Employment Court of New Zealand

Patel v OCS Limited [2014] NZEmpC 49 (27 March 2014)

Last Updated: 4 April 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 49

ARC 9/14

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN POOJA PATEL Plaintiff

AND OCS LIMITED Defendant

Hearing: 18 and 19 March 2014 (Heard at Auckland)

Appearances: L Herzog, counsel for plaintiff

S Langton and A Evans, counsel for defendant

Judgment: 27 March 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff was dismissed from her employment with the defendant on 20

March 2013. She subsequently pursued a claim for unjustified dismissal in the Employment Relations Authority (the Authority). The Authority dismissed her grievance and she has filed a challenge against that determination.1

[2] The defendant's contract with the Auckland District Health Board (ADHB) is coming to an end on 31 March 2014. The plaintiff sought, and was granted, urgency in the hearing of her challenge. That is because she is seeking reinstatement and if she is not an employee at the time the contract expires she will not be entitled to

elect to transfer. The challenge was heard on a de novo basis.

1 [2014] NZERA Auckland 14.

Facts

[3] Ms Patel was initially employed by the defendant in 2007 as a cleaner. She was promoted to Cleaning Contract Supervisor in October 2008. In that role she was responsible for supervising the evening cleaning shift at the hospital, with contracted hours of work from 3.30pm to 12am, six days per week. The letter of appointment recorded that Ms Patel was to be responsible and accountable for establishing and meeting performance standards set between the defendant company and the ADHB, an obligation which was reinforced in the job description provided to her. The role was an important one, particularly given the hygiene imperatives that apply in the hospital environment.

[4] It is evident that a number of issues arose in relation to the standard of cleaning that was being applied during Ms Patel's shifts from a relatively early stage. The concerns were sparked by the results of quality assessment audits (QAs), which provided a means by which the defendant company's performance could be measured by the ADHB. Anything less than a 90

per cent rating was regarded as problematic. The company became concerned about the extent to which Ms Patel was taking corrective action to address the issues that were being identified following QAs.

[5] Ms Patel's manager was Mr Virtue. He was involved in ongoing discussions with Ms Patel in relation to QA issues, as was Ms Davies, who carried out the QAs for the ADHB. A number of concerns were raised by and on Ms Patel's behalf about a range of issues, including the sufficiency or otherwise of staffing levels for her shifts. Mr Virtue accepted that the night shift suffered from staff absences but considered that Ms Patel was failing to adequately prioritise tasks when the shift was short staffed, in particular the cleaning of critical areas (such as operating theatres) over non-critical areas (such as the lifts and stairwell) and checking that the work was done to an appropriate standard. Concerns were also raised in relation to the way in which Ms Patel allocated resources, taking a number of staff to clean one area. Mr Virtue involved the Manager of Human Resources, initially Mr Menkin and latterly Mr Reynolds, in dealing with the issues he was confronting.

[6] In evidence Ms Patel was reluctant to accept that issues had arisen and that these had been the subject of ongoing discussion with the company. She tended to minimise the nature and seriousness of the discussions. I was not drawn to her evidence, which was less than straightforward and was often contradictory and inconsistent with the documentation. While she did not accept that any disciplinary issues had been raised with her, that contrasts with the record of verbal warning for quality issues dated 28 June 2012 that was before the Court, and the evidence of two witnesses for the defendant which I preferred. References to ongoing discussions involving the plaintiff's then representative also feature throughout the contemporaneous documentation. I have no difficulty finding that the company had serious concerns about the way in which the plaintiff was undertaking her duties, that these concerns were the subject of ongoing and detailed discussions with her, and her representative, and that they resulted in a set of instructions being devised which she was to follow.

[7] The instructions clearly set out the steps that Ms Patel should be following to ensure that the company's quality concerns were addressed. The instructions were updated from time to time and included specific directions as to how QA issues were to be addressed, including that corrective actions were to be undertaken where necessary and then signed off by Ms Patel as being appropriate. The way in which work was to be allocated was also addressed, and a clear distinction was drawn between critical and non-critical areas. A table setting out critical areas (such as "Level 5 Radiology" and "All Level 9") and non-critical areas (such as the cafeteria and lounge) was provided to Ms Patel, noting that the areas signified as critical "must" be completed each evening, while non critical areas could be left for the day shift if the night-shift was short-staffed.

[8] Mr Virtue says, and I accept, that he met with Ms Patel and went through the instructions with her to ensure that she understood them, including the requirement that a staff member must be allocated to an operating theatre for a whole shift and that she must check the theatre to ensure that it was appropriately cleaned. A "handover book" was also introduced, to enable Ms Patel to note any issues that had come up during the night shift so that the day shift was aware of any non-critical areas that would require attention.

[9] Despite the steps taken by the company and the clarity with which its expectations had been articulated, things took a turn for the worse on the evening of

24 January 2013. Mr Virtue was aware that a QA had been scheduled for the next day and that it would be focussed on a critical area, namely the operating theatre on level 9 (OR9). Ms Patel was aware that there was to be a QA.

[10] The company failed the QA on 25 January. Mr Virtue investigated why that was so. Notations that Ms Patel had made in the handover book indicated that she had not reviewed or signed off OR9, which the company says was a requirement of the instructions document, and the shift roster indicated that Ms Patel had scheduled another staff member, Mrs Vaifoou, to clean both OR9 and radiology, level 5 (another critical area). The company says that the instructions make it clear that OR9 takes one staff member a full shift to clean properly.

[11] Mr Virtue obtained a signed handwritten statement from Mrs Vaifoou as part of his investigation. It said that:

I am writing this letter to let you know that on 24th January 2013 I worked at theatre 9 and my supervisor [Ms Patel] asked me if I can [help] to cover level 5 Radiology so I did go out from the theatre to do that area, I left [the] theatre at 10pm. I did one side and the supervisor and another cleaner [covered] the otherside.

[12] During the period Mr Virtue was investigating issues relating to the failed audit another issue came to his attention, although it had arisen about four weeks earlier. It too involved Mrs Vaifoou. She had fallen while at work on 10 January

2013 and had hurt her finger. The company says that its procedures require that all accidents be reported in writing by the supervisor in charge. Ms Patel had not done so, although she was present when the incident took place. Mr Virtue became aware of the matter when correspondence was received from ACC and the company's head office referred the apparent non-conformance to him. A statement was provided by Mrs Vaifoou, confirming that she had slipped and fallen while she was working with Ms Patel. Mr Virtue was concerned that Ms Patel had not followed the correct reporting processes.

[13] A meeting took place with Ms Patel on 19 February 2013. Her representative also attended. Mr Virtue explained that the company was investigating the events of

11 and 24 January and that a disciplinary meeting might take place. It appears that three statements were provided at this meeting, from Ms Patel and two other staff members. In her statement Ms Patel stated that Mrs Vaifoou had told her that she would help with level 5 if she had time but that she told Mrs Vaifoou to focus on OR9 after Mr Virtue reminded her that there was to be a QA of that area, that Mrs Vaifoou had rung her at 10.30 pm and asked her to check OR9 but that Ms Patel had said she did not have time and that she (Mrs Vaifoou) should carry on with what she was doing and "concentrate on what needs to be fixed". The two other statements corroborated aspects of the plaintiff's statement, that she had told Mrs Vaifoou to focus on OR9 and told her that she was stretched in terms of resources.

[14] On 17 February 2013 Mr Virtue's assistant told him that Mrs Vaifoou had indicated that she wished to change her statement to say that she had been in OR9 all night. He understood that she had said she wished to do so because she was concerned that if she did not change her statement she would get into trouble with Ms Patel and could end up in court. Mr Virtue talked to Mrs Vaifoou to see whether she wished to change her statement and she confirmed that she did not. A week later she returned to Mr Virtue's office, bringing three letters with her relating to events on

11 and 24 January. She told him that two were written by Ms Patel and one by Ms Patel's representative, and that she had come under pressure to sign them. She confirmed that these statements were not correct and that her original statement set out the truth. Mr Virtue wrote down what Mrs Vaifoou told him and she signed this as correct.

[15] Mr Virtue then gave all the information he had collected to Mr Reynolds. Mr Reynolds decided to initiate a disciplinary process and invited Ms Patel to a meeting. The company's concerns (namely failing to comply with the company's health and safety procedure by omitting to report a workplace accident; failing to check OR9 as required by the instructions; and reallocating a staff member away from OR9 to another area) were set out and she was advised that dismissal was a possible outcome. Ms Patel was encouraged to bring a representative with her to the meeting. Although there was a dispute about the extent to which documentation relating to

these concerns was made available to the plaintiff, I am satisfied that relevant documentation was attached to Mr Reynold's letter, including the additional statements that had been obtained and the various policy documents and instructions referred to.

[16] Arrangements for the meeting did not run smoothly. The extensive difficulties associated with scheduling the meeting can almost exclusively be laid at the plaintiff's door. There was correspondence with the Regional Manager requesting attendance at mediation to resolve some broadly expressed concerns raised on the plaintiff's behalf and various other correspondence that was not designed to progress the disciplinary process.

[17] While the meeting was scheduled for 18 March (by agreement) neither Ms Patel nor her representative arrived on that date. Mr Reynolds made follow-up enquiries as to their whereabouts but did not receive a satisfactory response. The meeting was rescheduled to 19 March 2013.

[18] Both Mr Virtue and Mr Reynolds were present at the meeting. Mr Reynolds made it clear that he was the decision-maker and clarified Mr Virtue's role. The plaintiff's representative asked for some additional information relating to training and sought a deferral of the meeting until that information was supplied. Mr Reynolds indicated that the meeting should proceed, in light of the information that had previously been provided and the late stage at which further information was being sought. He indicated that any issues could be dealt with as they arose during the course of the meeting. Ms Patel gave evidence that Mr Reynolds was angry and called her ignorant. Mr Reynolds said that Ms Patel's representative had indicated that he wanted access to certain information to determine whether his client was ignorant or ill-informed and it was in this context that the reference to ignorance was made. I do not consider that it could reasonably have caused disquiet in the circumstances. It became apparent that Ms Patel did not have a clear or consistent recall of numerous events, including the meeting of 19 March 2013. I preferred the evidence of Mr Reynolds and Mr Virtue. I do not accept that Mr Reynolds was anything other than measured and professional at the meeting.

[19] Early on in the meeting the plaintiff and her representative elected to leave. Mr Reynolds made it clear that the meeting would continue in their absence. Mr Reynolds proceeded in their absence, as he had told them he would do.

[20] Mr Reynolds considered the information that had been provided, including by and on the plaintiff's behalf. He had regard to the fact that Ms Patel had been a supervisor for a long time and had not reported Mrs Vaifoou's accident, although she was present at the time and had previously completed an accident form herself. He was satisfied, based on written records, that Ms Patel had received induction training, and that the HSE policy and OCS employer handbook referred to the requirement to report accidents. Mr Reynolds also had regard to the fact that Ms Patel's statement that she had not filled out the form because Mrs Vaifoou had told her she did not want to, suggested that she did know of the requirements to fill out the form. He specifically turned his mind to the differences between the statements that had been provided and formed the view that Mrs Vaifoou's statement was to be preferred in the circumstances.

[21] Mr Reynolds considered the second concern, namely that Ms Patel had not checked OR9 before the end of the night shift. Her failure to do so was, as he noted, recorded in the handover book. He considered her statement, which asserted that Mrs Vaifoou had called her to say that she had finished OR9 at 10.30pm, and concluded that even if this was correct it ought to

have rung “alarm bells” for her as she was well aware that it took a whole shift to complete the cleaning for that area (as reflected in the instructions and earlier discussions). He also took into account that OR9 was a critical area and that Ms Patel knew that it was going to be QA’d. He considered that the way in which she had annotated the handover book may have indicated that she was trying to avoid responsibility for the quality of the work that had been carried out in that critical area just prior to the audit.

[22] Mr Reynolds did not accept that Ms Patel had no time to check OR9. He noted that non-critical areas had been cleaned and that Ms Patel could have gone to OR9 at the time Mrs Vaifoou came down to level 5 and helped with the cleaning there.

[23] Mr Reynolds was also confronted with differing statements as to what had occurred on 24 January. Ms Patel and her advocate were well aware of this, given they had been provided with copies of the statements in advance of the disciplinary meeting. Mrs Vaifoou’s statement was that Ms Patel had asked her to do level 5 as well as OR9. This tended to be supported by the work allocation roster, which indicated that Ms Patel had, at least initially, intended for Mrs Vaifoou to work in both areas. Mr Reynolds considered that this was in breach of the instructions that had been given to Ms Patel.

[24] Mrs Vaifoou had indicated that she had come under pressure from Ms Patel to withdraw her original statement, and to provide replacement statements that had been prepared for her. This led Mr Reynolds to conclude that Ms Patel may have pressured Mrs Vaifoou to cover for her and to doubt Ms Patel’s statement that she had not requested Mrs Vaifoou to clean level 5.

[25] Mr Reynolds took into account Ms Patel’s explanation that she was short- staffed and explored this issue thoroughly with Mr Virtue, asking him to demonstrate to him how each critical area could be completed with the resources available to Ms Patel that night. He was satisfied, as a result of the response he received, that there were sufficient staff on that evening to complete all critical areas to the required standard. He checked the figures and concluded that Ms Patel’s notation in the handover book (namely that they were 10 staff short) was incorrect and that there were nine staff short. He also had regard to the fact that not only critical, but most non-critical areas, had been covered. This suggested to him that there had been sufficient staff to complete (to an appropriate standard) the critical areas, contrary to Ms Patel’s assertion.

[26] Mr Reynolds had regard to the extensive efforts that had been put in to formulating specific instructions to assist Ms Patel in fulfilling her role and to resolve the company’s longstanding concerns over the supervision of the night shift and her responsibility and accountability for its performance. He concluded that the company could no longer have the requisite trust and confidence in Ms Patel, including having regard to her failure to take responsibility and accountability. He

found that Ms Patel’s conduct amounted to serious misconduct and formed the

preliminary view that dismissal was the appropriate disciplinary response.

[27] Before reaching a concluded view on the disciplinary outcome Mr Reynolds

sought Ms Patel’s input, via her representative. He did this by way of email, sent at

9 am on 20 March 2013. He set out his conclusions as to serious misconduct, noting that while he would normally have sought comment as to outcome at the conclusion of the disciplinary meeting, as they had left early he was prepared to provide an additional opportunity. He advised that any response must be made in sufficient time for a decision to be made by 5 pm that day.

[28] Ms Patel’s representative replied to Mr Reynolds at 1.30 pm, although not directly to him. Rather he forwarded his email to someone else within the company, advising that he was doing so because of previous difficulties communicating with Mr Reynolds by way of email. There was no apparent basis for this assertion, as it is clear that there had been a free flow of email communication up to this time. The email requested an extension of time to provide a response due to workload pressures; advised that Mr Virtue’s involvement in the process was opposed; reiterated a request for training records; and concluded with the comment that:

I am prepared to pursue any disciplinary matter but only after mediation

where the larger context can be openly discussed...

[29] The email was forwarded to Mr Reynolds. He was not drawn to the request for an extension of time to respond. He was unaware of any difficulties with email contact and advised that he was surprised by the suggestion that it had been necessary to communicate with him via a third party. Mr Reynolds interpreted the concluding request for mediation as suggesting that the plaintiff and her representative were unwilling to engage in the process at that time and rather wished to pursue mediation, delaying the disciplinary process. He wrote back to the advocate just before 5 pm advising that he had considered the material contained in the most recent correspondence but that he had concluded that the plaintiff was to be summarily dismissed from her employment.

Analysis

[30] The role of the Court is not to substitute its view for that of the employer. Rather, it is to assess on an objective basis whether the decision to dismiss and the conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. Context is key.

[31] In determining whether Ms Patel's dismissal was justified the Court must consider a number of matters, including whether the company sufficiently investigated the allegations before the dismissal occurred; whether it raised the concerns that it had with Ms Patel before dismissing her; whether it gave her a reasonable opportunity to respond to its concerns; and whether it genuinely considered her explanation (to the extent that she offered one) in relation to the allegations before dismissing her. As s 103A(5) makes clear, a dismissal is not unjustified simply because an employee can point to a procedural deficiency. The deficiency must be more than minor and must have resulted in the employee being treated unfairly. The emphasis is on substantive fairness and reasonableness.

[32] The central thrust of the plaintiff's case is that Ms Patel did not breach any duty owed to her employer. That is because the instructions, on which the defendant relies, cannot reasonably be read in the way contended for by the defendant. Further it is said that the decision to dismiss defies commonsense in circumstances where Ms Patel was dealing with "severe" staff shortages and was obliged to undertake cleaning duties herself on the night in question. The plaintiff submits that any concerns relating to the failure to fill in an incident form following Mrs Vaifoou's accident on 10 January 2013 were negligible, that Ms Patel received inadequate training and that she did not consciously disregard any health and safety policies.

[33] The plaintiff was required under her employment agreement to comply with any operating procedures or policies in place at the time, including any instructions. The plaintiff had signed an acknowledgment that she had read and understood the defendant company's Employee Handbook which set out numerous categories of serious misconduct providing grounds for summary dismissal, including failure to follow an instruction. The handbook also made clear that health and safety was a

key issue of concern and that any failure to be aware of, and comply with, the company's health and safety rules and procedures may give rise to disciplinary action, including the requirement that "all" accidents be reported in the Accident Register on the prescribed form.

[34] As I have already observed, detailed instructions were issued to Ms Patel following a lengthy process that involved numerous discussions with her, her representative and the company. The instructions make it clear that Ms Patel was expected to spend the "vast majority" of the time ensuring that the staff rostered on for duty were being productive and that quality standards were achieved. It is evident that theatre suites (such as OR9) were to be fully staffed for the entire shift. That is reflected in the wording of cls 10 ("Note: Theatre Suites are to be fully staffed EVERY evening") and 12.1 ("The supervisor is required to control the activities of cleaners. Specific requirements for Theatre Suites are as follows: Cleaning Times: 3.30 pm to 12:00 am (midnight)").

[35] I accept the defendant's evidence that there had been issues with the standard of cleanliness of OR9 and that these issues had been specifically raised with the plaintiff, that the particular requirements to address these issues were discussed with her and that she was well aware of what was expected.

[36] The instructions also made it clear that Ms Patel was to check all areas each evening and verify that the standard was acceptable. Indeed Ms Patel accepted in cross examination that she had a duty to check that the cleaning had been done to the necessary standard and identify anything that needed to be fixed.

[37] Clause 13 of the instructions (Communication Books) provides that:

The supervisor is to check all areas in which communication books are in operation each evening and verify, by countersigning each OCS Communication Book, that the standard is acceptable.

Communication books are in operation for the following areas: Theatre Suites

...

Operating Rooms Level 9 ACH

...

[38] It was common ground that the communication book in OR9 had a habit of going missing and was not present on 24 January 2013. Mr Herzog submitted that in these circumstances there could be no breach of the instructions, as the requirement to check was specifically linked to the presence of a communication book. As I understood the argument, if on a particular day no communications book was present in OR9 there was no duty to check. However such an interpretation would undermine the evident purpose of the clause and the reasons why the instruction had been issued in the first place. Nor was it an interpretation advanced by the plaintiff at the time. Rather, it was raised for the first time in the context of

these proceedings.

[39] The narrow interpretation also overlooks an immediately following qualifying subclause, which provides that:

Should an area not have a Communication Book, the PM Supervisor is to record this [the results of the check] in the Handover Book.

[40] As it transpired, Ms Patel did write in the handover book. She did not, however, carry out a check of OR9 and she did not satisfy herself that the cleaning that had been done had been completed to an appropriate standard.

[41] Mr Reynolds considered Ms Patel's explanation as to staff shortages but concluded that it did not excuse her failure to undertake the necessary checks. He was entitled to reach this view based on the information available to him at the time. While it was submitted that there had been a "serious" staffing shortfall on 24

January, that was not something that Mr Reynolds accepted, on the basis of inquiries he made, and nor was it established on the evidence at hearing. His conclusion about staff numbers and capacity was reinforced by the fact that a number of non-critical areas had been attended to on the night in question.

[42] Mr Herzog submitted that concerns relating to the accident on 10 January and the failure to fill in the report form were de minimis. Mr Reynolds considered the health and safety issues involved and the importance of reporting incidents and accidents, including having regard to the hospital environment. Issues were raised at

the hearing about the sufficiency of training that Ms Patel had received but these were the sort of issues that could and should have been raised at the appropriate time, during the course of the disciplinary process. Reference was made to training records at the 19 March meeting but Mr Reynolds made it clear that he did not consider that an adjournment was necessary and indicated that such issues could be raised and dealt with during the meeting (which the plaintiff subsequently left). I did not understand the evidence to be that Ms Patel had asserted during the course of the disciplinary process that she was unaware of the requirement to report as supervisor or that her training had been deficient. Mr Reynolds had regard to the fact that she appeared to have been inducted, including on the company's health and safety policies, had signed off as having read and understood the company's policies and had previously filled in a claim form herself. This was the information he based his decision on and I do not consider that he can reasonably be criticised for failing to undertake extensive enquiries to fill in gaps that the plaintiff could have identified or have been expected to fill had she perceived there to be an issue at the time. After all, she was squarely on notice of the three concerns that the company had well before the disciplinary meeting took place.

[43] The reality is that Ms Patel and her representative adopted a relatively high risk strategy of leaving the disciplinary meeting at an early stage, effectively withdrawing from that part of the process, despite having been advised of the potential ramifications of doing so. She was perfectly entitled to take this course. However, her decision impacts on her ability to criticise aspects of the decision making process that followed.

[44] Mr Reynolds made the self-evident point that cleanliness is extremely important in a hospital environment but most particularly in an operating theatre. He was entitled to take the plaintiff's established failures seriously, having regard to the background context. Cumulatively the breaches reasonably amounted to serious misconduct.

[45] Mr Reynolds did not accede to the request for a one day extension of time to provide comment on the preliminary decision to dismiss, although he did have regard to the matters that were identified in the relatively lengthy email on the

plaintiff's behalf before reaching his decision. His decision was informed by the ongoing delays that had been occasioned by and on behalf of the plaintiff in progressing the disciplinary process, the fact that concerns (with no apparent foundation) had been raised about difficulties with email communications and the suggestion that the disciplinary process should be parked pending mediation. This was a repetition of an earlier theme. These factors led Mr Reynolds to believe that the request for an extension was another delaying tactic and an attempt to derail the process. That conclusion was reasonably open to him having regard to the particular circumstances at the time. While it may have been preferable for an extension to be granted, and another employer confronted with the same situation might have adopted such a course, that is not the yardstick by which justification is judged.

[46] I am satisfied that the process followed by the company was what a fair and reasonable employer could have done in all of the circumstances prevailing at the time. The plaintiff was given a reasonable opportunity to respond to the proposal to dismiss and failed to fully take up the opportunity that was afforded to her.

Would it have made a difference in any event?

[47] I pause to note that even if the decision to proceed did amount to a procedural defect issues would have arisen as to whether it resulted in unfairness to Ms Patel in the sense required under s 103A(5)(b). On one level it would have, as she was denied an extension of time to provide a response. However, it is at least arguable that a broader approach applies in assessing whether a breach of process has resulted in the employee being treated unfairly, having regard to whether the

employee would have suffered the same fate if the breach had not occurred.

[48] Section 103A(5)(a) makes it clear that minor procedural defects will not render a justifiable dismissal unjustifiable and it is equally clear that more significant defects in the process will not have that effect unless the Court is satisfied that the defects led to the employee being treated unfairly. Where dismissal would have resulted notwithstanding the procedural defect it raises issues as to whether an otherwise just result (which is what process rights are aimed at securing) can be characterised as unfair. In the present case I would have been far from satisfied that

a different result would have been arrived at had an extension been provided. Ms Patel has not subsequently put forward anything that would likely have led the company to another conclusion.

[49] On the one hand a broader approach to the phrase "result in an employee being treated unfairly" may render the notion of procedural unfairness (emphasised in s 103A(3)) nugatory in some cases. On the other hand, if a narrower approach applies the sort of difficulty that this case throws up can only be dealt with by way of s 124 (contribution), with the employee enjoying something of a pyrrhic victory. I return to this issue below.

Other issues

[50] Even if Ms Patel was unjustifiably dismissed, there were a number of additional difficulties with her claim.

[51] I would not have been satisfied, based on the relative paucity of evidence before the Court, that Ms Patel took adequate steps to mitigate her loss. It appears, although limited details are provided, that she applied for a number of jobs but that she did not seek cleaning work, which she would have been well qualified for. Mr Reynolds' evidence was that such work is readily available. While Ms Patel was a cleaning supervisor, I consider that she could reasonably have been expected to have sought out cleaning work having regard to her experience.

[52] Nor would I have awarded compensation for hurt and humiliation sought in the region of the quantum sought, namely $12,000. In particular, there was insufficient evidence to support the medical effects that Ms Patel says she suffered from as a result of her dismissal. Simple assertions are unlikely to persuade the Court that a significant claim for compensation has been adequately made out.

[53] There would also have been difficulties for the plaintiff in terms of contribution. That is because in deciding both the nature and extent of the remedies to be provided, s 124 of the Act requires the Court to consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal

grievance. If those actions so require, the Court must reduce the remedies that would otherwise have been awarded accordingly.

[54] Ms Patel significantly contributed to the situation that she found herself in and this would have substantially, if not wholly, reduced the quantum of any remedies that she might otherwise have been awarded.

[55] Nor would I have ordered reinstatement in the circumstances. It is no longer referred to in the Act as a primary remedy; rather it is one of the remedies amongst others, with no apparent hierarchy, that can be ordered. The Court must be satisfied that reinstatement is both practicable and reasonable. It is essentially a prospective inquiry.

[56] Serious misconduct was established. This weighs against reinstatement as an appropriate remedy. So too do the evident difficulties in the relationship, most particularly with other employees. Mrs Vaifoou gave clear and compelling evidence that she would be fearful of working with Ms Patel again and the reasons why that was so. It is true, as Mr Herzog points out, that reinstatement to the current employer would be for a limited period (a matter of days). However the reality is that Mrs Vaifoou has elected to transfer to the new employer, which is precisely what Ms Patel has said she will do if reinstated. It would be artificial to take an overly narrow approach to the effect of reinstatement in these circumstances.

[57] The defendant has since employed a new supervisor who has been in the position for some time. While in some circumstances this is unlikely to tell against reinstatement, having been a risk the employer knowingly assumes, there is some strength in Mr Langton's argument that the plaintiff's delays in pursuing her grievance, and reinstatement, weigh against reinstatement as an appropriate remedy.

[58] Mrs Vaifoou's evidence that Ms Patel and her partner had applied pressure on her to change her story, including after Ms Patel's dismissal, was not challenged and Ms Patel's partner did not give evidence. There is also Mr Virtue's unchallenged evidence of discussions he had with another employee after Ms Patel's dismissal and a signed statement she gave him, which refers to pressure and threats made against

her. I was not drawn to Ms Patel's evidence in relation to the interactions she says she had with Mrs Vaifoou. I preferred Mrs Vaifoou's evidence as to what transpired.

[59] The Court of Appeal in *Salt v Fell*2 confirmed that subsequently discovered misconduct may be taken into account when

making an assessment of remedies, observing that:3

Everyone accepts that subsequently discovered misconduct might result in reinstatement being totally inappropriate. It might also render inappropriate, however, full compensation.

[60] It remains somewhat unclear as to whether the subsequently discovered misconduct must relate to the grounds on which an employee was actually dismissed. The examples given by the majority in *Salt v Fell* (such as subsequent discoveries of theft) suggest not.4 Ms Patel was not dismissed for applying undue pressure on a colleague to change her story and threatening her if she did not, although the defendant had suspicions that that was so. The information that

subsequently came to the company's attention would have reinforced the conclusions

I would otherwise have reached in relation to remedies, if they had been in issue.

Result

[61] The plaintiff's challenge is dismissed.

[62] Costs are reserved at the request of both parties. If they cannot otherwise be agreed the defendant is to file and serve a memorandum and supporting material within 30 days of the date of this judgment with the plaintiff filing and serving any memorandum and supporting material in reply within a further 20 days.

Christina Inglis

Judge

Judgment signed at 12 noon on 27 March 2014

2 [2008] NZCA 128; [2008] 3 NZLR 193 (CA).

3 At [85].

4 The minority judgment leaves the issue open, at [61] – [62].
