

**ATTENTION IS DRAWN TO THE
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TO IN THIS DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

5131908
WA 101/09

BETWEEN ANTHONY SHEPHERD
Applicant

AND WHANGANUI DISTRICT
HEALTH BOARD
Respondent

Member of Authority: P R Stapp

Representatives: Peter Cranney and Fleur Fitzsimons for Applicant
John Unsworth and Sarah Little for Respondent

Investigation Meeting: 29 and 30 April 2009 at Wanganui

Further information on
lost wages and a hard
copy of the respondent's
final submissions By 4 May and 24 June 2009

Determination: 4 August 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Shepherd was a full time registered psychiatric nurse employed by the Whangauni District Heath Board at Whanganui hospital in the Te Awhina acute psychiatric in-patient unit. He has been employed by the Board since 1996, first as a psychiatric assistant, and secondly as a psychiatric nurse once he completed his studies.

[2] Te Awhina has an acute patients' side, and an intensive psychiatric care (IPC) side. Mr Shepherd spent much of his time on the IPC side, which is locked and has the difficult clients.

[3] On 30 January 2008 Mr Shepherd started work on the afternoon shift at 2pm, and was informed about a new patient¹ who had been admitted to the unit that morning because there were no free beds on the acute ward.

[4] Mr Shepherd says he was informed about the new patient, who had got out of bed and had gone AWOL. Mr Shepherd says that no comment was made about any risk factors associated with the patient. Mr Shepherd walked on to the ward at change over. He says he grabbed his key and alarm, which he checked. Other staff on the unit for that shift included a designated nurse in charge, a psychiatric assistant, a community psychiatric nurse, a registered nurse, an enrolled nurse, and another psychiatric assistant.

[5] The patient was returned to the unit and admitted via IPC for assessment.

[6] At about 5.45 pm there was an incident involving the patient that caused Mr Shepherd to intervene to help one of the psychiatric assistants to manage the situation. He approached the patient first with the help of the community psychiatric nurse. As a result Mr Shepherd put his arms around the patient. This was described by the Board as a bear hug. The psychiatric nurse went to set off the old alarm because Mr Shepherd was preoccupied with the patient and unable to use his alarm. No one else used a personal alarm. The registered nurse and the other psychiatric assistant came to assist, and they were joined by the designated nurse in charge. During the incident Mr Shepherd was badly injured when he was winded because the patient kned him in the stomach. Mr Shepherd's hand connected with the patient's face causing the patient's lip to bleed. This has been variously described as a punch. Staff from Stafford House, another unit, arrived and took over, by which time the patient had been restrained.

[7] The incident was reported on the computer ("*Riskman*") (for Mr Shepherd's ACC, and a record for the patient who required first aid). Elizabeth McDade, clinical leader, discussed the incident with Anne Davies, the service manager. Ms Davies decided there needed to be an investigation. She orally requested Ms McDade and Mr

¹ The name of the patient and any details likely to lead to the identification of the patient has been prohibited from publication pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000.

Richard Barrass to carry out the investigation. They were helped by Bronwyn Long, the Board's human resources advisor. There were no written terms of reference. The various people involved at the time provided written statements, but not Mr Shepherd. He was advised that he needed to be interviewed, and a meeting was arranged for 7 February 2008, to investigate an allegation of serious misconduct for an alleged assault during a restraint (letter dated 1 February 2008). The allegation of the assault was linked to three breaches of the Board's code of conduct. These were that:

- “1 Conduct injuring the business, reputation or goodwill of the Whanganui District Health Board or its employees.
- 4 Physical or verbal violence against other people including members of the public, clients, fellow employees, or management, on Whanganui District Health Board premises during work hours or whilst on Whanganui District Health Board business, and
- 19 Professional misconduct or breach of professional code of conduct, scope of practice or ethics”.

[8] This meeting was Mr Shepherd's opportunity to respond to the allegation of assault and breaches of the above policies and he was given copies of the following:

- The code of conduct.
- The ACC report (called the Riskman Entry).
- Statement from the patient.
- Statement from the psychiatric assistant.
- Statement and file note from the designated nurse in charge.
- File note re the other psychiatric assistant.
- File note re the registered nurse.
- Report on the use of management of aggression.

[9] Minutes of the meeting of 7 February were produced. The investigators then met with a person called “*the management of aggression and restraint trainer*” for an opinion, and in particular whether or not Mr Shepherd's “*punch*” was within the bounds of what is called “*fight or flight*” guidelines.

[10] More interviews were held on 11 February with the registered nurse, one of the psychiatric assistants and other staff who had a lesser involvement and who arrived at the scene after the injury to Mr Shepherd and after the patient was allegedly

punched. The nurse in charge and the community psychiatric nurse were interviewed on 12 February. The other psychiatric assistant was interviewed on 18 February.

[11] On 19 February Mr Shepherd was given notice to clarify issues raised following the meetings with the other staff and to respond to an additional alleged breach of the Board's code of conduct that he failed to follow defined Board policies and procedures in applying a restraint and failing to properly communicate during the physical restraint with team members (letter dated 19 February 2008). He was given a copy of the minutes from the meeting held with the person called "*the management of aggression and restraint trainer*".

[12] The purpose of the next meeting held on 20 February was for Mr Shepherd to have the opportunity to respond to the assault allegation, and including the new allegation: re the breach of the Board's code of conduct that he failed to follow defined Board policies and procedures in applying a restraint and failing to properly communicate. This meeting was part of the investigation and Mr Shepherd had been provided with the relevant documents. Afterwards minutes were prepared. An issue has emerged about what the next stage would be. It is common ground that an "*outcome*" would be considered, but there is a difference of opinion about what this meant.

[13] Mr Shepherd had a representative present at the meetings on 7 February and 20 February. He also understood that the Board considered the allegations were within serious misconduct and could lead to disciplinary action that included warnings or dismissal if the allegations were proved.

[14] The investigators signed off a report dated 21 February for Ms Davies with findings that included detail about:

- Mr Shepherd's professional judgement in initiating a restraint.
- Mr Shepherd's management and leadership during a restraint process.
- The assessment of risk of injury to staff and patient.
- Mr Shepherd's mitigation of "fight and flight" policy.
- Mitigating factors on skill mix, gender mix, staffing levels and staff inability to carry out restraint, all of which it was reported were raised by a delegate during the first interview.

[15] The particular findings were reached on 3 out of the 4 alleged breaches of serious misconduct being proved (21 February 2008 Investigation Findings). Mr Shepherd had been advised of the particular polices on 1 February and 19 February. First the charge that Mr Shepherd's conduct "*injured the business, reputation or goodwill of the Board or its employees*" was found not to be substantiated. Second that Mr Shepherd had admitted physically assaulting a patient and was serious misconduct in regard to the Board's policy of "*Physical or verbal assault against other people including members of the public, clients, fellow employees, or management, on Whanganui District Health Board premises during work hours or whilst on Whanganui District Health Board business*". Thirdly it was found that Mr Shepherd had breached the code for serious misconduct for failing to abide by the "*professional misconduct or breach of professional code of conduct, scope of practice or ethics*". Fourthly it was found that Mr Shepherd had failed to follow the defined Whanganui District Health Board policies and procedures.

[16] At this point Ms Davies wrote to the Board's general manager with (a) areas of concern about clinical risks to patients, (b) organisational risk, and (c) the timeline of events in the incident, including debriefing, statements, interviews and investigation meetings. She informed the general manager that 3 out of 4 allegations had been proved under the Board's code of conduct for serious misconduct. She provided a summary and recommended that Mr Shepherd be dismissed. The general manager upheld the recommendation and sought the delegation for dismissal from the chief executive. The delegation was approved by the chief executive. Mr Shepherd was not given a copy of the investigators' findings and the memoranda with recommendations for delegations. He did not know that that process was being followed.

[17] Another meeting was arranged, and on 22 February, Ms Davies delivered the outcome to Mr Shepherd. Before that meeting the decision had been made to dismiss Mr Shepherd. Ms Davies requested that there be no interruptions while she delivered the conclusions and decision. She then, according to the minutes and her evidence, provided some general comments and detailed the four allegations, and that three of the allegations had been substantiated. She advised that:

“...due to the serious nature of the breaches that your employment with Whanganui District Health Board is therefore terminated immediately...”

[18] There was some further time after that announcement for any questions, but the meeting focussed on an attempt by Mr Shepherd’s representative to make submissions on Mr Shepherd’s behalf for a lesser penalty. When there was no change to the decision Mr Shepherd’s representative said that it would be recommended to Mr Shepherd that he raise a personal grievance. Arrangements were made for Mr Shepherd to leave his employment.

[19] Mr Shepherd was advised in writing by the general manager of his dismissal.

The issues

[20] Was the evidence available to the Board at the time sufficient to justify its conclusions to dismiss Mr Shepherd?

[21] Was the process followed by the Board fair? If not, would the outcome have been any different?

[22] My consideration of the employer’s justification of the dismissal is based on section 103A of the Employment Relations Act: i e

“103A Test of justification

For the purposes of section 103 (1) (a) and (b), the question of whether a dismissal or an action was justifiable must 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 or action occurred.”

[23] The employer is required to justify the decision to dismiss under s 103A of the Act. S 103A requires that the employer’s actions are to be objectively determined by considering whether they were what a fair and reasonable employer would have done in all the circumstances at the time of dismissal. I must consider each stage of the employer’s actions, including the procedure leading to any findings made by the employer without imposing minute and pedantic scrutiny of the process. The

procedure has to be fair and the decision to dismiss must be one which a fair and reasonable employer would have taken in all the circumstances relating to both the employer and employee: see *The Chief Executive of UNITEC Institute of Technology v Kathleen Henderson* (unreported) Colgan CJ 19 March 2007 AC 12/07 and *Chief Executive of the Department of Corrections v George Imo* (unreported) Shaw J 14 November 2007 AC 57/07 and *Air New Zealand Ltd v Hudson* [2006] 3 NZELR 155 and *X v Auckland District Health Board* [2007] ERNZ 66.

[24] Further I must scrutinise the employer's decision on the basis that the employer reached an honestly held belief that there had been serious misconduct and that the allegations against Mr Shepherd were of such gravity to bring the employment to an end: *BP Oil NZ Ltd v Northern etc Distribution Workers etc IUOW* (1989) ERNZ Sel Case 512; [1989] 3 NZILR 276; [1989] 3 NZLR 580 (CA) and *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483; 4 NZELC 95,600 (CA) and *Click Clack International Ltd v James* [1994] 1 ERNZ 15 applied.

[25] The test does not mean that the Authority is to substitute its own decision for that of the employer (*X v Auckland District Health Board* [2007] 1 ERNZ 66), but it may reach a different conclusion from that of the employer provided the conclusion is reached objectively and having regard to all the circumstances at the time the dismissal occurred (*UNITEC v Henderson* and *Air New Zealand v Hudson* above applied). The principles on fairness are well established: see *Auckland CC v Hennessey* (1982) ERNZ Sel Case 4; [1982] ACJ 699 (CA) and *Airline Stewards and Hostesses (NZ) IUOW v Air NZ Ltd* [1990] 3 NZLR 549.

[26] If Mr Shepherd has a personal grievance, did he contribute to the situation giving rise to the personal grievance?

[27] Is it practicable to reinstate him?

Determination

[28] Mr Shepherd has a personal grievance. In all the circumstances a fair and reasonable employer would not have dismissed Mr Shepherd because there was never a proven assault. Although Mr Shepherd did hit the patient, his hitting the patient

must be viewed in the very difficult context of where a psychiatric assistant was in some potential difficulty, Mr Shepherd was injured and there was some ambiguity and different interpretations about what happened.

Does the evidence meet the standard required to justify the dismissal?

[29] The Board relied upon an alleged assault. It is common ground that Mr Shepherd hit the patient. His action has been referred to as a punch. However, a fair and reasonable employer would not have concluded that Mr Shepherd deliberately and wilfully punched the patient because:

- He intervened in an incident that involved the patient putting another staff member at risk in a potentially volatile situation.
- His actions had more to do with whether or not they met the standard required in a restraint situation.
- He was injured during the incident. He was also partially trapped and partially immobilised. He was injured when he was kned by the patient in the stomach. His injury was serious enough for other staff members to consider he was having a heart attack. He had to take time off work and was on ACC afterwards.
- There was an issue about how he conducted the restraint and his leadership, communication and technique.
- The Board has training and follow up and debriefing on such incidents for emotional release and avoidance and proper technique.
- Ms McDade told me without providing names that remedial action was required for two other staff members involved in the restraint and who did not meet the terms of the code for restraint.
- The issue of whether any delay between the patient kneeing Mr Shepherd and Mr Shepherd's punch, and what the patient at the time said in response, would not support a conclusion that there was deliberate retaliation from Mr Shepherd. The nature of Mr Shepherd's injury and that one of his arms was trapped would not lead a fair and reasonable employer to reach a conclusion that he retaliated out of any malicious or deliberate motive. This is because Mr Shepherd moved away as soon as he became free to do so. The nurse in charge was properly concerned about what had happened, and she properly moved

to ensure there was nothing untoward and counselled Mr Shepherd when she placed her hand on his shoulder and said “*No Tony don’t*”. She took a leadership role. The psychiatric assistant who was present at the outset of the incident went to set off an old fixed alarm because all of those present were trying to restrain the patient and one of them did not have an alarm. It is possible that Mr Shepherd did not have an ability to get to his personal alarm (which he says he had and had tested) given he was trying to restrain the patient, got injured and had his arm trapped. He received help from two other staff members, one of whom had a broken arm, and he was kned in his stomach, which injured him significantly.

- The nurse in charge and the registered nurse, both of whom witnessed Mr Shepherd’s reaction, did not provide any information to link any punch as being a deliberate and wilful retaliatory action from Mr Shepherd because he was injured and one of his arms was trapped. Indeed the Board’s investigators did not take this up sufficiently with the two of them for their comment and opinion at the time.
- The person called “*the management of aggression and restraint trainer*”, who the Board consulted, had no input from anyone else, including Mr Shepherd and the nurse in charge and the registered nurse.
- Although the Board notified the Nurses’ Council of the incident and outcome it did not rely on this for any independent findings on the alleged breach of professional misconduct or breach of professional code of conduct scope of practice or ethics. It was entitled to make its own judgement, but in doing so, the above considerations would impact on those findings.
- Finally there was evidence of some rapport between Mr Shepherd and the patient leaving some ambiguity about whether or not Mr Shepherd deliberately and wilfully struck out in response to the injury he had received. I have given the benefit of any doubt to Mr Shepherd given the version of events and statements made at the time. Although he accepted that he hit the patient that action has to be viewed in the context of the incident and the restraint.

[30] Thus, in those circumstances a fair and reasonable employer would not have dismissed Mr Shepherd. This is especially so because the employer is required to have sufficient evidence to meet the gravity of the charge and it has not met that requirement: (*Honda NZ Ltd v NZ etc Shipwrights etc IUOW* (1990) ERNZ Sel Cas 885 [1991] 1 NZLR 392 (CA)). Also, the range of circumstances in which the incident occurred means that a fair and reasonable employer would not have come to an honestly held belief that Mr Shepherd deliberately and wilfully “assaulted” the patient. To meet the requirements of serious misconduct the employer has failed to prove that Mr Shepherd’s conduct was deliberate and wilful (*BP Oil NZ Ltd v Northern etc Distribution Workers etc IUOW* (1989) ERNZ Sel Case 512; [1989] 3 NZLR 276; [1989] 3 NZLR 580 (CA) and *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483; 4 NZELC 95,600 (CA) and *Click Clack International Ltd v James* [1994] 1 ERNZ 15 applied)..

[31] Other reasons for my conclusion include:

[32] The decision had been made before the full findings had been given to Mr Shepherd. A fair and reasonable employer would have given Mr Shepherd the investigators’ written findings that were used to obtain delegations because of the extent of the findings and the serious implications in regard to his employment. Not to have given him this information was unfair because Mr Shepherd had no opportunity to mitigate and comment on them for consideration of any penalty. It would not be fatal for an employer to rely on an oral communication to convey the findings, but the extent of such findings about Mr Shepherd’s alleged conduct would require more from an employer, I hold. Indeed in such circumstances a fair and reasonable employer would have given a preliminary decision on the outcome. Mr Shepherd was not given any opportunity to comment on the possible disciplinary action such as a lesser penalty prior to a final decision and I accept he was confused about what was meant by waiting for an outcome.

[33] The Board breached its own code of conduct by not informing Mr Shepherd clearly who the decision maker would be. It was not reasonable for the Board to expect that Mr Shepherd would have assumed Ms Davies was the decision maker because she had not obtained any delegations until the investigation was completed and the findings made. Mr Shepherd did not know that she was making

recommendations to dismiss him from his employment, although he was on notice of dismissal being a possible outcome when he was still waiting on the outcome of the investigation on the findings. Ms Davies communicated the decision to dismiss Mr Shepherd, and not to put too finer point on the situation, it would seem she had the responsibility for the decision. It was unfair that she did not tell him that she required delegations based on the full information derived from the investigation and the findings and denied Mr Shepherd any opportunity to have an input and comment on any appropriate penalty. These contributed to making his dismissal unfair, I hold.

Remedies

[34] I now turn to remedies. Mr Shepherd has requested his job back. The Board has denied reinstatement and relies on Mr Shepherd's contribution to the situation giving rise to the personal grievance as being serious enough not to warrant any reinstatement. It also has made a very strong point that Mr Shepherd's behaviour and actions were significant because he assaulted a patient. There was never a proven assault, although Mr Shepherd did hit the patient, and his hitting the patient must be viewed in the very difficult context of where a psychiatric assistant was in some potential difficulty and there was a restraint that did not follow the correct procedure. A staff member would expect where there has been some performance failure and a failure to follow proper procedures, counselling and monitoring and review training. Further the Board says Mr Shepherd's actions of not following Board policies and procedures means he could not be trusted and relied upon to set an example to other staff and that there will be public outrage. First there has been no prior difficulties involving Mr Shepherd and there were no details of how he might be unable to set any example for staff he has not previously worked with. Second, this matter has not been a matter of public notice and nor is there any evidence of any public outrage. Third there has been no other professional action and findings and conclusions with which to speculate what public reaction there might be. Fourth, the whole matter has to be considered in context where there was some great difficulty in actually determining what did happen, and I conclude the Board's representative has overstated any public reaction and that Mr Shepherd could not be trusted, in his submission. It is not appropriate for me to second guess what the public reaction might be or to be influenced by such a submission, especially when there was not a shred of evidence to support the submission.

[35] It is my finding that the issues of Mr Shepherd following best practice in complying with Board policies and procedures can be managed, especially where the Board has managed other staff members who were involved and who did not meet the requirements during that incident. Also, there has been no prior history of Mr Shepherd deliberately and wilfully failing to comply with the Board's policies and procedures before this matter happened and him not meeting the professional standards of his profession.

[36] I find that there was no proof that it would be impracticable to reinstate Mr Shepherd. He was supported by colleagues and there was no indication at all that any of his managers or senior staff would threaten to resign. Also, there was no evidence that Mr Shepherd would not be open to taking guidance and engage in professional management practices. He is still registered and there does not appear to be any bar on him working in his role as a qualified registered nurse at this time. For completeness, although the matter arguably did not involve Mr Shepherd following best practice his contribution and or blameworthiness has to relate to him making a judgement call in conducting his professional duties to support another colleague and where he was injured doing so. No issue was raised about him intervening; it was a matter of how he did it. The fact that an incident occurred was unfortunate. The incident was properly a matter for the employer to investigate. Also, it was open to the employer to conclude what the best practice would be in accordance with the board's policies. The risk of any judgement call could be that the policies are not properly followed in the performance of duties and the outcome could involve a range of actions on the scale involving debriefing, counselling and any lesser penalty than dismissal. Having said that I find that any contributory conduct in the situation involving Mr Shepherd would be at the lower end of the scale because of the different interpretations of what did happen and where a lesser penalty could have included counselling in regard to managing best practice, risk and the exercise of judgement in performing professional duties where there was no deliberate or malicious action. Indeed once Mr Shepherd got caught up in the incident other staff took responsible action to assist. Mr Shepherd intervened in a situation involving another employee at risk who he considered at the time needed his help immediately. This was a judgement call and I accept that he arguably had other options to set off his alarm and intervene differently, but there was no evidence that Mr Shepherd intervened for any

ulterior motive, or that he was malicious. Given the lack of proof that he deliberately and wilfully hit the patient, a fair and reasonable employer would not have escalated the matter to a dismissal for serious misconduct, but instead had other avenues to address any failure particularly in regard to the operation of the flight and fight policy and communication. Balancing these matters I find Mr Shepherd's judgement call does not amount to contribution and blameworthiness. This is because he went to another staff member's assistance where there was a potentially serious and volatile situation developing, and where in hindsight now he could arguably have intervened and communicated differently. The situation was fraught with risk and in split second decision making Mr Shepherd's actions and omissions were genuine to contain the situation without any malicious, deliberate and wilful intent. If he did not act in best practice the Board had its counselling and debriefing processes to remedy any defects.

[37] Finally the Board's representative requested leave at the end of the investigation meeting to call expert witnesses if the Authority was considering reinstating Mr Shepherd. This was opposed by the applicant's representative. The Board had every opportunity to produce its evidence at the investigation meeting and did not signal who else could be called to help. The purpose of the investigation meeting was for the Board to call all its evidence that could be reasonably expected and it was on notice that a major plank of the applicant's case was his claim for reinstatement.

[38] As such I order the Whanganui District Health Board to reinstate Mr Shepherd to his previous position or a position not less advantageous to him. This order is to be effected as soon as practicable.

[39] Mr Shepherd is entitled to lost wages. His loss started from the date of dismissal being 22 February 2008. He has tried to get work, but failed to do so in his chosen profession. He has had some casual contract work as a security guard. His income since his dismissal has been \$25,369.07 for approximately one year. His base fortnightly gross pay at the Whanganui District Health Board is \$1,817.07. His salary at the Board is \$47,380 per annum.

[40] The dismissal occurred on 22 February 2008. The parties attended mediation 10 September 2008, before the statement of problem was filed in the Authority on 16 October 2008.

[41] Even although Mr Shepherd's loss of wages covers a period of 62 weeks, from the date of dismissal until the Authority's investigation meeting, there have been delays from the date of dismissal and the matter getting to mediation and then the Authority. The delay should have been avoided and the matter should have proceeded more quickly and speedily. Therefore I have calculated Mr Shepherd's loss of wages, from the time of his dismissal on 22 February 2008 and limited the claim to 52 weeks. This means his loss amounts to \$21,874.75 including a deduction for his income received (\$25,369.07). The Whanganui District Health Board is to pay Mr Shepherd \$21,874.75 lost wages.

[42] He is also entitled to compensation for humiliation loss of dignity and injury to feelings. From his evidence I assess his compensation as \$8,000 under s 123 (1) (c) (i) of the Act because I accept that the manner in which the decision was conveyed would have shocked Mr Shepherd and the loss of his job would have devastated him. I accept that there was an impact on Mr Shepherd affecting his emotions and well being. The Whanganui District Health Board is to pay Mr Shepherd \$8,000.

[43] Costs are reserved.

P R Stapp
Member of the Authority