

[3] The respondent, Healthcare, purchased the Blenheim company Nelmar Home Support Limited (Nelmar) on 27 November 2004. After the purchase of Nelmar, Healthcare continued to provide and coordinate from its Blenheim office home-based home help, personal care and nursing services for its clients.

[4] The Blenheim office continues to trade using the Nelmar name as a division of Healthcare.

[5] Ms Finlay was employed to work in the Blenheim office for Healthcare as a service coordinator. Her tasks were to provide a care service to clients who needed support in their homes by organising and coordinating support workers to provide the various services. These workers were known as care workers but are now known as support workers. I shall use the term support workers from hereon in this determination.

[6] Ms Finlay lodged two employment relationship problems with the Authority.

[7] The first problem was lodged with the Authority on 12 March 2007. The nature of the problem was that Healthcare refused to allow Ms Finlay to return to work from paid leave for work-related stress. Ms Finlay wanted to return to work and sought compensation for treatment she said she had received from her employer in the sum of \$10,000.

[8] The statement of problem set out the causes of workplace stress for Ms Finlay as those provided to Healthcare by Ms Finlay's representative, Mr Hardy-Jones, in a letter dated 27 February 2007. Mr Hardy-Jones had set out the causes of workplace stress in that letter as amongst other matters, advice that weekend work was no longer available and the corresponding reduction in Ms Finlay's income, changing standards of performance criteria when Ms Finlay had met the requirements, complaints by clients about Ms Finlay being escalated, engineered or encouraged, removal of vehicle, monitoring as to her hours and unreasonable demands being put upon her by management.

[9] The respondent, in its reply to the problem, said that Ms Finlay had been on paid leave since 22 November 2006 on the basis of workplace stress but it was not until 22 February 2007 that a letter was tabled by Mr Hardy-Jones outlining the stressors and causes.

[10] Healthcare said in its statement in reply that it was of the view that there was no basis to the allegations of unfair and unequal treatment alleged in the letter dated 22 February 2007. It was concerned that if Ms Finlay simply returned to work, the assurance was not

likely to resolve the situation that existed prior to 22 November 2006 and that further claims of grievance and workplace stress were likely to follow.

[11] Healthcare was also of the view that the matters identified in the statement of problem seemed to be more in the nature of claims of personal grievance which needed to be particularised so they could be properly addressed. The statement in reply also referred to the Blenheim office becoming increasingly fraught and unhappy and the engagement of an occupational psychologist to talk to the Blenheim staff individually and in confidence before Ms Finlay went on sick leave in November 2006.

[12] A telephone conference took place with the Authority on 4 April 2007 with Mr Hardy-Jones and Healthcare's representative, Ms Heaton. In light of the nature of the problem, the Authority asked that Ms Heaton discuss with her client a return to work plan for Ms Finlay.

[13] At the time of the telephone conference, the Blenheim office was staffed by six employees although one staff member was to leave shortly.

[14] The Blenheim office staff were advised by the National Human Resource Manager, Patricia Brosnan, that a working plan was being formulated for the return of Ms Finlay following the discussion with the Authority. Four of the staff, including the Service Manager of the Blenheim office, Brian Ross, said they would leave if Ms Finlay was to return to work at the Blenheim office. Staff were asked by Ms Brosnan to put their concerns expressed verbally in writing.

[15] The Area Manager of Healthcare, Susan Watson, who works from Nelson but attends Blenheim as part of her duties, also advised Ms Brosnan that she would not remain with Healthcare if Ms Finlay returned to work.

[16] Ms Heaton wrote to Mr Hardy-Jones by letter dated 2 May 2007 and advised that Healthcare considered that its employment relationship with Ms Finlay may have been frustrated by reason of incompatibility between employees and that Healthcare was inclined to think that it had little choice but to terminate Ms Finlay's employment on notice. Mr Hardy-Jones was supplied with the written statements from staff. Healthcare said in its letter that it considered that a period of two months' notice from termination date would be appropriate in the circumstances. Mr Hardy-Jones was invited to comment on the matter prior to any decision.

[17] Correspondence then took place between Ms Heaton and Mr Hardy-Jones.

[18] Mediation was then requested by Healthcare and took place on 3 August 2007. On 6 August 2007, Healthcare terminated Ms Finlay's employment as at 3 August 2007 for the reasons expressed in the letter of 2 May 2007 and, because Healthcare had heard nothing since that time to alter its preliminary view.

[19] A further employment relationship problem was then lodged with the Employment Relations Authority that Ms Finlay had been unjustifiably dismissed.

[20] Ms Finlay sought payment for one month's notice and holiday pay on that sum, compensation in the sum of \$40,000, a declaration that Healthcare, by its conduct toward her, had been guilty of harassment and unfair treatment, and costs.

[21] Healthcare said in its reply that its decision that the employment relationship had been frustrated by incompatibility and, was irretrievably dysfunctional, was justified.

The investigation meeting

[22] The investigation meeting took place over three days in Blenheim. The Authority heard evidence about the various matters that preceded the decision to dismiss. Ms Finlay alleged that these matters included harassment and discrimination which, along with the allegation of unjustified dismissal, formed part of her claim.

[23] The events that I have been asked to consider cover the entire period of Ms Finlay's employment and have required careful consideration both as individual events and as part of a continuum leading to the termination of Ms Finlay's employment in August 2007.

[24] There is a considerable amount of documentation about particular events by way of minutes of meeting and other correspondence. From mid-January 2006 until her last day that she was physically in the office, Ms Finlay made written diary entries which were provided to me as part of Ms Finlay's bundle of documents.

The issues

[25] The issues for the Authority to consider are whether Ms Finlay was subject to actions on the part of Healthcare that were unjustified and that disadvantaged her in her employment. The actions complained of are listed below:

- Actions with respect to travel coordination proposal;

- Actions with respect to collegial difficulties;
- Was the workplace culturally unsafe and was there racial harassment;
- Christmas party;
- Working over the Christmas period;
- The removal of ability to work secondary employment as a support worker and on-call work
- Complaints received by Healthcare from clients, support workers or others and whether they were manufactured, encouraged or escalated by management or colleagues;
- Was the performance management process unfair;
- Were part-time/acute support workers available for Ms Finlay;
- Removal of private use of a vehicle.

[26] Several of the actions that Ms Finlay complained about were not clearly raised until 22 February 2007 after Ms Finlay had been on paid leave since November 2006. These were then raised in the context of workplace stressors.

[27] The second issue is whether Ms Finlay's dismissal was unjustified.

[28] The Authority must determine on an objective basis whether that was what a fair and reasonable employer would have done in all the circumstances that existed at the time – s.103A of the Employment Relations Act 2000.

Ms Finlay's commencement of employment

[29] Ms Finlay's employment appeared incident-free for a short period after commencement in June 2005. Ms Finlay gave evidence that she was enthusiastic and happy in her work and particularly enjoyed visiting clients and undertaking reviews of their care.

[30] Mr Ross, as senior manager at Healthcare Blenheim, had confidence at the start of Ms Finlay's employment that she had a lot to offer the organisation. The comment in the performance plan completed with Mr Ross one week after Ms Finlay commenced

employment was that Ms Finlay is *demonstrating a natural energy for the position of coordinator and I am sure will build to a very positive and innovative member of the Blenheim team.*

[31] Ms Finlay's extensive knowledge in the health sector with a focus on Maori health service delivery, both at a local and national level was recognised and Mr Ross stated in the performance plan that he believed Ms Finlay had much to offer the company with regard to access to the local Maori community.

[32] To determine the issues before it, the Authority needs to consider in detail what happened to this employment relationship from that point in time shortly after it commenced to the time when Ms Finlay was dismissed for reasons of incompatibility in August 2007.

Ms Finlay's plan

[33] Shortly after Ms Finlay's employment commenced, she proposed a new idea to the Area Manager of Healthcare, Susan Watson, and Mr Ross. Ms Finlay proposed that the support workers be reorganised and realigned so as to provide care in the same area. Ms Finlay said that this would lead to more efficiency in terms of travel for the support workers and would reduce vehicle expenses for them.

[34] Mr Ross and Ms Watson were both keen on the idea and considered it to be a good initiative on the part of Ms Finlay. Ms Finlay was asked to attempt to implement her plan in the Blenheim office. There was a dispute about whether Ms Watson and Mr Ross talked to the two other coordinators who were part of the Blenheim coordinating team about the idea.

[35] I conclude that it is more likely from the evidence that Mr Ross and Ms Watson talked to the other coordinators early on about the plan and that Ms Finlay was not simply left to implement the plan on her own. I have reached this conclusion from the documentation about these matters and because, as a matter of commonsense, it seemed to me to be most unlikely that the other coordinators would have cooperated at all if they did not consider Mr Ross and Ms Watson both knew of and supported Ms Finlay's plan.

[36] The implementation of the plan was the subject of complaints from clients and support workers who had become used to their relationships and did not want to change. I find too that the implementation of the plan was the most probable cause of friction at that time between Ms Finlay and the other coordinators.

[37] On 26 July 2005, Ms Watson met with Ms Finlay and one of the other coordinators, Lisa, to talk about the ground rules for implementing support worker change. Document 25 in the respondent's bundle supports that there was also a discussion at that time about different steps that could be taken if an altercation was pending between members of staff. Suggestions included time out with a coffee and then a discussion or having a mediator join the team to see if the issue could be resolved. There was mention of the employee assistance programme being available as well.

[38] It would have been clear in late July 2005 all was not well between the coordinators.

[39] The preparation of ground rules seemed a sensible and reasonable step to be taken at that time, given that Ms Finlay felt that the other coordinators were unsupportive of her idea and Ms Watson considered Ms Finlay sometimes acted as a bit of a *one man band* and on occasion simply made changes without consulting the other coordinators.

[40] On 3 August 2005, the ground rules were tabled and accepted at a meeting with Ms Finlay, the other two coordinators and Mr Ross. It was also recorded in the minutes of the meeting that there be a focus on ensuring open communication and that any identified team dynamic difficulties are quickly identified and resolved with the assistance of Mr Ross if required.

[41] Coordinator meetings were, from that time onwards, held regularly with Mr Ross and often on a weekly basis.

[42] In September 2005, Ms Watson received a call from the administrator in the office, Beryl Nelson. Ms Nelson was concerned that unacceptable language was being used in the office and that there were raised voices between Lisa and Ms Finlay. Ms Nelson reported that she mainly heard Lisa's voice on that occasion. Ms Watson also received a written complaint from Lisa under cover of letter dated 30 September 2005 about the incident on 29 September together with a letter about general difficulties that Lisa said she and others had with Ms Finlay.

[43] Lisa's specific complaint was that on 29 September 2005, she asked Ms Finlay about changing a meeting time and this caused Ms Finlay to become agitated. Lisa said in her complaint that she told Ms Finlay that she was not listening and needed to open her ears. She asked Ms Finlay to leave the office. She said that Ms Finlay would not leave and then came close to her and said in a quiet voice *fuck you, you silly bitch*. Lisa said in her letter that she then went to see Ms Finlay in her office and said that she could not talk like that and

would not get away with it. She wrote in her complaint that Ms Finlay said again, *fuck you, you silly bitch*.

[44] Ms Watson met with Ms Finlay on 10 October 2005 to talk to her about the incident. Ms Finlay did not want a support person at that meeting. She was provided with the letter of complaint and the letter setting out general difficulties. Written notes were taken of the meeting. Ms Finlay also raised other issues at that time and where they are relevant I shall refer to them when I come to address other matters.

[45] As an explanation for the alleged behaviour on 29 September, Ms Finlay is recorded as saying amongst other matters that she was provoked to respond in such a way by Lisa. She outlined at the meeting some instances of inappropriate behaviour towards her by the other coordinators. Ms Watson found that Ms Finlay admitted swearing and at the end of the process she gave Ms Finlay a written warning that such behaviour not be repeated.

[46] In her evidence to the Authority, Ms Finlay did not accept that she had admitted swearing on that occasion. The written warning was never challenged. Lisa was given a verbal warning for having unnecessarily provoked the situation. Ms Watson said that it was the aggressive nature of Ms Finlay's response that led to the difference in the disciplinary outcome. Lisa had accepted when questioned by Ms Watson that she did talk about Ms Finlay in the office in a negative way. I accept that Ms Watson told both Ms Finlay and Lisa to stop talking about each other and to raise concerns with her or Mr Ross.

Was the environment culturally unsafe and/or was there racial harassment?

[47] The administrator, Ms Nelson, was employed until February 2006 at Healthcare on reception. Ms Nelson gave evidence to the Authority and said that during her period of employment there were difficulties between the other two coordinators and Ms Finlay. Ms Nelson said in her evidence that she felt there was a racial element in the difficulties between the other two coordinators and Ms Finlay but accepted that she did not raise this with management.

[48] One of the issues Ms Finlay raised when questioned about the allegation of swearing in October 2005 was that she believed a statement said by one of the coordinators to a Maori support worker was a racially discriminatory statement and further that a statement about an Asian support worker was also inappropriate.

[49] Ms Finlay also raised with Ms Watson that she believed both coordinators needed cultural training.

[50] Ms Watson, in her evidence to the Authority, said that she counselled the coordinator about the matter regarding the statement made to a support worker although Ms Finlay said she was unaware that that had taken place. Ms Watson did advise Ms Finlay at the time in or about October 2005 that all clients have a choice both of support workers and the culture of their support worker and thought that Ms Finlay had accepted that.

[51] Mr Hardy-Jones in his submissions said that the workplace may have been unsafe culturally for Ms Finlay. Reliance was placed by Mr Hardy-Jones on a discussion that it was agreed took place between Ms Finlay and Mr Ross where Mr Ross referred to racism that his daughter had encountered as a teacher of Te Reo. Mr Hardy-Jones says that this demonstrated the knowledge of management of the unsafe cultural environment but nothing was done about it.

[52] Mr Ross in his evidence said that, although he was aware of difficulties in the office between the coordinators, he did not agree that the issues were racially based. Mr Ross said that he thought the conversation that he had with Ms Finlay about his daughter was related to the coordinators' reference that Ms Finlay was concerned about, not that Ms Finlay was the subject of racism herself. Mr Ross said that had that complaint been made to him he would have dealt with it quickly. Ms Watson said that there was no allegation of racism raised with her by Ms Finlay.

[53] There was evidence given to the Authority of steps that Healthcare could have taken such as asking kaumatua to be involved or to have involvement of the Tangata Whaiora consultant employed by Healthcare so that issues could be resolved.

[54] Mr Hardy-Jones in his letter of 22 February 2007 in which he mentioned the factors that caused Ms Finlay to become unwell made no mention of racism or a culturally unsafe environment for her as one of the workplace stressors.

[55] Ms Finlay was clearly offended by the language used by the coordinator in 2005 and appropriately raised that with Ms Watson. I am satisfied that Ms Watson took steps to deal with that by talking to the coordinator and there was no evidence that there was repetition. I do not find that Ms Finlay clearly raised an issue that the workplace for her was otherwise a culturally unsafe workplace. There was no evidence to support that when Mr Hardy-Jones began formally communicating with Healthcare from March 2006 that such a concern was

raised with anyone from Human Resources at Healthcare. Having heard the evidence, I am satisfied that if a concern of that nature had been raised, it would have been appropriately dealt with.

Part time support workers

[56] One of Ms Finlay's concerns was that part time support workers were not readily available to her during her employment. There is a particular issue in terms of a support worker called Heather who was employed to work primarily with Ms Finlay. In terms of the part time support workers generally Ms Watson instigated a process with a roster, as set out in an email dated 7 April 2006, to clarify the use by coordinators of the support workers and ensure that they could be used equally. I conclude that is a reasonable response to this issue which is the nature of issues which inevitably arise from time to time in a workplace where resources have to be shared.

[57] I shall come to the issue with Heather and Ms Finlay at a later time in this determination.

Was Ms Finlay performing adequately by the end of 2005 in terms of her documentation?

[58] On 21 October 2005, Mr Ross and Ms Finlay completed a performance plan. There was some dispute in the evidence about what the performance plan provided with respect to compliance with client records. I find that the object of the performance plan was 100% compliance in terms of the client's needs and issues recorded accurately on the Healthcare database and support plan. Ms Finlay is recorded as partially achieving the object of 100% compliance.

[59] It was further recorded in the performance plan that it was a high priority for Ms Finlay to receive ongoing training in the use of client/care worker database and furthermore the performance plan recognised that some assistance and ongoing guidance would be required to be given to Ms Finlay until her role of coordinator was developed and consolidated.

[60] Objectively assessed, it was reasonable that Ms Finlay would consider her performance was adequate at the end of 2005. This seemed to be further confirmed by what appeared to be another performance plan assessment in December 2005. It was equally clear, however, that Ms Finlay still required some assistance and indeed from the performance plan could expect that to be forthcoming from Mr Ross.

Did Ms Finlay's relationship deteriorate with Mr Ross because she did not complete a manual in terms of the implementation of the realignment plan?

[61] During the implementation of the realignment support worker plan, Ms Finlay was asked to document the positive and negative aspects of the plan and prepare notes in the form of a manual to be used in other offices of Healthcare. Ms Finlay said in her evidence that she did not prepare the manual because she did not want to cause more difficulty within the workplace than perhaps she already had. Ms Finlay did not advise Mr Ross that this was the reason the manual was not completed when she spoke to him before December 2005. Ms Finlay told Mr Ross that she was too busy to prepare a manual.

[62] Mr Ross does not accept that the failure to document the process by way of a manual had any bearing on his interaction with Ms Finlay or the performance process that was undertaken in 2006. I am not satisfied from the evidence that any link has been established between those matters.

[63] In her written evidence Ms Finlay said that she had the impression that Mr Ross was wanting to adopt the report and/or manual as his own and therefore Ms Finlay would not get any credit for it. This was not accepted by Mr Ross or Ms Watson. They said in their evidence that they always accepted that the plan was Ms Finlay's idea. I accept Ms Heaton's submission that the concern that management may take credit for Ms Finlay's idea demonstrated a level of distrust in the relationship between Ms Finlay and management from late 2005.

Did Healthcare do enough about the employment relationship between the coordinators leading up to December 2005?

[64] Ms Finlay said in her evidence that she endured a raft of insults and unprofessional conduct from the other two coordinators in the office from July until October 2005. Some of these difficulties Ms Finlay said were because of a lack of cooperation from the other coordinators in terms of her plan for realignment and difficulties with accessing support workers on an acute basis. Ms Finlay also referred in her evidence to paperwork being thrown at her by one of the coordinators and a campaign of putting coloured stickers over her computer screen with messages on them. Ms Finlay said that she felt singled out, under pressure, and that the changes she was trying to implement were being actively derailed.

[65] Lisa, the other coordinator, set out general difficulties to Ms Watson in a letter dated 29 September 2005. Some of the matters set out were Lisa's concerns that Ms Finlay would not listen effectively, there was a power struggle and the other coordinators were not

considered on the same level as Ms Finlay. Lisa also set out concerns that Ms Finlay had no insight into how her actions impacted on those around her, there were intimidating behaviours displayed and that there was a lack of communication with Ms Finlay because she disappeared for long periods without telling the team where she was going. Lisa accepted in her letter that she was not blameless as she had lost her cool with Ms Finlay several times, but she said that Ms Finlay's inability to accept others' views, opinions and directions had caused huge difficulties for her. She wrote in her letter of Ms Finlay working outside the terms for her own goals and vision.

[66] Ms Nelson in her written evidence provided to the Authority said that the matters needed to be resolved but that they were not. In her evidence at the Authority investigation meeting, Ms Nelson accepted that there were efforts made by Healthcare, which included Ms Watson coming from Nelson and having meetings with staff. Ms Nelson said with respect to the effectiveness of the meetings that there was talk but she felt that it was not genuine. Ms Nelson said that Ms Finlay was not seen as being open to reconciliation and that up to February 2006 when she left her employment she did not see the attitudes change.

[67] I do not accept Ms Finlay's written evidence that Mr Ross and Ms Watson did not want to know what was happening in terms of relationships in the office at that time. That is because the evidence does support that there were steps taken of an informal nature to try and deal with issues that arose at that stage. That is supported by Ms Nelson in her evidence.

[68] Ms Finlay said that it was clear to her that she was singled out as the person who was the outsider in the office. Ms Finlay decided to have her tea breaks separately from other staff. Mr Ross and Ms Watson encouraged Ms Finlay on occasion to join the other coordinators in the tea room. Ms Watson said that when Ms Finlay did join the others for morning or afternoon tea in the office she did not speak or eat.

[69] One of the other concerns from Ms Finlay in 2005 was that if a support worker or client telephoned in and were unhappy at that time about the realignment plan change then the other coordinators would not diffuse the situation with the client or support worker and they would ask for the concerns to be placed in writing. Ms Finlay believed the clients were also advised that the idea was Ms Finlay's rather than a direction from management.

[70] I shall go on to address the issues of complaints more fully later on, but I am not satisfied that it was always inappropriate to ask for complaints from those telephoning to be in writing. This is both in terms of the complaints procedure but also for business reasons as

positive and negative impacts of any change would need to be known about and assessed. I can understand Ms Finlay wanting to implement her plan and feeling frustrated at the concerns being received in writing. If there is dissatisfaction from users of the system about any change, then that however cannot be ignored.

[71] Mr Hardy-Jones submitted that in terms of the realignment plan the obligation of Healthcare was to monitor what was happening and when there was dissension from the other coordinators that attitude had to be *quickly and decisively controlled*. Mr Hardy-Jones submitted that there was an obligation on Healthcare to support Ms Finlay because she was performing a function at her manager's direction, and referred in his submissions to the need for Healthcare to make it clear to the other coordinators the employment consequences if they did not come on board with that direction.

[72] Ms Finlay was not the only employee to be considered in terms of implementation of the plan and employment relationship. Dealing with the issue in the manner in which Mr Hardy-Jones submits could in all probability have made the employment relationship between the coordinators worse. I find that a fair and reasonable employer would have attempted as Healthcare did to get the coordinators to agree to some ground rules about implementing the plan which balanced everyone's needs, not simply Ms Finlay's.

[73] I specifically note that one of the ground rules agreed to was to decide what is going to be communicated to the client and to minimise the manipulation of the process by the client. It would seem that this ground rule was directed at trying to address Ms Finlay's concerns that clients were manipulated to view the change in a negative way.

[74] Mr Hardy-Jones is correct in his submission that there was no evidence of a threat of disciplinary action in terms of the other coordinators' views. Equally however the implementation of the realignment plan was not stopped at the first sign of dissatisfaction. A fair and reasonable solution in my view was not an all or nothing approach. It was to try and get a workable arrangement between the coordinators as a team, deal with the difficulties and concerns that they had in a low key manner and indicate the avenues for support. Healthcare took those steps.

[75] Changing an established process is difficult but I am not satisfied that criticism can be levelled at Healthcare in terms of steps it took in 2005 to address the relationship difficulties.

[76] As it was because of the large number of concerns from support workers and clients, Ms Watson discontinued the realignment process by email dated 13 January 2006. The email provided that initially Mr Ross and Ms Watson supported the process and may do so again in the future in a more structured and controlled way. It would have been preferable for Ms Watson to discuss the email with Ms Finlay before it was sent. Ms Finlay was on sick leave at the time and the email was discussed with her on her return by Ms Watson.

[77] I also accept that there were business reasons for discontinuing the implementation of the plan because of dissatisfaction, and also because Healthcare lost money as a result of clients leaving the service. On that basis, the discontinuation of the plan was not unjustified.

[78] When questioned during the investigation meeting Ms Finlay did not deny that she continued with the plan for her own support workers after 13 January 2006.

[79] With the benefit of hindsight, having a comparatively new employee implement a plan with real potential to be controversial both with peers, support workers and clients, may not have been the wisest course of action. On the one hand it demonstrates the confidence Ms Watson and Mr Ross must have had in Ms Finlay at the early stage of her employment by them agreeing to her implementing the plan at that time. On the other hand, it would have been a difficult plan to implement for a new employee who had not yet found her feet with the role and whose skills at being able to manage change sensitively and cooperatively had not been assessed.

[80] I do not see that being given a chance to implement a plan as Ms Finlay was can be seen as a disadvantage to her or that giving her the opportunity can be seen as an unjustified action.

Christmas party

[81] Ms Finlay organised the Christmas party in December 2005. Mr Hardy-Jones's submissions are that that was unfair because it involved a lot of work, there was a lack of support from the other coordinators and little recognition for Ms Finlay's effort for what was clearly a successful event. Ms Finlay, however, agreed in her evidence that the other coordinators thanked her for her efforts and her efforts were recorded in the minutes of the coordinators' meeting on 17 January 2006.

[82] It appears from Ms Finlay's evidence that she felt put upon both in terms of the amount of work required to organise the party and the subsequent lack of appreciation which

she was shown. I am not satisfied, however, that Ms Finlay being asked and/or agreeing to organise the party could be seen as an unjustified action or a disadvantage.

The Christmas duties

[83] Ms Finlay wanted to be on duty over the Christmas period because she was to take leave in January 2006. Mr Hardy-Jones submitted that it was unreasonable for Ms Finlay to be the sole coordinator on duty given that historically there was more than one coordinator on duty over that time.

[84] Mr Ross said that more preparation than previous years had been carried out in anticipation of the Christmas break. Ms Finlay did have an on call coordinator to assist her and there was assistance available for administrative type matters. Ms Watson said in her evidence that she did not consider Ms Finlay to be a new or junior member of the team as she had been employed since June 2005.

[85] It was clarified for me during the investigation meeting that Ms Finlay had been on her own for the Christmas duty for three days on 28, 29 and 30 December 2005. Ms Finlay was then on a combination of public holiday and annual leave and then sick leave.

[86] I do not consider, having heard the evidence, that Healthcare agreeing to Ms Finlay undertaking the Christmas duty on her own amounts to an unjustified action. It seems to me, in considering this particular complaint, that it arose because it was over this period that Mr Ross and Ms Watson discovered issues that they considered to be performance concerns for Ms Finlay. Not all of the performance concerns at that time were matters that arose over the three days Ms Finlay was on duty over the Christmas period, but were discovered after that period.

Performance issues and the performance plan

[87] Over the Christmas holiday period, Mr Ross and Ms Watson gave evidence that performance issues came to light about Ms Finlay. The evidence was that there were complaints received from the on call coordinator, the referring agencies, and some families and support workers. Mr Ross and Ms Watson perused Ms Finlay's files to look into the problems and how they arose. They both concluded that there were numerous errors or omissions in Ms Finlay's paperwork and inputting into the client computer system.

[88] Ms Watson gave evidence that she calculated the business had lost approximately \$30,000 as a combined result of the realignment concerns, issues of documentation and consequent loss of clients.

[89] I accept Ms Watson's evidence that a critical part of Ms Finlay's role was to correctly input data into the computerised client management system. The management system was described in evidence as a tool in terms of service delivery that was integral to Healthcare's contracts with the DHB, ACC and the Ministry of Health and the discharge of various statutory duties and functions such as health and safety. Ms Watson explained in her evidence that errors made in terms of data input could cause a significant "knock-on" effect with respect to payroll, rosters and invoices.

[90] Ms Watson telephoned Ms Finlay on 10 January 2006 to arrange a meeting to discuss the issues that had arisen and the various complaints. Ms Finlay was on sick leave at that time but she agreed to return to work the following day and meet with Ms Watson and Mr Ross to discuss issues.

[91] The meeting on 11 January 2006 was documented. Ms Finlay said that she was very busy leading up to and over the Christmas period and worked long hours. Ms Watson investigated that and did not conclude that that was the situation from log in and log out records and numbers of new clients.

[92] Ms Finlay was also shown various complaints that had arisen.

[93] A verbal warning was issued to Ms Finlay on 16 January 2006 for her document keeping. The meeting on that day was also documented and the notes reflect that Ms Finlay agreed that she could not deny that her record keeping was not up to standard on the evidence provided. Her explanations in respect to the complaints were accepted.

[94] Ms Watson advised Ms Finlay at that meeting that she would commence a performance monitoring programme to assist her with the improvement of her documentation and data entry to prevent incidents of errors and complaints arising in the future.

[95] The performance monitoring process then took the form of daily meetings from 23 January 2006 until 27 February 2006. Primarily these meetings were between Mr Ross and Ms Finlay. Mr Ross saw that these meetings were in the form of coaching, although at a

later meeting with Ms Watson and Mr Ross on 17 March 2006 Ms Finlay disputed the use of that word as a description of the process that had taken place.

[96] On 27 February 2006, Ms Finlay was provided with an audit tool which had 41 audit points against which her documents would be assessed. The audit tool was discussed with Ms Finlay at the meeting that took place on that day.

[97] From 27 February 2006, Ms Finlay's meetings changed from daily to weekly. Ms Watson gave evidence that Ms Finlay's workload was reduced when she expressed concern about it. There was evidence that supported that Ms Finlay had less caregiver hours than the other coordinators. For example, one of the other coordinators, Shirley, had 782 caregiver hours and 213 clients. Ms Finlay had 597 caregiver hours and 168 clients (see audit document). Ms Finlay was also not rostered during that time on the on-call and was asked to keep regular hours of work.

[98] Ms Brosnan said that it was only during the Authority investigation meeting that it became clear the 41 points in the audit tool presented to Ms Finlay on 27 February 2006 was the reason Ms Finlay maintained there was a new performance criteria and a shifting of the goalposts. Mr Ross and Ms Watson did not accept that the 41 points in the audit tool was a shifting of the goalposts.

[99] I find that in late February 2006 Ms Finlay had become quite distrusting of the process in terms of her performance. Recorded at the meeting on 27 February 2006 was a comment to the effect that Ms Finlay had learnt from the coaching so far and at that point believed what requirements are expected of her in relation to documentation. In her own diary entries for that day she noted *Milly admits that the coaching process was apparent and an insult to my human rights furthermore realising that the intimidation of the peer process was a constant reminder of how unprofessional the environment has become.*

[100] In early March 2006 Ms Finlay questioned Ms Watson about whether Ms Watson wanted her to resign. Ms Watson made it clear that resignation was not sought from Ms Finlay. Ms Finlay also asked for the meetings to be tape recorded.

[101] Ms Finlay had also been asked as part of the performance process to provide Mr Ross with copies of her Outlook calendar. I accept Mr Ross' evidence that he could not access Ms Finlay's Outlook calendar from his own computer. There were some further matters arising that were put to Ms Finlay from investigation on 15 March 2006 although it seemed that no further action was taken with respect to those matters.

[102] There was also an occasion when Ms Finlay was asked to provide an explanation for failing to provide Mr Ross with her Outlook calendar printout so that Mr Ross could be aware of clients that Ms Finlay was visiting.

[103] Throughout the performance process, there were offers made to Ms Finlay for her to access the employee assistance programme and there were frequent reminders to her that she could bring a support person with her to the meetings.

[104] I find Ms Finlay was giving somewhat mixed messages as to how she was feeling during the performance process. By 23 March 2006, Ms Finlay had decided to place the matters about the performance process in the hands of her solicitor, Mr Hardy-Jones.

[105] Mr Hardy-Jones wrote to the General Manager of Healthcare, Peter Hausman, and the Southern Area Manager, Mark Leggett by letter dated 23 March 2006. He advised in his letter that Ms Finlay had an employment relationship problem and raised a personal grievance that she had been disadvantaged in her employment. Mr Hardy-Jones went through and provided explanations for the 14 separate matters that Ms Finlay had been asked to answer when she returned to work in January 2006. In his letter, Mr Hardy-Jones said that he did this to demonstrate the triviality of the allegations acknowledging, in his letter that Ms Finlay's explanations to those matters appeared to have been accepted. Mr Hardy-Jones said in his letter that the daily reporting regime was totally unjustified bearing in mind the minor nature of the complaints. Mr Hardy-Jones also set out responses to the latest allegations about the failure to provide an Outlook calendar printout and the visit of clients.

[106] Mr Hardy-Jones noted in his letter that it was clear that what was behind the allegations and the investigation process was a system by which *Ms Finlay will be harassed into leaving the workplace*. Finally, compensation of \$20,000 was sought in the letter.

[107] As already stated, Mr Hardy-Jones has made mention that the failure by Ms Finlay to prepare a manual was part of the reason for the claim that there was a campaign of harassment, unfair treatment and unrealistic expectations placed on Ms Finlay.

[108] By letter dated 31 March 2006, Adrienne McBride, human resources adviser at Healthcare, responded to Mr Hardy-Jones and did not accept that the situation was as Mr Hardy-Jones had set out in his letter with respect to Ms Finlay. Specifically, Ms McBride said in her letter about the manual:

Milly had come to us with an idea to realign the Support workers and Clients so that less travel was required by the staff. That was a great idea and made business sense. The guidelines regarding implementing these changes were put in place. We asked that Milly look at expanding on these guidelines so that the information could be sent to other areas within the company. There was no expectation that this had to be completed nor any timeframes for this given as it was a low priority for us.

[109] Further, Ms McBride did not accept that Ms Finlay had in any way been harassed, mistreated or that she had had unrealistic expectations set. Ms McBride set out the reasons for this conclusion in her letter.

[110] Before that letter from Ms McBride was received, Mr Hardy-Jones attended a meeting at Healthcare with Ms Finlay on 24 March 2006. The notes of that meeting make it clear that there was an allegation that Ms Finlay thought her workplace was emotionally unsafe and that Mr Hardy-Jones is recorded as stating that Ms Finlay's treatment was appalling and that the processes were a discredit to Mr Ross and Ms Watson and that they should be ashamed of themselves. As I understand the evidence, this comment was in relation to the way continuing issues were being put to Ms Finlay and the performance plan to date. At that point, Ms Watson advised Mr Hardy-Jones that Healthcare human resources would be consulted and the meeting did not appear to progress beyond that point.

[111] The evidence supports that the weekly performance meetings stopped on 13 April 2006 and the matters were then essentially left with discussions between Mr Hardy-Jones and Ms McBride. As I understood Ms Finlay's evidence at the investigation meeting, her main concern was that she had been singled out and was not performing at a lower level than the other coordinators, but had been subjected to a performance review process.

[112] Mr Hardy-Jones wrote to Ms McBride on 3 May 2006 referring again to the assessment and review meetings as burdensome and an indication of continued unfair treatment. By this time the meetings had in fact stopped. Mr Hardy-Jones also challenged Healthcare in his letter to assess other employees by the same stringent standards that Ms Finlay had been assessed and then *convince us that Milly's paperwork is at a lower standard than others.*

[113] On the basis of Mr Hardy-Jones' request, it was agreed with him that an independent file audit would be carried out for all three coordinators to try to address the concerns that Ms Finlay was being singled out. The audit was carried out by a service manager who flew down from Wellington and audited 10 files from each of the Blenheim coordinators. Mr Hardy-Jones selected the files for audit.

[114] The audit took place on 5 May 2006 and the results were provided to Mr Hardy-Jones by Healthcare under cover of letter dated 9 May 2006. The audit showed Ms Finlay's documentation at 45% accuracy and the other two coordinators in mid to high 60% accuracy. Mr Ross said that it was apparent from the audit that one of the other coordinator's documents did require some attention, but that she was responsive to assistance and direction and quickly returned to an acceptable level. It is also clear from the audit that that coordinator was carrying a higher workload than Ms Finlay as set out earlier in this determination.

[115] On the face of the audit results provided with the letter of 9 May 2006, it did not support that Ms Finlay was singled out in terms of her performance. The results supported that Ms Finlay needed some assistance and support with meeting the very high standard expected from her employer in terms of documentation. Employment law recognises that an employer is entitled to expect a high standard or level of performance from an employee but equally there is an expectation that an employee will be supported and trained to reach that standard.

[116] The letter of 9 May which provided the audit result also provided that Ms Finlay was to be issued with a written warning for not using Outlook as requested by Mr Ross to document her client visits for 16 March 2006. One of the concerns for Healthcare was the number of visits that Ms Finlay made to clients. I have formed the view from hearing the evidence that Ms Finlay enjoyed undertaking client reviews. Ms Watson said in her evidence that the coordinator's role was primarily office-based and there were concerns from the other coordinators about having to take messages in Ms Finlay's absence which contributed to an increase in their own workloads. Mr Ross wanted to know Ms Finlay's whereabouts and monitor the clients she was visiting to assess that.

[117] I am satisfied that Ms Finlay was given an opportunity to comment on her failure to provide a copy of her Outlook calendar for the day in question and that in terms of that process Mr Hardy-Jones was available as a representative. In all those circumstances, and particularly given the concern that was held by management at Healthcare Blenheim, I am of the view that the warning was not unreasonable and is what a fair and reasonable employer would have done in all the circumstances.

[118] One of the concerns for Ms Finlay was that she was the only employee required to provide Mr Ross with a copy of her Outlook calendar and was therefore again being unfairly

singled out. I find that this matter was addressed, albeit not until October 2006, by requiring all coordinators to provide Mr Ross with a copy of their Outlook calendars.

[119] Mr Hardy-Jones raised some issues about the audit and I am satisfied these were fairly responded to by Healthcare. It is clear from the correspondence and from Ms Finlay's own evidence that she did not accept that the audit was carried out in a fair way. Ms Finlay said the questions asked unfairly assisted the other coordinators and not her and that the audit was carried out on a different basis to that which her files and documentation were considered in the process that finished in April 2006.

[120] On Ms Finlay's behalf, Mr Hardy-Jones disputed some of the audit findings and these were reconsidered by the auditor and some changes agreed to. These changes lifted Ms Finlay's score from 45% to 48% and this is reflected in the attachment to Ms McBride's letter of 10 July 2006. In my view, this demonstrated that there was an emphasis on attempting to deal with Ms Finlay's concerns that she was being singled out. It was becoming clear at that point that Ms Finlay was not going to accept that she was not being singled out.

[121] Ms McBride, clearly recognising the difficulties in the situation, noted in her letter of 10 July 2006 that there had been no resolution of Ms Finlay's personal grievance since it had been raised on 23 March 2006. She said in her letter that all the indications were there was going to continue to be disagreement about the audit results and on that basis Ms McBride requested mediation be held.

[122] Mr Ross and Ms Watson gave evidence that the concerns about Ms Finlay's documentation continued until she went on special leave in late November 2006.

[123] Mr Hardy-Jones submits that the treatment of Ms Finlay during the performance process was unfair. The first matter in submissions is that a number of complaints were raised with Ms Finlay on her return from sick leave. Whilst accepting that that is not the best time to present an employee with concerns, Ms Finlay had indicated that she was to return to work on that day. Ms Finlay's explanations to the complaints were accepted and I do not conclude, in the particular circumstances, that she was disadvantaged in that matter.

[124] Mr Hardy-Jones submits the performance process was unfair and procedurally flawed. I find that Healthcare had become dissatisfied with Ms Finlay's performance and wanted her to improve her performance. Mr Ross spent about one hour a day for a period of three weeks with Ms Finlay to try to achieve a higher standard of performance and I accept

that it could be seen as more intensive than some performance processes. Equally during that time it was seen by Healthcare that Ms Finlay's documentation improved.

[125] The meetings were then reduced on 27 February 2006 to weekly, Ms Finlay's workload was reduced during her performance process and she was offered the option of participating in the employee assistance programme.

[126] One of the other concerns that Ms Finlay had was that she was being singled out or unfairly targeted in terms of her documentation. As part of my investigation, I have had regard to all the documentation and importantly to the audit that was carried out at Mr Hardy-Jones' request. The audit shows that Ms Finlay was performing at a level below that of the other two coordinators and below 50% accuracy. I do accept that 85% to 100% accuracy was a target no coordinator was reaching, but in my view that would not have been obvious until after the results of the audit, by which time the performance process had ended.

[127] In conclusion, objectively assessed, the audit did support that Ms Finlay required some help and assistance with her documentation and I do not find there is evidence to support that the process embarked upon in January 2006 was for reasons other than genuine performance concerns. I do not conclude that it was carried out to single out or harass Ms Finlay.

[128] One of the other criticisms of the process is that the initial concerns in January 2006 came from a detailed inspection of Ms Finlay's files by Mr Ross and Ms Watson rather than being generated by client complaints. In other words, as I understand the particular concern, it was that Ms Finlay's managers were searching for faults. Concerns were clearly brought to Ms Watson's attention over the Christmas period that led her and Mr Ross to the conclusion that there were errors in Ms Finlay's documentation. It was those concerns which prompted an inspection of the relevant documentation. Healthcare is entitled to look at its own employees' documentation from time to time rather than waiting for an external complaint before doing so.

[129] I have finally considered whether the performance process was such that it was unfair or onerous for Ms Finlay. A fair and reasonable employer who is aware that there is an area of weakness in terms of an employee's performance is required to provide support, training and assistance before reaching any sort of conclusion that that employee is not able to perform the functions of the role. In this case, I have found that there was concern about Ms Finlay's documentation and that it was not at the standard required. A decision was

made that there would be daily meetings initially for a three week period. Ms Finlay felt that the performance process undertaken was stressful and difficult.

[130] I do not conclude, objectively assessed, that daily meetings for an hour for three weeks is so unreasonable so as to amount to harassment. I accept Ms Watson's evidence that there was a particularly high level of feedback and coaching required because of the exacting documentation requirements. There is no evidence to support that the process was undertaken as part of a campaign to get rid of Ms Finlay.

[131] Ms Finlay was of the view that the audit tool provided created a shifting of the goalposts. Even if it was considered unjustified for Healthcare to introduce such a tool, and I am not satisfied that it was, I am unable to find any corresponding disadvantage to Ms Finlay because such a tool was only used for a short period of time, after which the whole performance process was stopped.

[132] In conclusion, therefore, I am not satisfied that Ms Finlay has a claim that she was disadvantaged by the performance process undertaken by Healthcare. It was an important part of Ms Finlay's role to be accurate in her paperwork and when mistakes were found they were pointed out to her and a process commenced to improve the accuracy of her documentation. When Mr Hardy-Jones complained about the performance process and the impact it had on Ms Finlay the process was stopped. There was also an independent audit of the other coordinators' files undertaken at Mr Hardy-Jones's request which should have reassured Ms Finlay that she was not singled out.

Complaints

[133] Ms Finlay said that, during her period of employment with Healthcare, complaints against her were manufactured, encouraged or engineered. It came to my attention during a telephone conference with Mr Hardy-Jones and Ms Heaton, that Mr Hardy-Jones and Ms Finlay had approached some clients of Healthcare in this regard. As many of the clients of Healthcare are elderly and/or unwell, I recorded in my directions notice following the conference that no clients were to be contacted until the Authority had had an opportunity to assess the evidence. If I was to conclude that it was necessary to talk to clients, then I recorded in my directions notice that I would, in consultation with the representatives, decide the best way to do this. I have not considered that I need to involve or talk to clients in this matter. The issue for me was whether the complaints were dealt with in accordance with Healthcare policies.

[134] I accept Ms Watson's evidence that Healthcare is externally audited by several bodies and has to have evidence for audit purposes to demonstrate that if there is a complaint that it is actioned. Complaints or incidents are recorded on a standard form and investigated by seeking comments about the alleged problem. The evidence was that there was a higher proportion of complaints received about Ms Finlay than any other employee or coordinator in the office, although it was accepted that there were complaints about other staff. Mr Ross said that, given the frontline healthcare service provided, it was inevitable that third parties would have complaints from time to time.

[135] Both Mr Ross and Ms Watson strongly denied that any complaints were manufactured or engineered or dealt with in a different way from complaints received about other employees when they regarded interactions with respect to Ms Finlay. Ms Watson described the situation with complaints as all becoming too much toward the end of 2006 and complaints involving Ms Finlay were put through Mr Hardy-Jones. Ms Watson said there were 50 to 60 complaints received involving Ms Finlay although not all of them were reduced to writing.

[136] I do not conclude that the evidence supports the complaints about Ms Finlay were engineered or encouraged. A complaint may well have been trivial or even mistakenly have been about Ms Finlay when it should have been about someone else. That is different from the situation where a complaint is engineered or encouraged or unduly escalated. In terms of fairness, it was important that the complaints were dealt with in accordance with the required complaints procedure. I am not satisfied, from the evidence, that they were dealt with other than in accordance with the complaints procedure. It is also important that Ms Finlay had an opportunity to answer and give her view about a complaint and I am satisfied that opportunity was available to her.

[137] The other matter that is important in terms of fairness is the outcome of complaints. It did not appear from the evidence that I saw that there was any disciplinary outcome from complaints. Certainly Mr Ross gave evidence that he could not recall there having been such an outcome.

Vehicle

[138] There was no reference within Ms Finlay's individual employment agreement to the provision of a vehicle for her private use. Ms Finlay's pay records that were provided to the

Authority after the investigation meeting reflected that she had on occasion claimed, and was paid, car mileage.

[139] There were two vehicles with Nelmar signage available for Ms Finlay to drive during the day if she required a vehicle. Up until January 2006, Ms Finlay had been permitted to take the vehicle home overnight if she wanted to. Another coordinator would take the other vehicle home. The evidence supported this was largely for security reasons.

[140] There is no dispute that Mr Ross advised Ms Finlay in January 2006 that she could no longer take a vehicle home although her use of the Nelmar vehicles during the day was unrestricted. Mr Ross said that he viewed taking the car home as a privilege and performance issues had occurred at that time with Ms Finlay and she was often on sick leave and therefore that caused some difficulties in terms of the others accessing the car during the day.

[141] The evidence does not support that it was a term and condition of Ms Finlay's employment agreement that she have a vehicle for her private use. Her ability to take it home was therefore in the nature of a privilege which Healthcare was entitled to withdraw, although one would normally expect a reasonable period of notice before doing so. If there was a disadvantage it was not in the removal of the ability for Ms Finlay to take the car home, but the failure to give reasonable notice before that occurred together with a clear reason to Ms Finlay as to why that privilege was being withdrawn.

[142] This matter was not formally raised as a concern for Ms Finlay until 22 February 2007 which I find is well outside the 90 day period. In those circumstances, I do not find that there was a personal grievance raised in terms of the removal of the vehicle and I do not find, because of the nature of the disadvantage which would exist in the removal of the privilege, that it was in the nature of a continuing breach.

Support work and on call work

[143] It had been agreed between Healthcare and Ms Finlay that she could, outside of her work hours and usually on the weekend, work as a support worker for Healthcare when required. This was work in the nature of secondary employment. There was no information provided at the investigation meeting about the financial benefits of that work to Ms Finlay. After the investigation meeting, Ms Heaton provided a copy of Ms Finlay's full pay records to the Authority and Mr Hardy-Jones.

[144] Ms Finlay did 129.5 hours of support worker work between July and December 2005 at an hourly rate of \$14 per hour. The work performed by Ms Finlay as a secondary nature decreased significantly between late October 2005 and the end of December 2005.

[145] When the on call work was removed from Ms Finlay as part of the performance process, the support worker work was also removed. Ms Watson said that this was because Ms Finlay indicated that she was overworked. The inability to continue with that secondary work was one of the areas Ms Finlay said she was disadvantaged in when she was advised that she could no longer undertake this work in or about February 2006. This decision was never revisited.

[146] I am not satisfied that the decision to stop providing Ms Finlay with some support worker work was justified. It is somewhat difficult to see how removing the weekend work would have reduced Ms Finlay's workload during the week. The other matter that I note is that it was an area that Ms Finlay particularly enjoyed in terms of what was otherwise a difficult employment situation.

Heather Bates

[147] A matter was raised about the removal of Heather Bates as a support worker from Ms Finlay. Ms Bates gave evidence at the Authority investigation meeting and said that she was told by Mr Ross that she was not to have contact with or morning tea with Ms Finlay as she had had a habit of doing in the past. As I understand Ms Bates' evidence, this was from in or about March 2006.

[148] Mr Ross said that he could not have told Ms Bates not to have any contact or to talk with Ms Finlay. He put the context of any discussion with Ms Bates in terms of the complaint that Ms Bates had made to him in early March 2006 about Ms Finlay. When I put written notes about the complaint to Ms Bates, she could not remember raising a complaint but also said she was probably tired and that she had a short fuse.

[149] I find it more likely than not that there was a meeting between Ms Bates and Mr Ross to discuss a concern of Ms Bates, that Ms Finlay had been inappropriate in her management of her and that she felt she was being used to undermine Mr Ross' role as service manager. The notes taken at that time reflect that Ms Bates expressed she would be happy to continue with Healthcare if another coordinator was assigned.

[150] It seemed from the documentation that this matter was also the subject of an investigation with Ms Finlay – document 67 of the respondent’s bundle. No further action, however, was taken with respect to that matter.

[151] It is unfortunate Ms Bates and Ms Finlay could not have tea together. Mr Hardy-Jones has placed a considerable amount of emphasis on this matter. It was not raised in or about March 2006 when in all likelihood that was when the interaction stopped between Ms Finlay and Ms Bates. Had it been raised, I imagine that between Mr Hardy-Jones and Human Resources the matter could have been resolved.

[152] It also seemed to me that the instructions seem to have been tied up with Ms Bates’ own concerns about Ms Finlay. As a result I am unable to firmly conclude that Ms Bates herself objected at the time to being told by Mr Ross not to have tea with Ms Finlay. I am not satisfied that Mr Ross told Ms Bates that she could not have any contact with Ms Finlay.

10 minutes only for morning and afternoon tea

[153] One of Ms Finlay’s concerns was that she was only allowed to have 10 minutes for morning and afternoon tea and other staff were given a longer period. Having heard the evidence in relation to this complaint and read the relevant documentation, I find it more likely that this was a timeframe that Ms Finlay placed on herself rather than it being imposed externally.

[154] There was no indication that Ms Finlay was monitored at her morning and afternoon tea and she was frequently outside of the office. Again, this was a matter that was never clearly raised at the time, and could have been easily resolved if it had been. I am not satisfied that there was any action by Healthcare that constitutes an unjustified action in this regard that disadvantaged Ms Finlay.

Unnecessary deduction of 15 minutes per day from Ms Finlay’s timesheet

[155] Mr Ross accepted that he had inappropriately deducted 15 minutes from Ms Finlay’s worksheets. This situation, however, was quickly put right when Ms Watson intervened and therefore there was no consequent disadvantage to Ms Finlay. Mr Ross accepted that his conduct in deducting the 15 minutes was unacceptable. That matter was resolved.

Removal of Documents from the Office

[156] Ms McBride wrote to Mr Hardy-Jones from about June 2006 with respect to a concern that Ms Finlay had removed documentation from the Healthcare offices and this continued to be a concern for Healthcare that this was occurring in order to provide proof for the personal grievance. It was apparent at the investigation meeting that Ms Finlay still had some confidential documents in her possession and there was a discussion that the documents should all be handed back to Healthcare.

The relationship within the office

[157] The relationship difficulties in the office which I have referred to earlier in this determination existed before Christmas 2005 and continued to deteriorate after January 2006. The only communication Ms Finlay really had with her colleagues appeared to be at the regular, usually weekly, coordinators' meeting. Ms Finlay's evidence is that it was the other coordinators who isolated her and she did not accept that she was responsible for the situation which developed in terms of the office relationship.

[158] For much of 2006, I find Ms Finlay was focused on her grievance that she was harassed, singled out and that there was a campaign to *get rid of her*. Ms Finlay would record, as I have already indicated, incidents, issues and meetings in her diary from January 2006. This included recording exchanges with other employees and on occasion their movements in and out of the office.

[159] Ms Finlay tended to focus in a negative way on employment matters.

[160] In her evidence to the Authority, Ms Finlay said that she was excluded from activities within the office and gave as an example the fact that she was not invited to attend at the office on Saturday, 16 September 2006 to review files for auditing with the other coordinators. The minutes that were taken on 13 September 2006 at a coordinators meeting show that Ms Finlay would have been aware that she had this option of attending if she wished on the Saturday. Her own diary notes for 13 September 2006 state *Brian mentioned in passing to all staff that there is an option to come in on Saturday morning to go over hard files auditing – four hours or lieu time.*

[161] Notwithstanding that Ms Finlay, in an email dated 29 September 2006 which appears to have been sent to Ms Brosnan, said that she was not informed of the audit on 16 September 2006. I think it is more likely that Ms Finlay forgot about the date or thought it was another weekend. It was an example that her mistrust had increased considerably in

terms of any interactions, and she was inclined to form a negative view with respect to most matters.

[162] The relationship between Ms Finlay and her service manager, Mr Ross, deteriorated and the evidence supports that she had little respect for him. Mr Ross raised his own personal grievance in May 2006 with human resources about the environment he was working in although he decided not to pursue the matter.

[163] Mr Ross said that he began to feel undermined and unsafe in his relationship with Ms Finlay and Ms Watson then played a more active role in her management. Although initially Ms Finlay indicated she felt safe with Ms Watson, that relationship became very difficult as well.

[164] It was clear that the low key approach to the office environment and conflict was no longer adequate in 2006.

[165] Although mediation took place in September 2006, it is obvious from the documents provided that matters did not improve after mediation.

[166] Healthcare asked a registered psychologist, Gaynor Parkin, to meet with all the staff from the Blenheim office and Ms Watson to discuss communication issues within the office and suggest possible protocols or guidelines to help manage this better. She did this in early 2006. The psychologist recommended for immediate action that the personal grievance process needed to be resolved. She noted that all staff identified this as the main source of stress and that there was a strong consensus among all of the staff that the process had been creating a difficult work environment, with one staff member describing the work environment as toxic.

[167] Ms Parkin, said that several staff commented that it was the most difficult work environment they had ever worked in and Ms Parkin noted in her report that the difficulty in the work environment was evidenced by the amount of time that the area manager had been spending at, or dealing with, the Blenheim office. She estimated this at 40% of her time in one week and for many weeks up to 80% of her time.

[168] Ms Parkin said that while she did not conduct any formal clinical assessments, from the evidence she observed that five of the staff presenting with advanced signs of stress-related illness and noted four of the staff broke down in tears while speaking to her.

Ms Parkin said that for all the staff their passion for their work, their commitment to the organisation and to their clients had prevented them from resigning.

[169] For the future, Ms Parkin noted that within the next three months, once the personal grievance process was resolved, that there needed to be remedial work and she also made comments about the importance in the future of staff selection with a documented track record of professional behaviour in personal working relations and accurate and thorough record keeping.

[170] Clarification was sought by human resources at Healthcare from Ms Parkin as to what could be done at the present time to improve communication work. An email was received from Ms Parkin clarifying that her belief that any communication work within the team was not recommended because of the evidence of general mistrust and suspiciousness in the office as a consequence of the grievance process which would get in the way. Team members reported they did not feel safe saying what they thought or how they felt and were concerned about the consequences of speaking frankly.

[171] On 17 November 2006, Ms Brosnan wrote to Mr Hardy-Jones with respect to allegations that Ms Finlay had acted in an inappropriate and insubordinate manner towards Ms Watson and the acting service manager, Lisa. The allegations were that Ms Finlay refused to comply with a reasonable and lawful instruction from the acting service manager, Lisa, to document a visit. The allegation was that Ms Finlay had almost immediately *blew up* and told Lisa to *be quiet and grow up* with her voice becoming louder and louder, and then threatened Lisa to report the conversation to Healthcare in the email she was currently writing. The second allegation concerned the tone and manner of the conversation between Ms Finlay and Ms Watson.

[172] Mr Hardy-Jones responded on 20 November 2006 by letter stating that Ms Finlay was placed under pressure by both Ms Watson and Lisa and that Healthcare was not providing a safe environment for Ms Finlay.

[173] Ms McBride responded on 22 November 2006 and proposed special leave for Ms Finlay if she was not well enough to be in the workplace. Ms McBride also questioned when Ms Finlay would be available to discuss the allegations.

[174] On being advised of the stress that Ms Finlay thought the workplace was generating by letter dated 23 November 2006, Healthcare asked Ms Finlay to remain away from the

workplace on special leave and then Ms Finlay obtained medical certificates and was off on paid leave until her employment was terminated.

[175] Healthcare did ask to be provided with details as to the nature of the concerns Ms Finlay had about the workplace and these were provided as set out previously in this determination by letter dated 22 February 2007.

[176] The matters then came to a head when staff were advised that a plan should be put in place to return Ms Finlay to work and they provided statements in writing advising that they would resign if that took place.

Determination

Unjustified action causing disadvantage

[177] When the Authority is presented with the amount of detail about an employment relationship as it was in this case, then care must be taken not to pedantically or minutely examine matters that fall into the category of the normal ups and downs of an employment relationship. If the Authority is not careful in this regard, then it may make the error of regarding these matters in a more serious manner than is justified in the particular case.

[178] There were times in the employment relationship when Ms Finlay was not treated as well as she could have been. Mr Ross, for example, refusing Ms Finlay leave on the basis that she had only given 14 days' notice instead of nine days was one such occasion. Mr Ross freely accepted in his evidence that his conduct in that behaviour could be considered *mean spirited*. Ms Finlay's reaction to that refusal as described by Mr Ross in his email to human resources, was concerning. I find Ms Finlay described the refusal of Mr Ross in words such as the *crown jewel* in her grievance. The better approach would have been for Ms Finlay or for her representative, Mr Hardy-Jones, to have asked for that decision to be revisited at a higher level.

[179] The situation with Ms Bates could have been dealt with in a better way by Mr Ross, but that matter was not one that was clearly raised as an issue when the relationship was ongoing.

[180] From early 2006 Ms Finlay believed that her employer singled her out in terms of its treatment, harassed her and attempted to get rid of her. That became the platform from which Ms Finlay viewed all interactions between herself, her colleagues and management. I

do not find on all the evidence before me that Ms Finlay was justified in her view of her employer.

[181] I have carefully considered and reflected on the many issues that were raised. I find that there are only two actions on the part of Healthcare that I conclude were unjustified and disadvantaged Ms Finlay. The first was the removal of the support worker work on the weekends and the second the failure to visit the on-call roster.

[182] For reasons I set out earlier, I am not satisfied that the action of removing the support worker work was justified because it is unclear in my view how this would have reduced Ms Finlay's workload as it was usually performed on the weekend. Ms Finlay was disadvantaged by that matter in terms of the reduction of her income.

[183] The other action that I find was unjustified was the failure to revisit whether or not Ms Finlay should have been on the on-call roster. That matter could easily have been resolved, but it did not appear to have been raised before 22 February 2007.

[184] The loss of income from the on-call work would not have been significant. Taking into account that Mr Hardy-Jones did not ask for Ms Finlay to be reinstated onto that work, then I do not intend to make any award for loss of income in terms of that matter.

[185] In terms of the loss of the opportunity to Ms Finlay for support worker work, I have had some guidance with what was earned for the 2005 period in terms of that work. In awarding a sum, I have to take into account that this matter was not raised earlier and the figure therefore will only be what I consider to be a fair amount for lost income in that period taking into account that the work had begun to decrease from October 2005.

[186] I order Healthcare to pay to Amiria Finlay the sum of \$700 gross in terms of the loss of income from the support worker work.

[187] I dismiss all the other claims for unjustified actions causing disadvantage.

Unjustified dismissal

[188] Ms Finlay was dismissed for reasons of incompatibility. Healthcare had formed the view that its relationship with her was frustrated by reason of incompatibility between employees. This was in light of the knowledge only acquired in April 2007 that if Ms Finlay returned to work, four out of five employees in the Blenheim office would resign as would the area manager who was not based in the Blenheim office but oversaw the Blenheim office

as part of her duties from Nelson. Healthcare referred, as part of its reasons, to the tortuous history of the matter together with the unsolicited refusals by these employees and managers to work with Ms Finlay.

[189] In *Mabry v. West Auckland Living Skills Home Trust Board (Inc)* Employment Court AC86/01, Judge Travis held that the essential issues going to justification in an incompatibility case could be encapsulated as:

- (a) The employer must have reasonably concluded that the employment relationship was irreparable;
- (b) If so, the employer must include, on reasonable grounds, that the irreconcilable breakdown was attributable wholly or substantially to the employee to be dismissed; and
- (c) The employer must effect the dismissal in a fair manner.

[190] In *Mabry* it was recognised in relation to incompatibility that it is unlikely there will be single or multiple incidents of related misconduct but rather evidence of a snowballing effect in respect to incompatibility issues over a reasonable period of time.

[191] Both counsel in their respective submissions recognised that the circumstances need to be *entirely convincing to uphold a decision to dismiss for incompatibility*. Ms Heaton recognised in her submission the view of the Court that such cases will be *unusual and rare* – *New Zealand Fire Service v. Reid* [1998] 2 ERNZ 250.

[192] Each case in terms of incompatibility turns on its own facts which require examination in some detail.

[193] I am also aware in this case, although not raised by either representative, of s.121 of the Employment Relations Act 2000 with respect to the absolute privilege of any statement made or information given in the course of raising a personal grievance or in the course of attempting to resolve the grievance or in the course of any matter relating to a personal grievance.

Was Healthcare entitled to come to the conclusion that the employment relationship was irreparable?

[194] The view Ms Finlay had about her employer and the resulting distrust was a significant barrier between Ms Finlay and those who attempted to manage her. It is also

clear that Ms Finlay viewed her colleagues with the same degree of mistrust as her managers and the interviews with Ms Parkin confirm that the other staff were well aware that Ms Finlay had alleged a personal grievance.

[195] There were many examples of the difficulties experienced by Mr Ross and Ms Watson. Although I did not hear evidence from the three staff who were not managers it is clear that they considered Ms Finlay disrespectful in her interactions with Mr Ross and Ms Watson.

[196] Mr Ross said that his relationship with Ms Finlay deteriorated to the extent that he thought if he said anything to Ms Finlay then her lawyer would be told about it. He felt that he could not direct her in these circumstances.

[197] Ms Watson presented a factual written statement of evidence to the Authority. She expressed in her answers to the Authority very strong and, in my view, genuinely held views about the difficulties she felt existed in her relationship with Ms Finlay and management of Ms Finlay. Ms Watson was of the view, as I understood her evidence, that in essence Ms Finlay could not or did not want to perform her role and that her behaviours were in part to cover or disguise that. Ms Watson had been asked, given the issues with Mr Ross, to play a significant role in the management of the Blenheim office and it had clearly taken its toll on her.

[198] It was also clear by November 2006 that there was no real benefit in further communication work because of the general mistrust and suspiciousness in the office until Ms Finlay's personal grievance was resolved.

[199] On the basis of the material that I have read, including Ms Finlay's own diary notes, and the clear statements that five staff would resign if Ms Finlay returned to work, then a fair and reasonable employer would conclude that as at April 2007 the employment relationship between Ms Finlay and Healthcare was irreparable.

Was the irreconcilable breakdown attributable wholly or substantially to Ms Finlay?

[200] I have stood back and considered all the evidence in order to answer the question whether the irreconcilable breakdown was wholly or substantially due to Ms Finlay.

[201] I have considered the evidence from Mr Ross and Ms Watson and read the written statements from staff in trying to understand how the situation got to the stage where five staff would resign if Ms Finlay returned to work.

[202] I have reached a firm view that from late August 2006 Mr Ross and then later Ms Watson found the situation with Ms Finlay to be unmanageable. I think that would have been obvious to the other staff. Human Resources was certainly involved in terms of interactions with Mr Hardy-Jones, but for day to day matters Ms Watson was left to manage an increasingly difficult situation. The evidence supports that whilst some performance or relationship issues were dealt with formally with Ms Finlay, many were simply left when it became too difficult and confrontational, or the concerns too numerous. There may also have been a view that the existence of the personal grievance required a different approach to everyday workplace relations. Ms Watson in my view did her best to manage the Blenheim office but eventually needed more assistance and support in managing the situation.

[203] I conclude that the decision by three staff, Mr Ross and Ms Watson to resign if Ms Finlay returned to work was the failure by Healthcare to properly manage and stop behaviours that were causing concern and stress, and impacting on the relationships in the office. The statements provided to the Authority refer to many situations that required management before it got to the stage of staff feeling they had to resign. Healthcare took some good steps by engaging Ms Parkin and trying to improve communication but management was still required. On that basis, therefore, I am not satisfied that the reason for the irreconcilable breakdown or incompatibility was attributable wholly or substantially to Ms Finlay.

Would a fair and reasonable employer have dismissed Ms Finlay in all the circumstances?

[204] Ms Finlay was aware through her representative of the views of her colleagues and was provided with their statements in April 2007. Mr Hardy-Jones responded to Healthcare by letter dated 4 May 2007 and, amongst other matters, advised that *our client does not accept the allegations made by staff members and wishes to be heard in the staff members' presence with counsel's assistance to ascertain the truth or otherwise of the various allegations made.*

[205] Mediation then took place before Ms Finlay's employment was terminated.

[206] Ms Finlay was represented during this process and had an opportunity for input knowing the preliminary view of Healthcare was that there was incompatibility and that most of the staff were intending to resign if she was to return to work in the Blenheim office. I accept that Blenheim is a small area and that to replace the staff who said they would resign would be extremely difficult if not impossible.

[207] I do accept that a fair and reasonable employer would conclude that the employment relationship was irreparable because of the situation with staff at August 2007. Given my finding on an objective assessment that many of the reasons that led the employees to say they would resign were ones that should have been properly managed earlier then I do not find that a fair and reasonable employer would have dismissed Ms Finlay for the reason of incompatibility. A failure to manage behaviours earlier led to a lack of confidence by those employees and managers about what would happen if Ms Finlay returned to Healthcare. Ms Finlay did not have an opportunity before November 2006 to explain, deny or stop the behaviours that were causing difficulty as set out in the statements with other employees she worked with.

[208] Ms Finlay has a personal grievance that her dismissal was unjustified. I now turn to the issue of remedies.

Contribution

[209] The Authority has to consider whether the actions of Ms Finlay contributed towards the situation that gave rise to the personal grievance. This is a case where I find that Ms Finlay, by her attitudes and her behaviour that I have already set out, contributed to the situation that gave rise to the personal grievance.

[210] Ms Finlay's interactions with her managers and colleagues were such that it was damaging to a productive working environment.

[211] Regrettably, I have formed a view that had these interactions been properly managed before November 2006, there is a strong probability that Ms Finlay's employment relationship may have been terminated before that time.

[212] I have assessed Ms Finlay's contribution to be significant at 60%.

Lost wages

[213] Ms Finlay should have been paid one month's notice when her employment was terminated. It may have been that since the investigation meeting when this matter was raised the parties have attended to that. I understood that they were to do so. Holiday pay should also be paid on that sum. If there are any difficulties with that matter, then I reserve leave for the parties to return to the Authority.

[214] I make no other award in terms of lost wages as it is my view that the employment relationship would not have been able to continue as it was irreparable at the time of termination.

Compensation

[215] There was limited evidence about the effect on Ms Finlay in terms of her dismissal. Much of her evidence as to feeling humiliated and distressed was focused on interactions in the workplace. Ms Finlay had been away from Healthcare from late November 2006 until her dismissal on 3 August 2007 on full pay.

[216] In those circumstances, I am of the view that a suitable award for compensation for humiliation and loss of dignity would be \$5,000 before making the necessary adjustment for contribution.

[217] Taking contribution into account I order Healthcare of New Zealand Limited to pay to Amiria MacDonald Finlay the sum of \$2,000 without deduction being compensation for humiliation, and loss of dignity.

Costs

[218] I reserve the issue of costs.

Summary of findings and orders made

- I have found there were two unjustified actions that caused Ms Finlay disadvantage. The first was that the on-call work was not revisited and the second was the removal of the secondary employment support worker work. I have dismissed all of the other claims in terms of unjustified actions causing disadvantage.
- I made no award in terms of the on-call work but made an award in terms of the loss of opportunity to work as a support worker and earn income from that in the sum of \$700.00 gross.
- I have found that Ms Finlay was unjustifiably dismissed.
- I have found that Ms Finlay was entitled to payment of one months notice and holiday pay on that payment. I have reserved leave for the parties to return to the Authority if necessary. I make no other award for lost wages.
- I have assessed Ms Finlay's contribution at 60%.

- I have ordered Healthcare to pay Ms Finlay the sum of \$2000 without deduction being compensation under s 123 (1) (c) (i) of the Employment Relations Act 2000.
- I have reserved the issue of costs.

Helen Doyle
Member of the Employment Relations Authority