

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2023] NZEmpC 158
EMPC 243/2022**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN AMANDA TURNER
 Plaintiff

AND TE WHATU ORA – HEALTH NEW
 ZEALAND, IN RESPECT OF THE
 FORMER WAIRARAPA DISTRICT
 HEALTH BOARD
 Defendant

Hearing: 16-19 April 2023
 (Heard at Wellington)

Appearances: E Lambert, advocate for plaintiff
 H Kynaston, E von Veh and G Beverley, counsel for defendant

Judgment: 21 September 2023

JUDGMENT OF JUDGE J C HOLDEN

[1] Amanda Turner was employed by the Wairarapa District Health Board (DHB) as a registered palliative care nurse working in the community from May 2015 until her summary dismissal on 23 April 2021. The dismissal was as a result of the DHB learning of various Facebook posts made by Ms Turner that the DHB found were contrary to the DHB’s interests and/or offensive.

[2] Ms Turner claims that the DHB had no substantive reason to justify summarily dismissing her and that this was preceded by an unjustifiable suspension effected in a

procedurally unfair manner. She also claims that the DHB acted in a discriminatory manner and ignored her rights to privacy and to freedom of expression.

[3] Her claims were unsuccessful in the Authority and Ms Turner now challenges the Authority's determination.¹ Since the determination was issued, the Wairarapa District Health Board has been subsumed into Te Whatu Ora – Health New Zealand.

[4] For the reasons set out in this judgment, Ms Turner's challenge is unsuccessful.

Ms Turner was a community nurse in palliative care

[5] Ms Turner graduated as a registered nurse in 2010 and started her career in an aged residential care facility in Carterton. In her second year of practice, she decided to complete her post-graduate certificate in palliative care and in May 2015 she commenced work with the DHB as a community nurse in that area of nursing. She says that she was extremely dedicated to her job and was recognised as being very good at it. Her competency and commitment to the needs of the people she cared for was, she says, never called into question.

The DHB became aware of Facebook posts by Ms Turner

[6] In March 2021, an Associate Charge Nurse at the DHB was visiting an aged residential care facility in Carterton and was advised that it had been brought to the attention of one of the nurse managers there that Ms Turner had been posting anti-vaccine information on Facebook. Concern was expressed that, due to Ms Turner being a well-respected Kahukura nurse that other staff looked up to, the posts had caused staff at the aged residential care facility to question whether they should be vaccinated against COVID-19.

[7] The Associate Charge Nurse raised the issue with the DHB's General Manager/Director for People, Capability and Organisational Development (the HR Advisor).

¹ *Turner v Wairarapa District Health Board* [2022] NZERA 259 (Member Beck).

The Facebook posts were provided to the DHB by a staff member

[8] At the time these issues arose, Ms Turner had approximately 86 Facebook friends. When the issue was first raised with the DHB by the nurse manager at the aged residential care facility in Carterton, the DHB made inquiries and learnt that one of the nurses it employed also had concerns about Facebook posts by Ms Turner. The DHB then contacted that nurse to see if she was happy to provide copies of the Facebook posts to the DHB, which she was. That nurse subsequently provided the DHB with screenshots of various questionable Facebook posts made by Ms Turner that remained available.²

The Facebook posts cover several matters

[9] The Facebook posts that were provided to the DHB canvassed several themes.

[10] There were many posts expressing concern about the COVID-19 vaccine. The posts were not considered or balanced discussions but involved memes and strongly worded statements or allegations against individuals and groups. For example, on one post Ms Turner simply writes “They say its safe Ha!” and then shares a post from another person saying they had experienced a rash or hives after receiving the vaccine. In another post Ms Turner attaches a post from the Government’s Unite Against COVID-19 page and writes:

The injection is not “free” the tax payers of NZ ARE paying for it! I’m glad the word voluntary is used, so we can decline the injection.

[11] In one of her posts Ms Turner writes in opposition to a Māori specific COVID-19 vaccine plan:

Don’t do it people, this vaccine is unsafe.

They talk as if we’re all living 200 years ago when Maori were susceptible to all the diseases the pakeha brought into NZ

Anyone with underlying health issues can get this Chinese flu and have a reaction to the vaccine! You’s are not special! They’re lying to you!

² It seems some posts may have been removed by Facebook.

[12] There then are a substantial number of posts that express concern about Muslim immigration into New Zealand, and which can only be described as derogatory towards Muslims generally as well as particular Muslim individuals.

[13] Amongst the posts copied to the DHB is a post that is derogatory of a non-binary person and posts attacking the Government and the then Prime Minister, but those posts were not raised during of the DHB's process.

The DHB undertook a process leading to dismissal

[14] On 26 March 2021, after the DHB became aware of the posts, the Charge Nurse Manager who had been Ms Turner's direct manager for three and a half years, called Ms Turner to advise her that a complaint had been made against her and that details would be outlined in an email to her.

[15] The same day, Ms Turner was emailed a letter from Kieran McCann, the Chief Operating Officer at the DHB, advising her of an investigation and possible suspension due to alleged inappropriate behaviour. The letter informed Ms Turner that the DHB had received a complaint from the manager of a local aged residential care facility that anti-vaccination posts that Ms Turner had made on Facebook had influenced staff because of Ms Turner's role as a registered nurse. The letter advised that, as a result of looking into that complaint, the DHB had also found that she had posted some "racially inappropriate" remarks on Facebook.

[16] Ms Turner was asked to attend a meeting at which the DHB would provide her with a copy of the information they had received and outline the investigation process, including what the next steps would be. Ms Turner was advised that she would not be expected to respond to the allegations at the meeting. The letter also advised Ms Turner that, given the serious nature of the allegations, in particular the racially inappropriate social media posts, the DHB was proposing to suspend her while the investigation was undertaken. Mr McCann said the DHB wished to hear Ms Turner's thoughts on that issue.

[17] This letter was sent on Friday, 26 March 2021 with a proposal that the meeting take place the following Monday, 29 March 2021 at 9 am. Mr McCann encouraged Ms Turner to bring a legal or union representative with her to the meeting.

[18] Shortly after the time the meeting was scheduled to start, Ms Turner emailed the DHB informing it that she could not make the meeting at 9 am that day and asking for all information to be sent to her New Zealand Nurses Organisation (NZNO) representative. She says she had difficulty in making arrangements for representation with NZNO in time for the meeting due to the intervening weekend.

[19] Later that day, the local organiser for NZNO emailed the DHB advising that NZNO did not agree with the proposal to suspend Ms Turner and, as such, she was advised to attend to her normal duties from the next day.

[20] Mr McCann then wrote again to Ms Turner. His letter attached the documents that the DHB was going to provide to Ms Turner at the proposed meeting, advising that a copy of that material was also being sent to Ms Turner's representative. The letter advised Ms Turner that Mr McCann had made the decision to suspend her effective immediately while an investigation was undertaken. The DHB said that it considered suspension was appropriate for two key reasons:

- (a) Given the nature of the allegations it was not appropriate for Ms Turner to be at work while the investigation was undertaken.
- (b) The details of the allegations were of a serious enough nature that the DHB needed to be sure it met its obligations to protect the interests of, and minimise potential risk to, Ms Turner, other members of staff and patients.

[21] Ms Turner and her representative from NZNO met with the DHB on 7 April 2021. Prior to the meeting commencing, Ms Turner's representative advised the representatives from the DHB that she was concerned for her safety because of the anger that Ms Turner was displaying. Nevertheless, the representative, who is an experienced NZNO organiser, said she was comfortable proceeding with the meeting.

[22] The DHB representatives at the meeting were Mr McCann, the Director of Nursing for the DHB, and the senior HR Advisor. The Charge Nurse Manager sat in on the meeting. Ms Turner attended with her NZNO representative, her mother and husband.

[23] At the meeting Ms Turner defended her right to post her opinions on her own Facebook page, and defended those opinions. She said she was wracking her brain to understand what was so bad about what she had said but said that “maybe” she would choose her words more carefully in future. She pointed out that the posts were on her private Facebook page, where she discussed current issues with other like-minded people. She was angry that someone would go onto her page and report what she had said, which had the potential to “ruin [her] life”.

[24] By letter dated 12 April 2021 Mr McCann, who was the DHB decisionmaker in the process, advised Ms Turner of the DHB’s preliminary decision.

[25] Mr McCann referred to the Nursing Council of New Zealand (NCNZ) Code of Conduct and cited the following standards:

- (a) Registered nurses are not to impose their political, religious and cultural beliefs on consumers, and that they should intervene if they see other health team members doing this.
- (b) Registered nurses are to reflect on and address their own practice and values that impact on nursing care in relation to the health consumer’s age, ethnicity, culture, beliefs, gender, sexual orientation and/or disability.
- (c) Registered nurses must maintain a high standard of professional and personal behaviour, including when they use social media and electronic forms of communication.

[26] Mr McCann also referred to the DHB’s social media policy and to its Code of Conduct. Mr McCann advised that he had considered Ms Turner’s responses at the

meeting of 7 April and all the information available to him. He advised that those responses; the circumstances in which the behaviour occurred as explained to him by Ms Turner; the volume of posts; her position, duties and responsibilities; and the consequences or potential consequences of her conduct led him to the view that Ms Turner had engaged in serious misconduct and that her actions had seriously breached the DHB's expectations of her, the DHB Code of Conduct and also NCNZ requirements.

[27] Mr McCann advised that, given Ms Turner's role in the community, the DHB had to take these matters very seriously. Mr McCann said that his preliminary view was that this matter had to be treated at the higher end of serious misconduct and that his preliminary decision was that Ms Turner's employment would be summarily terminated due to serious misconduct.

[28] Another meeting was proposed to hear Ms Turner's response to the preliminary decision.

[29] That next meeting took place on 21 April 2021. Ms Turner was accompanied by a lawyer. The DHB representatives were as for the first meeting.

[30] The focus of the responses from Ms Turner's lawyer was an objection to the access of Ms Turner's private Facebook page, arguing that she was entitled to express her opinions on her own Facebook page and questioning whether her opinions had any bearing on her job or had influenced other people, as alleged. Ms Turner sought information as to how the DHB came to have copies of her private Facebook page. The DHB advised that it had not accessed the Facebook page but had been provided with the information by another person whose identity they would not disclose.

[31] Ms Turner was dismissed by letter dated 23 April 2021. In that letter, Mr McCann advised that he had considered Ms Turner's responses at the meeting of 21 April, alongside her other responses during the process. He said he was disappointed that she continued to focus on the how and why of this matter being raised, rather than on the substance of what was brought to the DHB's attention. He said that he had seen no insight from Ms Turner that, as an employee of the DHB and

a regulated healthcare professional, the posts were entirely inappropriate and that they would bring the DHB and the nursing profession into disrepute. He said this lack of reflection did not provide him with any considerations or mitigations against the actions previously proposed; he did not see anything he could use to further refine his decision.

[32] He therefore confirmed his preliminary decision that Ms Turner's actions constituted serious misconduct, and that meant that he no longer had trust and confidence in her to perform her duties and responsibilities; and maintain expected standards of professional behaviour without having her personal views and values bringing the DHB into disrepute.

[33] Ms Turner was advised that her employment was terminated due to serious misconduct, effective immediately, Friday, 23 April 2021.

[34] As noted, the Facebook posts had been copied to the DHB by one of its nurses. Ms Turner, however, assumed that it was another person who had provided copies of the Facebook posts. Ms Turner texted that person after she had been dismissed saying "Well you'll be pleased to know [name], ive been fired! See you in court". The person responded, saying she did not know what Ms Turner was talking about and advised she had never given the DHB access to Ms Turner's Facebook page. Ms Turner then apologised, explaining that she had a letter from the DHB about a staff member who was a friend of hers on Facebook giving the DHB the information.

Ms Turner claims her dismissal was unjustifiable

[35] There is no dispute that Ms Turner made the posts in issue. She has attempted to justify them. First, she says that they are private and only accessible to people who are her friends on Facebook. Second, she says they contained her opinions, which she was entitled to have. She also said she feared some posts had been, to some extent, misinterpreted. In particular, she points to the post in which Māori are mentioned and says that when she was saying that Māori were not "special" she was attempting to warn Māori that they were being misled because they were, now, not more susceptible to viruses as a race.

[36] Ms Turner said that the posts regarding Muslims were not anti-Muslim but were directed to immigration policy. In Court, Ms Turner continued to argue that her views on immigration were reasonable. To support her claim, she endeavoured to put in evidence a document entitled, “Statement of case to designate Al-Aqsa martyrs’ brigades, as a terrorist entity”.

[37] Ms Turner says that the decision to dismiss her for comments outside of the workplace, was contrary to her right to free speech and unjustifiable.

[38] The key themes of her submissions are:

- (a) The DHB’s obtaining of her Facebook posts was a breach of her privacy and amounted to “spying”. This tainted the rest of the DHB’s investigation process.
- (b) Ms Turner was not allowed to be heard in respect of her proposed suspension, which was unfair.
- (c) The meeting of 7 April 2021 was unfair:
 - (i) her representative went behind her back to raise safety concerns with the DHB, which displayed “disloyalty” and meant Ms Turner had no effective representation;
 - (ii) people Ms Turner said had previously bullied her (being the Associate Charge Nurse who reported the comment from the aged residential care facility and the Charge Nurse Manager who sat in on the disciplinary meetings), and had been involved in the breach of her privacy, were in attendance; and
 - (iii) the meeting was a “charade” with the DHB acting as if she was a criminal that needed to understand a crime she had been convicted of already.

- (d) The promotion of the COVID-19 vaccine was problematic, and Ms Turner was endeavouring to share full information with health consumers, including Māori.
- (e) The racism charge levied at Ms Turner was “manufactured”.
- (f) The matter was not a workplace problem, being views posted by Ms Turner on her private Facebook page.
- (g) Ms Turner was discriminated against for her religious and political beliefs.

[39] Ms Turner asserts her rights to freedom of thought, conscience and religion, and to freedom of expression. She refers to ss 13 and 14 of the New Zealand Bill of Rights Act 1990 (BORA).³

[40] Te Whatu Ora defends the decisions made by the DHB. In summary it submits:

- (a) Ms Turner had a genuine opportunity to respond to the proposed suspension and the suspension was justified substantively in the circumstances.
- (b) The process that led to Ms Turner’s dismissal was procedurally justifiable:
 - (i) The DHB was entitled to rely on the information it received from the aged residential care facility, and it was appropriate to do so.
 - (ii) Ms Turner was properly represented at the meeting of 7 April 2021 and was able to respond to the issues in a way that demonstrated she was not constrained.

³ Ms Turner referred the Court to an article: Rodney Harrison “Employment Law and Human Rights – a Crucial Interface” (paper presented to New Zealand Law Society 10th Employment Law Conference, October 2014) 175.

- (iii) Ms Turner was not discriminated against on the basis of her religious beliefs, ethical beliefs or political opinion. None of her comments were expressions of that sort.
- (iv) Ms Turner's responses were properly considered, which is demonstrated by the decision letters which refer and respond directly to Ms Turner's responses.
- (v) The DHB was entitled to dismiss Ms Turner based on her Facebook posts, even though her posts were made outside of work and to her Facebook friends.
- (vi) BORA does not apply to the DHB's actions as it was not performing a public function when it dismissed Ms Turner.⁴ Even if BORA did apply, the rights contained in it are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁵ The DHB was entitled to dismiss an employee for comments by that employee that might bring it into disrepute or otherwise damage sufficiently the trust and confidence the employer has in the employee, regardless of the right to freedom of expression.
- (vii) Finally, the DHB says that neither of the people to whom Ms Turner has objected were involved in the decision-making process; any issues they had with Ms Turner were historic and relatively minor and/or were not raised by Ms Turner at the time.

⁴ New Zealand Bill of Rights Act 1990, s 3.

⁵ Section 5.

Several issues arise

[41] The parties provided an agreed list of issues. Based on that list, and on the evidence and submissions, the principal issues for the Court are:

- (a) Did the DHB unjustifiably disadvantage Ms Turner through its decision to suspend her on 29 March 2021?
- (b) Did the DHB unjustifiably dismiss Ms Turner from her employment? In particular:
 - (i) Did the DHB act unjustifiably by relying on the information supplied by the aged residential care facility?
 - (ii) Did the DHB act unjustifiably by seeking and reviewing Ms Turner's Facebook posts?
 - (iii) Did the DHB act unjustifiably by proceeding with the meeting on 7 April 2021, after Ms Turner's NZNO representative had advised that she was concerned for her safety?
 - (iv) Was the involvement of the Charge Nurse Manager and the Associate Charge Nurse in the DHB's process appropriate?
 - (v) Was Ms Turner unlawfully discriminated against because of her political and/or religious beliefs?
 - (vi) Did the DHB genuinely and fairly consider Ms Turner's responses?
 - (vii) Could the DHB lawfully dismiss Ms Turner for her personal Facebook posts outside of work?

- (viii) Did the right to freedom of speech in BORA protect Ms Turner from disciplinary action in respect of her posts?
 - (ix) Was the decision to dismiss Ms Turner for her Facebook posts a decision open to the DHB in the circumstances?
- (c) If Ms Turner is successful in all or any part of her personal grievances, what remedies, if any, should be awarded for the personal grievance(s), including:
- (i) compensation for lost wages, taking into account the steps Ms Turner took by way of mitigation (Ms Turner seeks full recovery of the wages not paid to her by the DHB/Te Whatu Ora since her dismissal, being approximately \$64,000 at the time of filing);
 - (ii) interest on any lost earnings; and
 - (iii) compensation for humiliation, loss of dignity and injury to feelings (Ms Turner seeks \$100,000).
- (d) If Ms Turner is successful in all or any part of her personal grievances, should the Court reduce potential remedies due to any contributory conduct?

Various documents were relevant to Ms Turner's employment

[42] Ms Turner was employed pursuant to the NZNO Multi-Employer Collective Agreement (MECA). Pursuant to cl 28.1 of the MECA, Ms Turner was required to comply with the DHB's policies and procedures in force from time to time, to the extent that such policies and procedures were not inconsistent with the terms and conditions of the MECA.

[43] One of the policies that covered Ms Turner was the DHB's disciplinary policy. Under that policy, Ms Turner was expected to adhere to the expected standards of conduct as per the Code of Conduct.

[44] The disciplinary policy defines “serious misconduct” as “unacceptable conduct that seriously breaches the DHBs’ expectations as set out in the Code of Conduct or any other relevant document, policy or procedure”.

[45] The disciplinary policy provides for suspension, including that it may be appropriate where patients are at risk, where the situation is highly emotive or there is considerable friction in a workplace, where there is risk of interference with an investigation and/or where the conduct alleged is very serious such that the trust the DHB has in the employee is seriously in doubt. Examples of circumstances where suspension may be appropriate are included, one of which is where there are serious allegations of racial harassment. The examples given are not exhaustive.

[46] The DHB’s Code of Conduct, referred to in the disciplinary policy, requires employees, amongst other things, to:

- (a) adhere to the expected standards of conduct;
- (b) ensure that they do not bring the DHB into disrepute through their conduct and actions either as employees or private individuals;
- (c) conduct themselves professionally at all times, respect the rights, interests and diversity of their colleagues, and work harmoniously and courteously with others;
- (d) avoid any activities, work or non-work, that may harm the reputation of the DHB or the state services;
- (e) abide by the code of ethics and conduct of the profession (if applicable);
and
- (f) be professional when posting any information online, either personal or work-related, and take responsibility for what they write.

[47] Ms Turner also was expected to comply with the DHB’s social media policy. That policy refers to the risks to the DHB of social media being mismanaged by

individuals, including damaging the DHB's reputation; the DHB being linked to derogatory, racist or otherwise offensive comments, and the risk that employees' personal comments might appear to be reflecting a DHB view.

[48] The social media policy required employees to comply with principles including:

...

2. Staff understand their workplace obligations and do not bring the DHB into disrepute by damaging the DHB's reputation and integrity, or undermining the trust and confidence of the public in the organisation or its services; and

...

6. Remember that search engines never forget: Everything you post stays online for a long time. Think before posting something you might regret later.

[49] The NCNZ sets and monitors standards in the interests of the public and the profession. The NCNZ Code of Conduct bound Ms Turner and outlines the standards of ethical conduct set by the Council under s 118(1)(i) of the Health Practitioners Competence Assurance Act 2003. The relevant principles from the NCNZ Code of Conduct include:

- (a) Principle 1 – Respect the dignity and individuality of health consumers;
- (b) Principle 2 – Respect the cultural needs and values of health consumers; and
- (c) Principle 8 – Maintain public trust and confidence in the nursing profession.

[50] The NCNZ Code of Conduct, also included relevant standards, which are referred to in Mr McCann's letter of 12 April 2021.⁶

⁶ See [25] above.

The suspension was justifiable

[51] Ms Turner was advised of the proposal to suspend her on Friday 26 March 2021. The DHB sought a response on Monday 29 March 2021.

[52] While that is a short timeframe, that is not unusual where suspension is being considered. The decision was made on notice and an opportunity to discuss the proposed suspension was provided to her, in line with the DHB's policy. It was also made clear that Ms Turner would not be required to respond to any substantive allegations at that stage.

[53] While it appears there were some issues with Ms Turner obtaining representation prior to the scheduled meeting due to the timeframes involved, the NZNO responded on Ms Turner's behalf on the Monday. In doing so, NZNO said that it had advised Ms Turner to attend to her normal duties the next day and that she did not agree with the DHB's proposal to suspend her. Further documentation was requested.

[54] That same day, the DHB provided the documents as requested, which would have been provided in the meeting. It advised that it had proceeded based on the information it had at that time and had made its decision to suspend Ms Turner on pay until 7 April 2021, when a provisional outcome of the investigation would be reached.

[55] I consider the process the DHB followed was fair.

[56] I also accept that the issues raised were serious and that an investigation was required, which would involve other people, including other members of staff. For these reasons, I consider the decision to suspend while an investigation took place was one that was open to the DHB in the circumstances.⁷ Time was of the essence, given the serious allegations and the likely impact on other people of the investigation.

[57] The suspension was justifiable.

⁷ See *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 40; and *Workforce Development Ltd v Hill* [2014] NZEmpC 174, [2014] ERNZ 465 for examples of justifiable suspensions that enabled investigations to take place.

The DHB was entitled to investigate

[58] Having had the aged residential care facility raise concerns about Ms Turner's posts, the DHB was understandably concerned; the issues raised were relevant to the DHB's role in the community, and important. The context has to be borne in mind. As is well known, COVID-19 was particularly dangerous for elderly people such as those who lived in aged residential care facilities. It was reasonable and understandable that the DHB considered it needed to investigate the issue. Indeed, it would have been surprising if the DHB decided it did not need to do so. It also was entitled to accept the aged residential care facility's concerns about Ms Turner's postings, and their potential influence on staff at that facility, as legitimate.

[59] In carrying out its investigation, the DHB was entitled to seek information about the posts on Ms Turner's Facebook page and to ask her colleague if she would provide them. The case is not on all fours with the situation that arose in the case dealt with by the Human Rights Review Tribunal in *Hammond v Credit Union Baywide*,⁸ where the key focus of the Tribunal was on the way in which the employer sought the information from an unwilling colleague, and its promulgation of the information it received.

[60] There was nothing untoward in the way the DHB went about obtaining copies of the Facebook posts.

The meeting could proceed

[61] After Ms Turner's representative advised the DHB that she was concerned for her safety because of the anger that Ms Turner was displaying, the DHB appropriately inquired with the representative whether she was comfortable proceeding with the meeting. The representative said she was, and the meeting proceeded without incident. Ms Turner was accompanied by her mother and her husband, and she was able to put forward her views without any impediment. It is difficult to see how not proceeding with the meeting would have been of any assistance to Ms Turner. Any impact caused by the representative's comments would have existed regardless of whether a different

⁸ *Hammond v Credit Union Baywide* [2015] NZHRRT 6.

representative had attended with Ms Turner. Ms Turner does not point to anything that she wished to say at that meeting that was not said, or any representations that could have been made that were not.

[62] The DHB was entitled to continue with the meeting and Ms Turner was not disadvantaged by the DHB not advising her of the representative's comments.

The involvement of staff members did not make the process unfair

[63] Neither of the two staff members, who Ms Turner says should not have been involved in the process, were decision-makers. One simply passed on the concerns that she received from the aged residential care facility. The other was present at the meeting but was not a decision-maker or involved in the deliberations. Further, the issues raised by Ms Turner were relatively minor and in the past. There is nothing to suggest that Ms Turner was disadvantaged by the roles that the respective managers played in the process.

Ms Turner was not discriminated against

[64] An employee has a personal grievance where they have been discriminated against in their employment.⁹ An employee is discriminated against in their employment if their employer, by reason directly or indirectly of any of the prohibitive grounds of discrimination, dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment.¹⁰ The prohibited grounds of discrimination include religious belief, ethical belief, and political opinion.¹¹

[65] Ms Turner claims that she was discriminated against because she is Christian. She also maintains that her comments were about allowing the immigration of Muslim people, which was a policy position to which she was entitled. She says she was discriminated against on the basis of her political beliefs. I do not accept these

⁹ Employment Relations Act 2000, s 103(1)(c).

¹⁰ Section 104(1)(b).

¹¹ Section 105.

contentions. There is nothing to suggest Ms Turner's Christianity had any bearing on the DHB's decision-making. Her anti-Muslim comments had to be weighed against the relevant staff policies and codes of conduct she was expected to adhere to, they cannot be immune from that scrutiny on the basis they are allegedly on a matter of policy.

[66] Further, as the DHB submits, freedom of religion cannot be taken to include the freedom to discriminate against other religions or to make derogatory comment about those other religions and the people who practise them without consequences. Ms Turner's right to hold religious or political beliefs did not prevent the DHB from taking disciplinary action in respect of her posts criticising Muslims, including attacking individual Muslim New Zealanders.

[67] The posts regarding the vaccine also are not covered by any protection against discrimination based on political opinion. The posts were directly contrary to the position being taken by the Ministry of Health and the DHB at the time; although the vaccine programme was still being developed, vaccination against COVID-19 was being promoted by health agencies. The posts had the potential to undermine the trust and confidence of the public in the DHB, which is inconsistent with the social media policy and with Ms Turner's obligations to her employer.

Ms Turner's responses were considered

[68] The evidence shows the DHB was open to hearing from Ms Turner and considering any mitigation raised.

[69] Ms Turner accepted the posts were made by her. She did not resile from them but defended what she said and her right to say it. Although she said that "maybe" she would choose her words more carefully in future, that was said in the context of her defending her views and also saying she did not understand what was so bad about what she had said.

[70] The 12 April letter from the DHB recorded Ms Turner's explanations and responses given during the meeting in detail. It made clear those responses were

considered, and acknowledged specific aspects of her concerns, before finding serious misconduct.

The Facebook posts could be considered, even if “personal”

[71] It is accepted that Ms Turner’s Facebook posts were made outside her work time and environment and that her Facebook page had certain privacy settings in place.

[72] However, that is not the end of the issue. If the out of work conduct could negatively impact on the employer, for example by bringing it into disrepute, or if the conduct otherwise erodes the trust and confidence the employer has in the employee, the employee’s conduct can be the subject of disciplinary action.¹²

[73] Social media posts, even if done in the employee’s free time, and containing their personal opinions, are not automatically protected from possible employment consequences.¹³ Eighty-six “Facebook friends” is significant enough to mean that comments made cannot be regarded as truly private. As the evidence demonstrated, the posts were accessible to other employees of the DHB and employees of the aged residential care facility. Even if the material in the posts had been said or sent directly to one or only a few other employees or professional contacts, that could have been of concern to the DHB; being posted on a Facebook page with a much wider audience is even more of an issue.

[74] The DHB’s employment documents, including its Code of Conduct and the social media policy made clear the risks with social media posts. Ms Turner was, or ought to have been, aware that posts made on Facebook, even to a closed group, could be the subject of an employment investigation and potential disciplinary action.

¹² *Smith v Christchurch Press Company Ltd* [2001] 1 NZLR 407 (CA) at [25].

¹³ *Hook v Stream Group (NZ) Pty Ltd* [2013] NZEmpC 188, [2013] ERNZ 357 at [29]–[36]; and *FGH v RST* [2022] NZEmpC 223, [2022] ERNZ 1076 at [225] and [227].

BORA does not protect Ms Turner’s comments from disciplinary action

[75] Ms Turner refers to her right to free speech as provided for in BORA. That Act provides:

13 Freedom of thought, conscience, and religion

Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[76] BORA applies to acts done by the legislative, executive, or judicial branches of the Government of New Zealand; or by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.¹⁴ It will therefore apply to some actions of the DHB pursuant to s 3(b) of BORA. I do not accept, however, that BORA applies to employment decisions, even if made by public entities or entities operating in the public sector that happen to perform a public function. This is because employment does not involve the “performance of any public function, power or duty”. Employment matters are ancillary to Te Whatu Ora/the DHB’s public functions, and more properly governed by the principles of general private law.¹⁵

[77] In any event, the rights under BORA are not absolute; they are subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹⁶ Even if BORA applied, the rights contained within it do not protect everything that an employee might say, particularly if it is contrary to the interests and actions of the employer.

¹⁴ New Zealand Bill of Rights Act 1990, s 3.

¹⁵ Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 96; *Butler v Shepherd* HC Auckland CIV-2011-404-923, 18 August 2011 at [58]; and *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197, [2013] ERNZ 531 at [51]–[56].

¹⁶ New Zealand Bill of Rights Act 1990, s 5.

[78] Ms Turner cannot use BORA as a shield to protect herself from the consequences of her statements.

DHB's decision to dismiss was justifiable in the circumstances

[79] In determining whether Ms Turner's dismissal was justifiable, I must consider what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.¹⁷ In addition to the mandatory considerations,¹⁸ the Court may consider any other factor it thinks appropriate.

[80] The statements that Ms Turner made on her Facebook page, both in respect of Muslims and in respect of the issue of vaccination, ran directly contrary to the interests of the DHB. The DHB, quite understandably, had policies in place to ensure that its staff respected the rights, interests and diversity of their colleagues and health consumers; worked harmoniously and courteously with others; and avoided activities, work or non-work related, that may harm the reputation of the DHB or the state services.

[81] The posts regarding the COVID-19 vaccine were posted at a time when the DHB was very actively and openly involved in work to support and deliver the Government's vaccination programme. There were genuine fears that COVID-19 would again enter the community.¹⁹ Aged residential care facilities were seen as particularly vulnerable, as demonstrated during the first wave of COVID-19 in New Zealand. Ms Turner was a respected medical professional, whose views could have influenced fellow employees and other people with whom she interacted, including those who worked in the sector of the community in which Ms Turner worked, caring for vulnerable elderly people and other people with significant health issues.

[82] Ms Turner's anti-vaccination posts ran counter to the interests and actions of her employer in those circumstances. The concern that Ms Turner, in a respected role, was seen as somebody of influence with others working in the sector, was a legitimate

¹⁷ Employment Relations Act 2000, s 103A.

¹⁸ Section 103A(3).

¹⁹ At the relevant time, New Zealand was thought to be COVID-19 free in the community, with cases confined to managed isolation facilities.

consideration. Although Ms Turner gave evidence that she was not telling people what to do, on their face, the point of her posts was to attempt to persuade people. While this can be inferred generally, it is most obvious in the post regarding the Māori programme, which commenced “Don’t do it people...”. This was at a time when one of the focuses for DHBs generally was on endeavouring to ensure that Māori were properly protected against COVID-19, including by having a high uptake of the vaccine.

[83] Ms Turner’s posts regarding Muslims were offensive and ran counter to the principles and requirements of the DHB as contained in the DHB’s Code of Conduct, which warns against actions that might cause damage to the DHB’s reputation, or cause it to be linked to derogatory, racist, or other offensive comments. They ran counter to the NCNZ Code of Conduct. The posts were not respectful of Muslim New Zealanders and certainly making those comments could well have harmed the reputation of the DHB.

[84] The evidence showed that the DHB was open to hearing from Ms Turner in respect of her posts, but her position at the meetings with the DHB gave no reason to be confident that she would not repeat her behaviour in the future. She lacked understanding of the gravity of the posts and showed no regret for having posted them. That remained the position throughout the Court hearing.

[85] In those circumstances, not only was the conduct serious misconduct, but there was also no basis for the DHB to find any mitigation in the comments made by Ms Turner at the meetings.

[86] The decision to dismiss Ms Turner was justifiable; it was one that was open to the DHB as a fair and reasonable employer.

[87] There is no need for the Court to consider remedies.

Te Whatu Ora is entitled to costs

[88] Te Whatu Ora is entitled to costs. The parties are encouraged to agree on costs, but if that is not possible, Te Whatu Ora may file a memorandum seeking costs within

21 days of the date of this judgment. Ms Turner then has 14 days within which to respond, with any reply from Te Whatu Ora to be filed within a further seven days. Costs then will be determined on the papers.

J C Holden
Judge

Judgment signed at 3.30 pm on 21 September 2023