

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Hemi Timu (Applicant)  
**AND** Waitamata District Health Board (Respondent)  
**REPRESENTATIVES** Paul Pa'u, Counsel for Applicant  
Anthony Russell, Counsel for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 1 July 2005  
12 July 2005  
**DATE OF DETERMINATION** 15 September 2005

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] The applicant (Mr Timu) alleges he was unjustifiably dismissed from his employment by the respondent, the Waitemata District Health Board (the Board). Compensation, lost wages and legal costs are sought.

[2] The Board denies this allegation and contends that the dismissal was substantively justified and procedurally fair.

[3] The parties attended mediation but were unable to resolve their differences.

[4] Mr Timu commenced employment with the Board in 2002 at the Mason Clinic, a forensic psychiatric facility. Mr Timu is a psychiatric nurse.

[5] On 19 June 2004 there was an incident between Mr Timu and a particular patient at the Mason Clinic (patient A), which led to Mr Timu's dismissal.

[6] On 22 June, patient A complained to James Gore, a unit manager at the Mason Clinic about the 19 June incident. Mr Gore made a contemporaneous written record of the complaint and had patient A confirm it.

[7] The essence of the complaint was that:

- (a) There was a verbal disagreement between patient A and Mr Timu about whether patient A could continue watching TV, patient A maintaining he had authority to continue watching the television and Mr Timu saying the opposite. Mr Timu effectively sought to exert his authority over patient A by indicating to patient A that patient A *did not make the rules*.

- (b) When patient A retired to his bedroom, Mr Timu followed him, entered the room and continued a heated verbal exchange. It seemed that Mr Timu was again wanting to make the point that patient A was not in charge.
- (c) When patient A was advised by staff nurse White that he had to take his antibiotic medication, patient A refused, but, faced with the insistence of Mr Timu, patient A eventually relented and went to the dispensary window where he had his medication. Patient A then threw the empty water cup through the dispensary window and went to walk off.
- (d) Mr Timu then sought to have patient A apologise to staff nurse White for throwing the empty water cup and when patient A refused to apologise, Mr Timu grabbed the front of patient A's shirt with one hand and pushed him against the wall with the other.

[8] Mr Gore then spoke with Tania Andrews-Bell (Ms Andrews-Bell) a psychiatric assistant, and she broadly confirmed the events as patient A had recounted them.

[9] Mr Timu was asked to attend a preliminary interview on 22 June, the same day Mr Gore had received patient A's complaint, and Ms Andrew-Bell's statement. At this preliminary meeting, Mr Timu was advised of the allegations, encouraged to seek advice, and suspended on full pay pending an investigation.

[10] The Board talked to witnesses to the 19 June incident and forwarded their statements to Mr Timu, in preparation for a meeting on 28 June at which Mr Timu was represented by counsel, Mr Simon Mitchell.

[11] The adequacy of the Board's investigation to that point was firmly put in question by Mr Mitchell. As a consequence, the Board undertook to re-interview some witnesses and the results of these further inquiries were provided to Mr Timu in anticipation of a further meeting on 7 July.

[12] A report was then prepared by Mr Blair Nugent, the Board's human resources manager, which attached the witness statements and reached some conclusions. This report was made available to the Board's decision-maker, Mr Dave Davies. Mr Davies is the Board's general manager, mental health.

[13] Mr Davies decided he needed to hear from Mr Timu. A meeting took place in that regard on 21 July 2004. Mr Timu maintained his position that while there had been a verbal altercation, there had been no physical assault. Mr Timu also maintained his position that there were issues of credibility between the versions of the 19 June event and that Mr Davies needed to resolve those issues.

[14] Mr Davies retired with Mr Nugent to reflect on the evidence and subsequently returned to advise Mr Timu that he considered the incident on 19 June 2004 to constitute a case of serious misconduct. He noted that the next issue he would have to determine was that of penalty.

[15] Mr Davies suggested to Mr Timu that there be a further meeting to discuss penalty. Despite the Board's enthusiasm for a further meeting, no such meeting took place. There was an exchange of correspondence between the parties during which Mr Timu put before Mr Davies the central issues from his perspective, but in the result, the Board's decision was to dismiss, and this was effected on 30 July 2004.

## *Issues*

[16] The test is whether it was available to a fair and reasonable employer to reach a decision to dismiss after the conducting of a proper process of investigation.

[17] In order to apply that test the Authority must establish the answers to the following questions:

- (a) Was the process used by the Board in investigating the 19 June incident, fair?
- (b) Was the decision to dismiss substantively justified?
- (c) Should anything be made of an earlier issue between Mr Timu and patient B?

### ***The issue with patient B***

[18] Because I have reached the conclusion that the issue with patient B is a red herring, it is convenient to deal with it first. At the commencement of the first day of the investigation meeting, Mr Timu's advisers complained about the Board's decision to adduce evidence about an earlier issue involving Mr Timu and patient B. The Board said that the evidence was relevant because it involved similar facts and because Mr Timu's advisers had claimed (allegedly erroneously) that Mr Timu had an unblemished record until the 19 June 2004 incident.

[19] It seemed to me the question was whether the Board had relied on the earlier incident with patient B as part of its decision-making matrix or not. If the earlier incident with patient B had not formed part of the decision-making matrix, then in my opinion, the earlier issue with patient B was completely irrelevant.

[20] Mr Davies, the general manager of psychiatric services for the Board who was the decision-maker in the dismissal of Mr Timu, gave me absolutely clear evidence that he was not aware of the earlier incident before he made the decision to dismiss, and only became aware of it after the decision had been made and communicated to Mr Timu. I was impressed with Mr Davies as a witness and regarded his evidence as absolutely honest and straightforward. Accordingly I accept that the earlier incident played no part in the decision to dismiss. On that basis, it is completely irrelevant to this determination and I say nothing more about it.

[21] I note for the sake of completeness that other members of the management team were aware of the earlier incident with patient B. Mr Gore for instance was personally involved with the earlier incident (as he was with the 19 June 2004 incident). But the earlier incident was not referred to in the documentation provided to the decision-maker and the decision-maker gave me evidence which I accept that he was not personally aware of the earlier incident. It is therefore not germane to the present issues.

### ***The process***

[22] The Board is a large organisation and by virtue of its size and no doubt its complexity, it adopts a form of inquiry in employment matters which is to say the least de-centralised. As a consequence of the process of inquiry which the Board habitually undertakes in matters of this kind, there were complaints by Mr Timu that the process which had led to his dismissal was unfair and it is important that I scrutinise that allegation carefully before proceeding further.

[23] Mr Davies is the decision-maker. He carries the Board's delegation to dismiss as the principal executive officer responsible for the psychiatric services of the Board. However, Mr Davies is responsible for a large and complex unit of the Board's activity and were he to personally undertake inquiries into employment matters that came before him, he would arguably do little else.

[24] Accordingly, Mr Davies delegates his responsibilities to some extent and it is the extent to which that delegation happens which is Mr Timu's principal complaint.

[25] In this particular case, an inquiry was commissioned as to what had actually happened after the receipt of the initial complaint from patient A, and the apparent corroboration of that by a colleague of Mr Timu, Ms Andrews-Bell. Of course, before any inquiry could take place, there needed to be an advice to Mr Timu of a general nature that an allegation had been received and that it was to be inquired into. That was the nature of the first meeting between Mr Timu and management representatives which happened on the day that the complaint from patient A was received. The purpose of that meeting as I recited in paragraph 9 above, was to advise Mr Timu of the allegations, encourage him to seek advice and suspend him on full pay to enable an inquiry to be undertaken.

[26] That inquiry was undertaken under the general aegis of Mr Blair Nugent the human resources manager of the Board. Mr Nugent caused witnesses to the alleged incident (all of them staff members of the Board) to be interviewed and have the results of those interviews reduced to writing and provided to Mr Nugent within an agreed timeframe.

[27] Mr Nugent did not himself interview the complainant nor any of the witnesses.

[28] Mr Nugent simply collated the written transcripts of the interviews that had been conducted by others and then produced a report which went to Mr Davies with a recommendation about the conclusions that Mr Davies might appropriately draw.

[29] Mr Nugent in his evidence to the Authority also indicated that he regularly updated Mr Davies verbally on progress.

[30] Contemporaneously with this report being made available to Mr Davies, it was of course also made available to Mr Timu and there was a further and subsequent meeting between Mr Timu (this time represented by counsel) and the Board on 28 June. That meeting resulted in a decision of the Board to re-interview some witnesses. That decision was taken because of matters raised at the 28 June meeting by Mr Timu and particularly his legal counsel.

[31] A further meeting on 7 July 2004 between the Board's representatives and Mr Timu and his legal counsel gave the latter a further opportunity to comment on, and challenge the evidence accumulated by the Board in respect to the incident.

[32] Only when that series of interviews between the Board representatives and Mr Timu and his representative had occurred was the matter referred formally to Mr Davies by way of the Blair Nugent report that I have already referred to. This report is dated 7 July 2004, the day of the most recent meeting of the series just described between Mr Timu and his legal counsel on the one hand and Board representatives on the other.

[33] Mr Davies had not been personally involved in any of these meetings and had no meeting or contact with any of the witnesses, including the complainant, up to this point. Indeed, the only contact that Mr Davies had had was the informal verbal updates which Mr Nugent told me in his evidence that he gave to Mr Davies.

[34] Once Mr Davies received Mr Nugent's report the matter then passed to him for further action and he naturally sought to meet with Mr Timu and his legal counsel to discuss the matter. This meeting took place on 21 July 2004. This was a meeting where Mr Timu's legal counsel urged upon the Board's decision-maker the notion that he should himself see the witnesses (including the complainant) and make decisions about what were referred to throughout the investigation meetings as matters of "credibility".

[35] This issue arose because on inquiry, it became clear that there were a number of staff around about at the time that the complainant, patient A, says that he was physically attacked by Mr Timu and yet only one staff member (Ms Andrews-Bell) comprehensively supports patient A's account of the alleged assault.

[36] Mr Timu denied the assault and a number of his colleagues who were physically close-by at the time that the assault allegedly took place and who, based on the diagrams drawn for the Authority at the investigation meeting, would be in line of sight of the alleged assault, saw nothing or perhaps more accurately, said they saw nothing.

[37] Mr Davies was being urged to resolve this conflict in the evidence. What he said in evidence before the Authority was that sadly, it was not uncommon for the Board to find itself in the predicament where staff chose not to see transgressions of their colleagues. Assuming that premise is accepted, it seems to follow that no amount of further inquiry or testing of evidence by the Board would result in one jot of change from the position that the Board found itself in in July of 2004, namely, the position of having to make a decision based on conflicting information.

[38] For the Authority's part, I have already indicated that I found Mr Davies to be an honest and truthful witness and I accept that what he says in this particular regard is also truthful. I am not persuaded that further inquiry from Mr Davies would have resulted in any change. Mr Davies would have been left in the position that further time had passed without a decision being made as to Mr Timu's future and he would be likely no further ahead. In the result, he would still have had to make a decision on the evidence before him which, as is often the case in matters of this kind, is not necessarily internally consistent.

[39] At the meeting on 21 July, Mr Davies took an adjournment and together with Mr Nugent retired to reflect upon what he had heard. He came back and advised Mr Timu that he had reached the conclusion that what had happened on 19 June 2004 constituted serious misconduct and he offered Mr Timu the opportunity to meet again to discuss what sort of penalty ought to be imposed.

[40] In the result, Mr Timu's representatives sought only to make submissions in writing as to penalty and the decision to dismiss was subsequently made on 30 June 2004.

[41] Mr Davies was clear that the finding that he made of serious misconduct was supported not just by an allegation of physical assault (which Mr Timu denied), but also by the verbal abuse of patient A which although Mr Timu also denied, there was a much wider span of evidence to support. Mr Davies made the point during my investigation meeting that both physical assault and verbal abuse of a patient by a staff member constitutes serious misconduct in terms of the code of conduct and therefore either ground a decision to dismiss.

[42] I have reached the conclusion that the process adopted by the Board was procedurally fair. I have tried to look at the matter in its totality and not to be overly analytical and judgmental of the individual parts of the process, as I think the decided cases in the Employment Court require.

[43] Taken in its totality, I think the process did comply with the basic and well-known test in *New Zealand Food Processing Union v Unilever New Zealand Ltd* [1990] 1 NZILR at 35. That decision requires three broad elements, vis:

- (a) A proper and fair investigation;
- (b) A genuine opportunity for the employee to be heard;
- (c) Actual and genuine reflection by the employer on any explanation offered before a decision is taken to dismiss.

[44] The only gloss on those well-known principles relates to the quality of the inquiries made by the employer and whether or not Mr Timu's complaint about the lack of involvement of the decision-maker can be made out.

[45] As to the second of those issues, the decision of Chief Judge Goddard in *Ioane v Waitakere City Council* (2003) 1 ERNZ at 104 is relevant.

[46] The Chief Judge makes clear that the decision-maker must have an active role in the process, but he acknowledges that it is perfectly appropriate for the decision-maker to delegate parts of the inquiry work to subordinates.

[47] That is what happened here and I am satisfied that when the matter came to Mr Davies he considered it fairly, impartially and properly and that he gave Mr Timu a more than adequate opportunity to engage with him in the process. The fact that Mr Davies ends up disagreeing with Mr Timu and/or his advisers as part of the process is neither here nor there. The question is whether Mr Davies has given Mr Timu an opportunity to genuinely engage with him, and I believe the evidence shows that he has.

[48] I also reject Mr Timu's claim that Mr Davies can only discharge his obligations as a decision-maker by personally conducting further inquiries to resolve issues of "credibility". Mr Davies' evidence before me was that it was *reasonably common* for staff to "turn a blind eye" to issues such as this in the workplace and he thought it unlikely that any further inquiry would result in anybody relevant having repaired recollection. Mr Nugent, the Human Resources Manager, also pointedly gave evidence that the witnesses said *they saw nothing not that nothing happened*. In those circumstances, I think the employer is entitled to make a judgement about what is reasonably practicable, particularly when it is also under pressure to make a timely decision so as not to have an employee party anxious about resolution for an extended period.

[49] Having dealt with those particular issues, and applying the *Unilever* test to the present factual situation, I am satisfied that Mr Timu was able to be heard throughout, I am satisfied that the evidence discloses a proper opportunity was given to him to have his explanations considered before any decision was taken, and I am satisfied that the Board conducted a proper and reasonable inquiry.

***Was the decision to dismiss substantively justified?***

[50] In *W & H Newspapers Ltd v. Oram* [2000] 2 ERNZ at 448, the Court of Appeal emphasised that the burden on an employer in these circumstances was of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct. Given that I have already found that there had been a full and fair investigation in this case, the remaining question is whether the conduct complained of constitutes serious misconduct or not.

[51] In the incident on 19 June 2004, over a period of some 15 minutes or so, the respondent alleges that there are elements of both verbal abuse of patient A and a physical assault on patient A.

[52] Mr Davies, the general manager of the respondent's psychiatric services, was at pains to point out in his evidence that both verbal abuse and physical assault were each of them capable of constituting serious misconduct in terms of the respondent's policies and procedures. That this is the case is not surprising. The respondent's staff in this area are dealing with some of the most vulnerable individuals in our society and the respondent's staff are plainly in a position of power over those individuals.

[53] For example, the Code of Conduct promulgated by the respondent contains these relevant passages: *Threats of abuse, physical or verbal, assault or intimidation will not be tolerated. Provocation will not be accepted as an excuse.* And:

*Assault*

*Any form of assault of a client is not acceptable.*

[54] Further, both physical assault and verbal abuse are defined by the respondent's discipline and dismissal policy as individually constituting serious misconduct.

[55] The letter of dismissal dated 27 July 2004 confirms that the respondent has made a finding that both a physical assault of patient A and verbal abuse of patient A actually occurred. In respect of those findings, the letter of 27 July simply echoes its precursor letter of 21 July wherein the respondent advised Mr Timu that its provisional conclusion was that termination of employment was the appropriate response.

[56] As we have already seen, Mr Timu denied the physical assault in its entirety although there was corroborating evidence of that physical assault from one of his work colleagues. Further, although denying verbal abuse of patient A, Mr Timu did acknowledge using bad language but claimed both that that bad language was common in the workplace and in this particular case was not directed at patient A.

[57] In relation to the verbal abuse question, there was a wider span of evidence available to the Board that inappropriate language had been used by Mr Timu and in my opinion the Board was entitled to find that that language had been directed at patient A.

[58] The Board does not base its decision exclusively on the narrow issue of the alleged physical assault. The Board takes the wider view that its client base is entitled to a high standard of care and respect and that that high standard is breached not just by a physical assault but also by the kind of verbal altercation which the Board found proved against Mr Timu in this particular case.

[59] That being the position, even if I was to find on the balance of probabilities that the evidence of the physical assault was insufficient enough to ground an instance of serious misconduct and thus a dismissal, the Board still seeks to rely on the wider premise that standards have already been breached by the verbal altercation which it found proved, even before the question of physical assault is considered.

[60] It is helpful to consider these two issues separately. In relation to the verbal abuse, the evidence seems to be overwhelming that there was in fact a vigorous verbal exchange between patient A and Mr Timu and the evidence also appears strong that Mr Timu initiated that exchange. Mr Timu acknowledges that such an exchange did take place, although he contends that he was responding to what patient A said to him rather than vigorously asserting his position and of course Mr Timu denies that he directed any abuse at patient A.

[61] In giving evidence before the Authority, Mr Timu referred to the discussion with patient A as *heated* and agrees that he swore but claims that *his frustration was not directed at anyone in particular.*

[62] Mr Timu also agreed before the Authority to waving his finger and he admitted that he probably did say *you won't fucking tell us what to do.*

[63] I am persuaded that the evidence supports the conclusion made by the Board that there was verbal abuse of patient A by Mr Timu. The complainant himself gave evidence of that and although

his evidence was given by telephone to the Authority, his testimony was unshaken by the process. Evidence was given by a variety of Mr Timu's colleagues to the Board that there was verbal abuse of patient A by Mr Timu. Mr Timu himself agrees that he swore but claims that that was not directed at patient A directly.

[64] Notwithstanding that claim, Mr Timu acknowledged in giving his evidence before the Authority a heated discussion involving swearing, acknowledges waving his finger and says that he probably did tell patient A that patient A would not *fucking tell us what to do*.

[65] On the balance of probabilities therefore I find that it is reasonable for the Board to have reached the conclusion that there was verbal abuse of patient A by Mr Timu.

[66] That leaves us only with the physical assault allegation to consider. As I have mentioned above, there was much less evidence of the physical assault although the evidence for that is stark and not successfully challenged by the investigation meeting process. The Board is entitled to reach the conclusion that it prefers the evidence of the complainant, patient A, and one staff member to the evidence of other staff. As I mentioned earlier, the Board's witnesses were at pains to point out to me during the investigation meeting that it was a not uncommon occurrence for co-workers to decline to report matters such as this or to similarly decline to give evidence against work colleagues. Mr Nugent for the Board also made the observation that it was more accurate to say that witnesses claimed they saw nothing rather than that nothing had happened.

[67] Those are relevant observations given that the test that I must apply requires that I not substitute my own judgment for the judgment of the employer but rather must make a determination on whether it is reasonably open to the employer to reach the judgment that it did.

[68] Given the nature of the Board's workplace and particular challenges that that must engender, the convictions of senior Board staff that the absence of corroborative testimony in relation to the alleged assault was not particularly unusual, I find that the Board is entitled to reach the view that, on the balance of probabilities, a physical assault of patient A by Mr Timu has actually taken place.

[69] I accept the submission of the Board's counsel that Mr Timu's actions need to be looked at as a continuum. In that regard, the Board's counsel referred to an earlier determination of mine *Aranga v. Department of Corrections* CA61/05, which was a case involving a prison officer who was dismissed for assaulting an inmate.

[70] In my determination in that case, I referred to three questions which I considered needed to be answered and applied the continuum approach to analysing the facts of that case.

[71] Certainly a similar process in the present case leads to a similar conclusion, namely that Mr Timu entered the bedroom of patient A when he actually had no need to, continued an exchange with patient A when there was no necessary purpose for doing that (and when he could have retreated at any time), and throughout the exchange Mr Timu was the initiator of the contact between the parties.

[72] Even without considering the factual matrix for the incident itself, the events leading up to it disclose Mr Timu acting contrary to his employer's procedures, contrary to best practice and in circumstances where at any time Mr Timu could have withdrawn from the contact.

[73] There are decided cases where an employee has been dismissed simply for verbal abuse (although typically that verbal abuse is directed at a supervisor or the employer himself). Physical assault is also a judicially accepted ground for dismissal. The *Aranga* case is a relevant example in a not dissimilar occupation and there are also examples where an assault by a teacher on a school student has been found to constitute a ground for dismissal.

[74] I conclude that it is available to the respondent Board to reach a conclusion that there has been both verbal abuse of patient A by Mr Timu and a physical assault on patient A by Mr Timu and that in consequence, Mr Timu's actions do not meet the standard that the Board requires in caring for patients in its district.

[75] It follows that I consider the Board was entitled to respond to those two examples of serious misconduct by dismissing Mr Timu from his employment.

***Determination***

[76] I have reached the conclusion that Mr Timu does not have a personal grievance in respect of his dismissal by his former employer, the Waitamata District Health Board.

***Costs***

[77] Costs are reserved.

James Crichton  
Member of Employment Relations Authority