

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 180  
3033451

BETWEEN CHRISTINE CLEMENTS  
Applicant

AND CASTLECLIFF HEALTH 2016  
LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Sarah Cates and Rochelle Farmer for Applicant  
Toby Braun for Respondent

Investigation Meeting: 20 December 2018

Submissions Received: 11 January 2019 from Applicant  
16 January 2019 from Respondent

Determination: 27 March 2019

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**DETERMINATION OF THE AUTHORITY**

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- A. Ms Clements was unjustifiably dismissed and one or more of her conditions of employment were affected to her disadvantage by the unjustifiable actions of Castlecliff Health 2016 Limited.**
- B. Castlecliff Health 2016 Limited is ordered to pay to Ms Clements the following remedies within 28 days of the date of this determination:**
- a) Lost wages and holiday pay equivalent to \$12,636 gross under s 123(1)(b) of the Employment Relations Act 2000;**

**b) Compensation of \$30,000 under s 123(1)(c)(i) of the  
Employment Relations Act 2000;**

**C. Ms Clements application for penalties is declined.**

**D. Costs are reserved.**

**Employment relationship problem**

[1] Ms Clements was employed by Castlecliff Health 2016 Limited as its Practice Manager from 26 April 2017 until her dismissal on 23 April 2018.

[2] Ms Clements had 14 years' experience as a Practice Manager followed by one year as the Chief Executive Officer for the same medical practice before moving to Whanganui and accepting the offer of employment at Castlecliff Health. It was common ground that a factor in Ms Clements' appointment was her substantial experience in the management of a medical practice.

[3] At the time she started working for Castlecliff Health it was intended the clinic would move to new premises in September 2017. The move was delayed due to a number of issues that had to be addressed and the clinic finally moved into its new premises on 26 February 2018.

[4] Dr Praveen Thadigiri, Ms Jane Dutton, Nurse Practitioner, and Ms Agnes Ginestet (wife of Dr Thadigiri) are the three directors of Castlecliff Health. They became concerned about Ms Clements performance of her duties and decided her continued employment was untenable. By way of letter couriered to her residence on 23 April 2018 Ms Clements was summarily dismissed.

[5] Ms Clements challenges her dismissal which she says was unjustified. Ms Clements also claims one or more conditions of her employment were affected to her disadvantage by the unjustified actions of Castlecliff Health and claims penalties for breaches of good faith and the employment agreement.

## **Issues**

[6] In order to resolve Ms Clements' employment relationship problems I must determine the following issues:

- a) Were one or more conditions of Ms Clements' employment affected to her disadvantage by the unjustifiable actions of Castlecliff Health and if so what if any remedies should be awarded?
- b) Was Ms Clements unjustifiably dismissed and if so what if any remedies should be awarded?
- c) Did Castlecliff Health breach its statutory obligations of good faith or the terms of the employment agreement and if so should a penalty be imposed?

[7] As permitted by s 174E of 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 as a result. It has not recorded all evidence and submissions received.

## **Background**

[8] The following events leading up to the termination of Ms Clements' employment provide some context to the employment relationship and its termination.

### ***14 March 2018 Management Meeting***

[9] On 14 March Ms Clements attended a management meeting with two of the three directors of Castlecliff Health, Dr Thadigiri and Ms Dutton. A Practice Nurse attended the meeting briefly to provide feedback on a meeting she had attended regarding Mana Taimahi a new program which aimed to support people with health or medical conditions to stay in or return to work.

[10] The issues discussed at the meeting included confirmation that the Saturday clinics would continue including confirmation of the cost for non-urgent appointments booked in advance; flu clinics and that client information was not to be available at reception. Also discussed was the appointment of a new Nurse Practitioner; that Ms Clements was to contact a person who may be interested in casual or part-time

administration work and that Ms Clements would set dates for the Management, full staff, clinical and admin meetings.

***21 March 2018 staff meeting***

[11] On 21 March all staff including Ms Clements attended an urgent meeting called by Dr Thadigiri and Ms Dutton to discuss the clinic's financial situation. At the meeting Dr Thadigiri focussed on the increasing patient debt levels and the need to strictly adhere to Castlecliff Health's policies and procedures to manage this.

[12] Staff were instructed to encourage all patients without a regular payment schedule to pay on the day of their consultation prior to being seen. This policy was to apply to patients with a regular pay schedule who had an outstanding balance of more than \$65.00.

[13] Staff were advised that all ordering of non-clinical items were now to be sent to Ms Dutton and that a new Practice Nurse would be starting at the clinic on 3 April. They were told the Practice Nurse would be working five days each week and would be included in the Saturday roster from about June.

***16 April email***

[14] On 16 April Dr Thadigiri sent an email to the directors, Ms Clements and the Nurse Practitioner attaching a Plans and Development document (the 16 April document). The 16 April email expressed the view of the directors that they were experiencing an uphill battle with the management of the clinic and proposed having a meeting in the afternoon of 18 April to discuss a host of issues with staff being invited to bring any issues they wished to raise.

[15] This was the first time Ms Clements became aware that all was not well and that the directors held concerns that she was not performing her role to the expected standard. The 16 April document sets out 11 areas of concern including:

- a) Spending – a decision was made to suspend all future spending unless approved by either Dr Thadigiri or Ms Dutton due to cash-flow issues being identified. Ms Dutton would take full responsibility for ordering all supplies except clinical supplies which would be managed by the Nurse Practitioner.

- b) Eftpos – In his document Dr Thadigiri described this as a “fiasco” which was “honestly forgettable”. The document recorded that Dr Ginestet and Ms Dutton had met with the suppliers of the Eftpos equipment and they had resolved issues relating to the contracts and returned surplus equipment.
- c) IT contractors – the document recorded issues with the provision of IT services and the associated costs. The directors had decided the Nurse Practitioner would be the first point of contact for all IT issues from that point forward in cases where a technician may need to be called. Dr Thadigiri noted that the Nurse Practitioner understood the system best out of all staff and was the best person to decide whether or not a technician needed to be tasked with a particular IT job.
- d) Digital certificate for claiming – the directors decided this should remain on Ms Clements’ computer and that Ms Dutton would complete the claiming during Ms Clements’ absence on planned leave.
- e) Training reception staff – both reception staff were to be trained so that they were both ‘on par’ in terms of technical skill sets.
- f) Keys – the list of key holders was set out.
- g) Window cleaning – Dr Thadigiri noted that he was in touch with a commercial window cleaner and was awaiting a quote.
- h) Enrolments – a 2-3 week wait after submitting an enrolment form was considered to be too long. Dr Thadigiri recorded a few complaints had been received and at least two critical situations identified but managed. This was to be discussed at the next staff meeting to ensure everyone was aware of the process.

### **Disadvantage**

[16] Ms Clements claims one or more conditions of her employment were affected to her disadvantage by the unjustified actions of Castlecliff Health when:

- a) Duties were unilaterally removed from her and reallocated to others;
- b) She was excluded from management meetings, which she would normally attend; and
- c) She was excluded from decision-making, which falls within her responsibilities as Practice Manager.

[17] Ms Clements bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. If Ms Clements discharges that onus then the burden of proof moves to Castlecliff Health to establish on the balance of probabilities that any disadvantage Ms Clements may have suffered was justified.

[18] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Castlecliff Health's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

***Unilateral removal and reallocation of duties***

[19] Ms Clements told me the following actions by the directors of Castlecliff had the effect of removing duties from her in March and April 2018:

- a) Recruitment of a new Practice Nurse;
- b) Leasing of a room to a physiotherapist;
- c) IT issues resolution.

**Recruitment of a new Practice Nurse**

[20] In March Dr Thadigiri employed a new Practice Nurse. Despite Ms Clements' job description making recruitment and training of staff her responsibility, Ms Clements was not involved in the recruitment process and did not know about the appointment until she was advised during the management meeting on 14 March.

### Leasing of a room to a physiotherapist

[21] Ms Clements told me that on 21 April she discovered Dr Thadigiri had arranged for a Physiotherapist to rent a room at the clinic premises. Ms Clements told me no discussion had been held with Ms Clements prior to the decision being made and no notification of the sub leasing had been made prior to the Physiotherapist starting work at the clinic.

[22] The inclusion of a Physiotherapist in the clinic impacted on the booking and invoicing systems because the Physiotherapist used different software. Ms Clements' job description included the requirement that she develop and maintain office systems and protocols.

[23] The documents produced to the Authority indicate Ms Clements was made aware that a physiotherapist was to be leasing space at the clinic before the 14 March meeting. In a document sent by Dr Thadigiri to Ms Clements Dr Thadigiri records "...the physio will be coming Wednesday this week to meet with me to finalize details of her starting physiotherapy clinics here."

[24] The wording used by Dr Thadigiri indicates it was common knowledge physiotherapy clinics would be run from Castlecliff Health's premises.

### IT issues resolution

[25] Until March Ms Clements was responsible for troubleshooting all issues regarding the clinic's IT systems. Following the move to the new premises a significant number of IT issues were experienced, some of which remained outstanding on 23 April.

[26] Because of the dissatisfaction with the lack of support and the costs associated with Castlecliff Health's IT provider being called in to rectify issues the directors decided to allocate responsibility for dealing with IT issues to the clinic's Practice Nurse at its meeting on 14 April.

### ***Exclusion from management meetings***

[27] Ms Clements says she was excluded from three management meetings on 7, 8 and 14 April 2018. During these meetings discussions ensued which had the potential

to impact on Ms Clements role including Saturday morning clinics, patient flow and templates, physiotherapy clinics and charging/accounts.

[28] I am satisfied the meetings on 7 and 8 April were directors' meetings which Ms Clements would not usually attend. However, the meeting on 14 April cannot be described as a directors' meeting. The Practice Nurse was present at that meeting and appears to have contributed to the discussions and outcomes. If this had been a directors' meeting, the Practice Nurse would have been at the meeting as an observer only and not as a participant. Ms Clements did not receive notification of the meeting nor was she invited to attend.

### ***Exclusion from decision-making***

[29] Until April Ms Clements was involved in the approval of new patient enrolments together with Ms Dutton and the Practice Nurse. On 4 April Ms Clements was advised by another employee that Dr Thadigiri had changed the system for enrolments which excluded Ms Clements from the process.

[30] The 16 April document alerted Ms Clements for the first time that the new Practice Nurse had been involved in a significant number of decisions relating to both clinical and management processes over the previous few weeks and months without any involvement from Ms Clements.

[31] Ms Clements also says she was excluded from the decision to lease a room to the Physiotherapist which had impacts on the booking and invoicing systems because the Physiotherapist used her own systems. I have concluded it is more likely than not that Ms Clements was not part of the decision to lease the rooms but was aware that this was happening Dr Thadigiri was in communication with Ms Clements' about this before the 14 March meeting.

### ***Conclusions***

[32] The decisions made by Dr Thadigiri from March 2018 impacted on Ms Clements' role. The decisions affected key tasks set out in Ms Clements' job description and for which Ms Clements had responsibility.

[33] I am satisfied one or more conditions of Ms Clements' employment were affected to her disadvantage when Castlecliff Health took responsibility for duties

which under the terms of the employment agreement were the purview of Ms Clements including decision making processes from which Ms Clements was excluded. I am also satisfied the meeting on 14 April was more than a directors' meeting because it resulted in management decisions being made which had a direct impact on Ms Clements' role.

[34] The actions leading to Ms Clements' disadvantage were unjustified. Castlecliff Health failed to include Ms Clements in any discussion prior to or during the removal of her responsibilities including the discussion which led to the 16 April document being drafted. These are not the actions a fair and reasonable employer could have taken in all the circumstances of this case.

### **Dismissal**

[35] On Monday 23 April while Ms Clements was on her day off, she received a letter by courier dismissing her without notice. In the letter of dismissal the directors make it very clear that they would not be conducting any investigations relating to the decision to dismiss Ms Clements. Ms Clements was advised that the directors were willing to meet if she believed she had been treated unfairly but she was to contact Castlecliff Health's legal team as the directors did not wish to entertain any further communication from her directly. Finally the directors cautioned Ms Clements not to enter the premises and/or communicate with any of the team "...under any circumstances."

[36] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Castlecliff Health's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[37] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, Castlecliff Health sufficiently investigated the allegations, raised the concerns with Ms Clements, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal.

[38] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Ms Clements being treated unfairly.<sup>1</sup> A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

[39] I am required to assess whether Castlecliff Health had, on the balance of probabilities, convincing evidence to show it had a reasonable basis at the time of the dismissal for believing serious misconduct had occurred.<sup>2</sup>

[40] The employment agreement sets out the terms relating to the termination of employment. In particular the agreement requires four weeks' notice or payment in lieu. The parties have agreed to an exception for serious misconduct in which case no notice is required.

[41] In the employment agreement the parties agreed Castlecliff Health must have a good reason for terminating the employment relationship and must treat Ms Clements fairly in reaching its decision. In particular Castlecliff Health promises to give Ms Clements a reasonable opportunity to comment on any proposal or concerns it might have that may lead to the termination of her employment. The parties have agreed Ms Clements is entitled to involve a representative or support person in the process.

[42] The letter dated 22 April sets out the following reasons for the dismissal:

- a) Reluctance to allow Ms Dutton, a director, to access the computer operated by Ms Clements during her leave period. Castlecliff Health says Ms Clements reluctance to allow Ms Dutton access jeopardised the efficient and timely processing of client claims and exposed Castlecliff Health to reputational risk and risk of delayed care to patients;
- b) Failure to properly manage IT systems appropriately;
- c) Incompatibility with other staff members including exhibiting favouritism and divisive behaviours;

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<sup>1</sup> Employment Relations Act 2000 (the Act), s 103A(5).

<sup>2</sup> *Honda New Zealand Ltd v NZ Boilermakers Union* [1991] 1 NZLR 392 (CA) at 394.

- d) Failure to manage human resources adequately resulting in unacceptable delays in performance reviews;
- e) Unauthorised use of time in lieu;
- f) Poor financial management resulting in over-ordering of products and services; and
- g) Failure to undertake the specified tasks of the role of Practice Manager including business management, IT Systems, human resources, PHO management including enrolments.

***Access to computer***

[43] In the letter of dismissal Castlecliff refers to Ms Clements "...reluctance to allow..." Ms Dutton to work from her computer to process claims in Ms Clements' absence. This was viewed by Castlecliff Health as a deliberate attempt by Ms Clements' to stall processes and created added workloads and pressures for the directors which the directors say exposed Castlecliff Health to risk.

[44] Ms Clements' reluctance was viewed as offensive given that she had allowed a Medical Receptionist to use her computer for the same purpose previously. Ms Clements' actions were viewed as a lack of trust and confidence in the directors.

[45] Ms Clements says she was not reluctant to allow Ms Dutton access to her computer to process claims nor did she make a deliberate attempt to stall the process. Ms Clements says it was in her interest to ensure there was a satisfactory system in place so that claims could be processed while she was on leave as she did not want to return to a backlog.

[46] Ms Clements was concerned that if her computer was available to staff other than the directors, access to personal information held on her computer about staff could breach privacy and employment obligations. Ms Clements expressed this concern in an email dated 19 April. There is no evidence Ms Clements was reluctant to allow Ms Dutton access to her computer, only other members of staff.

### ***Failure to properly manage IT systems***

[47] For several weeks after moving to the new premises Castlecliff Health encountered serious technical problems with the IT and phone systems. Ms Clements says she worked hard to communicate with the IT company and the phone company to resolve the problems.

[48] Dr Thadigiri told me the IT supplier had been its system provider for the clinic since October 2014. Castlecliff Health and the supplier had entered into a three-year contract which was due to roll over for another three years in October 2017. He said it was Ms Clements' responsibility to ensure contracts were reviewed to ensure they were appropriate for the clinic.

[49] Dr Thadigiri told me that in March 2017 (prior to Ms Clements' appointment) the directors had decided to terminate the contract with its IT provider. He told me he had informed Ms Clements of the decision to terminate the contract prior to its rolling over in October 2017 and asked her to contract with a local provider. This was because the local provider had offered significantly lower costs and could provide a more efficient service, whereas the current provider was more costly and was not local. It was common ground that Ms Clements did not inform the IT provider of the wish to terminate the supply contract and it automatically rolled over for a further three years.

### ***Incompatibility***

[50] Castlecliff Health must establish an irreconcilable incompatibility existed and there was an irreconcilable breakdown in the employment relationship wholly or substantially attributable to Ms Clements.<sup>3</sup>

[51] In the letter of dismissal Castlecliff Health asserts that staff had advised the directors that they had found it increasingly difficult to build a working relationship with Ms Clements as Practice Manager. The directors record in their letter that the staff had perceived her comments, actions and delegation of tasks inappropriate and lacking insight.

[52] After her dismissal Ms Clements received feedback from the two receptionists at the clinic that they were shocked and saddened to hear of her dismissal and

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<sup>3</sup> *Walker v Procare Health Limited* [2012] NZEmpC 90 at [82].

confirmed that they had never said anything against her. Ms Clements told me she also received telephone calls of support from two other employees who also both expressed disbelief at her dismissal. Out of eight staff Ms Clements had the support of six.

[53] Dr Thadigiri is critical of Ms Clements for contacting the receptionists following her dismissal. He told me that in contacting the receptionists Ms Clements has demonstrated a lack of respect for process and she had clearly been instructed in the letter of dismissal not to attempt to contact staff on account of the pressure she may put them under through such communications.

[54] The dismissal letter refers to a performance management issue regarding one of the receptionists. This is an issue addressed later in this determination.

[55] Castlecliff Health has produced two letters of complaint written by two of the Practice Nurses who wrote and signed their letters on 24 October 2018. This is six months after Ms Clement's dismissal. None of the comments in the complaints were ever raised with Ms Clements prior to her dismissal.

[56] In his evidence Dr Thadigiri made unsubstantiated allegations of bullying behaviour by Ms Clements. These allegations were not raised with Ms Clements prior to making the decision to dismiss.

[57] Ms Clements told me if the directors held genuine concerns about her compatibility she would have been happy to hear the concerns, respond, take on board any feedback and adjust her behaviour and interactions. No issues were ever raised with her.

#### ***Failure to manage human resources***

[58] In his letter of dismissal Dr Thadigiri is critical of Ms Clements for starting a performance review and a performance management process which had not been concluded. Dr Thadigiri was concerned that the employee had been "left in limbo" due to her inability to perform her duties to the expected standard. Dr Thadigiri alleged Ms Clements' had disadvantaged the employee in matters relating to hours of work, further training and career progression.

[59] Dr Thadigiri and Ms Dutton had raised performance concerns they wanted addressed with the receptionist. Ms Clements told me she had several conversations with the receptionist about her work performance starting on 2 May 2017.

[60] On 27 November 2017 Dr Thadigiri sent Ms Clements a very long email regarding the receptionist and in that email he was very disparaging about the receptionist and her performance. Ms Dutton concurred with Dr Thadigiri's comments and as a result Ms Dutton and Ms Clements conducted the receptionist's performance review on 6 December 2017. Prior to that Ms Clements had communicated with Dr Thadigiri and Ms Dutton that she wanted to discuss the issues with them before proceeding further. She also wanted the performance review to be put on hold while Castlecliff Health was moving to new premises as it was very stressful for all the staff. However, it was agreed to go ahead and get them out of the way before Christmas.

[61] Dr Thadigiri told me Ms Clements undertook performance reviews for the administrative staff but failed to undertake reviews for the Practice Nurses. He said one of the Practice Nurses was due for a contractual review and was entitled to a change to her rate of pay as per the nursing Multi Employer Collective Agreement. Dr Thadigiri said Ms Clements ignored or was unaware of the requirement until the Practice Nurse brought it to her attention. Dr Thadigiri says he was then forced to apologise to the Practice Nurse for the delays. Dr Thadigiri told me Ms Clements failed to initiate a performance review for another Practice Nurse and so he and the other directors did this themselves after the Saturday clinic on 14 April. This was the same day the directors meet to discuss management issues. The Practice Nurse was present at that meeting. There is no evidence to show why the performance review could not be conducted the following week when Ms Clements was working.

[62] Dr Thadigiri told me that a few months into starting as Practice Manager Ms Clements changed the process for creating a roster for the Saturday clinic which was run with a GP, a Practice Nurse or with a Nurse Practitioner and a Practice Nurse.

[63] Dr Thadigiri said that on a Saturday the Practice Nurse would manage the front desk and triage patients and the GP or Nurse Practitioner would then attend to the patient. Dr Thadigiri told me that Ms Clements' process for rostering was fraught with errors and in one particular instance he ended up being on duty for two

successive Saturdays due to a lapse on her part. He said that on 21 April 2018 due to Ms Clements' negligence he ended up having to be at the clinic to support Ms Dutton who was the Nurse Practitioner rostered on that Saturday otherwise she would have been all by herself in the premises an unacceptable health and safety risk.

[64] At the investigation meeting Ms Clements denied that she had scheduled Dr Thadigiri on for two successive Saturdays.

[65] I have been provided with two different copies of the Saturday roster for April 2018. Dr Thadigiri is not rostered to work two Saturdays in a row in either of these two rosters.

#### *Unauthorised use of time in lieu*

[66] Dr Thadigiri raised allegations that Ms Clements' use of time-in-lieu was not in line with the terms of the employment agreement which states:

- 6.3 Time in lieu may sometimes be granted for hours worked outside your normal hours of work. This needs to be confirmed in advance of working the extra hours. Any time in lieu must be taken within one month of the entitlement arising, or it will be forfeited. Unused time in lieu will not be paid out.

[67] Castlecliff Health never raised any concerns with Ms Clements regarding her use of time in lieu. Ms Clements says she did not realise her employment agreement stated that time off in lieu must be taken within one month of the entitlement arising and unused time off in lieu will not be paid out. She says she only realised this after she received the dismissal letter and checked her employment agreement.

[68] On 2 October 2017 Dr Thadigiri sent Ms Clements an email copied to the other directors confirming their agreement that Ms Clements could take time in lieu for extra hours worked at that time or for her time to be paid.

[69] Ms Clements told me that from this communication she understood she should record additional time worked, to be taken as time in lieu or paid out. In accordance with that whenever she worked additional time she would note it in the payroll system which Ms Ginestet and the company's accountant had access to.

[70] In early April 2018 Ms Clements asked to use 48 hours of her time off in lieu for a holiday from 3 May to 15 May 2018. On 3 April her request was approved and a copy was sent to Ms Ginestet. The directors never told Ms Clements that she was using the time off in lieu incorrectly and the provision in the employment agreement was never enforced by the directors.

[71] Ms Ginestet told me Ms Clements failed to deal with the directors at all times openly and in good faith. Ms Ginestet told me Ms Clements breached the directors' trust by failing to apply for approval from the directors for the time in lieu she accrued between September 2017 and April 2018. At the investigation meeting Ms Ginestet acknowledged Dr Thadigiri had approved some time in lieu in October 2017.

[72] Ms Ginestet told me that she only discovered Ms Clements had accrued additional time in lieu on 26 March 2018 when she applied to take the 48 hours in May 2018 to go to Australia.

[73] Dr Thadigiri told me that he believed Ms Clements had abused the trust placed in her as a Practice Manager by her use of time in lieu. He said there was only one instance that he recalls when Ms Clements was advised she could take time in lieu and that was in late October 2017.

[74] Ms Clements did not follow the requirements of the employment agreement in respect of accruing, or working hours that would be attributable to, time off in lieu. The terms of the employment agreement required Ms Clements to seek approval prior to working additional time. This was not done. The approval granted in October 2017 was not a general approval for Ms Clements to work additional hours at her discretion and have those hours attributed to time off in lieu.

[75] It is surprising this issue was not raised in March 2018 when Ms Clements applied to use 48 hours of her time in lieu for her May holiday. At that time the directors would have been fully aware of the level of time in lieu recorded in the system against Ms Clements profile.

### ***Poor financial management***

[76] Castlecliff Health alleged Ms Clements' ordering of supplies and services for the clinic led to losses which resulted in the directors taking over the responsibility for future ordering. No examples of poor ordering processes were provided in the letter.

[77] Ms Clements told me that she paid Castlecliff Health's creditors on the 20<sup>th</sup> day of each month. Before payment was made she would send Ms Ginestet a schedule listing the creditors and the amounts owing. The reason Ms Clements wanted Ms Ginestet to approve these payments in particular was because she had previously been instructed to hold off payments to the IT company and wanted to make sure Ms Ginestet was happy for her to make the payment at this time and to ensure there was sufficient funds in the account to make the payments. Ms Ginestet knew in advance what payments would be made to creditors and no issues with payments were ever raised with her during the employment.

[78] Ms Clements told me she worked hard to manage the clinic. Responsibility for tax reports and annual accounts was with Castlecliff Health's accountant and Ms Ginestet was also involved in aspects of the finances for the clinic. Ms Clements told me that from time to time she would produce business management reports that she believed to be relevant and useful but she was never asked to produce any financial reports.

[79] Ms Dutton told me the overheads of the clinic are high because the directors choose to maintain a level of staffing to support the population. For this reason costs needed to be contained in all areas. Ms Dutton told me she noticed there were several surplus items such as very large tins of coffee and several litres of dishwashing liquid in the clinic. Ms Dutton said that when she asked Ms Clements about these she [Ms Clements] was not aware of the cost of the items or why they had been ordered. Ms Dutton said she had several discussions with Ms Clements about non-clinical items and keeping down costs.

[80] All of the directors were highly critical of Ms Clements' management of the clinic's finances and purchasing. I was told of items being over-ordered, payment for supplies at an excessive level and surplus and inappropriate equipment being ordered by Ms Clements.

[81] At no stage did any of the three directors raise these concerns with Ms Clements before they made the decision to dismiss her.

***Failure to undertake the specified tasks of the role of Practice Manager***

[82] Casltlecliff Health alleged Ms Clements' had failed to perform the role of Practice Manager in relation to human resources, business management, IT systems and PHO Management including enrolments.

[83] In the dismissal letter Dr Thadigiri was critical of Ms Clements for not developing required policies. Ms Clements told me that after she commenced employment in April 2017 she encountered a lot of problems with organising and managing the practice. She said Dr Thadigiri was largely unavailable to discuss policies from May 2017 to February 2018 as he was busy seeking approvals for the new premises, performing work outside the clinic and was then on an extended holiday in India.

[84] Ms Clements says that despite that she was working on the policies. Ms Clements referred me to an email from Dr Thadigiri on 17 November where he advised Ms Clements "...we can't have yourself, Ms Dutton and I working endlessly, constantly thinking up policies or ways of improving when people just don't seem to follow them". Ms Clements says this statement is completely at odds with Dr Thadigiri's assertion in the dismissal letter that she had not been working on policies.

[85] Ms Clements told me the directors never stepped back from managing the practice as they said they would at her interview. She does not believe she was given a real opportunity to manage the practice.

### ***Conclusion***

[86] I have no hesitation in finding Ms Clements' dismissal was unjustified. The actions of Castlecliff Health and the way it acted were not what a fair and reasonable employer could have done in all the circumstances.

[87] The process leading to Ms Clements' dismissal was fundamentally flawed. Castlecliff Health failed to meet any of the mandatory considerations set out in s 103A(3) of the Act. No concerns were raised with Ms Clements about her performance and no opportunity for her to respond to any of the concerns before dismissal. Consequently Castlecliff Health was unable to consider any explanations. The dismissal was abrupt and immediate.

[88] The conduct relied on by Castlecliff Health when making its decision to dismiss Ms Clements has not been substantiated. Even if it could, it does not amount to serious misconduct. All of the concerns raised in the dismissal letter are based on Ms Clements' performance.

[89] If Castlecliff Health had genuine concerns about Ms Clements' performance it was required to follow the established process described in *Trotter v Telecom*<sup>4</sup> which it did not. This required Castlecliff Health to identify the nature of the performance inadequacies, identify what standards must be met, warn of the likely consequences of failure to improve and give the employee an opportunity to improve.

[90] At the investigation meeting Ms Dutton told me dismissing Ms Clements was the safest thing for the clinic and patients. Ms Dutton said managing the issues would have taken three months to work through. This was in spite of the employment agreement providing for suspension in the case of serious misconduct. When I asked Ms Dutton if the directors had considered suspending Ms Clements while a full investigation of all concerns was undertaken she told me it was not something they had considered.

[91] Contrary to that evidence it is apparent Dr Thadigiri did turn his mind to suspension because in his written evidence he told me that if Ms Clements had been suspended the pressure on the clinic would have been heightened due to the limited resources available including monetary and human resources expertise to conduct an investigation while continuing the clinics normal operations providing patient care.

[92] Suspension under the employment agreement was an option that ought to have been considered. The directors acknowledged they did not make the decision to dismiss Ms Clements lightly. The reasons for the dismissal were discussed at length in meetings held by the directors prior to drafting the letter on Sunday 22 April which was then couriered to Ms Clements on 23 April. The letter records that the directors turned their mind to discussing the issues with the Applicant but chose not to. This was a deliberate and conscious decision by the directors.

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<sup>4</sup> *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659, 681.

[93] A failure to follow an agreed procedure will render a dismissal unjustified.<sup>5</sup> Clause 21.2 of the employment agreement states Castlecliff Health will treat Ms Clements fairly in reaching any decision to terminate her employment. Castlecliff Health's treatment of Ms Clements in this case has not been fair.

### **Remedies**

[94] Ms Clements has established two personal grievances. I have taken a global approach to Ms Clements' claims for remedies to resolve her personal grievances of lost wages and compensation.

### ***Lost wages***

[95] Ms Clements seeks reimbursement of lost wages for up to two years at which times she would have retired. Ms Clements was 68 when she was dismissed. While I have found her dismissal to be unjustified, given the level of concerns the directors held about her performance there is no certainty her employment would have continued for the ensuing two years.

[96] Ms Clements took steps to mitigate her loss following her return from holiday. She was successful in obtaining an alternative position, albeit on a casual basis, on 3 September 2018.

[97] In all the circumstances of this case I have awarded Ms Clements three months lost wages which equates to \$11,700 which I have calculated on the basis that Ms Clements was paid \$30 per hour for 30 hours each week.

[98] In addition Ms Clements is entitled to holiday pay on her lost wages of \$936.00 being 8% of her lost wages.

### ***Interest***

[99] In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion of interest on the amount awarded.<sup>6</sup> Interest on lost wages is not a remedy specified in s 123 of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. Until the

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<sup>5</sup> *NZ Baking Trades IUOW v Cormack* [1990] 1 NZILR 906 at 928.

<sup>6</sup> Employment Relations Act 2000, Sch 2 cl 11.

issuing of this determination there was no known entitlement and therefore no loss of use in the interim. The claim is declined.

### ***Compensation***

[100] Ms Clements seeks payment of compensation of \$50,000 for humiliation, loss of dignity and injury to feelings. Ms Clements gave me compelling evidence of the effect the dismissal had on her. She told me when she received the dismissal letter on Monday 23 April she was in shock.

[101] Ms Clements said she read the letter and started to feel sick. She had no forewarning it was coming and was not in any way prepared for the allegations and criticisms contained in the letter. The letter accused her of committing serious misconduct and creating acrimony. Ms Clements told me the contents of the letter were incredibly hurtful. She felt as though her entire character and competence was being attacked.

[102] The instruction that she not contact staff or enter the premises left her feeling like a criminal. She was particularly hurt she said, by the part of the dismissal letter which said staff had spoken to the directors in confidence, that they could not build a relationship with her and her actions toward them was inappropriate and lacked insight. She told me that in her 12 months working at Castlecliff Health she never had any inkling that her relationship with any staff member was anything other than respectful and friendly. She said she had always felt they had a good team environment.

[103] In the week after Ms Clements' dismissal Ms Clements and her husband travelled to Australia for their pre-planned holiday. She said she had been looking forward to the holiday for a long time but she was in shock over her dismissal and was unable to enjoy herself. Ms Clements told me they stayed with her step- daughter and her family but she could not bring herself to tell them what had happened. Ms Clements was embarrassed and upset about her dismissal and did not wish to discuss it. Ms Clements told me she experienced countless sleepless nights feeling distraught about what had happened and shed many tears and felt totally confused and broken.

[104] Since her dismissal Ms Clements has had to attend her doctor for medical assistance. Ms Clements has provided medical notes for each of those consultations.

She said it was extremely difficult for her to visit her doctor as her doctor knows Dr Thadigiri and that made her feel very uneasy about openly discussing what she was experiencing. The medical notes record Ms Clements suffering from stress because of her dismissal, hypertension and an inability to sleep. Because of her discomfort with her own doctor's association with Dr Thadigiri Ms Clements changed doctors.

[105] Ms Clements has also seen a counsellor on three occasions since her dismissal and is continuing to see this counsellor.

[106] Mr Clements gave evidence in support of his wife's claim for hurt and humiliation. He told me that in the days after receiving the letter he observed Ms Clements becoming confused, crying and unable to sleep. When Ms Clements suggested cancelling their holiday Mr Clements refused as he believed the holiday would be good for her.

[107] Mr Clements told me Ms Clements' mood was very low and she could talk of nothing but the dismissal and how upset she was. He said financially their future was thrown into disarray. Ms Clements felt she had let him down as she had been the principal income earner for the past 20 years. Mr Clements told me the normally level headed and confident woman he had known for 26 years was becoming moody and irrational and her confidence was totally undermined by what had happened.

[108] Mr Clements told me they spent six days on their own in Australia and Ms Clements told him it was a relief not to have to face anyone she knew. When staying with their daughter Ms Clements was not behaving like her normal bubbly self which prompted Mr Clements' daughter to ask whether everything was okay. He said he did not tell his daughter what had happened because Ms Clements had asked him not to tell anybody.

[109] Taking all of the circumstances into account I consider an award of compensation of \$30,000 is appropriate.

### **Contribution**

[110] Ms Clements has established personal grievances. Section 124 of the Act requires me to consider the extent to which Ms Clements actions contributed towards

the situation that gave rise to her grievances and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[111] The respondent seeks a reduction in remedies on the basis that Ms Clements' actions contributed in a significant way to the events leading up to the dismissal including putting patients at risk by failing to properly enrol them, putting staff at risk by failing to remove a dangerous patient, misuse of the time in lieu policy and causing financial losses which are ongoing.

[112] The situation that gave rise to the personal grievances was Castlecliff Health's failure to address its concerns with Ms Clements prior to making its decisions. In those circumstances I decline to reduce the awards.

[113] Castlecliff Health 2016 Limited is ordered to pay to Ms Clements the following remedies within 28 days of the date of this determination:

- a) Lost wages and holiday pay equivalent to \$12,636 gross under s 123(1)(b) of the Act;
- b) Compensation of \$30,000 under s 123(1)(c)(i) of the Act.

### **Breaches of Good faith and the employment agreement**

[114] Ms Clements claims Castlecliff Health has breached its statutory obligations of good faith and the employment agreement.

[115] The duty of good faith requires employers to be active and constructive in maintaining a productive employment relationship including being responsive and communicative. The obligation requires an employer who is proposing to make a decision that will or is likely to have an adverse effect on the continuation of employment to provide access to information and an opportunity to comment on the information.<sup>7</sup>

[116] The employment agreement sets out Castlecliff Health's commitments to treat Ms Clements fairly, to comply with its policies and procedures, to consult with her about major changes that may impact her employment, have a good reason to terminate the relationship and provide Ms Clements with a reasonable opportunity to

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<sup>7</sup> Employment Relations Act 2000 s 4(1A).

comment on any concerns Castlecliff Health may have that may lead to the termination of her employment.<sup>8</sup>

[117] Ms Clements has asked the Authority to impose penalties for any established breaches of good faith or of the employment agreement and for those penalties to be paid to her.

[118] The Court has held that where remedies have been awarded for a successful grievance claim and then to impose a penalty in respect of the same conduct amounts to double dipping and should be avoided, unless there are special facets of the breach which call for a punishment to be imposed on the employer on top of compensation to the employee.<sup>9</sup>

[119] The claim for a penalty involves the same facts as Ms Clements' personal grievances claims and these have already been appropriately addressed by the award of compensation. Castlecliff Health has incurred significant financial consequences as a result of my findings that its actions towards Ms Clements' during and at the end of her employment were unfair.

[120] In the circumstances I do not consider a penalty is necessary for punishment or deterrant purposes. Separate remedies have been awarded to compensate Ms Clements for her grievance, so the imposition of penalties on Castlecliff Health for these breaches would amount to double dipping. I have declined Ms Clements application to impose penalties in these circumstances.

### **Recommendations**

[121] Ms Clements has asked the Authority to make recommendations to Castlecliff Health concerning the action it should take to prevent similar employment relationship problems occurring.

[122] Section 123(1)(ca) allows the Authority to make such recommendations where any workplace conduct or practices are a significant factor in the personal grievance.

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<sup>8</sup> Individual Employment Agreement at cls 5 and 12.

<sup>9</sup> *Xu v McIntosh* [2004] ERNZ 448.

[123] It is appropriate to make recommendation in this case. I recommend Castlecliff Health develops and implements comprehensive disciplinary and performance management policies and procedures to deal with the performance and conduct matters about its employees. I recommend Castlecliff Health undertakes a full investigation of any misconduct or performance issues before providing full information including notes from any interviews to the employee concerned. I recommend Castlecliff Health provides a full opportunity to an affected employee to respond to all allegations with the benefit of support or representation with notice as to the possible consequences if the allegations are proven or performance does not improve.

[124] I also recommend Castlecliff Health's working directors and managers consider appropriate training in how to undertake effective performance management and misconduct processes.

### **Costs**

[125] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Clements shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Castlecliff Health shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[126] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority