**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2013] NZERA Christchurch 71
5398115

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| | BETWEEN | WENDY VOLLMER<br>Applicant |
| | A N D | THE WOOD LIFE CARE (2007) LIMITED<br>Respondent |

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| Member of Authority: | Christine Hickey |
| Representatives: | Nicole Ironside, Counsel for Applicant<br>Jeff Goldstein and Linda Ryder, Counsel for Respondent |
| Investigation meeting: | 27, 28 & 29 November 2012 and 30 & 31 January 2013 in Nelson |
| Submissions Received: | From both parties on 31 January 2013 and further requested information on 22 March and 5 April 2013 |
| Date of Determination: | 26 April 2013 |

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## DETERMINATION OF THE AUTHORITY

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**A. Wendy Vollmer was unjustifiably disadvantaged.**

**B. Wendy Vollmer was unjustifiably dismissed.**

**C. The Wood Life Care (2007) Limited must pay Wendy Vollmer her wages and the employer contribution to Kiwisaver for 27 weeks after the date of dismissal.**

**D. The Wood Life Care (2007) Limited must pay Wendy Vollmer compensation of $9,375 for humiliation, loss of dignity and injury to her feelings.**

**E. In reliance on her undertaking given under section 127(2) of the Act Wendy Vollmer must reimburse The Wood Life Care (2007) Limited for any amount paid to her in lost wages and Kiwisaver contribution over and above the 27 weeks ordered above.**

**Employment relationship problem**

***Background***

[1] Ms Vollmer was employed as Charge Nurse of the rest home and apartments at The Wood Life Care (2007) Limited aged care facility in 2007. In April 2011 she was also appointed the Infection Control Co-ordinator for the whole facility, which includes a continuing care, or hospital, wing. Another charge nurse is in charge of care in the hospital wing[1]. Both charge nurses report directly to Correne Berryman, the facility manager. Ms Berryman, in turn, reports to Andrena Williams, the general manager of The Wood facility and a director of the company. Ms Williams is based in Christchurch and is usually present at The Wood for one day a week.

***Infection Control Policy Issue***

[2] It was Ms Vollmer's role, as Infection Control Co-ordinator (ICC), to record and report on all infections that had been identified in the facility on a monthly basis.

[3] On 24 April 2012 the District Health Board's contractor conducted a surveillance spot audit of The Wood's infection control. The outcome of the audit was generally good but there were two partial attainments, one being in the 'surveillance' area; being that data on non-medicated infections[2] was not being collected and collated[3]. The Wood was given three months to take corrective action and report back to the auditors. The report to the auditors was made on 31 July 2012. The Infection Control Policy (ICP) was also due to be reviewed by The Wood in August 2012.

[4] Ms Vollmer was aware of the partial attainment and that there were three months to correct the surveillance monthly data collection and to report back to the auditor. There is a dispute over whether in failing to report on the non-medicated

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1 At the time of the alleged misconduct and dismissal and the investigation meetings that was Shirley-Anne Langford. However, she has since resigned from The Wood.

2 As opposed to infections for which medication was prescribed.

3 The other partial attainment related to the general practitioners whose patients lived at The Wood. It was quickly and simply resolved and is not relevant to these proceedings.

infections over that three month period she failed to follow the ICP and lawful instructions. Ms Vollmer was also aware that the ICP was due to be internally reviewed.

[5] On 30 July 2012 Ms Berryman approached Ms Vollmer, who was in her office, and asked for a copy of the infection control register. She expressed surprise that all the infections recorded since the audit had been treated with antibiotics. Ms Vollmer made it clear that she had not yet commenced recording and reporting on the non-medicated infections. Ms Berryman asked her if she had read the policy. There is a dispute about what Ms Vollmer said. Ms Berryman remembers her saying that she had not read the policy. Ms Vollmer says that she meant that she had not read the policy in the past two weeks. Ms Berryman was referring to the necessity to report back on the corrective action taken. Ms Vollmer says she understood her to be referring to the need to review the ICP in August 2012.

***Behaviour towards Correne Berryman***

[6] On 3 August 2012 Ms Vollmer discovered that a day that she had requested to take as sick leave had been recorded as annual leave. She went to speak to Ms Berryman in her office. Their memories of the conversation vary greatly although both agree that Ms Vollmer's voice was raised, that she refused to leave the office when first requested to by Ms Berryman, and that she raised the fact that Ms Berryman had taken sick leave because of surgery on her nose. Ms Vollmer also agrees that on her way out of Ms Berryman's office through the reception area she said "she just doesn't get it".

***The initial allegations***

[7] On 6 August 2012 Ms Vollmer was given a letter inviting her to attend a disciplinary meeting on 8 August 2012 about three allegations that *could be viewed as serious misconduct by The Wood and could lead to your dismissal*. The allegations included:

> *abusive, intimidating and unprofessional behaviour towards Correne Berryman, Facility Manager on Friday 3rd August 2012*
>
> *failure to read/follow policy and lawful instructions regarding recording all infections as reported in the Surveillance audit*

> *an ongoing recent history of inappropriate communication and unprofessional behaviour towards the Facility Manager, the ATR Charge Nurse Lisa Turner and the Ebos Representative Michelle Campbell*

[8] Ms Vollmer continued to work the remainder of her shift and worked on the following day, 7 August 2012. However, she became ill and was off work and therefore unable to attend the proposed meeting on 8 August 2012.

***Suspension and behaviour of Ms Vollmer related to leaving The Wood's premises***

[9] Ms Vollmer recovered from her illness and intended to return to work on 14 August 2012. In the afternoon of 13 August 2012 she received an e-mail at home from Andrena Williams, The Wood's general manager, proposing that the disciplinary meeting take place on 21 August 2012 and stating:

> *the Company will continue to pay for you to be on paid leave.*

[10] Ms Williams says she meant that as an instruction not to come to work before the disciplinary meeting took place.

[11] Ms Vollmer contacted her lawyer who told her she did not have to remain on paid leave and could go back to work. That evening her lawyer e-mailed a letter to Ms Williams notifying her that Ms Vollmer intended to return to work the next day. In the meantime, Ms Williams had informed Ms Berryman that Ms Vollmer would remain on paid leave and not attend work until the disciplinary meeting.

[12] Ms Vollmer came to work on 14 August 2012 before 7 a.m.; her shift began at 7 a.m. No other registered nurse had been engaged to undertake her duties in her (anticipated) absence so she began working. Ms Berryman saw Ms Vollmer near Ms Berryman's office at least one hour and 40-50 minutes after she began work. Ms Berryman told Ms Vollmer that she was not supposed to be at work. Ms Vollmer told her that she had obtained legal advice that she was entitled to attend work.

[13] Ms Berryman informed Ms Williams that Ms Vollmer was at work and Ms Williams telephoned Ms Vollmer and told her to go home on paid leave. When Ms Vollmer expressed the opinion that she was entitled to be at work Ms Williams

told Ms Vollmer that she was thinking of suspending her. In a subsequent phone call Ms Williams suspended Ms Vollmer[4].

[14] Ms Berryman told Ms Vollmer to leave the premises. Ms Vollmer said she wanted to seek legal advice first. Ms Williams told Ms Berryman to call the police if Ms Vollmer continued to refuse to leave and Ms Berryman told Ms Vollmer that. When she did not leave Ms Berryman called the police[5]. Once the police arrived Ms Vollmer left and went home.

[15] The police officers went to Ms Vollmer's home and served her with a trespass notice signed by Ms Berryman warning her against going to The Wood for two years from 14 August 2012. The notice advised Ms Vollmer:

> *It is an offence punishable by a fine not exceeding $1,000.00 or imprisonment not exceeding 3 months to enter the above address within 2 years from the date you receive this warning.*

***Further allegation***

[16] On 15 August 2012 The Wood added an allegation to the allegations for discussion at the disciplinary meeting; that Ms Vollmer:

> *…refused to follow a lawful instruction when she refused to leave the facility as directed after she was suspended.*

[17] The Wood considered the allegation could potentially amount to serious misconduct and therefore could lead to her dismissal.

[18] The third allegation listed in the 6 August 2012 letter, relating to Ms Vollmer's communication with Ms Berryman, Ms Turner and Ms Campbell was not pursued by The Wood.

[19] The disciplinary meeting took place on 3 September 2012. Ms Williams was not able to be present because she was overseas on a long planned trip. She delegated the conduct of the disciplinary process, investigation and decision-making to Shirley McKenzie, who is not an employee of The Wood but the manager of another aged-care facility in which Ms Williams has an interest.

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4 There are disputes about issues of timing. However, the fact that Ms Vollmer was suspended is not in dispute.

5 Again there are disputed issues especially about timing. I cover these below.

[20] Ms Vollmer and her lawyer, Ms Ironside, attended the five hour disciplinary meeting along with Ms McKenzie, Ms Berryman and The Wood's lawyer, Ms Ryder[6]. After the meeting Ms McKenzie undertook further investigation, including interviewing and getting statements from witnesses.

[21] On 18 September 2012 Ms Williams returned to New Zealand and resumed the decision-making role. On 28 September 2012 The Wood notified Ms Vollmer that it considered that she was guilty of serious misconduct on all three allegations.

[22] The 28 September 2012 letter also stated:

> *that dismissal is a possible outcome, however, before we make any final determination in that regard, we wish to give you the opportunity to comment on penalty…*

[23] Ms Vollmer remained suspended on full pay until she was dismissed by way of letter dated 3 October 2012:

> *We are of the view that your actions in relation to all three allegations amount to serious misconduct. In relation to the appropriate penalty our view is that dismissal is appropriate. This is to take effect immediately.*

**The claim**

[24] Ms Vollmer claims that she was unjustifiably dismissed. She also claims she was unjustifiably disadvantaged by her suspension on 14 August 2012. Ms Vollmer makes a further claim that she was unjustifiably disadvantaged when The Wood appointed a permanent staff member in her role while she had been reinstated in the interim. She claims that was a breach of her employment agreement and a breach of good faith. Ms Vollmer also claims that The Wood has breached its good faith obligations to her. By way of remedies she seeks:

(a) Permanent reinstatement to the position of registered nurse, or a position no less advantageous to her;

(b) Payment of lost wages from the date of dismissal on 4 October 2012 until the date of her interim reinstatement on 19 November 2012;

(c) Payment for the day of 23 July 2012 as sick pay;

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[6] The meeting was recorded and has been transcribed. The transcript runs to 43 pages.

(d) Reimbursement of lost benefits, specifically Kiwisaver entitlements;

(e) An order that The Wood has breached its obligations of good faith and a penalty for that breach; and

(f) Compensation for humiliation, loss of dignity and injury to her feelings.

[25] On 13 November 2012 I reinstated Ms Vollmer to her position on an interim basis giving The Wood the option to reinstate her on garden leave which it has done.

[26] On 22 November 2012 the respondent's solicitors informed the applicant's solicitor that it had appointed a new staff member on a permanent basis to the position held by Ms Vollmer before her dismissal. At the investigation meeting in January 2013 The Wood confirmed that the charge nurse position in the rest home had been filled and the newly appointed nurse had started employment.

[27] The issues the Authority needs to determine are:

(a) Whether The Wood acted in a way that unjustifiably disadvantaged Ms Vollmer;

(b) Whether Ms Vollmer was unjustifiably dismissed;

(c) Whether The Wood breached its obligation of good faith to Ms Vollmer;

(d) Whether The Wood acted in a way that unjustifiably disadvantaged Ms Vollmer when it appointed someone to her former position on a permanent basis, and whether it breached its contract with Ms Vollmer in doing so;

(e) Whether The Wood breached its obligation of good faith to Ms Vollmer in appointing someone permanently to her position, and if, so should pay a penalty,

(f) Whether Ms Vollmer is entitled to be reinstated and/or awarded any other remedies; and

(g) Legal costs. That decision is reserved.

[28] The substantive hearing was over a period of five days. I heard from a number of witnesses and have considered their evidence as well as a large number of documents and full submissions from both parties. I do not refer to all the evidence in this determination although I have taken it all into account.

***Was Ms Vollmer disadvantaged by her suspension?***

[29] Ms Williams says that because Ms Vollmer was in a senior and very responsible position and the allegations she faced were of serious misconduct, she considered that it was not safe to allow Ms Vollmer to continue working on 14 August 2012 or at all before the disciplinary hearing. The Wood believes it was justified in suspending Ms Vollmer because she demonstrated an unwillingness to follow Ms Berryman's instruction to leave the premises.

[30] There is no question that suspension from one's employment is a disadvantage in employment[7]. That is so even if suspended on full pay. In this case the applicant is a senior nurse who held a responsible position in a relatively small town and had done so for about 5 years; her lengthy suspension has disadvantaged her.

[31] In addition, the length of a suspension can of itself amount to a disadvantage. Ms Vollmer had been suspended for 51 days when she was dismissed. Prior to the disciplinary meeting on 3 September 2012 both parties made a number of attempts to organise a suitable date for a face-to-face meeting. Both parties suggest the delay between 6 August 2012, when the allegations were communicated to Ms Vollmer, and 3 September 2012 were the fault of the other party. I consider there were a number of valid reasons on both sides[8] which led to the delay and which culminated in a mutually agreed date of 3 September 2012.

***Was the suspension justified?***

[32] The test of whether an employer's actions were justifiable is set out in section 103A of the Employment Relations Act 2000. The full Employment Court has said that so long as the outcome, and how it was arrived at, is one of the outcomes that a

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7 See, for example *Birss v Secretary for Justice* [184] 1 NZLR 513 at 521. Although that case was about the public sector its effect is not confined to the public sector according to the Employment Court in *Association of Staff in Tertiary Education v Northland Polytechnic Council* [1992] 2 ERNZ 943 at 959

8 Including counsel unavailability, and Ms Vollmer's holiday which had already been booked.

fair and reasonable employer in all of the circumstances could have decided upon then the decision will be justified.[9]

[33] Therefore, s.103A of the Act requires the Authority to objectively assess whether *what* The Wood did (substantive justification) and *how* The Wood did it (procedural fairness) were what a fair and reasonable employer in all the circumstances could have done at the time Ms Vollmer was suspended.

[34] There are two aspects to what the employer did on 14 August 2012 that could amount to unjustified disadvantage. First, the suspension and secondly, the trespass notice.

[35] Suspension of an employee must be based on a contractual or statutory right. Clause 24.1 of Ms Vollmer's individual employment agreement contains a contractual right for The Wood to suspend Ms Vollmer if she was facing an allegation that could amount to serious misconduct.

[36] However, even if the allegations that Ms Vollmer was facing could amount to serious misconduct the seriousness of the allegations in itself is not sufficient to justify suspension. When deciding whether to suspend an employee pending a disciplinary investigation an employer must comply with the rules of natural justice[10]. Natural justice requires that a person is given an opportunity to be heard before a decision is made about them. In *Tawhiwhirangi v Attorney General* Goddard CJ, in a matter relating to the opportunity of an employee to be heard prior to being suspended from employment held that:

> *…the matter must be looked in a sensible, flexible, and reasonable way to ascertain what are the requirements of fairness on the particular occasion in the particular surrounding circumstances.*[11]

[37] Ms Williams believed her letter to Ms Vollmer *confirming that she could remain on paid leave until the disciplinary process had been completed* meant that Ms Vollmer would remain on paid leave. Indeed, she meant it to be a direction that Ms Vollmer must remain on paid leave. Ms Williams also believed the 6 August 2012 letter *also contained an instruction not to come into* work. However, neither the 6 August letter nor the 13 August e-mail contained an instruction not to return to

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9 *Angus and McKean v Ports of Auckland Ltd* [2011] NZEmpC 160.

10 *Tawhiwhirangi v. Attorney-General* [1993] 2 ERNZ 546

11 Ibid, at 559

work. The e-mail contained what could be reasonably read as an offer of paid leave only.

[38] The suspension occurred first by Ms Williams telling Ms Vollmer she was suspended. Ms Vollmer asked for that to be confirmed in writing; which it was when a letter dictated by Ms Williams and signed on her behalf by Ms Berryman was handed to Ms Vollmer:

> *Further to my conversation where I said I was thinking about suspending you and gave you an opportunity to comment, I then decided to suspend you on full pay until we meet on Tuesday 21st at 2.30 pm.*
>
> *As you have refused to leave at my verbal request please accept this in writing.*

[39] The Wood submits Ms Williams gave Ms Vollmer an adequate opportunity to comment on its proposal to suspend her.

[40] In applying the justification test in s.103A(3) the Authority needs to consider a number of factors in determining whether an employer's action has been implemented in a procedurally fair manner. The factors are expressed in a way that is more readily applicable to dismissals but must also be applied so far as possible to consideration of other actions.

[41] Factors include whether the employer:

(a) Sufficiently investigated the allegations, having regard to available resources;

(b) Raised its concerns with the employee before taking action against an employee;

(c) Gave the employee a reasonable opportunity to respond to the employer's concerns before taking action against an employee; and

(d) Genuinely considered the employee's explanation before taking action against an employee.

[42] The Authority may also consider any other appropriate factors[12].

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12 Section 103A(4)

[43] Section 103A(5) says that the Authority may not determine a dismissal to be unjustifiable solely because of defects in the process of dismissal if the defects were minor and did not result in the employee being treated unfairly.

[44] There is significant dispute about the time of various discussions and events on 14 August 2012. The Wood argues that it was justified in calling the police because Ms Vollmer would not leave the premises. However, I do not consider the timing of exchanges between Ms Williams and Ms Vollmer or Ms Berryman and Ms Vollmer and the time the police were called and attended to be determinative of whether the disadvantage was justified.

[45] Ms Williams says during the first telephone call to Ms Vollmer after being told Ms Vollmer intended to continue her shift she told Ms Vollmer that she was thinking of suspending her and asked if she had anything to say before Ms Williams rang the company's lawyer for advice. Ms Vollmer agrees she was asked what she wanted to say and says she told Ms Williams that she had

> *…been committed to her and to the company over the past 5 years. Andrena told me to stay where I was and that she would ring me back.*

[46] Ms Vollmer says that the period of time between Ms Williams' first call to her and the second call in which Ms Williams suspended her was two to three minutes only. Ms Williams says when she told Ms Vollmer that she was thinking of suspending her she gave her the opportunity to seek legal advice and told Ms Vollmer she would call her back. By the time of the second call Ms Vollmer had not obtained any legal advice.

[47] During the second call Ms Vollmer told Ms Williams she required notification of suspension to be in writing and that she would not leave until after she had talked to her own lawyer.

[48] At between 9.20 and 9.25 a.m. the letter confirming the suspension was handed to Ms Vollmer.

[49] Ms Berryman says she called the police, after Ms Williams requested her to, and called them again after Ms Vollmer's continued refusal to leave The Wood. In her first affidavit dated 25 October 2012 Ms Berryman says she called the police at *just after 9am* and she *waited until around 9.30am.* She also says the police came at

about 9.30 a.m. and that *the whole process took about an hour*. In 'that process' Ms Berryman includes the completing of the trespass notice. In her affidavit Ms Berryman does not refer to calling the police a second time. The existence of a second call was raised for the first time in oral evidence at the substantive investigation meeting.

[50] On 14 August 2012 Ms Berryman wrote an account of what happened that day. She states that she called the police. She does not refer to a second call to the police. She did not note down any times.

[51] In an e-mail dated 29 August 2012 to Ms Ryder Ms Berryman wrote her recall of the events on 14 August 2012. She states that she called the police:

> *…around 9am. They took a long time and arrived at approximately 9.30am.*

[52] Evidence supplied by the police about the time of a call or calls from The Wood and the time the police arrived at The Wood is contradictory. But all of that evidence, such as the letter from Constable Jeshurun Scheib to Ms Ironside, was not available to The Wood when the decision to dismiss was made.

[53] Constable Hambrook gave oral evidence at the investigation meeting. He confirmed that he had been mistaken about the other officer who attended The Wood with him and that it had not been Constable Scheib. I have had no evidence from the other officer but do not consider it necessary. Constable Hambrook's impression was he and his colleague were at The Wood in total for about 15 minutes. He considered Ms Vollmer left The Wood within 5-6 minutes of the arrival of the police.

[54] Shirley-Anne Langford says that once the police arrived she asked Ms Vollmer to go and Ms Vollmer agreed to do so and left, accompanied to her car by Ms Langford.

[55] I conclude Ms Vollmer was not suspended verbally until about 9.15 a.m. I consider it unlikely Ms Berryman called the police before that but may have done so immediately once it was clear Ms Vollmer was not going to leave after the purported suspension.

[56] I also conclude the police arrived at The Wood between 9.40 and 9.45 a.m. and Ms Vollmer left about 5 minutes later voluntarily; that is, she was not told to

leave by the police. I conclude that Ms Berryman called the police only once. Her statements made closer to the time confirm that. Ms Berryman is mistaken that she called the police a second time. The arrival of the police around 9.45 a.m. is consistent with Ms Berryman's account that she waited about half an hour for them to arrive.

[57] I also conclude that the period between the first telephone call between Ms Williams and Ms Vollmer was followed at most approximately 5 minutes later by the second call during which Ms Vollmer was suspended.

[58] Evidence was given by Ms Berryman at the substantive hearing that she was uncomfortable working with Ms Vollmer after the 3 August incident. Ms Williams would have been aware of that.

[59] The decision to suspend is somewhat puzzling in light of the fact that Ms Vollmer completed her shift on 6 August 2012 after she was given the letter containing the three initial allegations[13] and worked a full shift on 7 August 2012 before falling ill. It was only because she was ill that she was not at work for her rostered shifts between 8 and 13 August 2012. She had already been at work for approximately one hour and 45 minutes on 14 August 2012 before Ms Berryman saw her. There is no suggestion that on 6 and 7 August and for the first part of her shift on 14 August Ms Vollmer failed to carry out her usual duties diligently. There is no suggestion she attempted to or did tamper with any evidence that The Wood intended to use in the disciplinary process or that she dealt with Ms Berryman in a disrespectful or less than courteous way.

[60] But because of Ms Berryman's discomfort with continuing to work closely with Ms Vollmer it could have been a reasonable decision to suspend Ms Vollmer pending the investigation and disciplinary process.

[61] However, Ms Williams did not tell Ms Vollmer before she proposed suspending her why she considered it appropriate to require her not to be at work on 14 August or at all before the disciplinary meeting. I do not consider that Ms Williams asking whether Ms Vollmer had anything to say about her proposed pending suspension and expecting a response then and there or indeed even during the next telephone call, some five minutes later, could amount to:

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13 Although there was probably only a short period of her shift left.

(a) Adequately raising The Wood's concerns about Ms Vollmer continuing to work before the disciplinary meeting;

(b) Giving Ms Vollmer a reasonable opportunity to respond to The Wood's concerns before suspending her;

(c) Genuinely considering Ms Vollmer's explanations for the allegations before suspending her[14].

[62] I consider that the procedural defects were more than minor and resulted in Ms Vollmer being treated unfairly. I do not consider suspending Ms Vollmer on 14 August 2012, in the way that it was done was within the range of actions a fair and reasonable employer could have taken in all the circumstances. Therefore the suspension was an unjustified disadvantage.

***Was Ms Vollmer disadvantaged by the trespass notice?***

[63] The trespass notice amplified the effect of the suspension, which was in itself unjustified. The trespass notice itself also amounted to a disadvantage to Ms Vollmer in her employment. As at 14 August 2012 Ms Vollmer was facing allegations of serious misconduct. However, no investigation was complete and there had been no opportunity to allow Ms Vollmer to give her explanations to her employer. Nevertheless her employer unilaterally decided that she could not attend her place of work for a period of two years. Ms Vollmer was disadvantaged in her employment by the trespass notice being issued and served on her.

***Was the trespass notice justified?***

[64] Ms Berryman's evidence is that she was advised by the police to issue the trespass notice which they would serve on Ms Vollmer:

> *One policeman stayed with Wendy while the other came to my office and had a trespass order with him which he said I needed to fill out… I completed the trespass order with the first policeman's help…*

[65] I do not accept that the police made the decision to issue the trespass notice preventing Ms Vollmer from attending her place of work for two years. Under the Trespass Act 1980 it is the occupier of property who has the authority to issue a

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[14] I accept that a consideration of s.103A(3)(a) is not necessarily useful in this case given that only a preliminary investigation was able to be undertaken before the disciplinary meeting at that stage proposed for 21 August 2012.

warning to a person who is trespassing or has trespassed[15]. An 'occupier' is defined under s.2 of the Act:

> ***occupier**, in relation to any place or land, means any person in lawful occupation of that place or land; and includes any employee or other person acting under the authority of any person in lawful occupation of that place*

[66] Ms Berryman was the manager and the person in lawful occupation of The Wood's premises. The police provided the form, advised Ms Berryman that it was possible and could be advisable to issue such a notice, and served the notice on Ms Vollmer. Ms Berryman, in her capacity as the occupier of The Wood issued the trespass notice.

[67] I have already found that the suspension was unjustified. Once the police arrived Ms Vollmer left voluntarily. She remained an employee, although suspended on full pay. The Trespass Act is a blunt instrument for an employer to use against an employee, but especially at such an early stage in the disciplinary process before there could have been any fair decision made about whether Ms Vollmer's conduct prior to 14 August 2012 amounted to serious misconduct.

[68] I also doubt that Ms Vollmer was actually trespassing. She was there legally in her capacity as an employee at least up until the time she was suspended. According to The Law of Torts in New Zealand:

> *An honest belief that one is legally entitled to remain on the premises provides a defence under the general law.*[16]

[69] Ms Vollmer had such an honest belief. Since I have decided the suspension was unjustified it follows that her honest belief was correct; she remained on the premises legally and was not actually trespassing.

[70] The decision to issue a trespass order against Ms Vollmer was not within the range of actions a fair and reasonable employer could have made in all the circumstances at the time the decision was made. Therefore Ms Vollmer was unjustifiably disadvantaged by the trespass notice.

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15 Sections 3 and 4 of the Trespass Act 1980.

16 Ed. Stephen Todd, 5th Edition, page 445

***Was Ms Vollmer's dismissal justified?***

[71] The justification for Ms Vollmer's dismissal is also determined under the statutory test in s.103A of the Employment Relations Act 2000. The test requires the Authority to decide the question of justification objectively. This is the same test that I used to consider whether the suspension was justified and is set out in paragraphs [40] to [43].

[72] The Authority may not substitute its opinion for that of the employer, and in applying the test of justification it must consider whether The Wood acted fairly in concluding Ms Vollmer was guilty of serious misconduct and whether, before deciding to dismiss her, it carried out a fair process.

[73] I need to consider whether The Wood had reasonable grounds for concluding that:

(a) The misconduct in question occurred; and

(b) It amounted to serious misconduct.

***Was Ms Vollmer's conduct on 14 August 2012 capable of amounting to serious misconduct?***

[74] The Wood considers that Ms Vollmer brought the suspension, the arrival of the police and the trespass notice on herself because she failed to leave the premises when asked. It concluded:

> *You took the opportunity to seek advice from your lawyer on at least four occasions during the time that you were at the facility, between 9.00 am and 9.30 am.*
>
> *It is not accepted that you needed to remain at the facility for that length of time to hand over the keys. In fact you took your keys with you. You did not have any other personal belongings to uplift, and there was no need for you to do a handover.*
>
> *In short, it is not accepted that there was any need for you to remain at the facility for approximately forty five minutes after the time that you had been suspended on full pay.*
>
> *We are satisfied that you wilfully ignored a lawful request to go off duty and leave the premises and, in doing so drew attention to yourself and made inappropriate comments about how The Wood treats its staff.*

[75] Although during the disciplinary process The Wood did not refer to its House Rules they are relevant and it is appropriate to consider them.

[76] Clause 22 says that serious misconduct and ordinary misconduct are separately discussed later in the Rule and:

> *The distinction between the two forms of misconduct is not always clear and may overlap. Descriptions of types of …misconduct given below …are not necessarily complete. Any incident will be viewed in light of its own particular facts.*

[77] Clause 23 of Ms Vollmer's individual employment agreement sets out a disciplinary process and refers to the Rules which it says set out some examples of serious misconduct. Clause 22.1 of the House Rules states:

> *The following examples of serious misconduct, although not exhaustive, may render an employee liable to instant dismissal.*

[78] Categories of the listed serious misconduct that could possibly apply to the allegations are:

> *(i)* *Refusal to carry out proper work instructions …*
>
> *(xiii)* *Behaviour either in or out of the workplace that may bring the company into disrepute or otherwise damage the reputation or image of the company …*
>
> *(xiv)* *Using offensive language or behaviour …*
>
> *(xvii)* *Conduct, comments or misrepresentations that are, or are likely to be injurious to the employer.*

[79] Ms Berryman says after Ms Vollmer had been suspended and asked to leave she was**:**

> *…openly defiant, hostile and angry. ..Wendy went out of the photocopy room and said loudly "call the police then!*[17]*" and walked toward the nurses' station*
>
> *This situation was very unpredictable, and I believe Wendy was out of control with her emotions to shout out defiantly "call the police then!" at reception with little regard about bringing the company into disrepute and instead wanting to make her own point.*
>
> *[Once the police arrived] …Staff reported to me that Wendy was euphoric then shouting is this the way The Wood treats their staff.*

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[17] Ms Vollmer denies this and says that once she was told that Ms Berryman would call the police if she did not leave she said "you do what you have to do". She continued to say that she did not believe she had to leave but was entitled to stay at work.

*Wendy made this situation undignified as she created this scene…*

[80] However, that evidence was not before Ms Williams when she made her decision to dismiss based on the events of 14 August. Ms Berryman's notes made that day are written in a more matter-of-fact descriptive fashion although they refer to Ms Vollmer refusing to leave and saying "call the police then".

[81] Senior Constable Hambrook says that when he arrived at The Wood Ms Vollmer:

> *…was very upset, stressed and agitated. At one point she started to cry. She was not hostile or out of control. She was not shouting out.*[18]

[82] Ms Langford wrote a signed statement which is not dated but I consider it was probably written after the disciplinary meeting on about 4 or 5 September 2012 as part of Ms McKenzie's investigation. She says:

> *Wendy's mood was out of character, very elevated and loud, as though she was drawing attention to herself…*
>
> *Wendy became upset and said after 5 years of employment this is how you are treated here.*

[83] Chris Gaul, who is The Wood's nurse educator and quality facilitator, wrote a signed statement on 4 September 2012. She said that about 10-15 minutes after the police arrived:

> *I heard shouting in the corridor from Wendy. She was making statements like 'they want to get rid of me', 'they've only gone and phoned the police', 'I've done nothing wrong'. … During this incident Wendy appeared euphoric and uncharacteristically loud. She was visibly upset and angry.*

[84] Ms Gaul said at the Authority's investigation meeting that she:

> *Had not found her to be a loud person and had always spoken reasonably quietly.*

[85] Apart from the fact Ms Vollmer attended work for her rostered shift against what The Wood understood to be Ms Williams' instructions there is no other criticism by The Wood of Ms Vollmer's behaviour on 14 August 2012 prior to refusing to go home and insisting she had a right to be at work.

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[18] I put little weight on this statement as it was obtained by Ms Ironside over the telephone and was not signed by Mr Hambrook. However, his evidence is consistent with the evidence of Ms Gaul and Ms Langford.

[86] Given that Ms Vollmer had not been suspended prior to 14 August 2012 she was entitled to attend work. I have already concluded the suspension was unjustified and that issuing the trespass notice was also unjustified. It follows that The Wood's finding that Ms Vollmer *wilfully ignored a lawful request to go off duty and leave the premises* cannot be correct. She wilfully ignored the request to leave the premises[19] but the request was not a lawful one; nor was it reasonable in all the circumstances. That part of Ms Vollmer's behaviour could not reasonably be seen to amount to serious misconduct in all the circumstances at the time the decision was made.

[87] I do not consider Ms Vollmer's 'drawing attention to herself' could reasonably be considered to be serious misconduct in all the circumstances at the time the decision was made. Leaving immediately once suspended in order 'to fight another day' may have been the discrete and prudent approach. However, her emotional behaviour once the threat of police involvement was made and once the police arrived was understandable.

[88] I do not consider it could reasonably have been concluded that Ms Vollmer *made inappropriate comments about how The Wood treats its staff.* The Wood did unjustifiably suspend her and unnecessarily involve the police in the employment dispute. She did not use offensive language or behaviour. The Wood may have considered her comment was *likely to be injurious to the employer* as it was made in earshot of other staff but it was true and entirely understandable in the circumstances. In all the circumstances at the time her comments could not have been considered by a fair and reasonable employer to amount to serious misconduct.

***Was Ms Vollmer's conduct on 3 August 2012 capable of amounting to serious misconduct?***

[89] The Wood concluded that Ms Vollmer engaged:

> *…in intimidating and unprofessional behaviour towards Correne Berryman …*
>
> *We also take into account the fact that you had other alternative ways in which to address this issue, namely you could have consulted Andrena Williams over the situation. Instead, you decided to confront, in an aggressive and intimidating and unprofessional manner, Correne in her office about the issue.*

[90] The Wood concluded that behaviour amounted to serious misconduct.

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19 At least until she had been able to seek advice from her lawyer.

[91] The word 'unprofessional' can bear two different meanings. The first and most common is its colloquial use meaning behaviour that is inappropriate at work. The second meaning is behaviour not in line with a nurse's professional responsibilities. At the time of making the decision The Wood did not clarify which meaning of the word it relied on. I consider The Wood to have blurred the two meanings.

[92] The examples of serious misconduct listed in the House Rules which this could be considered as are:

> *(xiii) Behaviour either in or out of the workplace that may bring the company into disrepute or otherwise damage the reputation or image of the company…*
>
> *(xv) Using offensive language or behaviour…*

[93] The policy on sick leave in Ms Vollmer's employment agreement provides that the employer can ask the employee to provide a medical certificate after *the first three calendar days of absence due to sickness or injury*.

[94] On 18 July 2012 Ms Vollmer asked for prior approval of a sick leave day for 23 July for a scan she needed which was at 2.30 p.m. She did not tell Ms Berryman what the procedure was, why she needed it, what time it was or that she had been instructed not to eat for four hours prior to the scan. The first discussion about the sick leave was documented by Ms Berryman at the time. Her notes says Ms Vollmer:

> *…said yes she could have it in advance and got argumentative. She said right – is that the way it is – thanks for your support! Stormed out of room.*

[95] A replacement was arranged for Ms Vollmer for 23 July. When she received her payslip she realised she had not had a sick leave day applied to the day of her scan but an annual leave day. She went to see Ms Berryman in her office to get that changed to a sick leave day.

[96] Ms Vollmer had previously undergone treatment for breast cancer. There had been a practice of not requiring her to take leave of any kind, if possible, for medical appointments but working her shifts around the appointments. Those arrangements were made on a case-by-case basis between Ms Berryman and Ms Vollmer. The scan in question was not directly related to her breast cancer although in light of her previous cancer understandably Ms Vollmer was worried.

[97] Ms Berryman's position was that if Ms Vollmer brought in confirmation of her hospital appointment she could retrospectively change the day in question to a sick leave day. I conclude that at least on 3 August, if not when they originally discussed the request for sick leave, Ms Berryman asked Ms Vollmer to do that.

[98] Once Ms Berryman made it clear she did not agree to what Ms Vollmer sought without some proof of the need for the sick leave Ms Vollmer said she would take it up with Ms Williams who was due to visit within a few days. Ms Berryman told her Ms Williams would agree with Ms Berryman's view but unfortunately Ms Williams was going to a funeral on the next day she had been due to be at The Wood.

[99] I accept that there was a robust and perhaps angry exchange between Ms Vollmer and Ms Berryman. What Ms Berryman most objected to was Ms Vollmer's sarcastic and bad-mannered reference to Ms Berryman's own time off work for surgery for skin cancer. Ms Vollmer said words to the effect of *that's a bit rich*.

[100] I consider Ms Berryman muddied the waters unnecessarily on 3 August 2012 by suggesting Ms Vollmer may at an earlier time have dishonestly used some sick leave by driving to Christchurch. I am in no doubt that contributed to inflaming Ms Vollmer as it was a direct suggestion that Ms Berryman did not trust her. That allegation was not pursued formally by The Wood but I consider that Ms Berryman did take it into account in reaching her decision to commence disciplinary action against Ms Vollmer following the 3 August events.

[101] Ms Vollmer did not leave Ms Berryman's office when asked to do so. At the investigation meeting she said:

> *She asked me to leave and I said I wasn't going to, not until she had answered by request that I had come to the office for….I refused until I had my questions answered.*

[102] The tenor of the exchange, although not the words, was able to be heard from the reception area. Whether Ms Berryman left the office first is not clear but Ms Vollmer only left when Ms Berryman got up from behind her desk and walked to the door and opened it wide and indicated again that Ms Vollmer must leave. Ms Vollmer was still in the grip of her high emotions when she walked into the reception area and accepts that she said *she just doesn't get it* as an aside to Karen

Gibson when she walked through the reception area once Ms Berryman managed to get her to leave her office.

[103] There was a new client and her daughter, Julie Scoggins, at the reception desk. Ms Scoggins' evidence in a signed statement of 2 October 2012 is that she realised that Ms Vollmer and Ms Berryman were having *a determined discussion* but that it was not an argument and that *Wendy was not arguing at the reception area* and that she saw *absolutely no unprofessional, intimidating or abusive behaviour from Wendy*.[20]

[104] Ms Berryman says she was very shaken by the exchange and felt *intimidated and quite threatened*. In her notes written on 3 August or the day after that she wrote that she considered Ms Vollmer to have been *rude* and *totally unprofessional*.

[105] Ms Vollmer was bad-mannered, perhaps rude, and not duly respectful towards Ms Berryman. She had an aggressive manner. However, her behaviour did not amount to any of the categories of misconduct set out in the House Rules such as verbal abuse[21], or amount to abusive behaviour. She did not use any swear words or offensive language or rude gestures.

[106] According to the Oxford Online Dictionary *to intimidate* means:

> *To render timid, inspire with fear; to overawe, cow; in modern use esp. to force to or deter from some action by threats or violence.*

[107] Ms Vollmer stood up, folded her arms and refused to leave Ms Berryman's office. But she cannot reasonably be said to have inspired Ms Berryman with fear. She did not make use of force or threats. Ms Berryman felt intimidated by Ms Vollmer but that does not necessarily mean, objectively speaking, that Ms Vollmer engaged in *intimidating behaviour*.

[108] A senior employee should speak to her manager with more moderation and better manners even when there is a dispute. Ms Vollmer's behaviour was inappropriate. However, her behaviour was not necessarily unprofessional in the particular sense of her being a nurse. It was not alleged prior to dismissal that Ms Vollmer had breached the Nursing Council Code of Conduct - Competency for

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[20] Ms Scoggins was not called as a witness and so her evidence has not been tested. That affects the weight I can put on it.

[21] This in any event is categorised as ordinary misconduct in the House Rules, for which summary dismissal is not the usual outcome.

Registered Nurses when its decision to dismiss was made. She was not asked to respond to such allegations.

[109] The Wood's letter of 28 September 2012 states that Ms Vollmer had other options and that she *could have consulted* Ms Williams. I accept Ms Vollmer's evidence that was what she intended to do next but before Ms Williams came to The Wood again she received the 6 August letter inviting her to a disciplinary meeting. In addition, it was reasonable for Ms Vollmer to approach Ms Berryman in the first instance as her direct manager.

[110] A fair and reasonable employer could not have concluded that Ms Vollmer's behaviour on 3 August amounted to serious misconduct in all the circumstances at the time the decision was made. But her behaviour could reasonably have been considered ordinary misconduct for which, for example, a formal warning could have been given about how she spoke to her manager. That is the case especially when the incident was so close in time to what Ms Berryman considered was inappropriate behaviour towards Ms Turner and in the presence of Ms Campbell. The two latter concerns had not been made the subject of a formal warning and ended up not being pursued by The Wood because Ms Williams considered they had been appropriately dealt with in a less formal way by Ms Berryman.

***Did Ms Vollmer refuse to carry out proper work instructions for the role she was responsible for?***

[111] The allegation against Ms Vollmer was:

> *Refusal to carry out proper work instructions, namely failure to read/follow policy and lawful instructions regarding recording all infections as reported in the Surveillance Audit.*

[112] By 28 September 2012 The Wood concluded:

> *We are satisfied that Correne asked you about the Infection Control Policy on 31 July/1 August 2012, and that you communicated to her that you had not read the policy.*
>
> *…refused to carry out proper work instructions for the role that you were responsible for*

[113] In The Wood's view failing to read the policy and carry out proper work instructions amounted to serious misconduct.

[114] The Wood submits that in the disciplinary meeting Ms Vollmer acknowledged that she had told Ms Berryman she had not read the policy. That is not how I read the transcript. Ms Vollmer was asked if she had ever read the ICP. She responded:

> *Of course you do, when you are employed you have to sign and say you have read the infections control policy. It is due for its review; I knew it was going to be addressed.*
>
> *I hadn't read it in the last two weeks of course not; the inference was I should know verbatim everything that is in it. I know where it is, I know where to look for stuff.*
>
> *…I was the infection control person. Have I read the policy, yes.*
>
> *[And you were complying with the policy?]*
>
> *As I understood it.*

[115] The ICP is a long (53 pages) and detailed document. In part, it states:

> *The Infection Control Co-ordinator shall co-ordinate the Infection Control activities within the facility.*
>
> - *Assist in the development and review of all Policies and Procedures that guide staff and assist in safe infection control practices.*
> - *Document and collate all details of all infections in the facility and report on those via the Quality Committee, on appropriate templates.*

[116] There is no further detail on the method the ICC should use to collect and collate the infection data. The ICP does not direct the ICC to consult each resident's file each month.

[117] Ms Berryman says the responsibility for recording all infections, including those that were non-medicated was Ms Vollmer's alone and she knew that as soon the audit was completed. Ms Vollmer says that she did not receive any specific instruction to do so. She believed she was doing things properly because she was following the same process that the previous ICC had used.

[118] Ms Vollmer also says she didn't immediately start recording the non-medicated infections because the method she thought she would have to use, going through each resident's file for the rest home and hospital each month was too time consuming. Also, she understood a new process was still being developed.

[119] There is no record of any oral or written instruction being given to Ms Vollmer in the wake of the audit to immediately begin to collect data and report on non-medicated infections. However, even when she knew about the partial attainment she persisted in using the same approach.

[120] Ms Vollmer's insistence that she was using the correct method because that is how the previous ICC had done it is consistent with a lack of clear understanding of what was now required of her. In the investigation meeting she said:

> *We were still going with the protocol we had always used, which was established process until the QA and the manager and my input had decided how the process was going to happen.*

[121] I give credence to the fact that Ms Vollmer had some uncertainty about how and when a new procedure would occur for the following reasons:

(a) Ms Vollmer and Ms Gaul, the quality educator, worked on a new risk management form after the audit and before the report was due. That form included the ability to record the risk of infection factors. It was placed on residents files in June for a trial period. The Minutes of the Registered Nurse and Enrolled Nurses Meeting of 29 May 2012 attended by Ms Vollmer, with apologies from Ms Berryman, recorded that Ms Gaul gave an *Infection Control Update. Feedback from audit. To ensure all infections are in line with the Infection control policy. Updated the Resident Infection Assessment form to include risk factors and make an easy to use form. Education given about collecting/surveying all residents with suspected infections*[22]. In fact, that form was ultimately discarded by Ms Berryman as not sufficiently helpful. However, I consider that as at that date Ms Gaul and Ms Vollmer shared the belief that form was likely to be part of the new process for collecting data on all infections, as The Wood was required to do in line with its own policy;

(b) The Minutes of the Quality/Infection Control/Health & Safety Meeting of 9 May 2012, attended by Ms Vollmer and Ms Berryman, recorded that there were three months to complete the collection of the data in

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[22] There were two versions of the minutes only one of which recorded the education session. I am satisfied by Ms Gaul's evidence that the education session did occur but was inadvertently omitted from the first draft of the minutes.

line with the ICP and that *actions are already in place*. *E-mail sent to auditors to state this before I* [Ms Berryman] *go on holiday tomorrow.* No specific action was identified in the minutes as having been put in place. I am satisfied that one of the actions Ms Berryman referred to was the development of the resident risk assessment form by Ms Gaul and Ms Vollmer. That is because under the heading 'Quality Assurance' the minutes state:

> *Chris is doing a great job and is setting up a new form for Infection Control Surveillance. Teaching session will be at next R/N & E/N meeting 24th May.*

(c) The Minutes of the Quality/Infection Control/Health & Safety Meeting of 12 June 2012, which Ms Berryman and Ms Vollmer attended, record that the Infection Control management audit was reviewed and completed.

(d) Ms Berryman was away for a period of time after the audit and before the report was due which may have contributed to the lack of clarity of who was to do what about making sure The Wood could meet the auditor's concerns within the allowed three months.

(e) In the disciplinary meeting Ms Vollmer explained that she was carrying on without changing anything:

> *…until you had formulated a new method. The quality person, the manager and myself had been involved in trying to work the process out. You don't put something in practise without having been clear.*

(f) Ms Berryman responded:

> *C: I think that what has clouded the issue was Chris bringing in the other form which we have canned. The main issue was to record all infections.*

(g) Ms Gaul's statement dated 4 September 2012 says, in part:

> *I can not recall any discussion about how the information would be collected from this point and assumed that Wendy would continue to document this data in collaboration with the Registered and Enrolled nurses.*

[122] Reports to the Infection Control meeting in May, June and July 2012 do not break down the reported infections into medicated and non-medicated groupings.

Ms Berryman says that she asked Ms Vollmer in each of those months whether she had reported on the non-medicated infections and Ms Vollmer said she had. Ms Vollmer denies this.

[123] The Wood was aware from Ms Vollmer's explanation at the disciplinary meeting on 3 September 2012 that she denied never having read the policy and believed prior to the audit that she was implementing the surveillance aspect of the policy as she understood it and as she understood the previous ICC to have done. Her explanation for why after the audit she was not collating the non-medicated infections was that it was too time consuming and that she understood that there was going to be a new form developed which *was a work in progress.*

[124] In all the circumstances a fair and reasonable employer could not have reached the conclusion that Ms Vollmer had never read the ICP. However, I do not consider that was the primary conclusion of The Wood which led it to conclude that Ms Vollmer was guilty of serious misconduct in her role as ICC. Rather it was its conclusion that she failed to follow proper work instructions that led to the finding of serious misconduct.

[125] No specific and clear *proper work instruction* was given to Ms Vollmer in writing or orally by The Wood to commence recording all un-medicated infections over the three months after the audit and before the report was due. Ms Berryman would have been the person who would have issued such an instruction. I am not satisfied that she did so.

[126] Instead Ms Gaul and Ms Berryman assumed that Ms Vollmer would 'lead' the required changes in her role as ICC.

[127] Once Ms Vollmer was aware of the audit partial attainment she was under an obligation to stop relying on her previous method and to adapt to what The Wood was required to do for then and for the future. She was aware it was necessary and if she did not think she had responsibility to 'lead' the change she needed to seek clear direction from Ms Berryman as her superior and manager of the facility.

[128] Ms Vollmer should have begun to ensure she recorded all infections, including any not treated by medication, and reported on them monthly even if it was a time consuming process. She should and could have done so in tandem with working on the new methodology she understood was being developed. The failure of

Ms Vollmer to record data on and report monthly on non-medicated infections immediately after the audit was an issue of performance in her role of ICC.

[129] In all the circumstances at the time the decision was made a fair and reasonable employer could not have concluded Ms Vollmer refused to carry out proper work instructions in her ICC role. Even if there had been such an instruction, there was no warning given to Ms Vollmer that a failure to obey the instruction would lead to serious consequences, including possible summary dismissal.

[130] The law is clear on what is required when dealing with performance issues, especially for a senior employee[23]. The law requires that generally:

(a) An employee must be warned about poor work performance in a clear and explicit way; and

(b) Told how their performance must improve, which must be measurable by objective standards;

(c) Given a reasonable time to improve; and

(d) Warned that a failure to improve could lead to dismissal.

[131] Clause 22.2 of the House Rules states out:

> *Offences that may constitute ordinary misconduct such as lateness, inadequate work performance, verbal abuse, etc shall be dealt with in accordance with the following warning system.*

[132] The warning system consists of a system of oral and/or written warnings. Each written warning needs to include certain things. It needs to set out clearly what the employee has done to warrant the warning and what is expected of the employee to avoid further disciplinary action along with a reasonable time frame *within which the employee is expected to rectify the fault.*

[133] Written warnings must also include a:

> *…clear statement that failure to complete the corrective action may result in dismissal as well as a clear statement of what assistance will be given by the employer, as appropriate*

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23 *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659 is the leading case in this area.

[134] It is clear from Ms Berryman's explanation at that meeting that she was unaware until the audit that data on non-medicated infections had not been collected and reported at least in the time Ms Vollmer was in the ICC role. Therefore, it was not just Ms Vollmer who apparently misunderstood The Wood's surveillance responsibilities prior to the audit findings.

[135] The Wood did not deal with Ms Vollmer in line with its own House Rules and failed to carry out the agreed disciplinary process related to inadequate performance. For that reason Ms Vollmer's dismissal on this basis was unjustified.

[136] I have concluded that none of the three allegations relied upon to dismiss Ms Vollmer were capable of amounting to serious misconduct. I have also found that the allegation of failing to carry out proper work instructions would be more properly characterised as a performance issue. The procedure for dealing with performance issues was not followed. Therefore, without needing to consider the specific procedural matters set out in s.103A(3) of the Act, I could conclude that Ms Vollmer's dismissal was not justified as the decision that she was guilty of serious misconduct justifying summary dismissal were not among a range of decisions that a fair and reasonable employer could have made in all the circumstances at the time.

***Was The Wood's process fair?***

[137] However, I also consider that some aspects of The Wood's process were unfair and were more than minor matters that affected Ms Vollmer to her disadvantage.

*Failure to take into account Ms Vollmer's previous good employment record*

[138] Ms Berryman's evidence was that in April 2012 as part of Ms Vollmer's performance review they discussed Ms Vollmer's stress levels and reactions when she was under stress. In the review dated 20 April 2012 Ms Berryman wrote they had *discussed the importance of 'self care' and good communication in this lead role*. She says that shows that there were existing issues of communication at that date. There may have been. However, Ms Berryman must have considered the issues minor as she also graded Ms Vollmer's communication as *very good* while commenting:

> *Monday meetings important with Manager and Hospital Charge Nurse. Communication very important for a good working relationship.*

[139] Ms Berryman's final comment on the review was *a big thank you for a job well done!*

[140] I am concerned that Ms Vollmer's length of service and extremely good performance reviews and lack of any prior warnings or other kind of disciplinary action did not seem to be taken into account by Ms Williams in considering appropriate consequences once she had decided Ms Vollmer had committed serious misconduct. The closeness in time of the four allegations made against Ms Vollmer, although the original third allegation was not pursued, was taken by The Wood as being an aggravating factor making dismissal an almost inevitable result. However, a fair and reasonable employer acting in good faith would have recognised a significant departure from what was the norm for Ms Vollmer's behaviour and performance as reflected in her performance reviews and would have sought to counsel and assist Ms Vollmer to improve through warnings and/or performance management, and not to dismiss her.

*Was it fair that Ms Williams made the decision to dismiss although she had not been involved in the disciplinary process?*

[141] My second concern is that the decision to dismiss was ultimately made by Ms Williams without her having been involved in the disciplinary meeting at which Ms Vollmer provided her explanations to the allegations or in the subsequent investigations in which the witnesses were interviewed. The applicant believed that Ms McKenzie took notes at the meeting. Ms Williams' evidence was that she did not see and had not been given notes of the disciplinary meeting from Ms McKenzie. However, Ms McKenzie discussed the meeting with her. She says that she was told the transcript was *in parts a true and accurate record and I relied on Linda* [Ms Ryder] *as I wasn't there.*

[142] Generally speaking an employee is entitled to be heard by the decision maker before a decision is made. Ms McKenzie was to all intents and purposes the decision maker at the time the meeting was held. She then went on to conduct further investigations, including interviewing witnesses or causing them to write statements, or agree to or amend statements she drafted for them. Copies of all of that evidence were duly provided to Ms Williams and Ms Vollmer before a decision was taken.

[143] However, Ms Williams did not hear from Ms Vollmer in person and did not interview the witnesses to events herself when she re-assumed the decision-making

role. I consider that to have been unfair to Ms Vollmer. Ms Williams did not have the ability to assess for herself the demeanour of Ms Vollmer before reaching any conclusions.

[144] In addition, Ms McKenzie spoke to Ms Williams before Ms Williams reached her decision. However, Ms Vollmer was not informed of what Ms McKenzie said or given an opportunity to comment on it.

[145] There is yet another factor of concern in Ms Williams being the decision-maker. Ms Williams made the decisions to suspend Ms Vollmer and to call the police if she didn't leave. Therefore, she was not in a position to objectively consider whether Ms Vollmer's attendance at work on 14 August and her refusal to leave the premises once purportedly suspended could amount to misconduct of any kind. Ms Williams should not have been the decision-maker because her ability to act objectively in relation to the third allegation was compromised.

*The trespass notice*

[146] In my determination of 13 November 2012 I wrote:

> *The issuing of the trespass notice also tends to suggest some compromise to the employer's ability to fairly decide later whether the allegations against Ms Vollmer amounted to serious misconduct justifying summary dismissal.*

[147] There is nothing that has caused me to change my view that the issuing of the trespass notice for two years suggested some pre-determination on The Wood's part as to the outcome of the disciplinary process.

*Was Ms Berryman's involvement in the disciplinary meeting fair?*

[148] Ms Vollmer submits that Ms Berryman was *the main complainant* about the 3 August incident and had been actively involved in the suspension and the trespass notice. She says it was not fair that Ms Berryman was so actively involved in the disciplinary process. In particular, she should not have had an active role in the disciplinary meeting.

[149] At the disciplinary meeting Ms Berryman's presence was explained as being because *the incident occurred between Corrine* [sic] *and Wendy* and it was more efficient to allow Ms Berryman to hear Ms Vollmer's explanation and to respond to it

and allow Ms Vollmer to respond to that. In fact, Ms Berryman did not leave after discussion of that allegation and was present for the entire meeting, which lasted five hours.

[150] Ms Berryman participated fully in the discussion of all three allegations, including the infection control policy issue, in which she was the complainant.

[151] From the transcript I see that at times the meeting became a debate between Ms Berryman and Ms Vollmer and between Ms Berryman and Ms Ironside. That was unfortunate and less than ideal when the purpose of the meeting should have been to investigate the allegations further and to hear Ms Vollmer's explanations of her behaviour and to consider her explanations. Ms Berryman's presence and full participation in the meeting was not fair to Ms Vollmer.

*Report to the Nursing Council*

[152] Another factor that should have been taken into account by The Wood is the professional consequences for Ms Vollmer of being dismissed. One of those consequences was the employer's responsibility to report that dismissal to the Nursing Council. On 15 October 2012 Ms Berryman reported Ms Vollmer's dismissal and the three grounds on which she was dismissed:

> ***Abusive, intimidating and unprofessional behaviour towards the facility manager …***
>
> *This forced me to leave my office as she wouldn't leave when asked two times.*
>
> ***Failure to read/follow policy and lawful instructions regarding recording all infections as reported in the surveillance audit.***
>
> *Refused to complete corrective actions and change her methodology of collecting infections when pointed out at audit and instructed by me over a 3 month time period and was misleading about what she was doing.*
>
> ***Refusal to follow a lawful instruction when the applicant refused to leave the facility as directed after she was suspended.***
>
> *Wendy Vollmer came to work when instructed not to until the Disciplinary meeting, then refused to leave the premises as directed by myself and the General Manager Andrena Williams. Police were called and we now have a 2 year trespass order served on Wendy Vollmer.*

[153] Ms Berryman told the Nursing Council that Ms Vollmer was *actively arguing this dismissal*. On 25 October 2012 Ms Vollmer was informed by the Nursing Council that the complaint had been referred to the Health and Disability Commissioner so that he could assess whether the complaint would be dealt with by him or should be referred back to the Nursing Council.

[154] The consequences of such a complaint and its inevitable impact on Ms Vollmer's career, even if she is ultimately vindicated after the Health and Disability Commissioner and the Nursing Council's process, was not taken into account by The Wood in making its decision on what was an appropriate disciplinary consequence.

[155] I consider all five factors to be more than minor breaches of fair process and ones that disadvantaged Ms Vollmer. Overall, Ms Vollmer's summary dismissal, particularly considering the process that was followed, was not among a range of options that a fair and reasonable employer could have taken in all the circumstances at the time.

***Did The Wood comply with its good faith obligations?***

[156] Ms Vollmer has made claims that The Wood breached its duty of good faith to her. The first claim is in relation to the process used to dismiss Ms Vollmer. I have already made specific findings on all aspects of the dismissal and remedies for the unjustified dismissal are considered below. I do not consider that it is necessary to also consider whether there was bad faith on The Wood's part in relation to the process leading to dismissal.

[157] Neither party acted in breach of good faith in trying to and eventually setting up the disciplinary meeting.

[158] Ms Vollmer also says that in filling her position with a permanent appointee after the Authority had reinstated her on an interim basis The Wood has breached its duty of good faith to her as an employee and has breached its contract of employment with her. The Wood advertised for a replacement for Ms Vollmer within a few days after her dismissal. The Wood made an offer of employment to its current rest home charge nurse on 16 October 2012; that was after the Statement of Problem was lodged but before the order for interim reinstatement was made.

[159] In all the circumstances I do not consider that the appointment of a new employee in Ms Vollmer's role has been proved to be a breach of good faith.

[160] In addition, I do not consider the appointment to have been an unjustifiable disadvantage to Ms Vollmer in her employment or a breach of contract. At the time the new charge nurse was appointed Ms Vollmer had been dismissed and not yet reinstated. Therefore she was not employed by The Wood and there was no contractual term that could be breached.

**Remedies**

***Should Ms Vollmer be reinstated to her role as charge nurse of the rest home and infection control co-ordinator?***

[161] Reinstatement is a remedy that the Authority may provide for if it is reasonable and practicable to do so[24]. It is no longer the primary remedy. The Employment Court has given some guidance on how issues of reasonableness and practicability are to be assessed:

> *…not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, … the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although …evidence considered when determining justification for dismissal …may also be relevant to the question of reinstatement.*[25]

[162] In considering reasonableness, the effect of reinstatement of Ms Vollmer on other employees of The Wood may be considered. In addition, I need to consider the effect of Ms Vollmer's reinstatement on the residents of The Wood[26].

[163] The meaning of "practicable" in the context of reinstatement was considered by the Court of Appeal in *Lewis v Howick College Board of Trustees*[27] which affirmed the Employment Court's view:

> *Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully.*

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24 Since 1 April 2011 reinstatement is not the primary remedy, but a discretionary one.
25 *Angus and McKean*, ibid. at paragraph 66.
26 *Gazeley v Oceania Group (NZ) Ltd* [2012] NZ EmpC 8 at paragraph 37
27 [2010] NZCA 320 at paragraph 2.

[164] If I decide it is reasonable and practicable to reinstate Ms Vollmer I then have to consider whether the nature and degree of her contribution to the situation leading to the personal grievance is such that she should be denied reinstatement.

[165] Reinstatement is strongly opposed by The Wood. Its opposition was set out in affidavits, other evidence and submissions at the interim and the substantive hearings. The main objection is that the essential mutual trust and confidence that The Wood needs to have in Ms Vollmer has been so broken that it cannot be restored. As a sub-set of that objection The Wood submits that Ms Vollmer has demonstrated by her actions that she does not respect Ms Berryman and will not take instructions from her.

*The effect on other staff if Ms Vollmer is reinstated*

[166] Ms Gaul's evidence was that if Ms Vollmer returned to work it would create a negative atmosphere especially within the senior nursing team. She said in particular:

> *The manner in which Wendy acted when asked to leave the premises has in my mind, changed some staff's opinion of her sense of professionalism.*
>
> *… My trust in Wendy has been destroyed because of the way this matter has escalated. I would find it hard to trust Wendy based on what I have seen here.*
>
> *…Professionally I can see that a lot of work would be needed to build bridges between Wendy and Correne, Shirley and me.*

[167] Ms Langford's evidence at the substantive hearing was that she considered that she and Ms Vollmer had not had a good working relationship prior to any disciplinary action being taken against Ms Vollmer. That evidence came as a surprise to Ms Vollmer who said she thought they did have a good working relationship. Ms Langford said that she was likely to resign if Ms Vollmer was reinstated. During the substantive hearing the Authority was made aware that Ms Langford had resigned and so no longer works at The Wood.

[168] I note that Ms Langford's affidavit referred to the events of 14 August 2012 having had *a destructive impact on my relationship with some staff members in the Rest Home … I feel there is a division within the staff* [in the rest home] *between those who support Wendy, and those who don't*.

[169] A division amongst the staff between those who support Ms Vollmer and those who support The Wood is an almost inevitable result of the events to date. It is

not uncommon when a staff member has been dismissed and particularly when she is actively challenging that dismissal.

*Are there safety concerns for the residents of The Wood if Ms Vollmer is reinstated?*

[170] Ms Williams says that if Ms Vollmer is reinstated she would notify the DHB that The Wood had been required to *re-employ an unsafe registered nurse.* However, there is no evidence that Ms Vollmer's behaviour towards the residents of The Wood fell below the standards of care that would be expected of her as a registered nurse. The issue of infection control surveillance data collection was not one which ever put the health of residents of The Wood at risk.

[171] I give no weight to Ms Williams' belief that Ms Vollmer is an *unsafe* nurse. There was no evidence put before me of any unsafe nursing practices.

[172] The allegation to the Nursing Council of an inappropriately close relationship with a resident of an apartment and of Ms Vollmer receiving a gift from her has been adequately explained and refuted by Ms Vollmer's evidence in the substantive hearing. I do not consider that would be a barrier to Ms Vollmer's successful reinstatement.

[173] The two general practitioners whose patients reside at The Wood gave evidence in support of Ms Vollmer's work and considered her work to be of a high standard and appropriate as far as their patients were concerned. They were in support of Ms Vollmer being reinstated. Dr Brooke acknowledged on 27 November 2012 that the rest home had settled down since the initial unease amongst staff directly after Ms Vollmer's suspension and dismissal. In response to questioning he said that Ms Vollmer's reinstatement need not unsettle the residents and *any good or competent charge nurse would have a positive impact on the residents.* He clearly considered Ms Vollmer to be a good charge nurse.

[174] I need to consider the effect of the passage of time since Ms Vollmer was last at work on the residents. Initially it would have been understandable that the residents of the rest home were unsettled by Ms Vollmer's abrupt removal from work. Over time I would expect that the continued care they received from the remaining staff allowed them to become more settled. Since 26 November 2012 there has been a new charge nurse of the rest home.

*Relevance of the appointment of a charge nurse in Ms Vollmer's position*

[175] The Wood currently has another employee in Ms Vollmer's previous role. It has put itself into a position that may cause a problem between it and its new employee if Ms Vollmer is reinstated. However, that is not a factor that in itself necessarily resolves whether it is practicable and reasonable to reinstate Ms Vollmer.

*Has the essential term of trust and confidence been irretrievably severed?*

[176] Apart from its concern about the relationship between Ms Berryman and Ms Vollmer The Wood's arguments against reinstating Ms Vollmer mainly relate to Ms Vollmer's behaviour on 14 August 2012 and to the way she and Ms Ironside went about seeking evidence to respond to The Wood's allegations.

[177] Ms Williams and Ms Berryman consider that Ms Vollmer's actions on 14 August 2012 demonstrate Ms Vollmer's unwillingness to take the kind of instruction necessary in the workplace.

[178] Ms Williams says that she could no longer trust Ms Vollmer to behave professionally in the workplace. In reaching that view she took into account:

(a) Ms Vollmer's interaction with Ms Turner of the local DHB and Ms Campbell of Ebos contributing to a pattern of behaviour emerging with Ms Vollmer's *current actions at the facility*;

(b) Concerns for patient safety because of Ms Vollmer's *abusive behaviour*;

(c) That Ms Vollmer threatens the safe operation of the facility;

(d) Failing to provide the official confirmation of her scan appointment to The Wood before the appointment or during the disciplinary process;

(e) Unsigned statements from witnesses being taken and presented without their agreement by which she concluded that Ms Vollmer *actively sought to mislead me by providing what were in effect unverified and inaccurate statements to support her position*; and

(f) Disapproval of Ms Vollmer contacting staff to try and encourage them *to take her side against management*.

[179] I have already dealt with Ms Williams' concerns about Ms Vollmer's safety.

[180] Ms Williams' and Ms Berryman's disapproval of Ms Vollmer seeking statements from staff and Constable Hambrook and their related concerns about Ms Vollmer's honesty are not factors I consider relevant to a consideration of whether she should be reinstated. The fact the statements were unsigned merely goes to the weight that could be put on them.

[181] Ms Vollmer was entitled both during the investigation and disciplinary process and since then to seek evidence to support her view that she had not done anything amounting to serious misconduct and had been treated unfairly. There can be no suggestion that The Wood was entitled to investigate and seek evidence but that Ms Vollmer was not. An employer does not have a sole right to seek and use the evidence of employees and other witnesses.

[182] The Wood undertook its investigation and contacted the witnesses that had been already approached on Ms Vollmer's behalf. There was no disadvantage to The Wood in Ms Vollmer and Ms Ironside contacting witnesses and seeking evidence.

[183] I give little weight to the negative view Ms Williams, Ms Berryman and Ms Gaul have of Ms Vollmer's behaviour on 14 August 2012 in refusing to leave the premises. That situation was of The Wood's making and has little relevance to whether it is practicable or reasonable to reinstate Ms Vollmer, except as to what would be The Wood's responsibility to repair its relationship with Ms Vollmer if she was reinstated.

[184] I do not consider that Ms Vollmer's communication with Ms Turner or Ms Campbell should be relevant factors for me to take into account in deciding whether she should be reinstated. That is because they were not considered to be so serious that Ms Berryman made them the subject of disciplinary action at the time they occurred or apparently for Ms Williams to take them into account in making her decision to dismiss Ms Vollmer.

[185] Ms Williams and Ms Berryman's concerns are to a great extent based on conclusions they reached about Ms Vollmer's actions and character during the events themselves, the investigation and disciplinary meeting and the Authority's proceedings. I have found that their conclusions were largely unfounded.

[186] In their submissions counsel referred me to relevant authorities. Ms Ironside submits that as in *Sefo v Sealord Fisheries Ltd*[28] the professed loss of trust and confidence in an employee requires an objective assessment of whether trust and confidence has actually been lost, rather than merely accepting the subjective evidence of an employer. I agree that I need to make an objective assessment.

[187] I also note that in *Sefo* a relevant factor to Mrs Sefo being reinstated was how much day to day conduct the relevant manager would have to have with Mrs Sefo and the likelihood of similar disciplinary issues arising in the future. It was also relevant to Chief Judge Colgan's consideration that the company had:

> *… taken on board the findings of the Employment Relations Authority adverse to the company and, by implication, that future similar situations will be dealt with differently.*

[188] Conversely, I do not have confidence that The Wood considers that it was to blame in any way for how things have proceeded.

*Is Ms Vollmer likely to be able to work under Ms Berryman's management?*

[189] This is the key consideration. I do not consider that Ms Vollmer's behaviour on 3 August 2012 alone shows that she is unable to work effectively under Ms Berryman's management again although Ms Berryman believes that Ms Vollmer will *once again act in a disruptive, and undermining manner and have a negative impact on those under our care*.

[190] Ms Berryman also has concerns about Ms Vollmer's *honesty*; the honesty issue is in relation to what she and Ms Williams considered were *false statements* supplied by Ms Vollmer. I have already dealt with those considerations above.

[191] Ms Berryman also says she can no longer *trust Wendy to practice in a safe and professional manner* due to concerns about communication and collaboration at work.

[192] The Wood submits that Ms Vollmer's conduct of her case and of herself during the investigation meetings shows that she has lost trust and confidence in The Wood and in Ms Berryman in particular. Therefore, it is not practicable or reasonable to reinstate her. I am sure that trust and confidence Ms Vollmer would need to have

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28 [2008] ERNZ 178, at paragraphs [68]-[69]

in The Wood has been damaged, in part by The Wood's actions. However, I cannot make that determinative because that would mean that the worse an employer acted the less likely it would be an employee could have the remedy of reinstatement.

[193] The Wood submits that Ms Vollmer has not acknowledged any wrongdoing and her attitude and responses have shown that she is unlikely to be able to work constructively again within the small management team at The Wood.

[194] In my view Ms Vollmer feels deeply shocked and hurt by what she considers unfair treatment at the hands of The Wood. She has some justification for that. However, I have the impression that Ms Vollmer has a combative nature if things are not going her way. At times she was an evasive witness, was highly defensive and was reluctant to answer questions from me and from The Wood's counsel directly, instead giving justifications for her behaviour.

[195] Ms Vollmer's responses in the disciplinary meeting showed that she did not accept any responsibility for her behaviour towards Ms Berryman and continued to characterise the problem as the issue of sick leave and not one of how she communicated and tried to resolve the disagreement she had with Ms Berryman.

[196] I consider that Ms Berryman did not deal with the aftermath of the 3 August 2013 argument appropriately. She took the events very personally and did not handle it in a way I would expect a manager to be able to do. A manager must be able to deal with conflict between herself and her staff as well amongst her staff. A manager must have a level of robustness to perceived personal criticism. However, Ms Vollmer has yet to accept that her behaviour on 3 August 2012 was unacceptable.

[197] Ms Vollmer also appears to still consider that she bears no share of blame for the fact that data on non-medicated infections were not collected in May, June and July 2012.

[198] In addition, although Ms Berryman's total lack of trust and confidence in Ms Vollmer may not be reasonable when viewed objectively it is very real. I also consider that despite Ms Vollmer's insistence that she could work with Ms Berryman and Ms Williams again at The Wood it is unlikely that Ms Vollmer would be able to rediscover the requisite trust and confidence she would need in her employer. The workplace is a very small one and the nature of the enterprise in caring for vulnerable elderly people requires close co-operation and easy communication. It requires team

work and there are very few registered nurses in The Wood's team. Ms Berryman is Ms Vollmer's direct manager and they need to have daily contact.

[199] In addition, Ms Williams is Ms Berryman's manager and Ms Vollmer's ultimate manager. If it was only Ms Williams who lacked trust and confidence in Ms Vollmer my concerns would not be as great as they do not need to have daily contact. However, the fact that both Ms Berryman and Ms Williams have lost trust and confidence in Ms Vollmer is significant.

[200] In the disciplinary meeting Ms Vollmer objected to Ms Berryman's involvement. In the circumstances I do not consider that to be evidence that Ms Vollmer lacks the necessary trust and confidence in Ms Berryman.

[201] At the beginning of the substantive investigation meeting Ms Vollmer objected to Ms Berryman remaining in the meeting as The Wood's representative in Ms Williams' absence for part of the substantive hearing because she said there were issues of credibility and in particular she did not feel comfortable giving her own evidence in front of Ms Berryman. I do take that into account as evidence of a lack of trust in Ms Berryman.

[202] The issue of reinstatement is of significant importance to Ms Vollmer at this stage in her career. I have given consideration to whether Ms Vollmer's reinstatement could be made subject to conditions, such as mediation between her and Ms Berryman which could make her reinstatement both practicable and reasonable. Hearing from Ms Vollmer, Ms Williams and Ms Berryman, questioning them and observing them at the substantive hearing over a period of five days assisted me greatly in reaching my decision.

[203] Because of the depth and nature of the mutual feelings of distrust between Ms Berryman and Ms Vollmer, in particular, and bearing in mind the effect that could have on the smooth daily running of the facility and on its vulnerable clients I consider that on balance it is not practicable and reasonable to reinstate Ms Vollmer to her former position at The Wood. That view is reinforced by my decision about Ms Vollmer's contribution set out below.

***Contribution***

[204] Under section 124 of the Act when I consider remedies I must consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance.

[205] The Wood's counsel submitted that the Employment Court case of *Villegas v Visypak (NZ) Ltd*[29] was relevant to the question of contribution and should result in a finding of 100% contribution. I do not agree. In that case Mr Villegas' actions were considered by his employer and by Judge Travis to be unsafe and so he was not reinstated. In this case Ms Vollmer's actions although considered to be unsafe by The Wood are not so when objectively considered.

[206] Ms Vollmer bears some responsibility for how events unfolded on 3 August 2012 and the fact that her behaviour became part of a disciplinary process. I consider that Ms Vollmer's verbal altercation with Ms Berryman on 3 August 2012 was blameworthy behaviour.

[207] However, according to the Employment Court:

> *Not every element of blameworthy conduct on the part of an employee that contributes to a dismissal that is subsequently found to be unjustified should be reflected in remedy reduction. To do otherwise would expect standards of perfection of work performance by employees that are simply unrealistic in most workplaces…the Authority and the Court should take a robust and realistic attitude to what occurs in workplaces and not scrutinise pedantically and critically every slight deviation for the ideal or even the norm.*[30]

[208] Ms Vollmer's behaviour on 3 August was blameworthy but not so blameworthy that it should be reflected in remedy reduction.

[209] Ms Vollmer's lack of action in the infection control data collection issue was also blameworthy, and to a greater extent since it related to The Wood's ability to comply with its externally imposed obligations. As at the point Ms Berryman realised Ms Vollmer was still not recording the non-medicated infections there was no harm done in relation to The Wood's external obligations and it was a simple matter to collect the data for the relevant three months. The Wood met its obligation to report its compliance within the required three months.

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29 [2010] NZ EmpC 154

30 *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178, at paragraph [78].

[210] However, Ms Vollmer continued to insist that her methodology, which she believed to have been how the previous ICC had collected and collated the data, was correct. It is that which is most blameworthy when she knew that method was unacceptable to the auditors. In addition, Ms Vollmer admitted in the disciplinary meeting that the auditors had shown her the part of the policy that categorised colds and influenza-like illnesses as infections. However, she stubbornly refrained from the simple but time-consuming task of going through each resident's file in May, June and July 2012.

[211] I consider that to have been blameworthy conduct that contributed to the situation that gave rise to the personal grievance and should result in a reduction of 25% in remedies.

[212] Ms Vollmer's behaviour on 14 August 2012 could not be characterised as having contributed to the situation that gave rise to the personal grievance of an unjustified suspension and trespass notice. Rather her behaviour that day arose out of The Wood's unjustified actions.

**Other remedies sought**

*Should 23 July 2012 have been paid as a full sick day?*

[213] Ms Berryman thought it was unusual for Ms Vollmer to have left her a note requesting the sick leave for her scan. She characterised the note as 'aggressive' for its use of capital letters and the underlining of ***SICK***. Ms Berryman and Ms Vollmer had co-operated previously to allow Ms Vollmer time off work to attend other appointments related to her breast cancer without the need for sick leave or other paid leave to be taken. In that way Ms Vollmer's request for sick leave for the scan appointment was unusual.

[214] Ms Berryman was acting reasonably to ask Ms Vollmer to supply some details or proof of her appointment given that Ms Vollmer had not told her what the appointment was for or why it was necessary. They had previously discussed such details in relation to Ms Vollmer's breast cancer. In saying that, I acknowledge that the House Rules do not cover the issue of sick leave being used for medical appointments known about in advance. The Rules only give the employer the right to seek a medical certificate once an employee has been on sick leave for three consecutive days. But good faith requirements between an employer and an employee

are mutual, so Ms Vollmer had a duty to be responsive and communicative. She could easily have shown Ms Berryman the appointment card in advance of the appointment or told her about what was happening and why she needed time off when she first asked for it or at least on 3 August when she was asserting her 'right' to sick leave. It is also of concern that the note refers to *various medical appointments*. However, there is no suggestion that there was more than one appointment that day.

[215] The appointment was at 2.30 p.m. and she was only required not to eat solid food for four hours (from 10.30 a.m.) leading up to the appointment. Ms Vollmer's shift was due to finish at 3 p.m. I do not consider that it is reasonable for Ms Vollmer to expect to receive a full day off as paid sick leave for an appointment half an hour before her shift ended. At most it would have been reasonable to leave work somewhat early. I do not consider that Ms Vollmer could reasonably have expected to receive a day's sick pay as a benefit if the personal grievance had not arisen[31]. Therefore, I do not order that Ms Vollmer be paid for a day's sick leave for 23 July 2012.

*Should Ms Vollmer be reimbursed for lost wages?*

[216] Section 123(1) allows me in addition to reinstating Ms Vollmer to order that she is reimbursed the whole or any part of any wages lost and for the loss of any benefit, such as Kiwisaver.

[217] Ms Vollmer has been on full pay, and presumably has been getting Kiwisaver contributions, for the period since she was reinstated, but placed on garden leave.

[218] The Wood submits that if Ms Vollmer was not to be reinstated then she should be required to pay back all money paid to her by The Wood since 19 November 2012. Ms Vollmer submitted that she should be reimbursed for her lost wages between the date of dismissal and her interim reinstatement.

[219] The principles outlined by the Court of Appeal in *Sam's Fukuyama Food Services v Zhang*[32] are applicable to my consideration of reimbursement of lost wages to Ms Vollmer. The first principle is that an employee can only be reimbursed for actual lost income.

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31 Section 123(c)(ii) of the Act

32 [2011] NZCA 608

[220] Section 128(2) of the Act states that whether or not I award any remedies under section 123 I must order the employer to pay the employee the lesser of the sum equal to lost remuneration or to three months' ordinary time remuneration.

[221] I order The Wood to pay Ms Vollmer for the first thirteen weeks after her dismissal, which includes the period from the day after her dismissal until 18 November 2012, the day before she was reinstated in the interim. She has been paid from 19 November 2012 and the balance owed for that earlier period must be paid. The thirteen weeks cover the period from Thursday, 4 October 2012 until Wednesday, 20 February 2013.

[222] Section 128(3) of the Act gives me the discretion to order an employer to pay an employee, by way of compensation for remuneration lost by an employee as a result of the personal grievance a sum greater than three months remuneration that is mandatory under s.128(2).

[223] In the Employment Court decision of *Jinkinson v Oceania Gold (NZ) Limited*[33] Judge Couch awarded Mrs Jinkinson lost earnings of approximately three and a half years, less three months for failing to take up an offer of outplacement assistance.

[224] In the *Zhang* case the Court of Appeal considered that the Employment Court's award of 47.4 weeks lost wages[34] was excessive in the circumstances. The Court considered that between 26 and 30 weeks would be a moderate award, based on the discretionary power under s 128(3) of the Act, for lost income.

[225] Mr Zhang had been employed for 10 months and the Court considered that as the employment relationship had broken down he was unlikely to have remained employed for the whole period up to 30 weeks. The Court awarded Mr Zhang 26 weeks of ordinary time remuneration in total.

[226] If there had not been an unjustified dismissal of Ms Vollmer and her blameworthy conduct on 3 August and in her ICC had been dealt with by way of warning and/or performance management I consider it likely that she would still be employed in her role at The Wood.

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33 [2010] NZEmpC 102

34 The whole period from the expiry of Mr Zhang's two weeks' notice until he began a new job.

[227] Ms Vollmer was in a senior role with managerial responsibility and lives in a relatively small town. Jobs at a similar level of responsibility are likely to be few. She had been employed for five years by The Wood. The circumstances are different from the *Zhang* case.

[228] Ms Vollmer is facing the possibility of action by the Health and Disability Commissioner or the Nursing Council. That will undoubtedly affect her ability to gain employment in nursing at least in the interim and certainly at any level of responsibility comparable to that she had at The Wood. Had she not been unjustifiably dismissed The Wood would not have been obliged to report to the Nursing Council. Despite Ms Berryman's belief that Ms Vollmer's age of 58 is not likely to be a barrier to employment in the aged care sector that remains to be seen. Age is frequently a barrier to gaining new employment.

[229] In all the circumstances I consider it reasonable that Ms Vollmer continues to receive wages for 36 weeks after the date of dismissal, unless she gains new employment before then. For the sake of clarity that 36 weeks includes the first 13 weeks already ordered.

[230] Ms Vollmer should also be paid her employer contribution to Kiwisaver for that period.

[231] However, because of Ms Vollmer's contribution of 25% she should only receive 27 weeks of lost wages and the employer Kiwisaver contribution, which is up to and including 12 April 2013. That is likely to mean that Ms Vollmer must honour her undertaking and reimburse The Wood for any amounts paid to her past 27 weeks after her dismissal.

***Compensation***

[232] Section 123(1)(c)(i) of the Act allows me to award compensation for humiliation, loss of dignity and injury to feelings when an employee has a personal grievance.

[233] The *Zhang* case makes it clear that compensation should be considered separately from any reimbursement ordered to be paid under section 128[35]. Ms Vollmer's evidence is that she has been very badly affected by her suspension and

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35 Ibid, paragraph [35].

dismissal. She claims compensation of $60,000. The Wood submits that is an extremely high amount of compensation and if any is to be awarded, it should be far lower.

[234] Ms Vollmer's evidence is that she has been humiliated, degraded, embarrassed and highly distressed by all the events, which include the police being called, the trespass notice, her unjustified dismissal and the report to the Nursing Council. She feels that she was treated like a criminal by The Wood. She was also confused by the suspension, the police being called and the issuing of the trespass notice.

[235] She believes her career and her reputation have been ruined. Ms Vollmer was certainly tearful at times during the investigation meetings and it is clear to me the events have greatly affected her. She says that the events and their effect:

> *… have been traumatic and the loss is indescribable. It has impacted on me physically, socially, psychologically and economically. This has had a negative, harmful effect on my life. I have had to deal with anxiety, feelings of uncertainty about the future and changes that are taking place. I have experienced increased tension in coping with the stress I have been under. I've suffered significant loss, humiliation, isolation and this has left me feeling emotionally fragile. I am terrified the physical stress to me on my body may exacerbate a return of my cancer.*

[236] Ms Vollmer's doctor wrote a letter dated 9 October 2012 stating that Ms Vollmer was suffering from sleeplessness, tearfulness and bewilderment as a result of her suspension and dismissal. He said that she reported feeling betrayed.

[237] In addition to the three allegations for which Ms Vollmer was dismissed Ms Berryman reported to the Nursing Council:

> *There is a recent history of unprofessional abusive behaviour to an ATR Charge Nurse at the District Health Board and the Ebos representative.*
>
> *Since Wendy's dismissal we have serious concerns about her over involvement with a resident in an Apartment (socialising, receiving gifts), contacting a resident's family, criticising my management, bringing the company into disrepute.*

[238] The report to the Nursing Council, specifically the allegation about inappropriate dealing with a resident and accepting a gift, from her were particularly distressing to Ms Vollmer as the issue had never been raised with her by The Wood and she completely refutes the allegation, and has evidence to support that. In addition none of the other additional allegations were raised with her and were not

reasons relied on for her dismissal. I accept the additional allegations made to the Nursing Council have added to Ms Vollmer's distress after her dismissal.

[239] I consider that Ms Vollmer should be paid $12,500 compensation, reduced by 25% to $9,375.

**Costs**

[240] Costs are reserved. The parties are invited to agree on the matter. If they are unable to do so the applicant shall have 21 days from the date of this determination in which to file and serve a memorandum on the matter. The respondent shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

Christine Hickey
Member of the Employment Relations Authority