

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 182/10
5276476

BETWEEN LEANNE COLLIER-WILSON
 Applicant

AND AUCKLAND DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: K J Anderson

Representatives: E Hartdegen, Counsel for Applicant
 A Drake, Counsel for Respondent

Investigation Meeting: 18 November 2009

Submissions received: 3 December and 21 December 2009 from Applicant
 17 December 2009 from Respondent

Determination: 21 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Collier-Wilson, says that she has a personal grievance pursuant to s.103(1)(b) of the Employment Relations Act 2000 (“the Act”) in that she was disadvantaged in her employment with the Auckland District Health Board (“the ADHB”). Ms Collier-Wilson also claims that the Board breached her contract of employment. The breach alleged was not set out in the *Statement of Problem*, but upon exploring this claim with Ms Hartdegen at the investigation meeting, it seems that it relates to a purported failure on the part of the Board to adhere to the harassment policy contained in the *Board Policy Manual*. The applicant also claims that ADHB has failed to act in good faith towards her, leading to a breach of s.4 of the Act. Finally, Ms Collier-Wilson claims various monies in the total sum of \$12,624.61. ADHB denies and refutes all of the claims advanced by Ms Collier-Wilson.

[2] For reasons of completeness, I record that in regard to her claim of unjustified disadvantage, Ms Collier-Wilson was seeking an order of compliance, with the effect that ADHB should allow her to return to work at the Te Puaruruhau unit. However, on 21st December 2009, the Authority was notified by Ms Hartdegen that Ms Collier-Wilson had resigned from her employment, effective from 1st December 2009.

[3] In addition to the evidence of Ms Collier-Wilson, the Authority received evidence from Ms Rachel Collier-Wilson. For the ADHB, there is evidence from: Dr Niall Kelly, Clinical Director, Ms Linda Haultain, Professional Leader, Ms Sheryl Wilson, Team Leader of Women's and Children's Social Work, Ms Matalau Loli, Clinical Supervisor, Ms Lynette Turner, Human Resources Consultant, Ms Anne Culpan, Rehabilitation Advisor, and Ms Cheryl Kirkness, Human Resources Manager. The Authority also received a number of relevant documents and closing submissions from the parties. All of the material provided has been closely considered albeit not specifically referred to in this determination.

Background Facts and Evidence

[4] Ms Collier-Wilson was employed as a social worker in November 2005 and worked as a Clinical Supervisor in the Starship child protection team, Te Puaruruhau ("Te Pua"). When Ms Collier-Wilson was promoted to Clinical Supervisor in November 2007, she moved from Paediatrics to Women's Health. It appears that Ms Collier-Wilson has some difficulties in her role in Women's Health and in April 2008, she requested that she return to Te Pua and did so, remaining in the role of Clinical Supervisor.

[5] The evidence of Ms Collier-Wilson is that she following her return to Te Pua she; "*continued to feel overwhelmed and began to be stressed and anxious at work.*" She says that she was managing staff performance issues as well as being consulted daily by the Women's Health social work team about practice issues while also dealing with serious maltreatment cases in Te Pua. The further evidence of Ms Collier-Wilson is that "*matters worsened*" and she succumbed to "*on-going work-related stress.*" Ms Collier-Wilson says that by the end of August 2008, she was too stressed to be at work as the stress and anxiety symptoms were seriously impacting on her performance. Ms Collier-Wilson consulted her GP, Dr Beetham, and was put off

work from 1st September until 5th October 2008. During this time, on 30th September 2008, Ms Collier-Wilson was assessed by Dr Cole at the Occupational Health and Safety Clinic. In his report to Dr Beetham, Dr Cole concludes that:

I think that graduated return to work would be on the cards but not until further assessment and treatment. For now I have declared her unfit for work in her current role. Due to the complexity of the work related issues it would be very hard to see how to start a graduated return to work without a clear and concise plan, with co-ordination with her management team. I do not think this can be considered for another month at least.

And further:

I have stated that there is no medical condition that prevents her from working and she is likely to be fit within the next 2-6 weeks and start a gradual return to work programme. I also wonder if Procure engage programme referral to Procure Psychological Services might be an option for her.

[6] On 14th October 2008, Ms Collier-Wilson sent an email to Ms Turner, Human Resources Advisor for the ADHB, providing the latest medical certificate. Ms Collier-Wilson informed that she was happy with Dr Cole's recommendation that she; "return to work in a staged way with a sound plan of support." Ms Collier-Wilson proposed that she return to work by working three days each week initially, progressing to four or five days by Christmas. Ms Collier-Wilson also indicated that:

I understand that the progression back to full time work and also, back to Te Puaruruhau will be a collaborative decision made with the aid of assessment and advice from my GP and Dr Cole.

Ms Collier-Wilson also requested that arrangements be made for her to resume work in a seconded post, on or about 28th October 2008, and temporarily away from the Women's and Children's Social Work team.

[7] On 23rd October 2008, Dr Beetham informed Dr Cole that Ms Collier-Wilson was now ready to resume work. Dr Cole reviewed Ms Collier-Wilson on 28th October and recommended that she start a gradual return to work program, initially for 30 hours a week for two weeks, then increasing to 40 hours.

Return to work

[8] A meeting took place on 29th October 2008 with Ms Collier-Wilson for the purpose of planning her rehabilitation back into the workplace. Present at the meeting were Ms Turner, Human Resources Consultant, Ms Marie Wardel-Vaughn, Team Leader - Social Work, Ms Linda Haultain, Professional Leader – Social Work, and Mr Andrew Lamb, Team Leader – Social Work. The evidence of Ms Turner, is that Ms

Collier-Wilson indicated that she wished to return to Te Pua but was informed that this would not be possible for now, due to the fact that there would be a lack of supervision at Te Pua and also because Dr Beetham had recommended that Ms Collier-Wilson avoid any jobs that are inherently stressful. As it is commonly accepted that Te Pua is a stressful environment, it was decided that it would be best if Ms Collier-Wilson did not return there for the time being. Following a meeting with her team leaders on 30th October, Ms Collier-Wilson returned to work on 3rd November 2008, on the basis of working 30 hours a week over five days, supervised by Ms Haultain and Mr Lamb.

[9] On 8th December 2008, Ms Haultain prepared a *return to work progress report*. The report records that Ms Collier-Wilson returned to work in the ACH Adult Social Work team and reasons are given for why she is working outside of Te Pua:

1. *This area of practice is inherently stressful*
2. *This practice environment was the location of Leanne's 'workplace collapse' and therefore held a lot of associated stress and distress for Leanne.*
3. *Leanne identified the Adult Social Work Team as a somewhat safer workplace in which to engage in a rehabilitation programme, having identified feeling able to work with Andrew Lamb, and Karlin Austin as part of her rehabilitation team.*

[10] The report also shows that Ms Collier-Wilson was not able to sustain working 30 hours over five days and was now working the 30 hours over four days albeit she was being paid for 40 hours a week and being supported by flexible start and finish times. Ms Haultain summarises:

Leanne has been back in the work place for 30 hours per week for approximately five weeks. During this period Leanne continues to be challenged by 'affect regulation' and has periods of intense sadness, as well as anger, whilst engaging with social work leaders in review conversations of the rehabilitation programme. Whilst indicating that she is highly motivated to return to work, limited progress has been made in increasing her hours of work, or increasing the challenge associated with the tasks Leanne undertakes. Given that Leanne [sic] substantive position is one of Clinical Supervisor in the area of child protection and high risk, I believe that substantial progress needs to be made prior to Leanne returning safely to this practice environment.

[11] The evidence of Ms Collier-Wilson is that while it was agreed that Ms Haultain would provide a written return to work (RTW) plan by 10th November 2008, this was not available until 17th December and that this delayed the process overall. Ms Collier-Wilson says that she was "*distressed*" by the way she was treated and the approach that the managers took to her rehabilitation which: "... *did not seem*

supportive or aimed at facilitating a return to being a fully functioning effective supervisor.” Indeed, Ms Collier-Wilson is critical of the rehabilitative process overall and she says that she complained to Mr Lamb and Ms Haultain because she felt that the RTW process was not supportive or rehabilitative. On the other hand, Ms Haultain says that she saw Ms Collier-Wilson every week regarding the RTW plan and while it was not clearly articulated on paper initially, Ms Collier-Wilson was given clear expectations every week until the RTW plan was finalised. Ms Haultain also says that Ms Collier-Wilson wanted to return to Te Pua, but Dr Cole had asked that Ms Collier-Wilson should be placed in an environment that allowed her to return to work whilst being supported in every way possible.

The second period of absence

[12] On 20th January 2009, Ms Collier-Wilson had an out-of work accident. She fell and hurt her back and was away from work for until 13th July 2009. Prior to returning to work, Dr Gavaghan, Occupational Medicine Specialist, undertook a physical and mental health review of Ms Collier-Wilson to determine her fitness for work in her usual role as a clinical supervisor and social worker. Dr Gavaghan’s report, dated 15th May 2009, records:

- (a) From a physical perspective he could not identify any physical reason why Ms Collier-Wilson would not be able to undertake her role as a social worker.
- (b) That from a mental perspective, Ms Collier-Wilson’s mental wellness has improved considerably since the change of medication and counselling but she still had some vulnerability and needs time to build her resilience.
- (c) That while there was no medical reason to suggest that Ms Collier-Wilson was not fit to return to her role as a social worker in Te Pua, her fitness to return to a role of clinical supervisor was not clear until she had successfully performed her role as a social worker in the unit.

[13] Dr Gavaghan recommended a staged rehabilitation process but noted that there were many issues making the rehabilitation “*complicated*,” including:

- *Ongoing chronic back pain*
- *Symptoms of anxiety and depression now in remission*
- *Unsuccessful rehabilitation October-January for multiple reasons*
- *Probable unresolved workplace relationship issues*

- *Returning to an area recognised for its inherent high stressors.*

[14] Dr Gavaghan records that Ms Collier-Wilson understood that some form of further assessment needed to be undertaken, as part of her rehabilitation back into the workplace, and that is due to:

... the history of having either physical or mental health issues that have impacted on her ability to work. The aim of the assessment should be to confirm that Leanne is able to function safely and competently as a social worker in the workplace.

And further:

I would recommend that rehabilitation should be staged such that she initially returns to a social work role before any consideration of a supervisory position. The options associated with this staged approach are whether the introduction back to work should be straight back to Te Puaruruhau or via initial rehabilitation into a non-confrontational area, ie that Leanne has not recently worked in. My recommendation, supported by the opinion of her GP, is that Leanne should follow the second option and initially have rehabilitation at another location.

[15] Dr Gavaghan then set out the advantages and disadvantages of Ms Collier-Wilson returning to Te Pua and a staged rehabilitation process for her. Stage 1 being initial rehabilitation into a non-confrontational area:

This will also allow Leanne to continue to increase her resilience and underlying wellness. It would provide an environment where there has been no conflict when she was unwell or during her last rehabilitation.

Dr Gavaghan assessed that at 8 weeks, under a return to work programme, it should be clear if Ms Collier-Wilson is able to work competently as a social worker. Dr Gavaghan's opinion was that once Ms Collier-Wilson completed this stage of the rehabilitation, she should be fit to return to her normal work area of Te Pua as a social worker. Dr Gavaghan then set out the two further stages of the rehabilitation programme being: Return as a social worker to Te Pua and then; consideration of Ms Collier-Wilson's return to a role as a clinical supervisor.

[16] The evidence of Ms Turner is that the ADHB Return to Work plan team went through the recommendations of Dr Gavaghan and looked at what areas of social work were available for Ms Collier-Wilson, consistent with Dr Gavaghan's report. Ms Turner says that AHDB needed to find an area that had the least amount of stress. Ms Haultain spoke to the staff at Te Pua, including Dr Kelly. Ms Haultain discussed with Dr Kelly the option of Ms Collier-Wilson returning to Te Pua. Dr Kelly recorded his opinion in an email dated 4 June 2009. The pertinent content is:

My position is that I cannot accept Leanne's return to Te Puaruruhau in any capacity. I have discussed this on a number of occasions with Katherine Newell

(Nurse Specialist and Te Puaruruhau Team Leader), who has viewed this email and agrees with its content. I have worked with Leanne for several years and I have the highest regard for her clinical work with patients and families, her understanding of the principles of child protection and her dedication to the welfare of children.

However, this is a highly stressful and demanding area of clinical practice in situations which are emotionally charged and where controlled confrontation is often required. These dynamics not only apply between clinicians and families, but between clinicians and other professionals – both health professionals, and statutory employees (particularly, social workers in Child Youth and Family).

Leanne's temperament is mercurial or unstable. While (in my experience) she is always professional with children and families, she is often unnecessarily aggressive and confrontational with other professionals. While she has controlled this tendency in meetings where I have been present, I have had consistent feedback to this effect from a number of team members of several professional disciplines. To work safely as a child protection social worker in Te Puaruruhau requires the ability to work harmoniously in a team with varying points of view, the ability to encourage consultation from colleagues who may not have managed previous cases particularly well, and the ability to work collaboratively with professionals who may not (in our view) be acting professionally in individual cases. It is a difficult balancing act in which all team members participate. To have even one person who does not function in this way (or whose function is erratic and unpredictable), creates enormous pressure on colleagues who are already struggling to cope.

Despite the personal respect and liking I have for Leanne, in my view it would be bad for the team, and our ability to work collaboratively with others outside the team, for Leanne to return to this role. In the end, it will inevitably have an adverse impact on our ability to deliver the service we are employed to deliver.

Return to work meetings

[17] The first meeting took place on 30th June 2009 for the purpose of discussing with Ms Collier-Wilson the suitability of her returning to Te Pua, including the view of Dr Kelly. There was also some discussion about other possible vacancies for Ms Collier-Wilson in regard to a return to work plan. Initially it was thought there was no suitable position available, due to the two possible vacancies being too stressful in the circumstances. The evidence of Ms Collier-Wilson is that she thought that the meeting did not go well and she is critical of Ms Haultain; but Ms Haultain refutes the criticism levelled at her. There was some mention by ADHB of “*frustration of contract*” if an alternative role could not be found for Ms Collier-Wilson but this was cut off by Ms Collier-Wilson's representative, Ms Piper (PSA Union Organiser) and it was not raised again. However, following information received from Ms Piper, it was subsequently revealed that there was a role available in Adult Social Work, albeit action had already been implemented to fill the vacancy.

[18] On 9th July 2009, a further meeting took place to discuss with Ms Collier-Wilson the role in Adult Social Work. The evidence of Ms Turner is that she thought that Ms Collier-Wilson was “*very difficult*” during the meeting. For example, when

told that the position was full time, Ms Collier-Wilson said she only wanted a part-time position. It was also conveyed to Ms Collier-Wilson that the new position was paid less than her previous role and it would not be a supervisory position.

The second return to work

[19] Ms Collier-Wilson returned to work on a graduated work plan on 13th July 2009. Ms Collier-Wilson says that Mr Andrew Lamb, the Team Leader she reported to, told her that he “*laughed*” when he was told that she was coming back to work. Ms Collier-Wilson also says that when she told Mr Lamb that she was on a graduated return to work he; “*sarcastically*” said that he was not having someone for six months part-time and that he understood that he was getting a full time equivalent employee. Ms Collier-Wilson is generally critical of Mr Lamb in that she perceived that he had not been informed of the agreement that had been reached for her return to work and that he made her feel “*unwelcome and unwanted*” at work. Mr Lamb is not available to give evidence having returned to the UK to live. However, the evidence of Ms Turner is that while Mr Lamb did not want Ms Collier-Wilson in his team for various reasons, he acted in a “*professional and friendly manner*” towards her. In an email dated 16th July 2009 to the members of his team, Mr Lamb asks them to: “... *please ensure you monitor carefully her [Ms Collier-Wilson] welfare and that of all of our staff, as she settles into the team. Please ensure that staff maintains a professional manner at all times.*” On the same day, via an email to Ms Collier-Wilson, Mr Lamb forwarded the return to work plan which had been modified following feedback from Occupational Health, after Ms Collier-Wilson had met with them. Mr Lamb indicated that he would meet weekly with Ms Collier-Wilson to review progress.

[20] Ms Collier-Wilson was assigned to the Adult Surgical/Medical team. This team is supervised by Ms Matalau Loli. Ms Collier-Wilson says that she had always had a good relationship with Ms Loli but was “*dismayed*” when Ms Loli was dismissive of her in that she did not want Ms Collier-Wilson to attend the team meeting that day (14th July) but that she would meet with her afterwards. However, the evidence of Ms Loli is that she did not return to work, after a period of leave, until 15th July 2009. Ms Collier-Wilson says that because she had not met with Ms Loli, by the forth day back at work, she went to see her. Ms Collier-Wilson says Ms Loli informed her that she was upset because she had just returned from annual leave and that prior to going on leave, applicants had been short-listed for a vacancy in her team.

However, upon her return, Ms Loli discovered that Ms Collier-Wilson had been appointed to the vacant role without any consultation. Ms Collier-Wilson says that Ms Loli informed her that she was “*very unhappy*” about the way in which Ms Collier-Wilson had been appointed to the vacancy in her team.

[21] The evidence of Ms Loli is that she was informed on 13th July 2009 that Ms Collier-Wilson was to be the new member of her team. Ms Loli says that she was “*angry*” about this. She had also heard that her team were “*unhappy and shocked*” that Ms Collier-Wilson was to be part of the team as she did not have a good reputation because of her “*unpredictable behaviour and overly aggressive approach*” towards other staff. Ms Loli says that she first spoke to Ms Collier-Wilson on 16th July but accepts that she was not prepared to meet with Ms Collier-Wilson on that day as she didn’t know how she felt about the circumstances of Ms Collier-Wilson’s appointment. Ms Loli says that when Ms Collier-Wilson informed her about the return to work plan she responded that she was not part of this plan and that she needed time to think about the overall situation. The further evidence of Ms Loli is that Ms Collier-Wilson expected that she should have first priority. However, Ms Loli had been away on leave for two weeks and she needed to meet with all her team members to gauge their views and feelings before she spoke with Ms Collier-Wilson.

[22] Ms Loli did meet with Ms Collier-Wilson on 17th July 2009. Her evidence is that during the meeting Ms Collier-Wilson “*cried uncontrollably and appeared distressed*” and she informed Ms Loli that she was upset about how Ms Loli had treated her the day before. Ms Loli says that she was frank with Ms Collier-Wilson in regard to having her appointed to the team “*out of the blue*” and apologised to her for her approach. Ms Loli attests that Ms Collier-Wilson only remained with her team for about seven days. The Authority understands that Ms Collier-Wilson only worked for a total of 30 hours before going off work due to sickness on or about 5th August 2009¹ albeit it appears there may have been a week of illness sometime after 17th July and before 5th August 2009.

[23] On 6th August 2009, Ms Collier-Wilson raised a personal grievance alleging unjustified disadvantage, breach of contract and good faith and a failure on the part of

¹ According to the report of Dr Walls dated 21st August 2009.

the ADHB to keep her safe from hazards in the workplace. The parties attended mediation on 21st September 2009, without resolution.

[24] In the meantime, Ms Collier-Wilson initiated a visit to Dr Walls, a colleague of Dr Gavaghan in the same practice. It is unclear why this visit was initiated given the comprehensive report of Dr Gavaghan dated 15th May 2009. The report of Dr Walls, dated 21st August 2009, provides a diagnosis and opinion including:

There is a definitive medical disorder; there is either an anxiety disorder or depressive disorder with anxiety symptoms. She has to some extent “burnt out.”

Dr Walls also makes comment on the work environment within the ADHB and the employment relationship. *“I would not recommend that she undertake any supervisory or management functions, at least in the short term.”*

Dr Walls concludes his report with the suggestion that perhaps Ms Collier-Wilson needs some time away from social work.

[25] Because there was some variance in the medical report of Dr Walls as compared with that of Dr Gavaghan, Ms Kirkness wrote to Dr Gavaghan on 12th October 2009 requesting that Dr Gavaghan and Dr Walls consider their respective reports and provide a single opinion regarding a return to work for Ms Collier-Wilson, along with details of an appropriate return to work plan. Dr Gavaghan responded via a letter dated 27th October 2009. Dr Gavaghan concluded that:

Dr Walls and myself are of the opinion that Leanne has not demonstrated a sustainable wellness to support returning to a highly stressful area of work such as Te Puaruruhau as described in Stage 2 of the rehabilitation plan in the report dated 06/05/09.

[26] At the date of the investigation meeting (18th November 2009) Ms Collier-Wilson had not returned to work. However, the Authority was subsequently informed that she returned to work on 23rd November following a meeting on 20th November. The notes of the meeting held on that day record that it was agreed that Ms Collier-Wilson would return to work under a 3 stage plan. The first stage being that Ms Collier-Wilson would work for 8 weeks as a Social Worker in Adults. The parties would then meet and review the situation. Stage 2 involved Ms Collier-Wilson working as a Social Worker for a further 8 weeks in the Women’s and Children’s Team – but this was subject to a review. Finally, stage 3 would have Ms Collier-

Wilson working as a Clinical Supervisor (if this was deemed to be her substantive post) in the Women's and Children's Team. The notes record that:

This process will take approx 4 months and it would not be until Stage 3 was reached that DS [Diane Smith – Acting Team Leader] would approach Te Pua with a possible return there – it was reiterated again that Leanne had heard what Dr Kelly has said and that this may not be possible however, DS would have those discussions as long as Leanne had achieved the expectations in the previous stages. Leanne was consulted about all the above and was in agreeance [sic].

[27] It appears from the notes of the meeting of 20th November 2009 that the parties had amicably agreed to a return to work plan for Ms Collier-Wilson to be effected from 23 November. However, by submissions received following the investigation meeting, the Authority now knows that Ms Collier-Wilson resigned from her employment with the ADHB on 1st December 2009 with her last day of employment being 18th December 2009. In her letter of resignation to Ms Smith dated 1st December 2009, Ms Collier-Wilson records that:

You will be aware that I have been an employee of ADHB for the past four years. For most of that time I have been engaged in challenging and deeply satisfying clinical work. I feel privileged to have had the opportunity to have worked alongside some extremely skilled and professional clinicians and to have extensively extended my skills, knowledge and experience. I would like to take the opportunity to thank you for making my recent return to the workplace and my final time here a positive and well-supported experience.

[28] For reasons of completeness, I note at this point that, due to the resignation of Ms Collier-Wilson, the matter of whether she would or should have been able to return to the Te Pua unit has not been subjected to any close analysis. Nonetheless, it is transparently clear, from the overall medical opinions and the surrounding circumstances, that at no time, from approximately mid-October 2008 until the date of her appearance at the investigation meeting, would it have been appropriate or possible for Ms Collier-Wilson to return to Te Pua despite her views to the contrary.

Analysis and Conclusions

[29] While the claims of Ms Collier-Wilson were not couched particularly clearly, following an exploration of them with Ms Hartegen, at the opening of the investigation meeting, the claims and the rationale behind them, can be summarised as follows:

(a) An unjustified disadvantage in her employment; allegedly brought about by several actions on the part of the ADHB. Firstly, it is claimed for Ms Collier-Wilson

that she was victimised and bullied and that this came about as a result of her interactions with Ms Haultain, Ms Loli and Mr Lamb. It is also claimed that the ADHB failed to keep Ms Collier-Wilson safe from hazards in the workplace.

(b) It is further claimed by Ms Collier-Wilson that the ADHB breached her employment agreement. This claim relates to an alleged breach of the ADHB *Harassment* policy. Under this policy:

Harassment can be defined as any unsolicited and unwelcome hostile or offensive act, expression or derogatory statement, including incitement to commit such behaviour, which causes distress or offence to an individual.

Ms Collier-Wilson contends that the treatment of her by Ms Haultain, Ms Loli and Mr Lamb caused offence and distress to her and constituted harassment under the ADHB policy. It is also claimed that in regard to the “*Other Forms of Harassment*” set out in the ADHB policy, Ms Collier-Wilson says that she was subjected to:

- Bullying;
- Embarrassing, threatening, humiliating, patronising or intimidating remarks;
- Belittling opinions or constant criticism;
- Undermining another’s authority/standing in the workplace; and
- Publicly insulting/humiliating a person in the workplace.

(c) Ms Collier-Wilson also claims that the ADHB breached its obligation of good faith to her pursuant to s.4 of the Employment Relations Act 2000 (“the Act”).

(d) Finally, Ms Collier-Wilson claims the gross sum of \$12,624.61 which she says she is entitled to due to the ADHB failing to pay her correctly while she was in receipt of ACC payments and also due to the fact that she was required to use her annual leave entitlement while on sick leave in October 2009. There is also a claim that she was not paid according to the rate for Step 8 in the applicable MECA.

(a) **Was there an unjustified disadvantage?**

[30] The requirements of s.103(1)(b) of the Act are twofold: an unjustified action on the part of the employer; and the employment must be affected to the employee’s disadvantage. It appears that the substance of Ms Collier-Wilson’s unjustified disadvantage claim relates to the circumstances pertaining to her return to work after the injury to her back. But it seems to me that the circumstances are more complex

than that. It is clear that there was some unfinished business carried over from her earlier absence which manifested itself in her being unable to remain working in the Te Pua unit due to mental health issues, and then some subsequent difficulties in completing a satisfactory return to work in the role of a Social Worker rather than a Clinical Supervisor. The evidence of Ms Turner is that before Ms Collier-Wilson could return to the workplace, the ADHB had to ensure that she was not only physically fit but also mentally fit to return to work. It has to be accepted that the combined circumstances pertaining to the two absences, and the respective return to work plans, were difficult for Ms Collier-Wilson and possibly, on reflection, matters could have been managed better by the ADHB. Nonetheless, it is accepted that the circumstances were complex and that Ms Collier-Wilson was difficult to accommodate, partially due to managing the ongoing circumstances associated with her mental and physical health and a practicable return to work, and partially due to the intricate demands associated with running complex medical facilities for ADHB managers and team leaders.

[31] While it can be accepted that the combination of a variety of factors led to some disadvantage for Ms Collier-Wilson in regard to her employment, I cannot find that any disadvantage incurred by her was the direct result of any unjustified action or actions on the part of the ADHB. On the contrary, there is considerable evidence that points to the ADHB going to some lengths to accommodate Ms Collier-Wilson, some of which, unfortunately, created some internal conflict that manifested itself in a negative response to her by various people, particularly Ms Loli and Mr Lamb. While it seems to me that the placement of Ms Collier-Wilson under the management of Mr Lamb and Ms Loli could have been dealt with better, hence the exposure of Ms Collier-Wilson to the unenthusiastic response she received may have been avoided to some extent, I do not find that any deficiency in the management of the second return to work for Ms Collier-Wilson can be held to an unjustified action or actions on the part of the ADHB.

[32] In summary, while I accept that Ms Collier-Wilson was exposed to some disadvantage in her employment pertaining to the second return to work, I do not find that this was caused by any unjustified action on the part of the ADHB.

(b) **Was there a breach of the employment agreement?**

[33] This claim relates to an alleged breach by the ADHB of the harassment policy that forms part of the terms and conditions of employment for Ms Collier-Wilson. Having examined the policy and the overall evidence pertaining to the allegations of Ms Collier-Wilson, I do not find that any breach of the harassment policy occurred. While I accept that Ms Collier-Wilson may have been subjected to some attitudinal behaviour which may have been less than pleasant at various times, and I also accept that her perception of this behaviour caused her some distress and/or offence, I do not find that that she was exposed to any “*unwelcome hostile or offensive act, expression or derogatory statement*” as defined in the introduction the harassment policy. Additionally, I do not accept that Ms Collier-Wilson was bullied or victimised or exposed to any of the actions set out above in paragraph [29]. Rather, I conclude that while the attitude of various management staff may have exuded some frustration at times about the overall circumstances surrounding Ms Collier-Wilson, her perception and/or interpretation of this is exaggerated and misplaced. By this, I do not mean any particular criticism of Ms Collier-Wilson. Rather, I conclude that it is more likely that her frame of mind at the time was such that any negative response on the part of the ADHB was perceived by Ms Collier-Wilson to be a personal criticism or antagonism towards her rather than being taken in the context of the substantial and ongoing difficulties faced by all concerned.

(c) **Was there a breach of good faith pursuant to s.4?**

[34] I do not find that the alleged incidents separately or together, constitute a breach of any express or implied term of the employment contract, or of s.4 of the Act. But even if I am wrong about this (and I think not), there is a high statutory threshold to be attained before a penalty can be awarded for a breach of s.4, in that a failure to comply with the duty of good faith must be deliberate, serious and sustained or alternatively, intended to undermine an employment relationship.² That statutory threshold has not been attained in the circumstances of this case.

(d) **Is Ms Collier-Wilson entitled to the monies claimed?**

[35] The overall evidence pertaining to this matter is somewhat unclear and Ms Collier-Wilson has provided little evidence of why she believes she has an entitlement. However, as I understand it, that as part of the second return to work

² *New Zealand Air Line Pilots Assn Inc and Ors v Jetconnect Ltd and Ors* AC 23A/09, 19 June 2009.

plan, it was agreed by the ADHB that when ACC reduced its payments to Ms Collier-Wilson, due to her being declared fit for work again, the ADHB would start paying her on an interim basis until she actually returned to work. The payments made to Ms Collier-Wilson were a “top up” of the ACC payments based on what she would have been paid had she returned to work on 29th May 2009, calculated on the basis of the reduced hours agreed under the return to work plan, not on the normal full time pay. It is submitted for Ms Collier-Wilson that she was told by her ACC case manager that a top up calculation means that an employee should get paid as if they were working a regular 40 hours per week. The submission for the ADHB is that there was never any agreement that the pay of Ms Collier-Wilson would be topped up to the equivalent of 40 hours worked. However, this submission seems to be at odds with the content of an email dated 23rd June 2009 from Ms Turner to Ms Collier-Wilson in which she records the effect of the graduated return to work plan and associated payment for hours being; “*as if you had returned on your graduated return to work plan*” with a graduated number of paid hours of work; and then from:

“Week 5 – onwards 5 days x 8 hours 40 hours”

This appears to give a degree of credence to the claim of Ms Collier-Wilson that she should have been paid for 40 hours each week from the w/e 5th July 2009 through to going on sick leave again.

[36] The ADHB has provided a schedule of payments received by Ms Collier-Wilson each fortnight. It shows that for the w/e 5/07/2009 she was paid for 72.50 hours rather than 80 hours and then for some reason that is not clear, the hours per fortnight for the w/e 19/07/2009 and the w/e 2/08/2009 are 26.5 and 67 respectively. There then follows periods of paid sick leave and paid special leave where Ms Collier-Wilson was paid 40 hours each week albeit the information provided is difficult to assess without further explanation, as the hours are made up of several components. While it seems that there may be some validity in Ms Collier-Wilson’s claim that she should have been paid for 40 hours each week from the w/e 5/07/2009, I do not have enough information available to conclude that this is more probable than not and hence I am unable to make any order in favour of Ms Collier-Wilson. Nonetheless, given that Ms Collier-Wilson may have the entitlement she claims, the parties are directed to engage in further discussion regarding the payment details with the right reserved to return to the Authority for a final determination, subject to the provision of further information.

[37] Ms Collier-Wilson also claims that she should have been paid on Step 8 of the MECA salary scale from 1st October 2009. While she accepts that she was paid at the correct rate, with the equalisation allowance, until 30th September 2009, (\$65,849), Ms Collier-Wilson says that following an increase in the salary scales from 1st October, she should have been paid at the new Step 8 rate of \$68,483 per annum. However, the ADHB says that the role that Ms Collier-Wilson was appointed to in the Adult Team, was paid at the Step 7 rate (\$63,882) compared to the previous Clinical Supervisor rate at Step 8 of \$65,849, but the ADHB agreed to pay an equalisation allowance until Ms Collier-Wilson's salary in the Adult Team role equalised or exceeded her former salary of \$65,849. As of 1st October 2009, the Step 7 rate increased to \$66,437 which was more than the previous Clinical Supervisor rate and hence the equalisation allowance was no longer applicable.

[38] I accept the evidence of the ADHB on this matter as it seems most appropriate and logical. Given that on medical advice, Ms Collier-Wilson was no longer able to hold a supervisory or management role and that the only position available was the one that she was consequently appointed to, there is no validity to her claim and it must be declined.

[39] The final aspect of Ms Collier-Wilson's monetary claims is that she says that she should be reimbursed for 109 hours of annual leave that she used to cover for sick leave taken in October 2009. She has not provided any coherent evidence to support this claim. The ADHB says that Ms Collier-Wilson had exhausted her sick leave entitlement and that she elected to use accrued annual leave to obtain payment for the time off in question. In the absence of any evidence to the contrary, I accept that this is most probably so and hence the claim for reimbursement of the annual leave is declined.

Determination

[40] For the reasons set out in the body of this determination, I find that:

(a) Pursuant to s.103(1)(b) of the Employment Relations Act 2000, the employment of Ms Collier-Wilson was not affected to her disadvantage by some unjustified action by her employer, the ADHB and the claim is dismissed.

(b) The ADHB did not breach any of the terms and conditions of Ms Collier-Wilson's employment agreement. In particular, the ADHB did not breach its harassment policy nor did it fail to keep Ms Collier-Wilson safe from hazards in the workplace and the claim is dismissed.

(c) The ADHB did not commit any breach of good faith pursuant to s.4 of the Employment Relations Act 2000 hence this claim is dismissed.

(d) It is possible that Ms Collier-Wilson was entitled to be paid for 40 hours per week from the w/e 5th July 2009 as claimed (see paragraphs [35] and [36]) but the Authority is not in possession of sufficient information to make any order. The parties are directed to engage in further discussion regarding the payment details, with the right reserved to return to the Authority for a final determination, subject to the provision of further information. All of the other monetary claims are dismissed.

Costs

[41] Costs are reserved subject to the outcome of the direction at paragraph [40] (d) above and the possible further involvement of the Authority, with the parties having the right to subsequently make submissions on costs if they are unable to resolve all matters including costs.

K J Anderson
Member of the Employment Relations Authority