Employment Court of New Zealand

Gazeley v Oceania Group (NZ) Limited [2013] NZEmpC 234 (11 December 2013)

Last Updated: 21 December 2013

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2013] NZEmpC 234

CRC 52/12

IN THE MATTER OF a challenge to the determination of the

Employment Relations Authority

BETWEEN MARGOT ELIZABETH GAZELEY Plaintiff

AND OCEANIA GROUP (NZ) LIMITED Defendant

Hearing: 19-23, 26-29 August 2013 (Heard at Nelson)

Appearances: Ms A Sharma, counsel for plaintiff

Ms K Dunn and Ms A Smith, counsel for defendant

Judgment: 11 December 2013

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff, Mrs Margot Gazeley, was employed by the defendant, Oceania Group (NZ) Limited (Oceania) as its Facility Manager at the Woodlands Rest Home and Retirement Village (Woodlands) in Motueka.

[2] During the course of Mrs Gazeley's fulfilment of the role, she was directed to work in another of Oceania's facilities, the Otumarama Rest Home. She was also seconded to assist with re-opening the Omaio Retirement Village, also a facility owned by Oceania. This was re-commissioned on an emergency basis, to assist with housing aged victims of the Christchurch earthquakes.

[3] On 7 July 2011, the auditing agency, Bureau Veritas New Zealand Limited

(BVQI) designated by the Nelson Marlborough District Health Board (the DHB) to

audit Woodlands, carried out a spot surveillance audit on the facility. This was critical of Mrs Gazeley's management of Woodlands. The following day, the DHB exercised its powers under art 22.2 of the Age-related Residential Care Services Agreement to place Woodlands under temporary management.

[4] Mrs Gazeley was on annual leave when these events occurred. When she returned from leave she was suspended without notice from her employment. Oceania then commenced a disciplinary process and terminated Mrs Gazeley's employment on 30 September 2011.

[5] Mrs Gazeley raised personal grievances against both the suspension and the dismissal. These were not resolved, becoming the subject of proceedings in the Employment Relations Authority (the Authority) and there followed a determination that she was not unjustifiably suspended or dismissed.1 There was a subsequent determination ordering her to pay the sum of

$32,954 to Oceania as a contribution towards its costs and disbursements.2 Execution of that costs determination was later stayed by the Court.3

[6] Mrs Gazeley filed challenges to the determinations. She sought a de novo hearing. She had also previously applied unsuccessfully for interim reinstatement.4

The pleadings

[7] The final form of pleadings consists of an amended statement of claim dated

3 May 2013 and a statement of defence to amended statement of claim dated 31 May

2013. The statement of claim is a substantial document necessitating detailed pleadings in answer from the defendant.

[8] There are five causes of action pleaded:

a) unjustifiable suspension;

1 [2012] NZERA Christchurch 261.

2 [2012] NZERA Christchurch 67.

3 [2013] NZEmpC 104.

4 *Gazeley v Oceania Group (NZ) Limited* [2012] NZEmpC 8.

b) unjustifiable dismissal;

c) breach of a contractual requirement to carry out periodic performance reviews (this was abandoned at the hearing upon concession as to limitation);

d) breach of Principle 11 of the Privacy Act 1993 by disclosing the

plaintiff's personal information to the media; and

e) breach of the obligation of good faith. (Section 4(A)(b)(iii) of the Employment Relations Act 2000 (the Act) is relied upon as setting the obligation when it should be s 4 (1)(a)).

[9] The remedies sought are:

a) permanent reinstatement;

b. reimbursement for past earnings, and in the event that reinstatement is not granted, future loss of earnings;

c) reimbursement of lost benefits;

d) interest;

e. compensation for distress, anxiety and humiliation in respect of both the suspension and dismissal;
f. a penalty payable to the plaintiff for breach of the obligation of good faith; and

g) costs.

[10] The pleadings also claimed a penalty in respect of the alleged breach of contractual obligations and also sought special damages arising from pre-litigation

costs. Those remedies have now been abandoned as has any remedy in respect of the alleged breach of the Privacy Act.

[11] In respect of the challenge to the Authority's determination on costs, Mrs

Gazeley seeks to have that determination reversed or modified.

Quantification

[12] Whether or not reinstatement is granted, Mrs Gazeley seeks reimbursement of these financial claims. The submission

was made that this is an appropriate case for the Court to exercise its discretion to award greater than the three months' ordinary time remuneration as provided for in s 128(3) of the Act. As lost income will not crystallise until judgment by the Court has been issued, the final quantification has not been presented in respect of lost income, and presumably the parties will be able to calculate the sum if awarded. In addition, Mrs Gazeley is claiming loss of benefits relating to a petrol allowance of $5,000 per annum and lost KiwiSaver contributions. The penalty sought for breach of the obligation of good faith is $20,000. As compensation, Mrs Gazeley seeks $15,000 in respect of the suspension and $45,000 in respect of the dismissal.

Factual outline

[13] Mrs Gazeley was first employed by Oceania under an employment agreement and letter of offer dated 20 July 2009. Her position was to be Facility Manager at Woodlands. Mrs Gazeley had substantial experience in the industry prior to taking up this appointment, and at that time Oceania regarded her as a valuable acquisition. It was not long into her employment that favourable comments were being received by Oceania about her management of Woodlands. There was also evidence that she was responsible for increasing its bed occupancy rate. As an indication of the esteem in which she was held by Oceania and, in particular, the Chief Executive Officer, Mr Geoff Hipkins, it had asked her, in addition to her duties at Woodlands, to help oversee the rectification of deficiencies which had occurred at Otumarama Rest Home, another of the Oceania facilities. Also, when Oceania set up emergency admissions for earthquake victims at Omaio Retirement Village, another of

Oceania's aged care facilities, Mr Hipkins directed her to assist with its re- commissioning. From what later transpired in this matter, the effect of these diversions of Mrs Gazeley away from Woodlands upon her ability to manage Woodlands with its difficulties may have been significant and later overlooked.

[14] It is clear from the evidence and not disputed by Mr Hipkins and other witnesses called for both parties that Woodlands had a particularly difficult staff culture. It was recognised that there were employees who had adopted obstructive and obstinate attitudes to previous managers' attempts to improve proper administration of care for residents at the institution. These matters were discussed with Mrs Gazeley before she commenced employment. It was hoped that she would use her experience and skills to try and resolve these issues. This also may have involved the removal from the employment of those employees with these attitudes.

[15] In February 2011 there was a difficult incident with the need to administer medication to one of the residents at Woodlands. This incident involving Mrs C received some mention during the course of the hearing as being related to one of the grounds involving another resident, Mrs H, which was eventually used to dismiss Mrs Gazeley. Apparently, in order to ensure that the medication was administered as directed by the medical adviser, Mrs Gazeley and another employee used minor physical force. There was no suggestion of the resident being restrained but it was alleged that Mrs Gazeley and the other employee had breached Oceania's Code of Resident's Rights and Responsibilities in respect of this resident. An inquiry was held. This resulted in Mrs Gazeley and the other employee receiving a warning for that breach. There was no allegation that Mrs Gazeley or the other employee had breached Oceania's Restraint Minimisation and Safe Practice Handbook & Policies.

[16] During the period in which this warning was administered Mrs Gazeley was continuing with her duties at Otumarama and Omaio. She did not return fully to her work at Woodlands until 11 April 2011. On 31 May 2011, she commenced five and a half weeks annual leave. It was while she was away on leave and on 7 July 2011 that the designated auditing agency, BVQI conducted the spot surveillance audit at Woodlands as a follow up of a previous audit. The Exit Interview Non-conformities Report from this spot surveillance audit identified an alleged critical risk situation in

respect of alleged intimidation and abuse by Mrs Gazeley. The following day the DHB exercised its powers to place Woodlands under temporary management. Mrs Gazeley was later contacted at home at the end of her leave. Early on the morning of

11 July 2011, when she returned to work, she was met by Ms Barbara Sangster, Oceania's General Manager of Clinical and Quality. She was suspended by Ms Sangster at that time.

[17] On the same day the DHB undertook an assessment of residents at Woodlands to check for any signs of abuse arising from the allegations under the BVQI audit. No findings of abuse were uncovered. Nevertheless, Ms Sangster was later directed by the DHB to report an allegation relating to the forcible handling of a resident (Mrs H) by Mrs Gazeley to the Police. The Police made no further inquiries into the allegation, one of the reasons apparently being that the resident did not lay any complaint. As will be seen by the matters raised to justify the dismissal, this allegation assumed some importance in the employment relationship problems which followed. By July 2011, however, the incident was several months old.

[18] On 13 July 2011 the DHB confirmed to Oceania that as from 20 July 2011, a temporary manager was to be appointed to Woodlands. That person was to conduct a quality audit. On that same day Mrs Gazeley raised a personal grievance in respect of her suspension. Disciplinary procedures were then commenced against her with Oceania writing and setting out serious misconduct allegations.

[19] To the extent that further factual exposition is needed in this judgment it will be supplied in the following paragraphs

under separate headings.

The inquiry and disciplinary meetings

[20] Disciplinary meetings between Mrs Gazeley and her lawyer on the one hand, and Mr Hipkins and a Human Resource Manager, Ms Kate Hoyle, on the other, were conducted on 11 August 2011 and 13 September 2011. Ms Sharma, who was representing Mrs Gazeley, prepared lengthy letters for those meetings, which were clearly to provide the basis of Mrs Gazeley's submissions and responses to the allegations against her.

[21] In the period leading up to the first meeting, Ms Sharma, as part of her preparation for representing Mrs Gazeley, requested substantial documentation. It needs to be said that the defendant, which had clear obligations of disclosure to Mrs Gazeley, did not attend to its task of providing the documentation in a timely fashion. This was admitted during evidence by Mr Hipkins and Ms Hoyle. Of primary importance would have been the report arising from the BVQI spot surveillance audit and the subsequent DHB report. Ms Sharma had to use some persistence to have copies of these eventually made available.

[22] Initially, the allegations against Mrs Gazeley involved a number of matters arising out of these investigations. Faced with appropriate requests from Ms Sharma for further details and information relating to these specific allegations, Oceania indicated a few days prior to the first disciplinary meeting that it would not be relying upon information contained in the DHB clinical report for making any decision that might impact upon Mrs Gazeley's employment. As a result, it decided not to respond to any of Ms Sharma's requests for information pertaining to that part of the reporting. Instead, the allegations against Mrs Gazeley, which were to become the subject of the first disciplinary meeting, were allegations raised by other staff members, some of whom were the disaffected staff members referred to earlier, and some residents, as to Mrs Gazeley's behaviour towards them. These were allegations which, for the most part, had initially come to light as a result of the spot surveillance audit.

[23] The allegations to be discussed with Mrs Gazeley at the meeting on 11

August 2011 were set out in Mr Hipkins's letter of 22 July 2011. That letter reads as

follows:

...

Disciplinary Meeting

Today we completed our investigation into serious concerns regarding staff management, clinical and patient care at Woodlands. This investigation was triggered by a BVQI unannounced audit which took place on 7 July 2011. The BVQI audit identified two critical risk unattained standards which were reported to HealthCERT and the Nelson – Marlborough DHB. Namely, significant issues relating to your behaviour including allegations from residents/family and staff that you have been verbally/physically abusive of both residents and staff. Also, fear was expressed by both staff and residents

to the auditors about retaliatory action from you if they were to raise their concerns about the abuse.

Following our own investigation into these issues, we are concerned that your conduct may have fallen far short of your accountabilities and responsibilities as a Facility Manager. The details of the allegations are contained in the documentation attached. However, in summary, it has been alleged that you have:

- Repeatedly made intimidating and threatening remarks to staff and residents. See Appendices "B", "C", "F" and "H".

- Physically and verbally abused residents. In particular, it has been alleged that you rushed a resident, grabbed her by the arms, forcibly pushed her back into her chair and requested one of your Healthcare Assistants to restrain her in her chair. See Appendices "D" and "G".

- Repeatedly yelled at both staff and residents and made rude and

  derogatory comments to both. See Appendices "C" and "G".

- Failed to date to rectify a partial attainment identified in Woodlands' Certification Audit identified in September 2010. Namely, your Clinical Leader remaining as the full time Rest Home Registered Nurse. See Appendix "K".

As you are aware, on 4 February 2011, you were issued with a formal warning for assisting other staff to medicate/restrain a resident in a manner which breached the Code of Rights. This warning was issued for a 6 month period and is therefore currently in effect.

I would like to meet with you to discuss all of the issues outlined in this letter. I suggest that we meet at Support Office on **Tuesday 26 July at**

11am. We will arrange your flights.

We consider that the issues outlined in this letter are very serious, because the overall management of Woodlands appears to have fallen far short of our and DHB's standards, which has had serious consequences in relation to the company's relationships with its residents and families, and the company's reputation in the community. Such conduct has also compromised our relationship with third parties including the DHB and has already created adverse media attention. Without predetermining the outcome of the meeting, given the seriousness of the issues, we need to advise you that, disciplinary action up to and including summary termination of employment may be warranted.

We encourage you to bring your representative to the meeting with you. Kate Hoyle, HR Manager, will also be in attendance.

...

[24] The meeting did not take place on 26 July 2011. Mrs Gazeley was, of course, at this stage still under suspension as a result of the spot surveillance audit and the

resultant steps taken by the DHB. After the appointment of a temporary manager and continuing enquiries and investigations into the clinical issues that had come to light, the preliminary allegations against Mrs Gazeley were, to use Ms Sharma's words, "falling away". Her letter of 4 August 2011 appropriately requested that Oceania provide Mrs Gazeley with further substantial documentation and information. It also raised pertinent questions, which Oceania clearly realised would affect the basis upon which further disciplinary action against Mrs Gazeley could continue.

[25] During the course of his evidence Mr Hipkins indicated that at this stage he was relying upon, to use his words, his "HR team". While one clinical issue became the subject of both the disciplinary meetings and the subsequent dismissal, Mr Hipkins was no longer being advised by any clinical professional within Oceania after it arose. This was confirmed by his evidence and also by the evidence of Ms Sangster. She stated that her last involvement in Mrs Gazeley's disciplinary process was her investigation report on 21 July 2011, provided to Mr Hipkins. Ms Sangster gave evidence of other, what can only be described as cursory, contacts with Mr Hipkins as the disciplinary procedure progressed.

[26] In the face of what was taking place in respect of the continuation of Mrs Gazeley's suspension and investigations to determine what further disciplinary action would be justifiable, a fair and reasonable employer would carry out a thorough investigation of the allegations it was using as the basis for the discussion with Mrs Gazeley at the disciplinary meetings. The results of those investigations including statements from complainants and witnesses would be fully set out prior to the meetings so that Mrs Gazeley would have a reasonable opportunity to know of the extent of the allegations against her and be able to respond to them. Having received a response, a fair and reasonable employer would then take time to consider whether, in its mind, the allegations were established and if they were, whether they resulted in acts by Mrs Gazeley which could justify termination of her employment. If they were acts of serious misconduct the appropriate response of a fair and reasonable employer in all the circumstances would be to carefully weigh up whether dismissal was the only outcome or whether some lesser form of disciplinary action or no disciplinary action at all was nevertheless justifiable. The documents

that Mr Hipkins had attached to his letter of 22 July 2011 had very little in the way of direct evidence from the alleged complainants. There was a lengthy letter from one of the employees which contained a number of areas of her dissatisfaction with Mrs Gazeley. With the known conflict between this employee and Mrs Gazeley, care was needed in assessing its accuracy.

[27] By the time of the disciplinary meetings, the DHB's temporary management of Woodlands had been lifted. Oceania had appointed its own temporary Facility Manager, Ms Susanne Harzer, pending the outcome of the disciplinary process against Mrs Gazeley. Three days prior to the first disciplinary meeting, Mr Hipkins delegated to Ms Hoyle the important task of travelling from Auckland to Woodlands to carry out investigations into the remaining allegations against Mrs Gazeley. Preliminary information was available to Oceania in the form of the report from BVQI. However, in view of what was contained by way of allegations from those who had spoken to or written to BVQI, one would expect that the type of inquiry, which would be necessary out of fairness to Mrs Gazeley, would take at least a day, probably longer. Obviously, signed statements would be procured from those making the allegations, and as part of the preparation for the first disciplinary meeting, those statements would be given to Mrs Gazeley and her legal advisor.

[28] Ms Hoyle flew to Nelson, travelled up to Woodlands at Motueka, and back, and then returned to Auckland all in the one day. The total time that she spent at Woodlands, using the most benevolent timing to Oceania, was near enough to two and three quarter hours. That was the extent of her investigation on Mr Hipkins's behalf. Nothing is contained in Ms Hoyle's brief of evidence about how she conducted her investigation. It appears that she remained in an office and Ms Harzer mustered the persons to be interviewed. Ms Hoyle would have made the decision as to who was brought to the office for that purpose. If the notes Ms Harzer made of the interviews and produced in evidence represent the length and extent of the interviews, then the entire process was totally inadequate. One important eye witness to one of the serious incidents giving rise to an allegation against Mrs Gazeley, Ms Belinda Palmer, a highly qualified nurse, described being interviewed by Ms Hoyle for a

total period of five minutes. While one would have expected Ms Hoyle to be well prepared in advance for such an interview, Ms Palmer got the

impression that Ms Hoyle did not even know who she was. Ms Palmer stated that when she endeavoured to raise the incident to which she had been an eye witness and provided an earlier statement on, Ms Hoyle did not seem interested. The resident who was the subject of this complaint was not even interviewed. Instead, Mr Hipkins and Ms Hoyle initially relied upon the observations of an administrative staff member who had shown she was seriously disaffected when in employment at Woodlands.

[29] The notes, which Ms Harzer took of these interviews, are contained in the bundle of agreed documents. They are disjointed and cursory. The handwriting is difficult to read. It is difficult, in some cases, to ascertain who exactly is being interviewed. As a basis for providing Mrs Gazeley, in advance of any disciplinary meeting, with the specific allegations against her, these notes would have been useless. It was on the basis of these inquiries that two of the grounds used to justify Mrs Gazeley's dismissal were held to be established. However, clearly realising the inadequacy of these notes, Ms Hoyle made the somewhat concerning decision not to provide them to Mrs Gazeley or Ms Sharma prior to either meeting.

[30] A transcript was taken of the discussions that took place at the two disciplinary meetings. As I have indicated in respect of both, Ms Sharma had appropriately set out matters in response to the allegations, which she would wish to raise at the meetings on behalf of Mrs Gazeley. In such circumstances particularly where the employer's concerns have been set out at length in writing as happened in this case, a fair and reasonable employer must give substantial audience to both an employee and their legal advisor. Having read the transcripts, Mr Hipkins and Ms Hoyle did not accord to Mrs Gazeley and Ms Sharma the courtesy of allowing Ms Sharma in particular, to properly speak to her letters, which in effect amounted to submissions. Constant interjections and interruptions took place. One can only describe the discussions as argumentative and displaying unreasonable disruption from Mr Hipkins and Ms Hoyle. Indeed one is left with the impression that both Mr Hipkins and Ms Hoyle prejudged the matter, and may have decided, in view of what had transpired back in July at the time of suspension of Mrs Gazeley, that the outcome was to be a dismissal. Mr Hipkins on more than one occasion raised the fact that Woodlands had been placed in "statutory management". It seemed to

unreasonably dominate the discussions. The four grounds contained in the final letter of dismissal give the appearance of being makeweights after the earlier allegations had largely fallen away. One of them, which was not even a ground raised against Mrs Gazeley in advance of the first meeting, appears to have been seized upon by Mr Hipkins and Ms Hoyle as providing a serious ground of criticism of Mrs Gazeley's performance during her period as Facility Manager at Woodlands. The outcome of these meetings was totally unfair to Mrs Gazeley. The way that Oceania acted through its Chief Executive Officer and Human Resources Manager throughout the entire disciplinary process from the time they began the investigations into the allegations against Mrs Gazeley were not the actions that a fair and reasonable employer could have taken in all of the circumstances viewing the matter objectively.

The allegations against Mrs Gazeley upon which the decision to dismiss was based

[31] Leading into the first disciplinary meeting, which took place on 11 August

2011, Oceania again wrote to Ms Sharma. This letter is dated 8 August 2011. The letter was prepared and signed by Ms Hoyle as Human Resource Manager – Operations. No attempt was made to place the letter under the authorship of Mr Hipkins. This letter is dated the same day Ms Hoyle travelled to Nelson and then Woodlands to conduct her enquiry. She must therefore have written the letter, which emanated from Oceania's Auckland office, upon her return late in the afternoon. That raises a question as to the extent of consideration she and Mr Hipkins gave to the information gathered by her that day at Woodlands.

[32] The letter sets out information alleged to support the initial allegations contained in Oceania's letter of 22 July 2011. It was written in response to Ms Sharma's letter of 4 August 2011 seeking further information. This sequence of dates also causes some concern as to the process adopted by Oceania. In Mr Hipkins's letter of 22 July 2011 it will be seen that he stated:

Today we *completed* our investigation into serious concerns regarding staff management, clinical and patient care at Woodlands. (emphasis added)

[33] If this was the position then why did Ms Hoyle *later* go to Woodlands on 8

August 2011 to carry out an inquiry before responding to Ms Sharma's request for information to justify the allegations in the letter of 22 July 2011? This undermines Oceania's position in respect of whether it was acting as a fair and reasonable employer towards Mrs Gazeley at this stage. Significantly, however, the letter of 8

August 2011 stated that Oceania would not, from that point, be relying upon information from the clinical report in making any decision that may impact upon Mrs Gazeley's employment. The position in respect of the continued suspension was now becoming undermined by this process.

[34] As will be seen from the letter of 22 July 2011, which has already been set out in this judgment, the allegations against

Mrs Gazeley at that time were specified to be:

a) repeatedly making intimidating and threatening remarks to staff and residents;

b) physically and verbally abusing residents. In particular it was alleged that she rushed at a resident, grabbed her by the arms, forcibly pushed her back into her chair and requested one of her health care assistants to restrain her;

c) repeatedly yelling at both staff and residents and making rude and derogatory comments to both; and

d) failing to rectify a partial clinical attainment identified in the Woodlands' certification audit in September 2010, namely by retaining her clinical leader as the full time rest home registered nurse.

[35] Following the first disciplinary meeting on 11 August 2011, two letters were written to Ms Sharma and Mrs Gazeley by Oceania. They were supposedly written by Mr Hipkins but were drafted by Ms Hoyle. She signed them on his behalf.

[36] The first letter dated 15 August 2011, indicated that Oceania was going to consider the matters raised and then indicate a decision for further comment. In this earlier letter it was clearly indicated that Oceania regarded itself as considering whether it had lost trust and confidence in Mrs Gazeley. However, it also contained an allegation that the DHB had lost trust and confidence in her by virtue of its decision to place Woodlands under temporary management. This allegation by Ms Hoyle, writing on behalf of Mr Hipkins, was in fact false as a statement of the DHB's attitude, as correspondence from the DHB later disclosed. It was something that had not been raised in the earlier letter of 22 July 2011 even though the DHB involvement had arisen prior to that earlier letter.

[37] In the later letter, dated 19 August 2011, Oceania indicated that it had narrowed the matters down upon which it intended to rely as a basis for disciplinary action against Mrs Gazeley. These were as follows:

a) that it had lost trust and confidence in Mrs Gazeley;

b) physical and verbal abuse towards residents;

c) using language that was rude and derogatory of residents and staff.

This referred to two incidents I shall describe from the evidence as the

"jellimeat for dinner" and "dirty hua" allegations;

d) failure to rectify a partial clinical attainment; and

e) Mrs Gazeley's "admission" during the first interview that she did not regularly review care plans for residents and left clinical issues to her clinical team.

[38] Other allegations raised earlier, of intimidating, threatening and yelling at residents and staff were, on consideration, withdrawn as being without a sufficient evidential basis. The letter reiterated that Oceania regarded the suspension as lawfully and procedurally fair. It again stated that the mere fact that the DHB had

appointed a temporary manager indicated the DHB's lack of trust and confidence in

Mrs Gazeley.

[39] Finally, the letter referred to Mrs Gazeley's difficulties with staff. Whereas Mr Hipkins and other management had raised these issues with Mrs Gazeley at the outset of her employment, this was now being turned against her. It was now being alleged that the fact that these issues had been raised by her during the disciplinary meetings indicated a lack of responsibility and accountability on her part. It was suggested that she "failed to take ownership" of the facility. This was a surprising allegation in view of Mr Hipkins's glowing support and regard for Mrs Gazeley right up until the date of the spot surveillance audit.

[40] Ms Sharma responded to these letters, putting forward Mrs Gazeley's position. The next step in the process was a telephone conference. This linked Mr Hipkins and Ms Hoyle, in Auckland, to Ms Sharma and Mrs Gazeley in Nelson. It occurred on 30 September 2011 at 10.30 am. Mrs Gazeley was then informed she was being dismissed. She was told that a letter was being drafted and would be sent to her. Surprisingly neither Mr Hipkins nor Ms Hoyle were able to, or would not, disclose fully the grounds for the dismissal. The letter of dismissal, however, was forwarded later that day. It referred to the responses from Ms Sharma. It is set out as follows:

...

Outcome of disciplinary process

Further to our most recent correspondence, I have now had an opportunity to carefully consider your written submissions

dated 13 and 21 September as well as your verbal submissions presented at our meeting of 13 September.

You accept that Oceania must have the highest level of trust and confidence in you as a Facility Manager. Our expectation has been that you manage your facility, Woodlands, in a consistently professional manner, maintaining high clinical standards and building a positive reputation in the wider community. The Nelson – Marlborough DHB, in directing the appointment of a statutory manager, has called into question our ability to have trust and confidence in you as manager - in particular, your ability to ensure the safety of the staff and residents at Woodlands. Your conduct has compromised the company's relationship with the DHB and has damaged the company's reputation as evidenced by the adverse media attention and DHB's actions.

From our investigations, I am of the view that you have failed to demonstrate effective leadership and drive positive cultural change within

Woodlands where this was required. Further, it is my view that you have failed to take ownership of Woodlands as a whole and, in particular, its clinical safety and operational effectiveness.

The following sets out our findings on the individual allegations.

Statutory Management of Woodlands Facility

The DHB's decision to place Woodlands under statutory management has detrimentally impacted on Oceania's relationship with the DHB and on Oceania's reputation as a whole. We have considered your most recent correspondence regarding your alleged discussion with Peter Burton. However, this does not change our view that the DHB's actions demonstrate how serious the situation is at Woodlands - this is, after all, only the second facility in Oceania's history to be placed under statutory management. It is not an action taken lightly by either the DHB or Oceania.

Allegations regarding clinical safety

Your lack of clinical oversight of Woodlands is unacceptable and has resulted in significant clinical failings. You admitted that you had never reviewed a care plan during your time at Woodlands. Further, you admitted to leaving all clinical issues to your Clinical Manager, Clo Taylor, despite concerns raised about her at the time you were appointed. You admitted to relying on Ms Taylor's word that this crucial area of the business was under control without taking steps to ensure this.

Allegation regarding physical/verbal abuse of resident

I have concluded that you attempted to, or at least indicated your intention to, restrain resident, H. Our decision is based on the fact that, while there are some inconsistencies in the evidence provided, all employees involved in the matter report that you referred to restraining or "tying up" H. At our meeting on 13 September, you also admitted that you may have mentioned restraining H at the time. Further, only 3 days following this event, and by your own admission, improperly restrained a resident. Oceania's policies on restraint are well entrenched and clearly prohibit restraining residents in the manner you did.

Allegation regarding rude and derogatory comments to staff and residents

I have concluded that you made rude and derogatory comments to staff and residents. In particular, we note that you admitted at the meeting and in your written response to calling residents to dinner by saying *teatime, teatime, jellimeat for dinner*. We find this comment offensive as, even said in jest, it is degrading and, potentially offensive. Managers are expected to act professionally at all times and treat residents with dignity and respect.

You also admitted to us at the meeting to calling one of your maintenance men a *hua/dirty hua* which you explained to us was different from the term *whore* which, according to Ms Rogers, you allegedly used. You have since explained that the term was used with the meaning given to it in the Concise Oxford Dictionary – namely, "grey haired". Notwithstanding this, the comment was clearly inappropriate given that it was said in front of another

staff member who took offence to it. This further demonstrates a failure to communicate appropriately and professionally to staff and residents at all times.

Your responses regarding staff and Support Office

As previously stated, we have been disappointed by your choice to rely on a defence that you have staff who do not support you and have sought to undermine you during your time as manager at Woodlands. As discussed at the meeting, many other Oceania managers have been presented with similar challenges and have managed to turn the situation around by driving positive cultural change.

More recently, you have raised concerns about the alleged lack of support from Support Office as part of your response to the allegations. You accepted at our meeting of 13 September that the communication between you and Support Office flows both ways and that you had access to me, your cluster HR Manager, Operations Manager and GM Clinical/Operations by phone/email if/when needed. You also admitted that you received an appropriate level of support from HR and that I had

always been responsive to your email/correspondence. We further discussed the fact that you have had members of the Operations Team visit you/Woodlands/Woodlands' staff during your time with the Facility despite your written submissions suggesting this was not the case.

These responses further demonstrate a lack of accountability for the management of Woodlands and your effectiveness as a manager with Oceania.

Outcome

Due to a loss of trust and confidence in you in your position, I have formed the view that your continuation in the role is untenable. I have therefore reached a decision to terminate your employment with immediate effect. We will arrange for your final pay to be processed this week which will include

4 weeks' pay in lieu of notice as well as any outstanding holiday pay, lieu days and outstanding salary to date.

[41] Following receipt of that letter Mrs Gazeley raised a personal grievance against Oceania in respect of the dismissal and matters proceeded from there.

Principles applying

[42] The defendant must establish that the dismissal of Mrs Gazeley was justifiable. The statutory test of justification is contained in s 103A of the Employment Relations Act 2000 (the Act). That section states:

103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in

all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the

employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action

against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before

dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the

employee before dismissing or taking action against the

employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects

in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[43] In *Angus v Ports of Auckland Ltd*5 a full Court considered the recent amendments to s 103A, and the ambit of the Court's enquiry in the light of its earlier decision in *Air New Zealand Ltd v V*6 decided prior to the amendments. The Court stated in *Angus* as follows:

[22] The change from “would” in former s 103A to “could” in new s

103A is not dramatic but, contrary to the submission put to us by Mr

Mitchell, it is neither ineffectual nor even insignificant. The Authority and the Court must continue to make an assessment of the conduct of a fair and reasonable employer in the circumstances of the parties and judge the employer’s response to the situation that gave rise to the grievance against that standard. What new s 103A (“could”) contemplates is that the Authority or the Court is no longer to determine justification (what the employer did and how the employer did it) by a single standard of what a notional fair and reasonable employer in the circumstances would have done.

[23] The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer’s

5 [2011] NZEmpC 160.

6 [2009] ERNZ 185.

decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified. So, to use the present tense of “would” and “could”, it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.

[24] There are substantial and significant parts of former s 103A that are unaltered. The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer’s decision as to consequence once sufficiently serious misconduct is established, as was argued unsuccessfully for the employer in *V*. That has never been the position and is not so under the most recent amendments. The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and then the employer’s response to those conducts.

[44] Nevertheless, in *Angus*, the full Court, in analysing the section, emphasised that the role of the Court is not to simply substitute its view for that of the employer. It is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. In this regard, the Court stated as follows:

[58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer’s enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.

[45] In *C v Air Nelson Ltd*,7 while dealing with the previous s 103A, the Court considered and applied the full Court’s decision in *V*. This was for the purposes of deciding the extent to which the Court should review the reasoning of the employer for its decision to dismiss. The Court, in *Air Nelson*, went on to state that:

[48] ... It is clear ... that the focus of the Court’s inquiry must be upon the employer’s actions and how the employer acted. The Court must be

7 [2011] NZEmpC 27; [2011] ERNZ 207. The approach adopted by the Court was approved on appeal in *Air Nelson Ltd v C* [2011] NZCA 488. The Court of Appeal stated at [19] of its judgment: “Section 103A requires the Court to undertake an objective assessment both of the fairness and reasonableness of the procedure adopted by [the employer] when carrying out its inquiry and of its decision to dismiss [the employee]. Within that inquiry into fairness and reasonableness the Court is empowered to determine whether [the employer] had a sufficient and reliable evidential basis for concluding that [the employee] had been guilty of misconduct.”

satisfied that in reaching its decision to dismiss, the employer adopted a logical chain of reasoning, which is transparent and reasonable from the facts uncovered during its inquiry and presented to it. That is what the Court’s review of “reasonable grounds to believe” requires. It is not for the Court ... to enter into a fact finding inquiry, of the kind which would be required for example, in a criminal proceeding. That is not the purpose of the question which the Court must answer under s 103A of the Act.

[49] It would, however, be illogical for the Court to not be able to consider the factual rationale for the employer’s belief. The principles are, in my view, succinctly contained within the following statement by the Court of Appeal in the *Airline Stewards and Hostesses* case where at 993 the Court said:

What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the

employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.

And in the *Arthur D Riley* case this Court said at [52]:

Section 103A obliges the Court to take an objective approach to determining justification for dismissal. The process is essentially a review of the employer's decision to dismiss. ... The question is whether the employer was justified in his decision.

...

[41] Based on the legal principles applying, the Court can appropriately inquire into whether Mr Hambleton had clear evidence upon which any reasonable employer could safely rely and/or whether he conducted reasonable inquiries, which left him on the balance of probabilities with grounds for believing, and he did believe, that the employee was at fault. The Court is then entitled to make a further inquiry into whether, even if the evidence of the employer's inquiries reasonably led to a finding of misconduct, the ultimate decision to dismiss, as opposed to taking some other disciplinary action, was justifiable applying the test under s 103A of the Act.

[46] These principles still apply despite the amendment to s 103A but with the consideration now needed of the wider scope of options available to the employer as established in *Angus*. It is the approach to be taken in this case.

[47] The test in s 103A of the Act therefore requires the Court to consider criteria, each of which informs the other. The test is not what an employer could have done but what a fair and reasonable employer could have done. The Court is then to inquire into what that fair and reasonable employer could have done in all of the

circumstances as they presented themselves. Those circumstances must exist at the time of the decision to impose a disciplinary measure. In applying that criteria the Court must have regard to all of the matters set out in s 103A(3).

[48] A heavy onus rests upon an employer before a dismissal can be validly effected. The reasons for this are obvious. The right to be in employment and earn the means to support oneself and one's dependents is a substantial right requiring protection. There is a strong societal imperative behind this, supported by the economic need for full employment as founding a strong overall economy. A position of employment is a valuable asset. Employees are the most valuable asset of any business hoping to thrive. If the employment is to be terminated it is essential that it be justifiable and fair.

[49] Clearly it is not the Court's prerogative to substitute its own decision for that of the employer where as a result of meaningful adherence to the legal requirements, the action taken was an option which was open to the employer. Before reaching the point of sanctioning the actions of the employer in a given case, the Court (and for that matter the Authority) is entitled to review the factual basis upon which the employer's decision was made. This is for the purpose of deciding whether it was correct and that the criteria have been met such that the employer is entitled to say that the dismissal or other action was justifiable. If that is not the extent of its jurisdiction, then it would only be in rare cases, if at all, that the Court would ever be able to intervene.

Analysis and conclusions

[50] Oceania failed to carry out its task to be a fair and reasonable employer in the dismissal of Ms Gazeley.

[51] I have already indicated the diversions that Oceania imposed on Mrs Gazeley at the other institutions. Oceania was, at that time, happy to rely upon the substantial experience Mrs Gazeley had in the industry. It would clearly be happy with her management of Woodlands at the point where she went on leave, as there was full bed occupancy and positive reporting on clinical management. Mr Hipkins

confirmed in evidence that he had full trust and confidence in Mrs Gazeley at this time. However, during the course of evidence it came to light that Mr Hipkins had responsibility for carrying out reviews of Mrs Gazeley's performance. Such reviews were part of the requirements of her employment agreement with Oceania. On not one single occasion did Mr Hipkins conduct a review of Mrs Gazeley's performance. He conceded in evidence this was a deficiency on his part.

[52] It does not appear that in weighing up the matters to be considered, Mr Hipkins or Ms Hoyle gave any attention to the strain Mrs Gazeley would have been under with her responsibilities at three separate institutions. She was, as a result, away from Woodlands while attending to duties at the other sites and was back at Woodlands for only a short period before going on leave for five and a half weeks. Prior to going on leave, she put in place documentation that needed completion for clinical and administrative audit purposes. All of this led into the spot surveillance audit on 7 July 2011. This was all part of the circumstances at the time of dismissal under which Oceania is to be judged. No cognisance appears to have been given to these circumstances in the requirement to deal fairly with Mrs Gazeley. Mr Hipkins claimed he took these matters into account when he was questioned on the point during the hearing. However, there is no written record of this being so. Mr Hipkins's notes, which he claims to have made, were neither disclosed nor produced. He did not articulate this factor in his

correspondence dealing with the disciplinary process and the final dismissal as a matter which he had taken into account.

[53] It is clear from the evidence that there was antagonism towards Mrs Gazeley from a number of staff members. Ms Janeen Rogers, Mrs Gazeley's personal assistant/administrator, made no secret in her evidence of the fact that she disliked Mrs Gazeley. This is further apparent from the nature of the complaints that she made at the time of the BVQI spot audit and which she later confirmed in typewritten memoranda. It appears that some of the residents and other staff may have been dragged into this antagonism. What is curious also is that amongst the documents containing written complaints against Mrs Gazeley there are some from other staff members and also residents which have the appearance of being typed up and printed out on the same processing equipment as that used by Ms Rogers. In view of the fact that Ms Rogers was the personal administrative assistant for Mrs

Gazeley, this evidence would suggest that Ms Rogers may have typed up these documents. Staff at Woodlands were in two camps, but during the course of evidence it became plain that there were a large number of supporters of Mrs Gazeley amongst the staff and certainly amongst the residents. Mrs Gazeley had of course been warned by Ms Sangster, and had confirmed by Mr Hipkins, of the disaffected group of staff members. Ms Rogers denied in her evidence that she was part of this group. Other witnesses, however, spoke of her participation and this evidence was also available to both Mr Hipkins and Ms Hoyle during the disciplinary process. In considering the allegations against Mrs Gazeley a fair and reasonable employer would keep firmly in mind that the allegations were being made from a source of disaffected staff members. Clearly their veracity would need to be assessed in the context of the atmosphere which prevailed in some quarters within Woodlands.

[54] As the disciplinary process proceeded, Mr Hipkins and Ms Hoyle plainly decided that many of the allegations could not be substantiated. As Ms Sharma mentioned, the evidence disclosed that allegations against Mrs Gazeley giving rise to the DHB appointment of a manager following the audits had fallen away. By the time of the dismissal, the allegations against Mrs Gazeley had devolved into four areas. First, there was the allegation that Mrs Gazeley had failed in her oversight of clinical management at Woodlands. Accompanying this was the allegation that, as a result of the DHB's actions, Oceania was entitled to adopt the view that the DHB had lost trust and confidence in Mrs Gazeley. Secondly, there was the allegation against Mrs Gazeley as to her treatment of the resident Mrs H. Thirdly, there was the allegation of rude and derogatory comments towards a staff member and residents. There were allegations in the documents as to similar alleged abuse of another staff member. This received no traction in the evidence and is not referred to in the dismissal letter. Finally, and Mr Hipkins has confirmed that this was not a ground for dismissal, there was criticism that Mrs Gazeley failed to accept ownership and responsibility by referring to the difficulties she faced with the disaffected staff members and the part that they played in what transpired while she was away on leave in July 2011.

[55] In evidence, both Mr Hipkins and Ms Hoyle conceded that this final criticism could hardly be fair in view of the fact that a lot of these difficulties existed before Mrs Gazeley commenced employment. Admittedly, Ms Rogers started at about the same time as Mrs Gazeley but it is clear that at some stage during her employment she sided with the difficult staff members and clearly assisted them, and also some residents, in promulgating complaints. Mr Hipkins, in his dismissal letter drafted and signed by Ms Hoyle, pointed out that Mrs Gazeley had assistance from senior management and human resources staff in dealing with these difficult issues. It is hard to know why that was mentioned in the final paragraphs of the dismissal letter because Mr Hipkins's own evidence was that Mrs Gazeley clearly consulted with him and used the services of other senior management staff during the period of her employment. Quite apart from this, Mr Hipkins failed in his responsibility to carry out periodic performance reviews with Mrs Gazeley. He conceded that that was a fault on his part. Further, Ms Harzer, who was appointed temporary manager and now Facility Manager of Woodlands since Mrs Gazeley's suspension and dismissal, while clearly having a different management style from Mrs Gazeley, indicated in her evidence that problems still existed at Woodlands even as the hearing was proceeding. I got the impression that, as they were not grounds for the dismissal, these final paragraphs were put in the dismissal letter by Mr Hipkins and Ms Hoyle out of some motive of providing good measure. Those areas of criticism were clearly unfair and making them could not have been the act of a fair and reasonable employer in all the circumstances.

[56] In the letter of dismissal, much is made of the appointment of a temporary manager by the DHB. Mr Hipkins (in conjunction with Ms Hoyle as she wrote and signed the letter) stated that Oceania's ability to have trust and confidence in Mrs Gazeley had been called into question. This criticism of Mrs Gazeley in respect of these allegations narrows, however, primarily into one issue, which was the subject of much discussion during the disciplinary meetings and the correspondence surrounding them. This was Mrs Gazeley's alleged failure to review care plans.

[57] Mr Hipkins in the letter indicated that the DHB in directing the appointment of a "statutory manager" had called into question Oceania's ability to have trust and confidence in Mrs Gazeley as Facility Manager, and particularly her ability to ensure

the safety of the staff and residents at Woodlands. Prior to the dismissal, this allegation so far as the DHB was concerned was taken up by Ms Sharma in correspondence with the DHB. The DHB confirmed both orally and in writing that it had not lost confidence in Mrs Gazeley. Placing Woodlands in management was primarily to assist Oceania in meeting the DHB's service requirements. This was clearly notified to both Mr Hipkins and Ms Hoyle prior to the decision to dismiss and, indeed, Ms Sharma's correspondence with Mr Peter Burton of the DHB is referred to in the dismissal letter. It was, however, given no

credence by Mr Hipkins and Ms Hoyle. From that evidence, Oceania's view of Mrs Gazeley on this issue was based on a false premise.

[58] As indicated, Mr Hipkins and Ms Hoyle concentrated heavily on a statement made by Mrs Gazeley during the course of the first disciplinary meeting that she did not review care plans. Mr Hipkins seemed to infer in his evidence that this failure was the primary reason for the dismissal. However, Ms Hoyle disputed this in her evidence. Mr Hipkins conceded that on their own, the two remaining grounds of alleged abuse of a resident, and rude and derogatory comments made to staff and residents would not be sufficient to justify dismissal.

[59] The apparent failure to review care plans only arose from the discussions with Mrs Gazeley herself after her suspension. It was not a ground notified to Mrs Gazeley prior to the first disciplinary meeting. It was then grasped by Mr Hipkins and used as the basis for alleging Mrs Gazeley's responsibility for significant clinical failings. However, those alleged significant clinical failings were not properly specified.

[60] Fortunately there is a transcript available, which enables exactly what Mrs Gazeley said to be ascertained. This, along with evidence from other witnesses, puts into context this primary allegation by Mr Hipkins. When Mrs Gazeley's statement is considered alongside evidence from witnesses such as Karen Lorigan, Belinda Palmer, Rolene Gardiner and other highly qualified nurses and former clinical managers, including Mrs Gazeley herself, the assertion by Mr Hipkins surrounding the care plans issue as thereby providing evidence of clinical failings can be seen as

seriously exaggerated. Even the evidence of Ms Sangster who gave evidence on behalf of Oceania provides moderation to the assertion.

[61] One further significant factor is that Mrs Gazeley's job description provided to her at the outset of her employment makes it plain that review of care plans was not the responsibility of Mrs Gazeley in her role as Facility Manager. The job description attached to the Clinical Manager's employment agreement, making this the responsibility of that position, also makes this patently clear. That is not the end of the matter, however, because Mrs Gazeley's considerable nursing qualifications were relied upon by Oceania to provide clinical oversight. Mrs Gazeley did not dispute that this was part of her role. There was some disputed evidence of the role played by other Facility Managers employed by Oceania. It seems plain that Oceania employed some Facility Managers in its other aged care facilities who had no nursing or clinical qualifications whatsoever. This somewhat undermines the significance of the point made by Mr Hipkins. When analysed further, it is plain from the evidence that despite Mrs Gazeley's statement on care plans, she did not, in any event, ignore her responsibilities for clinical management. There is uncontested evidence that Mrs Gazeley had regular meetings with the clinical manager and clinical staff almost on a daily basis and certainly twice every week. She participated in clinical oversight and, indeed, was disciplined for endeavouring to carry out the directions of a medical advisor by administering medicine to a difficult resident (Mrs C). This would also appear to answer the allegation in the dismissal letter that she left all clinical issues to her Clinical Manager.

[62] Mr Hipkins's assertion that Mrs Gazeley lacked clinical oversight of Woodlands resulting in significant clinical failings was drawn from her statement, made to him during the first interview. Further, he asserted that she admitted to leaving all clinical issues to her Clinical Manager despite concerns raised about the Clinical Manager at the time that Mrs Gazeley was appointed. While this was raised in the dismissal letter it was a point not covered by Mr Hipkins in his brief of evidence. Mr Hipkins, however, conceded in questions from the Court the significant failings on his part in not carrying out periodic performance appraisals of Mrs Gazeley as he was required to do as her Cluster Manager. Mr Hipkins attempted to divert responsibility for this failing from himself by maintaining that

Ms Lorigan had taken over as Cluster Manager for Mrs Gazeley and that it was her responsibility. However, this was never formally notified, was subject to dispute, and certainly, Mrs Gazeley was not aware of it. Ms Lorigan does not mention this fact in her brief of evidence which was admitted by consent into evidence in view of the fact that she is now deceased. Mr Hipkins, despite criticising Mrs Gazeley for endeavouring to cast responsibility on other employees, was happy to do so himself during the course of evidence and conceded when pressed that he had done this.

[63] If Mr Hipkins had carried out performance appraisals as he was required to, then in his position as Cluster Manager he would have been able to ensure that care plans were regularly reviewed by the Facility Manager. If that was what he required, even though it would be contrary to the job descriptions in the employment agreements, then that would no doubt have been his opportunity to do so. By that process he would also have been able to satisfy himself of Mrs Gazeley's oversight of the Clinical Manager.

[64] Ms Lorigan also had some views in respect of this which I will come to shortly. However, while dealing with Ms Lorigan's evidence, in view of the circumstances under which the evidence was admitted, it might be said that it is to carry less weight in view of the fact that she was not available for cross-examination. Ms Lorigan died before the challenge was heard. Her brief of evidence given under oath before the Authority investigation was admitted by consent. At varying points during the course of the hearing, Ms Lorigan's evidence was put to Mr Hipkins and other witnesses. It was also corroborated by other professionally qualified witnesses. In being tested in that way it can be given greater weight than might otherwise be the

case. In addition, the brief of evidence being prepared and presented before the Authority, where presumably Ms Lorigan would have been closely questioned as part of the investigation, gives her evidence further weight. The one instance in the determination where Ms Lorigan's evidence is referred to does not demonstrate any reservations as to her credibility as a witness.

[65] The unfairness of Mr Hipkins's assertion that Mrs Gazeley's failure to review care plans and leaving all clinical issues to the Clinical Manager resulted in significant clinical failings becomes apparent when the statements of Ms Lorigan

and the other clinical professionals who gave evidence at the hearing are considered. It is also important to consider exactly what Mrs Gazeley did say during the course of the disciplinary interview when questioned on the review of care plans because it is not quite as straightforward as Mr Hipkins has asserted for the purposes of clinging to this ground for dismissal. The exchange between Mr Hipkins and Mrs Gazeley went as follows:

...

Geoff: Did you review care plans?

Margot: No I didn't review care plans, I thought there would be the clinical

co-ordinators position.

Geoff: In your two years, have you reviewed a care plan?

Margot: In my two years no I haven't personally reviewed any. I have read

them, some of them. (Geoff: Okay) But ...

Geoff: When you read them is that for the purpose of making sure they are getting the appropriate level of care or what, why did you review them?

Margot: Well, just ... why did I review them probably just to look and you know if they've got certain issues I would go and just get an understanding of it.

Geoff: From a clinical point of view?

Margot: From a clinical point of view. I don't review any of the care plans or evaluate any of them, because also what I do is I meet with the clinical team every week, twice a week, it used to be once a week as a formal management and I expect them to come to me because one of my headings is, and there was a meeting minutes template that I introduced so as we covered everything, occupancy, hospital, villa, all those resident cares...

[66] The conversation at the meeting then goes on to consider specific clinical issues to which Mrs Gazeley said she attended, such as wounds, skin tears, bruising and other clinical indicators. It is plain from that exchange that there is some misunderstanding between Mr Hipkins and Mrs Gazeley as to exactly what he meant by the word "review" and this occupied some of the evidence at the hearing. When Mr Hipkins was questioned about this, it was clear that he was not requiring Mrs Gazeley to review every care plan. Obviously if there was no communication going on between Mrs Gazeley and the clinical team that would be an area of grave concern. However, the evidence showed clearly, particularly from Ms Lorigan, that that was not the case. In addition, Ms Sangster who, for a short period during the

disciplinary process was advising Mr Hipkins on clinical matters, stated in evidence that her understanding of reviews would involve taking out a small number of samples of care plans on a regular basis and reading them. From the exchange which took place between Mr Hipkins and Mrs Gazeley, I did not perceive Mrs Gazeley to be saying that she did not do that and indeed she confirms that she did during the exchange itself.

[67] Ms Lorigan, to whose evidence I am prepared to now give some weight even though she did not personally give evidence at the hearing, stated as follows when giving evidence in the Authority investigation meeting:

23. I understand that Margot has been criticised for not reviewing a nursing care plan. My response to this is if Oceania had intended this to be so, then all of its facility managers would have held registered nurses qualifications. However, this was not the case, and I can recall at least two Oceania facility managers who were not clinicians.

24. Irrespective of this, Facility Managers cannot do everything. While it was expected that a Facility Manager had a good overview of residential care, there was no requirement for them to be involved in reviewing nursing care plans, but to ensure that the Clinical Managers/Leaders on the site did so in partnership with the resident's medical general practitioner. That is the purpose of the nursing structure, particularly in a larger site such as Woodlands.

25. Even with respect to my own situation, I was not required under my contract or job description to have a current practising certificate, or even a nursing qualification.

26. In my view, it would be clinically unsafe for a Facility Manager to review a nursing care plan, when they are not clinically involved with residents in the way that the clinical management team is.

[68] Ms Lorigan was, shortly before she made those statements, employed by Oceania in the senior role of General Manager of Clinical/Operations. She was a person with substantial qualifications and experience both in New Zealand and abroad. In her evidence, she was clearly in conflict with the assertions of Mr Hipkins but is corroborated by other witnesses called by Mrs Gazeley. In her brief of evidence she does speak about difficulties she experienced in her relationship with Mr Hipkins. These have some relevance in this challenge. She refers to a conversation which took place on 4 July 2011, shortly before Woodlands was placed

under temporary management. She indicated that up until that time she had experienced a good working relationship with Mr Hipkins. She goes on to state:

71. However, in saying this during my employment at Oceania there were instances where it became apparent that we were at opposing ends of the spectrum on matters of process. For example, in dealing with staff, Mr Hipkins would often tell me just get rid of them. My response was that there was a process to follow, and I would not dismiss staff for reasons that were not justified, or process based.

72. I recall an incident concerning Ms C. I am uncertain as to why, but Mr Hipkins held her in low regard, and directed me to dismiss her. After investigating various allegations raised by Mr Hipkins, I prepared a full report with supporting reasons for my decision not to dismiss. Mr Hipkins made it clear to me that he was not happy with my decision, and this resulted in further tension between us. He subsequently dealt with Ms C's termination by restructuring her out of her employment.

[69] Even though it was agreed that Ms Lorigan's brief of evidence was to be before the Court from the early stages of the hearing, Mr Hipkins, despite knowing that, nevertheless in his own evidence did not endeavour to refute those matters contained in her brief. He certainly had the opportunity to do so. The evidence discloses an unfortunate propensity on Mr Hipkins's part.

[70] In view of the fact that there were other senior qualified nurses and former clinical and facility managers who gave evidence in support of Mrs Gazeley and who had been employed under Ms Lorigan at Oceania, there was a clear conflict in the evidence between the assertions which Mr Hipkins made on this point and those clinicians. It needs to be recalled also that Mr Hipkins had no clinical qualifications, and as I have indicated, chose not to have the benefit of a clinical adviser following the report he received from Ms Sangster.

[71] There is further significant evidence to support Ms Lorigan's assessment of Mrs Gazeley's control of clinical management. This is the evidence of Dr James Chisnall of Motueka. His practice, which provides medical care to a large number of patients, also has care of residents at Woodlands. Between mid-2009 and mid-2011 he and his fellow practitioners noticed a significant improvement in the clinical care and management of Woodlands. He stated this was as a result of the quality of the clinical leaders appointed during this time. He was aware that it was during the time when Ms Gazeley was Facility Manager.

[72] Mr Hipkins's failure to retain a clinical advisor to assist in dealing with the remaining allegations against Mrs Gazeley, which involved a clinical issue Oceania maintains was significant to it, was not the act of a fair and reasonable employer in all of the circumstances. It meant that a lay manager would be considering clinical issues upon which he had no or insufficient expertise to draw upon as a basis for dismissal. As it became apparent later, there were also clinical professionals employed by Oceania who had opposing views to Mr Hipkins on the issue. In my view, that failure also led to the difficulties which Mr Hipkins and Ms Hoyle faced in conducting the disciplinary interviews with Mrs Gazeley. While Mr Hipkins had previous experience in the management of similar institutions to Woodlands, he had no clinical background or training. Also, rather than having an HR team as he maintained, he had only Ms Hoyle who carried out the employment investigation on behalf of Oceania and drafted virtually every letter that Mr Hipkins was to put out in his name. Surprisingly, on most occasions, Mr Hipkins also got Ms Hoyle to sign the letters, including the final letter of dismissal. Ms Hoyle was an inexperienced Human Resources Manager. Although legally qualified, she had little forensic experience and should have been assisted by more senior managers.

[73] These factors all seriously undermine the decision of Mr Hipkins and Ms Hoyle. It was, I perceive, used as the primary ground for terminating Mrs Gazeley's employment. To use this as the basis for an allegation of serious misconduct and, therefore, termination of employment, could not be the act of a fair and reasonable employer in all of the circumstances. As was stated recently by the Court in *Rittson- Thomas t/a Totara Hills Farms v Davidson*8 and *Brake v Grace Team Accounting*

*Ltd*9 while the Court will not substitute its view for the decision of the employer, the

employer will be required to produce evidence to establish that it had good reasons for reaching the conclusions that it did. Once such reasonable grounds are established in the evidence, some of which will be a matter of scrutiny by the Court, then the Court would not overturn the employer's decision based on those grounds. However, if the basis for the decision is false or misleading information then a fair and reasonable employer could not dismiss the employee in such a situation. While

these decisions dealt primarily with redundancies the principles apply to general

8 [2013] NZEmpC 39

9 [2013] NZEmpC 81.

dismissals. They are particularly pertinent in the present case where the employee has been dismissed on the basis of views held by lay and inexperienced management on clinical grounds where senior clinically qualified managers have different views and strongly support the employee.

[74] When all of these factors are taken into account, it is clear that a fair and reasonable employer could not have used this as a ground to dismiss Mrs Gazeley in all of the circumstances which prevailed. It is compounded by the fact that Mr Hipkins and Ms Hoyle had a mistaken view as to the DHB's attitudes towards Mrs Gazeley and its underlying reasons for placing Woodlands under management, which precipitated this entire episode.

[75] The next allegation contained in the letter of dismissal relates to the incident with the resident, Mrs H. This arose as an allegation against Mrs Gazeley from the time of the spot surveillance audit conducted by BVQI on 7 July 2011. The alleged incident itself occurred many months before the allegation was first raised. Mrs H, with her husband, was a resident at Woodlands. She suffered from Parkinson's disease. She was aged and infirm and had a tendency to fall over. Ms Rogers, Mrs Gazeley's personal assistant, raised the incident with BVQI at the time of the audit. Ms Rogers later set out in a lengthy memorandum of complaints against Mrs Gazeley her recall of this incident. This document was attached to Mr Hipkins's initial letter of 22 July 2011 to Mrs Gazeley and to Ms Sharma. This was the letter which initiated the disciplinary process. Ms Rogers had apparently observed the incident taking place in the foyer at Woodlands from her own office. She describes the incident as follows:

...

17 Jan: H was left in the foyer and Margot took her walker away from her and put in her office. H wanted to go and see her husband but Margot said he had to rest. She got up from her chair and tried to walk but Margot told her to sit down. This happened 3 times then Margot threatened to restrain her if she did not stay there. H proceeded to stand up again and Margot rushed at her, grabbed her by the arms and forcibly put her back into her chair and asked Belinda to tie her to the chair Belinda quietly refused and Margot asked her to do it again. Belinda put her hand on Margot's shoulder and whispered something to her and Margot walked back into her office saying that H could do what she wanted and she didn't care if she fell and

hurt herself. Trudes witnessed this from outside Kay's office. She had also

tried to keep H still. Liz also gave her a cup of Milo hoping it would help.

[76] The "Belinda" referred to in this paragraph is Belinda Palmer who was an eye witness to the incident and indeed participated in it. No other witness supporting Ms Rogers's version of the event gave evidence.

[77] Mrs Gazeley and Ms Palmer have an entirely different account of what transpired. Curiously, even though Ms Hoyle stated more than once during evidence that Ms Palmer was not formally interviewed over the incident because her version of events was accepted, Mr Hipkins and Ms Hoyle nevertheless reached the conclusion in the dismissal letter that Mrs Gazeley had attempted to or at least indicated an intention to restrain Mrs H. If Ms Palmer's evidence was accepted then a conclusion such as this could not be established. When I questioned Ms Hoyle, she conceded there had been no attempt to restrain Mrs H, and in view of the tenor in which Mrs Gazeley used the words she did at the time of the incident, there could clearly have been no expression of intent to restrain Mrs H.

[78] Mr Hipkins also conceded in his evidence that this incident was one of two relied upon by Oceania, which of themselves could not justify terminating Mrs Gazeley's employment.

[79] Mrs Gazeley's version of the events relating to Mrs H is set out as follows in

her brief of evidence:

265. I have no recollection of making any comment about tying Mrs H up, even if it was in jest. The incident happened several months prior to the matter being raised with me. During the disciplinary meeting I suggested to Mr Hipkins that I may have said casually to Mrs H, *we don't want to have to tie you in*. And if I did say those words, there was certainly no reaction from her to a light hearted comment, which was never intended as a threat or attempt to restrain her as Mr Hipkins subsequently found.

266. The fact that Mrs H was a serial faller who suffered from Parkinson's disease meant that the incident did not carry the same significance as a resident who may only fall once. This resident was known to fall between three to four times in a shift. At the time of the incident Mrs H's safety was uppermost in my mind.

267. Mrs H was also an individual who spoke up, and I have little doubt that if there was any truth to my alleged actions she would have complained, as it was her right to do.

268. My recollection of the incident is that I was working from my office, and I looked up to see Mrs H about to fall over. I rushed over to her, and grabbed her, to stop this from happening. However, when I say I grabbed her it was not motivated by unnecessary force or abuse but simply to act quickly and save her from falling.

269. It was about this time, that a Healthcare Assistant, Ms Belinda

Palmer came by and offered me assistance.

270. I have no recollection of Ms Rogers, or Ms Vendelbosch being present. I note that Ms Rogers makes no mention of the fact that Ms Vendelbosch was present, **[BOE Rogers].**

271. I categorically deny Ms Rogers' claims that I was holding Mrs H's arms, and that I said that *I did not care if Mrs H fell and hurt herself,* **[BOE- Rogers paragraph 9]**.

[80] Ms Palmer's account of the matter is set out in her brief of evidence. The relevant paragraphs, including her reaction to Ms Rogers's version, are as follows:

Incident concerning resident, Mrs H

30. Ms Rogers has alleged that in my presence, Margot pushed, or shook a resident, Mrs H, before telling me three times to tie her up.

31. The reality of the incident is far more mundane. As I recall it, I was approaching the foyer from the rest home wing. I could see that Mrs H appeared very agitated. Margot had come out of her office to save Mrs H from falling over. We transferred her into an armchair. Mrs H continued to be agitated.

32. Margot and I stood back from Mrs H, and then in a dry sort of way Margot said something to me in regard to tying Mrs H up. I cannot recall her exact words. She did not repeat herself, and the comment was not delivered in a threatening manner as claimed by Ms Rogers.

33. Margot did not tell me three times to tie Mrs H up.

34. In equally dry fashion, I placed my arm around Margot's shoulder, and said, "*Margot, we can't do that."* Margot then returned to her office, and I placed Mrs H's walker in front of her, and returned to the wing in which I was working.

35. I understand that Ms Rogers, and the Activities Coordinator, Ms Trudes Vendelbosch have said that they were present at the time. That is not my recollection. If they were, I fail to understand why they did not go to Mrs H's assistance in response to what they have alleged took place.

36. In terms of their alleged physical proximity to the incident this would have meant that they were closer to the scene than Margot. Having said this, the unreported incident became an issue some six months after it allegedly happened, and was not overly significant.

37. The reason I say this is because Mrs H was a serial faller as a result of her Parkinson's disease. It was not an uncommon occurrence for her to fall several times in a day.

38. What horrifies me is that anyone would seriously believe that a vulnerable elderly woman in my care would be left at the mercy of another person in the manner alleged by Ms Rogers, with nothing done about it.

39. In my observation of Mrs H, she was at this time quite a cognisant and vocal lady, who would clearly communicate her displeasure if the situation was warranted. In this particular instance there was no such reaction over the comment Margot made, because the humorous side of it was obvious to those present.

Ms Rogers

40. I have read Ms Rogers statement. I do not accept Ms Rogers's

further version of events she says that took place.

41. Margot did not ask me to tie Mrs H *down*.

42. Margot was not holding Mrs H's arms to restrain her but to put her in the chair.

43. Margot did not say *that she did not care if Mrs H fell and hurt herself.*

44. Mrs H made no comments about Ms Rogers's alleged claims of

Margot's treatment toward her.

[81] Both Mrs Gazeley and Ms Palmer were closely cross-examined as to their respective versions of these events and maintained their disagreement as to the way Ms Rogers had described it. The dispute was in any event resolved by Ms Hoyle's evidence that when it came to considering the incident as a ground for dismissal, Ms Palmer's account was to be preferred and accepted. What clearly happened was that Mrs Gazeley, seeing that Mrs H was about to fall again, rushed to save her and managed, with Ms Palmer's assistance, to get her into a chair. It is difficult to know why Ms Rogers described it in the way that she did.

[82] Mrs H herself did not complain about the incident. It had occurred several months before Woodlands was placed under temporary management by the DHB. As Ms Hoyle and Mr Hipkins decided to accept Ms Palmer's version of events, then like the previous ground for dismissal, Oceania had no evidence to establish that it had good reasons for reaching the conclusion that it did. It was correct to decide that Ms Palmer's version of events, which corroborated Mrs Gazeley, would have to be

the correct version because Ms Palmer actually participated in the event. Terminating Mrs Gazeley's employment on this ground could not be the act of a fair and reasonable employer in all of the circumstances. There was no evidence that Mrs Gazeley attempted to restrain Mrs H or that the words she uttered in the circumstances at the time indicated an intention to do so.

[83] One final matter, which needs to be mentioned in the context of the Mrs H incident, is the fact that Oceania does have a restraint policy (Oceania's Restraint Minimisation and Safe Practice Handbook & Policies). It is designed to assist employees with ensuring the safety of residents. Obviously, as this example has shown, there will be situations where restraint in some form or another may be necessary. Curiously, in dealing with this event as a disciplinary matter, neither Mr Hipkins nor Ms Hoyle had read the policy document and were unfamiliar with its contents.

[84] The next allegation relates to assertions that Mrs Gazeley was rude and made derogatory comments to staff and residents. Again, at the time they were raised, these incidents had occurred many months previously. It was plain from the evidence given by those who know Mrs Gazeley that she has a vibrant sense of humour. She was well liked by many of the staff and residents. She appeared to have a special relationship with two elderly gentlemen who were residents at Woodlands and who spent some considerable time sitting in the foyer lounge outside Mrs Gazeley's office. Repartee appears to have taken place on a regular basis. There was an allegation that Mrs Gazeley on more than one occasion in a sing-song voice said to the gentlemen "tea time, tea time, jellimeat for dinner". This jingle taken from a television advertisement has been turned into something sinister by those complaining about Mrs Gazeley. Ms Hoyle alleged that Mrs Gazeley, in uttering those words, was treating the residents as animals. In the circumstances, that is a ridiculous assertion. Nothing more can really be said about it, except that a fair and reasonable employer would certainly be required to view the comment in the spirit in which it was uttered and intended. It is surprising that such a serious stand has been taken, particularly when from what little we know about the investigations which Ms Hoyle made at Woodlands in the short time she was there, this incident was referred to, by those asked about it, as banter.

[85] Similarly there is the allegation that Mrs Gazeley in another humorous moment told the groundsman/maintenance worker at Woodlands, Mr Alan Joyce, that he was a "dirty hua" when he left soiled handprints on her desk when he was speaking to her in her office. Mr Joyce appears to have been asked about this incident and it is briefly referred to in Ms Harzer's notes as banter. Mr Joyce in his evidence stated that he was not the slightest bit offended by the comment although umbrage appears to have been taken to it again by Ms Rogers who overheard it. Mr Joyce stated that when Mrs Gazeley said this to him, he had wiped her desk with his sleeve. Both of them saw it as having a funny side. Ms Rogers and Ms Hoyle on the other hand maintained that Mrs Gazeley was calling Mr Joyce a "whore", which was, they maintained, inappropriate.

[86] This is a matter which again has been given a sinister turn by Mr Hipkins and Ms Hoyle in the letter of dismissal. In all the circumstances prevailing, using it as a ground for dismissal could not be the action of a fair and reasonable employer.

[87] Having regard to this analysis of the grounds used to dismiss Mrs Gazeley there was no factual basis for Oceania to believe that it had lost trust and confidence in Mrs Gazeley.

[88] There would be no doubt that the outcome of the BVQI's spot surveillance audit, resulting as it did in the DHB stepping in and placing Woodlands under temporary management, would have been concerning for Oceania. Mr Hipkins, as Chief Executive Officer, would obviously feel particularly responsible. Mrs Gazeley was suspended. She has raised a personal grievance in respect of that. She did, however, concede under questioning from Ms Dunn that suspension in those circumstances was probably an appropriate action for Oceania to take. Having heard evidence from Ms Sangster I am quite sure that the situation with which she was confronted was very distressing to her. Up to that time she was a friend of Mrs Gazeley. In my view Ms Sangster carried out the suspension in the most sensitive manner possible in the circumstances. She waited until Mrs Gazeley returned to work from leave before informing her of the situation. She made sure that she informed Mrs Gazeley as soon as she arrived at work quite early in the morning. It is somewhat unfortunate that the letter confirming the suspension to Mrs Gazeley

was sent by Ms Sangster to an incorrect address. The fact that Oceania had incorrect details for such a senior employee as

Mrs Gazeley is very concerning. However, the fact that Mrs Gazeley never received written confirmation of the suspension notified to her orally by Ms Sangster on the first day back at work does not really add to the consideration of remedies in this case. Mrs Gazeley criticises the manner in which the suspension was carried out and continued. However, it is difficult to think of a good way to carry out a suspension in circumstances such as that. It was necessary while the serious allegations were being investigated.

[89] As matters progressed, many of the earlier allegations, which had been made, could clearly not be established or were turning out to be unfounded. It led to a difficult situation being faced by Oceania. There could be no criticism of its decision to enter into a disciplinary process with Mrs Gazeley. However, as I have discussed, the grounds for disciplining Mrs Gazeley narrowed down into the three or four heads of criticism, which were finally contained in the letter of dismissal.

[90] As indicated, on the basis of the authorities referred to, the Court is entitled to carefully review the grounds upon which a decision to terminate employment was made. In this case that also included the decision to continue with the suspension of Mrs Gazeley for a period of time. Her application for interim reinstatement was rejected by the Court. In all of the circumstances surrounding the way that the disciplinary process proceeded, Oceania could not be criticised for continuing to hold Mrs Gazeley under suspension until it had carefully investigated all of the circumstances and reached a decision on the disciplinary action that it decided to take. Some criticism could be levied at the manner in which Oceania failed to realise the humane need to secure Mrs Gazeley's belongings left in her office. Clearly this has become the source of some added distress to Mrs Gazeley, and has resulted in her losing some valued belongings.

[91] It is always emphasised that subject to fair process being followed, it is not for the Court to substitute its own decision for that of the employer. Where an employer establishes that its finding of serious misconduct was justified and, viewed objectively, that dismissal was one of the disciplinary outcomes that could be taken by it, the Court does not intervene. If, in this case, Mrs Gazeley had physically

abused a patient, sworn at and been deliberately rude to staff and residents, and ignored procedures to ensure residents' safety, then the Court would not intervene. Even if the Court considered that in such circumstances dismissal was perhaps too harsh an outcome, although a justifiable option, that would not entitle it to set aside the dismissal or provide other remedies. However, in the present case, Mr Hipkins and Ms Hoyle were faced with evidence that could not justify and indeed undermined the conclusions they reached. That evidence was before them and they failed to have regard to it. It led to them reaching a decision which a fair and reasonable employer could not take. It led to them reaching conclusions in some instances on false premises.

[92] Quite apart from the substantive inadequacies, Mr Hipkins and Ms Hoyle failed to comply with the predominantly procedural requirements of s 103A(3) of the Act. It was clear they failed to sufficiently investigate the allegations used against Mrs Gazeley for dismissing her. They raised the concerns that they had against her in quite lengthy correspondence, but then failed to give her and her legal advisor a reasonable opportunity to respond. The disciplinary meetings were not conducted in a fair and reasonable way. Having received substantial responses in writing from Mrs Gazeley and her legal advisor, accompanied by documentary statements from those witnessing events or supporting Mrs Gazeley, Mr Hipkins and Ms Hoyle could not have genuinely considered the explanations provided and other evidence before them. This included a situation where considerable emphasis was placed upon the DHB's apparent reasoning for placing Woodlands under temporary management. Ms Sharma had given them evidence from the DHB. Having been presented with it, Oceania nevertheless continued to act on a false assumption as to what the DHB's views actually were.

[93] In all of the circumstances the dismissal of Mrs Gazeley was not the action a fair and reasonable employer could take viewing the matter objectively as the Court is required to do. This dismissal was unjustifiable. It is therefore necessary to consider what remedies should be available as a result of that finding. Before doing so, however, I briefly refer to the Authority's determination.

Decision of the Employment Relations Authority

[94] I am conscious that my decision is substantially at odds with that reached in the determination of the Authority. The investigation by the Authority took place over five days. It appears that three separate sets of submissions were received and considered. The entire hearing before the Court took place over nine days. All of the crucial witnesses, apart from Ms Lorigan, were closely examined by opposing counsel. There is a substantial difference between the inquisitorial approach adopted by the Authority in its investigation and the more robust adversarial process, which is followed in the Court. There is also an advantage to the Court in that the parties have had time to consider the ambit of their evidence following the Authority investigation meeting and having read and considered the findings. This is a situation where it is plain that the Court had substantially more evidence on this matter than was available before the Authority and that, as a result of the closely fought adversarial contest, witnesses have made concessions that were not made before the Authority.

Remedies

[95] Mrs Gazeley seeks reinstatement. Oceania has submitted that on the basis of the evidence and the legal principles applying that it is neither practicable nor reasonable for Mrs Gazeley to be reinstated.

[96] Reinstatement is no longer a primary remedy for an unjustifiable dismissal of employment but is to be considered along with other remedies as specified in s

123(1) of the Act. Section 125(2) of the Act provides that reinstatement may be ordered along with other remedies if it is practicable and reasonable to do so. The application of these criteria has been the subject of a number of decisions both of this

Court and the Court of Appeal.[10]

10 See *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] NZEmpC 176; [1992] 3 ERNZ 243; *NZ Post Primary Teachers Association v Board of Trustees of Kelston Boys' High School (No 2)* [1992] 2 ERNZ 936; *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] NZCA 509; [1994] 2 ERNZ 414 (CA); *C v Air Nelson Ltd* [2011] NZEmpC 27; [2011] ERNZ 207; *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160; *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110.

[97] Clearly where reinstatement is claimed, as it is in this case, the Court will embark upon an assessment of all of the circumstances as to whether reinstatement is practicable and reasonable. In this case there is quite substantial evidence to suggest that a number of the remaining staff at Woodlands and its residents would welcome Mrs Gazeley back as the Facility Manager. However, as Ms Sharma acknowledged, the matter is not a popularity contest, and all of the circumstances need to be considered, including the views of the employer as expressed in the evidence in this case by Mr Hipkins and Ms Sangster.

[98] Mr Hipkins, who is no longer an employee of Oceania, gave evidence in support of Oceania's opposition to Mrs Gazeley's reinstatement. He conceded that he was no longer an employee but expressed concern if Mrs Gazeley did return. This was on the basis of the alleged incidents of improper restraint of a resident, and inappropriate comments made towards staff and residents. He later conceded in his evidence that these would not, on their own, provide grounds for dismissal. He also conceded the great confidence he had in Mrs Gazeley right up to the time of her suspension. This included the way that she had improved the facility, which no doubt led to the considerable support Mrs Gazeley enjoyed from the majority of the residents and staff, quite a few of whom gave evidence in her support. Ms Harzer's position as now being the permanently appointed Facility Manager at Woodlands was mentioned. However, Mr Hipkins had to concede that Ms Harzer's appointment was made permanent after Oceania was aware that Mrs Gazeley would be challenging the determination of the Authority.

[99] Ms Sangster gave evidence on the matter of reinstatement. In her brief of evidence she indicated a lack of confidence in Mrs Gazeley's ability to run Woodlands. She also mentioned difficulties that Mrs Gazeley would face in having to obtain recertification. However, that evidence became somewhat equivocal during the course of cross-examination. Oceania has changed the extent of clinical specification for the position of facility manager since Mrs Gazeley's dismissal.

[100] In addition, under cross-examination, Ms Sangster elaborated upon some further equivocation which appeared in her evidence in chief. This can best be

demonstrated perhaps by setting out the exchange which took place briefly between

Ms Sharma and Ms Sangster on the point as follows:

Q. Now you oppose Ms Gazeley's reinstatement don't you?

A. I do.

Q. So what exactly is it - what is it that you don't have trust and

confidence in Ms Gazeley now. What is the basis for that?

A. I think that Ms Gazeley has had a very difficult site and difficult staff. I also think that Ms Gazeley was pushed to the edge of some professional boundaries which could have been - this is a personal view - that could be misrepresented if overheard. And I do not have the trust for some of these events to be misconstrued once again I guess if that makes sense, probably not.

Q. But you said yourself that you didn't have a problem with Ms

Gazeley's work didn't you?

A. That's right.

Q. And that you held her in high regard.

A. That's right.

Q. And you'd be aware having heard the evidence even in the Court

that the allegations under the BVQI audit fell away.

A. However she did say some things that can be misconstrued and taken the wrong way by some people.

THE COURT: You're really casting the responsibility on others rather than her? Worried how others will react?

THE WITNESS: I think if you're a nurse or a professional sometimes you

have to guard where you say things and who it is to.

[101] It will be seen from this that Ms Sangster's concern relates to the problem at Woodlands which has pervaded throughout this entire episode, relating to the antagonism and disaffection of some of the staff who remain in employment. Ms Sangster is clearly concerned that Mrs Gazeley will continue to have difficulty in resolving this issue, as Ms Harzer has been unable to do so in her time as Facility Manager at Woodlands. Ms Sangster's concern is more for Mrs Gazeley personally, rather than any difficulties Oceania itself may face.

[102] The sentiments of Ms Sangster are understandable. However, the position is clearly not insurmountable. When Mrs Gazeley was Facility Manager there were clear systemic difficulties emanating from higher management. Mr Hipkins failed in his responsibilities towards Mrs Gazeley and presumably if she were to take up the position again, lessons would be learnt from what had transpired previously.

[103] Oceania cannot rely upon the position of Ms Harzer.11 She was appointed in an acting capacity. Oceania obviously decided to take the risk by making her position a permanent appointment. In any event Ms Harzer gave clear evidence that she has been away from Woodlands on other delegated responsibilities for some time. Mrs Gazeley's reinstatement can be managed.

[104] In circumstances where the grounds for dismissal are demonstrated to be so bereft of justification, Oceania is unable to provide any substantial reason why Mrs Gazeley's reinstatement would be impracticable or unreasonable. Accordingly, it is appropriate that there be an order that Mrs Gazeley be reinstated to her former position. In circumstances such as this where she has been away from the site for a considerable period of time, it is necessary that such reinstatement be managed on an orderly basis. While she is to be taken back into employment forthwith, with her salary and other financial benefits to be resumed immediately, her return to the workplace is deferred for 28 days from the date of this judgment.

[105] In this case, so far as reimbursement of lost income is concerned, Ms Dunn, counsel for Oceania, submitted that this is an appropriate case, if remedies are granted to Mrs Gazeley, for the lost remuneration to be limited to three months' ordinary time pursuant to s 128(2) of the Act. While I have held that the suspension in this case was justified, presumably Mrs Gazeley received full salary and entitlements up to the date of dismissal. In a small community, the circumstances surrounding Mrs Gazeley's dismissal would have been significant in reducing her ability to mitigate the position by obtaining alternative employment. She gave evidence as to her personal difficulties in mitigating the loss. In the circumstances, it is appropriate that Oceania, in view of the reinstatement, reimburse her for the full loss of earnings from the date of suspension unless on full pay, and then from the date of dismissal. In addition, she should receive reimbursement of all benefits, which included an annual petrol allowance of $5,000. Oceania should also fully reinstate her KiwiSaver entitlements. That may require payment to the scheme of her individual contributions, employer and government subsidies and no doubt the scheme provider will need to have further funds from Oceania to compensate her for

investment income lost during the period when she has been unemployed. Those are

11 *Asken v New Zealand Rail Ltd*, WEC 33/94, 12 July 1994.

matters which should be capable of resolution between the parties and the scheme provider, but leave is reserved for further application to the Court to resolve any dispute should that arise.

[106] Mrs Gazeley is also entitled to interest on the sum which will need to be paid to her to reimburse her for lost income and benefits. This will be in accordance with cl 14 of sch 3 to the Act which incorporates the rate prescribed under s 87(3) of the Judicature Act 1908. She will not be entitled to have interest on any payment required to reinstate her KiwiSaver scheme in view of the fact that I have already directed that her lost investment income in the scheme is to be separately reimbursed. The calculation of these items is likely to be reasonably complicated and, again, if there is any dispute then leave is reserved to refer the matter back to the Court for assistance.

[107] Mrs Gazeley has also sought compensation. In respect of the claim relating to the suspension the sum claimed is $15,000. In respect of the claim relating to dismissal the sum claimed is $45,000. I have already decided that in the circumstances prevailing, there was no alternative but to suspend Mrs Gazeley. It was handled in the best manner a difficult situation such as that could have been handled. Accordingly, she is not entitled to any compensation in respect of the suspension. So far as the dismissal is concerned, Mrs Gazeley gave her own evidence and also called evidence from her husband and a friend and colleague to support her compensation claim. There is no doubt that as a result of the actions of Oceania in dismissing Mrs Gazeley and in all of the circumstances surrounding that dismissal, including the adverse publicity

which followed, that she suffered substantial humiliation, loss of dignity and injury to her feelings. In a small provincial town the adverse publicity would have aggravated the situation. Counsel have referred me to previous judgments of this Court which provide some guideline as to quantification of such a claim. It is of course always difficult to quantify an award under this head keeping in mind that, except in the most serious cases, moderation is required. The level of hurt and humiliation suffered in this case does fall within the higher end of the spectrum of awards. In the present circumstances, it seems to me that the sum of $20,000 is an appropriate figure to compensate Mrs Gazeley under this head, and an award of $20,000 is accordingly made.

[108] In respect of Mrs Gazeley's claim for a penalty for breach of good faith I have considered the submissions made by counsel. I have given consideration also to the authorities which have been referred to. I agree with the submission made by Ms Dunn on behalf of Oceania that there is insufficient evidence in this particular case to reach a conclusion that there has been behaviour on the part of Oceania which failed to comply with the duty of good faith. I am not persuaded that there was any such behaviour that was deliberate, serious or sustained or was intended to undermine the employment relationship. Even though mistakes were made, they could not be categorised in that way. As indicated in *Waikato District Health Board*

*v The New Zealand Public Service Association Inc*12 the penalty for such a breach is

to be reserved for egregious behaviour. In the present case it is unfortunate that Mr Hipkins and Ms Hoyle did not properly comply with their obligations towards Mrs Gazeley, and, in particular, to fully disclose information to enable her to be fully informed of and deal with all of the allegations against her. However, this is not an appropriate case for the award of a penalty and that application is declined.

Contributory conduct

[109] Section 124 of the Act requires the Court in deciding both the nature and extent of the remedies to be provided in respect of a personal grievance to consider the extent to which the actions of the employee may have contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Court may then reduce the remedies that it would otherwise have awarded. Ms Dunn in this case has submitted that the actions which Mrs Gazeley has admitted to did indeed contribute towards the situation giving rise to her personal grievance. The actions she described are effectively a repetition of the allegations made against Mrs Gazeley to dismiss her. In the course of reviewing the actions of Oceania, I have decided that those alleged actions of Mrs Gazeley were either without substance or certainly not so as to justify her dismissal. In the circumstances, I am not prepared to accede to Ms Dunn's submission that they amount to contributory conduct. My assessment of Mrs Gazeley's performance up to the point of her suspension was that she used her considerable experience and skills to improve the

life and position of the residents at Woodlands. Evidence provided during the

12 [2008] ERNZ 80.

hearing showed the extent of the improvements which she made. She was unjustifiably accused of compromising the clinical safety of residents. She brought to the position her human qualities, including her considerable sense of humour. Things she said in jest to lighten the atmosphere at the facility have been deliberately misinterpreted and used against her. I am not satisfied that she has in any way acted in a manner that contributed to this sorry episode.

Costs

[110] Costs are reserved. In view of the outcome of this judgment there will need to be a review of the costs awarded by the Authority. In addition there is an outstanding issue of costs in respect of the unsuccessful application by Mrs Gazeley for interim reinstatement. I will deal with that issue also. Costs in respect of the challenge need to be considered. Costs in their entirety are accordingly reserved. The Court's Christmas vacation is fast approaching. Mrs Gazeley should have until

24 January 2014 to file a memorandum of submissions on costs. No doubt Ms Sharma will be attending to that matter. Some flexibility will be allowed should that timing not be able to be complied with. Subject to the same flexibility the defendant will then have until 21 February 2014 to file any memorandum of submissions in answer.

[111] Finally, I compliment counsel for both parties in the way they have handled this difficult case and conducted themselves during the hearing. It is always of immeasurable assistance to the Court when counsel carry out their obligations in the competent and courteous way that occurred in this case.

M E Perkins

Judge

Judgment signed at 3pm on 11 December 2013