

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Wendy Clear (Applicant)
AND	Waikato District Health Board (Respondent)
REPRESENTATIVES	Mark Hammond, Counsel for Applicant Geoff Bevan, Counsel for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	26 April 2006 27 April 2006 28 April 2006 22 June 2006 23 June 2006
DATE OF DETERMINATION	13 February 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant submits that during her employment with Waikato District Health Board (WDHB) she suffered disadvantage because of the Board's failure to properly investigate her complaints of bullying and that as result it failed to provide her with a safe working environment. This led to a breakdown in her health and she was unable to work. The applicant also submits that she was unjustifiably dismissed from her employment in December 2004.

[2] To remedy her alleged grievances, the applicant seeks reimbursement of lost remuneration, compensation pursuant to s.123 (1) (c) (i) for humiliation and injury to feelings, reimbursement of medical expenses, payment (plus interest) for lieu days lost and costs in the matter.

[3] The respondent denies the applicant's claims and, in the alternative, submits that if the Authority is to find that some aspect of WDHB's response breached the duty it owed to Miss Clear, its breach has caused her no (or alternatively very little) loss.

[4] The statement of problem in this matter was filed with the Authority on 19 December 2005.

Notes

[5] Counsel have agreed that the provisions of s.114 (6) of the Act preclude Miss Clear from commencing any action in relation to a personal grievance more than three years after the date on which the personal grievance was raised in accordance with s.114 (1). Counsel disagree as to when Miss Clear raised her personal grievance with WDHB but are in agreement that 19 September 2002 is the cut off date, i.e. allegations of grievances arising from actions occurring prior to this date are not able to be actioned or remedied by the Authority. Counsel for the applicant does however submit that the circumstances on which the unjustified action and personal grievance claims are founded are based upon facts, which predate September 2002.

[6] By agreement this Determination addresses only the issue of liability. The question of remedies, if applicable, will be dealt with in a separate determination if necessary.

Background

[7] The applicant is a qualified nurse and midwife who worked for WDHB from 1969 until her dismissal on 21 December 2004 (with the exception of two periods overseas which totalled approximately four years). Over the period of her employment, the applicant worked as a registered nurse in a number of areas at Tokoroa Hospital including accident and emergency, surgery and on the general ward.

[8] In September 1987, the applicant started work in the maternity ward. It was Miss Clear's evidence that she agreed to transfer to the maternity ward as part of an agreement reached to separate herself and the night charge manager on the general ward (Ros Corban) following an episode of bullying by Ms Corban towards her.¹

[9] In June 1991, Miss Clear was the subject of a positive performance agreement carried out by her clinical team leader, Mrs Margaret Parata. There were no further performance reviews undertaken until February 2000. Maureen Hartley, charge nurse, carried out this performance review. (Ms Hartley supervised both Miss Clear and Mrs Parata). The reason that Ms Hartley carried out the performance appraisal was that, by this time, there had been deterioration in the relationship between Miss Clear and Mrs Parata and it was decided that another manager would carry out the performance appraisal. The performance appraisal carried out in 2000 by Ms Hartley was a positive one.

[10] On the matter of the relationship between herself and Mrs Parata, it was Miss Clear's evidence that by 2000 the environment had become extremely unhealthy and was excessively stressful under Mrs Parata's leadership. Over a period of time, there was a build up of small occurrences (and larger ones) that led her to believe that bullying was occurring. Mrs Parata was increasingly controlling and did not allow Miss Clear to carry out her normal duties without supervision. Miss Clear believed that Mrs Parata's behaviour was unwarranted.

[11] It was Miss Clear's position that in August 2000 she returned to work after a period of extended leave to be told by another midwife (Tania Rangī) that she believed Mrs Parata had a vendetta against her (Miss Clear). Ms Rangī denied making such a comment to Miss Clear. Nevertheless, it is an alleged event of particular significance to Miss Clear, in that it crystallised for her and provided an explanation for the increasing disquiet she had in relation to Mrs Parata's conduct towards her.

¹ As I understand the evidence Miss Clear did not use the expressions "bullied" and "bullying" with reference to the conduct of others towards her before mid 2002. However, in her evidence at the Investigation Meeting she did use this term to describe Ros Corban's conduct towards her in 1987.

[12] In 1999, Miss Clear had discovered that she was suffering from hypertension. She visited her GP, Duncan Gadsden, who prescribed anti-hypertensive medication, which was effective for some time.

[13] It was Miss Clear's evidence that by October 2000 she was finding Mrs Parata's conduct intolerable and she made a formal complaint about her behaviour to management. In her complaint addressed to Maureen Hartley, (dated 21 October 2000) Miss Clear detailed 27 concerns she had with Mrs Parata's conduct towards her. The complaint was referred by Ms Hartley to Peter Campbell, area manager at the time. He investigated the complaints and concluded that whilst the individual complaints made by Miss Clear about Mrs Parata interfering in Miss Clear's work could not be confirmed there were issues relating to a non-nurturing environment in the delivery of services. He took this up with Mrs Parata. Mr Campbell advised Miss Clear of this outcome and advised her he had expressed to Mrs Parata his desire to see improvements in this area and in particular the way cases were allocated with a more equitable sharing of the caseload.

[14] It was Miss Clear's evidence that while she was disappointed that the individual complaints she had made against Mrs Parata had not been dealt with, overall she was satisfied with the outcome of her first complaint about Mrs Parata.

[15] For her part, Mrs Parata gave evidence that as a result of the complaint and the discussions she held with Mr Campbell she instituted monthly meetings with staff and set up a communications book where issues/problems could be recorded by staff on a daily basis. She acknowledged she had been advised by Mr Campbell to ensure that the workloads were fairly spread out amongst staff.

[16] However, the outcome for Miss Clear was, according to her evidence, anything but an improvement in the situation. She submits that Mrs Parata's bullying and negative behaviour towards her intensified to an even greater level. The fact that she had made a complaint about Mrs Parata had been disclosed to her and as a result she was treated as persona non-grata. She submitted the working environment was unbearable and Mrs Parata was making her dislike of her increasingly public. It was Miss Clear's evidence that out of desperation and in order that management could intervene and protect her from Mrs Parata's bullying she made a further complaint. At the time she felt Mrs Parata was trying to strain the relationship between them to such an extent that she would quit her position. However she was committed to her job and the work she was doing for patients. She did not wish to leave and did not wish to have to tolerate further bullying. As a result she wrote to Mr Campbell again on 9 April 2001. In this letter Miss Clear detailed 14 specific complaints against Mrs Parata.

[17] The evidence discloses that Miss Clear subsequently met with Mr Campbell to discuss the complaint. Miss Clear's complaint was given to Mrs Parata and she was allowed an opportunity to respond. Miss Clear believed that this second complaint led Mrs Parata to retaliate against her with a list of complaints about her (Miss Clear's) performance.

[18] On 2 May 2000 Mrs Parata provided a formal written response to Miss Clear's second complaint against her. She addressed a number of the original complaints (21 October 2000²) and said that she spent a lot of time trying to teach and encourage staff to expand their knowledge, she had tried to get staff to take on cases (caseload) and she believed her staff needed to be willing to use more initiative themselves. She noted that other staff members would not sign the complaints submitted by Miss Clear despite her efforts to get them to do so. She also questioned the accusation that she was doing all the deliveries and stated that the figures did not support this. Mrs Parata went on to respond to the specific complaints raised in Miss Clear's second letter of complaint and made

² She told Mr Campbell she had let the matter go at the time because of other issues and she now felt that had been a mistake and that the truth had not been arrived at.

the point that she did not belittle or criticise Miss Clear and in fact tried her best not to say too much to her. As a result she did not critique Miss Clear's performance, which she described as poor and not of a high standard.

[19] In addition to the formal response Mrs Parata made to Miss Clear's complaints against her, Mrs Parata submitted a formal complaint of her own to Mr Campbell about Miss Clear's conduct and performance. In this complaint (dated 29 May 2001) Mrs Parata detailed a number of complaints communicated to her about Miss Clear's attitude to patients, their supporters and other staff. She stated that patients found Miss Clear intimidating and that she belittled them, she confused them with her explanations and she did not provide continuity of care in a team situation. Mrs Parata went on to name patients who had made complaints about Miss Clear and provided details of the complaints made.

[20] There was no conclusion reached on the matter of Miss Clear's second written complaint about Mrs Parata. Nor was there any conclusion reached on Mrs Parata's complaint about Miss Clear.

[21] In closing on this episode, I note it was Miss Clear's evidence that she observed an improvement in Mrs Parata's attitude and conduct towards her in July 2001. This lasted for 3 weeks before Mrs Parata returned to the harassment and bullying of old.

[22] Mr Campbell was replaced by an acting manager (Ann Morrison) who held the position until September 2001 when Ms Janice Osborn took up the reins as Area Manager.

[23] It was Ms Osborn's evidence that within the first few weeks of her arrival she was made aware of a file concerning Miss Clear. She reviewed the file and saw that there appeared to be a history of complaints and of personal conflict between Miss Clear and Mrs Parata. She said that, given what she had read, she decided to take steps to try and resolve the issues between the two women.

[24] Ms Osborn's first step was to consult HR. She was advised to address the issues in the present rather than to try and resolve historical complaints. She also decided to try and get to know the individuals concerned without making judgements about their past actions based on the documented complaints and counter-complaints. To this end she met with Miss Clear. She believes this was some time in October 2001. At their meeting, she questioned Miss Clear as to the current status of her relationship with Mrs Parata.

[25] It was Ms Osborn's recollection that Miss Clear indicated that she and Mrs Parata were working together but did not have a great working relationship. Ms Osborn's evidence was that she remembered saying to Miss Clear that she felt it was difficult for her as a new manager to have all this historical stuff in the background. She had not been employed by the Board when the complaints were made and she did not know what had gone on. Neither did she know the people concerned.

[26] It was Ms Osborn's evidence that she obtained a very clear agreement from Miss Clear to address matters going forward. As part of the agreement reached between them, she told Miss Clear that she expected issues to be discussed within the maternity ward and where possible resolutions found. If it was not possible to resolve issues at that level, then she expected Miss Clear to report her concerns using the procedures and processes that were in place for that purpose (incident reports), so that each incident could be investigated and Mrs Parata provided with an opportunity to comment as they occurred. Ms Osborn's evidence was that she emphasised to Miss Clear that she would deal with any incidents raised by Miss Clear but that Miss Clear needed to report them as they arose.

[27] It was Ms Osborn's evidence that at this stage Miss Clear was not using the word "bullying" to describe her complaints regarding Mrs Parata's conduct towards her. Ms Osborn's own impression of the problem at that stage, from what she was hearing, was there were two strong-minded women who were unable to find the middle ground needed to work effectively together and as she saw it the challenge was to find a way through the problems in the working relationship and get some measure of respect between the two.

[28] Between November 2001 and June 2002, Miss Clear filed five incident reports. Leaving aside the "shredding incident" which I address below (paras 31, 32) only one of these complaints raised a specific issue in relation to Mrs Parata's conduct towards her. (On investigation it was revealed the problem at the heart of this complaint involved the actions of another midwife). All these incidents were investigated and dealt with in accordance with the Board's procedures.

[29] Notable among these incidents is a complaint laid by Miss Clear about breaches of policy/confidentiality by an enrolled nurse Rachel Harris.³The outcome of Miss Clear's complaint was a finding that enrolled nurse Harris had acted entirely appropriately. Miss Clear was asked to address aspects of her own clinical practice and to apologise to Nurse Harris for the way she had spoken and acted towards her. Miss Clear provided a written apology to Ms Osborn.

[30] Despite the instruction given to Miss Clear that she was to raise any concerns she had by way of contemporaneous incident reports to allow complaints to be investigated and for those concerned to be given an opportunity to respond, Miss Clear submitted a third letter of complaint about Mrs Parata. That complaint was dated 16 May 2002⁴ and detailed 17 specific complaints about Mrs Parata's conduct. This letter is notable because Miss Clear had been studying the literature on bullying and believed (and still believes) Mrs Parata was bullying her. In this letter of complaint Miss Clear describes Mrs Parata's behaviour as appearing "*to fit the criteria of an organisational psychopath*".

[31] When Ms Osborn received this letter detailing new complaints against Mrs Parata, she was concerned that Miss Clear had not abided by their agreement that incident forms would be filled out at the time incidents occurred. She looked at the complaints and saw events that had not been reported. She believed them to be historical; and they also appeared to be relatively minor and trivial. Ms Osborn's evidence was that she wanted a change in behaviour from Miss Clear. It was a key part of her strategy to ask Miss Clear to document incidents as they occurred so they could be dealt with at the time. This way, if there was a pattern of small but deliberate behaviour she could recognise it. She did not want to encourage a culture of storing up lots of incidents and then reporting them well after the event. She was also conscious of the importance of ensuring Mrs Parata was being treated fairly. Ms Osborn did not consider it appropriate to try and investigate the sorts of issues that were being raised months after they had occurred. For this reason, she investigated what appeared to be the only current issue – that relating to a shredded document. On 10 June 2002, Miss Clear filed an incident form in respect to this complaint. She complained that on 14 May 2002 she wrote a referral for a team patient which she found in the shredder the following morning. At this time Miss Clear communicated that she saw the solution as lying with Mrs Parata leaving her job. Ms Osborn did not see this as an option.

[32] Ms Osborn investigated the matter and spoke to both Miss Clear and Mrs Parata. When Ms Osborn spoke to Mrs Parata she advised that she had shredded the referral form that Miss Clear had done because she had already made a referral to the specialist. Ms Osborn counselled

³ This was the second time interaction between Miss Clear and Ms Harris had become the subject of an investigation by the Board. On the first occasion (dealt with by Peter Campbell) Miss Clear's conduct towards Ms Harris was found to be inappropriate and she was told she owed Ms Harris an apology. The evidence given by Miss Clear was that she felt she did not owe Ms Harris an apology but she did express to her "*that she regretted the incident*"

⁴ It appears, however, that at the time it was submitted to Ms Osborn it was not dated.

Mrs Parata that the better way to do this sort of thing next time would be to talk about the issue with Miss Clear rather than to shred the document. It was Ms Osborn's evidence that Mrs Parata accepted this advice.

[33] Following her investigation into the "shredding complaint", Ms Osborn wrote two memoranda to Miss Clear. In her first memorandum, dated 11 June 2002, she communicated the outcome of her investigation – being that she had met with Mrs Parata and that Mrs Parata accepted that a better way of dealing with the matter would have been to discuss the issue with Miss Clear before destroying the referral. She asked both women to work on the communication required to ensure such incidents did not happen again.

[34] In the second memorandum, dated 14 June 2002, Ms Osborn recorded details of the discussions which had taken place between herself and Miss Clear in relation to the investigation of the complaints and she reminded Miss Clear of the importance of raising issues at the time and that the other employee must be given the opportunity to respond as soon as possible.

[35] To conclude on the evidence provided by Ms Osborn, it was her position that she investigated every incident raised by Miss Clear (being those incidents that were raised in a timely manner). In the course of her investigations and otherwise on a regular basis she had many informal discussions with Miss Clear. She questioned Miss Clear on those occasions as to how things were going. Miss Clear never advised her that things were getting worse or were becoming unmanageable for her.

[36] It was also Ms Osborn's position that she recalled that both Miss Clear and Mrs Parata worked very hard to keep the service going and both women put in more than could be expected of them at times. She observed them discussing matters and they both tried to be civil towards each other. Ms Osborn noted that generally speaking the two women did not work together because Mrs Parata worked mornings and Miss Clear worked afternoons so that the time they worked together was limited. Her impression was that if Miss Clear could avoid working with Mrs Parata she did so. Ms Osborn saw this as an effective coping strategy.

[37] She also said that she advised Mrs Parata that if she found any evidence of harassment by her she would not tolerate it.

[38] Ms Osborn closed on her evidence by submitting the personnel file copy of a memorandum to her from Miss Clear dated 21 June 2002. On 1 April 2003 Ms Osborn noted on that letter "*No further issues raised. Midwives have worked extremely hard to keep service alive – JO*". Ms Osborn said she believed she had made this note as she prepared to depart the Board. She left in May 2003.

[39] Miss Clear had a different perspective as to the outcome of her May 2002 complaint. It was her evidence that as far as the substantive complaints were concerned Ms Osborn dictated the approach taken to the investigation of her complaints and declined to deal with anything other than the "shredding complaint".

[40] Going forward, it was Miss Clear's evidence that Mrs Parata's behaviour did not improve and the ongoing stress was damaging to her health. She was not sleeping; she was depressed; she had lost her appetite and was losing weight. She was suffering flare-ups of warts on her hands at times of high stress. She also suffered from polyarthralgia (a painful condition of the joints), and her hypertension worsened and by August 2002 her blood pressure was uncontrollable. Dr Gadsden referred her to a cardiologist who then saw Miss Clear regularly.

[41] In June 2003, Ms Osborn was replaced by Ms Thia Priestly. At the relevant time, Ms Priestly was Area Manager of King Country that included Te Kuiti and Taumarunui Hospitals and the

Family Health Team. For an intermittent period between February 2003 and June 2005, she also worked as the Acting Manager, Southern and Eastern Area. This area encompasses Tokoroa Hospital and the Southern and Eastern Family Health Team.

[42] Miss Clear stated in her evidence that Ms Priestly was a long-standing colleague of Mrs Parata. Ms Priestly denies that she had any special relationship with Mrs Parata. She accepted that they did train together, however, like many student nurses, they did not keep in touch and the next time she recalled meeting Mrs Parata was at Tokoroa Hospital in 2003 - over 40 years later. It was her evidence that she and Mrs Parata had no relationship and she did not believe that the fact they trained together affected her interactions or decisions relating to Miss Clear in any way.

[43] Despite her concerns about the relationship between Ms Priestly and Mrs Parata, Miss Clear decided to attempt to resolve her concerns relating to Mrs Parata's conduct towards her by approaching Thia Priestly. She met with Ms Priestly on 27 June 2003. At this meeting she raised her concerns and asked to have her practice separated from that of Mrs Parata. She said that a time frame of four weeks was agreed to work towards this. They agreed to meet again on 28 July to review the situation.

[44] Ms Priestly's evidence regarding this meeting was notable in that it addressed the tone of the meeting and Miss Clear's state of mind at that time. Ms Priestly said that Miss Clear came into her office with a paper bag filled with notes that she proceeded to take out of the bag. Miss Clear told her that she had kept evidence over a period of 16 years on matters relating to Mrs Parata. She also informed Ms Priestly that her relationship with Mrs Parata was in an irreparable state. It was Ms Priestly's evidence that she told Miss Clear she did not want to see all the contents of the bag and she asked Miss Clear to talk her through the key issues.

[45] Miss Clear told her that she believed that she, Ms Priestly, might have difficulty dealing with the matter because of her longstanding relationship with Mrs Parata. She said she would take the WDHB to Court if Mrs Parata was not sacked from her job. Ms Priestly said she found Miss Clear's manner threatening and intimidating and she ended the meeting within about 15 minutes, having offered Miss Clear EAP counselling. They agreed to meet again on 28 July and in the interim she referred the matter to Ms Kate Cotterall who was a human resources consultant with WDHB.

[46] Ms Priestly did not recall agreeing to a time frame to move towards separation of the two women's practice. However, Ms Priestly did believe space and temporary separation was required to allow time to seek resolution. She considered the situation serious enough to consider drastic and temporary intervention bearing in mind the effect of the conflict on the small midwifery team based at Tokoroa and the risk of losing a midwife. Because both Miss Clear and Mrs Parata had significant amounts of annual leave owing (in excess of three months each), she suggested it might be an option for both to take a substantial amount of this annual leave at separate times in order to give them the space that seemed necessary. (As it happened, both women declined to use annual leave to facilitate their separation in this manner).

[47] There was another meeting on 28 July (attended by Miss Clear, Ms Priestly and Kate Cotterall). Prior to that meeting, Ms Priestly took steps to bring herself up to speed with the issue relating to the relationship problems between Miss Clear and Mrs Parata. She discussed the matter with Nora Creigh-Smith, a hospital administrator. Ms Creigh-Smith was familiar with Miss Clear and Mrs Parata's relationship issues and she confirmed to Ms Priestly that resolving the issues submitted by Miss Clear had been difficult because of the unrealistic outcome demanded by Miss Clear. Ms Priestly also reviewed Miss Clear's personnel file which revealed a number of records of patient complaints against Miss Clear. She also informed Mrs Parata of Miss Clear's allegations against her.

[48] When they met Miss Clear handed over a letter (dated 26 July). That letter delivered an ultimatum to the Board to the effect that the only basis on she would consider not having her complaints investigated would be if Margaret Parata resigned. She advised that if Mrs Parata had not resigned by close of business on 8 August she would assume Mrs Parata would prefer her behaviour to be investigated by WDHB management and other named bodies.

[49] It was Ms Priestly's evidence and that of Ms Cotterall that, at this meeting, Miss Clear reiterated again and again her position that Mrs Parata's employment had to be terminated. It was Ms Cotterall's evidence that Miss Clear used phrases such as "*that woman will be terminated; she will not work here*". Ms Cotterall's evidence was that she too found Miss Clear's tone threatening and intimidating. She advised Miss Clear that she was happy to look into any complaints Miss Clear had about Mrs Parata, but that her statements and the tone she was using were threatening and this was not appropriate.

[50] All those present at the meeting of 28 July agree that Ms Priestly posed a number of options that would enable Miss Clear to separate her practice from Mrs Parata's. Miss Clear was asked if she wished to consider practice as an independent midwife and this would give her independence from Mrs Parata and a choice of access to other WDHB facilities, including Tokoroa Hospital. The other option suggested by Ms Priestly was to encourage Miss Clear to consider a career as a caseload midwife with WDHB. While she would continue to work for WDHB, this would again give her a measure of autonomy and full responsibility for the women registered in her name. It was Ms Priestly's evidence that she believed pursuing these options would have given Miss Clear the independence from Mrs Parata that she wanted while allowing her to keep practising as a midwife at Tokoroa.

[51] It was the evidence of both Ms Cotterall and Ms Priestly that Miss Clear did not want to discuss these options at all. It was Ms Cotterall's evidence that Miss Clear did not seem to hear what they were saying. She was totally focused on the removal of Margaret Parata. Her tone of voice, body language, behaviour and reactions were not normal.

[52] Miss Clear's perspective on the options presented to her by Ms Priestly at that meeting was that it appeared that management thought the solution lay with *her* leaving or *her* changing her role, not with Mrs Parata being made accountable for her behaviour.

[53] As Miss Clear was scheduled to take annual leave in August the meeting concluded with agreement that there would be another meeting to continue the discussion following her return to work.

[54] On 8 August 2003, Miss Clear signed off a third written complaint about Mrs Parata. (I find this complaint was not seen by Ms Priestly until 25 August when it was referred on to Ms Cotterall who received it on 26 August). In this complaint, Miss Clear detailed 32 separate complaints about Mrs Parata's conduct towards her.

[55] At the same time, or thereabouts, Miss Clear also wrote to the Nursing Council, OSH, New Zealand College of Midwives, New Zealand Nurses' Organisation and Human Rights Commission, along with the Midwifery Council and Ministries of Health and Employment. She also sought legal advice.

[56] It was Miss Clear's evidence that in August 2003⁵ she was at her wits' end physically and emotionally. She suffered deterioration in her polyarthralgia condition and she sought advice from her doctor, Dr Duncan Gadsden. She was given a medical certificate certifying her unfit for work from 11 August 2003 until further notice.

⁵ She was on annual leave at this time.

[57] Miss Clear received a medical clearance to return to work and did so on 30 August. An incident occurred this day that resulted in a complaint being made about her by nurse Wendy Jones. The complaint was submitted in an incident form dated that day. The concern expressed by Nurse Jones was that, in a situation where Miss Clear was on call, Miss Clear told Ms Jones that she would not return to the maternity unit to admit and check a patient being returned from Waikato Hospital. She complained that Miss Clear left the ward at 14:55 hours to go home and told her “*don’t ring unless it’s an emergency*”. Nurse Jones complaint recorded that she had checked with Sister Parata who advised her that Staff Nurse Clear should come in to check the patient.

[58] On 8 September, Miss Clear met with Thia Priestly and Kate Cotterall to discuss her written complaint of 8 August 2003. Miss Clear’s notes of this meeting record that she was told there had been no movement to separate her practice from that of Mrs Parata’s; that the letters she was writing reflected badly on her and there were to be no more; and that there would be another meeting on 29 September.

[59] It was the evidence of Kate Cotterall and Thia Priestly that there were a number of issues covered at that meeting. It was their position that Ms Cotterall’s minutes of that meeting accurately reflected the scope of the issues discussed that day.

[60] Ms Cotterall asked Miss Clear if there were any issues other than the 32 specific complaints recorded in the letter of 8 August that Miss Clear wished to have addressed by management. Miss Clear confirmed that there were no other issues that she wanted investigated and she confirmed that the 32 issues included in her the 8 August 2003 complaint had all arisen since her previous letter (May 2002). It was agreed that the Board would deal with the 32 points raised in her letter and not with historic issues.

[61] Miss Clear was advised that a full and fair investigation would be undertaken to investigate the 32 complaints. The scope of the investigation was outlined and Miss Clear was advised that Ms Cotterall and Ms Priestly would interview Mrs Parata and others.

[62] Miss Clear was advised that in future she was to record all further incidents that arose and submit them in incident forms or, if appropriate, by way of a letter. She was to keep to the facts and refrain from name-calling; for example, she was not to call Mrs Parata an “*organisational psychopath*”. Miss Clear was told this amounted to similar behaviour to that she was complaining about.

[63] The offer of EAP counselling was reiterated and another meeting (to follow matters up) was to be set down following Ms Priestly’s return from planned annual leave at the end of September.

[64] After the meeting, Ms Cotterall wrote to Miss Clear to formally acknowledge receipt of Miss Clear’s complaint of 8 August 2003 and to notify her that a full and fair investigation into her complaint was currently being undertaken. Notes from the meeting of 8 September were attached for Miss Clear’s information.

[65] To close on this, it was Ms Cotterall’s evidence that when they met with Miss Clear on 8 September, her behaviour at that meeting was similar to the behaviour exhibited by her at the meeting of 28 July although Ms Cotterall (being more prepared for the meeting this time) was somewhat less surprised. It was her evidence, however, that she continued to have concerns about Miss Clear’s state of health.

[66] On 3 September, Ms Priestly had received an email from Ms Creigh-Smith, the Hospital Administrator at Tokoroa. She advised that Margaret Parata had called to say that she had been phoned by the College of Midwives and told that they have received an eight-page letter about her

from Wendy Clear. They have advised Margaret to take out a harassment order against Wendy. She had counselled Margaret to speak to Kate before doing anything. Ms Creigh-Smith expressed serious concern about the two women being able to work together. She noted that Margaret was stressed and that she would ensure she was offered EAP assistance. She also noted that Wendy had asked to see Ms Priestly. She noted it had been a terrible week and closed with the words “*HELP – Nora*”

[67] It was Miss Clear’s evidence that after she returned to work on 30 August, Mrs Parata provoked her all the time.

[68] On 9 September, Miss Clear said she was having a discussion with a patient (for whom she was the lead maternity carer) who had presented for her final post-natal check. Miss Clear was discussing contraception with this patient and told her that she would give her a prescription for the mini pill. At this point, Mrs Parata interfered by obtaining a prescription sheet. She filled it in, signed it and gave it to her (Miss Clear’s) patient.

[69] At this point Miss Clear was extremely stressed. She completed and filed an incident report on Mrs Parata’s interference and she left the hospital. She was on sick leave on 10 September and on 11 September a friend who was a trained psychiatric nurse recognised that she was at her wits’ end and made an appointment for Miss Clear to visit Dr Gadsden. She saw Dr Gadsden and he provided her with a new medical certificate saying that she was unfit for work from 11 September to 25 September 2003.

[70] On 14 September, Ms Priestly was advised that Miss Clear had contacted Charge Nurse Hartley to advise that she would be off on sick leave indefinitely. Shortly thereafter, Ms Cotterall received a letter from Miss Clear’s solicitor, David Venter. He raised an employment relationship problem with the Board on Miss Clear’s behalf. (The Board treated this statement as a submission of personal grievance.)

[71] Mr Venter noted a well documented history of complaints by Wendy Clear against Margaret Parata over the past 2½ years and stated that all previous attempts to address the problem had failed. He advised the Board that it had failed to carry out a full and fair investigation of Miss Clear’s complaints and had failed to take reasonable and appropriate action to resolve the situation. The Board was advised that the situation had become intolerable to Miss Clear and that it was affecting her health. She had seen her doctor who was now treating her for stress and depression. Mr Venter closed by advising that he would be requesting a mediation meeting through Mediation Services in an attempt to resolve the matter.

[72] On Monday, 15 September 2003, Ms Cotterall replied to Mr Venter acknowledging receipt of his letter. Mr Venter was advised that a meeting had been held with Miss Clear with regard to her complaints letter dated 8 August and that at this meeting it had been agreed with Miss Clear that the Board would undertake a full and fair investigation into her complaints. Mr Venter was advised that the process had not yet been completed.

[73] In accordance with the agreement they had reached with Miss Clear to conduct a full and fair investigation into the complaints raised by her in the letter dated 8 August 2003, Ms Priestly and Ms Cotterall conducted a number of interviews with individuals they believed might be able to shed some light onto the matter.

[74] They met with Mrs Parata on 8 September and went through with her in detail all the 32 complaints made by Miss Clear. At the end of that meeting, Mrs Parata was asked if Ms Cotterall and Ms Priestly could validate her comments with other midwives and Maureen Hartley, the Charge Nurse. Mrs Parata agreed to this.

[75] It was the evidence of Ms Priestly that at the meeting Mrs Parata said that in accordance with the Code of Health & Disability Services Consumers' Rights Code 7, women have the right to make decisions and to change their mind if they wish. Women may choose who will be their midwife, and those who chose Margaret over Wendy had the right to do so. She also made the point that as clinical leader she had the responsibility to ensure staff used best practice guidelines, that clients have the choice of service, that the service is responsive to the needs of women and that the service is safe and client-focused. Mrs Parata also said she believed that a good clinical leader would oversee and support the practice of colleagues in a team-like environment. She admitted she found it very difficult to communicate effectively with Miss Clear because of the likelihood of misinterpretation. She said she had tried to remain low key with Miss Clear to avoid further complaints.

[76] On 2 October, Ms Priestly and Ms Cotterall met with Maureen Hartley and May Thomas (another staff midwife). Ms Priestly's evidence summarised the key points of the meetings with Ms Thomas. I have summarised these points again. Ms Thomas advised Ms Priestly and Ms Cotterall that;

- The inequitable workload complained about by Miss Clear results from members of the public asking for Margaret and asking not to have Wendy because of past experience. She said that she had never worked with anyone in her life that had received so many complaints from patients as Miss Clear and that her complaints against Mrs Parata were unjustified. She said that quite a few patients say that Wendy is rude and obnoxious. Some of these complaints had been written down and given to Maureen Hartley but most comments were simply made verbally.
- Margaret Parata had a good relationship with all staff and treated all staff the same. She did her best to keep things going as the Department would not function with Wendy's behaviour continuing as it is.
- She had never seen anything of the nature that Wendy complained about in respect of Margaret's behaviour. She noted that while both Wendy and Margaret are professional as soon as Margaret would leave a room, Miss Clear would ask her if she had seen some specific conduct and would accuse Margaret Parata of unreasonable conduct. Ms Thomas stated that in these instances nothing had happened.
- All the midwives (excluding Wendy) worked as a team. She said that Miss Clear was disruptive and was difficult to deal with and while they got on well personally, Miss Clear would not work as part of the team.

[76] Ms Priestly and Ms Cotterall also met with Maureen Hartley that day. The key points Ms Hartley made at that meeting were:

- She received many complaints about Wendy from clients.
- Her experience with Margaret was positive. She is a hard working professional.
- Margaret is considerate to nursing staff.
- It was Ms Hartley's view that Miss Clear's problems are long-term problems.
- Nurses are not intimidated by Mrs Parata but do feel intimidated by Miss Clear.
- Miss Clear is always having a problem with someone.

[77] Another staff midwife, Elwyn Osborn, was asked at this time to give a statement. However, she declined to do so.

[78] Whilst these inquiries were taking place, Miss Clear had taken up the offer of EAP counselling made available to her by the Board. By now, she had been diagnosed as suffering from agitated depression and she was prescribed sleeping tablets and anti-depressants

[79] As previously recorded Miss Clear had (in late 2003) lodged a complaint with OSH and on 7 October OSH wrote to the Board in relation to this complaint. Ms Cotterall prepared a timeline for OSH and sent this as well as other relevant documentation to OSH.

[80] In October 2003, Miss Clear's sick leave entitlement had been used in full. As she did not want to use her annual leave entitlement, she was no longer in receipt of any income and she was very keen to have the matter dealt with in a timely manner by WDHB. On 26 September, she had written to Ms Priestly requesting further funding for counselling. She advised Ms Priestly (to whom she directed her request) "*The need for this is a direct result of Health Waikato's failure to comply with the Employment Act in providing a stress-free workplace*".

[81] Ms Priestly replied to this request on 21 October. It was her evidence that she had taken advice and been told that EAP counselling was best utilised for short term issues and given Miss Clear's request for additional sessions, her medical certificate and Ms Priestly's own concerns about the situation, it might be more appropriate to request that Miss Clear obtain an assessment from a psychiatrist. For this reason, Ms Priestly suggested such an assessment to Miss Clear. In her letter, she declined further EAP counselling sessions and advised that WDHB was prepared to meet the cost of Miss Clear's consultation with a psychiatrist, subject to that psychiatrist being a specialist nominated by the Board and the psychiatrist's report being made available to the Board.

[82] On 6 November 2003, Miss Clear met with Ms Creigh-Smith and Ms Priestly. Ms Priestly's letter in response to Miss Clear's request for additional EAP sessions was discussed at that meeting and the Board's wish to have Miss Clear obtain an appropriate assessment from a psychiatrist. The Board's offer to meet the cost of such a consultation, subject to the psychiatrist being the specialist nominated by the Board and the results and recommendations being made available to it, was reiterated to Miss Clear. Miss Clear was asked to advise on her intentions and/or availability to attend such a session. It was her evidence that Miss Clear said it was her GP's advice that such a report was not necessary. Ms Priestly's evidence was that no resolution of this issue was reached at that meeting.

[83] A number of other issues were dealt with at that meeting. The Board's record of the meeting states that Miss Clear asked what was happening with regard to Mrs Parata's employment and she was told that Ms Priestly was not prepared to discuss the issue with her. Miss Clear expressed concerns about her time sheets being tampered with and that annual leave had been deducted instead of sick leave in respect of time taken off over this period.

[84] At this meeting Miss Clear submitted a formal request for discretionary sick leave. She was reminded of the need for a psychiatrist's report.

[85] On 15 November, Ms Priestly wrote to Miss Clear stating that her application for discretionary leave had been declined because she had 500 hours of annual leave and because the reason cited by Miss Clear for the leave (post-traumatic stress disorder) was a condition that could only be diagnosed by a trained professional (e.g. a psychiatrist). Miss Clear was also invited to a meeting on 27 November to discuss the results of the Board's interviews with relevant staff. Copies of those interviews were noted to be attached to this letter. However, it appears they were omitted⁶

⁶ Miss Clear believes the omission was deliberate.

and despite the fact that Miss Clear called and requested that the interview records be sent she had not received them by the time the 27 November convened. She was given new copies of the notes of the interviews in question and was allowed a period of time to consider these notes. However, Miss Clear decided, as a matter of principle that she would not respond formally at that time.

[86] At that meeting Miss Clear advised that, as she had been told that any discretionary sick leave was dependent on her providing a psychiatrist's report, she had made an appointment with a psychiatrist of her choice (Gil Newburn) for 20 January 2004. The matter of a psychiatrist's report and who would undertake the assessment was to have a major impact on the investigation into Miss Clear's complaints and the outcome of that investigation.

- The Board wanted a report from a psychiatrist of its choosing to assist it in developing a way forward. It was also necessary if the Board was to reconsider Miss Clear's request for discretionary leave. As Ms Cotterall put it, the Board was extremely worried about Miss Clear's health. At meeting of 27 November Ms Cotterall advised she would check if Dr Newburn was acceptable to the Board and if so would do what she could to arrange for an earlier appointment. In the event the Board decided that Dr Newburn was not acceptable to it. The Board's view regarding his suitability was further complicated by Dr Gadsden's referral letter to Dr Newburn. The Board considered it was biased and leading.
- To further complicate matters the Board arrived at the position that no further steps should be taken to progress matters with Miss Clear without the psychiatrist's report. This decision was adopted for fear of implementing steps that had a negative impact on her health. However, it was Ms Cotterall's evidence that the Board never told Miss Clear that it would take no further steps to progress the matter until it received a report from a Board-approved psychiatrist.
- Miss Clear interpreted the Board's communications on this point as a requirement only that she obtain a psychiatric report and decided to consult Dr Newburn. When the Board declined to approve Dr Newburn Miss Clear decided to continue her arrangements with him interpreting the Board's stance as an attempt to control the situation because it did not want an independent review. Dr Gadsden supported Miss Clear in her choice of psychiatrist. He was not, however, aware that the issue of discretionary sick leave hinged in part on Miss Clear obtaining a psychiatrist's report from a psychiatrist acceptable to the Board.

[87] At the 27 November meeting Miss Clear also provided a list of names of people who, she submitted, had left because of Mrs Parata's tyranny and she produced documentation on bullying which the respondent submits she flung across the table. Miss Clear denies this and says she pushed it across the table and it was pushed back. She also produced her medical record and gave it to Ms Cotterall.

[88] When Miss Clear returned home from this meeting, the interview notes despatched by Ms Creigh-Smith in response to her telephone request were in her mailbox.

[89] It was Miss Clear's evidence that on 28 November she prepared a detailed response to the interview notes she had been provided. She set this out in writing in a letter to Ms Priestly that day. It was Miss Clear's evidence that she was expecting to be provided with the opportunity to attend another meeting to enable her to submit her response to the interview notes. She did not send her written responses, preferring instead to make them available at a new meeting where she could also provide her verbal response. She asked Nora Creigh-Smith to request a meeting with Ms Priestly to

provide her responses to the employer's investigation. Then as she had received no response to her request Miss Clear rang again in mid-December. She left a message asking for a meeting time.⁷

[90] Miss Clear kept her scheduled appointment with Dr Newburn on 20 January.

[91] It was Miss Clear's evidence that she waited for a response to her request for a meeting with Ms Priestly but none was forthcoming. This caused her considerable stress. It was her preference, she said, to have the matter resolved speedily. However, by 28 January 2004 Miss Clear she was so frustrated with the lack of a response to her request for a meeting to discuss the ongoing investigation she decided to write to the CEO of WDHB, Dr Jan White (28 January 2004). She advised Dr White she had been subjected to bullying for almost 16 years by a colleague whom she described as a "*chronic workplace bully*". She advised too that she had laid four complaints with the Board regarding the matter and, following her most recent complaint on 8 August, she had been had been promised a full and fair inquiry. She advised she was unhappy with the progress on the complaint said if it was not brought to a speedy conclusion she would take action in the Employment Relations Authority or the Employment Court. She advised she would listen to offers of settlement but a prerequisite would be the dismissal of the perpetrator. (She did not name Mrs Parata in this letter).

[92] After Miss Clear wrote to Dr White on 28 January 2004, responsibility for managing Miss Clear's complaints passed to Mr Peploe, an employee relations consultant employed by the Board. From that point in time, Ms Priestly had a reduced role in the matter and was fully committed elsewhere, albeit she did have discussions with Mr Peploe and Ms Cotterall. Ms Cotterall's role became limited to assisting Mr Peploe.

[93] It was Ms Priestly's evidence that at no time did she advise Mr Peploe that the inquiries she had conducted into Miss Clear's complaint had not been concluded. Neither did she respond to Miss Clear's request for a meeting to discuss the interviews that had been conducted with Maureen Hartley, May Thomas and Margaret Parata.

[94] When Mr Peploe took the responsibility for investigating Miss Clear's complaints he also assumed responsibility (along with Ms Cotterall) for providing the information required by OSH to assist them in their investigation into the complaint laid by Miss Clear with OSH in late 2003. It was Mr Peploe's evidence that over the months of February, March and possibly April, he was involved in gathering information for OSH and in meetings with representatives from OSH in relation to Miss Clear's complaint.

[95] As a result of Miss Clear's letter to Dr White and the matters raised in the OSH complaint, Mr Peploe accessed Miss Clear's personal file and other relevant documents and had them collated. He then reviewed them. He also had consultations with Ms Priestly, Ms Cotterall, and he met with Ms Creigh-Smith and Maureen Hartley.

[96] It was Mr Peploe's evidence that as a result of his discussions and assessment of Miss Clear's file, it became clear that the issues with Miss Clear were wider than simply her conflict with Mrs Parata. For example, he became aware that a number of patients and staff had raised concerns about Miss Clear's behaviour. Indeed, the level of complaints about Miss Clear was almost unheard of.

[97] As a result of his discussions with Ms Priestly and Ms Cotterall, he became aware that Miss Clear had said she would provide the names of other staff that she believed had resigned because of their treatment at the hands of Mrs Parata. Miss Clear had not, however, provided this

⁷ The evidence discloses that Ms Creigh-Smith forwarded Miss Clear's request for a meeting to Ms Priestly.

advice and he emailed her on 5 March 2004 asking her to provide the names of the staff that could corroborate her claims.

[98] Miss Clear responded on the same day giving (among other details) names and contact details of persons she believed had left their employment as a result of Mrs Parata's conduct towards them.

[99] When Mr Peploe received this information he decided not to make inquiries of the named persons. He said there were several reasons for this. First, it did not appear to him that Miss Clear's email contained any new allegations and many of the matters referred to in the email were historical, some dating back many years. These matters had been dealt with by previous managers. Mr Peploe was also conscious of the effect of the ongoing investigation on Mrs Parata. He considered the Board had a duty to Mrs Parata as well as to Miss Clear and he was conscious of the fact that the Nursing Council had apparently told Mrs Parata that she should consider getting some form of harassment injunction against Miss Clear.

[100] Mr Peploe also had regard to discussions he had had with Ms Priestly, Ms Creigh-Smith and Ms Cotterall about their observations from their meetings with Miss Clear. Their advice appeared to be that Miss Clear's view of what these people could offer was not necessarily correct. They communicated to him that Miss Clear seemed obsessed and single-minded in her focus to ensure Mrs Parata's dismissal or resignation. Her behaviour was concerning and to be frank did not appear to be rational.

[101] The evidence discloses that, at some stage in the process⁸, Ms Priestly, Ms Cotterall and Mr Peploe decided, on the basis of the investigation so far, that it was not appropriate to continue the investigation. It became the Board's view that despite Miss Clear's firmly held and genuine view, her allegations against Mrs Parata were not justified. It is not in dispute that this conclusion was never communicated to Miss Clear.

[102] In March/April 2004 Miss Clear received Dr Newburn's report (dated 29 March). She forwarded it to the Board⁹.

[103] On 25 April, 7 June, 23 July, 5 August, 17 August and 18 August, Miss Clear emailed Mr Peploe requesting an update on his progress in the investigation. Over that period of time, the tone of her emails progressed from that of polite inquiry to threats to proceed with Court action. Miss Clear also emailed Mr Peploe on three occasions in relation to her request for discretionary sick leave. It is clear from these emails that Miss Clear still believed that access to discretionary leave would be forthcoming once she had provided the Board with a psychiatrist's report which by this time she had provided.

[104] In July 2004 OSH reported to the Board the results of its investigation. It found the Board had adequately managed the complaints made by Miss Clear and had taken (and were taking) all practicable steps that could reasonably be expected to be taken in regards to the Health and Safety in Employment Act 1992 and that OSH would take no further steps in the matter.

[105] Eventually, (on 27 August 2004) Mr Peploe emailed Miss Clear advising her that mediation had been scheduled for 30 August to discuss all issues concerning her employment. Miss Clear had through her solicitor been seeking mediation since late 2003. However, the Board had declined, taking the view that the OSH investigation should be finalised first. Unfortunately the OSH investigation took longer to finalise than expected. It was also the Board's position that it was

⁸ The evidence is unclear as to precisely when this occurred but it seems this conclusion was probably reached early in 2004.

⁹ Date unknown.

unable to agree or accept that Mrs Parata had bullied Miss Clear and it was now the Board's focus to find a solution to allow Miss Clear to return to work.

[106] In the event the August date for mediation was abandoned because Mr Peplow was ill. The mediation did not take place until October 2004. It was unsuccessful in resolving the problems associated with Miss Clear's employment.

[107] The next step involved the Board writing to Miss Clear on 12 October 2004 regarding her ongoing absence from work on health grounds. Miss Clear was told she was required to attend a meeting to be held at 3pm on 15 October 2004 at Tokoroa Hospital to discuss her ongoing absence from work. She was advised the Board would be seeking to make a decision on her continued employment at this meeting. Miss Clear was advised to bring any medical information or prognosis to the meeting and was invited to obtain advice and support.

[108] That meeting went ahead as planned. Miss Clear was supported at that meeting by her lawyer, Mr Venter, and her friend, Marie Gadsden (wife of Miss Clear's GP and personal friend Dr Duncan Gadsden). Miss Clear also obtained a written report from Dr Gadsden. I accept Miss Clear's evidence that this report was provided to the Board that day. Dr Gadsden reported that there had been some improvement in Miss Clear's health albeit he was not of the belief she was fit to return to work. He concluded his report with the statement that as nothing in the workplace was likely to have changed he believed that were Miss Clear to return to work he would expect an abrupt deterioration in her health.

[109] The parties have a very different perspective on the outcome of the meeting held on 15 October 2004.

[110] Miss Clear believes she was offered a district nurse's position which she accepted with a start date of 15 November.

[111] It is the Board's position that Miss Clear made it clear she would not prepared to work as a midwife while Margaret Parata remained employed. She continued to demand Mrs Parata's resignation or dismissal. She also refused to work in the general ward under the supervision of Ms Hartley whom she also described as a "bully". As a result Miss Clear could not be reintegrated back into the hospital as a midwife with independent facilitation and support. Miss Clear also turned down of employment at other hospitals managed by the Waikato Board. It was Mr Peplow's evidence that this meant that redeployment options for Miss Clear were extremely limited.

[112] In the context of discussing options to get Miss Clear back to work, Ms Priestly then asked Miss Clear if she would consider any other roles such as district nursing. Miss Clear stated that possibly she would. A medical clearance was discussed. It was agreed that the Board representatives would go back and review the situation to determine whether there were other redeployment options and that Miss Clear would also reconsider her own wishes. The parties agreed to meet in one month. In the event there were no district nursing positions and it was also decided that even if there had been any positions Miss Clear was not currently qualified to take up such a role The Board's witnesses were adamant that no position was offered to Miss Clear at the 15 October meeting

[113] However, by early November, staff at Tokoroa were reporting that Miss Clear had been advising people that she was returning to work as a District Nurse on 15 November. Mr Peplow could not understand how Miss Clear could have reached such a conclusion. As a result he wrote to Miss Clear's lawyer on 9 November 2004. He outlined his understanding of the outcome of the meeting of 15 October. Miss Clear was advised that there were no positions in emergency or community nursing that Miss Clear could fulfil. He concluded with the advice that unless

Miss Clear was able to return to her position as a midwife the Board would be in the position of having to terminate her employment.

[114] Miss Clear received Mr Peplow's letter of 9 November in the week prior to her intended start date as a district nurse. She was unable to contact her lawyer on the matter and as a result she decided to attend the workplace on 15 November with a view to starting employment. On her arrival, she was advised that she had misunderstood the situation and there was no position available for her. Miss Clear spoke to her lawyer the same day and he wrote to the Board that his understanding of the outcome of the 15 October meeting was that an occupational health person was going to contact Wendy's GP to discuss and report on her medical condition and if she was well enough to return to work. He also understood that Mr Peplow was going to make inquiries about the possibility of redeployment and/or retraining. He then stated that it was Wendy's understanding that if she was interested in a District Nurse's position she was to return to work on 15 November. He stated that Miss Clear did not accept there had been any misunderstanding in the matter. He reminded Mr Peplow that Wendy's position remained that she had suffered from workplace stress caused by bullying by Margaret Parata. She was not prepared to work with Mrs Parata. The Board was also reminded of its obligation to resolve the matter in good faith and provide Wendy with a safe working environment.

[115] On 3 December Mr Peplow replied and explained the Board's position. He concluded that Wendy's self-imposed restrictions on redeployment options meant that the Board had been unable to locate a suitable position for her. He advised that a decision on Miss Clear's continued employment would be made on Wednesday 8 December 2004 and suggested that if Miss Clear had any further representations to make then they should be forwarded to him.

[116] No representations were made on Miss Clear's behalf and on 21 December 2004 CEO Jan White wrote to Miss Clear terminating her employment with effect from 22 January 2005. The reason for the termination was confirmed as "your *continued absence from work with little hope that the situation will be resolved in the near future*".

[117] On 14 April Miss Clear's new counsel (Mr Hammond) raised a grievance on her behalf and requested reasons for the termination. Following some correspondence between the Board and Miss Clear's counsel, Miss Clear's claim was lodged with the Authority on 19 December 2005.

Other evidence

The Complaints

[118] In her written complaints to various managers between 2000 and 2003, Miss Clear made approximately 90 separate complaints about Mrs Parata's conduct towards her. With the exception of 6 -7 complaints they lacked specificity, particularly as to the date, on which the action was alleged to have taken place. Many of the complaints were expressed in very general terms e.g. [Margaret Parata] "*states women want her but some have no idea they do*". Some of the complaints were trivial – which was acknowledged by Miss Clear.

[119] I have considered the nature of the complaints made and summarised them under six or seven headings with one or two examples together with Mrs Parata's general responses and, on occasion, her specific responses to the complaints made against her. I have done this to demonstrate the nature of the complaints made and the intractable nature of the problem presented over time.

There was an inequitable sharing of the workload and Mrs Parata took the majority of maternity cases for herself.

[120] Miss Clear made numerous complaints over the time in question that Mrs Parata took the lion's share of the caseload for herself. Examples:

- [Mrs Parata] *does not fairly share the workload. Currently has about 45% of all patients booked.* (Miss Clear's complaint dated 21 October 2000.)
- *While I was on leave, my name has been crossed off a chart as LMC and a non-urgent referral written. I have still not been notified.* (Miss Clear's complaint dated 9 April 2001.)
- *The workload is still very inequitable, e.g. I have had <10 deliveries this year while Margaret Parata has had about 40.* (Miss Clear's complaint dated 8 August 2003.)
- *I wonder whether it is coincidental that most of the patients for whom I am the LMC are taken over by her.* (Miss Clear's complaint dated 8 August 2003.)

[121] Mrs Parata's evidence addressed these complaints in general and specific terms. She made the general point that Miss Clear commonly claimed that she was the lead maternity carer (LMC) for particular patients. Mrs Parata said that this gave a misleading impression of the circumstances under which maternity care was delivered at Tokoroa Hospital. It was her evidence that until July 2005 (by which time Miss Clear had left the hospital) midwives did not caseload. This meant, in effect, that patients did not actually have an LMC in the true sense of the word. Patients were the patients of the whole team.

[122] Mrs Parata went on to say, however, that in order for the hospital to receive funding for patients, one midwife had to sign the registration form as the LMC and that midwife would be responsible for the paperwork generated in respect of that patient. She also made the point that patients could, and did, request a particular midwife (or request that they not be seen by a particular midwife). Where a patient requested a specific midwife, that midwife would in effect become the LMC on an "informal" basis.

[123] Mrs Parata also stated that the way the work was organised in Tokoroa (where midwives worked shifts), it was unusual for any midwife to look after a patient throughout the entire pregnancy as an LMC would do and, in reality, a patient would usually be seen by whoever was working the shift when that patient presented.

[124] Mrs Parata's evidence was that generally she and other staff in the ward did not use the term "lead maternity carer" because that model was not being practised at Tokoroa. However, she said that Miss Clear did use that term.

[125] It was also Mrs Parata's evidence that from September 1999 (the date that accords with Miss Clear's evidence that she began to suffer high blood pressure), Mrs Parata noticed that Miss Clear's behaviour and character started to change. She said that from this time Miss Clear's work quality started to deteriorate and patient complaints escalated.

[126] Mrs Parata went on to address in her evidence all the specific claims raised by Miss Clear under this head and Miss Clear provided reply evidence.

Mrs Parata unreasonably interfered with Miss Clear's practice as a midwife

[127] Miss Clear's evidence was that Mrs Parata unreasonably interfered in her clinical practice and that midwives were *professionally stifled* at Tokoroa. By way of examples of these claims, Miss Clear's specific complaints included the following:

- [Margaret Parata] *supervised me doing a pregnancy test.* (Miss Clear's complaint dated 21 October 2000.)
- [Margaret Parata] *finds some reason to intrude when other midwives are consulting.* (Miss Clear's complaint dated 21 October 2000.)
- *Appears to make a point of entering the delivery suite when another staff member has a patient in there. The last time she did this to me I was in the process of performing a vaginal examination.* (Miss Clear's complaint dated 8 August 2003.)

[128] Mrs Parata addressed these complaints in her evidence. Speaking generally, it was her evidence that as clinical leader she was not the line manager of midwives who worked in the maternity unit. However, she is responsible for day-to-day management of the maternity ward to ensure that services are delivered in accordance with agreed standards of practice. She is required to act as a role model, to provide ad hoc clinical advice and to audit the hospital's practice against standards of practice. She is also required to performance manage a defined group of clinicians, coordinate the provision of patient care and lead quality improvement processes. Her role also requires her to be responsible for professional supervision, coaching and informal supervision within the service.

[129] Mrs Parata spoke to the specific complaints of this type and Miss Clear provided reply evidence.

Referral tampering

[130] It was Miss Clear's evidence that Mrs Parata persistently interfered with referrals that she prepared for maternity clients. Examples of complaints that fall under this head include:

- [Margaret Parata] *wrote a specialist referral on my patient when she knew I hadn't finished with the notes.* (Miss Clear's complaint dated 21 October 2000.)
- *On 14/5/02 I wrote a referral for a team patient which I found in the shredder the following morning.* (Miss Clear's complaint of 16 May 2002.)
- *At a very rough guess, I would say that I have been aware of referral tampering about 50 times since March 1997 which is when the GPs left obstetrics. This is only referrals with which I have been associated.* (Miss Clear's written complaint dated 8 August 2003.)

[131] Mrs Parata's evidence spoke to these claims both generally and specifically. She rejected the allegation that she had tampered with Miss Clear's referrals. She admitted that on occasions she may have corrected or even re-done a referral. It was her evidence that it is very important that a referral is completed correctly, that all facts are included, correct dates are given etc so that an appropriate appointment can be made. As the coordinator of the maternity service, it is her responsibility to see this occurs. She addressed the specific complaints and Miss Clear gave evidence in reply.

Mrs Parata interfered with Miss Clear's leave requests and timesheets to her disadvantage

[132] Examples of these complaints include:

- [Mrs Parata] *altered a signed leave request of mine.* (Miss Clear's complaint 21 October 2000.)
- *My pay sheet advice for the period 29/12/02 did not appear until 20/5/03.* (Miss Clear's complaint dated 8 August 2003.)
- *Twice this year, my call and overtime sheet has not made the payroll section with my timesheet. Both times there was significant overtime noted.* (Miss Clear's complaint dated 3 August 2003).
- *My timesheet has been countersigned as correct when there was a glaring omission (of two days). I do not necessarily expect it amended but I was not even notified. Yet when the roster had been changed to invalidate a claim for call after I had completed my sheet it was held back until I was on duty to correct it.* (Miss Clear's complaint dated 3 August 2003).

[133] It was Mrs Parata's evidence that Ms Hartley does the time sheets and payroll, not herself and that she has never deliberately withheld information from Ms Hartley. She also said that no-one is entitled to change another employee's timesheet so when Miss Clear's timesheet was wrong it was held back until she was available to change it.

Mrs Parata's open criticism/public chastisement of staff and the negative treatment suffered by Miss Clear personally

[134] It was Miss Clear's evidence that Mrs Parata was prone to publicly berating medical and midwifery colleagues and she believes that most midwives who had left over the years had left as a direct result of Mrs Parata's behaviour. She named Consuela Brown, Tania Rangi, Molly Winterburn, Beryl Kirk and Sandra Thomas.

- Miss Clear also complained that Mrs Parata criticised, belittled, ignored and generally undermined her. She cited the following examples:
- *Margaret Parata treats me as persona non grata and appears to utilise every opportunity to criticise, belittle or ignore me.* (Miss Clear's complaint dated 9 August 2001.)
- *It doesn't seem to matter what I offer to the unit. It is ignored, declined or, at best, minimised.* (Miss Clear's complaint dated 16 May 2002.)
- *On 8/7/03 she took a chart from me and stated she would see that patient. She then turned 180° and handed May Thomas the chart for her to see the woman.* (Miss Clear's complaint dated 8 August 2003.)
- *There are many occasions when I need to address her more than once before I receive a response.* (Miss Clear's complaint dated 9 April 2001).

[135] In response, Mrs Parata accepted that she is a strong leader and she accepted that that may have seemed to Miss Clear to be somewhat controlling. It was her evidence that she could at times be direct and she does ask that midwives achieve high standards. Her aim is to provide excellent patient care in a positive manner to Tokoroa maternity patients. She stated there had been a number of complaints made against her concerning her relations with staff. As a manager in a busy unit she did not always make decisions that were popular with all. However, it was her position that generally she had had good relations with staff and she noted that she received much positive

feedback from students and midwifery colleagues with whom she had worked. A number of notes and cards received from staff and grateful patients were introduced by Mrs Parata in evidence.

[136] Mrs Parata firmly believed that she had not harassed Miss Clear or bullied her at any time. She had, in her role as clinical leader, audited Miss Clear's work against her clinical standards of practice. However, she had always done so in a professional manner in spite of the difficulties she had encountered with Miss Clear.

[137] It was Mrs Parata's evidence that she and Miss Clear mostly worked on opposite shifts and she really did not work with Miss Clear a lot to be able to bully her.

[138] She was aware by mid-2000 Miss Clear did not like her and she believed that Miss Clear was trying to get her into trouble. For this reason she was very cautious and professional in her behaviour towards Miss Clear and conscious of not knowingly leaving herself open to further accusations.

[139] It was also Mrs Parata's evidence that she took positive steps to support Miss Clear. From 1999/2000 when she noticed that Miss Clear's work quality had started to deteriorate and that patient complaints were escalating she asked another midwife (Elwyn Osborn) to speak with Miss Clear and ask if there was anything they could do to help her. This approach was not successful because Miss Clear would not say what was wrong or even agree that anything was wrong.¹⁰ It was also Mrs Parata's evidence that at this time she spoke to the clinical resource nurse because she thought that Miss Clear might need some support. She also tried to shield Miss Clear from patient complaints by caring for them herself. She thought it was not helpful and indeed would be hurtful to Miss Clear to tell her that patients did not want her caring for them.

[140] She said she supported Miss Clear when her performance was criticised by Waikato Women's staff who wrote an incident form criticising her judgment. She replied in support of Miss Clear. She also supported Miss Clear in an incident when a general staff nurse called a doctor to see a maternity patient without calling Miss Clear first, which is what they should have done.

[141] In response to Miss Clear's claim that the bullying behaviour became worse after Miss Clear had made a complaint, Mrs Parata stated she simply did not accept these allegations. She was extremely careful about anything that she did in relation to Miss Clear because she knew that if she did anything to upset her she was likely to complain again. This was an extremely difficult time for her; however, she carried on in a professional manner.

[142] Mrs Parata addressed Miss Clear's evidence that a number of staff midwives had left their employment at Tokoroa because of Mrs Parata's conduct towards them. It was Mrs Parata's evidence that Elwyn Osborn and Beryl Kirk had retired at the age of 65 and 66 respectively. Molly Winterburn's husband was made redundant and so they shifted to Tauranga. She and Molly did have an argument but this was *after* she resigned and not before as Miss Clear stated¹¹. She had also given Ms Winterburn a reference when she was asked for one by Tauranga Hospital. Consuela Brown transferred to Hamilton, partly to follow her partner who was moving and partly because she wanted more experience. Mrs Parata referred to a very supportive card she received from Consuela Brown at the time she left her employment at Tokoroa.

¹⁰ Ms Osborn did not recall being asked to speak to Miss Clear in this way and said she did not speak to Miss Clear adding one didn't make such inquiries of Miss Clear.

¹¹ When questioned on this point Ms Winterburn could not recall having an argument with Mrs Parata around the time she left her employment at Tokoroa.

[143] It was Mrs Parata's evidence that Tania Rangi left to further her career and become an independent practitioner. Ms Rangi was now back working at Tokoroa. Sandra Thomas moved to Hastings with her husband and May Thomas left to get another job with better hours.

[144] Mrs Parata addressed Miss Clear's specific complaint that on 8 July 2003 she took a chart from Miss Clear and stated that she was to see the patient only to hand the chart to May Thomas with a request that she to see the patient. It was Mrs Parata's evidence that she did not believe that she had said she would see the patient herself. However, she did ask Ms Thomas to see the patient instead of Miss Clear because this patient had specifically requested not to see Miss Clear.

[145] Finally on this subject, Mrs Parata responded to Miss Clear's complaint that she had to address her more than once before Mrs Parata responded and that she was refusing to acknowledge her and trying to cut her out. Mrs Parata said she did not accept this claim. She advised that she is quite deaf and at the time she was receiving treatment for this. She said that Miss Clear would speak softly so at times she would not hear her. However, at no time had she refused to respond to Miss Clear in order to cause difficulties.

[146] Miss Clear provided responses to Mrs Parata's evidence on the above issues. On the whole she stood by her claims. She also advised that she had never been told by Mrs Parata that she was deaf and she continued to believe that she was deliberately ignored by Mrs Parata on occasions.

Mrs Parata encouraged patients to complain about Miss Clear

[147] It was Miss Clear's evidence that she had not received any patient complaints before she went to maternity. She acknowledged that there were a high number of complaints from patients about her conduct towards them (both written and oral).

[148] Miss Clear accepted Mrs Parata's evidence that it was not her role to manage patient complaints. However, Miss Clear firmly believed that Mrs Parata had a hand in the initiation of those complaints by encouraging clients to lay complaints against her. Specifically, it was Miss Clear's evidence that she had seen patients with Mrs Parata. Shortly thereafter Mrs Parata would return to the ward saying there "*will be a complaint*" and sure enough there would be a complaint received from the patient.

[149] It was also Miss Clear's evidence that Ms Hartley had told her that she believed that Mrs Parata had been responsible for at least one complaint and she and Beryl Kirk were aware of another complaint which both of them believed had been initiated by Mrs Parata.

[150] It was Mrs Parata's evidence that there was an escalation in patient complaints about Miss Clear's conduct towards them from the time that Miss Clear (now reports) that her health started to deteriorate. Mrs Parata received complaints from patients and through other midwifery staff who themselves had received complaints from patients about Miss Clear's conduct towards them.

[151] Mrs Parata denies encouraging patients to submit formal complaints about Miss Clear. Unfortunately, she said, there was no need to. Complaints came from patients about Miss Clear on a regular basis without prompting from her. It was her role, she said, to listen to complaints and deal with them in accordance with hospital policy. However, from 2002 she distanced herself from these complaints and referred them to the charge nurse, Mrs Hartley, because of the complaints that Miss Clear was making about her.

[152] Miss Clear's response to Mrs Parata's evidence that she did not encourage or initiate patient complaints about Miss Clear was "*not believed*".

Miscellaneous complaints

[153] There were a number of complaints which I describe as “miscellaneous”. I am not detailing them to any extent other than to include one complaint and the evidence of Mrs Parata and Miss Clear on the particular point. I include it only to demonstrate the level of scrutiny Mrs Parata was under and the intractable nature of the problem presented.

[154] Miss Clear complained that Mrs Parata “*slit a large plastic bag that she knew I could reuse. It would normally be discarded*”. (Miss Clear’s complaint of 8 August 2003.)

[155] Mrs Parata responded that Miss Clear had never asked for it and she did not know she wanted it. She said that the bag was damaged and that in any event it was Waikato Hospital’s property and she was not sure that Miss Clear could just take it. Miss Clear’s response was that the bag was in almost mint condition until Mrs Parata slit it. She said that she had intended to recycle it and she had deliberately told Mrs Parata she could use the bag to see what response it generated.

Personalities, Clinical Practice, Staff and Patient Relationships

[156] Miss Clear was said to have good clinical skills and to be a first rate nurse. Ms Sherston (a friend of Miss Clear’s described her as a kind and intelligent person, a dedicated nurse and a person with an incredible memory. She said she was shocked at the changes she observed in Miss Clear when she returned from the UK at the beginning of 2004. Ms Standing has known Miss Clear professionally for over 35 years. She described Miss Clear as a bright intelligent person who did her best for patients and mothers and babies in her care. Both women commented on the fact that Wendy’s excellent memory had been negatively affected by her illness.

[157] Janice Osborn described herself as enjoying Miss Clear’s company and lively debates.

[158] Miss Clear was variously described by other witnesses as “old school, having black and white perceptions with there being no shades of grey in between and as a person with very strong likes and dislikes. She was described as a very exacting person and a stickler for following policy “*no-one gets away with less than 100% effort and efficiency*”¹². She was said to stand up for things she believes in resolutely and that it is not in her nature to back down. She was described as a fiercely loyal friend and a difficult enemy. She is not inclined to apologies.

[159] Those who worked as midwives with Miss Clear said they enjoyed a professional relationship with her. She was said to be possessive of her patients and that she wanted to exert control over their care. As a result she could be said to be somewhat secretive about her patients and did not consult with her midwifery colleagues about her patients. She was not seen as a team player.

[160] Ms Thomas, Ms Rangi (midwives) and Ms Hartley (charge nurse) all gave evidence that they fielded numerous complaints from patients about Miss Clear (commonly verbal with some submitted as formal complaints). Common to the complaints notified was Miss Clear’s negative attitude towards clients and their families. She was described as “*cold*”, “*like a sergeant major*”, “*intimidating*” and “*rude to relatives*”. It was Ms Rangi’s evidence that she had never worked with a midwife who received so many complaints from patients. Ms Thomas described herself as being “*incredulous*” at the number of complaints she received from patients about Miss Clear.

[161] It was Mrs Hartley’s evidence that Miss Clear did not have good relations with a number of hospital staff at Tokoroa. (Miss Clear denied this and said that generally speaking she had good relationships with staff at the hospital with the exception of Ros Corban, Rachel Harris, Margaret Parata and, I believe, Wendy Jones).

¹² Miss Clear confirmed that she had high standards and that people either met them or they didn’t.

[162] Mr Campbell observed that both women were difficult to deal with and both frequently complained to him about the other. He said that in his time managing the hospital Miss Clear had lousy relationships with three-quarters of the nursing staff.

[163] The weight of the evidence pointed to Mrs Parata being strict and having her own ideas about the delivery of maternity care (antenatal, labour and delivery). She expects others to follow her practice. She was said to be opinionated "*that's the way of midwives*". She is direct and no-nonsense in her communication style. She could misread situations on occasion and be a bit rough on people but "*she had the responsibility to ensure things were right*".

[164] There was general consensus that Mrs Parata was inclined to swear when annoyed but she did not use foul language and it was suggested that this has moderated in recent times.

[165] Mrs Parata's management style, it is perhaps best summed up in the evidence given by Ms Osborn. She described Mrs Parata as "*an old-fashioned charge nurse*". She has high standards and expects them to be met. She has a controlling personality. These management traits and this management style are common in the health sector among charge nurses of Mrs Parata's era.

[166] It was Mr Campbell's evidence that he was concerned that the environment for mothers delivering babies at Tokoroa was not nurturing. He laid much of the blame for this at Mrs Parata's door because she was reluctant to adopt modern approaches to midwifery practice and was a poor leader. He said he gave Mrs Parata a warning during his time at Tokoroa.¹³ He did state to be fair, the midwifery staff at the time were all "*old school*" and reluctant to adapt to the new models of delivering maternity care. Mrs Parata was particularly unwelcoming of independent midwives. He stated that he continually addressed his concerns to Mrs Parata.

[167] Mrs Parata was also said not to be inclined to apologies.

[168] Mrs Parata was, on the other hand, described by other midwives that worked with her and gave evidence - with the exception of Miss Clear and Selina Fairbrother - as having a large knowledge and as being a supportive and collegial clinical leader helping others to grow their practice. She was said to be very good with patients and she enjoys enormous respect within the community in Tokoroa and Putaruru with the girl children she has delivered returning to her for their care when pregnant themselves. Mr Campbell stated that, unlike Miss Clear, Mrs Parata had good relationships with other staff over his time as Area Manager for the Board.

[169] Elwyn Osborn, May Thomas Tania Rangi and Molly Winterburn all denied having left Tokoroa Hospital because of Mrs Parata's conduct. It was Elwyn Osborn's evidence that she left her position at Tokoroa for the sole reason that she retired. May Thomas said that she left her employment because she was looking for a position with better hours and it was Tania Rangi's evidence that she left Tokoroa because it was quiet and she wanted to further her practice and learn more. She went to Rotorua because it was busier. She did not leave because of Mrs Parata and she has since gone back to work with her. She was not aware of any staff leaving in her time at Tokoroa because of Mrs Parata.

[170] It was the evidence of those practicing as midwives at Tokoroa at the time in question that they were all aware of the tension between Miss Clear and Mrs Parata. However, the consensus was that both women acted professionally in the delivery of maternity care and that patients suffered no detriment. The service was described as functional and the atmosphere was "*not that bad*"

[171] On the matter of Miss Clear's complaints against Mrs Parata, Maureen Hartley, May Thomas, Elwyn Osborn and Tania Rangi were unanimous that they had never observed Mrs Parata engage

¹³ He could not now remember the details.

in bullying behaviours towards Miss Clear or any other staff member. It was Ms Thomas' evidence that Mrs Parata bent over backwards to act in a professional manner towards Miss Clear and that Mrs Parata did not deserve the complaints made about her. She reiterated the information she provided to Ms Priestly and Ms Cotterall in October 2003 that it was common for Miss Clear to ask her if she had observed some particular negative conduct on Mrs Parata's part. Ms Thomas' evidence was that she had never observed the conduct complained of and that she came to the conclusion it was in Miss Clear's mind.

[172] Ms Creigh-Smith's evidence was that she had never personally observed Mrs Parata to be moody and had never seen her throw a tantrum. She stated that to her knowledge Mrs Parata was not a bully and other than Miss Clear's complaints, she had never seen any evidence of this. It was her evidence that she usually hears about issues within the hospital because she has the kind of relationship with staff which means that she does hear things – the hospital having only about 90 staff. Ms Creigh-Smith believed that if Mrs Parata behaved as a bully towards any staff member, she firmly she believed she would have heard about it. She had never heard Mrs Parata publicly berate colleagues.

[173] It was Ms Hartley's evidence that she had never told Miss Clear that Mrs Parata had instigated complaint(s) about her.

[174] Two former employees on the nursing staff at Tokoroa (besides Miss Clear) gave very different evidence about Margaret Parata, her practice and her relations with staff. They were Selina Fairbrother and Carol Englebrecht. Neither was working in the Maternity Ward over the years 1999-2003.¹⁴

[175] Selina Fairbrother was an enrolled nurse. She worked in the maternity wing from 1986 until her employment was terminated on the grounds of redundancy in 1995. She described herself as a friend of Miss Clear.

[176] It was Ms Fairbrother's evidence that Mrs Parata was a controlling and difficult person to work with and that as she worked her way up the maternity hierarchy her domineering behaviour intensified. She was said to have a "*nasty streak*" and a rude manner and to have strong opinions which she freely expressed e.g. she called Maori solo mothers that presented from Mangakino "*trashy bitches*". She said Margaret Parata used foul language.

[177] She said there was a high turnover of staff at Tokoroa maternity in her time and she believes this was directly related to Margaret Parata and the way she treats staff. She cited Molly Winterburn as an example of someone who had left her employment because of Mrs Parata. (Molly Winterburn denied this).

[178] Mrs Parata was said to have behaved in a cavalier and ruthless fashions when redundancies were implemented and went around pointing at staff members saying "*you can come with me (stay)/ you're gone*".

[179] She said that knowing the personalities (Margaret, Ms Priestly and Ms Hartley) it would be a waste of time for staff to complain about Margaret because Ms Priestly and Mrs Parata are friends (having trained together) and Margaret and Maureen rally together if criticised by anyone else. She said Margaret, Maureen and Thia are in cahoots together and she believed they would lie to protect each other. Her evidence that these three were in cahoots together was based on the fact that she saw

¹⁴ Ms Englebrecht did commence working in the general ward at Tokoroa Hospital in August 2003 - approx 3 weeks before Miss Clear left.

them congregated together whilst waiting to attend the meeting held with Miss Clear on 27 November 2003.¹⁵

[180] Ms Fairbrother described Mrs Parata's behaviour as racist and commented in particular about an occasion when Mrs Parata had called her a '*dumb-dickey Maori*'. She admitted this was said in the context of a joke but that she did take offence.

[181] She accepted she had never made a formal complaint about Mrs Parata.

[182] Mrs Parata addressed this evidence.

[183] She said she and Selina had shared a collegial relationship and interacted socially too. However, when she was made redundant she believes Selina became very upset with her. On this she said she had no input into or control over the redundancies. She cared very much for the impact the redundancies had on staff and had put in a proposal to save jobs that was not accepted. As a member of 'front line' management at the time staff were angry with her over it.

[184] Mrs Parata denied absolutely being a racist. She is a pākehā New Zealander married to a Maori. She said is an honorary member of the Judea marae. 90% of her patients are Maori and Pacific Islanders. She is caring for the daughters of mothers she delivered years ago – they come looking for her. She loves and respects all Maori and Pacific peoples and is accorded respect by them. Mrs Parata denied calling solo mother's "*trashy bitches*" and denied calling Ms Fairbrother a "*dumb-dickey Maori*".

[185] She denied having close relationships with Thia Priestly and Maureen Hartley. Thia and Maureen confirmed this.

[186] She reiterated her evidence about Molly Winterburn (refer para 142).

[187] Carol Englebrecht is a general nurse who worked at Tokoroa Hospital in the general ward. I understand she commenced her employment on 18 August 2003 and she left in July 2005.

[188] Her evidence was that she worked weekend shifts in the main and that she had frequent contact with Miss Clear¹⁶, Mrs Parata and other maternity staff.

[189] Ms Englebrecht was highly critical of Mrs Parata's personal style and her treatment of staff. She described Mrs Parata as demanding and difficult to work with and power hungry. She said Mrs Parata worked long hours and overtime outside her scheduled hours. This was because she was unwilling to relinquish power or to accept that other midwifery staff are qualified or capable of providing good patient care.

[190] She was described as having a "*nasty streak*" and being "*extremely unpleasant*" to work with. It was alleged she constantly undermined staff by engaging in public criticism and excessively supervising staff in their clinical practice.

[191] Ms Englebrecht said she observed maternity staff as visibly scared of Mrs Parata and stated that staff left their practice at Tokoroa because of Mrs Parata's conduct towards them.

[192] She described Mrs Parata as a bully whose inappropriate conduct had never been addressed by hospital management. On this point she described Maureen Hartley as an ally of Mrs Parata.

¹⁵ Ms Fairbrother attended that meeting to support Miss Clear.

¹⁶ Miss Clear was on leave from early August until the 30th. There were only 2 weekend days between that date and 9 Sept when Miss Clear took sick leave from which she never returned.

Ms Hartley, she said would go out of her way to protect her allies including lying and she had, occasion, known Ms Hartley to lie.

[193] Ms Englebrecht also described Mrs Parata as “*racist*”.

[194] Ms Englebrecht detailed a number of incidents that in her opinion supported the allegations she made against Mrs Parata.

[195] Ms Englebrecht accepted she had never filed an incident report about Mrs Parata’s practice or conduct. (Ms Creigh-Smith gave evidence that Ms Englebrecht filed 12 incident forms over the twenty months of her employment. This was described as “*prolific*”).

[196] Mrs Parata addressed Ms Englebrecht’s evidence in general terms and she responded to the specific incidents. Addressing this evidence said (among other things) that Ms Englebrecht worked weekends in the general ward and provided only minimal assistance in the maternity ward. She (Mrs Parata) works Monday to Friday during office hours and only attends on weekends when she is required. As a result she had minimal contact with Ms Englebrecht. She didn’t know how Ms Englebrecht could have witnessed the conduct alleged and stated that if it had occurred others would also have witnessed it and submitted an incident form e.g. public, ward receptionist.

[197] She said the delivery of maternity care is governed by a number of midwifery standards of practice, policies and protocols and statutory and regulatory Acts etc. It is her job to ensure that care is delivered within the scope of these controls. Ms Englebrecht did not have the training or knowledge to judge her practice. She commented on a claim made by Ms Englebrecht that she had excessively supervised a trainee midwife (Tristan Lindsay). The fact was that this trainee had requested (as part of her contract) that Mrs Parata be present at all her deliveries and take an oversight of all abnormalities. She had also requested Mrs Parata accompany her and her patient on an ambulance trip to Waikato Hospital – a trip that Ms Englebrecht criticised as demonstrating Mrs Parata’s inability to relinquish power or responsibility to her staff.

[198] Mrs Parata said the only staff in the maternity ward at the time that Ms Englebrecht was there were Elwyn, May and Tristan and Val who works two to three nights per week. She reiterated that Elwyn and May were the only midwives to leave over the time of Ms Englebrecht’s employment and she reminded the Authority of her evidence as to the reasons they left (para 142).¹⁷ She denied that any of these staff were “scared” of her.¹⁸ In respect of Ms Englebrecht’s specific claims that Val Shaw was scared of her she questioned how Ms Englebrecht could have observed this as she was never present when Mrs Parata and Ms Shaw worked together.

[199] She denied being racist (see her evidence para 184).

[200] Two letters from other staff members critical of Mrs Parata were introduced into evidence. One dated 4 May 2001 was from Mihi Butler. The other, dated 13 July 1999, was written by Gwen Blandford a former Community Midwife. Ms Blandford appeared for questioning at the Investigation Meeting. When I sought a meeting with Ms Butler (sometime after the dates of the Investigation Meeting) I was informed she had died recently.

[201] In her letter Ms Butler said that she had worked with Mrs Parata for years and while she found her to be extremely competent her attitude towards staff was of a “denying nature” and she did not allow staff the benefit of her experience. In recent years she had seen this attitude intensify. She too

¹⁷ Evidence that was supported by the individuals concerned (see para 169).

¹⁸ Note evidence May Thomas, Elwyn Osborn and brief introduced for Tristan Lindsay (highly supportive of Margaret Parata).

described a number of staff who had problems - implying that Margaret's conduct had contributed to their departure from the Unit. Individuals named included Consuela Brown, Molly Winterburn and Tania Rangi. She noted there is a continuing "*power play*" between Margaret and Wendy and this is affecting the entire staff.

[202] Mrs Parata responded to this document. She said Mihi did not leave over any issue she had with her (Mrs Parata). She said Ms Butler had been a casual employee and it had been difficult to place her in a permanent role. She had called her one day and Ms Butler had said she had finished and was not coming back. She realised from her discussions with Ms Butler recently that she had been upset at the time (the letter had arrived about the same time), although they did not discuss the letter specifically. Mrs Parata said management did not make her aware of the letter at the time it was received.

[203] Elwyn Osborn noted in her evidence that when Ms Butler left her employment she had not been well.

[204] Ms Blandford was a community midwife between 1997 and 2003. She said she was in and out of the Unit at Tokoroa on a daily basis. Ms Blandford wrote in July 1999. She complained of an incident where Mrs Parata had sworn at another team member. In her oral evidence she said that Mrs Parata was upset about something and referred to maternity staff (including Sandra Thomas) as "*you bitches*". This was the only example of such conduct she saw although she described the unit as a "*sad workplace*". She also complained that Mrs Parata had left an inappropriate note about a patient's condition on the notice board. She considered this to be unprofessional and felt her own care had been negatively judged without Mrs Parata referring to the notes she had prepared about the patient's condition and the advice she had given to the patient and her family. She sought a better means of communicating clients' notes.

[205] At the hearing Ms Blandford advised that Mrs Parata liked power but didn't empower others thinking she was the only one to manage clients' care. She thought Mrs Parata genuinely thought she was doing the best for the patients and they didn't suffer in her care. She was "old school" in her management style. Calling herself Sister P was evidence of this approach. Ms Blandford called her Margaret and she believed Mrs Parata did not like that. She stated she had also laid complaints about Miss Clear. Lastly she said that her assessment of the relationship between Miss Clear and Mrs Parata was that they were not too friendly but she didn't perceive them to be antagonistic towards each other.

[206] Mrs Parata responded and said she had got on fine with Ms Blandford. She said she had not seen the letter in question until it was put to her at the hearing. She denied calling Sandra Thomas "*a bitch*" and said she would not say anything like that unless it was in jest.

[207] An email sent by Ms Sandra Thomas to Miss Clear was submitted in evidence. On the face of the email it seems to be a response to a request by Miss Clear for support in her complaint about Mrs Parata. It is somewhat equivocal and Ms Thomas did not appear to enable her views to be clarified.

Medical evidence on causation

[208] Dr Duncan Gadsden is a general practitioner in Tokoroa. He is Miss Clear's GP and a close personal friend.

[209] It was his evidence that he has been a medical practitioner for 36 years working in general practice. He has treated at least six other people besides Miss Clear for symptoms associated with work-related psychological harm. He submits that he therefore has an understanding of the

relationship between stressors in the workplace and the cluster of symptoms associated with this. At least one of the other patients he has treated has also been involved in legal proceedings and he submits that he has an appreciation of the issue of causation.

[210] It was Dr Gadsden's evidence that he has known Miss Clear for about 32 years since he and his wife came to Tokoroa. He has known her as a colleague (as a nurse and midwife), and over the ensuing years he and his wife have built a very close friendship with Miss Clear and her friend Margaret Peart. It was Dr Gadsden's evidence, however, that in his role as Miss Clear's GP, he has endeavoured to remain objective.

[211] Dr Gadsden said that in 1999 he diagnosed Miss Clear as suffering from hypertension. He prescribed medication which was effective for a time. He began to see Miss Clear more frequently for consultation from August 2002. She was presenting with increased blood pressure and headaches. At that time, he did not ascribe anything special to Miss Clear's hypertension though he did not delve into the matter with her to any great extent. It did not occur to him that Miss Clear was suffering anything other than headaches and hypertension which were not atypical of a woman of her age and stage.

[212] However, by August 2002, her blood pressure had become uncontrollable. He referred Miss Clear to a cardiologist. No other symptoms were volunteered by Miss Clear at this stage. The cardiologist met with Miss Clear in September 2002 and thereafter. He reviewed her medication and by February 2003 Miss Clear's blood pressure began to respond to that medication. It was Dr Gadsden's evidence that the specialist reported that Miss Clear's variable blood pressure recordings may have been associated with a condition known as "white coat hypertension" (that is when a patient is uncomfortable in the presence of medical people and their blood pressure becomes elevated at these times). Dr Gadsden doubted this diagnosis.

[213] In April 2003 Dr Gadsden felt it was likely that Miss Clear's hypertension was being caused by her state of mind and that it was work-related. She began to present with anxiety for which he prescribed valium¹⁹. By August 2003, Miss Clear's anxiety had worsened considerably. Her sleep pattern was disrupted and she was experiencing anxiety throughout the day. In response, he diagnosed hypnotics, specifically halcyon for use at night.

[214] It was Dr Gadsden's evidence that on 14 September 2003 he was called to see Miss Clear at home at 8.45pm. She was acutely distressed and tearful and had been without sleep for some time. He described treating her symptoms and stated that he diagnosed Miss Clear's condition as an agitated depression which manifests as extreme anxiety that cannot be calmed or relieved. Miss Clear's condition continued and it was during this month that Dr Gadsden began prescribing anti-depressants for Miss Clear.

[215] Dr Gadsden observed that at this stage Miss Clear was extremely unwell. This manifested primarily in a marked change in her personality. She had become irritable and distracted. She was quite insensitive to her friend Margaret Peart's unwellness and increasing need for support. It was Dr Gadsden's view that she had become so traumatised by work-related events that she isolated herself from others, particularly those close to her.

[216] In October 2003, Dr Gadsden contacted Dr Gil Newburn (psychiatrist) to discuss Miss Clear's case. By this time she had lost a considerable amount of weight. She was sleeping poorly and continued to be anxious on mobilising each day. Both he and Dr Newburn were concerned that Miss Clear continued to ruminate over the issue of Margaret Parata and WDHB. Dr Gadsden knew by then that Miss Clear had made several complaints and that none of them had been responded to

¹⁹ The medical records submitted by Miss Clear show that this medication was prescribed as early as February 2002.

and Miss Clear was waiting for some response from the WDHB. On Dr Newburn's advice, Miss Clear's anti-depressant medication was changed.

[217] By late 2003, Dr Gadsden was aware that Miss Clear was intensely frustrated with WDHB's failure to intervene on her behalf or to resolve any of the issues that were outstanding and as a consequence of this her symptoms were worsening. Where once upon a time she had been a computer on legs with a formidable memory, this appeared to have now melted away leaving a distracted and forgetful woman behind. Her personality appeared to have changed remarkably. She could at times be irritable and snappy and at other times despondent and tremulous.

[218] It was Dr Gadsden's assessment that while the damage done to Miss Clear seemed to begin with the behaviour of Mrs Parata, which undermined Miss Clear's self-confidence, in the end it was largely the result of the intense frustration that Miss Clear was feeling because nothing was happening to address the complaints she had raised.

[219] Dr Gadsden described two accidents in which Miss Clear fell off a ladder and was involved in a motor vehicle accident. He believes these accidents occurred because Miss Clear was again ruminating on her ongoing and all-consuming problem with WDHB and that she did not see what was going on around her.

[220] Dr Gadsden said he was aware that Miss Clear had described herself as suffering from post-traumatic stress disorder. He agrees with that diagnosis, though he would say her symptoms are in the mild to medium region of symptoms associated with that condition. It was his evidence that Miss Clear has been left with a permanent deficit insofar as there is a continued failure of precise functioning. He traces this back to the events in August and September 2003 when Miss Clear stopped functioning as she had functioned before.

[221] It was Dr Gadsden's evidence that when Miss Clear's friend Margaret Peart died, it seemed to have little impact on her. He conjectured that Miss Clear was already so injured by other events (being the work-related incidents) that even Ms Peart's death did not touch her.

[222] He closed with the following evidence.

"I estimate that Wendy is between 30% and 40% permanently disabled. I have genuine concerns that she could ever return to work. My view is that the longer this matter with the Waikato District Health Board goes on the more harm it has on Wendy and the more difficult it will be to restore her to being fully functional. I believe that too little has been done too late and the way Wendy continues to malfunction it is unlikely to be changed by merely restoring her to work. In my view she needs treatment including psychotherapy or counselling".

[223] As previously noted (para 102), Dr Newburn provided a report following his consultation with Miss Clear.

[224] In his report, Dr Newburn confirmed Dr Gadsden's advice to him that Miss Clear "*has significant issues around her workplace situation*". Dr Newburn's evidence is notable in that he reports on Miss Clear's "*perception*" that she has been the victim of workplace bullying and her "*perception*" that Mrs Parata was encouraging patients to write letters of complaint about her.

[225] Dr Newburn described Miss Clear's collapse in September 2003. "*She decompensated significantly with misery, sleep disturbance (initial mild interminable insomnia), agitation, prominent and intrusive ruminations about work, anorexic and fall off in taste, weight loss of 18kgs, fall off in energy, reduced hedonic response, inattention and poor memory*".

[226] He concluded:

“She presents with significant major depressive disorder, with intrusive thoughts and images in particular prominent. Our initial therapeutic intervention has been to ... I have little doubt that work issues have played a significant precipitating part in this disorder and should be taken into account accordingly”.

[227] Dr Newburn did not attend the investigation meeting to be questioned on his report.

Documentation

MECA

[228] Miss Clear’s employment was covered by a Multi Employer Collective Agreement (MECA). It covered the period 1 July 2002 to 30 June 2005.

[229] Clause 25.5 of the MECA sets out the sick leave provisions that applied to Miss Clear as an employee of WDHB. That clause provides that employees in Miss Clear’s situation are entitled to 10 working days’ sick leave calculated at the ordinary rates. The sick leave provision provides for sick leave to be accumulated by carrying forward from year to another any unused sick leave up to a limit of 320 days for nurses employed by the Board - as Miss Clear was-before 30 June 1992.

[230] Clause 25.5 provides that on application the Board may grant discretionary leave in excess of the above limits. Agreement is not to be unreasonably withheld.

[231] Other sub clauses permit the payment of full salary where a whole time employee is incapacitated by sickness or injury arising in the course of their employment and where an employee is suffering from a minor illness which could have a detrimental effect on the patients in their care the Board could place that employee on alternative duties or direct him/him to take paid sick leave for not more than eight days in any one year.

WDHB workplace bullying policy

[232] Over the period that Miss Clear laid her written complaints regarding Mrs Parata’s conduct towards her i.e. October 2000 to August 2003, WDHB did not have a policy that addressed workplace bullying. However, I note that a policy was issued in June 2004. That policy contains definitions of bullying and a procedure to be followed in the event of an employee alleging bullying by another employee. The Board’s policy provides for the submission of the complaint in writing, for a preliminary investigation (which includes interviews with relevant persons) an initial decision which confirms or rejects the claim or makes some other finding, action appropriate to the findings made and appropriate feedback to the complainant.

Assessment of the evidence

General credibility findings

[233] Most of the witnesses I saw and spoke to gave an honest and balanced account of the personalities, events and issues that make up this story.

[234] Miss Clear, I find, has a genuine belief that she was a victim of workplace bullying by Mrs Parata over a very long period. To the extent I make contrary findings, I am not saying that Miss Clear was dishonest in her evidence. I have simply arrived at a different view having regard to all of the evidence.

[235] However, I did not find the evidence of Selina Fairbrother or Carol Englebrecht to be credible. Neither was in a position to give evidence relating to Mrs Parata's conduct towards Miss Clear and their evidence is in the nature of similar fact evidence. The Court has expressed caution in relation to the acceptance of such evidence *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* (1990) Sel Cas 791.

[236] I also find that their evidence about Mrs Parata was vituperative and contrary to the weight of evidence given by other witnesses. Even those witnesses called by WDHB did not speak in glowing terms of Mrs Parata. They described her warts and all. The evidence of Ms Fairbrother and Ms Englebrecht was of a different order altogether. I note too they are both close friends of Miss Clear and that they each had axes to grind about Mrs Parata – Selina Fairbrother over the redundancies and Carol Englebrecht in all probability because she was on one occasion on the sharp end of Mrs Parata's tongue about non-midwives covering in the maternity ward.

[237] As a result I do not accept their evidence, and in particular I find that Mrs Parata is not a racist.

[238] Mihi Butler made a written complaint about Mrs Parata after she left her employment at Tokoroa Hospital (4 May 2001). In that letter she implied that staff had left Tokoroa Hospital because of Mrs Parata's conduct towards them. The first hand evidence of two of the individuals she names contradicts her stated view. She also describes the existence of a power play between Mrs Parata and Miss Clear that she says was affecting all the staff in the maternity unit. I note too that while one witness described Ms Butler as a balanced person another suggested she had been unwell when she left her employment at Tokoroa and that this might have affected her state of mind at the time.

[239] As a result, I am not dismissing her views altogether but I am also not attaching enormous weight to them.

Assessment of the Medical Evidence

[240] Dr Gadsden presented as an honest witness and a most compassionate person. It is clear that he and his wife Marie care deeply for Miss Clear.

[241] That said, I do not accept his evidence as to the cause of Miss Clear's illness. He is not a specialist and he cannot be said to be objective in his assessment. Dr Gadsden said he knew that Miss Clear had laid complaints about Mrs Parata's conduct towards her and that she was claiming that she was being bullied. He accepted that he was in her corner over the matter and that his written referral to Dr Newburn was designed to introduce Miss Clear and the problem and provide a short cut to the basis of the problem. He wrote to Dr Newburn on 7 November 2003:

“It is a long and complex story and to cut to the essentials, Wendy has been the victim of bullying practice by the senior midwife at our local maternity unit where Wendy has been working. This has been a systematic and prolonged process about which Wendy has sought redress through her employers, the Waikato Hospital Board, on no less than four occasions. The matter has been dealt with in a completely inept way; in fact, it hasn't been dealt with at all”.

[242] He then goes on to describe Miss Clear's symptoms.

[243] Given Dr Gadsden's close relationship with Miss Clear is it unsurprising that he is sympathetic to her view of the matter. However, that close friendship and his unqualified acceptance of her views disqualify him from having his evidence as to causation accepted as objective.

[244] I also find his evidence as to the progress of Miss Clear's illness and her long term prognosis to be confusing. He submitted that the harm suffered by Miss Clear appeared to begin with the behaviour of Margaret Parata but in the end was largely the result of the intense frustration she felt because nothing was happening to address her complaints. Compare this with other evidence given by him that her illness was at its most serious in September/October 2003. This seems to be confirmed in his referral to Dr Newburn (7 November 2003) where he describes Wendy as "*much better*" and that he thinks, "*the worst of Wendy's illness is already over*".

[245] On 14 October he wrote that Wendy's motivation and higher cerebral functions were improving with occasional lapses of concentration. This together with the fact she remained on maximum dose of one medication led him to believe she was unfit to return to work. Then his evidence at the investigation meeting was that Miss Clear is 30-40% permanently disabled.

[246] This evidence is extremely confusing and this is confounded by the fact that Miss Clear turned up for work on 15 November 2004 (presumably fit) to start work in the position she believed had been offered and accepted i.e. a district nursing role.

[247] Lastly on the matter of assessing the medical evidence, I find that the report provided by Dr Newburn is clearly based on Miss Clear's report to him. He states that *Miss Clear has* significant issues around her workplace situation. He goes on to describe Miss Clear's description of events and her perception of the implications to be drawn from these events. He describes her symptoms, her family history - all as reported by Miss Clear. He sets out his diagnosis and concludes that workplace issues have played a significant precipitating part in this disorder and should be taken into account accordingly.

[248] Dr Newburn's report does confirm her illness and I do not question his diagnosis. However, I must have regard to the caution confirmed by the Employment Court in *Elayne Margaret Nilson-Reid v Attorney-General of the Department of Conservation* CC 4/05 "*that the Court may reject specialist evidence based on the self reporting of a litigant if the specialist uncritically accepts what the litigant has said*". Of course Dr Newburn was not in a position to carry out an objective inquiry into the workplace issues described by Miss Clear. That task falls to be determined in a different sort of inquiry. However, I cannot accept his report as sound evidence as to the cause of Miss Clear's illness.

Issues for Determination

- What duty did WDHB owe Miss Clear?
- Did WDHB breach its duty to Miss Clear?
- What harm or loss did Miss Clear suffer?
- Was that harm or loss caused by or contributed to by the Board's breach of duty?
- Was that harm or loss reasonably foreseeable by the Board?
- Was Miss Clear disadvantaged in her employment by unjustified action(s) of the Board?
- Was Miss Clear unjustifiably dismissed?

Findings

[249] In arriving at my findings in this matter I have considered carefully all the evidence received together with the submissions made by counsel for the parties. I have also considered relevant case law and reviewed a significant amount of the literature on bullying.

[250] One point needs to be made about the submissions I have received. It is strongly argued for Miss Clear that the respondent has put the spotlight on Miss Clear's actions to support its position that she has not been bullied by Mrs Parata. I am cautioned not to do so in arriving at findings in the matter.

[251] I see the situation somewhat differently. It is important to consider the totality of the evidence presented to me in determining this matter – including the personalities and interrelationships at play. Mrs Parata's character and actions have been put under the microscope. It is not the case however, that Miss Clear is a blank canvas upon which Mrs Parata's actions have left an indelible and damaging mark. Miss Clear is a key player and the extent to which her personality and actions have had a hand in the outcomes described must be identified and described as appropriate.

Bullying – Definition

[252] There is no single universally accepted definition of bullying. My colleague Dzintra King considered definitions in *Karen Evans and Gen-i Ltd* AA 333/05.

*“As with many concepts, this is not easy as even a quick examination of the literature shows. Dan Olweus Bullying at School, Cambridge, MA : Blackwell, 1993, defined it as “negative behaviour” intended to inflict “injury or discomfort” and that it was likely to occur in situations where there was an imbalance of power The English criminologist, David Farrington, “Understanding and preventing bullying” in Crime and Justice, Vol 17, Chicago : University of Chicago Press, 1993 said it was “repeated oppression, psychological or physical, of a less powerful person by a more powerful person”. All behaviour needs to be looked at in the social context in which it occurs and the motivation for the behaviour is also relevant. A vulnerable person may perceive criticism of his or her work as bullying, regardless of how the criticism is couched. Bullying may be seen as something that someone repeatedly does or says to gain power and dominance over another, including any action or implied action, such as threats, intended to cause fear and distress. **The behaviour has to be repeated on more than one occasion and there must be evidence that those involved intended or felt fear**”.* (Emphasis mine).

[253] This definition is consistent with many of the definitions of bullying I have reviewed in that they uniformly refer to repeated unreasonable behaviours directed towards an employee or employees with the intention of causing harm.

[254] I make the point too that it is important, in considering complaints of bullying, to test the evidence objectively. Are the behaviours complained of unreasonable by the standards a reasonable person?

Organisational Psychopaths

[255] I must address an important issue that arises from my investigation into the employment relationship problems presented.

[256] In her 2002 complaint Miss Clear described Mrs Parata's behaviour as appearing "*to fit the criteria of an organisational psychopath*". In her evidence Miss Clear described Mrs Parata as "*an organisational psychopath*".

[257] The term "*organisational psychopath*" is a loaded one. It takes from serious medical/scientific literature a concept associated with violent and abusive behaviours and places that concept squarely into the workplace. It is a highly emotive and derogatory term and has the potential to do serious harm to persons so labelled. It is also divisive. I accept that persons whose behaviours exhibit psychopathic characteristics occupy everyday roles in everyday life and that they will be found in workplaces. However, given the serious implications/potential for harm to the individual so labelled, the well being of other staff and the organisation that is alleged to harbour such an individual it is critical that such an assessment is carried out by an appropriately qualified person and that it is objectively based.

[258] Literature on bullying, so readily relied on by Miss Clear, has a lot to answer for to the extent it leaves it open to individuals, regardless of their health or state of mind, to make subjective judgements of such seriousness. When non-experts bandy about such terms, it devalues the concept and it undermines credible research into a significant and serious personality disorder. It also has the effect of alarming reasonable people charged with managing such allegations, which has the potential to back fire on the accuser. (I will return to this point later in my findings).

[259] On this point I note the work of John Clark *Working with Monsters*, Random House Australia Pty Limited, 2005. Mr Clark's work qualifies him as an expert in this field. Mr Clark cautions specifically that readers of his text should not attempt to diagnose themselves or anyone else as a psychopath.

The Personalities - Findings

[260] I find there are some remarkable similarities between Miss Clear and Mrs Parata. They are of a similar age and were trained in an old school hierarchical system that focussed on management, instruction and direction where subordinates were expected to obey without question. Neither adapted easily to new models of service delivery where the focus is on leadership, collegiality, teamwork and patient centred models of care that embrace families as part of the patient package. Both are sticklers for adherence to professional standards and woe betides those that do not measure up. The evidence suggests that both are quick to judgement and uninhibited in dressing others down when they do not measure up. Neither is inclined to apologies when called for.

[261] Both women have excellent clinical skills. Both women were focussed on establishing and exerting control over their own practice.

[262] There are, however, some clear differences. Generally speaking, I find, Mrs Parata had good relationships with staff. I accept that two written complaints were submitted regarding her management and communication style. Aside from these complaints, however, she had reasonable relationships with staff. Mrs Parata is also held in very high regard by the Tokoroa community for whom she is the face of child delivery services in the area.

[263] The evidence shows too that those that have trained under Mrs Parata in more recent times have enjoyed very positive leadership and training experiences and with the exception of Miss Clear other midwives employed at Tokoroa over the 2000/2003 speak highly of Mrs Parata as a leader and a colleague. I note too the first hand evidence of the staff that appeared as witnesses who contradicted Miss Clear's evidence that they had left their employment because of Margaret Parata's conduct towards them.

[264] Miss Clear on the other hand is a very private person who had few if any friends at work²⁰ In fact the evidence discloses that she had poor relations with a number of staff. There are on record too, numerous written complaints from patients all of which speak to a lack of empathy and rudeness on her part. I also heard evidence that Miss Clear was not uncommonly in dispute with trades people and servicemen. I also find that Miss Clear's attitude/conduct to other staff and to patients deteriorated as her health deteriorated. I find on the evidence that Miss Clear was not uncommonly in dispute with her colleagues and others and that she was subject to numerous complaints from patient about her cold and critical approach to them and their families.

What contractual duties were owed by WDHB to Miss Clear?

[265] The judgements in *Gilbert v Attorney-General* [2002] 1 ERNZ 332 (Employment Court) and *Attorney-General v Gilbert* [2002] 1 ERNZ p.31 (CA) give guidance on this issue:

[266] *"The content of the duty implied by common law to maintain a safe workplace is informed and given content by modern legislation, including in New Zealand the provisions of the Health and Safety in Employment Act". (Gilbert, CA cited above).*

The object of the Health and Safety in Employment Amendment Act is to promote the prevention of harm to all persons at work (and others in the vicinity of a workplace). The primary responsibility is placed on employers who have the duty to *"take all practicable steps to ensure the safety of employees while at work"*. (S.6). The Act was amended with effect from 5 May 2003.²¹ The definition of harm in s.2 (1) of the 1992 Act was amended to include physical or mental harm caused by work related stress. Section 2A of the principal Act sets out the factors to have regard to in terms of all practicable steps. It means all steps to achieve the result that it is *reasonably practicable to take in all the circumstances*, having regard to-

- The nature and severity of the harm that may be suffered if the result is not achieved, and
- And the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
- The current state of knowledge about harm of that nature; and
- The current state of knowledge about the means available to achieve the result, and about and about the likely efficacy of each of those means; and
- The availability and cost of each of those means.

[267] S.2A(2) provides that *"a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about"*.

[268] The Court of Appeal in *Gilbert* also said:

"The appellant raises the spectre of unreasonable burden on employers. The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of "all practicable steps". What is "reasonably practicable" requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and

²⁰ I accept she has strong friendships and she is highly regarded by her close friends.

²¹ Post *Gilbert*.

the cost and availability of those means, all have to be assessed. Moreover, under s.19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligations. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risk. (Emphasis mine)

[269] In addition to the duty on the employer to take all reasonable steps to provide a safe place of work and the corresponding s.19 obligation, which rests on employees, employers and employees must not do anything that would undermine the implied obligations of mutual trust and confidence. Parties to employment relationships also have a statutory duty of good faith towards each other

[270] These are the duties the Board owed to Miss Clear. It can be seen from my description above that there are corresponding duties that Miss Clear owed the Board as a party to the relationship.

Did WDHB breach any of its duties to Miss Clear?

[271] It is Miss Clear's position that it was the Board's failure to address her complaints that led to her illness, the termination of her employment and the losses she has suffered. This calls for findings regarding the Board's management of Miss Clear's complaints.

Miss Clear's 1st complaint (21 October 2000)

[272] The evidence supports a finding that at this time Mrs Parata was an over-controlling manager possessed of relatively poor leadership and communication skills. Gwen Blandford's 1999 complaint describes another example of poor communication by Mrs Parata. The tenor of Miss Clear's complaints about Mrs Parata's poor communication style seems to be that all maternity staff were affected. However, on this subject I find Miss Clear did not come to the Authority with clean hands. The evidence also supports a finding that Miss Clear was and remained throughout the relevant period, judgemental, quick to criticise others in the most trenchant terms, uncompromising and unforgiving.

[273] I find that Mr Campbell had been addressing with Mrs Parata his expectations for the delivery of nursing care at Tokoroa. In particular he was concerned that the midwives under Mrs Parata's leadership were not embracing modern principles of maternity delivery with a focus on the creation of a warm/family friendly environment. As a result of his inquiries into Miss Clear's first complaint, Mr Campbell reinforced with her his concerns and expectations for the management of the ward and the delivery of care. Miss Clear was generally satisfied with the outcome of this complaint.

[274] I find there was no breach of duty by the respondent in the management of Miss Clear's first written complaint.

Miss Clear's 2nd complaint (9 April 2001)

[275] This complaint is of a different tenor. Whereas the first complaint was suggestive of an over controlling management style being at play and a relative poor leadership/communication style the allegations in Miss Clear's second complaint were of a more serious nature. While the complaints of

an over-controlling management style continued there were, here, new allegations that Miss Clear was being personally targeted for negative treatment.

[276] Mrs Parata responded to the allegations and laid a complaint of her own against Miss Clear.

[277] It is not possible from this distance in time to make definitive findings on any of the specific allegations made by Miss Clear in her second complaint. Neither can one come to any conclusion about the specific complaints made by Mrs Parata about Miss Clear at that time.²²

[278] Generally, however, I can find that the complaints and counter complaints in question are indicative of a deteriorating relationship. There was a failure by both parties to communicate constructively with each other. There was a clash evident between Mrs Parata's over-controlling management style and Miss Clear's equally determined wish to exert control over patients she saw as "hers". The tendency of Mrs Parata to over-control the management of patient care was complicated by Miss Clear's increasingly poor relations with patients some of whom were asking not to be put in her care. Mrs Parata, I find, had no formal responsibility to address/manage performance issues with Miss Clear. Neither, given patient choice in the matter, did Mrs Parata have any alternative but to accede to patient requests and take over their care herself or divert them to another nurse or medical specialist. Thus Mrs Parata's propensity to over-manage and/or manage everything herself was exacerbated. This served to confirm to Miss Clear that Mrs Parata was taking the lion's share of the work to the detriment of her own practice.

[279] The issues raised in Miss Clear's 2001 complaint to Mr Campbell, taken with Mrs Parata's response to those complaints, Mrs Parata's complaint about Miss Clear and Miss Clear's response were not resolved at that time. I accept that Mr Campbell commenced a process to address the issues raised. It was not completed because he left his role and the investigation was not taken up and completed by the incoming interim manager. It is most unfortunate because taken together these communications are indicative of a deteriorating relationship between Miss Clear and Mrs Parata. They also raise performance issues in respect of both women and wider issues in the management and delivery of midwifery care at Tokoroa hospital.

[280] Technically there was a breach of the Board's duty to Miss Clear in that there was no conclusion into her second complaint. However, had the matter been resolved it might have led to outcomes that were not all that Miss Clear expected. There may have been more resources put into addressing communications/leadership issues with Mrs Parata. Equally there may have been steps taken to address relationship/communication issues with Miss Clear that were said to be impacting on her performance.

[281] I note that any breach of duty at this time is not remediable under the Act. However, there is a more important point to make about this. To the extent that Miss Clear considers there was a failure by the Board over a lengthy period i.e. from 2000 to 2003 to deal with her complaints that she was a victim of bullying by Margaret Parata any continuous breach of duty by the respondent was broken by the efforts made by the incoming manager Janice Osborn to get to the bottom of this relationship problem and to resolve it.

Miss Clear's 3rd complaint (dated 16 May 2002)

[282] While there were failures in the Board's management of Miss Clear's second complaint this cannot be said of Janice Osborn's management of Miss Clear third complaint. Ms Osborn did not, in fact, wait for a complaint before she proactively set out to address the problems in the relationship between Miss Clear and Mrs Parata with a view to resolving those problems.

²² With the exception of the recorded outcome of Ms Harris' complaint about Miss Clear. Miss Clear was found to have behaved inappropriately towards Ms Harris.

[283] She met with Miss Clear and questioned her on the current status of her relationship with Mrs Parata. Miss Clear advised that they were working together but did that they did not have a great relationship.

[284] I find that Ms Osborn discussed and reached agreement with Miss Clear as to how she would raise any issues that she had. Not unreasonably, I find, Ms Osborn recommended that issues would first be discussed within the ward with a view to resolving them. If an issue was not resolved then Miss Clear would put it in writing in an incident report so that each incident could be investigated by Ms Osborn with Mrs Parata being notified and allowed an opportunity to respond. There was an emphasis on reporting and investigating issues at the time they arose.

[285] I find that Ms Osborn's approach was entirely appropriate. Employees are required to raise such concerns with their employer *McGowan v Nu-Type Accessories Ltd* [2003] 1 ERNZ 120 (and I would add to raise concerns in accordance with accepted practice for doing so). Employers are also required to treat an alleged bully fairly in the process of investigating and managing such complaints *Goldstone v Cogent Communications Ltd* AA 170/04. I find that Miss Clear did undertake to focus on the situation going forward to allow Ms Osborn to address issues as they arose – albeit she signalled if she was not happy with this approach she would revert to addressing her concerns with reference to historical complaints.

[286] On the face of it Miss Clear took this advice on board. Between November 2001 and May 2002, Miss Clear filed three incident reports one of which related to Mrs Parata. On investigation, the matter at the heart of this complaint about Mrs Parata involved another midwife. Ms Osborn investigated all the complaints raised by Miss Clear and the outcomes were communicated to her. Miss Clear did not, I find, express unhappiness with those outcomes.

[287] However, I find that at some stage Miss Clear ceased to comply with the process that had been agreed between herself and Ms Osborn to address issues of concern to her. She did not tell Ms Osborn this and unbeknownst to Ms Osborn, Miss Clear starting hoarding complaints about Mrs Parata which she addressed to Ms Osborn in a letter dated 16 May 2002. These complaints bear all the hallmarks of Miss Clear's other letters of complaint. The majority are undated. One that is dated is not contemporaneous. They lack other important detail (times, places, individuals involved and other identifying features). Some are trivial.

[288] Ms Osborn was concerned to receive this letter because it was not consistent with the process that she had discussed and agreed with Miss Clear. I find that Miss Clear did, in the ensuing discussions on her complaint, tell Ms Osborn that the complaints included in this letter were included as background to the latest complaint i.e. the "shredding incident".

[289] To reinforce her message about how Miss Clear's concerns were to be addressed Ms Osborn directed Miss Clear to submit the only recent and dated complaint (the shredding incident) in an incident report. That complaint was investigated, found to have substance and Mrs Parata was counselled to discuss such issues with Miss Clear in future before taking action. Both women were counselled to address/improve their interpersonal communications.

[290] Following the investigation into this complaint and its outcome Miss Clear was reminded of the importance of submitting any concerns she had in a timely manner. Miss Clear submitted one further incident form in June 2002 which was investigated and dealt with according to the agreement. She submitted no other complaints over the time Ms Osborn remained with the Board although she did continue recording complaints which she stored in her home computer.

[291] Why did Miss Clear cease to comply with the agreement she had with Ms Osborn that she would submit complaints in a timely manner by way of incident reports?

[292] Miss Clear said at the Investigation Meeting, that she did not submit incident reports as incidents occurred because many of the incidents “*were below the radar*”. I find that this is one of the reasons Ms Osborn wanted Miss Clear to log incidents as they occurred so that she could assess if there was a *pattern of small but deliberate negative behaviours being directed towards Miss Clear by Mrs Parata*. Neither was Miss Clear’s view a logical one because she was saving these ‘*below the radar*’ incidents to submit in letters of complaint well after the incidents in question occurred expecting them to be investigated and dealt with.

[293] It is probably the case that Miss Clear did not submit incident forms for the reason she cited. However, I find there were other factors that led to Miss Clear failing to submit her complaints promptly to allow investigation and resolution. By this time Miss Clear had embarked on a study of literature available on bullying and had formed the belief she was a victim of bullying. She was by now describing the conduct of Margaret Parata as fitting the criteria of an “*organisational psychopath*”. I find on the evidence before me and my assessment of the literature including that Miss Clear has referred me to that she has succumbed to selective reading of the general characteristics said to define the personalities of bullies and targets and she has overlooked those characteristics that do not fit her own beliefs. This is the phenomenon of ‘*confirmatory bias*’ at work.

[294] John Clarke describes this concept²³

“It is important to be aware of psychopathic behaviours and characteristics along with other extreme personality types to protect ourselves and to avoid conflict. However it is equally important not to jump to conclusions or try to diagnose someone’s behaviour without professional advice.

Misdiagnosis or improper use of a label is just as destructive for a person as the psychopath can be. There is a phenomenon known as confirmatory bias that is very important when it comes to people making judgements about whether a colleague is a workplace psychopath versus ‘something else’.

Confirmatory bias is a term used in social psychology that refers to an error in how people make judgments about various situations. Generally speaking, confirmatory bias occurs when a person ‘confirms’ what they believe by selectively looking at certain bits of information available to them. For example, a person may believe that they are working with a psychopath, therefore they read a book such as this one to find out more about the workplace psychopath. The person reads through all of the characteristics carefully and then looks for those characteristics in their colleague. They try and remember behaviours that their colleague has done which fit the characteristics they have read about. They may remember that ‘Bob had an affair 20 years ago with a secretary therefore he was sexually promiscuous and fits that criteria’, an incorrect conclusion. In effect they find what they want to find and ignore any contradictory evidence. Confirmatory bias is very dangerous as it can lead to ‘false positives’ concluding that a person is a workplace psychopath when in fact they are not.”

[295] Miss Clear ruminated on the belief she was being bullied and it became entrenched. She had and has no insight into her own behaviours and the impact of her behaviours on this dysfunctional relationship and the flow on effects on other staff and maternity patients. Simultaneously with all this and probably, in part as a result of her entrenched belief and the associated ruminations on her problem, Miss Clear’s physical and mental health was deteriorating and along with it went any vestige of objectivity and balance in the matter. While Miss Clear did advise Ms Osborn she sought

²³ “Working with Monsters” Ibid p.280

an apology from Mrs Parata for her actions in shredding the referral form I accept she also proposed to Ms Osborn at this time that Mrs Parata should be removed from her job. This solution developed in the ensuing months to be the only solution acceptable to Miss Clear. I find that for this reason the reporting of incidents for investigation *and resolution* (which had to contemplate solutions other than the removal of Mrs Parata) was of little interest to Miss Clear.

[296] To close on the matter of Miss Clear's third written complaint I find that having reinforced to Miss Clear the importance of reporting incidents promptly Ms Osborn kept a watchful eye on the maternity ward. She spoke to Miss Clear from time to time to ascertain how things were going and received no complaints. She observed staff working hard to deliver maternity care and when she left in mid 2003 she noted on her copy of a memo from Miss Clear (dated 21 June 2002) "*No further issues raised. Midwives have worked extremely hard to keep service alive-JO*". This note was dated 1 April 2003. It is clear from this evidence that Ms Osborn knew nothing of the fact that Miss Clear had returned to her practice of saving her complaints to submit in her own time.

[297] It is noted that Miss Clear's claim that the Board did not appropriately deal with her third written complaint is out of time. However, given the importance Miss Clear attaches to her claim that there was a continuing failure of the Board to address her complaints over a long period I consider it is necessary to make clear findings with regard to the Board's management of this third complaint.

[298] I find the Board (through Ms Osborn) managed the concerns raised by Miss Clear appropriately and in a manner open to a fair and reasonable employer with an eye to treating both women fairly. To the extent that Miss Clear now says she was unhappy with Ms Osborn's management of her 2002 complaint and the outcome, she did not make that known at the time. She could have taken her complaints to a higher level as she did in 2003 and she could have raised a personal grievance.

Miss Clear's 4th Complaint (8 August 2003)

[299] I am including Miss Clear's complaint to Dr White (her 5th complaint dated 28 January 2004) in the following analysis.

[300] Ms Priestly took up the position of Acting Manager for the Southern and Eastern area of the Waikato Hospital Board in June 2003. Miss Clear went to see her on the 27th of that month. She raised her concerns about Margaret Parata going back over the 16 years of her maternity service²⁴. It is now known that Miss Clear was on the verge of a breakdown at this time. However, neither she nor Ms Priestly were aware of this at the time.

[301] Miss Clear formalised her fourth written complaint on 8 August. I find, however, that Ms Priestly and Ms Cotterall did not receive it until 25/26 August 2003²⁵. It conformed to all the other complaints submitted by Miss Clear with the majority of the individual claims being undated and general, containing minimal detail. It includes historical and trivial complaints.

[302] When Miss Clear met with Ms Priestly and Ms Cotterall on 8 September she was advised that the Board intended to undertake a full and fair investigation into her complaints. Miss Clear was directed to submit any further complaints in incident forms and to stick to the facts and refrain from referring to Mrs Parata as an "*organisational psychopath*". To this point, I find the Board's

²⁴ This is the first time Miss Clear raised a complaint that focussed on the entire tenure of her employment in the maternity ward.

²⁵ It may have been received in Ms Priestly office earlier than this date. However, at this time she was spending only one day per week at Tokoroa Hospital.

conduct towards Miss Clear was reasonable and consistent with its obligations of trust and confidence.

[303] However, Miss Clear is critical of the Board's failure to separate her practice from that of Mrs Parata and the direction to her to submit future complaints by way of incident reports, sticking to the facts and refraining from referring to Mrs Parata as "*an organisational psychopath*".

[304] I have considered whether or not given Miss Clear presented as unwell in July 2003 (prior to her taking leave for a month) whether there was a breach of duty by the respondent in that it did not ensure her practice was separated from that of Mrs Parata particularly after she returned from leave and while the investigation into her complaints was in progress. It is submitted for Miss Clear this did amount to a breach of duty in that the Board, knowing she was under stress and unwell, allowed her to remain working in the maternity ward and to return to work there after her leave and that thereby it failed to provide her with a safe place of work.

[305] This claim has to be viewed in the totality of the surrounding facts. Yes, Miss Clear did present as unwell prior to her taking leave. However, the respondent had no contractual right to demand that she obtain a medical assessment. The respondent made EAP services available to Miss Clear. It also suggested she take a longer period of leave and suggested she take up a position as an independent midwife. Miss Clear would not agree to these suggestions. Given the overall circumstances including the fact the two women worked different shifts which itself separated their practice to a degree and the operational contingencies the Board faced i.e. the requirement on it to provide maternity services at Tokoroa; the key role played by Mrs Parata in delivering those services, the difficulty faced in recruiting and retaining midwives at Tokoroa, I find the Board was not required to go to the lengths of suspending Mrs Parata to ensure the complete separation in practice of the two women. (This was the only real alternative remaining to the Board to ensure separation). I find, too, that by July/August Miss Clear was experiencing medical symptoms that should have rung alarm bells for her as a qualified medical professional - hypertension, sleeplessness, loss of weight, deterioration in her polyarthralgia and anxiety. Miss Clear made none of this known to the respondent and despite the existence of these symptoms she obtained a medical clearance to return to work on 30 August. Between 30 August and 9 September when she left the workplace in a very stressed state she gave no advice to the employer that her health was deteriorating. Miss Clear's actions were themselves not consistent with her obligations under s.19 of the HSEAct

[306] I find that the Board had no knowledge of the stress Miss Clear was under up to her taking leave from August 2003 although her demeanour gave managers cause for concern about her health. Nor was it possessed of the information Miss Clear had as to her state of health at that time. The fact that the Board allowed Miss Clear to return to work in the maternity ward from 30 August without inquiry as to her state of health needs to be weighed in light of the fact that the Board had no right to demand a medical assessment in respect of Miss Clear's health and in light of Miss Clear's own action (or lack of it) with regard to her health at that time. It was Miss Clear who was accessing EAP (a confidential service). It was Miss Clear who was consulting her doctor about work related stress. Miss Clear and her doctor had that knowledge and neither appreciated the extent of Miss Clear's health problems. Neither did either of them anticipate her impending collapse. None of this information was available to the Board.

[307] I find on the information available to it at the time the Board took all reasonable steps necessary to ensure Miss Clear's safety at work. In particular it did not fail to provide her with a safe place of work prior to her taking leave in August 2003 or after she returned to work on 30 August 2003. I find, too, that there was nothing in Mrs Parata's actions on 9 September 2003 (when she provided a patient Miss Clear was assisting with a prescription) that amounted to any breach of

duty and it certainly was not an act of bullying although I accept Miss Clear saw it as inappropriate interference in her work.

[308] I find too that the Board's instruction to Miss Clear on 8 September to submit any further complaints by way of incident reports was entirely reasonable and consistent with the standard complaints procedure and the approach twice before advised to Miss Clear by Ms Osborn. Further, there was nothing unreasonable about the Board's instruction to Miss Clear that she was to refrain from comparing Mrs Parata's conduct with that of an *organizational psychopath*. The Board had promised to undertake a full and fair inquiry into Miss Clear's complaints and the subjective use of such a term was so derogatory and damaging as to amount to abuse in itself.

[309] As a result I find that the Board was, until 9 September 2003 (and thereafter into October/November) on track to undertake the full and fair investigation into Miss Clear's complaints. It was behaving in a fair and reasonable manner towards Miss Clear.

[310] Ultimately however, the full and fair investigation promised to Miss Clear was not full and fair – it was inept and unfair. On the evidence before me there are a number of apparent problems.

[311] Firstly, I find those charged with managing the inquiry into Miss Clear's 2003 complaint developed closed minds towards Miss Clear and her complaints. Ms Priestly and Ms Cotterall had been alarmed at Miss Clear's threatening and intimidating manner prior to her taking leave. She did not seem "*normal*". This made them extremely uncomfortable. All of these are normal human reactions when confronted by anger and intimidation out of the blue. Unfortunately, these perceptions taken together with the view that Miss Clear was making unreasonable demands (the termination of Margaret Parata) and referring to Mrs Parata as "*an organisational psychopath*" affected the view WDHB management took of the her complaints. An initial scepticism regarding Miss Clear's complaints developed into a bias and culminated in very unfair treatment towards her. I find on this issue that the fact Miss Clear was presenting as intimidating and '*not normal*' did not mean that she was not being subjected to bullying. Unfortunately, this bias against Miss Clear went on the blight the inquiry that followed and it led to those charged with managing Miss Clear's complaints to jump to the conclusion that it was only Mrs Parata that needed support. Those charged with managing Miss Clear's complaint should have parked their views on her extravagant presentation and demands, kept open minds about the allegations and ensured that both women were treated fairly in the investigation process.

[312] Having said this, Miss Clear's reliance on such extreme descriptors of Mrs Parata's conduct did not serve her well in having her concerns taken seriously by the Board.

[313] There were other problems with the inquiry. In the first place the scope and depth of the inquiry was I find too narrow/shallow. Among the things the Board should have had regard to were:

- There should have been an in depth interview with Miss Clear to obtain more details about her very generally expressed complaints. The detailed complaints would have been provided to Mrs Parata for her consideration and response.
- There should have been a thorough assessment of the history and nature of Miss Clear's complaints in an attempt to determine relevant patterns to those complaints.
- There should have been a thorough assessment of the files of Miss Clear and Mrs Parata and the files of other midwives who had been employed in the Maternity Ward going back at least to the time of Miss Clear's first complaint and possibly further back. This would have been done to find any complaints, commendations and warnings about or in respect of either Miss Clear or Mrs Parata.

- Staff turnover would have been investigated and reasons for staff leaving. On the point of staff turnover and the reasons for it I find it was inappropriate for the management staff charged with managing Miss Clear's complaint to ask her for the names of people who could corroborate her belief that staff left because of Mrs Parata and then not to follow up the information she provided as part of the inquiry.
- Sick leave records would have been investigated with particular attention given to unusual patterns of sick leave and sick leave taken for reasons of stress.
- The Board should have interviewed a wider group of current staff and managers than the group that were interviewed and consideration would have been given to interviewing staff who had resigned to ascertain the reasons for their resignation and their perception of the relationship between Miss Clear and Mrs Parata and the merits or otherwise of Miss Clear's complaints. Former Board managers should have been sought out and interviewed particularly those who had had dealings with the Miss Clear's previous complaints and the management/relationship issues they raised.
- The Board should have investigated whether any personal grievances had been raised that might have thrown light on the issues.

[314] The Board acted appropriately when it provided Miss Clear with access to EAP services. It also took reasonable steps in all the circumstances to provide Miss Clear with options to separate her practice from that of Mrs Parata.

[315] However, Miss Clear's application for discretionary leave was bungled. The Board repeatedly put an emphasis (in letters to Miss Clear on this point) on the Board's willingness to pay for the psychiatric assessment it sought rather than on the fact that discretionary leave would not be reconsidered unless Miss Clear attended a psychiatrist of the Board's choosing with the report being made available to the Board. I am not satisfied either that Board managers provided clarity on this point in its oral advice to Miss Clear on this point because at 30 July 2004 Miss Clear still believed the requirement for having discretionary leave reconsidered was the provision to the Board of *a* psychiatric assessment. Dr Gadsden was of the same belief based on the information provided to him by Miss Clear. Miss Clear was suspicious of the Board dictating whom she would see. However, she may have reconsidered her position had she been clearly advised of the prerequisite for reconsideration and Dr Gadsden may have had a positive influence on her thinking in this regard. It is an extremely important issue I find given that the Board went on to decide it would take no further action to progress Miss Clear's complaint until it received the psychiatric report it sought.

[316] There are other problems with the stance the Board took on this issue. I accept Board managers had good intentions when they sought a psychiatric report (they wished to avoid taking any step that might harm Miss Clear). However, the respondent had a duty to Miss Clear to conduct and complete a full and fair inquiry into her concerns. It had no contractual right to require that Miss Clear undertake a psychiatric assessment and it was not absolved of its duty to conduct and complete its inquiry because Miss Clear did not cooperate with the Board's wish that she undertake an assessment with a specialist of its choosing. Having clearly set out its request and the reasons for it the Board could have encouraged Miss Clear to comply. It could have stated that reconsideration of her request for discretionary leave was dependent on the provision of the assessment sought but it was a breach of duty towards her to halt all progress on the investigation until she complied. This problem was compounded by the fact that the Board did not tell Miss Clear that it was ceasing all progress on her investigation until she undertook the assessment.

[317] Returning to the inquiry itself. Having conducted a full inquiry the Board should have gathered all the information available and provided it to Miss Clear and provided her with the

opportunity to respond to that information. I accept the Board took some steps in this regard but Miss Clear did not receive the information gathered as a result of the Board's limited inquiry and when she received it she declined to respond as a matter of principle. Miss Clear was entitled to reasonable time to allow her to address and respond to this information. The Board failed her when it did not ensure that such an opportunity was provided to her to respond as she wished. Thereafter the Board's management of Miss Clear's complaints just unravelled. The Board did not communicate further with her despite her repeated requests for information the tone of which became increasingly desperate. This was profoundly unfair to her. The Board excuses its actions in this regard. It says that legal counsel represented Miss Clear by this time and it would have been inappropriate to deal with her directly. I don't accept this. Miss Clear was emailing Mr Peploe on a frequent basis from March 2004 onwards. He could have responded to her enquiries through her representative, Mr Venter. Instead he ignored her inquiries altogether.

[318] Had the Board completed its inquiries and given Miss Clear an opportunity to provide responses to the information gathered, only then would the Board have been in a position to assess all the information with an open mind free from bias and predetermination and come to a conclusion on the complaints and the question of whether or not Wendy Clear had been the victim of bullying by Margaret Parata. The outcome of that inquiry would have been notified to Miss Clear and Mrs Parata and appropriate follow up action would have been implemented including steps to get Miss Clear back to work.

[319] Not only did the Board fail to conduct full and fair inquiry into Miss Clear's 2003 complaint, at some stage the Board managers charged with managing this inquiry made a finding that Miss Clear had not been bullied by Mrs Parata. This very important finding was not communicated to Miss Clear even after Miss Clear contacted Mr Peploe on several occasions seeking information on the progress of the investigation.

[320] On 27 August 2004 the Board deigned to notify Miss Clear that mediation had been arranged to consider ways to get her back to work. In the event, Mr Peploe's illness meant the parties did not meet in mediation until October 2004. Nothing was resolved which is hardly surprising given the fact that the Board had not delivered on the full and fair investigation it had promised to Miss Clear, albeit I also find on the balance of probabilities that no outcome would have satisfied Miss Clear that did not vindicate her belief that she had been bullied by Mrs Parata and confirm her removal. On this I find that Miss Clear's demand that Mrs Parata's employment be terminated itself contradicted the concept of a full and fair inquiry and predetermined the outcome.

[321] Following the mediation, the Board wrote to Miss Clear regarding her ongoing absence from work. This led to a meeting between the parties on 15 October and the disputed offer to Miss Clear that she return to work as a district nurse. The answer to this dispute in the evidence is clear on a reading of the letter written by David Venter to the Board on 15 November. He states in that letter that it was *his understanding that*:

“Following this meeting an occupational health physician was going to contact Wendy's GP to discuss and report on her medical condition and if she was well enough to return to work. I also understood that you were going to make inquiries about the possibility of redeployment and training”.

[322] He also describes *Miss Clear's understanding* of the outcome of this meeting.

“At the conclusion of the meeting Thea made a reference to the position of district nurse that was available. Wendy understood if she was interested in the position she was to return to work on 15 November which she did. ... Wendy does not accept there was a misunderstanding”.

[323] Mr Venter's understanding of the outcome of the meeting coincides with that of the Board. He goes on to describe Miss Clear's understanding of the meeting. I find, therefore, that Miss Clear was mistaken in her understanding of the outcome of that meeting and for the sake of certainty I find there was no offer. A district nurse's position was suggested and the Board agreed to look into it along with other redeployment opportunities. In the event, however, no district nurse position was available and as a result of Mr Peploe's inquiries, he found that even were such a position available to Miss Clear, she was not qualified to fill it.

[324] There is no question however, that the Board breached its duty to Miss Clear to carry out a full and fair inquiry into the complaint submitted by her on 8 August 2003. The breach was serious and sustained.

Did Mrs Parata bully Miss Clear?

[325] Before addressing the question as to the harm (if any) suffered by Miss Clear as a result of the Board's breach of duty and the remaining issues to be determined, I consider it appropriate to consider whether or not Miss Clear was in fact bullied by Mrs Parata. While this is not strictly a matter that falls to be determined by me - it is the question on the lips of everyone involved in this case and witnesses have very firm views on the question. I find it is also necessary to set my findings in context and hopefully to provide some finality in the matter.

[326] To the extent I have covered most if not all of the ground that would have been covered by the employer's inquiry if there had been a full and fair inquiry with an outcome that was communicated to Miss Clear, I find that Miss Clear was not bullied by Margaret Parata. In all probability a full and fair inquiry would have found, and I find:

- Miss Clear and Mrs Parata worked together for 13 years before Miss Clear made any complaint about Mrs Parata's conduct towards her. It was only from late June 2003 that Miss Clear complained that she had been the victim of bullying by Margaret Parata for 16 years. The fact they worked together for so long without incident begs the question as to what factors led to the emergence this problem in 2000. Miss Clear believes Tania Rangi's remark gave an explanation for her experiences. Ms Rangi denies telling Miss Clear she was the victim of a vendetta by Margaret Parata. Regardless of what triggered Miss Clear's belief it is improbable that the behaviours complained of could have been going on for 13 years without objection from Miss Clear.
- The kernel of the problem as it was expressed originally lay with Miss Clear seeking to obtain greater control over her own practice. This created a problem given Mrs Parata was herself an over controlling manager and the area of practice that Miss Clear sought greater control over (her practice) was a subset of Mrs Parata's practice. Further the model of maternity delivery did not itself support the type of practice Miss Clear wished to deliver and Mrs Parata's over controlling management style and tendency to see herself as the embodiment of and arbiter of everything relating to maternity care at Tokoroa did not lend itself to Miss Clear being able to practice as she would have preferred i.e. having responsibility for the whole of a patient's care to the extent it was possible within the framework of the practice at Tokoroa Hospital. Given the model of maternity care practiced at Tokoroa at the time and Mrs Parata's responsibility for the safe delivery of that care I find there was no breach of duty by her towards Miss Clear in relation to her management style albeit it fell short of perfection.
- There was a dysfunctional relationship between Miss Clear and Mrs Parata and that it was a longstanding problem. Both women had contributed to this breakdown in the relationship. There was a mutual failure to communicate appropriately contributed to in equal measures by poor communications skills and an unwillingness to address and resolve issues through constructive

debate and compromise. By mid 2003 neither woman had the will and/or was possessed of the interpersonal skills to address and resolve the relationship issues between them. It was also not within Ms Hartley's responsibility (or her ability) to address the problem that existed.

- The seriousness of the problem was being masked by the joint efforts of Miss Clear and Mrs Parata to avoid open conflict in the interests of service delivery. This was possible because both women have a strong commitment to professionalism and the maintenance of standards. (Hence Miss Clear's reference to "*a veneer of civility*" and the widespread evidence of witnesses that despite the fact that the two women did not get on that they co-operated to ensure service delivery and that the atmosphere in the ward "*was not too bad*").
- The fact that things "*were not too bad*" for service delivery meant there was (after Janice Osborn's intervention) no "*problem*" to attract the attention of senior management. The manner in which Miss Clear presented her complaints – saving them to present as a job lot from time to time contributed to the failure of her issues to surface as a serious and ongoing problem. As already noted an employee faced with problems of this nature has a duty to raise his or her concerns appropriately and Miss Clear did not do so. (*McGowan* cited above p 39).
- However, Miss Clear did continue to believe she was being bullied and she scrutinized Mrs Parata's conduct for signs that confirmed her belief. She was blind to any contraindications. As the belief became entrenched, Miss Clear seethed on the problem. It led to deterioration in her health, her judgement became impaired and insight deserted her. Her scrutiny of Margaret Parata intensified and even extended to setting a trap for Mrs Parata to confirm her view that she was being bullied (the "blue plastic bag incident").
- Mrs Parata had long since become concerned about Miss Clear's complaints about her and the readiness of Miss Clear to find fault. By 2001 she was demonstrating avoidance behaviours. She communicated with Miss Clear only when necessary and where possible avoided contact to minimise the potential for further complaints. She took this to the extent where she sat in her car to avoid contact at shift changes. She abandoned critiquing Miss Clear's clinical performance and "fixed" things without communicating with Miss Clear. There were dozens of examples of this in the evidence e.g. the 'shredding incident' and the incident where a client was directed to the care of another nurse right under Miss Clear's nose. (This happened I accept because the patient had communicated that she did not want to see Miss Clear). None of this was communicated to Miss Clear. Mrs Parata had no formal supervisory role over Miss Clear. In the absence of more appropriate tools to manage issues presented and afraid of raising it with management for fear of generating more complaints Mrs Parata managed defensively around Miss Clear. Of course Miss Clear saw this as one class of the bullying behaviours she was experiencing (that she was being isolated and ignored). I find, this was happening. However, Mrs Parata's conduct in this regard was defensive not offensive.
- The situation became increasingly intolerable for Miss Clear, her health was deteriorating and with it her ability to communicate appropriately and to deal with patients kindly. Patient complaints escalated. Miss Clear threaded the blame for the escalation of patient complaints into the cloak of persecution she had assumed. I find she was mistaken in this belief. The evidence does not support Miss Clear's position that the timing of patient complaints coincided with complaints Miss Clear made about Mrs Parata. Neither do I accept that patients would take the time to write and submit complaints if they did not have a genuine concern about their treatment. Neither does Miss Clear's explanation explain the numerous verbal complaints other nursing staff received about Miss Clear's conduct towards them – complaints that were never formalised.

- Mrs Parata continued managing around Miss Clear and it all developed into a desperate downward spiralling mess until Miss Clear's health collapsed. And until June/July 2003 senior management at WDHB had no idea that Miss Clear harboured ongoing concerns.

What harm or loss did Miss Clear suffer as a result of the respondent's breach of duty?

[327] The Board had no knowledge after June 2002 (when Ms Osborn thought that the latest issue between Margaret Parata and Miss Clear had been resolved) that in fact Miss Clear was harbouring further grievances or that her health was deteriorating. It was only when Miss Clear met with Ms Priestly late in June 2003 the Board was made aware she had ongoing complaints about Margaret Parata. Neither did it have any knowledge of the stress Miss Clear was under albeit her intimidating manner did not seem normal leading the Board to be concerned about her state of health. From 27 June until 9 September when Miss Clear left the workplace the Board was on track to undertake the full and fair investigation into her complaints. Its conduct was reasonable right up to 27 November 2003 (although the Board was increasingly sceptical of Miss Clear's complaints by this time). I have also found that the Board took all reasonable steps to assist Miss Clear, including the provision of EAP services and suggestions that would have separated her practice from that of Margaret Parata. There was no breach of duty by the Board up to time that Miss Clear left the workplace on 9 September that caused Miss Clear harm.

[328] The Board did breach its duty to Miss Clear when it failed to carry out and complete a full and fair inquiry into her 8 August 2003 complaint. It also breached its duty to Miss Clear when it failed to communicate to her the outcome of that inquiry and treat her fairly in the process of the investigation into her complaints. What harm did this breach cause Miss Clear? I have looked for evidence that the breach described either exacerbated Miss Clear's illness or inhibited her recovery. The evidence on this is confusing. Miss Clear's evidence does not separate out the effects of her original illness from any impact on her of the failure of the Board to deal with her 4th complaint. I note too that Miss Clear provided me with a diagrammatic representation of the progress of her illness. That shows her levels of stress escalating in severity up to September 2003 and dissipating from late October/November. Dr Gadsden's evidence was that the damage done to Miss Clear started with Mrs Parata's treatment of her but that was made worse by the Board's failure to deal with her complaints. I have found on the contrary that the Board did not fail to address and deal with Miss Clear's first three complaints (although it did not complete the inquiry into her second complaint and Margaret Parata's counter complaints).

[329] On balance I find that the weight of the evidence including that provided by Miss Clear supports a finding that Miss Clear suffered no additional harm as a result of the Board's breach of duty. I am supported in this view by Dr Gadsden's referral letter to Dr Newburn (7 November 2003) where he states, "*the worst of Wendy's illness is already over*". While Miss Clear continued to suffer a serious depressive disorder I find on the evidence the acute phase of her illness had passed by November 2003.

[330] I find further that there is insufficient evidence to allow me to make a finding that the Board's breach of duty impeded her recovery. Dr Gadsden advised in his report to the Board in October 2003 that Miss Clear was suffering occasional lapses in concentration and he considered this left her unfit to return to work. On the other hand Miss Clear made it known to the Board on 15 October 2004 that she would obtain a medical clearance to return to work as long as she did not have to work with Margaret Parata and she presented for work as a district nurse on 15 November 2004.

[331] While I cannot find that the Board's breach of duty towards Miss Clear exacerbated her illness or impeded her recovery I nevertheless find it would have been frustrating and humiliating to have been treated the way the Board treated Miss Clear in the management of her fourth written complaint.

Determination

Did Miss Clear suffer disadvantage in her employment?

First Disadvantage Claim

[332] It is the applicant's claim that she suffered disadvantage within the meaning of s.103 (1) (b) of the Act as a result of the respondent's handling of her written complaint to Janice Osborn dated 16 May 2002.

[333] This claim is out of time. However, for the sake of certainty and in reliance of my findings (paras 284-298) there could be no finding that Ms Clear suffered a disadvantage grievance arising from the Board's management of her third written complaint.

Second Disadvantage Claim

[334] The applicant claims that the respondent's failure to properly and fully investigate her fourth written complaint; to make a decision on the complaint; convey that decision to the applicant and provide follow-up constitutes a second disadvantage action.

[335] On the basis of my findings (paras 299-324) I find that Miss Clear has a disadvantage grievance against her former employer under this head.

Third Disadvantage Claim

[336] It is the applicant's claim that given the seriousness of the situation the two women could not work together. It is also submitted that the Board had knowledge of health and stress issues for the applicant and that it recognised need for the two women to remain apart. Given all this it is submitted the respondent failed to provide the applicant with a safe working environment and this constitutes a third disadvantage action.

[337] In reliance on my findings (paras 326 – 331) this claim is declined

Was Miss Clear unjustifiably dismissed?

[338] It is submitted for the applicant that she was dismissed for incapacity. It is also the applicant's position that her ongoing absence from work was caused by the respondent's failures to properly investigate and act on her complaints. As a result the applicant's dismissal was unjustified.

[339] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against the actions **a fair and reasonable employer would have taken ...in all the circumstances ...at the time....** (S. 103A test).

[340] Counsel for the applicant accepts that the Board did not refer to incapacity in its letter of dismissal but that Miss Clear's ongoing absence from work due to sickness was in its mind when it wrote to Miss Clear on 12 October requiring her to attend a meeting to consider her ongoing employment.

[341] I accept that the Board did refer to Miss Clear's "*continued absence from work on health grounds*" in its letter of 12 October. However, a significant amount of water flowed under the bridge after that time. The situation confronted by the Board in November and December and which informed its decision to dismiss Miss Clear is explained in Mr Peploe's letters of 9 November and 3 December. It was:

- That Wendy would be able to get a sign off from her Doctor to return to work but not if she was to return to the maternity unit.
- That Wendy was not prepared to return to the maternity unit while Margaret Parata remained there.
- That Wendy would accept a nursing position in ED but had concerns about that because the Charge Nurse there is also a ‘bully’.
- Wendy would not look at employment opportunities outside Tokoroa
- That Wendy would ascertain from the Nursing Council the scope of practice that they would issue to allow her to practice as a registered nurse.

[342] He then advised that the Board had no positions at Tokoroa outside maternity that Miss Clear was qualified to fill. On 3 December he wrote to refute the belief held by Miss Clear that she had in fact been offered a district nurse position to commence on 15 November 2004. In that letter he did accept that there had been agreement to contact Wendy’s GP. He states “*however, as there were no positions for Wendy Clear to be offered in Tokoroa, and your client will not look at other Hospitals within the Waikato DHB organisation, your client’s fitness to return to work is a moot point*”

[343] I find that the question of Miss Clear’s fitness to work was not a factor that was weighed by the Board in its decision to terminate her employment (even accepting that Miss Clear provided the Board with a written report at the 15 October meeting where Dr Gadsden questioned her fitness for work at that time).

[344] I accept the Board focussed on Miss Clear’s assurance she would be cleared for work as long as she would not be required to return to the maternity ward. In the event, while Wendy was willing and presumably fit to return to work²⁶ she would not return to work in the only position available to her at Tokoroa Hospital (maternity) and she also advised she would not work at other hospitals managed by the Board.

[345] Miss Clear was not dismissed for incapacity. I find there were no positions available at Tokoroa hospital that Miss Clear was both qualified for *and* willing to work in. That is what the Board was referring to when it stated the reason for the dismissal, as “*your continued absence from work with little hope the situation will be resolved in the near future*”.

[346] In arriving at my determination in this matter I have considered the facts of the case against those described in *Cartwright v Commissioner of Police* [2001] 1 ERNZ 255. The Court found in that case that Mr Cartwright had been unjustifiably dismissed because the respondent’s actions caused his illness, which led to a permanent disability and to his compulsory separation. As I see it, those facts are distinguishable from the facts of this case. WDHB did not cause Miss Clear’s illness; it is not established that she has been left with a permanent disability and she was not dismissed for incapacity but rather because there were no available positions for which she was both qualified and willing to undertake.

[347] I find in all the circumstances at the time the Board was justified in dismissing Miss Clear. Her claim that she was unjustifiably dismissed is declined.

²⁶ A presumption drawn from the fact that she turned up for work on 15 November 2004

Remedies and Costs

[348] In conclusion I reiterate that Miss Clear has a disadvantage grievance against her former employer in that it failed to investigate her fourth complaint about Mrs Parata and failed to treat her fairly in the process. The determination as to the remedy or remedies applicable to this grievance remain to be considered as does the issue of costs

[349] In the first instance I direct the parties back to mediation to attempt to resolve these issues between them.

Janet Scott

Member of the Employment Relations Authority