IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 53
5601972

BETWEEN	STEPHEN READER Applicant	
A N D	CANTERBURY HEALTH BOARD Respondent	DISTRICT

Member of Authority:	James Crichton
Representatives:	David Beck, Counsel for Applicant Penny Shaw, Counsel for Respondent
Investigation Meeting:	12 April 2016 at Christchurch
Date of Determination:	26 April 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Reader) alleges that he was disadvantaged by an unjustifiable action of his employer, the respondent (CDHB or the Board) when the Board issued him with a warning dated 24 September 2015. In addition, as part of its response, CDHB developed a performance improvement plan which it sought to have Mr Reader implement and notified the Nursing Council of the action that it had taken. Mr Reader seeks the vacating of all those actions by the Board together with a finding that he has a personal grievance.

[2] Those various claims are all resisted by the CDHB.

[3] Mr Reader is a long serving registered nurse who has worked in the mental health area for the Board for over 30 years. This is his first disciplinary issue.

[4] The CDHB investigated two separate incidents involving Mr Reader and a particular patient in a forensic mental health unit in Christchurch. To protect the patient's privacy, I shall refer to him throughout this determination as Patient A.

[5] The first of these incidents took place on 7 July 2015 and by common consent, during an exchange between Mr Reader and Patient A, Mr Reader used the word *"nigger"*. Despite the common cause surrounding the use of that word, there is no agreement about the context in which it was used. Patient A maintains that it was used in a derisory and/or racist way to refer to family members of Patient A while Mr Reader maintained that it was used in the context of a discussion around rap music and the use of that word in the rap music culture.

[6] The second incident took place about six weeks later on 18 August 2015 when Patient A was preparing a meal in the unit. In order to do so, he needed access to a sharp knife to slice vegetables. The sharp knives were, of necessity, kept under lock and key. Patient A asked Mr Reader to provide a suitable knife for the task.

[7] In handing the knife over to Patient A, Mr Reader says that he said *"don't do it"*, that it was an involuntary observation, meant to be humorous but it became instantly clear to him that Patient A was offended by it and according to Mr Reader, Patient A said words to the effect that Mr Reader had a *"shit sense of humour"*.

[8] Again, the written complaint from Patient A was more embellished, suggested that Mr Reader had developed his theme by repeating the observation or something similar to it, that he had said in fact *"don't use the knife"* and there was some suggestion as well that Mr Reader had used mock actions to purport to defend himself.

[9] Again, Patient A was offended by this because what the health sector refers to as his *"index offence"* involved a stabbing.

[10] Mr Reader says that part of the therapeutic process of caring for patients in the mental health service involves a level of informality that might be unfamiliar in the rest of the health sector.

[11] He told me that nurses did not wear uniforms and that part of the care protocols for patients required nurses to endeavour to build wholesome relationships with patients to assist their therapeutic recovery. Part of this process, according to

Mr Reader, was the use of humour and discussions about music and other things that particular patients were known to be fond of.

[12] While the CDHB does not necessarily quarrel with any of those views in a broad sense, it still maintains that there are standards that need to be met and that when they are not met, the employer has an obligation to investigate and take action as appropriate.

[13] It is common ground that the immediate response to each of these two incidents, separated as they were by several weeks, was an informal complaint made by Patient A to the Charge Nurse Manager, Mr Tony Keatley. Put at its simplest, Mr Keatley's evidence was that he had dealt with both matters informally, that he had the patient's consent to deal with it on that footing, that what he did was consistent with the CDHB's complaint policy and that as far as he was concerned, the matter was concluded by his informal action.

[14] What he did in fact was engage with both protagonists and require certain remedial steps from Mr Reader including a letter of apology to Patient A and some further training to assist him (Mr Reader) not to make the same mistake again.

[15] Mr Keatley was quite clear that he regarded the escalation of the matter after the action he took as unprincipled and indeed in his evidence to me, he referred to his investigation and his determined outcome being *"overturned"* by Ms Kearney, the Service Manager of the Board's Regional Forensic Psychiatric Service.

[16] While Mr Keatley's evidence was clear and explicit, it is nonetheless a fact that he has formed a jaundiced view of Ms Kearney and indeed he told me that he had left the service at CDHB because of *"an untenable relationship"* with Ms Kearney.

[17] Despite that, I have not been persuaded that his evidence is unreliable. He makes a fair point that the matter was disposed of by his investigation and presumably it would have been available to the Board (although there is no evidence at all that it considered this) to simply respond to the subsequently received written complaint with an outcome that reiterated Mr Keatley's original determinations in the matter.

[18] Moreover, Mr Keatley is quite correct that the CDHB's complaints policy does contemplate both a formal and an informal complaint raising process and indeed

complaint response process, so the actions that Mr Keatley took were mandated by the policy and not in any way outside of its terms.

[19] I observe without making any decision on the point that the policy itself may be somewhat uncertain in that it does not clearly identify the relationship between an informal complaint and an informal outcome on the one hand, and a formal complaint and a formal outcome on the other.

[20] In any event, Patient A was apparently satisfied with Mr Keatley's process; certainly that is Mr Keatley's evidence and I believed him. Notwithstanding that, within a matter of days of Mr Keatley's informal response to the second complaint, Patient A had filed a formal written complaint which was dated 21 August 2015 but appears to have been received by the Board for the first time on 24 August 2015. The evidence I heard suggested that Patient A had been assisted to complete his formal complaint by another patient whom Mr Keatley described as *"a serial and vexatious complainant who was a dominant and negative influence on the unit dynamic"*.

[21] Having received the written complaint, Ms Kearney decided to conduct her investigation assisted by Phillip Patira who is a nurse consultant for the Forensic Service of the Board. This requires Mr Patira to provide professional leadership in respect of the nursing workforce.

[22] Ms Kearney and Mr Patira interviewed registered nurse Nelson, who was a witness to the first incident and that interview took place on 17 September 2015 and there was an interview with Mr Reader on 23 September 2015 and at the end of that interview which, based on the notes available to me took around two hours, Mr Reader was issued with a written warning based on a finding of serious misconduct. That decision was confirmed by a letter dated 24 September 2015.

[23] While there are differences between the written complaint of Patient A and Mr Reader's recollection about what happened in the two incidents, it is not entirely clear from either the notes of the disciplinary meeting on 23 September 2015, or the letter recording the outcome the following day, or indeed Ms Kearney's evidence to me, as to exactly what her findings of fault were which justified the serious dismissal outcome.

[24] For instance, in answer to questions from me, Ms Kearney appeared to say at my investigation meeting that she preferred the complainant's version of events to

that advanced by Mr Reader but she then resiled somewhat from that when being cross-examined by Mr Beck.

[25] Critically, Ms Kearney did not ever speak to the complainant; she had Mr Patira go to speak to him but it was absolutely clear from Mr Patira's evidence that he was not the decision-maker; Ms Kearney was. I would have thought that when confronted with competing views of two significant incidents involving a professional staff member with a blameless record, the least that an investigator would do is to interview both protagonists.

[26] That is particularly so when it is apparent on the evidence, as I have already remarked, that there was no thought whatever given to the possibility that the matter had already been appropriately dealt with or at worst, if it had not been appropriately dealt with, that CDHB's remedy would be against Mr Keatley for his perceived inadequacies rather than a re-heating of a complaint that has already been dealt with against Mr Reader.

The issues

[27] The Authority needs to decide whether Mr Reader has sustained a personal grievance or not and if so what the consequences of that ought to be.

Has Mr Reader suffered a personal grievance?

[28] The test for justification requires me to assess whether a good and fair employer could have concluded that Mr Reader had committed serious misconduct and was therefore able to be warned about his behaviour. It is clear law that the Authority need not find that there is only one possible answer; it is enough if one of the available fair and just outcomes is the one that the employer has chosen in the particular circumstances of the case.

[29] I am satisfied on the evidence I heard that no good and fair employer could have reached this conclusion and therefore that Mr Reader has a personal grievance because CDHB's actions are unjustified and have clearly caused Mr Reader disadvantage.

[30] That disadvantage is amply demonstrated by the evidence of Mr Reader's wife who describes his descent into depression and anxiety as a consequence of his

employer's handling of this matter. While there have been financial consequences undoubtedly including the necessity to seek legal redress, the principal deficits seem to me to be health-related and I can only hope that by this successful outcome, Mr Reader will be able to rebuild his health and return to being an active and successful member of CDHB's team.

[31] In that latter regard, I was heartened by the evidence of Mr Patira who impressed me as an honourable and decent man who, despite the difficult circumstances, valued Mr Reader's contribution and was hopeful of a resolution in the dispute between the parties.

[32] Moreover, Mr Patira was very quick to accept a suggestion of mine that he might agree to correct the record with the Nursing Council which I suggested to him (and he agreed) rather overstated the Board's findings in respect of the disciplinary issues against Mr Reader. Notwithstanding the outcome of these proceedings, I understood Mr Patira to undertake to correct that record and I applaud him for making that entirely honourable concession.

[33] My conviction that no good and fair employer could have made the decision the Board made is based on a number of factors and I refer to them now. First, and fundamental to my conclusion, is what seems to me to be the manifest unfairness of the re-investigation of a matter that has already been dealt with. As I have already noted, Mr Keatley had dealt with the matter and concluded it and I think a good and fair employer would at the very least have reflected on the fact of the original informal complaint and response process and given consideration to whether that was all that need happen. There is absolutely no evidence that that consideration was ever part of the decision-maker's matrix.

[34] Clearly, the board's complaints process contemplates a formal and informal process both in terms of lodging of a complaint and responding to it and it cannot be right that the CDHB can simply ignore the earlier outcome because that is not fair to Mr Reader who is entitled to think that the matter is at an end.

[35] I do not say that the Board must decide that the earlier outcome stands because I think that goes too far, but I do say that the Board must consider the earlier outcome and factor that in to its consideration and there is just no evidence that it ever did that.

Indeed, I fancy Mr Keatley is absolutely right when he says that the outcome he identified was *"overturned"* by Ms Kearney.

[36] Certainly, it would have been available to the Board to say that the informal outcome was the Board's formal response as well; that would have reflected the fact that the matter had already been dealt with apparently to the satisfaction of all parties including in particular the complainant.

[37] Next, I am troubled by the failure of the decision-maker to interview the complainant. There is a difference between the complainant and Mr Reader about what happened in both events. If the decision-maker had interviewed the complainant, that might have dealt with the matter by elucidating whether the complainant was actually still exercised by the complaints or was indeed satisfied with Mr Keatley's earlier efforts.

[38] Moreover, it would have dealt with Mr Keatley's fundamental objections to the subsequent formal investigation which revolved around Mr Keatley's concerns about the failure of the formal investigation to take any account of Patient A's mental state and the influence, if any, on Patient A of the other patient who helped Patient A complete the complaint form.

[39] It seems to me impossible to make proper judgments about the weight to place on the complainant's written words without talking to him and it was clear from my questions to Mr Patira, who did talk to Patient A, that all Mr Patira was doing was telling Patient A that his complaint was being actioned and being dealt with appropriately.

[40] Next, it is difficult to understand why the Board's investigation of the matter, looked at as a totality, was so cursory. The decision-maker effectively spoke to a witness to the first incident, never spoke to the complainant at all, then had one meeting with Mr Reader, took no account whatever of the fact that the matter had already been dealt with informally, and then made a decision on the spot to find both serious misconduct and identify a penalty, without giving Mr Reader any opportunity of further input into the question of penalty, as good practice would suggest.

[41] This is not a small employer; this is a large well-resourced employer with significant human resources capacity and it is difficult to see why such an employer would adopt such a cursory approach.

[42] Mr Beck made much of the fact that the Board had taken just 15 minutes to make a decision at the end of the meeting with Mr Reader, and when it reconvened the meeting, it told Mr Reader that he was guilty of serious misconduct and what the penalty was so there was no opportunity for Mr Reader to make responses around penalty as would normally be the case. I think Mr Beck's point about the expedition of the Board in reaching such a decision so quickly, is well made.

[43] Ms Shaw sought to interest me in the proposition that the Board was able to move quickly because, unlike in *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, there were admissions made by Mr Reader. That is true as far as it goes, but Mr Reader did not agree with the complainant either in respect of context for the first incident or indeed in respect of the words allegedly used in the second incident although he acknowledged that the episode itself had happened. In my view, there was just too great a difference between what the complainant was saying and what Mr Reader remembered of the incidents to not require further investigation.

[44] Finally, the real question has to be whether, looked at in the round, a fair and reasonable employer would have found these two incidents constituted serious misconduct and not simple misconduct. My sense of the evidence is that the Board went too far and that the acknowledged behaviour of Mr Reader was no more than ordinary misconduct. Looking at the material before me, there seems to be no evidence that the Board gave Mr Reader any credit for making the admissions that he did. Based on what the Board told the Nursing Council, it seemed to have accepted Patient A's version of the second incident over Mr Reader's protests, and despite the fact that the decision-maker never spoke to Patient A there seems to have been little willingness to accept Mr Reader's position that he had made errors of judgment, that he had let himself and his profession down, and that he was remorseful.

What remedies are appropriate?

[45] Given my finding that Mr Reader has a personal grievance, I am satisfied that the proper course is to dismantle the Board's response to his errors of judgment and I think the warning must be expunged from his personnel file and the professional improvement plan discontinued. The Nursing Council needs to be advised that Mr Reader has successfully had the warning overturned in this proceeding.

[46] Mr Reader seeks the restoration of his sick leave plus compensation and legal costs. As to the sick leave, my understanding of the evidence is that Mr Reader took sick leave while he was actually on annual leave and so it would seem that if I reinstate the sick leave the effect of that will simply be to reduce his annual leave balance as a consequence. I am happy to leave that aspect to counsel to resolve between them and reserve leave for either party to revert to me if they are unable to agree the matter.

[47] I deal with the questions of compensation and costs next.

Determination

[48] I have found that Mr Reader has a personal grievance because the warning issued to him by CDHB alleging he had committed serious misconduct was an unjustified action which caused him disadvantage by way particularly of reversals in his health and the general enjoyment of family life and he is, in consequence, entitled to remedies.

[49] Having concluded that there is a personal grievance, I must now consider whether Mr Reader has contributed to the circumstances giving rise to the grievance and I am satisfied on his own admissions that he has contributed to the circumstances giving rise to the grievance. In reaching this conclusion, I follow the reasoning of His Honour Judge Couch in *De Bruin*. In *De Bruin*, the applicant admitted *"a light slap"* to a patient; here, Mr Reader acknowledges using the word *"nigger"* and uttering the words *"don't do it"* when handing Patient A a knife, both remarks which Mr Reader himself acknowledges were wrong, in breach of his professional standards and in beach of his own standards.

[50] Like Judge Couch, I find that Mr Reader's contribution to the personal grievance is significant but not so as to avoid him being entitled to any remedies. I think it is enough for me to decide that Mr Reader is only entitled to the removal of the warning and the expunging of the record both with the employer and with the Nursing Council, to reflect his significant contribution to the circumstances giving rise to the personal grievance.

[51] I direct that the warning is to be expunged from Mr Reader's personal file and that the Board is to write to the Nursing Council indicating that Mr Reader has successfully challenged the warning and that in consequence the warning has been

removed. A copy of this determination may be made available to the Nursing Council to assist in that process.

Costs

[52] The parties are urged to try to resolve costs on their own terms. If that proves impossible, Mr Reader can file and serve a submission on costs to be fixed in the Authority and the Board has 14 days from the date of its receipt of those submissions to file its response.

James Crichton
Chief of the Employment Relations Authority