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OF CERTAIN INFORMATION REFERRED
TO IN THIS DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 37
5366783

BETWEEN

PRAVEENA NAIDU
Applicant

A N D

RADIUS RESIDENTIAL
CARE LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Tim Oldfield, for Applicant
Sally Leftley, for Respondent

Investigation Meeting: 14 and 15 February 2012 at New Plymouth

Submissions Received: 15 February 2012

Date of Determination: 5 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Praveena Naidu, claims that her dismissal as a Duty Leader Caregiver at the Heatherlea Rest Home, owned and operated by the respondent (Radius), was unjustified. She does so on that basis not only that she did not have a reasonable opportunity to respond to Radius's allegations and that the decision to dismiss was made before a full investigation was completed, but also that Radius discriminated against her on the grounds of her involvement in the activities of her Union, the Service and Food Workers Union. She seeks reinstatement, amongst other remedies.

[2] Radius denies all of Ms Naidu's claims and considers that she was justifiably dismissed following a full and fair investigation process.

[3] There is an order prohibiting the publication of the name of any of Heatherlea's current or former residents, or any information that would be likely to lead to their identification.

Factual discussion

[4] Radius operates a rest home called Heatherlea in New Plymouth. Ms Naidu was employed in the facility for many years, and since 2008 she had been the Duty Leader on the nightshift. Thus she was the most senior member of the three care-giving staff on duty at night.

[5] In the latter part of 2011 Ms Naidu, as a delegate for the Service and Food Workers Union, had been involved in a claim, settled in mediation, over the contracting out of laundry work at a nearby rest home. The result of these changes in the workplace meant that there was no longer any laundry work to be done on the night shift at Heatherlea for their sister facility. Consequently Radius management reduced staff cover at nights, which was resented by the remaining staff, and may have been the catalyst for the problems that follow. This change also led to a reduction in work required on night shift, because the laundry work previously done on that shift was no longer required to be done.

[6] As a result of this dispute it was also clear that (whoever was responsible for it) a breakdown in communication had occurred between Ms Naidu and the Facility Manager, Ms Fiona Kelson.

[7] Ms Naidu was also a union delegate on the bargaining for a national collective employment agreement between the union and Radius.

[8] On 5 October 2011 Ms Kelson received a complaint from a family member of a resident over lack of care for her, and of staff on the night shift being asleep.

[9] Radius has a form for written complaints, and (quite appropriately) prefers to act only on written complaints. The written complaint simply stated:

Went into lounge and both nurses asleep with blankets on between 3-4.

[10] This was clearly a reference to 3-4am on the night of 4/5 October.

[11] Ms Kelson interviewed the complainant, who provided some further information, including that no-one had checked on his relative for hours and this had led him to start looking for staff. He then used his cell phone to provide himself with light to conduct the search. This information was not directly raised with Ms Naidu at any stage of the investigation process, as referenced by Radius' minutes of the two disciplinary meetings held.

[12] Two new complaints were received by Ms Kelson on 7 October, by two other members of the family. These complaints alleged that Ms Naidu was seen watching TV at about 1.30 in the morning, but at about 4 o'clock she was seen asleep in the lounge, with blankets on her and the lights off. They also complained that no checks had been done on their relative resident by the nightshift, and that there were inadequate checks on her by the afternoon shift. They also alleged that when confronted, one caregiver, not necessarily Ms Naidu, claimed that the relative had been seen when she had not. They were also concerned that regular checks had not been made of residents in one particular wing throughout the course of the three nights that they were with their relative. Another issue raised was that when confronted about not answering bells, Ms Naidu shrugged her shoulders without answering. All of this information was provided to Ms Naidu.

[13] Finally, another member of staff claimed, in a third complaint, that before starting her shift in the morning she had seen Ms Naidu asleep while on duty.

[14] These complaints were of great concern to Ms Kelson, and she decided to conduct a disciplinary investigation. Ms Naidu was told by letter of four matters of concern to Radius, namely:

- a. being observed asleep while on duty on 4/5 October;
- b. not providing routine care checks as required on the same night;
- c. not providing such care checks the next night, despite telling the resident's family she had done them; and
- d. failing to document an alleged altercation between two residents that she had told the resident's family of, as the reason for not having done the checks required.

[15] Added was the fifth concern, relating to sleeping at work on the 13th of October, as alleged by a co-worker. Ms Naidu was clearly informed of the seriousness with which Radius was treating matters.

[16] A meeting was held to discuss these matters, in conjunction with a disciplinary meeting for other staff who were also involved in the issues. That meeting was held on 25 October 2011 and Ms Naidu was represented by Mr Sam Jones, an organiser for the Service and Food Workers Union.

[17] Ms Naidu claimed that the resident's family members were being noisy and obstructive, and that they had harassed her. Mr Jones explained that there was an incident report prepared by Ms Naidu at the time, but Ms Kelson noted that she had never seen it. When asked why Ms Naidu had not raised the alleged harassment with Ms Kelson, she said she was rude to her and did not talk to her, so there was no point.

[18] The final complaint was explained by the fact that the complainant was mistaken, as it was another staff member's daughter who was asleep on site at that time. This explanation was accepted.

[19] Mr Jones then asked for the progress notes for the patient. He was told they would be provided. Radius management then told Ms Naidu that they would have to go away and make further investigations.

[20] Following the meeting, Radius management decided to look at video coverage (there are a number of cameras throughout the facility) in order to try and ascertain what was happening over the nights in question. Management looked at the raw on-site video footage directly after the meeting. The footage showed a lot of activity over the early stages of the night shift, including by the resident's family members, but that this reduced sharply between midnight and 4.00am. I accept that the footage shows someone walking around using a light from a cell phone and returning with Ms Naidu at that time. Towards the end of the shift employee activity was very great, which was similar to the beginning of the shift. Radius took that as evidence that Ms Naidu was sleeping during the middle period of those evenings.

[21] Ms Kelson interviewed members of the resident's family and a number of other residents, none of whom considered that there had been any misbehaviour by the resident's family. Unsurprisingly, given the length of time that had taken place

since the dates in question, there was no physical evidence of disturbance by the family, as alleged by Ms Naidu.

[22] Ms Kelson also interviewed the Duty Manager of the morning shift, who had not been told of any incident at morning handover, nor had she seen any incident form such as the one produced by Ms Naidu at the disciplinary meeting.

[23] The progress notes, which were never provided to Ms Naidu despite Radius' undertaking to the contrary, showed that treatment had in fact been provided to the resident, which was inconsistent with the complaint, but also that there was no reference to any incident between any of the nursing staff and the resident's family.

[24] In the meantime, Ms Naidu raised a personal grievance of unjustified disadvantage, discrimination and duress, focusing on Ms Kelson's allegedly rude and unfair treatment of her over the last few months, including the way the disciplinary process had developed.

[25] There were genuine problems in producing a copy of the video footage for October. As a result, Ms Kelson could not tell Mr Jones that the video was available until 10 November. After he had indicated problems with availability, Ms Kelson believed that Mr Jones was delaying matters, because she wanted to deal with the matter on 21 and/or 22 November. She stated – *I am prepared to reschedule the meeting to the week commencing 28 November 2011. However, I am not prepared to delay beyond that.*

[26] New information was provided to Radius on 24 November, when Ms Kelson received a letter from a night shift worker, who stated (grammar corrected) that

... the last ten months I've seen some staff sleeping during working hours and I know it is the worst thing to do while we have residents depending on us to give them support when they need it. I talked to the staff but that is not working so I'm asking you to help me stop the sleeping before something terrible happens.

[27] When the staff member was interviewed by Ms Kelson she was told that Ms Naidu was a principal offender, that you don't put blankets and sheets on the chairs if you are just on a break, and that she would inform Ms Kelson directly the next time she saw such sleeping taking place.

[28] As a result of the new complaint Ms Kelson looked at further surveillance footage for different dates in November, two when Ms Naidu was on duty, and two when she was not. She did not provide that footage to Ms Naidu, but she did provide her summary of what could be seen, and the written complaint quoted in part above. The summary shows no movement by Ms Naidu between 1.35 and 3.30am, and between 3.35 and 4.59am, on the first date of 15 November. The second date of 21 November shows no activity by Ms Naidu between 1.43 and 2.29 am and then again between 2.29 and 4.03am.

[29] In the meantime Ms Kelson wrote to the union about the other worker facing disciplinary action. In his response, Mr Jones noted that that worker was out of the country. He also stated, amongst other things:

... we did not see anything except evidence the staff were up and working and the rest home was busy with several wandering residents on top of the extra visitors. We would be surprised if Radius would want to do anything other than drop these matters and apologise for the stress, hurt and humiliation this process has caused our members.

If you are to progress please confirm which of the allegations you wish to meet and discuss and if any of the surveillance footage is to be used we would like to view that specific footage as guided by you at the meetings before we respond further.

Can we confirm our start time of 10am for Veena?

[30] While Radius management claim that this email had nothing to do with Ms Naidu, but in fact the other worker, I do not accept that. It clearly covers both of them. It mentions Ms Naidu on two occasions, including the start date of her meeting, and requests to view specific footage to be provided by Radius at the meeting, before any further response would be made.

[31] At the commencement of the disciplinary meeting on 2 December, Ms Kelson tried to go through the detail of the video of the first set of allegations. Mr Jones responded by stating that they had already been forced to look through hours of footage and that they needed to be shown exactly what the company was looking at. Ms Kelson raised the issue that the footage of the first set of allegations did not show regular checks on the resident and Mr Jones objected to this, being what he claimed was a new allegation.

[32] The issue of the incident report not having been seen by Radius before was then raised by Ms Kelson. Mr Jones asked if Ms Naidu was being accused of writing it up after the event. Ms Kelson responded in the negative, but added that it concerned her that she had never seen the form before the meeting, and Ms Naidu was asked why she had not contacted management or the Police about it. The response given was that there was no communication between Ms Naidu and Ms Kelson.

[33] Ms Kelson then attempted to move on to the second set of allegations. Mr Jones stated they were not there to discuss the new allegations and furthermore that Ms Naidu's co-worker's statement was not correct, and that she would do a new one.

[34] The discussion then reverted to the first set of allegations, where Ms Naidu claimed that she was always busy working. I find that this was not a credible explanation, given the long periods of inactivity shown by tapes over several nights.

[35] An argument then followed about whether Radius should have given the specifics of all the matters it was concerned about on both sets of footage.

[36] Radius then had an adjournment and came back to indicate that it would give Ms Naidu the opportunity to look at the footage if Mr Jones could provide a hard drive for it to be transferred on to. Mr Jones was told that Radius would give them until next Tuesday, 6 December, to respond.

[37] Mr Jones replied that he and Ms Naidu would be in collective negotiations with Radius that Tuesday, and preparing for them the day before, and declined to do the work over the weekend. Radius would not change its mind about that date, stating that Mr Jones could have asked for more time earlier. At that point the meeting was closed.

[38] On the following Tuesday, being the last date for a substantive response, Mr Jones emailed Radius, stating that he was unwilling to provide his personal hard drive and that he needed specific references to specific actions (or inactions), so as to be able to fairly view and comment on matters. In particular, Radius was asked to provide specific footage with reference as to exactly which part of it was being considered in Radius's investigation.

[39] Radius's response came on 7 December in the form of a letter of summary dismissal. The letter from Ms Kelson noted that the incident form had never been seen by her before and the issues had not been mentioned to any other staff member. Ms Kelson's conclusion from this was that the *form was not submitted as you claim*. Ms Kelson noted that she had spoken again to the co-worker, who stood by her complaints, and that all these complaints appeared to be supported by the video footage, namely that *sleeping on duty is a regular event*.

[40] Ms Naidu was then informed that the other complaint was baseless, however, and did not form any part of the decision making process.

[41] Ms Kelson concluded by stating:

After very careful and serious consideration to these matters I find myself unable to accept your version of events. I believe, on the balance of probability and the facts uncovered that the cares of our clients have been seriously compromised, through your conduct. Furthermore, my thorough investigation has led me to conclude that your account of events has been less than truthful and a serious breach of trust and confidence now exists as a result of your conduct.

The behaviours that you have displayed can never be condoned or tolerated within our facility. I have therefore decided to summarily dismiss you from our employment, effective immediately.

[42] Ms Naidu immediately raised personal grievances over this decision, stating that it was entirely unclear what she had been dismissed for, that Radius had failed to give due consideration to her responses and that there was no indication as to how Radius arrived at its conclusion. Ms Naidu drew the conclusion that the real reason for her dismissal was her involvement in the activities of her union.

[43] A substantive investigation meeting was convened on an urgent basis in order to investigate Ms Naidu's claims, given that mediation proved unsuccessful.

[44] In later information gathered during the Authority's investigation process, Ms Kelson concluded that Ms Naidu had been sleeping on duty as alleged and that this meant the residents were not provided with the care they were entitled to. This was considered serious misconduct. Ms Kelson accepted that she had not provided the progress notes as promised due to a genuine oversight, but adamantly denied that Ms Naidu's union involvement was a factor at all. Instead she was required to investigate serious concerns raised by residents' families and did so fully and fairly.

In particular, she noted that as a Facility Manager she was not involved in the national union negotiations.

The law

[45] The standard of proof involving cases of alleged serious misconduct must be consistent with the gravity of the allegations. Thus the degree of evidence required to support an allegation will be influenced by the potential consequences for all concerned should the allegation be proved, and that is why the civil standard of proof is flexible (*Managh t/a Managh & Associates and Café Down Under Ltd v. Wallington* [1998] 2 ERNZ 337 (CA)).

[46] This case is to be decided under the new s.103A. In *Angus and McKean v. Ports of Auckland Ltd* [2011] NZEmpC 160 the Full Court dealt with the issue of the application of this section in practice. It held at [57] ff:

[57] The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's dismissal or disadvantage of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.

[58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.

[59] Finally, in determining justification under the new s.103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for those of a fair and reasonable employer in all the circumstances.

[47] Those subsections (3), (4) and (5) referred to above state as follows:

- (3) *In applying the test in subsection (2), the Authority or the Court must consider -*
- (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.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were -*
- (a) *minor; and*
- (b) *did not result in the employee being treated unfairly.*

[48] There is also a new test as to reinstatement. As was held in *Angus and McKean*:

[61] *Reinstatement is now no longer the primary remedy for unjustified disadvantage and, or unjustified dismissal from, employment. The remedy of reinstatement is available but now has no more or less prominence than the other statutory remedies for these personal grievances. That is not to say that in a particular case, reinstatement may not still be the most significant remedy claimed because it is of particular importance to the grievant. As in the past, the Authority and the Court will need to examine, on a case by case basis, whether an order for reinstatement should be made if it is sought.*

[62] *Not only must the Authority and the Court be satisfied that the remedy of reinstatement is practicable in any particular case, but they must also now be satisfied that it is reasonable to make such an*

order. Parliament has clearly intended that there be factors which are additional to those of practicability as the Employment Court and the Court of Appeal have interpreted that notion.

...

[65] Even though practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicality. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[67] Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.

[68] As in other aspects of employment law, it is not a matter of laying down rules about onuses and burdens of proof but, rather, on a case by case basis, of the Court or the Authority weighing the evidence and assessing therefrom the practicability and reasonableness of making an order for reinstatement. The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[49] Section 104 deals with discrimination, which applies if the employer, by reason directly or indirectly of any involvement in the activities of a union, dismisses an employee in circumstances in which other employees employed by that employer on work of that description are not, or would not, be dismissed. Section 107 defines involvement in activities of a union to include, in the 12 months before dismissal, acting as a negotiator or representative of employees in collective bargaining; having made, or cause to have made, a claim for some benefit of an employment agreement either for that employee or another employee, or having supported any such claim,

whether by giving evidence or otherwise; or being a delegate of other employees in dealing with the employer on matters relating to the employment of those employees.

[50] Section 119 provides that in cases of discrimination by reason directly or indirectly of the employee's involvement in the activities of a union, such as here, there is a rebuttable presumption that the employer discriminated against the employee on the grounds of union activities.

Determination

[51] It is usually convenient to look first at how the employer acted.

[52] Having regard to the resources available to Radius, a large company, I conclude that it did not sufficiently investigate the allegations against Ms Naidu before dismissing her. I do so for the following reasons.

[53] First, this investigation should have been continued for at least one further meeting, after giving Ms Naidu a reasonable opportunity to view the latest video footage and respond to Radius' concerns about it. While Mr Jones's interventions were seen by Radius as obstructive, the fact remains that he is not employed by Radius, but by the Service and Food Workers Union. His job was to represent Ms Naidu and to ensure that she has a reasonable opportunity to respond to the allegations, which included the second set of video footage, as Ms Kelson's summary may have been inaccurate, or further information to benefit Ms Naidu may have been observed.

[54] Second, Ms Naidu was provided with the video footage over the first set of allegations, but was not provided a summary of points of concern to Radius. On the flip side, Ms Naidu was not given a reasonable opportunity to look at the video coverage of the second set of allegations, even although she was provided with a full summary by Radius of its points of concern. This lack of completeness led to a significant failure in Ms Naidu's ability to fairly respond to Radius' concerns on both sets of allegations. With the first set of allegations, all that would have been required was a summary (as provided with the second set) and/or an opportunity for Radius and Ms Naidu, with Mr Jones, to go through the areas of concern. Given the ability to fast-forward the video tapes, it appeared that it would only have taken around an hour to view the whole footage.

[55] The failings in respect of the second set of allegations are even more serious. Ms Naidu and Mr Jones were not given a reasonable opportunity, in all the circumstances at the time, to view the video footage around the second set of allegations. Mr Jones' email of 28 November made it clear that his preference was to look at specific footage of the first and then only set of allegations, as guided by Radius at a meeting. The next day a new letter was sent concerning the second set of allegations, with a log of concerns, but with no CCTV footage. It therefore follows that Ms Naidu and Mr Jones had no opportunity to see the video footage before the meeting.

[56] Ms Naidu and Mr Jones were not required to accept what was described in the log without having an opportunity to view the video evidence. This is not to suggest that Ms Kelson was being deceptive with her log, or that the union would not have agreed with it, but rather that as a matter of fairness Ms Naidu and Mr Jones should have had a reasonable opportunity to look at the video footage, and an opportunity to comment on it, before the decision was made. Apparently recognising this at the second meeting, an opportunity was given by Radius to Mr Jones and Ms Naidu to view the footage over the next four days, two of which were the weekend.

[57] I accept that Mr Jones was required (as Radius was well aware) to attend bargaining together with Ms Naidu with Radius on the Tuesday (the last day given for comment) and that the day before was being used in preparation for those negotiations. As a result, Radius must have been aware that the timeframe it was setting was unreasonable. For example, Radius itself had had problems in obtaining copies of the October video footage. Furthermore, I accept that Mr Jones was not being unreasonable in refusing to provide his own personal hard drive to Radius for them to upload the video footage, as it contained a great deal of personal information, including that relating to his children. Even had Ms Naidu and Mr Jones been able to look through the footage, time would then have been required for them to prepare a response, which would not have been able to be given in person, so that Radius would have been receiving further information without the opportunity of being able to question Ms Naidu about it.

[58] I conclude that no fair and reasonable employer could have gone on and made a decision adverse to an employee in these circumstances.

[59] Furthermore, these failings were fundamental to Ms Naidu's right to be given a reasonable opportunity to respond to Radius' concerns, and did result in her being treated unfairly. This is not only because she did not have an opportunity to respond to all the allegations made against her, particularly those involved in the second set of allegations, but also that she was never provided with the progress notes, which tended to show that some of the family's concerns that their relative had never been given attention over many hours were incorrect. I do not accept that Ms Naidu could have uplifted the notes on her own initiative because that would have been a breach of confidentiality, and could have been dealt with by further disciplinary action by Radius.

[60] Third, all of the detail of the allegations was never put to Ms Naidu for comment, such as that the use of the cell phone for lighting supported the family's complaint, nor was the results of Ms Kelson's investigations that she had conducted about untidiness allegedly caused by the resident's family.

[61] Fourth, Ms Kelson had responded to Mr Jones that it was not pursuing the provision of an incident form allegedly created after the fact, but, at the very least, that was part of Radius' reasoning for not believing Ms Naidu's other explanations.

[62] I turn now to what Radius did – i.e. the decision to dismiss. It became clear, as a result of the investigation process, that Ms Naidu was in fact dismissed for sleeping on the job, although the dismissal letter does not make that decision clear. Sleeping during working hours is, as may be expected, serious misconduct warranting dismissal.

[63] The key finding was thus about Ms Naidu sleeping during working hours. In all the circumstances it was not possible for Radius to have come to such a conclusion fairly at the time it did. The allegation was a very serious one, and there was always the possibility that even on the information provided to Radius, Ms Naidu may have been watching TV at that time (as suggested in evidence by a co-worker) rather than sleeping. This is not a factor that seemed to have played a large part in Radius' consideration. Radius was never in a position, due to its own flawed investigation, to be able to conclude that there was sleeping on duty and therefore the dismissal was unjustified.

[64] I accept, however, for reasons elucidated in the heading of contribution, that Radius has rebutted the presumption that the dismissal was because of Ms Naidu's union activities, even though the haste with which the latter part of Radius's investigation was pushed through gave the union and Ms Naidu grounds for considering otherwise. First, I accept the evidence of Ms Kelson that Ms Naidu's union roles played no part in her decision, and that she was not involved in national negotiations with Ms Naidu. Second, Radius was in receipt of allegations that came from third parties and thus not generated by it. It was under an obligation to investigate to investigate the concerns, which had no apparent connection with Ms Naidu's union activities.

[65] Thus, while Ms Naidu and the union had legitimate grounds to believe that there was a link with her union activities, principally because of the unreasonable timeframes that were given to respond to video allegations and the nexus with the national collective negotiations, I find on the balance of probabilities that this was not a factor in the decision to dismiss. Instead I conclude that Ms Kelson did not predetermine the matter, nor discriminate against Ms Naidu, but was genuinely focussed on whether or not Ms Naidu was sleeping on the job in breach of her employment agreement.

[66] In conclusion, I do not accept that the test in s.103A has been met by Radius, in that as a result of the defaults in (3)(a) there was no reasonable opportunity to respond, a breach of (3)(c); and that not all its concerns were raised (particularly the misuse of a complaint investigation form) as required under (3)(b). On the other hand, I do accept that Radius genuinely considered such explanations as it was given. I also find that there were no other factors appropriate for consideration.

Remedies

[67] Any remedies awarded must be reduced to reflect the extent to which the actions of Ms Naidu contributed towards the situation that gave rise to the personal grievance.

[68] It is clear that the concerns raised by the resident's family about Ms Naidu sleeping on the job and not properly looking after their relative, combined with the concerns of the co-worker about Ms Naidu regularly sleeping, were part of the situation that gave rise to Ms Naidu's personal grievance, procedural failings aside.

[69] In this case Radius chose not to call as witnesses the family of the resident who complained, which is in line with its policy, and which I, out of respect to it, chose not to pursue. Without that direct evidence, it has been difficult to make a finding, given the seriousness of the allegations, about whether Ms Naidu was ever asleep on the job during the times it was alleged she was. The Authority was faced with a stark choice, in setting remedies, as to whether Ms Naidu was sleeping, working, or watching TV at the times in question.

[70] There was one witness, who did not appear to have anything to gain by bringing a complaint, namely the co-worker, who claims that she regularly saw Ms Naidu sleeping on duty. This co-worker is a member of the union, which also tends to negate the claim that this dismissal was based on discrimination. Her apparent concern about not *dobbing in* her colleagues, until she learnt of the disastrous rest home fire in Australia last year, appeared credible, even although she had not mentioned that she knew Ms Naidu was sleeping on occasion because she was snoring, which an in depth investigation by Radius might have elucidated earlier, rather than through questioning by me. Similarly, I accept the credibility of the evidence of Ms Kelson. Furthermore, there is a significant degree of documentary evidence that tends to support the co-worker's and family's claims, apart from the mere documenting of the claims themselves. In particular, there was no challenge to the claims that there were regular periods, each of around 1½ hours in length, when the lights were off and there was no activity taking place in the lounge and the other areas that Ms Naidu was responsible for.

[71] By contrast, Ms Naidu and her witness's evidence was, unfortunately, not consistent over what they had done over this period. Ms Naidu also provided in oral evidence new explanations as to why she was not asleep, that had never been provided to Radius before, although this may have partly been as a result of Radius' failure to fully investigate matters. However, one would have expected such explanations to have been in Ms Naidu's witness statement, but they were not. Similarly, Ms Naidu and her support person's evidence was not consistent as to whether they had been regularly lying down with blankets on them and the lights and television off.

[72] While I accept that there is a possibility that Ms Naidu may have been resting with her eyes closed, that was not an explanation provided at any stage of Radius' or

the Authority's investigations, except to say that 1½ hours is a very short period to sleep for, which is true.

[73] My conclusion is, to the degree of seriousness required, that Ms Naidu did regularly take extended breaks of over an hour during the course of her employment and that in all likelihood she was asleep during some of these periods.

[74] The Authority's jurisdiction being one of equity and good conscience, it would be inequitable in these circumstances to provide Ms Naidu with any remedies, as in effect she is the author of her own misfortune. In particular, it would be neither reasonable nor practicable for Ms Naidu to be reinstated, as Radius could have no confidence that she would remain focussed on her duties throughout her shift.

[75] I therefore conclude that while Ms Naidu was unjustifiably dismissed, it was not for discrimination and her contribution is so great as to disentitle her to any remedies for compensation or lost remuneration.

Costs

[76] Costs are reserved.

G J Wood
Member of the Employment Relations Authority