

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 390
5593008

BETWEEN ANA SHAW
 Applicant

A N D BAY OF PLENTY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Allan Halse, advocate for Applicant
 Mark Beech, Christie Goodspeed and Tessa Carlisle,
 counsel for Respondent

Investigation Meeting: 4 and 5 October 2018 at Tauranga

Submissions Received: 27 September, 17 October and 12 November 2018 from
 the Applicant
 27 September and 5 November 2018 from the
 Respondent

Date of Determination: 7 December 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms Shaw’s dismissal by the Bay of Plenty District Health Board was justified. Accordingly, Ms Shaw does not have an employment relationship problem.**
- B. Costs are reserved.**

Employment Relationship Problem

[1] The Bay of Plenty District Health Board (DHB) is one of 20 DHBs in New Zealand. It provides health services to a population of approximately 225,320 for the major population centres of Tauranga, Katikati, Te Puke, Whakatāne, Kawerau and Ōpōtiki¹.

[2] The applicant, Ms Ana Shaw, was employed by the DHB as a Cardiac Physiologist in its Echo Cardiology Unit from 16 August 2010. She was dismissed for serious misconduct on 27 March 2015.

[3] Ms Shaw says her dismissal was unjustified. She further claims that from the time she commenced employment at the DHB she was subject to disparate treatment, bullying and harassment by her colleagues. Ms Shaw says she raised these matters as unjustified disadvantage grievances with the DHB but they were not acted upon.

[4] The DHB denies Ms Shaw's dismissal was unjustified. It says its decision to terminate Ms Shaw's employment for serious misconduct was fair and reasonable in all the circumstances.

[5] It further denies that Ms Shaw suffered or raised unjustifiable disadvantage grievances with it in relation to issues arising during her employment. The DHB says Ms Shaw raised an unjustifiable disadvantage grievance with it for the first time on 3 October 2014, shortly following its commencement of a preliminary investigation into a complaint about Ms Shaw made by a colleague.

Determination on a preliminary matter

[6] The DHB acknowledges that Ms Shaw raised issues about her colleagues during her employment. Matters included their work practices, operational matters within the Echo Cardiology Unit and Ms Shaw's view that her skills were being under-utilised. The DHB says these issues were dealt with as they arose. Ms Shaw did not make a formal complaint.

[7] Ms Shaw did not raise a personal grievance with the DHB until 3 October 2014. This was not within 90 days of the grievances allegedly arising, as required by

¹ www.bopdhb.govt.nz

s.114 of the Employment Relations Act 2000 (the Act). In fact, it was years after the alleged grievances arose.

[8] With the agreement of both parties and their representatives, the issue of whether Ms Shaw raised claims of unjustified disadvantage with the DHB within 90 days of them allegedly occurring, was investigated by the Authority as a preliminary matter.

[9] In a determination dated 16 October 2017², the Authority held that Ms Shaw did not raise personal grievance claims within 90 days, as required by s.114 of the Act. The Authority's determination was not challenged to the Employment Court by Ms Shaw.

[10] The remaining issue for determination by the Authority is whether Ms Shaw was unjustifiably dismissed by the DHB on 27 March 2015.

The investigation meeting

[11] The investigation meeting took two days in the Authority. Ms Shaw filed a witness statement. For the DHB, Mr Peter Chandler, Chief Operations Officer, and Mr Neil McKelvie, Business Leader for Medical Services, both filed witness statements. In addition, following a direction by the Authority, Ms Gail Bingham, the former General Manager of Governance and Quality for the DHB, filed a witness statement.

[12] Each of the witnesses giving evidence before the Authority confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[13] As permitted under s.174 of the Act, this determination does not set out all the evidence and submissions received. The determination states findings of fact and law, and makes conclusions on issues necessary to dispose of the matter.

² [2017] NZERA Auckland 332

Progress of the Authority's investigation into Ms Shaw's claims of unjustifiable disadvantage and dismissal by the DHB

[14] Ms Shaw's advocate has made comments in communications to the Authority, and in his submissions, about the progress of Ms Shaw's claims to reach an investigation meeting in the Authority. These statements do require a response. A key function of the Authority under the Act is to "...to deliver speedy, informal, and practical justice to the parties to any matter before it".³

[15] The rate of progress of the current matter before the Authority has been delayed for a number of reasons, outside the Authority's control. Ms Shaw has engaged a number of advocates and counsel to represent her from the time she raised her personal grievance claim in 2014 and throughout the Authority's investigation. Ms Shaw's current advocate is her fifth representative. Understandably, each new representative instructed has had to become familiar with the facts of the case and the considerable volume of documentation.

[16] Complaints were made by Ms Shaw's current advocate about the Authority's process. These complaints had to be considered and addressed by the Chief of the Authority. The complaints were found to lack merit. During this time, the investigation of Ms Shaw's claims by the Authority was suspended. As a result, progress of Ms Shaw's matter was delayed.

[17] With the agreement of both parties, the Authority investigated and determined, as a preliminary matter, whether Ms Shaw had raised claims of unjustified disadvantage with the DHB within 90 days of when she says they occurred. This preliminary issue required a separate investigation 'on the papers' by the Authority. After reviewing lengthy affidavits and submissions, the Authority issued its written determination on 16 October 2017⁴. This process took time also.

[18] The investigation meeting was due to proceed on 12 and 13 July 2018. However, as a result of a strike by members of the NZ Nurses Organisation which affected the DHB, the investigation meeting could not proceed. The investigation meeting was adjourned and took place in early October 2018.

³ Employment Relations Authority Regulations 2000, Reg 4(c).

⁴ Fn2.

The issues

[19] The issues requiring investigation and determination are:

- (a) Was Ms Shaw unjustifiably dismissed?
- (b) If Ms Shaw was unjustifiably dismissed, what remedies should be awarded?
- (c) If any remedies are awarded, should they be reduced for blameworthy conduct by Ms Shaw that contributed to the situation giving rise to the grievance?
- (d) Should costs be awarded?

Background Facts

[20] Ms Shaw studied Cardiology in South Africa. In 1983, Ms Shaw graduated from Witwatersrand Technikon, now part of the University of Johannesburg, with a National Diploma in Clinical Technology (specialising in Cardiology). Ms Shaw gained practical experience in Cardiology and later, in catheterization (“cath lab”)⁵ and Echocardiography, a subspecialty of Cardiology.⁶

[21] In late 2009, Ms Shaw successfully applied for a position at the DHB as a Cardiac Physiologist. She signed an offer of employment letter confirming her employment by the DHB in the position of Cardiac Physiologist effective from 16 August 2010. Her personal terms of employment included the provisions of the District Health Board’s/Public Service Association (PSA) Allied, Public Health and Technical Employees Multi Employer Collective Agreement (MECA) – 1 November 2007 to 31 October 2010, a Code of Confidentiality and her offer of employment.

Induction and orientation

[22] Ms Shaw’s lengthy experience as a health practitioner meant she was well aware of the importance of patient privacy and confidentiality.

⁵ “Catheterization Laboratory or cath lab is an examination room in a hospital or clinic with diagnostic imaging equipment used to visualise the arteries of the heart and the chambers of the heart and treat any stenosis or abnormality found”: <https://en.wikipedia.org/wiki/cath-lab>

⁶ Shaw witness statement

[23] During August and September 2010, Ms Shaw was taken through a 2 day workplace induction process. As part of this process Ms Shaw received an orientation booklet and attended health and safety training. The induction included an understanding of privacy expectations for clinical staff.

[24] As part of her induction, Ms Shaw was introduced to the DHB's workplace policies including in respect of privacy, confidentiality, and dealing with threatening behaviour, bullying, harassment and violence in the workplace – management policy (“anti-bullying policy”).

[25] The anti-bullying policy states that the DHB has a policy of “zero tolerance” to threatening behaviour, bullying, harassment and violence and it sets out the responsibilities and expectations of managers, supervisors, and employees. One of the obligations placed on employees is to ensure they report “all incidences of violence/threatening behaviour/bullying/harassment on a Reportable Event Form, (“REF”).

[26] Ms Shaw attended training throughout the course of her employment which included a workshop on handling conflict at work in 2011, together with workshops named “Stress busters” and “Bully by the horns” in 2011. The orientation and training was logged in Ms Shaw's training log.

Issues arising following Ms Shaw's employment at the DHB

[27] On 16 October 2010, Ms Shaw suffered a knee injury and had to have six weeks off work to recover. She returned to work in December 2010 before undergoing knee surgery in January 2011. Ms Shaw gradually returned to work from 23 February 2011.

Clinical competency concerns

[28] In March 2011, concerns were raised with Ms Shaw about her technical skills in performing cardiology. Following a meeting including with Leigh Lamont, Section head for Echocardiography and Michelle Bayles, Team Leader Clinical Physiology and Echocardiography, Ms Shaw was informed that her scans and reports were to be supervised by a senior echocardiographer or consultant.

[29] On 1 April 2011, Ms Bayles wrote to Ms Shaw stating “...We acknowledge that you have done a significant amount of scanning in the past and that over the years you will

also have obtained a vast bank of knowledge. Tauranga's scanning protocols are however more extensive and thorough than those perhaps previously used in South Africa, and so we are keen to support you while you up skill...At any time during your up skilling that you feel that you need extra help or guidance or are not happy with [the] way you are progressing please notify me and I will do my utmost to help you."

[30] Further concerns were raised about Ms Shaw's clinical competency in the cath lab during 2011. On 23 June 2011, Ms Sheryl Tait, Section Head sent an email to Ms Bayles with her concerns in respect of Ms Shaw's clinical competency in the cath lab.

[31] Ms Bayles requested a review of Ms Shaw's echocardiography scanning. On 18 August 2011, Ms Gillian Whalley Torckler, Locum Echocardiographer undertook an onsite review of Ms Shaw's echocardiography scanning. In the report that followed her review, Ms Whalley stated that in the three cases she observed, Ms Shaw did not view or save enough images to a minimally acceptable standard. Ms Whalley also stated that despite knowing the department has an imaging protocol, Ms Shaw did not demonstrate that she understood the importance of the protocol.

[32] Ms Whalley concluded her report by stating that Ms Shaw "...should not be scanning unsupervised..."

[33] Following Ms Whalley's report, a clinical practice/performance development plan was agreed between Ms Tracey Cumming, Assessor, Ms Sheryl Tait, Team Leader/Manager and Ms Shaw. The plan was to focus on retraining and improvements in Ms Shaw's use of equipment in the cath lab. In accordance with the plan Ms Shaw received training and support.

[34] Upon completion of the plan, Ms Cumming reported to Ms Bayles that Ms Shaw "...is very comfortable and confident in the cath lab and her system set up is now of a safe, satisfactory, clinical skills level."

Ms Shaw's concerns within the team

[35] Ms Shaw says that from the beginning of her employment she encountered difficulties with members of the team in the Echocardiology Unit. Ms Shaw says that she was often criticised about her practice as an Echocardiographer by her colleagues, she was removed from the Echo roster in April 2011 and despite having lengthy experience and qualifications, her skills were not utilised within the Unit. Ms Shaw

also says that she felt team members looked down on her South African qualifications and she heard team members make derogatory comments about her from time to time.

[36] Ms Shaw says that she raised these issues informally with her manager Ms Michelle Bayles, as they arose. This was done verbally, not by way of email because this was her practice when employed in South Africa. Other issues related to Ms Shaw's concern about the clinical practice of her colleagues.

[37] In June 2012, Ms Bayles undertook a performance development review with Ms Shaw. Ms Shaw noted the need to improve relationships and communication with staff members and her frustrations with the role being the "Hostile, trifling and debilitating work environment. Being given trifling activities. Poor working environment and facilities contributing to some of the hostile environment problems."

[38] Ms Bayles' comments noted Ms Shaw's difficulties in integrating with the team and that she had taken steps to educate all team members on how to treat each other with respect in accordance with DHB guidelines.

[39] It is my view that from the outset of Ms Shaw's employment at the DHB, there were issues with her clinical competence. This may have been for various reasons including differences in practices between South Africa and New Zealand. During this time, Ms Shaw was supported and supervised while being upskilled by the DHB.

[40] Ms Shaw says the issues raised by her with Ms Bayles were matters she considered amounted to bullying and harassment by her colleagues. The issues raised by Ms Shaw in the performance development review with Ms Bayles, about the working environment did not refer to "bullying" or "harassment" or provide details of such behaviours. Ms Shaw says this was because she was not fully aware of the processes by which she could report what she considered to be matters of bullying and harassment.

[41] Other than talking to Ms Bayles about matters of concern within the team, which largely related to clinical practice, Ms Shaw did not utilise the processes within the DHB to report what she says were actions by members of her team which amounted to bullying and harassment.

[42] I do not accept that Ms Shaw was not aware of the processes within the DHB to report matters of concern, in particular bullying and harassment. The DHB has a

“zero tolerance” policy on bullying and harassment. Ms Shaw undertook workshops and training which were directly relevant. Despite this, Ms Shaw did not raise a REF or a personal grievance with her Manager or HR about the issues she said amounted to bullying and harassment.

[43] Ms Shaw says that she understood the REF system was for reporting clinical incidents, not incidents of bullying or harassment. The anti-bullying policy makes it clear, in my view, that bullying will not be tolerated and the steps to be taken if an employee has such concerns. Filing a REF is key to raising a complaint of bullying or harassment.

[44] Ms Shaw raised a grievance for the first time on 3 October 2014, through her then representative, Mr Kerry Single. It was in relation to “ongoing procedures and failures...presented to the Clinical Physiology Manager...”

[45] On 5 May 2015, Ms Shaw’s then counsel Ms Helen Gilbert raised grievances of “various breaches of her employment agreement”, and unjustifiable dismissal.

[46] The Authority’s determination of 16 October 2017⁷ found that Ms Shaw did not raise a personal grievance within 90 days as required by s.114 of the Act. The determination was not challenged by Ms Shaw.

[47] From the evidence, there were issues during the course of Ms Shaw’s employment concerning her clinical competency and there were resulting tensions between Ms Shaw and some members of her team. Ms Shaw’s Manager, Ms Bayles took steps to address both these matters.

[48] The remaining issue for determination by the Authority is whether Ms Shaw was unjustifiably dismissed by the DHB.

Ms Shaw’s email of 29 July 2014

[49] On 29 July 2014 at 8:32am, Ms Shaw sent an email to Ms Bayles, about a “cath lab incident”. Ms Shaw copied members of the team in to the email.

[50] The email stated:

⁷ [2017] NZERA Auckland 332

Hi all. I have encountered a life card and referral that has not been downloaded in the tray for reporting. As you are all well aware these trays are VERY SEPARATE (“reporting” on top of shelf and then to be downloaded on the other end of the desk). However, the referral in question was mixed with the to be reported referrals and there was a problem with the card reading when I tried to download it. (Maybe that is the reason why it was “missplaced” (sic).) However, I would like to think it was a genuine error on someone’s part, and then it would be BEST CLINICAL PRACTICE ask for assistance if you are not sure what to do.

This holter was done on the 23/07/2014 as a grade one (ASAP) – due to the patient having recurrent loss of conscious (sic). The patient should have been called back for a repeat test. Please lets work together as a team and not against each other for the wellbeing of our patients “it could be one of your relatives”!!

[51] Ms Bayles was not happy about the email sent by Ms Shaw and responded by email accordingly. Ms Bayles requested that Ms Shaw “refrain from making accusations about my staff – and suggestions of what your reactions might be to a situation”. One of the team members who had received the email complained to Ms Bayles that she found the email to be offensive.

Letter to Ms Shaw – 13 August 2014

[52] On 13 August 2014, Ms Bayles sent a letter to Ms Shaw confirming that a complaint had been received from a member of the team who had found the email of 29 July 2014 offensive. Ms Bayles set out two allegations, firstly that Ms Shaw in sending the email may have breached Principle 1 of the Shared Expectations – Respect for People, and secondly may have breached the DHB’s email usage protocol in terms of professional and personal courtesy.

[53] Ms Bayles stated in the letter to Ms Shaw that she had decided to undertake a formal investigation. Ms Shaw was requested to meet with Ms Bayles and Ms Liz Thorpe, HR advisor on 18 August 2014 so that she could provide information on the matter. Ms Shaw was informed that she could bring a support person to the meeting.

[54] Ms Shaw was informed that the allegations were significant and may constitute misconduct/serious misconduct.

[55] The investigation included meetings between Ms Bayles, Ms Thorpe and members of the unit individually. On 15 September 2014, Ms Shaw met with Ms Bayles and Ms Thorpe.

Investigation Meeting – 15 September 2014

[56] Ms Shaw attended the investigation meeting with her representative from the Union, Association of Professionals & Executive Employees (APEX) and gave her responses to the two allegations made in relation to the email of 29 July 2014. Ms Shaw also read out a statement prepared by her responding to the allegations.

Confidential draft investigation report – 24 September 2014

[57] On 24 September 2014, Ms Bayles sent Ms Shaw a copy of her draft report in respect of the complaint about her email of 29 July 2014. The stated purpose of sending Ms Shaw the draft report was to provide her with an opportunity to provide any feedback or additional comments on it.

[58] The findings made in the draft report were that Ms Shaw had breached both Principle 1 of the Shared Expectations – Respect for People, and the DHB’s email usage protocol in terms of professional and personal courtesy. In the report Ms Bayles recommended the following:

- that consideration be given to commencing the disciplinary process;
- the team building work already underway be continued, in particular confirming team expectations around appropriate behaviour and how to raise issues/concerns; and
- that Ana and I discuss and resolve the issue Ana has raised around her feeling unable to approach me as her manager.

[59] Ms Shaw was invited to respond.

3 October 2014 - letter raising a personal grievance of unjustified disadvantage

[60] Ms Shaw instructed Mr Single as advocate to represent her. On 3 October 2014, he raised a personal grievance on Ms Shaw’s behalf “on the basis of disadvantage in that the matters that were the cause of the investigation are as a result of ongoing procedures and failures which have been documented over time and presented to the Clinical Physiology Manager without any resultant finalisation of those matters. Our investigations suggest that there is a deep seated resentment of our client’s qualifications and work experience to the point that she has been excluded from direct training by the suppliers of new

equipment, prevented from carrying [out] the duties for which she is ably qualified and actually was employed to do.”

[61] Mr Single requested that the parties attend mediation through the Ministry of Business, Innovation and Employment (MBIE).

[62] Ms Thorpe wrote to Mr Single on 22 October 2014 stating that the current investigation by the DHB into the email sent by Ms Shaw on 29 July 2014 was to be put on hold. This was to allow a new investigation into Ms Shaw’s claims (“workplace allegations”) that team members resented Ms Shaw’s qualifications and work experience and that she had been excluded from performing work for which she was qualified.

[63] Ms Thorpe suggested that this investigation take place before mediation took place.

[64] There were email exchanges between Mr Single and Ms Thorpe for the DHB regarding the issues to be investigated by the DHB and the appropriateness of mediation at that stage. Mr Single claimed that the issues raised in respect of Ms Shaw’s qualifications and exclusion from performing work were historical and that mediation should proceed. In the end, the parties agreed to attend mediation on 11 December 2014, in an attempt to resolve issues.

Scope of investigation into Ms Shaw’s workplace allegations

[65] On 29 October 2014, the DHB prepared a draft scope for investigation in respect of Ms Shaw’s workplace allegations. The purpose of the investigation was to investigate issues raised by Ms Shaw “as part of her response to allegations relating to her own use of the workplace email system.”

[66] The issues to be investigated by the DHB were:

1. That Ana Shaw has difficulty having meaningful communications with her Team Leader.
2. That Ana Shaw has raised concerns about clinical practices that have not been resolved to her satisfaction or understanding.

3. That Ana Shaw feels there is a deep seated resentment of her qualifications and work experience to the point that she has been excluded from direct training by the suppliers of new equipment, prevented from carrying out the duties for which she is ably qualified and actually was employed to do.

[67] Mr McKelvie, Business Leader for Medical Services, was tasked with leading the investigation into Ms Shaw's workplace allegations with assistance from Ms Thorpe. The draft scope set out the relevant DHB policy, how the investigation would be carried out and the timeframe. The draft scope was sent to Mr Single, inviting his comments. Mr Single's response was to reiterate, among other things, that the issues raised by Ms Shaw were historical, and that he would not be commenting further until after mediation had taken place on 11 December 2014.

[68] The DHB confirmed the scope of the investigation on 4 November 2014 and requested Ms Shaw to attend a meeting on 12 November 2014. This meeting did not occur, as Mr Single did not see the benefit in having a meeting until after mediation. The mediation held on 11 December 2014, was not successful.

Further details of Ms Shaw's work place allegations

[69] On 17 December 2014, Mr Single sent a lengthy letter to Ms Gail Bingham setting out in detail workplace issues Ms Shaw says she had endured since commencing employment at the DHB. Mr McKelvie responded on 19 December 2014, stating that Ms Shaw had raised workplace allegations which he considered to be serious. Mr McKelvie asked Ms Shaw to provide evidence to support her workplace allegations as soon as possible.

[70] Mr Pete Chandler, Chief Operations Officer was informed of the situation. On 22 December 2014, Mr Chandler wrote to Ms Shaw approving special leave for her until 9 January 2015, during which time he asked that she prepare the evidence to support her workplace allegations. This special leave was subsequently extended to 23 January 2015.

Final report regarding Ms Shaw's conduct in sending the email of 29 July 2014

[71] At about the same time as the DHB was informed by Mr Single of the details of Ms Shaw's workplace allegations, the DHB finalised its report into Ms Shaw's conduct in sending the email of 29 July 2014.

[72] The final report concluded that “on balance” Ms Shaw “...breached principle 1 of the Shared Expectations and the Email Usage Protocol in terms of professional and personal courtesy.”

[73] Recommendations made in respect of Ms Shaw’s conduct and for moving forward were almost identical to those contained in the draft report. This process did not continue while the DHB investigated Ms Shaw’s workplace allegations.

Evidence from Ms Shaw in respect of her workplace allegations

[74] Mr McKelvie asked Ms Shaw to provide more information and evidence to support her claims about poor clinical practices, resentment of her qualifications, being excluded from training and underutilisation of her skills, as set out in Mr Single’s letter of 17 December 2014.

[75] Ms Shaw compiled a large ring binder of papers and left them on Mr McKelvie’s desk on Friday, 9 January 2015. This was the evidence Ms Shaw says supported her workplace allegations.

[76] On Monday, 12 January 2015, Mr McKelvie began reviewing the documents. He says the folder contained a large mix of documents which appeared to be random and not relevant to the issues being raised by Ms Shaw about her employment.

[77] The documents included various types of patient notes dating from 2010 to 2014. Mr McKelvie became concerned that Ms Shaw had retained confidential patient information and had held it for a significant period of time. This, he thought, may be in breach of the DHB’s Health Information Privacy Standards, which was a matter for Ms Bingham whose role included that of privacy officer. Mr McKelvie phoned Ms Bingham with his concerns. He also met with Ms Thorpe to discuss the matter.

Ms Bingham’s letter to Ms Shaw – 14 January 2015

[78] On 14 January 2015, after discussing the matter with Mr McKelvie, Ms Bingham wrote to Ms Shaw, with a copy to Mr Single. Ms Bingham told Ms Shaw that she had received information from Mr McKelvie “raising concerns that you have accessed patient documents without a work related need to do so”. The letter went on to state that “accessing of patient information without a work related need is a breach of Rule 10 of the Health Information Privacy Code 1994, Principle One of Shared Expectations

and the BOPDHB Health Information Privacy Standards Policy, 2.5.1, Protocol 1. If substantiated such a breach is considered serious misconduct and could lead to disciplinary action up to and including summary dismissal”

[79] Ms Bingham asked Ms Shaw to attend a meeting with her on 16 January 2015, with a representative, so that Ms Shaw could respond to the privacy breach allegations. Ms Bingham asked Ms Shaw to return any copies of patient documents that she may have at the meeting. The meeting did not take place on 16 January 2015.

Meeting with Ms Bingham - 21 January 2015

[80] Ms Bingham met with Ms Shaw and Mr Single on 21 January 2015. Ms Bingham asked Ms Shaw why she had retained patient records and photocopied them. Ms Shaw’s response to Ms Bingham was that she had gathered the patient notes “to use as evidence to show how she was being treated by the DHB”⁸. Ms Shaw told Ms Bingham that she was aware of the privacy rules relating to patient notes but felt this was over-ridden by her need to prove she was being bullied⁹.

[81] At the Authority’s investigation meeting, Ms Shaw said that she retained the patient records to “safeguard” herself. She felt that patient records were being tampered with, and that the records illustrated this. Ms Shaw said she was trying to protect patients and also her reputation. She also said that the records were retained to show that there was a serious risk to public health.

[82] Ms Shaw says she notified HR verbally of the issues on numerous occasions, and was told not to get involved.

Meeting with Mr McKelvie and Mr Cockcroft – 22 January 2015

[83] Mr McKelvie and Mr Cockcroft, the DHB’s HR Manager, to whom Ms Thorpe reported, met with Ms Shaw and Mr Single on 22 January 2015. This meeting was for the purpose of investigating Ms Shaw’s workplace allegations and was separate from Ms Bingham’s privacy investigation.

[84] Mr McKelvie says it was unclear why Ms Shaw’s evidence included patient records. It appeared to Mr McKelvie that Ms Shaw had collected the records of

⁸ Bingham evidence

⁹ Bingham evidence

patients with whom she had no clinical involvement, copied and retained them. He sent Ms Shaw a series of questions on 16 January 2015 regarding this and inviting her to respond at the meeting.

[85] Ms Shaw's response was that she needed copies of the medical files to show that colleagues were interfering with her work. There was an adjournment during which Mr Single decided not to continue representing Ms Shaw. Following the adjournment, Ms Shaw read a written statement to the meeting. Ms Shaw's statement referred not to her reason for holding patient records but rather for sending the email of 29 July 2014 out to team members.

[86] At the Authority's investigation meeting, Ms Shaw was asked about an opening submission by her advocate that Mr McKelvie told her "that if she did not stop complaining about being bullied she would be dismissed. And that "Ana was told by Neil McKelvie that she would be dismissed if she didn't stop complaining about being bullied, Ana was accused of breaching patient privacy."

[87] Ms Shaw told the Authority that Mr McKelvie did make those threats to her at the meeting on 22 January 2015, when Mr Single "quit". Ms Shaw was asked why this evidence had not been given before. Ms Shaw was asked on a number of occasions to find this evidence in her witness statement. She was not able to do so.

[88] Mr McKelvie strongly denied making such threats.

Ms Bingham's report into privacy breach allegations

[89] Following the meetings, Ms Bingham prepared a report into the alleged privacy breach by Ms Shaw. Ms Bingham observed in her report that; "it was quite apparent that she [Ms Shaw] considered her right to advance any grievance she may have against the DHB over-rode any right to patient privacy. She was totally focused on her needs and any consequences of her actions were irrelevant to her."

[90] Ms Bingham concluded that Ms Shaw had collected patient health information over an extended period and acknowledged doing this. There was no work related need for Ms Shaw to have this information. Ms Bingham noted that Ms Shaw was aware of the Health Information Privacy Code but felt her need was more important than patient privacy. Ms Bingham was also of the view that Ms Shaw had no remorse and may "readily breach patient privacy again to advance her own agenda."

[91] Ms Bingham recommended a disciplinary process be commenced into a breach of patient privacy. Ms Bingham further stated that "...given the seriousness of the breach and the lack of remorse that this breach be considered serious misconduct and therefore be subject to summary dismissal."

[92] Ms Bingham's report was provided to Mr Pete Chandler, Chief Operations Officer.

[93] On 23 January 2015, Mr Chandler wrote to Ms Shaw enclosing a copy of Ms Bingham's report into her alleged breach of privacy. Mr Chandler concluded that in light of the report and information that she had accessed patient files to support her own workplace issues, she should be suspended from work "because of the overwhelming evidence that you have breached a fundamental DHB policy".

[94] Ms Shaw was provided with the opportunity to comment on the report and the recommendation that she be dismissed. Ms Shaw was invited to attend a meeting with Mr Chandler on 29 January 2015, to do so.

[95] Arrangements were also made for the continuation of Mr McKelvie's investigation into Ms Shaw's workplace allegations.

Disciplinary investigation by DHB

[96] Ms Shaw changed representatives during her meeting with Mr McKelvie and Mr Cockcroft on 22 January 2015. This meant that there were some delays while her new representative, Ms Helen Gilbert, became familiar with her matter.

[97] In a letter from Ms Gilbert to Mr Chandler on 11 February 2015, Ms Gilbert stated that she did not agree that Ms Shaw's conduct amounted to serious misconduct and did not warrant summary dismissal. This was for a number of reasons including that the records were not disclosed to a third party and were retained by Ms Shaw to illustrate the treatment she was receiving at the DHB, which was not being addressed by her manager.

Meeting on 18 February 2015

[98] A meeting was held between Ms Shaw with Ms Gilbert and Mr Chandler on 18 February 2015 to discuss the recommendation that Ms Shaw be dismissed for serious misconduct. Ms Shaw acknowledged collecting patient records and holding

them for her own use. Mr Chandler formed the view that Ms Shaw did not appreciate the rights of patients to confidentiality.

Letter from Mr Chandler on 4 March 2015

[99] In a letter to Ms Shaw on 4 March 2015, Mr Chandler concluded that Ms Shaw's actions constituted "a serious breach of a fundamental principle of confidentiality which is in place to ensure that our community has trust and confidence that patient information will be appropriately protected and not be misused. As a result, I support the recommendation that you be dismissed and will write to the Chief Executive today to advise him of my decision".

[100] Mr Chandler then reported by way of memorandum to Mr Phil Cammish, the Chief Executive of the DHB. Mr Cammish was the decision maker. Mr Chandler supported the recommendation for Ms Shaw's dismissal and provided Mr Cammish with Ms Bingham's report, together with recent correspondence.

[101] On 9 March 2015, Mr Cammish sent a letter to Ms Shaw, informing her that he had received an investigation report together with a recommendation to terminate her employment:

To ensure I have as much information as possible prior to making a decision on the recommendation I would like to offer you the opportunity to meet with me." The date for the meeting was suggested as 12 March 2015.

[102] A meeting was held on 19 March 2015. Ms Shaw and Ms Gilbert attended to discuss the recommendation of dismissal.

Letter of dismissal – 24 March 2015

[103] Mr Cammish concluded that dismissal was appropriate. In his letter he states:

Whilst I acknowledge that the Privacy breaches could be divided into two groups namely those associated with your concerns that your reports were being modified and those associated with your claims of improper use of organisational resources resulting in performance issues for yourself I do not accept that either use was appropriate, reasonable in the circumstances or permitted by organisational policy, protocol or practice. In making my decision I have also considered, if I decided not to terminate your employment, whether you could be reintegrated into the DHB workforce in a role appropriate to your training and skills. In deciding whether reintegration would be an

option I reflected on our meeting and whether or not you had a genuine understanding of the seriousness of your actions and the chance of similar behaviours occurring in the future. Whilst in the meeting I initially felt you had reflected on your actions and their inappropriateness I was left by the end of the meeting with the strong sense that should you find yourself in a similar situation in the future you would behave in your own interest even if that meant breaching organisational policy, protocols or practices. In short I have no confidence that you could re-establish the required high trust working relationship with the DHB that would allow you to continue to work for the DHB. I have therefore decided that the breaches of patient privacy do constitute serious misconduct and that the trust and confidence necessary for you to perform your role as a Clinical Physiologist have been lost and that the recommendation to terminate should be accepted. Your employment with the DHB will cease on Friday 27 March 2015, and DHB will pay you four weeks' pay in lieu of notice as well as any holiday or any other entitlements due to you.

First Issue

Was Ms Shaw unjustifiably dismissed?

Test of justification

[104] By raising a grievance about her dismissal by the DHB and bringing it to the Authority for investigation and determination, Ms Shaw has required the Authority to apply the test of justification under s.103A of the Act.

[105] The onus falls upon the DHB to prove that its actions in dismissing Ms Shaw were justified.

[106] Under the test in s.103A of the Act, the question of whether Ms Shaw's dismissal was justifiable must be determined, on an objective basis, by considering whether the DHB's actions, and how the DHB acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.¹⁰

[107] In applying s.103A, the Authority must also consider four particular factors set out at s.103A(3), as well as any others it thinks appropriate. The four particular factors relate primarily to the way in which complaints about an employee are investigated, whether the employee concerned has been properly notified of the complaints, provided with a proper opportunity to respond to them, and whether the employer has genuinely considered the employee's responses.

¹⁰ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [22]

[108] The test in s.103A is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly¹¹.

[109] The Authority has had the benefit of extensive evidence on all matters material to the resolution of this grievance, and has received submissions from both Ms Shaw's advocate and counsel for the DHB in relation to the law to be applied, particularly under s.103A of the Act.

Credibility issues

[110] There were issues of credibility in this matter. The evidence has been carefully evaluated and consideration has been given to how reasonable, plausible and probable the evidence is. The onus of proof is the balance of probabilities. This requires an assessment of which version of events is more likely than not.

[111] In my view Ms Shaw's evidence was inconsistent and unreliable. During the course of the investigation meeting, new evidence was raised by Ms Shaw. This evidence could have been included in the lengthy witness statement filed in the Authority on 28 February 2017, by her former counsel. It was not.

[112] The Authority heard for the first time in opening submissions on Ms Shaw's behalf, that Mr McKelvie had threatened that if she did not stop complaining about being bullied, she would be dismissed. And that one month after making this threat, Ms Shaw was accused of breaching patient privacy.

[113] Ms Shaw was asked about this at the Authority's investigation meeting. Ms Shaw was asked to identify where in her witness statement she had provided such evidence. Ms Shaw was asked on a number of occasions to point this out to the Authority, but could not do so. This was an important piece of evidence and should have been included in Ms Shaw's witness statement.

[114] Ms Shaw told the Authority that the threat was made by Mr McKelvie at a meeting she attended with him and Mr Cockroft on 22 January 2015. Mr Single was also at the meeting.

¹¹ Section 103A(5) of the Employment Relations Act 2000

[115] The privacy investigation by Ms Bingham had already occurred before the meeting, not one month after, as claimed. There were other instances during the course of the Authority's investigation where I found Ms Shaw's evidence to be unreliable.

DHB Policies

[116] Ms Shaw is a health practitioner with more than 34 years' experience. She was aware of the DHB's policies and protocols in relation to patient medical records. When accepting employment by the DHB, Ms Shaw signed a code of confidentiality. The code states that breaches of confidentiality will be considered to be serious misconduct. Ms Shaw agreed that she understood and would comply with all relevant DHB policies. These included the policies concerning patient privacy. The DHB policies relating to patient privacy and confidentiality prescribe requirements regarding the collection, retention, distribution and destruction of patient notes.¹²

[117] As a Cardiac Physiologist, Ms Shaw was bound by the Standards of Conduct of the Clinical Physiologists Registration Board ("CPRB"). The standards of conduct include in paragraph 2 a mandatory requirement to respect the confidentiality of patients, clients and users and "use it only for the purpose for which it was given."

Induction and orientation

[118] Ms Shaw received a full induction and training and was aware of the policies relating to the confidentiality of patients and their medical records and her own obligations in that regard. She was also aware of her duties to protect a patient's right to privacy of his or her personal information.

DHB's investigation

[119] During the course of the DHB's investigation into a complaint about Ms Shaw's email of 29 July 2014, Ms Shaw raised a number of serious workplace issues.

¹² DHB Health Record – Retention and Destruction of Inactive Health Information, Policy 2.5.2, Protocol 5; DHB Health Information Privacy Policy No. 2.5.1; Health Information Privacy Standards, Policy 2.5.1, Protocol 1; Health Records Management Policy No. 2.5.2; Health Record – Content and Structure, Policy 2.5.2, Protocol 2; Health Record Standards, Policy 2.5.2, Protocol 1; Health Record – Transportation by BOP DHB Staff, Policy 2.5.2, Protocol 4; Clinical Physiologists Registration Board Summary of Standards of Conduct; the Privacy Act 1993; Health Information Privacy Code 1994; Health Information Privacy Policy; Health Information Privacy Standard NZS8153.2002; Shared Expectations: Code of Conduct [staff management]

Mr McKelvie was tasked with investigating the workplace allegations and requested that Ms Shaw provide him with the information.

[120] Ms Shaw provided Mr McKelvie with a file of patient records spanning a number of years. There appeared to be no work-related need for Ms Shaw to have the records. An investigation into Ms Shaw's actions in retaining patient records was started by Ms Bingham.

[121] Ms Shaw accepts that she retained clinical patient records. She says she did this "for the specific and sole purpose of providing evidence of my bullying complaint...".¹³

[122] Ms Shaw had a contractual obligation to comply with the DHB's policies and the privacy legislation which applied to her as a health practitioner. Ms Shaw deliberately breached those policies and privacy legislation because she was of the view that she needed to retain the information in order to establish how she was being treated by the DHB.

[123] In his letter of dismissal, Mr Cammish stated that Ms Shaw's breaches of patient privacy constituted serious misconduct. He also stated that he had lost the necessary trust and confidence necessary in Ms Shaw to continue to perform in her role as a Cardiac Physiologist. Accordingly, Mr Cammish accepted the recommendation to terminate her employment.

[124] It is a decision that in my view was open to the DHB to make in all the circumstances.

[125] In the Court of Appeal decision of *Chief Executive of the Department of Inland Revenue v Buchanan* (No. 2)¹⁴ it was held that a breach by an employee of an employer's policies and procedures contained in a code of conduct may justify a dismissal.¹⁵ In that case, the employee had accessed records of family, friends and acquaintances in breach of the Inland Revenue's code of conduct.

[126] The following passage from the Court of Appeal judgment is relevant:

¹³ Shaw witness statement
¹⁴ [2005] ERNZ 767 (CA)
¹⁵ At [38]

[36] In our view, the correct approach is to stand back and consider the factual findings made by the Authority and evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal. We do not agree with the Chief Judge that a failure to establish wilfulness creates a presumption that the conduct is not serious misconduct. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred and the circumstances of the breach ...

[127] The above passage was referred to and applied by the Employment Court in *Drader v Chief Executive of the Ministry of Social Development*.¹⁶

[128] Ms Shaw was a senior cardiac physiologist with a great deal of experience. She knew her obligations under the DHB's policies to maintain the confidentiality of patient records. She chose to ignore her obligations, to use the patient records in pursuit of her claim that she was being unfairly treated by the DHB. There were other avenues which Ms Shaw could have explored for raising such issues with the DHB, but they were not taken by Ms Shaw.

[129] Ms Shaw's dismissal by the DHB for serious misconduct was a decision open to a fair and reasonable employer. The dismissal was justified.

Costs

[130] Costs are reserved. The DHB has 14 days from the date of this determination to file a memorandum as to costs. Ms Shaw has 14 days from receipt of the DHB's memorandum within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority

¹⁶ [2012] NZEmpC 179