

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 132
5425135

BETWEEN SEIONALA HAMMOND
Applicant

A N D RADIUS RESIDENTIAL
CARE LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Warwick Reid, Advocate for Applicant
Anne Wilson, Counsel for Respondent

Investigation Meeting: 6 and 7 March 2014 at Tauranga

Date of Determination: 7 April 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Hammond), alleges that she was unjustifiably dismissed from her employment by the respondent (Radius). Radius resists that claim.

[2] Ms Hammond worked as a caregiver at Radius' hospital and rest home at Matua, Tauranga. She commenced her employment on an independent employment agreement on 26 July 2011, when the property was owned by a previous operator, and subsequently transferred to the employ of Radius when Radius acquired the facility. It is because of the transfer of the ownership to Radius during the employment of Ms Hammond that her employment agreement is dated 31 October 2012.

[3] Ms Hammond worked primarily night shifts and was involved in work in all areas of the facility which included a rest home, the hospital wing and a dementia care facility.

[4] There was a written warning dated 19 August 2011 given to Ms Hammond for sleeping during her shift. That was the only disciplinary proceeding Ms Hammond was involved with prior to the events which led to her dismissal.

[5] Relevant to Ms Hammond's claim is a complaint made by Ms Hammond and others against another staff member, Ms Deidre Reid. This undated complaint was received in the head office of Radius in January 2013. It raised a number of criticisms of Ms Reid's practice by her colleagues on the night shift. Ms Reid was a long serving caregiver at Radius Tauranga.

[6] Radius investigated the complaint and while certain generic actions were taken, it is common ground that there was no disciplinary sanction against Ms Reid nor did Radius find any reason for complaint in Ms Reid's practice.

[7] On the morning of 28 February 2013, a complaint was received by the facility manager at Matua relating to Ms Hammond. The complaint concerned events over the previous night shift which started on the evening of 27 February 2013 and finished first thing in the morning of 28 February 2013.

[8] The complaint was multi-faceted; there was a complaint that Ms Hammond had failed to adequately care for a particular resident who was found by the day shift in her own vomit, there was a complaint that Ms Hammond had failed to answer call bells, that she was not caring for residents to an adequate standard and was rough with residents, and that she was verbally abusive of another caregiver, Ms Reid.

[9] It is common ground that Ms Reid was the source of all of the complaints about Ms Hammond except for the complaint about the alleged neglect of a resident who the Authority will refer to throughout this determination as Resident A. It is also common ground that Ms Reid and Ms Hammond were working together on the evening in question for the very first time since the complaint about Ms Reid to which Ms Hammond was a party.

[10] On the afternoon of 28 February 2013, Ms Hammond was summoned to a meeting with Ms Tennant, the facility manager, and told that there had been a complaint. Ms Hammond volunteered that she assumed it was about her altercation with Ms Reid and Ms Hammond offered to give her side of the story.

[11] Radius indicated that was not necessary at that time, but discussed its provisional conclusion with Ms Hammond that she should be suspended from duty to allow an investigation to take place.

[12] Although this is disputed by Ms Hammond, Radius says that Ms Hammond raised no objection and accordingly she was suspended from duty on pay.

[13] The facility manager then commenced inquiries into the matters complained about. She spoke to and obtained statements from Ms Reid, from members of the day staff who found Resident A in a distressed and uncared for state and she also spoke to the registered nurse on duty during the night shift in question. It is common ground that she did not speak to other night staff who subsequently gave evidence to the Authority about what they heard of the altercation between Ms Reid and Ms Hammond. Radius says it did not know that those other staff had heard any of the altercation and had it known, it would of course have spoken to the staff in question.

[14] In any event, a first disciplinary meeting was held on 7 March 2013. It is fair to characterise that meeting as unsatisfactory from both parties' perspectives. Each party complains about the behaviour of the other. The Authority is satisfied the meeting was intemperate and to use the well worn adage, probably generated more heat than light.

[15] Ms Hammond alleges that Radius was not prepared to listen to points raised on her behalf and Radius alleges that Ms Hammond was not prepared to answer straightforward questions about what happened and instead was raising smokescreens that were not relevant to the factual matrix.

[16] There was a second disciplinary meeting on 13 March 2013 at which Radius expected that Ms Hammond would use the opportunity to comment on the reports from the registered nurse on duty on the night in question, whose written observations had only recently become available. Unlike the first meeting of a disciplinary nature, which took well over two hours, by common consent, the second meeting was quite short, had a break of about 30 minutes when Radius retired to consider the position, and when it reconvened, Ms Hammond was told that her employment would come to an end on a summary basis.

[17] A personal grievance was promptly raised and the matter proceeded to the Authority after an unsuccessful mediation.

Issues

[18] Ms Hammond faced four allegations of wrongdoing and the Authority will need to consider how the employer dealt with each of those issues.

[19] In addition for the sake of completeness, the Authority will need to reflect on the relevance (or otherwise) of an earlier written warning, and the terms under which Ms Hammond was suspended from duty. While these two matters are not controversial, it is appropriate they are dealt with in this determination.

[20] A final consideration is the involvement of vulnerable residents in the factual matrix. In order to protect the identity of those individuals, the Authority made an order, at the commencement of the investigation meeting, prohibiting from publication the names of those residents and any detail which would enable them to be identified. For the avoidance of doubt, the Authority refers throughout this determination to the two residents involved as Resident A and Resident B respectively.

[21] It follows from the foregoing that the Authority will need to consider the following questions:

- (a) Was Radius correct in its findings concerning Resident A;
- (b) Did Ms Hammond answer the residents' bell as required;
- (c) Was Ms Hammond rough and uncommunicative with patients;
- (d) Was Ms Hammond verbally abusive of a co-worker;
- (e) Did the earlier written warning play any part in the dismissal; and
- (f) Did Radius correctly suspend Ms Hammond from duty?

Was Radius correct in its findings concerning Resident A?

[22] Resident A had been unwell, and in hospital, prior to the events complained of. Ms Hammond worked the night shift of 27 to 28 February 2013, and as part of her duties, shared in the care of Resident A.

[23] Resident A vomited in the early morning of 28 February 2013 and was discovered to have done so by Ms Hammond and her co-worker, Ms Reid. Ms Hammond and Ms Reid attended to Resident A around 5am, changed her nightwear and her bed and settled her down again.

[24] Ms Hammond's evidence is that she checked Resident A again at the end of her shift so at approximately 6.30am and that there were "*no signs of vomiting*". Radius complained that Ms Hammond did not walk to the bedside to check Resident A and simply looked at her from the doorway.

[25] But the evidence that I heard suggested that the room was small and there was a helpful physical description of its size and dimensions during cross-examination by Mr Reid. Moreover, Ms Reid gave evidence that she would only have checked from the door of the room. The conclusion I formed from the evidence I heard was that Ms Hammond may well have been able to see the resident clearly from the doorway, and, based on Ms Reid's evidence, while observing from the door may not have been best practice, it was certainly common practice.

[26] Whether that assessment is accurate or not is almost academic because it was also established that the registered nurse on duty at the time, Ms Lopez, also checked Resident A at 6.15am and found no evidence of vomit at that time.

[27] Then when the day staff checked Resident A at 7.45am, they found her covered in vomit again with the vomit soaked through her bedclothes and bedding and the resident cold and shivery.

[28] Radius formed the view that Ms Hammond had failed to properly check Resident A at 6.30am and in consequence, this was the first of the four allegations Ms Hammond faced from that night shift.

[29] I have to say immediately that I was absolutely bewildered by Radius' conclusion that Ms Hammond was somehow responsible for the state of Resident A. That conclusion, with the greatest respect, is simply against the weight of evidence. If the registered nurse and Ms Hammond conduct almost contemporaneous, but nonetheless separate, checks on Resident A and a subsequent check an hour and a half after Ms Lopez's check or an hour and 15 minutes after Ms Hammond's check finds the resident in a distressed state, it is difficult to see how one can conclude that Ms Hammond must have missed something.

[30] In order for that proposition to be accepted, it either has to be contended that Nurse Lopez also missed the vomit 15 minutes before Ms Hammond did her check (in which case, Nurse Lopez ought also to be subject to disciplinary inquiry), or the vomit event happened in the 15 minutes between 6.15am and 6.30am. No doubt that is theoretically possible, but it seems much more likely that the second vomit event (that is, after the 5am event about which there is no dispute) happened after Ms Hammond did her checking.

[31] The standard that the employer is required to adopt in disciplinary inquiries is the balance of probabilities and it is difficult to understand the logic of a conclusion that the balance of probabilities test supported the second vomiting attack taking place in the 15 minutes between 6.15am and 6.30am rather than the much more likely window between 6.30am and 7.45am.

[32] The best that I could get from Radius' witnesses about why they had concluded that Ms Hammond was culpable was that because the bedding in particular was wet through, the conclusion was reached that the vomit event had happened some little time before it was discovered at 7.45am. But presumably the amount of vomit would affect the degree of penetration and perhaps even the force of the vomiting attack.

[33] In any event, if Radius was disposed to conclude as it did that the vomit event had happened earlier, and therefore should have been picked up by Ms Hammond, it is difficult to understand why Ms Lopez was not also considered for disciplinary action because if she saw Resident A 15 minutes before Ms Hammond and her evidence is unequivocal that Resident A was fine then, as I have already noted, either the vomit attack happened within the 15 minute window between the two inspections at the end of the night shift or Ms Lopez missed it as well and therefore she also ought to have been investigated by Radius.

[34] In all the circumstances, I am not persuaded that Radius has reached a conclusion that was available to it in respect of this allegation and accordingly I set their conclusion aside.

Did Ms Hammond answer the residents' bells as required?

[35] During the various shifts in the care facility, staff often work in pairs and when they do, they will answer residents' bells alternately. All residents have bells to

summon staff for assistance and some residents also have pads beside their bed which activate a bell at the staff station to alert staff to the fact that the resident has got out of bed. Residents who are prone to falling are allocated these pads.

[36] The complaint about Ms Hammond is that she failed to answer a bell rung by Resident B. It is acknowledged that it was Ms Hammond's turn to answer the bell but Ms Hammond's evidence is that because she and the other carers knew the residents well and knew that Resident B was a highly independent woman who did not value staff fussing after her, Ms Hammond says she simply monitored Resident B's progress from a distance.

[37] Ms Hammond's evidence to the Authority was that she could observe Resident B "*soon after she left her room from the place where I was sitting*" as Resident B went to the toilet. Ms Hammond says that she was waiting for Resident B to emerge from the toilet, that the toilet was open and she could see that no harm had come to Resident B. Ms Hammond's co-worker, Deidre Reid, walked to the toilet at this point and Ms Hammond said to her that this matter was "*her turn*" meaning that it was her turn to supervise Resident B.

[38] It is common ground that Radius' policies and procedures require staff to physically answer resident bells so the procedure that Ms Hammond adopted of simply sitting in the staff area was not approved. Worse than that, Ms Hammond acknowledged that she had one earphone in, listening to music, although she maintained that she could still hear the bells.

[39] There are two more issues that are relevant to this issue. The first is that Radius says that what Ms Hammond told me at the investigation meeting was different from what she told it at the disciplinary meetings, relating to how much she could see of Resident B's movement from her room.

[40] Radius went to a great deal of trouble to prove that Ms Hammond could not possibly have seen all that it says she claimed to have seen during its disciplinary meetings with her. This was because the place that she was sitting had a field of view and it did not seem physically possible for somebody sitting where Ms Hammond was sitting to see all of what Radius says Ms Hammond claims to have seen during the disciplinary meeting. Radius says that Ms Hammond claimed to be able to see Resident B from the moment she left her doorway en route to the toilet. Certainly the

notes of the disciplinary meeting seem to convey that impression on behalf of Ms Hammond although it is fair to say that the bulk of the talking, including on this point, was done by her then advocate, Alison Gray.

[41] Certainly, on this point, Radius is quite right that Ms Hammond could not possibly have seen what she certainly gave the impression at the disciplinary meeting she was claiming to have seen. Radius of course is entitled to rely on what it was told rather than what I was told.

[42] But the more significant issue about which there is dispute, is the very strong evidence I heard that Resident B was, like a number of residents of rest homes and care facilities around the country, a highly independent woman, apparently an ex-nurse herself, who strongly resisted staff fussing after her. Indeed, I heard evidence from co-workers of Ms Hammond to the effect that they had been given a serious dressing down by Resident B for interfering.

[43] In relation to Resident B, the staff of the facility had reached the conclusion that they needed to keep an eye on her when she was toileting at night but not be too oppressive about that by providing close supervision.

[44] The extent to which Radius' policies and procedures were abrogated by staff in relation particularly to this resident was significant, in my judgement. I heard from a number of caregivers or former caregivers at the investigation meeting whose predominant view seemed to be that so far as Resident B was concerned, the understanding was that she was to be left alone as far as that was possible. That then formed the basis of Ms Hammond's explanation of her behaviour.

[45] Of course, Radius had received a complaint and had to investigate it. The complaint came from Deidre Reid who was Ms Hammond's co-worker on the night in question. The Authority has already observed that Ms Reid was not liked by a significant number of other night staff because her approach was quite different and that different approach was the subject of a formal complaint by the bulk of the night shift employees to Radius. Ms Hammond was a signatory to that complaint and Ms Hammond and Ms Reid were working together again for the first time after the complaint had been dealt with, although the complainants' view was that the complaint had not been dealt with at all because the management had simply sided with Ms Reid.

[46] In any event, looked at exclusively from the perspective of Radius' policies and procedures, Ms Hammond could not protest a finding of fault by Radius; she had an earphone in while she was working when she should not have, and she failed to respond to a resident bell when she should have. But that cannot be the end of the inquiry. Radius has to take account of the mitigating factors offered by Ms Hammond, the principal one of which is that she points out that a significant number of her night staff colleagues have precisely the same approach to the management of Resident B, because of Resident B's fierce independence.

[47] If Ms Hammond is to be disciplined for failing to follow Radius policy concerning this resident, then equity and fairness require that Radius takes a disciplinary approach in relation to all the other people who work for them and who treat Resident B in exactly the same way.

[48] My conclusion is that Radius went too far in their determination of this issue. Certainly Ms Hammond was at fault in relation to the earphone and a fair and reasonable employer would have given her a warning for that behaviour, evaluating it as ordinary misconduct rather than serious misconduct. But to discipline Ms Hammond for her management of Resident B, and to use those events to support a finding of serious misconduct goes too far because it seems partial, in that Ms Hammond is the only one of the staff disciplined, despite the common approach to looking after Resident B.

Was Ms Hammond rough and uncommunicative with patients?

[49] Again, this complaint emanates from Ms Reid. What Ms Reid says in her complaint, which was effectively adopted by Radius, is that Ms Hammond did not talk to the resident when she was attending to them, that as a consequence, they were sometimes frightened by her sudden approach and therefore were not prepared for what she needed to do for them.

[50] In the Authority's judgement, this is as much about the philosophy of care as it is about anything else; Ms Reid had a particular way of doing things where she talked to the residents and got them used to her presence through that process whereas Ms Hammond (and it seems a large number of other staff) adopted the approach of getting the job done as quickly and efficiently as possible so that the resident would be inconvenienced for as little time as was necessary. The whole point of the

complaint against Ms Reid was that she spent long periods of time talking to residents allegedly, that disrupted residents' private time and sleep patterns and that the better approach was to adopt the quick and efficient method which Ms Hammond and a number of other staff seemed to prefer.

[51] In any event, for our purposes, the only source of the allegation about Ms Hammond's alleged inadequacies is Ms Reid and in this particular matter, Radius has simply preferred Ms Reid's evidence to Ms Hammond's explanation. Radius says that staff are supposed to talk to residents, to explain to them what they are doing and that, if they do not do that, they are failing in their duty. Ms Hammond says that as Ms Reid is talkative by nature, when she works with Ms Reid, it is unnecessary for her to talk as well.

[52] Given that the only evidence Radius has of what happened on that night on this issue is from Ms Reid herself, Radius ought to have proceeded with caution in placing exclusive reliance on Ms Reid's testimony.

[53] There is dispute about what admissions (if any) Ms Hammond made about her process when she was not working with Ms Reid and the handwritten notes provided to the Authority are frankly confusing, but it is illustrative that Ms Hammond was sufficiently exercised by the issue to want to seek the advice of the resident nurse on duty, Ms Lopez, about how much talking she should be doing. That does not suggest somebody who is completely resistant to the idea of engaging with the residents as necessary.

[54] Another factor which the employer seems to have completely neglected is that Ms Hammond speaks English as a second language and she may well feel some diffidence in talking to residents because of that.

[55] Radius seemed to have placed emphasis on the point that it says Ms Hammond told it that if the resident was awake she would speak to the resident but if the resident was asleep she would simply get on with their cares. Radius says this is inappropriate and it may well be right, but that seems to be a training issue rather than a disciplinary one, particularly when it is remembered Ms Hammond, on the night in question, sought to get the advice of the registered nurse on duty about just how much talking she should be doing. That does not suggest an attitude of intransigence but Radius does not seem to have given Ms Hammond the benefit of any doubt in this regard.

Was Ms Hammond verbally abusive of a co-worker?

[56] It seems fair of me to conclude from the evidence that it was the fact that Ms Reid thought that Ms Hammond was having a go at her during the relevant shift that provoked Ms Reid to complain about Ms Hammond's overall performance. It is common ground that the two women had an altercation, but the extent of that and who was responsible for it is an open question. Radius, of course, formed the view that Ms Hammond was to blame.

[57] Based on the evidence I heard from Ms Lopez, the registered nurse on duty, that conclusion seems wrong-headed and I would have thought that both were to blame, perhaps about equally. However, I have to acknowledge that it appears that Ms Lopez's evidence to me was different from the evidence that she gave Radius at the time, albeit only by a matter of degrees.

[58] From my hearing of Ms Lopez's evidence, what she told me was that Ms Reid and Ms Hammond were arguing about whether both of them should talk when they were working together (that is talk to the residents) and Ms Lopez told me that only one of them need to talk even if the resident was sleeping. Ms Lopez said "*I couldn't stop either of them talking* [referring to Ms Reid and Ms Hammond]. *If I could have stopped one, they would both have stopped*".

[59] Then later on in her evidence, she said:

Both Nala [Ms Hammond] and Deidre [Ms Reid] talk loudly. Deidre was not frightened. Nala only pointed her finger. It was fair for Nala to ask me if she should talk to residents when she was working with Deidre because Deidre was always talking. They had tried to solve it between themselves but had failed and so that is why Nala came to me.

[60] This evidence was clearly a surprise to Radius; it is broadly inconsistent with what Ms Lopez told Radius at the time of the disciplinary inquiry but she gave me that evidence on oath and it is difficult to resist it.

[61] Again, I must conclude that on the balance of probabilities it seems more likely than not that a finding of culpability against Ms Hammond for abuse of her co-worker is unjust and that the most that could be said is that each gave as good as they got but certainly on the basis of Ms Lopez's evidence to my investigation meeting, it was hardly a major confrontation.

Did the earlier written warning play any part in the dismissal?

[62] I am satisfied on the evidence I heard that the earlier written warning which Ms Hammond received for sleeping while at work played no part whatever in the dismissal. That point is accepted by Ms Hammond's advocate based on the evidence, and nothing more needs to be said on that issue.

Did Radius correctly suspend Ms Hammond from duty?

[63] Again, this is not a matter that is now controversial and although there was earlier argument on the point, it is not now pursued by Ms Hammond.

[64] On the evidence I heard, I am satisfied that the suspension was properly dealt with by Radius.

Is Radius' dismissal of Ms Hammond what a fair and reasonable employer could do?

[65] My conclusion is that a fair and reasonable employer could not have reached the conclusion that Radius did in the particular circumstances of this case.

[66] There are two overriding and pervasive themes about this case. The first is the involvement of Ms Reid as complainant and the concern about whether that role is somehow in retaliation for the earlier complaint about her in which Ms Hammond was a complainant, and the second is the strong support for Ms Hammond from her co-workers. While neither of those matters are determinative, they are both relevant considerations that impact on the way in which Radius dealt with the matter.

[67] Dealing first with the situation around Ms Reid, it is common ground that there was a complaint about Ms Reid, that Ms Hammond was one of the complainants, and that the nature of the complaint was around a philosophical difference between the way that Ms Reid attended to her duties as a caregiver and the way that the majority of the other night staff attended to their duties.

[68] Radius conducted inquiries having got the complaint about Ms Reid, but seemed to have pretty readily accepted that, to put it loosely, she was right and the complainants were wrong. The difficulty with that answer is that the complainants are in the majority and Radius does not seem to have used the complaint about Ms Reid as a teachable moment to try to bring the night staff together and have them

operating on the same philosophical or ideological basis. Had it done that, it is possible that the present unhappy differences between Ms Hammond and Radius might never have occurred.

[69] I am not persuaded though that Ms Reid was activated by malice in bringing her complaint to Radius about Ms Hammond. Ms Reid gave evidence to the Authority. She struck me as a straightforward and sensible woman with a very clear sense of what was right and what was wrong and above all of a woman who knew her own mind. She told me that she did not like working with Ms Hammond and I do not think it would be inappropriate to say that Ms Hammond would prefer not to work with Ms Reid. As I noted above, if Radius had endeavoured to address the very distinct differences in the way of working amongst its night shift staff, all of this might have been avoided.

[70] Having accepted that Ms Reid was not activated by malice, does not mean that Radius can simply treat a complaint from her in the same way that it would treat a complaint from a person who does not have a previous history with Ms Hammond. Radius has an obligation in terms of fairness and equity to be conscious of the possibility that things will be exaggerated, put out of context or otherwise innocently misrepresented, because of the personal antipathy and past history. There is simply no evidence that Radius took any notice of those cautions. Indeed, it tended to simply reject the suggestion that because there was a history it needed to proceed with caution.

[71] Of course, Radius has to investigate. A complaint is a complaint, whoever it comes from. But to investigate without any evidence that it has given thought to the human parameters involved is not what a good and fair employer could do. This is perhaps particularly the case with the complaint about the altercation. A fair and reasonable employer in my view would have been much more cautious about making a finding of fault against one of these women, given the history, than Radius was. As I have already noted, on the evidence I heard from Ms Lopez, it would be difficult to make a finding of fault against either woman because they were both equally to blame. I accept, as I have already noted, that Ms Lopez's evidence appears to have changed, but I have a difficulty in dismissing the evidence that she now gives on oath and preferring earlier evidence which she gave at the behest of her employer after becoming involved in a complaint made by somebody else.

[72] In relation to the other matters that Ms Reid complains about, the episode with the call bell and the allegation of failing to talk and roughness, there may be less cause for concern although there is still the possibility that because of the antipathy, there is some exaggeration and my real criticism is not of Ms Reid in what she did, but in Radius' failure to demonstrate they had properly considered the possibility of a lack of balance. That point is especially demonstrated by the way Radius dealt with Ms Alison Gray, Ms Hammond's then representative, who tried unsuccessfully to get Radius to focus on the possibility of a lack of balance.

[73] The other related aspect, again not determinative of the result but nonetheless influential in this particular claim, is the extraordinarily wide support that Ms Hammond appears to have from co-workers.

[74] A number of them gave evidence to me and they seemed to not only be supportive of her practice as a caregiver but also to want to have her back. The support for her seemed wide ranging and not simply self-serving and even included Ms Lopez, for example, who gave very clear evidence to me that she had no reason to think badly of Ms Hammond and for instance said that Ms Hammond was not rough with patients when Ms Lopez worked with her and that she never saw Ms Hammond frighten a patient. There was also a petition got together to support Ms Hammond's return. Of course, the fact that co-workers support Ms Hammond's return to the workplace ought not to have any effect on my decision, but it is nonetheless linked to the point I made earlier about Radius' failure to get the night staff working together as a team on the same plan.

[75] But the fundamental difficulty for Radius in my judgement is not about Ms Reid's bias (which as I noted above I discount anyway), or about the number of staff who support Ms Hammond; it is about Radius' judgments on the complaints made against Ms Hammond.

[76] In relation to the complaint relating to Resident A, I think Radius' conclusion is just perverse as the weight of evidence supports the conclusion that Ms Hammond was blameless. On the call bell issue with Resident B, Radius' process is misconceived because it has failed to take account of Ms Hammond's explanation based on the customary practice of staff. Radius says it is concerned about the fact that other staff adopted exactly the same practice as Ms Hammond, but if there is a

widespread practice amongst staff that is against company policy, it is difficult to see how Radius' conclusion in respect of one staff member can stand up.

[77] At worst, there is evidence here of ordinary misconduct; the use of the earphones is a clear example of misconduct and ought to have resulted in a warning. But the balance of the allegation really results in a finding of fault against Ms Hammond when this is precisely what the majority of other night staff are also doing in relation to the same resident, and that just seems unfair.

[78] The allegation that Ms Hammond was rough and uncommunicative with patients is an allegation exclusively from Ms Reid. There is no other evidence whatever to support that allegation and given the points I have already made about Ms Reid's relationship with Ms Hammond, a fair and reasonable employer would be very cautious about making a factual finding based exclusively on the evidence of one staff member. That is particularly the case when Ms Lopez for instance says that she never saw Ms Hammond being rough with residents and there is no other evidence before the Authority to suggest any previous examples.

[79] The issue about lack of communication with residents clearly is in dispute and revolves around what it is that Ms Hammond is supposed to have said to the employer. As I have already noted, the notes of meeting in that regard are confusing but I am influenced by the fact that whatever Ms Hammond might have said to Radius, at the time of the incident, she seemed very willing to try to get some advice from the senior person on duty as to what she should or should not do.

[80] The verbal abuse of a co-worker is not a claim that in my judgment has been made out. The evidence on oath I heard from Ms Lopez suggests that there was no offence.

[81] I have noted earlier some difficulty in discerning what exactly Ms Hammond told Radius during their disciplinary enquiries. There are at least two areas where the message is confused. Without deciding the point, I observe that Ms Hammond speaks English as a second language and it may be that the communication difficulties apparent on the record, are contributed to by that fact. Certainly there is no evidence before me that would suggest that Radius took account of the language issue.

Determination

[82] I am satisfied that Ms Hammond has established her personal grievance, that she has been unjustifiably dismissed from her employment.

[83] She seeks compensation, lost wages and permanent reinstatement to her position. All those remedies are opposed by Radius. In particular, Radius says it is neither practicable nor reasonable for the Authority to grant reinstatement.

[84] There has been an exchange between the parties since the investigation meeting which was provoked by an observation I made at the end of the investigation meeting to the effect that I wanted to be clear about Ms Hammond's family circumstances and the compatibility of those circumstances to working at night.

[85] I was concerned at the possibility that Ms Hammond was spending the full day looking after her young children and then attempting to do a night shift thereafter and I was anxious to know when exactly it was that she was getting appropriate rest. Moreover, if reinstatement was to be contemplated, the question of the appropriateness of night shift arose particularly if her obligations during the day were such as to preclude her getting any rest during the day.

[86] Mr Reid for Ms Hammond has helpfully set out her position, the short point of which is that Ms Hammond slept while the two children were at school and preschool respectively. He indicates that she could also have some opportunity to rest later in the afternoon once the children returned from school, if she needed extra rest.

[87] Radius responded by pointing out that the time available for sleeping was insufficient for normal purposes, that the youngest child was too young to qualify for preschool, that reinstatement was still strongly opposed and that there were no current positions available on the night shift.

[88] Through Mr Reid, Ms Hammond advises in her further submissions that she would willingly accept reinstatement to the afternoon shift or the night shift and has arranged for a close friend to collect her children from school should that be contemplated by the Authority.

[89] As the Authority has already noted, Ms Hammond seeks compensation, a contribution to lost wages and reinstatement on a permanent basis. Dealing with the

question of compensation first, she seeks a comparatively modest sum of \$8,000. However, if the Authority was minded to consider reinstatement, then that is, of itself, a benefit and the compensatory sum must be reduced accordingly.

[90] Before turning to consider compensation though, the Authority must give consideration to the question whether Ms Hammond has contributed in any way to the circumstances giving rise to her grievance as s.124 of the Employment Relations Act 2000 (the Act) requires. The Authority is not persuaded that Ms Hammond's misconduct in respect of Resident B contributed to the circumstances giving rise to the grievance because the grievance was caused by the failure of Radius to properly assess the evidence in support of the various allegations made against Ms Hammond. It follows that I am not persuaded that contribution is in issue.

[91] The personal grievance was caused by Radius' failure to properly determine a range of complaints about Ms Hammond. That Ms Hammond made some mistakes is acknowledged, but those mistakes did not cause the personal grievance or contribute to the personal grievance.

[92] In the circumstances, and having regard to the need for compensation to be determined as one of the remedies in a package which includes reinstatement, I set compensation for the wrong done to Ms Hammond at \$4,000. I am satisfied that the evidence I heard about the hurt to her was significant and compensatable and that the sum I have identified properly compensates Ms Hammond for the loss she has suffered, when considered together with the other remedies awarded.

[93] On the reimbursement of lost wages, Ms Hammond seeks more than three months' ordinary time remuneration. It appears her earnings at Radius were around \$41,200 a year. On that footing, three months' lost wages would amount to \$10,000. I award Ms Hammond the sum of \$10,000 gross as a contribution to her lost wages.

[94] Finally, I turn to reinstatement. I am not persuaded that reinstatement is either impracticable or unreasonable. I accept the submissions made on Ms Hammond's behalf that she has "*enormous practical difficulty in obtaining alternative employment*" and the difficulties that existed in the workplace are mitigated to some extent by the fact that Ms Reid has now left the workplace and that Ms Hammond has, as the Authority has been at pains to point out, a significant number of supporters amongst the staff.

[95] Of course, those supporters may not include the management who made the decision to dismiss her and who have stoutly maintained throughout the Authority's investigation that they no longer have trust and confidence in her. But my view is that that conclusion of the management of Radius is wrong-headed and I am not satisfied that I should avoid making an order for reinstatement in circumstances where my conclusion is that Radius has made a poor decision to dismiss against the weight of evidence.

[96] For those reasons then, I think it reasonable that Ms Hammond be reinstated and it is obviously practicable because the Authority is advised there are vacancies on the afternoon shift, although not on the night shift, and Ms Hammond is prepared to work the afternoon shift instead of the night shift.

[97] Accordingly, I direct that Ms Hammond is to be reinstated to the employment at Radius Tauranga to one of the vacant positions on the afternoon shift with immediate effect, time being of the essence.

Costs

[98] Costs are reserved.

James Crichton
Member of the Employment Relations Authority