

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Lavinia Daini Matich (Applicant)

**AND** Christian Healthcare Trust (Respondent)

**REPRESENTATIVES** Caroline Joslin and Grey Seagar, counsel for Applicant  
Chris Patterson, counsel for Respondent

**MEMBER OF AUTHORITY** Alastair Dumbleton

**INVESTIGATION MEETING** 19, 20 and 22 December 2005

**FINAL SUBMISSIONS  
RECEIVED** 16 and 19 January 2006

**DATE OF DETERMINATION** 8 February 2006

**DETERMINATION OF THE AUTHORITY**

Employment relationship problem

[1] The problem for investigation and determination by the Authority arises from the dismissal of Mrs Lavinia Matich by the Christian Healthcare Trust (CHT). She regards her dismissal as unjustified.

[2] To resolve the problem Mrs Matich seeks reinstatement to her position of senior caregiver with CHT, and also the reimbursement of wages lost by her and compensation for hurt feelings and humiliation suffered by her.

Offer to reinstate

[3] After the dismissal, which occurred on 16 September 2005, with the assistance of a mediator Mrs Matich and CHT tried to resolve the problem by reaching agreement.

[4] Although this was not accomplished, just how far CHT was prepared to go to reach settlement can be seen in the terms of an offer it made to Mrs Matich. On 9 December 2005, just a few days before the Authority's investigation meeting was due to start, CHT's lawyer Mr Patterson sent the Authority a memorandum recording a settlement proposal that had been made by CHT to Mrs Matich. This was an offer to "revoke" her dismissal and to permanently reinstate her to "a position no less advantageous to her." It seems that the only difference between the offered position and the one she was dismissed from was location. Whereas previously she had worked

as a senior caregiver at CHT's St Margarets Hospital in Te Atatu, the proposal was to reinstate her into the same position but at CHT's Royal Oak hospital, which is called St Johns. Another significant term of CHT's settlement proposal was the reimbursement to Mrs Matich of lost earnings.

[5] Although in return under the proposal Mrs Matich would have been required to receive formal disciplinary warnings for the conduct or performance of hers that had led to dismissal, the warnings were to have force for only three months and CHT expressly acknowledged that Mrs Matich could raise a personal grievance about them if she wished.

[6] The settlement offer was expressed to lapse if it had not been accepted by 16 December 2005, a date three days before the Authority's investigation meeting was due to begin.

[7] As I advised Mr Patterson following his disclosure of CHT's settlement proposals, the Authority did not need or want to know anything about the contents of them, particularly before investigating and determining whether Mrs Matich had been unjustifiably dismissed. Such proposals can have no bearing on that exercise. If they are relevant to awarding remedies or fixing costs then they may be revealed at that later stage of the investigation.

[8] Predictably counsel for Mrs Matich, Ms Joslin, formally objected to the terms of the settlement offer being placed before the Authority by CHT, and she advised that in any event the proposals were not acceptable to her client. Ms Joslin contended that the Authority, having been made aware by CHT of the offer, could view it as containing admissions that the dismissal had been unjustified and that the relationship of trust and confidence between CHT and Mrs Matich had not been broken irreparably to preclude reinstatement as a practicable remedy.

[9] Mr Patterson pointed out that the settlement offer was expressly qualified as having been made "without any admission of liability," but I am not so sure that tags such as "without prejudice" and "without admission of liability" do provide such blanket protection to the makers of settlement offers, at least not on all occasions and for all purposes, and especially not in the present circumstances created by CHT's own action of communicating the contents of its proposals to the Authority.

[10] I do not consider that the making of such an offer and any of its terms could amount to an admission by an employer that dismissal was unjustified. Justification is as much a legal as a factual question, and it is one that is ultimately for the Authority to decide. Furthermore it is a question that is to be determined from the circumstances as they existed at the time of the dismissal, not from a post-dismissal response to the raising of grievances.

[11] I do however view the offer as relevant to the purely factual matter of whether there is currently any significant impediment to the reinstatement of Mrs Matich, a question which only arises if the stage is reached where remedies fall to be considered. I view the proposals as containing an acknowledgment by CHT that even if its trust and confidence in Mrs Matich had been destroyed or seriously damaged by her at the time it decided to dismiss, CHT now believes that the essential trust and confidence can be restored or repaired. There is therefore no real bar to reinstatement, in the event the dismissal is determined to have been unjustified.

[12] With regard to reinstatement it may simply be noted at this point that it is expressed by s.125 of the Employment Relations Act 2000 to be the "primary" remedy. It is also one that the Authority "must" provide "wherever practicable," once it has determined that an employee has a personal grievance. It may also be noted that in concept reinstatement is not a remedy that can be scaled down where there has been contributory behaviour by the employee.

[13] Tendering settlement proposals to the Authority before an investigation meeting has commenced is an unusual and irregular step which achieves no useful purpose at that stage of the investigation. The parties in this case had every facility at their disposal to settle this matter without the need for intervention by the Authority. Judging the parties on their efforts to settle should be no part of an investigation into the merits of the grievance.

[14] Having been told of the proposals the Authority advised the mediator of them, so that she might consider whether they provided impetus for more mediation. Whatever further activity may have taken place in that regard, the grievance remained unresolved and the investigation meeting was required to proceed. However even after it was finished CHT persisted with its offer to reinstate Mrs Matich. In final submissions received by the Authority on 16 January 2006, CHT said it was willing to renew its offer to withdraw Mrs Matich's dismissal and reinstate her to a position no less disadvantageous, although upon condition that she would receive formal warnings. These however would remain live for two months only. Although the position of caregiver is able to be offered, it would be at CHT's Landsdowne hospital which is in Howick apparently and even further away from St Margaret's than is St Johns.

[15] This case must be determined by the application of legal principle to the facts as established by the Authority, but in carrying out that exercise it would be unrealistic to completely disregard the fact that whatever the legal rights and wrongs of CHT and Mrs Matich, both have expressed a desire for reinstatement of the employment. Mrs Matich seeks reinstatement either to St Margarets or to St Johns, and CHT has offered reinstatement although at another one of its Auckland hospitals. For many years before dismissal occurred there was a productive and valuable employment relationship between the parties, who lately have readily affirmed and reaffirmed their willingness to resurrect that relationship. In those circumstances given the resources the parties (not to mention the Authority) have put into this investigation, they may wish to consider whether it was really necessary for the case to be resolved by Authority investigation and determination.

### The misconduct

[16] The misconduct for which Mrs Matich was dismissed arose from events which occurred while she was working at St Margaret's Hospital on two separate occasions, being Wednesday 24 August 2005 and seven days later on Wednesday 31 August. After interviewing several people including residents of St Margaret's, other caregivers employed there and Mrs Matich herself, CHT presented allegations of misconduct against her. These were set out in a letter written by Mrs Anne Parr, the manager of the hospital, on 8 September 2005, in which she said;

*..... it is alleged that you have seriously affected the safety and quality of care of residents by the following:*

1. *You failed to provide assistance to when it was requested by a resident, [Ms B]*
2. *You prevented another caregiver [Mrs Charmaine Joyce] providing assistance to [Ms A] when it was requested by a resident, [Ms B]*
3. *On 31<sup>st</sup> August, you failed to assist [Mr C, also a resident] when he requested assistance with a bowel movement.*
4. *You switched off the call bell and told him that you were too busy.*
5. *As a result, [Mr C] was left in his own faeces until after 3.30 pm.*

The three residents involved were named in the letter, but for privacy reasons I refer to them only by letter of the alphabet.

[17] It was fortunate that no harm befell Ms A, as she is a very old lady who with age has deteriorated mentally and become physically frail. As for Mr C, who was in palliative care and died not long after 31 August, he suffered the physical discomfort and the mental distress of having to lie soiled in his bed for a period of up to two hours or more before finally being attended to by a nurse. Mrs Parr told the Authority that she viewed the situation of Ms A as being even more serious than that of Mr C, because of the potential for Ms A to have fallen and suffered broken bones or other injury if left to carry on what she had been doing that caused Ms B to call for caregiver assistance. Ms B was physically very limited in the assistance she could have given.

[18] Mrs Matich provided a detailed written response to the allegations, denying that they were true. Further interviews were conducted with her and others before Mrs Parr, assisted by Mr Lou Maea, CHT's finance manager, decided that Mrs Matich was guilty of gross misconduct and that the appropriate penalty was summary dismissal. This decision was announced to Mrs Matich in person at the end of the last interview with her, held on 16 September 2005.

[19] There was no dismissal letter provided by CHT to Mrs Matich confirming the dismissal and reasons for it, although on 8 November 2005 a response was given by CHT through Mr Patterson to a statutory request from Ms Joslin to provide those reasons. (CHT appears to have breached the Act in the length of time it took to respond to the request, as it sent its reply well outside the 14 days required under s.120(2).)

[20] Also in attendance with Mrs Matich, Mrs Parr and Mr Maea at the meeting on 16 September 2005 was Mrs Matich's daughter. Mr Maea made notes of the meeting and had them typed up. The notes are an important record of the meeting because they were produced reasonably contemporaneously, unlike Mr Patterson's letter and the various affidavits and briefs of evidence that were generated later on after grievance claims had been raised.

[21] The notes record that CHT had found a "charge" established against Mrs Matich that on 24 August 2005, when requested by hospital resident Ms B to assist another resident Ms A whose physical safety was at risk, Mrs Matich had failed to give that assistance and, in addition, had prevented another CHT care-giver employee, Mrs Charmaine Joyce, from giving it. This conduct was found by CHT to be gross misconduct under the express terms of employment of Mrs Matich.

[22] The notes also record that CHT found a second "charge" established against her that on 31 August, when asked for assistance by hospital resident Mr C, she had failed to provide basic care to him. This too was found by CHT to be gross misconduct.

[23] The notes of Mr Maea record that advice to the following effect was conveyed orally to Mrs Matich;

*Given there are two charges made out, to the satisfaction of CHT and that each charge concerns the safety, health and wellbeing of Clients, a final written warning is not an option in either matter.*

*Accordingly Anne Parr advised Lavinia that her employment with CHT is now terminated, effective immediately.*

[24] The evidence of both Mrs Parr and Mr Maea is that after the disciplinary investigation had been completed, when making the decision to dismiss Mrs Matich they had carefully

considered several matters including the following;

- a. *Patient safety;*
- b. *Her length of service to CHT;*
- c. *Her employment history;*
- d. *Her seniority at CHT; and*
- e. *The impact of a dismissal upon her.*

[25] At the time of her dismissal Mrs Matich had worked for CHT for about 20 years, 16 of those at St Margaret's hospital.

Legal principles – substantive and procedural justification, and disparity of treatment

[26] As the dismissal of Mrs Matich occurred in 2005, the test of justification is that provided at s.103A of the Employment Relations Act 2000, which provision has overruled the previous test of *Oram* as laid down in the well known Court of Appeal decision of that name. Many decisions given under legislation in force prior to the current Act and its 2004 amendment remain good law, in so far as they are relevant to the role of a tribunal or court such as the Authority when determining a claim of personal grievance.

[27] As to the proper focus of an Authority investigation into a claim of unjustified dismissal, I refer in particular to the following passages from the Court of Appeal judgment in *Airline Stewards and Hostesses of NZ IOUW v Air New Zealand Ltd* [1990] 3 NZILR (CA) 584 at 590-591;

*.....an employer could not justify dismissal of the employee if he had closed his eyes to available evidence or not given the employee an opportunity to be heard in his own defence. However, the employer is not required to continue his investigations indefinitely, only to carry out enquiries to a reasonable extent in all the circumstances.....*

*The employer must have more than mere suspicion but need not have proof beyond reasonable doubt..... At the time the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.....*

This approach has been explained in more general terms in *Drummond v Coca Cola Bottlers NZ* [1995] 2 ERNZ 229 at 234, as follows;

*The initial question for the Tribunal [now Authority] is solely this; on the basis of the enquiry that the employer carried out, was the decision to dismiss one that was open to a fair and reasonable employer? This involves a value judgment about the quality of the enquiry and about the quality of the decision based upon it.*

[28] With regard to the primary issue of justification for the dismissal of Mrs Matich, the task of the Authority is not therefore to determine whether she actually did what she was accused of doing but is to determine whether, as a result of a full and fair investigation, CHT was reasonably entitled to conclude and did conclude that there had been misconduct as a result of her actions on either or both of the days of 24 and 31 August 2005.

[29] As to the procedure generally to be followed by a fair and reasonable employer in cases of dismissal, the well known decision of *NZ Food Processing Union v Unilever NZ Ltd*

[1990] 1 NZILR 35 remains good law. In it the Labour Court expressly regarded (at page 46 of the judgment) the following as the minimum requirements of procedural fairness;

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct;*
3. *An unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*

The Court also observed that what is looked for is ... .. *substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.*

[30] In relation to procedural fairness, in her submissions counsel for Mrs Matich referred to an Employment Court decision in *Man O'War Farm Limited v Bree* unreported, 11 June 2002, AC 24/02. Unfortunately it is no longer good authority, as it was overruled by the Court of Appeal in an unreported judgment of the same name delivered on 31 July 2003 under CA 169/02. The Court of Appeal found (at paragraph 38) that the Employment Court had taken the rules of natural justice too far in the circumstances of the case where potentially material witnesses had not been interviewed by the employer before it decided to dismiss.

[31] For Mrs Matich it has been strongly argued that there was disparity of treatment between her and Mrs Joyce, the caregiver working with her at material times on the occasion of the 24 August alleged misconduct. It was contended that Mrs Joyce was equally culpable for any failure to assist a hospital resident [Ms A] when requested to by another [Ms B], yet while Mrs Matich was dismissed no disciplinary action was taken against Mrs Joyce.

[32] The law in relation to disparity has recently been reviewed and clarified by the Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan and Symes* unreported, 22 December 2005, CA 2/05. Overruling the Employment Court, the Court of Appeal held (at paragraph 45) that there are three issues to be considered when justification is challenged on the grounds of disparity. They are;

- (a) *Is there disparity of treatment?*
- (b) *If so, is there an adequate explanation for the disparity?*
- (c) *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*

#### Conduct on 24 August 2005

[33] I am quite satisfied from the extensive evidence taken by the Authority that after carrying out a full and substantially fair investigation CHT was left with reasonable grounds for believing that Mrs Matich had failed to perform her duty on 24 August 2005. Further I am satisfied that CHT was correct to conclude that her failure was a serious one warranting some disciplinary action, perhaps even dismissal.

[34] CHT had sufficient information from which it could reasonably conclude that Ms B had called out by name to Mrs Matich asking her to take control of Ms A before that very elderly and frail resident suffered any harm through wandering into another resident's room. From interviews with material witnesses CHT could reasonably conclude that Mrs Matich heard that request but did not comply with it at the earliest opportunity, or indeed at all. Mrs Matich acknowledged to the Authority that her general duty as a caregiver extended to responding to calls for assistance from residents.

[35] When Ms B called out for help Mrs Matich was attending to another resident, assisted by Mrs Joyce. I find it was a reasonable conclusion of CHT that that resident could have been "safely" left with only one caregiver, either as soon as the call for assistance was heard or within just a few minutes of that. Either the resident was already safe on her bed, as another caregiver Mrs Jeanette Coyle when interviewed said she had seen her, or the resident could have been quickly lowered by the hoist then being used, into a safe position to allow Mrs Matich to comply with Ms B's request.

[36] As to the duty of Mrs Joyce in these circumstances I find that she had been equally responsible with Mrs Matich to provide the assistance requested by Ms B. She heard the request and indeed initially offered assistance but did not finally give it. Mr Maea, a senior manager of CHT, gave evidence to the Authority that the lifting procedures for the patient Mrs Matich and Mrs Joyce were attending required both of them to be present, at least while those procedures were being undertaken. Mr Maea said that Mrs Joyce too had had a responsibility to answer the request for help, but had not done so when she should have. He explained that either Mrs Matich or Mrs Joyce – "one or the other" – should have gone to help as soon as the resident they were looking after was made safe. He said that any disagreement or resistance from Mrs Matich about Mrs Joyce providing assistance should have been ignored by Mrs Joyce. As long as one caregiver had responded to the request for assistance there would not have been the problem, Mr Maea said. Although he regarded Mrs Matich as the senior caregiver of the pair, Mr Maea conceded that she had not been formally in charge of Mrs Joyce as her immediate boss or supervisor. Mrs Matich was therefore not in a position to instruct or direct Mrs Joyce to do or not to do anything.

[37] Mrs Parr, the manager of St Margaret's, told the Authority that she too regarded the two caregivers to whom Ms B had directed her request for assistance, as having been equally responsible for providing it. She also agreed that Mrs Joyce should have disregarded any opposition from Mrs Matich to her going to help.

[38] I therefore find that once the request for assistance had been made and was heard by the two caregivers, even if it had been directed to one of them by name, they were responsible between them to see that one or other gave that assistance. The only reason for any delay was in ensuring that they could safely suspend whatever procedure they were immediately engaged in with a resident. While Mrs Matich was dismissed for failing to assist a resident, Mrs Joyce was given a talking to about the same conduct of hers but otherwise not disciplined at all.

[39] One reason for the apparent disparity of treatment may be that Mrs Matich was blamed for "preventing" Mrs Joyce from responding to the request for assistance. This is made clear from the meeting notes of 16 September in which Mr Maea recorded; ..... *In response to ... query about what constitutes gross misconduct ... Lua Maea advised it was any action or inaction by staff that may result in any harm or sub standard care - preventing Charmaine [Mrs Joyce] from investigating [Ms B's] request may have resulted in [Ms A] harming herself... .*

[40] It has never been suggested that Mrs Matich physically "prevented" Mrs Joyce from going to help Ms B. It may be that if Mrs Matich had merely failed to encourage Mrs Joyce to go and help or had simply displayed some lack of enthusiasm or negativity, that situation should not have given

Mrs Joyce any excuse not to take the initiative and go to the aid of Ms B. That attitude might reasonably have earned Mrs Matich a talking to from her employer, or even a warning, but is unlikely to have justified a dismissal.

[41] CHT I find regarded Mrs Matich not as having merely displayed indifference to the request for assistance or as having simply expressed a view that Mrs Joyce could not go and assist because she was needed to continue the job she was then doing for another resident. When first interviewed about the incident Mrs Joyce told CHT she had felt intimidated by Mrs Matich. In a subsequent interview, on 16 September 2005, Mr Maea asked Mrs Joyce..... *Why didn't you go ahead and see what [Ms B] wanted.* Mrs Joyce is noted as replying..... *I'm scared of Lavinia and she said to stay and help with [resident].* Mrs Joyce told Mr Maea that Mrs Matich had been able to make her life "a hell." Mr Maea agreed that this suggested bullying. The information obtained by Ms Fiona Berry, CHT's human resources manager, from an initial interview concerned her enough to write in a report under "Key Issues";

3. *Preventing a colleague from providing assistance to a resident is a form of bullying.*

[42] Mrs Matich was not told that "bullying" or similar blameworthy behaviour of that specific kind was being investigated against her. Any concern that Mrs Matich had bullied Mrs Joyce into submission with her will, or had improperly exercised intimidation or coercion to prevent her from going to assist Ms B, was not followed through to any conclusion reached by CHT about it in the subsequent investigation. CHT confirmed that it reached no conclusion about that matter. Nevertheless it is obvious that her "preventing" Mrs Joyce from going to help Ms B when Mrs Joyce shared the responsibility for doing so, was for some reason found to be a matter of blame against Mrs Matich.

[43] I conclude that CHT was swayed in its decision to dismiss for the 24 August conduct by claims from Mrs Joyce that she had been improperly intimidated or dissuaded from acting by bullying type behaviour on the part of Mrs Matich. For that reason CHT concluded that Mrs Matich was substantially if not totally to blame for the failure by one or other of the two caregivers to respond to Ms B's request for assistance. Mr Maea said however that this aspect of the conduct had not been pursued with Mrs Matich herself, as it should have been if an adverse conclusion against her was a possibility.

[44] I cannot accept that it was reasonable for Mrs Matich to be held solely to blame and for her alone to pay the penalty, when Mrs Joyce had equally been required to discharge a comparable duty which she did not perform yet suffered no disciplinary consequences. Without conducting an adequate enquiry CHT could not fairly conclude that bullying or similar blameworthy conduct by Mrs Matich had prevented Mrs Joyce from carrying out her duty. Of the two women Mrs Matich has the stronger and more dominant personality, but that alone does not make her a bully, or make Mrs Joyce a victim of bullying. Mrs Joyce told the Authority that she had been "terrified" of Mrs Matich, yet the pair had often worked together over many years and without complaint from Mrs Joyce. On 24 August she said she had willingly helped Mrs Matich with her duties as an act of kindness. I note that Mrs Jeanette Coyle, another long serving staff member who has often observed the pair together, rejected the suggestion that Mrs Joyce was scared of Mrs Matich.

[45] I accept that Mrs Joyce had been fearful or apprehensive about working with Mrs Matich, but whether there was any reasonable basis for feeling that way was a matter CHT should have investigated more thoroughly if it was going to attribute blame to Mrs Matich alone for failing to assist Ms B.

[46] I find that there was disparity of treatment with regard to the two employees Mrs Matich and Mrs Joyce. I do not consider the explanation for that disparity to be adequate. To the extent that CHT distinguished between the conduct of Mrs Matich and Mrs Joyce with a finding that Mrs Matich had intimidated or coerced Mrs Joyce not to assist Ms B, there was no proper basis for reaching that conclusion in the absence of a full investigation. CHT has acknowledged that it did not extend its investigation that far.

[47] Applying the *Department of Inland Revenue* decision (above), I consider the magnitude of the unexplained disparity to be too great to ignore as a matter detracting from the justification for dismissal. This was not a case of blatant defiance of work rules or total dereliction of work performance. The meeting notes of 16 September 2005 record a “finding” by CHT that on both 24 and 31 August, “Lavinia’s conduct was negligent.” CHT has not suggested to the Authority that her conduct on 16 August in particular had been reckless, or that she had intentionally breached the terms of her employment, or that she had wilfully disobeyed her employer. There is no suggestion to the contrary that whatever Mrs Matich had or had not done on 24 August, she had at all times been endeavouring to carry out her job as a caregiver. If she had not assisted [Ms B] as requested this was because she had attached priority to attending to the needs of another resident.

[48] If Mrs Matich was blameworthy at all, “negligent” – CHT’s word - aptly describes the degree of her culpability. In those circumstances it would be unjust to overlook the disparity of treatment between Mrs Maea, who was dismissed, and Mrs Joyce who suffered no disciplinary action taken against her. That disparity was unreasonable in the circumstances and therefore the dismissal, to the extent that the 24 August conduct was relied upon as grounds for it, was I find unjustified.

#### Conduct on 31 August 2005

[49] In relation to this conduct I find that CHT carried out a sufficiently full investigation which left it with adequate evidence from which it could reasonably conclude that Mrs Matich had failed to help Mr C when he had asked her for assistance with his bowel movements. To uphold the extensive submissions made for Mrs Matich about the inadequacy of CHT’s investigation or the unreliability of its conclusions would be to require a standard of proof beyond reasonable doubt in a disciplinary investigation. As the Courts have held, the employer in those circumstances is not prosecuting a criminal trial. It is not required to investigate exhaustively and indefinitely but is required only to carry out reasonable enquiries.

[50] I find that CHT did just that and was left with clear information upon which any reasonable employer could rely. In summary this information was the statement of Ms Kata Hope, a nurse at St Margaret’s, that Mr C had told her on 31 August that his earlier bell call on that day had been responded to by “Lavinia.” He had told “Lavinia” that he had gone to the toilet in his bed but Mrs Matich told him he would have to wait to be attended to. She had then gone away and left him soiled for two hours or more before help came from Ms Hope and a caregiver.

[51] CHT interviewed Mr C himself as well as Mrs Matich and others. Ms Hope’s information to CHT was reasonably compelling and not substantially detracted from by other not fully explained facts such as the sequence of calls made with the bell from Mr C’s room and an entry in the bowel movement record made on 31 August.

[52] I find that CHT properly considered the possibility that Mr C had been confused or mistaken in what he had said, because of mental deterioration. On the basis of Mrs Parr’s direct observation of him it was reasonable for CHT to reject that possibility. CHT also considered whether Mr C had mistaken the identity of the caregiver who had first responded to his call. I am satisfied that it was reasonable for it to reject that possibility, as well.

[53] I agree that the conduct attributed to Mrs Matich on 31 August was a serious breach of duty and comprised misconduct to a degree that would have justified dismissal as a response.

[54] Mrs Matich was dismissed, but I find that in reaching that decision CHT relied on the cumulative effect of the misconduct on 24 and 31 August 2005. Mr Maea said in evidence that dismissal had been the response to the misconduct because of the “combined effect of the two charges,” ie. 24 and 31 August. His announcement to Mrs Matich on 16 September of her dismissal is recorded by him in his notes as including the following advice;

*Given there are two charges made out to the satisfaction of CHT ..... a final written warning is not an option in either matter.*

[55] This note strongly implies that it was the cumulative effect of the two “charges” that had led CHT to decide upon dismissal rather than giving warnings. While the second part of the statement might suggest that each charge was looked at as standing by itself, it clearly would serve no practical purpose to decide upon dismissal for one charge and the giving of a warning for the other. If accompanied by dismissal, giving a warning would be a meaningless response.

[56] In her evidence Mrs Parr said that the action taken against Mrs Matich might have been different if there had been only one instance of misconduct and that by themselves the 24 and 31 August charges might have justified a warning only. She said it was the combination of the two that had led her to decide upon dismissal as the appropriate punishment for Mrs Matich.

[57] For the reasons given earlier in this determination I have found that half of that combination cannot prop up a decision to dismiss. Given the way the employer viewed the two charges in combination, without one of them the other becomes inadequate support for the decision.

### Determination

[58] Applying the test under s.103A of the Act, I find in the circumstances that dismissal was not what a fair and reasonable employer would have decided upon at the time CHT took that action. I therefore must conclude that the dismissal of Mrs Matich on 16 September 2005 was unjustified and that she has a personal grievance for that reason.

[59] A fair and reasonable employer is more likely to have issued a warning, particularly for the 31 August conduct, and for the 24 August conduct such an employer is more likely to have explored properly the concern that there had been bullying. If it had concluded there was no bullying then it is likely to have warned not one but both caregivers, Mrs Matich and Mrs Joyce, for failing to respond to the request by Ms B for assistance.

### Remedies

[60] Given the expressed attitude of both parties to reinstatement and their acknowledgment of the practicability of reinstatement, I now order that remedy in favour of Mrs Matich. CHT is ordered to immediately reinstate her to either St Margaret’s or St John’s hospital in her former position of caregiver, or in a position no less advantageous to her.

[61] I do not consider that reinstatement, the primary remedy under the Act, can be meaningfully adjusted to take account of any contributing behaviour, within the meaning of s.124 of the Act, on the part of Mrs Matich.

[62] I consider that CHT would be justified in issuing Mrs Matich with a formal disciplinary warning, but only in relation to her 31 August 2005 conduct. Such warning if issued should not remain live for longer than the period of two months proposed by CHT at paragraph 3 of its final submissions. The Authority leaves it to the discretion of CHT as to whether or not it does issue any warning to Mrs Matich.

[63] Reimbursement of lost wages is also a remedy Mrs Matich should be awarded but it must be given with a reduction for contributory behaviour, as I consider there was on her part, particularly in relation to the 31 August conduct. She did not contribute to the disparity of treatment in relation to the 24 August conduct and I am not satisfied that she bullied or intimidated Mrs Joyce.

[64] Neglecting her duty towards Mr C, as CHT could reasonably be believed had occurred, was clearly blameworthy conduct that was causally linked to the decision to dismiss. I consider the blame for what happened and the outcome for Mrs Matich, should be shared evenly between her and CHT. She is therefore to receive 50% of the wages actually lost by her between 16 September 2005 and the date of her reinstatement. Any earnings during that period are to be deducted from the loss. Also, any wages received under the Authority's consent order of 2 December 2005 (cancelled on 19 December) must be deducted. Any benefits or similar payments received from state support agencies will not affect the quantification but must be accounted for by Mrs Matich to the agency.

[65] Interest at 8.5% is to be paid by CHT to Mrs Matich on the reimbursed wages.

[66] I am satisfied that Mrs Matich suffered considerable shame, humiliation, loss of dignity and general hurt to her feelings as a result of being unjustifiably dismissed. She is entitled to compensation for that under s.123(1)(c)(i) of the Act. Given her long service, her staff and family relationships and her evident sense of wrong, I consider that without contribution an award of close to the \$10,000 claimed would have been appropriate. Taking significant contribution into account, I award \$4,000.

#### Costs

[67] Counsel are requested to discuss the question of costs and try to settle it by agreement, without the need for an award to be fixed by the Authority. As part of that discussion they should consider whether this is a case where costs should lie where they fall, partly in view of the result to each party and also in view of the *pro bono* legal representation Mrs Matich has been fortunate in obtaining from Ms Joslin and Mr Seagar, who spared no effort on her behalf.

[68] If no agreement on costs can be reached, memoranda are to be filed providing the Authority with the usual relevant information and requesting the Authority to fix the amount of an award.