

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 53
5361848

BETWEEN DEBORAH HOFF
 Applicant

A N D THE WOOD LIFECARE
 (2007) LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Applicant
 Jeff Goldstein and Linda Ryder, Co-Counsel for
 Respondent

Investigation meeting: 25 and 26 October 2012 at Nelson and 11 January 2013
 by telephone

Submissions Received: 1 February and 1 March 2013 from Applicant
 19 February 2013 from Respondent

Date of Determination: 13 March 2013

DETERMINATION OF THE AUTHORITY

- A. The Applicant was unjustifiably dismissed due to procedural deficiencies.**
- B. Subsequently discovered serious misconduct justifies the reduction of the compensatory remedy pursuant to the principles of *Salt v Fell* [2008] ERNZ 155**
- C. Costs are reserved**

Prohibition from publication

[1] The Authority's investigation involved hearing evidence in respect of a care home. During the course of the evidence, the names of some of its present and former residents were disclosed. It is not necessary for the identities of the residents to be disclosed and, in order to protect their right to privacy, I prohibit from publication any information that reasonably could identify them.

[2] In addition, evidence was heard both from and concerning a former member of staff and the nature of his relationship with Mrs Hoff, which it was alleged was an intimate or improper one. As the former member of staff is married, and he is not a party to the proceedings, I accept that it could cause unnecessary distress to him and his wife for his name to be linked to the allegations. Accordingly, I prohibit from publication the name of this member of staff.

[3] However, it is accepted by Ms Sharma, who requested an order for prohibition from publication on behalf of the individual, that it is not possible to suppress all the information regarding this former member of staff (such as his role within the respondent company) as it would render the logic of the determination unacceptably obscure. Accordingly, whilst balancing the need to protect this person's privacy with the need to ensure that the Authority's determination is comprehensible, a risk inevitably subsists that his identity could be worked out.

Employment relationship problem

[4] Mrs Hoff worked as a senior caregiver at The Wood Retirement Village (The Wood) between 2002 and her dismissal on 3 May 2011. She claims that she was unjustifiably dismissed. The respondent denies that Mrs Hoff was unjustifiably dismissed.

[5] The respondent also relies on alleged after-discovered serious conduct which it says is relevant to the issue of remedies pursuant to the principles set out by the majority in the Court of Appeal judgement of *Salt v. Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] ERNZ 155. The nature of this alleged after discovered misconduct is that Mrs Hoff and the male staff member (hereinafter referred to as *the gardener*) engaged in displays of affection, including kissing and cuddling, which amounted to behaviour in the workplace that could have brought the company into disrepute or otherwise damaged its reputation or image. The

respondent argues that such behaviour is serious misconduct, relying on its house rules.

Brief account of the facts leading to dismissal

[6] Mrs Hoff had a master key, with the knowledge and approval of the respondent, which she used to access the medication trolley. It also opened the doors of the apartments and studios in which elderly residents lived under a licence to occupy. On 26 April 2011, either shortly before (according to Mrs Hoff) or shortly after she had clocked out (according to the respondent), but in any event after her shift had ended at 3pm, she used the master key to give the gardener access to Studio 3. Studio 3 was unoccupied but still contained all of the personal belongings and furniture of a resident who had passed away in February 2011. Mrs Hoff states that she gave the gardener access to this studio in order to allow him to water the plants on the balcony belonging to the studio.

[7] It is common ground that, shortly after Mrs Hoff and the gardener had entered the studio, the receptionist of The Wood went to unlock the studio door in order to show the family of a prospective resident around the studio. These individuals had walked in off the street, without an appointment. Finding the door unlocked, the receptionist entered the studio with the family and found the gardener in there, his glasses on the bed and keys, which the receptionist recognised as belonging to Mrs Hoff, next to them. The gardener, who looked startled according to the receptionist, walked out onto the balcony and started watering the plants. Mrs Hoff was nowhere to be seen. However, a family member noticed that there was somebody (Mrs Hoff as it turned out) hiding behind the bathroom door, which was partially open.

[8] The family member commented that someone was behind the door but Mrs Hoff, despite the family member (a prominent member of the Nelson business community according to the respondent) walking in and looking at her, did not emerge from behind the door. The receptionist was embarrassed by this but was able to lead the family members out shortly afterwards when one of their telephones rang.

[9] Mrs Hoff's evidence is that she could not explain why she had hidden behind the bathroom door when she heard the front door of the studio being opened but

realised that it put her in a bad light and so, for the rest of that day, had felt anxious about it.

[10] As soon as the receptionist had finished with the visitors, she reported the incident to the Facility Manager, Ms Berryman. Ms Berryman called the gardener in to her office and told him what the receptionist had reported. A note made by Ms Berryman shortly afterwards states that the gardener said that he and Mrs Hoff had been in Studio 3, that Mrs Hoff had unlocked the studio door so that he could look after the plants on the balcony and that Mrs Hoff did this all the time for him. The note records that the gardener said that the door was shut as they had been *gossiping* and Mrs Hoff had hidden behind the bathroom door when someone entered the room because *she did not want to be found out*. The gardener said that nothing had happened.

[11] Ms Berryman was unable to speak to Mrs Hoff that day as Mrs Hoff had already gone home. Ms Berryman spoke to Mrs Hoff the following day at 10am and her note states that Mrs Hoff told her that she had been in Studio 3 with the door shut talking with the gardener and had hidden behind the bathroom door when the receptionist came in with a visitor. The note records that Mrs Hoff said that *hiding was a stupid thing to do* as she had finished work and so was not doing it in work hours.

[12] The same day, 27 April, Ms Berryman wrote a letter to Mrs Hoff as follows:

Dear Debbie,

This letter serves to confirm my intention to hold a disciplinary meeting with you in regard to an incident that occurred between 3-3.30pm Tuesday afternoon 26th April 2011. It is alleged that at that time you were hiding behind the bathroom door in Studio 3 and [the gardener] was also in the Studio with the main door shut. You [sic] keys were left on the bed along with [the gardener's] glasses. You did not come out of the bathroom despite a visitor saying there was someone behind the door. Hiding behind the bathroom door indicates there was something inappropriate happening or about to happen. This furtive behaviour was not a good look for our staff as well as highly embarrassing for the staff member showing the Studio. This also occurred after your duty had finished when you were not meant to be in the facility. It appears that you used your key to access the Studio when you were not authorised to.

This behaviour in the workplace had the potential to bring the company into disrepute or otherwise damage the reputation or image of the company.

The above allegations, if substantiated, could be viewed as serious misconduct by The Wood and could lead to your dismissal. Your actions bring into question the company's faith, trust and confidence in you.

You are required to attend a disciplinary meeting on Tuesday 3rd May at 11am at The Wood. You are invited to bring a support person with you to this meeting. At this meeting you will be given every opportunity to respond to the allegations. I have enclosed a copy of the details of these allegations.

Yours sincerely,

[13] A similar letter, although not identical in wording, was sent to the gardener.

[14] The disciplinary meeting with Mrs Hoff took place on 3 May and she was accompanied by her husband as her support person. Present at the meeting were Ms Berryman, who took the notes, and Ms Williams, General Manager, who was the decision-maker. Mr Hoff spoke for Mrs Hoff at the beginning of the meeting and made the following points, according to the notes taken by Ms Berryman (which Mr and Mrs Hoff both accepted were largely accurate):

- (a) Mrs Hoff had not clocked out when she let the gardener into Studio 3 and so was still at work;
- (b) She had never been told not to unlock doors;
- (c) She got a fright and had hidden behind the door;
- (d) She felt intimidated when Ms Berryman was around and so hid behind the door;
- (e) She had a fear of being seen;
- (f) She had been employed for 9 years;
- (g) She had been totally stressed in her job losing her mother (who had died in January) and several residents she was close to;
- (h) That he didn't know why the gardener was in there but may have been looking after the studio keeping it looking nice; and
- (i) That he and his wife could not answer why the gardener's glasses were there.

[15] In response to questions, Mrs Hoff stated, according to the notes, that:

- (a) She just went in, and took the keys out of the door;

- (b) She did not know why she shut the door;
- (c) She put the keys down but did not know why;
- (d) She did not know why she had hidden behind the door;
- (e) They had just been talking.

[16] There was some discussion as to whether Mrs Hoff had clocked out (the clocking out records showing she had done so at 3.12pm on 26 April) and then gone back upstairs with the gardener. Mrs Hoff strenuously denied that this was the case and said that she had let the gardener in before she had clocked out. In my view, taking into account all the evidence, she had clocked out, but even if she had not done so, she had certainly finished her shift when she entered the studio with the gardener.

[17] Mrs Hoff said that she did not know why she did *any of that* but that nothing was going on and she had just *had a silly moment and hid behind the door*. She said that she did not think about going into another person's property without permission and did not think about the deceased resident's plants being private as opposed to belonging to The Wood.

[18] The disciplinary meeting lasted approximately 1½ hours, including two adjournments of around 20 minutes each. During one of these adjournments, Ms Williams checked with the receptionist when she had taken the visitors up into Studio 3. The receptionist indicated that she had done so around 3.20 to 3.25.

[19] After the second adjournment Ms Williams told Mrs Hoff that she did not accept her explanation for her inappropriate behaviour. She advised her that she felt it was totally unacceptable that Mrs Hoff would be in an unoccupied studio with a male staff member with the door closed and leaving the company's keys, including a drug and master key, on the bed while she chose to hide behind the bathroom door.

[20] Ms Williams told Mrs Hoff that she had made no effort to present herself when the visitor had said twice that there was someone behind the bathroom door and that her suspicious behaviour suggested something inappropriate may have happened or was about to happen and that it may therefore have brought the company into disrepute or otherwise have damaged the image of the company. She regarded this as a serious breach of the company's house rules and that she no longer had faith, trust and confidence in Mrs Hoff to be employed as a senior caregiver at The Wood.

[21] Mrs Hoff's employment was terminated with effect from that day, but she was paid two weeks' pay.

[22] The gardener attended a disciplinary meeting on the afternoon of 3 May 2011 but chose to resign from the employment of the respondent.

The issues

[23] Counsel for Mrs Hoff points to a number of alleged procedural failings by the respondent which, she submits, rendered the dismissal unjustified and which the Authority must therefore examine. These are as follows:

- (a) The failure of the respondent to offer Mrs Hoff a support person before being interviewed by Ms Berryman on 27 April 2011;
- (b) That the allegations were not initially treated as serious by the respondent;
- (c) The failure of the respondent to interview the gardener with a support person present before deciding to dismiss Mrs Hoff;
- (d) The failure to allow Mr and Mrs Hoff to talk about the stress she had been under which may have caused her to hide;
- (e) The failure of the respondent to give her a copy of the house rules prior to dismissal;
- (f) The failure of the respondent to put to Mrs Hoff its concern that she had ignored an express instruction not to open the door to Studio 3;
- (g) That the decision to dismiss was substantially unjustified.

Section 103A of the Employment Relations Act 2000 (the Act)

[24] For the purposes of determining, on an objective basis, whether an employee's dismissal was justified, the Authority must apply the test set out at s. 103A of the Act. This provides as follows:

(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.

(3) In applying the test in subsection (2), the Authority or the court must consider—

*(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

The failure to offer a support person to Mrs Hoff on 27 April 2011

[25] Ideally, the respondent would have allowed Mrs Hoff the opportunity to have a support person present during this initial interview with her. However, I do not believe that Mrs Hoff was unduly prejudiced by this failure, for two reasons.

(a) First, Mrs Hoff had already guessed that she was going to be spoken to about the incident the previous day.

(b) Second, and more importantly, the conversation between Mrs Hoff and Ms Berryman was a preliminary discussion only to ascertain the key facts. Ms Berryman prepared a short summary of the conversation (as well as of her conversations with the receptionist and the gardener) and sent this summary to Mrs Hoff with the letter of 27 April 2011 inviting her to attend a disciplinary meeting in five days' time. This written

summary gave Mrs Hoff the opportunity to correct or amplify what she had told Ms Berryman on 27 April.

[26] Therefore, whilst I believe that this failure to provide Mrs Hoff with the opportunity to have a support person present on 27 April 2011 was a flaw, I believe it was a minor one which did not result in any unfairness to Mrs Hoff.

The allegations were not initially treated as serious by the respondent

[27] Mrs Hoff's counsel submits that the letter of allegation did not refer to the rumours that had been alluded to by Ms Berryman and that this is significant because the absence of a reference to the rumours means that the rumours were not seen as important, and so the respondent could not then have concluded that something inappropriate was happening or about to happen in the studio where Mrs Hoff hid behind the bedroom door.

[28] However, although Ms Williams told Mrs Hoff when she dismissed her that Mrs Hoff's suspicious behaviour suggested that something inappropriate had happened or was about to happen, which may have brought the company into disrepute, I understand from the respondent's evidence that this conclusion did not derive from the rumours but from the fact of Mrs Hoff hiding behind the bathroom door without having any substantial explanation. I do not, therefore, see it of significance that the rumours were not alluded to in the letter of allegation. This is related to Ms Sharma's submission that the rumours were not put to Mrs Hoff so she was denied the right of reply. However, I do not believe that the rumours formed a part of the reasons for dismissal as cited by Ms Williams, and so this failure did not in anyway prejudice Mrs Hoff.

[29] Mrs Hoff and her husband also suggested that they did not realise that Mrs Hoff could be dismissed for what had happened. However, the letter of allegation makes clear that, if substantiated, the allegations could be viewed as serious misconduct and could lead to her dismissal.

[30] Mrs Hoff's counsel also relies on the fact that Mrs Hoff was not suspended before the disciplinary meeting, suggesting that the matter was not treated as serious misconduct. However, the gardener was suspended and so any risk of repeat behaviour by him and Mrs Hoff in the workplace had been removed in any event. I do not, therefore, see the fact that Mrs Hoff was not suspended as significant.

Not interviewing the gardener before deciding to dismiss Mrs Hoff

[31] This failing was of a more substantive nature as Ms Williams, the decision-maker, had not had the benefit of hearing the gardener's version of events prior to reaching a decision with respect to Mrs Hoff's conduct. Although she had the benefit of the written statement that had been prepared by Ms Berryman, it was very short and lacked detail. Had she spoken to the gardener before making her decision, in theory, new avenues of inquiry could have been opened which could have led Ms Williams to reach a different conclusion.

[32] However, a written note was taken by Ms Berryman of Ms Williams' disciplinary interview with the gardener which the gardener agreed was accurate. A careful scrutiny of these notes shows that the gardener spent some considerable time during the meeting talking about him being allowed to water plants and clean decks and that he had been asking Mrs Hoff to open studios for him for the preceding six weeks. He stated that, just because he and Mrs Hoff were in the room together did not mean that they were misbehaving, although he acknowledged that it did not look right, that he was probably startled and that he could not explain why his glasses were on the bed. His answers indicated that Mrs Hoff had been unlocking Studio 3 for him for some time, that he had been consoling and counselling staff and that he was not a lecherous person. The notes also indicate that the gardener was not happy about discussing rumours regarding his allegedly inappropriate behaviour with Mrs Hoff and with another woman.

[33] Having analysed these notes, it appears that nothing was said during the disciplinary interview of the gardener which could have opened an avenue of inquiry which could reasonably have led to the respondent reaching a different conclusion with respect to Mrs Hoff. Therefore, although Ms Williams should have interviewed the gardener, who was effectively a co-accused of Mrs Hoff, prior to making her decision about Mrs Hoff's culpability, I believe that nothing was said by the gardener that would legitimately have caused Ms Williams to reach a different decision. This flaw in the proceedings did not, therefore, amount to unfairness.

[34] However, turning to s.103A(5) of the Act, it is clear that the Authority must not determine a dismissal to be unjustifiable solely because of defects in the process if the defects were minor and did not result in the employee being treated unfairly. Whilst this defect did not result in Mrs Hoff being treated unfairly, I do not believe

that the failure to interview the gardener prior to the dismissal was minor. As the requirements in s.103A(5) of the Act are conjunctive, and not disjunctive, I must find that this defect leads to the dismissal being unjustified.

Failure to allow the Hoffs to discuss Mrs Hoff's stress and extenuating circumstances

[35] Ms Berryman's notes of the disciplinary meeting with Mrs Hoff were generally agreed to be accurate. The notes show that Mr Hoff, speaking on behalf of Mrs Hoff, did state that she had been *totally stressed in [her] job losing several residents [she is] close to*. The notes later show that Ms Williams told Mrs Hoff to *keep to the facts*. That was in response to Mrs Hoff saying that she had been a loyal member of staff there. The notes also show that Ms Williams asked Mrs Hoff whether she had anything else that she wanted to say and that Mrs Hoff responded explaining that she had opened the door, had been talking, had hidden in the bathroom, and that the gardener had not been in the bathroom.

[36] Although the evidence of Mrs Hoff was that she had not been allowed to say everything she wanted to, which was corroborated by Mr Hoff, the notes suggest that Mrs Hoff had not been prevented from talking about the stress she had been under. What appears to be the case is that Mrs Hoff did not make a great deal of the stress that she says that she had been under and that Mrs Hoff had said that she did not know why she had hidden behind the door. She did not say that she had hidden behind the door because she had been feeling a great deal of stress.

[37] Whilst I accept that Ms Williams appears to have stopped Mrs Hoff from talking further about her having been a loyal member of staff, she does not appear to have stopped her trying to explain her actions, and that Mr Hoff did state that she had been feeling stressed after losing her mother and some residents to whom she had been close.

[38] I therefore believe, on balance, that Mrs Hoff was not prevented from explaining her actions and that her difficulties arise from the fact that she had no cogent explanation for her conduct. Even during her evidence to the Authority, all she could say as the reason for her hiding behind the bathroom door is that she had been startled. She was unable to explain the underlying cause of her feeling startled or her hiding.

[39] Therefore, I do not believe that Mrs Hoff was prejudiced in the way alleged.

The failure of the respondent to give her a copy of the house rules

[40] Ms Williams regarded Mrs Hoff's conduct as a serious breach of the company's house rules, which led Ms Williams to no longer have faith, trust and confidence in Mrs Hoff to be employed as a senior caregiver at The Wood. It is understood that Ms Williams was thinking of the first example of serious misconduct cited below, which appears in the house rules, although the second example cited below could equally apply to the circumstances in question. The two examples are:

(xiii) Behaviour either in or out of the workplace that may bring the company into disrepute or otherwise damage the reputation or image of the company; and

(xvii) Conduct, comments or misrepresentations that are, or are likely to be injurious to the employer.

[41] Ms Berryman did not include a copy of the house rules in her letter of 27 April 2011 to Mrs Hoff, although the letter did state that Mrs Hoff's alleged conduct could be viewed as serious misconduct and could lead to her dismissal.

[42] However, s. 4(1A)(c) of the Act makes clear that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of employment of one or more of its employees is to provide to the employees affected access to information, relevant to the continuation of the employees' employment and an opportunity to comment on that information before the decision is made. The house rules were clearly relevant as they formed the basis of Ms Williams' conclusion that Mrs Hoff had committed serious misconduct. No fair and reasonable employer could have failed to have provided the house rules to Mrs Hoff prior to the disciplinary procedure.

[43] I do not believe that this omission caused Mrs Hoff any prejudice as she was well aware of the nature of the allegation and the possible consequences. However, I cannot characterise the omission as minor, as the house rules formed the very basis of the standards against which Mrs Hoff's conduct was being judged. I must therefore find that the omission results in the dismissal being unjustified.

It was not put to Mrs Hoff that she had been told expressly not to open the door to Studio 3

[44] The evidence of Ms Berryman was that, after the resident who had been living in Studio 3 had died and her relatives had stated that they wished to continue to pay for occupancy of the studio, with all of the furniture and effects still in it, in order to help them make the place look more appealing for selling their right to occupy, Ms Berryman had told each member of the staff (save the gardener, who did not need to access studios in any event according to the respondent) that no one was to access Studio 3 without her permission.

[45] Ms Berryman's evidence on this point was quite clear. She said that she had a clear memory of telling Mrs Hoff this and that the caretaker had been present.

[46] Mrs Hoff's evidence was that she categorically denied that Ms Berryman had given her specific instructions not to go into Studio 3 and that it was to be kept locked. She stated that she had no recollection of being told that the mother-in-law of the deceased resident would be keeping the studio clean and watering the plants. She also stated that she was unaware that this relative was accessing the studio for this purpose. She also denied that Ms Berryman had told her that Ms Berryman was the only person permitted to enter Studio 3 for the purpose of showing prospective clients the room.

[47] The notes of the disciplinary meeting carried out by Ms Williams indicate that this specific point was not put to Mrs Hoff. Furthermore, the letter dated 27 April 2011 inviting Mrs Hoff to the disciplinary meeting on 3 May does not expressly state that Mrs Hoff had been instructed not to access Studio 3 but had done so contrary to that instruction. The letter does state the following:

It appears that you used your key to access this Studio when you were not authorised to.

[48] Unfortunately, this statement could have more than one meaning and it is certainly not the case in my opinion, as submitted by the respondent, that this statement was sufficient to enable Mrs Hoff to understand that she was being accused of deliberately disobeying an express instruction.

[49] Section 103A(3)(b) of the Act makes clear that the employer is expected to raise its concerns with the employee before dismissing him or her. As I have already

stated above, s.4(1A)(c) of the Act requires an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of employment of an employee to provide him or her access to information which is relevant to the continuation of his or her employment and an opportunity to comment on that information before the decision is made.

[50] Ms Williams stated in her evidence to the Authority that one of the key points that caused her to decide that Mrs Hoff had committed serious misconduct was that Mrs Hoff had used the company's keys to access the studio having been instructed not to do so.

[51] Under cross-examination, Ms Williams did not seem to appreciate that if she believed that Mrs Hoff was acting contrary to an express instruction, that belief had to be put to Mrs Hoff in order to allow her to object. For example, if this had been put to Mrs Hoff, she may have convinced Ms Williams and Ms Berryman that Ms Berryman was, in fact, mistaken in her belief that she had expressly told Mrs Hoff not to access the studio. That, in turn, could have led to Ms Williams finding that dismissal was not appropriate.

[52] In my view, no fair and reasonable employer could have failed to have put this concern clearly and unambiguously to Mrs Hoff. Because of the respondent's failure to do so, I am bound to find that the dismissal was procedurally flawed and that, in turn, the dismissal was unjustified.

The decision was substantially unjustified

[53] Ms Sharma submits that the respondent, at the time of the decision to dismiss, had not substantiated on balance that Mrs Hoff had breached its House Rules. Ms Sharma submits that there was no finding of misconduct that brought the respondent into disrepute or otherwise damaged the reputation or image of the company. Ms Sharma asserts that Ms Williams stated *speculatively* that *something inappropriate may have happened or was about to happen and therefore may have brought our Company into disrepute or otherwise have damaged the image of our Company*.

[54] However, Ms Williams' evidence to the Authority was that the reason for her finding of serious misconduct included the following:

- (a) that Mrs Hoff had no legitimate reason to be in the studio with the door closed;
- (b) that she had displayed furtive behaviour by hiding behind the bathroom door;
- (c) that she was off duty, and so had no right to be there;
- (d) she had been expressly instructed not to access the unit, but had used the company's keys to do so, which was in breach of the family's wishes and exceeded her professional boundaries.

[55] The House Rules at paragraph 22.1 (xiii) refers to *behaviour...that may [emphasis added] bring the company into disrepute or otherwise damage the reputation or image of the company*. This does not require that the company has actually been brought into disrepute, or that its reputation or image has actually been damaged. I understand from Ms Williams' evidence that her finding that *something inappropriate may have happened or was about to happen and therefore may have brought our Company into disrepute or otherwise have damaged the image of our Company* refers to the likely reaction of the visitors to Mrs Hoff's conduct of furtively hiding behind the bathroom door.

[56] Furthermore, in light of Mrs Hoff's conduct of hiding behind the bathroom door and refusing to come out, I believe that a fair and reasonable employer could have concluded that Mrs Hoff had been present in the room for an inappropriate reason and, further, that such conduct could have damaged its reputation or image. I therefore do not find that the decision to dismiss Mrs Hoff was substantially unjustified.

Remedies

[57] Having established that Mrs Hoff was unjustifiably dismissed for procedural reasons, I must now consider what remedies are due to her.

Subsequently discovered serious misconduct

[58] The respondent relies on what it called subsequently discovered serious misconduct to argue that, if Mrs Hoff were to succeed in her claim of unjustified dismissal, any remedies that may be due to her under s. 123 of the Act should be

reduced before further reducing those remedies under s.124 of the Act in line with her contribution towards the situation that gave rise to her personal grievance. The respondent is relying on the principles expounded by the majority in the Court of Appeal judgement of *Salt v. Fell* referred to above.

[59] The nature of the evidence of the subsequently discovered serious misconduct was that several members of staff had come forward after Mrs Hoff's dismissal and the gardener's resignation to say that they had witnessed or heard of occasions when Mrs Hoff and the gardener had been kissing and cuddling in corridors. Evidence was also given, indirectly, that some of the residents seemed to infer that there was an intimate relationship between Mrs Hoff and the gardener.

[60] Having heard evidence from four members of staff, I do believe that Mrs Hoff and the gardener were more likely than not to have been kissing and cuddling (or possibly hugging, which evokes a less intimate picture) at work. I believe that this was likely to have been happening whilst Mrs Hoff was stressed because of her mother being terminally ill and because some residents she had been close to had died shortly after her own mother had died. I do not believe that it is necessary for me to reach any conclusions as to whether or not Mrs Hoff and the gardener were in fact conducting an extramarital affair and, on the evidence, it is not possible for me to safely reach that conclusion in any event.

[61] However, I do accept the respondent's submissions that such conduct in the setting of an elderly care home was not professional. Mrs Hoff and the gardener were clearly careless in the way that they conducted themselves, having been observed by several staff members on different occasions, and the fact that they were seen to be very defensive about the way they were behaving (evidence having been given of them springing apart when a member of staff saw them and of the gardener speaking to one of the members of staff saying that no rumours were to be spread about what the member of staff had seen), tells me that they were aware that they should not have been acting in the way they were in the workplace.

[62] I am also convinced that such behaviour, in such a setting, could damage the reputation of the facility because, if it were seen by members of staff and residents (the evidence strongly suggesting that this behaviour had been so witnessed), it could equally have been seen or become known of by visitors and members of the families who were wishing to inquire about placing their elderly relatives in the facility. I

have no doubt that some individuals would find such conduct distressing or distasteful or could raise questions about the level of care being given if members of staff are distracted by such behaviour.

[63] Therefore, I am persuaded by the respondent's argument that such conduct, although it was discovered after Mrs Hoff's dismissal, amounted to serious misconduct on the grounds that the house rules contained two examples of serious misconduct already cited above at (xiii) and (xvii) of the house rules.

[64] I believe that the behaviour of Mrs Hoff with the gardener as witnessed by several members of staff falls exactly into those categories of serious misconduct.

[65] The principles expounded by the majority in *Salt v. Fell* make clear that subsequently discovered misconduct of a truly significant nature [see para 83] can be taken into account when determining the remedies under s.123 of the Act. That section confers remedies in broad discretionary terms and the Authority is required to exercise its broadly discretionary power as equity and good conscience dictates.

[66] While *Salt v. Fell* refers to misconduct of a truly significant nature, I believe that serious misconduct must fall within this category. It is trite law that serious misconduct, once proven, entitles an employer to dismiss an employee summarily. It is arguable that no worse sanction for misconduct exists in an employment setting in New Zealand. Therefore, as I have found that the subsequently discovered misconduct committed by Mrs Hoff falls within the category of serious misconduct as set out in the house rules, I am satisfied that that conduct was of a truly significant nature. I am therefore further satisfied that I can take it into account when deciding what remedies to award to Mrs Hoff.

[67] Their Honours Judges Chambers and Robertson stated, at [96]:

At times, the subsequently discovered conduct may be so egregious that no remedy at all should be given, notwithstanding the dismissal being technically unjustifiable. But that will not often be the outcome. After all, the employer has also committed a wrong, namely an unjustified dismissal based on what he or she knew at the time. He or she did not act as a fair and reasonable employer would have acted in all the circumstances at the time.

[68] This is not a case, I believe, where it would be justified in not awarding any remedies to Mrs Hoff in respect of her unjustifiable dismissal as the conduct, whilst

capable of amounting to serious misconduct under the House Rules, was not egregious. However, I am satisfied that a reduction in remedies is justified.

Loss of wages

[69] Mrs Hoff claims a loss of income from 2 May 2011 to February 2012 in the gross amount of \$9,575.64. This sum includes pay for 3 May 2011 (of \$116.25 gross) which counsel for the respondent says has already been paid. I accept Mr Goldstein's submission on the point that Mrs Hoff was paid two weeks' payment in lieu of notice commencing on 3 May 2011, and that she has, accordingly, been paid for that day. Therefore, it is appropriate to deduct \$116.25 from \$9,575.64, resulting in \$9,459.39.

[70] However, Mr Goldstein also argues that Mrs Hoff's loss of wages should be restricted to the lesser sum of three months ordinary time remuneration, and then further reduced in accordance with *Salt v Fell* principles. I believe that it is appropriate to limit Mrs Hoff's loss of wages claim to three months' wages, in reliance upon s. 128 (2) of the Act, as Mrs Hoff commenced new employment within a month of being dismissed, and as I do not see any cogent reason to exercise the Authority's discretion under s.128(3) to award a greater sum. That means that Mrs Hoff's loss of wages amounts to \$7,556.25. I do not accept that it is \$3,614.65 as asserted by Mr Goldstein. S128(2) makes clear that the Authority must (subject to s. 124 and s. 128(3)) order the employer to pay the lesser of a sum equal to the lost remuneration (\$9,459.39) or to three months' ordinary time remuneration (\$7,556.25). Section 128(2) does not contemplate deducting from three months' ordinary time remuneration sums earned during the first three months immediately following the termination of the employment.

[71] Having limited the recovery of lost wages to the period of three months, I believe that it would be overly harsh to reduce this sum further pursuant to the principles of *Salt v Fell*. In any event, given the wording of s. 128(2) of the Act, the Authority must order the employer to pay the lesser of a sum equal to lost remuneration or three months' ordinary time remuneration (subject to ss.124 and 128(3)) and *Salt v Fell* does not appear to endorse such a reduction expressly in breach of the mandatory force of s.128(2).

Compensation for humiliation, loss of dignity and injury to feelings

[72] In relation to compensation for humiliation, loss of dignity and injury to her feelings, I must consider what sum Mrs Hoff is entitled to under s. 123(1)(c)(i) of the Act. The Authority heard evidence from Mrs Hoff's GP and her counsellor of the effect of the dismissal upon her. Depression, sleeplessness and moderate distress were diagnosed, although these were relatively short lived. I did not get the impression that the dismissal had a severe or long lasting effect on her, despite the medical and counselling evidence put before the Authority, especially as she started new employment within a month of being dismissed. I do accept that Mrs Hoff was affected negatively by the dismissal however.

[73] Ms Sharma submits that Mrs Hoff should be awarded \$25,000 under s. 123(1)(c)(i). I see no reason to award such a significant sum. I believe that the sum of \$10,000 would be appropriate. However, in line with my findings in respect of the after discovered serious misconduct, I reduce that sum by 50% in accordance with the principles expressed by the majority in *Salt v Fell*.

Contribution under s. 124 of the Act

[74] Turning to s.124 of the Act, I must consider the extent to which the actions of Mrs Hoff contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[75] It is my finding that Mrs Hoff was told not to access Studio 3 by Ms Berryman and that she did so contrary to that instruction. I also find that Mrs Hoff accessed Studio 3 after she had finished her duties. (Whether she did so before or after she clocked out is, in my view, irrelevant as her duties finished at 3pm and she should have returned her keys after she had finished those duties.) By accessing Studio 3 with the gardener after 3pm, she was, in my view, misusing company property. She also left the keys to the drug cabinet unattended.

[76] Of further high significance in the matter is the fact of Mrs Hoff hiding behind the bathroom door and failing to reveal herself even when she had been seen and her hiding having been commented upon by a visitor. Such behaviour was not only *stupid* as she herself characterised it but, more importantly, raised serious and legitimate suspicions about her motives by being in the room at all. The Authority did not have

the benefit of hearing evidence from the visitors as to their reaction to this unexplained behaviour, but such behaviour is more likely than not, in my view, to have raised serious questions in the minds of such visitors about how the facility was run and the professionalism of its management and staff. This was a key concern of the respondent in deciding to dismiss Mrs Hoff and I believe that it was wholly reasonable for the respondent to have harboured that concern.

[77] I have no doubt in finding that Mrs Hoff did contribute in a blameworthy way to the situation that gave rise to her personal grievance. Therefore, I believe that it is appropriate to reduce the remedies awarded above by a further 50%.

Orders

[78] I order that the respondent pay to Mrs Hoff the following sums:

- (c) The gross sum of \$3,778.13 in respect of lost wages; and
- (d) The sum of \$2,500 in respect of compensation under s. 123(1)(c)(i) of the Act.

Costs

[79] The parties are to seek to agree how costs are to be dealt with as between themselves. In the absence of such agreement within 28 days of the date of this determination, any party seeking costs may serve and lodge a memorandum by way of its counsel and any response should be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority