private motor vehicle use do not succeed.**

**Employment relationship problem**

[1] OCS has a contract to supply cleaning services to the Auckland District Health Board (ADHB). Ms Patel was initially employed by OCS as a casual cleaner in 2007 but was promoted in October 2008 to Cleaning Contract Supervisor. Ms Patel was responsible for supervising the evening cleaning shift at ADHB. Her contracted hours of work were from 3.30pm until 12am six days per week.

[2] Ms Patel was employed under the Service & Food Workers' Union Nga Ringa Tota Inc and OCS Limited Collective Agreement (the collective agreement) together with a separate job description which was provided to her on 17 October 2008.

[3] Ms Patel was summarily dismissed on 20 March 2013 for serious misconduct which involved:

- (a) Failing to report a staff member's workplace accident on 10 January 2013;
- (b) Failure to perform her duties on Thursday 24 January 2013 in breach of specific instructions to her about what was required. This consisted of Ms Patel:
  - a. failing to check an operating theatre before signing off her shift on Thursday, 24 January 2013 resulting in OCS failing a Quality Audit (QA);
  - b. rostering a staff member from an operating theatre (a designated critical area) to also work in a non-critical area. This meant the critical area was not properly cleaned which resulted in OCS failing a QA.

[4] Ms Patel claims her dismissal was substantively and procedurally unjustified. Ms Patel withdrew her unjustified disadvantage claim at the beginning of the Authority's investigation meeting.

[5] OCS says that Ms Patel's summary dismissal was procedurally and substantively justified because her actions in relation to the failure to report a workplace injury and her failure to follow instructions regarding the checking of operating theatre 9 (OR9) and the allocation of an employee from a critical area to assist with the cleaning in a non-critical area when short staffed fundamentally undermined its trust and confidence in her to act appropriately in the future.

[6] Ms Patel also claims wage arrears. This claim relates to an extra half an hour pay per day for every day she worked. Ms Patel says that although she was rostered to work shifts that ran from 3.30pm until 12am she actually attended and started work at

3pm each day. Ms Patel says that she had to be at work half an hour before her shift started because she needed this extra time to do her job properly and efficiently.

[7] Ms Patel claims she is entitled to be paid overtime for that extra half hour (from 3pm until 3.30pm on each day that she worked) under clause 8.1(b) of the collective agreement. This states “*Where the parties agree to a variation of daily ordinary hours in excess of 8 hours, then overtime shall be paid for all hours worked in excess of those agreed.*”

[8] In or around 2011 Ms Patel informed OCS that she had been starting work half an hour earlier than her rostered start time and wanted to be paid for that. OCS advised Ms Patel that her contracted hours of work were from 3.30pm until 12am and that she would not be paid for any hours outside of that time. OCS also disputes that Ms Patel regularly started work at 3pm as she claims. OCS says Ms Patel is not entitled to be paid overtime because it was never agreed contrary to the requirement under clause 8.1(b) of the collective agreement.

[9] Ms Patel also claims she should be reimbursed for using her private vehicle for work purposes. This relates to her decision to use her own motor vehicle to travel 250 metres from the ADHB main building to the day care centre (which she was responsible for inspecting) at night. Ms Patel says OCS did not supply her with any safety measures for getting to and from the day care centre so she used her own vehicle out of concern for her personal safety.

[10] OCS says there was never any agreement for Ms Patel to use her private vehicle for work purposes or for her to be reimbursed for doing so.

## **Issues**

[11] The issues to be determined are:

- (a) Was Ms Patel’s dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) Is Ms Patel owed wage arrears?
- (d) Is Ms Patel entitled to be reimbursed for using her private vehicle for work purposes?

(e) What if any costs should be awarded?

### **Was Ms Patel's dismissal justified?**

[12] Justification is to be determined in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether OCS's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Ms Patel was dismissed.<sup>1</sup> In applying the test, the Authority must consider the four procedural fairness tests set out in s.103A(3) of the Act.

#### *Failure to report a workplace accident*

[13] There is no dispute that on 10 January 2013 Ms Pele Vaifoou (one of the employees on Ms Patel's night shift) injured her finger at work whilst Ms Patel was present. Ms Patel was aware of the incident but did not fill out an accident reporting form. OCS found out about it when ACC wrote to them about the accident.

[14] Ms Patel says she was aware of Ms Vaifoou hurting her finger so asked Ms Vaifoou if she wanted to go to Accident & Emergency but Ms Vaifoou did not wish to do so. Ms Patel says that she told Ms Vaifoou to fill out an accident form but Ms Vaifoou declined to do so. Ms Vaifoou says Ms Patel never asked her to fill out an accident form.

[15] Ms Patel says that when Ms Vaifoou declined to fill out an accident report, she (Ms Patel) considered that to be the end of the matter. She says that she had not had any training from OCS around the requirement for her as a supervisor to fill out an accident report.

[16] OCS did not accept that explanation from Ms Patel. It says that Ms Patel completed training in work-related injury procedures which included the procedures around completing the necessary accident form.

[17] I find that this was not training but was a brief mention of health and safety matters which occurred as part of the induction that Ms Patel received when she started work in 2007 as a casual employee in a non-supervisory role. It focused on

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<sup>1</sup> Section 103A(2) of the Act

what an employee's health and safety responsibilities were not on what reporting procedures applied to supervisors if one of their team had an accident.

[18] OCS also says that its health, safety and injury policy records that supervisors are responsible for recording all near-miss and harm accidents in the company's accident register and that its employee handbook records that all accidents must be reported and that a staff member's supervisor would assist them to record any accident in the accident register.

[19] There was no evidence that the management policy document had even been provided to Ms Patel or that she had been given training on it. I therefore accept Ms Patel's evidence that she had no knowledge of it.

[20] I find that the employee handbook does not clearly put an obligation on a supervisor to complete an accident report in respect of every incident no matter how minor it may be. The requirement in the employee handbook is for an employee to report to their supervisor immediately all accidents, incidents or near-misses. It does not specifically address the requirement for a supervisor to complete an accident form which is the issue Ms Patel was disciplined over.

[21] OCS says that Ms Patel must have been aware of the reporting procedure because she completed two accident forms for herself in October 2001. I find these forms are not relevant because they both related to an incident involving Ms Patel's own accident and did not involve her reporting an accident of a staff member in her supervisory role of Shift Supervisor.

[22] I am not satisfied that a fair and reasonable employer could have viewed Ms Patel's failure to file an accident report for Ms Vaifoo's finger injury as serious misconduct in circumstances where OCS's expectations around Ms Patel's reporting requirements in her capacity as Shift Supervisor had not been clearly explained or identified to her.

*Issues arising from night cleaning shift on 24 January 2013*

[23] Two issues arise from the cleaning shift on 24 January;

- a. Ms Patel did not check OR9 (a critical area) at the end of the shift she was supervising; and

- b. She rostered Ms Vaifoou who was responsible for cleaning OR9 to also clean radiology level 5 which was a non-critical area.

[24] Ms Patel admits she did not check OR9 but says she did not have time to do so because her shift was short staffed so she had to do cleaning. OCS did not accept that explanation. I find it was justified in doing so because that was a finding a fair and reasonable employer could have made in all the circumstances at the time Ms Patel was dismissed.

[25] In 2011 and 2012 OCS raised concerns with Ms Patel about the quality of her shift's work. In response Ms Patel raised issues about, among other things, staff shortages and the adequacy of staff training. As part of addressing these issues OCS provided Ms Patel a "*PM Supervisor Duties*" document in October 2011 and August 2012.

[26] In paragraph 13 of the *PM Supervisor Duties* document Ms Patel was instructed to check specific operating rooms, radiology areas and oncology areas after they were cleaned by her shift. Ms Patel had also been given clear instructions regarding the completion of night cleaning duties when short staffed. These included:

- (a) On 11 July 2012 Ms Patel was advised that the night cleaning responsibilities were split 60/40 with 60% of the responsibilities regarded as critical which had to be completed each night by the cleaning staff, with the remaining 40% which could be handed over to the day time shift if completion was not possible due to staff shortages;
- (b) By letter dated 6 August 2012, OCS clarified the 60/40 split; and
- (c) By letter dated 5 October 2012, OCS provided Ms Patel's representative with a spreadsheet detailing the 60/40 split.

[27] It is clear that the evening cleaning shift on 24 January was seriously understaffed. It was also known by the parties at the outset of the evening shift that a QA audit of OR9 was to be undertaken in the very early hours of 25 January. Given that patients are operated on in OR 9 the level of cleanliness is extremely important so OCS's failure of the QA is a serious matter.

[28] Ms Patel's supervisor, Mr Stephen Virtue, investigated why OR9 failed the QA. He identified two reasons:

- a. The handover book showed that Ms Patel did not review and sign off OR9 on 24 January at the conclusion of her shift. Her sign off was a requirement which had been recorded in the PM Supervisor Duties document.
- b. The shift roster also showed that Ms Patel scheduled the staff member in charge of OR9 to also clean radiology level 5, which was a non-critical area. OR9 takes one staff member a full shift to clean properly so the staff member assigned to OR9 must be rostered to clean that one area only. The PM Supervisor Duties document records that.

[29] OCS reviewed staffing levels and the cleaning activities signed off on that night. It concluded that contrary to the requirements of the PM Supervisor Document Ms Patel failed to reallocate staff from non-critical areas to critical areas in order to cover the mandatory critical cleaning required. OSC concluded that if Ms Patel had done so (in accordance with the instructions previously given to her) she would have been able to have covered all critical cleaning areas during her 24 January shift.

[30] Ms Patel says the roster on 24 January did not reflect what actually happened during that shift. Ms Patel says she did not allocate Ms Vaifoou to clean radiology level 5. Rather she claims Ms Vaifoou just turned up to clean there and was sent back to OR9. This evidence was contradicted by Ms Vaifoou who says Ms Patel required her to clean one side of radiology 5. Ms Vaifoou's evidence about that was supported by the other staff member who cleaned radiology level 5 that night.

[31] OCS did not accept Ms Patel's explanation about what had occurred. I consider that was a conclusion which a fair and reasonable employer could have reached in all the circumstances. The roster shows that Ms Vaifoou was allocated to radiology level 5, Ms Vaifoou says she was instructed to clean both OR9 and also radiology level 5, the other staff member cleaning radiology level 5 confirms Ms Vaifoou also cleaned that area on the night in question.

[32] I am satisfied that OCS had good reasons for failing to accept Ms Patel's version of events and for concluding that the evidence which contradicted her explanation was more likely than not to be correct. OCS's finding that Ms Patel did

allocate resources away from a critical area to a non-critical area when short staffed in breach of clear instructions to the contrary is a matter which a fair and reasonable employer could have viewed as serious misconduct in the particular circumstances of this employment relationship and in light of the previous clear instructions given to her.

[33] It had been made clear to Ms Patel on a number of occasions that in the event of staffing shortages the critical areas were to be cleaned first. She was also aware that there was going to be a QA of OR9 immediately after the conclusion of the night shift on 24 January, so her decision to require the staff member who was responsible for cleaning OR9 to leave those duties and assist in cleaning in a non-critical area could fairly and reasonably be viewed as serious misconduct.

[34] It is not disputed that Ms Patel did not review OR9 before concluding her shift for the day. Ms Patel's failure to review OR9 at the end of the shift in circumstances where other non-critical areas were attended to (particularly when she knew that area was to be subjected to a QA a few hours later) could also fairly and reasonably be viewed as serious misconduct.

[35] I therefore find that OCS had good reasons based on reasonable grounds for concluding that Ms Patel's actions and inaction on 24 January amounted to serious misconduct.

#### *Procedural fairness*

[36] I am satisfied OCS complied with each of the four procedural fairness tests in s.103A(3) of the Act. It sufficiently investigated its concerns before taking action against Ms Patel; it raised its concerns with Ms Patel before she was dismissed; it gave her a reasonable opportunity to respond to its concerns before she was dismissed; and although Ms Patel did not provide an explanation to the disciplinary concerns (because she declined to participate in the disciplinary meeting), OCS nevertheless considered what Ms Patel's explanation was likely to have been had she participated. It drew that information from prior communications between the parties and other available information.

[37] After OCS was made aware that a work accident had not been reported and that OR9 had failed its quality audit, it carried out a preliminary investigation which was done by Mr Virtue. This involved meeting with Ms Patel in a non-disciplinary

meeting to obtain her views on these events. Mr Virtue also reviewed the handover book and the shift roster and obtained statements from the employee who was rostered to clean OR9 and who had injured herself (Ms Vaifoou).

[38] I do not accept Ms Patel's claim that Mr Virtue's investigation meeting with her was procedurally unfair because her representative was not allowed to question Mr Virtue and another employee who was present at the investigation meeting as a note taker. This was not a disciplinary meeting and the purpose of it was for OCS to gather information about the non-reporting of a work accident and the circumstances which may have contributed to or caused the QA failure.

[39] It was following the completion of this preliminary investigation to ascertain relevant facts that OCS's Human Resources Manager, Mr Andre Reynolds, decided to initiate a disciplinary process. I find that at that point (i.e. when the matter turned from a preliminary non-disciplinary investigation to a disciplinary matter) OCS did comply with the required standards of procedural fairness.

[40] I do not accept Ms Patel's claim that the disciplinary investigation was unfair because she had not been provided with copies of training records to show she had been trained in accident reporting procedures. There were no such records and Ms Patel knew that. Her point was that she had not been trained in accident reporting as a supervisor. OCS cannot be expected to produce documents that did not exist.

[41] Ms Patel objected to Mr Virtue being present at the disciplinary meeting and this appears to have been a catalyst for her refusing to participate in the disciplinary meeting and instead electing to leave with her representative. Whilst it was open to Ms Patel to object to Mr Virtue's presence ultimately it was up to OCS to decide (as the employer running the disciplinary process) who would be present at the disciplinary meeting. I find that it was not unfair to Ms Patel to have Mr Virtue present at the disciplinary meeting despite her objections.

[42] Mr Reynolds was the decision-maker and he was running the disciplinary meeting. That was made very clear to Ms Patel. It was also made clear to her that Mr Virtue was present at the meeting to provide Mr Reynolds with information about his investigation and to give Ms Patel an opportunity to question him and to respond to his information in the presence of Mr Reynolds as the decision-maker.

[43] However, Ms Patel elected to leave the disciplinary meeting without taking up the opportunity to engage with Mr Virtue over the findings of his preliminary investigation and without providing any feedback on the disciplinary allegations, despite knowing that the meeting would continue without her.

[44] It is also worth noting that the disciplinary meeting was adjourned multiple times at Ms Patel's request.

[45] Mr Reynolds provided his preliminary decision to Ms Patel at 9am the day after the disciplinary meeting and invited her to provide any feedback on it by 5pm that day before he made his final decision. Although Ms Patel's then representative Mr John Coyle did respond by email saying he did not have time to provide feedback before the end of the week, he did in fact raise other issues about the disciplinary meeting generally and advised that he was prepared to pursue any disciplinary matter only after mediation.

[46] I find that OCS was entitled to see its disciplinary process through to its conclusion despite Ms Patel's non participation. Ms Patel had been given a fair and reasonable opportunity to participate in the disciplinary process and it was her decision not to avail herself of that opportunity. I find OCS complied with its statutory procedural fairness obligations.

#### *Outcome*

[47] I find that OCS was justified in concluding that Ms Patel had engaged in serious misconduct (namely not checking OR9 and by allocating the cleaner of OR9 other non-critical cleaning to do on 24 January contrary to specific instructions) and that summary dismissal was one of the outcomes that a fair and reasonable employer could have imposed in all the circumstances.

[48] I find that OCS's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time it decided to dismiss Ms Patel for serious misconduct.<sup>2</sup>

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<sup>2</sup> Section 103A(2) of the Act

### **Is Ms Patel owed wage arrears?**

[49] Mr Herzog, in his submissions, submits that Ms Patel claims wage arrears of \$11,705.76 which is calculated at \$2,926.44 per year for four years (being the period 1 March 2009 to 1 March 2013). This is calculated based on her working an extra half an hour six days a week for 44 weeks of each year giving 132 hours per year @ \$22.17 per hour.

[50] Ms Patel's claim for wage arrears does not succeed. Under clause 11.1 of the collective agreement, overtime is only payable if the employer and employee agree to it. There was no evidence of any such agreement. To the contrary. Ms Patel admits that when she raised this with Mr Virtue he had made it clear to her that she would not be paid to start work at 3pm and that she would only be paid from the time her shift started (i.e. 3.30pm).

[51] I find the requirements for overtime payments have not been met. First there was no agreement as required by clause 8.1(b) and second the overtime Ms Patel claims had not "*been authorised in advance*" as required under clause 11.1 of the collective agreement. Ms Patel is therefore unable to reach the required standard of proof to establish her wage arrears claim.

### **Is Ms Patel entitled to a private vehicle use allowance?**

[52] Ms Patel is claiming a car allowance based on 80 cents per kilometre. However a car allowance is not a term or condition of her employment. There was no evidence of any collateral agreement or promise of a benefit to pay Ms Patel a car allowance. There was also no factual basis for the rate per kilometre claimed.

[53] I consider that Ms Patel's safety concerns were a matter for her union to raise with OCS. There is no evidence that occurred. It is not open to an employee to unilaterally incur additional costs at the employer's expense without its prior knowledge or approval and then expect to be reimbursed for them in the absence of any agreement from the employer.

[54] I find Ms Patel is unable to reach the required standard of proof to establish this claim so it does not succeed.

**What, if any, costs should be awarded?**

[55] Although both parties have had some success, OCS as the overall successful party, is entitled to a contribution towards its actual legal costs.

[56] OCS has 14 days from the date of this determination to file a costs application. Ms Patel has 14 days within which to respond with OCS having a further 7 days within which to reply.

**Rachel Larmer**  
**Member of the Employment Relations Authority**