

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 271
5358430

BETWEEN

SUZANNE JOHNSON
Applicant

A N D

BAY OF PLENTY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: K J Anderson

Representatives: S Austin, Advocate for Applicant
G Bingham, Counsel for Respondent

Investigation Meeting: 11 and 12 December 2012 at Whakatane

Submissions Received: 24 January and 4 March 2013 from Applicant
7 February 2013 from Respondent

Date of Determination: 28 June 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Suzanne Johnson, brings several claims to the Authority for investigation and determination:

- (a) A claim that the respondent has breached a term of a mediated *Record of Settlement* dated 1 June 2011;
- (b) A claim of unjustifiable disadvantage pertaining to a warning dated 2 June 2011;
- (c) A claim of unjustifiable disadvantage pertaining to a warning dated 17 August 2011; and

- (d) A claim of unjustifiable disadvantage relating to alleged “harassment” by the respondent while the applicant was on sick leave.

For completeness, I record that Ms Johnson was also advancing three further unjustifiable disadvantage claims relating to correspondence received from the Bay of Plenty Health Board (the DHB); dated 2 September, 16 November 2011 and 10 May 2012. It was claimed by Ms Johnson that the nature of the respective letters was such that she believed she had been issued with a warning on each occasion. However, at the first day of the investigation meeting, upon discussion with the Authority member, the DHB verified that these letters were not warnings; rather they were reminding Ms Johnson of existing performance concerns (and consequences) that had been the subject of a Performance Management Plan (PMP). This has now been accepted by Ms Johnson, via her advocate and the three claims in question are no longer being pursued.

[2] Ms Johnson also alleges that there have been several breaches of the duty of good faith pursuant to s.4 of the Employment Relations Act 2000 (the Act). It is alleged that the breaches of good faith are directly related to the actions of the respondent as they pertain to the claims of unjustifiable disadvantage and the actions of the respondent over a period of time.

[3] Ms Johnson asks the Authority to find that she has valid personal grievances relating to the claims of unjustifiable disadvantage (as set out above) and she asks the Authority to award her compensation pursuant to s.123(1)(c)(i) of the Act, along with reimbursement of wages for a period of unpaid sick leave. The applicant also asks to be awarded various penalties relating to the alleged breaches of good faith.

[4] The respondent, the Bay of Plenty District Health Board, denies the claims of the applicant and says that the warnings issued to the applicant were justified and she cannot show that she has been disadvantaged by any action(s) by her employer. In regard to the claim of a failure to comply with the mediated Record of Settlement, the respondent says that it has complied to the full extent required under the settlement. Finally, the respondent denies that it has breached its duty of good faith in any of its dealings with the applicant.

[5] The Authority has heard evidence from Ms Johnson. For the respondent there is evidence from Ms Jenny Roy, Ms Kathie Sale, Ms Nola Younger, Mr Ted Harper,

Ms Jodie Skinner, Ms Sue Lambert, Ms Bronwyn Anstis, Mr Nick Cockroft and Ms Penny Sanderson. The parties have provided a plethora of documents. The Authority has closely considered all of the material evidence, albeit it may not be specifically referred to in this determination.

Factual background

[6] Ms Johnson commenced her employment with the DHB in December 2006 in the position of Medical Records Clerk. In April 2007, she was appointed to the role of Outpatient/Inpatient Scheduler – Orthopaedics, at the Whakatane Hospital. The main focus of this role is to schedule and book patients for operations and for outpatient lists and clinics.

[7] When Ms Johnson was appointed as a scheduler in 2007, she joined two other schedulers. It appears that the working relationship between these three women in the team was harmonious and effective. Sometime in 2008, one of the schedulers, Ms Skinner, was appointed to the role of Scheduling Team Leader. Ms Johnson says that Ms Skinner was appointed as a team leader in “an informal way” but the evidence of Ms Skinner is that she applied for the position when it became available and was duly appointed. The relevance of Ms Skinner’s appointment is that it seems that the dynamics between the three members of the scheduling team changed somewhat. In particular the relationship between Ms Johnson and Ms Skinner deteriorated.

[8] The evidence of Ms Johnson is that in October 2010, she found that she was having difficulty with the leadership style of Ms Skinner. Ms Johnson says that she found that Ms Skinner’s leadership style was often pedantic and bossy. Reference is also made to Ms Skinner finding fault rather than team building. On the other hand, Ms Skinner’s evidence is that she noticed a change in the mannerism of Ms Johnson in that she would snap at her and raised her voice and was generally rude and aggressive.

[9] However, the overall evidence is that the problems in the relationship between Ms Johnson and Ms Skinner (and other members of the staff) arose much earlier than Ms Johnson attests to. But it is commonly accepted that because of the communication and relationship issues that arose, it was necessary for Ms Kathy Sale, the Manager of Surgical Services, to become involved. The evidence of Ms Sale is that on 23 September 2008, she received an email from Ms Skinner. The general tenor

of the email is that Ms Skinner informed that there was a problem as some staff were finding it hard to deal with Ms Johnson in regard to incorrect bookings of patients by Ms Johnson and her attitude when this was brought to her notice. Ms Sale had an informal discussion with Ms Johnson and the latter agreed to be more aware of her telephone manner in future.

[10] The evidence of Ms Sale is that several communication issues between Ms Johnson and other hospital staff arose between October 2008 and June 2009. Ms Sale met with Ms Johnson on 26 June 2009, along with a human resources person. The reasonably comprehensive notes of this meeting record the tenor of the discussion that took place, as does a subsequent letter (7 July 2009) from Ms Sale to Ms Johnson. In this letter, Ms Sale also informs Ms Johnson that:

You acknowledged and agreed that this behaviour is not acceptable.

We discussed the relevance of the customer service training day you recently attended in regards to these standards of behaviour. I also gave you a copy of Shared Expectations for reference.

I highlighted the seriousness of these issues and if your unacceptable behaviour continued we may have to consider formal disciplinary procedures.

On a positive note, subsequent to our meeting, I have received positive feedback regarding a noticeable improvement in your attitude to others since our meeting.

I look forward to our rescheduled performance appraisal where we can discuss this further.

Yours sincerely,
Kathie Sale
Elective Services Manager

[11] Via a letter dated 25 July 2009, Ms Johnson provided a response. In addition to requesting copies of written documents, letters of complaint, file notes/memos and similar material relating to all complaints made, Ms Johnson requested copies of written statements from parties who had provided positive feedback. Finally, Ms Johnson requested that any performance appraisal should “take place separate to and post resolution of these issues” and she advised that she would have a support person present at any further discussions or meetings pertaining to these issues.

[12] Ms Sale replied with a letter dated 30 July 2009 indicating that she did not believe any further response was required from Ms Johnson and that the matters had

been dealt with sufficiently at the meeting on 26 June 2009. Ms Sale suggested that Ms Johnson should reflect on this and hence her performance appraisal was postponed until 14 August 2009.

[13] The performance appraisal for Ms Johnson was conducted by Ms Sale on 14 August 2009 and relevant to the issues that had arisen, Ms Sale records under *Manager's Comments*:

The recent meeting with HR about issues surrounding your attitudes to colleagues seems to have been useful and there has been positive feedback from yourself and others about how you are now handling difficult situations involving other staff members. I admire your positive and proactive attitude towards this. The learning goals you have set for yourself this year will be helpful in your role and I am happy to support these. Thanks for the hard work you put into your job – your dedication is admirable.

[14] Notwithstanding the positive comments within the August 2009 performance appraisal record, the evidence of Ms Sale is that there continued to be some communication and behaviour problems relating to Ms Johnson's relationships with colleagues. The July 2010 performance appraisal records that:

You have had a much better year this year Suzanne. There are still a few instances of personality issues with other staff and I know you are working to try to manage these.

[15] Via a letter to Ms Sale dated 20 August 2010, Ms Johnson expressed her concern about the mention of personality issues in the performance appraisal record and she inquired as to what the DHB was going to do about resolving these issues. Ms Johnson also made mention that mediation had not been undertaken to address the personality issues that were deemed to exist.

[16] In response to Ms Johnson's concerns, Ms Sale met with her on 10 September 2010. A summary of their discussions is recorded in a letter of the same date from Ms Sale to Ms Johnson. An outcome was that mediation would be arranged. The evidence of Ms Sale is that a number of other issues were present involving Ms Johnson and by December 2010, the working relationship between Ms Johnson and Ms Skinner had broken down. Human resources advisers attempted a mediation of the situation.

[17] An internal mediation meeting was held on 28 January 2011. The evidence of Ms Johnson is that the mediation meeting ended with some general agreement that it

might take a few meetings for the issues regarding the relationship between her and Ms Skinner to be resolved. An email, also dated 28 January 2011, from a human resources adviser, records that the parties had agreed to some “action points” and that some “team exercises” would take place over a four week period. Ms Johnson and Ms Skinner also subsequently participated in an employee assistance programme. Further internal mediation meetings took place on 1 March and 11 March 2011 and there were various discussions involving the implementation of a Performance Management Plan (PMP) for Ms Johnson and Ms Skinner. The evidence of Ms Sale is that in regard to Ms Skinner, her PMP was enacted between 1 April and 30 June 2011 and was duly signed off as being completed. However, it seems that some issues arose in regard to the PMP for Ms Johnson. A meeting took place on 8 April 2011 to discuss the PMP, along with other matters, including specialist clinic days.

[18] The evidence of Ms Sale is that at the meeting on 8 April 2011, Ms Johnson informed that she felt unsafe in her office environment. This is also recorded in the written record of the meeting. Ms Sale says that she contacted Ms Johnson that afternoon to inform her that a move to new office space would be arranged as soon as possible. Ms Johnson subsequently (27 April 2011) moved to a work station in the office of the medical typists; albeit it seems that this move was not viewed particularly favourably by Ms Johnson or the typists. Indeed, on the first day of Ms Johnson’s move, Ms Sale received an email from Ms Sanderson, Manager of Clinical Support Services, complaining that Ms Johnson was causing “major disruption” and that she had demanded that the office be moved around to accommodate her. Nonetheless, Ms Sanderson also informs in her email that the typists “can be difficult to manage at the best of times”.

A reportable event – 28 April 2011

[19] Apparently Ms Johnson did not get off to a good start in her new work location as on 28 April 2011, Ms Sanderson filed a *Reportable Event* notification with Ms Sale. The events referred to are that Ms Johnson’s behaviour toward other staff included:

Rudeness, issuing instructions to staff using inappropriate tone, insistence that the office be moved to suit her needs, demanding that phone extensions be moved immediately despite being advised this wasn’t possible.

[20] Also recorded is that Ms Johnson had been asked to speak in a lower volume when on the phone and that her response was rude and unhelpful. Finally, Ms Sanderson recorded that her staff (and her) felt they had been bullied and harassed by Ms Johnson.

[21] The evidence shows that a number of other issues arose regarding Ms Johnson's interaction with other staff and her performance pertaining to certain matters. The issues were set out in a letter from Ms Sale to Ms Johnson dated 6 May 2011. Reference is made to two reportable event forms (one of which has been mentioned) in which it is alleged that:

- You failed to complete a core requirement of your position as Scheduler, Surgical Services and failed to maintain an acceptable level of work by not booking a patient for theatre according to standard process.
- You have displayed inappropriate and/or disruptive behaviour at work, including unreasonable behaviour towards other employees and failing to adhere to the BOPDHB Shared Expectations Policy (Code of Conduct, copy enclosed), since your office move.

[22] The letter then informs that there are several concerns relating to Ms Johnson's scheduling duties and this includes an appointment not being made, late bookings for a clinic, and not booking appointments prior to the required time. Mention is also made of procedural problems in relation to ACC matters. Ms Sale also indicates in her letter that she wished to discuss several items with Ms Johnson including:

- Clinic confirmations
- Specialist roster/timetable availability in your desk file
- Out of area process
- Leave calendar

[23] Ms Sale informs Ms Johnson that she is investigating the above matters further and invites Ms Johnson to attend a meeting on Thursday, 12 May 2011. The letter concludes:

Please be aware that this is an investigation meeting only. In accordance with the BOPDHB investigation process, the purpose of this meeting is to hear your response in relation to the reportable events forms and the allegations as detailed above. We ask that you provide a written response to both reportable event forms and that you bring this with you to the meeting on Thursday. Following completion of the investigation into this matter, a decision will then

be made as to whether this matter is to proceed further. If substantiated, these allegations are considered misconduct in terms of our Disciplinary Process and Shared Expectations Policy (Code of Conduct, copies enclosed) and may lead to a disciplinary process which could result in a disciplinary sanction being issued.

[24] Finally Ms Johnson was advised that Ms Sale and a human resources adviser would be present at the meeting and Ms Johnson was invited to bring a support person or representative with her.

[25] On 12 May 2011, a meeting took place with Ms Johnson accompanied by her advocate; as recorded in the written record of such. By a letter dated 25 May 2011, Ms Johnson was informed by Ms Sale that the outcome of the investigation into the reportable event (28 April 2011) was that the DHB would be undertaking a disciplinary process in regard to an allegation of a breach of organisational policy; namely:

Inappropriate or disruptive behaviour at work, including unreasonable behaviour towards other employees

[26] The investigation process and its conclusions are set out in a document titled *Investigation Report into REF-25 May 2011*. Following a meeting with Ms Johnson on 30 May 2011, she was issued with a written warning on 2 June 2011. The reason being:

... for inappropriate or disruptive behaviour at work, including unreasonable behaviour towards other employees.

Issue One: Was Ms Johnson affected to her disadvantage by an unjustified action by her employer due to receiving the warning dated 2 June 2011?

[27] It is well established that for Ms Johnson to have a valid disadvantage personal grievance claim under s.103(1)(b) of the Act, it must be proven that her employment or one or more conditions of her employment, was affected to her disadvantage. If this is found to be so, the onus then shifts to the employer to show that the action of issuing a warning to Ms Johnson was what a fair and reasonable employer could have done in all the circumstances¹. In applying the test in subsection (2) of the Act, the Authority must consider whether the employer has met the four criteria provided at s.103A(3) as they pertain to “taking action” against an employee. It is also established that in assessing the procedure followed by the employer in reaching its decision to

¹ Section 103A(2) of the Act

take disciplinary action, the investigation will not be subject to minute or pedantic scrutiny².

[28] It is submitted for Ms Johnson that in regard to the two step approach set out above, the employment of Ms Johnson was affected to her disadvantage by the fact of receiving a disciplinary warning. It is stated this is because, under a progressive warning system, by receiving this warning, Ms Johnson's future employment became more tenuous³. This is accepted by the Authority and hence it is then for the DHB to show that the issuing of a warning was something that a fair and reasonable employer could do in the circumstances.

[29] Ms Johnson says that she was not provided with all of the information that Ms Sale relied upon in regard to concluding that a warning was appropriate. The Authority is referred first to Ms Sale's letter of 25 May 2011 where the allegation against Ms Johnson is set out. Ms Sale then informs that:

To enable us to hear what you have to say in relation to the *report* before a decision is made on the level of disciplinary action a meeting has been arranged on:

DATE: Monday 30th May 2011, at 2.30pm in Jenny Roy's Office
(Italics added by the Authority)

[30] The evidence of Ms Johnson is that while the report (prepared by Ms Sale) referred to was available on 25 May 2011, Ms Johnson and her representative (Mr Austin) were not given it until the beginning of the disciplinary meeting on 30 May 2011. Ms Johnson says that the meeting was adjourned to allow them an opportunity to read the report. She attests that upon reading it she became aware that she had not been given certain information that she had requested at the earlier meeting on 12 May 2011; but it is unclear as to what she is referring to in this regard.

[31] The evidence of Ms Johnson is that upon the meeting resuming, Mr Austin raised various concerns on her behalf and requested further information. In particular, the report refers to three witnesses being interviewed: Ms A, Ms B and Ms C⁴.

² *Air New Zealand Ltd v. Sutherland* [1993] 2 ERNZ 10 at 18

³ *Alliance Freezing Company (Southland) Ltd v. NZ Amalgamated Engineering etc IUOW* (1989) ERNZ Sel CAS 575 (CA) referred to.

⁴ As these people were not part of the Authority's proceedings, it is not appropriate to publish their names. The letters used do not relate to their real names.

Ms Johnson says that a request was made at the meeting for copies of the interview records and witness statements pertaining to these three people but this information was not made available.

[32] The meeting was adjourned for approximately 25 minutes and then upon resuming Ms Sale informed that a warning would be issued to Ms Johnson and this was confirmed via the letter of 2 June 2011.

[33] The evidence of Ms Sale is that she sent the report to Ms Johnson on 25 May 2011 along with the letter of that date which required Ms Johnson to attend the meeting on 30 May 2011. While there is a reference to two other attachments to the letter of 25 May, there is no reference to the report being attached. I also note that Ms Johnson's advocate refers to the report being: "handed to us at the start of the meeting" - in his letter to Ms Sale dated 30 May 2011; apparently written immediately following the meeting on that date.

[34] When Ms Johnson received the report is not really an issue that requires a conclusion from the Authority, but on the weight of the evidence it seems more probable that it was at the beginning of the meeting on 30 May 2011.

[35] The reason Ms Johnson argues that the issuing of the first written warning is an unjustifiable action by the employer is that firstly, she was not provided with all of the information that was available to Ms Sale when the decision to issue a written warning was made. And secondly, taking disciplinary action was not what a fair and reasonable employer could do in all the circumstances. Regarding the first matter, the Authority understands that the "information" referred to includes a purported report prepared by Mr Ted Harper, Employee Health and Safety Manager for the DHB.

[36] The evidence of Ms Sale is that Mr Harper did not prepare a report. Rather, he investigated the respective bullying complaints made against Ms Johnson by staff in the typing area that Ms Johnson was transferred to; and informed Ms Sale by email of his conclusions. Ms Sale's report of 25 May 2011 informs that Ms Johnson's behaviour towards the typing staff did not constitute bullying. The report is inconclusive about any specific conclusions reached by Mr Harper. His evidence to the Authority is that he concluded that there had not been any bullying, but that Ms Johnson was having difficulty adjusting to her new work environment and did not want to be there. Mr Harper's further assessment was that Ms Johnson was displaying

behaviour that was not appropriate. It appears that he may have conveyed this view via an email to Ms Sale but this has not been produced. In any event, it is established that Mr Harper did not produce a “report”.⁵ It logically follows that there is no validity to the allegation that Ms Johnson was denied such.

[37] The second argument advanced for Ms Johnson in regard to the unjustifiability of the warning, is that she was not given a record of the interviews with the three employees who were interviewed during Ms Sale’s investigation, leading to her report of 25 May 2011.

[38] There is some merit in this argument. Having viewed the “minutes” of the respective meetings held by Ms Sale with each of these three people, it is revealed that while one person is quite critical of Ms Johnson’s behaviour, the other two are recorded as acknowledging (respectively) that Ms Johnson’s behaviour had become “more considerate”, that she had apologised for speaking “a bit loud” on the telephone, that she had been “polite and considerate” and that she had “amazing work ethics”.

[39] I conclude that if Ms Johnson and her representative had been provided with this information, it would have been quite possible for them to have advanced a meritorious argument that a written warning would be inappropriate and all that was required, at most, was a verbal warning, hence putting Ms Johnson on notice of what was required from her in regard to future behaviour.

[40] Therefore I find that the issuing of a written warning to Ms Johnson on 2 June 2011 was an unjustifiable action on behalf of the DHB and hence she has a personal grievance.

Remedies

[41] Ms Johnson seeks an order that the warning be withdrawn or cancelled. She also seeks compensation for hurt and humiliation of \$4,500. But while Ms Johnson has given some evidence of the cumulative effect upon her of the various warnings and her circumstances generally, there is no specific evidence pertaining to this first

⁵ This was also confirmed to Ms Johnson and her advocate via a letter dated 31 August 2011 from Mr Cammish, the Chief Executive Officer of the DHB.

warning and I therefore decline any award of compensation given the overall circumstances; including some contributory behaviour on the part of Ms Johnson.

[42] In regard to the written warning, the Authority has not been presented with any tangible evidence as to how long a warning is current for and whether or not this first written warning remains on Ms Johnson's personal record. If the warning does remain on Ms Johnson's personal record, it must now be deemed to be invalid and should be immediately purged from the record.

Issue Two: Was there a breach of the mediated Record of Settlement?

[43] On 1 June 2011, Ms Johnson and the DHB attended mediation with a (then) Department of Labour mediator. Among other things, the *Record of Settlement* records that:

3. Suzanne will work according to the Performance Monitoring Plan (attached) and this will be subject to an 8 week trial beginning on Tuesday 7th June 2011. All the procedures in the plan will be managed by her Manager Kathie Sale and they shall meet on a weekly basis to review Suzanne's performance and discuss and address any issues that may arise during that timeframe. If required they may seek assistance from the Mediator Steve Penn.
4. At the end of the trial period Suzanne and Kathie shall meet to evaluate the trial and decide on actions for the future.

[44] Ms Johnson alleges that the DHB failed to comply with clause 4 of the Record of Settlement (RoS). While the exact nature of Ms Johnson's claim is unclear (despite the Authority seeking some explanation), it seems that Ms Johnson is alleging that Ms Sale failed to meet with her to: "evaluate the trial (as set out in clause 3 of the RoS) and decide on actions for the future".

[45] There is common evidence that a series of weekly meetings took place between Ms Johnson and Ms Sale from 10 June 2011 to 22 July 2011 (seven weeks), consistent with clause 3 of the RoS. Ms Johnson was required to "work according to the Performance Monitoring Plan". The eight week trial period ended on 2 August 2011. On 5 August 2011, Ms Sale met with Ms Johnson and via a letter dated 17 August 2011 to Ms Johnson, Ms Sale records:

Thank you for attending the meeting on 5 August 2011 to discuss the Performance Monitoring Plan that was agreed with you at mediation.

As discussed with you at that meeting there were a number of areas that you had partially achieved and a number of areas that remain unachieved to a satisfactory level as follows:

- ACC data errors
- Confirmation of clinics
- Seeks solutions to problems within scope of practice
- Communication with team leader
- Working as part of a team

The number of unachieved areas means the plan is substantially unachieved.

As an experienced scheduler it was anticipated that you would have achieved in all areas of the Performance Monitoring Plan. As this is not the case, we consider this to be a failure to competently undertake and fulfil your job as a Scheduler (Surgical).

You are therefore issued with a written warning for failure to competently fulfil your duties. Continued failure to meet expected competencies could result in further disciplinary action.

[46] The written warning referred to is the subject of a disadvantage grievance claim by Ms Johnson which I will return to shortly. But in the context of the RoS and the alleged breach of this, it could be said that Ms Johnson and Ms Sale did meet “to evaluate the trial and decide on actions for the future”. However, it seems to me that it was envisaged that a mutual evaluation of the trial would take place and that, in common with most performance management plans, Ms Johnson would have had some input into both the evaluation and the decision about future actions; albeit the DHB was entitled to put in place a reasonable performance management plan to ensure that Ms Johnson met the expectations of her employer. Indeed, common law requires this⁶.

[47] Therefore, it seems that if there was a breach of the RoS it is that Ms Johnson did not have any real input into the evaluation or decision as to what would happen in the future. But the words of the RoS are not specific about this and nor is the Authority privy to exactly what was discussed at the meeting between Ms Johnson and Ms Sale on 5 August 2011. It seems to me that the overall circumstances are more suitably examined in regard to the claim of unjustifiable disadvantage pertaining to the warning that was issued on 17 August 2011; a matter I will return to soon.

[48] Also, it seems to me that any further analysis of whether there has been a breach of the RoS is a rather pointless exercise. This is because, given the elapse of

⁶ For example, *Trotter v. Telecom Corporation of New Zealand* [1993] 2 ERNZ 659

time, it is not possible for the Authority to order compliance as sought by Ms Johnson⁷. Nor would I find that it is appropriate to award a penalty for any alleged breach. This is because a penalty is imposed for the purpose of a wrongdoing and as was found in *Xu v. McIntosh* [2004] 2 ERNZ 448 at 464:

[47] ... Not all such breaches will be equally reprehensible. The first question ought to be how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

[48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate?

[49] I conclude that any breach of the RoS that has arisen (and that remains inconclusive) could only be seen as technical and inadvertent rather than flagrant and deliberate. It follows that, in any event, it would not appropriate for a penalty to be awarded in all the circumstances.

Issue Three: Was the issuing of the warning dated 17 August 2011 an unjustified action by the DHB that created a disadvantage to Ms Johnson's employment?

[50] As previously mentioned, this warning was contained in a letter to Ms Johnson dated 17 August 2011: the outcome of a performance management meeting that took place on 5 August 2011. Ms Johnson says that she was "stunned" to receive the letter as it did not accord with the process that she had agreed to under the mediation agreement. Ms Johnson attests that it had been her intention to take advice from and involve her representative in the evaluation meeting. Further, Ms Johnson says that there was never any indication that the agreed trial was any part of a disciplinary process. And of particular significance, Ms Johnson says that she was never informed by Ms Sale that disciplinary action was being considered and there was never any opportunity given to respond to any allegations: as the DHB disciplinary policy requires.

[51] The *Disciplinary Process – Staff Management Protocol* of the DHB provides that:

Disciplinary action can be decided only after sufficient consideration has been given to the facts of the case, including the employee's explanation.

⁷ And acknowledged in the closing submissions for her.

[52] There is nothing within the evidence for the DHB (or its submissions) that effectively rebuts the evidence of Ms Johnson in regard to her receiving the warning in question. The submission for the DHB is that, if an employee is not meeting the required performance, it is fair and reasonable for the employer to warn them that continued failure to perform could lead to disciplinary action. Of course this must be accepted. But an employee is also entitled to be informed of any performance concerns, possible disciplinary sanctions that are being considered, given an opportunity to respond and to have that response meaningfully considered before a disciplinary sanction is imposed.⁸ While I accept that Ms Johnson was made aware of the concerns about her performance at the meeting on 5 August 2011, there is no evidence that she was ever made aware that a disciplinary sanction was being contemplated, hence the warning issued on 17 August 2011 was totally unexpected.

[53] I find that the issuing of a written warning in such circumstances is not what a fair and reasonable employer could do in the circumstances and hence Ms Johnson has a personal grievance for which a remedy is available.

Remedies

[54] Ms Johnson seeks an award of \$4,500 pursuant to s.123(1)(c)(i) of the Act. Her evidence is that she was stunned to receive the warning letter and she was upset about the approach taken by Ms Sale, particularly given the review and evaluation process that had been agreed and the fact that an opportunity had not been provided to respond to the criticism that had been raised before the warning was issued.

[55] Ms Johnson says that she came to the conclusion that Ms Sale wanted to get rid of her and was not interested in being fair about it. Ms Johnson attests to her existing sleep problems becoming worse and becoming anxious more often after receiving the warning.

[56] Taking all of this into account and the evidence that Ms Johnson contributed to some extent in regard to the warning relating to her general performance, I conclude that an award of compensation in the sum of \$2,000 is appropriate. An order will follow.

⁸ Section 103A(3) of the Act and established common law.

[57] Ms Johnson also seeks an order requiring that the warning be withdrawn or cancelled. By the very fact that the warning has been found to be unjustifiable, it becomes a nullity, and hence it must be purged from Ms Johnson's personal record.

Issue Four: Was Ms Johnson subjected to an unjustified action leading to a disadvantage to her employment while she was on sick leave?

[58] The background to this claim is a convoluted one. Following the meeting on 5 August and the letter of 17 August 2011, Ms Johnson was requested to attend a meeting with Ms Sale on 19 August to discuss a continuation of the PMP; and the failure of Ms Johnson to achieve a number of the objectives set out in the plan. The evidence of Ms Sale is that Ms Johnson declined to meet with her on 19 August citing that her representative had "sent a letter". As Ms Sale is based in Tauranga and Ms Johnson is at the Whakatane Hospital, in a letter dated 19 August 2011 Ms Sale proposed a "phone meeting" for 22 August 2011 to discuss and finalise the draft PMP that would be implemented for two weeks from 22 August. Ms Sale informed that if Ms Johnson chose not to participate in the phone meeting, it would be taken that the plan was agreed and that it would commence on 22 August 2011. The letter concluded:

Please be aware that this is a lawful directive and failure to follow this could result in disciplinary action.

[59] The evidence for Ms Johnson is that while she did decline to meet with Ms Sale on 19 August 2011, it was because she wanted to have her representative present at the meeting, due to having received a written warning after the last meeting with Ms Sale. This was conveyed to Ms Sale via an email from Mr Austin of the same date. Mr Austin also informed that the PMP was not accepted.

[60] Acting on Mr Austin's advice (apparently), Ms Johnson also declined to participate in the proposed phone meeting with Ms Sale on 22 August 2011. Via a letter of the same date, Ms Sale informed Ms Johnson that the implementation of the PMP for a further two weeks (from 22 August) was a lawful instruction.

[61] The evidence before the Authority reveals a less than constructive exchange of emails between Mr Austin and Ms Sale that indicates that Ms Johnson appears to have decided that she would only engage with her employer via Mr Austin. This decision is confirmed by the evidence of Ms Sale who attests that on 25 August 2011, she phoned Ms Johnson for a pre-arranged discussion about the PMP. Ms Sale says that she told

Ms Johnson that she just wanted to “chat” to her about how she was progressing with the PMP. Ms Sale says that Ms Johnson informed her that Mr Austin wished to talk about this with Ms Sale but he was sick that day. Ms Sale’s response was that as the PMP was associated with Ms Johnson’s normal daily work tasks, it should not be necessary for Mr Austin to be present. Ms Sale says she asked Ms Johnson if she was not able to discuss anything related to work practices without Mr Austin being present and this was confirmed as being so by Ms Johnson.

[62] Having viewed the draft PMP I conclude that it is a rather innocuous document. But perhaps the reluctance of Ms Johnson to meet with Ms Sale without her representative being present, becomes obvious when a letter from Ms Sale to Ms Johnson dated 25 August 2011 is taken into account:

Investigation into Reportable Events Form (#13988)

I have contacted you twice on 19 August 2011, and 22 August 2011 to discuss your input into the investigation of Reportable Events Form (#13988). As you have declined to participate in the investigation process a preliminary draft report has been drafted using the information available to the investigator. To advance the investigation I invite you to a meeting to be held:

Monday 29th August at 11.30am in Meeting Room, Clinical School Whakatane Hospital

The purpose of this meeting is to hear your response to a preliminary draft investigation report. A copy of the report is enclosed for your information.

[63] The letter informs Ms Johnson that this is an investigation meeting in accordance with the District Health Board investigation process and that the purpose of the meeting is to hear your response in relation to the preliminary draft report. The letter continues:

The REF raises an area of concern in which there is a potential breach in performance, and if this allegation is proven, this may lead to a disciplinary process (copy enclosed), which could result in a warning or lead to a dismissal.

[64] While Ms Sale had earlier (19 August and 22 August 2011) represented that she only wished to discuss with Ms Johnson her general work practices associated with the PMP, this letter portrays a quite different agenda for a meeting. However it seems that Ms Sale was running two issues in parallel as another letter (26 August

2011) to Ms Johnson invites her to attend a second meeting on 29 August at 1.30pm, to discuss the PMP. It is hardly surprising that Ms Johnson became stressed about what was happening and relevant to this alleged disadvantage grievance, Ms Johnson went home on sick leave on 26 August 2011.

[65] The overall evidence pertaining to Ms Johnson's absence on sick leave is rather confusing. A doctor's certificate (29 August 2011) reveals that Ms Johnson attended that day and it is recorded that she has been (retrospectively) medically unfit from 26 August 2011, to and including 2 September 2011. But Ms Johnson attended the 11:30a.m. meeting on 29 August 2011 to discuss the Reportable Events Form (REF) #13988, accompanied by Mr Austin. However, Ms Johnson did not attend the 1:30pm meeting to discuss the PMP. Rather it seems that she went to her doctor as recorded above. A further medical certificate records that Ms Johnson was examined by her doctor on 5 September 2011 and she was medically unfit from that date until 19 September 2011.

[66] The evidence of Ms Johnson is that by Friday 2 September 2011 she was feeling "quite good" and decided that she would return to work on Monday 5 September. However, she subsequently discovered in her mail box an envelope containing three letters, all dated 2 September 2011. The first of these letters revisited the PMP process and requested that Ms Johnson attend a meeting at 10:00a.m. on Monday 5 September 2011. Ms Johnson was informed that the PMP was due to be completed on 2 September 2011 but due to her absence, the completion date had been postponed until 12 September 2011. The letter concludes by informing Ms Johnson that:

As per my letter of 26 August 2011, to date you are struggling to achieve the objectives in the PMP. I am concerned at your lack of active participation in achieving the goals in your PMP and continued non achievement and participation will result in disciplinary action with you.

[67] The second letter relates to the investigation into REF #14135, originating on 22 August 2011 and relates to theatre list bookings. An investigation report accompanies the letter. The report contains several recommendations, including:

As Suzanne is currently undertaking a performance monitoring plan and is being monitored to ensure her performance is in line with the organisations expectations, it is recommended that the relevant points above be included into this plan.

[68] Ms Johnson is invited to a meeting scheduled to take place, also on 5 September 2011, at 12:00p.m. The purpose of the meeting is to hear Ms Johnson's response to the investigation report.

[69] The third letter is identical to the first letter but appears to have had attached to it the new PMP. Ms Johnson consulted Mr Austin and he forwarded to Ms Sale a less than diplomatic letter on 4 September 2011, informing that Ms Johnson would not be attending a meeting the next day.

[70] As previously mentioned, Ms Johnson attended her doctor on 5 September 2011. Notwithstanding that she was aware that Ms Johnson was sick, Ms Sale wrote again to Ms Johnson that day. The letter opens with Ms Sale acknowledging that Ms Johnson was sick and informs her that the meeting scheduled for 11:00a.m. that day was cancelled; and rescheduled for 9 September 2011 at 11:00a.m. Reference is made to the REF #13988 and:

The final draft report contains a recommendation to progress to a disciplinary process, with the potential to issue a final written warning to you, on the grounds of misconduct due to:

A breach in good practice/expected practice in scheduling processes.

[71] Ms Sale also forwarded two other letters dated 5 September 2011. One of these refers to the REF #14135 and invites Ms Johnson to attend a further meeting on 9 September 2011, at 12:00 midday; to hear her response to the investigative report (as recorded in the similar correspondence dated 2 September 2011).

[72] The second letter (of three in total) refers to the PMP unachieved components and non-attendance at meetings (again a repeat of the correspondence dated 2 September 2011) with Ms Johnson being invited to a third meeting on 9 September 2011 at 10:00a.m.

[73] Sadly, all three of these letters were received by Ms Johnson on 6 September 2011 when she was on sick leave, as had been notified to the DHB by Mr Austin. Albeit it seems that Ms Sale may not have become aware until 6 September 2011 that the certified leave had been extended out until 19 September 2011. It subsequently transpired that Ms Johnson did not return to work until 26 September 2011.

[74] Upon the DHB becoming aware that Ms Johnson was on sick leave for a relatively lengthy period, the meetings scheduled for 9 September 2011 were

cancelled. But as Ms Johnson has attested, a question arises about why the meetings were scheduled for 9 September as on 5 September, her sick leave was extended to 19 September 2011. It is the evidence of Ms Sale that she received an email from Ms Johnson on 6 September 2011 informing that she would be off work until 19 September. In fact the email from Ms Johnson (6 September 2011) informs that she had sent Ms Sale a medical certificate in the hospital's internet mail the day before, having delivered the certificate to the hospital on the way home from attending her doctor.

[75] Further Ms Johnson had sent an email to Ms Sale at 5.26am on 5 September. This informed that Ms Johnson would:

Not be returning to work today. I will again send you a medical certificate.

This email was also copied to the team leader, Ms Skinner and Ms Johnson's colleague, Ms Harte.

Telephone calls received by Ms Johnson whilst on sick leave

[76] Ms Johnson attests to receiving six telephone calls (the calls) from the DHB whilst she was on sick leave. Ms Johnson took exception to the calls and says that combined with the letters that she received (as set out above) they added to the stress that she was already under.

[77] The first of the calls that Ms Johnson refers to was from Ms Sale on 31 August 2011. Ms Sale called to confirm that she had received the (first) medical certificate and she inquired if there was anything she could do to assist Ms Johnson. Ms Sale agrees that she called Ms Johnson on 31 August, there was no reply, and she left a message on the answer phone. Ms Johnson says that the call was unnecessary and infers that there was something improper about it and that there was some other agenda on Ms Sale's part. But I conclude that this is an overreaction by Ms Johnson and I find nothing improper about Ms Sale's call.

[78] The second call on 6 September 2011, was from Ms Johnson's team leader, Ms Skinner, inquiring as to whether Ms Johnson would be at work that day as she had not heard from her, and presumably, was expecting her to return to work that day after the period of sick leave. Again I find that there was nothing improper about this call. While there has been no evidence from her about this, it seems that Ms Skinner may

not have been aware of the extension of Ms Johnson's medical absence at the time she made the call.

[79] The third call to Ms Johnson, on 6 September 2011, was from Ms Bronwyn Anstis, the Business Leader, Anaesthetic, Radiology and Surgical Services for the DHB. As I understand it Ms Anstis is Ms Johnson's Line Manager and she became involved because Ms Sale was on leave. Apparently, Ms Anstis informed that given the length of time that Ms Johnson was going to be on sick leave this was considered to be significant and a matter that Occupational Health should be made aware of. Just quite why Ms Johnson should have taken offence to the call from Ms Anstis is difficult to ascertain and I find nothing improper about the actions of Ms Anstis.

[80] The fourth call to Ms Johnson was on 15 September 2011. It was from Ms Sale who was seeking confirmation from Ms Johnson that she would be attending a sick leave review meeting the next day. Given that Ms Johnson had been off work on sick leave from 26 August 2011 and the doctor's certificates gave no indication of what was causing Ms Johnson to be absent, it appears that under DHB best practice Ms Johnson had been referred to a Wellness Review Panel (the Panel) meeting to take place on 16 September 2011; upon her return to work after the expiry of her medical certificate the day before.⁹ As set out in a letter to Ms Johnson (7 September 2011) the Panel is a supportive forum to:

- (a) Promote positive solutions for staff affected by ill health or the ill health of dependants;
- (b) Promote staff wellness and a healthy workplace;
- (c) Review sick leave issues and manage sick leave usage (if appropriate).

[81] Ms Johnson refers to two further calls to her from the DHB but has not provided any details of the dates of these calls. But in any event, given the lack of any tangible evidence about these two calls, I am unable to conclude that there was anything improper about them to the degree that they were unjustifiable actions by the employer hence creating a disadvantage to the employment of Ms Johnson.

⁹ Subsequently extended to 26 September 2011

Summary of the Authority's findings regarding the contact from the DHB to Ms Johnston whilst she was on sick leave

[82] I find that the telephone calls mentioned above were not unjustified actions on the part of the DHB. However, that is not the case in regard to the various written communications that Ms Johnson was subjected to whilst on sick leave. Ms Johnson says that she was "harassed" by the DHB. But of course the definition of harassment as it pertains to being grounds for a personal grievance under s.103(1) of the Act is quite narrow in that the harassment must be sexual or racial in its nature. That is not the situation pertaining to the circumstances that Ms Johnson asks the Authority to investigate.

[83] Looking at the overall evidence pertaining to the circumstances surrounding the written communications received by Ms Johnson dated 2 September and 5 September 2011, I conclude that pursuant to s.103A of the Act, these communications from the DHB were not the actions of a fair and reasonable employer in all the circumstances.

[84] A mitigating factor for the DHB is that Ms Johnson's certified sick leave continued to be extended and hence there was a brief time lapse between the expiry of one certificate and the DHB becoming aware of an extension. But that does not excuse the excessive and unreasonable vigour exercised by the DHB in inviting Ms Johnson to attend various meetings (three in one day) whilst she was on certified sick leave.

[85] The attitude of the DHB towards Ms Johnson is highlighted to some extent by its response to a letter (15 September 2011) from Ms Johnson's doctor (GP). In this letter the GP expresses his concern about the frequency of the contact from the DHB to Ms Johnson whilst she was on sick leave. Firstly, the GP confirms that Ms Johnson had consulted him on 26 August 2011 and he had found her to be "extremely stressed" and he deemed it appropriate that she "take time out." The GP then informed that the frequent contact by the DHB has:

Had the effect of negating any rest and recuperation she should have had. The frequent contact with work merely heightened her anxiety and stress levels.

She has now exhausted her sick leave entitlement and feels no better since being booked off work on 29/08/2011. I would appreciate it if you could review her case with some urgency.

My patient appears to have been harassed during her sick leave and this has been extremely counterproductive to both her and her health and work issues.

[86] The DHB (via Ms Bingham) responded on 23 September 2011 and informed Ms Johnson's doctor that:

I consider it is highly unprofessional of you to interfere in an employment process that is clearly outside your medical purview. The BOPHB is undertaking a legitimate employment process with Ms Johnson and she has chosen to take sick leave rather than address her employment issues. It is unhelpful both for her and the DHB that you have entered into this process without understanding or requesting clarification of the issues.

[87] Apart from the obvious fact that Ms Bingham is not a medical practitioner, the assertion, expressed on behalf of the DHB, that Ms Johnson "had chosen to take sick leave rather than address her employment issues" was not based on any proven evidence and was entirely prejudicial towards Ms Johnson.

[88] In summary, I find that the consistent and pervasive written communications forwarded from the DHB to Ms Johnson dated 2 September and 5 September 2011 were not what a fair and reasonable employer could do in the circumstances. The circumstances being that Ms Johnson was on a period of certified sick leave and apart from the DHB being entitled to check on her general welfare, she was entitled to be left undisturbed in regard to the performance management issues until such time as she was declared medically fit to return to work.

[89] It follows that I find that the failure on the part of the DHB to allow Ms Johnson time to recuperate, as prescribed by her GP, was an unjustifiable action by her employer creating a disadvantage to her employment; hence she has a personal grievance.

Remedies

[90] Given the finding that Ms Johnson has personal grievance she is entitled to a remedy or remedies pursuant to s.123(1) of the Act. Firstly, Ms Johnson seeks an award of compensation for humiliation, loss of dignity and injury to feelings under s.123(1)(c)(i) in the sum of \$8,000. Ms Johnson refers to the comments of her GP and she has given evidence of the overall effects of what has been happening to her at various times. Much of the evidence relates to the Performance Management issues

and these have to be seen in a different context to the personal grievance concerning her time on sick leave; albeit the issues have unfortunately overlapped, to a considerable degree.

[91] Ms Johnson attests to “becoming anxious for a very long time” once the “harassment” while she was on sick leave began. Ms Johnson says that she just wanted to “escape” but could not. I accept that Ms Johnson was affected by the actions of the DHB while she was on sick leave to a degree that warrants compensation in the sum of \$4,000; without any contribution by her. An order will follow.

[92] Ms Johnson also seeks to be reimbursed for 76 hours that she was unpaid for whilst on sick leave; having used her sick leave entitlement. I understand the argument for Ms Johnson to be that because of the actions of the DHB during her sick leave, and the consequent affect upon her, she needed to take more time off work than she would have otherwise had, hence a loss of income was incurred.

[93] Firstly, a question arises as to whether the Authority is able to make an order in such circumstances pursuant to s.123(1)(b) or ss.(1)(c)(2) of the Act. My inclination is that the latter provision probably allows for such. But really, the problematic question is whether it is established that the actions of the DHB resulted in Ms Johnson being absent from the workplace for longer than she might otherwise have been if the DHB had not acted as it did.

[94] Unfortunately, the evidence is inconclusive about this factor and therefore I must decline to make any order relating to this particular remedy.

Alleged breaches of good faith

[95] It is alleged by Ms Johnson that there were “many” breaches of good faith regarding the overall circumstances pertaining to the various disputes that arose related to the performance management issues.

[96] Particularly it is alleged that the DHB failed to provide access to relevant information¹⁰ as it pertained to the subsequent intention to dismiss Ms Johnson on the ground that she allegedly continued to fail to meet the performance objectives set for

¹⁰ Section 4 1A (c) of the Act.

her. Given that this determination is already of considerable length, I have not set out the ongoing saga relating to the existing tenuous status of Ms Johnson's employment (as at the time of the investigation meeting) due to her (alleged) failure¹¹ to meet the requirements set out in the Performance Management Plan(s). Also it appears that some work has been done towards working towards a constructive outcome and I do not wish to open old wounds for no good reason.

[97] On the basis of the overall evidence before the Authority (substantial as it is), I am unable to conclude that there has been a breach of the good faith provisions of the Act by the DHB. But even if it were otherwise, the evidence shows that Ms Johnson was much less than "active and constructive in establishing and maintaining a productive relationship" and some questions also arise in regard to her duty to be "responsive and communicative" as required by the Employment Relations Act.¹²

[98] Indeed it is with regret that I feel bound to make the observation that none of the primary participants in this case have emerged well from this very sorry state of affairs. One can only hope that Ms Johnson and the DHB are able to reconcile their differences, notwithstanding the conflict that has arisen and the outcome to date.

Determination and summary of orders of the Authority

[99] For the reasons set out above the Authority has determined that:

(a) The issuing of a written warning to Ms Johnson on 2 June 2011 was an unjustified action by the DHB creating a disadvantage to Ms Johnson's employment. However, given the overall circumstances, it is not appropriate to award compensation pursuant to s.123(1)(c)(i) of the Act. The finding of the Authority is that the warning is nullified by its invalidity and if it remains on Ms Johnson's personal record, it should be removed forthwith.

(b) In regard to the alleged breach of the Record of Settlement, it is the finding of the Authority that it is inconclusive whether or not a breach occurred. But in any event, given the elapse of time, it is not possible to make an order for compliance. Further, if there was a breach of the Record of Settlement, it would not be appropriate

¹¹ The Authority has not been required to investigate the reasonableness of the requirements of the PMP(s) but taken at face value, the requirements do not appear to be particularly onerous given the overall ability and experience of Ms Johnson, as referred to by various sources in the general evidence before the Authority.

¹² Section 4 1A (b) of the Act.

to award a penalty as there is no evidence of any flagrant or deliberate behaviour by the DHB.

(c) The issuing of a written warning to Ms Johnson on 17 August 2011 was an unjustified action by the DHB creating a disadvantage to Ms Johnson's employment. Pursuant to s.123(1)(c)(i) of the Act, the DHB is ordered to pay to Ms Johnson the sum of \$2,000.00. The finding of the Authority is that the warning is nullified by its invalidity and if it remains on Ms Johnson's personal record, it should be removed forthwith.

(d) It is the finding of the Authority that the relevant written communications to Ms Johnson dated 2 September 2011 and 5 September 2011, were unjustified actions by the DHB that created a disadvantage to her employment. Pursuant to s.123(1)(c)(i) of the Act, the DHB is ordered to pay to Ms Johnson the sum of \$4,000.00.

(e) The Authority is unable to conclude that there have been any breaches of the duty of good faith pursuant to s.4 of the Act.

Costs

[100] Costs are reserved. The parties are invited to resolve this issue if they can, taking into account the daily tariff approach of the Authority. In the event that a resolution regarding costs cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the respondent having a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority