

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 84
3001384

BETWEEN SHARYN PAYNE
Applicant

AND BUPA CARE SERVICES
LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Mary-Jane Thomas and Kirsty Allan, counsel for
Applicant
Shelley Eden, counsel for Respondent

Investigation Meeting: 8 February 2018 in Invercargill

Submissions received: 16 February 2018 and 1 March 2018 for the Applicant
23 February 2018 for the Respondent

Determination: 5 June 2018

DETERMINATION OF THE AUTHORITY

Prohibition on publication

[1] Under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I prohibited from publication the evidence lodged in these proceedings about the identity of Resident Z.

Employment relationship problem

[2] Bupa Care Services Limited employed Sharyn Payne as Village Manager of the Ascot Retirement Village in Invercargill from 9 November 2015 until she was dismissed. There was a factual dispute between the parties as to the timing of the dismissal. Bupa said it was 27 October 2016 and Ms Payne said it was 3 November 2016.

[3] Ms Payne said her dismissal was procedurally and substantively unjustified. In settlement of her personal grievance, Ms Payne sought an award of lost wages, uplifted to take account of her circumstances post-dismissal and \$20,000 compensation for hurt, humiliation and injury to feelings.

Issues

[4] The issues for investigation were and determination are:

- (i) Was Ms Payne's dismissal, and how the decision was made by Bupa, what a fair and reasonable employer could have done in all the circumstances at the time?;
- (ii) If Bupa's actions were not justified, what remedies should be awarded, considering:
 - (a) Lost wages under s 123(1)(b) of the Employment Relations Act 2000 (the Act); and
 - (b) Compensation under s 123(1)(c)(i) of the Act;
- (iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Payne, which contributed to the situation giving rise to her grievance?; and
- (iv) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[5] During the Authority's investigation meeting, I heard evidence from Ms Payne, her partner John Payne, her friend Fiona McLister and Bupa managers Janet Lester, Jan Summerell and Janet Hamlin. Bupa human resources advisor Sarah Kenny also gave evidence. Given the large number of documents the parties cooperated in the preparation of a common bundle and the Authority is grateful for this.

[6] Having regard to s 174E of the Act, this determination does not refer to all the evidence heard or received during my investigation of Ms Payne's employment relationship problem. While I do not refer to all submissions advanced by counsel in this determination, I record I have fully considered them.

Narrative

Ms Payne's recruitment into Bupa

[7] Ms Payne was, in effect, "head-hunted" by Bupa to manage Ascot. She had previously applied for a position with Bupa but had been unsuccessful. Ms Summerell contacted Ms Payne several times thereafter and asked her if she was still interested in working for Bupa. Ms Summerell said she had been impressed by Ms Payne's "positive attitude and enthusiasm".

[8] In or about September 2015, Ms Summerell contacted Ms Payne to advise the role of manager of Ascot had been advertised and asked her to apply. Ms Payne said she was "informally" interviewed by Ms Summerell and Bupa sales manager, David Ketsell. Ms Payne said they advised her there would be on-going training and she would have a two-week handover period with the outgoing manager. Ms Summerell said she did not recall talking about timeframes but did say there was discussion about an "orientation" with the outgoing manager. Mr Ketsell did not give evidence during the investigation meeting, so was unable to assist in the resolution of this factual dispute.

[9] Ms Payne said she would subsequently discover the new manager of Bupa's Gore facility was given two weeks training with another manager and attended numerous courses. Ms Summerell disputed this and said the other manager was in a different position to Ms Payne because the Gore facility was new. Ms Summerell said Ms Payne was experienced in customer service and knew some of the residents through her role as a wedding celebrant. Ms Summerell said Ms Payne presented with the skill set to be a village manager but Bupa "... knew we needed to support her into the role". Ms Payne said she did not yet have the requisite skill set but she did possess a willingness to learn, as long as she was trained properly.

[10] During the interview Ms Payne discussed her work as a wedding celebrant with Ms Summerell and Mr Ketsell. She advised that although most of this work was undertaken at weekends, she had a couple of bookings coming up. It was agreed Ms Payne could undertake these provided she let them know.

[11] Ms Payne accepted the position. Ascot consisted of approximately 65 self-contained villas and a care facility, for which Ms Payne had no apparent, or at least, no clinical responsibility. Ms Payne said her standard hours of work, as set out in her employment agreement, were 40 hours. However it appeared Ms Payne's "actual" hours could be something different and these would be determined, according to her agreement, "after consultation with [Ms Payne]". Regardless of her standard or actual hours, Ms Payne's salary of \$59,000 was stated as being "full compensation for all hours worked". Ms Payne said she understood her hours were 8.30am to 5.30pm, Monday to Friday. Ms Payne said, in practice, she worked from around 8am to usually 6pm, or later.

[12] Ms Payne detailed her job description in her witness statement. Bupa also provided a copy to the Authority. A review of the job description discloses it is a highly responsible and multi-faceted job.

Ms Payne's training

[13] Ms Payne said she had a handover with the outgoing manager which lasted "two or three days". Ms Summerell said this period was "for about a week". During this time, Ms Payne said she was taken through the acceptability process for residents to move into the village. The acceptability process included obtaining a report from an intending resident's general practitioner certifying they were capable of independent living within Ascot. However, Ms Payne said she did not gain an understanding of other parts of the process involving the role played by Bupa's solicitors or its settlement team based in Auckland. Ms Summerell disputed this and said she took Ms Payne through the process herself. Ms Payne said she received some sales training from Mr Ketsell, which consisted of going through a folder explaining the sales process. She also said Mr Ketsell did not want to hear about "issues" and she was told by Ms Summerell to just tell Mr Ketsell what he wants to hear to make him happy.

[14] Ms Summerell said Ms Payne had the assistance of Janet Hamlin, who was employed 10 hours a week as Ascot assistant manager and was also manager of another Bupa facility in Invercargill. Ms Payne said it was not clear to her how Ms Hamlin was supposed to be utilised until mid-2016. She would suggest Ms Hamlin did not have a clear understanding either. Ms Payne said Ms Hamlin visited Ascot irregularly. Ms Hamlin said that when she attempted to attend Ascot, Ms Payne was unavailable or not on site. Ms Payne said Ms Hamlin was usually too busy to come to Ascot. She recalled at one point Ms Summerell telling Ms Hamlin that she had to perform her 10 hours of work per week at Ascot.

[15] Ms Summerell said she was available to assist Ms Payne and visited her regularly. Ms Payne said this was less than monthly. A review of Ms Summerell's evidence suggests her visits were, on average, less than monthly. Ms Summerell said Mr Ketsell also visited Ms Payne. Mr Ketsell's visits were also, on average, less than monthly. Overall, Ms Summerell she believed Ms Payne had very good support and training into the role of Ascot manager.

[16] Ms Payne was told to contact Care Home Manager Liza Adams if she had any concerns about the wellness of residents. She said was not responsible for supplying residents with medication, or fulfilling their prescriptions. However, Ms Payne did say she assisted Resident Z on one occasion with his medication as he was an old family friend. Ms Payne said she undertook, at her own volition, a first aid course through the care home. Ms Summerell said Ms Payne was advised to consult Ms Adams if she was unsure regarding a potential resident's acceptability.

Events of 21 September 2016

[17] On 21 September 2016, Ms Payne acted as celebrant for the daughter of a close friend of Ms Payne who had died in a car accident. Ms Payne said she did so at her friend's request. She said she was absent from Ascot from 9.30am to 12.30pm. However, her belief at the time was there was some flexibility in her role. Ms Payne said she worked until 9.30pm the night before, to make up the time. Ms Summerell became aware of Ms Payne's attendance at the funeral through "Facebook". However, it appears Ms Summerell did not raise the matter with Ms Payne at that time, despite previously finding it "curious" she had attended the funeral of a former resident on 29 August 2016 and had spoken to her about it.

First tranche of allegations

[18] On 29 September 2016, Ms Summerell advised Ms Payne via telephone that complaints had been made about her. Ms Payne said Ms Summerell did not detail what the allegations were. She said Ms Payne should not worry as Bupa was looking into them and if necessary there would be a meeting. Ms Summerell had a slightly different recollection. She said she advised Ms Payne there had been a complaint about her from a family member about her dealings with Resident Z. Ms Summerell said she did not go into specifics when pressed by Ms Payne. She said she also advised Ms Payne there had been a breach of confidentiality and unauthorised absences from work. At this point in time, Ms Summerell would say of Ms Payne in her witness statement: "... I was really struggling with my confidence in [Ms Payne], I was very concerned that she did not appear to be on site, as required, and very concerned about the apparent lapses with [Resident Z's] situation".

[19] Ms Summerell sent Ms Payne a letter later that day. The letter said Bupa had received a complaint from a family member of a resident who was alleging Ms Payne had been "negligent" in her role as manager and had failed to ensure his safety. The letter also advised Ms Payne there had been a breach of confidentiality and unauthorised absences from work. The letter did not provide any further details of the allegations beyond the bare fact they were being made. The letter concluded by offering Ms Payne access to Bupa's employee assistance programme.

[20] Ms Payne said she was very upset to learn someone had complained about her. She said receiving the letter ruined her pre-planned weekend with her friend Ms McLister in Auckland. Ms McLister confirmed in her evidence how upset Ms Payne appeared to be. Ms Payne said when she asked Ms Summerell on several occasions over the next few days about what the complaint was about, she would not tell her. Ms Summerell denied Ms Payne contacted her to ask about the complaints. However, she said she did speak to Ms Payne via telephone several times during this period.

[21] On 4 October 2016, Ms Summerell advised Ms Payne she hoped to have "something" out to her the next day. On 5 October 2016, Ms Summerell said she said sent Ms Payne an invitation to a disciplinary meeting and a summary of her investigation to date. Ms Payne said this letter constituted the first time she was aware of the nature of the complaints being made about her.

[22] The allegations were particularised, in summary as:

- (i) Ms Payne had failed to take Resident Z to a doctor's appointment despite advising the resident and a family member she would and this resulted in a failed respite care admission;
- (ii) Ms Payne failed to respond in a professional and timely fashion to a number of phone calls from Resident Z's family;
- (iii) Ms Payne failed to deliver Resident Z his lunch for approximately one week in late August 2016;
- (iv) Ms Payne failed to check on Resident Z while he was unwell despite being requested by his family to do so; and
- (v) During conversation with the daughter of Resident Z on around 5 September 2016, Ms Payne breached the confidential of another patient.

[23] In support of these allegations, Ms Payne was provided with a copy of the letter of complaint from a member of Resident Z's family. The letter also contained two further allegations. These were, in summary:

- (i) Ms Payne took unauthorised leave on 21 September 2016 to undertake her celebrant duties; and
- (ii) Ms Payne had, in effect, misled Ms Summerell about when she had contacted a service person about a problem with the "heat pumps" at Ascot.

[24] In support of the allegation about the unauthorised absence, Ms Summerell enclosed a "screenshot" from Ms Payne's Facebook page. A review of the screenshot discloses a picture of Ms Payne in her car surrounded by balloons together with a written statement to the effect she was honoured to be asked to be the celebrant for the funeral and the colourful (helium) balloons had been released after the service.

[25] The letter reproduced the definitions of "negligence", "misconduct" and "serious misconduct" from Bupa's code of conduct. Ms Payne was advised the possible consequences of a finding of misconduct could be disciplinary action and of serious misconduct, dismissal. Ms Payne was asked to attend a meeting with Ms Summerell on 13 October 2016. She was advised that Ms Kenny would also be in attendance. Ms Payne was encouraged to bring a support person with her to the meeting. She was again advised of her right to access Bupa's EAP services.

[26] Ms Payne's solicitors responded, on her behalf, to the allegations in a letter dated 7 October 2016. The letter requested a copy of Ms Payne's personnel file. The letter also requested confirmation Bupa had spoken directly to Resident Z. The letter asked for further information about the breach of confidentiality allegation, and initial responses and requests for further information about the remainder of the allegations concerning Resident Z. In response to the allegation about unauthorised absences, the letter referred to the funeral for which Ms Payne was celebrant. It stated Ms Payne made an error of judgement believing she did not need Ms Summerell's permission to attend and she had a certain degree of flexibility in her job having already made the time up. The letter did not respond to the allegation relating to the servicing of the heat pumps. However, this allegation was ultimately not substantiated by Bupa.

[27] On 7 October 2016, Ms Payne completed Residents E & F's acceptability process.¹ She said she requested a medical certificate from their general practitioner to certify they were capable of independent living. Evidently Ms Payne then ticked a box in Bupa's acceptability computer program indicating she had sighted this medical certificate. In her evidence Ms Payne said she may have confused two applications that she was working on, having received medical confirmation for the other. Ms Summerell queried how this could be given a date disparity between the applications. Ms Payne said she was very stressed during this time and had not eaten or slept properly for a week. She said she was "incredibly unwell". The date of settlement for Residents E & F's application changed. Ms Payne did not advise them of this. Ms Payne said she did not realise this was her job. She assumed and expected the settlements team based in Auckland would do it.

[28] Ms Summerell responded via letter on 14 October 2016. The letter addressed a number of matters raised by Ms Payne's solicitors including confirming Resident Z had been interviewed after some reluctance from his family. The letter noted he was interviewed in the presence of his daughter, who made the initial complaint about Ms Payne. The notes of the two interviews with Resident Z, which had occurred on 13 and 14 October 2016, were attached to the letter. The letter confirmed the Care Home Manager had been interviewed about the doctor's appointment for Resident Z and his failed respite admission. The notes of her interview were also attached to the letter. The letter confirmed the breach of confidentiality related to a disclosure made by Ms Payne to Resident Z's daughter during a telephone conversation about a medical emergency

¹ Real name anonymised

involving another resident. When it became apparent what the allegation was, Ms Payne would say a resident had a stroke and died in her arms. Ms Payne said she then successfully administered CPR. Ms Payne said the conversation with Resident Z's daughter occurred not long thereafter. Resident Z's daughter claimed in her complaint letter that Ms Payne had mentioned the name of the resident's sister and that CPR had been administered to a resident. The letter reproduced the following quote from the complaint: "Sharyn did not mention the resident's name but she did mention the sisters (sic) name however I don't recall it now. Quite frankly the details given were astounding me so it wasn't my focus". A review of the complaint discloses it was dated 21 September 2016, which was about two weeks after Ms Payne's alleged breach of confidentiality.

[29] On 14 October 2016, Mr Ketsell attended Ascot and asked Ms Payne whether she had sighted Residents E & F's medical certificate. She said she had but could not locate it. Ms Payne thought she might have inadvertently left it in Resident E & F's villa. She requested a new medical certificate that day, which was faxed by the medical practice to the care home. During the conversation with Mr Ketsell, Ms Payne said he advised her of the results of Bupa's "mystery shopper" initiative at Ascot. Evidently a mystery shopper is a person who poses as a customer and evaluates business customer service and staff and provides a report detailing findings. The evaluation of Ms Payne occurred on 20 September 2016 and she said the results were not positive. Ms Payne said Mr Ketsell told her she was "a disappointment to him". Ms Payne said she was very upset during this discussion. She said she did not have any practical experience in selling property and Mr Ketsell had not trained her properly.

[30] Ms Payne subsequently had a telephone conversation with Ms Summerell about Residents E & F's medical certificate. Ms Summerell said she was very concerned Ms Payne did not appear to understand the process for accepting residents into the village. Ms Summerell discussed her concerns with Ms Kenny. It was decided Ms Summerell was now a "witness" in the investigation. Ms Summerell made a statement on 18 October 2016 about her telephone conversation with Ms Payne four days earlier. Ms Summerell said she then "stepped out" of the investigation. Another Bupa manager, Ms Lester stepped in to replace her.

[31] Ms Lester said on becoming involved in the investigation, she reviewed the available material and had a discussion with Ms Summerell about the interviews she had completed. She also reviewed the overall allegations being made by Bupa.

[32] Despite saying she had stepped out of the investigation, Ms Summerell remained involved. On 17 October 2016, she wrote to Ms Payne, rather than her solicitors, advising Bupa needed to reschedule the date of the disciplinary meeting. Ms Summerell did not mention in this correspondence she was stepping out of, and Ms Lester was stepping into, the investigation. She also did not take the opportunity to advise Ms Payne that Bupa was investigating further matters and may advance further allegations. In addition, Ms Summerell emailed Ms Payne's solicitors on 25 October 2016 in relation to Ms Payne's training. Objectively assessed, Ms Summerell's email outlined the training given, or available, to Ms Payne in very positive, and potentially, partisan terms.

Second tranche of allegations

[33] On 21 October 2016, Ms Lester sent Ms Payne a letter setting out further allegations. These were, in summary:

- (i) Ms Payne did not follow the acceptability policy and put Bupa at risk by accepting Residents E & F without sighting a medical certificate. Bupa alleged she was dishonest and negligent as a result;
- (ii) In relation to the medical certificate for Residents E & F, Bupa said there were inconsistencies in the version of events given to Mr Ketsell and Ms Summerell. It also said there was no evidence the medical certificate had been received;
- (iii) Ms Payne failed to advise Residents E & F, and the settlement team, of a change in the settlement date for their villa purchase causing undue stress and pressure to all parties involved;
- (iv) Ms Payne's scores from Bupa's mystery shopper initiative highlighted significant performance gaps despite recent additional training and a clear sales process; and
- (v) The Net Provider Score (NPS) satisfaction results recorded a significant drop in customer satisfaction with both Ascot and Ms Payne when compared to the previous year (2015).

[34] The letter reproduced the definitions of “negligence”, “misconduct” and “serious misconduct” from Bupa’s code of conduct and set out the consequences of adverse findings against Ms Payne including dismissal.

Disciplinary meeting: 27 October 2016

[35] Ms Lester, Ms Kenny and Ms Payne, her partner and her solicitor attended the disciplinary meeting. Ms Kenny took notes. The meeting was tape-recorded by Ms Payne’s solicitor. Ms Lester described the meeting as “difficult”. She said Ms Payne’s solicitor and partner “presented very aggressively”. Ms Lester said it became quite distressing running the meeting at times because Ms Payne was very upset throughout. Ms Lester said that Ms Payne’s solicitor “hardly let [Ms Payne] say anything in relation to the allegations”.

[36] However, Ms Lester said “[n]otwithstanding the ... concerns that we had, we felt that in the end that between [Ms Payne] and her lawyer we were getting a good account of [Ms Payne’s] responses. In the end, we understood what it was that she had to say regarding the allegations”. However, this appeared to be then contradicted by this further statement in written evidence: “[i]t was not a positive discussion where we could get to grips with Ms Payne’s thoughts and responses to the allegations”.

[37] Ms Lester said the meeting lasted approximately two hours and then she and Ms Kenny adjourned to “deliberate and make findings”. Ms Payne said her solicitor asked for the decision in writing but said Ms Lester and Ms Kenny “insisted on adjourning and making their findings that afternoon”.

[38] Ms Lester said she and Ms Kenny carefully considered the allegations and the evidence that had been gathered. During their deliberations, Ms Lester said they telephoned Bupa’s director of independent living, “just to check our thinking and check that our decision was in alignment with previous decisions made by Bupa regarding employee misconduct”. Despite this, Ms Lester insisted she was the decision-maker. Ms Lester said it was “her belief on the balance of probabilities that [Ms Payne] had not been completely honest with Bupa, had not followed policy and then appeared to try to cover up what happened”. Ms Lester said she had lost trust and confidence in Ms Payne. Ms Lester then decided her preliminary decision was that summary dismissal was the appropriate outcome.

[39] Ms Kenny said Bupa “overlooked” the hostility of the meeting and “looked simply at the allegations and the evidence we had, both for and against them”. Ms Kenny said the “breadth and depth of the allegations” meant trust and confidence was an issue. She said she supported Ms Lester’s preliminary decision to dismiss Ms Payne. Ms Kenny said a final warning was considered but was ruled out due to the isolation of the role of village manager and Ms Payne’s failure to follow policy.

[40] Ms Lester then reconvened the disciplinary meeting. She said attempts to engage Ms Payne and her solicitor in a discussion about her preliminary view of summary dismissal were very difficult. Ms Lester said Ms Payne and her solicitor were unwilling to engage and “they simply argued with us, and indicated that they were going to take Bupa to Court”. Ms Lester said she confirmed her decision to summarily dismiss and ended the meeting. Ms Kenny supported this view as to what happened. Ms Payne, in contrast, said her understanding at the end of the meeting was that the decision to dismiss her was just a proposal and there would be an opportunity to respond to the substantiated allegations in writing.

[41] On Bupa’s case, the decision to dismiss Ms Payne was confirmed in writing on 3 November 2016. The letter said Ms Payne was dismissed with effect from 27 October 2016 on four weeks’ notice. Ms Payne said this was the first time she was aware she had been dismissed was when she received the letter. Ms Payne said she became aware Ms Summerell had a meeting with residents of Ascot on 1 November 2016 and told them she would not be returning. Ms Summerell confirmed in her evidence this meeting had taken place.

[42] The letter of 3 November 2016 recorded Bupa had substantiated the following allegations, in summary form, against Ms Payne:

- (i) Ms Payne failed to ensure the wellbeing of Resident Z and was negligent as a result;
- (ii) During conversation with the daughter of Resident Z, Ms Payne inappropriately disclosed confidential information about a resident;
- (iii) Ms Payne took unauthorised leave on 21 September 2016 to perform non-Bupa related duties;

- (iv) Ms Payne neglected to follow Bupa's acceptability policy on 7 October 2016 in respect of Residents E & F exposing Bupa to possible negligence and putting its reputation at serious risk;
- (v) Ms Payne was dishonest with her managers in relation to the medical certificate for Residents E & F; and
- (vi) Ms Payne failed to advise Residents E & F, and the settlement team, of a change in the settlement date for their villa purchase and was unprofessional and negligent as a result.

[43] Bupa said Ms Payne was negligent in carrying out her duties and the substantiated allegations breached several provisions of her employment agreement and Bupa's code of conduct.

[44] Solicitors of Ms Payne raised a personal grievance for unjustified dismissal by letter dated 2 December 2016. The letter set out the remedies sought by Ms Payne to settle her grievance. On 19 December 2016, Bupa responded and denied Ms Payne was entitled to the remedies sought. Bupa did, however, advise it would attend mediation in good faith. The subsequent mediation was unsuccessful.

Evaluation

Procedure

[45] Ms Payne said Bupa failed to adhere to the requirements of s 103A of the Act when investigating and subsequently dismissing her. Bupa said all procedural requirements were met. Ultimately, I agree with Ms Payne. I have found the investigation undertaken by Bupa was deficient in several major respects. These procedural deficiencies, whether viewed individually or cumulatively, were not minor and they resulted in Bupa treating Ms Payne unfairly.²

² Employment Relations Act, s 103A(5)

First procedural deficiency

[46] The role played by Ms Summerell during the investigation is cause for significant concern. In her evidence, Ms Summerell said she was “struggling with [her] confidence” in Ms Payne, was “very concerned” Ms Payne did not appear to be on site at Ascot and her “apparent lapses” with Resident Z. She also described the circumstances of Ms Payne’s attendance at the funeral for a former resident as “curious”. It is also clear that someone from Bupa, and possibly Ms Summerell, was, by this stage, monitoring Ms Payne’s Facebook page, as that was how Ms Summerell ascertained Ms Payne had acted as funeral celebrant on 21 September 2016.

[47] Ms Payne said Ms Summerell’s reference to “curious” was relevant to her view about whether she had lost trust and confidence in her. Bupa rejected this and said the concern expressed here was not a reason for dismissal but simply formed part of the disciplinary processes’ “factual matrix”. However, the problem with this factual matrix is that it is highly suggestive Ms Summerell had formed generally adverse opinions about Ms Payne and had developed relatively firm views about both Ms Payne’s work attendance and her “apparent lapses” in relation to Resident Z, even before commencing to formally investigate her. Even I am wrong about that, these statements even more clearly attain that hue when refracted through a prism of other evidence of Ms Summerell’s views about Ms Payne. On 28 September 2016, Ms Summerell forwarded an email to Bupa HR advisor Shahana Khan, who was briefly involved before Ms Kenny, with a subject line of: “Ascot Sharyn Payne, example dishonesty (5 of 6)”. Before the email was forwarded the subject line had been “Heat Pumps”. It is not clear what the other five examples of Ms Payne’s dishonesty were because they do not appear to have been provided to the Authority or, at least, not in that form. Bupa did not substantiate the allegation about the heat pumps against Ms Payne. However it is, in my view, instructive as to what was apparently happening behind the scenes during the investigation.

[48] A closed mind towards plausible alternative explanations, innocent explanations or honest excuses is not the disposition of a fair and reasonable employer. In my view, Ms Summerell ought not to have carried out the investigation into Ms Payne. In the absence of a broader understanding within Bupa about Ms Summerell's views about Ms Payne, she could, and should, have ruled herself out as an investigator. Perhaps, it could be argued that Ms Summerell stepping out of the investigation cured the procedural defects associated with her involvement. However it was not to be, as the facts do not support this. It was clear from the evidence, Ms Summerell's investigation provided the bedrock for Ms Lester and that her investigation was a continuation of the old and not a new one. Further, as outlined above, Ms Summerell, inexplicably, remained directly involved in the investigation until, at least, 25 October 2016, which was two days before the disciplinary meeting. Ms Lester formally advised Ms Payne on 23 October 2016 that Ms Summerell was stepping out due to a "conflict of interest" and she was stepping in.

Second procedural deficiency

[49] Bupa's letter of 29 September 2016 did not provide any specificity as to the allegations being made. Bupa said it did not have to, it was providing preliminary notification of the process to be followed in an intended investigation. In this regard, it relied on a finding of the Court in *H v A Ltd*.³ However, in my view *H v A Ltd* can be distinguished here. Bupa's letter contained no clear investigation process to be followed and what, if any, Ms Payne's involvement would be in it. The letter stated, while it could not provide a timeline for the investigation, that if the allegations were substantiated, Ms Payne would be advised in writing and invited to a disciplinary meeting, to which she could bring a support person. The letter referred to a "policy" but a copy of the policy was not enclosed. Further, the letter issued Ms Payne with an instruction to not contact or speak to any staff regarding the matter without Ms Summerell's permission or treat any staff member or Bupa "customer" that has raised a complaint inappropriately in any way. It was not clear how Ms Payne could comply with this instruction given the lack of specificity about the allegations including by who they were made and to whom they related. Not advising an employee about the allegations being levelled against them yet directing them to not discuss them is highly unusual, inappropriate and unfair. The situation was exacerbated by Ms Payne's unanswered requests of Ms Summerell, which I

³ [2016] NZEmpC 54 at [105] – [109]

find she is more likely than not to have made on, at least, the occasions Ms Summerell said she contacted Ms Payne before issuing her letter of 5 October 2016.

[50] Bupa said any unfairness in relation to the letter of 29 September 2016 was cured by the letter of 5 October 2016 and the disciplinary meeting on 27 October 2016. However, Ms Payne's solicitor's sought clarification of this letter on 7 October 2016. Ms Summerell eventually provided this on 14 October 2016. Consequently, Ms Payne was only given notice of the totality of the allegations on 14 October 2016, some two weeks after receiving the first letter and only 13 days before the disciplinary meeting. It is not clear how the disciplinary meeting could cure this procedural defect because, on Bupa's case, she was dismissed at its conclusion.

Third procedural deficiency

[51] Third, on 21 October 2016, Ms Payne received a letter from Ms Lester containing a second tranche of allegations. There had been no preliminary notification of these allegations or prior notice Bupa was even investigating other matters of concerns. One of the new allegations related to "Net Provider Score" (NPS) satisfaction results for Ascot. Unfortunately, this allegation appears to have been rushed into place and, prematurely. In an email to Ms Payne's solicitors on 25 October 2016, Ms Summerell advised that the NPS scores had not been made available to village managers as of 25 October 2016 "as they are still being analysed. We don't expect to receive the full reports until late November". A fair and reasonable employer does not level an allegation against an employee in relation to a matter that is "still being analysed". As it was, Ms Payne was already facing a significant number of allegations.

Fourth procedural deficiency

[52] Ms Lester and Ms Kenny said they were concerned about the behaviour of Ms Payne's solicitor during the disciplinary meeting. If that was the case, it was open to them to adjourn the meeting. However, they decided not to. They pressed ahead with the meeting, which, on their case, ended with Ms Payne's dismissal. As stated above, in her written evidence Ms Lester said: "[i]t was not a positive discussion where we could get to grips with [Ms Payne's] thoughts and responses to the allegations". She did not resile from this during the investigation meeting. This raises very real concerns about whether Bupa complied with s 103A (c) and (d) of the Act before reaching the decision to dismiss

Ms Payne. This deficiency dovetails into the next identified deficiency as it also relates to the disciplinary meeting.

Fifth procedural deficiency

[53] Given the extent of the allegations being made against Ms Payne, the late-piece appointment of a new investigator and the making of a second tranche of allegations, adopting, or continuing with, a single disciplinary meeting process was poor procedural practice and not the actions of fair and reasonable employer. It was clear from a review of the transcript of the disciplinary meeting Ms Lester accepted further investigation may be necessary and Ms Payne's solicitor was seeking further information about the allegation and was suggesting further lines of inquiry. Bupa should have provided this information and, at least, considered, the further proposed lines of inquiry, as it said it would, before arriving at a decision to dismiss Ms Payne. As it was, Ms Payne's evidence was she came away from the meeting thinking there would be a further step in the process and she would be able to respond in writing to the substantiated allegations. While, what could be characterised as, a "Grand Prix" approach to the final stage of disciplinary investigation may seem attractive; it will only ever be only superficially so, as it can create further and bigger problems, as is evidenced here.

Sixth procedural deficiency

[54] Finally, having reviewed the transcript of disciplinary meeting, which Ms Kenny said was accurate, Ms Kenny's own paraphrased notes and the evidence generally of all participants, I am not satisfied that Ms Payne was, in fact, dismissed by Bupa during that meeting. This raises, of course, a concern about Ms Summerell's meeting with residents of Ascot on 1 November 2016, which occurred, so I have found, before Ms Payne was notified of her dismissal on 3 November 2016. Advising third parties about an employee's dismissal before it is communicated to that employee is not the act of a fair and reasonable employer.

Substance

[55] The findings of significant procedural deficiencies about the employment investigation, raises real concern about the foundational basis upon which Bupa substantiated six allegations against Ms Payne. Bupa's letter of dismissal was not entirely clear whether the substantiated allegations were findings of serious misconduct occasioning negligence, serious misconduct or misconduct. The letter also did not identify the allegations that were not substantiated against Ms Payne and the reasons for that.

[56] Further, several of the allegations appeared to be performance related. However, Bupa characterised these as disciplinary from the outset. There was no evidence of Bupa formally addressing performance issues with Ms Payne before the disciplinary process. In her evidence, Ms Kenny correctly outlined the differences between misconduct and performance issues and expressed a keen academic interest in performance management. However, assuming Ms Kenny had a different view, the die of the investigation had been cast by the time she became involved.

[57] So what then of the six substantiated allegations?

Allegation 1: failure to respond appropriately to ensure the wellbeing of Resident Z

[58] This allegation forms part of Resident Z's daughter's exposition of Ms Payne's failings as an employee, detailed over a period of a month, and set out in a letter received by Bupa on or about 21 September 2016. The complaint contained four allegations. It liberally used the terms "negligence" and "duty of care". There was no evidence the complaint was encouraged and it would be wrong to speculate further about this.

[59] Resident Z's daughter was interviewed by Ms Summerell about her allegations on 4 October 2016. She was also present when her father was interviewed by Ms Summerell on 13 and 14 October 2016.

[60] Of the allegations made by Bupa in respect of Resident Z, it is not clear which were substantiated by Bupa during the disciplinary meeting. A review of the dismissal letter does not greatly assist here. Ms Payne thought it may have been in relation to failing to make or respond to phone calls about Resident Z's family members. If that is the case, Ms Payne said Bupa provided limited detail about the time and number of phone calls involved. Ms Lester said the phone calls should have been returned within one hour. Ms Payne said this was a performance issue and that she was in a better position to know what was expected of her following the disciplinary meeting. I accept this was a performance issue but unfortunately Bupa did not treat it as such.

[61] During the investigation meeting, Ms Kenny was asked why Bupa preferred Resident Z's daughter's complaint to Ms Payne's explanations. In response, she said, words to the effect of, there was no reason not to believe her and that she saw no reason why Resident Z's daughter would go to such lengths. It is reasonable to conclude then, that Bupa expected Ms Payne to disprove Resident Z's daughter allegations, rather than they be required to substantiate them. This could not be the action of a fair and reasonable employer.

Allegation 2: disclosure of confidential information to Resident Z's daughter

[62] This allegation also formed part of Resident's Z's exposition, which was dated approximately two weeks after the event. The circumstances in which Ms Payne may have disclosed confidential information during a telephone conversation were unique and deeply distressing to her (and, reasonably, many other people placed in that situation). A resident had died in Ms Payne's arms and she successfully administered CPR. The conversation occurred shortly thereafter. The conversation cannot be considered in the absence of its context. I find that a fair and reasonable employer could, and, indeed, would have accepted any disclosure by Ms Payne was inadvertent when considered in context. As it was, Resident Z's daughter said Ms Payne did not actually name the resident. It seems Resident Z's daughter was actually able to identify the resident based on her own knowledge of Ascot rather information imparted from Ms Payne.

Allegation 3: taking unauthorised leave on 21 September 2016.

[63] At the request of close friends, Ms Payne agreed to officiate at their daughter's funeral. Ms Payne's evidence was that before being dismissed by Bupa she was a marriage celebrant and not also a funeral celebrant. I accept this evidence. At the time, Ms Payne had a mistaken belief about Bupa's notion of flexibility and I find that belief was genuinely held. However, in any event, Ms Payne's evidence, which I accept, was that she made up the time in advance. Ms Lester said Bupa encouraged and expected flexibility but only in relation to Bupa business. Ms Payne conceded, appropriately, in hindsight, she should have sought permission of Ms Summerell, who was based in Christchurch. Ms Payne, did however, advise Ms Hamlin, Ms Adams and the caretaker, all of whom were based at Ascot or sometimes so. In the circumstances, a fair and reasonable employer could not have substantiated this allegation.

Allegation 4: breach of Bupa's acceptability procedure – medical certificate

[64] Ms Payne sought to explain her actions here with reference to lack of training and extreme stress in the face of first tranche of allegations. She accepted she made a mistake. That mistakes could be made in such circumstances by an employee ought not to be a surprise to Bupa. Bupa had an ability to suspend Ms Payne on pay under her employment agreement while it investigated misconduct. Given the weight of the allegations, on Bupa's case, it is surprising this did not occur. Ms Payne's response to the allegation was confused and I find she was genuinely confused by what happened. Ms Payne said her explanation that she was dealing with more than one acceptability application at the same time, and may have confused them, was not properly investigated by Bupa and had not actually been discounted. Bupa said this was not a training issue. Ms Summerell said she took Ms Payne through the acceptability process herself. To the extent, Ms Summerell's evidence about Ms Payne can be relied on, I would find the training given was insufficient for a person completely new to the aged care sector. At its highest, I would find Ms Payne made a genuine mistake, under heightened and pressurised circumstances, for which there were no consequences for Bupa. This is not an allegation where a fair and reasonable employer could substantiate negligence and dishonesty through the falsification of a document.

Allegation 5: breach of Bupa's acceptability procedure – notification of change in settlement date

[65] In the absence of any direct evidence from Mr Ketsell, I accept Ms Payne's evidence about the nature of the sales training he provided her. It appeared to be insufficient and perfunctory. Mr Ketsell provided two statements to Bupa's investigation but neither addressed the sales training given to Ms Payne. It is also clear from the evidence, Ms Lester and Ms Kenny did not contact Mr Ketsell during the disciplinary meeting to clarify what training was given.

[66] In her evidence, Ms Payne said she did not realise contacting the outgoing and incoming residents and settlements team about a change to a settlement date for a villa was her job. She said he assumed the settlements team would be responsible for that. I find this would be a reasonable assumption to make. However, even if Ms Payne's assumption was wrong, as Bupa would say it was, this situation was, in my view, a performance issue in the first instance. A fair and reasonable employer could not have found Ms Payne was "unprofessional and negligent" in regard to this allegation.

Allegation 6: dishonest responses to Mr Ketsell and Ms Summerell regarding medical certificate for Residents Z and F.

[67] This allegation was based on statements provided by Mr Ketsell and Ms Summerell. Given the procedural issues associated with Ms Summerell's involvement in the investigations, this became a very difficult allegation for Bupa.

[68] There is no evidence that Bupa sought to test the evidence of either Mr Ketsell or Ms Summerell before the allegation was made against Ms Payne. Quite apart from the taint associated with Ms Summerell's evidence, and for that reason it should have been set aside, there is no evidence Ms Lester and Ms Kenny contacted either or both Mr Ketsell and Ms Summerell during the disciplinary meeting to further investigate Ms Payne's response to the allegation. Rather, it seems Bupa just accepted the veracity of what Mr Ketsell and Ms Summerell said and then preferred that to Ms Payne's version of events. A fair and reasonable employer could not have done this. It would have investigated the allegation properly and discounted Ms Summerell's statement to ensure a credible evidential foundation or, more likely, given Ms Summerell's involvement arguably affected the entire allegation, set it aside.

Conclusion about Ms Payne's dismissal

[69] Drawing together all the factors detailed, discussed and analysed above and applying the test in s 103A of the Act, I find the process adopted by Bupa investigating Ms Payne and substantive justification for her dismissal were outside the range of what a fair and reasonable employer could have done in all the circumstances at the time. The defects in Bupa's process were not minor and they did result in Ms Payne being treated unfairly. Bupa's dismissal of Ms Payne was procedurally and substantively unjustified.

Remedies

Reimbursement for lost wages

[70] Having found Ms Payne was subject to an unjustifiable dismissal by Bupa, the Authority must, even if no other remedies are granted, order payment of the lesser of a sum equal to lost wages or three months ordinary time wages if it finds she has lost wages as a result.

[71] As lodged, Ms Payne's statement of problem sought six months wages as compensation for lost wages. On 16 February 2018, eight days after the investigation meeting, Ms Payne applied to amend her problem to seek lost wages from the day of her dismissal to the day of the investigation, a period of approximately 15 months. Bupa opposed the application. Bupa said it was far too late and it would be prejudiced by the grant of leave because it did not have the opportunity to cross-examine Ms Payne about her activities during the additional nine months of the claim.

[72] The Authority is not a tribunal of proper pleading and it is largely untrammelled by technicality. However, the Authority must when exercising its powers and functions under the Act comply with the principles of natural justice.⁴ Consequently, the Authority has adopted the usual practice, which is broadly consistent with the approach taken by other triers of fact in the civil jurisdiction, that parties may amend their statements of problem or reply up until the day of the investigation meeting and, with leave, during the meeting. The expected effect of this approach is that responding parties are aware of the case being put against them and applicant parties must be aware of the case they are being countered with by the time the investigation meeting commences. However, there are

⁴ Employment Relations Act, s 157(2)(a)

occasional aberrations, particularly in respect of attempted ambush by one or both parties of the other – which is entirely inconsistent with the Authority’s investigative and inquisitorial approach – and the Authority is required to deal with that on a case by case basis consistent with the principles of natural justice.

[73] I accept Bupa’s submission that Ms Payne’s application is very late. Too late. Ms Payne’s application to amend her statement of problem is, therefore, declined. However, and in any event, Ms Payne’s claim of six months lost wages still places it within the ambit of the Authority’s discretion contained in s 128(3) of the Act to grant a greater amount than three months lost wages. Ms Payne calculated her claim for six months lost wages as approximately \$25,340. Bupa said this calculation did not allow for the fact Ms Payne was paid four weeks’ notice. I accept this submission as far as it goes. However, Bupa made the election to pay Ms Payne notice in circumstances where it said it summarily dismissed her. So then, taking this four week period into account, Ms Payne’s wages claim runs from 1 December 2016 to 1 June 2017, and that is the period to be assessed by the Authority.

[74] Bupa said regardless of which of Ms Payne’s claims is entertained by the Authority, she provided no evidence of job applications and failed to properly mitigate her loss. Although the point does not necessarily arise in the present case, it is ponderous that some employers express disbelief to the Authority that an employee dismissed by them, often for serious misconduct, and saddled with a significantly blemished employment history as a result, is unable to find alternative employment immediately, or almost immediately, on the same, or substantially similar, terms of employment.

[75] The obligation to mitigate loss, which is a contractual notion, arguably, sits uncomfortably with an employment relationship that is much broader than its reduction to writing. Consequently, it seems to me the obligation to mitigate ought to be tempered by practical realities and an employee’s right to act in their own best interests post-termination. Ms Payne said she was unable to accept an offer of fulltime work because of mental distress arising out of her employment with Bupa. Ms Payne said post-dismissal she undertook casual work and continued her work as a celebrant. Ms Payne gave compelling evidence about the effect Bupa’s employment investigation had on her and, in response to questioning from Bupa during the investigation meeting, the actual, and no doubt, devastating, personal consequences for her. Ms Payne would also give compelling

evidence about the effect the termination of her employment had on her and that is discussed further below.

[76] That Ms Payne made a decision to protect her mental health is her right. She is entitled to act in her own best interests. To criticise her for doing that would be unfair and unreasonable. I am satisfied Ms Payne lost wages as a result of her personal grievance. I am also satisfied she made a reasonable attempt to mitigate, to the extent she was required, that loss. Consequently, she is entitled to, at least, three months lost wages under s 123(1)(b) of the Act.

[77] Turning the request by Ms Payne for the Authority to exercise its discretion under s 128(3) of the Act, this was opposed by Bupa. Relying on the decision of the Court of Appeal in *OneSource Limited v Hjarth*⁵, Bupa said by not accepting a full-time job when offered, Ms Payne broke the causal link between her grievance and her lost remuneration. However, the decline of the offer of full-time work by Ms Payne must be seen in context that it occurred as outlined above. However, if I am wrong about that, I would find having regard to the context it occurred, as a matter of degree, the causal link may have been damaged by the failure to accept the offer but it was not broken by it. Consequently, this is not a ground upon which Authority will refuse to exercise its discretion in favour of Ms Payne's claim

[78] Relying on the Court of Appeal's decision in *Sam's Fukuyama Food Services Limited v Zhang*⁶, Bupa said the Authority was also required in considering Ms Payne's claim for six months lost remuneration to undertake an exercise to consider any factual matters which might suggest, but for the dismissal, her employment may have come to an end in any event. Ms Payne said there was no evidence of poor work performance (presumably, other than those giving rise to her dismissal which has been found to be unjustified), other employment relationship problems or a risk of redundancy. Bupa said there were other issues of unsatisfactory performance, including arising out of Bupa's "mystery shopper" initiative at Ascot, and employment relationship issues. Counterfactual analysis of the kind required to be undertaken here is a potentially fraught exercise relying on subjective assessments of often fragments of evidence about what might have been. It also appears to sit uncomfortably with the *factual analysis* required to assess the

⁵ [2005] 1 ERNZ 763 (CA)

⁶ [2011] ERNZ 482

justification for a dismissal under s 103A of the Act in all the circumstances at the time.⁷ Having said that, I am satisfied on the evidence available that there is nothing to suggest that Ms Payne's employment would not have lasted for a period of six months after 3 November 2016. The mystery shopper initiative seemingly related to the sale of villas and that, I have found, was a training issue and it is not clear what the other employment relationship issues referred to by Bupa were. If Bupa is referring to the NPS survey allegation, for which there was no conclusion in the letter of dismissal, this was also matter of performance. To rely on this, Bupa would have needed to institute a proper process of performance management and, more likely than not, review the next round of survey results before moving to a disciplinary process. Consequently, a counterfactually assessed premature end to Ms Payne's employment is not a ground upon which Authority will refuse to exercise its discretion in favour of her claim.

[79] Standing back and assessing Ms Payne's claim, I have decided it is appropriate in all the circumstances of this case to exercise the discretion contained in s 128(3) of the Act in her favour. Subject to contribution, I award Ms Payne six months' pay, being the period 1 December 2016 to 1 June 2017, less any actual earnings, as reimbursement for lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[80] Ms Payne sought \$20,000 compensation for humiliation, loss of dignity and injury to feelings. Ms Payne gave compelling evidence about the effect Bupa's investigation and the subsequent termination of her employment had on her. She said she had trouble eating and sleeping and lost a significant amount of weight. Ms Payne said a pre-existing medical condition flared up and this caused incredible pain and discomfort. She said her dismissal placed a huge strain on her marriage and incredible stress on her family. Ms Payne said she went from someone who was outgoing, fun and vivacious to a person she did not recognise. She said she was embarrassed by what happened and tried to avoid running into any residents around town so she did not have to answer questions about what happened. While not necessary, her evidence was also generally corroborated by that of Mr Payne and Ms McLister who commented on their interactions with her during this period and their observations about the impact upon her.

⁷ Employment Relations Act 2000, s103A(2)

[81] It is now a notorious fact there is an unequivocal upward trend in compensation awards in the Authority. The amount to be awarded to Ms Payne is consistent with recent awards by the Authority and one made mindful of the Court's guidance, well-known and oft-cited, on granting such remedies.

[82] Subject to any consideration of contribution under s 124 of the Act, I award \$20,000 as compensation for that humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

Contributory conduct by Ms Payne?

[83] Having found that Ms Payne is entitled to remedies for her personal grievance, I am required by s 124 of the Act to consider whether Ms Payne's actions were causative and blameworthy of the situation he found himself in. Ms Payne said there should be no deduction for contribution. Bupa said given the nature of the allegations, particularly in relation to the medical certificate issue, her actions were highly relevant to the situation giving rise to her grievance. Consequently, it said her remedies should be reduced.

[84] I have found Ms Payne has a valid person grievance for unjustified dismissal against Bupa. Within that context, I found the allegations made against Ms Payne could be answered by her or that her actions were explicable within the context they occurred such that a fair and reasonable employer could not have dismissed her. The two most serious allegations made against Ms Payne were her absence without authorisation on 21 September 2016 and her sighting of the medical certificate for the acceptability of Residents E & F to Ascot on 7 October 2016.

[85] As to the leave issue, Ms Payne had a mistaken belief about Bupa's notion of flexibility and, I have found, that belief was genuinely held. Ms Payne had encountered some very difficult personal circumstances involving the death of a close friend's child. Ms Payne conceded, appropriately, in hindsight, she should have sought permission. However, against this, she made up the time in advance. In the circumstances this cannot be considered "blameworthy". As to the medical certificate issue, I have accepted Ms Payne was under a lot of pressure, her responses in relation to this allegation were confused and I have found, as a result of extreme stress, she was genuinely confused by what happened. At its highest, I have found Ms Payne made a genuine mistake for which there were no consequences for Bupa. I am not prepared to find blameworthiness on a counterfactual basis there might have been.

[86] On the balance of probabilities then, I find Ms Payne’s actions did not contribute to the situation that led to her personal grievance. I decline to reduce her remedies as a consequence.

Summary and orders

[87] Ms Payne was unjustifiably dismissed by Bupa and as a consequence, her personal grievance is made out. The remedial orders made are for Bupa to settle Ms Payne’s personal grievance by paying her the following amounts:

- (i) Six months’ pay, being the period 1 December 2016 to 1 June 2017, less any actual earnings, as reimbursement for lost wages;
- (ii) \$20,000 as compensation for humiliation, loss of dignity and injury to feelings.

Costs

[88] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Ms Payne has 28 days from the date of this determination in which to file and serve a memorandum on costs. Bupa has a further 14 days in which to file and serve a memorandum in reply.

[89] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.⁸

Andrew Dallas
Member of the Employment Relations Authority

⁸*PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.