

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 545
3200259

BETWEEN	SEAN HIKA Applicants
AND	TE WHATU ORA – WAITEMATĀ DISTRICT Respondent

Member of Authority:	Peter Fuiava
Representatives:	Applicant in person Anthony Russell, counsel for the Respondent
Investigation Meeting:	21 June 2023 in Auckland
Submissions received:	20 June 2023 from the Respondent
Determination:	21 September 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem and the issue?

[1] Sean Hika was a full-time employed psychiatric assistant (PA) for Te Whatu Ora – Waitematā District (TWOW) until he was dismissed on 21 March 2022 for serious misconduct. The essential issue is whether his dismissal was substantively and procedurally justified.

How has the Authority investigated?

[2] For the Authority's investigation written witness statements were lodged from Mr Hika who provided letters of support from family and friends as to his character and general good standing in the community. For TWOW, written witness statements from registered nurses (RN) Sally Cocker, Amy Kim, and Jeneth Magallanes were provided. I also received witness statements from general manager Stephanie Doe, human resource advisor, Anne Manley-Lumsden, and group manager, Mark Ashby. All

witnesses answered questions under oath or affirmation from me and the parties' representatives. Although scheduled for two days, the investigation meeting required only one. Oral closing submissions were made by Mr Hika and Mr Russell.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What happened?

[4] In February 2021, Mr Hika was employed as a PA and worked at TWOW's Mason Clinic. Prior to working for TWOW, Mr Hika had worked in the security industry and for the Department of Corrections. He is a qualified security professional and holds a National Diploma in Security (Level 6).

[5] At 4 pm on 1 July 2021, Mr Hika was on duty in the Totara unit and was working in the day room. He noticed TK (not the service user's real initials) approach the door wanting to be let in. The door in question opens up to a two-metre wide, nine-metre-long corridor. To the left and some four to five metres from the door, is a nursing station which at the time was occupied by RN Cocker, Kim and Magallanes. At the other end of the corridor was a seated area that was used by a student nurse and nine other service users.

[6] On the morning of the investigation meeting Mr Russell provided me and Mr Hika with two colour photographs of the door from different vantage points; from inside the nurses' station and from the corridor. The photograph taken from inside the nursing station showed that it has a direct line of sight of the door where the following incident took place.

[7] Mr Hika stated that he observed TK approach and opened the door for him as he was allowed to the day room. There was no obvious sign that TK was angry or violent. Once inside, he started to rain down punches on Mr Hika almost immediately and had said that he was going to waste him "mother fucker" or words to that effect.

[8] Mr Hika further stated that he was on his own and that TK had him up against the wall and was punching furiously. Mr Hika put up an elbow block but that did not stop TK from punching him. Fearing for his personal safety, Mr Hika felt that he had no other option but to punch back which he did. He threw three to four punches at TK in self-defence. The first punch had no effect so he punched him two more times which enabled him to grab TK by the collar, put him off balance, and bring him to ground where Mr Hika restrained him.

[9] RN Cocker stated that she heard a bang, looked up and saw Mr Hika swinging and punching TK to his head three to four times. Seeing this, RN Cocker thought she needed to stop Mr Hika immediately and ran out of the nursing station followed by RNs Kim and Magallanes both of whom also stated they saw Mr Hika punch TK. When RN Cocker reached the pair, she observed TK on the ground in the foetal position with his hands covering his face. She told Mr Hika to “stop” but he grabbed TK and swore at him saying “you fucking cunt” and other verbal abuse. Mr Hika looked angry.

[10] RN Kim stated that she saw Mr Hika and TK swinging at each other and that Mr Hika had punched TK causing blood to drip from his face. RN Kim called security and two other PAs arrived. She heard Mr Hika say “fuck you” to TK. RN Magallanes stated that from the nurses station she witnessed Mr Hika punch TK three or more times and that when she reached them that Mr Hika was swearing and was angry at TK.

[11] When the two other PAs arrived, RN Cocker recalled Mr Hika saying “[t]his fucking cunt did this to me”. TK needed to be taken to the High Care area for medical attention. RN Cocker told Mr Hika that he needed to leave but he refused and escorted TK into High Care. Because TK was visibly upset and angry with Mr Hika’s presence, RN Kim requested that he leave which he did.

[12] TK sustained a cut above his eye which was sterilised and steri-stripped by RN Cocker. The next day, she noticed that he had two black eyes.

[13] Apart from having some spittle to the eye because he had been spat at by TK, Mr Hika did not sustain any injuries that required treatment.

[14] Mr Hika was instructed to finish work for the day. Before leaving, he completed a “Risk Pro” form in which he stated that TK had lunged at him, attacked him, and had punched him with closed fists. Mr Hika further said that he was shocked by this and that he had tried to block TK but was able to grab his arm and take him to ground where he was held.

[15] On 2 July 2021, a second statement from Mr Hika was taken in which he described being punched in the face by TK three to four times. To stop him, Mr Hika said that he tried to grab TK’s head while reaching for his duress alarm (unsuccessfully). Mr Hika reiterated that he managed to grab hold of TK’s arm and bring him to ground where he hit his head. Mr Hika further stated that while holding him down he was instructed by one of the nursing staff to let go of him and to move away but had refused because of what he saw was a continuing risk of TK carrying out further violence either on him or other staff.

[16] On 3 July, Mr Hika advised that he need to take some time off from work due to stress.

[17] On 5 July, Ms Manley-Lumsden was informed that Mr Hika had been involved in a restraint incident and that he may have inappropriately hit and sworn at a patient.

[18] On 6 July, TWOW’s operations manager telephoned Mr Hika to advise that a complaint against him for assaulting a patient was being investigated. He was further advised that pending the investigation he would be placed on paid suspension. Throughout the subsequent investigation and disciplinary process, Mr Hika was represented by a union representative.

[19] The Police investigated the incident also. On 17 August 2021, the investigating police officer emailed TWOW to advise that TK had punched Mr Hika multiple times in the head/chest area and that Mr Hika had acted in self-defence by punching him back 3-4 times. TK received a final warning because he was receiving treatment at the Mason Clinic as an inpatient. Mr Hika was not charged.

[20] The investigation by TWOW provided evidence that Mr Hika was initially assaulted by TK; that in response he had punched TK back multiple times with a closed fist; had sworn at TK, brought him to the ground, had refused to let him go and to leave the area when instructed by an RN, and that TK had sustained a cut above his eye and two black eyes while Mr Hika had not sustained any injuries that required treatment.

[21] TWOW's disciplinary process comprised a disciplinary meeting on 27 July 2021 which was delayed because of the COVID-19 lockdown in Auckland at the time and because of requests for further information from Mr Hika's representatives which was provided. TWOW took into account a written response from Mr Hika on 27 November 2021 and 26 January 2022. A preliminary decision to dismiss Mr Hika was made on 14 February and when no further information was provided by him or his then newly-appointed representative to its preliminary decision letter, TWOW confirmed its decision by letter of 21 March which was to terminate Mr Hika's employment for serious misconduct.

What are the issues

[22] As stated, the essential issue for investigation and determination is whether Mr Hika's dismissal for serious misconduct was substantively and procedurally justified. While initially seeking to be reinstated as a primary remedy, Mr Hika confirmed during the investigation meeting that he was no longer seeking to be reinstated. However, he was still seeking remuneration for lost wages and compensation for hurt and humiliation.

Whether Mr Hika's dismissal was substantively justified?

[23] When the Authority considers justification of TWOW's decision to dismiss Mr Hika from employment it does so by applying the test of justification in s 103A of the Act. In determining justification of actions or of a dismissal, the Authority does not consider what it may have done in the circumstances but considers on an objective basis whether the actions of the employer were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[24] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. In a dismissal setting these are whether having regard to the resources available to the employer: the allegations against the employee

were sufficiently investigated; whether the employer raised the concerns with the employee before taking action; whether the employer gave the employee a reasonable opportunity to respond to the concerns before taking action; and whether the employer genuinely considered the employee's explanations before dismissing or taking action against the employee. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of minor defects in the process that did not result in the employee being treated unfairly.

[25] It is not in dispute that TK assaulted Mr Hika first. Neither is there disagreement that, in response, Mr Hika punched TK back and had sworn at him although the number of punches and words used by Mr Hika remain unclear. Even so, this is of no moment because the focus is on Mr Hika's response and whether this breached TWOW's discipline and dismissal policy by assaulting or threatening another person while on duty, causing injury or endangering the safety of staff or the public, and whether his behaviour was irresponsible or unacceptable. Mr Hika's actions may also have been inconsistent with TWOW's shared values and behaviours of safe practice, treating each individual with compassion and professionalism, and being connected with patients, whānau, and colleagues.

[26] As part of Mr Hika's induction, he received training in April 2021 in calming and restraint practice (C&R) which included techniques in de-escalating or defusing a situation, breaking away from confrontational situations, and using approved restraint techniques. I find that the induction training would still have been fresh in Mr Hika's mind at the time of the incident on 1 July 2021.

[27] Mr Hika stated that he acted in self-defence. In his written statement to the Authority (16 March 2023) he stated that TK had him up against a wall and was punching furiously. Mr Hika further stated that he feared for his own personal safety and while attempting to block TK's punches, he realised he was on his own so punched back because he was out of options.

[28] During the investigation meeting, I asked Mr Hika whether he could have used the width of the corridor (some two metres) to perform a "break away" manoeuvre so as to create distance between himself and TK. Mr Hika's response was that TK had given him no room. I find that evidence not credible. First, this was the first time Mr

Hika had mentioned this. He omitted to say in his Risk Pro report (taken on the afternoon of the incident) or in his second statement to TWOW (taken the day after the incident) that TK had him against the wall or that the service user had left him with no room to move. The first time Mr Hika has raised this was in his written statement to the Authority which was made some 20-and-a-half months after the incident. Given the relative recency of this evidence, it must be treated with caution.

[29] Second, even if Mr Hika had his back against the wall, he still had a whole corridor to break away from TK and to deploy the C&R techniques which he had learnt from his induction training which Mr Hika confirmed himself that he had received.

[30] Third, while Mr Hika was not able to reach his duress alarm because he was blocking TK's punches, he failed to call for help. Mr Hika was not alone in the day room. There were three experienced registered nurses a short distance away from him all of whom were familiar with TK, had received C&R training, and could have responded if summoned.

[31] Mr Hika relies on the Police investigation that found that he acted in self-defence. However, the investigation was not determinative of all matters and did not take into consideration what TWOW must consider as an employer who owes a duty of care to its patients and to its staff. I take into account that in deciding whether to lay a charge, the Police must assess the nature and extent of the criminal conduct, what evidence there is available to prove a charge in court beyond a reasonable doubt, the likelihood of securing a conviction having regard to the available evidence and potential defence issues, and whether the public interest requires a prosecution as it is neither necessary nor appropriate that offences for which there is sufficient evidence should be prosecuted (prosecutorial discretion).

[32] I was referred to *de Bruin v Canterbury District Health Board* which involved a well-experienced nurse who was dismissed from employment for slapping a patient's cheek.¹ However, this was a reflex action by the nurse after he had been spat in the face by a patient. The nurse was immediately apologetic and the Employment Court identified shortcomings with the employer's investigation.

¹ *de Bruin v Canterbury District Health Board* [2012] NZEmpC 110.

[33] It is difficult to argue that Mr Hika acted out of reflex given that he punched TK multiple times and had verbally abused him. The *de Bruin* case is distinguishable on its facts and does not advance matters for Mr Hika.

[34] During the investigation meeting, I asked Mr Hika whether he could have done anything differently. Concerningly, he stated that his position had not changed and if he found himself in the same situation again, he would not have acted any differently.

[35] Mr Hika stated that RN Cocker had given inconsistent evidence because she had been re-interviewed in February 2022 which is when she stated that she had seen him punch TK on the ground. In explanation, RN Cocker stated that she had not mentioned this detail in her earlier statements because she did not want Mr Hika to get in trouble with the Police.

[36] I find RN Cocker credible and I prefer her evidence and the evidence of RNs Kim and Magallanes who both saw Mr Hika punch and swear at TK. While I accept that it was correct of Mr Hika to use his elbow to block TK's punches, he went too far in punching TK multiple times and to then swear at him repeatedly. Mr Hika failed to follow the processes, training and protocols he had been taught by TWOW to de-escalate the situation. He had ample room to break away and despite having colleagues nearby, failed to call out for help. Aggravating matters further, Mr Hika did not leave the High Care area when initially instructed and by so doing unnecessarily upset and already irascible but psychotic service user even further.

[37] The evidence establishes that while not the initial aggressor, in the end Mr Hika resorted to having a fist fight with TK and verbally abused him. I find TWOW's decision to dismiss Mr Hika to be substantively justified.

Procedural fairness

[38] I have noted a lack of verbatim records during the TWOW's disciplinary meetings with Mr Hika and his union representative but it has not been established that this has prejudiced Mr Hika in a material way. Mr Hika was provided with an opportunity to be heard, was represented throughout the process, was provided with all relevant information to comment on, and his explanations were considered but (correctly) dismissed as a justification for his actions. Based on the information and

evidence before me, I am satisfied that TWOW's dismissal of Mr Hika was undertaken in accordance with the principles of fairness, natural justice and s 103A(3) of the Act.

Conclusion

[39] TWOW's investigation of the incident between Mr Hika and TK is of wider scope and of closer scrutiny than the Police investigation. This must be the case because of the obligations and responsibilities TWOW owes to its patients, its staff, and the wider community at large. Mr Hika is to understand that while the Police were satisfied that he acted in self-defence and was therefore not criminally liable, he was still accountable to his employer for breaching TWOW's discipline and dismissal policy and shared values. There were a range of C&R options reasonably available to Mr Hika at the time. Punching and swearing back at a service user is not one of them.

[40] The application is unsuccessful.

Costs

[41] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[42] If they are not able to do so and an Authority determination on costs is needed Te Whatu Ora – Waitematā District may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Hika would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[43] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Peter Fuiava
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].