Employment Court of New Zealand

Radius Residential Care Limited v McLeay [2010] NZEmpC 149; (2010) 8 NZELR 216 (3 November 2010)

Last Updated: 22 October 2011

IN THE EMPLOYMENT COURT WELLINGTON

[2010] NZEMPC 149

WRC 9/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN RADIUS RESIDENTIAL CARE LIMITED

Plaintiff

AND MEGAN MCLEAY Defendant

Hearing: 23 September 2010

24 September 2010

(Heard at Palmerston North)

Appearances: Peter Kiely and Mrs R M Rendle, Counsel for the Plaintiff

Alan Millar, Advocate for the Defendant

Judgment: 3 November 2010

JUDGMENT OF JUDGE A D FORD

Introduction

[1] In a determination dated 2 March 2010,[1] the Authority found that on

10 January 2008 the plaintiff unjustifiably dismissed the defendant from her position as manager of the Palmerston North branch of the company. The dismissal followed on from an internal investigation into a number of concerns that had been raised with the defendant by the plaintiff between the period of 5 December 2007 and

9 January 2008. The Authority concluded that the plaintiff's complaints against the

defendant should have been seen and handled as performance issues and it was not

persuaded that a fair and reasonable employer would have found that the conduct complained of amounted to serious misconduct warranting summary dismissal.

[2] The defendant was awarded compensation for lost wages in an amount to be ascertained together with compensation in the sum of $10,000 for humiliation and hurt. Both those figures were reduced by 25 percent on account of contributory fault. The defendant was also awarded costs.

[3] In this proceeding, the plaintiff challenges the Authority's decision in full and seeks a de novo hearing of the entire matter.

Background

[4] A Facility Managers' Manual produced in evidence describes the plaintiff as one of the largest private health providers for the elderly within New Zealand, comprising rest homes, hospitals and dementia care units. A subsidiary operation coming under the umbrella of the plaintiff is an agency known as Radius Care Solutions (RCS) which provides casual and temporary labour to the health-care industry. At the material time it operated in two sites, Hamilton and Palmerston North. The Palmerston North branch of RCS, which this case revolves around, ceased operations at the beginning of 2009.

[5] The defendant, a registered nurse, was employed in June 2006 as coordinator of the Palmerston North branch of RCS. In December 2006 the defendant was appointed to the position of Interim Branch Manager following the resignation of the Branch Manager. On 28 March 2007, the defendant was appointed permanently to the position of Branch Manager, reporting directly to the National Operations Manager, Ms Ann Bedford, who was based in Hamilton.

[6] Although it was only touched upon in evidence before me, the pleadings reveal that on 8 November 2007 the defendant had been issued with a final written warning for poor performance and an action plan to address the performance issues had been established. In his determination, the Authority Member notes that he had also been the Member of the Authority who had investigated a personal grievance instigated by the defendant arising out of the warning notice she had received in

November 2007. The Authority Member records that in his determination[2] in relation to that complaint he had concluded that, while the company had legitimate reasons to communicate its concerns to the defendant, it had failed to communicate its concerns to her before issuing a final warning.

[7] The Authority Member confirmed the outcome of the investigation was that he had awarded the plaintiff $4,000 compensation for humiliation reduced by 20 percent contributory fault for her failure to respond to her employer's concerns other than by in writing. The Authority also noted that during his earlier investigation it had been confirmed to him that the defendant's employment had been terminated in early 2008 and the defendant had advised him that she was awaiting the outcome of her first grievance before deciding if she would proceed with her second grievance which is now the subject matter before this Court. In this proceeding the plaintiff does not seek to rely in any way upon the November 2007 final warning.

The incidents

[8] At the time of her dismissal, the defendant had been given notice of seven "serious issues or concerns" which had been the subject of correspondence and a disciplinary meeting. The seven concerns had been conveyed to the defendant in the form of two letters. The first letter dated 5 December 2007 gave notice of three "serious concerns". The second letter dated 27 December 2007 itemised an additional four "serious issues". The defendant was requested to attend a disciplinary meeting in relation to all seven matters on 7 January 2008. I will endeavour to summarise the evidence in relation to each.

Concern 1: The Bill Hamilton complaint

[9] The incident that triggered the events giving rise to the dismissal was the receipt by Ms Bedford on 30 November 2007 of a letter of complaint addressed to the Credit Manager of the plaintiff in Auckland from a Mr Bill Hamilton. It seems that Mr Hamilton had recently retired to New Plymouth after 27 years as a respected owner/operator of rest homes, including "Aroha Home & Hospital" (Aroha), a rest home/hospital complex in Palmerston North. The first part of Mr Hamilton's letter

related to a complaint about an account he had received from RCS which he claimed to have paid. He then went on to say:

I would now like to bring to your attention a very serious concern that I have had with regard to the quality of Radius Care Solutions' caregiving staff. It was only during the last six months or so of my seven-year tenure at Aroha Home & Hospital that I found it necessary to employ agency staff. On several occasions I had my senior caregivers threaten to not work their shifts and even resign if I employed any more caregivers from Radius Care Solutions. This placed both me [and Aroha] in an untenable position. On the one hand the Ministry of Health required us to have a certain ratio of caregivers to residents [during M.O.H. audits the auditors can, and do, inspect the rosters randomly] and on the other hand my staff were threatening to walk out. I was told that some of your agency caregivers seemed not able to be conversant with basic caregiving requirements.

[10] The defendant was not identified directly in the complaint from Mr Hamilton but the evidence, which I accept, was that as manager she had overall responsibility for leadership and accountability for all aspects of client management within the RCS Palmerston North branch and she was responsible for ensuring that all employees were sufficiently skilled prior to placement to meet the basic requirements of the client.

[11] Ms Bedford immediately faxed Mr Hamilton's letter to the defendant and asked her to forward a full written account of the service provided to Aroha along with details of the experience and orientation of the staff RCS had provided. She requested a response by 4 December 2007 so that she could reply to Mr Hamilton.

[12] On the morning of 4 December 2007 the defendant emailed Ms Bedford saying that she had set her priorities for that day

and she would work on completing her report in response to Mr Hamilton's complaint after she had finished working on the "accruals". Ms Bedford responded by email stating that she felt that she had given the defendant adequate time to prepare a response (three working days) and again she reiterated the importance of responding to Mr Hamilton's concerns in a timely manner given that he was "extremely well-known in the Health Care Industry".

[13] Later that same morning the defendant provided Ms Bedford with the information she had requested. This included a list of the RCS staff that had been

sent to Aroha and details of the orientation those staff members had received. The names of the 28 staff members who had worked at Aroha between 5 November 2006 and 24 June 2007 were listed and a copy of a report regarding an incident on

19 December 2006 (before the defendant had been appointed manager) was also provided. In a covering explanatory note, the defendant said that she had never received one written complaint or incident report from Aroha but she had received "some feedback via telephone conversations or verbal when I made visits to the facility. This feedback was always actioned or passed on to the staff concerned as applicable. Bill Hamilton frequently made comments as to the efficiency of our service and the promptness with which any concerns or likewise were dealt with."

[14] In summary, subject to what is said in respect of the next issue, that was the evidence relating to the complaint from Mr Hamilton. Whether Ms Bedford responded to Mr Hamilton and whether Mr Hamilton accepted what she told him is not known. Her response (if any) was not produced in evidence.

Concern 2: The Integrated Progress Notes

[15] Included in the information the defendant forwarded to Ms Bedford in relation to Mr Hamilton's complaint were two pages of handwritten notes on a form headed, "RADIUS CARE SOLUTIONS INTEGRATED PROGRESS NOTES". The handwritten notes record matters the defendant obviously considered relevant to the inquiry which had occurred on nine separate days between 11 January 2007 and

18 May 2007. The following were two particular entries which the plaintiff highlighted during the hearing:

13/2/07 Received call from Gail. She requested we not send Mike to Dementia unit again as he was a bit "shell shocked". Gail is sure he will be ok in hospital unit.

16/4/07 Rec'vd [sic] a call from Gail. Elina worked 1500 – 2130.

Comment from Aroha staff was some concern regarding Elina's language ability. (English)

[16] None of the other entries appeared to be critical of RCS. An entry for

25 January 2007 for example records: "Bill Hamilton's wife came to the office with a box of chocolates for Lorna. Bill's wife said to make it clear they are from Bill personally."

[17] The concern Ms Bedford had about the Integrated Progress Notes was not so much over their contents but over the fact that not all of the matters documented in the notes had been recorded on the computer in the manager's Outlook Calendar. Ms Bedford emailed the defendant on 4 December 2007 with her concerns:

Hi Megan,

I have received the information relating to the complaint from Bill Hamilton. I however have some concerns about the written client notes that you have supplied, namely the actual date the notes were written by you as I recall that when I reviewed the client notes with you in August these notes were not there. Can you clarify this for me.

Regards, Ann

[18] The defendant responded by email the same day:

Hi Ann,

The response I sent you today was written today from notes in my calendar on Outlook, my personal diary and notes written on the Referral for Healthcare Workers Sheets. The dates are the dates they were noted – therefore giving you a timeline. It is a full written account of the service RCS provided, with details of follow up as I have documented in various places. If you wish to see all these documents, please let me know and I will copy them so they can be faxed to you.

...

[19] It was clear from Ms Bedford's email reply to the defendant that she did not accept that the notes had actually been

written on the day the events happened. She said:

Hi Megan,

Thank you for responding to my query in regards to the appearance of follow up notes. I however wonder why you did not write these up at the time given that they are important and should have been written at the time of events. Having them written now with the dates in the margin looks to all intensive [sic] purposes that they were written at the time of the events.

...

[20] In her evidence in relation to this matter, Ms Bedford said: "I was concerned that Ms McLeay had produced notes that appeared to have been actually written at

the time of the event, which I was sure was not the case." In her evidence, however, in relation to the same point, the defendant stated: "Items that were written on the Integrated Progress Notes that do not appear on Outlook were noted either on the referral sheets (which were kept in the Aroha file) or my private diary. Ann Bedford never requested this evidence at any time. As I was not able to return to the office after my dismissal, I was not able to gather the referral sheets from the file."

[21] That is a summary of the substance of the evidence relating to the complaint regarding the Integrated Progress Notes. In a lengthy passage of cross-examination, Mr Millar sought to clarify with Ms Bedford whether she was alleging that the defendant had falsified information in relation to the contents of the Integrated Progress Notes. Ms Bedford seemed reluctant to give a direct answer to the query but she implied that that may have been the situation. I reject any such contention. I am satisfied that the notes were recorded on the day of the actual events either on Outlook, the referral sheets or in the defendant's private diary. There was no evidence that the defendant had falsified any information.

Concern 3: The First Aid course

[22] I need not dwell on this complaint because in the end the plaintiff accepted the defendant's explanation and so it was not one of the grounds for dismissal. The initial complaint had been that on 3 December 2007 the defendant had attended a First Aid course leaving a coordinator, Ms Tracy Millar who was unwell, in charge of the RCS office. The defendant's response to the allegation was that she had visited the office at 8.15 am prior to attending the First Aid course and Ms Millar had made no mention of the fact that she was feeling unwell. It was not until the defendant contacted Ms Millar on her cell phone at 10.00 am "to touch base" that the latter revealed she was not feeling well. The defendant immediately offered to return to the office so that Ms Millar could go home for the day but Ms Millar indicated that she was well enough to carry on. Ms Millar wrote a report confirming the defendant's account.

The 5 December 2007 letter

[23] Ms Bedford sought advice from an employer services provider and, as indicated above, she then proceeded to raise these first three issues with the defendant in a letter dated 5 December 2007. Ms Bedford's letter concluded:

...

Given that you will be on Annual Leave from the 13th December 2007 to 4th

January 2008 I will require you to attend a disciplinary meeting on 7 January

2008 commencing at 10am. The meeting will be held at Radius Care

Solutions, 50 Victoria Avenue, Palmerston North.

You are entitled to bring along a representative to that meeting should you so wish.

Yours sincerely

Ann Bedford

[24] On 12 December 2007, the defendant responded in writing to Ms Bedford's

5 December 2007 letter. Her explanations in respect of each of the three issues are incorporated in the summary above. Her letter concluded:

...

While I am not declining to attend the meeting set for 7 January 2008, I believe it would be inappropriate to conduct a meeting on this day, as it is my first day back after a significant break. I believe I will need to spend the day receiving full handover and information from Tracy and Sharon on the events during my absence, and check all client folders etc updating myself with current and any new clients received during my absence. I would therefore request a later date in January.

Yours sincerely, Megan McLeay

The 27 December 2007 letter

[25] On 27 December 2007, Ms Bedford again wrote to the defendant stating in part:

...

I am writing to inform you that other serious issues have come to my attention that I wish to discuss with you (at the meeting scheduled for 7

January 2008). These concerns are detailed below and I have also attached relevant documentation.

...

[26] I will now endeavour to summarise the additional four issues raised in

Ms Bedford's letter.

Concern 4: The employment of Ms R

[27] The allegation made against the defendant in respect of the employment of Ms R was that she had employed Ms R under a permanent part-time agreement completing only one reference check and then suspended her indefinitely after receiving information about her previous employment. It was also alleged that she had written a letter to Ms R's solicitor which was likely to result in a personal grievance claim which could have ended up costing the plaintiff money. The matter came to Ms Bedford's attention on 13 December 2007 when RCS received a letter addressed to the defendant (who was then on holiday) from Ms R's solicitor thanking her for a letter she had written at Ms R's request and querying whether an addition could be made to the letter.

[28] The defendant's explanation in relation to this issue was that as Branch Manager she had authority to employ staff and at the end of October 2007 she had employed Ms R as a casual worker. In accordance with company policy, the names of two referees had been required. The defendant told the Court that she spoke to both of the referees although she obtained very little information from one who was working at a theme park in Australia. Ms R then signed a contract of employment. Within a very short time, however, the defendant received information from another employee that Ms R had falsified details about the name of her most recent employer. The informant advised the defendant that Ms R had in fact been dismissed by her real employer and was currently the subject of a police investigation. The defendant immediately checked this information out with the previous employer and once it was confirmed she asked Ms R to attend a disciplinary meeting. The meeting was held on 26 November 2007. Ms R duly attended accompanied by a friend. When confronted with the defendant's

allegations, Ms R readily admitted that she had falsified the name of her most recent employer and that she was under police investigation for the theft of narcotics.

[29] The defendant told the Court that at that point Ms R was suspended in terms of her employment agreement. The defendant began to formulate a letter officially terminating her employment. Before the termination letter was completed, however, Ms R returned to the defendant's office without an appointment and requested a letter to be addressed "to whom it may concern" confirming details of the disciplinary meeting. She explained that her lawyer had asked her to obtain the letter because it would be needed in connection with the police prosecution. The defendant told the Court that she provided the letter in good faith and at no stage had it been suggested that a personal grievance claim might be issued. She added that it was, "well-known that misleading an employer as to a previous employment was a serious matter that could justify suspension."

Concern 5: Work permit applicants

[30] The allegation made against the defendant in respect of this issue was that she had offered employment to three people, who still had to obtain work permits, guaranteeing them 40 hours work per week without notifying Ms Bedford or obtaining authorisation from the "appropriate level". In evidence, Ms Bedford said that international recruitment offers were handled only by herself and Ms Wendy Turner.

[31] The defendant's response to this allegation was, firstly, that it was not factually sound because she had not guaranteed 40 hours per week but offered a maximum of 40 hours on an as and when required basis. She pointed out that it was part of her duties to employ people and that she would have made in excess of 40 offers of employment since 1 January 2007 without seeking authority. She said in evidence that she was unaware of any policy that international recruitments could only be handled at the Hamilton office. She explained that in this regard she had followed the same practice used by her predecessor, Ms Cheryl Robinson, and she had used a template for her letters that had been designed by Ms Robinson. The defendant invited Ms Bedford to check the company's records for confirmation in this regard. She said that under the usual practice the Hamilton office and Napier

payroll office of the company were only informed after the employment process had been completed.

[32] The defendant explained in evidence that the background to the recruitment was that two of the workers concerned had been referred to her by an international recruitment agency. Both had obtained caregivers certificates in Auckland but they wished to work in Palmerston North. To obtain work permits the Immigration Office at Palmerston North required them to have an offer of employment. The third worker had already been employed by RCS and was simply seeking an extension to her work permit. Ms Robinson was not called as a witness. Apparently she was in Europe at the time of the hearing.

Concern 6: Concerns over petty cash

[33] In her letter to the defendant of 27 December 2007, Ms Bedford said that concerns existed around the use and management of the petty cash at the Palmerston North office. Without referring to any figures, she said that the balance of the petty cash was short and there was no explanation as to the use or whereabouts of the missing money. In her response, the defendant pointed out that she had been taken off work unexpectedly on ACC on 10 December 2007 prior to commencing her annual leave and when she left the office there was no shortfall. She added that upon her return to work on 7 January 2008 she would be able to demonstrate on the Excel spreadsheet that there was no missing money. The plaintiff accepted the defendant's explanation in this regard and this issue was not included among the reasons for her dismissal.

Concern 7: Failure to issue handbook

[34] This was the final complaint itemised in the plaintiff's letter of

27 December 2007. In essence the allegation was that the defendant failed to issue the RCS Handbook to new employees and concerns were expressed regarding certain aspects of the orientation of new employees. The complaint continued: "While you appear to provide limited Manual Handling training it appears that you do not cover the necessity of Standard Precautions as discussed in the handbook eg/ [sic] hand washing."

[35] In her response, the defendant stated that she followed the practice implemented by her predecessor Ms Robinson not to issue handbooks to all new employees but to make them aware of the handbook and where it could be located in the office for their perusal. The defendant went on to explain the orientation procedure in respect of each new employee and stressed that emphasis had always been placed on hand-washing and the use of gloves. Not surprisingly perhaps, very little time was spent by the plaintiff's counsel in cross-examination on this issue.

The disciplinary meeting and termination advice

[36] The defendant was on holiday in Australia between 14 December 2007 and

4 January 2008. She attended the disciplinary meeting called for 7 January 2008 along with her husband and her advocate, Mr Millar. Ms Bedford and the plaintiff's employment consultant, Ms Sally Leftley, had flown down from Hamilton for the meeting. Ms Bedford told the Court that she hoped to get clarity around some of the issues she had raised with the defendant but at the commencement of the meeting Mr Millar informed her that the defendant would not be talking to them but she would be providing a written response to the allegations contained in Ms Bedford's letter of 27 December 2007. Mr Millar asked for more time in which to respond. Ms Bedford considered that the defendant had been given sufficient time to consider her responses but she allowed an extension until the close of business on

8 January 2008. At Ms Leftley's suggestion and after consultation with the defendant, Ms Bedford suspended the defendant on full pay until the completion of the disciplinary process. Later that same day, Ms Leftley faxed a letter to Mr Millar confirming what had transpired and concluding with a warning that the concerns raised were extremely serious and could result in disciplinary action, including dismissal.

[37] On 8 January 2008, Ms Bedford received the defendant's response to the allegations contained in her letter of 27 December 2007. The responses are summed up under each of the concerns itemised above. Ms Bedford told the Court that she then proceeded to consider the explanations she had received from the defendant in her two letters dated 13 December 2007 and 8 January 2008 respectively. On

10 January 2008, Ms Bedford wrote to the defendant summarily terminating her employment. In her dismissal letter Ms Bedford said that she had accepted the

defendant's explanations regarding the petty cash and the First Aid course. She went on to say:

...

However, your explanations for the other concerns are not acceptable. Therefore, based on all this information, I have concluded that your actions constitute serious misconduct which may well cause financial loss to the Company. You failed to follow proper, reasonable and lawful instructions and processes with regard to the recording of client contacts, employment, orientation and suspension of staff. Furthermore, you gave guarantees of work on behalf of work-permit applicants to the

Immigration Authorities without authorisation, despite being fully aware that you were not authorised to do so or following procedural requirements in this respect. As a result of your actions, a serious breach of trust and confidence now exists. I have therefore decided to summarily dismiss you from the Company.

...

Discussion

[38] The test of whether a dismissal is justifiable is that set out in s 103A of the Employment Relations Act 2000 (the Act). Justification for a dismissal is to be determined on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[39] The Act does not distinguish between summary dismissal and dismissal on notice but the employment agreement in the present case specifically provides in cl 12(v) that summary dismissal is reserved for cases of serious misconduct.

[40] In *Air New Zealand Ltd v V*,[3] the Full Court considered the meaning and application of s 103A concluding relevantly that the section required the Court to determine the question of justification of an employer's decision on an objective basis. The obligation to justify a dismissal or action is on the employer who has to show that the decision was fair and reasonable in all the circumstances prevailing at the time it was made judged against the objective standard of a fair and reasonable employer. The section encompasses not just the employer's inquiry and decision about whether misconduct has occurred and its seriousness, but also an inquiry into the employer's ultimate decision in the light of that finding.

[41] In a case such as the present involving summary dismissal for alleged serious misconduct, the initial inquiry must be as to whether the employer, judged against the objective standard of a fair and reasonable employer, has established to the required standard of proof in civil cases that it conducted a full and fair investigation which disclosed conduct that was capable of being regarded as serious misconduct. It is only after that threshold has been met that it becomes necessary to conduct a similar inquiry into the ultimate decision to dismiss.

[42] I turn now to consider the issue of whether the investigation in the present case complied with these criteria and disclosed conduct capable of being regarded as serious misconduct.

[43] Towards the end of her evidence, Ms Bedford told the Court that of the five allegations the plaintiff found to be substantiated against the defendant the most serious was the suspension of Ms R followed by the incident regarding the Integrated Progress Notes. The thrust of the complaints detailed in the statement of claim in relation to Ms R was that the defendant had breached company policy by failing to obtain full references; that she breached Ms R's privacy rights by contacting Ms R's former employer and the police without Ms R's authorisation; that she proceeded to suspend Ms R in breach of company procedure; that those actions resulted in contact by Ms R's legal adviser and that she had falsified documents.

[44] I have not been persuaded that the defendant did breach company policy in the manner alleged. Nor do I accept that she falsified any documents. There was no allegation to that effect in the defendant's letter of 7 December 2007. There was some debate during the hearing as to whether Ms R had been employed as a casual or permanent part-time worker. The defendant appears to have used both terms at different stages but she explained to the Court the problem was that when she wrote her explanatory letter dated 8 January 2008 she was on suspension and did not have access to the office records. I accept that evidence. The reality is that the defendant had authority to employ staff. Ms R had falsified her CV and had failed to disclose that she was under police investigation. The defendant cannot be blamed for Ms R's false misrepresentations. There was never any threat made of a personal grievance claim.

[45] In relation to the Integrated Progress Notes, one of the points the defendant made to the Court was that they were designed for recording the medical progress of patients in hospitals or care centres rather than communications between RCS and one of the company's rest home clients. It is not clear from the evidence why the defendant had used the forms for writing up her notes regarding Mr Hamilton's complaint. What was clear, however, from Ms Bedford's evidence was that the plaintiff wrongly believed that the notes had not been made by the defendant contemporaneously with the events that she described. That is the allegation made in the statement of claim and the statement of claim also accuses the defendant of falsifying documents and subsequently attempting to cover this up by altering the records. It is pleaded, "at no stage in the process did the defendant produce any notes made contemporaneously."

[46] If the allegation of falsifying documents in the manner alleged had been properly made out then I would accept that such conduct could have amounted to serious misconduct but, in fact, there is no evidence that the defendant falsified documents. In her email of 4 December 2007 when this issue was first raised, the defendant explained that her handwritten notes on the Integrated Progress Notes forms had been written up that very day from notes in her calendar on Outlook, her personal diary and notes written on the Referral for Healthcare Workers Sheets. The defendant went on to say: "If you wish to see all these documents, please let me know and I will copy them so they can be faxed to you." In other words, right from the outset, the defendant made it very clear where her notes had been copied from and she had offered to make the original documentation

available to Ms Bedford for inspection but it appears that her offer was never taken up.

[47] A fair and reasonable employer conducting an investigation into the Integrated Progress Notes allegation would have called for the production of the original documentation before concluding that the defendant had falsified documents. Likewise, in relation to the investigation of the complaint regarding Ms R, a fair and reasonable employer would have accepted that Ms R was a dishonest person. Following on from that, and consistently with its obligation of trust and confidence, the employer would then have given the defendant the benefit of the doubt and concluded that at all material times she was simply trying to act in

the best interests of the plaintiff to counter possible adverse repercussions from Ms R's false representations. For these reasons, I do not accept that a fair and reasonable employer would have concluded that the defendant's conduct in relation to either of these matters could be classified as serious misconduct.

[48] Having regard to my findings in relation to what was regarded by the plaintiff as the two most serious allegations against the defendant, it follows that I do not find it necessary to go into the same detail in respect of the remaining three allegations. Suffice it to say that I have taken into account all the evidence and the very thorough submissions presented by Mr Kiely on behalf of the plaintiff. I have not been persuaded, however, that either on their own or collectively the allegations relied upon were sufficiently serious to justify summary dismissal. I am not satisfied, in other words, that the plaintiff's conclusion that there had been serious misconduct was a conclusion which a fair and reasonable employer would have reached in all the circumstances. It follows that I find the defendant to have been unjustifiably dismissed.

Compensation

[49] In relation to remedies, Mr Kiely submitted that the defendant had not proved any loss that would substantiate an entitlement to reimbursement for loss of wages under s 123(1)(b) of the Act. He noted that in her first brief of evidence all the defendant stated in relation to this aspect of the case was that after being dismissed she had "brief episodes of temporary work at a lesser rate of pay." There was no other evidence presented which would support a claim for compensation for loss of earnings. In her subsequent written response to Ms Bedford's evidence, however, the defendant stated that she earned "about $1,200 in total" as a nurse at Aroha until she commenced employment as a manager with Premier Health Care on 7 March

2008 on a salary identical to that which she had received when working for the plaintiff. Mr Kiely was critical of the fact that the defendant had not disclosed this additional information in her original brief but it had only emerged after Ms Bedford had challenged the assertion in her original brief that she had failed to find equivalent work. There is substance in this criticism. Mr Kiely noted that the Authority had awarded the defendant lost earnings compensation between 10

January 2008 and 31 March 2008.

[50] The onus was on the defendant to prove any loss of income resulting from her dismissal. In *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd",)*[4]

Chief Judge Colgan explained the obligations of a dismissed employee in relation to a loss of earnings claim in these terms:

[78] ...dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[51] No such evidence was produced by the defendant in the present case. It is up to the employee in an unjustified dismissal case to produce the evidence to prove any loss of income. The same applies in relation to the obligation to mitigate loss. The Court should not be left to speculate or guess. The paucity of evidence produced by the defendant on these topics has not persuaded me that she did take adequate steps to mitigate her loss. She has failed to produce any of the evidence identified by Chief Judge Colgan required to substantiate a loss of earnings claim. These observations have particular force in the present case because the defendant had been put on notice that the plaintiff was challenging her allegation of economic loss. I decline to make an award of compensation under this head.

[52] As noted earlier, the Authority awarded the sum of $10,000 for "humiliation and hurt". In relation to this aspect of her claim, the defendant told the Court:

I have found this whole episode in my life to be distressing and humiliating. The nursing community in Palmerston North is a small one and because of the position I had held I was (a) prominent and well-known figure. Living with the reality of dismissal eroded my reputation and my personal confidence. The impact of dismissal on our personal finances until I obtained new employment was substantial and this created some pressure on me.

[53] Mr Kiely submitted that the defendant's evidence as to the impact that her dismissal had on her was minimal. He stressed that there was no evidence from any supporting witness or any medical evidence confirming the effect of the

dismissal.

Counsel challenged the allegation that the dismissal had "eroded" her reputation and pointed out that she had been able to obtain alternative employment for an equivalent organisation at exactly the same salary within a relatively short period of time. He claimed that the only public record of the defendant's dismissal was the Employment Relations Authority Determination which was not issued until 2 March 2010, more than two years after the dismissal had occurred.

[54] I consider that there is some force in Mr Kiely's submissions. I also take into account the fact that prior to the events detailed in this judgment the employment relationship between the plaintiff and the defendant had been somewhat strained. The defendant told the Court that she did not trust Ms Bedford and this distrust dated back to the time of the previous disciplinary incident in October 2007. The compensation I award for humiliation, loss of dignity and injury to feelings arising out of the defendant's unjustified dismissal is $7,500.

Contribution

[55] Section 124 of the Act requires the Court to consider the extent to which the actions of the defendant contributed towards the situation that gave rise to her dismissal and to reduce the remedies accordingly if those actions so require. I am satisfied that the defendant's conduct during the disciplinary investigation in refusing to answer any questions or communicate with her employer otherwise than in writing contributed significantly to her dismissal. That approach is a scenario from a bygone era in industrial relations. The defendant, as part of her good faith obligations under s 4(1A)(b) of the Act, was required, among other things, to be responsive and communicative. That duty extends throughout the entirety of an employment relationship including during the course of any disciplinary proceedings.

[56] How the duty to be responsive and communicative is satisfied in any given case will, of course, depend on the facts. There will be occasions, as is demonstrated in relation to the complaints in the present case, when a written response to a communication from an employer is sufficient but I cannot accept that a refusal by an employee to answer questions or communicate verbally with an employer in the course of a disciplinary meeting convened for that purpose is appropriate. Unless an issue of a criminal prosecution and self incrimination arises, the failure of an

employee to respond and communicate frankly and verbally in the course of any disciplinary investigation is likely, if a personal grievance is established, to be reflected in the making of a contributing behaviour order.

[57] There are two other respects in which the defendant, in my view, contributed towards the situation leading to her dismissal. Firstly, in relation to the complaint from Mr Hamilton, Ms Bedford had given the defendant a strict timeline for providing her with a report so as to enable a prompt response to be given to Mr Hamilton. The defendant left it until the last day, however, and then sent an email which indicated that the complaint was not at the top of her priorities for that day. Her delayed reaction in this regard did not assist her cause. Similarly, in relation to the incident involving Ms R, the evidence was that the defendant became aware of the problems regarding this employee on 22 November 2007. Given the unusual nature of the problem, it would have been a wise precaution for her to have notified Ms Bedford of the situation immediately. In evidence, the defendant told the Court that she was proposing to inform Ms Bedford in person on 12 December

2007 but then she suffered an accident and was off work first on ACC. Ms Bedford did not come to hear about the problems relating to Ms R until 13 December 2007.

[58] As I have indicated, I consider that collectively all these actions of the defendant contributed significantly towards the situation giving rise to her dismissal and, accordingly, I reduce the compensation award of $7,500 by 50 percent.

Summary

[59] The defendant has succeeded in establishing that she was unjustifiably dismissed. Her claim for compensation for loss of earnings is dismissed. Her claim for humiliation, loss of dignity and injury to feelings is upheld and under this head she is awarded the sum of $7,500 reduced by 50 percent on account of her contributory conduct.

[60] The defendant is entitled to a modest award of costs. I would hope that agreement can be reached on this issue but, if necessary, leave is reserved for Mr Millar to file submissions within 21 days and Mr Kiely to file any submissions in response within a further 21 days.

Judgment signed at 2.30pm on 3 November 2010

A D Ford

JUDGE

[1] WA44/10.

[2] WA144/08, 28 October 2008.

[3] [2009] ERNZ 185.

[4] [2009] NZEmpC 38; (2009) 6 NZELR 530.