Employment Court of New Zealand

Hoff v The Wood Lifecare (2007) Limited [2015] NZEmpC 58 (6 May 2015)

Last Updated: 13 May 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2015] NZEmpC 58

CRC 19/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DEBORAH HOFF Plaintiff
AND	THE WOOD LIFECARE (2007) LIMITED Defendant

Hearing:	29, 30 September, 1, 2 and 3 October 2014 and 20, 21, 22 and 23 January 2015) (Heard at Nelson)
Appearances:	A Sharma, counsel for the plaintiff J Goldstein and L Ryder, counsel for the defendant
Judgment:	6 May 2015

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The plaintiff, Ms Hoff, worked as a caregiver at the defendant's retirement village in Nelson known as "The Wood". In May 2011, her employment was terminated over an incident involving the gardener at The Wood. The defendant alleged this incident brought the business into disrepute.

[2] Ms Hoff commenced proceedings in the Employment Relations Authority (the Authority) alleging that her dismissal had been unjustified. In a determination dated 13 March 2013, the Authority found that the dismissal was "procedurally

flawed" and therefore unjustified but it was not "substantially unjustified".[1] In

[1] *Hoff v The Wood Lifecare (2007) Ltd* [2013] NZERA Christchurch 53 at [52] and [56].

assessing the appropriate remedies, the Authority made significant deductions in the relief sought on account of contribution and in respect of serious misconduct on Mrs Hoff's part which occurred during her employment but which was not discovered until after her dismissal. After allowing for those deductions, the Authority awarded Mrs Hoff a total of a little over $6,000 in respect of lost wages and compensation for hurt and humiliation.

[3] Mrs Hoff then challenged the whole of the Authority's determination in this

Court seeking a full rehearing of the entire matter. In her statement of claim dated

10 April 2013 she accepted the Authority's finding that her dismissal was procedurally unjustified, although claimed it was both substantively and procedurally unjustified. She sought orders for significant relief including penalties. In its statement of defence, the defendant advanced a cross-challenge to the whole of the determination claiming that the dismissal was justifiable.

[4] Several interlocutory matters arose and were dealt with by other judges. They included an application by the defendant for a stay of execution of the orders made by the Authority pending the outcome of the challenge. The stay was granted on the basis that the sum required to satisfy the Authority's orders would be paid into the defendant's solicitors' trust account on interest-bearing deposit. The plaintiff also applied for a non-publication order of her name. That application was subsequently withdrawn but Judge Couch did make a non-publication order in respect of the gardener who was not a party to the proceedings. In this judgment I will follow the practice of the Authority and refer to this person simply as the "gardener".

Background

[5] Mrs Hoff commenced working as a caregiver at The Wood in 2002. She regularly worked 75 hours per fortnight. In 2007 she signed a new employment agreement after the business changed ownership but, apart from being given increased responsibilities, the nature of her work remained unchanged. Over the years, Mrs Hoff underwent regular annual performance reviews and received positive feedback from her managers. She underwent external and in-service

training to improve her general competency and at the time of her dismissal she was a senior caregiver.

[6] The Wood is an Aged Care facility with 34 rest home beds and 34 studios and apartments. Twenty two of the studio and apartment units are upstairs. It also has a

47-bed hospital and five villas. At the time of the incident leading to Mrs Hoff's dismissal, the complex had a total staff of approximately 100 (one of the defendant's witnesses said that, including part-timers, the staff totalled approximately 130) only three of whom were males.

[7] Mrs Hoff is 53 years of age. She has been married to Peter Hoff for more than 10 years. Prior to meeting Peter she had been a single mother raising three young children who are now adults. At the time she gave evidence before me she was in the final stages of completing her State final exams which would see her graduate as a nurse. Mrs Hoff gave evidence about "great distress" she suffered in the months immediately preceding her dismissal as a result of personal and work- related factors. In January 2011 she lost her mother to cancer after a period of considerable suffering. Around the same time three long-term residents in her care passed away who were all about 100 years old. She described their passing as "like losing close family members".

[8] Mrs Hoff worked in the area known as "studios and apartments" in the upstairs' wing of the facility. At full capacity her work involved the care of

22 residents of which between six and eight required full care. In the course of a shift she generally worked independently. Her direct line manager was Charge Nurse, Ms Wendy Vollmer. At all relevant times the Facility Manager in charge of The Wood was Ms Correne Berryman. The General Manager of The Wood was Ms Adrena Williams who was based in Christchurch. Depending on the need, Ms Williams would visit The Wood in Nelson approximately every three weeks.

[9] The 71-year-old gardener gave evidence on the plaintiff's behalf. He had been employed at The Wood for the 12 years it had been open. Initially he was employed on a full-time basis as the Maintenance Manager, which included gardening duties. In October 2010 he began training another person for the

maintenance role and he continued to work as a part-time gardener from then on regularly working 20 hours per week. As Maintenance Manager, the gardener had carried his own keys giving him access to all the apartments and rooms. In his gardening role he did not carry keys and when he needed access to an apartment or studio in relation to gardening matters he would approach a nurse or caregiver who had keys to allow him access.

[10] Apart from maintaining the outdoor gardens, the gardener told the Court that there were about six rooms with terrace gardens which he was required to attend to and it was not uncommon for him to water balcony plants for residents.

[11] The gardener had known Mrs Hoff since she began working at The Wood in

2002. He said that they had a good professional working relationship and they knew each other socially through work functions where he met and also got to know her husband, Peter. Mrs Hoff described how a small group from The Wood would regularly meet at the local tavern for a drink. The group included her husband and the gardener.

The incident

[12] The incident resulting in the dismissal occurred on Tuesday, 26 April 2011. At that time one of the studios at The Wood, Studio 3, was for sale. It had belonged to a Mrs Jack who had passed away on 14 February 2011. The incident was reported by the receptionist, Ms Karen Bothwell, to Ms Berryman and recorded by Ms Berryman in these terms:

Tuesday 26th April 2011

3.40pm

Statement by Karen Bothwell, Receptionist as reported to the Manager in her office.

I was showing three people who were interested in the Studio/Apartments as instructed by the Manager as she was busy in the office with other clients. I showed them to Apartment 12 then into Studio 3. The door was closed and when I opened it [the gardener] was in the room and looked to be stumbling and taken unaware. I was surprised to see someone in there and saw his glasses and a set of keys on the bed. Everyone walked in and there was general talk about the studio. [The gardener] went out to the terrace and

picked up a watering can. One visitor looked into the bathroom and said twice that there was someone in there behind the door. I didn't know what to say or what was going on so just said it's probably a staff member and diverted them as they wanted to look at the deck. Then the person/visitor got a phone call and we walked out of the Studio. I reported this to the Manager when the people left.

The investigation

[13] On the same piece of paper Ms Berryman went on to record the following:

Manager's investigation

3.50pm - Asked [the gardener] to come into the office. Said what Karen had reported. [The gardener] said that he and Debbie Hoff were in Studio 3. Debbie had unlocked the studio door so that he could look after the plants on the deck. Said Debbie did this all the time for him. The door was shut as they were gossiping and Debbie Hoff had hidden behind the bathroom door when someone entered the room because she didn't want to be found out. [The gardener] said nothing happened.

Debbie had gone home so not able to speak with her on this day. Wednesday 27TH April 2011 10am

Asked Debbie Hoff to come to my office. Said what had been reported to me. Debbie said that she was in Studio 3 with the door shut talking with [the gardener] and had hidden behind the bathroom door when Karen came in with the visitors. She said that hiding was a stupid thing to do. She had finished work so wasn't doing this in work hours.

Conduct that is questionable/inappropriate is;

[The gardener] and Debbie were in a Studio with the door shut. This would not be normal practice if you were just unlocking a door for someone.

Why would [the gardener's] glasses be on the bed. Why would Debbie's keys be on the bed.

Why would Debbie hide behind the bathroom door when Karen and visitors entered.

Why didn't Debbie come out when the visitors said there is someone behind the door (x2)

Why didn't [the gardener] disclose the fact that Debbie was behind the door. [The gardener] picked up a watering can. I would question why when we

have had heavy rain for several days.

The pot plants also belong to the owner of the Studio (her family as she is deceased) and are not the gardener's responsibility.

[The gardener] is the gardener and does not need to have access through people's apartments without their permission.

Debbie should not be unlocking the doors for [the gardener].

Debbie had finished work and therefore should not be in an apartment with

[the gardener]. [The gardener] was supposed to be working.

Correne Berryman

Facility Manager

[14] Ms Berryman was cross-examined at length by Ms Sharma, counsel for Mrs Hoff, about these statements, in particular about the timing of the incident Ms Bothwell had encountered in Studio 3. Mrs Hoff's shift hours on the day in question were from 7.00 am to 3.00 pm. Her evidence was that the incident occurred shortly after 3.00 pm because she had finished her shift and was on her way downstairs to clock-out when the gardener approached her and asked whether she could unlock Studio 3 for him for plant watering purposes. Evidence was produced which showed that she had clocked out of her shift at 3.12 pm. Mrs Hoff said that she then left the facility premises. Ms Bothwell's evidence was that the incident in Studio 3 had occurred between 3.20 pm and 3.25 pm but she agreed in cross-examination that it may have been up to a week later before she was asked about the time the incident had occurred. The timing became a significant issue and I will need to return to it.

Relevant contractual provisions

[15] Mrs Hoff's individual employment agreement dated 30 August 2007 stated relevantly:

18 Resignation/Determination

18.3 The employer shall act in accordance with the principles of good faith, mutual trust and confidence when considering terminating the employee's employment.

[16] The agreement further provided:

23 Disciplinary Process

23.1 In cases of serious misconduct, some examples of which are set out in the rules, the employer shall have the right to dismiss the employee without notice.

[17] The reference to the rules was a reference to The Wood's House Rules. Relevantly, they included the following provisions:

22.1 Serious Misconduct

The following examples of serious misconduct, although not exhaustive, may render an employee liable to instant dismissal:

(i) ....

...

(xiii) Behaviour either in or out of the workplace that may bring the company into disrepute or otherwise damage the reputation or image of the company.

...

(xvii) Conduct, comments or misrepresentations that are, or are likely to be injurious to the employer.

[18] The House Rules provided that cases of ordinary misconduct were to be dealt with by way of progressive warnings:

22.2 Ordinary Misconduct

Offences that may constitute ordinary misconduct such as lateness, inadequate work performance, verbal abuse, etc shall be dealt with in accordance with the following **warning system**:

(i) The employee may be given an oral warning which will be recorded in writing and placed on the employee's file; or

(ii) The employee may be given a written warning which will be placed on the employee's file; or

...

Disciplinary process

[19] After Ms Berryman interviewed Mrs Hoff on 27 April 2011 she telephoned Ms Williams, the General Manager in Christchurch, and updated her on developments. She had already given her a brief report on the incident the previous day. In the meantime, Ms Williams had taken advice from Mr Goldstein, senior

counsel for the defendant, and during the telephone conversation on 27 April, she was able to dictate a letter for Ms Berryman to send to Mrs Hoff requiring her to attend a disciplinary meeting called for Tuesday, 3 May 2011. A similar letter was to be sent to the gardener.

The letter convening the disciplinary meeting

[20] The letter to Mrs Hoff dated 27 April 2011 read:

Dear Debbie,

This letter serves to confirm my intention to hold a disciplinary meeting with you in regard to an incident that occurred between 3 - 3.30pm Tuesday afternoon 26th April 2011. It is alleged that at that time you were hiding behind the bathroom door in Studio 3 and [the gardener] was also in the Studio with the main door shut. [Your] keys were left on the bed along with [the gardener's] glasses. You did not come out of the bathroom despite a visitor saying there was someone behind the door. Hiding behind the bathroom door indicates there was something inappropriate happening or about to happen. This furtive behaviour was not a good look for our staff as well as highly embarrassing for the staff member showing the Studio. This also occurred after your duty had finished when you were not meant to be in the facility. It appears that you used your key to access the Studio when you were not authorised to.

This behaviour in the workplace had the potential to bring the company into disrepute or otherwise damage the reputation or image of the company.

The above allegations, if substantiated, could be viewed as serious misconduct by The Wood and could lead to your dismissal. Your actions bring into question the company's faith, trust and confidence in you.

You are required to attend a disciplinary meeting on Tuesday 3rd May at

1am at The Wood. You are invited to bring a support person with you to this meeting. At this meeting you will be given every opportunity to respond to

the allegations. I have enclosed a copy of the details of these allegations.

Yours sincerely,

Correne Berryman

Facility Manager

CC Andrena Williams, General Manager

(The attachment enclosed with the letter was the one and a half page document containing the information set out in [12] and [13] above)

The disciplinary meeting

[21] The disciplinary meeting on 3 May 2011 was attended by Andrena Williams and Correne Berryman from The Wood and Mrs Hoff along with her husband who was also her support person. Ms Berryman was the note-taker. The notes incorrectly record the date of the meeting as Tuesday, 2 May 2011 but the Tuesday was

3 May 2011.

[22] Peter Hoff works as a Launch Master in Nelson. He is familiar with the disciplinary investigation process in employment situations. He told the Court that he is the current president of the Nelson Branch of the Rail and Maritime Transport Union. His involvement with the union had spanned over 30 years. Mr Hoff said that after reading the letter dated 27 April setting out the allegations against his wife he formed the view, based on his experience in such matters, that it was all "a bit of a storm in a teacup." He went on to say:

I could not think of anything more ridiculous than the claim made by her employer that Debbie was about to, or had acted inappropriately with [the gardener]. I was taken aback to read that Debbie's employment was in jeopardy as a result of the allegations, especially as she had an unblemished employment record, and was held in high regard by management and her co-workers.

[23] There was no recording made of what was said at the disciplinary meeting and the notes taken by Ms Berryman do not purport to be a word for word record of everything that was said but I accept that they are probably a reasonably accurate summary of what took place. The meeting commenced at 11.00 am and concluded at 12.30 pm. That time period included two breaks of between 20 and 30 minutes each. After the introductory part of the meeting, Mr Hoff said that he would answer for Mrs Hoff and according to the notes he went on to explain that Mrs Hoff had not clocked out but was on her way to clock out when the gardener asked her to unlock the door to Studio 3 for him; she had never been told otherwise - not to unlock doors; when the staff member entered the room Mrs Hoff got a fright and hid behind the door; she was intimidated when Ms Berryman was around and so she hid behind the door: Mrs Hoff gets asked on numerous occasions to unlock doors; and she had been given the master key for the upstairs studios. Mr Hoff also spoke about the personal stress that his wife had been under which is described in [7] above. Mrs Hoff added

that she did not know why she had hid behind the door. She said that she and the gardener were "just talking".

[24] During the first break in the meeting Ms Williams spoke to Ms Bothwell and asked her what time she had gone to Studio 3. Ms Bothwell advised that it was approximately 3.20 pm – 3.25 pm. Ms Williams also checked the time target on the computer and noted that it recorded that Mrs Hoff had clocked out at 3.12 pm. Both those matters are recorded in Ms Berryman's notes. The notes do not record that during the break Ms Williams also spoke to Ms Berryman about the timing but it would appear from the exchange which followed after the meeting resumed that either during that break or sometime prior to the disciplinary meeting Ms Berryman informed Ms Williams that she had seen Mrs Hoff go back upstairs sometime after

3.12 pm. Whenever it was that Ms Berryman told Ms Williams what she had observed, the significant point was that, in breach of the defendant's good faith obligations, Ms Williams had never passed that information on to Mrs Hoff.

[25] As the timing appears to have then assumed some significance at the disciplinary meeting, I set out verbatim the notes recorded by Ms Berryman after the meeting resumed:

Andrena asked Debbie questions

Said behaviour appears very inappropriate

When did you clock out?

Debbie 3.12 pm

Andrena Did you come down to clock out then go back up to [the gardener]?

...

Debbie Definitely didn't go back up there

Andrena That doesn't correlate with the times Correne and Karen went upstairs & Time target

asked Debbie?

Debbie Don't know why I did any of that

Nothing was going on

Just had a silly moment and hid behind door

Andrena Why go to another persons property without permission?

Debbie Didn't think about it

Didn't think about plants being private

If I had known that wouldn't let him ([the gardener]) in

Been loyal staff here

Andrena I'm taking into account event

All talking about is this

Keep to the facts

Anything else you want to say?

Debbie I opened the door

Talking

Hid in bathroom

[the gardener] was not in the bathroom

Karen said [the gardener] was stumbling from bathroom

Wasn't in bathroom

The dismissal

[26] The second break in the meeting was then taken and when it resumed 20 – 30 minutes later, Ms Williams read the following statement which had been typed up:

I have considered what you have had to say. I don't accept your explanation for your inappropriate behaviour. It's totally unacceptable to the Company that you would be in an unoccupied studio with a male staff member with the door closed. Then you left the company's keys, including a drug and master key on the bed while you choose to hide behind the bathroom door when you heard Karen Bothwell and potential clients enter the unit.

The potential client's family member who is a prominent businessman in Nelson made the comment. Also you made no effort when the visitor said twice that there's someone behind the bathroom door to present yourself. What if it was the Jack family that had walked into their deceased mother's unit which was currently furnished by them.

You're suspicious behaviour suggests something inappropriate may have happened or was about to happen and therefore may have brought our Company into disrepute or otherwise have damaged the image of our Company.

You have seriously breached the Wood Lifecare House Rules according to clause 21.1 (sic) Serious Misconduct according to (xiii) and (xvii).

I no longer have faith, trust and confidence in you to be employed as a senior caregiver at the Wood.

I am terminating your employment as today.

You are requested not (sic) discuss this matter with other staff, residents or their family.

[27] The meeting concluded at 12.30 pm. At 2.00 pm Ms Williams and Ms Berryman met with the gardener and the notes taken of that meeting were also produced in evidence. Those notes show that at 2.55 pm the gardener proceeded to give Ms Williams his resignation.

The test of justification

[28] Section 103A(1) of the Employment Relations Act 2000 (the Act) provides that whether a dismissal or an action was justifiable must be determined on an objective basis by applying the test in subsection (2). Subsection (2) states:

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.

[29] In applying the test the Court must consider the non-exhaustive list of factors set out in s 103A(3) of the Act:

(3) ...

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[30] In addition to the factors described in subs (3), the Court may consider any other factors it thinks appropriate.2 A dismissal or action must not be found to be unjustified solely because of minor procedural defects if they did not result in the

employee being treated unfairly.3

2 Section 103A(4).

3 Section 103A(5).

[31] Section 4 of the Act requires the parties to an employment relationship to deal with each other in good faith and whether directly or indirectly, not to do anything to mislead or deceive the other or that is likely to mislead or deceive the other.4

Significantly, in relation to the present case, the section requires the parties to be active and constructive in maintaining a productive employment relationship in which they are, among other things, responsive and communicative.5 The duty requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees to provide to the affected employees access to information relevant to

the continuation of the employment and an opportunity to comment on the information before the decision is made.6

[32] The test of justification contemplates that there may be more than one response or other outcome that might justifiably be applied by a fair and reasonable employer in all the circumstances of a particular case. It is well established, however, that in undertaking its analysis, the Court may not substitute its view for that of the employer. Its role is to inquire into and assess on an objective basis whether the decision to dismiss (or any other action taken) fell within the range of conduct open to a fair and reasonable employer in all the circumstances at the time.

If it did, then it must be found to be justified.7

Subsequently discovered misconduct

[33] One of the issues raised by the defendant related to what was alleged to be subsequently discovered misconduct on the part of Mrs Hoff. It was pleaded in the statement of defence in response to the plaintiff's claim for remedies. The pleading reads:

9. [The defendant] denies that the plaintiff is entitled to any remedies as set out [the relevant passage in the statement of claim]. After the dismissal, the defendant was made aware of significant inappropriate behaviour by the plaintiff and [the gardener] such as kissing on the lips and hugging. The defendant is entitled to rely on this behaviour

4 Section 4(1).

5 Section 4(1A)(b).

6 Section 4(1A)(c).

7 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [23] and [25].

in regard to the plaintiff's claim for remedies: *Salt v Fell* [2008] ERNZ

155 (CA).

I will need to return to this issue.

Discussion

The process

[34] It is axiomatic that an employee accused of serious misconduct, with dismissal as a possible outcome, is entitled to have the charge and the employer's issues of concern clearly identified. The employee must be given details of the evidence the employer intends to rely upon in support of the allegations and a proper opportunity to respond before any final decision is made. Those requirements are encompassed in the statutory obligations of fairness and good faith.

[35] Ms Sharma submitted that in the present case the defendant failed to comply with its good faith obligation in this regard to the extent that it failed to properly inform Mrs Hoff of the allegations to be responded to.

[36] The "letter of allegation" as Ms Sharma appropriately referred to it, dated

27 April 2011, (see [20] above) was defective in that it did not refer to or enclose the House Rules which Mrs Hoff was alleged to have

breached. In itself I do not think that that omission resulted in any unfairness to Mrs Hoff. The alleged serious misconduct involving her and the gardener being in Studio 3 was described in the letter in some detail. The letter stated that the behaviour had the potential to bring the company into disrepute or otherwise damage the reputation or image of the company. Mrs Hoff had access to the House Rules and there was no suggestion either at the disciplinary meeting or in the evidence before me that she or her husband did not understand what was being alleged in relation to her presence in the studio even though the allegations were strongly denied.

[37] What would not have been so clear to Mr and Mrs Hoff was the significance of the final two sentences in the first paragraph of the letter of allegation. They read:

This also occurred after your duty had finished when you were not meant to be in the facility. It appears that you used your key to access the Studio when you were not authorised to.

[38] If those observations had been included in the letter simply as part of the narrative then most likely no objection could be taken to them. The letter does not appear to allege (but it is not altogether clear) that Mrs Hoff had been guilty of any form of misconduct simply by being on the premises after her duty had finished or by allowing the gardener access to the Studio nor did the dismissal statement (see [26] above) make any finding to that effect.

[39] What emerged from the evidence, however, was that Mrs Hoff's conduct in being on the premises after her duty had finished and allowing the gardener access to Studio 3 was very much in contention and, as the decision-maker, Ms Williams had made important findings of credibility based on matters relating to those two issues. That was unfair because there was no information provided to Mrs Hoff with the letter of allegation relating to those two issues.

[40] It would appear that Ms Williams obtained the information she was relying upon in relation to the two issues in question from Ms Bothwell and Ms Berryman but the allegation that Mrs Hoff had been in Studio 3 after she had clocked out for the day was simply sprung on Mrs Hoff without warning at the disciplinary meeting. Likewise, another allegation that Ms Berryman had specifically instructed Mrs Hoff that she was not authorised to enter Studio 3 was information which Ms Williams had obtained at some point from Ms Berryman but again, contrary to the defendant's good faith obligations, that information had not been made available to Mrs Hoff at any time prior to her dismissal.

[41] As noted in [24] above, the information Ms Williams was relying on in alleging that Mrs Hoff was on the premises after she had clocked out had been obtained by Ms Williams from Ms Bothwell and most likely Ms Berryman during the first break in the disciplinary meeting. Mrs Hoff had previously told Ms Williams that she had clocked out at 3.12 pm and did not return back upstairs. It followed that she must have been in Studio 3 with the gardener sometime prior to

3.12 pm. The letter of allegation simply records the time as being "between

3 - 3.30 pm".

[42] As a result of the information she obtained from Ms Bothwell and Ms Berryman during the break in the meeting, Ms Williams was able to go back into the meeting and inform Mrs Hoff that her evidence did not correlate with the times given to her by Ms Bothwell and Ms Berryman. That was unfair. If the timing was significant, then whatever Ms Bothwell and Ms Berryman had to say on the subject should have been made available to Mrs Hoff and her husband prior to the meeting so that they had proper opportunity to respond. In that event, Mrs Hoff may well have sought to obtain evidence supporting her movements from Ms Helen Bailey who she called as a witness in the case before me. Ms Bailey, who was a credible witness, gave evidence about her encounter with Mrs Hoff while walking her dog on the afternoon in question which supported Mrs Hoff's evidence that she left the premises after clocking out at 3.12 pm. As it turned out, however, Mrs Hoff was never given the opportunity to produce any corroborating evidence from Ms Bailey at the disciplinary meeting.

[43] Similar criticisms can be made about the second issue, namely the allegation in the letter of 27 April 2011 that Mrs Hoff had used her key to allow the gardener access to Studio 3 when she was not authorised to do so. Ms Berryman gave evidence on this issue in these terms:

I had told Debbie that studio 3 was to be kept locked as all of the late

Mrs Jack's belongings were in the room.

Debbie did not have the authority to open this door for [the gardener] who was now the casual gardener. Debbie should not be unlocking studios and apartments without the resident's permission and she had failed to follow my instructions regarding studio 3. She did not question this or come and talk to me about [the gardener] asking her to give him access into this room. Studio

3 was not an empty room and Debbie was told not to unlock it.

[44] Ms Berryman was cross-examined about this evidence and in the end she conceded that she could not remember whether she had told Debbie that she wasn't permitted to access Studio 3. The point is, however, that what Ms Berryman alleged in her evidence about giving instructions to Mrs Hoff was information which should have been conveyed to Mrs Hoff in a timely way prior to her dismissal so that she and her husband had a proper opportunity to respond to it. That was all part of the employer's good faith obligations.

[45] If Mrs Hoff had been aware of what Ms Berryman was saying on this issue, she may well have sought to produce evidence in rebuttal at the disciplinary hearing from others such as Ms Wendy Vollmer who was the Charge Nurse Mrs Hoff directly reported to. Although Ms Vollmer was absent overseas at the time of the incident involving the gardener, she gave evidence before me confirming that Mrs Hoff always had authority to carry keys on her person in the course of her duties and the witness described any allegation to

the contrary as "absolute nonsense". Ms Vollmer also said that at no time was she ever instructed by Ms Berryman that Mrs Hoff was not permitted to have access to Studio 3 or that the unit was to be kept locked.

[46] Similar evidence was given by Ms Gillian Laing, a registered nurse at The Wood who had been a qualified nurse for 45 years. I found both Ms Vollmer and Ms Laing to be credible witnesses but credibility is not really the issue. The issue quite simply is that Mrs Hoff had not been provided with any information about Ms Berryman's version of events in relation to the question of authorisation prior to the disciplinary meeting. The result was that she had not been given a reasonable opportunity to respond to those allegations prior to her dismissal. That was a further breach of the defendant's statutory obligations of fairness and good faith.

[47] In his closing submissions, Mr Goldstein, counsel for the defendant, said at one point:

67. In contrast to the paucity of evidence provided by the plaintiff at the disciplinary meeting, the defendant had a significant amount of information that supported its finding that the plaintiff had entered studio 3 after she had finished her shift.

[48] Counsel then made reference to statements from Ms Berryman and Ms Bothwell. But the point is that the information those two witnesses had made available to Ms Williams was not passed on to Mrs Hoff prior to the disciplinary meeting. It should have been made available as part of the defendant's good faith obligations.

[49] The allegations that Mrs Hoff was on the premises when she was not meant to be after she had clocked out and that she allowed the gardener into Studio 3 when

she was not authorised to do so were not minor or secondary issues. Indeed Ms Williams, as the decision-maker, appeared to acknowledge more than once in cross-examination that they were the real issues before her at the disciplinary meeting. Thus:

Q. Mmm. So you wrote – you dictated a letter of allegation to Ms Berryman but there's no mention in your letter of allegation about rumours around Mrs Hoff's workplace relationship with [the gardener], is there?

A. No, because that had no relevance to what I was writing – I wrote the disciplinary letter and it had no relevance. I mean I, I can't be in a position where I include something, um, that, as you said, is only rumours. I mean also it didn't relate to what I was going to hold the disciplinary meeting about. That was – the disciplinary meeting was about why Debbie Hoff was in studio 3, um, after she had finished work supposedly, had clocked out, um, with [the gardener], and that's what the disciplinary meeting was going to be about. It wasn't about, um, rumours, I mean that's got no relevance to what I was going to hold the meeting in relation to.

And later:

... The disciplinary meeting was in relation to Mr Hoff, ah, Mrs Hoff and [the gardener] being in the unit illegally. They were in there illegally. That's what it was about. They weren't meant to be there. ...

[50] Ms William's evidence as to the reason for Mrs Hoff's dismissal, however, was confusing and conflicting. In another point in her cross-examination when she was asked by Ms Sharma if there was any reason why Ms Laing should be disbelieved when she said that she was not aware that access to Studio 3 was barred to caregivers and other staff, the following exchange is recorded:

Q. You ought to have known that at the time of the decision to dismiss, shouldn't you?

A. I don't think it was necessary around my decision-making. Q. Why's that?

A. Because we weren't dealing with – the decision wasn't made around people having or not having permission to enter that unit. The decision was around inappropriate behaviour that was carried out in that unit.

[51] For the reasons explained above, I have concluded that there were serious defects in the process followed by the defendant which resulted in Mrs Hoff being treated unfairly and for those reasons her dismissal was unjustifiable.

The investigation

[52] Ms Sharma submitted that the dismissal was also substantively unjustifiable in that the defendant failed to sufficiently investigate the allegations made against Mrs Hoff before making the dismissal decision. Ms Sharma submitted that the decision to dismiss "was predetermined, biased and rushed, which fell well below the standard of a fair and reasonable employer." Mr Goldstein, on the other hand, invited the Court to conclude that the defendant had established that it had good reasons to dismiss the plaintiff.

[53] There were two particular matters raised by Ms Sharma relevant to the issue of substantive justification which I need to address. The first was the submission that there was no evidence of any reputational harm to the defendant resulting from the incident but rather, as counsel expressed it, "this was premised on mere speculation". The other was her contention that the defendant had failed to adequately investigate rumours about Mrs Hoff and the gardener's workplace relationship.

Reputational harm

[54] The grounds for the dismissal are set out in [26] above. It was alleged that Mrs Hoff had committed serious misconduct by breaching clause 21.1 (xiii) and (xvii) of the House Rules. The reference to clause 21.1 should have been a reference to clause 22.1 which is set out in [17] above. The allegation was that Mrs Hoff's "suspicious behaviour" in Studio 3 with the gardener suggested "something inappropriate may have happened or was about to happen" which may have bought the company into disrepute or otherwise have damaged its image.

[55] No authorities were cited on the point but the thrust of the submission advanced by Ms Sharma was that the defendant had failed

to specify in the letter of allegation the basis for its belief that Mrs Hoff's conduct had been harmful to its

reputation and it had failed to establish any evidence of a complaint being received to substantiate the allegation. While those observations are correct, the rules in question do not require evidence of an actual complaint. The rules would appear to be pre-emptive, intended to prevent a situation arising that might lead to a complaint.

[56] As a general proposition I would accept that an employer should know better than anyone else whether an employee's conduct or behaviour is likely to bring the employer into disrepute or otherwise damage its reputation. For that reason, if the Court is satisfied that the employer has acted in good faith and its decision to dismiss was one which a fair and reasonable employer could have reached in all the circumstances at the time it occurred then the Court will not interfere with that decision even though it may have taken a different view on the facts and opted for a less drastic outcome. The authorities on this issue were canvassed in some detail by

Judge Inglis in *Hallwright v Forsyth Barr Ltd*.8

[57] In *Hallwright* one of the issues the Court had to consider was whether an employer needed to be able to prove actual loss or damage to its reputation before it could be concluded that there had been serious misconduct bringing the employer into disrepute. Judge Inglis did not accept that proposition, making the observation that it could not have been the intention of the parties to the employment agreement, "particularly in relation to reputational damage which is notoriously difficult to

prove."9

[58] Judge Inglis referred to the decision of this Court in *Mussen v New Zealand Clerical Workers Union*10 where the Court concluded that the employer had been brought into disrepute "because people will talk and do talk". The Court in that case referred to, "the usual grapevine/s of gossip".

[59] As I understand it, similar considerations formed the basis of the employer's decision in the present case that Mrs Hoff's conduct may have brought the company into disrepute or damaged its image. I make this observation with some diffidence,

however, because as will be apparent from my conclusions above, the evidence

8 *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 202.

9 At [59].

10 *Mussen v New Zealand Clerical Workers Union* [1991] NZEmpC 66; [1991] 3 ERNZ 368 (EmpC) at 415.

before me suggested that the goalposts changed at some stage during the disciplinary process and the defendant's focus of attention shifted from the damage to reputation issue to the questions of whether Mrs Hoff was illegally on the premises after she had clocked out and whether she had authority to allow the gardener into Studio 3. For the record, however, I confirm that I do not uphold Ms Sharma's submission on the damage to reputation issue.

The rumours

[60] The thrust of Ms Sharma's submission on this issue was that both Ms Berryman and Ms Williams were aware of "rumours" of an alleged inappropriate workplace relationship between Mrs Hoff and the gardener but the rumours were not referred to in the letter of allegation or investigated, even though they were a significant factor in the decision to dismiss.

[61] In her submissions in response, Ms Ryder, counsel for the defendant, accepted that Ms Berryman and Ms Williams were aware of such rumours but counsel submitted that they did not need to be referred to in the letter of allegation or investigated further because they were not an issue in the decision to terminate her employment. That submission is consistent with what Ms Williams told the Court under cross-examination in the passage referred to in [49] above.

[62] Support for Ms Sharma's submission, however, can be found in the record of the disciplinary meeting involving the gardener. As noted above, that took place on the same day as Mrs Hoff's disciplinary meeting and it commenced one and a half hours after the conclusion of Mrs Hoff's meeting. The notes of the meeting, again recorded by Ms Berryman, show that the gardener made the point that no one gave him instructions in his job but he would help people out and he confirmed that he had asked Mrs Hoff to unlock Studio 3 so that he could water the plants. He also made the point that he spent "plenty of time" consoling, counselling and talking to the staff. He denied that he was a "lecherous person".

[63] A break was then taken and after the meeting resumed there was discussion between Ms Williams and the gardener relating to the rumours:

Andrena There is a pattern of behaviour

Part of Corenne's investigation

Usually seen you and Debbie people talk

[The gardener] I know that

Andrena Seen parked by St Johns Ambulance

Staff seen you

Karen Gibson seen you with Ambulance woman

Can't call that counselling behaviour You said you have never done anything unprofessional in workplace

Staff seen you upstairs together giggling hugging kissing

Corenne treated as gossip rumours

Staff reporting more

[The gardener] Why have people got it in for me? Andrena haven't got it in for you

[The gardener] Sitting in staff room cruel

Andrena Didn't have to sit there – asked if you wanted coffee

I think this is irrelevant

[The gardener] Sounds like someone got it in for me

Andrena Whats reported is inappropriate behaviour Regularly gone upstairs with Debbie on own Caught giggling hugging

[The gardener] Given Jill Laing hug – for staff birthdays etc

Whos saying?

Andrena This is in relation to Debbie

I have a responsibility to make sure I have grounds for these accusations.

[64] What is particularly significant about this passage from the notes is that Ms Williams confronted the gardener about the information she had that he and Mrs Hoff had been seen upstairs together giggling, hugging and kissing and she told the gardener that this "is inappropriate behaviour". That was the precise terminology Ms Williams had used less than two hours previously when she was terminating Mrs Hoff's employment but the behaviour she was then referring to was Mrs Hoff's conduct in being in "an unoccupied studio with a male staff member with the door closed".

[65] Ms Williams was asked in cross-examination about this passage in the notes of her discussion with the gardener and it was put to her that she had all the

information about the rumours available to her when she had met with Mrs Hoff that morning but she had not passed on the information to Mrs Hoff. At first Ms Williams responded by suggesting that people had come forward with the information about the rumours between the time of her meeting with Mrs Hoff and her meeting with the gardener but under further cross-examination she resiled from that stance and she was unable to give any satisfactory explanation for failing to inform Mrs Hoff of the information she had about the rumours.

[66] In the face of this evidence, I find it totally implausible for Ms Williams to suggest that the rumours in question played no part in her decision to terminate Mrs Hoff's employment. It was clear from what she told the gardener that Ms Williams had clearly reached the view prior to the disciplinary meetings that the alleged giggling, hugging and kissing between him and Mrs Hoff on earlier occasions had amounted to inappropriate behaviour and I agree with Ms Sharma that this evidence established that Ms Williams had predetermined the outcome of her disciplinary meeting with Mrs Hoff. In other words, it did not matter what response Mrs Hoff and her husband were going to give at the disciplinary meeting about what had happened in Studio 3, Ms Williams had already determined that the rumoured behaviour constituted serious misconduct. If those rumours were intended to be the subject of the disciplinary meeting, that should have been made very clear in the letter of allegation and Mrs Hoff should have been given a proper opportunity in which to respond – that never happened.

[67] My conclusion on this aspect of the case is that dismissal was an option for a fair and reasonable employer to invoke even in the absence of publicity or a complaint but it was more of a marginal option than an obvious one. In those circumstances, good faith becomes a significant element.

[68] For the reasons explained above, I am satisfied that the decision to dismiss was not made in good faith based on the matters set out in the letter of allegation. It was strongly influenced by the workplace rumours and most likely premeditated.

[69] Against that background, I have not been persuaded that a fair and reasonable employer in all the circumstances at the time could have terminated Mrs Hoff's

employment. The decision to dismiss, therefore, was also substantively unjustifiable.

Remedies

[70] In her statement of claim, the plaintiff seeks various remedies provided for in s 123 of the Act.

Reimbursement for lost remuneration

[71] Mrs Hoff initially claimed the sum of $9,459.39 for lost remuneration which was said to represent her lost wages for the period

between 16 May 2011 (she had been paid two weeks on her dismissal) and 13 February 2012. The significance of the 13 February 2012 date was that since February 2012 Mrs Hoff has been enrolled on a Bachelor of Nursing Degree course at the Nelson-Marlborough Institute of Technology on a full-time basis with a student loan to fund her studies.

[72] Mrs Hoff gave evidence which satisfied me that she had done her best to mitigate her loss following her dismissal. Between June 2011 and February 2012 she was employed for up to 40 hours per fortnight by Oceania (NZ) Limited at Green Gables Rest Home as a caregiver. Between November 2011 and 13 February 2012 she also undertook some casual cleaning work. Despite making herself available for extra shifts, she was unable to match the 70 hours per fortnight that she had worked at The Wood.

[73] The claim for lost remuneration was largely calculated by Mr Hoff. He conceded in evidence, however, that he had made a slight arithmetical error in his calculations as a result of which the claim was reduced to $8,257.04. I need not go into details but I am satisfied as to the basis of the claim. Essentially, it represents the difference between what Mrs Hoff would have earned at The Wood and what she in fact earned in her other employment. The defendant suggested approaching the loss of earnings calculation in another way which I was not attracted to.

[74] Section 123(1)(b) of the Act provides that one of the remedies the Court may award is reimbursement of a sum equal to the whole or any part of the wages or

other money lost by the employee as a result of the grievance. Section 128 then provides that under that head the Court must order the employer to pay the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration. Under s 128(3) the Court has a discretion to order an employer to pay a greater sum but, as the Court of Appeal made clear in *Sam's Fukuyama Food Services Ltd v*

Zhang,11 moderation is required in fixing awards for lost remuneration and any such

award must have regard to the individual circumstances of the particular case.

[75] I consider that this is an appropriate case for the exercise of my discretion under s 128(3). Mrs Hoff had worked at The Wood for a number of years and her work performance had never been questioned. The fact that Mrs Hoff was able to carry on working as a caregiver for another company for the period up until February 2012 provides a strong basis for her lost remuneration claim. As compensation under this head, I award the plaintiff the sum of $8,257.04.

Compensation for hurt and humiliation

[76] Mrs Hoff is claiming the sum of $30,000 as compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act. In the Authority, the sum of $25,000 had been claimed under this head. The defendant submitted that the increase in the amount sought "appears to be a response to the Authority's findings and the subsequent publicity relating to those findings." A number of newspaper articles were produced in evidence which recorded the Authority's findings under headlines such as, "'Canoodling' caregiver unfairly fired" and "Hiding, cuddling rest home worker wins ERA case".

[77] Counsel for the defendant submitted:

152. When a litigant commences proceedings they accept that the outcome of those proceedings become a matter of public record. They also assume the risk that the outcome of the decision might be published and cause harm.

153. As a result, it would be unfair and unreasonable for the defendant to be required to pay compensation because the plaintiff assumed that risk.

11 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, at [36].

[78] In general terms, I agree with that submission. For the record, however, Ms Sharma indicated the plaintiff's concern was not so much about media attention as the way in which the defendant had "driven a claim of post discovered serious misconduct ... for the purpose of throwing dirt at Mrs Hoff, which following the Authority decision could not have been more hurtful and damaging to her personally, and professionally."

[79] However, the claim of post discovered misconduct was part of the case before the Authority. In these circumstances, it is difficult to see how that claim or the publicity which followed from the Authority's determination can be used to justify an increase in the compensation sought. No authorities were cited on the issue.

[80] Evidence as to the effects of the dismissal on Ms Hoff was given by Dr Elizabeth Scott, a highly qualified General Medical Practitioner. In cross-examination, Dr Scott accepted that Mrs Hoff was suffering stress over the loss of her mother and the three elderly residents at The Wood but she had been Mrs Hoff's general practitioner for the last 17 years and she noted that Ms Hoff was normally a self-contained individual who coped well with life. Dr Scott confirmed that Mrs Hoff experienced "very significant distress" at the time of her dismissal. She prescribed certain medication and arranged for her to undergo counselling. Mr and Mrs Hoff both gave other credible evidence about the significant effects on her resulting from the dismissal.

[81] I accept that the plaintiff has made out a case for significant compensation for hurt and humiliation. Under this head I award the sum of $20,000.

Interest and penalties

[82] In her pleadings, the plaintiff sought interest on any lost earnings award and penalties, payable to the plaintiff, in the sum of

$5,000 each for breaches of the Act and of the employment contract. In a memorandum dated 10 February 2014, the plaintiff withdrew its claim for a penalty under the Act.

[83] The power to award interest under cl 14 of Sch 3 to the Act is discretionary but in *Salt v Fell* this Court held that interest could not be awarded on a

compensation award under s 123(1)(c)(i) of the Act for a benefit not of a monetary kind.12 In fixing the award for lost remuneration in the present case, I have settled on a figure which I consider does justice between the parties without the additional need for an award of interest. For that reason, the claim for interest is declined.

[84] Likewise, the jurisdiction to order a penalty under s 133 of the Act is discretionary. Section 135(5) of the Act provides that an action for the recovery of a penalty must be commenced within 12 months after the date when the cause of action became known or should reasonably have become known to the plaintiff, whichever is the earlier.

[85] There was no evidence that a penalty had been sought in the proceedings before the Authority. Mrs Hoff's brief of evidence in the Authority was produced and that made no reference to any such claim whereas she did give evidence before me in support of her claim for a penalty and the claim was included in her statement of claim filed on 10 April 2013. However, that was well outside the 12 month limitation period which would have expired in May 2012.

[86] In any event, quite apart from the limitation point, I would not have been prepared to exercise my discretion and order a penalty in the particular circumstances of the present case. The claim for a penalty is declined.

Subsequently discovered misconduct

[87] The defendant submitted that the Court is required to reduce the amount of any remedies on the basis of what Mr Goldstein described as "after discovered misconduct". This is a separate concept from any deduction made under s 124 of the Act on account of contributing behaviour by the employee.

[88] The misconduct in question was described in counsel's submissions in these terms:

81. After the plaintiff had been dismissed a number of staff members reported that over a period of time they had seen the plaintiff and [the gardener] acting as if they were in a relationship whilst at work.

12 *Salt v Fell* [2006] NZEmpC 49; [2006] ERNZ 449 (EmpC) at [133].

82. These actions included kissing and cuddling, being in close personal contact on a regular basis within the facility, sharing morning tea and lunch, being in vacant studios together and general flirtatious behaviour.

[89] The “actions” which Mr Goldstein described were a fair summation of the evidence given to the Court on behalf of the defendant by Chris Jackson, Greta Cole, Maria Persico, Fiona Peoples, Kate Bennett and Karen Stewart. I mention the witnesses by name because they were each subjected to an intense and searching cross-examination by Ms Sharma which resulted in several of the witnesses being reduced to tears. For the record, however, I found the witnesses credible and, although they made some concessions, I accept that they did their best to describe to the Court what they had actually witnessed. Three of the witnesses no longer work at The Wood.

[90] In [33] above I referred to the Court of Appeal decision in *Salt v Fell*13 which is the leading authority on subsequently discovered misconduct. In that case, after the plaintiff had been dismissed from his position as the Commissioner for Pitcairn Island, his employer, the Governor, discovered that during the period of his employment Mr Salt had sent a series of emails to recipients on Pitcairn Island which showed considerable disdain for his employer. In this Court, Judge Couch held that in determining remedies the Court could take into account the information about the emails which the employer did not know about at the date of the

dismissal.14

[91] Leave to appeal was granted on that point of law and in its decision the Court of Appeal concluded:15

The subsequently discovered information could not be taken into account under s 124, but could and should have been taken into account when determining wages reimbursement and humiliation compensation under s 123.

[92] Ms Sharma submitted that *Salt v Fell* could be distinguished on the basis that in the present case there was no post discovered serious misconduct. She contended

13 *Salt v Fell* [2008] NZCA 128; [2008] ERNZ 155(CA).

14 *Salt v Fell,* above n 12.

15 *Salt v Fell,* above n 13, at [104].

that the defendant was aware of rumours in the workplace about Mrs Hoff's workplace relationship with the gardener at the time of her dismissal and Ms Sharma submitted that, therefore, it could not rely on the claim that the information only came to light after the dismissal. Ms Sharma also submitted that the evidence showed that the witnesses did not volunteer information about their observations but they had been approached by Ms Berryman.

[93] In evidence Ms Berryman said that approximately two months before the incident in Studio 3 she had become aware of rumours about Mrs Hoff "flirting" with the gardener at morning tea and around the outside staff table at lunchtime. Ms Berryman claimed to

have actually seen her flirting. Ms Berryman was also aware of comments made by others that "a lot of flirting" was going on between [the gardener] and the female ambulance driver. Ms Berryman said that she talked to Ms Vollmer and told her of her concerns and questioned whether Mrs Hoff "may be vulnerable after her mother's death and knowing [the gardener] had a past reputation of a possible affair with a staff member".

[94] Ms Vollmer strongly denied that Ms Berryman ever spoke to her about these matters and I found her denials credible. The point is, however, that Ms Berryman as the facility manager was obviously aware of the rumours and if she had any genuine concerns about the conduct of Mrs Hoff and/or the gardener then she could have instigated an inquiry at that point in time and taken any appropriate disciplinary action. In my view, if a properly conducted inquiry had been undertaken at that stage it would have revealed the so-called subsequently discovered misconduct. For these reasons, I accept Ms Sharma's submissions that there was no post discovered serious misconduct.

[95] Ms Berryman told the Court that she did think of giving the gardener a warning at that time about his behaviour but the fact was that she took the matter no further. She did, however, pass the information on to Ms Williams prior to Mrs Hoff's disciplinary meeting. As noted in [64] above, Ms Williams concluded that the conduct amounted to "inappropriate behaviour" but none of these matters were raised with Mrs Hoff by Ms Williams prior to or during the disciplinary meeting.

[96] An employer cannot turn a blind eye to misconduct it learns about prior to a dismissal and then seek to put it forward after the dismissal, under the guise of subsequently discovered misconduct, as a ground for reducing the employee's remedies.

Contribution

[97] Section 124 of the Act provides that the Court must reduce any remedies awarded to the extent that the employee's actions contributed towards the situation that gave rise to the personal grievance. Ms Sharma submitted that there was no evidence of any contributing behaviour by Mrs Hoff. Mr Goldstein described Mrs Hoff's contributing behaviour as "blameworthy and egregious". He sought a reduction of at least 50 per cent for contribution.

[98] I accept that Mrs Hoff's actions did contribute towards the situation that gave rise to the personal grievance but not to the extent contended by Mr Goldstein.

[99] If management had investigated the gardener's inappropriate conduct in relation to the ambulance driver and had issued him with a written warning or taken other appropriate action then I am satisfied that the incident in Studio 3 would never have occurred. Likewise, if Ms Berryman had acted when she first witnessed and heard rumours about inappropriate behaviour between the gardener and Mrs Hoff then the incident in Studio 3 would never have occurred. But management did nothing.

[100] The gardener denied that he was a lecherous person but his behaviour was inappropriate and that should have been made clear to him by the defendant right from the outset. The defendant had an obligation to its female employees, who virtually made up the entire workforce, to provide an harassment free workplace. Admittedly, there was no evidence that any of the women employees had ever complained about the gardener's conduct but management had sufficient information to do something about it well prior to the incident in Studio 3. As Ms Berryman appeared to acknowledge, Mrs Hoff was particularly vulnerable at the time given the loss of her mother and the three other long-term residents at The Wood.

[101] In these circumstances, I do not accept that Mrs Hoff's contributory behaviour was as significant as Mr Goldstein claimed. I reduce her remedies under s 24 of the Act by 10 per cent.

Conclusions

[102] For the reasons stated, I find that the plaintiff's dismissal was unjustifiable.

[103] The plaintiff is awarded $8,257.04 for lost remuneration and $20,000 for humiliation compensation. The remedies awarded are reduced by 10 per cent on account of the plaintiff's contribution.

[104] The plaintiff is entitled to costs. If the parties cannot reach agreement on this issue then Ms Sharma is to file submissions within 28 days and counsel for the defendant will have a like period of time in which to respond.

A D Ford

Judge

Judgment signed at 10.45 am on 6 May 2015