

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 526  
5437196

BETWEEN ERIN THERESE DENT  
Applicant

A N D WAIKATO DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person  
A Sullivan, Counsel for the Respondent

Investigation Meeting: 30 September to 2 October 2014 at Hamilton

Submissions Received: 25 September and 6 October 2014 from the Applicant  
25 September and 6 October 2014 from the Respondent

Date of Determination: 19 December 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Erin Dent was unjustifiably disadvantaged by the actions of the Waikato District Health Board issuing a written warning in respect of her conduct towards Christine Haysom.**
- B. Erin Dent was not unjustifiably disadvantaged in her employment by the actions of the Waikato District Health Board in dealing with the complaint of bullying by Kevin Harris and Aileen McGowan. This personal grievance is dismissed.**
- C. Erin Dent was not unjustifiably disadvantaged by the actions of the Waikato District Health Board requiring her to undergo a drug and alcohol test on 15 October 2013. This personal grievance is dismissed.**

- D. Erin Dent was unjustifiably dismissed by the actions of the Waikato District Health Board leading to her dismissal.**
- E. I decline to reinstate Ms Dent because it is neither reasonable nor practicable to do so in the circumstances.**
- F. I decline to order payment of any lost remuneration because Ms Dent has not mitigated her lost remuneration and may have been unable to work following termination of her employment.**
- G. There is an order that Waikato District Health Board pay to Erin Dent compensation of \$2,500 for hurt, humiliation including a reduction of 50% for Ms Dent's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- H. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

### **Employment relationship problem**

[1] The applicant, Erin Therese Dent, was employed by the Waikato District Health Board (the respondent) until her employment was terminated for incompatibility on or about 21 March 2014. Ms Dent alleges she was unjustifiably dismissed. She also alleges she was unjustifiably disadvantaged by bullying, issuing of a written warning and a requirement she undergo a drug and alcohol test.

### **Facts leading to disadvantage/dismissal**

[2] Ms Dent was employed by the respondent as an administrative secretary in August 2000. Ms Dent's duties were set out in a job description she signed in November 2004<sup>1</sup> and involved typing and other assorted duties including compilation of doctors' rosters and providing administrative support. Her job required her to have relationships with doctors, technicians, nurses and various other staff numbering 24 or more on a daily basis.

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<sup>1</sup> Common Bundle of Documents Vol.3 pp.178 to187

[3] In January 2005 she started in the anaesthesia department. Her line manager was Aileen McGowan. Between 2005 and 2007 they worked together without incident.

[4] In October 2007 Ms McGowan met with Ms Dent regarding performance concerns raised by Dr David Kibblewhite, Clinical Director. As a result, Ms Dent's cellphone was removed, she was required to undertake training courses and there was a reorganisation of her work on the doctors' rosters. Ms Dent and Ms McGowan were also to meet with the Clinical Director.

### ***Misuse of sick leave***

[5] On 24 January 2013 Ms McGowan advised Ms Dent of concerns about her possible misuse of sick leave.

[6] On 15 February 2013 Ms Dent and her solicitor, Anamika Singh, met with Grant Hay, Human Resources Consultant, about the allegations. During this meeting her solicitor raised concerns of bullying by Ms McGowan. The meeting was adjourned and Ms Dent was asked to provide further information.

[7] On 18 February 2013 her solicitor wrote to Mr Hay alleging Ms McGowan had given incorrect and misleading information about the sick leave allegations. It also raised a general allegation of a pattern of bullying by Ms McGowan towards Ms Dent.

[8] The issue of misuse of sick leave was resolved without further disciplinary action being taken.

### ***Bullying***

[9] On 21 February 2013 Kevin Harris, Assistant Group Manager for Hospital Operations, became involved in the disciplinary process for Ms Dent.

[10] On 13 March 2013 Ms Dent's solicitor sent a letter with a schedule of 32 incidents from 2007 to 2013 she sought to have investigated.

[11] On 21 March 2013 Mr Harris forwarded the above letter to a senior human resources consultant, Ruth Ross. Ms Ross met with Ms McGowan. She did not meet with Ms Dent.

[12] On 26 April 2013 Ms Ross completed her report about the bullying complaints and provided this to Mr Harris. The report concluded there were reasonable explanations for each event with the exception of those Ms McGowan could not respond to because she was unclear about the issue.

[13] On 15 May 2013 Mr Harris wrote to Ms Dent's solicitor advising the majority of her bullying claims were historical and/or unable to be substantiated. He suggested fortnightly meetings with Ms Dent and Ms McGowan to establish a constructive working relationship.

[14] On 10 July 2013 Ms Dent's solicitor sent several pieces of correspondence raising a personal grievance of unjustified disadvantage. She sought the immediate cessation of fortnightly meetings with Mr Harris and Ms McGowan. Mr Harris sent an email stating he expected the fortnightly meetings to continue.

[15] On 16 July 2013 Mr Harris wrote to Ms Dent's solicitor stating the respondent's view the bullying allegations had been fairly investigated and were unfounded.

[16] On 22 July 2013 Ms Dent's lawyer emailed Mr Harris alleging Ms Dent continued to feel intimidated by Ms McGowan and the fortnightly meetings needed to cease immediately.

[17] On 22 August 2013 Ms Dent's solicitor raised amongst other things, issues about the bullying and harassment allegations against Ms McGowan. Ms Dent was willing to revisit the fortnightly meetings but referred to them not being used "as a nit picking and interrogation exercise". Ms Dent did not attend the meetings.

[18] On 26 September 2013 Ms Dent obtained a medical certificate alleging her stress was exacerbated by the meetings with her line managers.

[19] On 25 October 2013 Mr Harris replied to her lawyer's letter dated 22 August 2013 about the allegations of bullying and harassment claims by Ms Dent.

[20] On 1 November 2013 her lawyer sent a letter complaining about respondent's refusal to investigate bullying complaints from 2007 forward.

[21] On 4 November 2013 Mr Harris replied to Ms Dent stating the respondent considered it had conducted a full and thorough investigation into her allegations against Ms McGowan and considered the matter to be closed.

### ***Written Warning***

[22] On 27 June 2013 the respondent received by email a formal complaint from Christine Haysom alleging Ms Dent had phoned her on Sunday 23 June 2013 demanding to visit her at home to discuss workplace issues (the Haysom complaint).

[23] On 2 July 2013 Messrs Harris, Hay and another staff member interviewed Ms Haysom.

[24] On 15 July 2013 Mr Harris wrote to Ms Dent about the Haysom complaint attaching a copy of the email dated 27 June 2013 and notes of the meeting on 2 July 2013.

[25] On 18 July 2013 Ms Dent attended a disciplinary meeting about the Haysom complaint. She made submissions about the conduct and provided several references.

[26] On 23 July 2013 Ms Dent provided further information and references.

[27] On 7 August 2013 Mr Harris wrote to Ms Dent's lawyer requesting a further meeting to provide her with the outcome in respect of the Haysom complaint. He suggested the meeting be held after the mediation scheduled for 20 August 2013.

[28] On 9 August 2013 Ms Dent's solicitor sought the respondent's preliminary view about the Haysom complaint by 13 August 2013.

[29] On the same day Mr Harris confirmed his preliminary finding "*was that the allegations had been substantiated and in my view Ms Dent had breached the Waikato District Health Board Code of Conduct and should be issued with a first written warning*".

[30] On 12 August 2013 Ms Dent's lawyer sought from the respondent further information they relied upon to make their preliminary decision, including a copy of the Code of Conduct.

[31] On 20 August 2013 the parties attended mediation. Mediation was unsuccessful.

[32] On 22 August 2013 Ms Dent's solicitor raised further issues about the Haysom complaint and the non-receipt of information including a copy of the Code of Conduct.

[33] On 8 October 2013 Mr Harris confirmed its preliminary view about the Haysom complaint that Ms Dent would be issued with a written warning and requested a further meeting.

[34] On 17 October 2013 Ms Dent, her lawyer and a PSA delegate, Denise Takiari, met with Mr Harris, Mr Hay and another staff member. The meeting was about the Haysom complaint. Ms Dent was issued with her first written warning.<sup>2</sup>

[35] On 29 October 2013 Ms Dent filed a statement of problem raising a personal grievance of unjustified disadvantage.

### ***Drug and Alcohol Allegations***

[36] On 15 October 2013 written complaints were made about Ms Dent's behaviour and the possibility she was under the influence of drugs and/or alcohol. Ms Dent consented to drug and alcohol testing. The tests were returned negative for non-prescription drugs and alcohol.

### ***Performance concerns***

[37] On 6 November 2013 Amy Pollard, Anaesthetics Registrar, made a complaint about Ms Dent's rostering. This was additional to an earlier email dated 17 October 2013 to Mr Hay and Ms McGowan about these concerns.

[38] On 11 November 2013 Gary Hopgood, Cardiac and Specialist Anaesthetist, complained about the administrative support available within the department. He gave specific examples of problems with Ms Dent.

[39] On 13 November 2013 Dr Arthur Rudman, sent Mr Harris a copy of an email from another doctor regarding problems with Ms Dent's processing his application for leave.

[40] On 18 November 2013 Mr Harris sent a letter to Ms Dent raising performance concerns about her leave management. She was provided with a copy of the

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<sup>2</sup> Common Bundle of Documents Vol.2, p.293

complaints from Dr Pollard, Dr Hopgood and Dr Rudman dated 6, 11 and 13 November 2013. The same day Ms Dent contacted health and safety alleging harm from her workload and the disciplinary matters.

[41] On 5 December 2013 a meeting was held with Ms Dent, Ms Takiari, Mr Harris and Mr Hay about the performance concerns. Stuart Irwin, Health and Safety Services, attended to discuss the harm alleged by Ms Dent in her workplace.

[42] On 6 December 2013 Mr Harris advised the outcome of the meeting was that no further action would be taken regarding issues raised about the performance concerns. The letter also noted an agreement that Ms Dent be removed and placed in clinical records on a temporary basis while an independent psychiatric assessment was undertaken to assess her ability to return to her substantive role.

[43] On 9 December 2013 Ms Dent relocated to the clinical records department.

### ***Incompatibility***

[44] On 7 January 2014 a further complaint was received from Cameron Buchanan, Director Anaesthesia, and various other doctors, regarding the workability of the relationship between Ms Dent and the Anaesthesia Executive Group (AEG) and Ms McGowan.

[45] On 14 January 2014 Mr Irwin sent a letter to the psychiatrist, Dr Rob Shieff, requesting he assess Ms Dent and answer a number of questions regarding the alleged harm to her in her workplace.<sup>3</sup>

[46] On 20 January 2014 Dr Shieff provided a report.<sup>4</sup> He advised Ms Dent was not currently demonstrating symptoms or signs of physiological or psychological harm. He presumed this was because she was using prescribed medication and was working away from that environment. She was able to resume her usual roles and responsibilities without restriction but was concerned about her relationship with her line manager. He recommended a process of mediation between Ms Dent and her line manager using a process of three to four meetings over a course of six weeks. He concluded saying *“Irrespective of the facts of this matter, it is Erin’s perception of*

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<sup>3</sup> Common Bundle Vol.2, p.342

<sup>4</sup> Common Bundle Vol 2 p355

*being the victim of bullying behaviour that has been the casual factor in her past experience of psychological difficulties.”*

[47] On 30 January 2014 Karen Berry provided a statement alleging belligerence by Ms Dent and an inability to communicate effectively. She also alleged that Ms Dent was repeatedly absent, had an untidy and unorganised office and verbally belittled her to other staff. Ms Berry believed there was a breakdown in her relationship with Ms Dent and she felt she could no longer have a suitable working relationship within the anaesthetic department. Ms Berry also alleged she would look for employment elsewhere if Ms Dent was returned to the department.<sup>5</sup>

[48] On 31 January 2014 Ms McGowan provided a written statement alleging she would leave her employment if Ms Dent returned to work in the anaesthetic department. She referred to the detrimental effect of Ms Dent upon her mental and physical health.

[49] On 4 February 2014 Ms Takiari advised Ms Dent intended returning to her position in theatre and anaesthetics on Monday 10 February 2014.

[50] On 7 February 2014 Mr Harris requested a meeting with Ms Dent to discuss her return to the department and the impact on staff.

[51] On 10 February 2014 a meeting was held with Ms Dent, Ms Takiari, Mr Harris, Mr Hay and Greg Peplow, Legal Advocate. During the meeting Ms Dent accused Mr Irwin of saying she was lying. There was an agreement Ms Dent would remain at home on paid leave.

[52] The same day Ms Dent received a letter setting out a number of concerns about incompatibility (the incompatibility concerns). A further meeting was to be scheduled. She then obtained a medical certificate stating she was unfit to return to work until 24 February 2014.

[53] On 17 February 2014 her Union representative, Daryl Gatenby, began corresponding with Mr Peplow. A further medical certificate was provided stating Ms Dent was currently unavailable to attend work until 3 March 2014. He sought an adjournment of the meeting. Mr Peplow advised the medical certificate did not

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<sup>5</sup> Common Bundle Vol.2, p.361

prevent Ms Dent from attending the meeting, expected her attendance and in her absence a decision would be made.

[54] On 18 February 2014 Mr Gatenby sought an opportunity for Ms Dent to respond to the statements and to be heard. He also raised the possibility of a role for Ms Dent outside of the anaesthetic department.

[55] Mr Peploe replied the same day stating *“if Erin Dent does not wish to take up the opportunity to meet then the Waikato DHB will extend a timeframe until 16.30 tomorrow to provide written material, alternatively we can rearrange the meeting schedule for today to tomorrow. However, should Erin elect not to take up the option then Waikato DHB will make a decision based on the material available to it, including your submissions made in your correspondence below.”*

[56] On 19 February 2014 Mr Gatenby replied protesting that an opportunity to be heard *“was clearly not reasonably open to Erin given the circumstances.”* He referred to the fact she was not fit to return to work and denied that her ability to communicate through him evidenced her ability to attend a meeting. He then provided a written response.

[57] On the same date the respondent met to consider the allegations. Mr Harris determined Ms Dent’s employment would be terminated upon one month’s notice.

[58] On 21 February 2014 Ms Dent was advised her employment was terminated and that she was able to continue working at clinical records until 21 March 2014 when she returned to work.

[59] On 28 February 2014 Ms Dent raised a personal grievance about her dismissal.

[60] On 12 March 2014 this matter was directed to mediation. Mediation was unsuccessful.

[61] On 4 April 2014 Ms Dent raised a further personal grievance regarding the behaviour of Mr Harris, Greg Peploe and Grant Hay.

[62] These applications are now before me for determination.

## **Issues**

[63] At the beginning of the first hearing day, the parties agreed the following issues are for investigation:

- (a) Was Ms Dent unjustifiably disadvantaged in her employment by the actions of the employer in issuing a written warning in relation to a complaint by Christine Haysom?
- (b) Was Ms Dent unjustifiably disadvantaged in her employment by bullying behaviour by Kevin Harris and Aileen McGowan?
- (c) Was Ms Dent unjustifiably disadvantaged in her employment by the requirement she undergo a drug and alcohol test on 15 October 2013?
- (d) Was Ms Dent's conduct incompatibility such that a fair and reasonable employer could have dismissed her for it?
- (e) Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?
- (f) What remedies (if any) should be awarded?

## **Other Personal Grievances**

[64] Several personal grievances in addition to those listed above were sought to be included within this hearing. I deal with each below.

[65] Ms Dent alleged a personal grievance arising from the actions of Greg Peplow in his dealings with the process leading to dismissal. This is part of the issue (e) above. It is not a separate personal grievance.

[66] Ms Dent alleged a personal grievances arising from the actions of Grant Hay in his dealings with her drug and alcohol testing and dismissal. This is part of the issues (c) to (e) above. It is not a separate personal grievance.

[67] Ms Dent alleged a personal grievance of discrimination under s103(1)(c). She referred to the grounds in s105(1)(b),(h),(k) and (j). The evidence she relied upon was identical to that in support of the personal grievances in paragraph [63] above. She

believed this showed she was discriminated against as well. This is not evidence of discrimination under any of the above grounds. This personal grievance is dismissed.

[68] Ms Dent alleged a personal grievance under s103(1)(d) for sexual harassment. She believed this was shown by the copying and distribution of her personal emails to her ex-partner sent from her work computer containing sexually explicit material<sup>6</sup> and the fact Ms McGowan met with her ex-partner on 4 January 2013. The meeting and emails were relevant to the serious misconduct concerns raised on 24 January 2013.<sup>7</sup> The 4 January 2013 meeting minutes and emails were sent to Ms Dent's lawyer at her request. There is no evidence they were released to anyone other than those involved in investigating and determining the allegations. This is not evidence of sexual harassment under s103(1)(d). This personal grievance is dismissed.

[69] Ms Dent alleged a personal grievance under s103(1)(f) that she had been subjected to duress due to her union membership. She states she was a union delegate for four years, the respondent had excessive human resources available for dealing with personal grievances<sup>8</sup> and she alleged Mr Peplow pressured her Union to withdraw.<sup>9</sup> Her Union representative status and the respondent's human resources do not show duress. Two Union delegates gave evidence at hearing. Neither confirmed her assertion about Mr Peplow using undue influence.<sup>10</sup> There is no evidence of duress due to union membership under s103(1)(f). This personal grievance is dismissed.

[70] Finally Ms Dent alleged personal grievances about bullying by Drs Cameron Buchanan, Arthur Rudman and Gary Hopgood. She alleged Dr Hopgood verbally abused her on or about 30 November 2012.<sup>11</sup> She did not complain or raise a personal grievance at the time. This bullying was raised in her witness statement filed on 16 September 2014.<sup>12</sup> This is nearly two years outside of the time for raising a personal grievance. Dr Hopgood denied speaking rudely to Ms Dent. There are no exceptional circumstances for extending time to raise this personal grievance. Given Dr

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<sup>6</sup> Applicants submissions received 4 October 2014 para F(1) to (4)

<sup>7</sup> Common Bundle Vol 1 pp74-75

<sup>8</sup> Applicant's submissions received 6 October 2014 para G(1) to (7) and Brief of evidence E Dent in reply to G Hopgood sworn 30/09/14

<sup>9</sup> See above para C(81)

<sup>10</sup> See Brief of evidence B Stott sworn 30/09/14 and Brief of Evidence D Takiari sworn 2/10/14

<sup>11</sup> Applicant's submissions received 6 October 2014 para E(13)

<sup>12</sup> Brief of evidence of E Dent in reply to G Hopgood para 1

Hopgood's denial, the lack of any corroborating evidence and the late raising of this grievance, this personal grievance is dismissed.

[71] The alleged bullying by Drs. Hopgood, Rudman and Buchanan arises from a letter dated 7 January 2014 containing concerns about her performance and incompatibility. I will deal with this as part of issues (d) and (e) above.

### **The Law**

[72] The onus falls upon the respondent to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2) Employment Relations Act 2000 ('the Act'). In applying this test, the Authority must consider the matters set out in s.103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[73] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.<sup>13</sup>

[74] Employees must raise a personal grievance with their employer within a period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee whichever is the latter. This period may be extended with the employers consent or by leave of the Authority where the delay was occasioned by exceptional circumstances and it is just to extend the time for raising the grievance (s.114(1) and (4) of the Act).

[75] A personal grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or its representative, aware the employee alleges a personal grievance that the employee wants it to address (s114(2)).

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<sup>13</sup> *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

[76] What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.<sup>14</sup> There is a low threshold of information required to raise a personal grievance<sup>15</sup> but it is insufficient to raise a grievance, where the employer is expected to deduce the grounds relied on for raising a personal grievance.<sup>16</sup>

[77] The definition of bullying must include elements of repeated actions, carried out with the desire to gain power or exert dominance and with the intention to cause fear and distress.<sup>17</sup> Warning or disciplining employees in line with the workplace's code of conduct is not bullying.<sup>18</sup> Criticism or feedback from an employer is not bullying.<sup>19</sup>

[78] Although incompatibility may be a ground for justifiable dismissal,<sup>20</sup> the facts need to be considered in each case. An employer may take appropriate action, including dismissal, where there is serious incompatibility in the workplace.<sup>21</sup> Incompatibility must to some extent be the "fault" of the employee, although the test remained whether the decision to dismiss was one a fair and reasonable employer could have taken in all the circumstances.<sup>22</sup> Where a relationship has become seriously incompatible, and the incompatibility was irreconcilable, the Court has held the dismissal was justified.<sup>23</sup> Dismissal on the grounds of incompatibility may not be justified if the employer does not adequately supervise or manage the situation.<sup>24</sup>

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<sup>14</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]

<sup>15</sup> *Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v Edmonds* [2008] ERNZ 139 (EmpC)

<sup>16</sup> *Dickson v Unilever New Zealand Limited* (2009) 6 NZELR 463 (EmpC)

<sup>17</sup> *Kneebone v Schizophrenia Fellowship Waikato Inc* ERA Auckland AA31/07, 13 February 2007 at [207]

<sup>18</sup> See Workplace NZ "What is workplace bullying" <http://www.business.govt.nz/worksafe/information-guidance/all-guidance-items/bullying-guidelines/01>

<sup>19</sup> *Isaac v Chief Executive of the Ministry of Social Development* ERA Auckland AA200/08, 5 June 2008

<sup>20</sup> *Lal v Skellerup Clothing and Rubber Ltd* [1979] ACJ 259; *Tate v South Westland Timber Co Ltd* [1986] ACJ 458; *New Zealand Printing & Related Trades IUOW v Allied Press Ltd* [1986] ACJ 434.

<sup>21</sup> *Harris v Chief Executive Department of Corrections* [2000] 1 ERNZ 544 (CA)

<sup>22</sup> *Mabry v West Auckland Living Skills Homes Trust Board (Inc)* (2002) 6 NZELC 96,573 (EmpC) at [36]

<sup>23</sup> *Walker v Procure Health Ltd* [2012] NZEmpC 90

<sup>24</sup> *Hollands v Jam Marketing Pty Ltd* ERA Auckland AA 179A/07 31 July 2007

***Was Ms Dent unjustifiably disadvantaged in her employment by the actions of the employer in issuing a written warning in respect of her conduct towards Christine Haysom?***

[79] The respondent submits it sufficiently investigated the claim by interviewing Ms Haysom and Ms Dent, set out its concerns in a letter to Ms Dent, met with Ms Dent to give her an opportunity to respond, and genuinely considered her response prior to the decision to issue her with a warning.

[80] The facts were largely undisputed. Ms Dent accepts she called Ms Haysom. She accepts she asked to come to Ms Haysom's home to speak about Ms MacGowan and the concerns over Ms Dent's sick leave.

[81] The dispute lies in the nature and tone of the conversation. Ms Haysom found the phone conversation to be threatening. Ms Dent denied that it was.

[82] The respondent's decision maker was Mr Harris. He resolved the matter on the basis of credibility, namely Ms Haysom was found to be more credible than Ms Dent.<sup>25</sup> At the hearing Mr Harris confirmed the basis for his credibility finding was that Ms Dent accepted she had made the call and used the alleged words. He also believed Ms Dent had difficulty perceiving the distress this caused to Ms Haysom.

[83] These were not the only relevant factors to credibility. Ms Dent had no prior disciplinary action for similar behaviour. The telephone call lasted minutes. Ms Haysom may have been mistaken about Ms Dent's tone because of her concern about her mother. She had told Mr Harris "*the call felt threatening but I was more concerned about her coming around due to my elderly mother living with me.*"<sup>26</sup> The respondent did not question Ms Haysom again. It could not have reasonably excluded the possibility Ms Haysom was mistaken about Ms Dent's behaviour in these circumstances.

[84] However, even if proven, this was not misconduct the respondent could have disciplined her for. Mr Harris relied upon the behaviour being breaches of Appendix C paragraphs 1.1 and 1.2 of the Performance Management and Discipline Policy. Appendix C is the respondent's code of conduct setting out minimum standards of integrity and conduct (code of conduct). Misconduct and serious misconduct is

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<sup>25</sup> Common Bundle Vol 2 pp 280 and 293

<sup>26</sup> Common Bundle of Documents Vol 2 p206

defined in Appendix B of the policy.<sup>27</sup> The grounds for disciplinary action are set out in Appendix A of the policy.<sup>28</sup> Those definitions and grounds do not expressly state all breaches of the code of conduct shall result in disciplinary action.

[85] The respondent has other policies identifying conduct that is misconduct and/or serious misconduct breaching the code of conduct and giving grounds for disciplinary action. Ms Dent's alleged behaviour logically falls within the bullying and harassment policy.<sup>29</sup> The definition of workplace harassment includes "*where a person is subjected to behaviour ... that ... the person considers to be offensive, humiliating or threatening.*"<sup>30</sup> Where harassment and bullying is established, it is a breach of the code of conduct and disciplinary action will be taken.<sup>31</sup> However this policy expressly excludes "*a single incident of harassing type behaviour*" from the definition of workplace harassment. Even if it was found to be bullying, the one off incident with Ms Haysom may not be considered workplace harassment.

[86] Mr Harris admitted at hearing he did not turn his mind to the bullying and harassment policy when he made his decision. He also did not provide Ms Dent with a copy of the relevant policies prior to the decision to issue the warning.

[87] A fair and reasonable employer could not have made the decision to issue the written warning to Ms Dent about Ms Haysom complaint in these circumstances. The respondent did not give reasonable consideration to issues of credibility, the alleged breaches could not have given rise to disciplinary action based upon the respondent's own policies and it did not provide Ms Dent with sufficient information, depriving her of a reasonable opportunity to respond. These failures were not minor and did result in Ms Dent being treated unfairly.

[88] Erin Dent was unjustifiably disadvantaged by the actions of the Waikato District Health Board issuing a written warning in respect of her conduct towards Christine Haysom.

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<sup>27</sup> Common Bundle of Documents Vol 1 p52  
<sup>28</sup> Common Bundle of Documents Vol 1 p47  
<sup>29</sup> Common Bundle of Documents Vol 1 p30 ff  
<sup>30</sup> Common Bundle of Documents Vol 1 p37  
<sup>31</sup> Common Bundle of Documents Vol 1 p31

***Was Ms Dent unjustifiably disadvantaged in her employment by bullying behaviour by Kevin Harris and Aileen McGowan?***

[89] The applicant submits Kevin Harris bullied her by threatening job loss on 23 November 2013, referred to her emails with Rob Ebert, changed her 'mediation leave' to annual leave without consultation on 28 November 2013 and continued weekly meetings which she did not attend and her lawyer had asked should stop.<sup>32</sup> She filed sworn evidence<sup>33</sup> Mr Harris stopped payments, required her to do work which she refused and was done by another secretary, gave her menial tasks, micromanaged and included references to charges in the disciplinary process which were unfounded. She also believed he was responsible for Ms McGowan's actions in the removing Ms Dent's ACC chair, refusing sick leave and refusing compensation for time spent on hiring tables for an exam. She also believes the written warning and drug and alcohol testing evidence collusion.

[90] The bullying by Ms McGowan is set out in her lawyer's letter dated 13 March 2013 and parts of her sworn evidence.

**Kevin Harris**

[91] There is no evidence of bullying by Kevin Harris. There is no evidence of repeated bullying actions by him or a desire to gain power or exert dominance to cause fear and distress toward Ms Dent.

[92] Ms Dent referred to a document entitled "Allegation of misconduct 18 November 2013" as evidence Mr Harris had threatened her job. That is her document. It was not generated by Mr Harris. I cannot see where in the document Mr Harris threatens Ms Dent's job as alleged.

[93] The emails between Ms Dent and Rob Ebert make no reference to Mr Harris. They do not evidence bullying.

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<sup>32</sup> Applicants submissions received 6 October 2014 para 13  
<sup>33</sup> Brief of E Dent in reply to K Harris sworn 30/09/14

[94] Mediation leave is not a type of leave provided for in Ms Dent's employment contract. Annual leave is.<sup>34</sup> Mr Harris' recording of her leave to attend mediation as annual leave would have been in accordance with her employment contract.

[95] The proposed weekly meetings were not bullying. I accept Mr Harris' evidence they were attempts to establish a constructive working relationship between Ms Dent and Ms McGowan and to monitor Ms Dent's health and its impact upon her job performance.<sup>35</sup> I do not accept this was micromanaging. Ms Dent's refusal to attend the meetings thwarted the respondent's attempt to improve her relationship with Ms McGowan and to address her health issues.

[96] The stopped payments related to extra work monitoring doctor's exams. Mr Harris required her to take annual leave if she wished to be paid for this work. She alleged unfair treatment because Dr Hopgood marked the exams and still received payment.<sup>36</sup> I have no evidence about Dr Hopgood's arrangements regarding the examinations. That is not bullying by Mr Harris.

[97] Ms Dent's refusal to do work allocated to her by Mr Harris cannot be bullying. The work was within her job description and had to be given to another secretary to do. I do not accept the work she was left with were menial tasks – she retained management of the Anaesthetists roster. This was an important task. She was having trouble managing the roster. It is understandable in the circumstances management would remove less important tasks such as recruitment or other administration to allow her to concentrate on the roster.

[98] I cannot see how Mr Harris is responsible for the alleged actions of Ms McGowan. Her allegations of respondent management 'collusion' have little if any factual basis. It appears to be pure speculation.

[99] Mr Harris' actions pertaining to written warning and the drug and alcohol testing unjustified disadvantage grievance do not evidence bullying. She may not agree with the decisions Mr Harris has made but that alone does not evidence bullying.

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<sup>34</sup> Clause 4 Multi-Employer Collective Agreement between respondent and PSA 28 October 2011 – 30 June 2014

<sup>35</sup> Affidavit K Harris sworn 17 September 2014 para 10

<sup>36</sup> Brief of evidence E Dent in reply to G Hopgood sworn 30/09/14 para 8

[100] Given the above, the personal grievance of unjustified disadvantage of bullying by Kevin Harris is dismissed.

## **Aileen McGowan**

### ***Raising of Personal Grievances***

[101] There is a preliminary issue about when Ms Dent raised her personal grievance about bullying by Ms McGowan. Ms Dent alleges she told Karen Moss, Dr Kibblewhite, Ralph Tyrell and Deryl Penjuili about bullying by Ms McGowan.<sup>37</sup> Only Dr Kibblewhite appeared at hearing.

[102] Ms Dent alleges a conversation in 2008 with Karen Moss, health and safety, raised a personal grievance of bullying. On 18 July 2008 she says Ms Moss asked her about stress. Ms Dent said she was being bullied. When asked who was bullying her, she said Aileen McGowan.<sup>38</sup> There is no explanation how Ms Dent recalled the date and nature of this conversation 5 years later. There was no contemporaneous note. The conversation appears brief, makes a broad allegation of bullying without any details and does not specify she is raising a personal grievance. This does not evidence the raising of a personal grievance of bullying by Ms McGowan pursuant to s114.

[103] Ms Dent alleges a conversation with Dr David Kibblewhite in 2009 about bullying raised a personal grievance of bullying by Ms McGowan. She referred to an email dated 31 March 2009 sent by Dr Kibblewhite. The email referred to Ms Dent's concerns another employee (Cindy Burke) was making allegations the place was in chaos due to Ms Dent. Ms Dent was "*threatening to lodge a bullying complaint.*" The employee involved was not Ms McGowan.<sup>39</sup> This does not evidence the raising of a personal grievance of bullying by Ms McGowan pursuant to s114.

[104] Ms Dent alleges in 2010 at a meeting with Ralph Tyrell about bullying she raised a personal grievance. She produced minutes of a meeting on 10 August 2010. The meeting was about her role, rostering and hours of work. Ms Dent raised the issue of Ms McGowan addressing correspondence to her as "Evil Dent". Ms

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<sup>37</sup> Common Bundle Vol 1 p112

<sup>38</sup> See above

<sup>39</sup> Common Bundle Vol 1 p115 and 159

McGowan subsequently apologised.<sup>40</sup> This complaint was remedied by the apology. The meeting does not refer to any personal grievance being raised. This does not evidence the raising of a personal grievance of bullying by Ms McGowan pursuant to s114.

[105] There is no evidence a personal grievance was raised with Deryl Penjuili.

[106] It is not until 10 July 2013 a personal grievance of unjustified disadvantage due to bullying by Ms McGowan was raised with the respondent by Ms Dent's lawyer's letter. This is the date Ms Dent made the respondent aware she alleged a personal grievance of bullying by Ms McGowan. She has not raised individual personal grievances in respect of each and every incident. She refers to Ms Ross' report which looked at an alleged pattern and history of bullying.

[107] Even if she was raising individual personal grievances in respect of each of the 32 incidences there are no exceptional circumstances justifying leave to extend the time to raise personal grievances. The majority of these grievances are being raised more than 90 days after the cause of action arose. Ms Dent submitted the reason for her delay was her fear of losing her job. This is not the view I take of the wealth of correspondence she has produced showing her complaints about Ms McGowan and other employees. It shows she vigorously pursued complaints without fear for her continued employment. She was also a Union representative and had the assistance of the Union at various times. I decline to grant leave to extend the time for raising the individual personal grievances. Ms Dent is within time to bring a personal grievance alleging a pattern of bullying up to 13 March 2013.

[108] I also do not accept there is evidence of bullying by Ms McGowan to the extent alleged. At hearing Ms Dent accepted some incidences were not bullying at all such as Ms MacGowan's refusal of her leave because another secretary had been granted leave for the same period.<sup>41</sup> The remaining incidences appeared more likely to be attempted performance management and not bullying as Ms Dent alleged. I deal with these as set out in the schedule of incidences attached to her lawyer's letter dated 13 March 2013 below.

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<sup>40</sup> Common Bundle Vol 3 p235-246

<sup>41</sup> Common Bundle Vol 1 p125

### ***2007 Incidences***

[109] In 2007 Ms McGowan raises concerns about roster mistakes and performance concerns generally. Ms Dent believes this was bullying designed to cause distress and fear.<sup>42</sup> Ms Dent complains Ms McGowan made a number of exhaustive claims about her performance. This does not evidence bullying. Under the respondents policies and the collective agreement Ms McGowan may undertake performance management of Ms Dent. No concerns were raised at the time by Ms Dent regarding these incidences. This detracts from Ms Dent's credibility these incidences should now be considered bullying.

### ***2008 Incidences***

[110] In February to April 2008 Ms Dent was asked to move to another floor and share an office with Ms MacGowan. She submits this was bullying.<sup>43</sup> She accepted at hearing there was a need for her to be moved due to refurbishment. She was also injured outside of work and at home on ACC during this period. ACC suggested the purchase of an ergonomic desk. She alleged the respondent's lack of support for the purchase of a new desk, time taken to sort her new workspace and finding another secretary using her old workspace evidenced bullying by Ms McGowan. This is speculative and is not evidence of bullying.

[111] Some of the alleged bullying did not involve Ms McGowan at all. One incident in 2008 refers to Dr David Kibblewhite, clinical director, refusing to allow her to do his typing.<sup>44</sup> She alleges this is 'retribution' for referring to the loss of typing in performance management meetings in 2007. There was no indication how this is bullying by Ms McGowan.

[112] Ms Dent raises concerns about workload due to a computer systems crash in 2008. She alleges Ms McGowan's failure to hire an assistant to help her was workplace bullying.<sup>45</sup> During the same period, she alleges Ms McGowan attempted to remove duties such as rostering and recruitment which was bullying.<sup>46</sup> This could

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<sup>42</sup> Common Bundle Vol 1 pp106-110

<sup>43</sup> See above

<sup>44</sup> Common Bundle Vol 1 pp112 David

<sup>45</sup> Common Bundle Vol 1 p109

<sup>46</sup> Common Bundle Vol 1 pp109, 112 and 114

also have been an attempt to address her workload and recruitment was not part of her job description.<sup>47</sup>

[113] She refers to Ms MacGowan publically berating her in 2008 about empty surgical theatres and no supervising doctors rostered. She believes this was designed to embarrass and humiliate her and to justify removal of the roster.<sup>48</sup> The incident appeared to be a spur of the moment exclamation by Ms MacGowan in response to a rostering issue. The incident evidenced the concerns about Ms Dent's rostering and leave management. Her roster failed to provide for doctors who could supervise theatre.

[114] No concerns were raised at the time by Ms Dent regarding this performance review. This detracts from Ms Dent's credibility these incidences should now be considered bullying.

### **2009 Incidences**

[115] In 2009 Ms Dent complained another secretary, Cindy Burke, had verbally abused her by saying her office was a mess and that she had been hired to "*sort things out*".<sup>49</sup> There was no direct evidence this occurred. She relied upon office gossip. She submits Ms McGowan did not do anything about this but then refers to a meeting Ms McGowan held about it being "shut down" after Ms Burke called Ms Dent a liar and burst into tears.

[116] Ms Dent alleges Ms McGowan bullied her by exerting dominance and force by refusing to show her an email on 31 March 2009 in which Ms Dent has told Dr Kibblewhite she was being bullied by Cindy Burke,<sup>50</sup> Ms McGowan shutting down a meeting when Ms Burke called Ms Dent a liar, her segregation from other staff by a wall, Dr Kibblewhite giving work to another secretary on 29 April 2009 and unilateral removal of Ms Dent's glide time.<sup>51</sup>

[117] None of these matters evidence bullying by Ms McGowan. The email is a record of Ms Dent's allegation of bullying by a different colleague. Ms McGowan did not need to show her as it gave very little detail of Ms Dent's complaint. It

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<sup>47</sup> SBDA Vol.3 pp.178 to187  
<sup>48</sup> Common Bundle Vol 1 p115  
<sup>49</sup> See above n46  
<sup>50</sup> Common Bundle Vol 1 p158  
<sup>51</sup> Common Bundle Vol 1 p115-118

appears a meeting was then arranged by Ms McGowan regarding the alleged bullying. It was appropriate for Ms McGowan to shut the meeting down when the accused colleague called Ms Dent a liar. There is no evidence Ms McGowan instructed the building of a wall to segregate Ms Dent. This is speculation. Dr Kibblewhite's allocation of work is not bullying by Ms McGowan. Ms Dent was not entitled to 'glide time' under her collective agreement. It was not unilaterally removed. Her terms and conditions of employment were enforced. Ms McGowan's actions were therefore not bullying.

[118] No concerns were raised at the time by Ms Dent regarding this performance review. This detracts from Ms Dent's credibility these incidences should now be considered bullying.

### ***2010 Incidences***

[119] In 2010 she alleged Ms McGowan knowledge of her personal problems such as her leaky home was used against her because Ms McGowan was training a replacement in Carly Jones. There is no evidence this was occurring. Ms Jones was replacing Ms Burke and reported to Libby MacEwan. She had different work to do from Ms Dent. She was only to assist Ms Dent with the roster but this never happened. This is not bullying by Ms McGowan.

[120] Ms Dent also attributed her suicide attempt in 2010 to Ms McGowan's bullying.<sup>52</sup> This was not corroborated by the evidence of her GP Dr Jonathan Phillips. Under cross-examination Dr Phillips produced Ms Dent's medical records and confirmed her overdose in 2010 was attributable to her own personal issues including a leaky home.<sup>53</sup> The evidence was she complained to Dr Phillips only from January 2013 about bullying.

[121] Paragraph [103] refers to an incident involving Ms McGowan's addressing of correspondence to Ms Dent as "Evil Dent". For the reasons noted above, this incident was dealt with at the time by way of an apology. Unless there are further proven repeated incidences, this cannot be an example of bullying under the respondent's policies.

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<sup>52</sup> Brief of evidence E Dent in reply to R Ross sworn 30/09/14 para 6.  
<sup>53</sup> Oral evidence Dr J Phillips 31/09/14

[122] The refusal of her requests for information about Cindy Burke's leave and minutes from a meeting involving Ms Burke from over a year ago<sup>54</sup> are appropriate. Ms Burke had been replaced by Ms Jones. The relevance of minutes from over a year ago is unclear. It is well out of time to raise a personal grievance about that behaviour. Ms Dent was not entitled to see Ms Burke's personal information about leave. She refers to there being another incident of bullying set out in her email to Dr Kibblewhite on 13 July 2010.<sup>55</sup> This is the same allegation made above and in paragraphs [115] to [118] above. She makes general allegations Ms McGowan is saying negative things behind her back because Dr Kibblewhite allegedly said "walls have ears". This does not evidence bullying or anything that was said by Ms McGowan.

[123] She also accuses Ms McGowan of driving the disestablishment of her job. The evidence shows Ms McGowan was trying to clarify her position description.<sup>56</sup> This is not bullying.

### ***2011 Incidences***

[124] Ms Dent complains in February 2011 a job was advertised for a Unit PA which indicated a replacement for her as Aileen's PA. I do not have a copy of the job advertisement or evidence about who drafted it. This is not bullying by Ms McGowan.

[125] Ms Dent complains nursing staff were told to give confidential typing to Karen Berry. I have no evidence this in fact was occurring or that it was at Ms McGowan's instigation. This is speculative and is not evidence of bullying.

### ***2012 Incidences***

[126] She also refers to 42 consultants giving their typing to Ms Berry. Their typing preferences did not evidence bullying by Ms McGowan. This is speculative and is not evidence of bullying.

[127] She refers to an incident where Ms McGowan asked why Ms Dent had sent the same email three times which she admitted doing. This was not bullying. This is

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<sup>54</sup> Common Bundle Vol 1 p120  
<sup>55</sup> Common Bundle Vol 3 p225  
<sup>56</sup> Common Bundle Vol 1 pp120 & 162

minor performance issue which Ms McGowan is entitled to raise with her under the respondent's policies.<sup>57</sup>

[128] Ms Dent cancelled a surgery list without telling Ms McGowan and was berated for this. She admitted at hearing she did not have the authority to cancel the list but sought this from Dr Rob Ebert. It was not within her job description to cancel a surgery list. Her direct report was Ms McGowan, not Dr Ebert. She should not have sought permission from Dr Ebert to do work she was not authorised to do in her job description or by Ms McGowan. Ms McGowan's criticism was justified in the circumstances.

[129] Ms Dent admitted making mistakes in the rostering but believed Ms McGowan threatened her job on 4 December 2012 saying "*if you wish to remain an administrator ...*"<sup>58</sup> Ms McGowan refuted making this statement. She alleged there were numerous roster errors and Ms Dent was behaving erratically.<sup>59</sup> I prefer Ms McGowan's evidence. There was no contemporaneous note of this conversation. It was common ground Ms Dent had personal relationship and health issues. She referred to Dr Gary Hopgood's 'condescending tone' when he was also raising concerns about Ms Dent's rostering mistakes, disorganisation and leave errors.<sup>60</sup> Attempts to raise these concerns and address them with Ms Dent were seen as bullying. They were not.

[130] She complains throughout 2012 another employee, Karen Berry, called her 'missy' 'crazy'.<sup>61</sup> This is not bullying by Ms McGowan. Ms Berry denies she was ever accused of bullying Ms Dent.<sup>62</sup> This allegation was raised as an incident showing bullying by Ms McGowan. It was not.

[131] She alleges a conversation she overheard in late December 2012 involving another employee, Mark Tumai, saying give all his confidential typing to the another secretary, Karen Berry, evidenced Ms McGowan telling everyone not to give her

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<sup>57</sup> Common Bundle Vol 1 p46

<sup>58</sup> Common Bundle Vol 1 p125

<sup>59</sup> Common Bundle Vol 1 p195

<sup>60</sup> Brief of evidence and Reply Brief of G Hopgood sworn 1/10/14; Brief of evidence C Buchanon sworn 30/09/14

<sup>61</sup> Common Bundle Vol 1 p129

<sup>62</sup> Brief of Evidence K Berry para 22 sworn 1/10/14

typing since October 2007.<sup>63</sup> There is no basis for Ms McGowan to be blamed for Mr Tumai's typing preferences. This is pure speculation.

### ***2013 Incidences***

[132] She alleges between December 2012 and 24 January 2013 Ms McGowan encouraged communications from her ex-partner then fabricated a serious event threatening her employment.<sup>64</sup> This allegation was about the respondent's concern she had misused her sick leave because she continued working after obtaining a medical certificate and then travelled to the Bay of Islands.<sup>65</sup> Ms McGowan alleged a medical certificate had been provided on 13 December but Ms Dent worked on 14 December. Ms Dent's ex-partner had told Ms McGowan Ms Dent had travelled to the Bay of Islands during the period she was sick. Ms Dent denied she gave the medical certificate to Ms McGowan on 13 December but confirmed she had travelled to the Bay of Islands during her period of sick leave. The respondent was entitled to raise concerns about Ms Dent's true state of health in the circumstances. There was evidence supporting concerns about Ms Dent's truthfulness. She gave a reasonable explanation for the travel which was accepted. This does not indicate bullying.

### ***General Allegations***

[133] In her brief Ms Dent made general allegations Ms McGowan was gossiping about her to other staff over six years. She based her belief upon office gossip and her exclusion from a birthday party for another staff member.<sup>66</sup> There was no direct evidence of this. She also complained about Ms McGowan discussing her situation with the Clinical Director of Anaesthetics, Dr Cameron Buchanan. It was understandable Ms McGowan would discuss her employment issues with Dr Buchanan because as the Clinical Director given he is one of Ms Dent's direct reports.<sup>67</sup> This is not evidence of bullying.

[134] Ms McGowan was not cross-examined by Ms Dent at hearing.

[135] Other than the admitted allegation in 2010, the evidence does not support a bullying by Ms McGowan to the extent alleged by Ms Dent.

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<sup>63</sup> Common Bundle Vol 1 p126

<sup>64</sup> Common Bundle Vol 1 pp126-127

<sup>65</sup> Common Bundle Vol 1 p75

<sup>66</sup> Brief of evidence E Dent sworn 30/09/14 para [17] and [62]

<sup>67</sup> Common Bundle Vol 3 p207

## ***Investigation***

[136] However the investigation by the respondent into the bullying was defective. Ms Ross did not interview Ms Dent about the allegations, yet made credibility findings about Ms Dent referring to her “view” about Ms McGowan’s intentions was “*because of the level of disconnect with the event.*” This could not have been substantiated at the time where she failed to interview Ms Dent and in view of the admitted allegation in 2010 Ms McGowan had re-addressed Ms Dent’s correspondence to “Evil Dent”.<sup>68</sup> She primarily relied upon Ms McGowan’s replies to justify her findings. She made no other enquiries. She had the time and resources to interview Ms Dent but failed to do so. The 2010 admitted allegation should have enhanced Ms Dent’s credibility. The fact it was raised outside of the time limitation periods did not diminish its relevance to the other allegations. Mr Harris relied upon her report in making his decision.

[137] I need to consider whether this defect was minor and if it resulted in unfairness to Ms Dent (s103A(5)). Standing back and considering Ms Dent’s evidence about bullying, other than the 2010 incident, the rest of the alleged bullying is unsustainable. The 2010 incident may not be workplace harassment under the respondent’s bullying and harassment policies, because it was a one off incident and was not repeated after the apology was given. It was also resolved by the apology at the time. Given this context, the defect in the investigation is minor and did not result in unfairness.

[138] Erin Dent was not unjustifiably disadvantaged in her employment by the actions of the Waikato District Health Board in dealing with the complaint of bullying by Kevin Harris and Aileen McGowan. This personal grievance is dismissed.

## **Was Ms Dent unjustifiability disadvantaged in her employment by the employer’s actions in requiring her to undergo a drug and alcohol test on 15 October 2013?**

[139] Ms Dent submits she was disadvantaged by the actions of Grant Hay because he failed to check for any visible signs of impairment, humiliated her by publically escorted her to take the drug test and damaging her reputation and following the

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<sup>68</sup> Common Bundle Vol 3 p246.

negative test continued to find ‘other charges’ against Ms Dent. She also alleged he acted in collusion with Ms McGowan.<sup>69</sup>

[140] The respondent has a drug and alcohol policy which forbids employees from being under the influence of drugs or alcohol while at work.<sup>70</sup> The testing procedure may be enacted where there is “*reasonable cause for testing*”. It sets out examples of behaviour that would lead to a test for reasonable cause and can include two of the situations set out therein.<sup>71</sup>

[141] There were two written complaints about Ms Dent’s behaviour. Karen Berry alleged she had droopy eyes, slurred speech, mumbling, swaying, head on desk with closed door, vacant with no activity. Aileen McGowan alleged Ms Dent was not interacting with anyone, had a shut door and a doctor thought she seemed ‘low in spirits’.<sup>72</sup>

[142] Stuart Irwin, Team Leader Health and Safety, spoke to the complainants and Messrs Hay and Harris. He provided a copy of the drug and alcohol policy then asked about their observations of Ms Dent and whether her behaviour met the criteria to justify a request that she undergo a drug and alcohol test. There was agreement the criteria had been met. Ms Dent was asked to come down to HR for a meeting. When she arrived Mr Irwin noted she looked quite pale and dishevelled and had slow speech. He was responsible for accompanying her to the external testing place which was away from the workplace.<sup>73</sup>

[143] Mr Hay gave evidence at hearing he relied upon Ms Berry’s complaint as showing two of the bases for reasonable cause to test. He also stated he observed Ms Dent to have a slow gait.

[144] Ms Dent and her union representative Denise Takiari met with Mr Hay, Mr Harris, Stuart Irwin and Karen Moss from Health and Safety. They explained the complaints. Ms Dent consented to do the testing. The test returned a negative result for non-prescription drugs and alcohol. Ms Dent was allowed sick leave following the testing because she felt stressed.

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<sup>69</sup> Applicants submissions received 4 October 2014 paras. A(7), C(11)iii, (14)

<sup>70</sup> Common Bundle Vol 1 p56 ff

<sup>71</sup> Common Bundle Vol 1 p58

<sup>72</sup> Common Bundle Vol 2 p282-283

<sup>73</sup> Brief of Evidence S Irwin sworn 30/09/14 paras. 6-16

[145] While I have sympathy for Ms Dent being required to undergo a drug and alcohol test which returned a negative result, she was not unjustifiably disadvantaged by this. The respondent had the right under the collective employment agreement to develop policies such as the drug and alcohol policy for the workplace.<sup>74</sup> It had evidence that gave rise to a reasonable cause to test under the respondent's policies. Ms Dent was given an opportunity to consider the concerns and had access to legal representation. Mr Hay and Mr Harris' decision was reasonable in the circumstances.

[146] Mr Irwin did not advise anyone other than those involved why and where she was being taken. His escorting of her is not unusual. It would be for her protection to prevent any allegation she interfered with the test. She also consented to the testing. I cannot see how she was unjustifiably disadvantaged in her employment in the circumstances.

[147] Erin Dent was not unjustifiably disadvantaged by the actions of the Waikato District Health Board requiring her to undergo a drug and alcohol test on 15 October 2013. This personal grievance is dismissed.

**Was Ms Dent's conduct incompatibility such that a fair and reasonable employer could have dismissed her for it?**

[148] Ms Dent denies any responsibility for conflict. She alleges she worked well with staff. She alleges she was bullied by others, lacked the support of her manager, humiliated when other staff were offered better work conditions and faced inaccurate accusations. She accepts there was conflict with Ms McGowan. She alleges Ms McGowan, Dr Hopgood and Karen Berry exhibited workplace harassment towards her and health and safety failed in its duty of care to her. When she was clearly in the wrong Ms Dent apologised. Amy Pollard accepted at hearing Ms Dent had apologised to her. She believes there has been a petition to dismiss her for poor performance over 5 years. She provided 22 character references from various colleagues.<sup>75</sup>

[149] The grounds for Ms Dent's termination inferred there was serious incompatibility between Ms Dent and her work colleagues:<sup>76</sup>

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<sup>74</sup> MECA between respondent and PSA for clerical and administrative employees

<sup>75</sup> Applicants submissions received 4 October 2014 para C (28)-(66)

<sup>76</sup> Common Bundle Vol 2 p383

*The justification to terminate your employment are that the ongoing relationship with your line manager and a number of senior staff within the Theatre and Perioperative Department has been destroyed and your returning to the department would cause further disruption and damage to the functioning ability of the department*

[150] It is my view there was serious incompatibility. Even if I set aside the conflict with Ms McGowan, there was substantial evidence about the difficulties caused by Ms Dent in this working environment.

[151] Amy Pollard gave evidence of the difficulties of working with Ms Dent impacting upon her decision to step down from writing the anaesthetist's roster.<sup>77</sup> Under cross-examination by Ms Dent, Dr Pollard stated her advice to Ms Dent about the roster was being ignored, the rosters were non-compliant with the Resident Doctors Association and respondent Multi-employer Collective Agreement (RDA MECA), she was sending emails which made Ms Pollard look incompetent, she created risks for the respondent in her roster and leave management and unnecessary work for Dr Pollard. She believed she could not trust Ms Dent. Despite pointing out mistakes to Ms Dent, they would happen again. This resulted in Dr Pollard doing the work herself rather than asking Ms Dent. Ms Dent's 'initiatives' were unhelpful and not things Dr Pollard had asked her to do with the roster. She was exhausted and frustrated from working with Ms Dent.

[152] Gary Hopgood, Cardiac and Specialist Anaesthetist, gave sworn evidence of Ms Dent's disorganisation, errors in roster and leave management, general poor performance and its impact upon staff.<sup>78</sup> Documents were being lost, held up in Ms Dent's office, adjusted inappropriately or returned in error, necessitating double handling by clinicians. He gave an example of Ms Dent's errors where his leave had been declined because all other cardiac anaesthetist's were absent that week. Ms Dent still approached him to confirm he would be absent for the purposes of re-organising the roster. He referred to having to follow up with Ms Dent continually about patient files and documentation for new employees not being completed. He received numerous unnecessary, irrelevant and non-urgent text messaging. He noted Ms Dent's poor ability to take minutes of meetings. Staff avoided using Ms Dent as a result. Dr Hopgood was not cross-examined by Ms Dent at hearing.

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<sup>77</sup>

Brief of evidence A Pollard sworn 31/09/14

<sup>78</sup>

Brief of Evidence and Reply Brief of G Hopgood sworn 1/10/14

[153] Cameron Buchanan, Clinical Director of Anaesthesia, wrote a letter dated 7 January 2014 setting out the concerns of the Anaesthesia Executive Group (AEG) about Ms Dent.<sup>79</sup> AEG were embarrassed by Ms Dent's performance and believed the unit was more effective during her absence. He described the work environment with Ms Dent as "*poisonous or toxic.*" Ms McGowan was described as being tearful and on the brink of resignation as a result of Ms Dent. AEG was of the view it was now impossible for Ms Dent to provide the service for which she was employed. They believed the situation was one of irreconcilable incompatibility and "*we are absolutely unable to work effectively together.*"

[154] Dr Buchanan gave sworn evidence Ms Dent was unreliable and her performance erratic.<sup>80</sup> Ms Dent's management of the roster and leave resulted in the cancellation of theatre and delayed surgeries. He believed Ms Dent's poor performance had been long-standing and the Unit had tried to work around her. He expressed concern about Ms Dent's deteriorating appearance becoming unkempt and showing to work in woollen beanies, sneakers and track suit pants and her frequent absences. Her relationship with most of her colleagues within the Unit had become fractured or was destroyed altogether. Following dismissal, he received an email about a complaint by Ms Dent had made to the Medical Council of New Zealand about bullying, alleging Drs Buchanan, Rudman and Hopgood were covering up an allegation she had made in 2007 about the behaviour of two anaesthetic registrars.<sup>81</sup> He denied bullying Ms Dent and stated her email to the Medical Council was untrue. Dr Buchanan was not cross-examined by Ms Dent.

[155] Ms Dent believed Dr Buchanan's criticisms of her performance "*were really everyday occurrences that have to be managed and or corrected as part of daily routine.*"<sup>82</sup> This submission was not sustainable in light of the evidence of numerous and repeated errors being made by Ms Dent. I do not accept her substandard performance was caused by a lack of performance reviews. There was evidence of attempted meetings with Mr Harris and Ms McGowan for the purpose of addressing her performance. It was her resistance to steps to address her performance that allowed these errors to continue. Her substandard performance coupled with her resistance to address it caused incompatibility in this workplace. There is evidence of

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<sup>79</sup> Common Bundle Vol 2 p351

<sup>80</sup> Brief of evidence and reply brief C Buchanan sworn 30/09/14

<sup>81</sup> Common Bundle Vol 2 p384

<sup>82</sup> Reply Brief of Evidence of E Dent to C Buchanan sworn 30/09/14

how serious this became when staff avoided her and Dr Pollard gave up rostering altogether due to Ms Dent. Staff were also threatening to leave if she returned.

[156] Under cross-examination and in her sworn evidence, Ms Dent confirmed “*if they [AEG] hadn’t written the 7 January 2014 letter, I wouldn’t have put in the complaint*”.<sup>83</sup> My impression of her evidence was that she had made bullying complaints against various staff in retaliation for their raising performance concerns.

[157] She has accused staff of undertaking “acts of sabotage” and referred to Drs Gary Hopgood and Arthur Rudman ‘framing’ charges against her in November 2013.<sup>84</sup> Dr Amy Pollard had also complained. Although there was no further disciplinary action about the November complaints, there is a record Ms Dent had agreed those incidents occurred but was not solely responsible.<sup>85</sup> If she agreed the incidences occurred, there is no basis for her accusing Drs Hopgood and Rudman of framing charges against her in November 2013. This appears to be further retaliatory behaviour.

[158] There was no evidence to support her allegations to the Medical Council of New Zealand about fraudulent activity by the AEG doctors. It could have potentially affected their ability to practise. This action can only have been in retaliation for their complaints about her performance.

[159] Unfounded accusations against a number of respondent staff are repeated throughout her evidence. Ms Dent’s accuses the respondent’s management of colluding to end her employment.<sup>86</sup> Kevin Harris bullying her. Grant Hay acting in ‘collusion’ with others<sup>87</sup> and Karen Berry, Ms McGowan, Libby MacEwan and the AEG doctors aligning to cause her dismissal.<sup>88</sup>

[160] Ms Dent admits to ‘issues’ with every new staff member performing her role in anaesthetics including Cindy Burke, Janice Chelecki, Carly Jones and Karen Berry.<sup>89</sup>

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<sup>83</sup> Oral evidence E Dent 31/09/14; Brief of evidence E Dent in reply to C Buchanan sworn 30/09/14 para 19

<sup>84</sup> Brief E Dent in reply to G Hopgood sworn 30/09/14 para 9

<sup>85</sup> Common Bundle Vol 2 p344

<sup>86</sup> Brief of E Dent in reply to K Harris sworn 30/09/14 para 19

<sup>87</sup> Applicants submissions received 4 October 2014 para C(14)

<sup>88</sup> Brief of E Dent in reply to K Berry sworn 30/09/14 para 5

<sup>89</sup> Brief of E Dent sworn 30/09/14 para 61

[161] Ms Dent submitted her mental health may have impacted upon her behaviour at the relevant times. She had been diagnosed with depression. Dr Shieff provided a report advising Ms Dent was not currently demonstrating symptoms or signs of physiological or psychological harm.<sup>90</sup>

[162] At the time of the report, there was evidence of continuing issues with staff and her work environment at clinical medical records. She described her placement at clinical records in December 2013 as being fraught with problems, including a manager whom stood over her when she fell behind in the work and expressed annoyance at reduced output.<sup>91</sup> She sent an email to Stuart Irwin at health and safety complaining about poor lighting and air conditioning.<sup>92</sup> She complained Mr Irwin failed to address her concerns by reinstating her previous ergonomic desk and had accused her of lying. There was no evidence Mr Irwin accused her of lying. He had sent two emails setting out his position including his inability to reinstate the desk and his request for a workplace assessment.<sup>93</sup> The impression I have of this evidence is her mental health status was not responsible for her incompatible behaviour.

[163] Having regard to the above evidence, it is my view Ms Dent was responsible for the serious incompatibility.

**Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?**

[164] Ms Dent submits there was procedural unfairness because the respondent omitted documents, Greg Peplow engaged in unfair conduct leading to dismissal and the decision to dismiss was pre-determined given the number of disciplinary actions she faced during the 12 months

[165] In total Ms Dent faced at least five disciplinary matters in 2013/14. These include misuse of sick leave (January 2013), the written warning from the Haysom complaint (June 2013), drug and alcohol testing (October 2013), performance concerns (November 2013) and incompatibility (January 2014). Three of the matters did not result in any disciplinary action. Two did result in disciplinary action, one of which I have determined to have been unjustified. Ms Dent has concerns about Ms

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<sup>90</sup> Common Bundle Vol 2 p355

<sup>91</sup> Brief of E Dent in reply to S Irwin sworn 30/09/14 para 4

<sup>92</sup> Common Bundle Vol 2 p379

<sup>93</sup> Common Bundle Vol 2 pp358, 363-368

McGowan and other staff involvement in all of the allegations and disciplinary actions and possible collusion with Mr Harris who was the decision maker.

[166] The number of allegations seems more than what would normally be expected for an average employee over a twelve month period. It is understandable Ms Dent believes she was being targeted and therefore the dismissal decision was inevitable. I would have had no hesitation to reach the same conclusion if there was no evidential basis for the concerns raised. Unfortunately for Ms Dent there was evidence founding the concerns raised on each of the five occasions.

[167] In respect of the sick leave concern, I refer to paragraph [132] above. The fact they accepted her explanation and took no further action does not evidence predetermination. It evidences the opposite.

[168] In respect of the Haysom complaint, I refer to paragraphs [79] to [88] above. The fact they proceeded to issue a written warning when one was not justifiable favours Ms Dent's submission. However it does not necessarily evidence predetermination.

[169] In respect of the drug and alcohol testing, I refer to paragraphs [139] to [147]. The fact the test was returned negative does not evidence predetermination. In a safety sensitive area such as a hospital, any concerning behaviour giving rise to reasonable cause to test should be investigated. This does not evidence predetermination.

[170] In respect of the performance concerns, there were ongoing complaints by other doctors about Ms Dent's roster management.<sup>94</sup> There was an agreement the incidences occurred. This does not evidence predetermination.

[171] In respect of the incompatibility issue, I refer to paragraphs [148] to [163]. I have concluded Ms Dent was responsible for serious incompatibility in this workplace.

[172] However the process the respondent engaged in leading to her dismissal was unfair. Mr Peploe's requirement she urgently attend a disciplinary meeting when she was unwell was unfair. Ms Dent wished to face her accusers. Even though Mr Gatenby filed submissions, given her ill health, it is probable they would not have

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<sup>94</sup> Brief of Evidence A Pollard sworn 31/09/14

specifically addressed the accusations made against her. These submissions were brief and compiled over a 24 hour period.

[173] The respondent could have delayed the meeting until Ms Dent was well enough to respond in full. Mr Harris accepted at hearing there was no urgency. Ms McGowan later advised she had found another job elsewhere and was no longer going to be part of the Anaesthetic Unit. Options of mediation could have been explored as suggested by Dr Shieff although I accept Mr Harris' evidence this had been tried and failed before. It may be speculative whether delay would have produced a different result. However delay would have produced a fairer result in all the circumstances.

[174] Ms Dent was not given a reasonable opportunity to respond to the concerns in all the circumstances. Erin Dent was unjustifiably dismissed by the Waikato District Health Board.

#### **What remedies (if any) should be awarded?**

[175] Having found there was a personal grievance, I am required to consider remedies. I have taken a global approach to remedies for both the disadvantage and dismissal claims.

#### **Reinstatement**

[176] Ms Dent seeks reinstatement. She submits that reinstatement represents self-reliance, self-worth and purpose. She submits those whom she was incompatible with have now left namely Aileen McGowan, Karen Berry, Grant Hay and Stuart Irwin. She requires reinstatement for the long service holiday leave and financial security to meet future ACC, surgery and other living costs.

[177] If it is determined that an employee has a personal grievance, then the Authority may provide the remedy of reinstatement if "*it is practicable and reasonable to do so*" (s125 Employment Relations Act 2000). That assessment must be made at the time the Authority is considering the evidence of practicality and reasonableness.

[178] An employee's conduct may be relevant to remedies. Section 124 requires the Authority "*consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance*" in deciding the nature

and extent of remedies to be provided in respect of a personal grievance and “*if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*”

[179] Ms Dent was assessed as unfit to return to work as at 4 August 2014. Her next review was not until after the hearing on 4 November 2014.<sup>95</sup> At hearing Ms Dent’s GP, Dr Phillips, could not confirm whether Ms Dent was able to return to work because he had not seen her since he issued the last medical certificate. There was no current medical information about Ms Dent’s health. Her evidence showed substantial health concerns. I have significant concerns about the practicality of any immediate return to work based upon Ms Dent’s own evidence.

[180] Although some of the people have left, a large number of affected staff remain employed by the respondent. These include the six AEG doctors, Kevin Harris, Amy Pollard, Ruth Ross, Christine Haysom and others. Ms Dent’s job requires her to continue interacting with those persons on a daily basis.

[181] There was no evidence about what Ms Dent had done or undertaken to remedy her contribution to the serious incompatibility. More concerning, at hearing under examination from me, Ms Dent did not take any responsibility for her actions and blamed the respondent and its staff for her situation.

[182] Given my finding that Ms Dent was responsible for the serious incompatibility, the level and amount of incompatibility that existed at dismissal and still exists, the lack of responsibility taken by Ms Dent for the incompatibility and the evidence she continues to be unfit to work, I decline to reinstate Ms Dent because it is neither reasonable nor practicable to do so in the circumstances.

### **Lost remuneration**

[183] Ms Dent refers to her above submissions regarding reinstatement. She alleges she has lost wages through the dismissal. She seeks restoration of her reputation. She believes she would be due 15 years salary and given the uncertainty of the job market and her age, an award of \$200,000 is appropriate.

[184] Where the Authority determines an employee has a personal grievance and has lost remuneration as a result of that grievance, the Authority must order the employer

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<sup>95</sup> Common Bundle Vol 3 p 166

to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration pursuant to s128.

[185] In considering an order for remuneration under s128, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement.<sup>96</sup>

[186] An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.<sup>97</sup>

[187] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like<sup>98</sup>.

[188] Issues of reputational damage are not relevant to lost remuneration. There is no evidential basis to justify an award in excess of the statutory three month period.

[189] Ms Dent returned to work out her notice period from 3 to 21 March 2014 for which she was paid. She applied for three jobs between 21 February and 22 May 2014.<sup>99</sup> She was unfit to return to work in April 2014 due to personal health and other matters.<sup>100</sup>

[190] There is insufficient evidence of mitigation. It appears she could not work from April 2014. In the circumstances, I decline to order payment of any lost remuneration because Ms Dent has not mitigated her lost remuneration and may have been unable to work following termination of her employment.

### **Compensation for hurt and humiliation**

[191] Ms Dent seeks compensation of \$100,000. She does not give any evidential basis for the amount sought.

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<sup>96</sup> *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

<sup>97</sup> *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

<sup>98</sup> *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

<sup>99</sup> Common Bundle Vol 3 pp158-162

<sup>100</sup> Common Bundle Vol 3 pp152,164

[192] An award of this magnitude would only be justifiable in the most extreme cases. There was no evidence of reputational damage other than bare submission. I accept Ms Dent felt hurt and humiliated. However the respondent's actions appear to be mistaken belief about policy leading to the written warning and insensitivity in the process leading to dismissal.

[193] Where an employee was dismissed insensitively the Court of Appeal has awarded \$7,000 pursuant to s123(c)(i).<sup>101</sup> The Court could not accept that the circumstances of the case put it in the top 2.5 per cent of awards for non-economic loss. An award of the magnitude sought by Ms Dent would be in top 2.5%. Based upon the evidence before me an amount of \$5,000 for damages under s123(c)(i) is appropriate.

[194] I must consider the extent to which Ms Dent's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded (s.124). Contributing behaviour is behaviour which is causative of the outcome and blameworthy.<sup>102</sup> Subsequently discovered misconduct can also be taken into account in reducing remedies.<sup>103</sup>

[195] There was contributing behaviour in the form of incompatibility. This behaviour was blameworthy. There were unfounded and retaliatory bullying complaints by Ms Dent. Ms Dent's behaviour justifies a 50% reduction in remedies.

[196] There is an order that Waikato District Health Board pay to Erin Dent compensation of \$2,500 for hurt, humiliation including a reduction of 50% for Ms Dent's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

[197] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>101</sup> *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA) at [44]

<sup>102</sup> *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

<sup>103</sup> *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155 at [104]

