

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2013] NZERA Auckland 106  
5383204**

BETWEEN HELEN MARGARET JONES  
Applicant

A N D WAITEMATA DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: James Crichton

Representatives: Carolyn Boell, Counsel for Applicant  
Anthony Russell, Counsel for Respondent

Investigation Meeting: 19, 20 and 21 November 2012 at Auckland

Date of Determination: 28 March 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Ms Jones) seeks reinstatement to her position as clinical charge nurse of the Intensive Care/High Dependency Units (ICU/AHDU) at North Shore Hospital together with appropriate compensation for the allegedly unjustified action or dismissal with her employer (Waitemata DHB) in removing her from that position.

[2] Waitemata DHB resists those contentions and say that it acted properly. Waitemata DHB says that it received complaints of bullying by Ms Jones, investigated those complaints properly, found those complaints to be made out, and then removed Ms Jones from the subject position but continued to employ her in another position within the organisation.

[3] This is a longstanding employment. Ms Jones has been employed within the health sector for 36 years and has been employed by the Waitemata DHB since March 1997.

[4] In her present employment, she has held a variety of middle management and senior positions within nursing and was promoted to the position of clinical charge nurse of the ICU/AHDU on 16 June 2008.

[5] At the time of the events complained of, the value of Ms Jones' package was around \$100,000 per year. Her terms and conditions of employment were provided by a collective agreement dated 24 April 2008 and a job description.

[6] The latter set out the obligations of the position which the statement of problem directly summarises as a duty to "*oversee and manage staff to deliver appropriate care outcomes for patients*" in the two units.

[7] For the sake of completeness, the Authority notes that Waitemata DHB has a Harassment and Bullying Management Policy which identifies the process to be adopted by complainants. In brief, the complainant is supposed to contact a specialist bullying and harassment team member, their manager or an HR person. As one might expect of an organisation the size of Waitemata DHB, the policy is well developed, clear, and thorough.

[8] The definition of bullying contained in the policy is, relevantly, as follows:

*The organisation's definition of workplace bullying is persistent, unreasonable and unwelcome behaviours which have a detrimental affect on the individual's enjoyment, job performance or job satisfaction. These behaviours include but are not limited to:*

- *Verbal abuse*
- *Unjust criticism*
- *Threats*
- *Sarcasm and teasing*
- *Withholding of information required to perform tasks*
- *Exclusion or isolation from team.*

*Behaviours may be overt, covert, and/or hostile.*

...

*The test for bullying is the reasonableness of the behaviour and the impact of the unreasonable behaviour.*

[9] In November 2011, four written grievances were filed with the Waitemata DHB within the space of six days. There were further complaints provided to Ms Jones on 3 December 2011, but those complaints were all historical in nature, dated respectively 26 December 2008, 27 December 2008 and 22 January 2009.

[10] Ms Jones provided responses to the proffered complaints but notwithstanding those responses, Waitemata DHB determined to conduct an investigation. It appointed Mr Robin Nicole to investigate the complaints. Mr Nicole was described as being from Align HR but Mr Nicole was also an acting HR director for one of the units within Waitemata DHB.

[11] Mr Nicole's report issued on 9 March 2012 and concluded a total of 16 complaints were of bullying by Ms Jones.

[12] Ms Jones has a number of objections to the investigation process adopted by Mr Nicole.

[13] On 20 March 2012, there was a meeting between Ms Jones and Waitemata DHB at which Waitemata DHB accepted the report and removed Ms Jones from her charge nurse position. Two alternative positions were offered, but in the result, a temporary role at Waitakere Hospital was agreed to by the parties pending the resolution of the personal grievance that Ms Jones had by that time raised.

## **Issues**

[14] The Authority needs to consider the following questions:

- a) Did Waitemata DHB act appropriately in receiving and considering the initial bullying complaints?
- b) Did the employer's investigation meet its obligations as a good and fair employer?
- c) Was the outcome chosen by the employer available to it?

**Did the Board act appropriately in receiving and considering the initial bullying complaints?**

[15] The Board's bullying policy sets out in some detail what participants in the process can expect. First, it is clear from the bullying policy that it is available to Waitemata DHB to conclude that there is, in effect, "*no case to answer*". Furthermore, the policy contemplates a situation where the complainant may take their own action to resolve matters (referred to in the policy as "*self-initiated solutions*"), and the response might include what it described as "*informal action*" which includes a facilitated discussion or an informal investigation.

[16] The four initial complaints were received by Liz Dalby who is charge nurse manager for the ICU/HDU department at North Shore Hospital. Ms Dalby's involvement was simply to advise the complainants that if it was to be a formal complaint, it would have to be in writing, and to facilitate that, she provided the human resources template to each of the complainants to enable them to properly format their complaint. Ms Dalby passed the complaints to her manager, Ms Anne Haller, who was at the relevant time operations manager for intensive care services for the Board. As such, she had overall managerial responsibility for the ICU and HDU and, in consequence, for Ms Jones.

[17] Ms Haller convened a meeting on 2 December 2011 at which Ms Jones was informed of the complaints and advised of the process that the Board would undertake. Ms Jones sought to have the complaints presented to her immediately and that was done.

[18] Ms Jones sought an assurance from Ms Haller that the only complaints in consideration before that were under discussion and Ms Haller confirmed that previous events would not be considered. Ms Haller told the Authority she thought it "*odd*" that Ms Jones would seek to limit the extent of any Board inquiry before she had even responded to the allegations.

[19] Ms Haller told Ms Jones that she had obtained advice from human resources as to the process for managing these complaints and she gave Ms Jones a copy of the Board's bullying policy, to which the Authority has already referred.

[20] Waitemata DHB sought to have Ms Jones consider the complaints and provide a response. The purpose of that process is plain; as one of the Board's human resources managers made clear in correspondence to counsel for Ms Jones (email dated 8 December 2011 from Julia Davenport to Carolyn Boell):

*... the initial response (from the person complained about) may provide a satisfactory explanation and there may be no further action required. However, if a satisfactory explanation is not provided this may then lead to a formal investigation.*

[21] When the parties eventually met on 14 December 2011 to receive Ms Jones' responses, those responses could best be described as minimalist. She maintained that some of the complaints were "*outside the 90 day limit*", she denied making some statements attributed to her, and she said that she could not remember other incidents. Her substantive response was directed at providing the Board with a bundle of character references from colleagues and former colleagues. But certainly from the Board's perspective, her responses to the actual allegations were so inadequate as to require a full investigation. The Authority observes at this point that Ms Jones had a clear opportunity to respond collaboratively to the Board's request for comment, and she could have sought to try to diffuse some or all of the complaints in order to make it easier for Waitemata DHB to determine not to investigate further.

[22] Instead, Ms Jones adopted an approach which could best be categorised as an outright denial laced with erroneous beliefs as to the legal position.

[23] In that latter regard, the Authority refers particularly to the conviction advanced by Ms Jones that because some of the complaints were "*outside the 90 day limit*", they did not need to be considered. The 90 day limit that Ms Jones refers to relates to the raising of a personal grievance by an employee with an employer. This is an entirely different situation. These are complaints by co-workers to their employer about allegations of bullying by Ms Jones. They are not in any sense personal grievances within the meaning that that phrase has at law.

[24] Given Ms Jones' inadequate responses to the complaints, it was always inevitable that Waitemata DHB would decide to conduct a formal inquiry and that is

precisely what it decided to do, notifying Ms Jones of its intention to do that by letter dated 15 December 2011.

[25] Contemporaneously with the Board's decision to investigate, Ms Jones raised a number of objections to the Waitemata DHB's proposed process. She spelt those objections out in her evidence to the Authority although in reality, at the time that the Board was considering matters, Ms Jones articulated her concerns primarily through correspondence from counsel.

[26] The first of Ms Jones' complaints alleges collaboration between the four complainants. She puts this allegation baldly in her evidence in the following terms: "... *it was obvious to me that the complainants had collaborated*". Her evidence for this being "*obvious*" was that the four complaints were filed within four days of each other between 16 and 20 November 2011, three of the four allegedly car pooled together, the language was similar, and some of the incidents complained about were the same.

[27] Waitemata DHB's response to that allegation was simply that "*the fact that there are multiple complaints from multiple staff and that those staff know each other does not warrant us to discount or discredit their complaints*". No more should it. The allegations are serious and have not been properly responded to by Ms Jones so she can hardly expect the Board to simply refuse to deal with the allegations, just because they all came in at once, all came from staff who knew each other, and on occasion referred to the same incident.

[28] In fact, given the nature of the workplace, none of those circumstances are particularly surprising. The fact that the complainants all knew each other cannot be in any way unusual; although the Board's total staff is large, the area of work supervised by Ms Jones, and the subject of complaint, was actually very small and so the number of people who transited through the two units for work purposes would of necessity know each other.

[29] Further, the Board opined (without in any way concluding the matter), that the reason that the complaints had all come together, as it were, was that there had been a change in line management which coincided with the receipt of the complaints and that may have explained why staff suddenly felt able to complain about something

which, if the allegations were made out, they had been carrying as a burden for some considerable time in many cases.

[30] Whatever the explanation for the complaints coming together as they did, Waitemata DHB assured Ms Jones that it would take into account her complaint of collusion during the course of its investigation process.

[31] Dealing then with the allegation that Ms Jones makes, the Authority is not satisfied that the Board could do anything other than investigate the complaints it received. It would be a nonsense in the Authority's view if the Board were unable to investigate one or more of these complaints because the party complained about alleged collusion. The Board had to investigate, gave an undertaking that it would consider, during that investigation, whether there had been collusion and the Authority is satisfied that that is a decision that a fair and reasonable employer could reach in determining its process in relation to this matter: s.103A of the Employment Relations Act 2000 (the Act) applied.

[32] Next, Ms Jones complained that the Waitemata DHB intended to investigate all of the allegations together. She sought a single investigation in respect of each complaint. She said that fairness and equity demanded it and that in order for her to get a fair hearing, she was entitled to have four separate inquiries.

[33] The Board simply says that each of the complaints is about Ms Jones and it is appropriate that, in the interests of timeliness and efficiency, one investigation assembling and considering all of the evidence was appropriate.

[34] In defence of its position, the Board refers to *Clear v. Waikato DHB* [2008] ERNZ 646 and the appeal from that Employment Court decision in the Court of Appeal reported at *Waikato DHB v. Clear* [2010] NZCA 305. The effect of the *Clear* decision is, as Waitemata DHB maintains, to approve a holistic approach to bullying investigations where one investigation assembled all of the available material and assessed it according to its merits.

[35] Although not strictly on all fours with the present factual matrix, the Authority sees no reason to challenge Waitemata DHB's conclusion that the proper course was to conduct a single inquiry into the matter. Certainly, it is easy to see how confusion could develop if there were separate inquiries as well as the obvious difficulties in respect of resourcing issues.

[36] Looked at in its totality, the Authority is not persuaded that the Board acted inappropriately in its initial handling of these very serious allegations. Indeed, the Authority is satisfied that the Board, acting through its line manager at first instance, took appropriate human resources advice, acted within the terms of its own policy in respect of bullying, behaved transparently and gave Ms Jones a proper opportunity to be heard.

[37] At its heart, Ms Jones had the opportunity at first instance to try to deflect or diffuse some or all of the complaints but instead she chose to adopt a truculent attitude to the process which did little to assist her cause. Even the very language that she used in her brief of evidence to the Authority suggests this kind of approach. As well as stating that *“it was obvious to me that the complainants had collaborated”*, she referred to the investigation as being *“pursued as a concerted attack on me”*.

[38] As the Authority has already noted, Ms Jones seems to have adopted a stance which was unhelpful to the early resolution of this matter. Indeed, Ms Jones’ responses to the complaints at first instance were so inadequate as to make it inevitable that the Board would decide to conduct inquiries. The Authority is satisfied with the approach taken by Waitemata DHB in its initial exchanges with Ms Jones.

**Did the employer’s investigation meet its obligations as a good and fair employer?**

[39] Once Waitemata DHB resolved to conduct a formal investigation, a decision was taken to invite Mr Robin Nicole to conduct the inquiry. As the Authority has already noted, Mr Nicole was the principal of an HR consultancy and had an association with the Board already because he was providing some HR services in another part of the Board’s business. The decision to use Mr Nicole was advised to Ms Jones on 22 December 2011. Mr Nicole was presented as an independent person because he had had no previous engagement with the persons involved in the complaint.

[40] Ms Jones protested his independence on the footing that, as he was already engaged as a consultant with the Board, he would be biased in favour of the Board.

[41] In her evidence to the Authority, Ms Haller indicated that she thought that by virtue of Mr Nicole’s engagement with the Board in other matters, he would have some overall understanding of the environment in which the complainant parties and

the alleged perpetrator sat. Ms Haller also made the point that, as an HR specialist, Mr Nicole could be expected to run a process which followed best practice. She quite properly conceded that, although she was the relevant line manager, she did not have the experience to conduct such an investigation and she deferred to Mr Nicole in consequence.

[42] In responding to counsel for Ms Jones' complaint about Mr Nicole's involvement, Ms Haller made the point that her obligation was "*to find an investigator who has the skills and professional manner to carry out the role impartially*" and that that did not required that a person who had no connection at all with either party must be appointed.

[43] In the same letter, Ms Haller goes on to exhibit her frustration at the objection from Ms Jones' counsel and indicated that the complaint was "frivolous". Ms Jones comments on the "*overbearing behaviour*" of the Board when commenting on the tone of Ms Haller's letter of 1 February 2012. Ms Jones maintained that she was entitled to raise the point of the independence of Mr Nicole, because she had discovered at a meeting with Mr Nicole on 27 January 2012 that he "*reported to Ms Haller*" and that the Board "*were mounting a concerted effort against me*".

[44] Ms Jones goes on to claim that Ms Haller and Mr Nicole were close colleagues and that Mr Nicole was drafting correspondence for Ms Haller concerning the investigation.

[45] As to the first of those allegations, Ms Haller told the Authority that she did not have a close working relationship with Mr Nicole and that he did nothing more than advise her of the progress of the investigation and provide her with draft correspondence relevant to that investigation.

[46] The Authority sees nothing improper in Mr Nicole drafting relevant correspondence for senior managers to sign and accepts Ms Haller's evidence at face value that she did not have a close working relationship with him.

[47] Ms Haller impressed the Authority as a straightforward and competent senior manager when she gave her evidence in the Authority's investigation meeting, and the Authority has no reason to disbelieve her contention that the relationship with Mr Nicole was a proper one.

[48] That view was cemented later on when Mr Nicole gave his evidence to the Authority. His approach to the challenging task he had been asked to undertake seemed to the Authority completely professional. Like Ms Haller, he denied “*cosying up*” to the Board or its senior officers, maintained that he conducted an impartial and fair inquiry into the matters before him, and was not improperly influenced by any factors other than a proper assessment of the weight of evidence before him. The Authority rejects Ms Jones’ contention that Mr Nicole’s involvement was inappropriate by reason of bias or perceived bias and also rejects Ms Jones’ contention that Mr Nicole was so close to the Board’s senior officers as to be inappropriately influenced by them.

[49] On that narrower issue about whether Mr Nicole was inappropriately influenced by a close relationship with the senior officers of the Board, the Authority observes that it is an easy allegation to make but there is simply no evidence to support it save for Ms Jones’ contention that the email traffic between Mr Nicole and the senior managers he was working to was friendly in nature. There is nothing inappropriate about friendly communications between parties working together and nothing inappropriate about that. The existence of friendly email exchanges does not evidence a conspiracy of the sort Ms Jones seems to have been referring to when she said that the Board was “*mounting a concerted effort against me*”. The evidence the Authority heard suggested that the Board was conducting a careful and measured inquiry into very serious allegations made by a number of co-workers against Ms Jones which, because of her complete failure to deal with them when she had the opportunity, became the subject of a full scale inquiry.

[50] Then Ms Jones complained about Mr Nicole accessing the personal file held on her by the Board and including historical information from that to inform his investigation. These were matters raised by counsel for Ms Jones when the draft report issued. That letter, dated 2 March 2012, commences with a complaint about the inclusion of the “*historical information*” from Ms Jones’ file and refers back to the first meeting between Ms Haller and Ms Jones on 2 December 2011 when Ms Jones says she got an undertaking from Ms Haller that the only matters to be investigated were the four complaints then under discussion.

[51] Ms Haller told the Authority that she gave that undertaking in good faith at the time, believing that was the factual position, although it will be recalled that in giving

that evidence to the Authority, she also questioned why Ms Jones should seek such an assurance before she had even responded to the allegations.

[52] In any event, the Authority is satisfied that, whatever Ms Haller said at the time that the parties initially engaged, the only proper course for an investigator to take is to seek all of the relevant information and to follow that wherever it leads. To be charged with the task of investigating a number of complaints of bullying by a single individual and not accessing that individual's personal file as part of the process would seem to the Authority to be ensuring an incomplete investigation. Furthermore, as Judge Shaw made plain in *Clear v. Waikato DHB* [2008] ERNZ 646, a piecemeal approach which does not appropriately gather all of the material available together and weigh it properly risks not doing justice to the complainants.

[53] As Ms Haller very sensibly makes clear in her response to counsel's letter:

*... the purpose of an investigation such as this is to identify whether there has been bullying or not. An employer must consider all the information and Mr Nicole attempted to do just that before drawing his conclusion.*

[54] It is also clear from the Board's response to counsel's letter that every effort was made to protect Ms Jones' privacy in terms of the release of her personal file to the investigator. Moreover, Waitemata DHB made the self-evident observation that the point of issuing a draft report was to enable comment from the other side. That opportunity was taken by counsel for Ms Jones who produced comments running to almost 13 pages.

[55] The Authority observes, without in any way wishing to be definitive, that Ms Haller's observation at the meeting on 2 December 2011 was probably ill judged. In apparently committing the Board to limit the inquiry to the four complaints that Ms Jones had been apprised of, Ms Haller managed to provide a focus for complaint. Any competent human resources practitioner charged with the task of investigating bullying allegations against a particular staff member would have insisted on wide ranging terms of reference, which in fact was what Mr Nicole received from the Waitemata DHB. The part of the exercise that is, as it were, out of step, is Ms Haller's commitment to Ms Jones that only the four initial complainants would receive consideration.

[56] Having reached that conclusion, it is appropriate that the Authority make clear that it does not regard the issue as fatal to the Board's process. The Authority is satisfied that pursuant to s.103A(5) of the Employment Relations Act 2000 (the Act), the procedural defects were both minor and did not result in Ms Jones being treated unfairly. Those conclusions are reached because of the Authority's conviction that any fair minded human resources practitioner would want to see all the information available in respect of a bullying complaint and would not be happy to have his or her inquiry constrained in the way that would have occurred if the Board's instruction to Mr Nicole had been consistent with Ms Haller's observation at the 2 December meeting. The Authority's conviction is that the issue is a minor one and that fairness and equity demand that all of the available information be available to the investigator. It is conceivable, for instance, that the investigator may have found, in Ms Jones' file, aspects of mitigation which had not otherwise been available to the investigator.

[57] A related complaint from Ms Jones is that because of the assurance made to her by Ms Haller, other parties were spoken to by Mr Nicole beyond the four complainants and that those persons improperly influenced Mr Nicole to reach conclusions which were adverse to Ms Jones.

[58] Importantly for the Authority, Mr Nicole, in his evidence to the Authority, made the point that all of the four complainants:

*... made it clear that the issue was with Helen's [Ms Jones'] behaviour in general. The incidents they complained of were just specific examples of a wider pattern of Helen's [Ms Jones'] behaviour. These incidents were not intended by the complainants to be an exhaustive list of complaints. ...*

*I therefore considered it necessary not only to look at these complaints individually, but also collectively against the backdrop of the working environment at the WDHB [the Board].*

*As part of establishing this backdrop and looking at these events in context, I looked at Helen's [Ms Jones'] personnel file in order to gain any insight into any alleged pattern of behaviour.*

*I also interviewed previous employees of the ICU/HDU, in order to establish any patterns of behaviour. ...*

[59] When the Authority discussed the draft report with Mr Nicole during the investigation meeting, he made the point in his oral testimony that he was asked to

investigate “*without fetters*” and that he would not have undertaken the work “*unless he was given a free hand*”.

[60] He told the Authority that he stood by the piece of work (the investigation report) as a professional HR practitioner.

[61] Again, the Authority is not persuaded that there is anything improper in the process that the Board has undertaken. It provided an open-ended instruction to its investigator (as the Authority would expect) and the investigator followed professional lines of inquiry and assembled evidence from its various sources within the organisation in a way that the Authority is satisfied was consistent with best practice.

[62] While Mr Nicole freely conceded that he had not indicated to Ms Jones that he had spoken to former staff of the two units at the time that he did that, any information that came to him as a consequence of those discussions was referred to explicitly in the draft report and therefore able to be commented upon by Ms Jones and/or her adviser. Again, the Authority would simply observe that it is not satisfied that the process adopted by the Board is in any way improper; the only deficit was Ms Haller’s innocent but mistaken undertaking to Ms Jones that only the original four complainants were in play.

[63] Two final matters need to be dealt with in respect of Ms Jones’ complaints about the process adopted by the employer. The first is an allegation which the Authority described in the investigation meeting as “*channelling*”. Ms Jones complained that Mr Nicole gave copies of the Board’s bullying and harassment policy to each of the complainants and that this was designed to produce the desired outcome for the Board.

[64] Mr Nicole’s evidence is different and the Authority prefers Mr Nicole’s view. Mr Nicole said in his evidence that he provided a copy of the Board’s policy to each of the complainants because he wanted to understand what they meant when they told him they were being “*bullied and harassed*” by Ms Jones. In particular, he wanted to know what their complaints “*actually were*” and he wanted to ensure that the complainants were speaking as precisely as they were able to in relation to the matters in contention.

[65] Mr Nicole told the Authority that, in his experience, people might use language loosely and he wanted to establish what if anything was actually being alleged. In the result, despite all the complainants referring to harassment as well as bullying, Mr Nicole was able to identify that harassment was not in issue.

[66] The final matter is Ms Jones' complaint that Mr Nicole selectively used material in his report. That of course is in the nature of things. Mr Nicole is the author of the report and is entitled to draft it in a way that he thinks appropriate. Ms Jones was particularly concerned about Mr Nicole's reference to historical matters which he drew from her personnel file in part. But Mr Nicole answers that by reference to his desire to assess patterns of behaviour within the ICU/HDU over the period in contention and because it informs his overall assessment of the position. The Authority is not satisfied it can appropriately criticise Mr Nicole's selection of some material for inclusion and of other material for exclusion from the final report. That is a matter for the author and the conclusions reached in the report stand or fall on the basis of its totality.

[67] Taking all of Ms Jones' complaints into account and looking at the nature and extent of the investigation undertaken by Mr Nicole, and having carefully read both the draft report and the final report issued in respect of this matter, the Authority is not satisfied that there is any reasonable basis for attacking the process that the Board has undertaken to investigating the complaints it received about bullying by Ms Jones. The one area where the Board could have done better was by Ms Haller not giving Ms Jones an apparent undertaking that only the four complainants would be spoken with.

[68] But that aside, the Board acted entirely appropriately in progressing the complaints efficiently, in commissioning an appropriate person to perform the work, in giving him an appropriately wide brief and in dealing with the matter in an expeditious timeframe.

**Was the outcome chosen by the employer available to it?**

[69] Ms Jones maintained in her evidence to the Authority that Mr Nicole had taken *little notice of the issues raised with his draft report*. But that observation does not seem to be objectively verifiable. The Authority was provided with the draft report and the final report, as the Authority has already noted, but in addition, the

Authority was provided with a marked-up copy of the final report showing the amendments in red. This document was provided to counsel for Ms Jones under cover of an email dated 9 March 2012. It is fair to say that the marked-up version evidences very considerable amendment throughout its length with some passages being significantly altered and in at least one place, whole paragraphs being included at the behest of Ms Jones and her counsel.

[70] The Authority is not persuaded that the DHB or Mr Nicole as the author of the report were unreceptive of the various representations made on Ms Jones' behalf. What is true is that Mr Nicole's conclusion was fundamentally adverse to Ms Jones and, that being the position, it would be inevitable that Ms Jones would object to the nature of the determinations reached.

[71] There was a disciplinary meeting to consider the outcome of the report and the first of those meetings took place on 20 March 2012. By that stage, Waitemata DHB has accepted Mr Nicole's report but by virtue of the important decisions that now had to be taken, more senior managers became involved in the engagement with Ms Jones.

[72] Those more senior managers included Ms Jocelyn Peach, who has been Director of Nursing and Midwifery at the Board since 1999. Her particular concerns were about the impact, if any, of the reports findings on Ms Jones' professional practice in terms of the Nursing Council competencies.

[73] Of particular importance, in the Authority's view, was Ms Peach's emphasis on the need for a nursing leader (for such Ms Jones was in her Charge Nurse position) to promote a healthy environment in which staff could work professionally and in particular to promote what the Nursing Council Code of Conduct refers to as a *respectful* interaction between professionals in the work environment.

[74] The Authority was particularly struck with the following passage from Ms Peach's evidence:

*Essential to the role of Charge Nurse is the need to create a safe environment for their nursing team to work in. Issues about delegations and communication within the team are fundamental to creating such an environment.*

*The failure to create a safe environment for staff has serious implications in terms of patient safety. It can compromise the standard of patient care. Particularly, when nurses do not feel that they can ask for help, they may make mistakes. Moreover, staff*

*nurses can become distracted by who they are working with rather than attending to the patients' needs which can compromise care. Such disharmony can be reflected in the taking of sick leave to avoid working with certain people, requiring casuals to be called in and again this further impacts on the team dynamic.*

*Therefore the issues identified in the report went to the heart of the role of Clinical Charge Nurse.*

[75] Ms Peach's evidence is that she addressed these matters with other members of the Board management team when they met to consider Mr Nicole's report, prior to engaging with Ms Jones.

[76] Ms Peach gave persuasive oral testimony to the Authority. She acknowledged that the way in which Ms Jones' behaviour had been managed was less than ideal. She accepted that there had been a history of behaviour complained of, but that the management of those issues had been inconsistent from the Board's perspective. Indeed, she stated explicitly:

*One would have wished for a more consistent approach to Ms Jones' behaviour over time.*

[77] But Ms Peach also made clear her view that people had difficulty in changing their

*ways of communication and their personal style. I did not think that Ms Jones could change. It would have helped if Ms Jones had asked for assistance when the issues of bullying were first raised with her some years previously.*

[78] But Ms Peach went on to opine that as Ms Jones had never asked for help in respect to these matters or indeed the wider issue of how she was perceived by colleagues, it was difficult to attribute the blame entirely to the continuing inconsistency in management over time. Ms Peach considered that because there was no acknowledgment by Ms Jones that there was a problem it was always going to be a challenging task to persuade her to change.

[79] Ms Peach was adamant that the Board was not able to go back because of the impact on the team and on patient safety. She told the Authority that an appointment had been made to Ms Jones' old position.

[80] The Authority has dwelt on Ms Peach's evidence because she was a most persuasive witness. She made concessions readily where she acknowledged the Board's deficiencies in managing the issue over time, but she also made her professional judgments explicit, explained why she concluded, in the way that she had, and refused to concede ground on matters that went to the core of her professional judgement. It was apparent to the Authority that her influence over the Board's disposition of the matter was powerful as was her influence over the Authority in terms of the decision it must make in respect to Ms Jones' personal grievance. It is illustrative of Ms Peach's influence on proceedings that the decision-maker, Mr Lenssen, identified Ms Peach as the person who explained to Ms Jones and her counsel that given that the findings of bullying and the patterns involved *she* (Ms Jones) *would be unable to stay in the role of Charge Nurse at ICU/HDU at North Shore Hospital.*

[81] Mr Lenssen, who made the decision to demote Ms Jones, plainly relied on the professional advice of Ms Peach, the Board's principal nurse. Mr Lenssen was, at the relevant time, acting general manager for surgical and ambulatory services. He convened the group of senior managers and considered the report and then presided over the two meetings with Ms Jones and her counsel respectively on 20 March and 22 March 2012.

[82] As the Authority has just noted, the tipping point in terms of the disposition of this matter seems to have come at the first meeting on 20 March when Ms Peach indicated that Ms Jones could not continue in her present role. That, in essence, was the Board's decision. The role that Ms Jones currently fulfils in the Board's organisation was arrived at after a lengthy process involving the Board and Ms Jones.

[83] In considering whether the decision the Board made was a decision available to it, the Authority must apply the test for justification set out in s.103A of the Act. That test requires the Authority to assess whether the decision taken by the employer was a decision that a fair and reasonable employer **could** take in the particular circumstances of the case.

[84] As is plain from the decision of the Full Bench of the Employment Court in *Angus v. Ports of Auckland* [2011] NZEmpC 160, the new test allows for more than one possible outcome. It follows that the fair and reasonable notional employer might justifiably consider more than one possible resolution of the disciplinary issue. All

that is required for this employer to be successful is that one of those justifiable outcomes is arrived at.

[85] The Nicole report concluded that if the sixteen incidents were considered incident by incident, each, looked at in isolation, might not be regarded as evidence of bullying.

[86] But, taken in their totality, Mr Nicole's conclusion is that Ms Jones' behaviour has been viewed as bullying by some people some of the time and that that fact ought to *give reason for concern as it is not an acceptable way for a CNN (Clinical Charge Nurse) to continue to behave over a period of years.*

[87] The Authority has already indicated its acceptance both of the Board's process and of the Nicole investigation. The Authority has identified some infelicities in both aspects of the Board's work, but is satisfied that in neither case have the deficits been so great as to cause unfairness to Ms Jones or the other than *minor*: s.103(5) of the Act considered.

[88] Further, pursuant to s.103A(3) of the Act, the Authority is satisfied that Waitemata DHB *sufficiently investigated, raised the concerns that the employer had with the employee, gave the employee a reasonable opportunity to respond, and genuinely considered the employee's explanation.*

[89] The Board did not dismiss Ms Jones. What they did was they removed her from her position as a Clinical Charge Nurse on the basis that her behaviour in that role was incompatible with her responsibilities both to patients and to other staff. The Authority has already made clear its reliance on the evidence of Ms Peach who the Authority considered a straightforward and honourable witness occupying a very senior professional position in the Board's service. Ms Peach was clear that having concluded that bullying was proved, such behaviour was inconsistent with the proper professional performance of a Clinical Charge Nurse role. The Authority has been persuaded that Ms Jones' demotion because of that finding, underpinned as it is by concerns for patient safety and the professional safety of colleagues, is one of the justifiable decisions that a fair and reasonable employer could make in the particular circumstances of this case.

[90] Ms Jones has sought to encourage the Authority to depart from the definition of bullying contained in the Board's own policy and for instance that in order for

bullying to be found there must be *marked repetitive behaviour, not just a one off incident with one person.*

[91] But that aspect is referred to in the definition of bullying contained in Waitemata DHB's own policy and Mr Nicole's report found there was *persistent, unreasonable and unwelcome behaviours* over a significant period of time and involving a number of different individuals. The Authority is not satisfied that the Board's definition of bullying requires that the behaviour complained about must always be directed exclusively at the same individual in order for "persistence" to be identified. Mr Nicole's conclusion is that the existence of persistent behaviours is a function of the repetitive nature of the complaints made by a number of people about Ms Jones when each of them made complaints about her behaviour that were consistent, the one with the other.

[92] In all the circumstance, the Authority has not been persuaded that Ms Jones has a viable personal grievance. The Authority is satisfied that the Board has dealt appropriately with the bullying complaints it received, has given Ms Jones a proper opportunity to have input into those complaints and to inform the Board's process. It has then set up an appropriate investigation into the matters complained of, reached a conclusion through that investigation which the Board itself has decided to accept and then concluded that the only proper course for the Board to adopt is to remove Ms Jones from the position of responsibility that she held, while continuing to offer her employment elsewhere.

### **Determination**

[93] The Authority has not been persuaded that Ms Jones has a personal grievance. It follows that Ms Jones' claim is dismissed in its entirety.

### **Costs**

[94] Costs are reserved.

**James Crichton**  
**Member of the Employment Relations Authority**