

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 62
5433450

BETWEEN ROBIN GOULDEN
 Applicant

AND CAPITAL & COAST DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: G J Wood

Representatives: Paul McBride for the Applicant
 Paul White for the Respondent

Investigation Meeting: 13-16 May 2014 at Wellington

Submissions Received: 16 May 2014

Determination: 4 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Goulden), a security orderly with the respondent (Capital & Coast/the DHB), wishes to be reinstated back into work with the DHB, given that he remains suspended following an investigation that has been ongoing for five months. He has also raised personal grievances and made applications for compliance orders over allegations about health and safety issues, the reopening and the soliciting of complaints against him, the failure of the DHB to investigate his complaints against others, his exclusion from a staff meeting, his exclusion from working in the Emergency Department, his suspension, a direction that the parties only communicate through lawyers and fundamental flaws in the ongoing investigation process. These alleged breaches appear to have been categorised as personal grievance or breaches of

fundamental duties of an employer (including good faith) in the alternative and whether one or both apply will depend on findings of fact.

[2] Capital & Coast denies all of Mr Goulden's claims and resists reinstatement, especially given that the investigation into its concerns about his behaviour is ongoing.

[3] There is an order prohibiting the publication of the names of any patients of the Capital & Coast District Health Board, or any information that might lead to the identity of any such patients.

Factual discussion

[4] Mr Goulden is a highly qualified and experienced manager, who for reasons of his own took up the role of a security orderly with no management responsibilities on 16 April 2012. He was employed under a collective employment agreement between a number of District Health Boards and his union, the Service & Food Workers Union.

[5] Security orderlies work throughout the hospital on a number of runs, which involve a range of duties from collecting laundry to transporting patients, and providing security services such as watching certain patients and patrolling the hospital grounds, together with a wide variety of other tasks. Mr Goulden particularly enjoyed working in the Emergency Department, which is where he had spent about thirty percent of his time.

[6] Around 70 staff are employed in the Security Orderly Service, covering both Wellington and Kenepuru Hospitals. Mr Goulden worked at the Wellington Hospital. Included in that group are around nine supervisory staff (known as Charges or Seniors), and in the office, as it were, there are three management staff – the Security Orderly Service Manager (the manager) and his two second in charges, known as Coordinators.

[7] The collective agreement sets out the requirements for health and safety, including of course compliance with the law. Clause 30 provides, amongst other things, that:

30.1 ... employees should be adequately protected from any health and safety hazard arising in the workplace. All reasonable

precautions for the health and safety of employees shall be taken ...

30.2 *It shall be the responsibility of the employer to ensure that the workplace meets required standards and that adequate and sufficient safety equipment is provided.*

30.3 *It shall be the responsibility of every employee covered by this agreement to work safely and to report any hazards, accidents or injuries as soon as practicable to their supervisor.*

[8] Mr Goulden took his responsibilities under the agreement and under the Health and Safety in Employment Act 1992 seriously. In the course of 2012, Mr Goulden raised with the manager a number of such issues in writing, including over staff and visitors not wearing proper safety equipment in the emergency department, damaged electrical equipment and soiled linen being put out for collection either not in the containers provided, or improperly or over-loaded when placed in those containers. There was also an issue about sharps containers being in with the linen. I accept that that the latter is not appropriate, but do not accept that it creates any serious health and safety issues, because of the inbuilt safety mechanisms in the sharps containers.

[9] The only formal response Mr Goulden appears to have received was that the matter would be dealt with by the security orderlies' health and safety representative.

[10] In 2013, following an assault by a mental health patient, Mr Goulden raised, in his required incident report, concerns about orderlies not being given sufficient information about patients with mental health problems who could be violent (i.e. orderlies being needed to be informed in advance of this risk) and orderlies being required by nursing staff to assist patients breaching hospital rules on non-smoking. Mr Goulden also raised concerns about orderlies not being fully informed when coming into contact with infectious patients, such as when transporting them.

[11] A number of these issues, particularly the issues of potential violence and procedures for dealing with potentially infectious patients and soiled linen, were, it is accepted, major health and safety issues. They were not matters that could, however, be resolved by the Security Orderly Service Manager on his own, as they all require inter-departmental cooperation.

[12] I accept that the manager did address those issues when raised with him, but was unable to make much, if any, progress in resolving the issues, apart from the breaches of the no smoking policy. I also accept from the DHB's evidence that these are matters that are not restricted only to Wellington Hospital, but are international issues. That does not, however, negate its responsibilities to its staff.

[13] While Capital & Coast has set in place strategies and procedures to deal with all of these matters, their implementation is demonstrably less than ideal, as the evidence over the safety risks faced by security orderlies and the ongoing problems with linen clearly showed. It cannot be denied that the DHB's policies and procedures are not always followed by some staff and contractors, and that as a result security orderlies are exposed to unnecessary hazards from dangerous patients and/or visitors, infectious patients and soiled linen. In addition, training of orderlies in self-defence has not occurred, which would help them protect themselves.

[14] Mr Goulden also had a number of serious concerns about what he saw as a poor team culture, such as divisiveness within the workforce and concerns about the ability of his management to effectively deal with the issues facing the Security Orderly Service. I make no comment on Mr Goulden's claims, which are outside the scope of this investigation, except to note that the DHB has procedures for dealing with issues such as that and Mr Goulden is able to raise them within such procedures, provided he does so using an appropriate communication style and remembering that he is a security orderly, not a manager.

[15] Significantly, the DHB often failed to respond to Mr Goulden's concerns in a timely manner, if at all. During 2013, Mr Goulden escalated his concerns to the Security Orderly Services Manager's own manager. A meeting was held with him on 28 June 2013.

[16] While Mr Goulden claims that he insisted on and was granted confidentiality over a concern he raised about another staff member at that meeting, this is not reflected in the notes of the meeting and Mr Goulden's evidence did not disclose in any particular way that such confidentiality as he sought was guaranteed by Capital & Coast's representatives. The matter was in fact a confidential one on all sides, and thus even though the DHB was already taking disciplinary action over the matter it did not tell Mr Goulden, who was not the complainant and had not been directly involved in the matter. It felt, quite correctly, that it was required to keep that

person's employment information confidential and was not required to disclose what it had done to Mr Goulden.

[17] A staff meeting was scheduled for 25 July 2013. Mr Goulden wished to attend as he had a number of health and safety matters he wanted to raise. The security orderly service management must have been aware that he was likely to raise such matters. However, Mr Goulden was called away by a senior to provide cover. As is obvious, all security staff could not attend the meeting, because skeleton cover had to be provided. There is no evidence to support Mr Goulden's claim (other than his own perception) that he was deliberately excluded from this meeting. The decision was made by a senior who did not give evidence, and the manager denied giving any instructions to the senior to exclude Mr Goulden. This allegation is therefore unproven.

[18] On 25 July 2013, Mr Goulden emailed his manager's manager stating that he had still not had proper responses to the issues he had raised, that there had been a breach of confidence (over the matter dealt with above) and that he had been excluded from the meeting of security orderlies (also dealt with above). The manager's manager and the manager met with Mr Goulden on 5 August 2013 about his email. The meeting did not start well because the senior manager stated that he was not impressed by the email and that not all operational matters required feedback response to Mr Goulden. This is a bad practice for an employer to adopt when an employee raises concerns, particularly health and safety concerns that the employer accepts are legitimate. Mr Goulden correctly observed that he was entitled to such feedback.

[19] The senior manager then criticised Mr Goulden for breaching confidentiality by raising the complaint about another staff member. I accept that given the serious nature of the allegations against the other staff member, Mr Goulden, who could have been affected by their actions, was entitled to raise it, even though he was not directly affected, and he stated so. Mr Goulden also raised the matter of complaints that had been made against him. I accept that the manager said that another meeting would be required to discuss those complaints.

[20] Mr Goulden responded the next day in writing, stating that the senior manager's attitude was unacceptable and that his serious concerns needed a written response. Mr Goulden then raised his concerns, as is his right, with Human

Resources. One of his concerns was that he wanted a formal response to the results of three complaints against him.

[21] In any event, the Security Orderly Manager then invited Mr Goulden to a meeting to discuss how the complaints had been dealt with. On the basis of the documentation and oral evidence I accept that here was, however, no issue of Mr Goulden being disciplined over any of these complaints. Mr Goulden did not wish to meet with his manager over these matters because of his lack of trust in the manager.

[22] It is important to note that at this point that lack of trust was beginning to operate both ways. Mr Goulden believed that his manager had breached his confidentiality (not upheld), had not responded to his concerns (not upheld in full, but a genuine concern of Mr Goulden nevertheless), and he had no faith in his management ability, demonstrated by later correspondence and a comment made to a very senior manager. On the other hand, the Security Orderly Manager was frustrated at issues being raised over and over again despite his best efforts to remedy them, Mr Goulden's non-acceptance that he had breached any confidentiality, and what he saw as efforts to undermine his management role within the DHB.

[23] Mr Goulden sought advice from HR about whether he needed to attend the proposed meeting. I accept that he was told that the matter could be held off until HR had had time to make further investigations on Mr Goulden's concerns, which went wider than the three complaints at issue.

[24] Mr Goulden met with the manager of People and Culture on 29 August 2013 to discuss Capital & Coast's response to his concerns. At that meeting, Mr Goulden's health and safety concerns set out above were recognised as genuine and addressed. It was noted that despite processes being in place, they were not always followed, as were communication issues within the team. A number of other points of concern to him were noted without any specific actions being proposed. Mr Goulden was also told that complaints were "*an opportunity to be a learning experience*" and that the three complaints were ready to be discussed with him.

[25] Mr Goulden wrote to express his disappointment at the outcome of that meeting. He was particularly concerned that the manager of People and Culture had not dealt with his perceptions of the senior manager's attitude towards him at their

two meetings. He indicated he would be taking legal advice over a personal grievance. He later commented that there needed to be:

... a willingness to change even at management level. My view is that there is an attitude and a culture that needs to be changed and until that happens little progress will be made and staff will continue to be at risk. That is not a situation that I am prepared to put up with.

[26] Despite Mr Goulden's view, I do not accept that there was any risk of disciplinary action being taken against Mr Goulden over the three complaints against him.

[27] Mr Goulden then raised a personal grievance on 11 September 2013, relating to health and safety issues, the lack of response to those, a culture of *inaction or apathy*, the alleged breach of confidentiality, being told management issues were none of his business, and the reactivation of historical issues or complaints. Over the course of time Mr Goulden's employment relationship problems have been extended to those set out at the beginning of this determination.

[28] The grievance was not resolved in mediation and on 23 October 2013 the DHB was provided with a draft Statement of Problem that may be filed in the Authority. This was sent to the Interim Chief Executive of the DHB, with a request to discuss what Mr Goulden saw as systemic issues in Security Orderly Services.

[29] Around this time, Mr Goulden was working in the Emergency Department on night shift. On the morning of 27 October 2013, Mr Goulden was removed from working in the Emergency Department on concerns being raised by nursing staff about his behaviour. Mr Goulden also put in his own complaint when he became aware of some nursing staff not wanting Mr Goulden back in the Emergency Department. The Security Orderly Manager made the decision that Mr Goulden was to stay away from the Emergency Department from that date. While he states that that was in order for the matter to be investigated, I do not accept that Mr Goulden was told that. Mr Goulden was very upset about his removal because he liked the Emergency Department work so much and as he felt he had been falsely accused of misconduct.

[30] Mr Goulden sought to have the ban lifted, but his manager insisted that the issues had to be investigated first and that he was entitled to instruct Mr Goulden not to work in that area.

[31] Mr Goulden did not accept this advice and again asked for a meeting with the manager, which took place on 31 October 2013. That meeting, like the issue of what happened in the Emergency Department the last time Mr Goulden worked, are currently the subject of disciplinary proceedings for which Mr Goulden has been suspended. In these circumstances, it would be inappropriate for the Authority to make specific determinations on what happened at that meeting. In any event it is not necessary to determine them to determine the employment relationship problems raised by way of applications for personal grievance and breaches of the employment agreement. It is sufficient to note that the meeting ended with Mr Goulden allegedly being asked to leave the manager's office three times before he would do so, which is denied by Mr Goulden. His behaviour was also said to be threatening, again denied.

[32] The manager, with the assistance of Human Resources, drafted a letter the next day to Mr Goulden about an initial investigation meeting to be held by the manager. There were two serious issues with this proposal. First, the letter stated that Mr Goulden had disobeyed lawful instructions, instead of clearly stating that that was an allegation, although I accept that was merely poor wording and an oversight. Second, the letter proposed that the manager was to be the judge in his own case, as he was to lead the investigation. Mr Goulden was quite right to raise these issues with Capital & Coast, which he did by way of a further personal grievance.

[33] The DHB's response was, amongst other things, to invite its Executive Director, People & Culture, to look into Mr Goulden's concerns, including the issues of health and safety. She advised that she would be instructing an independent contractor to look into the complaints from the Emergency Department and that the Manager, Health & Safety, would look into the health and safety issues. Mr Goulden's exclusion from the Emergency Department was, however, to stand.

[34] I note that Mr Goulden has only recently become aware of the specifics of the allegations about his behaviour in the Emergency Department, even although the matter was five months old by that time. The point about the lack of specifics on the Emergency Department issue was made to the DHB as early as 13 November 2013. That date also coincided with a meeting with the Chief Executive of Capital & Coast with Mr Goulden. At that meeting, Mr Goulden was assured that all issues would be dealt with promptly.

[35] Soon after the meeting, matters between Mr Goulden and his manager could only have worsened as a result of Mr Goulden's emails to a large number of people in the Security Orderly Service, no doubt as a result of a "reply all" option being chosen by Mr Goulden, which were unprofessional, as Mr Goulden himself accepted at the investigation meeting.

[36] These emails also provide evidence to support my findings, on the balance of probabilities, that Mr Goulden later made comment to the Executive Director, People & Culture, that his manager was "*not a manager's backside*".

[37] The tone and content of those emails became the next matter to be part of the DHB's investigations into Mr Goulden's behaviour.

[38] Another matter Capital & Coast is investigating relates to Mr Goulden's interactions with colleagues on 19 November when they were involved in trying to track down a fake doctor, who had plagued Wellington Hospital for some time.

[39] The next issue of concern related to interactions with co-workers and a union organiser on 21 November 2013. To the extent that this relates to a union meeting, Capital & Coast would be unwise in the extreme to attempt to discipline a union member employee for their behaviour at a union meeting. Employers have no control over union meetings, although what happened after the union meeting by its employees on its premises could be appropriate to investigate.

[40] Another issue arose because of Mr Goulden's accessing of the Emergency Department on 25 November 2013 when he was told not to attend there. Mr Goulden has an explanation for that and has stated that he was not there trying to work.

[41] In the meantime, the DHB sought to address three of those issues by way of a disciplinary investigation, with Mr Goulden being informed of this on 21 November 2013. That process was overtaken by the subsequent disciplinary process, which now covers those issues and more.

[42] In the meantime, further mediation was attempted, but again it was not successful in resolving matters between the parties.

[43] It is alleged that the manager sought to elicit complaints against Mr Goulden in respect of what had happened at the union meeting and thereafter. There was

insufficient evidence to support such a finding, and in any event Mr Goulden cannot have it both ways, as he has also complained (quite correctly as a matter of law) that the DHB should not simply act as a sponge when complaints are raised, but investigate them by looking for additional witnesses. The manager would therefore have been entitled, given that a complaint had been made, to make enquiries of other staff, even if informally.

[44] Mr Goulden continued, quite appropriately, to raise health and safety issues and was in fact elected at a meeting of security orderlies as a health and safety delegate. However for whatever reason, but not one of that was supportive of Mr Goulden, the manager has failed to put in place any health and safety delegates, even though employee participation is a major part of the DHB's health and safety programme and is required under the parties' collective employment agreement.

[45] The DHB then engaged external counsel, namely its current representative, to assist it. As a precursor to the mediation, he set out all the concerns that the DHB had with Mr Goulden, but also noted that Capital & Coast was:

... concerned that Mr Goulden's ongoing employment may be comprised by his incompatibility with CCDHB ... there is a suggestion that Mr Goulden is not satisfied with anything that does not accord with his view on what is best in his workplace. He also seems to repeatedly generate accounts from others of intimidating behaviour and inappropriate language.

[46] Then on 4 December Mr Goulden was informed of another complaint about his behaviour. That complainant alleged that Mr Goulden's behaviour had led to her being unable to attend work. The allegations were denied by Mr Goulden. Capital & Coast also informed Mr Goulden that while its disciplinary policy contemplated a meeting about suspension, this was clearly not practicable in the current situation and thus the matter would be assessed following any written submissions Mr Goulden might make by the next day.

[47] In his response, Mr Goulden noted that he was prejudiced in having to make a response in such a tight timeframe and that the process was in breach of the DHB's disciplinary policy. It was submitted that he was no risk to any other staff and that he was available to meet with the DHB to discuss the issue.

[48] The decision to suspend was taken by the DHB's Chief Operating Officer, effectively on the sole basis of the most recent complaint. It was considered that an

employee being too stressed to attend work because of Mr Goulden's alleged behaviour was grounds for suspension.

[49] The issue of suspension was, however, readdressed within a reasonable timeframe, around a week later. However, in the interim, there were more concerns raised about Mr Goulden's alleged behaviour, namely that he had made repeated attempts to contact the complainant and one of her close associates, which form another issue to be addressed in the DHB's disciplinary investigation and over which Mr Goulden denies acting inappropriately.

[50] As a result of the further meeting on suspension, the DHB maintained its view about the need for suspension, relying principally on the original concern, but also on the evidence the allegations of unwanted continued contact by Mr Goulden. As a result of that meeting, the Chief Operating Officer also made it clear that the outstanding issues of concern to Mr Goulden (namely the three old complaints) were closed as far as the DHB was concerned.

[51] On 19 December 2013, Capital & Coast wrote to Mr Goulden setting out its eight concerns (less the issue of compatibility) and inviting explanations from him in order to determine whether or not a formal investigation was required.

[52] Mr Goulden responded and was happy to answer the DHB's list of issues, although he noted that some had never been raised with him before and that unless the DHB now *"takes the (correct) view that the 'complaints' are spurious, they do need to be properly investigated"*.

[53] On 31 December 2013, the Chief Operating Officer wrote back, advising that there would be a formal investigation, run by a contractor, over the nine current issues, now including the issue of compatibility. However, *"her role will not include determining whether you have breached the DHB's code of conduct. I will make that determination once I have the result of her investigation"*. It was indicated that 10 people would be interviewed, including Mr Goulden, but that the DHB would also interview any other person who might come to light through information received during the investigation as having relevant information. I note that despite this, the DHB had not yet interviewed a witness to a key interaction between Mr Goulden and the complainant after the union meeting.

[54] On 8 January 2014, Mr Goulden rang the DHB's investigator. As a result, she came to the view that he was trying to impede the investigation, or otherwise conclude in Mr Goulden's favour. Her views about the process that she was to follow were made known to Mr Goulden through his lawyer, in writing.

[55] I conclude that there was nothing improper in her doing so. First, Mr Goulden was aware that she was the investigator when he raised his issues with her, which related to the lack of information he allegedly had, together with other potential problems with the process. Second, she was obliged as the investigator to make those reflections so that Mr Goulden knew where he stood with her. Any action otherwise would have been improper, and it would have been inappropriate for the investigator to have recused herself from the investigation in these circumstances. It also does not provide evidence of predetermination.

[56] On 14 January 2014 the DHB's external counsel wrote to Mr Goulden's lawyer *requesting* him to communicate with Capital & Coast only through his lawyer. No specific acceptance or refusal of this request was made by Mr Goulden, although in effect he has complied with the request.

[57] Despite commencing her investigation early in January, the investigator has not yet completed it. As at 15 May 2014 when she gave evidence, together with the Chief Operating Officer, they expected the matters to be concluded within another month. All interviews, except those of people Mr Goulden suggested, have taken place. However, Mr Goulden made his suggestions of those people in March 2014. Furthermore, an analysis of one of the initial complaints in late 2013 makes it very clear that there was a witness to a key interaction and that is a person who Mr Goulden identified in March and has still not been interviewed.

[58] There are two other major reasons for the delay in this process. The first is that two complainants wanted union support and this could not take place until February. While I accept that the DHB was content to wait for the complainants' union representative to be available, a delay of that magnitude has not been sufficiently explained. The other major reason for the delay was the six week delay in interviewing Mr Goulden. However, Mr Goulden has not been delaying the process, apart from Mr McBride being unavailable for one meeting, which is not surprising when only given one date from which to choose.

[59] All these delays are inconsistent with the first principle in the DHB's disciplinary policy which is that "*any action should be taken as soon as practicable after the event*". I note that the policy also deals with suspension and states:

In cases where it is best that the employee not be at work during an investigation of serious misconduct (e.g. risk to patient/client/the employee or other employees, a highly emotive situation, an allegation which is criminal in nature or relates to fraudulent activity), the employee may be required, by a manager with delegated authority, to absent themselves from the workplace on ordinary pay plus taxable allowances.

[60] The suspension policy itself makes it clear that the manager "*is to meet with the employee and their representative/support person*". Again, that is not set out in the policy as an optional procedure.

[61] Although Mr Goulden complains of the DHB's investigator raising serious allegations about his behaviour with other witnesses and thus breaching his confidentiality and expanding the scope of the investigation unnecessarily, I do not accept that claim. The investigator has been charged with a very broad range of issues, including the most serious allegations and also has to deal with the issue of compatibility. The seriousness of the complaints made by two key complainants, which relate to whether they feel safe at work with Mr Goulden has, understandably, been a major focus of his since the investigation commenced formally. However, until the allegations are withdrawn, the DHB has no alternative but to investigate such serious allegations.

[62] Thus while it is true that these two complainants have to a large degree withdrawn (or not maintained) their allegations about Mr Goulden representing a physical threat to them, they had made such allegations, and at the time that the other staff were interviewed, those allegations had not been at all resiled from.

[63] In addition, where compatibility is an issue, a fair and reasonable employer is entitled to ask general questions about compatibility and is required to take into account answers it receives.

[64] Throughout the suspension, Mr Goulden has been paid his average weekly earnings for the four weeks preceding his suspension. However Mr Goulden is concerned that he has lost the opportunity to do overtime, which others have done over the course of his suspension.

[65] Mr Goulden seeks to be reinstated forthwith. On the other hand, his manager gave evidence of resigning were Mr Goulden be reinstated.

Determination

Health and safety

[66] It is for Mr Goulden to establish on the balance of probabilities that all practical steps were taken to ensure his safety while at work, and in particular that he is not exposed to hazards in his place of work. Clearly in the hospital there will always be risks associated with isolation patients, potentially violent patients and soiled linen. As indicated above, I accept that the DHB has proper processes in place that should theoretically ensure Mr Goulden's safety in relation to isolation patients and soiled linen. However, the employer is also required to ensure that such systems are applied by its own staff, either by way of training and/or supervision. In this case it was clear, in relation to isolation patients and soiled linen, that the procedures did not protect employees such as Mr Goulden from hazards associated with such risks. Even more fundamentally, it is clear on the evidence that the DHB has not taken all practical steps (although it does have policies in place) to ensure the safety of its staff from potentially violent patients or visitors.

[67] As a remedy for any personal grievance and/or breach of the parties' employment agreement Mr Goulden has suggested that a compliance order be made requiring Capital & Coast to comply with the collective agreement and the Health and Safety in Employment Act, and that such compliance order be adjourned pending voluntary compliance. I agree that this is the most appropriate remedy in these circumstances, because I accept that the DHB is attempting to put into place steps to ensure the safety of its staff at work from violent patients or visitors and to ensure compliance with its rules in relation to isolation patients and soiled linen.

[68] It is open to Mr Goulden therefore to pursue his claim for a compliance order should compliance not be forthcoming within an acceptable period.

Suspension from Emergency Department

[69] Emergency departments are one of the most stressful workplaces in the country, not just in a DHB. Life or death decisions are made routinely. In these circumstances, staff must be able to rely without question on their colleagues. Where

some staff wish an orderly staff member to be excluded from the Emergency Department (where it is not a necessity for them to work in), then the DHB has no choice but to take such a matter seriously. Mr Goulden's exclusion from the Emergency Department in the relevant circumstances was therefore justifiable. Any unfairness to Mr Goulden in losing an enjoyable part of his job is greatly outweighed by the benefits of an effective emergency department I hold.

[70] On the other hand, Mr Goulden was also entitled to have the matter properly investigated. After all, an investigation might conclude that Mr Goulden was not the problem and that the complainant or complainants were the real problem. Given that such staff work permanently in the Emergency Department this could be far worse a problem for the effective operation of the Emergency Department, which is a vital part of the hospital's operation. That the investigation is still ongoing over six months later reflects poorly on the DHB, and will be addressed in a later section.

Suspension from all duties

[71] I accept that the DHB was justified in substance for suspending Mr Goulden when it did. It is these sort of situations for which suspension may occur even in the absence of a specific contractual entitlement for an employer to suspend. The Chief Operating Officer was facing an increasing number of complaints about Mr Goulden and at the time the Chief Operating Officer made the decision to suspend, at least one staff member was refusing to come to work if Mr Goulden was there. Again I accept that the decision to maintain the suspension some eight days later was substantively justifiable, because at that point the most serious allegations against Mr Goulden had not been withdrawn (or left in abeyance) by the complainants.

[72] On the other hand, there are serious failures by the DHB in the way that it implemented and has continued the suspension. The DHB should have followed its own policy on suspension, which requires a meeting, yet none was held. I do not accept that the matter was so urgent that a meeting could not have been convened at short notice, given that the complainant (who was the only one whose safety was allegedly immediately at risk at the time) could have been let off work for the day until such a meeting had taken place. The fact that a meeting was held subsequently was insufficient to remedy the matter, because it took place after the suspension. Its only effect is to limit remedies.

[73] More significantly, this suspension has gone on for far too long. The DHB's own policies require a disciplinary process is to be conducted promptly. Under no interpretation could the DHB have met this standard. Its defences to the length of a process that it controls are unconvincing, as highlighted above, and must be rejected.

[74] It follows that the disciplinary process and hence the suspension should have been completed some time ago. The Authority can only remedy past non-compliance by way of financial compensation. However, the Authority can order Capital & Coast to reinstate Mr Goulden to his job, which is what he wants. Given the gross delays in this matter, reinstatement is appropriate, pending the DHB's decisions following its disciplinary investigation. Any further delays, such as interviewing another witness, are delays of the DHB's own making. It was clear from the first complainant's statement that that person was a key witness and they should have been interviewed months ago.

[75] I accept there are issues between Mr Goulden and his manager, but that they can be catered for in a manner that is reasonable and practicable. To be fair to both parties, I hold that Mr Goulden is to be reinstated to such part of his duties as the DHB directs (i.e. excluding him from the emergency department and avoiding direct contact with his manager, at least in the short term, by assigning him work outside of core management hours, if it so wishes) within 14 days of the date of this determination.

[76] Mr Goulden's continued suspension has had a significant impact on him. Furthermore, given that the most serious allegations against him do not appear to be being pursued and yet he has not been formally informed thereof, compensation in the sum of \$1,000 is appropriate. There is no contribution by Mr Goulden, as he was not responsible for the procedural errors made by the DHB, nor the delays in the DHB progressing its disciplinary process within a reasonable timeframe.

[77] I do not accept that Mr Goulden is entitled to additional remuneration over the course of his suspension for loss of a chance of greater overtime and penal rates. The formula adopted by the DHB seems reasonable and more generous than that provided in the suspension policy Mr Goulden seeks to rely on, and much of the extra remuneration sought may ironically be due to Mr Goulden's ongoing absence.

Discrimination

[78] I do not accept that Mr Goulden was suspended from the Emergency Department and later suspended from work altogether for reasons in any way related to the fact that he had raised a personal grievance or grievances, for the reasons set out above. Furthermore, I do not accept that any previous complaints against him were reopened, or that the DHB solicited complaints against him, or that he was excluded from the staff meeting for unjustifiable reasons. I do accept that the DHB has failed to investigate Mr Goulden's complaints against others, but it may be that it will do so once his disciplinary investigation is completed. In any event, this is not a matter for which remedies were sought by Mr Goulden.

Communication through lawyers

[79] At the time the DHB made such a request, Mr Goulden had already engaged counsel and was suspended. In these circumstances, Capital & Coast was entitled (unless Mr Goulden ceased to engage legal representation) to request that the lines of communication be limited to counsel-to-counsel. It is highly questionable whether an employer can require an employee to only communicate with it through his or her lawyer. Such an approach may lead to increased costs to an employee. However, here there was merely a request that was effectively complied with without specific objection, at least until Mr Goulden filed with the ERA.

[80] In all of the circumstances I conclude that the matter of Mr Goulden's costs is best dealt with in costs rather than by separate personal grievance or special damages. This is because I conclude that the DHB's actions in investigating Mr Goulden were not so unfair as to give rise to special damages. The DHB has been facing an extremely difficult situation and while it has failed in some areas its actions have been found to be justifiable in others. I therefore decline to make any order for special damages. Once proceedings have concluded I will address any areas where Mr Goulden has been faced with unnecessary costs.

Investigation process

[81] I have dealt with these matters in the facts and also in part over the suspension. However, for the purposes of completeness, I note that I accept that the decision-maker and the investigator are sufficiently independent to complete Capital & Coast's investigation. For reasons given above it was appropriate for the investigator to

indicate her views about Mr Goulden's initial communications with her. I also do not accept that witnesses were led in any particular direction by the investigator, or that there was predetermination. Similarly, I do not accept that the DHB allowed complainants to advocate in their own cause. The DHB's job was to find out what it believed had been happening in its workplace. Finally, while the investigation may have progressed better if Mr Goulden's witnesses had been interviewed earlier, it does make sense to interview him last, so that he is aware of all the material that he was going to be questioned over.

Conclusion

[82] While Mr Goulden has been unsuccessful in a number of his claims against the DHB, Capital & Coast has failed in its duty in law and under the parties' employment agreement to provide Mr Goulden with a safe workplace over the issues of risk of violence from patients or visitors, risk of infection from isolation patients and risks associated with soiled linen. That matter can be pursued by way of compliance order in the future (should one be necessary), given that the DHB has undertaken to take further steps to minimise such hazards.

[83] Mr Goulden was unjustifiably suspended from his workplace because he was not given a meeting beforehand, and because the suspension has gone on for far too long. Capital & Coast is ordered to pay Mr Goulden the sum of \$1000 compensation under s.123(1)(c)(i) and (pending its decisions on its disciplinary investigation) to reinstate Mr Goulden to his position as an orderly (subject to its discretion to set his place and times of work), within 14 days of the date of this determination.

Costs

[84] Costs are reserved.

G J Wood
Member of the Employment Relations Authority