

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 166
5524303

BETWEEN	ROBYN HENDERSON Applicant
A N D	NELSON MARLBOROUGH DISTRICT HEALTH BOARD Respondent

Member of Authority:	David Appleton
Representatives:	Angela Sharma, Counsel for the Applicant Paul McBride, Counsel for the Respondent
Investigation Meeting:	20 to 22 October 2015 at Nelson
Submissions Received:	22 October 2015 from both parties
Date of Determination:	3 November 2015

DETERMINATION OF THE AUTHORITY

- A. Ms Henderson was unjustifiably disadvantaged in her employment and is awarded the remedy set out in this determination.**
- B. Ms Henderson was not unjustifiably constructively dismissed.**
- C. Costs are reserved.**

Prohibition from publication order

[1] Evidence was heard by the Authority about a former staff member of Ms Henderson who, Ms Henderson said, had anger management problems. This former employee of the respondent did not take any part in the Authority's

investigation meeting, and it is not necessary for the identity of this staff member to be publicised. I therefore prohibit from publication any information that may reveal the identity of this staff member.

Employment relationship problem

[2] Ms Henderson claims that she suffered unjustified disadvantage in her employment and was unjustifiably constructively dismissed. She also claims breaches of contract and a breach of the duty of good faith, and seeks penalties in respect of these alleged breaches.

[3] The respondent denies that Ms Henderson suffered unjustified disadvantage in her employment or that she was dismissed. It also denies breaches of contract and a breach of the duty of good faith.

Brief account of the material events

[4] Ms Henderson was the respondent's Director of Nursing and Midwifery, commencing in that role at the respondent on 8 February 2010. Ms Henderson has had a long career in the health service and has held similar management positions dating back to 1990. Up until February 2013 Ms Henderson reported to the Chief Executive Officer, Mr John Peters. After Mr Peters' retirement, Ms Henderson reported to his successor, Mr Chris Fleming.

[5] Ms Henderson was employed pursuant to an individual employment agreement which included the following relevant clauses:

...

6. PERFORMANCE REVIEW

6.1 The Chief Executive will be responsible for reviewing your work performance and will meet with you to discuss and agree on a process for performance review during that year.

6.2 This process will take into account your general performance, your primary accountabilities, duties and responsibilities, and any objectives agreed between you and the Chief Executive for the year.

20. TERMINATION OF EMPLOYMENT

20.1 Termination and Resignation

20.1.1 Except as provided below, a minimum of one month's written notice of termination or resignation, shall be given by either party provided that this may be varied by mutual agreement.....

21 **RESOLUTION OF EMPLOYMENT RELATIONSHIP PROBLEMS PROCESS**

21.1 *If a problem arises during the employment relationship the employer and/or employees' representative should be notified immediately.*

...You agree to abide by the policies and procedures that the employer may from time to time implement. These policies and procedures are at the discretion of the employer and may be amended from time to time as the employer shall decide.

[6] Ms Henderson was a member of the respondent's Executive Leadership Team (ELT). After Mr Fleming's arrival, Ms Henderson was responsible for implementing a number of significant changes in the nursing and midwifery function at the DHB. It would appear to be uncontested that some of these changes were not popular with some of the nursing staff.

[7] On 9 June 2014 Mr Fleming wrote to Ms Henderson advising her that her salary was going to increase by 0.7%. The letter concluded with the words:

Thank you Robyn for the contribution you continue to make to the Nursing and Midwifery Service, ELT and the wider organisation it is appreciated [sic].

[8] On 5 July 2014 Mr Fleming sent Ms Henderson an email with the subject heading *Performance Appraisal* and attached to it:

- a. a memorandum headed up *Performance Appraisal 2013/14*;
- b. a template Staff Performance Appraisal Self Assessment form;
- c. draft performance objectives for 2014/15; and
- d. Action Plans for 2014/15.

[9] In the memorandum Mr Fleming stated that he had scheduled her performance appraisal for a set date and time (which was subsequently moved by agreement to 22 August). He apologised that specific and documented performance expectations had never been finalised and stated that he wished to address this by agreeing specific performance objectives with each of his Executive Team members. The memorandum ended with the following sentence:

I encourage you to come to the Performance Appraisal to be ready to reflect on your own development needs as I would like to be able

to identify these clearly so that I can support you through the coming year to develop in relevant areas.

[10] On 22 August 2014 Ms Henderson met with Mr Fleming to take part in what she believed would be her prearranged annual staff performance appraisal in accordance with Mr Fleming's memorandum. Ms Henderson's evidence is that she had completed her part of the staff performance appraisal form which she brought along to the meeting. The Authority saw a copy of this form completed by Ms Henderson and notes that, under the question *What do you consider are the key job skills required for your position?*, Ms Henderson had listed:

- *Tolerance*
- *Vision*
- *A strong Nursing Identity*
- *Capability to get alongside idiots.*

[11] Ms Henderson's evidence is that Mr Fleming did not undertake an appraisal but instead commenced his discussion with her at the meeting by stating that Ms Henderson had previously referred to her *fit* within the organisation and asked whether she was considering that currently. Ms Henderson's evidence is that she replied by saying that she had referred to her fit in the organisation shortly after Mr Fleming's appointment, at a time when many people felt unsettled as a result of his decision to implement a significant restructure process for the purpose of making cost savings across the organisation. However, since then, her fit was no longer a consideration for her. Mr Fleming denies that he had referred to Ms Henderson's fit in the meeting.

[12] Ms Henderson says that Mr Fleming then asked her whether she was applying for any roles currently, to which she replied that she was not. Mr Fleming's evidence is that he asked this question because he wanted to be sure that Ms Henderson was committed to the organisation for at least another six months, as he was intending to invest resources in Ms Henderson's performance development.

[13] Ms Henderson said that Mr Fleming then proceeded to raise concerns about how he viewed her interpersonal relationships with others, mentioning the recently established Clinical Governance Group, saying that Ms Henderson needed to be a key player in that group.

[14] Ms Henderson said that Mr Fleming then referred to her comment in her appraisal form about a *capability to get alongside idiots*. Ms Henderson said that she had completed the form late at night and had given the draft to a secretary who had failed to remove the comment which she had not intended to include. She says that she apologised for the inclusion, and that Mr Fleming accepted her apology.

[15] Ms Henderson said that Mr Fleming then asked how she was progressing with her PhD and she told him she had leave approved from 13 October 2014 so that she could complete writing her thesis.

[16] Ms Henderson said that the discussion then *took another sharp turn* with Mr Fleming stating that she should consider her options within the organisation. That is, if Ms Henderson intended to leave within the next year he would be prepared to support her to find a job within the next six months. Ms Henderson says that Mr Fleming stated that the alternative option was that she stayed, but would need to improve and be subject to *some form of performance management process*. Ms Henderson says that Mr Fleming did not provide any further specific information as to what that performance management process would be based on, how it would be managed, or conducted.

[17] Ms Henderson said that Mr Fleming then referred to an exit interview for a former member of Ms Henderson's staff, whom he did not name, and suggested that her comments about Ms Henderson were not good. He did not provide her with a copy of the exit interview to read, or comment on further. Ms Henderson guessed which employee Mr Fleming was referring to and said that she explained that it had been her intention to commence managing this staff member's anger management problems, which had led to complaints about the staff member, but that the staff member had subsequently resigned her employment.

[18] Ms Henderson said that the meeting finished with Mr Fleming saying that she had two options open to her, that she should consider them very carefully and that they should continue the discussion in a week's time. She said she left the meeting shocked and in disbelief over the direction the meeting had taken.

[19] On 27 August 2014 Mr Fleming wrote a memorandum to Ms Henderson headed *Performance Review 2013/14*. Although the memorandum is lengthy, as it

forms part of the relevant background relied upon by Ms Henderson in arguing that she was constructively dismissed, I set out the text of that memorandum in full:

Thank you for meeting with me recently to undertake your Performance Appraisal for the 2013/14 year which has just concluded.

I would like to acknowledge the many challenges we have faced together over the past 18 months since my arrival at Nelson Marlborough District Health Board. The period has been full of significant issues and hurdles that we have had to work through both individually and collectively.

In terms of our conversations I want to reiterate that we are at a critical juncture. As discussed as the performance appraisal, I believe your vision, direction and passion for growing the nursing and midwifery profession is admirable, and I believe overall it is on the right track. However the big challenge facing you is the fact that there are many concerns raised over you in your role. While the concerns raised are varied, they come from all levels of the organisation. At the centre of these concerns are your approach and relationships.

One of the things I often enjoy about working with you is that you are rather forthright and at times blunt, a good example is in your performance appraisal document which you completed was where you said on [sic] of the key job skills required for your position was a "capability to get alongside idiots". While I acknowledge you may have intended on deleting this before you sent it to me, the same can at times arise in verbal communication where you may express a view which later could have been represented more tactfully.

Another example is the exit interview of one of your former staff members who very clearly articulated concerns about your approach, mannerisms and style. While I take the content of the exit interview letter loosely, I think you acknowledged that you struggle when you do not respect or value individual staff and this clearly impacted this relationship.

A professional leader's role is one of the more challenging within a DHB environment; it often has very little direct authority but rather needs to operate by way of influencing the profession and your peers to move down a particular pathway.

On many occasions you have raised the issue of questioning whether you are the right fit for the combination of the role and the organisation. Only you are able to respond to this one.

As discussed however I think where we are at a juncture of where you have to make a decision about the pathway you wish to take [sic]. I should note that I am prepared to support you on either pathway however I would appreciate you considering your options carefully and we can discuss the next action depending on your decision. The two pathways are:

1. Continue long term in the role.

If you choose this pathway then there will be a number of performance improvement initiatives that we will need to agree. The areas of attention include:

- *Full engagement with the Clinical Governance Group. This includes building stronger relationships with the CMO, ACMO, and the DAH, as well as the GM Clinical Governance Support.¹ Please note this is not a one way street, if you choose to pursue this pathway then I think we need to have a dialogue with this group to ensure that we are all moving forward together.*
- *Strengthening the dynamic and linkages with Senior Nursing. I appreciate that Senior Nursing across Nelson Marlborough has a degree of rigidity in approach to things, and at times can appear to be change resistant. Reality however is that we have to work with our workforce and we can only lead if staff are prepared to follow.*
- *Selling the vision to the workforce. While I agree with your overall direction and vision, I am concerned you don't have the overall nursing and midwifery workforce behind you. While I acknowledge that some of the views that you see which are entrenched is out of date, one does not open a walnut with a sledgehammer.*

2. Seek your next career move

Continuing in your current role long term will mean making changes to your approach with colleagues, staff and stakeholders within the Nelson Marlborough Health System. One of the great things about you personally is your views are clear and you are always forthright. The challenge however as you have acknowledged is changing your style and approach. While I am prepared to support you if you face that challenge, the other alternative would be to decide to look for opportunities outside of the organisation. As discussed I am aware that you are nearing the end of your PHD study and this is something important for you to conclude.

I am prepared to support you to finish this; you have already applied for the month of October off to finish your academic work. If you wish to bring this period forward I am open to discussions.

However if you choose to take the option of a career change outside the organisation I would be happy to support you to remain in your current role for a period of up to 6 months while you seek your next move. During this time I would expect you to continue to deliver within your role and to support the organisation, particularly focussing on the strengthening of the Clinical Governance Group in the upcoming Workforce Strategy Plan development.

I appreciate that this performance review is a huge challenge, however I would ask that you consider carefully over the next week which challenge you are going to face and then let's meet again to

¹ CMO = Chief Medical Officer; ACMO = Associate Chief Medical Officer and DAH = Director of Allied Health

finalise performance objectives which are best aligned to the pathway you wish to take.

I need to stress, the option of remaining as the Director of Nursing and Midwifery is yours to take, it is just simply unfair on both yourself personally and the organisation, if we don't tackle the issues impacting your ability to excel if this is the direction you choose.

*Regards,
Chris Fleming
Chief Executive Officer*

[20] Ms Henderson's evidence is that she was thrown into a sense of panic after reading Mr Fleming's memorandum as it verified the meaning that she had taken from the 22 August meeting; that is, that *she was being given the choice of having her permanent employment circumvented by way of resignation, or to undertake a performance management process to rectify his concerns which at that time remained unspecified.*

[21] Ms Henderson says that she went to see the General Manager of Human Resources, Ms Heather Smith, to seek her guidance and that Ms Smith told her to go back to Mr Fleming and reaffirm her commitment to her role. Ms Henderson then prepared a draft letter, which she showed to Ms Smith, and who advised her that, in her next meeting with Mr Fleming, she was to go in with a positive approach and confirm her commitment to the job.

[22] The Authority saw a copy of the letter written by Ms Henderson which, although dated 31 August 2014, was not handed to Mr Fleming until 11 September 2014. The text of this letter was as follows:

Dear Chris,

I refer to your letter of 27 August 2014 in which you articulate the two options that you believe appropriate for my consideration within my current role as Director of Nursing and Midwifery for the Nelson Marlborough DHB.

In response to your letter I would like to confirm the following:

- *I am absolutely committed to my role within and across NMDHB, to nursing and midwifery and to the greater good of service provision to our community.*

As part of this I acknowledge and confirm my commitment to working with the business to improve my performance with your support to achieve this as articulated by you below:

- *Accepting your (CEO) identified performance improvement initiatives namely:*
 1. *Full engagement with the Clinical governance Group.*
 2. *Strengthening the dynamic linkages to senior nursing.*
 3. *Selling the vision to the workforce.*

[23] Ms Henderson said that she then attended a meeting with Mr Fleming on 11 September. After discussing a work issue, Ms Henderson says Mr Fleming read her letter and commented that he was surprised that she had chosen *option 2*².

[24] Ms Henderson said that Mr Fleming stated that staying with the DHB would be likely to be an onerous exercise because it would include anonymous feedback from all areas across the organisation and that this would be very trying on Ms Henderson personally. Ms Henderson said that Mr Fleming stated that he had calculated how much he was prepared to pay her out but that, since she was choosing to stay with the DHB, she needed to understand that it would be very difficult for her going forward. Mr Fleming denies that he had referred to calculating a pay-out.

[25] Ms Henderson said that Mr Fleming then referred to a consultant from the UK National Health Service, Helen Bevan, who had given him feedback about Ms Henderson following some seminars that Ms Bevan had run and Ms Henderson had attended. Ms Henderson said that Mr Fleming told her that Ms Bevan had said that Ms Henderson was strategic but had no *followership*³. Ms Henderson says that Ms Bevan had not made that directly apparent to her.

[26] Ms Henderson said that Mr Fleming also stated that she had a habit of *writing people off*, which she disputed. Ms Henderson said that Mr Fleming then stated that she would have to undertake a 360 degree feedback review which would be extremely onerous and for which she would be *the guinea pig*. He said that feedback would need to come from all Heads of Department and Clinical Nurse Managers, although he did not specifically articulate what the process would involve. Ms Henderson said that she expressed concern at the involvement of Heads of Department as she had had very little interaction with them. She says that Mr Fleming then admonished her for apparently not knowing who these individuals were, although it would appear that this arose from a misunderstanding between them as to who was being referred to.

² I believe that Ms Henderson means option 1, by reference to the memorandum of 22 August. To avoid confusion, I will refer to the options of *committing to the DHB* and *leaving the DHB*.

³ Having staff committed to follow her.

[27] Ms Henderson says she expressed concerns because her role in being *the face of the centralised rostering process and the District Nursing review* had created a high level of concern and stress amongst many of the nursing and medical staff *which had not won her any friends*.

[28] Ms Henderson said that Mr Fleming then referred to the Top of the South Review which should have included nursing, but due to her interpersonal relationship issues, she had not been invited to attend those meetings because people did not want her to be there. She said that he was not more specific than that.

[29] Ms Henderson says that Mr Fleming said that a 360 degree feedback review would be a process when *all the demons would come out*, although Mr Fleming's evidence is that he referred only to the possibility of demons coming out. Ms Henderson said that Mr Fleming then sought to explore who would actually prepare the feedback review process and that she said it should involve an organisational psychologist with the appropriate brief because a clinician would not have the skill or ability to do it. Ms Henderson said that Mr Fleming stated that he would make arrangements to find someone to do the review and that she could agree to the *designer*. He proposed that, as she was taking one month's leave in October, it would be ideal to get the process up and running in her absence so that, following her return, they could deal with the outcome and begin the performance management process from there.

[30] Ms Henderson says that, at that point, it was hard for her not to view Mr Fleming's comment as being pre-determinative of what lay ahead. She said that he told her that he would source an external coach to assist her to change her interpersonal style.

[31] Ms Henderson said that Mr Fleming ended the meeting by saying his expectation was that she would respond appropriately to all of the support that was going to be put in place for her and that any *falloff* in this would not be accepted. She says she responded by saying that she would not let herself falloff in terms of achieving expectations. Ms Henderson said that Mr Fleming repeated that he was not convinced that she was committed to the process and she assured him that she was.

[32] Ms Henderson says that when she left the meeting she felt that, no matter what she did, she was destined for failure.

[33] Mr Fleming followed up the meeting of 11 September with another memorandum addressed to Ms Henderson. Again, as this memorandum forms an important part of the background leading to Ms Henderson's resignation, I set out its contents in full.

Subject: 360 Degree Review, Coaching & Performance Improvement Plan

Thank you for meeting with me again this afternoon following our earlier performance review and my follow-up letter dated 24 August 2014. I acknowledge that my letter set a clear challenge for you.

As discussed I am convinced that you have a clear vision and passion for driving nursing development forward within the Nelson Marlborough Health System, however I believe you are challenged in terms of interpersonal styles and relationships, and an effective leader needs to have both the vision as well as the ability to have teams that are engaged and are committed to the journey.

In your meeting and the letter dated 31 August 2014, you have made the commitment to want to move forward within Nelson Marlborough District Health Board and face the challenges.

To this end we have agreed that we will engage an appropriate person to undertake a 360 degree review of you in your role. My expectation is that the review will include CNMs, CMMs,⁴ those staff that report to you, Senior Medical Leaders (CMO, ACO, HODs) and you [sic] peers within the Executive Leadership Team. There may be others which you may see as beneficial to include which can be agreed as the review is developed. My intention is to do this within an external party ensuring confidentiality of any individual results so that we can focus on themes and any differences between feedback from the different groups of people.

We will clearly discuss the approach for the review as I am keen on this being seen as one that is supporting your development and I do not want it to undermine you in any way.

Once this has been completed I intend on supporting you through external coaching to assist in addressing issues that will come from the review.

Robyn, the challenge is significant. NMDHB needs to have a strong and supported Director of Nursing and Midwifery. I am prepared to support you in addressing the issues and concerns we have discussed, however as a part of the process of establishing the coaching I expect to agree some performance expectations with respect to addressing concerns raised. I would then expect that we would be able to see substantial improvement on these fronts within the 6 month time period.

I have also attached the performance objectives for your role. I would appreciate if you could sign them and return to me. You will

⁴

note that I have added to the bottom the reference to agreement to undertake the 360 degree review and agree performance improvement actions post that exercise. I urge you to consider what you are committing too [sic] as a road will indeed have challenges, however with the right intent I am sure these challenges will be able to be conquered.

*Regards
Chris Fleming
Chief Executive Officer*

[34] Attached to this memorandum was a table entitled *Performance Objectives 2014/15*. This set out a number of expectations against a number of objectives, which were grouped under the following headings:

*Financial & Performance
Budgeting & Forecasting
Nursing & Midwifery Leadership
Clinical Governance
Executive Leadership Team
Alliance Leadership Team
Audit & Risk
Health & Safety
Annual Plan Priorities*

[35] The performance objectives document ended with the following paragraph:

I also agree to participate in a 360 degree performance review and with the support of a coach develop a performance improvement plan to address the interpersonal/relationship challenges which have been identified. The improvement plan is expected to see significant improvement within a 6 month period.

[36] Ms Henderson's evidence is that this memorandum

...included a new twist, in that [Mr Fleming] sought my agreement to participate in the proposed 360° feedback review and performance management process which now included several of my key accountabilities outlined under my employment contract. This is not something that was raised with me by Mr Fleming in our earlier discussions, and was in addition to the unspecified interpersonal relationship concerns Mr Fleming had referred to. The information contained in Mr Fleming's memorandum in relation to the basis for a 360° feedback review was all encompassing. I fail to understand how he could have reached this conclusion, first without any direct engagement with me on those matters, and secondly because my performance appraisal remained incomplete without any enquiry into those additional stated concerns.

[37] Ms Henderson says that she met with Ms Smith again who encouraged her to take legal advice on the matter. Ms Henderson's evidence included the following:

The enormity of Mr Fleming's actions, and the invidious position I found myself in, manifested in a level of stress and anxiety that was unprecedented for me.

[38] Ms Henderson consulted with her GP on Monday 15 September 2014 who stated that she was medically unfit due to workplace stress from 15 to 26 September and she would be fit to resume work on 29 September.

[39] Ms Henderson also consulted Ms Sharma, who wrote a letter to Mr Fleming on 18 September 2014 advising that Ms Henderson was absent from work for reasons of work related stress and asking that all further correspondence and any other communication be directed to her office, rather than directly to Ms Henderson. Ms Sharma wrote this letter following a request from Mr Fleming on 16 September for Ms Henderson to meet with him and Ms Smith on 22 September.

[40] Correspondence then ensued between Ms Sharma and Mr Fleming. This included the issue that Ms Henderson had originally submitted a medical certificate which stated simply that she was *medically unfit* and that it was only on 17 September, the day after Mr Fleming wrote to Ms Henderson requesting her to attend a meeting, that the certificate was amended and backdated to 15 September stating that Ms Henderson was unfit due to workplace stress.

[41] On 26 September 2014 Ms Sharma wrote a 19 page letter to Mr Fleming setting out a detailed history of recent events. Ms Sharma stated, inter alia, that the purpose of following the 360 degree review process was to establish specific criticisms about Ms Henderson, that would then be applied to her being placed on the performance management plan. Ms Sharma stated that, if there were specific concerns about Ms Henderson's interpersonal management style, then these ought to have been put to her to provide a response, following which, if Ms Henderson had failed to improve on that level, the appropriate pathway would have been to consider a performance management plan.

[42] Ms Sharma's letter later went on to advise Mr Fleming that Ms Henderson was resigning and claiming constructive dismissal. As it is essential to understand the rationale for Ms Henderson's resignation at that point, I set out the relevant paragraph in full:

H. *Constructive Dismissal*

For Ms Henderson, standing back and reviewing her employment situation she is left with no choice to conclude that your actions have been totally destructive of the relationship of trust and confidence, so vital in her direct reporting role to the CEO. The choices that you presented Ms Henderson could only be fatal to the continuation of the employment relationship. First, utilising an unprecedented 360 degree review would invariably have given rise to a character assassination of Ms Henderson, making it untenable for her to continue in her DONM role. Secondly, at your behest, forcing Ms Henderson's resignation by curtailing the duration of her employment created an equally untenable situation for her. The pathway followed by you can only be described as constructive in nature, and wholly destructive of the employment relationship.

[43] Again, in order to understand the rationale for Ms Henderson's resignation, I quote the following passages from her written brief of evidence concerning the decision to resign:

56 I had reached a point in my thinking where I failed to understand what could be achieved from Mr Fleming's insistence that I attend a meeting with him after all that had been done and said. His actions had carved out the only available pathway to me. There was no going back for me. I found it hard to comprehend Mr Fleming's apparent lack of insight in demanding that I attend a meeting with him and Ms Smith, without any consideration of the significant impact on me of the pathway he had forcibly driven to get to this point.

57 I found Mr Fleming's pointed attempts to make direct contact with me, despite knowing that I was represented by legal counsel to aggravate the situation, rather than being constructive, which contributed to my feelings of deep stress.

58 As I remained absent from work a number of concerned colleagues made contact with me. My sudden and unpredicted absence was entirely out of character, promoting questions and many bouquets of flowers being delivered to my door. However, I could not bring myself to talk to them about my situation, as I felt mentally derailed. By this stage the impact of Mr Fleming's actions had started to kick in, causing me further stress, which snowballed from sleepless nights, and an overall sense of grief over the loss of my job. I kept asking myself the question, "what had I done so wrong to deserve this treatment?" Over and over again my thoughts twisted and turned searching for signs, and even reasons that might amount to explaining the vagaries of Mr Fleming's unsubstantiated claims against me, but to no avail. I remained in an almost reclusive state as I continued to try to grapple with my world crashing down around me.

59 I reached a penultimate point [sic] in my thinking where I sadly decided that as much as I loved my job there was simply no ability for me to go back, and that the employment relationship was permanently fractured. On 26 September 2014 I instructed Ms Sharma to inform

Mr Fleming of my resignation, and that I would not be returning to my workplace, with immediate effect.

[44] Mr Fleming responded to Ms Sharma's letter by way of a letter dated 30 September 2014 taking issue with the contents of Ms Sharma's letter, saying that the DHB would welcome mediation and suggested that it proceeded with urgency. Mr Fleming also stated that he invited Ms Henderson to *carefully consider and take alternative advice about the decision that she has made to resign. If she genuinely wishes to resign, that is her prerogative. If she does not want to resign of her own choice, then I look forward to discussing that and the way forward with her.* Mr Fleming asked that Ms Henderson let him know either way by no later than Friday 10 October of her decision.

[45] On 2 October Mr Fleming emailed Ms Sharma to say that he had been told by staff that Ms Henderson had resigned. Ms Sharma replied the next day saying that Mr Fleming had been notified of Ms Henderson's resignation by way of her letter of 26 September. The same day, nurses were advised by Mr Fleming that Ms Henderson had resigned. On Monday 6 October Mr Fleming made a formal announcement of Ms Henderson's resignation and further correspondence then ensued between Ms Sharma and the respondent's counsel, Mr McBride.

[46] It is not entirely clear when Ms Henderson's employment ended as, in Ms Sharma's letter of 26 September, she stated that Ms Henderson's *four week notice* commenced on 15 September, when she was first assessed for work related stress leave. However, this cannot be correct in law as the resignation was not communicated to her employer until 26 September. Clause 20.1.1 of the employment agreement provides that one month's notice was required⁵.

[47] One final chain of events to recount concerns Ms Henderson's application for employment with her current employer, Darling Downs Hospital and Health Service in Toowoomba, Queensland, Australia. This is relevant as the respondent has submitted that Ms Henderson resigned in order to take up employment at Darling Downs Hospital.

[48] Looking at the chain of emails that passed between Ms Henderson and a recruitment consultant in Australia, the position (as Executive Director of Nursing and

⁵ An employee resigning in response to a repudiatory breach by an employer need not, of course, give any notice.

Midwifery) was first brought to Ms Henderson's attention on Wednesday 20 August 2014. The email from the recruitment agent which the Authority saw made it clear that the recruitment was making unsolicited contact with Ms Henderson. On 11 September 2014, prior to the meeting with Mr Fleming, Ms Henderson emailed the recruitment agency seeking position descriptions of two Director of Nursing roles in Brisbane and Townsville respectively. On the same day, shortly after the meeting with Mr Fleming, Ms Henderson replied to the recruitment agent's response, giving details of her DHB mobile phone number and times when she could be contacted.

[49] On Friday 3 October Ms Henderson contacted the recruitment agent asking if she was still looking for candidates for the Darling Downs role. Ms Henderson did not fly to Brisbane for an interview for the Darling Downs role until 31 October and she did not receive the offer of employment from Darling Downs Hospital until 2 December 2014. Her employment commenced on 8 December 2014.

[50] In light of this, I accept that Ms Henderson did not resign in order to take up her employment with Darling Downs Hospital (or, indeed, any other employment). Although she asked for information about other two Director of Nursing posts prior to the 11 September meeting with Mr Fleming, I do not find that this showed any settled intention to leave at that point. I accept that she was seeking the information in light of her uncertainties about the security of her role at that point.

The issues

[51] There are four principal issues that need to be determined:

- a. Was Ms Henderson unjustifiably disadvantaged in her employment by the actions of the employer?
- b. Was Ms Henderson unjustifiably constructively dismissed?
- c. Did the respondent breach the terms of Ms Henderson's individual employment agreement and, if so, should penalties be imposed?
- d. Did the respondent breach its duty of good faith towards Ms Henderson and, if so, should a penalty be imposed?

Was Ms Henderson unjustifiably disadvantaged in her employment by the actions of the employer?

[52] Section 103A of the Employment Relations Act 2000 provides as follows;

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[53] Ms Henderson gave evidence to the Authority that Mr Fleming had not made any reference to her performance difficulties prior to his meeting with her on 22 August 2014. Ms Henderson said that she felt ambushed in both of the meetings with Mr Fleming as she had expected to go into a performance appraisal at the first meeting, which it was not, and that, at the second meeting, Mr Fleming made mention of utilising a 360° review for the first time.

[54] Mr Fleming's evidence was that, as at 22 August 2014, he had identified a performance problem and that the 22 August meeting was the first step in engaging on that problem with Ms Henderson. His evidence was that that meeting was the first time he had spoken to Ms Henderson about his concerns in a structured way although

he had had conversations with her in the past about certain issues which involved her interpersonal relationships with staff.

[55] Mr Fleming's evidence was that, with very senior members of the organisation, it was not uncommon to get *noise* about them. He said that it was his intention to get clarification of the *noise* he had been hearing about Ms Henderson, and that he wanted to change the *noise* (or *rhetoric*, as Mr Fleming also put it) into fact. He said in his oral evidence that he was not intending to use the 360° review process as an evidence gathering process, as that would not have been appropriate in a disciplinary context.

[56] Mr Fleming conceded, however, that, by 22 August 2014, he had enough specific examples in his mind to have been able to put them to Ms Henderson as evidence of his concerns about her interpersonal relationships. He said that, if he had wanted to go down a disciplinary path, he could have done so, but that instead, he had wanted to use a process that would have helped Ms Henderson to address her performance issues. Mr Fleming also conceded that he did not make known to Ms Henderson during either of the meetings of 22 August or 11 September any of the specific examples that he had had in his mind of the interpersonal relationship problems which he had wanted to address.

[57] In his oral evidence to the Authority, Mr Fleming also conceded that he had been supposed to conduct an appraisal of Ms Henderson but that there had been *issues* with the process he had adopted. He said that, with hindsight, he would have given her feedback about the positives of her performance. However, he had wanted to address the *elephant in the room*.

[58] With respect to his intentions as to who would provide feedback about Ms Henderson in the review, Mr Fleming said that it would have been all of her peers, all of her clinical nurse managers, the heads of department and himself. He said that would have comprised up to around 80 people.

[59] Mr Fleming's evidence was that, after his meeting with Ms Henderson on 11 September, he had reflected on whether it would be fair to subject her alone to a 360° review and so intended to also engage the Chief Medical Officer and the Director of Allied Health in 360° reviews as well. However, he was unable to convey this to Ms Henderson because she went on sick leave from Monday, 15 September

and Ms Sharma had forbidden him from engaging with her directly. Mr Fleming did not ever convey this intention in writing to Ms Sharma, however.

[60] With respect to the feedback being anonymous, Mr Fleming said that staff members are reluctant to give feedback if it can be attributed to them and that the process would have been designed to have protected Ms Henderson so that the broad themes could have been drawn out for discussion with Ms Henderson and the coach he had been proposing to engage afterwards.

[61] Ms Smith also gave evidence to the Authority. She had several years of experience working in HR with the respondent. She says that she first found out about Mr Fleming's idea of conducting a 360° review for Ms Henderson when Ms Henderson spoke to her again at the end of the meeting of 11 September. Ms Smith only found out about Mr Fleming's idea of including the CMO and DAH in a 360° review the following week, once Ms Henderson had gone off on sick leave.

[62] Ms Smith gave evidence that the organisation had done 360° reviews in the past, but not for around 10 years. She said that those reviews had been different from the 360° review that Mr Fleming had been proposing to conduct. Ms Smith said they had been conducted in a *supportive way* to set objectives for individual managers. She said that only around six people gave feedback for each manager, and that the questions being used were from a template that had been designed for the purpose. The subjects of the 360° reviews were able to choose three of the people giving feedback and their managers chose the other three. With respect to the 360° review that Mr Fleming had been intending to implement for Ms Henderson, she understood that it was going to be designed especially for her and the CMO and DAH.

[63] Ms Smith said that managers in the DHB had asked to use 360° reviews on their staff in the past but, that the organisation had discouraged them doing so as it was a tool for assessing managers *going up* rather than staff *going down*, to use her words.

[64] Ms Smith said that Ms Henderson had had a very tough job and that she had experienced interpersonal issues but that they were not by any means all attributable to Ms Henderson's conduct. However, she did say that Ms Henderson had a style which *rubbed some people up the wrong way*.

[65] Ms Smith said that there were issues with Ms Henderson's interpersonal relationship skills which had not been fairly or openly dealt with in the past at a time when they should have been. Ms Smith said that the DHB had not been good at tackling issues as they arose and I understood from this evidence that she included issues in respect of Ms Henderson's interpersonal relationships.

[66] When asked what process should be used to address a performance shortfall, Ms Smith said that, first, issues should be dealt with by managers as and when they arise but that staff appraisals should also be used to do so. In 2013, however, only 22% of staff had been subjected to an annual performance appraisal (although in 2015 it has risen to around 60%, with an aspiration for it to be 90% by the end of the year).

[67] Ms Smith said that if performance shortfalls have been identified, addressed as they arose, and then addressed at the annual appraisal but had still not resolved, then an improvement plan with a timeline would be implemented. Ms Smith said that that would be a formal step and that it could either be a precursor to or a first step in a full disciplinary process. It would be once the formal disciplinary process had been implemented that the employee would be told that their employment was in jeopardy.

Determination

[68] First, I accept that Mr Fleming genuinely had concerns that some of Ms Henderson's interpersonal relationships had become strained, as a result of her style or approach towards people she did not respect. Second, I also accept that these concerns had some founding in fact, although I am unable to assess how significant a problem Ms Henderson's interpersonal relationships had become, or to what extent she was to blame, as insufficient first hand evidence was led by the respondent to enable me to judge it accurately. Third, I accept that the respondent was entitled to take steps to address Mr Fleming's concerns.

[69] However, Mr Fleming's approach was ill judged and resulted in a disadvantage to Ms Henderson, which I find to be unjustified. The respondent relies upon a policy document entitled *Performance Development* which states:

Managers and staff may use their own formats, or specifically required area formats for performance development process planning and review such as Professional development and Recognition Programme (PDRP) for nurses. Generic forms for use are located on the intranet under Policies and Forms/HR Forms and include

- *Performance development form*
- *Employee self assessment form.*

[70] However, this freedom to use their own formats does not absolve managers from ensuring that the format they use is fair and transparent and does not effectively ambush the employee. The *Performance Development* policy goes on to refer to a *guidance for best practice* contained in the respondent's *Human Resources Handbook – A Guide for Managers (Section: Performance Planning and Review)*. That section, (section three) in turn refers to section four of the *Human Resources Handbook* for a *generic step by step process to help manage performance, whether disciplinary action is needed or not*. Section four contains eight pages of guidance on how to deal with unsatisfactory performance, including six stages. The guidance is predicated upon a gradual process which gives the affected employee the opportunity to understand the concerns and means to attempt to resolve the shortfalls in performance.

[71] Whilst the *Human Resources Handbook – A Guide for Managers* is not a policy document that has been approved by the ELT, it is available to all staff (or at least, all managers) on the respondent's intranet. I therefore conclude that it was intended to be utilised where relevant.

[72] Unfortunately, Mr Fleming elected not to utilise the guidance in the *Human Resources Handbook – A Guide for Managers*. Whilst he was not obliged to, what he did, in effect, was to mix up elements of a disciplinary process with elements of a performance development process. Although he denies that he was taking Ms Henderson down a disciplinary process, by making reference to his concerns about her interpersonal relationships and her need to improve, he clearly brought the conversation into the ambit of a potential disciplinary process. This is especially the case when one takes into account the comments made about her having a choice of two pathways, staying in the organisation or leaving the organisation, which set a context for Ms Henderson against which, understandably, she interpreted all of his other actions from that point onwards.

[73] No matter how robust, resilient, forthright, senior or experienced Mr Fleming thought Ms Henderson to be, she was entitled to expect the fundamental elements of a fair process to be followed, including the respondent's own best practice guidance.

[74] I find that the Mr Fleming's entire methodology in addressing his concerns about Ms Henderson's interpersonal relationships constituted a disadvantage in her employment, but refer in particular to the following actions and omissions;

- a. Mr Fleming inviting Ms Henderson to an annual performance appraisal meeting, but not discussing her objectives with her, or giving her all-round feedback at that meeting;
- b. Mr Fleming telling Ms Henderson on 22 August that he had concerns about her interpersonal relationships, but not giving her any specific details other than broad hints;
- c. Mr Fleming going straight into a process that hinted strongly at disciplinary action, when he had never raised his concerns with Ms Henderson before 22 August in a structured way;
- d. Mr Fleming giving Ms Henderson only two choices; leaving her employment or staying, but being subject to a performance review that would be a *huge challenge*;
- e. Failing to advise Ms Henderson prior to asking her to commit to one of the two pathways that he envisaged utilising an anonymous 360 degree review process if she elected to stay;
- f. Not making clear to Ms Henderson exactly how he envisaged the 360 degree review would be conducted (or, alternatively, not having a clear view himself of what the process would be before raising the possibility); and
- g. Not making clear to Ms Henderson (or Ms Sharma) that he had decided that she would not be the only one undergoing the 360 degree review.

[75] Having found that Mr Fleming's methodology constituted a disadvantage in her employment, I also consider that that disadvantage was unjustified. No fair and reasonable employer harbouring the concerns Mr Fleming had about Ms Henderson in all the circumstances that prevailed at the time could have failed to have given her specific details of incidents giving rise to those concerns or allowed her to address

each one in a formal disciplinary setting, in accordance with the organisation's policies and procedures.

[76] Alternatively, that fair and reasonable employer could have advised Ms Henderson that the organisation wished to engage in a 360° review of her and her other senior colleagues without first making unspecified assertions about its concerns if it did not wish to specify them at that stage. By mixing up the two processes, however, the respondent put Ms Henderson in a very vulnerable position. Ms Henderson was faced with the prospect of up to 80 people giving anonymous feedback about her, knowing that Mr Fleming believed that she was a poor performer in respect of her interpersonal relationships. No fair and reasonable employer could have gone down such a route in all the circumstances.

[77] Accordingly, I find that Ms Henderson suffered an unjustified disadvantage in her employment.

Was Ms Henderson constructively dismissed?

[78] In considering this question, it is first necessary to understand the fundamental legal principles relating to the law on constructive dismissal in New Zealand. These were enunciated in the Court of Appeal case of *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*⁶, which set out three non-exhaustive categories of constructive dismissal:

- (1) Where the employee is given a choice of resignation or dismissal;
- (2) Where the employer has followed a course of conduct with a deliberate and common purpose of coercing an employee to resign;
- (3) Where a breach of duty by the employer leads a worker to resign.

[79] Ms Sharma submits that all three of these categories may apply.

[80] With respect to the third of the three non-exhaustive categories of constructive dismissal referred to above, the Court of Appeal elaborated on that category in the

⁶ [1985] 2 NZLR 372 (CA) at 374-375

case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*⁷. The Court of Appeal stated at [172]:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[81] There are a number of duties of an employer that are potentially relevant in this field. One common duty, as affirmed by the Court of Appeal in *Auckland Electric Power Board*, is that *employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage a relationship of confidence and trust between employer and employee.*

[82] It is my finding that the first two limbs of the *Woolworths* test do not apply in this case. Although Ms Henderson was given the choice of resigning or undergoing a performance review, I do not believe that there was any predetermined intention on the part of Mr Fleming for Ms Henderson to fail the review. I believe that he genuinely wished Ms Henderson to succeed in the review, once she had elected to go down that route. The fact that he believed that it would be a *huge challenge* for Ms Henderson does not alter that intention.

[83] For the same reason, I do not accept that the respondent had a deliberate and common purpose of coercing Ms Henderson to resign.

[84] Ms Henderson's evidence was that it was Mr Fleming's memorandum of 11 September 2014 that caused her to decide that there was no way back into her role. In explaining her decision to resign, Ms Henderson's oral evidence was that an anonymous 360° review feedback process given by a number of people, including heads of department and clinical nurse managers, who had recently undergone a significant restructuring exercise, could have resulted in a *free for all* and that they could have reflected their dislike of the process that had been undertaken in their

⁷ [1994] 2 NZLR 415 (CA)

feedback about her. Ms Henderson spoke of her professional and personal reputation and how important it was to her for it to be kept intact.

[85] Ms Henderson also stated that she was worried about what a 360° review process would signal to her peers given that she had been told that she was going to be the guinea pig, implying that it was not being undertaken for anyone else in the organisation. She said that she was not worried about any particular individual giving poor feedback about her, however.

[86] When asked as to why Ms Henderson did not simply refuse to agree to a 360° review, given that Mr Fleming had requested that she sign the objectives to signal her agreement, her answer was that *one could make the assumption that he would have done it anyway*.

[87] When asked why Ms Henderson had not taken up the offer that she said had been made to take a payment of six months' wages instead of simply walking out, her reply was that *it was not about the money*.

[88] On balance I do not believe that Mr Fleming offered Ms Henderson the option of leaving in return for six months' pay. First, I accept Mr Fleming's evidence that it would not have been an appropriate use of public funds, and that he would have needed Board approval, which he did not seek. Second, I did not find Ms Henderson's evidence entirely credible when she answered the Authority's questions about her not having given any thought to the purported offer to leave on six months' pay instead of simply resigning against the context of the financial commitments she said she had which caused her to pause before deciding to tender her resignation by Ms Sharma. It is my belief that Ms Henderson has misunderstood or misinterpreted something that Mr Fleming said; probably, in relation to giving her six months to find new employment.

[89] It is hard to discern from the evidence the exact point at which Ms Henderson decided that she wished to resign from the employment of the respondent. It would appear that the likely sequence of events is as follows. Ms Henderson received a surprise when, on 22 August 2014, she turned up for what she believed would be a performance appraisal but was instead confronted with being given a choice of either leaving or undergoing some form of performance improvement process. Given that Ms Henderson did not have it in her mind at that point to leave the organisation, she

wrote her letter of 31 August 2014 as a defensive move to make it abundantly clear to Mr Fleming that she wished to stay, and acknowledged that he had imposed on her as a condition of being allowed to stay the undergoing of a performance improvement process. I understand that Ms Henderson wrote this letter, which she said was carefully crafted, in order to protect her position and so as to make it clear in return that she wished to stay.

[90] The fact that Ms Henderson contacted the Australian recruitment agent before her meeting of 11 September strongly suggests, however, that Ms Henderson was still very concerned about her position and was putting in place a contingency plan in case the landscape changed. As it turns out, the landscape did change in the sense that Mr Fleming then advised Ms Henderson that she was to undergo a 360° review process. Still adopting a defensive position, Ms Henderson did not openly refuse to engage in a 360° review during the meeting of 11 September but did make quite reasonable points that it could result in comments being made which reflected the difficulties that some of the anonymous reviewers had undergone during the restructuring process which Ms Henderson had been leading within her department. Ms Henderson also pushed back on the idea that a clinician should design the process but that an organisational psychologist from outside would be better.

[91] It is Ms Henderson's evidence that, despite engaging in this way with Mr Fleming about the process, she did not agree to it. On balance, I accept that evidence. I believe that, whilst Ms Henderson was not fully familiar with the respondent's performance improvement process as set out in section 4 of the Human Resources Handbook – A Guide for Managers, she was aware that she was in unfamiliar territory.

[92] In her written brief of evidence, cited above in paragraph 36, Ms Henderson, referring to the memo, stated that the new *twist* in the memo was Mr Fleming having added her performance in her overall objectives to the 360 degree feedback. However, during her oral evidence to the Authority, it appears that Ms Henderson changed her position and, instead of attributing the *new twist* to the inclusion of her objections in a 360° review, she meant the inclusion of feedback from CNMs, CMMs, the staff who reported to her, senior medical leaders and her peers within the executive leadership team.

[93] Normally, the inconsistency of evidence such as this would lead one to doubt the credibility of the witness. This is especially the case when the inconsistency concerns a key part of the evidence. However, it is my strong suspicion that Ms Henderson's brief of evidence was put together by Ms Sharma, having interviewed Ms Henderson by telephone (Ms Henderson being located in Australia), and that the statement in the brief of evidence in this respect is inadvertently inaccurate.

[94] I prefer the evidence given by Ms Henderson orally to the Authority that, what concerned her most about the memorandum, was the inclusion of her peers in the review process. This was what was new about the process I believe. The feedback was to be obtained from a wider number of people than Ms Henderson had been told during the meeting (namely, all heads of departments and clinical nurse managers).

[95] It is my finding that it was the receipt of Mr Fleming's 11 September memorandum received by Ms Henderson on 12 September that caused Ms Henderson significant concern and led her to see her general practitioner the following Monday. I believe that it was upon, or shortly after receipt of that memorandum that Ms Henderson's intention to resign became crystallised.

[96] Did the actions of the respondent amount to a repudiatory breach of contract entitling Ms Henderson to resign? It is my finding, despite his denial under cross examination, that when Mr Fleming started hearing an increase in the *noises*, to use his word, about Ms Henderson having strained interactions with a number of people, he wished to gather evidence to support that view. Whilst it is acceptable for an employer to investigate concerns about an employee, it is completely inappropriate, save in the most exceptional of circumstances, to do so anonymously, so that the employee cannot answer them with full knowledge of the circumstances in which the concerns have been raised. Therefore, the process that was proposed by Mr Fleming had a very strong potential of seriously prejudicing Ms Henderson. To use her phrase during her oral evidence, it would have been impossible to have sorted *the wheat from the chaff*.

[97] In assessing the respondent's actions at the point when Ms Henderson received the memo of 11 September 2014, one must consider the context against which it had been received. Mr Fleming is the most senior executive in the entire District Health Board. He had a conversation with one of his senior managers which made clear that

he was not happy with her performance. Indeed, he was so unhappy that he gave her the choice of leaving or undergoing a rigorous performance review process. This process was predicated upon anonymous feedback from a large circle of individuals, some of whom Ms Henderson knew were likely to give negative feedback because of the impact upon them of the restructuring that had occurred previously.

[98] Whilst the respondent essentially expected Ms Henderson to have faith in the process that Mr Fleming was intending to impose, Ms Henderson did not have the safety net of the respondent's published and accepted policies and processes to protect her as the 360 degree review fell outside of them.

[99] I also accept that she was a senior manager with a significant reputation in the world of nursing and midwifery and that, if the process had resulted in her being dismissed on the basis of anonymous feedback, it could have seriously undermined her reputation and career, for which only a few years remained given her age.

[100] I do not accept the submission of Mr McBride that the actions of the respondent fell short of a repudiatory breach, when they are considered in the round. I also find that it was not reasonable to have expected Ms Henderson to have abided by clause 21.1 of her employment agreement, which required her to notify the employer immediately that a problem arose in the employment relationship, when the only person more senior to her was Mr Fleming, who was the cause of her concerns. As it goes, Ms Henderson did seek the assistance of HR through Ms Smith.

[101] It is my finding that the proposed imposition of a 360° review involving anonymous feedback from a wide circle of individuals did constitute a significant breach of the duty of good faith owed by the respondent to Ms Henderson, when set against the context of the earlier conversation that she had had with Mr Fleming about having to choose between leaving, or staying but undergoing a performance improvement process.

[102] As the duty of good faith is a fundamental requirement of all employment relationships, this breach was a repudiation of the contract which Ms Henderson could elect to accept, by resigning.

[103] I also believe that it ought to have been foreseeable to any fair and reasonable employer that the process that Mr Fleming was proposing, in the circumstances, created a substantial risk that Ms Henderson would resign in response. Had he paused

and reflected upon his actions, or taken advice from HR, I believe that Mr Fleming is likely to have also come to this conclusion.

Did Ms Henderson affirm the breach?

[104] It is Mr McBride's submission that a key factor in repudiation (which applies equally to constructive dismissal situations) is the requirement to elect to cancel the contract before taking any steps that would affirm that the contract was still in force. He cites a number of cases in support of this principle, which I accept is a fundamental requirement of constructive dismissal.

[105] The question is, though, did Ms Henderson affirm the contract by delaying the communication of her resignation between 12 and 26 September 2014, or by any actions or omissions taken by her or on her behalf during that period?

[106] When asked why she waited until 26 September 2014 to instruct Ms Sharma to communicate her intention to resign, my understanding of Ms Henderson's evidence, which was a little opaque on this point, is that she wanted to be sure that she could afford to resign given that she had a mortgage to pay and that she was 63 years old.

[107] I do not accept that an employee must resign immediately in the face of a repudiatory breach by an employer, as Mr McBride suggests by the heading in his written submissions *immediate election required*. That this contention is incorrect is confirmed by the Employment Court in *Premier Events Group Limited and others v Malcolm James Beattie and others*^{8 9} which cited with approval a passage from the UK Employment Appeal Tribunal judgement in *WE Cox Turner (International) Ltd v Crook*¹⁰ (which was relied on by the UK Court of Appeal in *Cantor Fitzgerald International v Callaghan*¹¹).

[108] The passage in question is as follows:

Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract

⁸ [2014] NZEmpC 231

⁹ I thank Mr McBride for bringing this case to my attention after the conclusion of the investigation meeting.

¹⁰ [1981] ICR 823 (EAT)

¹¹ [1999] All ER 41, [1999] ICR 639

since his conduct is only consistent with the continued existence of contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence with the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his right to accept the repudiation ... such further performance does not prejudice his right subsequently to accept the repudiation.

[109] The Employment Court in *Premier Events Group Limited* then stated, citing the Court of Appeal in *Cantor Fitzgerald*¹²:

.....“the ultimate question is one, not of law, but of fact” including in circumstances from which the Court is invited to draw inferences about whether the contracts of employment were affirmed.

[110] In view of this, it is necessary to examine carefully the events that ensued between 12 and 26 September, and afterwards. I summarise these as follows¹³:

- a. 12 September 2014: Ms Henderson reads Mr Fleming’s memo of 11 September;
- b. 15 September. Ms Henderson consults with her GP, and obtains a medical certificate which certifies that she is medically unfit from 15 to 26 September 2014. The presumed date she can return to work is cited as 29 September. Ms Henderson emails this certificate to Ms Smith on the same day referring to workplace stress.
- c. 16 September. Mr Fleming writes to Ms Henderson and asks to meet with her, and a support person, on 22 September *to discuss this matter* [her email referring to workplace stress] *and to identify any actions that can be taken to assist her return on 29 September.* He also refers to the respondent’s EAP service.
- d. 17 September. An amended medical certificate is rendered referring to absence due to workplace stress.
- e. 18 September. Ms Sharma writes to Mr Fleming stating that, *if a meeting is to take place, it would be more appropriate that it happens*

¹² At [653]

¹³ The following summary does not traverse all issues that occurred nor refer to all matters raised in correspondence by the respective authors. I have selected what I believe to be events which are pertinent to the questions of affirmation.

at such time as when Ms Henderson's medical practitioner should provide a clearance for her return to work. Ms Sharma makes no reference to a repudiatory breach by the respondent, but does say she needs to take further instructions.

- f. 19 September. Mr Fleming writes to Ms Sharma seeking further information about the nature of the sick leave, and reiterating that he wanted to meet with Ms Henderson, but would be willing to defer it if there was good reason and supporting information provided.
- g. 22 September. Ms Sharma writes to Mr Fleming saying that Ms Henderson was on *work related stress leave that has been appropriately diagnosed by her medical practitioner as formulating grounds in justifying her absence from the workplace.* She also states *...you would have sufficient knowledge of serious issues around Ms Henderson's continued employment with the NMDHB....* Ms Sharma makes no reference to a repudiatory breach by the respondent, but says she is seeking final instructions from Ms Henderson.
- h. On 22 September Mr Fleming replies to Ms Sharma's letter. He states that he is *seeking information in order to understand the position, and in order to assist Robyn in her employment going forward.* He restated a desire to meet with Ms Henderson so as to understand how to mitigate the stressors causing the workplace stress Ms Henderson complained of.
- i. 25 September. A new medical certificate is supplied stating that Ms Henderson is unfit to work between 26 September and 12 October.
- j. 26 September. Ms Sharma writes a 19 page letter to Mr Fleming. It commenced by referring to *concerns relating to Ms Henderson's continued employment with the NMDHB.* The bulk of the letter then set out the history of what had occurred over the past few weeks. It then states that Ms Henderson tendered her resignation on the basis of constructive dismissal. Ms Sharma purported to back date notice to 15 September. She also stated that mediation was sought.

- k. 30 September. Mr Fleming replies taking issue with what Ms Sharma set out in her letter of 26 September, conveying that he was not clear if Ms Henderson had or intended to resign, but welcoming mediation, suggesting that it proceeded with urgency. He also invited Ms Henderson to reconsider her decision to resign.
- l. 2 October. Mr Fleming emails Ms Sharma stating that he had been told by nursing staff that Ms Henderson had resigned, and seeking urgent clarification.
- m. 3 October. Ms Sharma replies referring to separate without prejudice correspondence (not seen by the Authority) but effectively putting the ball back into Mr Fleming's court regarding mediation. Mr Fleming advises nursing staff that Ms Henderson had resigned, and sends out an email to that effect.
- n. Further correspondence then ensued between legal representatives.

[111] It is suggested by Mr McBride that Ms Henderson sending in medical certificates and claiming (or accepting) sick pay from her employer constitutes an affirmation of her employment agreement. However, given that it is accepted in *Premier Events Group Limited* that mere delay, and performing the contract to a limited extent will not necessarily affirm the contract, it must be logically follow that continuing to receive pay (whether sick pay, or otherwise) will, in itself, not constitute an affirmation.

[112] However, *Premier Events Group Limited* also makes clear, by its citation from *WE Cox Turner (International) Ltd*, that further performance of the contract to a limited extent must, at the same time, be accompanied by the innocent victim of the breach making it clear that she is reserving her right to accept the repudiation, if the further performance is not to be seen as an affirmation.

[113] At no time before 26 September did either Ms Henderson, or Ms Sharma on her behalf, make any reference to any action by the respondent which Ms Henderson treated as a breach of her employment agreement. The only references to previous actions by the respondent were references to workplace stress, and a statement in Ms Sharma's letter dated 22 September to *serious issues around Ms Henderson's*

continued employment with the NMDHB, which can be identified as arising directly from meetings that have recently taken place between [Mr Fleming] and her.

[114] This statement does not, by any reasonable stretch, amount to a reference to Ms Henderson believing that the terms of her employment agreement have been breached fundamentally by the respondent. Indeed, the very fact that Mr Fleming expressed a wish to take reasonable and practical actions to assist in mitigating Ms Henderson's stressors indicates that Mr Fleming reasonably believed that he was dealing with a stress issue, not an allegation of repudiation.

[115] In light of this, I find that Ms Henderson did affirm the contract by waiting two weeks before resigning, while at the same time sending in medical certificates which triggered her receipt of sick pay, but without reserving her right to accept the repudiation she later sought to rely upon.

[116] During the period between 12 and 26 September, in failing to reserve her rights or accept the repudiation, the employment relationship continued on foot, and Ms Henderson thereby continued to owe the respondent a duty of good faith, as defined in s.4 of the Act. In particular, she owed the respondent the duty to be active and constructive in establishing and maintaining a productive employment relationship in which the parties were, among other things, responsive and communicative.¹⁴ By keeping quiet about her belief that the respondent had breached her employment agreement, she was in breach herself of this duty. In other words, one may say that the common law concept of affirmation has a further layer added to it by virtue of the statutory mutual duty of good faith.

[117] Furthermore, given her continuing duty of good faith, Ms Henderson should have either unambiguously indicated that she believed that the contract had been repudiated¹⁵, or responded in good faith to Mr Fleming's attempt to identify the stressors that were causing her absence. Even if she was not up to meeting Mr Fleming and Ms Smith there was no reason why she could not have instructed Ms Sharma to have set out her concerns about the 360 degree process so that Mr Fleming could have revisited it and remedied the breach.

¹⁴ Section 4(1A)(b).

¹⁵ Not necessarily using those exact words.

[118] In conclusion, I find that the repudiatory breach by the respondent of Ms Henderson's employment agreement was affirmed by Ms Henderson prior to her resignation. Therefore, her termination of employment was not a dismissal in law, and I must reject her claim of constructive dismissal.

Penalties

[119] Ms Henderson seeks penalties in her amended statement of problem under four headings:

- a. For breach of clause 6 of the employment agreement, pursuant to s. 134 of the Act;
- b. For breach of clause 20.1.1 of the employment agreement, pursuant to s. 134 of the Act;
- c. For breach of workplace policies, pursuant to s. 134 of the Act; and
- d. For breach of good faith, pursuant to s.4A of the Act.

Clause 6

[120] Whilst the respondent did fail to conduct annual appraisal reviews in breach of its contractual obligation, Ms Henderson did not commence her action for a penalty in respect of this breach within 12 months of the cause of action first becoming known to her, as required by s.135(5) of the Act. That date would have been 1 January 2014 at the latest; the statement of problem was not lodged until April 2015. Therefore, there is no jurisdiction to consider this application for a penalty.

Clause 20.1.1

[121] Ms Sharma conceded at the investigation meeting that this application was based upon a misapprehension of the meaning of clause 20.1.1. Accordingly, there has been no breach of this clause and I decline to impose a penalty.

Breach of policies

[122] I accept the submission of the respondent that Ms Henderson's employment agreement makes clear that the respondent's policies are non-contractual. Therefore,

there has been no breach of employment agreement in respect of the *Performance Development policy*.

Breach of good faith

[123] Section 4A makes clear that a penalty may be imposed if:

- (a) *the failure was deliberate, serious, and sustained; or*
- (b) *the failure was intended to undermine—*
 - (i) *bargaining for an individual employment agreement or a collective agreement; or*
 - (ii) *an individual employment agreement or a collective agreement; or*
 - (iii) *an employment relationship; or*
- (c) *the failure was a breach of section 59B or section 59C.*

[124] Sub-section (c) is irrelevant. I do not accept that the failure of good faith that I have identified was deliberate, as I do not believe that Mr Fleming intended to act in bad faith. Rather, I believe that he was acting hastily, without due regard to fair and proper process, but that his motives were sound. Therefore, neither the limb of subsection (a) or (b) is engaged, and I cannot impose a penalty.

Remedies

[125] Sub-section 123(1)(a) to (c) of the Act provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

- (a) *reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;*
- (b) *the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;*
- (c) *the payment to the employee of compensation by the employee's employer, including compensation for—*
 - (i) *humiliation, loss of dignity, and injury to the feelings of the employee; and*
 - (ii) *loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen;*

[126] No pecuniary loss arises from the unjustified disadvantage I have found occurred in Ms Henderson's employment. Therefore, only s.123(1)(c)(i) is relevant.

[127] Ms Henderson's evidence was fulsome in respect of the effects that she suffered from the actions that I have found amounted to unjustified disadvantage in her employment. None of this evidence was significantly contested by the respondent. A selection of Ms Henderson's evidence was as follows:

- a. She left the meeting of 22 August *shocked and in disbelief* over the direction the meeting had taken;
- b. She felt *thrown into a state of panic, and in a state of turmoil* after having read the memorandum from Mr Fleming dated 27 August;
- c. She left the meeting of 22 September feeling *shell-shocked and numb with disbelief* and felt as though her *back was truly against the wall*;
- d. She felt *greatly stressed and alone* after reading Mr Fleming's memorandum of 11 September. She felt as though she was *in a mental vacuum of despair, disbelief and denial, from which she could not escape*. She felt *physically ill, professionally alienated* and as though her *whole life had fallen away in one quick swipe*. She felt a level of stress and anxiety that was unprecedented for her.

[128] Whilst these descriptions appear to manifest a degree of hyperbole, Ms Henderson's two daughters gave very measured evidence of the effects on their mother that they witnessed, and I accept that Ms Henderson did suffer a palpable sense of humiliation, loss of dignity and injury to her feelings. I believe that an award of \$15,000 is appropriate in the circumstances.

[129] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s. 124 of the Act).

[130] There is little doubt in my mind that the respondent had genuine concerns about Ms Henderson's interpersonal relationships, and that these concerns were not unfounded. However, the respondent has never argued that the nature of its concerns related to an act of misconduct by Ms Henderson. Whilst it is possible to reduce

remedies by reason of an employee's actions that are characterised as performance, as opposed to misconduct, I do not believe that it is just to do so when the performance shortfalls in question have never been properly addressed by the employer.

[131] For this reason, I decline to reduce the award under s.123(1)(c)(i) of the Act.

Orders

[132] I order the respondent to pay to Ms Henderson the sum of \$15,000 pursuant to s.123(1)(c)(i) of the Act.

Costs

[133] Costs are reserved. The parties are to seek to agree between themselves how costs are to be disposed of. However, in the absence of agreement within 21 days of the date of this determination, any party seeking a contribution from the other for its costs may serve and lodge a memorandum of counsel within a further 14 days. Any memorandum in opposition is to be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority