



Employment Court of New Zealand

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Emmanuel v Waikato District Health Board [2019] NZEmpC 81 (4 July 2019)

Last Updated: 14 July 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 81](#)

EMPC 84/2018

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN ARTHI EMMANUEL
 Plaintiff

AND WAIKATO DISTRICT HEALTH BOARD
 Defendant

Hearing: 29-30 April 2019
 (Heard at Hamilton)

Appearances: A Emmanuel, representative for
 plaintiff A Russell, counsel for
 defendant

Judgment: 4 July 2019

JUDGMENT OF JUDGE J C HOLDEN

[1] The plaintiff, Mrs Emmanuel, was summarily dismissed by the defendant, the Waikato District Health Board (Waikato DHB) on 11 August 2017. Mrs Emmanuel took a case to the Employment Relations Authority (the Authority). The Authority found that the dismissal was justifiable and dismissed Mrs Emmanuel's claim.¹

[2] Mrs Emmanuel challenges that determination and this judgment resolves her challenge.

¹ *Emmanuel v Waikato District Health Board* [2018] NZERA Auckland 49.

ARTHI EMMANUEL v WAIKATO DISTRICT HEALTH BOARD [\[2019\] NZEmpC 81](#) [4 July 2019]

Mrs Emmanuel dismissed after late return to work

[3] Mrs Emmanuel had been due back to work from approved annual leave at 8 am on Monday 24 July 2017. On that morning, she advised the Waikato DHB that her flight had been cancelled, that the next flight she was able to get was for the next day, Tuesday 25 July 2017, at 10 am and that she would return to work on Wednesday 26 July 2017.² She arrived back at work shortly after her usual start time on Tuesday 25 July 2017.

[4] The Waikato DHB investigated the circumstances of Mrs Emmanuel's failure to return from annual leave on the expected date and ultimately summarily dismissed her. This was based not only on Mrs Emmanuel's absence on the Monday (and late arrival on the Tuesday), but also because the Waikato DHB believed Mrs Emmanuel had deliberately misled it.

[5] Mrs Emmanuel claims that her dismissal was unjustifiable, essentially for two reasons:

- (a) the Waikato DHB's investigation was not fair; and
- (b) Mrs Emmanuel's conduct on 24 and 25 July 2017 and during the investigation, did not constitute serious misconduct

justifying summary dismissal.

[6] Mrs Emmanuel seeks reinstatement, lost wages from the date of her dismissal and compensation of \$20,000 for hurt and humiliation. Mrs Emmanuel is represented by her husband, Mr Arthur Emmanuel, so has not incurred legal fees, but she does seek reimbursement of the Employment Court filing fee.

2. In her amended statement of claim Mrs Emmanuel says 10.30 am, but the evidence was clear that 10 am was the time referred to.

[7] For the reasons set out in this judgment, Mrs Emmanuel's challenge fails:

(a) The process the Waikato DHB followed was fair and reasonable in the circumstances;

(b) It was open to the Waikato DHB to find that Mrs Emmanuel's conduct constituted serious misconduct and that summary dismissal was warranted.

Mrs Emmanuel had previously been warned about her timeliness

[8] Mrs Emmanuel was an administrator in the Waikato DHB's parking and cashiers team. This is a small team. Mrs Emmanuel had some performance issues raised with her by the Waikato DHB. Of particular relevance were concerns raised around her attendance and timekeeping. Mrs Emmanuel was issued with a first written warning, regarding an unplanned absence from the workplace and her excessive sick leave use on 26 November 2013. That warning remained in force for a period of 12 months from the date it was given but a copy of the warning letter remained on Mrs Emmanuel's personnel file as a historical record.

[9] There were further discussions with Mrs Emmanuel regarding her timekeeping and use of sick leave. At a meeting held on 22 March 2016, Mrs Emmanuel was advised she was to receive a written warning, in part as a result of her failing to advise her manager that she would not be coming into work. This warning was issued in writing on 4 April 2016. Again, the warning was in place for 12 months from the date it was given but the warning letter was retained on Mrs Emmanuel's personnel file as a historical record.

[10] At the time Mrs Emmanuel was dismissed there were no current warnings on her file. But, in about mid-June 2017, Mrs Emmanuel's supervisor spoke with Mrs Emmanuel about her arrival time at work, because she had been arriving several minutes late each day. This was disappointing to the supervisor because the supervisor was relatively new in her role and felt the small team she supervised had gotten off to a good start and were working well together.

Mrs Emmanuel took annual leave in July

[11] Mrs Emmanuel applied for and was granted annual leave from 12-21 July 2017. Her supervisor understood that Mrs Emmanuel was going to Fiji during that time. Mrs Emmanuel was due to return to work at 8 am on Monday 24 July 2017. Mrs Emmanuel went to Fiji but returned to New Zealand on Wednesday 19 July 2017. She travelled to Palmerston North to visit family later that week, apparently planning to drive back from Palmerston North to Hamilton on Sunday 23 July 2017, to be at work the following day. As it transpired, she did not drive back to Hamilton on the Sunday.

[12] Early on Monday 24 July 2017, Mrs Emmanuel e-mailed her supervisor:

Arti here, sorry a bit of hiccup our flight got cancelled the next we got is for Tuesday 10.am. sorry for not being at work.

I Will see you on Wednesday Regards

Arti

[13] The email to the supervisor 'bounced back' as it was incorrectly addressed, so Mrs Emmanuel followed up by email with a colleague, first at 7.30 am, asking her to forward the first email to their supervisor and then shortly after 8 am to check she had received the first email. The colleague then responded to Mrs Emmanuel:

Shoot just got this Hun algood I see you Wednesday [emoji]

[14] Mrs Emmanuel also sent a text message to another colleague, a parking co-ordinator, advising him too that her flight had been cancelled, that the next flight she could get was Tuesday at 10 am and that she would be back at work on Wednesday.

[15] Ms Allison, the Director of Finance Support at the Waikato DHB, learned of Mrs Emmanuel's delay in returning to work and emailed Mrs Emmanuel at 9.02 am

that day, Monday 24 July 2017, as follows:

Hi Arti,

We are very short staffed in the parking office today as Rhonda is on leave, fully expecting that you would have returned.

Why was your flight cancelled? Which airline were you flying with?

Please provide me with a copy of your original air ticket/itinerary and the reason for cancellation? When were you due to arrive back in New Zealand?

Was there absolutely no flight to get you back to work before Wednesday? I look forward to hearing from you.

[16] As is apparent from that email, Ms Allison understood that Mrs Emmanuel was returning to New Zealand from Fiji and that it was her flight from Fiji that had been cancelled. Mrs Emmanuel did not respond to Ms Allison's email or otherwise contact the Waikato DHB again that day.

[17] Mrs Emmanuel decided to return to Hamilton by road and drove back from Palmerston North on the Monday. She arrived at work, unexpectedly, shortly after her normal start time of 8 am on Tuesday 25 July 2017.

[18] After Mrs Emmanuel arrived back at work, she and her supervisor spoke about what had happened. Mrs Emmanuel says she told her supervisor she had missed her Air New Zealand flight from Palmerston North, scheduled to depart at 6.55 am on Monday 24 July 2017.

The Waikato DHB investigated

[19] After she became aware that Mrs Emmanuel had arrived at work on the Tuesday, Ms Allison arranged to meet with Mrs Emmanuel the following day. At the meeting on Wednesday 26 July 2017, Mrs Emmanuel advised Ms Allison that she had returned from Fiji the previous Wednesday but had then driven to Palmerston North a couple of days later. Mrs Emmanuel told Ms Allison that Mrs Emmanuel's brother-in-law had booked for her to fly out of Palmerston North at 6.55 am on 24 July 2017, via Wellington, but she had missed her flight.

[20] Ms Allison says she challenged Mrs Emmanuel's story, first, because the flight she said she missed would have had her arriving to work late anyway, and, second, because in Mrs Emmanuel's email to her supervisor, she had said the flight had been cancelled. Ms Allison says she told Mrs Emmanuel that she did not believe her story and that Mrs Emmanuel had been absent from work without permission. She also says she advised Mrs Emmanuel that the situation raised questions as to whether she could be relied on in the future and impressed upon her the seriousness of the matter.

[21] Ms Allison relayed what she says occurred at the meeting in an email the same day to the Waikato DHB's Human Resources Consultant and to Ms Riggs, who is the Manager of Payments and Revenue at the Waikato DHB.

[22] Mrs Emmanuel's recollection of her meeting with Ms Allison was similar to that of Ms Allison. However, she says, when she was asked why she referred to the flight as being "cancelled", she advised Ms Allison that, in the heat of the moment, she had used that expression, as she was focussed on sending the email to her supervisor. Mrs Emmanuel also says she told Ms Allison she had been sick on the Monday, but Ms Allison disputes that.

[23] Ms Allison was scheduled to take extended leave from the Waikato DHB and therefore arrangements were put in place for Ms Riggs to cover part of Ms Allison's role, including managing the remainder of the investigation and disciplinary process regarding Mrs Emmanuel. Mrs Emmanuel was advised of this.

Disciplinary process continues

[24] The Human Resources Consultant conducted a preliminary investigation, obtaining statements from the people who Mrs Emmanuel contacted, and provided her findings to Ms Riggs.

[25] Ms Riggs then wrote to Mrs Emmanuel by letter dated 31 July 2017 alleging that Mrs Emmanuel had breached the Waikato DHB's Code of Conduct Policy by:

(a) being absent without authority;

(b) arriving to work late on Tuesday 25 July; and

(c) misleading the Waikato DHB by failing to provide a truthful explanation as to why she was unable to attend work on Monday 24 July 2017.

[26] The letter advised Mrs Emmanuel that, dependent upon the outcome of the investigation, Mrs Emmanuel's employment at the Waikato DHB may be summarily terminated or she may be issued with a warning or a final warning. Copies of the Waikato DHB Code of Conduct Policy, its Managing Behaviour and Performance Policy, Mrs Emmanuel's position

description, and statements and emails from witnesses were included with the letter.

[27] A meeting between Ms Riggs and Mrs Emmanuel was convened on 4 August 2017, but when Mrs Emmanuel arrived on her own, the meeting was adjourned to allow Mrs Emmanuel to obtain representation.

[28] The rescheduled meeting occurred on Friday 11 August 2017. Mrs Emmanuel was accompanied at that meeting by two union delegates.

[29] Mrs Emmanuel was given an opportunity to respond to the allegations against her. She advised that she had decided to go to Palmerston North, but when it came time to return to Hamilton, she had become unwell and so her brother-in-law thought she should fly back to Hamilton on the Monday morning. She said her brother-in-law had made the flight booking but that she missed the flight because she arrived late at the airport and that this is what she meant when she referred to her flight being "cancelled". She said they then looked into other flights and there was one on the Tuesday at 10 am. Mrs Emmanuel said she did not have her flight itinerary but that her brother-in-law would be happy to provide it. Mrs Emmanuel then said that her brother-in-law was not available at the time of the meeting, as he was on a flight himself that day. Mrs Emmanuel said she then felt Wednesday was too far off, so she decided to arrive back to Hamilton on the Monday, despite feeling unwell. This meant she was back at work on the Tuesday, earlier than expected.

[30] The Waikato DHB representatives said it was too late to contact Mrs Emmanuel's brother-in-law, but that Mrs Emmanuel had over two weeks during which she could have provided any documentary evidence of her booking to the Waikato DHB. Mrs Emmanuel said she had been dependent on her brother-in-law, but he had not given her anything to bring. Nevertheless, she accepted that she was responsible for obtaining and providing information to the Waikato DHB. During the meeting, one of the union delegates representing Mrs Emmanuel accepted that Mrs Emmanuel could have acted more responsibly and handled communications better, but that she had "got all muddled".

[31] After hearing from her, Ms Riggs, as the decision-maker, advised Mrs Emmanuel that she did not find the reasons given for her absence to be credible and had doubts there was a flight ticket booked. She said that the matter was one of trust and confidence, which she felt had been seriously damaged. She said that Mrs Emmanuel had not shown remorse or ownership and did not seem to have insight into the concerns held by the Waikato DHB. Ms Riggs advised Mrs Emmanuel that her preliminary decision was to terminate her employment. The meeting was then adjourned to allow Mrs Emmanuel time to consider the preliminary decision. When the meeting resumed, the union delegate said Mrs Emmanuel was remorseful and again accepted she could have handled communications better. However, neither Mrs Emmanuel nor the delegate provided any new information that caused Ms Riggs to depart from her preliminary decision. Ms Riggs confirmed that her concluded decision was to summarily terminate Mrs Emmanuel's employment. The reasons she gave were:

- (a) Mrs Emmanuel had been absent without authority on 24 July 2017, as she did not have management approval to take additional leave;
- (b) Mrs Emmanuel arrived late to work on Tuesday 25 July 2017 despite having previously been spoken to about arriving to work on time;
- (c) Ms Riggs did not find Mrs Emmanuel's explanation for her absence on 24 July 2017 to be credible and believed that Mrs Emmanuel had deliberately misled the Waikato DHB; and

(d) Mrs Emmanuel had failed to provide evidence of the purchase of an airline ticket, despite being given ample opportunity to do so; and which would have supported her explanation.

[32] These reasons were confirmed in a letter sent to Mrs Emmanuel on 14 August 2017.

[33] Mr and Mrs Emmanuel later asked for a meeting with the Waikato DHB. That was agreed to and occurred on 15 August 2017. It did not resolve the issues.

Mrs Emmanuel claims unfair process

[34] In submissions on behalf of his wife, Mr Emmanuel pointed to what he said was unfair process. His key points were:

- (a) The Waikato DHB had not made enough inquiries about Mrs Emmanuel's travel arrangements before concluding that she had misrepresented the reason for her absence on 24 July.
- (b) The Waikato DHB failed in its initial investigation to ask Mrs Emmanuel the reason for not attending work.
- (c) It was unfair that Mrs Emmanuel had previously been advised that further attendance issues would, if substantiated, result in disciplinary action, but not advised that she could face summary dismissal.
- (d) In those circumstances, it was unfair to dismiss Mrs Emmanuel without first giving her a warning that specifically notified her of the possibility of dismissal.

[35] Mrs Emmanuel also gave evidence that she has been unhappy in her job for some time and that she was treated differently from other staff. She says she felt micromanaged and bullied and claims that the Waikato DHB's decision to dismiss her

included an element of predetermination. She complains about a number of supervisors and managers, but particularly Ms Allison.

[36] The Waikato DHB submits that:

- (a) It sufficiently investigated the allegations in accordance with its own disciplinary policy and the statutory requirements before dismissing Mrs Emmanuel.
- (b) The Waikato DHB's investigation was fair and proper:
 - (i) the preliminary investigation included gathering and considering statements from the relevant witnesses;
 - (ii) the Waikato DHB raised its concerns formally with Mrs Emmanuel. Mrs Emmanuel was provided with all the information relevant to the allegations and continuation of her employment;
 - (iii) Mrs Emmanuel was provided with a reasonable opportunity to respond to the allegations against her; and
 - (iv) the Waikato DHB considered Mrs Emmanuel's explanation prior to determining the outcome of the disciplinary process.

The Waikato DHB had to act fairly and reasonably

[37] [Section 103A](#) of the [Employment Relations Act 2000](#) (the Act) sets out the test for justification. In terms of process, that section requires the Court to consider whether how the employer acted was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The Court must consider whether, before dismissing the employee:³

3 [Employment Relations Act 2000, s 103A\(3\)](#).

- (a) having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee;
- (b) the employer raised the concerns that the employer had with the employee;
- (c) the employer gave the employee a reasonable opportunity to respond to the employer's concerns;
- (d) the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee.

[38] The Court may consider any other factors it considers appropriate.⁴

[39] If, however, there are defects in the employer's process, but those are minor and did not result in the employee being treated unfairly, then such defects will not cause a dismissal to be unjustifiable.⁵

The Waikato DHB could have made further inquiries, but was not obliged to do so

[40] One of Mrs Emmanuel's key points is that she requested the Waikato DHB contact her brother-in-law, who would have been able to provide information about the flight bookings. Her request to the Waikato DHB was late in the process and qualified by her advice that her brother-in-law was not available to speak to the Waikato DHB at the time. Mrs Emmanuel had already had more than two weeks to provide the relevant information. As noted, Ms Allison had requested information from Mrs Emmanuel almost immediately following Mrs Emmanuel's advice to the Waikato DHB that she would not be at work on 24 July 2017, including asking for copies of the original air ticket and itinerary and the reason for cancellation (as had been advised by Mrs Emmanuel). At no time did Mrs Emmanuel provide the

4 [Employment Relations Act 2000, s 103A\(4\)](#).

5 [Employment Relations Act 2000, s 103A\(5\)](#).

information and supporting documentation sought regarding the flight that she had intended to catch on 24 July 2017.

[41] After Mrs Emmanuel was dismissed, and before the Authority investigation meeting, the Waikato DHB undertook further inquiries from Air New Zealand that cast doubt on whether there was a flight from Palmerston North at the time Mrs Emmanuel had said she had been booked to leave.

[42] By the time the challenge was heard in the Employment Court, the Waikato DHB had sought further information from both Air New Zealand and Jetstar regarding flights departing Palmerston North on 24 July 2017. That information confirms that there was no Air New Zealand flight at the time Mrs Emmanuel said she was planning to fly from Palmerston North to Hamilton via Wellington. It also shows Air New Zealand had flights on Monday 24 July 2017 from Wellington to Hamilton via Palmerston North departing from Wellington at 9.46 am and again at 7.10 pm. Jetstar had no relevant flights.⁶ That more

detailed information would have been useful during the investigation and therefore it would have been helpful if the Waikato DHB had made those inquiries earlier.

[43] However, good faith requires employees to be responsive and communicative with their employers.⁷ Mrs Emmanuel was asked for the relevant information and was best placed to obtain it. This includes information from her brother-in-law. She had time to obtain the requested information. That the Waikato DHB did not make its own inquiries of possible flights from Palmerston North to Hamilton was not a defect in its process and was not unfair to Mrs Emmanuel.

Mrs Emmanuel gave reasons for not being at work on time

[44] Mrs Emmanuel says that the Waikato DHB should have asked her for reasons for her non-attendance at work. But Mrs Emmanuel gave a reason for her not being

6 There were Jetstar flights from Palmerston North to Auckland (including a cancelled flight at

6.55 am), but it has never been suggested that Mrs Emmanuel was intending to fly to Hamilton via Auckland, or that she was flying Jetstar. Mrs Emmanuel's amended statement of claim refers only to an Air New Zealand flight, which Mrs Emmanuel missed.

7 [Employment Relations Act 2000, s 4\(1A\)\(b\)](#).

at work as expected; she said that her flight had been cancelled. There is a difference in evidence as to whether Mrs Emmanuel advised Ms Allison on Wednesday 26 July 2017 that she was unwell. On balance, having heard from the witnesses, and bearing in mind the email Ms Allison sent following that meeting, which does not include any reference to Mrs Emmanuel saying she was unwell, I prefer the evidence of Ms Allison.

[45] It was incumbent on Mrs Emmanuel to explain the reasons why she was late to work. She accepts she incorrectly advised the Waikato DHB that her flight had been "cancelled". She then changed her story to say that she had "missed" her flight because she was late and that she was unwell.

Previous warnings do not preclude summary dismissal

[46] The previous warnings did not expressly refer to the possibility of dismissal but both letters advised Mrs Emmanuel if any similar or other incidents occurred in the future, that may lead to further disciplinary action. Disciplinary action can include dismissal.

[47] In any event, the Waikato DHB's decision to dismiss was not just in relation to Mrs Emmanuel's failure to return to work on time; the other aspect of Mrs Emmanuel's behaviour, which was of critical importance to the Waikato DHB, was its finding that she had deliberately misled the Waikato DHB as to why she was unable to attend work on Monday 24 July 2017. Mrs Emmanuel was advised in the letter of 31 July 2017 that summary dismissal was a possible outcome.

[48] The wording of the previous warnings did not preclude summary dismissal.

Unfair targeting and predetermination not made out

[49] I accept Mrs Emmanuel has found on-going performance management difficult and upsetting. Ms Allison acknowledged in evidence that she spoke firmly to Mrs Emmanuel at the meeting on Wednesday 26 July 2017; I accept that is likely to be consistent with other engagements with Mrs Emmanuel. However, the evidence

did not establish bullying. Ms Allison also satisfactorily addressed the allegation of different treatment. There was no unfair disparity of treatment between Mrs Emmanuel and other staff.

[50] Nor do I find that the Waikato DHB predetermined the outcome of its process. Ms Riggs was the decision-maker in this process and explained her thinking. Mrs Emmanuel has not complained about her.

Process overall was fair

[51] The Waikato DHB investigated the allegations against Mrs Emmanuel, including asking her for information that would assist it. As noted, the Waikato DHB could have gone further but, on balance, I consider the investigation was sufficient.

[52] The Waikato DHB's concerns were raised with Mrs Emmanuel to enable her to respond to them, and she was given a

reasonable opportunity to do so. The Waikato DHB considered Mrs Emmanuel's explanation before deciding to dismiss her.

[53] Overall, the process the Waikato DHB followed was one that was fair and reasonable in the circumstances.

Mrs Emmanuel says her conduct did not warrant summary dismissal

[54] Mrs Emmanuel submits that her conduct did not constitute serious misconduct. She contrasts it with other examples of misconduct such as violent behaviour, bullying, harassment, theft, fraud or use of illegal drugs while at work.

[55] Mrs Emmanuel also says it was not reasonable for the Waikato DHB to take into account expired warnings when deciding whether to dismiss her.

[56] The Waikato DHB points to Mrs Emmanuel's explanations about her absence on 24 July 2017, which it says were misleading and deceptive. It says that if an employee is found to have deliberately acted, or made statements that were ambiguous or unclear, in order to mislead or withhold information, this can be regarded as serious misconduct.

[57] The Waikato DHB raises the previous history to demonstrate that Mrs Emmanuel was aware of the importance placed on timeliness. Moreover, it says this incident demonstrated that Mrs Emmanuel had not adjusted or modified her behaviour despite the previous warnings and discussions.

Behaviour that deeply impairs or is destructive of confidence or trust can justify summary dismissal

[58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, justifying dismissal. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.⁸

[59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.⁹

[60] It is essential to the maintenance of the necessary trust and confidence in the employment relationship that employees are honest and open with their employers. It will be a serious breach of an employee's obligations to his or her employer to mislead the employer in response to specific inquiries based on the employer's concerns.¹⁰ The duty of good faith also includes that parties to an employment relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other.¹¹ Where an employee provides misleading information to his or her employer on a matter that the employee knows is

8. *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] NZCA 428; [2005] ERNZ 767 (CA) at [36].

9. *Auckland Provincial District Local Authorities Officers IUOW v Northland Area Health Board* [1991] NZLabC 180; [1991] 2 ERNZ 215 (LC) at 222; *Air New Zealand Ltd v V* [2009] ERNZ 185 (EmpC) at [34]- [37]; *Secretary for Justice v Dodd* [2010] NZEmpC 84, (2010) 7 NZELR 578 at [121].

10 *Griffith v Sunbeam Corp Ltd* EmpC Wellington WC 13/06, 28 July 2006 at [149].

11 [Employment Relations Act 2000, s 4\(1\)\(b\)](#).

important to the employer, that usually will deeply impair or be destructive of the basic confidence or trust that is an essential of the employment relationship.¹² It will almost inevitably amount to serious misconduct.

[61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made.¹³ The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant in this context.¹⁴

[62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate.

Mrs Emmanuel's misleading statements amounted to serious misconduct

[63] Mrs Emmanuel was not dismissed for failing to improve her performance following warnings; she was dismissed summarily for serious misconduct, being her conduct in July 2017.

[64] The Waikato DHB's finding of serious misconduct was not solely because of Mrs Emmanuel's failure to attend at work on 24 July 2017. A dismissal for that on its own would have been unjustifiable. As Mrs Emmanuel submits, it would be inconsistent with the previous disciplinary action the Waikato DHB had taken regarding timeliness issues.

[65] The arrival at work late on Tuesday 25 July 2017 does not add much to the equation. On its own, it certainly would not have justified summary dismissal, particularly given she was not expected until the next day.

12 *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] NZCA 228; [1992] 3 ERNZ 483 (CA) at 487.

13 [Employment Relations Act 2000, s 103A\(2\)](#).

14 *Secretary for Justice v Dodd*, above n 9, at [97].

[66] What placed Mrs Emmanuel's conduct into a category that meant that the Waikato DHB had lost trust and confidence in her was the misleading, evasive and incomplete information she provided to it.

[67] When Mrs Emmanuel emailed the Waikato DHB that her flight had been "cancelled", she knew that was untrue. Mrs Emmanuel later said that she had "missed" her flight because she had arrived late at the airport, implying that she had a booked flight. With no evidence to support that Mrs Emmanuel had a booking, Ms Riggs did not believe her and considered that statement, too, to be misleading. The explanation that she was sick was another explanation, raised on 11 August 2017 at the disciplinary meeting.

[68] It was open to Ms Riggs to find that Mrs Emmanuel had deliberately misled the Waikato DHB and that this amounted to serious misconduct.

The Waikato DHB was entitled to summarily dismiss Mrs Emmanuel

[69] Before Ms Riggs made her decision to dismiss Mrs Emmanuel, she considered the overall history of Mrs Emmanuel's employment with the Waikato DHB. That showed Mrs Emmanuel had not taken on board the importance the Waikato DHB placed on reliability, despite the issue being raised on several occasions, including in formal disciplinary processes. Ms Riggs also took into account her assessment that Mrs Emmanuel lacked remorse and insight into the concerns held by the Waikato DHB.

[70] Ms Riggs concluded that the necessary trust and confidence had been irreparably damaged, and Mrs Emmanuel could not be relied upon in future. It was open to Ms Riggs to reach that conclusion, based on Mrs Emmanuel's serious misconduct and in view of her employment history and responses during the employment investigation.

[71] The decision to summarily dismiss Mrs Emmanuel was open to the Waikato DHB. Her challenge fails.

Reinstatement would not have been ordered

[72] I have found that the dismissal of Mrs Emmanuel was justifiable. If I had found that the dismissal was unjustifiable, I would have declined reinstatement in any event. This includes because information subsequently learnt demonstrated that, not only did Mrs Emmanuel not have a booking for a flight from Palmerston North to Hamilton, there was no flight to Hamilton or to Wellington at the time suggested. Further, contrary to her advice that the next available flight was at 10 am on Tuesday 25 July 2017, the information from Air New Zealand demonstrates that there was a flight to Hamilton later that Monday morning and in the evening.

[73] This additional information reinforces the findings made and adds force to the Waikato DHB's conclusions that the necessary trust and confidence has been irreparably damaged. Reinstatement would be impractical and unreasonable.

[74] Another factor that would have counted against reinstatement is Mrs Emmanuel's feelings towards the Waikato DHB and its managers. She has been unhappy in her job and with her managers for some time. That goes to the impracticality of reinstatement.

Other remedies would have been affected

[75] If I had found the dismissal to be unjustifiable, I also would have had to consider the extent to which Mrs Emmanuel's actions contributed to the situation that gave rise to her dismissal and, if those actions so required, reduce the remedies that would otherwise have been awarded accordingly.¹⁵

[76] Mrs Emmanuel's contributory actions were significant. First, she did not take sufficient steps to ensure she returned to work on time. Second, she incorrectly advised the Waikato DHB that her flight was "cancelled", and then that she "missed" it. Third, she did not provide information requested that would have clarified what had happened.

[77] The information learned after Mrs Emmanuel's dismissal showed that her statement that the next available flight was at 10 am on Tuesday 25 July 2017 also was incorrect. As this was not discovered until after Mrs Emmanuel's dismissal, this misleading statement would not be considered as a contributing action under [s 124](#) of the Act, as it did not contribute to Mrs Emmanuel's dismissal. But it would have been relevant to the Court's discretion under [s 123](#) of the Act, when determining the level of reimbursement for lost wages and compensation for humiliation, loss of dignity and injury to Mrs Emmanuel's feelings.¹⁶

[78] These matters would have diminished the financial compensation that otherwise would have been awarded.

Costs are reserved

[79] I reserve costs. The proceedings were assigned Category 1B for costs purposes under the Practice Direction Guideline Scale. If costs cannot be agreed, the Waikato DHB may, within 20 working days of this judgment, file and serve a memorandum seeking costs; Mrs Emmanuel may file and serve a memorandum in response within a further 15 working days following such service; and any submissions in reply may be made five working days thereafter.

J C Holden Judge

Judgment signed at 11.45 am on 4 July 2019

16 *Salt v Fell* [\[2008\] NZCA 128](#), [\[2008\] 3 NZLR 193](#), [\[2008\] ERNZ 155](#) at [\[104\]](#).