

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 261
5360571

BETWEEN MARGOT GAZELEY
Applicant
A N D OCEANIA GROUP (NZ)
LIMITED
Respondent

Member of Authority: Alastair Dumbleton
Representatives: Angela Sharma, counsel for Applicant
Kylie Dunn and Anna Smith, counsel for Respondent
Investigation Meeting: 15, 16, 17 and 18 May, and 16 June, 2012
Submissions Received: 16 and 31 July, and 6 August 2012
Date of Determination: 30 November 2012

DETERMINATION OF THE AUTHORITY

- A. Mrs Margot Gazeley was not unjustifiably suspended or unjustifiably dismissed. She does not have a personal grievance arising from the actions of her employer Oceania Group (NZ) Ltd or from the way her employer acted.**
- B. No remedies as claimed by Mrs Gazeley under the Employment Relations Act 2000 are ordered.**
- C. Costs are reserved.**
- D. A non-publication order shall apply to the names of residents of the Woodlands residential care facility at Motueka operated by Oceania Group (NZ) Ltd.**

Employment relationship problem

[1] The applicant, Mrs Margot Gazeley, was dismissed from employment by the respondent, Oceania Group (NZ) Ltd, at the conclusion of an inquiry the company carried out into allegations made against her of misconduct and seriously deficient work performance.

[2] The CEO of Oceania, Mr Geoff Hipkins, confirmed the dismissal by letter on 30 September 2011. Several weeks earlier, on 11 July, Mrs Gazeley had been suspended from work by Oceania. The suspension remained in effect until the inquiry into the allegations was completed and Mr Hipkins had made the decision to dismiss. He notified Mrs Gazeley of this by letter, which contained the following advice:

Due to a loss of trust and confidence in your position, I have formed the view that your continuation in the role is untenable. I have therefore reached a decision to terminate your employment with immediate effect. We will arrange for your final pay to be processed this week which will include four weeks' pay in lieu of notice as well as any outstanding holiday pay, lieu days and outstanding salary to date.

[3] An application by Mrs Gazeley for interim reinstatement followed the dismissal but was declined by the Authority after a hearing in November 2011. A challenge against that decision to the Employment Court, heard in January 2012, was unsuccessful. The two decisions are reported at [2011] NZERA Christchurch 180, and [2012] NZEmpC 8.

[4] As attempts by the parties to resolve the employment relationship problems on their own terms had not been successful the Authority investigated the claims and must now determine them. They are that under the Employment Relations Act 2000 the suspension and dismissal of Mrs Gazeley were unjustifiable and that in relation to the actions of Oceania she has personal grievances. To resolve them she claims remedies under the Act, including permanent reinstatement to her former position of employment, reimbursement of lost wages, and compensation for injury to feelings and for loss of benefits expected from her employment. Mrs Gazeley also claims special damages and a penalty for breach by Oceania of the duty of good faith the parties to an employment relationship owe each other.

[5] A written employment agreement was signed by Mrs Gazeley and Mr Hipkins on behalf of Oceania in July 2009. It provided that Mrs Gazeley was to be employed

as Facility Manager of the Woodlands residential care facility at Motueka, which consisted of a retirement village, a rest home and a hospital.

[6] Over 50 such facilities are operated by Oceania to provide services under the New Zealand Public Health and Disability Act 2000 and the Social Security Act 1964. The company's facilities such as Woodlands each contract with a local District Health Board (DHB) to provide residential care services in their area. The DHB Services Agreement is a comprehensive contract, the one for Woodlands running to 66 pages. It was entered into by Oceania and the Nelson Marlborough DHB in December 2008.

[7] At material times Woodlands provided care for up to 65 residents who were looked after by some 61 employed or engaged staff. Mrs Gazeley as Facility Manager was the most senior employee and had overall responsibility for any operational issue that arose. Her responsibilities included maintaining the rest home's occupancy levels and monitoring the performance of staff working there, including those providing clinical care to residents.

[8] In relation to the role and qualifications of the person appointed to be the Facility Manager, the Services Agreement provided the following:

D17.3d Manager

- (i) *Every Rest Home must engage a Manager who holds a current qualification or has experience relevant to both management and the health and personal care of older people, and is able to show evidence of maintaining at least 8 hours annually of professional development activities related to managing a Rest Home; and*
- (ii) *The role of the Manager includes, but is not limited to, ensuring the Subsidised Residents of the Home are adequately cared for in respect of their everyday needs, and that services provided to Subsidised Residents are consistent with obligations under legislation and the terms of this Agreement.*

[9] Under its Services Agreement the DHB was able at any time to audit the services provided at Woodlands, so as to assess whether Oceania was complying with its contractual obligations. The agreement allowed the DHB to do this without prior warning. In the course of any audit the DHB also had the right to interview residents, including their families, and any staff working at the rest home.

[10] If the DHB considered that Oceania was not complying with the Services Agreement a Temporary Manager for the facility could be appointed by the Board. In that event the Agreement provided:

Such Temporary Manager will take over management of the provision of Services, in substitution for and on behalf of you [Oceania] and your Manager [Mrs Gazeley] for the purpose of remedying the breach referred to ...

- (b) *Where a Temporary Manager is so appointed, you must:*
- (i) *allow the Temporary Manager access to your Facility;*
 - (ii) *ensure that the Temporary Manager is able to carry out his/her duties without disturbance or disruption;*
and
 - (iii) *comply with any direction or instruction given by the Temporary Manager.*

Spot audit of 7 July 2011

[11] Without notice on 7 July 2011 the DHB carried out a spot audit at Woodlands. What it found out about Oceania's compliance with the Services Agreement gave the DHB serious concerns which extended to Mrs Gazeley. On 8 July the DHB advised Oceania that the Board viewed the situation seriously enough for it to appoint a Temporary Manager for Woodlands and to involve the Police.

[12] No issue has been taken in this case with the conduct of the audit or the decision the DHB took as a result of it to appoint a Temporary Manager, which Oceania was notified of on 8 July, the day after the audit.

[13] Mrs Gazeley was away on leave when the audit took place. When she returned to work on 11 July, after meeting with management of Oceania she was suspended from her position. It was taken over on 20 July by the Temporary Manager whose appointment had been notified to residents and their relatives on the same day Mrs Gazeley was suspended.

[14] Between 11 July and 30 September 2011, Oceania inquired extensively into the DHB's concerns about Mrs Gazeley arising from the audit. Oceania's CEO Mr Hipkins, assisted by an HR adviser, led that inquiry. On several occasions he met Mrs Gazeley and her legal adviser, Ms Sharma. Their lengthy discussions were recorded and transcribed, and a copy has been provided to the Authority.

Justification for acts and actions of Oceania

[15] To determine Mrs Gazeley's personal grievance claims the Authority must apply the test of justification at s 103A of the Employment Relations Act to the acts or the actions of her employer, particularly in relation to suspending and subsequently dismissing her. Oceania's inquiry conducted into the allegations against Mrs Gazeley and the extent of that investigation, directly bear on the way the test at s 103A is to be applied, and on the Authority's determination of whether the Act's requirements were met by Oceania.

Suspension grievance

[16] Mrs Gazeley claims that her suspension by Oceania on 11 July 2011 was an unjustifiable action, as she was not consulted or given a chance to be heard about the suspension before it was imposed by her employer. The amended statement of problem dated 10 February 2012 includes the allegation that the suspension was unfair because Mrs Gazeley was "denied an opportunity to have representation in a matter where she had been given no prior notice, and that concerned serious allegations against her, placing her employment in grave jeopardy." There is also an allegation that "the decision to suspend was predetermined, biased, and rushed."

[17] Oceania denies that the suspension was unjustified in all the circumstances present on 11 July. The employer contends that in any event the Authority cannot resolve the claims in relation to it as a personal grievance was not raised about that action within 90 days of it occurring, as required under the Employment Relations Act. No application has been made by Mrs Gazeley to the Authority for leave to raise a grievance out of time.

Raising of a grievance in relation to suspension

[18] I find that a grievance was raised on behalf of Mrs Gazeley by her counsel Ms Sharma, who wrote to Oceania on 20 July 2011 just nine days after the suspension. The following passages in the letter in particular, I find, raised a grievance:

There are serious concerns arising over the manner in which Mrs Gazeley was suspended from her duties. Mrs Gazeley signed an individual employment contract with Oceania on 20 July 2009. Under clause 9 of the contract there is a right to suspend, but the process around doing so has not been set out. As you will know the

principles of natural justice are applicable in respect of suspensions, and how they are carried out.

On her return to work Mrs Gazeley was taken by surprise over allegations that were put to her around her conduct in the workplace. She was not offered the opportunity to have a support person present or to comment on why she opposed the suspension. Mrs Gazeley was simply told by Mrs Sangster that she was suspended and that she was to leave the workplace premises immediately. The manner in which the suspension was carried out was really prejudicial to Mrs Gazeley.

[19] In her letter Ms Sharma made further complaints about the adequacy of information Mrs Gazeley had been given when she was suspended.

[20] I find that in accordance with the case law referred to by counsel explaining what must be done to “raise” a grievance, Mrs Gazeley met the requirements. She put to Oceania, for it to address, the matter of a lack of opportunity to oppose the action of suspension and to have a person support her.

[21] If upon reading the 20 July letter Oceania had considered those complaints were reasonable it could have offered Mrs Gazeley an opportunity to say why she should not be suspended, and she could have been allowed to have someone to support her. Oceania could have addressed with her any concerns that the manner of suspension had been prejudicial. The suspension could have been reconsidered and either confirmed, modified or withdrawn by the employer.

[22] I find that the Authority is not prevented by the 90 day time limit from determining the claim of unjustifiable disadvantage Mrs Gazeley has brought in relation to her suspension.

Justification for suspension

[23] When the spot audit was carried out on 7 July by the DHB, Mrs Gazeley was having the last few days of five weeks annual leave she had taken. I accept that upon returning to work early on the morning of 11 July, she was unaware an audit had taken place a few days earlier. She was met by Ms Barbara Sangster, Oceania’s Operations Manager North Island. Mrs Gazeley’s evidence is that after Ms Sangster had told her about the spot audit she was informed of her suspension. Her evidence is that she was not told of the Nelson Marlborough DHB’s involvement or that the Board had notified its intention to appoint a Temporary Manager for Woodlands.

[24] Ms Sangster’s evidence about this was as follows:

When Mrs Gazeley returned to Woodlands I ensured I was at the facility for her arrival at work on the following Monday. I asked her to meet with me in her office. I told Margot about the allegations and asked her for her comments. I listened and then left the office to consider her comments. I then went back into the office and proposed to suspend her pending an investigation into the allegations reported to the auditors.

I gave Margot the Exit Interview Non-Conformities Report that was completed by the auditors.

[25] During their meeting Ms Sangster also gave Mrs Gazeley a letter or memorandum setting out comments that staff, residents and some family members had made to the Board's auditors on 7 July. Some of the comments outlined were;

..... that the Facility manager

- *Was abusive and a bully.*
- *She had shaken a resident.*
- *Forced antibiotics into a resident while restraining her.*
- *Told residents that they were animals and they would be given jellimeat for dinner.*
- *Told a resident's family that there was no space for them to attend the Xmas dinner, but when the family called by there were two empty seats beside their resident.*
- *Complaints placed in the Suggestion box had been removed and may have been destroyed. The complaints process had not been followed.*
- *All felt intimidated and were scared of retaliation from the Facility Manager.*

[26] The letter had been composed from the Exit Interview report made following the spot audit. Recorded on the second page of the report is the finding, "significant issues related to the behaviour of the facility manager." Mrs Gazeley was given that page and another of the report. Her evidence was that she was shocked to read the allegations and did not accept any of them as true. In the report, under the heading Corrective Action required to be taken (within 24hrs), was the following:

Investigate & address issues related to the behaviour of the facility manager. Organise ... to ensure safety of residents & staff while issues are being investigated.

[27] In her evidence Ms Sangster said that before Mrs Gazeley had returned to work after taking leave she had been asked by the DHB to remove her as Facility Manager from the site, so that the Board could conduct an investigation. Ms Sangster

said she had advised the DHB that Mrs Gazeley was on annual leave and that there was a process to be followed, which was for her to meet with Mrs Gazeley, go through the findings of the spot audit and give her an opportunity to comment. Ms Sangster said although she had felt pressured by the DHB to suspend, if Mrs Gazeley had provided a reason not to suspend that action would not have been taken. Ms Sangster gave evidence that when she had met Mrs Gazeley on 11 July she had simply not thought to offer her the opportunity of having a support person.

[28] On 8 July, the day after the spot audit, Ms Sangster recorded in a memorandum that she had been advised by the DHB of its decision to appoint a Manager to Woodlands. That information was therefore available for Ms Sangster to give to Mrs Gazeley on 11 July, at the time of suspension. Residents and their relatives were notified in writing the same day that a temporary Facility Manager was being arranged for a short period.

[29] I find that Ms Sangster did tell Mrs Gazeley on 11 July that the audit had been initiated by the DHB and also that the Board intended appointing a Temporary Manager. That information is in the notes Ms Sangster made after the suspension meeting and it seems highly likely information of that sort would have been given, to explain the seriousness of the situation including the need to suspend Mrs Gazeley, and to explain that matters were largely outside of Oceania's control.

[30] Mrs Gazeley was not simply rung up before she had returned to Woodlands and told to stay away until further notice. She was met at work on 11 July by Ms Sangster, a senior Oceania manager whom she knew well and had worked with. I find that in the discussion which then took place Ms Sangster did sufficiently explain the circumstances that compelled suspension.

[31] I find that the discussion led by Ms Sangster did not amount to *consultation* as that concept is understood in employment law and more generally. I am satisfied that suspension had effectively been decided upon by Oceania before Mrs Gazeley was spoken to on 11 July. In an email sent to the DHB and Mr Hipkins on 8 July, Ms Sangster advised that "Margot Gazeley is overseas until the 10th. I will suspend her first thing Monday morning (11th)."

In an email sent earlier on 8 July, after referring to the appointment of the Temporary Manager and Police involvement in the investigation, the DHB stated "Barbara confirmed that Margot has been suspended pending the investigation." This email was sent to Ms Sangster and Mr Hipkins and

neither responded by taking issue with the statement that suspension had already been determined.

[32] I therefore find that on 11 July there was no real possibility that Mrs Gazeley, whatever she said about suspension, could have persuaded Oceania not to impose that. A decision had already been made to suspend and in that situation the employer could not have had an open mind on 11 July about taking that action.

Consultation before suspension

[33] It has been held by the Employment Court not to be mandatory in every case for an employer to consult an employee before deciding upon paid suspension. This was discussed in *Graham v. Airways Corp of NZ* [2005] ERNZ 587, where in the following passage of the judgment the Court said:

[104] There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.

[34] The present test of justification in relation to an employers actions and how an employer has acted, did not become law until 2011 and did therefore not apply when the Court decided the *Graham* case in 2005. The current test at clause (c) of s 103A(3) requires the Authority to consider, amongst other things, “whether the employer gave the employee a reasonable opportunity to respond to the employer’s concerns before taking action against the employee.”

[35] It is clear from (a), (b) and (d) of sub section (3) of s 103A, that the reasonable opportunity to respond is to be provided with regard to the employer’s substantive allegations and concerns that might, if any explanation given is not accepted, lead to punishment or disciplinary action being taken by the employer. Justifiable suspension as an action is not ordinarily regarded as *disciplinary* in nature, as its proper purpose is to allow for the time and space, and in some cases security within the workplace, needed before the employee is given the opportunity to respond to allegations of misconduct or poor performance.

[36] The views of the Court in the *Graham* case are still applicable under the present test of justification at s 103A of the Act. In considering the suspension under

that test, the Authority must determine on an objective basis whether the actions of Oceania and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the suspension occurred.

[37] The importance of the “circumstances” was referred to in *Arthur D Riley & Co. Limited v Wood* [2008] ERNZ 462, where, with regard to s103A (as the provision was then) of the Act, the Employment Court observed:

[54] *..... the standards of what is fair and reasonable may be variable according to the circumstances and a fair and reasonable employer may not necessarily be totally impartial or neutral. Of necessity employers bring to their decisions the values, culture and expectations of their specific workplace. They must weigh the impact of the behaviour of an employee under investigation on other employees and the work environment generally.*

[38] In this case “all the circumstances” include the fact that Oceania operates in a particular industry, which Mr Hipkins described as follows:

The elder care industry is different from a run of the mill service provider. Oceania does not have “clients” or “customers” but residents. The first and foremost priority is the comfort and wellbeing of Oceania’s residents through the provision of a comfortable and enjoyable lifestyle alongside first class clinical care. Given the range of residential options Oceania provides, the average age of Oceania’s residents is 83 years old.

[39] In the Court’s decision dismissing Mrs Gazeley’s application by challenge for interim reinstatement – *Gazeley v Oceania Group (NZ) Ltd*, [2012] NZEmpC 8 – the residents of Woodlands were noted as deserving special consideration because “they are particularly vulnerable to any disturbance in the operation of the facility which is their home.” Other important circumstances are the complaints of physical and mental abuse of patients by Mrs Gazeley referred to in the auditor’s report, and Police involvement wanted by the Board.

[40] While Oceania’s employment relationship with Mrs Gazeley was not subservient to the company’s Services Agreement with the DHB, performance of the former is to be viewed in the context of the latter and the rights and obligations of Oceania and the DHB, the parties to it.

[41] Oceania had a business to run and contracting with central funding agencies such as the DHB was an integral part of that. The maintenance of the DHB relationship was crucial to Oceania’s business, as was made clear by Mr Hipkins in

his oral evidence. Critical matters of the health and safety of Woodlands' residents were addressed in the contract with the DHB and its provisions, which included the ability of the DHB to conduct spot audits and if necessary appoint a Temporary Manager.

[42] Before working for Oceania, Mrs Gazeley had accumulated some 15 years experience in the elder care industry in which she had held management positions. She was fully conversant with the contractual arrangements between Oceania and the DHB and knew the significance her level of performance as Facility Manager had to maintaining the DHB's key funding role and to the exercise of any of the DHB's powers under the Services Agreement with Oceania.

[43] Another relevant circumstance in this case was that Mrs Gazeley's employment agreement expressly provided Oceania with a right to suspend her, in the following situation:

- (a) *While investigating serious misconduct, negligence in the performance of your duties, or any other serious misconduct or repeated breach of this Agreement;*

[44] The fact that the DHB had advised Oceania of its intention to appoint a Temporary Manager and the serious nature of the allegations made in the audit report against Mrs Gazeley, inclined the situation to be one in which a fair and reasonable employer could have concluded that consultation and the opportunity to have a representative were not required before a decision to suspend was made. Further inquiries needed to be carried out into matters potentially affecting the security and wellbeing of residents and staff. For that reason it was necessary and appropriate for Mrs Gazeley to remain off-site while that was being done.

[45] It may often be impracticable to have an employee, who is at the most senior management level, remain present in a workplace when another person has been temporarily appointed as a substitute to perform the same position, in accordance with reasonable contractual requirements. Some placed in the situation faced by Mrs Gazeley may have responded to it by voluntarily stepping aside from their position while it was being temporarily filled by another, particularly while there were allegations to be investigated about health and safety issues relating to staff and residents and when serious concerns had apparently been expressed by residents about

“retaliation.” There was also a prospect that the Police would become involved and investigate Woodlands.

[46] In submissions for Mrs Gazeley it was acknowledged by Ms Sharma that a reasonable option for Oceania would have been to consider placing Mrs Gazeley on ‘special leave,’ until such time as she was fully informed of the allegations or even until the end of the disciplinary investigation. This acknowledgement was a reasonable one to make, that there were compelling reasons why Mrs Gazeley could not remain in the workplace during the inquiry, given the nature of Mrs Gazeley’s workplace itself, her role there and the seriousness of the concerns raised by the DHB’s audit.

[47] The circumstances of this case are unusual, in that there was an urgent and pressing need for the employer to maintain the confidence of its residents and staff. There were serious allegations, including those of physical and mental mistreatment, made against the most senior manager of the Woodlands facility. It was in the interests of all concerned for those allegations to be investigated without obstruction or delay and without staff and residents feeling afraid that there would be reprisals or retaliation against them for making and substantiating complaints during an investigation. Also, the Board had considered that Police involvement was necessary.

[48] In combination with those circumstances was the pending transition to temporary management, in accordance with a Services Agreement provision. Given the central importance of the obligations Oceania had under that contract, it seems reasonable to expect in this particular employment that the Facility Manager would be responsive and would co-operate with the DHB’s requirement to appoint a Temporary Manager, and also would acknowledge that there were good reasons for doing so on the part of the DHB. In addition, there was an express right on the part of the employer to suspend.

[49] The presence of these unusual circumstances made the suspension of Mrs Gazeley somewhat inevitable, in my view. Whatever she might have been able to say in opposition to that course being taken is likely to have made no difference to the outcome of consultation. I find that the circumstances did not require consultation and that the suspension of Mrs Gazeley was justifiable under s 103A of the Act. She does not have a personal grievance arising from that action of Oceania.

Justification for dismissal

[50] Ultimately, a number of the serious matters of misconduct and performance raised against Mrs Gazeley by the DHB following its spot audit were not relied on by Oceania to justify dismissal. They included claims of abuse and bullying of residents, and that she had shaken one and forced another to take medicine. Those matters were not pursued further as Oceania's investigation proceeded and did so without the Police becoming involved.

[51] There is no suggestion that Oceania's response to the Board's audit report was an overreaction and that the employer had unreasonably proceeded immediately to act on the report, without investigating and forming its own view of whether there was any substance to the Board's concerns. I consider that Oceania acted responsibly in the circumstances by accepting the report and its contents, at least until such time as it could fully investigate for itself the concerns.

[52] In terms of process, or procedurally, the inquiry by Oceania that followed the suspension of Mrs Gazeley was, I find, fairly and reasonably conducted. The determination of the dismissal grievance claim turns instead on the conclusions Oceania reached from the information obtained by investigating the performance and conduct of Mrs Gazeley.

[53] Three particular aspects of her performance and conduct were relied upon by Mr Hipkins in deciding to dismiss;

- failure to exercise supervision of clinical services provided to residents of Woodlands.
- comment made on a particular occasion in the hearing of a resident about being tied up to restrain her movement.
- making rude and derogatory comments to staff and residents.

Supervision of clinical services – Care Plans

[54] Extensive and detailed provision was made for Care Planning in the Services Agreement entered into by Oceania with the Nelson Marlborough DHB. The scope and development of care plans are matters covered by the Agreement, as are the

evaluation and review of such plans. In relation to them, amongst other things Oceania was required to ensure that:

(a) *Each Subsidised Resident has a Care Plan and that all staff follow the Care Plan;*

.....

(c) *Each Care Plan is developed, documented and evaluated by a Registered Nurse within three weeks of this Subsidised Resident's Admission;*

(d) *Each Subsidised Resident's Care Plan is reviewed by a Registered Nurse and amended where necessary to ensure it remains relevant to address the Subsidised Resident's current identified needs and health status.*

.....

(f) *Each Subsidised Resident and his/her family/Whanau have the opportunity to have input into the Subsidised Resident's Care Planning process;*

(g) *The Care Plan addresses the Subsidised Resident's current abilities, level of independence, identified needs/deficits and takes into account as far as practicable their personal preferences and individual habits, routines, and idiosyncrasies;*

(h) *The Care Plan addresses personal care needs, health care needs, rehabilitation/habitation needs, maintenance of function needs and care of the dying;*

(i) *That a Registered Nurse is responsible for ensuring the plan reflects the Subsidised Resident's assessed physical, psychological, spiritual and cultural abilities, deficits and needs;*

(j) *Each Care Plan focuses on each Subsidised Resident and states actual or potential problems/deficits, and sets goals for rectifying these and detailed required intervention;*

.....

(l) *Care Plans are available to all staff and that they use these Care Plans to guide the care delivery provided according to the relevant staff member's level of responsibility.*

D16.4 Evaluation

(a) *You must ensure that each Subsidised Resident's Care Plan is evaluated, reviewed and amended either when clinically indicated by a change in the Subsidised Resident's condition or at least every six months, whichever is the earlier.*

.....

[55] Mrs Gazeley was well aware of the significance and importance of care planning to Oceania's operations at Woodlands, where she was in overall charge and could call on her experience of managing such facilities, accumulated over some 15 years.

[56] The DHB's spot audit revealed deficiencies in the clinical management of Woodlands. Immediate responsibility for that function had been assigned by Oceania to the position of Clinical Manager, to which Ms Clo Taylor had been appointed. Under the job description for that position the Clinical Manager was required to provide "effective Clinical Leadership and Management" to clinical and care staff and also to support the Facility Manager, Mrs Gazeley, to whom she reported.

[57] Mrs Gazeley under her job description had key responsibilities in "Leadership" and in "Management of Service Delivery." She was expressly responsible for;

Providing sound business and clinical leadership as well as ensuring the efficient, effective and sustainable long term and day-to-day management of the assigned residential facility.

[58] Under the Services Agreement between Oceania and the DHB, the role of the facility manager included "ensuring" the residents of Woodlands were adequately cared for. Although not party to that agreement, Mrs Gazeley was well aware of its requirements and the central part she had in seeing it was properly performed by Oceania, her employer.

[59] During the inquiry Oceania made into allegations against her Mrs Gazeley told Mr Hipkins she could not take issue with a description of the Woodlands care plans as being "woefully inadequate." She said that she had not reviewed a care plan although she had read or looked at them.

[60] Her explanation for that situation has been that the Clinical Manager, Ms Taylor, was responsible for reviewing the plans. She rejected the claim that as a Registered Nurse her professional qualification made it appropriate for her to review or assess care plans for residents. She claims that her nursing qualification was not one she was required to hold as Facility Manager and that other Facility Managers without that qualification were unable to conduct reviews of care plans.

[61] I consider that Mr Hipkins from the inquiry he conducted reasonably concluded that Mrs Gazeley had failed to discharge her responsibility of managing Woodlands by maintaining adequate clinical oversight. Mrs Gazeley knew that Ms Taylor had been having difficulty coping with the demands of her job and in those circumstances it would be reasonable for a manager to be keeping close supervision, which was likely to include carefully reviewing and assessing care plans.

[62] It was not Mrs Gazeley's responsibility to draw up care plans but to review them, as a part of providing clinical oversight at Woodlands. Evaluating or assessing plans against the individual residents they were addressed to was also an aspect of the requirement in the employment agreement that she was to provide supervision of the Clinical Manager. I am satisfied that it was a reasonable conclusion for Mr Hipkins to reach that merely looking at or reading care plans was not sufficient to discharge the responsibilities required of the Facility Manager in relation to the Services Agreement with the DHB. What was required was a critical analysis or review of the plans, or sample of them, carried out systematically to see that they were addressed correctly to any particular resident and to the needs and requirements of that person, medically and in any other respect relevant to the provision of appropriate care and wellbeing.

[63] I find that a fair and reasonable employer could, in all the circumstances, have concluded that Mrs Gazeley's conduct or performance with regard to the supervision of clinical services at Woodlands caused a loss trust and confidence in her as an employee, to the extent that continuation in her employment was untenable. This was the conclusion reached by Mr Hipkins and which he gave to Mrs Gazeley in notifying her of his decision to dismiss.

Comment made about tying up a resident

[64] I consider that from the inquiry he conducted Mr Hipkins' concerns about an utterance made by Mrs Gazeley about tying up a particular resident were not overstated or exaggerated in the circumstances. The utterance expressly or implicitly contained a threat, that if the resident did not stay seated in her chair she would be restrained from moving by being tied into it. Mrs Gazeley confirmed that what she said had been intended to be heard by the resident, a frail elderly woman who was at risk of falling over if she rose unaided from her chair, which she was given to doing. There is no suggestion that the remark was made in a situation where forcible restraint might have been justified, but neither was it made by Mrs Gazeley with intention to

harm, frighten or upset in any way the resident whose best interests Mrs Gazeley had at heart. Nevertheless it was reasonable for Mr Hipkins to conclude that she had acted improperly by talking about restraining a resident in this way.

[65] In my view Mr Hipkins had reasonable cause for taking the view that such remarks should not ever be made, especially by the Facility Manager, and that the conduct justified serious disciplinary action including dismissal.

[66] On 11 July when she was suspended Mrs Gazeley had on her personal file a written warning expressed to remain in effect until early August 2011. It warned that her conduct in the way she had medicated a resident of Woodlands had breached the Code of Rights for residents. The warning letter noted that Mrs Gazeley had accepted that her actions on that occasion were wrong, even although she had thought at the time she was acting in the best interests of the resident.

[67] It seems from the dismissal letter written by Mr Hipkins that the incident which led to the warning was a matter taken into account in deciding to dismiss Mrs Gazeley. In referring to his conclusion that Mrs Gazeley had talked about tying up a resident, Mr Hipkins said;

Further, only 3 days following this event and by your own admission, [you] improperly restrained a resident.

[68] This matter was raised by Mrs Gazeley, not so as to bring belatedly a grievance about the warning she received but to complain that Oceania had not made her fully aware of a particular policy which provided an exception to the rule that residents were not to be physically restrained unnecessarily. I accept that Oceania could reasonably have concluded that Mrs Gazeley in her position as Facility Manager knew or ought to have known of the existence of the restraint policy, its scope and exceptions to it under which physical restraint of a resident was permitted. She had or ought to have had that knowledge when she talked about tying up the resident, which occurred just a few days after the medication incident. I do not consider there was any unfairness through any failure by Oceania to make staff, including their most senior member, aware of its policies with regard to the proper care of residents.

Derogatory language

[69] I also consider that Mr Hipkins' view was a reasonable one that a person in the position of Facility Manager should not have been heard to make a joke, as Mrs Gazeley apparently had intended it to be, about the quality of dining provided by Woodlands for its residents. Neither should she have been heard to make jokes to members of the staff, even though they may not have taken offence or might have even encouraged them, if residents or staff overhearing them might reasonably have been offended. Staff Mrs Gazeley was in charge of were likely to lose respect for the Facility Manager as a result.

[70] The evidence confirmed by Mrs Gazeley was that she had called out or said, "dinner time, jellimeat for tea" on four or five occasions, rather than just once. Made once only, the remark might have earned no more than a warning, and the same is true of her addressing a particular staff member as a "dirty hua." It was reasonable in my view for Mr Hipkins to consider those matters in conjunction with the most serious failure with regard to clinical oversight and also the remark intended to be heard by a resident about tying her up. They were matters going to the employer's ability to have an appropriately high degree of trust and confidence in the Facility Manager's leadership and supervision.

[71] Applying the test in s103A of the Act and considering that the section has been held by the Court to provide an employer with a range of responses to misconduct or performance failure by an employee, I find that dismissal was an action that a fair and reasonable employer could have decided upon in all the circumstances. In my finding therefore Mrs Gazeley does not have a personal grievance arising from her dismissal, which was a justifiable action.

Failure to review performance annually

[72] Oceania had undertaken expressly in its employment agreement with Mrs Gazeley to review her performance annually. A failure in that regard was alleged in the amended statement of problem lodged with the Authority on behalf of Mrs Gazeley, as follows:

95. *The respondent [Oceania] breached its contractual obligations under clause 3.1 of the employment contract by failing to carry out the applicant's annual performance*

review, which was a requirement under its service contract with the NMDHB.

[73] The requirement was referred to again in final submissions made by Ms Sharma, although not in support of the remedy of a penalty but, as I have understood it, to persuade the Authority to increase the award of lost remuneration claimed and make “a reasonable adjustment” to Mrs Gazeley’s salary, reflecting her performance. It should be clear that making such an adjustment is contrary to the express prohibition, at s 161(2)(b) of the Act, against the fixing by the Authority of terms and conditions of employment. Reinstating Mrs Gazeley with a pay rise is outside the scope of the remedies available from the Authority.

[74] It has not been disputed by Oceania that Mrs Gazeley did not receive a performance review as required by the express term of the employment agreement. I find that Oceania breached the agreement in that regard, but as no penalty has been claimed it is not a remedy I impose.

[75] The Authority has closely considered the question of whether Oceania’s omission to annually review performance may have played some part in the failure by Mrs Gazeley to exercise clinical oversight, act with appropriate decorum and use good judgement in the way she addressed residents and staff.

[76] I consider it is likely that Mrs Gazeley’s conduct and performance, as found to be so badly wanting by Oceania, would have been treated less seriously had it been discovered otherwise than from a DHB spot audit followed by the placement of Woodlands in temporary management. As Mr Hipkins acknowledged in his evidence, the facility’s contract with the DHB was jeopardised by the adverse findings of the spot audit. He may have taken a more lenient view of Mrs Gazeley’s conduct and performance if the problems with those had not come to light in the way they did. It is possible that if they had been revealed earlier during a performance review, dismissal may not have been decided upon.

[77] That can only be speculation, as the Authority is left with considerable uncertainty as to when, how and by whom a performance review was to be carried out annually. Mr Hipkins’ view was that Ms Karen Lorrigan had been responsible for the review. If that was so, it seems likely from the evidence she gave to the Authority that Ms Lorrigan would not have considered Mrs Gazeley as having responsibility for

auditing care plans. No problem in that regard would have been drawn attention to, so that Mrs Gazeley could have an opportunity of correcting it.

[78] It is not possible now to say with any degree of certainty that an annual performance review, if one had been conducted, would have picked up in advance the particular problems with conduct and performance that led to Mrs Gazeley's dismissal. Equally it is not possible now to predict that she may have adjusted her conduct and performance and avoided having accusations made against her later.

[79] The Authority must find that there was a breach of the agreement in this regard but I am not able to find that it was such as to contribute to Mrs Gazeley's failure to meet the reasonable standards of performance and conduct required of her as Facility Manager by Oceania. Those standards were clearly identified in the employment agreement and job description, from the commencement of the employment.

[80] I also do not consider that Oceania overreacted to the seriousness of the conduct or performance by Mrs Gazeley simply because defects came to light in the course of a DHB spot audit carried out under the Services Agreement. I find that Mr Hipkins as CEO did view the conduct and performance of Mrs Gazeley as Facility Manager in the overall context of the purpose and requirements of the company's elder care business or enterprise.

Determination

[81] For the above reasons, the Authority finds that with regard to Mrs Gazeley's suspension and subsequent dismissal, Oceania in its actions and the way it acted did what a fair and reasonable employer could have done at the time the suspension and dismissal occurred. The Authority finds that Mrs Gazeley does not have a personal grievance in relation to either action.

[82] With regard to the claim for a penalty for breach of good faith, while arguably there were aspects of Oceania's conduct in relation to the suspension and depiction of it to Mrs Gazeley as having been preceded by "consultation," such misleading behaviour as may have occurred did not come close to satisfying the standard set by s 4A of the Act of being "deliberate, serious and sustained," or as having been intended to "undermine an employment relationship." No penalty is ordered in relation to the claimed breach of good faith in that regard.

[83] A penalty for breach of good faith was also claimed in relation to an alleged failure by Oceania to disclose its restraint policy, an earlier breach of which had led to the issue of a written warning to Mrs Gazeley. It was alleged that emails relating to her standard of performance were not disclosed either. I am not persuaded that any of that information fell with s 4(1A)(c) of the Act as being information about a “decision” adversely affecting the continuation of Mrs Gazeley’s employment. She was, or should have been, aware of the restraint policy in any event. I decline to order a penalty.

[84] Mrs Gazeley also claims as a remedy “special damages” of \$19,204. This sum is the amount spent by her on legal fees at a “pre-litigation” stage, presumably before the point where a claim was lodged in the Authority for interim reinstatement. In the result of the investigation there is no basis for such a claim, which appears to be an application for costs. Applications for costs should usually be made in accordance with the well established principles relating to costs awards as set out in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808. One of those principles is that “costs generally follow the event,” in this case the event being the Authority’s comprehensive findings in favour of Oceania rather than Mrs Gazeley.

Costs

[85] Costs are reserved. Any application by Oceania is to be made in writing within 21 days of the date of this determination, and any reply by Mrs Gazeley is to be made within a further 21 days. The parties are encouraged to try and resolve the question of costs themselves, if they can.

Order prohibiting publication

[86] The names of a number of Woodlands’ residents were given to the Authority in the course of receiving evidence in written and oral form. It is in the interests of justice that a permanent order be made to prevent any person from publishing in any form the name of any present or past Woodlands resident. I make that order pursuant to clause 10 of Schedule 2 of the Employment Relations Act.

