

There is an order prohibiting publication of the resident or any information that may identify him

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 222
3029531

BETWEEN TREENA RADCLIFFE
 Applicant

A N D CHT HEALTHCARE TRUST
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Warwick Reid and Rachel Rolston, Representatives for
 Applicant
 Daniel Erickson, Counsel for Respondent

Investigation Meeting: 28 and 29 June 2018 at Tauranga

Submissions Received: 29 June 2018 from both parties

Date of Determination: 12 July 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Ms Treena Radcliffe was unjustifiably dismissed from her employment by the respondent, CHT Healthcare Trust (“CHT”).**
- B. The dismissal was both substantively unjustified and carried out in a procedurally unfair manner. To remedy the grievance of unjustified dismissal, I order that:**
- (i) Ms Radcliffe be reinstated to the position of Healthcare assistant at CHT Glynaston on a permanent basis pursuant to s.123(1)(a) of the Employment Relations Act 2000 (the Act):**

- (ii) **Reinstatement is to restore Ms Radcliffe to her former position at CHT Glynavon on the same terms and conditions of employment;**
 - (iii) **Reinstatement is suspended for 14 days from the date of this determination to enable arrangements to be made for Ms Radcliffe to return;**
 - (iv) **Ms Radcliffe is to fully cooperate with any reasonable requirements of CHT necessary to facilitate her return to work;**
 - (v) **CHT is to begin paying Ms Radcliffe her previous income 7 days after the date of this determination.**
- C. Within 21 days of the date of this determination, CHT is to pay Ms Radcliffe the sum of \$20,000 compensation for humiliation, loss of dignity and injury to feelings as a result of her unjustified dismissal under s123(1)(c)(i) of the Act;**
- D. Within 21 days of the date of this determination, CHT is to pay Ms Radcliffe the sum of \$5,837.76 gross loss of remuneration pursuant to s128 of the Act;**
- E. Costs are reserved.**

Employment Relationship Problem

[1] Ms Radcliffe is an experienced health care assistant with qualifications and experience in care for people with dementia. Ms Radcliffe was employed by CHT and its predecessor at its facility in Glynavon from 2012 until her dismissal on 3 May 2018.

[2] Student nurses from Toi Ohomai Institute of Technology (“Toi Ohomai”) are placed at CHT as part of their practical training. A student nurse, Ms Joelle Farminer had been placed at Glynavon for about 1 week at the time of the incident which led to Ms Radcliffe’s dismissal.

[3] While managing a resident (Mr X), Ms Radcliffe was observed by Ms Farminer, pushing Mr X into his chair with what she felt to be excessive force, and speaking to him in a manner which she felt was unacceptable.

[4] During a conversation the following day with Ms Trishie Harrison, the student nurse educator from Toi Ohomai, Ms Farminer told Ms Harrison about her observation.

[5] Ms Harrison informed Ms Sue Brownlee, a registered nurse at CHT Glynavon about the complaint. Ms Brownlee, reported the matter to Ms Michelle Watson, the Unit manager for CHT Glynavon. As a result, Ms Watson suspended Ms Radcliffe and commenced a disciplinary investigation into the complaint.

[6] The result of the disciplinary investigation was that Ms Radcliffe was summarily dismissed for serious misconduct.

Ms Radcliffe's claims

[7] Ms Radcliffe says that she did not use excessive force when pushing Mr X, she used sufficient force to prevent him falling forward from his chair and injuring himself. Ms Radcliffe says her dismissal was unjustified. Ms Radcliffe seeks immediate reinstatement to her former position, compensation for the distress she has suffered and loss of remuneration.

CHT's response

[8] CHT states that Ms Radcliffe's dismissal was justified both substantively and procedurally. It says that it carried out a full and fair investigation following receipt of information that Ms Radcliffe may have mistreated Mr X. It concluded that Ms Radcliffe's actions amounted to serious misconduct for which immediate dismissal was appropriate in the circumstances.

[9] In the event that the Authority finds that Ms Radcliffe's dismissal was unjustified, CHT strongly resists Ms Radcliffe's claim for reinstatement. This is on the grounds that Ms Radcliffe has not shown remorse or acceptance of any wrongdoing on her part. Further, Ms Radcliffe has stated that after this experience, she would be unable to work with student nurses. Working with student nurses is a requirement of a health care assistant's position at CHT Glynavon.

The Authority's investigation meeting

[10] The investigation meeting took a full day and a half in the Authority. For the Authority's investigation, Ms Radcliffe filed an affidavit in support of her application for interim reinstatement and subsequently a witness statement. Ms Radcliffe's mother, Ms Dyanna Martin and a former colleague, Ms Christine Nankivell both filed witness statements.

[11] For CHT Glynavon, witness statements were filed by Ms Michelle Watson, Unit manager for CHT Glynavon, Ms Carol Ropati, Area manager for CHT and Ms Adelfa Dumanghi, the registered nurse at CHT Glynavon who was on duty on the night of the incident observed by Ms Farminer. Ms Farminer was requested to attend and did attend the Authority's investigation meeting to answer questions.

[12] Each of the witnesses giving evidence before the Authority confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[13] As permitted under s.174E of the Act, this determination does not set out all the evidence, which was significant. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

[14] This determination was delivered as quickly as possible as Ms Radcliffe sought urgent interim reinstatement to her former role. Ms Radcliffe's employment relationship problem was able to be accommodated by an early investigation meeting which dealt with her substantive claim of unjustified dismissal. This obviated the need and cost of two separate investigation meetings.

The issues

[15] The issues for the Authority to determine are:

- (a) Could a fair and reasonable employer have concluded that Ms Radcliffe's conduct amounted to serious misconduct?
- (b) Was Ms Radcliffe's dismissal by CHT justified?

- (c) In the event that the Authority finds Ms Radcliffe was unjustifiably dismissed what remedies, including reinstatement, are available to Ms Radcliffe?
- (d) In the event that the Authority finds Ms Radcliffe has personal grievances for which she is entitled to remedies, was her conduct a contributing factor which requires a reduction in remedies awarded under s.124 of the Act?

Background facts

[16] CHT provides residential care for people in rest homes, hospitals and dementia care units. CHT has a number of residential care units throughout the North Island. Ms Radcliffe has worked as a health care assistant for a number of years including at Bernadette Rest Home in Mt Maunganui and at Malyon House prior to its purchase by CHT in 2013, at which time it became known as Glynavon.

[17] Ms Radcliffe has undertaken a number of courses and obtained certificates in aged care education, dementia, loss and grief. Ms Radcliffe was a competent member of the CHT Glynavon team and received positive performance appraisals from Ms Watson during the period of her employment.

[18] In the 6 month period leading up to her dismissal, Ms Radcliffe suffered from some serious personal issues. These included a shoulder injury for which she had to have time off work to recover on ACC, the illness of her father and his death and increasing challenges with resident behaviour. Ms Radcliffe says these issues did affect her enjoyment of her job at the time. Ms Watson says Ms Radcliffe told her that she was not enjoying her job and her work performance deteriorated during this period.

Resident Mr X

[19] One of the residents of CHT Glynavon is Mr X, a resident with level 5 dementia and the onset of Parkinsons disease. Mr X is tall, heavy set and still strong. Ms Radcliffe described him as a person who was challenging. This was not disputed by Ms Watson, Ms Ropati or Ms Dumanghi.

[20] At times, Ms Radcliffe says Mr X would push or shove health care assistants and become aggressive. At other times he was lucid and pleasant. Mr X's family

including his wife, children and grandchildren were devoted to him and regularly visited. Mr X's wife had instructed CHT Glynnavon that she did not want Mr X to be restrained with a lap belt, a mechanism to ensure he could not get up, fall and injure himself.

[21] Ms Radcliffe says that Mr X is a "falls risk" and requires two health care assistants to assist with his care. The technique that Ms Radcliffe employed with Mr X was to encourage him to do as much for himself as he could and to intervene when necessary. Mr X was usually medicated, particularly in the early evenings, because of his condition.

Sequence of events

[22] Ms Farminer had had one placement at a rest home in 2016 as part of her practical training and had attended some lectures on dementia. Her placement at CHT Glynnavon in 2018, was her second placement at a rest home. Ms Farminer had been placed at CHT Glynnavon for about a week before the incident on 27 March 2018.

27 March 2018

[23] Ms Radcliffe was on duty on the evening of 27 March 2018. Mr X had been put to bed. At about 6.00pm, Ms Radcliffe received a notification that Mr X had got out of bed. Mr X has a mat next to his bed which when stood on by him, triggers a notification to the nursing staff and health care assistants that he is out of bed.

[24] Ms Radcliffe went into Mr X's room to find that he was on his hands and knees on the floor, trying to pull himself up on his dresser. Ms Farminer came into the room and immediately began trying to help Mr X get up. Ms Farminer says that was her natural response when seeing an elderly resident on the floor. Ms Radcliffe told her not to help him straight away and so she backed off. However, she did not agree with Ms Radcliffe's decision. Ms Radcliffe says there were a number of reasons for her instruction to Ms Farminer. She wanted to assess the situation in respect of Mr X's safety, provide him with some dignity and allow him the independence to help himself if he was able to. Ms Radcliffe says she was aware that Mr X liked to be able to do what he could on his own.

[25] Mr X did get up on his own without assistance and managed to seat himself. As he seated himself he began to topple forward. Ms Radcliffe says she put her right

hand on to Mr X's left shoulder and pushed him back into his chair with sufficient force for him to sit back in the chair. Ms Farminer observed one push which she says was excessive and upset her. Ms Farminer left the room and waited outside.

[26] Mr X attempted on 2 or 3 more occasions to get up out of the chair. Ms Radcliffe spoke loudly to Mr X and pushed him in to his seat on each occasion to stop him falling. On the third or fourth occasion that Ms Radcliffe says she had to push Mr X back into his chair, the registered nurse on duty that night, Ms Dumanghi came in. Ms Dumanghi had heard Ms Radcliffe speaking to Mr X in a loud voice and the bell was ringing. Ms Dumanghi observed the final push by Ms Radcliffe but was not concerned by the force used by Ms Radcliffe.

Events following the incident

[27] Ms Christine Nankivell, a health care assistant had asked her husband to bring in a pizza to share. Ms Radcliffe, Ms Farminer and some of the other healthcare assistants ate pizza together. Ms Farminer made no comment nor did she complain to Ms Dumanghi about the incident.

Morning of 28 March 2018 – complaint by Ms Farminer

[28] On the morning of 28 March 2018, Ms Harrison, a student nurse educator from Toi Ohomai had one of her regular meetings with Ms Farminer. Ms Farminer informed her that she had observed an incident and that she did not know what to do about it. Ms Farminer says she told Ms Harrison what had occurred and that her view was that the push by Ms Radcliffe was more than just a push. Ms Harrison told Ms Farminer that she would talk to the nurse in charge about what had occurred.

29 March 2018 – complaint referred to Ms Watson

[29] On 29 March 2018, Ms Watson received an email from Ms Sue Brownlee, a registered nurse at Glynavon. Ms Brownlee asked to see Ms Watson because there was a problem. Ms Brownlee and Ms Watson met. Ms Brownlee told Ms Watson that she had received a complaint from Ms Harrison that a student nurse, Ms Farminer had told her that Ms Radcliffe had hit a resident. Ms Watson asked if a written complaint had been made. There was no written complaint by Ms Farminer.

[30] Ms Watson informed the Area manager, Ms Carol Ropati that she had received a complaint that Ms Radcliffe had hit a resident. Ms Ropati considered this to be a serious allegation as resident safety was paramount. Ms Ropati asked Ms Watson whether Ms Radcliffe has been suspended. Ms Watson rang Ms Dumanghi, the registered nurse on duty at the time of the alleged incident to ask if she was aware of it. She was not. Ms Dumanghi asked for details and was told by Ms Watson the complaint was that Ms Radcliffe had hit a resident. Ms Dumanghi said she was shocked that such a thing had occurred on her shift and she did not believe Ms Radcliffe would do such a thing as it was not in her nature.

[31] At the Authority's investigation meeting, both Ms Watson and Ms Ropati agreed that pushing a resident and hitting a resident were quite different and would be dealt with by CHT differently.

[32] Ms Dumanghi says Ms Farminer should have come to her on the evening so that she could have immediately dealt with any issue. Ms Dumanghi told the Authority that recently a health care assistant was rough with a resident and she isolated the health care assistant. The health care assistant was not disciplined by CHT.

[33] Ms Farminer says she did not know what to do, she had never been in such a situation and was shocked. Ms Farminer was aware that she could report matters to the registered nurse on duty.

First Issue

Could a fair and reasonable employer have concluded that Ms Radcliffe's conduct amounted to serious misconduct?

Suspension – 29 March 2018

[34] On the morning of 29 March 2018, following her conversation with Ms Ropati Ms Watson telephoned Ms Radcliffe. Ms Watson informed Ms Radcliffe that she had received an allegation that she had hit a resident while on duty on 27 March 2018. Ms Watson informed Ms Radcliffe that she intended to suspend her on full pay while an investigation was conducted into the matter.

[35] Ms Radcliffe was shocked and told Ms Watson that she had not hit a resident but had pushed Mr X back into his chair.

[36] Ms Watson confirmed Ms Radcliffe's suspension in a letter to her of the same date. The letter stated:

Dear Treena,

I am writing to confirm the outcome of our telephone conversation this morning on 29.03.18. It is alleged that on the evening of Tuesday 27 March 2018 you hit resident , [Mr X]. This allegation is defined as serious misconduct within the CHT Code of Conduct.

Due to the nature of these allegations, I propose to suspend you on full pay, with effect from 29.03.18 to allow a full and thorough investigation into these allegations. I sought your response to the proposed suspension.

Having considered your response, I advised you that you were suspended on full pay, with effect from 29.03.18, to allow a full and thorough investigation into these allegations.

During this time you are not required to attend work and must not contact anyone involved in this investigation.

The next step may be another interview to investigate these allegations, which may result in disciplinary action being taken against you. Disciplinary action can include dismissal.

Yours faithfully,

Michelle Watson
Unit Manager CHT Glynavon.

[37] Ms Radcliffe says she was shocked by the allegation made by Ms Watson that she had hit Mr X. Ms Radcliffe rang her mother, Ms Martin, who came to see her. Following a discussion they decided to go and see Ms Watson, which they did. Both Ms Radcliffe and her mother Ms Martin, say that they felt reassured after the discussion with Ms Watson who told them that she did not believe that Ms Radcliffe had hit Mr X.

Statement from Ms Farminer – 4 April 2018

[38] Ms Farminer was requested by Ms Watson to provide a statement about what she had observed on 27 March 2018. Ms Farminer told the Authority that she made a number of attempts at writing down her recollection of events. On 4 April 2018, Ms Farminer sent her statement to Ms Watson. The statement was as follows:

On Tuesday 27th March I was answering bells for a patient named [Mr X]. I was having to go to his room often, as he was getting out of

his chair and he was standing on his sensor mat. I heard his bell go off at around 7.30 pm and I went to his room. The HCA Treena was already in there and [Mr X] had fallen out of his bed and was on his hands and knees with his feet on his protector mattress and his knees on the ground. I immediately went up to [Mr X] and asked if he was alright and told him I would help him stand up and Treena interrupted saying “No don’t help him, he always falls and gets himself back up when we’re not looking. Don’t you [Mr X], he can get up himself” and she told me to stand up and not help him. I did as I was told and stood up, and he slowly stood up too, once he was up I held his hands and helped him walk to his chair as he didn’t want to hop into bed. I sat him down and made sure he was comfortable and we left. His bell then rang again about half an hour at around 8pm after this and I went in there again to find Treena already in there. She was standing in front of his chair with him sitting in it, I asked everything was okay, and Treena proceeded to tell me how [Mr X] doesn’t listen. She said to him “You need to sit down [Mr X] and stay there, you’re taking up all my time, the time I have with the other residents because you’re not listening and you won’t stay still, I don’t have time to put up with you”. He appeared very confused and began to stand up, as he got off the chair Treena using one arm contacted it with [Mr X’s] left shoulder and used force to shove him back down onto the chair. He hit the back of the chair and said, “You don’t need to do that” and Treena replied “Yes I do [Mr X] because you’re not listening, stay in your chair I have other things to do”. [Mr X] then said, “You don’t care about me” and Treena replied “No [Mr X] I don’t care about you”. I was in shock and I left the room as I became emotional. I stood outside the door to ensure nothing else happened and I heard [Mr X] stand back up and he was pushed back down again and I heard him hit the chair when he came back down. Treena continued to speak to him in a condescending manner, and then said, “Do as you’re told [Mr X], your wife wouldn’t like you like this, stay in your chair” and she left. I went back into [Mr X’s] room after and knelt down beside him, I put my hand on his hand and said, “Are you okay [Mr X]?” He opened his eyes and looked at me and said, “Do you like the way I’m treated in here?” I was in shock and I froze but eventually said, “I don’t like to see you get hurt [Mr X]”. He then said, “Well I don’t like the way I’m treated in here but I can’t do anything about it, I have no voice”. He then asked about his wife, in which I asked if he would like to speak to her in attempt to calm him down, he wanted to. So I got him the phone and left him to speak to her. I felt very upset and hurt by what I had witnessed and I was unable to have my break with the staff, I sat outside during my break and the rest of the night. I found myself avoiding working with that HCA.

[37] On the same date, 4 April 2018, Ms Watson sent a letter to Ms Radcliffe setting out the allegations that she had been, “physically abusive towards [Mr X]” and that she had been “verbally intimidating” [Mr X].

[38] The letter is as follows:

DISCIPLINARY INVESTIGATION

As discussed with you via telephone in the morning of 29 March 2018 and then in person that afternoon, I have received a complaint about an incident that occurred between you and Mr X on the evening of Tuesday 27 March 2018.

The allegation: You were physically abusive towards Mr X on the evening of 27 March 2018.

Having received the statement from the witness to the event it appears that you were also verbally intimidating towards the Resident. If proven, this allegation may amount to serious misconduct and/or serious breaches of your duties and obligations under the company's code of conduct. We consider your actions, if proven, may amount to serious misconduct as defined in our Code of Conduct:

- Any action or inaction which seriously affects the quality of care, the safety of, and the physical and mental wellbeing of residents and/or employees
- Physical or verbal intimidation or violence towards employees, residents, visitors while at any CHT premises or while providing service to resident...

You are required to attend a meeting at CHT Glynavon on Tuesday 10 April 2018 at 2 pm to discuss these allegations...

Disciplinary Investigation by CHT

[38] Ms Radcliffe was informed of her right to bring a support person or representative to the meeting. Ms Radcliffe was informed that she was to remain suspended from her employment on pay while the investigation continued. Ms Watson enclosed with the letter a copy of CHT's employee Code of Conduct, record of complaint and a copy of Ms Farminer's statement.

[39] The copy of complaint attached and provided to Ms Radcliffe was as follows:

Date of Event: 27.03.18

Comment: RN Sue Brownlee reported to me on my return from leave that she had received a complaint from the SNE of one of the student nurses currently completing year 3 practicum. It is alleged that HCA Treena Radcliffe hit resident Mr X on the evening of 27 March 2018.

[40] The next section of the complaint set out the action taken by Ms Watson as follows:

I rang RN Adelfa Dumanghi who was the RN on duty at the time of the incident to see if she was aware of the alleged incident. She was not. I then rang Treena and explained that I had received an allegation against her and that I proposed to suspend her on full pay while I conducted an investigation. Treena stated that she did push the

resident back into his chair but that she did not hit him. Statement from student nurse is expected next Tuesday.

04.04.18 Statement received from Joelle Farminer.

Wife of resident informed of the complaint.

Invitation to a disciplinary meeting to be held on Tuesday 10 April at 2 p.m. delivered to Treena.

Meetings held during the course of the disciplinary investigation

[41] On 9 April 2018, Ms Watson and Ms Ropati briefly interviewed Ms Farminer about the statement that she had made on 4 April 2018.

[42] On 9 April 2018, Ms Watson met with Mr X. Mr X identified Ms Radcliffe from a photo provided to him by Ms Watson and stated to Ms Watson that he did not have any problems with her. Mr X told Ms Watson that he needed to be careful about what he said about staff and when asked why he said that some staff

“were a bit vicious in their care of him”.

[43] Ms Watson showed Mr X the photo of Ms Radcliffe again and asked if she was one of them and he informed Ms Watson that he did not think so. Ms Brownlee was in attendance during the course of the interview.

[44] Ms Watson then telephoned Mr X’s wife and spoke to her on 10 April 2018. Ms Watson asked Mr X’s wife whether she could recall the conversation that she had with Mr X following the incident on 27 March 2018. Mr X’s wife stated that:

“he was confused and that he was talking about an old persecution incident that occurred about 15 years ago and a conspiracy theory regarding university students.”

He did not give any suggestion that there had been any issues with staff or that he had been hurt in any way. Mr X’s wife reiterated that she and Mr X’s [family]:

“are more than happy with the care that Mr X receives”.

She acknowledged that he can be very difficult at times and that he is a big man and does require some force when being assisted back into the chair. Mr X’s wife stated that:

“she herself had had to push him back into his chair the previous evening when he was agitated and at risk of falling;”

This statement was signed by Mr X’s wife.

[45] Mr X's wife sent a letter to Ms Watson expressing her satisfaction with the care and treatment that Mr X receives at CHT Glynavon. The letter also stated:

Mr [X] is a retired farmer. He has been a strong muscular man and for an old man he still maintains quite some strength. He is also an independent man. Basically, he doesn't always like being told what to do. As well, Mr X has various moments of confusion (delirium?) here he gets conspiracy theories running around his head. One evening...[I] had to be very firm with Mr X ... I put both my hands on Mr X's shoulders and pushed him quickly and firmly in his chair before he fell and hurt us both. I would expect that any of the carers or staff will have also done the same and I hope they do!

Letter of 10 April 2018

[46] On 10 April 2018, Ms Watson sent a letter to Ms Radcliffe confirming a meeting with her on 13 April 2018. Ms Watson stated that:

the purpose of the meeting is for you to provide any further comments, feedback, information or any mitigating circumstances which you would like CHT to take into account in deciding what action if any should be taken in relation to your employment, and as regards to the allegations raised with you on 29 March 2018. You should be aware that a possible outcome of the meeting is the termination of your employment for serious misconduct.

11 April 2018 – Further meeting between Ms Farminer, Ms Ropati and Ms Watson

[47] At this meeting, Ms Farminer was requested to demonstrate how Ms Radcliffe "hit" Mr X. In Ms Farminer's opinion "the force that was used was well above what was warranted". Ms Watson questioned Ms Farminer about the use of force. Ms Farminer explained that she had seen other health care assistants push Mr X back into his chair "but not with the same level of force".

Disciplinary meeting with Ms Radcliffe - 13 April 2018

[48] On 13 April 2018 at 9.00 a.m., Ms Radcliffe and her representative met with Ms Watson and Ms Ropati. Ms Radcliffe disputed Ms Farminer's version of events and the time frames within which she said Mr X was attended to. During the course of the meeting, Ms Radcliffe's representative, when asked why Ms Farminer would make up the incident, felt that she was acting maliciously because she had not liked an instruction issued earlier in the evening to her by Ms Radcliffe. Ms Radcliffe denied Ms Farminer's version of events and said that she had not used excessive force when

pushing Mr X on the night of 27 March 2018. Ms Radcliffe was not requested to demonstrate how she had pushed Mr X.

Phone interview with Ms Dumanghi – 13 April 2018

[49] Ms Watson and Ms Ropati made a call to Ms Dumanghi at 9.37 a.m. on Friday 13 April 2018, to ask her whether she was aware there had been an incident on 27 March 2018 between Mr X, Ms Radcliffe and Ms Farminer. Ms Dumanghi, who was the registered nurse on duty that night, was not aware of any incident but she did notice that Ms Farminer had not joined them for the break as she usually did.

[50] The notes of the interview include the following exchange:

CR (Carol Ropati)

CR Who got the phone for Mr X?

AD (Adelfa Dumanghi)

AD I did.

CR Why did you get the phone?

AD Mr X was distressed.

CR Did Joelle ask you to get the phone?

AD No. I got it. I came out of [P's] room and went into Mr X's room as I could hear Treena talking to Mr X.

CR Was Treena yelling at Mr X?

AD No.

CR Where was Joelle at that time?

AD Joelle was standing by the drug cupboard.

[51] Ms Dumanghi's version of events differed from Ms Farminer's who had claimed that she had been the person to suggest a telephone call by Mr X to his wife and that she had got the phone for him. Further, there were discrepancies in the time frames. Ms Watson checked the log on the nurse phone and was able to see that a call had been made to Mr X's wife at 6.24 p.m. on 27 March 2018 which lasted for about 10 to 15 minutes. A further meeting was arranged with Ms Farminer to discuss the discrepancies.

Meeting with Ms Dumanghi – 16 April 2018

[52] On 16 April 2018, Ms Watson and Ms Ropati met with Ms Dumanghi. Ms Dumanghi was asked whether she had heard any yelling or shouting on the 27 March 2018. She responded that she heard a firm high voice but not yelling at around 6.00 to 6.30 p.m. The questions around the pushing of Mr X were as follows:

CR When you saw Treena pushing Mr X back into the chair was she using force?

AD No, she was using usual amount of force.

CR In your opinion it wasn't too hard?

AD No not too hard

CR Where was Joelle?

AD Outside in front of the medication cupboard.

CR So did Joelle report anything to you

AD No, no one reported Mr X being on the floor

CR Would they normally?

AD Yes

CR You went into the room. Joelle was outside of the room, where was Treena?

AD She was standing in front of Mr X and she was telling him that he needed to stay seated.

CR How was she speaking to him?

AD Firmly, but he often doesn't listen. Previously has been restrained at a previous facility and he often thinks the staff are trying to restrain him.

CR Where was Joelle - Did she seem upset.

AD Outside the room but didn't seem upset

- CR Was she looking into room
- AD Was looking into P's room
- CR Why did you go into Mr X's room?
- AD Because I heard Treena talking to Mr X and thought she may need help.
- CR Where was Mr X?
- AD Sitting in his chair but trying to get up.
- CR What did you do while you were there?
- AD I tried to calm him down. Suggested ringing his wife. Mr X said he did want to talk to her. Adelfa told Mr X to wait and she would get the phone. Adelfa went and got the phone back to him with his wife on the line.
- CR Joelle stated that she had got the phone.
- AD No, we use the nurse's phone...
- CR Did you hear any of the comments stated in Joelle's statement? "You need to sit down Mr X – stay there you are taking up all of my time, the time I have with other residents because you're not listening and you won't stay still. I don't have time to put up with you."
- AD No I didn't hear anything like that.
- CR Do you have any concerns regarding Treena's performance?
- AD No, she is standing up for others if Residents are rude to staff, [one resident] in particular can be very rude and Treena will ask him not to speak to the RN like that.
- MW You don't think the force Treena was using to push Mr X back in the chair was above normal?

AD No, but with this chair being up against a wall and may make a noise when Mr X falls back into it.

CR Do you think Mr X would say “well I don’t like the way I am treated in here and can’t do anything about it, I have no voice”.

AD No but he has told me that I am beating him up while I was performing personal cares and has told his wife this but this wasn’t happening.

CR When you went to get the phone for Mr X where was Treena?

AD I think she followed me out of the room. The phone was in my pocket but I went to get the phone number...

CR So in your opinion was the way Treena was speaking to Mr X acceptable?

AD It was loud and high pitched but sometimes have to speak loudly so the resident can hear.

CR Does Mr X have a hearing problem?

AD Yes as he was a bit groggy at the time. Normally doesn’t have a problem.

Meeting with Ms Farminer – 17 April 2018

[53] A further meeting was held with Ms Farminer on 17 April 2018. Ms Ropati and Ms Watson interviewed her about the differences in time frames between what she was telling them and what Ms Radcliffe was saying. Ms Farminer admitted that she may have got the times wrong.

[54] Ms Farminer also seemed to change her version of events in relation to the phone. When asked specifically about whether she had got the phone, Ms Farminer said “I think someone gave it to me as I handed it to him. Not sure who handed the phone to me.”

[55] This differed from her statement on 4 April 2018 when she stated “I got him the phone and left him to speak to her.”

[56] At the meeting on 17 April 2018, Ms Farminer said that she asked the Registered Nurse if it was OK for Mr X to talk to his wife. The Registered Nurse on duty was Ms Dumanghi. Ms Dumanghi gave a different account, as set out in para [52] above. Ms Dumanghi says Ms Farminer was outside the room, it was Ms Dumanghi that suggested ringing Mr X's wife and it was Ms Dumanghi who went to get the phone and took it to him to speak to his wife.

[57] At the end of the meeting, Ms Ropati summed up why Ms Farminer had apparently mistaken the timeframe by stating “ you were so upset about the whole thing that when you went to write your statement you had to re-write it several times.”

Further meeting request – 20 April 2018

[58] On 20 April 2018, Ms Radcliffe received a letter from Ms Watson requesting a meeting on 2 May 2018 for any further feedback to be provided. Prior to the meeting on 2 May 2018, Ms Watson wrote to Ms Radcliffe providing a preliminary decision that her employment be terminated. In the letter, Ms Watson stated:

we consider that Ms Farminer had no reason for putting forward false or malicious allegations against you. Our preliminary view is that we prefer her account of events...as such CHT is considering terminating your employment without notice for serious misconduct.

Ms Radcliffe was invited to provide any further information before the meeting on 2 May 2018.

Letter of termination

[59] On 3 May 2018, Ms Radcliffe received a letter confirming termination of her employment for serious misconduct. Ms Watson stated that she believed Ms Radcliffe had been:

physically and verbally abusive to resident, Mr X on Tuesday 27 March 2018. This amounts to serious misconduct as defined in CHT's Code of Conduct:

- Any action or inaction which seriously affects the quality of care, the safety of, and the physical and mental wellbeing of residents and/or employees.
- Physical or verbal intimidation or violence between employees, residents, visitors while at any CHT premises or while providing service to resident.

[60] Ms Radcliffe was informed that her employment was to terminate immediately and to return her uniform and other property to CHT.

Test of justification – s103A of the Act

Section 103A states:

- (1) For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[61] Section 103A(3) sets out a number of factors relating to the process required of an employer before dismissing or taking action against an employee. In the Employment Court decision in *De Bruin v Canterbury District Health Board*¹ Judge Couch considered a case in which a very experienced mental health nurse had, during the course of managing a difficult patient, slapped the patient's face. The mental health nurse, Mr De Bruin was summarily dismissed and brought a personal grievance claim.

[62] In that decision, Judge Couch states at para [38]:

The test of justification comprises both the substantive decision made by the employer and how the employer arrived at that decision.

Judge Couch then cites the Employment Court decision in *Angus v Ports of Auckland Limited*² :

[26] Nor, too, does the new statutory provision alter the approach to what is sometimes referred to as procedural fairness exemplified in a number of decisions of the Court. The legislation (in subs (3), (4) and (5)) although expressing this for the first time, continues the emphasis on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor, and to determine that this will not be fatal to justification. A failure to meet any of the s.103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to have taken an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3) is very likely to be found to have been dismissed unjustifiably. By the same token, however,

¹ [2012] NZEmpC 110.

² [2011] NZEmpC 160 at para [39].

simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal and disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[63] In the *De Bruin* case, Mr De Bruin acknowledged that he had slapped the patient on the face and this was wrong. Ms Radcliffe denied hitting Mr X. She accepted “pushing” Mr X in the course of performing her duties, but she says her action was not wrong and was to ensure his safety, in the circumstances. The issue in each case was the degree of force used and the context.

[64] I find there were serious flaws in CHT’s investigation. It is my view that based on the facts at the time, CHT could not conclude Ms Radcliffe’s actions on 27 March 2018 amounted to serious misconduct.

Second Issue

Was Ms Radcliffe’s dismissal justified?

Unlawful suspension

[65] The flaws in the investigation commenced as soon as Ms Farminer disclosed to Ms Harrison that she was upset by the incident observed by her on 27 March 2018. Ms Harrison when reporting the matter to Ms Brownlee reported that Ms Farminer had observed Ms Radcliffe “hit” a resident. Ms Brownlee passed this same information on to Ms Watson who, after discussing it with Ms Ropati, felt such an allegation warranted Ms Radcliffe’s immediate suspension. Ms Farminer never accused Ms Radcliffe of hitting Mr X, she claimed she had observed seeing Ms Radcliffe push Mr X with excessive force.

[66] Relying on third-hand information, Ms Ropati and Ms Watson formed the view that the complaint by Ms Farminer was that Ms Radcliffe had hit Mr X. This information was not checked with Ms Farminer, Ms Radcliffe, nor Ms Dumanghi. The complaint sent to Ms Radcliffe and the invitation that she attend a disciplinary meeting was on the basis that she had hit Mr X. She had not, this was never Ms Farminer’s complaint. Ms Radcliffe was wrongfully suspended in my view.

Flawed investigation

[67] The key issue was whether the push by Ms Radcliffe was deliberate and the amount of force used was excessive. Ms Radcliffe says that the amount of force used was not excessive and was to ensure Mr X did not fall forward and hurt himself.

[68] Ms Farminer says she saw one push only that occurred on 27 March 2018 and she considered that the push was excessive. Ms Farminer is a student nurse who has had one placement in a rest home prior to her placement at CHT and no qualifications in dealing with people with dementia.

[69] When questioned Ms Farminer did not appear to understand the extent of experience and training that Ms Radcliffe had had with people with dementia.

[70] During the course of the disciplinary investigation, Ms Ropati and Ms Watson asked Ms Farminer to demonstrate the force of the push by Ms Radcliffe. Ms Watson and Ms Ropati did not request Ms Radcliffe to demonstrate the push nor did they ask Ms Dumanghi, the registered nurse on duty on the night and who witnessed a push by Ms Radcliffe, to perform such a demonstration.

[71] From the evidence, Ms Ropati and Ms Watson formed their view that Ms Radcliffe had used excessive force on Mr X following a demonstration by Ms Farminer.

[72] Other flaws in the process included the fact that Mr X did not identify Ms Radcliffe as a person who mistreated him. Mr X was shown a photo of Ms Radcliffe and said that she was not one of the ones that he was talking about. Mr X's wife was clear that she was happy with the care that Mr X received at CHT Glynnavon. Mr X's wife was at pains to explain that Mr X was a large strong man with independent views who could be difficult and she herself had had to push him back with both hands in order to prevent him falling and hurting himself and her. Ms Dumanghi the registered nurse on duty at the time was spoken to by Ms Watson and Ms Ropati and confirmed that Ms Radcliffe was not a person who would hit or push a resident with excessive force. She was there on the evening of the incident and heard Ms Radcliffe speaking to Mr X and saw one of the pushes. She was satisfied that the push was not with excessive force.

[73] The other serious flaw in the investigation related to the unreliability of Ms Farminer. She made a statement a number of days after the incident of 27 March 2018, following a request to do so. Ms Farminer told the Authority that she had written and re-written her version of events a number of times. Her first statement on 4 April 2018 was inaccurate in terms of the time frames and concerning who suggested getting the phone for Mr X to call his wife and who got the phone.

[74] In her first statement Ms Farminer claimed that she had asked Mr X whether he wanted to speak with his wife and that she had gone and got the phone for him. She further stated that she had calmed Mr X following the phone call. Ms Dumanghi an experienced registered nurse said that it was she that got the phone for Mr X so that Mr X could telephone his wife. I prefer the evidence of Ms Dumanghi over Ms Farminer. It is my view that Ms Watson and Ms Ropati formed a view in their minds very early on in the investigation after being told that the complaint was that Ms Radcliffe had hit a resident and after seeing the demonstration of the push by Ms Farminer.

[75] Even though the overwhelming evidence gathered by Ms Watson and Ms Ropati, excepting Ms Farminer, supported Ms Radcliffe's version of events, they did not accept her version of events. They preferred the statement of Ms Farminer, a student nurse with little experience in the treatment of patients with dementia, limited experience with assisting with Mr X and whose account of the incident was unreliable.

[76] Another significant flaw related to the instruction by Mr X's family that the health care assistants and the nurses were not able to use a lap belt on Mr X to prevent him from falling. That instruction from the family meant that Ms Radcliffe and other health care assistants had to use their judgment with respect to the amount of force to use when pushing Mr X in to his seat to ensure that he did not fall and hurt himself or anybody else. Due to Mr X's stature, a push with enough force for him to sit back in his chair was required. This was a very difficult position to put health care assistants in and Ms Radcliffe was adamant that the amount of force that she used on 27 March 2018 was required in order to ensure Mr X sat back down in his chair and did not topple over and injure himself. It was not disputed that Mr X is a difficult patient, with dementia who at times became aggressive. I do not consider that the

investigation took sufficient account of this situation and the instruction from the family regarding the use of a lap belt.

[77] I find that the investigation was distinctly insufficient and failed to meet the standards required by s.103A(2 and (3) of the Act. I find that the decision to dismiss Ms Radcliffe and the process adopted to reach that decision were outside the range of what a fair and reasonable employer could have done in all the circumstances at the time. The dismissal was unjustifiable.

Employer's resources

[78] In reaching this conclusion, I have had regard to the resources available to CHT. CHT is a large employer. Such a large employer can properly be expected to conduct an investigation fully and thoroughly. Any significant failure to do so will be unjustifiable. The conclusion to dismiss Ms Radcliffe was not one which a fair and reasonable employer could reach.

[79] As in *De Bruin* an important factor was Ms Radcliffe's length of service and experience as a health care assistant. She had lengthy service, was a capable and reliable health care assistant.

Third Issue

In the event that the Authority finds Ms Radcliffe was unjustifiably dismissed what remedies, including reinstatement, is Ms Radcliffe entitled to?

[80] Ms Radcliffe seeks reinstatement to her former position. Whether that remedy should be granted depends on whether the test in s.125 of the Act is met. If that test is met, namely whether it is practicable and reasonable to reinstate, then the question is whether or not there was contribution by Ms Radcliffe to the situation such that she should be denied reinstatement.

[81] Section 125 of the Act provides:

Section 125(1). This section applies if –

It is determined that the employee has a personal grievance; and
The remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in s.123(1)(a).

(2) The Authority may, whether or not it provides for any of the other remedies specified in s.123, provide for reinstatement if it is practicable and reasonable to do so.

[82] “Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully.”³

[83] Reinstatement was opposed by CHT. Ms Radcliffe disputes having pushed Mr X with excessive force. For the reasons above, I disagree with the conclusion reached by Ms Watson and Ms Ropati preferring Ms Farminer’s version of events, that Ms Radcliffe did excessively push Mr X.

[84] In those circumstances, there is no reason to consider whether or not Ms Radcliffe “would assault another patient”. Ms Radcliffe did not do so. In *De Bruin*, Mr De Bruin accepted that he had slapped the patient and so the question as to whether he would do so again was a relevant one.

[85] Ms Radcliffe is a very experienced and capable health care assistant, she has received extremely positive performance reviews during the course of her employment and Ms Watson herself did not believe that Ms Radcliffe would hit a patient. Ms Dumanghi was clear that it was not in Ms Radcliffe’s nature to push a patient with excessive force.

[86] CHT needs to be conscious of the professional consequences of dismissal. Judge Couch in *De Bruin* cited the Chief Judge in *Lewis v Howick College Board of Trustees* at paragraph [5] as follows:

[5] As in the cases of other professional employees whose very livelihoods are affected by dismissal from employment, the consequences for a school teacher of dismissal for misconduct or incompetence and especially, as in this case a summary dismissal for serious misconduct, affect not only that employment relationship. Whereas many other dismissed employees have opportunities to seek alternative employment within their fields of experience and for which they are qualified, teachers (and others) must also be professionally registered to practice. Dismissals of teachers (and a range of lesser sanctions in employment) trigger automatically a vocational or professional registration investigation. As with many other professions there is little, if any, opportunity for employment in New Zealand without registration... so the effective dismissal of a teacher is especially significant. Put simply, allegations of misconduct

³ *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [2].

or incompetence place teachers (and other similarly registered occupations) in double jeopardy of their livelihoods. Accordingly, employers of teachers must act to a high standard when their decisions can have these consequences.

[87] This statement is particularly relevant to Ms Radcliffe. Ms Radcliffe has worked as a healthcare assistant for approximately 5 years. The consequences to her of a summary dismissal for serious misconduct involving the alleged “abuse” of a resident in her care, will leave her with little opportunity for similar employment.

[88] Ms Radcliffe lives in an isolated community in which alternative prospects of employment other than in the farming and kiwifruit industry are non-existent.

[89] When questioned by the Authority Ms Radcliffe spoke of her enjoyment working with the elderly and how much she enjoyed training student nurses. Ms Radcliffe said she would continue to work and train student nurses, if reinstated. I consider reinstatement to be practicable and reasonable in the circumstances.

[90] CHT is ordered to reinstate Ms Radcliffe to her former position.

Compensation under s123 (1)(c)(i) of the Act

[91] Ms Radcliffe has suffered hurt and humiliation as a result of her unjustified dismissal. Following her dismissal she was not able to sleep and lost her appetite which affected her Type 1 diabetes. Ms Radcliffe developed pneumonia, all of which she attributed to the stress and hurt resulting from her dismissal. An award of compensation of \$20,000 is appropriate.

Loss of remuneration – s128 of the Act

[92] Ms Radcliffe sought urgent reinstatement to her position. While waiting for the Authority’s investigation meeting, Ms Radcliffe made enquiries of rest homes regarding employment. Ms Radcliffe lost earnings totalling \$5,837.76 gross from the date of her dismissal to the date of the investigation meeting. I order CHT to pay Ms Radcliffe the sum of \$5,837.76 in lost remuneration pursuant to s.128 of the Act.

Section 124 of the Act – contribution to the dismissal

[93] Having concluded that Ms Radcliffe was unjustifiably dismissed, I must apply the provisions of s.124 of the Act. I do not consider that Ms Radcliffe contributed to

the situation which gave rise to her dismissal. On 27 March 2018, Ms Radcliffe pushed Mr X back into his chair to prevent him from falling over and injuring himself and possibly her. Ms Radcliffe was working to an instruction that she was not to use a lap belt to prevent Mr X, a large man from getting up, falling over and injuring himself.

[94] In order to ensure that he was safe in his seat, she pushed him, as did other health care assistants. Ms Radcliffe's push required some force and I accept that the force used by her was not excessive in the circumstances. Ms Radcliffe did not contribute to the situation which gave rise to her dismissal. Accordingly, there will be no reduction in remedies awarded to her.

Costs

[95] Costs are reserved. Ms Radcliffe has fourteen days in which to file a memorandum as to costs. CHT has fourteen days within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority