

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 255
5409395

BETWEEN

JENNY GEORGE
Applicant

A N D

NURSE MAUDE DISTRICT
NURSING SERVICE
Respondent

Member of Authority: Helen Doyle

Representatives: Jeff Goldstein, Counsel for Applicant
Peter Macdonald, Advocate for Respondent

Investigation meeting: 27 and 28 August and 18 September 2013

Submissions Received: 18 September 2013

Date of Determination: 17 December 2013

DETERMINATION OF THE AUTHORITY

- A. I have not found that Ms George was actually or constructively unjustifiably dismissed from her employment.**
- B. I have found one personal grievance of unjustified action causing disadvantage and have awarded Ms George under s 123 (1) (c) (i) of the Employment Relations Act 2000 the sum of \$3000 without deduction.**
- C. I have reserved the issue of costs and in the event agreement is not reached set a timetable for an exchange of submissions.**

Prohibition from publication

[1] I prohibit from publication by agreement under clause 10.1 of the Second Schedule to the Employment Relations Act 2000 any details of the applicant's medical conditions other than matters raised during a consultation by the applicant with her doctor on 6 December 2012 about workplace stress referred to in this determination.

Employment relationship problem

[2] Jenny George commenced employment with Nurse Maude District Nursing Service (Nurse Maude) in 1987. At the material time that the Authority is concerned with, the latter part of 2012, she was employed as Service Manager for Speciality Nursing based in Christchurch.

[3] Ms George in her statement of problem says that her resignation tendered on 10 December 2012 was in circumstances where she was unjustifiably constructively dismissed. She says that Nurse Maude breached express and implied terms of her employment agreement by failing to provide her with a safe workplace and that Nurse Maude failed in its obligations of good faith.

[4] During the first two days of the Authority investigation meeting Mr Goldstein suggested the Authority could find under s 122 of the Employment Relations Act two alternative grievances arising from the same facts. The first he said was an unjustified actual dismissal after Ms George's resignation was tendered and the second was an unjustified disadvantage following the tendering of Ms George's resignation and its announcement to staff.

[5] Ms George is seeking reimbursement of lost remuneration in the sum of \$59,746.32 gross and compensation of \$30,000, or in the alternative damages, together with interest payable on any wage reimbursement and costs.

[6] Nurse Maude does not accept that Ms George was unjustifiably constructively dismissed or that she is entitled to the remedies she seeks.

Issues

[7] Ms George says that she was actually unjustifiably dismissed and disadvantaged by the unjustified actions of Nurse Maude from the point the resignation was tendered. Alternatively Ms George says that her resignation was based on a breach by Nurse Maude of its obligations to provide her with a safe workplace. Ms George alleges that Nurse Maude failed to minimise, eliminate or prevent workplace bullying. Ms George's claim falls within the third of the non-exhaustive categories of constructive dismissal referred to by the Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Limited* [1985] 2 NZLR 372 at 374-375.

[8] The Authority needs to determine the following issues:

- Was the personal grievance that Ms George was actually dismissed raised within 90 days of 11 December 2012?
- If it was then was Ms George actually dismissed?
- If Ms George was actually dismissed, then was the dismissal justified?
- Was there a breach of duty by Nurse Maude?
- Was Ms George's resignation caused by a breach of duty on the part of Nurse Maude?
- If the answer is yes, then was the breach of duty of sufficient seriousness to make it reasonably foreseeable Ms George would not be prepared to continue to work?
- If it is found that Ms George was constructively dismissed then was that dismissal unjustified?
- If the Authority finds that Ms George was unjustifiably constructively or actually dismissed then what remedies is she entitled to and are there issues of mitigation?

- Was a personal grievance raised that Ms George was disadvantaged by the actions of Nurse Maude following the tendering of her resignation but before it was announced?
- If it was, then was Ms George disadvantaged by an action of Nurse Maude when it publicly announced her resignation?
- Was that action unjustified?
- If it is found that Ms George was disadvantaged by an unjustified action of Nurse Maude then what remedies is Ms George entitled to?

Background against which issues are to be considered

[9] Fran Cook is the General Manager of Clinical Services at Nurse Maude. In January 2011 when Ms George was employed as Clinical Nurse Manager for Business Excellence and Speciality Nursing she reported to Ms Cook for the Speciality Nursing component of her position and to Wayne Hutchinson for the Business Excellence component. In or about mid-2012, Ms George's position changed to full time as Service Manager for Speciality Services in which role she reported to Ms Cook.

[10] There are about 1,100 employees at Nurse Maude. The Chief Executive Officer is James Magee. Immediately below Mr Magee are eight senior managers including Ms Cook and they report directly to Mr Magee. There is then a second tier of about 8–12 managers. Ms George was employed at this second tier level and had 20 to 25 reports of her own.

[11] Ms George said that she found the management style of Ms Cook to be very different from any of her previous managers and was concerned about Ms Cook's management style from the time she commenced working under her management in January 2011.

[12] Mr Magee said that in appointing Ms Cook as manager he wanted her to set high standards and improve the organisation which he knew would involve some changes. He described in his evidence the traditional Nurse Maude way as *slightly smug, quite lax processes* and *that there hadn't been an investment in good systems*. He described the organisation having *signs of age*. Mr Magee said that he wanted to

retain the caring /compassionate component of Nurse Maude but make *good use of the dollars*. He said that there was increased competition for work coming from quite focussed organisations and that the organisation had to become more business-like. His view of Ms Cook was that she was very organised, focussed, hardworking and ambitious.

[13] Ms George said of Ms Cook that she:

- was condescending and patronising;
- took personal credit for every success with the service Ms George managed;
- micro-managed situations;
- did not disseminate information within clinical services creating silos;
- spoke to staff using unreasonable and unwarranted sarcasm;
- generally created a climate of fear by passive aggression; and
- had mood changes that were unpredictable and difficult to cope with.

Raising of concerns

[14] Ms George said in her oral evidence that she spoke to the General Manager of Human Resources at Nurse Maude, Valerie Wright, from 2011 about her concerns with Ms Cook's management style. It was known by Mr Magee, and no doubt others in the senior management team, that Ms Wright and Ms Cook had challenges in their working relationship. Ms George though was on friendly terms with Ms Wright and they had casual contact outside of work when they cycled together.

[15] Mr Magee described Ms Wright as disliking Ms Cook intensely in his oral evidence. In his written evidence Mr Magee referred to the two different styles of the managers as such in paragraph 7.

Valerie's perception and representation of Fran Cook are influenced very much by her own persona and style. Val was extremely conflict averse as a manager and found it very difficult to hold her own in a robust discussion. Her approach was often to take a very low profile in meetings but engage afterwards, on a one to one basis, in a re-litigation of the discussion. Her engagement style often manifested

itself in back room gossip and character assassination rather than constructive debate. Also in meetings her verbal style could be wordy and circumlocutory in contrast to Fran Cook who was more focussed and analytical. I believe this was a major source of resentment on her part which showed itself in continual criticism of Fran. Valerie's statement also reflects that level of resentment.

[16] Ms Cook in her written statement said that she was aware that Ms Wright was not discreet in her views about her and was sharing her opinion with others. There probably was, I conclude from the evidence, discussion about Ms Wright's view of Ms Cook with other human resource advisors at Nurse Maude. For example another human resource advisor, Sara Ogier said in her evidence that she was aware from what she had been told by Ms Wright that Ms Wright did not like Ms Cook. Ms Ogier in her evidence said that what stood out in her mind about what Ms Wright said was that Ms Cook did not respect human resources and its processes. After Ms Wright's position was disestablished in August 2012 Ms Ogier said that she was concerned about how her interactions were going to be with Ms Cook but in fact they went smoothly.

[17] Ms Wright did not accept that she was other than professional in her interactions with Ms George and Ms Cook's other direct reports when they talked to her about their difficulties with Ms Cook's style of management. There was no evidence to support otherwise. Ms Wright said that early in 2012 all four of Ms Cook's service managers came to her raising concerns about Ms Cook's management style and her behaviour towards them individually. Ms Wright said that they were hesitant to raise matters with Mr Magee as they were concerned about Ms Cook's response to them personally if the issues were raised. Ms Wright said that she offered to raise the issues for them either as a group or individually but could not do so without their authority. The service managers who reported to Ms Cook at that time were Ms George, Rosemary Fitzgerald-Carter, Lucy Fife and Jane Rollings. Ms Fife did not accept that she had spoken to Ms Wright about any issues she had with Ms Cook's management. I accept her evidence about that and find that Ms Wright only spoke to Ms George, Ms Fitzgerald-Carter and Ms Rollings.

[18] Remarkably Ms Cook I find was completely unaware for the almost two year period in which she managed Ms George about how Ms George felt about their relationship. Had the only evidence been some of the emails provided to the Authority sent between Ms Cook and Ms George over the duration of their

relationship then I would have concluded both Ms Cook and Ms George's relationship was a positive one.

[19] For example Ms Cook offered Ms George and her husband come and stay with her in April 2011 if necessary following the earthquake. She described Ms George in her performance appraisal to September 2011 as a great asset to Nurse Maude and stated that she was loyal and committed to the team and organisation and very supportive of her colleagues. In July 2012 she was appropriately concerned when it appeared Ms George was doing work at 3.26am. Ms George emailed a response to Ms Cook's query and said that she woke up and watched the Olympics for an hour and then started playing with her phone. On 29 November 2012 Ms Cook sent an email advising Ms George she did a great job spotting a problem with costings.

[20] Ms Cook said in her written evidence that Ms George at no time ever signalled that she was not happy or had any concerns with the working relationship and that when Ms George asked for feedback on how she was performing the feedback provided was positive and encouraging.

[21] Ms George made the following employee comments in her performance appraisal to September 2011 about Ms Cook; *I have learnt a huge amount working alongside a new manager and find these new changes very stimulating. I look forward to the next 12 months.* She explained these in her evidence as she was scared of Ms Cook and did not want to put down things that were negative.

[22] Ms Wright did not escalate concerns that Ms George or the other service managers spoke to her about beyond the one to one discussions until or about May 2012. There is no evidence to support that Ms George asked her to do so and Ms Wright without Ms George's consent and agreement did not believe it was her place to take a more formal approach.

[23] Ms George said in her oral evidence that she did not feel she could approach Ms Cook and tell her about her concerns because she was scared of her and she could not approach Mr Magee because Ms Cook had told her not to go to Mr Magee about *work unless you have talked to me first.* Objectively assessed issues about work would be more appropriately directed to the line manager in the first instance. I am further not satisfied that whatever Ms Cook said about direct approaches to Mr Magee it would be taken by someone as senior as Ms George as a general prohibition on her

raising any concerns with him whatsoever. The evidence supported that she frequently talked to Mr Magee.

May 2012

[24] The evidence supports that concerns that Ms George and the service managers had about Ms Cook's management were first advised to Mr Magee in May 2012 by Ms Wright.

[25] The circumstances in which that came about followed a meeting Ms Wright had with Mr Magee at which time he raised concerns about human resource performance in the Clinical Services areas. Ms Wright was concerned Ms Cook had not raised this with her directly. Ms Wright sought some legal advice and Mr Magee agreed to attend a facilitated meeting to attempt to resolve the issues. It was at this meeting that Ms Wright advised Mr Magee that she had been fielding concerns and complaints from staff about Ms Cook's manner and behaviour towards them. Initially Ms Wright said in her written evidence she was reluctant to share the names and specific details of the complainants but she then did. Ms Wright advised Mr Magee that he should meet with each of Ms Cook's direct reports in confidence and give them an opportunity to raise their concerns.

[26] In or about June or July 2012 Mr Magee did just that. He arranged for individual meetings with four of Ms Cook's direct reports to talk about any issues.

[27] Mr Magee then held an all up meeting intended to be with all four direct reports of Ms Cook but Ms Fitzgerald-Carter was not present. That meeting which, having heard the evidence, I conclude was sometime in late August 2012, was an opportunity for the direct reports to speak frankly to Mr Magee about their concerns. Ms Cook was not the sole focus of the meeting and other matters were also discussed. Ms George said her concerns about Ms Cook expressed at that time were those set out earlier in this determination. Having heard the evidence from the other attendees at the meeting it is useful to set out what their concerns were as well and what they thought would happen from that point on.

[28] Ms Fife when she gave her oral evidence recalled the one on one meeting with Mr Magee. She said a lot of other matters were discussed as well as the relationship with Ms Cook. Ms Fife said that she could not put her finger on any particular incident that had made her feel somewhat anxious but she explained that Ms Cook

had clear expectations and that was a big change from the previous manager. She accepted under questioning from Mr Goldstein that there was a level of anxiety around her performance and meeting of Ms Cook's high expectations. She was aware that Ms George had issues with Ms Cook's management style and that she was worried about meeting deadlines. She accepted that sometimes she may ring Ms Cook's personal assistant to see what sort of mood Ms Cook was in prior to a meeting. She could not recall as Ms George said in her written evidence a meeting where Ms Cook had been condescending to Ms George. She denied, as Ms George had said in her written evidence, that she had turned up in tears to talk to her about Ms Cook. She said that there was a possibility that Ms George could have felt challenged by Ms Cook. Ms Fife said she had no trouble herself or difficulty in approaching Ms Cook about issues.

[29] The other person who attended at the group meeting was Ms Rollings. Ms Rollings gave her evidence under summons. She explained that Mr Magee at the meeting with all reports listened to concerns about the relationship with Ms Cook and encouraged the service managers to talk to Ms Cook. She said there was a discussion about employee engagement and how employees could all influence management culture. Ms Rollings accepted that she had had some difficulties with some aspects of her relationship with Ms Cook but she said the relationship with Ms Cook was currently better than it had been and it seemed to improve after Ms George had left. Ms Rollings recalls that there was a suggestion Mr Magee may come along to the clinical service management meeting and talk about some management papers. It was understood that in fact he had done this.

[30] Ms George also recalled at the group meeting Mr Magee advised that he was available to talk about any issues that may arise.

[31] Mr Magee characterised the discussion as feedback and didn't advise Ms Cook that the service managers including Ms George had issues with her management style. Nevertheless Mr Magee said that he did take steps to check out the concerns in what I understand to be a reasonably subtle way. He asked questions for example of Ms Cook about how she was getting on with Ms George. He said that he found Ms Cook was positive about Ms George. He said that he had not found in his interactions and discussion with Ms Cook that she took credit for her direct reports successes and instead would talk about their achievements. Whilst Ms Cook was

never told of the concerns Ms George had with her style of management she recalled in her evidence that Mr Magee had indicated to her that some managers may find her style too direct and that she needed to be careful to give an opportunity for feedback. There were I find some examples of that feedback being requested from the meetings the direct reports attended.

[32] I find that the individual meetings and the all up meeting with the direct reports including Ms George was, as Mr Magee put it, in the nature of questions and feedback rather than complaints that required investigation and an outcome. I have relied in reaching that finding on the encouragement from Mr Magee that the direct reports talk to Ms Cook about their concerns and that they could in so doing influence her management style. He said in his oral evidence the culture that he wanted at Nurse Maude was to talk about concerns in that way. He did leave the door open for them to return to him if required. I do not find with senior managers who had different issues with their manager this suggested approach was an unreasonable one.

[33] Ms Cook was away for much of August and Ms George away for much of September on holiday.

Late September 2012 to the point of tendering the resignation

[34] Ms George said that on her return from holiday in late September she found matters had deteriorated significantly in the environment she worked in.

Infusion Centre

[35] One issue for Ms George during this period was that on her first day back from holiday she was told by Ms Cook that she was to inherit a major contract for service, the Infusion Centre. Ms Cook says that the position was only offered to Ms George following a change management process because Ms George had expressed an interest in it. She said, and this was confirmed by Ms Fife in her evidence that Ms Fife was happy during the consultation period which occurred when Ms George was away to pick up two services including the Infusion Centre under Community Services. Ms Fife felt that it sat well with her area although accepted it also sat well with Ms George's area. Ms Fife said that she asked Ms Cook whilst Ms George was on holiday whether they could just get on with the change and Ms Cook said that they needed to wait for Ms George to get back to read the proposal and respond.

[36] Ms Cook said although as a result of the discussion with Ms Fife it became apparent that Ms George was not a directly affected party to the change it was felt on advice that she should be offered the opportunity to take on the Infusion Centre given her earlier request. On her return from leave just prior to the consultation period ending Ms George was asked to meet with Ms Cook. Ms Cook said that she made it very clear that Ms George did not have to pick up the Infusion Centre if she did not wish to as Ms Fife had already agreed to take it on if required. Ms George did not accept that was said. She returned to Ms Cook the following day and confirmed that she wished to pick up the Infusion Centre.

[37] I prefer Ms Cook's account as supported by Ms Fife that Ms Cook considered it fair to give Ms George an opportunity to pick up the Infusion Centre if she wanted to. I find having considered the evidence it more likely than not that Ms Cook also told Ms George that Ms Fife could take the service rather than it being presented as something Ms George had to do. I find that Ms George could have declined to pick up the service.

Cruising comment

[38] There was a complaint by Ms George that as part of the discussion about the Infusion Centre, Ms Cook advised Ms George that Mr Magee thought she was *cruising and could handle the extra work*. Ms George took offence at this and appropriately challenged Mr Magee. Mr Magee said to Ms George that he did not expect the word *cruising* to be relayed directly to her by Ms Cook and expressed some regret to her that it had been. He did recall the conversation with Ms Cook and the tenor was that Ms George was performing well in her role and was probably capable of taking on more responsibility. That accorded with Ms Cook's evidence about the conversation she had had with Ms George which she described as positive. Ms Cook accepted that her choice of word to Ms George may have been poor. Although Ms George said in her written evidence that this exacerbated her feelings that she was unsafe, personally and professionally in the environment I find that Mr Magee cleared up any misunderstanding about the word. The more important matter I find is whether Ms George by the use of the *cruising* comment felt compelled or pressured to take on the service.

[39] There was no evidence to support that Ms George ever complained to Ms Cook or Mr Magee that the Infusion Centre was too much work for her or that otherwise her workload was excessive.

Specific issues arising after September before the resignation was tendered

[40] Over the period from late September to 10 December 2012 when the resignation was tendered Ms George described the environment as quite difficult, even toxic and that Ms Cook's moods became more extreme. She said that Ms Cook tore strips off the accountant and a clinical nurse manager resigned because of Ms Cook. She described a yelling match between Mr Hutchinson and Ms Cook. Mr Hutchinson talked to Ms George about the interaction he had had with Ms Cook. Ms George said that she had heard people had talked informally to the Board about the difficulties with Ms Cook.

[41] I listened carefully to Ms George's description of what was occurring over the almost three months before her resignation. The evidence about concerns with respect to direct interactions with Ms Cook over that period was I find limited to issues around the infusion centre and the cruising comment, Ms Cook having erratic moods and a *rolling eyes* incident that I will come to shortly. The other issues concerned other people and their interactions with Ms Cook.

[42] Whilst those matters would undoubtedly have made the environment less pleasant I am not satisfied from the evidence that the resignation of other employees or an interaction between two managers about which Ms Cook had an entirely different view made the workplace less safe for Ms George. I did hear evidence from Ms Cook's personal assistant Lynn Brice who resigned in October 2012. She said in her evidence that there was one occasion Ms Cook did upset her in what she described was a significant way. She said that this did impact on her decision to leave. Her exit report however had positive comments about Ms Cook. Ms Brice confirmed in her evidence that Ms Cook could be very empathetic and she did feel she liked her and that they mostly worked well. She said she *did not have too much to moan about*. She agreed that the human resource advisor Alex Williams had filled out the exit report correctly. I cannot be satisfied because there was no evidence from the other employees referred to that Ms Cook was responsible for the situation and at fault in each instance.

[43] Mr Magee agreed that the environment at Nurse Maude was more difficult from September 2012. There was pressure on Nurse Maude to make changes and review staff positions. Ms Wright's position had already been disestablished in August 2012. From the evidence she was a well-regarded and liked employee and was also friendly with Ms George. It would have been difficult for Ms George not to have Ms Wright in the workplace when she returned to work in late September 2012. The other position to be disestablished was that held by Ms Fitzgerald-Carter, one of Ms Cook's direct reports. That would have been difficult too not only for Ms Fitzgerald-Carter but for Ms George and the other service managers. Mr Magee said that employees were uncomfortable about the changes required. The financial situation though at that time was such there was a debate about whether or not to close the hospital. On top of all that as Mr Magee said the working conditions after the earthquake were restrictive and there was a deterioration in moral. He was not aware of anyone saying that there were increased difficulties with Ms Cook and he was not satisfied that there were overbearing behaviours exhibited by her.

[44] Ms Cook also acknowledged that the environment had become more difficult from when she returned in late August 2012. She said that attitudes towards her had changed and people would come up to her and ask why she had Ms Wright *sacked*. As I understand her evidence some employees blamed Ms Cook for what had happened to Ms Wright and their behaviour changed towards her as a result. I note Ms George in her written statement of evidence at para 17 says amongst other matters that Ms Cook's behaviour resulted in *reactionary restructuring of positions without proper consultation*. Ms Wright in answer to a question from Mr Macdonald accepted though that Mr Magee had the *prerogative to disestablish her position* and Ms Fitzgerald-Carter accepted that her position had been disestablished *purely due to the financial situation*. I am not satisfied that a blanket conclusion can be drawn that all the stress and environmental difficulties at that time was as a result of, or flowed from, Ms Cook's management style. Any restructuring that results in disestablishment of positions is stressful, unpleasant and an anxious time for everyone. If, as seems to be the case, some employees felt, although there was no evidence before me to support this, that Ms Cook was responsible for Ms Wright's situation then that belief would have only made the environment worse.

[45] Ms Cook explained that the incident involving Mr Hutchinson was not something that Ms George was involved in. I accept that and find it was

Mr Hutchinson who talked to Ms George about what had occurred but only from his own perspective. Ms Cook said that Mr Hutchinson advised her one of her managers had told him she was on the warpath and looking for blood. She said that she knew she was being undermined and at that stage thought that possibly it was Ms Rollings who was behind the comment because her relationship with Ms Cook had changed. Ms Cook said that she was able to deal with the situation involving Mr Hutchinson. There was reference to a comment Ms Cook made about the nature of the meeting she was to have involving Mr Hutchinson. She said that Ms Rollings challenged her about whether anyone could be offended by the meeting being described as such. Ms Cook said she had not previously thought about that. I am not satisfied that Ms Cook continued to refer to meetings in that way. Objectively assessed it seemed to me that Ms Cook when challenged at least by her direct reports did review her behaviour appropriately.

[46] Ms George said that the only discussion she had with Mr Magee about Ms Cook after the return from leave was in relation to the cruising comment and a telephone call in late November in which Mr Magee said *I hear it's a bit rough out there, please can you organise the Christmas function*. Mr Magee did not accept in his evidence that this comment had anything to do with Ms Cook. He said that it related to the fact that staff had come through a hard winter on top of earthquake issues and it was important there be a Christmas function to show appreciation. I am not satisfied from the evidence that Ms Cook's behaviour was the reason for the comment.

[47] I had some difficulty trying to reconcile the evidence of Ms George that she only had two discussions about Ms Cook with Mr Magee after she returned from leave in late September with Mr Magee's evidence that he had ongoing discussions with Ms George after she returned from leave in September. This he said was in the context that he saw Ms George most days and enjoyed talking to her. I accept Ms George's views about Ms Cook probably featured in the conversation from time to time. Mr Magee said in answer to a question from Mr Goldstein that he did not tell Ms Cook about the concerns as he felt it could make things worse. His advice to Ms George was to have a discussion with Ms Cook and he said that when he checked out Ms Cook's behaviour towards her direct reports whilst robust it was within reasonable boundaries. His view was that Ms George exaggerated her concerns.

[48] The Director of Nursing Sheree East recalled meeting with Ms George about Ms Cook once prior to Ms George returning from holiday in September 2012 and once after she returned from holiday. Ms East and Ms George had a good relationship. Ms East said that Ms George was concerned about what Ms Cook thought of her and her performance and asked her if Ms Cook had said anything to her about her performance. Ms East tried to counsel her to talk to Ms Cook and offered to intervene with Ms Cook. She said and I accept this evidence as likely that Ms George was not keen for that and was just using Ms East as a sounding board. Ms East said that just before Ms George left she started talking about a toxic environment. Ms East regarded that as a change that had not been spoken about earlier.

Appointment of Marilyn Downward

[49] On 14 November Ms George was told by Ms Ogier that she would need to complete the approval to appoint process for a school based nursing position for Marilyn Downward to undertake. Having heard the evidence I am satisfied that Ms George did not advise Ms Ogier at that point that Ms Downward had in fact already commenced her employment from 23 October 2012. Ms George took the forms away to get the necessary signoff. The forms required Ms Cook's signature as well as Mr Magee's. Ms George came back from an attempt to get Ms Cook to sign the form and advised Ms Ogier that Ms Cook was in a meeting and had rolled her eyes at Ms George when she had entered her office. Ms George, Ms Ogier recalled at that stage was upset, flustered and tearful and she suggested that they go to a private office to talk but Ms George did not want to. Ms Cook then came into the human resource office with a form known as Form 2 in the process. This form had been signed out of order by Mr Magee who is normally the last person to sign. Ms Cook commented on this with Ms George and Ms George replied that human resources needed it urgently. Ms Cook also signed the earlier form that Ms George had given Ms Ogier. Ms George advised Ms Cook that she was upset because she had rolled her eyes at her and Ms Cook apologised if she had done that but said Ms George had interrupted her twice when she was in a meeting.

[50] On receipt of the forms and the information therein Ms Ogier sent Ms George an email to clarify when the actual start date of the new employee was. One of the questions asked in the email was expressed as *The ATA says the term is for 9 weeks but she hasn't started yet right?* Ms Ogier also advised in her email that the person to

be hired would have to complete an application form and a police check and that Ms George would have to complete a confirmation of appointment form. Ms George did not respond to the questions in the email but the police check and application form were completed by Ms Downward on 23 November 2012. Ms George gave the confirmation of appointment paperwork to human resources on 4 December 2012. It then became apparent that the correct process had not been followed and Ms Downward was in fact already working and employed in the position. Another human resource advisor Alex Williams sent Ms George an email on 5 December 2012 which expressed concern that the process to appoint Ms Downward had not been followed at all and queried how Ms Downward had been paid. In fact she had received no payment as at that date.

[51] Ms George after receiving that email went to the human resource office and spoke with Natasha Mitchell who is employed as a human resource coordinator. Ms George when she gave her evidence agreed that she was upset and in tears but denied that she asked whether Ms Mitchell wanted her to resign as a result of the recruitment issues. In those circumstances the Authority wanted to and did hear from Ms Mitchell. I found Ms Mitchell's evidence that Ms George did offer to resign and on more than occasion during the conversation to be more likely than not. Ms Mitchell talked to Ms Williams and Ms Ogier about what had taken place with Ms George and Ms Williams then sent reassuring emails to Ms George advising her not to panic and that the matter could be sorted out.

[52] Ms George did not come into the Nurse Maude office on 6 December and by that time Ms Cook was aware what had occurred. Ms Cook emailed Ms George and asked her if she was OK.

[53] I should say at this point that Mr Magee had been advised by Ms George at least informally that she considered Ms Downward the appropriate candidate for appointment. What transpired could in some circumstances have created significant legal difficulties but there was no suggestion in this case that Ms Downward's appointment did that. I agree therefore with Ms William's evidence that the whole matter could have been worked out and resolved.

Medical Consultation

[54] On 6 December 2012 which was a Thursday Ms George attended a consultation with her doctor, Sue Hamer. Dr Hamer provided a letter to Mr Goldstein which was provided to the Authority. The letter set out details of various consultations however the important one for present purposes is that on 6 December 2012. Whilst I have prohibited from publication some aspects of medical evidence, I will provide the following limited detail. The information provided in the letter to Mr Goldstein, Dr Hamer confirmed when she gave her evidence, contained detail from her medical notes at the time of the consultation.

[55] Dr Hamer confirmed that when she saw Ms George on 6 December 2012 Ms George advised her that she was planning on resigning from her position. She advised Dr Hamer that she didn't feel she was able to stay at work for the one month's notice period and requested to be placed on sick leave for that time. Dr Hamer wrote that Ms George had advised her she was in a senior position at Nurse Maude with responsibility for eight contracts and 100 staff. Further, that she was having problems with her boss who she didn't get on with and felt she was getting more and more work piled upon her. Dr Hamer gave Ms George a month's sick leave and prescribed some sleeping pills for short term use. Under questioning from the Authority, Dr Hamer confirmed that there was no discussion about the appointment error with her during that consultation. She accepted in answer to a question from the Authority that making a mistake at work can be a stressful event. I find that stress was more likely when Ms George did not make it clear for some time that Ms Downward had already started employment with Nurse Maude. Dr Hamer concluded that Ms George was suffering from work related stress that had caused her to resign.

From 6 December 2012

[56] On Sunday 9 December security card records at Nurse Maude confirm that Ms George entered the building several times and I find it is likely that she removed personal items from her office at that time. That is consistent with the evidence given by others that on 10 December 2012 that Ms George's office no longer contained her personal items. Ms George also sent some emails on 9 December 2012 to non-work related addresses advising that she no longer worked at Nurse Maude and/or that she was resigning the next day and/or to stop sending emails to her Nurse Maude email address.

[57] Ms George also asked Ms East's assistant on 7 December 2012 to set up an offsite meeting on 10 December with Ms East at 10.30am at McDonald's for *an urgent catch up away from the clinics*. That was done.

[58] Ms George arranged an appointment with Mr Magee for 8am on Monday morning 10 December on 7 December 2012.

10 December and thereafter

[59] Ms George went with her husband Peter George to see Mr Magee for the pre-arranged meeting. Mr Magee was away the previous Thursday and Friday, unaware of the scheduled meeting until his return and was somewhat late for the appointment. I don't find anything can be read into that.

[60] Ms George discussed Ms Cook's behaviour and then advised Mr Magee that she wanted to resign. She handed to Mr Magee an email (document 5 attached to the statement of problem) which advised that she was tendering her resignation with effect from 10 December 2012. To the extent that there was evidence as to whether Mr Magee retained the email or not I find it likely he did. The email set out that Ms George did not feel safe working in a toxic environment and that the situation had been developing over a long period of time. Ms George wrote that she had made him aware of this on several occasions. A medical certificate for the four week period was provided.

[61] Mr Magee said in his oral evidence that he was concerned as he did not want Ms George to resign. He tried to persuade her not to resign and said that things had raised themselves to a serious issue. I find that Mr Magee advised Ms George she was regarded as a valuable employee. He asked Ms George to put off her decision for a week whilst they tried to sort things out. Although Mr Magee could not recall if this was agreed to or not I find it likely that everyone at the meeting understood that there would be a hold put on the resignation until Friday.

[62] There was emphasis put on some words that Mr and Mrs George says Mr Magee used during the meeting about Ms Cook. Ms George said that Mr Magee acknowledged to her and her husband that the management style of Ms Cook was *that of a Ward Sister 40 years ago but not acceptable today when managing staff*. Mr Magee said that his precise comment was *the behaviour you are describing sounds like that of a ward sister 40 years ago and would be unacceptable today*. He said that

he would never make a judgment of blame in the sort of situation without having heard both sides of the story.

[63] I found that Ms George when she gave her evidence had a tendency on occasion not to describe the full context in which events occurred. When that full context was explained by others in their evidence it gave a different impression. It may also have been that at this meeting Ms George wanted to, even subconsciously, hear something from Mr Magee to reassure her that her view of Ms Cook was accepted as valid. Ms George told Ms East at their meeting at McDonalds later that day about the comment. Looking at the evidence and for the reasons set out above I prefer Mr Magee's evidence to Ms George's as to the context this statement was said in. Mr Magee held Ms Cook in high regard and it is very unlikely he would have compared her senior management role in that way.

[64] Mr and Ms George then left the meeting and then emailed to Mr Magee the same email contain the resignation but with the additional words – *As discussed at our meeting this morning I am hereby tendering my resignation, with effect from today 10 December 2012.*

[65] Mr Magee said that he was disappointed to receive confirmation of the resignation after what had been discussed. Mr Magee then left a message on Ms George's telephone and then talked to her about the possibility of a part time position as a school nurse reporting to Ms East. He said that it was inferred that he would sort out a role for the balance of the time to make it up to a full time job.

[66] I don't conclude there was any discussion about the fact resignation had been confirmed. There was though a time frame put on Ms George getting back to Mr Magee about the offered role. He said Tuesday lunchtime and Ms George said that it was until the end of Tuesday.

[67] At about 3.30pm on 11 December Ms Cook sent an email to all Nurse Maude staff which had been preapproved by Mr Magee that provided:

It is with regret that I announce the resignation and departure of Jenny George (Service Manager, Specialty Nursing) from Nurse Maude. We wish Jenny well for her future endeavours.

[68] Ms George came to hear that others knew of her resignation. She raised a concern with Mr Magee and then sent him an email on 12 December 2012. She

explained in that email that she did not consider the offer of the part time role was a solution to address the underlying problems. She also advised that she was distressed to have the resignation announced by global email when Mr Magee had undertaken to wait for Ms George to reconsider her decision. Ms George said that the manner and timing of the announcement of her resignation further compromised her confidence in the safety of the Nurse Maude workplace. She finished the email by saying that the offer of a part time role is not acceptable and her resignation stands.

Was the personal grievance that Ms George was actually dismissed raised within 90 days of 11 December 2012?

[69] The Authority must, in order to be able to deal with a personal grievance brought before it, be satisfied that it has been raised within the statutory time frame. I am not satisfied that there was a personal grievance raised that Ms George was actually dismissed by Mr Magee's action on 11 December 2012 within 90 days of that date. There is a different time frame relied on for the actual dismissal than for the unjustified constructive dismissal and I do not find it arises therefore out of the same facts. The focus of both the letter raising the personal grievance dated 22 January 2013 and the statement of problem which was lodged with the Authority on 11 April 2013 was about a factual scenario that preceded that date.

[70] Even if I am wrong about the raising of this grievance within the statutory timeframe then I would not have found an unjustified actual dismissal on the basis of the announcing of Ms George's resignation. There was an initial agreement to place the resignation on hold. Ms George within half an hour or so of that agreement and in unequivocal terms confirmed her resignation to take effect on 10 December 2012. That I find, unless clarified otherwise, overtook the earlier agreement.

[71] Mr Magee then gave Ms George a further time period to consider another role with a different reporting line before announcing her resignation. Ms George upon hearing that her resignation had been announced did not suggest that she was in fact still employed in her email. She confirmed her resignation stood. She did not suggest that her email unequivocally resigning on 10 December 2012 was sent in error and that she had not resigned. Had she done so and Nurse Maude had continued in the circumstances to maintain that she had resigned then there may have been some basis for an unjustified actual dismissal. That did not occur.

[72] In conclusion I find that a personal grievance of unjustified actual dismissal was not raised within 90 days of 11 December 2012. Even if it had been for the reasons set out above I would not have found the claim made out.

Unjustified disadvantage

[73] I am satisfied that Ms George did within her email of 12 December 2012 and within the statutory timeframe raise a personal grievance about the manner and timing of the announcement of her resignation when she understood there was a period within which Nurse Maude had agreed to wait for her to reconsider her decision.

[74] I find that Mr Magee had, although the original agreement was overtaken by the unequivocal notice of resignation, given Ms George an extended timeframe to consider a part-time role. He recalled doing so until midday 11 December 2012. Ms George did not accept that was the timeframe. Mr Magee knew Ms George wanted to talk to her husband about the offered role. I find that a fair and reasonable employer could in all the circumstances have been expected to either call Ms George to confirm that she did not want the offered role on 11 December 2012 or wait at least until the close of business on Tuesday before making the announcement the following day. Ms George had been a long standing employee. Any control over how her resignation was announced to all staff was removed. With a senior manager leaving an organisation in these circumstances a fair and reasonable employer could be expected to talk to her about what would be said to staff about her resignation. To not do so I find was unjustified.

[75] I accept Ms George was disadvantaged by the unexpected announcement of her resignation. There was no mention by Nurse Maude though I find as Ms George concluded that the resignation was for reason of any health issues so no responsibility for any inferences drawn by others about that can rest with Nurse Maude.

[76] Ms George has a personal grievance that she was unjustifiably disadvantaged in her employment and is entitled to remedies.

[77] In assessing remedies I have taken into account that Ms George did not find the offer of the part-time role acceptable. Her resignation stood therefore. I have also taken into account that nothing was said by Nurse Maude about her health. I accept that Ms George did have to field calls after her resignation was announced when she was not prepared for that and was off on sick leave.

[78] I find that the sum of \$3000 without deduction is an appropriate compensatory award in all the circumstances and I so order.

Constructive dismissal

[79] Nurse Maude had an obligation to provide Ms George with a safe workplace. There is an express obligation in clause 22 of Ms George's employment agreement to comply with the statutory obligations in the Health and Safety in Employment Act 1992.

[80] Mr Goldstein refers to the implied terms as set out by the Employment Court in *Gilbert v Attorney General* [2000] 1 ERNZ 332 relating to the provision of a safe workplace.

[81] The foreseeability of harm and its risks are important in considering whether Nurse Maude has failed to take all practicable steps to protect Ms George. The employer does not guarantee to cocoon an employee from stress and upset and is not a guarantor of the safety or health of the employee - *Gilbert*.

[82] The Court of Appeal in *Waikato District Health Board v Wendy Clear* [2010] NZCA 305 stated the applicable test. *Clear* was a case where it was alleged the employer failed to take all reasonable steps to avoid the foreseeable risk of harm to Ms Clear. The Court of Appeal at [58] accepted that the proper question in issue is as Judge Shaw put it in the Employment Court judgment in *Clear* :

The Court's role is to objectively review the circumstances as they existed at the time and to judge whether in all the circumstances the employer acted fairly and reasonably.

Was there a breach of duty by Nurse Maude?

[83] I have set out the facts at some length. I found it difficult to ascertain from the evidence given by Ms George direct examples of Ms Cook's alleged inappropriate behaviour toward her. Much of the evidence was about Ms Cook's behaviour to other people. Some of the matters described in the written evidence as micromanagement fell within reasonable management prerogative. There was no clear evidence of direct interactions between Ms George and Ms Cook where there had been rudeness or unacceptable behaviour aside from rolling of eyes. I accept that Ms George could have felt challenged by Ms Cook if tasks had not been completed. Ms Cook communicated in a direct manner. Several witnesses including some direct

reports said in their evidence that they thought Ms George and Ms Cook got on well from their observation at meetings.

[84] Ms George I accept did not like Ms Cook's management style. Simply telling that to other people by using them as sounding boards does not amount to the same thing as stating clearly that she wanted to make a complaint.

[85] I am not satisfied that Ms George at any time before her resignation was presented raised a clear complaint about Ms Cook's behaviour to her that Mr Magee fairly and reasonably could have been expected to investigate. I find that Mr Magee suggesting the direct reports raise issues with Ms Cook directly about her style was what a fair and reasonable employer could have done in all the circumstances where the issues involved a group of senior managers. I can only gauge how Ms Cook would have reacted to that by one occasion when Ms George quite appropriately took her to task about rolling her eyes. Ms Cook immediately apologised for that. Effectively that matter was dealt with and resolved. The other matter objectively where the Authority could assess Ms Cook's reaction is where it came to light Ms George had made a mistake. Ms Cook said nothing about the mistake in emails and instead focussed on Ms George's wellbeing which was appropriate given the emails suggested Ms George was upset at that time.

[86] One of the concerns Mr Magee had was that by telling Ms Cook he had spoken to her direct reports in circumstances where they had not raised concerns directly with her may make matters worse. I find that concern is both fair and reasonable. For example Ms Fitzgerald-Carter, a direct report of Ms Cook had a concern that Ms Cook allowed her staff to go to her directly and that in doing so that undermined and compromised her authority. Ms Wright was also concerned Ms Cook did not raise issues directly with her. That is not to say that an employee should or could not in some circumstances go directly to the CEO however in this case Mr Magee, not unfairly or unreasonably, expected senior managers were comfortable to raise issues with Ms Cook in the first instance. He left the door open to return to him if that did not resolve matters.

[87] Mr Magee also did some informal checking with Ms Cook about her relationship with Ms George which was fair and reasonable in all the circumstances.

[88] There was no evidence that Mr Magee knew that Ms George was stressed and unwell because of the management of Ms Cook before 10 December 2012. He was aware of a different unrelated medical issue. He knew though she did not like Ms Cook's management style. When clearly advised on 10 December 2012 Mr Magee I find considered a different reporting line which was appropriate and Ms Cook recalled Mr Magee discussing with her a facilitated meeting to discuss issues before the resignation was confirmed.

[89] Mr Goldstein is correct that a complaint under the harassment policy can be raised informally but there still has to be something that fairly and reasonably amounts to a complaint. In *Clear* for example there were four formal written complaints between late 2000 and mid-2003.

[90] I have also considered the fact that there was more than one complaint about Ms Cook from different people. I find that the concerns were of a different nature and some quite specific and limited. I do not find that the fact there was more than one complaint raised greater obligations in all the circumstances to Ms George.

[91] In conclusion I am not satisfied that there was a breach by Nurse Maude of its obligations that led to Ms George's resignation or a breach of good faith.

Determination

[92] I accept that Ms George was unhappy and she made a decision to resign from Nurse Maude. It was a decision made very close in time to a mistake she made although I accept that may not have been the sole motivation in resigning. Having heard the evidence Mr Magee and others at Nurse Maude were disappointed that Ms George resigned as she was a well-respected employee and had been there a long time. I do not find however that Ms George was unjustifiably constructively dismissed.

Costs

[93] Nurse Maude has been largely successful in this case. No doubt both parties may well ask for costs. It may be that costs can be agreed however failing that

Mr Macdonald has until 30 January 2014 to lodge and serve submissions as to costs and Mr Goldstein has until 20 February 2014 to lodge and serve submissions as to costs.

Helen Doyle
Member of the Employment Relations Authority