

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 221/07
5044039**

BETWEEN TANE ARATAKI TAYLOR
 Applicant

AND RAUKURA HAUORA O TAINUI
 Respondent

Member of Authority: Leon Robinson

Representatives: Penny Swarbrick for Applicant
 Richard Harrison for Respondent

Investigation Meeting: 10 August 2006
 5 October 2006

Submissions Received: 26 October 2006
 10 November 2006

Determination: 27 July 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Dr Tane Arataki Taylor ("Dr Taylor") applies to the Authority for an investigation into his dismissal from Raukura Hauora o Tainui ("Raukura"). He says he was unjustifiably suspended and dismissed. Raukura denies these claims and says its actions were justifiable.

[2] The parties were unable to resolve the problem between them by the use of mediation.

The facts

[3] Dr Taylor is a registered medical practitioner. He was employed by Raukura from 1996 until his dismissal on 29 June 2006. At the time he was dismissed, he had worked at Raukura's Trust Health Clinic ("the Clinic") at 7 Hill Road, Manurewa as a full time general practitioner for 2 - 3 years.

[4] Dr Taylor was employed under the terms of a written individual employment agreement that he signed on or about 16 December 2005.

[5] Raukura's acting regional manager Mr Tukoroirangi Morgan ("Mr Morgan") wrote to Dr Taylor by letter dated 6 June 2006. The Authority accepts Dr Taylor's evidence that this advice was hand delivered to him late on the afternoon of 2 June 2006. It stated:-

Potential Conflict of Interest

I refer to your response of 31 May 2006.

The issue of your activities and a possible conflict of interest with that of Raukura and Trust Health Care is of major concern. The allegations that underpin this concern are as follows:-

- 1 That you gave an ultimatum and/or threat to Wayne McLean at the time of the proposal to purchase Trust Health that yourself and other staff would resign if the proposal was not accepted. I understand that you dispute this allegation, this is a matter that will have to be resolved through enquiries.*
- 2. Reports that you have been making enquiries to establish an alternative practice that is possibly harmful to the interests of Raukura and Trust Health.*
- 3. Your involvement with the establishment of the Community Wellness Foundation Charitable Trust may also conflict with the interests of Raukura O Hauora Tainui.*

As there is a potential for a conflict of interest that may amount to serious misconduct it is intended to undergo an investigation and that during the process of this investigation we suspend you in accordance with the terms of your employment agreement. Before making the decision about suspension, I invite you to reply no later than 3 pm today, your input will be considered before a final decision on suspension is made.

*Tukoroirangi Morgan
Acting Regional Manager*

[6] Dr Taylor was eventually dismissed as advised in a letter from Raukura's counsel dated 29 June 2006 ("the dismissal letter"). The advice communicates Raukura's essential conclusion that Dr Taylor had acted in conflict with Raukura's interests, actively undermining Raukura. This conclusion is founded on two principal allegations:-

- i) that Dr Taylor's statement to Mr McLean, Raukura's former chief executive officer that resignations would be forthcoming if Raukura declined an offer to purchase the Clinic was intended as a threat to pressure a sale; &

- ii) that Raukura was satisfied that Dr Taylor, after the proposal to purchase was declined, had been actively involved in taking steps to establish a competing clinic that would harm Raukura's interests and seriously undermine the Clinic.

[7] The dismissal letter concluded as follows:-

While my client is satisfied that Dr Taylor's actions are in conflict with the interest of Raukura, in fact actively undermining his employer, nevertheless consideration has been given to the feasibility or otherwise of the circumstances in which his employment could be continued at the clinic. However, Dr Taylor's responses during this process have been quite antagonistic towards Raukura and its management, there has been no suggestion at any time that this might change or even abate. If there was genuinely scope for a complementary practice from my client's point of view these discussions would have been undertaken in an open, constructive and non-threatening manner. My client believes that too much harm has been done to the working relationship by the activities of Dr Taylor, his hostility towards members of Raukura apparent at our meeting. Accordingly, Raukura has made a decision to terminate Dr Taylor's employment, effective as at today's date.

A justifiable dismissal?

[8] It is not disputed that Dr Taylor was dismissed. The question is whether that dismissal was justifiable.

The allegation of intended threat

[9] In Mr Morgan's letter dated 6 June 2006, Raukura stated this allegation against Dr Taylor:-

1 That you gave an ultimatum and/or threat to Wayne McLean at the time of the proposal to purchase Trust Health that yourself and other staff would resign if the proposal was not accepted. I understand that you dispute this allegation, this is a matter that will have to be resolved through enquiries.

[10] On or about 11 March 2006, Dr Taylor learned that his colleague Dr Tana Fishman had resigned. Another colleague Dr Bruce Arroll ("Dr Arroll") called a meeting with Raukura's management – chief executive officer Mr Wayne McLean ("Mr McLean") and clinical services manager Mr Winston Maniapoto ("Mr Maniapoto"). The employee doctors had concerns about Raukura's management and considered the workplace dangerous.

[11] Later that same day Dr Taylor spoke with Mr McLean regarding the possibility of third parties purchasing the Clinic. Mr McLean advised that he was open to that possibility. I find that Dr Taylor did not then disclose his own personal connection with a third party. He was acting for himself and other of his colleague doctors employed by Raukura at the Clinic. Dr Taylor's intention was to purchase the clinic with his colleagues, under a trust that Dr Taylor had established

as settler and trustee in 2002 known as the *Community Wellness Foundation Charitable Trust* ("the Foundation").

[12] Dr Taylor subsequently followed up his conversation with Mr McLean by email and advised that he had "*some parties who were seriously interested in purchasing the Trust Health Clinic as a going concern*". He requested that Mr McLean give an indication of Raukura's interest in the possibility. He wrote:-

*Further to our discussion last Thursday regarding Trust Health. I have some seriously interested parties who are interested in purchasing the Trust Health Clinic business as a going concern. I understand that there are several caveats to Trust Health especially in regards to Charitable Status, Community focused, Not for profit etc. I am sure that these can be addressed once you can give an indication of Raukura's interest in this issue. Off top of my head I would guesstimate a purchase value of around \$85,000 – 100,000.00. Hope to hear from you soon
Dr Tane A Taylor*

[13] Mr McLean responded to Dr Taylor by email dated 16 March 2006, confirming that he was open to ideas. He raised the issue of the value of goodwill and further email communication followed on that point. He wrote:-

*Tane
I'm open to ideas. The main one with respect to Raukura's interest in Trust Health is the value of the future and if we let Trust Health go would we retrieve the lost client numbers.
Wayne*

[14] Dr Taylor replied on the same date and wrote:-

Hi Wayne, I'm not sure if I fully understand what you are asking for, do you mean "goodwill"?
Tane

[15] Mr McLean responded the same day and wrote:

*Tane
Partly goodwill obviously. But I'm also thinking internally for Raukura. Losing 5000 patients has greater financial implications long term*

[16] The following day on 17 March 2006 Dr Taylor replied to Mr McLean by email. He wrote:-

*Wayne,
It appears to me that we should consider Raukura's interests in conjunction with the people of Manurewa interests. Until recently Trust Health has been providing a high quality service to their patients. This high quality is partly due to the teaching component that we provide. With*

the pending departure of Tana this program will cease, and very likely others will follow. The Trust Health issues are not new they have been on the table for at least two years- and frankly will remain there. The working environment is very volatile and unsafe. From my own observations I wouldn't be surprised if Trust Health is financially non-viable or very close to it. Any down grading would make the situation worse – this has currently happened with afterhours. If this trend continues the value of this business will significantly diminish. I would appreciate your guidance on how to ensure Raukura's best interests are protected. I believe there is an opportunity to consolidate what we have and continue to provide this high quality service to our people. As you will appreciate the timing is very important. I would hope to have this sorted prior to any significant staff exodus.

[17] Word of the discussions apparently spread beyond Dr Taylor and Mr McLean. Mr McLean wrote to Dr Taylor late on 17 March 2006:-

Tane

I received a call from Winston Maniapoto this afternoon to say that he had received a call from a staff member at Health Trust who overheard details of korero regarding a sale of Trust Health- I did not ask from him details of who were involved in the discussions. Suffice to say whilst I'm open to ideas, I am not pleased to be getting this kind of feedback thru the kumara vine.

[18] Dr Taylor travelled overseas and when he returned he met again with Mr McLean to continue the discussions they had been having. He told Mr McLean that he thought there was an opportunity for Raukura to spread its risk by releasing non-profit services and capitalising on the initial investment made when Raukura took over the Clinic. Dr Taylor suggested that the parties would need to undergo a due diligence process and once this was completed they could sit down and ensure that both parties "[came] out on the right side".

[19] When he had not heard from Mr McLean, Dr Taylor emailed him on or about 19 April 2006. Dr Taylor asked Mr McLean to contact him to make an appointment to meet. He followed the matter up with a further email on 1 May 2006 explaining that he had been trying to contact Mr McLean for the previous two weeks to catch up regarding long term plans for the Clinic. Dr Taylor repeated that he had people interested and that he was sure that Raukura would benefit from any deal.

[20] Throughout May 2006, Dr Taylor had various discussions with Mr McLean regarding the details of any deal including the possibility of franchising and how it would work in practice.

[21] On 11 May 2006, Dr Taylor met with Mr McLean at the Botanical Gardens Café because Mr McLean had requested they meet at a neutral venue to discuss matters further. During their discussions, Mr McLean said he could see an opportunity for Raukura to exit gracefully, get some

money back and still maintain a presence in Manurewa. He requested that Dr Taylor make a formal proposal. Dr Taylor says that his understanding from this was that Raukura had accepted a proposal needed to be made and that Raukura as it was then operating, was not fulfilling its obligations to the community. Dr Taylor felt that he and Mr McLean were in agreement as to what needed to happen. I find that Dr Taylor told Mr McLean that if the proposal was not accepted there would be resignations forthcoming. I find that he also told Mr McLean that both he and Dr Arroll would resign. I find that Mr McLean told Dr Taylor that he looked forward to receiving Dr Taylor's resignation.

[22] Later that day, Dr Taylor sent Mr McLean an outline of intent attaching a letter from the Foundation. The proposal was signed by Dr Taylor on the Foundation's behalf and referred to "our" proposal. The proposal put to Raukura specifically included a term that the Foundation would undertake to work collaboratively with Raukura in respect to DSM (Mobile Nursing Services) and community worker based programmes.

[23] On 12 May 2006 Mr McLean responded to Dr Taylor advising that the proposal was not accepted. Mr McLean wrote:-

Tena koe e Tane

Thank you for the outline and proposal offer relating to Health Trust, Manurewa

Your proposal was considered by the Finance Committee of Raukura at its meeting this afternoon and the following resolution asked to be conveyed to you. "Raukura acknowledges receipt of the proposal and advises that it wishes to pursue the long term interests it has in the Health Trust facility and its service base according to the hauora kaupapa vested in the organisation. We recognise the potential risk inherent in Raukura maintaining a physical association with Manurewa and the possible tensions associated with other service developments in the area."

We wish your party well in its planning for future services in Manurewa

Wayne McLean

Chief Executive

[24] Dr Taylor replied by email of 16 May 2006:-

Tena koe Wayne,

Thank you for your prompt response. Although disappointed in the outcome we acknowledge Raukura's position on this matter. We thank you for considering our offer, and wish to reiterate our commitment to Trust Health Raukura for the duration. As always professionalism must prevail.

Noho ora mai

Tane A Taylor

[25] Two weeks later Raukura's Acting Regional Manager Mr Tukoroirangi Morgan ("Mr Morgan") became involved. He wrote to Dr Taylor in a letter dated 31 May 2006 hand delivered to Dr Taylor as follows:-

Further to your proposal submitted to Wayne McLean to purchase the Trust Health Care in Manurewa, I confirm the Board committee's decision to decline this proposal. I understand from Wayne McLean that at the time of submitting the proposal, you indicated that if the Board did not accept the proposal that you and Dr Bruce Arrol would resign. I assume that this statement was made acknowledging that the activities of yourself and other staff in looking at establishing a clinic in Manurewa may well be in conflict with the interests of Raukura Hauora o Tainui. The purpose of Community Wellness Foundation Charitable Trust appears to have been established to provide services which mirror closely those of Raukura and Trust Health Care. It is also understood that you have been making enquiries to establish a practice within a proximity to the Trust's health clinic that could put our operation at risk. At this stage I seek your early response as to your intentions regarding your previous indication of resignation, I ask that you respond by the end of this week. Once your response have been given as to your intentions, then we can discuss how best to proceed once this information is known.

The emphasis is added.

[26] Dr Taylor replied to Mr Morgan in an email of 31 May 2006 as follows:-

Tena koe Tuku

In response to your letter dated 31 May 2006 delivered by hand by W Maniapoto and B Martin I make the following comments:

During my negotiations with Wayne McLean regarding the proposal to purchase Trust Health I confirm that there was no ultimatum/threat or such like that either Dr Bruce Arrol and/or myself will resign.

You may or may not be aware that I have already have an established GP practice in Manurewa, this was established before Raukura took over Trust Health.

Currently I have no firm plans of my future employment, suffice to say that I will abide to my professional responsibilities as outlined in my Contract Agreement.

Tane A Taylor

[27] Mr Morgan wrote his letter dated 6 June 2006 delivered to Dr Taylor on 2 June 2006 alleging an ultimatum and/or threat by Dr Taylor. When Dr Taylor was given the letter by Mr Maniapoto and Mr Martin he denied that he had told Mr McLean on 11 May 2006 that he personally would resign.

[28] Dr Taylor explains to the Authority that his discussions with Mr McLean had got past the principles of change and had moved to more detailed issues such as retention of current staff and they also discussed possible ongoing co-operation with Raukura. He says that during the whole

process he was under the impression that he and Mr McLean were exploring and/or negotiating a way forward and that Raukura was comfortable with that process.

[29] He denies raising staff resignations as a “threat” to Raukura. He explains that he advised Mr McLean to consider the impact the possible exiting of existing staff could have had on Raukura. He says he knew at that time that there were a number of doctors who were unhappy and were intending leaving. He explains that it was his view that it would have been unfair and inappropriate not to include this issue when discussing the proposed purchase and he was specifically authorised by the doctors concerned to disclose their intentions. He says it was a fact that a number of doctors were unhappy with how Raukura was operating and were on the verge of resigning and that Raukura needed to consider this reality. He says this information was not put forward in order to threaten or intimidate. He also says that Mr McLean at the time gave no indication he regarded those statements as threats. He says too that when Mr Morgan referred to the matter in his letter of 31 May, he immediately took steps to reassure Mr Morgan that this was not the case.

[30] Dr Taylor further points out that he had already referred to the possibility of a “*mass exodus*” in his email to Mr McLean on 17 March 2006 and that Mr McLean did not pursue that advice, question or challenge it in any way. Further, he points out he suggested that Raukura would also need to consider the possible impact on it of the establishment of another provider in the area. He says he did not raise these issues as a threat, but merely to highlight the reality of the situation. He tells the Authority Mr McLean never made any reference to a potential conflict of interest or even that by his discussions with him there may be an issue. He says Mr McLean was fully engaged in the process.

[31] Dr Taylor in his reply to Mr Morgan of 31 May, did not deny that he told Mr McLean he personally would resign. He denies only a threat or ultimatum and he reconfirms to Mr Morgan his professional obligations.

[32] There was a disciplinary meeting held on 22 June 2006 at Dr Taylor's lawyers' offices. Present were Dr Taylor, Ms Swarbrick, Mr Harrison, Mr Morgan and Raukura's human resources manager Mr Bill Martin (“Mr Martin”).

[33] When the allegation was put to him, Dr Taylor deposes that he had explained that he had been authorised by a number of doctors to disclose their intentions and further, that he never expressly

said that he personally would resign. He deposes he did not do so as a threat or an ultimatum but rather was disclosing a very high probability whether or not the proposal was accepted. Ms Swarbrick pointed out that a statement of that type, even if it was construed as a threat, did not amount to a breach of Dr Taylor's obligations as an employee. She also pointed out that the issue had been raised on 31 May for the first time and dealt with at the time in both Dr Taylor's response to the letter from Mr Morgan and Dr Taylor's email response to Mr Morgan. Mr Harrison responded that it was being regarded as a breach of Dr Taylor's obligation of fidelity.

[34] Mr Morgan says that at this meeting Dr Taylor denied threatening resignations as part of the proposal and also distanced himself from being one of the staff members who would resign. He recalls Dr Taylor stated he had advised Mr McLean that he was "*authorised by a group to indicate that they are prepared to resign*". Mr Morgan says that when he was asked to identify the group, Dr Taylor gave only the name of Dr Bruce Arroll. Mr Morgan says he did not accept that Dr Arroll was a "group". He says that he felt Dr Taylor was fudging the issue and he was backtracking from what had been intended as a threat. He felt that either Dr Taylor was not being forthcoming about the "group" who had given him the authorisation to resign or he had exaggerated the number of resignations to Mr McLean. Mr Morgan says he preferred the account given by Mr McLean that Mr McLean had been advised by Dr Taylor that in the event that Raukura declined the offer, "*... there would be resignations forthcoming*". Resignations plural, (whether real or overstated) made as a threat to Raukura in order to influence the decision of Raukura's Board when considering the Foundation's purchase proposal. He says that while the Board declined the proposal, there was the risk that this decision could collapse the practice if Dr Taylor's threat eventuated and resignations were forthcoming.

[35] Dr Taylor says that he gave the names of Dr Arroll and Dr Tana Fishman. He says the lawyers then embarked on a discussion and he was not asked again. He suggests he was interrupted before he could answer fully.

[36] The allegation in Mr Morgan's letter for Dr Taylor to answer was this:-

- 1 *That you gave an ultimatum and/or threat to Wayne McLean at the time of the proposal to purchase Trust Health that yourself and other staff would resign if the proposal was not accepted. I understand that you dispute this allegation, this is a matter that will have to be resolved through enquiries.*

[37] "Ultimatum" or "threat" are words with connotations. They connote some ulterior or improper purpose. A threat is a declaration of an intention or determination to inflict penalty, punishment, injury, etc., in retaliation for, or conditionally upon, some action or course.

[38] When Mr Morgan first wrote to Dr Taylor on 31 May 2006 he was not concerned with a "threat" and neither that word nor "ultimatum" was used. He wrote *"you indicated that if the Board did not accept the proposal that you and Dr Bruce Arroll would resign"*. The purpose of his advice was to seek *"your early response as to your intentions regarding your previous indication of resignation."* He merely wanted to know whether Dr Taylor would resign. He conveys no concern whatsoever concerning any threat or ultimatum. I say more about this advice later.

[39] Nor do the Minutes of Raukura's finance committee of the meeting held on 12 May 2006 refer to any threat or ultimatum. The Minutes record *"Tane advised Wayne that resignations were forthcoming if proposal rejected."* One of the conclusions of the committee was to note *"risk of losing staff should the proposal be declined."* But there is no record of any discussion of a threat or ultimatum or any concern about Dr Taylor's conduct. While Mr Morgan tells the Authority Mr McLean presented the situation to the Board of a threat by Dr Taylor, that is not borne out by the Minutes of the meeting.

[40] Nor is it borne out from Mr McLean's contemporaneous correspondence. Mr McLean's letter to Dr Taylor of that same date, does not convey any record of a threat or ultimatum by Dr Taylor to Mr McLean, or of a perception by Mr McLean of the same. Quite inconsistent with Mr McLean being threatened, he writes *"we wish your party well in its planning for future services in Manurewa."*

[41] While Mr Morgan notified the allegation in his advice of 6 June 2006, it was not until a letter of 17 June 2006 that Mr McLean formally recorded his version of events after an apparent request from Mr Martin for him to provide the same. Raukura had put the formal allegation to Dr Taylor to respond to before it had formally heard from Mr McLean. As well, Mr McLean's statement of 17 June 2006 was not, I find, put to Dr Taylor and his lawyers until 22 June 2006. The delay is not satisfactorily explained.

[42] Nowhere in Mr McLean's advice is there express use of the words "threat" or "ultimatum". Far from believing he had been threatened or had an ultimatum put to him, Mr McLean confirmed

to Raukura there was *nothing that caused him concern* about his discussions with Dr Taylor. Mr McLean does not note this allegation as an "Issue". This is the material aspects of his advice:-

*I had no problem with Dr Taylor's conduct in approaching me to ascertain whether Raukura would consider receiving and indeed giving consideration to a proposal to purchase the facility as an ongoing business. Other staff have approached me over the years about different aspects of Raukura's service and these have progressed through to a conclusion. I received a phone call from Winston Manaipoto Clinic Services Manager on March 17 2006 advising that a staff member had overheard discussions regarding the sale of Trust Health. This was conveyed to Dr Taylor by email on the same afternoon. **Apart from this issue there was nothing that would have caused me concern.***

I met with Dr Taylor at the Botanical Gardens, Manurewa on Thursday May 11 at 1pm at which a written proposal was handed to me. In discussion with Dr Taylor I learnt the following:

- 1) *Dr Taylor was authorised to represent and speak for a group which was making the offer; that group being the Community Well Health Trust.*
- 2) *In offering to purchase the facility the group was committed to employing existing staff at Trust Health with the exception of one; that person being Poojah.*
- 3) *An urgent decision was requested from Raukura as planning had advanced on the acquisition of an alternative facility located in Manurewa and that they were committed to taking up the option on Friday 12 May 2006 in the event that Raukura declined the offer.*
- 4) *In the event that Raukura declined the offer there would be resignations forthcoming.*

(emphasis added)

[43] So I conclude, the only person who used the words "threat" or "ultimatum" was Dr Taylor himself in his email of 31 May 2006 to Mr Morgan where he confirmed *"that there was no ultimatum/threat or such like that either Dr Bruce Arrol and/or myself will resign"*. Dr Taylor advised he had no firm plans for his future employment and agreed to abide by his professional responsibilities.

[44] Raukura's counsel advised Raukura's tentative finding by letter dated 23 June 2006. On this present allegation the tentative decision was this:-

Dr Taylor advised Wayne McLean at the time of presenting the proposal to purchase the Manurewa Trust Health Care clinic that if the proposal was declined, there would be resignations forthcoming. This was a threat to the employer that if the offer to purchase was not accepted resignations would follow that would harm Raukura and the clinic, thereby pressuring a decision to sell.

[45] But the real issue for Raukura as articulated by its counsel in the meeting held on 22 June 2006 relates to the duty of fidelity. On 29 June 2006 the essential issue was put by the lawyer in these terms:-

The circumstances in which Dr Taylor presented the proposal to purchase Raukura is at odds with his obligation to act in the best interests of his employer. While it is accepted that he is entitled to put a proposal to purchase the clinic, the accompanying threat that there would be resignations forthcoming if the offer was not accepted is clearly adverse to Raukura's interests.

[46] The lawyer submits that the purpose of advising Mr McLean that there would be resignations if the offer was not accepted could only be for one reason - to pressure a sale. It is submitted there is no other reason why this statement would have been made at this time and that Dr Taylor was letting it be known that if the offer was not accepted "*I am authorised to advise that staff will resign*". It is submitted that this statement actually means "*if you do not sell, you will not be left with much of a practice, if one at all.*" It is next submitted, I suggest acknowledging that Mr McLean did not have any concern, that nonetheless it was certainly open to Raukura to see the statement in this light. It is said that the statement in the circumstances of what was found to also have been occurring at the time, that the suggested threat "*was being made good*". It is submitted that Dr Taylor's steps to set up a competing practice is sufficient in context to elevate what might have been an idle observation, to something more sinister. The submission I interpret is distilled to this - that a statement, as one of fact and that was unremarkable and caused no concern to the person to whom it was made, is to be converted to something more sinister because of what was otherwise being done by Dr Taylor as his preparatory steps to set up a competing practice.

[47] In the context of a open discussions of a commercial nature, the statement can be made as an idle observation, and also as a statement of act. That latter is more likely to be correct, given that I find that Mr McLean did not regard Dr Taylor's statement as a threat or ultimatum. His statement and advice thereafter are not consistent with his perception of a threat. Indeed he tells the Authority he did not perceive any threat and says he was not concerned about the issue.

[48] As well, in answer to the submission, there was no evidence available to Raukura of other preparatory steps being taken by Dr Taylor to set up a competing practice at the time the statement was made to Mr McLean on 11 May 2006. And in what capacity did Dr Taylor have the discussions with Mr McLean? In his statement of 17 June 2006 in relation to his discussion with Dr Taylor on 11 May 2006, Mr McLean states this issue:-

a) I am concerned to know the extent of Dr Taylor's involvement particularly given his authority to make the proposal and speak on behalf of the party(s) and did this constitute a conflict of his employment obligations to Raukura.

[49] This "issue" was not a concern for Mr McLean before 17 June 2006 although it subsequently and now of course, turns out to be the central concern for Raukura. I do not accept it was an issue or that Dr Taylor's involvement was unknown to Mr McLean. This is clear because of what he communicated of Dr Taylor's and Dr Arroll's involvement to Mr Morgan which formed the basis of Mr Morgan's advice of 31 May 2006.

[50] Mr McLean, the Chief Executive and the person to whom Dr Taylor reported to, did not raise any concern about this issue at any time as he conducted discussions with Dr Taylor, discussions which commenced in March 2006 and continued through to May 2006. Quite the contrary, he says he had "no problem" with Dr Taylor's conduct in approaching him for these discussions. He never asked or enquired as to who made up the interested party. He contradicts his own issue because when I suggested to him that he knew of Dr Taylor's personal involvement as the interested party he said:

I believed there was an involvement as early as March at which time the notion of whether Raukura and in particular at that time myself, would contemplate considering a proposal.

So I find that Mr McLean knew of Dr Taylor's personal involvement. I further find that Mr McLean told Dr Taylor "*I look forward to receiving your resignation*".

[51] When I suggested to Mr McLean that he had no difficulty with the discussions with Dr Taylor given Dr Taylor's personal involvement he said:-

None from March to 12 May, we had conducted a due diligence type process and this proposal was nothing out of the ordinary. We had done it in respect of other proposals. The initial approach was undertaken through to May. I was comfortable with the proposal and any conduct that took place during that period of time. Once the indication had been given that we would be prepared to consider a proposal there is a certain amount of due diligence and I was comfortable with that. I had no problem with that or allowing Tane to be a part of that process.

[52] In answer to Ms Swarbrick's questions, Mr McLean confirmed that he understood that Raukura's Clinic was not the only option the interested party was looking at. He also confirmed he had informed Mr Morgan of his discussions with Dr Taylor in March 2006 and that the Raukura's board chair Mr Timi Maipi ("Mr Maipi") had also been briefed. He confirmed too that he

understood that in addition to Dr Taylor, other clinicians were involved and further, that he conveyed this situation to Mr Maipi.

[53] So if the issue is about the duty of fidelity, I conclude that Raukura acquiesced and through Mr McLean conducted commercial negotiations with Dr Taylor in an open and frank manner without any objection whatsoever. I do not accept that Raukura can object now to what Mr McLean clearly had no difficulty with and that senior management were aware of. I do not know whether Raukura had the information from McLean I have quoted above, but it should have. If it did, it ought not have persisted with the allegation.

[54] The discussions between Dr Taylor and Mr McLean related to a commercial purchase. The parties did not engage in them as an incident of the employment relationship. They are not performing the employment contract when they are negotiating a sale and purchase of the employer's operation. That discussion is entirely outside of the employment. In entering into them and in permitting them to continue, Raukura was not acting as employer and Dr Taylor was not carrying out his employment duties. These were parties conducting commercial negotiations. It cannot be said that Dr Taylor was furthering his employer's interests in offering to purchase its business. He was pursuing his own interests and that was known to Mr McLean and therefore Raukura, and no objection was taken to it.

[55] The statement of forthcoming resignations was made by a prospective purchaser to a prospective vendor. The "threat" was not made to an employer, but rather, to a vendor. It was capable only of being a threat to the vendor because only the vendor was at peril of suffering any detriment. Accordingly, as Dr Taylor was not acting as an employee when he conducted negotiations with Mr McLean, there is no place for the implication of any duty of fidelity in such discussions.

[56] In the Authority's assessment, having regard to the particular circumstances, Dr Taylor did not give an ultimatum and/or threat to Wayne McLean that he and other staff would resign if the proposal was not accepted. No threat was perceived and no pressure exerted. Nor is the statement converted to a threat in the context of the discussions then taking place, in contravention of Dr Taylor's duty of fidelity because there was no duty of fidelity in discussions concerning a commercial transaction. Those discussions were not an incident of the employment relationship.

[57] It is also my view that Mr Morgan's advice of 31 May 2006 does not attribute any improper threat or ultimatum on Dr Taylor's part. Mr Morgan instead, attributes an honourable intention to Dr Taylor (and Dr Arroll) in the sense that Dr Taylor recognised that his resignation would be appropriate if the proposal was declined. Mr Morgan communicates his assumption that resignation was acknowledgement by Dr Taylor and Dr Arroll of a potential conflict with their continued employment and that resignation was appropriate in that regard. He does not suggest in anyway there had been improper conduct on Dr Taylor's part (or Dr Arroll's).

[58] But Dr Taylor in his email of 31 May 2006 did not resign and instead confirmed his professional responsibilities. That was probably not the result Mr Morgan expected. It is my assessment that thereafter, Mr Morgan and Raukura, sought to characterise Dr Taylor's advice of resignation in quite a different way from the suggested honourable intention he had "assumed" initially. Two days later on 2 June 2006, in the letter dated 6 June 2006, the assumption of an honourable intention was converted to an allegation instead of something very improper in the form of a threat/ultimatum.

The allegation of establishing a competing clinic that would harm Raukura's interests

[59] This was the second ground of dismissal Raukura relied on. It was first articulated as allegations in Mr Morgan's letter dated 6 June 2006 as two distinct allegations as follows:-

2 Reports that you have been making enquiries to establish and alternative practice that is possibly harmful to the interests of Raukura and Trust Health.

3 Your involvement with the establishment of the Community Wellness Foundation Charitable Trust may also conflict with the interests of Raukura O Hauora Tainui.

[60] The allegation is the second issue Mr McLean refers to in his report of 17 June 2006 as follows:-

b) On May 12, Raukura declined the offer to purchase. On May 16, Dr Taylor acknowledged our letter and at this point all matters in so far as Dr Taylor's involvement in the proposal (from an employment perspective) was at an end. Since then I have had conversations with Neil Woodhams, CEO Te Kupenga O Hoturoa PHO with respect to approaches made to him by Dr Taylor for the Community Health Trust to join the PHO, seen a letter signed by Alan Moffat of the Counties Manukau DHB addressed to Dr Taylor at our Raukura address in Otahuhu with respect to Community Health Trust business and been briefed by Bernard Te Paa of Counties Manukau DHB about discussions with Dr Taylor, again about the business of the Community Health Trust.

[61] After the proposal to purchase was rejected by Raukura, Dr Taylor contacted Mr Alan Moffitt Director Primary Care of Counties Manukau District Health Board ("Mr Moffitt") on Saturday 13 May 2006 to ascertain what steps needed to be undertaken to set up a new service provider following Raukura's rejection of the proposed purchase. He followed up that discussion by a letter dated Sunday 14 May 2006 materially as follows:-

*The Community Wellness Foundation Charitable Trust
MBA 328
63 Remuera Road, Newmarket
Auckland, 1031*

May 14th 2006

Tena koe Allan,

I am writing to you to confirm our yesterday late afternoon phone conversation.

...

As part of the implementation of this kaupapa we made a formal offer to Raukura Hauora O Tainui for the purchase of their General Practice Trust Health Services in Manurewa, unfortunately they respectfully declined our offer citing their intent to continue to have a long term interest in Trust Health. Without going into the specific details that led our team to make such a bold move suffice to say that we are convinced that we can provide a much better service to the people of Manurewa and continue to enhance the Teaching Program that we currently provide for our up coming doctors.

As you are aware Prof Arroll, Dr Fishman, Dr Nachiappan, NP Renouf, others and myself intend to continue to provide our services within the Manurewa areas. Our intent is to remain within TKOH PHO however, we are mindful that their Board of Trustees will make the ultimate decision. This mass shift of General Practitioners out of RHOT and possibly TKOH could cause significant instability for both organisations. We understand that RHOT is well aware of the potential risks associated with this move. We appreciate your supportive comments and wise advice.

Noho ora mai

Dr Tane A Taylor

[62] Dr Taylor wrote this letter dated Monday 15 May 2006 to Mr Neil Woodhams, the chief executive officer of Te Kupenga o Hoturoa, a primary health organisation:-

*The Community Wellness Foundation Charitable Trust
MBA 328
63 Remuera Road, Newmarket
Auckland, 1031*

May 15th 2006

...

Tena koe Neil,

Further to our previous discussions I am writing to you to formally seek approval to join your PHO. Approaching your organisation as our preferred choice was an unanimous decision by our team. The Community Wellness Foundation Charitable Trust is a kaupapa māori community based organization that has been established for the following purposes:

- a) *to provide financial aid for causes that work toward the alleviation of human suffering*
- b) *to provide financial aid for the development, establishment and support of a comprehensive, integrated wellness system*
- c) *to provide financial aid for initiatives that preserve and restore health*
- d) *to provide financial aid for research and development which are beneficial to the community*
- e) *to provide financial aid for initiatives that protects and restores the environment*
- f) *to provide financial aid for the education of the public and professionals in the area of personal and community wellness*
- g) *to provide financial aid for the promotion and education of indigenous rights' and values*
- h) *such other purposes as may from time to time be agreed or declared by deed by the Settler or the Trustee(s) provided that such other purposes are charitable purposes in New Zealand.*

This organisation is intending to establish a GP service in the township of Manurewa. Currently we will start with 4 FTE doctors with the expectation to increase to 6 FTE over a 12 month period.

Currently we are in negotiations with landlords to secure appropriate premises.

As you may be aware several of our doctors are currently practicing in Manurewa and have established a very good and credible reputation.

It is our understanding that this area remains under serviced as far as GP's are concerned.

We are modestly optimistic that the service will attract around 6 - 7000 ESU's within the first 12 months of operation.

As you would appreciate we will be starting this service from ground level hence your support is of great importance.

It is our intention to further develop a teaching/training program in conjunction with the School of Population Health University of Auckland.

At this point we would like to assure you our full cooperation to ensure that we maintain a beneficial, constructive but above all a professional relationship with your organisation and your providers.

Last but not least we hope to have further discussions with RHOT to see if there is anyway forward that the objectives and interest of both organisations can be accommodated in the spirit of serving our community.

Noho ora mai

Dr Tane A Taylor

[63] Dr Taylor tells the Authority this letter was written because in order to have capitation funding the Foundation required approval to join a primary health organisation. It wanted to join Te Kupenga o Hoturoa. Dr Taylor asks the Authority to note that the letter specifically refers to an express wish to discuss matters with Raukura to see if there was anyway forward that the objectives and interests of both organisations could be accommodated in the spirit serving their community.

[64] By letter dated 16 June 2006, Dr Taylor was provided with Mr Martin's record of a meeting he and Mr Maniapoto had had with Dr Taylor on 31 May 2006, a note of a discussion held with Dr Nasir on 9 June 2006, a letter from Allan Moffitt to Dr Taylor dated 16 May 2006, an email from Mr Woodhams to Mr Morgan of 14 June 2006 and an email from Dr Taylor to Mr Woodhams dated

15 May 2006. In the meeting on 22 June 2006 Dr Taylor was asked to respond to questions relating to this information.

[65] The email from Mr Woodhams to Mr Morgan dated 14 June 2006 stated materially:-

Kia ora Tuku

Attached is an email Tane Taylor sent to me on Tuesday 16 May. This follows a phone call he made to my cell phone the previous Sunday. I did not pick the call up but he left a message on my phone to the effect that he and some of the staff from Trust Health were intending to leave Raukura. They were setting up an alternative community trust and wanted to know if the new trust could join Te Kupenga O Hoturoa PHO.

I phoned him back on the Monday morning from my car on the way to work. In that call he explained that the new trust had acquired premises just down the road in Manurewa and he needed a decision from me urgently as they were going to have to make a commitment to a lease with the landlord.

This approach was not a surprise to me as the previous Friday I had been in Hamilton at a meeting with Wayne McLean. He advised me that RHOT was in possession of an offer from Tane Taylor to buy the Trust Health business. He said that the offer which had been received the previous night had a deadline for acceptance of 2.00pm that day and the threat that if it was not accepted it would result in the resignation of most of the key staff of the clinic.

After discussing the approach from Tane Taylor with several of my trustees and having had various other discussions with senior DHB managers, the General Manager of TaPasefika PHO who Dr Taylor had also approached to join, and Tane Taylor including several in work hours, I emailed him back on 25 May indicating that I would not be recommending to my Trustees that they accept the application to join.

Naku noa

Neil Woodhams

Tumuaki/General Manager

[66] At the meeting held on 22 June 2006, Mr Harrison stated that the two notified allegations were interrelated and would be dealt with that way. He said that the issue was that since Raukura had declined the proposal to purchase, Dr Taylor had approached Mr Woodhams in breach of his duty of fidelity. Mr Harrison further stated it was alleged that Dr Taylor had approached and solicited employees.

[67] Dr Taylor began by explaining that the primary intention was to ensure Raukura's best interests. He assured Raukura that at no time previously or currently did he have any intent to undermine its work or services. He said that the proposal followed two years of total chaos at Raukura including poor management, unhappy staff and declining standards of care. He said that Raukura's services had shrunk (reduced weekend and after hours service and reduced number of patients) in a high needs area. He emphasised that it was important work within the area, and that nothing which had been done (by him or the Foundation) was in conflict with the kaupapa of Raukura. He said that unfortunately Raukura had shortcomings as a teaching facility for

undergraduates, and that anything which could be done to prop that up and at the same time retain the workforce was beneficial to it. He said that there was a joint group - not just his own proposal. He sought to assure Raukura that at no time had he made any comments or communications with the intent to undermine Raukura and that the intention was always to enhance Raukura's services.

[68] Mr Morgan tells the Authority that Raukura acknowledges that there were administrative issues that required resolution. However, he says Dr Taylor and Dr Arroll had been overstating the issues.

[69] Dr Taylor denied that he had solicited staff, and said this was clear from the documentation provided. He rejected the statements recorded by Mr Maniapoto regarding Dr Nasir. He said that he had never approached Dr Nasir and that Dr Nasir had been part of the group who put the proposal in. He rejected Staff Nurse Sahol's statement as recorded by Mr Maniapoto. He said he did not know how Dr Nasir had become part of the group. He confirmed that Dr Nasir had pulled out after 15 May 2006 and that he did not know if Dr Nasir intended to work as a GP or simply be an investor. He also confirmed there were non GPs who were investors. Ultimately however, Raukura did not pursue any allegation against Dr Taylor concerning Dr Nasir.

[70] Dr Taylor did not deny Mr Wooham's information to Raukura of a telephone discussion in which Dr Taylor told Mr Woodhams *"he (Dr Taylor) and some of the staff from Trust Health were intending to leave Raukura"*. When he was asked about the 14 June email from Mr Woodhams to Mr Morgan, Dr Taylor confirmed that the first paragraph was accurate. When he was asked who the people were who were leaving, I find that he responded Dr Bruce Arroll. In relation to the second paragraph of Mr Woodhams email to Mr Morgan, Dr Taylor denied that premises had been acquired and said they still had not but explained the premises referred to were ASB premises. He confirmed he had expressed urgency to Mr Woodhams because for the group to be accepted as a business it had to be part of a PHO. He said the district health board's preference was that the group was part of Te Kupenga, but if not, then a smaller PHO. Dr Taylor explained that Mr Woodhams had wanted the group to support a Maori or Pacific provider. He said Mr Woodhams had asked him if the group had approached Ta Pasifika and he had confirmed to Mr Woodhams that it had.

[71] Dr Taylor says he was not asked about the letter he wrote to Mr Moffitt. That is correct.

[72] When he was asked who the four FTE doctors were referred to in his letter of 15 May to Mr Woodhams, I find that he said that he did not know, and they would be "whoever came along" and that this was a guess. He said that he had no idea who would be working there, and pointed out that Manurewa was a high needs area especially with the shrinking of the services provided.

[73] When he was asked if he had any discussions in work hours, Dr Taylor said that he had interpreted Mr Woodhams' note to refer to discussions with Ta Pasifika during working hours, but that he had not. He said that the approaches he had made to Mr Woodhams had been out of work hours, but if Mr Woodhams had called back in response to a message during work hours he may have spoken to Mr Woodhams during working hours.

[74] At the end of the meeting on 22 June 2006, Dr Taylor was advised that Raukura would make further enquiries of Dr Nasir and Mr Woodhams as to the timing of discussions he had had with Dr Taylor who did not agree that these were during work time.

[75] The results of the further enquiries and Raukura's tentative findings were presented to Dr Taylor's lawyers by Raukura's counsel in a letter dated 23 June 2006.

[76] Ms Swarbrick responded by letter dated 26 June 2006. Counsel remarked that further particulars were required before a full response could be made. However, it was acknowledged that Raukura's allegation appeared to be that it had formed the view that Dr Taylor had approached and arranged for staff and four full-time doctors to join a breakaway practice. Ms Swarbrick pointed out that Trust Health was working only at 2.5 doctors. She repeated Dr Taylor's explanation that 4 was simply the number of doctors expected to be at the clinic. She repeated his statement that the doctors could be anyone from within the Manurewa area, or even beyond and that Dr Taylor did not know whether members of the group intended to actually undertake clinical work in any new practice or if so the proportion of their work time. Ms Swarbrick also stated that she and Dr Taylor were unaware of any information available to support the allegation or the tentative finding and any such information had not been provided to them.

[77] On the allegation of intention to compete and cause harm to Raukura, Ms Swarbrick denied the intention, but repeated that Dr Taylor's intention was to provide a better service to the people of

Manurewa. Counsel stated that the Community Wellness Foundation comprises a group of people who operate on a collective decision-making basis and that Dr Taylor was the spokesman. Ms

Swarbrick also reminded Mr Harrison that Raukura had been fully aware of the possibility of the Community Wellness Foundation setting up a trust as this is alluded to in Mr McLean's letter to Dr Taylor of 12 May and his well wishes in its endeavours.

[78] Raukura's Mr Maniapoto made further enquiries of Dr Nasir. Mr Morgan subsequently accepted Dr Taylor's responses that this had not occurred after the purchase offer was declined.

[79] Mr Morgan concluded that he did not accept Dr Taylor's answers or that such a breakaway practice could be anything other than harmful to Raukura's interests. He considered Dr Taylor had not been open about his activities or the involvement of others in the new enterprise. Mr Morgan was satisfied that Dr Taylor had been taking steps to establish a competing practice without notifying Raukura, that he had been involved in this process both inside and outside of work time and that there were other clinic doctors and staff intending to join the breakaway practice in some capacity. This being Mr Morgan's assessment, he considered there was a very real potential that the impact on Trust Health Clinic could be fatal. Mr Morgan considered that Dr Taylor's failure to fully disclose his interest and the involvement of other staff only served to reinforce the view that all trust and confidence had been lost in him and, that Dr Taylor no longer had trust in Raukura. Raukura says that Dr Taylor was given every opportunity to disclose the situation, the other staff who would be joining him and in what capacity, but that this did not occur. It found unconvincing his statement that 4 FTE doctors was a guess. It considered he was vague about investors, he was not forthcoming with answers and at times he was evasive.

[80] Nor did Mr Morgan accept Dr Taylor's explanations as to the effect of the breakaway practice. He considered Dr Taylor's claim that setting up a practice within 30 yards of Trust Health Care clinic would not risk the loss of patients to the practice, especially those who had seen Dr Taylor in the past, was not logical. Mr Morgan considered that the doctors, nurse and others referred to in Dr Taylor's correspondence if they were to set up down the road would in all likelihood put the clinic out of business. He regarded it entirely inconceivable for Dr Taylor to suggest that a practice established across the road would not impact negatively on Raukura. Mr Morgan also found it difficult to accept Dr Taylor's suggestion that they could work through issues of patient loss and look for a "win-win" situation given all the steps taken to date had been behind our backs and without any direct approach or advice from Dr Taylor. Mr Morgan asks, if Dr Taylor truly wanted a "win-win" situation, why were his actions so clandestine.

[81] In relation to the Woodhams letter, Raukura concluded that Dr Taylor was not forthcoming in that he knew full well who was involved and he failed to disclose their identities. It concluded his answers were inconsistent with the letter he wrote to Mr Woodhams as these references demonstrate:-

*In the first paragraph "our preferred choice" which was a "unanimous decision by our team";
&
"... We will start with 4 FTE doctors with the expectation to increase to 6 FTE".
"As you may be aware several of our doctors are currently practising in Manurewa..."*

[82] Dr Taylor had written to Mr Moffitt, by letter dated 14 May 2006 (a Sunday). Mr Moffitt replied by this letter dated 16 May 2006 (a Tuesday):-

*Tane Taylor
RHOT
PO Box 22640
Otahuhu*

Dear Tane

Thank you for your letter dated 14th May indicating your wish to split from your existing provider and start a new clinic.

I have discussed this matter with Bernard Te Paa, General Manager Maori Health, and we believe that the best scenario is for you to reconsider breaking away from Raukura Hauora o Tainui as a separate provider.

We believe that maintaining the relationship within RHOT is in the best interests of yourselves and the community you serve and that the differences between you can be resolved.

The DHB does not wish to see further disintegration of service provision and is strongly supportive of existing Maori providers. There is the question whether your Trust will qualify for Maori Provider status and this is an issue that you will have to take up with Bernard and the Tainui MAPO.

Failing reconciliation, we wish you well in your future endeavour but point out that funding would be dependent on entering into a relationship with an existing Primary Health Organisation.

*Yours sincerely
Allan Moffitt*

[83] This letter was intercepted by Mr Maniapoto at Raukura's GP clinic and given to Mr McLean around the time of its date - 17 May or 18 May 2006. Raukura concluded that it made clear Dr Taylor's intention to create a new clinic. It concluded too, that Mr Moffitt's expressed concern at Dr Taylor's wish to split from his existing provider causing disintegration of service, was contact that was harmful in itself to Raukura's interests and reflected badly on it.

[84] Raukura also concluded that Dr Taylor had initiated contact with Mr Woodhams during worktime, contrary to Dr Taylor's denials. Raukura found that Dr Taylor had contacted Mr Woodhams as follows:-

On 16 May Dr Taylor called Mr Woodhams at 11.45 am. Mr Woodhams had called Dr Taylor at 2.40 pm

On 24 May Mr Woodhams called Dr Taylor at 2.56 pm returning a message Dr Taylor had left for him earlier that day.

[85] While it did not pursue its original allegation in respect of Dr Nasir, Raukura did however conclude that it was not satisfied with Dr Taylor's answers that there had not been approaches to other staff, or, alternatively, collusion with them in terms of both the threat of resignation and the later proposal to set up a breakaway practice as a separate provider.

[86] Finally, Raukura concluded that Dr Taylor's responses had been quite antagonistic towards Raukura and its management, and there was no suggestion that this might change or abate.

[87] The most important duty resting on an employee is a duty to act with good faith towards the employer. That is a duty implied by law but also by statute at section 4 of the Employment Relations Act. Conduct which viewed objectively, undermines the relationship of trust and confidence is a breach of the duty of fidelity. The duty of good faith is wider than the implied terms.

[88] Dr Taylor had previously set up the Foundation which had lain dormant. So who was involved in the group - the Foundation? Dr Taylor tells the Authority it was himself, Dr Fishman, Dr Nachiappan, Dr Arroll and one NP Renoulf. I find that Dr Taylor never disclosed this precise information to Raukura.

[89] It is true, that after 12 May 2006 when the proposal to purchase was declined, Dr Taylor did not share with his employer the detail of his further alternative steps that he was then taking in respect of the Foundation. But I agree with Ms Swarbrick's advice of 26 June 2006 when it refers to Mr McLean's email to Dr Taylor of 12 May 2006 in these terms:-

It is difficult to interpret RHOT's comments in that letter as being anything other than it was aware of the potential risks, but on the other hand encouraged CWF, by wishing it well, to continue planning for future services in Manurewa.

[90] Dr Taylor tells the Authority he truly believed that at all times his and his colleagues' intentions to purchase the Clinic or establish another service in Manurewa would be beneficial to Raukura. He says the Foundation intention was always to work collaboratively with the Raukura

and he saw the services provided by both organisations as being complimentary to each other and both organisations enhancing and benefiting the other. Notably however, he did not disclose his goodwill to his employer.

[91] Mr McLean had always known of Dr Taylor's intentions, at least in principle, and of Dr Taylor's personal involvement from March 2006. He had no concerns about Dr Taylor's intentions. He encouraged the discussions he and Dr Taylor had whether they were about purchasing Raukura's operation or establishing an alternative local practice. Mr McLean had been shown a lease by Dr Taylor when they had met. Raukura had not concerned itself as to whether or not the alternative plans would be harmful or otherwise to it.

[92] I find that Raukura's senior management were fully aware of these discussions and Dr Taylor's involvement and his precise intentions because Mr McLean communicated these matters to Raukura's management including Mr Morgan and Mr Maipi. It knew not only of the proposal to purchase the Clinic and Dr Taylor's personal involvement, but also of the plans to establish an alternative operation. Indeed these very matters were explicitly discussed as the finance committee Minutes of Meeting held on 12 May 2006 record and in particular:-

What the purchaser requires will be up to them to determine in discussions around the Heads of Agreement and in any case one would assume that they have been undertaking a due diligence of their own since the initial approach by Tane in March.

and significantly:-

Well Trust were already committed to planning of potential services in Manurewa with or without the clinic. In respect of Raukura declining the proposal they were advancing plans to secure alternative local premises.

[93] Mr McLean, the chief executive officer, writing on 12 May 2006 wished Dr Taylor and his "group" well in the very activities Dr Taylor was ultimately dismissed for. Mr McLean, Mr Maipi and Mr Morgan knew of the plans for an alternative local operation. If Raukura did not want Dr Taylor setting up a new clinic it should have told him so immediately once it was fixed with knowledge. Instead, it wished him well and the Finance Committee directed Mr McLean to write to Dr Taylor in those terms.

[94] On Monday 15 May 2006, Mr Woodhams phoned Mr McLean and informed Mr McLean of an approach Dr Taylor had made seeking to join the PHO. It is significant for the Authority that Mr

McLean, Raukura's chief executive officer at the time, confirms to the Authority he was not surprised that Dr Taylor had taken such steps, but rather, how quickly those steps were being taken. There was no objection whatsoever to what was being done.

[95] When Mr Morgan was asked why he had waited for three weeks before he did anything, he told the Authority:-

We trusted this man. We wanted to give him the benefit of the doubt. He had been with us a long time. He was a trusted worker. We had explicit faith in him. We wanted to believe he was going to come clean. After several years we had a measure of faith, a good deal of faith in him.

[96] I find that Raukura was fully aware of Dr Taylor's precise intentions and Mr Morgan wrote to Dr Taylor in his advice of 31 May 2006 on that basis enquiring only as to whether Dr Taylor would be resigning but raising no objection to what was known.

*I understand from Wayne McLean that at the time of submitting the proposal, you indicated that if the Board did not accept the proposal that you and Dr Bruce Arrol would resign. I assume that this statement was made acknowledging that **the activities of yourself and other staff in looking at establishing a clinic in Manurewa** may well be in conflict with the interests of Raukura Hauora o Tainui.*

[97] There was no issue whatsoever taken as to Dr Taylor's intentions. Nothing in Mr Morgan's advice raises any concern about Dr Taylor's and "other staff" known plans. Mr Morgan is concerned only to know whether Dr Taylor was planning to resign and raises no objection to the "activities".

[98] Te Kupenga is the Primary Health Organisation used by Raukura. Mr McLean and Mr Maipi are members of Te Kupenga's board. The application Dr Taylor made to Mr Woodhams to join the Te Kupenga PHO would have been known to Mr McLean and Mr Maipi. Dr Taylor was aware of this situation. His lawyer suggests Dr Taylor was not hiding anything he had done given he knew Mr Maipi and Mr McLean were going to be making decisions.

[99] I accept that Mr Maniapoto passed on the Moffitt letter to Mr McLean on or about 17 May 2006. But I note too that Mr Morgan does not refer to it in his letter to Dr Taylor of 31 May 2006. It may not have been remarkable to Mr Morgan given his existing knowledge.

[100] Dr Taylor wrote by email assuring Mr Morgan of his commitment to his professional obligations. So what changed after this correspondence on 31 May 2006 so that Dr Taylor's and

"other staff" known "activities" became objectionable to Raukura, and further, necessitated the institution of formal disciplinary procedures notified in Mr Morgan's advice of 6 June 2006?. I find there was no change, and no justification for the escalation of matters.

[101] So I conclude that Dr Taylor's and "other staff" "activities" were known to Raukura. Whether or not those activities were contrary to any duties owed to Raukura, they were undertaken with its full knowledge and I infer, its implied consent or acquiescence. Raukura continued dialogue at senior management level with Dr Taylor and in doing so, encouraged those discussions. This case is different from the authorities cited because of this aspect.

[102] When it advised that the proposal was declined, Raukura should also have told Dr Taylor he was not to take steps to set up a competing practice as he had given notice of, and also reinforced its expectations of him in terms of his duty of fidelity and good faith. It did not do so.

[103] By failing to raise any objection with those activities, Raukura acquiesced and waived its rights (if any) to object to them. It is unfair of it to object to what it had previously encouraged at least by its inaction or acquiescence. So when it sought to object by Mr Morgan's disciplinary letter of 6 June 2006, I find it was not entitled to do so. I see no justification for the escalation of matters unobjectionable as Mr Morgan's letter of 31 May 2006 demonstrates but within two days later purportedly objectionable as from 2 June 2006. Nor do I consider it reserved its position or legal rights sufficiently to later raise any legitimate objection.

[104] Nor is there anything between 2 June 2006 and the dismissal letter of 29 June 2006 which altered matters either. Nothing changed and I discern no justification at all for Raukura's objection to what it had previously encouraged and consented to. So I reach the position that whatever duties are alleged by Raukura to have been breached, whether expressed in the employment agreement, implied by law or imposed by statute, the behaviour or activities were undertaken with Raukura's knowledge and I find, its consent by its acquiescence. If it genuinely objected, it ought to have done so well prior to 2 June 2006 when its letter dated 6 June 2006 was devised. It chose not to, and I find, it is unfair to permit it to do so now.

[105] Raukura concluded it was satisfied that Dr Taylor had been actively involved in taking steps to establish a competing clinic that would harm Raukura's interests and undermine the Clinic. Raukura's letter of dismissal relies on the following matters in support of this principal conclusion:-

- (i) It did not accept Dr Taylor's responses to questions surrounding the letter written to Neil Woodhams. Essentially, it regarded multiple references to "our" and "we" were references to specific and known individuals and not unknown persons as Dr Taylor maintained.
- (ii) The letter to Alan Moffitt evidenced proof of an intention to create a new clinic by splitting away from Raukura.
- (iii) Dr Taylor had in fact corresponded with Mr Woodhams during work hours.

[106] The references to "our" and "we" were hardly conclusive evidence – especially to the *Honda* standard. Raukura relies on this aspect of matters to say it did not believe Dr Taylor. But as a means to justify dismissal for soliciting other of Raukura's employees, it is insufficient. As well, it would have been prudent and appropriate for Raukura to have made enquiries of its own staff. The enquiries it did make were inadequate, and in Dr Nasir's and Angeline Smith's case unsubstantiated. Dr Nasir was not asked who was involved and Mr Maniapoto's notes made no reference to that enquiry being made of the doctor. It improperly relied on the statement of 4FTE doctors to mean four actual doctors and not the equivalent.

[107] As for the letter to Alan Moffitt as evidence of proof of an intention to create a new clinic by splitting away from Raukura, that evidence was redundant, for Raukura already knew. As noted above, it encouraged that intention and in my assessment acquiesced. Mr Morgan acknowledged the "actions" in his advice of 31 May 2006. The Finance Committee wished the group well. I have also said, it is unfair to object and to disavow knowledge of these activities. But in the meeting of 22 June 2006, there is no evidence that this advice or the matters arising out of it were put to Dr Taylor and it does not appear to have constituted part of Raukura's investigation.

[108] Dr Taylor's correspondence with Mr Woodhams during work hours would not as a matter of degree and in the particular circumstances justify summary dismissal. The significant aspects of his known activities were conducted at the weekend in Dr Taylor's personal time but substantially, these were preparatory steps which had been condoned.

[109] If Raukura did not believe Dr Taylor as to who was involved, it had no evidence that he actually did solicit any other person. It was always within Raukura's power to investigate this specific allegation properly but it did not. It does not offer to the Authority sufficient evidence of enquiries of its other doctors to establish that Dr Taylor had solicited them. It did not make enquiries of Dr Arroll, Dr Fishman, Dr Nachiappan or NP Renouf and there is no evidence of it doing so. Because it failed to conduct proper enquiries, it had no evidence not to believe Dr Taylor, but also, it had no evidence that he had actually acted improperly by soliciting its staff.

[110] Instead, Raukura concluded that Dr Taylor had not been truthful in respect of his responses as to who exactly was involved. I agree that Dr Taylor did not disclose his precise knowledge to his employer. Dr Taylor maintains that he had never been asked whether staff were intending to leave, and if so, how many and where they were intending to go. He also says he was never asked whether he was involved in setting up a breakaway practice and whether others intended to join him. I find he was asked who was involved in the group and the allegation of a breakaway clinic was spelt out to him in Mr Morgan's letter of 6 June 2006. But the allegation of whether he had been untruthful is an entirely different allegation from whether he solicited other employees contrary to his duty of fidelity. This different allegation was never put directly to Dr Taylor for him to answer. That was unfair to Dr Taylor. Raukura is not entitled to find that Dr Taylor was untruthful and therefore must have taken steps to set up a competing practice by soliciting employees.

[111] Similarly too, the issue of Dr Taylor's alleged antagonism to his employer rendering his continued employment untenable was not put to him for his response. That was also unfair to Dr Taylor.

[112] It is odd that Raukura did not seek Mr McLean's statement until 17 June 2006 and it made its allegation against Dr Taylor without consulting with Mr McLean about it. As well, Mr McLean's statement was not put to Dr Taylor until 22 June 2006 and that delay is not satisfactorily explained. The statement is also curious as to the issues raised by Mr McLean and also, because it completely fails to address whether Dr Taylor had said he would personally resign. I have found that Mr McLean said he looked forward to receiving Dr Taylor's resignation and this was obviously the reason why Mr Morgan wrote to Dr Taylor on 31 May 2006 (too late as I have earlier said).

[113] The investigation was further defective for while it did not explicitly allege that Dr Taylor had solicited employees contrary to his duties, that is what was implied as one of the "steps" taken by him. The enquiries made of the staff suspected were completely deficient. As well, while Raukura had clear notice of Dr Taylor's letter to Mr Moffitt, it never sought that advice to put to Dr Taylor. All of those matters lead me to conclude there was not a full and fair investigation of the kind that a fair and reasonable employer would have made and consequently, an improper finding was made.

[114] So I rely on the above reasons, and conclude by finding it was wrong for Raukura to find *"Reports that Dr Taylor had been making enquiries to establish an alternative practice that was possibly harmful to Raukura's and Trust Health's interests"*. It knew of those reports and the actions behind them. It had encouraged those actions. It was bad faith to disavow knowledge of those actions and object to them having previously encouraged them. So too can the same be said of the criticism and conclusion that Dr Taylor's *"involvement with the establishment of the Community Wellness Foundation Charitable Trust may also have conflicted with the interests of Raukura O Hauora Tainui"*. It knew of that involvement and if it did have such an impact, it was impact that was known about, encouraged and implicitly consented to.

[115] Raukura waited too long before it sent Mr Morgan's letter of 31 May 2006. It waited too long to counsel him to resign if it considered that was the right thing for him to have done. The letter of 31 May 2006 should have been written at the same time Mr McLean's advice delining to proposal was sent on 12 May 2006. Because it was not, Dr Taylor can be forgiven for thinking he had his employer's approval to carry on what he had told it he was doing.

[116] When Dr Taylor did not resign as a result of his intentions known generally, at least in principle to Raukura, Raukura then diagnosed what Mr Morgan had first ascribed by way of assumption to Dr Taylor as an honourable, appropriate and proper intention to resign, as instead something insidious and objectional in the form of a threat or ultimatum contrary to his duty of fidelity. It sought to then characterise Dr Taylor's particular steps towards that generally known purpose as grounds justifying his termination. But it is not fair of Raukura to adopt that stance and I conclude that Raukura contrived Dr Taylor's termination after he advised he was not resigning. But it had no evidence of his soliciting other employees, as a consequence of a deficient investigation, and then concluded he had done so because he had not been honest when it had never put that allegation to him for his response.

[117] I find that Dr Taylor should not have been dismissed because he had approached Mr Woodhams. That is how the essential second allegation was stated in the meeting on 22 June 2006. Viewing matters objectively, I do not regard Dr Taylor's dismissal in all these particular circumstances as the actions or the decision of a fair and reasonable employer. **I therefore find his dismissal was unjustifiable. He is entitled to remedies in settlement of that personal grievance.**

The suspension

[118] On 2 June 2006 Dr Taylor provided Raukura with a medical certificate which deemed him unfit for work until 12 June 2006.

[119] Mr Morgan's advice of 6 June 2006 stated:-

Before making the decision about suspension, I invite you to reply no later than 3 pm today, your input will be considered before a final decision on suspension is made.

[120] Dr Taylor's lawyers replied on Dr Taylor's behalf by letter of the same date stating:-

We have just received instructions to act for Dr Taylor in relation to your letter to him dated 6 June 2006. We have yet to take full instructions, and write this letter as an interim measure, being cognisant of your request for a response by 3pm today.

As you will be aware from the Medical Certificate provided to you on Friday morning 2 June, Dr Taylor is presently unfit for work. The Medical Certificate states that he will be fit to return to work on 12 June.

In the circumstances we are unable to provide the comments requested, and will do so as soon as possible. In the meantime, we understand that a staff meeting is scheduled for this afternoon. We confirm that you are not authorised to make any disclosures about Dr Taylor to third parties, including the staff of the organisation.

Please communicate direct with the writer rather than Dr Taylor in relation to this matter.

[121] Raukura's counsel replied by letter dated Friday 9 June 2006 after close of business, in these terms:-

It is understood from your facsimile of 6 June 2006 that Dr Taylor will be fit to return to work on Monday 12 June 2006. If this is still the case, following on from Mr Morgan's letter and in the absence of any response on this issues of suspension, I am instructed to advised that Dr Taylor is suspended as from 12 June 2006. I will return to you on Monday with a proposed meeting time.

[122] That response was not well received by Dr Taylor's lawyers as plainly evidenced by their response of 12 June 2006.

[123] It is submitted that the Dr Taylor's suspension was unnecessary and unwarranted. I agree. The matters of concern to Raukura had been known to it for some time before Dr Taylor was suspended. Dr Taylor was already absent from the workplace unwell at the time the letter of 6 June 2006 was delivered to him and also when his response was required.

[124] I accept too that on the afternoon of 12 June 2006 there was a staff meeting at Raukura where an announcement was made that Dr Taylor had been suspended and an investigation was in progress as to Dr Taylor's activities and a possible conflict of interest. Dr Taylor gives evidence that he was very upset by these actions because of harm to his reputation and because his lawyers had specifically advised Raukura it was not authorised to disclose this information about Dr Taylor to others. Dr Taylor's lawyers demanded the suspension be immediately lifted but it was not.

[125] I conclude that the suspension in all the circumstances was unfair. Raukura could have waited for his response. Dr Taylor was already away from the workplace and nothing was lost by waiting. As well, the announcement to staff after his lawyers' specific request that Dr Taylor's privacy be respect was also unfair.

[126] **I find that Dr Taylor was unfairly suspended and he has a personal grievance in relation to that action by Raukura. He is entitled to remedies in settlement of that grievance.**

The resolution

[127] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the *Employment Relations Act 2000* to consider the extent to which Dr Taylor's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. This obligation on the Authority I regard as no more than a reflection of the rule in the courts that no man should profit from his own wrong.

[128] Mr Morgan criticises Dr Taylor for transferring a Raukura patient data base to his personal email on 10 May 2006. This information was not known to Raukura when it dismissed Dr Taylor. The file contains personal contact details of all of Raukura's patients at its clinics. Dr Taylor acknowledges this conduct. He says he did so as part of a due diligence process in advance of his meeting with Mr McLean on 11 May. He says he had alerted Mr McLean at least as early as 3

April 2006 that a due diligence process would be necessary. He says that Mr McLean knew he would be looking at this information and that he did not object. He also says he never hid that he had done so and it was entirely above board. He explains that when he saw what he had sent to himself, he realised it was the wrong database and was of no use to him. He did not look at it any further and was only reminded of his possession of this information when the matter was raised in the Authority's investigation. I am inclined to accept what Dr Taylor says. The Finance Committee Minutes of 12 May 2006 corroborate the essence of Dr Taylor's response. The Minutes record this:-

What the purchaser requires will be up to them to determine in discussions around the Heads of Agreement and in any case one would assume that they have been undertaking a due diligence of their own since the initial approach by Tane in March.

[129] While Dr Taylor denies his activities were clandestine, an overtone of secrecy is apparent from an email authored by Dr Arroll dated 11 May 2006 to Dr Taylor and Dr Fishman. Dr Arroll suggests they "*proceed with caution*" and suggests a particular lawyer if and when they needed one. Suspect too is an email of 14 May 2006 that Dr Taylor sent to Dr Arroll and Dr Fishman:-

It may be prudent to communicate non medical issues through our personal e-mails. The business email is monitored and accessed by others.

[130] Also not known to Raukura at the time of its enquiries but with notice of its existence, is Dr Taylor's letter to Mr Moffitt dated 14 May 2006. In that advice, Dr Taylor makes a statement which suggests the alternative practice would not be complimentary to Raukura and he also specifically names the doctors involved.

[131] If Raukura had conducted a full and fair enquiry before it dismissed Dr Taylor, it would have been in possession of these items. The application of reasonable diligence would have yielded this information. It has only itself to blame for the consequences of its failure. If it had gathered this and other information by way of a full and fair investigation, it might well be in a very different position to justify the termination.

[132] I accept that Dr Taylor never disclosed who was involved with him. I find that he was asked and also that he did not tell Raukura what he tells the Authority. Although I have found that Dr Taylor's actions with respect to an alternative practice were always known to Raukura at least in principle and cannot be said to be blameworthy, his failure to be honest with his employer consistent with his duty of good faith in relation to who else was involved, is a very different

matter. Dr Taylor did not act in good faith towards Raukura because he did not disclose who was involved when he was asked. He did not tell his employer what he told the Authority. Whether or not he was expressly asked, as he maintains he was not, the duty of good faith imposed on him an obligation to be forthcoming to his employer, to volunteer in an active and communicative way what he knew. His employer's concerns were plainly obvious to him.

[133] This lack of good faith can be attributed to the situation that led to the personal grievance I have found. One of the reasons for his dismissal is that he had not been forthcoming and his answers were inconsistent with the letter he wrote to Mr Woodhams. That was an imperfect finding, but nonetheless, I regard it proved before the Authority and therefore it did contribute to the situation that led to his dismissal. I find Dr Taylor's failure in this regard is blameworthy and I consider it proper to reduce the remedies to be awarded to him in respect of his personal grievances. I fix his contribution at 33%.

Reimbursement

[134] I am satisfied that Dr Taylor has lost wages as a result of his unjustifiable dismissal. I award him reimbursement for the earnings he has lost from his dismissal on 29 June 2006 until the time he obtained alternative full-time employment. I leave it to these senior counsel to attempt to agree the quantum of that loss, to be reduced by one third. Should they be unable to agree, either of them may revert to the Authority to have the matter formally determined and if so, no later than 28 days after the date of this Determination. I note that Dr Taylor further claims the notice period under his agreement.

Compensation

[135] Dr Taylor says that he was shocked by his dismissal because it seemed to him that Raukura had jumped to conclusions without having all the information. He never accepted that Raukura had the evidence to justify the conclusions it had reached. I agree with that in so far as Dr Taylor had been found to have solicited other employees. He was surprised to be told by his lawyer over the telephone of his dismissal. He says he was awaiting further information from Raukura as to the further people it had spoken to and expected to have his further say in relation to that information. He expected to have a final opportunity to address Raukura before it made its decision to dismiss. He took exception to the finding that he had been antagonistic because that allegation had never been put to him. He also expected to rebut Mr Woodhams' statements in relation to the time of the contact between them.

[136] Dr Taylor says he was devastated at Raukura's decision and its treatment of him throughout the process leading to his dismissal. He says certain members of Raukura have jumped to conclusions about his actions and have not listened or been unprepared to listen to his responses. He believes that his excellent reputation at the Clinic has been sullied by a few people on the board including Mr Maipi and Mr Morgan. He desires his name be cleared by a finding from the Authority that he has been unjustifiably dismissed and that he has not used the database for improper purposes.

[137] Dr Taylor further emphasises he has never wished harm on Raukura and that he has been the face of the organisation for close to ten years. He is proud of his involvement.

[138] I find that Dr Taylor has suffered loss in the form of loss of dignity, injury to his feelings, hurt and humiliation as a result of his unjustifiable dismissal and suspension. Having regard to his evidence, his length of service and the circumstances of his personal grievances, I make a global award of compensation in respect of both of those grievances and award him \$15,000.00 compensation but reduced for contribution by one third in the total sum of \$10,000.00. **I order Raukura Hauora o Tainui to pay to Dr Tane Arataki Taylor the sum of \$10,000.00 as compensation.**

Costs

[139] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Swarbrick is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Harrison is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

[140] If there are any outstanding matters, leave is reserved to the parties to make application to the Authority within 28 days to have any such matter addressed.

Leon Robinson
Member of Employment Relations Authority