

ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION (REFER PARAGRAPH 3)

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 348
5416862

BETWEEN LOPISENI TAKATAKA
Applicant

A N D WAIKATO DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Scott, Counsel for Applicant
Anthony Russell, Counsel for Respondent

Investigation Meeting: 10 and 11 July 2013

Submissions Received: 19 July and 5 August from Respondent
30 July from Applicant

Date of Determination: 08 August 2013

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Mr Lopiseni Takataka by Waikato District Health Board was justified.**

- B. Costs are reserved.**

Interim reinstatement application

[1] Mr Lopiseni Lataimoana Takataka's (LT) claim against Waikato District Health Board (WDHB) came to the Authority as an interim reinstatement application. By consent, the parties agreed that an early substantive investigation should be held instead of an interim reinstatement hearing.

[2] LT's personal grievance was investigated at a meeting of the Authority on 10 and 11 July 2013 and this is the determination.

Prohibition on publication

[3] **I order that the name of the patient involved is not to be published. The patient is to be referred to as patient X, a letter bearing no relationship to the patient's actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Employment relationship problem

[4] The WDHB Mental Health Addiction Services (MHAS) provides a portfolio of specialist mental health and addictions services which includes the Regional Forensic Psychiatric and Rehabilitation Service (RFPRS).¹

[5] The RFPRS cares for individuals who have a mental disorder which has led to criminal offending. On the WDHB Hamilton campus, RFPRS has a secure in-patient service, the Henry Rongomau Bennett Centre (the Henry Bennett Centre).²

[6] LT has been employed by WDHB as a Psychiatric Assistant (PA) for approximately 2¼ years.

[7] LT was one of the PAs working the 3pm to 11.30pm shift on Ward 32 in the Henry Bennett Centre on 2 March 2013. Patient X was in the outside courtyard and had been asked by a senior PA, Mr David Heke, to come back inside. LT overheard the request by Mr Heke and approached patient X. An altercation occurred between patient X and LT which led to LT physically forcing patient X to the ground. Patient X complained to the WDHB that he had been assaulted by LT.

[8] WDHB says following receipt of the complaint by patient X, it carried out a full investigation. LT claimed he acted in self defence when patient X attacked him, he did not assault patient X. WDHB concluded that LT had assaulted patient X, which constituted serious misconduct. WDHB says it lost trust and confidence in LT and formed the view that summary dismissal was appropriate in the circumstances. WDHB summarily dismissed LT on 8 April for serious misconduct.

¹ *Sigglekow v. Waikato District Health Board* [2011] NZERA Auckland 384, para.[4]

² *Supra*, para.[5]

[9] LT says the summary dismissal was unjustified and seeks reinstatement, reimbursement of lost wages, compensation for hurt and humiliation and costs. WDHB denies LT's dismissal was unjustified and says summary dismissal was an action a fair and reasonable employer could take in all the circumstances. WDHB says that even if the Authority finds the dismissal to be unjustified, LT's contribution to the situation that led to his dismissal was significant and he should not be reinstated.

Issues

[10] The Authority must determine the following issues:

- (a) Was LT's dismissal by WDHB unjustified?
- (b) If so, what remedies (if any) should be awarded?
- (c) If remedies are awarded, should there be a reduction on the grounds of LT's contribution (if any) and by what extent?

First issue

Was LT's dismissal by WDHB unjustified?

[11] LT was employed by WDHB on a casual basis as a Psychiatric Assistant (PA) from 1 November 2010. LT was employed as a PA on a full time permanent basis on 7 July 2011 and worked at the Henry Bennett Centre at Waikato Hospital.

[12] The Operations Manager, Midland RFPRS, Ms Eileen Hughes, describes the role of a PA in the Henry Bennett Centre as follows:

- *Complete routine tasks and activities under the direction and supervision of a registered health professional or manager.*
- *Maintaining a safe therapeutic environment.*
- *Follow instructions of the Registered Nurse (R/N).*
- *Assists with activities and escorts.*
- *Notifies RNs of concerns or changes in behaviour.*
- *Assists with restraint (SPEC) where required, but not responsible for restraint decision making.*

- *The PA is not responsible for decision making in terms of patient care, planning and evaluation of care*

[13] The position description for a PA emphasises, in my view, that the role is that of an assistant. The PA assists with various tasks, communicates issues to his/her superior and performs tasks assigned to him/her by a Registered Nurse (RN) or other more senior staff members. As the position is described, it is that of a psychiatric assistant.

[14] The RN is required to administer medication and to monitor the mental state of and risk to patients. The RN is also responsible and accountable for the care provided by the PA.

[15] LT undertook induction and orientation training when he commenced employment and attended a four day safe practice and effective communication (SPEC) training shortly after he commenced on 29 November 2010.

[16] SPEC training is to ensure that all health care professionals are competent when dealing with any challenging situation. The course is based around the New Zealand Standard Health and Disability Services Restraint Minimisation and Safe Practice Standards 2008, NZS 8134.2. The intent of the practice standards is to encourage the least restrictive practices and to emphasise that “*restraint*” is a serious intervention which requires “*clinical rationale and oversight*.”

[17] Participants on the SPEC training course are taught various approaches to such situations including de-escalation, personal space, stance and that restraint is always a last resort and that under no circumstances is a restraint done alone, it is done with a team of 3 in the presence of an RN.

[18] On 26 July 2012, LT successfully completed a restraint questionnaire testing his knowledge of WDHB’s restraint practice and procedure. LT was due to complete a SPEC refresher in December 2012 but this did not occur.

[19] WDHB’s restraint policy states:

... Restraint is a serious intervention that requires clinical rationale and oversight...[WDHB] supports the reduction in the use of restraint in all its forms and encourages the use of least restrictive practices, as supported by NZS 8134.1:2008, Health and Disability Services(core standards)...

[20] LT accepts that the restraint of a patient is a last resort, it is organised and must only be undertaken by a team of at least 3 people because of the safety risks involved.

[21] On 2 March, the day of the incident, LT was working the “D”shift (from 3pm to 11.30pm) on Ward 32 at the Henry Bennett Centre. Others working the “D”shift with him were:

- Ms Joanne Lesser Cole, RN
- Mr David Heke, Senior PA
- Mr Bryce Samuel, RN
- Mr Clinton Ritete, PA
- Sharon McKay, RN

[22] Witnesses to the incident claim LT was aggressively swearing at patient X, then pursued him which ultimately lead to patient X being forced to the ground by LT. LT accepts he swore at patient X but only because patient X had sworn at him and he was talking to him at the “*same level*”. LT denies being the aggressor and claims he followed patient X to ensure he was ok. He only “*took down*” patient X when he became isolated and was attacked by patient X. There were a few variations in the witness statements as to exactly what was said by LT and by patient X. WDHB concluded that the incident occurred largely in the way described by the witnesses and patient X and not in the way described by LT. I concur. LT was not credible, his evidence was inconsistent and contradictory. At the investigation meeting, LT’s demeanour when witnesses were giving their evidence was intimidatory. The following are the relevant facts.

[23] LT had read patient X’s clinical notes prior to commencing the D shift and knew that patient X, a young autistic patient was “*out of sorts*”. At approximately 8.00pm, Mr Heke requested patient X to come in from the outside courtyard. LT overheard the request and approached patient X. Patient X came inside and LT swore at patient X about being outside and not coming in when asked. LT then shouldered patient X who walked away. LT closely followed patient X and swore at him saying words like “*don’t you fucking pull this fucking shit on my shift*”, “*you need to learn*”.

LT was told by Mr Heke to leave patient X alone. When patient X stopped, turned towards LT and told him to “*fuck off*”, LT physically forced patient X to the ground and held him in a head lock. LT was told by Mr Heke, Ms Cole and Mr Samuel to get off patient X. Mr Heke and Mr Samuel pulled LT off patient X.

[24] Following this incident, patient X complained of assault and WDHB initiated an investigation. LT was suspended on 6 March while the WDHB conducted its investigation and on 8 April, LT was summarily dismissed for serious misconduct.

[25] There is no dispute that on 2 March, after a request that patient X come inside from the outside courtyard, there was swearing between patient X and LT. LT then followed patient X and ultimately physically forced him to the ground.

[26] The circumstances and reasons for LT taking such action are in dispute. LT said he took the action to protect himself and others and received no support from his colleagues. The WDHB said LT assaulted patient X.

[27] Upon receipt of the complaint from patient X that he had been assaulted by LT, a meeting was held with LT on 4 March. Present at the meeting was the operations manager, Eileen Hughes, charge nurse manager, Aaron Keelty, and the human resources manager, Mr Greg Peplow. LT and his support person, Jonathan Elliott, were also present. LT was informed that an allegation of assault by patient X had been made against him, he was not to respond to the allegation that day but that the matter was being investigated and that he may be suspended during the course of the investigation.

[28] Statements were obtained from staff who were present on the shift with LT and saw the incident with patient X. Joanne Cole’s statement described hearing “*raised voices*” and a “*verbally aggressive exchange ensued between LT and Patient X*”. Ms Cole says in her statement that she witnessed “*LT forcibly shoulder a client (Patient X)*”. She stated that LT was “*yelling confrontationally at client, words to the effect ... don’t you pull this fucken shit on my shift, you gotta learn*”. Ms Cole stated that she witnessed LT “*appearing to lunge forward at client and take him to the ground on his own. At this time I shouted at LT to get off client*”.

[29] Patient X gave a statement that LT swore at him about being outside and then followed him before being “*slammed ... on the ground real hard*” and being in a headlock.

[30] Bryce Samuel also gave a statement that he heard LT aggressively swearing at patient X and that when he left the clinic he found LT and patient X on the floor and that LT had a “*neck hold*” on patient X.

[31] Mr Heke’s statement referred to the discussion between LT and patient X which resulted in LT grabbing patient X and taking him to the ground.

[32] In a letter dated 6 March 2013, Ms Hughes forwarded statements that she had obtained from Joanne Cole, patient X, Bryce Samuel and another patient to LT. The letter confirmed LT’s suspension and stated that if the allegation of assault was confirmed to be wholly or partially correct that “...*Waikato DHB would consider this to have the potential to undermine the necessary trust and confidence that it requires in its employees.*”

[33] A further meeting with LT was attempted but was not able to be convened until 20 March 2013. At that meeting, LT was represented by his lawyer, Mr Simon Scott. Ms Hughes, Ms Keelty and Mr Peplow attended on behalf of the DHB. LT provided a written statement of his version of events.

[34] At the meeting LT questioned the accuracy of some of the witness statements and it was agreed that WDHB would follow up on the statements. During this period of time, LT remained on suspension.

[35] Following the meeting, Ms Hughes conducted further interviews with staff who had witnessed the event to clarify variances between what was being said by the witnesses and what LT was saying.

[36] A further meeting was held on 8 April 2013 with LT, his partner and his lawyer. The incident was discussed further and LT was questioned about break away techniques. At the meeting LT accepted that he had been taught break away techniques and that he had never been taught to “*take someone down in the way LT had taken down Patient X*”. LT claimed he had acted in self-defence.

[37] Following an adjournment, Ms Hughes stated that she:

... considered what they had to say, believed that LT had alternative options available to him, and it was believed an assault did occur by

LT and as a consequence LT had broken the trust and confidence of the employer, therefore, employment was terminated.

[38] In a letter dated 9 April 2013 from Ms Hughes to LT, she states:

Further to our meeting on Monday, 8 April 2013, this letter is to confirm that you have been summarily dismissed for serious misconduct. The reason for the termination is that the incident that occurred on 2 March 2013 when you assaulted a patient.

[39] WDHB had concluded, following its investigation, that LT had assaulted patient X, this was serious misconduct and summary dismissal was appropriate because LT had broken its trust and confidence in him.

[40] On the basis of the evidence before the employer (and now the Authority), I am satisfied that WDHB was entitled to conclude that the conduct of LT towards patient X constituted serious misconduct, for which disciplinary action was appropriate and required.

[41] The decision to dismiss LT on the basis of serious misconduct must be justifiable in accordance with the test as set out in s.103A of the Employment Relations Act 2000 (the Act) which states:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[42] In applying this test, the Authority must also consider four factors specified in s.103A(3) as well as any others it considers appropriate.

[43] Section 103A was considered by the Full Court of the Employment Court in *Angus v. Ports of Auckland*³. The test requires the Authority in this matter to determine whether, on an objective basis, LT's dismissal was within the range of responses open to a fair and reasonable employer. If the dismissal was within the range then it will be justified.

³ [2011] NZEmpC 160

[44] LT accepted that he swore at patient X and then followed patient X. He also accepts that he physically forced patient X to the ground. At the investigation meeting, LT exaggerated events, claiming he was “*attacked*” by patient X and had to act in *self defence*. I do not accept this is what occurred. I find, as did WDHB, that LT was the aggressor. When patient X came in from the courtyard, rather than leaving the issue there, he continued with it and pursued patient X who was trying to get away. Even if LT is correct and patient X was the aggressor, LT did not employ any of the de-escalation or breakaway techniques required for such a situation. LT then physically forced patient X to the ground. In the initial interview, LT claimed this to be a restraint. It clearly was not, as any restraint requires a team of 3. At the investigation meeting, LT claimed, as he had during the WDHB investigation, that he acted in self defence. I agree with WDHB’s conclusion that this was not the case.

[45] Counsel for LT relies on *de Bruin v Canterbury Health Board*⁴ a decision of the Employment Court which held that a dismissal by the DHB of a mental health nurse who had slapped a patient, to be unjustified. The facts and circumstances in *de Bruin* differ quite markedly from those in this case. The profiles of the respective patients and their treatment differed as did the circumstances of each “*assault*”. Significantly, the Court was of the view that the CDHB had not sufficiently investigated the allegations against Mr de Bruin and had failed to meet the standard required by s103A(3)(a) of the Act. Accordingly, the dismissal was unjustified.

[46] The WDHB carried out a thorough investigation in my view in accordance with the requirements of the Act.

[47] After conducting a number of interviews with staff members and a patient who were present and witnessed the incident, with patient X and with LT, WDHB formed a preliminary view which is documented in the notes of the meeting of 8 April as follows:

- *While [Patient X] had gone outside, that he had responded and come inside when directed.*
- *That has given the statement of David Heke and Clinton greater weight in the build up to the attack.*
- *That LT did follow [Patient X] closely and swore at him.*
- *Swearing at a client contrary to LT’s statement was not standard nor acceptable practice.*

⁴ [2012] NZEmpC 110

- *LT continued to berate [Patient X].*
- *That if LT had concerns he should have reported to staff and planned to remove [Patient X] to a safe area and be spoken to. He appeared to escalate the situation, swearing at him.*
- *LT took [Patient X] to the ground without using approved SPSE techniques, there was opportunity for him to back off from the situation and he did not.*
- *LT had taken it upon himself when wasn't assigned to [Patient X] , and not taken direction from David Heke.*
- *Did not accept that the statements were inconsistent, while not identical, they reflected individual recollection.*

...

In light of the above [WDHB] was considering dismissing LT.

[48] After carrying out a full investigation, WDHB was entitled to form the preliminary view that LT's conduct in "taking down" patient X amounted to serious misconduct for which he could be summarily dismissed. Having considered the substantial amount of evidence placed before the Authority, I find that summary dismissal was action a fair and reasonable employer could take given all the circumstances. While it is accepted the assault was out of character for LT, it occurred. LT assaulted a vulnerable patient with a mental disorder in a relationship in which there was a power imbalance. In my view, LT's action was sufficiently serious to impair WDHB's trust and confidence in him and no reasonable employer could be expected to continue the employment relationship.

[49] LT appeared at no stage of WDHB's investigation to have any insight into his actions. Similarly at the investigation meeting, LT claimed he had acted professionally, had only used the minimum force on patient X and considered his actions were correct and appropriate. LT claimed the evidence of his fellow staff members who had witnessed the incident on 2 March including Mr Heke, Ms Cole and Mr Samuel were "lies". When asked why they would lie, LT claimed they had conspired to "save their arses". No evidence was produced to support such a statement. I do not accept staff colluded to save their jobs. Mr Heke, Ms Cole and Mr Samuel were credible witnesses, liked LT and were clearly distressed by the situation.

[50] In *Northern Distribution Workers' Union v. BP Oil NZ Ltd*⁵ Hardie Boys J observed that the conduct necessary to justify summary dismissal is always a matter of degree, and “usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship”.

[51] Section 103A(3) of the Act requires the Authority, when deciding if a dismissal is unjustified, to consider whether before dismissal the employer:

- (a) Sufficiently investigated the allegations;
- (b) Raised concerns it had with the employee;
- (c) Gave the employee a reasonable opportunity to respond to the employer's concerns;
- (d) Genuinely considered the employee's explanation.

[52] I am satisfied the investigation by WDHB was a full and thorough one which complied with each of the above elements of s103A(3). I find LT's summary dismissal justified.

[53] If I am not correct in determining that WDHB could form a view that LT's conduct amounted to serious misconduct for which summary dismissal was appropriate, I find that reinstatement would not be practicable and reasonable as required by s125 of the Act. LT claimed he did not have the support of his colleagues on the evening of the incident. He also claimed in the ensuing investigation by WDHB at by the Authority, those staff members had colluded to “save their arses”. LT stated he no longer trusted his colleagues and his anger and resentment towards them and managers at WDHB was obvious at the investigation meeting. This confirms to me that reinstatement would not be practical or reasonable in a working environment requiring a high degree of trust between colleagues and management.

[54] Section 124 of the Act requires the Authority when considering remedies to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If the employee's actions did contribute to the situation, then the Authority can reduce the remedies that would otherwise have been awarded.

⁵ [1992] 3 ERNZ 483 and 487

[55] It is my view, in the event LT's dismissal was unjustified, his contributory conduct was such as to deny him the remedy of reinstatement. The Employment Court in *Angus .v Ports of Auckland Limited*⁶, considered the effect of an employee's contribution on the remedy of interim reinstatement. At paragraph [75] Judge Colgan stated:

...As already noted, s124 of the Act deals expressly with the significance and consequence of culpable fault in remedies for dismissal. The section does not exclude, in appropriate cases, the remedy of reinstatement and so logically neither does it preclude interim reinstatement. That is not to say that in some cases contributory fault may be so substantial and significant that in a particular employment, the Court or the Authority will not, on balance and taking into account all other relevant factors, reinstate, even on an interim basis...

[56] While the Court has held in *Angus* that contributory conduct may preclude reinstatement, the contributory fault must be "substantial and significant". The contributory fault by LT was in my view substantial and significant to preclude reinstatement. Similarly, any award of compensation would be reduced by 100%.

Costs

[57] Costs are reserved. The respondent has 7 days within which to file and serve a memorandum as to costs and the applicant has 7 days from receipt to file and serve his reply.

Anna Fitzgibbon
Member of the Employment Relations Authority

⁶ [2011] NZEmpC 125