

# S103A; A Serious Slapping

Last month (Issue 208) we looked at the changes to s.103A of the Employment Relations Act 2000 which provides the test for justification and the 'could/would saga'. A very recent Employment Court decision **de Bruin v. Canterbury District Health Board** (14 July 2012) brings back into focus the ongoing question of what a fair and reasonable employer 'could' do.

Mr de Bruin was an experienced mental health nurse who was accused of serious misconduct following an altercation with a difficult patient. He was accused of slapping a patient and of holding her down with his knee during a restraint process. He was further accused of failing to document the situation, namely failing to complete an incident form or similar report. Both the physical conflict and the failure to report were characterised as failures to meet the required standards of performance.

The Board investigated the issues and de Bruin accepted that he had slapped the patient, and that while this was a serious error he stated that this was a reflex action rather than an intended one. He accepted that while his knee may have touched the patient, he did not put any weight on her. The Court does not record the explanation given by Mr de Bruin regarding the failure to report the incident. Mr de Bruin further provided a detailed explanation as to personal pressure that he was under at the time which presumably affected his judgement. These included the effects of the February earthquake and personal and financial pressures.

At a subsequent meeting Mr de Bruin was dismissed for a breach of the CDHB Code of Conduct, finding that the slapping of a patient in the face and holding her down by the knee was a breach of his duties and responsibilities as a nurse and amounted to assault. As required by the Health Practitioners Competence Assurance Act, the Board reported the incident to the Nursing Council. The Council investigated and determined in an interim decision, that his practice should be conditional, requiring him to advise any future employer of the incident and having professional supervision. Mr de Bruin's practising certificate was not suspended.

The Court considered both the substance and the procedures adopted by the Board; in the latter applying the tests adopted in the **Angus v. Ports of Auckland** (The Advocate, July 2012) decision. Namely, that the investigation requirements set in s.103A(3) of the Employment Relations Act 2000 are absolute minimum requirements and therefore simply following them will not of itself mean that a dismissal is justified.



The Court found that the Board had combined the two incidents (knee and slap) into one allegation of assault and therefore referred to the events as 'a single instance of serious misconduct and a single breach of (the) Code of Conduct'. The Court held that while the slap was accepted by de Bruin the knee incident was not. The investigation showed contradictory and inconsistent reports from a number of witnesses. The Court found that in such circumstances it was not reasonable for the Board to reach the conclusion it did on the information held. More investigation was required and some of the witnesses, who gave inconsistent reports, should have been reinvestigated.

The Court further determined that the Board had reached the conclusion that the slap was deliberate. The evidence on this was similarly inconsistent and the Court again held that such a conclusion was not reasonable without further investigation by the Board. Mr de Bruin and other witnesses should have been re-interviewed on this point. In part these findings related to the obligations on the Board because of its size; the s.103A test is to be applied having regard to "the resources available to the employer" (s.103A(3)(a)).

In addition the Court found the process unjustified because of the manner in which the allegations were put to him. The first letter, setting out the allegations referred to a 'violation of both the CDHB and Nursing Council competencies'. This was explained (in the hearing) to mean the CDHB Code of Conduct. The Court found this to be a significant flaw stating:

*"This was a thoroughly unsatisfactory approach to informing Mr de Bruin of this allegation and enabling him to properly respond to it. Unless the employer is unable to do so, every allegation should be specific and, where it is based on a document, accompanied by a copy of that document. I find that CDHB also failed to meet the requirements of s 103A(3) in this regard."*

Substantively, the Court put great emphasis on its belief that the Board dismissed believing the slap to have been deliberate, stating that a deliberate action was more serious than a reflexive action. The Court concluded that any determination on intention required the decision-maker to understand how hard the slap was. This issue was one which again the Court felt needed greater investigation.

The Court further found that the test of justification required consideration of all the circumstances. In this case the Court felt that the Board failed to consider the effects of the earthquakes on staff and patients, the personal circumstances of Mr de Bruin, his length of service and the professional consequences of dismissal on a nurse. This latter issue revolved around the effective 'double jeopardy' whereby such a finding could cost the employee his job and his profession.

Having found the dismissal to be unjustified, procedurally and substantively, the Court went on to consider remedies. Reinstatement was sought and came to be considered under the new rules, i.e. it is no longer the primary remedy and may be provided for if it is practicable and reasonable to do so (s.125). Practicability was found to mean:

*"... is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully."*

The sole reason provided for a lack of practicability was concern that de Bruin might assault another patient. The Court found that it was practicable for the Board to provide the support that de Bruin would need to ensure that this would not happen. With regards the 'reasonableness' of reinstatement the Court found that *"an employer opposing reinstatement will need to substantiate that opposition by evidence . . ."*. Given that reoffending was the only stated concern of the CDHB, the Court found that it was not reasonable to deny reinstatement. The personal pressures on de Bruin no longer applied, he was *'acutely aware'* of the actions he had taken and the Nursing Council had not suspended him. The Court found the incident was a one off and therefore unlikely to reoccur. Reinstatement was awarded as reasonable and practicable.

The Court then came to consider de Bruin's contribution for financial remedies. The Court considered that as a professional, de Bruin was at fault for failing to take appropriate measures to deal with the personal pressure that was on him. Although not a reason for the dismissal, the Court found that the failure to report the incident was misconduct; although because no action was taken against the other nurses involved, the Court found it was not significant misconduct. The Court dealt similarly with de Bruin's failure to seek medical assistance for the patient. Considering the above the Court made no award for lost remuneration or humiliation.

In conclusion the case is significant for the relatively narrow approach that it takes to the interpretation of s.103A of the Employment Relations Act 2000. The Court set the standard requirements for an investigation at quite a high level, overturning two specific findings made by the employer on the grounds that the employer had failed to reinvestigate what the Court took to be an inadequate investigation. Significantly the Court seems to have set its own standard for the acceptability or otherwise of behaviour, reaching a finding that the slap fell short of serious misconduct. Despite this, in awarding a penalty, the Court determined that the light, reflexive action, slap was *'plainly wrong and a breach of his professional obligations'* and was *"... very significant misconduct"*.

All cases will turn on their own facts and while it is unlikely that there will be a duplication of the facts before the Court in this instance, there are still some lessons to be learnt:

- (a) Inconsistencies in the statements of witnesses may require a reinvestigation prior to a final finding;
- (b) the size and resources available to an employer will affect the procedural expectations; and
- (c) finally and significantly as a procedural step, allegations should be specific and where based upon a document, a copy should be provided.

The demands on employers in disciplinary procedures appear to be becoming more, rather than less, complex and demanding. Contact McPhail Gibson & Zwart Ltd before beginning these processes rather than after they are concluded.