Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 153/09
5136630

BETWEEN	TAMARA ATLEY Applicant	
AND	SOUTHLAND HEALTH BOARD Respondent	DISTRICT

Member of Authority:	Philip Cheyne
Representatives:	Mary-Jane Thomas, Counsel for Applicant Peter Churchman, Counsel for Respondent
Investigation Meeting:	18 and 19 March 2009 at Invercargill
Submissions:	No additional submission from the applicant 3 September 2009 from the respondent
Determination:	10 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tamara Atley works for the SDHB as a registered nurse. From July 2005 her role in the emergency department (ED) involved shift work, including rostered night shifts. In December 2007, Ms Atley's doctor provided a medical certificate to the effect that she should not do night shifts because of a medical condition. Later SDHB determined that Ms Atley could not be exempted from the requirement that all ED nurses must be available for rostered night shifts. That meant that Ms Atley could no longer work in the ED and SDHB deployed her to other nursing positions that did not require night shift work.

[2] The central problem for Ms Atley is her claim that SDHB should have accommodated her inability to work night shifts and rostered her to work only day and afternoon shifts in the emergency department. Ms Atley says that SDHB's decision not to accommodate her disability in that way amounted to discrimination on the grounds of her disability in breach of the Human Rights Act and/or an unjustified disadvantage personal grievance.

[3] While working on this determination I became aware of *McAlister v Air New Zealand* [2009] NZSC 78, a judgment of the Supreme Court dated 20 July 2009 concerning unlawful age discrimination in employment. The parties were given an opportunity to make any additional submissions in light of that decision. While the statutory drafting issue that was a feature of that case is irrelevant to the present matter, the analysis of discrimination law is in my view relevant as explained below.

The statutory framework - discrimination

[4] The Employment Relations Act 2000 provides that discrimination on the grounds of disability amounts to a personal grievance. There are three heads to the definition of discrimination, only two of which are potentially relevant here. Ms Atley is discriminated against in her employment if SDHB, by reason directly or indirectly of her disability, does not afford her the same terms and conditions of work as are made available to other employees of the same skills employed in the same circumstances: see s.104(1)(a) for a fuller definition. This head prevents inequality in conditions of employment by reason of disability when the employee is compared with other employees with the same qualification, experience etc: see *McAlister* at [26]. Ms Atley is also discriminated against in her employment if, by reason directly or indirectly of her disability, SDHB subjects her to any detriment, in circumstances in which other employees employed by SDHB on work of that description are not or would not be subjected to such detriment: see s.104(1)(b) for a fuller complete definition. This head prevents detriment (or dismissal – not presently relevant) where others employed on work of the same description would not be subjected to such detriment: see *McAlister* at [26].

[5] There are exceptions and limitations that affect whether particular circumstances in a case such as this amount to unlawful discrimination: see s.106(1) of the Employment Relations Act 2000 and ss.29 and 35 of the Human Rights Act 1993. In what follows, I will first assess whether SDHB's refusal to exempt Ms Atley

from the usual obligation for nurses in the emergency department to work night shifts falls within either s.104(1)(a) or s.104(1)(b) of the Employment Relations Act. If it does, I will need to consider the application of s.29 and s.35.

Did SDHB discriminate against Ms Atley?

[6] Ms Atley was employed as a .9 FTE nurse in the emergency department working rotating shifts as directed by SDHB.

[7] On 14 December 2007, having been to her general practitioner the day before, Ms Atley disclosed to Toni McKillop that she had a medical condition that affected her ability to work night shifts and she gave her a medical certificate to that effect. Ms McKillop was the acting nurse manager in ED and was Ms Atley's manager at the time. The certificate reads:

> *Tamara suffers from a medical condition and I would advise that she does not do night shifts because this makes her medical condition worse.*

[8] There are disputes about earlier and subsequent exchanges which need not be resolved at present, but by 15 January 2008 at the latest, Ms McKillop and SDHB's Health and Safety Manager (Yvonne Stewart) were aware that Ms Atley had been diagnosed as suffering from bipolar disorder for which she was receiving medication. The 14 December disclosure and a January meeting resulted in various events which are now the subject of disputed evidence. The events need not be detailed here nor do the evidential disputes have to be resolved for present purposes.

[9] On 12 February 2008, Ms Atley consulted a psychiatrist who wrote to the SDHB on 20 February 2008 saying:

> *Dear Ms Stewart*
>
> *Thank you for requesting some advice as to how best to support Tamara in her continuing employment with you as a registered nurse. Tamara was willing for me to be in contact with you, and I am pleased to have your confirmation that her employment is not at risk, and that her manager is keen to explore options which would allow her to continue in her valued role as a member of her current nursing team within the emergency department.*
>
> *In brief Tamara has a bipolar affective disorder, which, while not at the most severe end of the spectrum of such disorders, and generally under very good control by Tamara, has become destabilised by her attempt to include night shifts in her working routine. She has agreed to my recommendation to her GP that she add a mood-stabilising*

> *drug to her regime, and she will need to be off work for approximately one month while this drug is added and has enough time to restabilise her condition.*
>
> *However, while I think it is most likely that she will restabilise in her mood and be able to return to work; I think her condition is fundamentally incompatible with working intermittent night shifts. The mood disorders of the kind she suffers from are so closely linked with disturbance of the body's own day/night, sleep/wakefulness regulation, that the disruption of intermittent night shift work is often incompatible with good control of the disorder.*
>
> *Tamara values the work in the emergency department, and if it were possible for her to have a mixture of morning and afternoon but not night shifts, I think she should be able to continue contributing to the good working of the Department.*
>
> *I hope this is of help. Please do not hesitate to contact me should you require clarification.*
>
> *Yours sincerely*
>
> *Signed*
> *Dr Stephanie du Fresne*
> *CONSULTANT PSYCHIATRIST*

[10] Isabel Radka was SDHB's acting director of nursing at the relevant time. It is not necessary at present to refer to the sequence of emails, letters and meetings between Ms Radka and Ms Atley and her lawyer. Eventually, by 30 June 2008, the point was reached where Ms Radka wrote to advise that SDHB would not:

> *make an exception for Tamara to the policy that all nurses in ED work night shift and because the evidence from Dr du Fresne is that a requirement to work night shift causes a significant risk to Tamara's health, Tamara cannot continue to work in ED.*

[11] Ms Radka's decision meant that Ms Atley could no longer work in ED. It is clear from Ms Radka's correspondence and her evidence that the reason for the decision was Ms Atley's medical condition which was inconsistent with her working night shift. Since then Ms Atley has had other engagements elsewhere in the hospital of either a casual, fixed term or part time nature and generally involving less than .9 FTE. Ms Atley has lost remuneration, experienced uncertainty and anxiety about her ongoing employment and suffered a reduction in job satisfaction from not being able to work in ED. Because she was no longer going to be deployed in ED, Ms Atley was withdrawn from a training course that she otherwise would have attended. All this amounts to detriment which in s.104(2) of the Employment Relations Act 2000 is defined as including *anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.*

[12] SDHB will have discriminated against Ms Atley in her employment if it is established that SDHB, by reason directly or indirectly of her disability, subjected her to the proven detriment in circumstances in which other employees employed by SDHB on work of that description are not or would not be subjected to such detriment. As noted above, this head prevents detriment where others employed on work of the same description would not be subjected to such detriment: see *McAlister* at [26]. It requires a comparison to be made between the treatment of Ms Atley and other employees in order to identify whether there has been discrimination on a prohibited ground. The question then is whether Ms Atley should be compared with other ED nurses generally or only with other ED nurses who for a good reason other than an illness (or similar prohibited ground of discrimination) are not able to work night shift.

[13] As with *McAlister* the comparator position must be one that leaves open some relevance for ss.29 and 35 of the Human Rights Act. In particular I note the judgment of Tipping J who said at [51]:

> *A comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry. By artificially I mean that the comparator chosen fails to reflect the policy of the legislation, which is to take a purposive and untechnical approach to whether there is what I will call prima facie discrimination, while allowing the alleged discriminator to justify the prima facie discrimination if the case comes within an exception.*

[14] To succeed under s.104(1)(b) the complainant must show that she has been subjected to detriment in circumstances in which other employees employed by SDHB on work of that description are not or would not be subjected to such detriment. As mentioned the comparators are ED nurses who are unable to do night shift work for any other reason or ED nurses without that limitation. The former category is hypothetical since the evidence is that all ED nurses are required to participate in the night shift roster. However, the words of the statute (…*would not*…) allow that possibility and adopting the latter category as the comparator would make ss.29 and 35 irrelevant. For that reason I find that I should compare Ms Atley's situation with that of an ED nurse. It is then apparent that there is prima facie discrimination in the sense discussed by Tipping J since there was no other reason for Ms Radka's decision. The next step is to consider the application of ss.29 and 35.

The s.29 exception

[15] Under s.29, different treatment based on disability is not prohibited in two situations. Only the exception set out in s.29(1)(b) is potentially relevant here. That subsection permits different treatment if the environment in which the duties are to be performed or the nature of the duties (or some of them) is such that the person could perform those duties only with a risk of harm to themselves or others, and it is not reasonable to take that risk. However, under s.29(2) this exception does not apply if the employer could, without unreasonable disruption, take reasonable steps to reduce the risk to a normal level.

[16] I find that the nature of some of Ms Atley's duties, being the requirement to work night shift, meant that she could do so only with a risk of harm to herself. There was also then a risk of harm to others. That finding is based on the unchallenged medical evidence that good management of her condition is fundamentally incompatible with working intermittent night shifts. I further find that it is not reasonable to take that risk.

[17] In part, SDHB's defence is that its obligations under the Health and Safety in Employment Act 1992 require it to identify and eliminate all known hazards so it could not roster Ms Atley in ED on night shifts once it knew of her condition. I am referred to several cases including *Pooley v NZ Society for the Intellectually Handicapped Inc* 7/6/95, BW Stephenson (Adjudicator), AT102A/95 where an employee with epilepsy who was not able to drive a van with IHC clients in it was justifiably dismissed. There, driving was an *essential component* of the employee's job. The Employment Tribunal referred to the statutory obligations as the basis for justification of the dismissal. Counsel points out that rather than adopting this approach in the present case SDHB wanted the employment to continue with Ms Atley deployed elsewhere. I am also referred to *Air Nelson Limited v Neill* 28/10/08, Couch J, CC15/08.

[18] The relevant duties are set out in s.6 and following sections of the Health and Safety in Employment Act 1993 and they are also noted in the collective employment agreement at clause 6.0. The duties are all expressed as a requirement to take all practicable steps. Even if that meant that SDHB could not roster Ms Atley on night shift, it does not answer the question whether refusing to exempt her from the

ordinary requirement to work night shift and therefore deploy her elsewhere amounted to unlawful discrimination.

[19] The next issue is whether SDHB could, without unreasonable disruption, take reasonable measures to reduce that risk to a normal level. It is necessary to explain what happened with night shift work in the Emergency Department.

[20] The evidence establishes that SDHB changed its policy in about June 1998 to ensure that emergency department nurses rotated through all three shifts rather than working (say) a fixed night shift. There were two reasons for this change. First, it had become apparent that those nurses who worked only on night shift gradually became isolated from their peers and the standard of their nursing practice was seen to deteriorate. Second, if not working night shifts was an option in general, most nurses would avoid doing so. The perception that one employee was being relieved of an obligation to work night shift or rostered less frequently on night shifts was a cause of resentment amongst other staff. This is Ms Radka's evidence which I accept.

[21] Given Ms Atley's circumstances several nurses offered to cover her night shift requirement. A group of others supported accommodating her disability. Limiting Ms Atley's roster to day and afternoon shifts would have caused only minor disruption. Further I find that deploying others with their agreement to cover Ms Atley's share of night shift and not requiring Ms Atley to work nights were *reasonable measures* that SDHB could have taken and would have reduced the risk of harm to a normal level. These steps would not have caused *unreasonable disruption* for the purposes of s.29(2). I find that s.29 does not save SDHB in these circumstances. I should also note that accommodating Ms Atley would have been consistent with the contractual obligation to *ensure disruption, personal health effects and fatigue associated with shift work are minimised for the group of workers involved*.

[22] The application of s.29 is limited by s.35 in the present case. It qualifies the s.29 exception by providing that an employer may not, by virtue of s.29, accord a person different treatment based on a prohibited ground of discrimination even if some duties would fall within s.29, if another employee could carry out those duties without unreasonably disrupting the employer's activities. This qualification supports the finding above that having other employees cover Ms Atley's night shift would not involve an unreasonable disruption.

[23] As the s.29 exception to otherwise unlawful discrimination did not apply to SDHB in the present circumstances it follows that SDHB did discriminate against Ms Atley on the basis of her disability in breach of s.104(1)(b), and she had a personal grievance as a result. In *McAlister* the majority interpreted s.104(1) to avoid any overlap between the subsections so it is not necessary to consider s.104(1)(a). I will nonetheless review Ms Atley's unjustified disadvantage grievance, if only to give some more of the factual background.

Unjustified disadvantage grievance

[24] In her statement of problem, Ms Atley says that she has been unjustifiably disadvantaged because of her illness, her doctor's advice against working night shift and SDHB's decision to remove her from the emergency department and not to consider her for any other position where night shift is a requirement.

[25] Under the Employment Relations Act 2000 a personal grievance includes any grievance that an employee may have against their employer because of a claim that the employee's employment or one or more conditions of their employment is affected to their disadvantage by some unjustifiable action by the employer.

[26] The reasons for the finding of detriment expressed above also cause a finding that Ms Atley's employment had been disadvantageously affected. The central issue at dispute is whether SDHB's actions were justified. Section 103A provides that justification must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances.

SDHB's actions and how it acted

[27] There are some disputes about what happened between December 2007 and January 2008, but for present purposes I will accept Ms Atley's account of these events. Around November 2007, Ms Atley spoke with Ms McKillop about problems with her health. Ms Atley at the time thought that Ms McKillop knew of her bipolar disorder as a result of things Ms Atley had said to the unit nurse manager. Ms McKillop told Ms Atley that she should get a letter from a doctor so Ms Atley did that on 13 December 2007 and gave the letter to Ms McKillop the next day. Ms McKillop said she would need to go to Ms Radka to decide whether Ms Atley could continue in the emergency department in light of the night shift restriction.

Ms Atley became upset. Ms McKillop said that in light of the certificate she could not permit Ms Atley to continue night shifts. Ms Atley asked for the letter back and it was returned to her.

[28] Ms Atley worked a further two night shifts after this exchange but thereafter was not rostered on night shifts.

[29] Yvonne Stewart is SDHB's Health and Safety Manager. Ms McKillop asked Ms Stewart to participate in a meeting with Ms Atley on 20 December 2007. There is an email dated 21 December 2007 written by Ms Stewart to Ms Atley and Ms McKillop after the meeting which indicates that there was discussion at the meeting about trialling strategies to manage Ms Atley's insomnia. There is no complaint by Ms Atley about this meeting.

[30] On 14 January 2008 Ms Atley rang work to say that she could not work for the next few days. Several days previously, in a discussion with Ms McKillop, Ms Atley had spoken about being diagnosed with bipolar disorder some ten years earlier, and that she was awaiting an appointment with a psychiatrist for a re-assessment. These events culminated in Ms Atley agreeing to allow her doctor to meet with Ms McKillop and Ms Stewart to discuss her condition and its management in the workplace. That meeting occurred on 21 January 2008. There are several differences of recollections about this meeting between Dr Hastilow, Ms McKillop and Ms Stewart but it is not necessary to resolve them. SDHB was given more background about Ms Atley's history and her referral to a Dunedin psychiatric service.

[31] On 25 January 2008 there was a further discussion between Ms Atley and Ms McKillop prompted by other staff reporting their concerns about Ms Atley's behaviour to Ms McKillop. Ms Atley was seen mutilating a toy rabbit. At the meeting, Ms McKillop asked Ms Atley if she had *taken anything* that might account for her state that day. Ms Atley mentioned her prescription medication and became very upset. Ms McKillop initiated a discussion about Ms Atley seeking psychiatric help via the SDHB Mental Health Unit rather than waiting for the appointment with the Dunedin service. Ms Atley conditionally agreed to see a SDHB specialist and Ms McKillop followed up to confirm arrangements. In the meantime, because of Ms Atley's distressed state, Ms McKillop sent her home from work early.

[32] On 29 January 2008 Ms McKillop and a colleague went unannounced to see Ms Atley at home. Ms McKillop told Ms Atley that she had decided to put her on paid sick leave pending her consultation with the psychiatrist.

[33] Ms Atley saw her psychiatrist (Dr du Fresne) on 12 February 2008. Before then, and with Ms Atley's consent, Ms Stewart wrote to Dr du Fresne explaining that Ms Atley was on *manager directed (paid) leave due to concerns about her ability to work safely*, advising that *she is a valuable member of the team, and her manager is keen to help her as much as possible*, and asking for Dr du Fresne's advice on how to help Ms Atley back into the workplace. Dr du Fresne replied on 20 February 2008 explaining the nature of Ms Atley's condition and its current management which she expected should stabilise Ms Atley's condition. Dr du Fresne's letter also says:

> *However, while I think it is most likely that she will restablise in her mood and be able to return to work; I think her condition is fundamentally incompatible with working intermittent night shifts. The mood disorders of the kind she suffers from are so closely linked with disturbance of the body's own day/night, sleep/wakefulness regulation, that the disruption of intermittent night shift work is often incompatible with good control of the disorder.*
>
> *Tamara values the work in the emergency department, and if it were possible for her to have a mixture of morning and afternoon but not night shifts, I think she should able to continue contributing to the good working of the Department.*

[34] Ms Atley saw her psychiatrist on 12 March 2008 and was cleared to return to work on 13 March 2008. Before then, it had been agreed between Ms Stewart, Ms McKillop and Ms Atley that SDHB would meet with Ms Atley and provide her with an outline of a return to work plan prior to her next appointment with the psychiatrist. Ms Stewart's notes make it clear that this was a shared understanding. It is also common at SDHB when an employee is off work for an extended period of time for there to be a return to work programme discussed and agreed. While the duration of Ms Atley's absence might be at the shorter end of the spectrum where SDHB would look to put in place a return to work plan, the important factor here is the agreement mentioned above. It was thought that there should be a return to work plan in the circumstances.

[35] Emails between Ms Stewart, Ms McKillop and Ms Radka dated between 26 February 2008 and 10 March 2008 indicate that SDHB's focus was on whether or not Ms Atley could continue to work in the emergency department with the restriction

of not being able to work night shift. Ms Atley was aware of that because that issue was discussed between her and Ms Stewart on Friday 7 March 2008. At that time Ms Atley expressed her preference for a decision to be made sooner rather than later. While they discussed Ms Atley's upcoming appointment with the psychiatrist and her expectation of returning to work on 13 March, there was no discussion about a pre-work meeting or a return to work plan despite the earlier agreement.

[36] Ms Atley returned to Invercargill from her Dunedin appointment at about 8.30pm on 12 March 2008. Dr du Fresne had suggested that Ms Atley try and arrange a meeting before returning to work the next day. Ms Atley rang ED that night and spoke to the co-ordinator who suggested that she ring Ms McKillop at home. Ms Atley did so but there was no answer. She did not leave a message but rang the emergency department again to say that she would be at work next day as rostered.

[37] Dr du Fresne also wrote to Ms Stewart expressing concern about the lack of a preliminary meeting before Ms Atley's planned return to work. It is apparent from the facsimile header that this letter was sent on 14 March 2008 at 9.43am, the day after Ms Atley resumed work.

[38] Ms Atley started work at 1pm on 13 March. Ms McKillop saw her sometime after then but Ms Atley did not return her greeting. A little later, other staff reported to Ms McKillop that Ms Atley appeared to be very angry about something. Ms McKillop asked Ms Atley to see her in her office. Ms Atley explained that she felt unsupported and had expected a return to work meeting. Ms McKillop apologised and said that she would talk with Ms Stewart to organise a meeting. Ms Atley and Ms McKillop have slight differences in their recollection of this exchange but it is not necessary to resolve that. I accept that Ms McKillop acted promptly and appropriately once it became clear to her why Ms Atley was upset.

[39] The exchange on 13 March between the two women resulted in a meeting on Thursday 20 March. The meeting was arranged by Ms Stewart who phoned Ms Atley on 20 March seeking her agreement to meet later in the morning. Ms Atley agreed to meet then rather than delay the meeting until after the Easter weekend when some of those involved in the meeting would be next available. At the meeting itself there was discussion about and agreement over a graduated increase in duty hours to .9 FTE during the four weeks starting Monday 24 March. Responsibilities for monitoring and reporting any issues were discussed and agreed and the date, time and place for the

next meeting was set. During the meeting, Ms Atley was also told that management were looking at other options within SDHB where she could work without having to do night shifts; that while no final decision had been made it was unlikely that the emergency department would be able to accommodate Ms Atley's *no night duty* restriction; and that Ms Atley should have contacted either Ms Stewart or Ms McKillop prior to returning to work if she had expected a return to work programme before 13 March 2008. Ms Atley's evidence is that she was told she had returned to work *without clearance* and *off her own back.* Ms McKillop's evidence is that they were disappointed that Ms Atley had simply come back to work without letting them know that she wanted a return to work meeting. The words mentioned by Ms Atley in her evidence convey that sense and I accept that they were probably said to her by Ms McKillop. It was an attempt to suggest that Ms Atley bore responsibility for there being no return to work meeting.

[40] A second *return to work* meeting was held on 28 March as scheduled. Ms McKillop was not able to be present and another person attended for her. Ms Stewart was late so the meeting started about 15 minutes after the scheduled time. There are typed notes which I accept accurately record the issues discussed and their outcome. In particular I note that the next meeting was scheduled for 16 April 2008. Ms Atley requested that the issue of her future in the emergency department be progressed prior to or at that next meeting. That echoed Ms Atley's earlier approach to Ms Radka to meet personally with her about the issue.

[41] A third *return to work* meeting was held on 16 April 2008 as scheduled. It was agreed that Ms Atley would return to full rostered duties (excluding night shift) from 21 April. It was left for Ms McKillop and Ms Stewart to brief Ms Radka and SDHB's HR Manager and make arrangements for a meeting to progress the issue of Ms Atley's future in the emergency department. Prior to 16 April 2008, Ms Atley had been advised by Ms Radka that she was *unable to meet with you at this time but understood you are currently undertaking a return to work programme scheduled to finish later this month. As you are aware Tamara it is very unlikely that ED will be able to accommodate your practice restriction (of not working nights) and currently we are looking at re-deployment opportunities for you within the hospital. Potential practice opportunities will be discussed with you during the meeting scheduled to be held at the completion of your return to work programme.* However, as will be apparent, SDHB did not do so in any concrete way before the 16 April meeting.

[42] Later in April arrangements were made for a meeting on 30 April 2008 to discuss the consequences of Ms Atley's *no night duties* restriction. At this meeting Ms Atley was given a copy of a file note dated 18 March 2008. It refers to Ms Radka's request of Ms McKillop and her nursing co-ordinators for their advice about the implications for the emergency department of Ms Atley being exempt from night shift. The file note records the advice that *if Tamara is stood down from nights for medical reasons the effect would create a precedent that would prove destructive to the department … It would enhance and support already existing arguments for other staff to seek removal from nights.* This file note was Ms McKillop's response to Ms Radka's request dated 10 March 2008 for a recommendation about whether Ms Atley's *no night shift* restriction could be accommodated within the emergency department.

[43] A number of other matters were discussed during the 30 April meeting: Ms Atley not declaring her medical condition on SDHB employment questionnaires; the reason for Ms Atley's absence from work on 18 and 19 April; several vacancies in other departments; ED staff use of cellphones while on duty; Ms Atley's request for a three month trial period of not working night shifts; the rabbit incident of 25 January 2008.

[44] The evidence of Ms Atley on the one hand and SDHB managers on the other, discloses quite different perceptions about the tenor of the discussion during this meeting. For example, Ms Atley uses the word *accused* whereas the SDHB managers refer to matters being raised or discussed. I do not intend to resolve each of the points separately. I am mindful that Ms Atley was represented by her Union at this meeting and no evidence has been offered from that representative to back up her evidence. In general, I prefer Ms Radka's evidence about the tenor and detail of the exchanges rather than Ms Atley's evidence where there is a difference. However, there is one specific point that I will expand on.

[45] Having become aware of Ms Atley's history of bipolar disorder, SDHB reviewed its files to see what Ms Atley had disclosed about this condition at the time of her appointment. Ms Atley completed a *Pre Employment Screening* form in January 2001 but did not mention her bipolar history in that form. Ms Atley completed a more detailed form in 2005 and answered *no* to the question *Do you have*

or have you had in the past mental health/stress related conditions?. The same answer was given to an overlapping question. The answers are clearly inaccurate.

[46] I accept the evidence for SDHB that if Ms Atley had answered these questions correctly in 2005 it is likely that she would not have been permitted to start in ED without specialist advice and a management plan; or not at all if the advice had been consistent with Dr du Fresne's opinion. However, SDHB has elected not to treat the matter as a disciplinary issue so nothing more needs to be said about it for the time being.

[47] Following the 30 April meeting, Ms Atley instructed a solicitor who wrote to SDHB on 7 May 2008. That letter ruled out the possibility of a three month trial to assess the effect of Ms Atley's continuing to work in ED without doing night shifts. A request was made for Ms Atley's file and details of any specific issues supporting SDHB's expressed view about not being prepared to exclude Ms Atley from the night shift roster. In the meantime a group of ED nurses committed to writing their support for Ms Atley's continued involvement in ED notwithstanding her night shift restriction. They sent the memo to SDHB. A little under half the ED nurses signed the memo.

[48] The solicitor's letter of 15 May 2008 drew a response from Ms Radka summarising events to that point, at least from SDHB's perspective. There followed an exchange of correspondence between Ms Radka and the solicitor and then a meeting. SDHB eventually announced its conclusion that Ms Atley could not remain in ED because it would not make an exception to its policy of participation in night shift rosters. That was confirmed by letter dated 30 June 2008. There was then some correspondence about alternative positions. By this time Ms Atley had been off work on paid special leave for some time so Ms Radka was keen to redeploy Ms Atley without delay. Ms Radka also stipulated that there would need to be a *wellness and awareness plan*. There was some dispute about the terms of this *plan* but agreement was eventually reached so it is not necessary to canvass the disputes. Ms Atley returned to work in late July 2008 and has worked in a number of different positions, often earning less that she had earned in her ED position. Ms Atley has not been considered for or offered a number of positions subsequently because of her inability to work night shifts.

Justification

[49] This was a difficult matter for SDHB and Ms Atley. SDHB wanted to retain Ms Atley but would not make an exception to its policy. It took some months to get to that point but I do not think any grievance arises based on delay. The situation was complicated because Ms Atley was absent on sick and other leave. It took some time for the ramifications of her condition to be established. SDHB had to manage her graduated return to work between mid March and late April 2008. The focus turned to Ms Atley's future and Ms Atley instructed a solicitor. Some time was taken in the correspondence between the solicitor and Ms Radka but neither side should be criticised in hindsight because of those exchanges. Eventually SDHB finalised its decision. By that time some of the redeployment options were no longer available but that was a consequence of the time taken consulting with Ms Atley.

[50] Ms Atley complains that there was not a return to work meeting before she started again in March 2008. I have already noted that it was agreed that there would be a return to work meeting. I further find that SDHB should have ensured that the meeting was arranged. The evidence is that none of the managers involved saw it as their own responsibility to make the arrangements but one of them should have, that being what a fair and reasonable employer would have done. Accordingly, I do not accept the suggestion in the evidence for SDHB that a return to work meeting was not arranged because it was not mentioned by Dr du Fresne in her 20 February 2008 letter or because Ms Atley did not contact a manager before she restarted work. I find further that Ms Atley's employment was affected to her disadvantage as a result of SDHB's failure to arrange the meeting. It caused her to be angry and resulted in her behaviour that day that was reported to Ms McKillop and which resulted in their meeting that day. From then on, SDHB properly established and implemented the return to work process. As a result, the effect on Ms Atley's employment of the initial failure was very short-lived and it is not possible to separate out the effects from those of the established discrimination grievance. Accordingly it is not necessary to say anymore about this point.

[51] Ms Atley raises an alleged disparity of treatment issue but I prefer SDHB's evidence to the contrary.

Remedies

[52] I have found that Ms Atley has a discrimination personal grievance. She does not seek reinstatement but does seek reimbursement of lost remuneration and $10,000.00 compensation.

[53] Ms Atley has lost remuneration as a result of her grievance because there have been periods when she worked fewer hours and received less remuneration than if she had continued working .9 FTE in ED. SDHB must assess each pay period and in any pay period where Ms Atley worked less than .9 FTE she must now be paid as if she had worked .9 FTE in ED. Some pay periods Ms Atley worked .9 FTE or more but they should not be included in this calculation. Those periods when Ms Atley was on sick leave or special leave should not be included. This order covers the period up to the date of the investigation meeting and is subject to Ms Atley's assessed contribution.

[54] There is a claim for $10,000.00 compensation for humiliation, loss of dignity and injury to feelings but almost no evidence was expressly directed to the claim. There is ample evidence of Ms Atley's distress throughout the timeframe involved but it is difficult to distinguish the distress caused by her bipolar condition from that caused by the unlawful discrimination. Inevitably unlawful discrimination must be regarded as a serious wrong even if arising in the context of otherwise considerate treatment by an employer, as here. The seriousness of the wrong gives rise to an inference that it will result in significant distress. Given that, I infer that the distress exhibited by Ms Atley from March 2008 onwards was materially caused by the unlawful discrimination foreshadowed from then and confirmed in June 2008. The compensation claim in that context in reasonable and I award it in full, subject to the assessment of contribution.

[55] The Authority must always assess the extent to which a grievant contributes to the circumstances giving rise to a grievance and reduce remedies to reflect any established blameworthy conduct. I have already concluded that Ms Atley should have disclosed her bipolar condition in 2005 even though not doing so was due to oversight on her part. Ms Atley's failure contributed to the discrimination grievance arising when it did since a timely disclosure would have resulted in a focus on the risk issue in 2005. It does not follow that a grievance would not have arisen if Ms Atley had disclosed her condition in 2005. A decision at that time by SDHB not to transfer

Ms Atley to ED could have amounted to discrimination; or SDHB might have appointed her to ED depending on specialist advice at the time. I consider the major responsibility for the unlawful discrimination that occurred must rest with SDHB since Ms Atley did not contribute to its unwillingness to take the reasonable steps available to accommodate Ms Atley's disability so she could continue in the ED. An appropriate reduction to recognise Ms Atley's contribution is 25%.

Non publication order

[56] By agreement I make an order prohibiting from publication the names of the employees mentioned at paragraphs 27.1 and 27.2 of Ms Atley's statement of evidence. It has not been necessary to mention those employees in this determination.

Summary

[57] Ms Atley was discriminated against by reason of her disability and therefore has a personal grievance against SDHB.

[58] SDHB must compensate Ms Atley for 75% of her lost remuneration with leave reserved in case of any difficulty with quantum.

[59] SDHB must pay Ms Atley compensation of $7,500.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[60] Costs are reserved. Any claim for costs must be made within 28 days. The other party may then file a submission in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority