

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 79
3007991

BETWEEN HEATHER STEEL
Applicant

AND BUPA CARE SERVICES
LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: J B Lovely, counsel for Applicant
Shelley Eden, counsel for Respondent

Investigation Meeting: 14 February 2018 in Timaru

Submissions received: 14 February and 26 February 2018 for the Applicant
14 February and 23 February for the Respondent

Determination: 28 May 2018

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I prohibited from publication the evidence lodged in these proceedings about the identity of Resident A, Resident B, Resident C, Registered Nurse A and Caregiver A. I also prohibited from publication any medical evidence lodged relating to Resident B and Resident C.

Employment relationship problem

[2] Bupa Care Services Limited employed Heather Steel as an Enrolled Nurse from 23 May 2011 until 10 June 2014 at its Highfield Rest Home, which is located in the northern suburbs of Timaru. During her employment with Bupa, Ms Steel was a member of the New Zealand Nurses Organisation (NZNO) and she was covered by a collective agreement negotiated between Bupa, the NZNO and the union now called E tū.

[3] Ms Steel qualified as a nurse in 1982 with extensive work-experience at South Canterbury District Health Board and in the aged care sector. Bupa summarily dismissed Ms Steel following an investigation into serious misconduct. Bupa said it substantiated two allegations that Ms Steel had physically abused two elderly residents by inserting her finger into their anuses while assisting them with showering. Ms Steel denied Bupa's allegations and claimed her dismissal was procedurally and substantively unjustified. The NZNO represented Ms Steel throughout Bupa's investigation and raised a personal grievance for unjustified dismissal on her behalf. The matter was progressed to the Authority by her now representative.

[4] In settlement of her personal grievance with Bupa, Ms Steel sought an award of lost wages and compensation for hurt, humiliation and injury to feelings.

Issues

[5] The issues for investigation were and determination are:

- (i) Was Ms Steel's dismissal, and how the decision was made by Bupa, what a fair and reasonable employer could have done in all the circumstances at the time?
- (ii) If Bupa's actions were not justified, what remedies should be awarded, considering:
 - (a) Compensation for lost wages under s 123(1)(b); and

- (b) Compensation for hurt, humiliation and injury to feelings under s 123(1)(c)(i) of the Act.
- (iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Steel, which contributed to the situation giving rise to her grievance?
- (iv) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[6] During the Authority's investigation meeting, I heard evidence from Ms Steel, Bupa human resources advisor, Sarah Kenny, former Bupa human resources advisor, Jenny de Carteret and former Bupa southern operations manager, Joanne Powell. Ms Powell, with leave of the Authority, gave evidence via video-link from Sydney, Australia. I record my appreciation to the staff of the Ministry of Justice at the Timaru Courthouse for their assistance during the meeting.

[7] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of Ms Steel's employment relationship problem. Although I have not referred to all the submissions advanced by the representatives in this determination, I have fully considered them.

Narrative

[8] Ms Steel's employment difficulties began in 2013 when Bupa investigated two disciplinary issues and two performance concerns. Ms Powell appeared to be directly or indirectly involved in all these matters. First, Bupa investigated Ms Steel "discriminating" against Resident A by delaying giving her a cup of tea after Resident A raised a concern about the way Ms Steel had treated another resident by allegedly denying her a slice of bread. Second, Bupa also investigated an allegation that Ms Steel when drying Resident's A back after showering put her finger in a towel and inserted it in her "back passage". Third, Bupa raised two performance concerns with

Ms Steel relating to poor time management and the high number of contacts made to the Registered Nurse on duty during shifts. Ms Steel denied all of Bupa's allegations and concerns. Ms Steel denied and/or had responses to all matters.

[9] Following an investigation dealing with both disciplinary and performance matters, including during the same meeting and in the same correspondence, Bupa substantiated the discrimination allegation in respect to Resident A and issued Ms Steel with a verbal warning, reduced to writing, for serious misconduct for a period of six months.

[10] Bupa said it could not substantiate the second allegation in respect to Resident A due to the "inability to ascertain timeframes of when the incident occurred", however it reminded Ms Steel of the need to provide residents with safe and appropriate care at all times.

[11] Bupa, in response to its performance concerns, put in place a process for monitoring and assessing Mr Steel's work. In October 2013, Ms Steel was formally placed on a performance improvement plan. In February 2014, Ms Steel was given a first written warning for six months due to failure to meet her performance improvement plan. Further, as a result of a separate disciplinary process Ms Steel was issued a first written warning.

[12] It was clear from her evidence at the investigation meeting, Ms Steel was not happy about Bupa's treatment of her during this period. However, she appears not to have formally disputed the warnings or other actions taken by Bupa in respect of her work nor had the NZNO do so on her behalf.

Events of 18 May 2014: the allegations

[13] On 18 May 2014, Resident B complained to Caregiver A that she did not want Ms Steel to shower her. As a consequence, alternative showering arrangements were made for Resident B.

[14] Later that day, Caregiver A was asked by Resident A to come and talk to Resident C in the West Wing Lounge, an area which Residents A, B and C regularly used and sat together in. Resident C then alleged to Caregiver A, Ms Steel had behaved inappropriately when showering her. There was a conflict in the evidence as to the nature of the allegation actually made and this is discussed below. Caregiver A said Resident C was upset during this conversation. Resident B apparently overheard what was being discussed and called out words to the effect of “she’s done the same to me” and “that’s why I don’t want her to shower me”. Resident B was not asked for details about what she was alleging at this stage other than when Caregiver A asked her who she was talking about and Resident B identified Ms Steel.

[15] Caregiver A reported the conversations she had with Residents B and C to Registered Nurse A. Registered Nurse A then recorded the conversation in “progress notes” reporting on Ms Steel’s performance during her shift on 18 May 2014, which was part of Bupa’s performance improvement process for Ms Steel. The notes record the allegation made by Resident C as Ms Steel “had rubbed [Resident C’s] anal area hard with one of her fingers and she did not enjoy her shower”. However, the notes did not record this allegation, or the refusal by Resident B to be showered by Ms Steel, as part of Registered Nurse A’s summary of concerns about Ms Steel’s performance during the shift.

[16] Registered Nurse A did not escalate the allegations to management on 18 May 2014 or lodge an incident report at the time. Ms Powell she said was informed by Highfield manager Ms Hinde who “became aware” of the allegations “a day or two” after they were made. Evidently, and independently of any process undertaken by Bupa, Caregiver A prepared a statement of her own volition, dated 18 May 2014, which stated Resident C told her Ms Steel had “stuck her finger up her bottom”.

Bupa's employment investigation

[17] In response to the allegations Bupa commenced an investigation. Ms Powell said given the potential risk to patients she considered suspending Ms Steel. On 23 May 2014, Ms Powell rang Ms Steel and discussed possible suspension with her. Ms Powell used a prepared script during the conversation. Ms Powell did not recall Ms Steel's response but she subsequently issued a letter dated 23 May 2014 confirming the suspension on full pay.

[18] Ms Powell said that when washing the perineum of a resident, nurses and caregivers were supposed to use a flat hand only and should not be using a finger. Ms Powell said this was commonly understood. However, a Bupa document disclosed by Bupa during the Authority's investigation and entitled, "Hygiene Needs of a Resident" was not so specific. In relation to bathing/showering, the document stated: "[w]et resident and lather all over with soap. Pay particular attention to skin folds, beneath breasts, genital area and groin, umbilicus, between fingers and toes". As to drying a resident, the document stated: "[p]at dry carefully and thoroughly – BEWARE OF FRAIL SKIN (inadequate drying may result in a skin break down or fungal infections, particularly under the breasts, groin, skin folds, between toes etc)".

[19] Bupa issued Ms Steel with three letters dated 23 May 2014. These letters were signed on behalf of Ms Powell. The first confirmed her suspension in response to the allegations made by Residents B and C. The second invited Ms Steel to attend a disciplinary meeting on 27 May 2014 to discuss performance issues including failure to perform her duties to a standard of care and failure to meet a number of performance objectives.

[20] The third letter sought to set out the allegations made by Residents B and C against Ms Steel and match these up with possible breaches of her employment agreement and Bupa's code of conduct. Possible breaches of the code included in relation to "personal conduct" and "respect for the rights of others" The letter set out the definition of "serious misconduct" from the code. It advised Ms Steel of her right

to bring a support person, seemingly in addition to her NZNO representative, to a proposed meeting on 27 May 2014 and encouraged her to do so. Ms Steel was also advised of her right to seek EAP counselling.

[21] Interviews were conducted with Residents B and C on 21 May 2014, notes were taken and the residents respectively signed each. Resident B said Ms Steel “put a finger in her bottom” while drying her. When asked if it had ever happened before, Resident B said “no”. When asked if she had spoken to anyone about the alleged incident, Resident B said the only person she would have told was Resident A but she did not think she said anything to her. Bupa would say this incident happened on 8 May 2014. Resident C was asked if she had been showered the previous weekend, to which she indicated she had but did not enjoy it. When asked why this was, Resident C said because Ms Steel “put a finger in her back passage”.

Meeting on 27 June 2014

[22] Bupa convened a meeting with Ms Steel and her NZNO representatives in Christchurch to discuss the allegations. A review of the notes of the meeting discloses, the NZNO representative identified the inconsistency between the progress notes and the incident report. Concerns were also raised about the lack of escalation to BUPA management about the allegations and timeframes. The representative expressed concern about three day time delay in interviewing Residents B and C after the allegations were first made on 18 May 2014. During the meeting Ms Steel denied the allegations. In denying the allegations, Ms Steel said, for example, Resident B came up to her later on 18 May 2014 and showed her a photo of her grandson. Ms Steel said she seemed quite happy and clearly wanted to talk to her.

[23] The meeting adjourned so BUPA could interview Registered Nurse A and Caregiver A, as seemingly they had not previously done so. Ms Powell accepted there were inconsistencies and issues about the actions of Registered Nurse A and Caregiver A. Ms Powell agreed to delay the performance meeting.

Interview with Caregiver A

[24] Following the meeting with Ms Steel on 27 May 2014, an interview was conducted with Caregiver A. In notes of the interview, which appeared to contain pre-populated prompt questions, Resident C's allegation was recorded as Ms Steel had "stuck her finger up her". The notes go on to record Caregiver A was asked if those were the exact words used by Resident C to which she confirmed they were. Caregiver A was asked if she lodged an incident report. She indicated she had. However, upon review of the documentation, seemingly this was not the case. Caregiver A was also asked when she prepared her written statement referred to above and which she had provided to Ms Hinde on 22 May 2014. She indicated 18 May 2014.

Interview with Registered Nurse A

[25] An interview was also conducted with Registered Nurse A. This interview occurred on 5 June 2014. In notes of the interview, again with what appeared to be pre-populated prompt questions, Registered Nurse A was asked if she had a conversation with Caregiver A on 18 May 2014 which prompted her to write the statement: "Heather had rubbed her anal area hard with one of her fingers and did not enjoy her shower". As stated above this statement is contained in the progress notes for the 18 May 2014 shift. In contrast, Resident C's allegation was recorded in incident report by Registered Nurse A as Ms Steel "had inserted her finger into her rectum" during a shower. Registered Nurse A did not directly, or even indirectly, answer this question. Further on in the notes, Registered Nurse A said after a discussion with Caregiver A, she approached Resident B to ask her what had happened during the shower with Ms Steel but Resident B did not elaborate. Registered Nurse A said "I didn't think she wanted to talk to me about it". Registered Nurse A confirmed she did not lodge an incident report about what she was told by Caregiver A or advise Caregiver A to lodge one herself. Registered Nurse A appears to have subsequently completed an incident report on 22 May 2014.

Meeting on 6 June 2014

[26] At the outset Ms Powell advised Ms Steel and her NZNO representatives she had clarified the timeframes around the allegations. It was clear from the notes Ms Powell was satisfied with these inquiries. Ms Powell then identified the matters she believed substantiated the allegations against Ms Steel. First, the allegations of Residents A and B were “independently” made and were “unsolicited”. Second, Resident C was upset and this presented as sincere and believable. Third, the statements of the staff and the consistency between these. Fourth, Ms Powell’s personal knowledge of the residents and while Resident C had some cognitive impairment, both presented as compelling witnesses. Fifth, no collusion was detected or was there any reason to believe it had occurred. Sixth, the vulnerability of the residents. Seventh, Ms Steel’s current first written warning for other breaches.

[27] Ms Powell said she and Ms Hinde both agreed the allegations had been substantiated against Ms Steel. Ms Hinde, who also took the lead in the early stages of the investigation, did not give evidence. Ms de Carteret, who provided human resources support to the investigation, described the evidence against Ms Steel as “compelling”.

[28] Ms Powell then said she considered what was more appropriate: a final written warning or a dismissal. Ms Powell said as part of her decision-making at this stage, she considered the earlier (unsubstantiated) allegation made against Ms Steel by Resident A. Ms Powell said while two allegations had been substantiated against Ms Steel, these findings had no bearing on the unsubstantiated allegation made by Resident A. However, Ms Powell said she was conscious that if there were further such incidents involving Ms Steel, the existence of the allegation made by Resident A may mean Bupa was breaching its duty of care by continuing to employ her.

[29] Ms Powell confirmed her decision to dismiss Ms Steel in writing on 10 June 2014. The letter stated the substantiated allegations involving Residents B and C against Ms Steel constituted serious misconduct, through assault, and the sanction for that was summary dismissal. The letter also advised Ms Steel that Bupa would be reporting the situation to the New Zealand Nursing Council “due to the probability of this assault occurring”.

[30] On 3 July 2014, the NZNO lodged a personal grievance on Ms Steel’s behalf for unjustified dismissal.

Police investigation

[31] Bupa informed the Police about residents’ complaints against Ms Steel. The Police conducted a investigation, including interviewing Residents A, B and C. However, after preliminary inquiries the investigation was discontinued and no action was taken against Ms Steel.

Nursing Council investigation

[32] On 14 June 2014, Ms Powell provided a formal report to the Nursing Council. The Nursing Council requested information from Bupa about Ms Steel’s dismissal. The Nursing Council found the evidence available to it did not support a charge of professional misconduct against Ms Steel in respect of Residents A, B or C. Ms Steel said this finding vindicated her. Bupa said it was irrelevant because an employer and the Nursing Council are required to apply different legal tests. Bupa also said the Nursing Council did not interview witnesses. It did, however have access to the material provided by Bupa (including the statements of Registered Nurse A, Caregiver A and Residents A, B and C), the police video interviews with residents and affidavits from Residents A and C.

Summary of the position of the parties about Ms Steel's dismissal

Bupa

[33] Bupa contended its decision to dismiss Ms Steel was both procedurally and substantively justified. Bupa rejected Ms Steel's characterisation of her conduct as allegations of sexual assault. I accept this submission. However, Bupa's substantiated allegations of serious misconduct were very serious ones: assault of Resident B and Resident C.

[34] Bupa said it received two independent, unsolicited complaints from residents and these complaints were consistent with the residents' reports to staff. Bupa said while one of the two residents had minor cognitive impairment, both presented as compelling witnesses. Bupa said it raised concerns with Ms Steel about the complaints, interviewed all relevant witnesses, provided her with all the relevant information, gave her a reasonable opportunity to respond, genuinely considered those responses and undertook all necessary lines of inquiry. During the investigation, Bupa said it offered EAP counselling and informed Ms Steel of her right to have a support person.

[35] Bupa said s 103A of the Act it was not required to re-deploy Ms Steel to other duties, which would have in all likelihood involved some form of caregiving, pending its investigation and that of the Nursing Council.

[36] Bupa said the test in s 103A of the Act simply required a reasonably founded belief, honestly held, that serious misconduct had occurred to establish the reasonableness of its decision. Bupa said it also considered the vulnerability of the patients and an in-time first written warning given to Ms Steel for other breaches. Bupa said it considered alternatives to dismissal but ultimately concluded summary dismissal was the justified sanction for the established serious misconduct.

Ms Steel

[37] Ms Steel said her dismissal was unjustified. She denied engaging in the alleged conduct in respect of Resident B and C. Ms Steel said there was no evidence to substantiate the allegations advanced by Bupa. Ms Steel said the decision to dismiss her was infected by bias due the blurring of disciplinary and performance issues, the involvement of Ms Powell who had previously investigated Ms Steel in several unrelated disciplinary and performance matters and imposed discipline on her, and the taking into account, when deciding to dismiss her, the previous unsubstantiated allegation made by Resident A.

[38] Ms Steel said Bupa did not properly take into account the cognitive impairment of Resident C when assessing the veracity of her allegation. Ms Steel said she had showered Resident C several times previously and there had been no complaints. Further, Ms Steel said Resident B was content to engage with her after the alleged incident on 18 May 2014 by showing a photo of her grandson.

[39] Ms Steel viewed the complaints from Residents B and C arising from a friendship they had with Resident A, who had previously made an unsubstantiated allegation against Ms Steel and had raised other issues about her; one of which resulted in a written warning. In effect, Ms Steel alleged there was “collusion” between the residents in respect of the allegations or, at least, Resident A had taken some sort of “ring-leader” role.

[40] Ms Steel said Bupa should have engaged an independent investigator. Ms Steel said when uninterested third parties, namely, the Nursing Council and the Police, examined the complaints no action was taken against her.

[41] Ms Steel said no alternatives to dismissal were discussed with her. She also said she should be placed in an alternative role while the Nursing Council considered the complaints. Ms Steel said as result of the finding of the Nursing Council and no action being taken by the Police, she was vindicated.

Evaluation

[42] The standard of proof applied by the Authority when assessing the justification for Bupa's decision to dismiss Ms Steel is the civil standard of "on the balance of probabilities". This is often expressed as being "more probable or likely than not". Such an exercise requires the Authority to consider the nature and quality of the evidence and whether Bupa had a sufficient and reliable evidential foundation for concluding Ms Steel engaged in the serious misconduct.

[43] The Supreme Court has recognised there is a "natural tendency" for tribunals of fact to require stronger evidence before being reasonably satisfied, on the balance of probabilities, that a serious allegation, as was the case here, has been made out.¹ Such a tendency, which is not to be conflated to a legal proposition, directs the attention of, in this case, the Authority to the strength of the evidence required in attaining the civil standard of proof, focusing on the probative value of such evidence. Essentially this goes to the degree of persuasion of the mind, ultimately manifesting itself as the reasonable satisfaction of the Authority.

[44] On the face of it, the form of Bupa's investigation into Ms Steel's alleged serious misconduct appeared coherent and robust. Bupa could point to general compliance with s 103A of the Act.² However, when examined more closely there were several procedural problems with Bupa's investigation, which called into question its integrity and the likelihood of a lack of fairness being afforded to Ms Steel.

[45] The first significant problem confronting Bupa was the nature of the allegations made against Ms Steel and their timing. In her evidence, Ms Powell she said was informed about the allegations by Ms Hinde who "became aware" of them "a day or two" after they were made. It is not clear, and far from satisfactory, that the allegations being made by Residents B and C were not immediately or, at least, more promptly

¹ *Z v Complaints Assessment Committee* [2009] NZLR 1 (SC) at [102]

² See para [39] above

investigated by Bupa. There appeared to be some sort of systems or communications failure involving Caregiver A, Registered Nurse A and Ms Hinde. An incident report was eventually lodged by Registered Nurse A on 22 May 2014. Resident C's allegation was recorded in this form as Ms Steel "had inserted her finger into her rectum". However, this contradicted the allegation recorded by Registered Nurse A in the progress notes for the 18 May 2014 shift which stated: "Heather had rubbed [Resident C's] anal area hard with one of her fingers and did not enjoy her shower". When interviewed during the investigation, Registered Nurse A was asked if she had a conversation on 18 May 2014 with Caregiver A which prompted her to write that statement in the progress notes. Registered Nurse A did not directly, or even indirectly, answer this question. However, in a subsequent interview with Ms Powell, Registered Nurse A was asked to reconcile these statements. In response she said: "[a]ll true didn't go into who did it on progress notes as just a timeline". The difficulty with this explanation, of course, is that Registered Nurse A explicitly identified Ms Steel as the key protagonist in the allegation made by Resident C in the progress notes. It appears Ms Powell did not press the issue further with Registered Nurse A.

[46] When Caregiver A was interviewed during the investigation, she was not asked why her own volition statement contained a different allegation to that recorded by Registered Nurse A in the progress notes. Caregiver A was asked: "[d]o you remember what you said to [Registered Nurse A]?" and she is recorded as saying, initially at least, "I can't remember exactly, I can't be certain but I said that [Resident C] was upset". Caregiver A then went on to say: "I asked her to go and talk to [Resident C] as she had said [Ms Steel] had showered her and stuck her finger in her". Caregiver A also was asked what actions she took immediately after receiving the complaint and she is recorded as saying: "I told [Registered Nurse A] what had happened. I went straight back on my wing and I think [Registered Nurse A] went to talk to her". When asked if she talked to Registered Nurse A about the situation later on, she is recorded as saying: "I can't remember".

[47] A fair and reasonable employer would have questioned the different understandings of the nature of the allegation made by Resident C before it was raised by the NZNO during the disciplinary meeting on 27 May 2014. The two versions of the allegation are quite different and go heart of whether the events as they related to Resident C occurred and in the manner that Bupa ultimately found they did. The written allegation: “Heather had rubbed [Resident C’s] anal area hard with one of her fingers and did not enjoy her shower” was the most contemporaneous written account of the allegation made by Resident C to Caregiver A and reported to Registered Nurse A. However, it was not the allegation investigated by Bupa despite there being no credible explanation as to why it, and not other versions of the allegation, was written in the progress notes by Registered Nurse A.

[48] Unlike the approach taken when interviewing Registered Nurse A and Caregiver A, there was no question and answer approach taken when interviewing Residents B and C. While it is not necessary to deploy the same questioning technique to all witnesses involved in an employment investigation³, a consistent approach is often desirable because, on one hand it demonstrates the even hand of fairness and on the other, it can provide an employer with the comfort that it properly and systematically gathering evidence upon which to base any findings; ultimately leading to robust decision-making. Certainly taking a question and answer approach with Residents B and C may have assisted Bupa. As it was, in the written statement of Resident C, Ms Steel was not even *named* by her. A notation was made, at the foot of the statement: “Heather Steel showered [Resident B] on 18 May 2014. This is documented in the Progress Notes”. However, given the uncertainty about what was actually being recorded in the progress notes, and Bupa was on notice of this following the interview with Registered Nurse A, further independent evidence as to whether Ms Steel actually undertook the showering would have been required.

³ *A Ltd v H* [2016] NZCA 419 (CA) at [36]

[49] While it is possible someone involved in the investigation may have reviewed some, or all, of this material, it was clear from the evidence Ms Powell had not. Indeed, it was only as a result of the Authority's investigation meeting when Ms Steel suggested she may not have dried Resident B on the day in question, that Bupa went away and further investigated this. Given the uncertainty created by Registered Nurse A about the progress notes and the general nature of the staff rosters, it is still not entirely clear whether Ms Steel did shower (or dry) Resident B or not. Even if she did, Bupa's investigation had not properly disclosed this at the time Ms Steel was dismissed, further calling into question its evidential foundation.

[50] A fair and reasonable of employer, given the uncertainty as to how the complaints arose and, indeed, what they even were, would have sought to clearly establish what the allegations actually were before putting them to Ms Steel.

[51] Another of Ms Steel's criticisms of Bupa's process was the possibility of collusion between Residents A, B and C or, at least, some overt (or, indeed, covert) influence by Resident A on the making of the allegations. Bupa said Ms Steel did not raise this during its investigation. However, it seems Bupa did not seriously consider collusion between the residents or some sort of overt or undue influence on Resident B and C by Resident A, who had made a similar, unsubstantiated, allegation against Ms Steel. Bupa said in its submission to the Authority that collusion was highly unlikely as Resident B and C not only spoke to Bupa about their allegation, they also spoke to the police. This is a potentially fraught submission because the involvement of the police was a circumstance after the fact of Ms Steel's dismissal. Further, it seems the police interviews took place around three weeks after the original allegations emerged and it is clear from the Nursing Council's summary, the statements given by Residents B and C, in particular, to the police contain several significant inconsistencies to the account (or accounts) they gave Bupa.

[52] While it is open to an employer to accept one account (or more accounts) over another, it must do so on a reasonable basis. Having received two similar, serious allegations from Residents B and C, who were strongly associated with Resident A – who had also made a similar allegation about Ms Steel and was likely dissatisfied and upset with its unsubstantiation – should have seen Bupa proceed more cautiously. Instead Bupa appeared to proceed on a “where there’s smoke, there’s fire basis” and having convinced itself of the veracity of the allegations squarely placed the onus on Ms Steel to disprove them.

[53] Ms Powell said she knew Residents B and C from her regular visits to Highfield. Ms Powell stated in her written evidence: “while one of them [Resident C] had some minor cognitive impairment, this was minor and they were presenting as compelling witnesses who understood clearly what they said had happened to them”. It is clear this knowledge helped Ms Powell form a view about what Residents B and C were alleging Ms Steel had done. Objectively assessed, the notes produced from the disciplinary meeting undertaken with Ms Steel on 27 May 2014 raise concerns about some of Ms Powell’s recorded statements and whether these could be construed as advocating for the veracity of Resident B and C’s allegations. Such an approach is, of course, evidence of a closed mind about the allegations and the possibility Ms Steel did not engage in the conduct, a position Ms Steel and her representatives were clearly advocating.

[54] As it was, Ms Steel raised concerns about the involvement of Ms Powell. She said a fair and reasonable employer would have bought in an independent investigator. Bupa said Ms Powell carefully considered the evidence prior to making her decision. Bupa said its view of the case law on this point was that provided an inquiry into an allegation is conducted fairly, there is no need to use an independent manager or external investigator.⁴ However, based on the evidence available to the Authority, it is clear Ms Powell saw Ms Steel as a difficult and non-performing employee. It is not a

⁴ See, *Keepa v Go Bus Transport Limited* [2015] NZEmpC 180 and *Bhikoo v Stephen Marr Hair Design New Market* [2016] NZEmpC 32

significant step of logic to suggest this may, and in all likelihood did, colour her judgement.

[55] Bupa said Ms Steel's previous employment issues, most of which Ms Powell had been involved in, were not taken into account when deciding to dismiss her. However, it was clear from the evidence Ms Powell had previously carried out disciplinary action against Ms Steel including issuing her with three letters on 23 May 2014. One of these letters, which invited Ms Steel to attend a disciplinary meeting on 27 May 2014 to discuss performance issues, referred to her "failure to perform [her] duties to the required standard, and [her] failure to meet a number of performance objectives". This letter was issued the same day Ms Steel received a letter from Ms Powell suspended her pending investigation for serious misconduct and another letter detailing this alleged misconduct.

[56] While Ms Powell said in her evidence to the Authority that the issues of serious misconduct and performance were separate matters this does not explain why all correspondence was issued on the same day. Ms Powell conceded in her oral evidence there may have, in effect, been some blurring of the lines but suggested this was to ensure Ms Steel believed the matters were being kept separate by Bupa. Ms Steel's ongoing performance issues were going to be discussed on 27 May 2014, presumably as part of the disciplinary meeting and while she was still suspended because none of the correspondence dated expressed a contrary position. The notes of the meeting on 27 May 2014 disclose that Ms Powell adjourned the performance discussion part of the meeting. However, this seems to have had more to do with the necessity to conduct further inquiries including with Registered Nurse A and Caregiver A, rather than for any other reason. Additionally, there was a pattern here in respect of how Bupa dealt with Ms Steel. As noted above, the 2013 allegation made by Resident A also involved performance issues and resulted in the putting in place of a process for monitoring and assessing Mr Steel's work.

[57] I find given the gravity of situation being investigated, Ms Steel was entitled to a single focus investigation inquiry uncomplicated and uncontaminated by collateral issues. It was simply unfair of Bupa to confront Ms Steel with, and expect her to respond to, what was, in effect, an avalanche of performance and disciplinary issues including some very serious allegations of serious misconduct. For that for reason alone, I would find the inquiry conducted by Ms Powell was unfair. Having regard to the resources available to Bupa, conducting an independent investigation would not have been too onerous. In any event, Bupa could have done so at its own volition. Ultimately, I find, in the circumstances, it would have been appropriate for Bupa to engage an independent investigator.⁵

[58] Even if I am wrong about that, I would find that in order to met the basic requirements of procedural fairness in the circumstances of this case, Bupa should have organised for an experienced manager unconnected to Highfield to have overseen the investigation and act as decision-maker. I further find that Bupa should have organised for an experienced investigator, also external to Highfield, to question Registered Nurse A, Caregiver A and Residents A, B and C at least in the first instance but more likely in all instances to ensure a consistent and quality investigation capable of arriving at sustainable conclusions. Furthermore, having someone independent of Highfield interviewing the residents would allay potential concerns about the obvious symbiotic nature of staff/resident relations in care facilities.

[59] Finally, Ms Steel raised what she described as, in effect, her vindication by the Nursing Council. The Nursing Council is an independent body and is predominately focused with professional conduct. However, in this case the employment misconduct and professional misconduct were in effect, and in reality, identical and lay at heart of the reason for Ms Steel's dismissal. While Bupa is correct to point out the test for justification under s 103A of the Act is different to civil standard of proof applied by the Nursing Council, the latter is the standard applied by Authority when considering

⁵ Employment Relations Act s 103A(4)

whether Bupa's decision to dismiss Ms Steel is justified.⁶ Indeed, the Nursing Council expressly adopted the formulation favoured by the majority in the Supreme Court decision in *Z* outlined above.⁷

[60] The Nursing Council had more information available to it than Bupa did at the time of Ms Steel's dismissal. Significantly some of that information was contradictory of (or further contradictory of) the evidence relied on by Bupa to dismiss Ms Steel. Bupa said it made its decision to dismiss Ms Steel based on all the (known) circumstances at the time – however, it is clear from the decision of the Nursing Council there were more circumstances than Bupa's investigation disclosed

[61] While the Nursing Council determination was issued after Ms Steel's dismissal and is not otherwise binding on the Authority it is, however, instructive and lends persuasive support to the Authority's earlier finding about the insufficiency in Bupa's investigation of Ms Steel and the lack of potency of the evidence relied on to dismiss her. If Bupa had conducted a more fulsome and robust investigation these circumstances could have been disclosed prior to Bupa's decision to dismiss Ms Steel.

Could a fair and reasonable employer have reached in all the circumstances at the time the decision to dismiss Ms Steel?

[62] Standing back and reviewing the matter objectively, I am not reasonably satisfied that Bupa's actions in response to the allegations made by Resident B and C against Ms Steel were what a fair and reasonable employer could have done in all the circumstances at the time. This raises doubt there was conduct of the nature alleged and the finding of serious misconduct in relation to Resident B and C was justified.

[63] I find the investigation carried out by Bupa was not what a fair and reasonable employer would have conducted and therefore the decision to dismiss her could not

⁶ *Z v Complaints Assessment Committee* [2009] NZLR 1 (SC)

⁷ Professional Conduct Committee of the Nursing Council of New Zealand and Heather Steel, Determination and Recommendations of Professional Conduct Committee, 4 March 2015 at p3.

have been properly reached. Ms Steel has a personal grievance for unjustified dismissal and she is entitled to an assessment of remedies as a result.

Remedies

Reimbursement for lost wages

[64] Having found Ms Steel was subject to an unjustifiable dismissal by Bupa, the Authority must, even if it awards no other remedies, order payment of the lesser of a sum equal to her actual lost wages or three months ordinary time wages, if it finds she has lost wages as a result.

[65] I am satisfied Ms Steel made reasonable attempts find alternative work and that she did, in fact, obtain alternative work. However, despite this, she also lost wages. Ms Steel gave evidence that she performed some “rousing” work, some processing work and then she eventually obtained work as a support/care worker. I accept, however, that finding work, particularly in her chosen profession, would have been very difficult given the stain of her dismissal, and the reasons for that, on her work history.

[66] Subject to contribution, I award Ms Steel three months’ pay as reimbursement for lost wages under s 123(1)(b) of the Act.

Compensation for humiliation, loss of dignity and injury to feelings

[67] Ms Steel sought \$10,000 compensation for humiliation, loss of dignity and injury to feelings. This was a modest amount when having regard to the clear upward trend of awards in the Authority. Ms Steel said she was very upset and distressed by her dismissal. Ms Steel said coping day to day in the aftermath of her dismissal was very difficult in circumstances where she believed, and the Authority has now found, the allegations made against her were unjustified. I accept that Ms Steel suffered humiliation, loss of dignity and injury to feelings as a result of her dismissal.

[68] Subject to any consideration of contribution under s 124 of the Act, I award \$10,000 as compensation for that humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act. Unfortunately, it seems clear it is not possible to award an amount greater than claimed.⁸ For completeness, given the general and readily discernable increase in compensatory awards under s 123(1)(c)(i) of the Act by the Authority in recent times, I would have awarded Ms Steel more compensation, if a greater amount was sought.

Contributory conduct by Ms Steel?

[69] Having found that Ms Steel is entitled to remedies for her personal grievances, I am required by s 124 of the Act to consider whether Ms Steel's actions were causative and blameworthy of the situation she found herself in.

[70] Ms Steel said there should be no deduction for contribution. Bupa said Ms Steel's remedies should be reduced and principally because she raised several matters during the Authority's investigation meeting which she never raised during Bupa's investigation. However, given Bupa prefaced this submission by saying Ms Steel's dismissal was justified, it is hard to see how such omissions by Ms Steel, if that is what they are, were causatively linked to her dismissal. Further, and more critically, these matters, for reasons stated above, actually demonstrate the lack of sufficiency of Bupa's investigation into Ms Steel's alleged misconduct.

[71] Having found Ms Steel has a valid person grievance for unjustified dismissal against Bupa in the circumstances that she does, I find, on the balance of probabilities, Ms Steel's actions did not contribute to the situation that led to her personal grievance and I decline to reduce the remedies as a consequence.

⁸ See, *McIver v Saad* [2015] NZEmpC 145 at [56]

Summary

[72] The remedial orders made are for Bupa to settle Ms Steel's personal grievance by paying her the following amounts:

- (i) Three months' pay as reimbursement for lost wages; and
- (ii) \$10,000 as compensation for humiliation, loss of dignity and injury to feelings.

Costs

[73] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Ms Steel has 28 days from the date of this determination in which to file and serve a memorandum on costs. Bupa has a further 14 days in which to file and serve a memorandum in reply.

[74] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.⁹

Andrew Dallas
Member of the Employment Relations Authority

⁹*PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.