IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAURAU ROHE

[2022] NZERA 82
3026417

	BETWEEN	ANGELA WARD Applicant
	AND	EDENVALE HOME TRUST BOARD Respondent
Member of Authority:	David G Beck	
Representatives:	Nicki Pender and Applicant in person Nathan Tetzlaff, counsel for the Respondent	
Investigation Meeting:	22 July 2021 and 17 February 2022	
Submissions Received:	22 July 2021 and 17 and 25 February 2022 from the Applicant 17 February 2022 from the Respondent	
Date of Determination:	10 March 2022	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This matter is also the subject of a 31 January 2022 preliminary determination of the Authority, in which I found Angela Ward was unable to pursue a unjustified disadvantage grievance relating to her assertion that Edenvale Home Trust Board (EHT) after the employment relationship ended, made an unwarranted complaint to the Nursing Council of New Zealand.[1] The extant proceedings deal with Ms Ward's remaining claims that: EHT unilaterally altered the status of Ms Ward's employment from part time to casual; whether EHT owes wages in lieu of notice to Ms Ward and whether Ms Ward's employment was affected to her disadvantage by unjustified actions or omissions perpetrated by EHT.

[1] *Angela Ward v Edenvale Home Trust Board* [2022] NZERA 23.

[2] Ms Ward, a registered nurse (RN) of over 40 years standing, worked for EHT in a part-time position commencing 20 October 2016 that ended by way of a dismissal communicated in a letter from EHT of 16 November 2016. The letter signalled the employment would end on 15 December 2016. In the event, Ms Ward worked eight shifts in her entire period of employment.

[3] Ms Ward's ongoing employment was the subject of a 90 days' trial period. The validity of the trial period was latterly not challenged by Ms Ward, and she accepted as such, that pursuant to what was then section 67B Employment Relations Act 2000 (the Act) that she was unable to pursue a personal grievance in respect of the dismissal. Ms Ward, however, relies upon s 67B(3) of the Act to pursue under s 103(1)(b) of the Act, a personal grievance that provides an avenue for an action where:

> … the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during the employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer. [2]

What caused the employment relationship problem?

[4] Ms Ward recalled responding to a vacancy EHT had advertised on Trade Me Jobs. The advert relevantly stated:

> Registered Nurse – Aged Care
>
> Company Edenvale Home
>
> Location Auckland City, Auckland
>
> Listed Fri 30 Sep, 7:42 am
>
> Type Part time, Permanent
>
> We are a 41 bed rest home, hospital & dementia unit and are seeking an experienced NZ Registered Nurse. Responsibilities will include Careerforce training, (full training will be provided). Estimated average hours will be 20 per week but will likely be in blocks of days/weeks to cover annual leave. If you are looking for a nursing role that gives you a balance of work and your own time or are semi-retired, we would like you to join our friendly dedicated team. Please forward your CV and covering letter to admin@edenvale.org.nz.

[2] Section 103(1)(b) Employment Relations Act 2000.

[5] Ms Ward phoned Marlene Hickmott, EHT's General Manager on 10 October and by email of 12 October Ms Ward briefly set out her extensive nursing background and attached a resume including recent experience in the aged care sector. A follow up email from Ms Ward to Ms Hickmott, reflecting the phone conversation, included: "It was very nice to talk to you Monday this week and learn more about the position being offered for a permanent part-time on-call Registered Nurse".

[6] Ms Ward was interviewed by Ms Hickmott for the position on 13 October. Ms Ward recalled being told during the interview that the position was to cover for nurses taking annual or sick leave and that it may involve "relieving some night shifts". Ms Ward says she responded to the latter pointing out she had not done night shifts since her training days and would not be available to work nights. Ms Ward then says Ms Hickmott "assured me that it (Night shift cover) would be very unlikely". It was agreed in a three day orientation that Ms Ward would initially be placed on a night, a morning and an afternoon shift.

[7] Ms Ward was offered the position on 18 October and provided with an individual employment agreement and expressly incorporated: job description, person specification and staff handbook. The job description described the role as a "Registered Nurse" and the person specification used the term "Duty Nurse".

[8] Hours of work are dealt with first in the body of the employment agreement at part 9 with a reference at cl 9(a) that "ordinary hours of work will be as detailed in the First Schedule" and cl 9(b) stated that in addition to the hours of the first schedule the employee:

> … is required to work any additional hours (whether on a roster basis or otherwise) as are necessary or reasonably required for the Employer or are reasonably required for the Employee to discharge his/her obligations and comply in all respects with the particular customs and practices that exist within the Employer's industry.

[9] The First Schedule to the employment agreement under the heading "Remuneration and other benefits" and "Hours of Work" then indicated:

> The employer may require you to be on-call as required at other times to cover staff unavailability.

And:

> There are a range of shifts. Part-Time (the latter designation being in handwriting and initialled by Ms Hickmott.).
>
> An employee's hours of work will be set out on a roster, which will be available one week in advance of occurring.

Comment

[10] I observe the above provisions are confusing and do not reflect the job advertisement and designation of the job as 'permanent part-time'. Ms Hickmott in giving evidence also appeared confused about the distinction between designations when I posited that given the requirements of the position (cover for absent staff), it may have been better to simply designate it as a casual position. Ms Hickmott responded by claiming the organisational needed to cover staff throughout a year with five registered nurses taking planned leave that allowed her to provide a reasonably constant working pattern for a part-time employee. Ms Hickmott also claimed the 'on call' component of the work was not being used in the accepted usage of such as a provision enabling someone to be always available to be called back to work at short notice.

[11] 'On call' from Ms Hickmott's perspective pertaining to Ms Ward, was her being available to fill the gaps in the roster that could largely be planned for scheduled leave periods of other nurses. In addition, Ms Ward was expected to make herself available to cover occasional unplanned absences. Mr Hickmott's written evidence made it clear EHT's expectation was:

> This is a flexible role with hours that will not be regular, and will change from time to time to meet Edenvale's needs. We were very clear about this to Angela throughout.

[12] I nevertheless conclude that there was a significant disconnect between: the above employment agreement provisions; how they were to operate in practice; and how the offer of employment was portrayed to Ms Ward. Whilst I do not consider there was an intention to mislead Ms Ward, she was misled.

[13] I observe a literal reading of the employment agreement's cl 9(b) and the first schedule, amounted to what was effectively, if insisted upon, a 'zero hours' or casual arrangement as no actual hours were guaranteed.

[14] Ms Ward by contrast, gave evidence that the role as described fitted with her lifestyle and other personal commitments and interests. In acknowledging this, Ms Ward said: "I like to know in advance what specific days and set hours I am working". This indicates Ms Ward was prepared to be flexible but had there been subsequent disputes over her availability, EHT had significant ability to impose hours upon Ms Ward. The 'on call' provision is essentially an availability provision that can only in terms of s 67D(2) of the Act, be in place if guaranteed hours are specified.

[15] I then observed that further 'expectations' placed upon EHT employees was also dealt with in the incorporated staff handbook that under the heading "Hours of Work" said "normal hours" had to have regard to the home being a 24/7 operation and: "Reliability of staff is therefore regarded by the Employer as a quality of utmost importance". Dealing with hours worked more than normal hours, the handbook stated: "Staff are expected to respond as positively to such requests as their circumstances will allow".

[16] Therefore, without paying any compensation for Ms Ward's availability and not detailing any guaranteed hours of work the employment agreement did not, however so unwittingly constructed or understood by EHT, comply with the Act. The only agreement protection Ms Ward had, was that rostered hours had to be set one week in advance.

Ms Ward's employment

Orientation

[17] Ms Ward's first shift was a night shift on 20 October 2016 (11:30 pm – 8 am). Ms Ward signed her employment agreement earlier on the afternoon of her first shift.

[18] On the first shift, Ms Ward was placed to observe alongside an RN and two care-givers (a.k.a. nurse aides) who comprised the staffing for the rest home area and a dementia unit. Ms Ward recalled inadequate and interrupted orientation in her first shift, as the RN had after two hours, asked Ms Ward to spend one on one time with a resident having difficulty

sleeping which took up a significant portion of the shift before she could observe the RN on the 6 am medication round. Ms Ward did not administer medication on this shift.

[19] The next two shifts on 25 and 26 October were a day shift and then an afternoon/evening shift and Ms Ward accompanied another RN for both shifts. Ms Ward spent both shifts observing the RN including watching but not administering, medication. Ms Ward says she was surprised she was not the subject of a competency assessment. Ms Ward says she expressed concern when the RN asked her to crush medication tablets and from that point the RN displayed an unhelpful attitude to completing her orientation by claiming she was too busy and had expected the other RN to deal with issues such as going through the computer systems, pager, and phone access numbers.

First solo shift

[20] Ms Ward says she was called on 27 October by Ms Hickmott and the Clinical Nurse Leader and asked to attend her first solo shift that forthcoming Sunday, as the normally rostered RN was on holiday. Ms Ward recalls being reluctant and raising her inadequate orientation but says Ms Hickmott insisted as there was no other RN available.

[21] On the first solo shift of the afternoon of 30 October Ms Ward worked alongside five caregivers. Issues arose during the medication round as Ms Ward was unfamiliar with residents. Ms Ward says as a precaution she decided the safety practice was to rely upon caregivers for identifying residents not in their rooms. For a variety of distracting reasons Ms Ward identified the shift was problematic and Ms Ward was unable to attend to her two medication rounds in a timely manner (although she completed both).

[22] The second solo shift Ms Ward completed was on 2 November, that Ms Ward says went better with less interruptions and more time to establish relationships with residents and staff.

Issues of concern

[23] Ms Ward recalled being called at home early in the morning of 4 November by Ms Hickmott who she says, “launched straight into a lengthy criticism of me saying that I was too slow and must do extra “training” and that her explanation for her delay in medication

administration, was ignored. Ms Hickmott suggested Ms Ward complete a further three orientation shifts.

[24] Ms Ward says she felt so unsettled by the call to the extent that she resolved to record any future exchanges with Ms Hickmott. Ms Ward emailed Ms Hickmott confirming she would work three further buddying shifts on 8, 9 and 10 November (all day shifts) and asked whether Ms Hickmott could confirm she would be paid for their total of 19 hours in her next pay cycle. Ms Ward says she got no timely reply to her email and had to ring Ms Hickmott on Monday 7 November and recalls Ms Hickmott emphasising that Ms Ward was required to be up to speed as soon as possible.

[25] The shifts were confirmed and on 8 November Ms Ward worked an afternoon shift administering medication without incident, alongside a supervising RN.

9 November shift

[26] For the next shift, Ms Ward was again paired with a supervising RN. Unfortunately, during this shift Ms Ward administered medication to a resident who she had misidentified. The accompanying RN immediately spotted Ms Ward's error. Ms Ward says the RN allowed her to finish the medication round unsupervised. An incident report was then completed by the RN with Ms Ward adding comment. Ms Ward in evidence maintained the RN on duty had wrongly identified the resident to her and then got distracted. However, Ms Ward's comment in the incident report did not fully describe how the mistake occurred beyond saying she "checked with the other RN …. that I was giving "X" her medication and that I had the correct medication for "X". Ms Ward says at the end of the shift the RN apologised to her saying she had been distracted by attending to relatives whilst Ms Ward wrongly administered medication.

10 November shift

[27] Ms Ward then worked a further shift on 10 November, commencing 7:30 am alongside another supervising RN. EHT's Clinical Leader was also present on this shift and during the afternoon, asked Ms Ward to administer medication whilst the RN was busy elsewhere and that she (the clinical leader), would watch over her. Ms Ward says in the

event, the clinical supervisor was distracted and Ms Ward for the most part, administered medication unsupervised.

[28] Ms Ward then recalls the clinical leader asking her toward the end of her shift to go and see Ms Hickmott to arrange future rostered shifts.

10 November meeting

[29] The subsequent meeting (10 November) in Ms Hickmott's office that the clinical supervisor attended, did not get go well. Ms Hickmott conceded that Ms Ward was not properly apprised of the purpose of the meeting, which from her perspective was to discuss Ms Ward's orientation and the medication error. Ms Hickmott recalled she had reviewed CCTV security footage prior to the meeting after Ms Ward had raised concerns about the adequacy of her orientation.

[30] The meeting got off to a bad start with consensus being that the first topic was Ms Ward's medication error that Ms Hickmott reinforced by displaying camera footage to Ms Ward and suggesting the error was her sole responsibility. Ms Ward then responded (angrily and defensively according to Ms Hickmott) and then after a further discussion the Ms Ward took a short break and retrieved her phone and proceeded to record the remainder of the meeting, she says at first surreptitiously. Ms Hickmott recalled she asked if the meeting was being recorded and when Ms Ward revealed that was so, Ms Hickmott asked she stop the recording but Ms Ward refused, which led to Ms Hickmott attempting to close the meeting. Ms Hickmott says this was a difficult process (trying to end the meeting), with her and the clinical leader eventually having to leave Ms Ward in her office to conclude proceedings. Ms Hickmott claimed Ms Ward got angry and defensive. Ms Ward by contrast, expressed concern that she felt ambushed by the direction of the meeting.

[31] Ms Hickmott then said after a period when Ms Ward had eventually left the office, Ms Hickmott returned with the clinical leader to discuss what to do. Ms Hickmott says she was concerned about Ms Ward's approach to the meeting and Ms Ward's "attitude" toward her and addressing the medication error.

[32] Ms Hickmott's written evidence claimed that during the meeting they had discussed Ms Ward working on night shift so she could more easily identify residents and Ms Ward

refused to consent to this. During the investigation meeting however, the reason for trying to place Ms Ward on night shift became a claimed health and safety issue with Ms Hickmott suggesting such concern prevented Ms Ward being considered for day shift during her subsequent notice period.

[33] The upshot after the meeting was Ms Hickmott decided a "formal meeting" to discuss Ms Hickmott's continued employment was required.

[34] Ms Hickmott says Ms Ward, sometime later on 10 November, returned to her office as she was in the process of completing the next meeting invite. After some discourse, Ms Hickmott says she provided Ms Ward with a just completed copy of the meeting invite for 15 November to discuss her trial period that included a warning that this may result in termination of employment. It was consensus, that Ms Ward read the letter and left it on the office floor and left the workplace.

[35] Ms Ward then received the 10 November letter by email authored by Ms Hickmott – it stated:

> I would like you to attend a meeting on Tuesday 15th November at 3.30pm to discuss your trial period. The meeting may result in the termination of your employment agreement with Edenvale Home.
>
> You are entitled to bring a support person to this meeting

[36] In a response email of 11 November, Ms Ward contended the invite was insufficiently clear what the purpose of the meeting was, citing it did not outline any allegations or concerns. Ms Ward asked whether her rostered shifts of 13, 15, 16, 22 and 23 November would proceed in the interim. Ms Hickmott responded within 90 minutes, stating EHT had made other arrangements for the 15 and 16 November shifts and that: "further shifts to be confirmed".

[37] In a further emailed letter of 11 November, Ms Hickmott did not elaborate further on the reasons for the anticipated 15 November meeting, claiming the statutory trial period provision (that she reproduced in the letter) provided:

> There is no requirement to provide reasons in writing but as part of good faith requirements, employers should advise the reasons verbally.

And:

> I have invited you to attend this meeting which gives you the opportunity to respond to my concerns. If you do not attend a decision will be made without your considerations.

[38] Further email exchanges in which Ms Ward disputed the above assumption ensued, culminating in an exchange on 15 November where Ms Ward, reiterating her concerns about "fair process" and saying her support person was not available for 15 November, concluded:

> Therefore there is no guarantee that you will follow fair process in the meeting.
>
> It would therefore be unsafe for me to attend the meeting as it stands and without a support person.

The dismissal and aftermath

[39] Ms Hickmott did not respond to the above email and Ms Ward did not attend the 15 November meeting. By way of an emailed letter of the morning of 16 November Ms Hickmott confirmed a decision made on the 15th to give notice of the termination of Ms Ward's employment in accord with the employment agreement trial period provision effective on 15 December 2016.

[40] Dissatisfied by the way her employment relationship ended, Ms Ward by email of 16 November 2016, advised Marlene Hickmott, that she was contemplating pursuing a personal grievance related to her perception that the process leading up to her dismissal had been unfair and she also sought payments for three shifts and 30 minutes for attending work during an orientation.

[41] Ms Hickmott in a letter of 17 November acknowledged notification of the personal grievance being contemplated and reiterated EHT's view that the process they engaged in was "compliant", noting: "Trial Period requirements are outside the Disciplinary requirements and the meeting called was not a disciplinary meeting". Ms Hickmott did not offer any work shifts in the letter but noted Ms Ward was "… expected to be available for on-call if required".

[42] Ms Ward did not work any shifts during her notice period – Ms Hickmott claimed night shifts were offered but declined and that due to health and safety concerns Ms Ward could not be offered day shifts.

[43] Correspondence between the parties continued with Ms Ward also identifying that she considered her employment agreement entitled her to a rostered part-time position rather than being treated as a 'casual' for shift allocations. The correspondence ceased in early February 2017 after EHT provided a certificate of service confirming Ms Ward had been employed by EHT "between 22 October 2016 and 15 December 2016" as a registered nurse.

[44] Ms Ward sought advice and by way of a letter she produced to the Authority of 8 December 2016, her then advocate, raised a personal grievance described as "her unjustified dismissal and a breach of good faith for failing to provide her with adequate training to perform her role as a registered nurse".

[45] On 15 January 2017, Ms Ward says she received a letter from the Nursing Council of New Zealand providing a copy of a report from EHT to the council in the form of a "Competence Notification". Ms Ward took issue with a comment the EHT general manger provided to the council suggesting her practice competency be reviewed due to her "displaying signs of memory loss".

[46] Ms Ward did not at the time raise her concerns with EHT about the general manager's comments preferring to deal directly with the Nursing Council.

[47] Dissatisfied with progress on her personal grievance, Ms Ward indicated to EHT by email of 29 May 2017, that the advocate author of the 8 December 2016 letter was no longer acting for her. It would appear from documentation disclosed that Ms Ward did nothing further about her grievances until she instructed a barrister, who in a letter of 15 January 2018 to EHT re-framed the grievance and confined it as an unjustified breach of Ms Ward's employment agreement, alleging a unilateral change had been effected to change the status of her role from part-time to casual. No other issues were alluded to.

[48] Utilising the same barrister, Ms Ward filed her first statement of problem with the Authority on 17 April 2018. The problem Ms Ward sought assistance with was a claim for unpaid wages in the amount of $673.75 and compensation for the distress she had

experienced as a result of the alleged unilateral altering of her role. No other claims were identified.

[49] The parties attended mediation in June 2018 but this failed to resolve matters.

[50] After mediation Ms Ward engaged another counsel and although maintaining contact with the Authority it was not until 8 October 2020 that Ms Ward's new counsel by email (copied to EHT's counsel), communicated that Ms Ward wished to restart the Authority investigation. Counsel noted in the email that Ms Ward's Nursing Council issue had been resolved and that Ms Ward remained a registered nurse.

[51] The matter was then a subject of some delay that the parties were not responsible for until a case management conference of 1 April 2021 was convened. This led to a Directions Notice from the Authority requiring Ms Ward's counsel to file an amended statement of problem to clarify Ms Ward's claims and remedies sought. Ms Ward's counsel confirmed that no unjustified dismissal was being pursued as it was accepted that the dismissal had been enacted within a valid 90-day trial period.

[52] EHT's counsel alluded to Ms Ward having not raised her additional disadvantage grievance within 90 days following her dismissal (as per s 114 (1) of the Employment Relations Act 2000 (the Act)) and that in attending mediation EHT had done so without prejudice to this stance.

[53] In an amended statement of problem filed 16 April 2021, Ms Ward's counsel detailed claims that in addition to the alleged unilateral variation from part-time to casual status and a claim for payment of notice in lieu the Nursing Council referral was at issue.

[54] An Authority investigation meeting took place on 22 July 2021 in Auckland, but it was adjourned part heard as EHT's general manager did not have time to give evidence.

[55] It was the Authority's intention to resume the investigation by video link on 13 August 2021. However, Ms Ward sought and was granted an adjournment due to her then counsel withdrawing at late notice. Ms Ward indicated she was seeking alternative legal advice. The Authority was then contacted by Ms Ward on 14 September, citing the Covid-19 level 4 Lockdown in Auckland as being an impediment to her obtaining representation. On

16 November Ms Ward indicated she had decided to represent herself and "I will contact you again soon with any further decisions relating to this matter.

The Authority's investigation

[56] At the investigation meetings held on 22 July 2021 and the resumed on 17 February 2022, I considered written briefs and oral evidence from Angela Ward and for EHT Cheryl Martin, an RN, and Marlene Hickmott.

[57] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions, but I do not record all evidence and submissions received.

Issues

[58] The issues I must determine are:

(i) Did EHT unilaterally change the status of Ms Ward's position to casual rather than permanent part -time?

(ii) Does EHT owe Ms Ward any wages in lieu of notice for not providing her with rostered shifts during the one month notice period?

(iii) Was Ms Ward's employment affected to her disadvantage by EHT's unjustified actions or omissions during the period leading up to her dismissal?

(iv) If I find that Ms Ward was disadvantaged what remedies are appropriate?

(v) If any remedies are awarded to Ms Ward, should they be reduced considering s 124 of the Act if it is found Ms Ward contributed to the situation given rise to her personal grievance claims.

Assessment of issues (i) and (ii)

[59] On the first issue I am unable to find that EHT unilaterally altered Ms Ward's employment agreement. This is simply because there was no need to do so, as the agreement as it stood was effectively casual from the outset in that no guaranteed hours were provided. I have found that the employment agreement contained no payment for Ms Ward being 'on

call' but looking at the employment agreement and incorporated policies I am not convinced that Ms Ward did not have the ability to refuse 'on call' duty if contacted. I have found that the job advertisement describing the role as permanent part-time was misleading and will deal with this in considering what payment in lieu of unallocated shifts during her notice period is due.

[60] That leads to consideration of the second issue of once Ms Ward's employment was ended on notice, was there any obligation on EHT to provide shifts during that period and how many were contemplated.

[61] I consider that EHT was obliged, given how the role was portrayed to Ms Ward and the fact that rostered shifts were cancelled during the notice period or simply not allocated, to offer Ms Ward at least some part-time hours for the four weeks notice period as an in-lieu payment. However, I have to consider Ms Ward's reluctance to work nights and whether it was reasonable for EHT to insist she do so on health and safety grounds. Applying discretion and considering all contextual matters including the employment agreement's provisions, I do not consider it was reasonable to attempt to force Ms Ward to only do night shifts citing health and safety of resident concerns. Had the concerns been legitimate, then Ms Ward should simply have been paid her notice in lieu. I balance this up with Ms Ward's claim she had not agreed to do any night shifts when she had done so during her orientation period.

Finding

[62] Considering the fact that Ms Ward's roster was unaccountably changed during the notice period and the factors identified above, I consider Ms Ward should receive an in lieu of notice payment equivalent to ten eight hour shifts at $27.50 per hour amounting to compensation under s 123(1)(b) of the Act in the amount of $2,200.

Assessment of issue (iii): unjustified disadvantage claim

[63] The test I must apply objectively is found in s103A of the Act and it overall includes assessing how EHT approached the situation when Ms Ward signalled her concerns about her orientation and the handling of the medication administration issue. I then assess if EHT's actions "were what a fair and reasonable employer could have done in all the circumstances at

the time the dismissal or action occurred". [3] I also must consider whether procedural fairness factors as codified in s103A were adhered to and any other contextual factors I think are appropriate.

[64] I find that Ms Ward was not sufficiently alerted to her employer's concerns about the medication error prior to the first meeting of 10 November. Clearly what has emerged in evidence is those concerns later contributed to the assessment made of the viability of Ms Ward's ongoing employment. Ms Ward was entitled under s 103A (3)(b) of the Act to prior notice that the meeting she attended was part of an investigation process of the medication incident. Prior notice would have allowed Ms Ward to collect her thoughts and respond in a more measured manner including deciding if she wanted to obtain representation to attend the meeting. So would disclosure of the video footage prior to the meeting. In the event, Ms Ward was 'ambushed' and this led to a sharp deterioration of the employment relationship. Ms Hickmott should have carried out a fair and open investigation of Ms Ward's responses to the medication error and this should have included then interviewing the other RN present. This did not occur and as a result, given her years of experience, Ms Ward reacted defensively.

[65] Further, whilst I accept under the 90 days trial provision that EHT had the right to dismiss Ms Ward, in doing so they did not give Ms Ward a reasonable opportunity to address the concerns they had about her nursing practice by refusing to specify in writing what these concerns were.

[66] I consider that EHT also did not act in a good faith manner in both convening the initial meeting with Ms Ward to discuss her medication mistake and then relying upon her reaction to such, to found undisclosed concerns at the second meeting that led to a decision to end Ms Ward's employment.

Finding

[67] I find Ms Ward has established that she was unjustifiably disadvantaged and is entitled to a consideration of remedies.

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[3] Section 103A (2) Employment Relations Act 2000.

Remedies

Lost wages

[68] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Ms Ward because of the grievance. Here I find Ms Ward's lost remuneration was attributed to the personal grievance.

[69] As discussed for the reasons outlined above EHT is ordered to pay Ms Ward lost wages in the sum of $2,200 gross.

Compensation for hurt and humiliation

[70] Ms Ward gave compelling evidence of the impact of the actions of EHT leading up to her dismissal. Given Ms Ward's vast nursing experience and displayed knowledge of nursing practice, her treatment was objectively humiliating and would have has caused significant distress at the time and an impact upon her dignity.

[71] Considering the circumstances, including the relatively short period of employment, and awards made by the Authority and Court in similar situations and how EHT acted, I consider Ms Ward's evidence warrants compensation of $3,000 under s 123(1)(c)(i) of the Act.

Contribution

[72] Section 124 of the Act states that I must consider the extent to what, if any, Ms Ward's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess this, I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*[4].

[73] Having carefully weighed the evidence and examined the limited transcript of the 10 November 2016 meeting and email correspondence I come to the view that Ms Ward's combative and at times sarcastic approach to the meetings did contribute significantly to the

[4] *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

circumstances given rise to her personal grievance. Whilst this may be speculation, I observe that Ms Ward taking a more conciliatory approach may have preserved her ongoing employment.

[74] I find that a reduction of 10 % is justified in all the circumstances and apply that to the compensatory remedy only.

Conclusion

[75] I have found that:

a. Angela Ward was unjustifiably disadvantaged by the way Edenvale Home Trust Board approached their concerns about her nursing practice prior to dismissing Ms Ward.

b. Edenvale Trust Board must pay Angela Ward the sums below:

(i) $2,200 gross lost wages; and

(ii) $2,700 compensation without deduction pursuant to s 123(1)(c)(i) of the Act.

Costs

[76] Costs are reserved. I suggest that the parties explore settling costs by agreement. If no agreement can be reached, I invite Ms Ward to make a costs' submission within 14 working days of his determination being issued and I provide Edenvale Trust Board with a further 14 days to respond.

David G Beck
Member of the Employment Relations Authority