

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 199
5462995

BETWEEN PAULINE LOLOHEA
Applicant

A N D THE TONGAN HEALTH
SOCIETY INC
Respondent

Member of Authority: Eleanor Robinson

Representatives: Keshila Fayen, Advocate for the Applicant
Amelia Schaaf, Counsel for the Respondent

Investigation Meeting: 16 and 17 June 2015 at Auckland

Submissions Received: 19 June 2015 from the Applicant and from Respondent

Date of Determination: 02 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Ms Pauline Lolohea, claims that she was unjustifiably dismissed from her employment on 12 May 2014 by the Respondent, The Tongan Health Society Incorporated (the Society), on the grounds of serious misconduct.

[2] The Society denies that Ms Lolohea was unjustifiably dismissed and claims that the dismissal was justifiable on procedural and substantive grounds.

Issues

[3] The issue for determination is whether or not Ms Lolohea was unjustifiably dismissed by the Society.

Note

[4] At the Authority's investigation on 16 and 17 June 2015 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation –

answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[5] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result

Background facts

[6] The Society is an incorporated society based in Auckland. The Society's members are mostly Tongans but anyone may become a member. It is governed by a Board of Directors consisting of elected members (the Board). It owns and operates two medical clinics under the name "Langimalie" (the Clinic). The main clinic is located in Onehunga and the other clinic is located in Panmure. Most of the Society's patients are Tongans. In addition to the clinic services offered by Langimalie, the Society also provides social services, mostly to Tongan clients.

[7] Ms Lolohea commenced employment with the Society in 2007 as a practice nurse and latterly held positions as Senior Practice Nurse and Charge Nurse. Ms Lolohea was also a Member of the Board, and confirmed that she had read and was familiar with the Constitution of the Tongan Health Society Incorporated (The Constitution) which provided at clause 33 a process for dealing with conflict resolution:

33. CONFLICT RESOLUTION

33.1 If any dispute or difference of any kind arises:

33.1.1 the parties will endeavour to settle the dispute or difference by agreement between themselves;

33.1.2 The parties may take and act upon the opinion of any barrister and/or solicitor practice in New Zealand ...

33.1.3 if the dispute or difference is not settled by agreement between the parties then it will be referred to mediation.

[8] During her employment, Ms Lolohea was provided with an individual employment agreement (the Employment Agreement) and confirmed that she had been familiar with the

terms and conditions set out in it. The Employment Agreement stated under the heading:
Resolution of Employment Relationship:

Raising an issue

Employment relationship problems may be such things as personal grievances or disputes. If you feel you have a problem, you need to raise this with us as soon as possible. If your problem is a personal grievance, this must be done within 90 days of the day the problem first arose.

You can raise a personal grievance in writing or in person. ...

Assistance

If you need help or advice when raising an employment problem, you can ask:

- *A Union*
- *A trusted family member or friend*
- *An employment lawyer*
- *The Department of Labour*

Meeting

The first step in resolving a grievance is for you to meet with us to discuss your issues. We are both allowed to seek advice before the meeting and you are also allowed to have someone present at the meeting to give you support. ...

Further steps

Further options are available if we are unable to reach agreement, including

- *Mediation Assistance through the Department of Labour – The mediator will work with us to resolve the employment relationship problem.*

[9] In the latter part of 2013, Dr Glenn Doherty was appointed Chief Executive Officer (CEO) of the Society. Dr Doherty had previous experience with the Clinic as a general

practitioner and later as the Society's Medical Director and a Board member. Dr Doherty was also the Clinical Director of the Clinic.

[10] Prior to the appointment of Dr Doherty, the Society was facing severe financial problems and was on the verge of liquidation. This was not only attributable to financial issues, but also to governance and management issues.

[11] Dr Doherty said his priority upon appointment as CEO was to improve the financial position of the Society because unless that happened, there would be a large number of jobs lost, affecting mostly Tongan staff members. Further, the services able to be offered to the predominantly Tongan clients of the Society would be compromised.

[12] There were staffing issues and problems arising as a result of procedures and policies not being followed and performance issues not having been addressed. An added difficulty was the financial relationships and connections between different members of staff and the Board members. Further there was the inclusion of staff members on the Board as stipulated by the Society's constitution.

[13] Dr Doherty said he regarded it as preferable to separate governance from operational aspects of the Society. That was also the view of the Primary Health Organisation (PHO) that dealt with the Society. He explained as there was no formal process to deal with the issue, it would require a constitutional change to be approved via an Annual General Meeting, and this had now occurred. As a result, staff members were no longer eligible to become Board members of the Society.

Performance issues with Ms Lolohea

[14] Dr Doherty said there were performance issues concerning Ms Lolohea which had arisen in January and February 2014.

(i) Time taken as time in lieu and administration issues

[15] On 22 January 2014, Dr Doherty sent an email to Ms Lolohea addressing two matters, first clarification of time regarding the taking of time in lieu, and secondly administrative tasks. Dr Doherty stated in the email:

Just want to clarify time in lieu and your admin time. Time in lieu is not a given. It requires approval from the operations manager and sign off by me arranged in advance with necessary cover ...

I am asking that you take the time off the floor each week on a Friday as discussed and arranged with Ana. This is not negotiable and must be taken to ensure that core admin duties within your job scope are achieved and must start this week.

[16] Dr Doherty said he had tried to assist Ms Lolohea with the administrative aspects required by her position as Senior Practice Nurse, by:

- a. getting a chair for her to use in an office where she would not be interrupted;
- b. setting aside hours during the week for her to finish her administration tasks;
and
- c. offering management support with report writing

[17] However Ms Lolohea claimed she had been too busy to perform the administrative aspects of her role. In particular she:

- a. Refused any assistance;
- b. Was not able to write reports for the PHO or her role as required;
- c. Failed to provide Dr Dougherty with nursing meeting minutes despite numerous requests; and
- d. Was not able to undertake performance reviews of nurses

[18] Dr Doherty said Ms Lolohea had taken almost three months to complete a PHO report which was finally completed by the Operations Manager on her behalf. He said Ms Lolohea had also admitted to him that she did not read emails which he regarded as inappropriate given the importance of communication amongst the management team.

[19] As a result, Dr Doherty sent an email to Ms Lolohea on 24 January 2014, addressing financial delegation matters and the nursing reporting and performance matters. In the email, Dr Doherty stated:

Just want to clarify a few things and am happy to meet about this, these are friendly reminders about process: I want to reiterate that you ultimately report to me not to Marlene or Viliami. Please ensure any matters related to payments to nurses or doctors are first agreed to by myself ... Any leave that is taken please ensure that this is signed off by myself – annual – sick etc ... Any changes to your work programme or roster is to be agreed to by myself.

In terms of financial delegations, the CEO is the only position in the organisation with financial delegation. You are able to order clinic consumables only but that is the extent of your delegation. Clinical capital equipment does not fall into this delegation – scales/ oximeters etc need sign off by me and a business case that they are needed. In addition they need to be identified in the asset register

and made known to the accountant and Angela so they can be put on our asset register ...

Purchases for non-resident patients – please ensure that if you want to do something special for a non-resident patient that you ask permission first and get sign off ...

Nursing performance management assessments. As part of our PPD contract and our cornerstone requirements and as an organisation annual performance reviews need to be undertaken. I have sent some templates to you from the PHO and would like to meet with you and Viliami regarding how we will approach this exercise within the nursing team. This also includes ensuring nurses meet their professional development and Council requirements just like medical staff. ...

Nurse meetings: Can I have the minutes of the nurse meetings from each meeting please. This is a cornerstone requirement and is good organisational practice.

[20] Despite the emails and offers to meet with Ms Lolohea, Dr Doherty said she did not respond to him, provide minutes from the nurse meetings, or attend the requested meetings.

(ii) Cold Chain Accreditation

[21] The Clinic had responsibility for carrying out a vaccination programme. Cold chain accreditation processes conducted by the appropriate PHO involved checking the storage of vaccines and other medications to ensure that the correct fridge temperature for vaccines was maintained.

[22] There had been an accreditation exercise completed on 26 September 2013 which had recommended that various remedial actions were taken. During February 2014 there was a further cold chain accreditation exercise scheduled.

[23] Ms Lolohea, who as Charge Nurse at that time had responsibility for ensuring that remedial actions notified as a result of the cold chain accreditation in September 2013 had been addressed, had not ensured the remedial action required had been instituted by the time she went on annual leave in February 2014, nor had she passed on the requisite information to the substitute Nurse Manager.

[24] Dr Doherty said that the implications of not meeting the requirements for cold chain accreditation would have been serious for the Clinic in terms of having to re-vaccinate patients, potential loss of clients, and the impact upon the reputation of the Clinic.

(iii) Unauthorised ordering of equipment

[25] On or about 2 April 2014, Ms Lolohea had ordered equipment and consumables to the value of \$5,117.00 without the authorisation of the CEO, contrary to instructions given to her by the email of 24 January 2014.

(iv) Care of patients

[26] On 8 April 2014 there was an incident regarding a female patient who had come into the clinic complaining of chest pains. Ms Lolohea had arrived at the Clinic at the same time as the patient, but when asked by the receptionist to see the patient, had asked if another nurse who had already arrived and logged on to the computer system could see the patient, pointing out that it was 8.25 a.m. and her commencement time for work was 8.30 a.m.

Letter of 7 April 2014

[27] On 7 April 2014, Ms Lolohea wrote a letter addressed to the Chairman of the Board and members of the Board. The letter stated::

***RE: PROPOSING A VOTE OF NO CONFIDENCE FOR THE
REMOVAL OF THE FOLLOWING STAFFS WITH IN THE
TONHAN HEALTH SOCIETY***

- 1. The CEO – Dr Glen Doherty*
- 2. The operational/public health manager – Mr Viliami Tuofa*

[28] The title line of the letter was subsequently altered to:

***PROPOSING A VOTE OF NO CONFIDENCE FOR REVIEW
AND/OR TERMINATION OF THE FOLLOWING POSITIONS
WITHIN THE TONGAN HEALTH SOCIETY***

[29] Again, these positions were cited as the CEO, Dr Doherty and the operational/public health manager (Viliami Toafa). The second version of the letter had been circulated to members of staff and had been signed by some of them.

[30] The letter dated 7 April 2014 stated:

We do hereby wish to submit the motion for a vote of no confidence for the two mentioned positions within the Tongan Health Society. They have violated our trust, confidence and respect in their leadership and management. Most importantly, good and stable relationship between them and the staffs have been smeared by a culture of bureaucratic, dictatorship, bullying, bias and favouritism. We have noticed some threatening and intimidating behaviour, and sometimes showed attitude of disrespect and look down attitude to staffs, and they also breach confidentiality. ...

- ***Bridge(sic) of confidentiality*** – any discussions that took place behind closed doors the CEO and Viliami, the CEO comes out and told Fonu, Fonu will then disclose the information to other staffs.
- ***Leadership style*** – bureaucratic and dictatorship way they have used to suppress employee's right to voice our concern. They try to micromanage the whole clinic. ...
- ***Favouritism and bias*** – this has been highlighted with the huge pay rise, offered to Viliami Toafa, appointed Viliami's wife (Fifita), Viliami had a pay rise of 1000% ...
- ***Bullying, threatening and intimidating behaviour*** – making staffs afraid to challenge and threaten their decision.
- ***Bias, look down and disrespect*** – he (CEO) often questions some staffs if they understand what he told them, we can all read and speak English, and very lucky to speak two or three languages. When his friends and their relatives came for consultation, he took them upstairs and did consultation in his office, while other clients wait for their turn in the clinic, and he often parked in the disability parking – how disrespectful is that, is it because he is the boss?
- ***Spending money appropriately*** – clearly their priorities lie mainly with renovation, furniture and their image to AH plus/ADHB and MOH, while a majority of the staffs get ignored throughout the process. ...

[31] The letter concluded:

It is our wish that the chairman and members of the board will take into consideration our request and take action as soon as possible.

[32] Mr Toafa said that at a Board meeting in June 2014 the then Chairman of the Board had arrived at the meeting and without prior notification tabled an agenda item which was the letter of complaint.

[33] The unexpected tabling of the item resulted in the CEO and other members of the Board claiming that it was inappropriate for the Chairman to discuss the complaint in the Board forum without having any regard for the confidentiality rights of the Board members who were named in the complaint, and the discussion escalated to the point where six Board members walked out of the meeting.

[34] Dr Doherty said he had first become aware of the letter when he had been handed a copy of it by another member of staff who had been concerned about it. He had asked Mr Toafa to speak to some members of his team about the letter and it had become apparent from the inquiries that while some members of the staff had signed the letter willingly, others felt

uncomfortable about signing it and some had been upset because they felt that they were pressurised.

[35] Ms Lolohea said her intention in writing the letter was to bring the performance of the CEO and the Operations Manager to the attention of the Board and she had believed that the Chairman of the Board would investigate the claims and take appropriate action. She confirmed that she had not investigated the claims stated in the letter prior to writing it, and said that some were 'word-of-mouth' issues or gossip that had been raised with her.

[36] Mr Toafa said from his inquiries amongst the staff it became apparent that some had signed the letter because of their own perception on certain issues, but not all the signatories had signed the letter or investigated the claims made in it before signing.

[37] Mr Toafa said that during the Board meeting at which the letter had been tabled it had been decided that it was a matter which should be referred back to the CEO for investigation and action. It had been felt that this was appropriate given that the letter was about operational processes.

Disciplinary Process

[38] On 16 April 2014, Dr Doherty wrote to Ms Lolohea requesting that she attend a disciplinary meeting on 29 April 2014 to discuss a number of issues relating to her employment. In the letter dated 16 April 2014 Dr Doherty stated:

... this relates to a letter being circulated and also performance issues. It is also proposed that while the matters of concern are being investigated that you will be suspended with pay from your employment beginning close of business on Thursday 17 April 2014. Before that happens, you can provide representations as to why you should not be suspended from your employment.

Circulation of letter

It is claimed that you have been observed circulating a letter dated 7 April 2014 to be handed to the Chairperson of the Board and other Board members, complaining about the Chief Executive Officer of the Tongan Health Society, Dr Glen Doherty, and Mr Viliami Toafa, the Operations Manager of the Society and asking for the termination of their employment. This is claimed to have been done during working hours and other staff members who have not signed the letter have been upset by what has happened ...

The circulation of the letter by you, if true, is very serious as it has a potentially destructive effect on the workplace. Also the matters raised in the letter are unsubstantiated and seem to reflect gossip rather than truth. In addition, if you have any grievances there are appropriate ways of addressing those grievances rather than circulating the letter.

An example of the inaccurate information circulated is gossip alleging that Viliami Toafa has been given a 1000% pay rise. This is not true, and any fair minded person will not believe such statements. There is questioning of spending of money. This is the prerogative of the management. Another allegation is bullying, threatening and intimidating behaviour. There is no specific example given and it seems that what is referred to is the inclusion of the Society's lawyer in emails.

It is also a very serious matter to call for the termination of the employment of the senior management of the Tongan Health Society potentially exposing the Society to breach of employment law and putting the Society at risk of legal action and damage to its reputation. As everyone knows, this Society has been through recent turmoil and it is not in the interests of the Society to be exposed to further risk.

If this claim is substantiated, then this will amount to a breach of your duty of fidelity to your employer, and may constitute serious misconduct.

Performance issues

There have also been a number of performance issues that need addressing which are listed below.

Cold chain accreditation

It is alleged that you failed to alert management about the remedial actions needed after the assessment for cold chain accreditation was completed on 26 September 2013. There was a review of the accreditation process scheduled on 26 February 2014. You had not addressed the clinical director/CEO about any of the remedial actions that needed addressing. A substantial amount of work was required to ensure the clinic had addressed the remedial actions. This was a serious omission on your part and could have had serious consequences for the vaccination programme and contracts that Langimalie currently has. This issue has been raised with you previously, but it needs to be formally addressed due to its seriousness.

Unauthorised ordering of equipment

On about 2 April 2014, you apparently ordered equipment without the authorisation of the chief executive officer (CEO). This is contrary to instructions given to you. The ordering of clinical capital equipment is one of the issues clarified in an email to you from the CEO on 24 January 2014.

Care of patients

On about 8 April 2014 at 8.25am, a female patient came into the clinic complaining of chest pains. You were alleged to have been at the front desk at the time, but you informed Soana Ali to call Mele Vaka or Ana Tangataolakepa. As you were at the clinic and the first clinical person aware of this problem you should have treated this as an emergency and therefore it was your responsibility to attend to the patient. In addition there was also a patient who presented recently with a suspected DBT and you were asked to take an important blood

test on behalf of the patient but this was never done. These two examples portray putting patients and the clinic at risk.

Management activities

You have been advised to take time off the floor to undertake management activities associated with the nurse team leader position for some time. The CEO had organised for this to occur including a room available for your use and also backfill on the clinic roster to cover you off the floor. This was at your request but this was never undertaken.

Minutes of nurses meetings have not been forwarded to the CEO as requested, in addition, you have not progressed any performance reviews of the nurses which have been requested from you for some time. You have also been offered support to do this and support to achieve reporting. PHO reports have also not been completed on time and have taken months to achieve even after deadlines were due and have in the end had to be completed by the Operations Manager. You have also reported to the CEO and Operations Manager that you do not look at your emails which is a concern given your role at that time. ...

The Society considers that some of the above conduct may amount to serious misconduct. If those actions that are deemed serious misconduct are found to be substantiated, your employment may be terminated. No decisions will be made until a meeting takes place and you get an opportunity to explain your conduct.

Dr Glennis Mafi and THS legal adviser will attend this meeting and will be involved in this process to address the issues raised as they relate to Dr Glen Doherty (CEO – clinical director) and Viliami Toafa (operations manager – public health manager).

Please feel free to bring a representative or support person to the meeting.

[39] The letter had been handed to Ms Lolohea on the day it was written, that being Wednesday 16 April 2014; however she said that she had put it into her bag and not looked at it until that weekend.

[40] Dr Doherty said that as no representations regarding the proposed suspension of Ms Lolohea had been presented by the close of business the following day, 17 April 2014, the proposed suspension was actioned.

Letter in response 24 April 2014

[41] On 24 April 2014, Ms Lolohea responded with a letter to Dr Doherty in which she stated:

Re Disciplinary meeting

Thank you for your letter dated 16/4/14, unfortunately it was passed on to me during a very busy, working period of the day trying to tidy

up before closing for the day, but not at home as per addressed on your letter, so I can look at it earlier instead of much later on Saturday night 19/4/2012 when I noticed it in my working bag ...

I do believe there are processes that should have been followed before being suspended, a face-to-face meeting to inform and give opportunity for my side of the story which had never happened. Therefore, I am requesting for a reschedule of the meeting that had been scheduled for 29 April at 11am, to a later date to give me enough time to seek legal advice and assistance, and I am recommending Tuesday 13 May 2014 at 11am.

May I also suggest the Chairman of the board or his Deputy to sit in the meeting taking over from Dr Glennis Mafi, somebody who will be neutral and have an open mind to listen to both parties and to minimise biases. Please take note that one of the issues that you raised was dealt directly with Dr Glennis Mafi, for a discussion around the area of responsibility and accountability need to be explored further before making such an allegation. I am happy to bring at least two support persons to this meeting, and thanking you in advance for your kind consideration of my right for this request.

[42] Dr Doherty said that the composition of the management members attending the disciplinary meeting had been carefully considered. The matter had been complicated by the fact that there were extensive familiar relationships within the Society, and some of the Board members did have personal connections with the staff, including the Chairman.

[43] After careful consideration, Dr Mafi had been invited to join the disciplinary meeting to deal with those issues raised in the letters which concerned himself and the Operations Manager because she was not involved in those issues and had no personal connections with the staff. Dr Dougherty explained that Dr Mafi was a senior staff member and also a Board member

[44] Mr Toafa said that consideration had been given to whether or not there was anyone within the Society more appropriate to deal with the matter than Dr Mafi, however she was the only one who would be suitable. In addition, he said Dr Mafi was highly respected within the Society; she could speak Tongan, understood the Tongan culture and was deemed to be the most appropriate person. He also felt that Dr Mafi could be unbiased and fair and reasonable in her assessment of the situation.

[45] To address Ms Lolohea's concerns about Dr Mafi's involvement in one of the performance issues, namely the failure of Ms Lolohea to carry out a blood test on a patient, he and Mr Toafa would address the performance issues.

[46] Dr Doherty responded to Ms Lolohea's letter of 24 April 2014 and advised her that the date and time of the meeting would not be changed on the basis that the letter had been

originally given to her on 16 April 2014 which had provided her with ample time to prepare for it and seek legal assistance.

[47] He also advised that there would be no change to the management members attending the meeting and confirmed that she would be able to bring one representative or support person to the meeting.

Disciplinary meeting 1 May 2014

[48] On 29 April 2014, Ms Lolohea attended the scheduled meeting with no representative or support person and requested further time. The meeting was therefore rescheduled for Wednesday, 1 May 2014, to allow her to attend with a support person or representative.

[49] Ms Lolohea subsequently engaged Mr Roland Samuels of Unfairly Dismissed Limited and a further postponement was requested until 12 May 2014 on the basis that Mr Samuels was unavailable and would be out of Auckland on 1 May 2014. Dr Doherty said the request was declined and Mr Samuels was asked to obtain a replacement from Unfairly Dismissed Limited to represent Ms Lolohea..

[50] The disciplinary meeting took place on 1 May 2014. Ms Lolohea attended the meeting with a support person of her choice, a Tongan nurse from another organisation.

[51] At the meeting Ms Lolohea attempted to introduce a second person, Dr Aisake Takau, to attend her as a second support person. However, Dr Doherty explained that Dr Takau was working as a contractor at the Clinic at the time of the meeting and was involved in attending to patients. As there had been no request or communication in advance from either Dr Takau or Ms Lolohea advising that she would like him to attend the meeting, there had been no arrangements made for another doctor to see the patients scheduled to see Dr Takau. Accordingly he had advised Dr Takau that he was to return to his work in the Clinic.

[52] Ms Lolohea confirmed at the Investigation Meeting that she had understood from the letter dated 16 April 2014 the issues that were to be discussed with her at the disciplinary meeting and the nature of them

[53] During the disciplinary meeting on 1 May 2014 which had lasted approximately two hours, Ms Lolohea confirmed that she had been given sufficient time to provide a response, all matters had been clearly discussed between the parties and Dr Doherty, Mr Toafa and Dr Mafi had listened to what she had to say by way of explanation to the issues raised with her.

Preliminary findings

[54] Dr Doherty said that following the meeting on 1 May 2014, he, Mr Toafa, and Dr Mafi had taken time to carefully consider the explanations that Ms Lolohea had provided.

[55] He said that Ms Lolohea had been persistent in her view that she had not behaved inappropriately, however whilst she had not been able to provide any evidence to substantiate issues raised in the letter dated 7 April 2014, including the accusations of bullying, exorbitant salary increases, and breaches of confidentiality, there had been evidence presented to substantiate the performance issues raised.

[56] Dr Doherty wrote to Ms Lolohea on 8 May 2014 confirming the preliminary findings of the disciplinary meeting. In a letter headed "*Disciplinary meeting findings 1 May 2014*", Dr Doherty addressed the main issues discussed with a detailed outlining of the particular issue including the concerns raised in the letter, an explanation and the view reached on the matter:

...

You admitted drafting the letter of 7 April 2014 and asking employees of the Tongan Health Society ("the Society") to sign the letter, calling for the Board of the Society ("the Board") to pass a vote of no confidence and for the review/termination of the employment of the Chief Executive Officer ("CEO") and the Operational and Public Health Manager ("Operational Manager") ...

Dr Glennis Mafi, as a member of the Management team of the Society and also a Board member, is dealing with the issues relating to your letter of 7 April as those matters relate to the CEO and the Operational Manager. Dr Mafi will be dealing with that part of the process. The performance issues are being dealt with by the CEO, Dr Glenn Doherty.

As you know, you were suspended with pay from the end of Thursday 17 April 2014. You did not make any representations as to why you should not be suspended. You will continue to be suspended on pay until the conclusion of the disciplinary process.

Below is a summary and draft conclusion after taking into account your response at the meeting on 1 May 2014. As indicated to you at the conclusion of the meeting you will be given the draft conclusions for you to have a further opportunity to respond before a final decision is made. You have a further two days to provide your response and a further meeting will be scheduled to inform you of the final conclusions and depending on those conclusions, an opportunity to respond to any proposed action to be taken. The meeting will occur on Monday 12 May at 2pm at the THS.

Breach of confidentiality

In relation to this claim, you had an issue with Paula Anga'aefonu ("Fonua") Asiata disclosing information to other staff members.

This was information relating to her appointment as an administration team leader. ... If Mrs Asiata told other people about this, it was not something that the CEO could control and it was not a breach of confidentiality as the information related to Mrs Asiata. ...

You further complained about the CEO talking to the public health team ...

You also complained about the CEO telling Mrs Lupe Alia that the CEO wanted to remove you and Dr Aisake Takau from the Board. ...

You failed to raise the other issues with the CEO first, instead got other staff involved in calling for the CEO's and the Operational Manager to be dismissed from their position. This is considered serious misconduct as it undermines the authority of the Tongan Health Society management and exposes the Society to risk.

Leadership style

You allege that there was micromanagement of the clinic ...

In addition being in a nurse team leader position and that you reported to the CEO you have had ample opportunity to engage with the CEO on matters that you wanted to raise.

Favouritism and bias

It seems that your issue with this is that Viliami Toafa's wife Fitiata had told people that Mr Toafa had received a pay rise of 1000%. Although this was not true and any reasonable person would conclude that this was not true, you stated that you wanted "to put it out there". ...

The stating of something that was untrue and could not be true relating to a pay rise of 1000% reflects poor judgement on your part as the senior staff member and brings the Society into disrepute when staff have signed a letter at your instigation containing something ridiculous.

Bullying, threatening and intimidating behaviour

You have complained about threatening and bullying behaviour ...

You were asked for an example and you did not have any example of such emails. ...

Demonstrated bias, look down and disrespect

You raise the CEO's relatives and friends being seen in his office rather than at the clinic and parking at the disability parking. The CEO apologised for parking once at the disability parking. He explained ...

Again, this issue should have been raised with the CEO and Dr Mafi said it was a reasonable thing to have raised at a staff meeting ... rather than be part of what can only be described as a campaign to dismiss the CEO and the Operational Manager.

Spending money appropriately

These complaints relate to the issue of drinking water, fans for the clinic, overtime payments and purchase of furniture

This is a management prerogative and the CEO is not accountable to you for those decisions.

Rumour about Pauline resigning

You have alleged that the CEO started a rumour about you resigning.

...

As can be seen from the explanation, the issues that you have raised do not have substance. If you had taken the time to talk to the CEO or the Operational Manager, you would have known that ...

Lack of effective communication

... It is considered misconduct that you saw fit to circulate a letter attacking the CEO and the Operational Manager without checking the facts and without raising these issues with them first.

In conclusion, in terms of your writing of the letter of 7 April 2014, it is considered that the matters raised in your letter were inappropriate. Some of those issues relate to other people, are gossip and untrue statements. As a senior member of staff, you should have brought any issues of concern to management. There are appropriate avenues for you to pursue. ... When asked why you did not see fit to raise these issues with management, you did not provide an explanation. Your action is considered serious misconduct.

Performance issues

Cold chain accreditation

You explained that ...

It was explained to you that you failed to communicate that there was an audit and that there were significant remedial actions to be taken. You said that you left a note for Mele Vaco when you went on leave. If the clinic did not pass the accreditation, the ramifications would have been quite serious in terms of having to revaccinate patients and potential loss of contracts and would have affected the reputation of the clinic. The audit had to be further deferred until those actions had been brought up to date which were considerable.

Care of patients

You explain that you came in at about 8.25am and entered the building at the same time as the female patient who complained of chest pains. ... You explained in the meeting that you did not have time to sign in and you were reminded that all "chest pains are serious acute problems". You replied that the clinic pays from 8.30am and it's 8.25am.

You were also asked about not following up a blood test ordered to be done for a patient and you admitted that you made an error ...

Further clarification was received from Dr Mafi in relation to this issue after the meeting on 1 May 2014. You were invited to further comment on this.

Your action towards the patient with the chest pains is unacceptable and in particular from a senior member of staff. Your comment that

you do not get paid until 8.30am does not reflect well on you ... In relation to the blood test, it was accepted that you made a mistake. This shows clinical negligence in your practice.

Management activities

In terms of your ordering equipment that you did not have financial delegation to order, you explained ...

It was pointed out that you were previously informed specifically by the CEO that you did not have the authority to order capital items and this had been confirmed to you clearly in writing by email in January 2014. ...

It is found that you exceeded your financial delegation in ordering the equipment and this was despite clear instructions in writing given to you. This is an action that will be subject to disciplinary action, but is not considered serious.

In terms of texting in your absence, although this was unacceptable, this is not a failing that will be subject to disciplinary action.

Finally you have been clearly given support in addressing the administrative components in your previous position. This is in writing and had been communicated to you clearly. ...

[57] After fully setting out the issues, the explanations provided and the conclusions reached, the letter concluded:

You are invited to respond in writing to the draft conclusions in this letter. Your response should be received by Monday 12 May at 9am. After that, a further meeting will be held with you and a representative you wish to bring with you to bring this issue to a conclusion on Monday 12 May at 2pm.

Meeting 12 May 2014

[58] On the morning of 12 May 2014, further responses were received in writing from Ms Keshila Fayen of Equitable Employment Solutions Limited who was at that point representing Ms Lolohea. In the letter of 12 May 2014, Ms Fayen advised that Ms Lolohea was raising a personal grievance for unjustifiable disadvantage. The letter requested clarification on the following points:

- *The inappropriate use of mobility parking.*
- *The CEO seeing patients of his choice in preference to other patients.*
- *That Ms Lolohea had been advised of a disciplinary meeting on 16 April 2014 which meant she had one full day to find representation before the Easter and Anzac period.*

- *Whether or not the decision-makers in the disciplinary process were sufficiently impartial.*
- *The statement by the Society that Ms Lolohea had potentially exposed the Society to a breach of employment law.*
- *Why it was inappropriate of Ms Lolohea to circulate a letter expressing her concerns and whether or not this would be possible if her views were not shared by co-workers.*
- *The raising of the concern about a co-worker's pay increase*
- *More information to be provided around the issues regarding Ms Lolohea's treatment of patients and good faith issues.*

[59] Later that day, Ms Lolohea attended the meeting with Dr Doherty, Mr Toafa and Dr Mafi, without a support person.

[60] Dr Mafi said that the issues were discussed again and Ms Lolohea was given an opportunity to make further submissions, however she did not make any further responses. Dr Mafi said that at no point did Ms Lolohea appear remorseful or accept any responsibility for her actions.

[61] During an adjournment taken to consider the submissions made on behalf of Ms Lolohea and the appropriate outcome, Dr Doherty said he, Mr Toafa and Dr Mafi had discussed each issue and weighted them according to the seriousness of each.

[62] They considered that the writing and circulation of the letter of 7 April 2014 had been a serious matter, a breach of Ms Lolohea's duty of fidelity and the fact that it could have had a destructive effect in the workplace at a difficulty time financially for the Society.

[63] The other issues by Ms Lolohea considered to be serious misconduct were the inaction regarding the cold chain accreditation, lack of patient care and exceeding her financial authorisation level.

Outcome

[64] Dr Doherty wrote to Ms Lolohea on 15 May 2014 advising that her employment was terminated with effect from Monday, 12 May 2014. In the letter, Dr Doherty addressed the various points which had been made on behalf of Ms Lolohea by Ms Fayen. In particular he stated in the letter:

... You have complained that you had not been provided with sufficient time to respond or seek a representative. We consider that you had more than sufficient time to respond and seek representations, but it seems from our interactions that you did not

seek representation until sometime after receiving the original letter.

...

The other matter that has been raised by Equitable Employment Solutions is questioning the impartiality of the disciplinary process. That was recognised from the beginning and hence the involvement of Dr Glennis Mafi, who is part of the management team and also a board member. She had been chosen to achieve impartial views relating to these matters. As you are aware, the Chairperson cannot be involved in these matters as his wife signed the letter that you circulated and other Board members have conflicts. Although Dr Mafi has some involvement and links to the Tongan community, she is not sufficiently connected to create a problem relating to the impartiality of her involvement in the disciplinary process.

In summary, the reasons for the termination of your employment were that four of the claims against you were found to be substantiated and they constituted misconduct. The four allegations relate to your writing of the letters (an early version and final version) and showing them to staff and asking the staff to sign the final letter, your lack of action relating to the "cold chain accreditation", your dealing with the patient presenting with chest pains, and exceeding the limit of your authorisation for financial expenditure. As expressed to you during the meeting on 12 May, you appeared to lack insight into the effect on the organisation of your actions and remain unrepentant about your actions. It was felt that there was no option, but to terminate your employment. ... There were other matters raised with you and of those that were found to be substantiated, they were not considered serious misconduct.

[65] The letter continued in some detail to set out responses under headings of the various issues raised during the disciplinary process with Ms Lolohea.

[66] On 27 January 2015, Ms Lolohea raised a Statement of Problem with the Authority. The parties subsequently attended mediation but this did not resolve the issues between them.

Determination

Was Ms Lolohea unjustifiably dismissed by the Society?

[67] The decision to dismiss Ms Lolohea on the basis of serious misconduct must be a justifiable decision in accordance with the Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) which states:

S103A Test of Justification

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

ii. *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[68] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. The Society must therefore establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Procedural Justification

[69] It was incumbent upon the Society to follow a fair process.

Suspension

[70] In this case there was no express contractual power to suspend Ms Lolohea. In such a case the Chief Judge stated in *Sefo v Sealord Shellfish Ltd*¹ that justification for suspending an employee:

.... Will depend upon the circumstances of the parties and the employment and fairness and reasonableness of the action at the time and in those circumstances.

[71] In *Tawhiwhirangi v Attorney-General in respect of Chief Executive, Department of Justice*² the Employment Court confirmed that despite their temporary nature, the rules of natural justice applied to suspensions. Upon a re-examination of the position in *Graham v Airways Corporation of New Zealand Ltd*³ the court held:⁴

Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from Tawhiwhirangi ...confirms the case by case, flexible and sensible approach to these infinitely variable cases.

¹ [2008] ERNZ 178 at para [33]

² [1993] 2 ERNZ 546

³ [2005] ERNZ 587

⁴ Ibid at para [104]

Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.

[72] Ms Lolohea was given the letter on Wednesday 16 April 2014, and was asked to respond concerning the proposal to suspend her by the close of business the following day, Thursday 17 April 2014. The letter set out in detail the issues that had given rise to concerns on the part of the Society and advised that some of the issues and concerns were capable of being regarded as serious misconduct, and if found to be substantiated: “... *your employment may be terminated*”.

[73] In these circumstances, especially as one of the issues raised a concern that Ms Lolohea’s actions were: “... *putting patients and the clinic at risk*” I consider that the Society did not act unreasonably in proposing a suspension on full pay pending investigation. In accordance with the principles of natural justice, I find that Ms Lolohea was entitled to be advised of the proposal and to be given an opportunity to have an input into it, and the letter dated 16 April 2014 offered her that opportunity.

[74] Ms Lolohea chose not to read the letter until the evening of the third day after she had been given the letter and two days after the expiry of the time the Society had given her to make representations.

[75] I find that Ms Lolohea had the opportunity to make representations about the proposal to suspend her, and she failed to do so.

[76] I determine that the Society did not act unreasonably in suspending Ms Lolohea.

Representation

[77] In accordance with the Society’s Operations and Procedures Manual, an employee: “*must be advised of his/her right to request union assistance and/or representation at any stage*”.

[78] I find that it was a reasonable expectation that such a right, once advised, would be operated within a reasonable time frame.

[79] Ms Lolohea was advised in the letter dated 16 April 2014 that there was to be a disciplinary meeting held on 29 April 2014, and she was invited to bring a representative to that meeting. By letter dated 24 April 2014 Ms Lolohea requested a rescheduling of the meeting to 13 May 2014 to allow her time to seek legal advice and assistance. This request was refused on the basis that Ms Lolohea had had sufficient time to access representation.

[80] Mrs Lolohea received the letter containing the notice of a meeting on Wednesday 16 April 2014 although she chose not to read it until Saturday 19 April 2014. Friday 18 April 2014 was a statutory holiday, as was Monday 21 April and Friday 25 April 2014. However, even taking into account the statutory holidays, I note that Ms Lolohea still had 5 working days on which to access representation. I consider this to have been a reasonable time frame.

[81] When Ms Lolohea attended the meeting on 29 April 2014, she had no representative, and was therefore allowed further time by the Society to obtain representation and/or a support person.

[82] Ms Lolohea had taken steps to engage Mr Samuels of Unfairly Dismissed Ltd who had requested a postponement of the meeting until 12 May 2014. The Society had suggested that another representative from Unfairly Dismissed Ltd be appointed in Mr Samuels' place to avoid further delay, which I consider to have been a reasonable request in circumstances which involved the serious nature of the allegations against Ms Lolohea and her continued suspension. However this suggestion had not been accepted by Mr Samuels.

[83] Ms Lolohea had a support person of her choosing at the rescheduled meeting held on 1 May 2014 however was not able to have a second support person, Dr Takau, on the basis that Dr Takau had duties to perform in terms of patient care and no arrangements had been made in respect of his attendance at the disciplinary meeting, although I observe that Dr Doherty said that arrangements would have been made had such a request been made in a timely manner.

[84] It is preferable that an employee is able to have representation of his or her first choice at a disciplinary meeting, especially when the outcome can be serious for an employee. However I find that the right of the employee has to be exercised in a timely manner and in this case, even taking into account the statutory holidays, there was a significant delay in Ms Lolohea seeking representation prior to the meeting held on 1 May 2014.

[85] I find that Ms Lolohea had been advised of her right to have a representative at the disciplinary meeting in accordance with the Society's Operations and Policy Manual, and she did have a support person at the meeting held on 1 May 2014. She did not have representation at the final meeting held on 12 May 2014, but she had been advised of her right

to do so and the representations made on her behalf by Ms Fayen had been received and considered by the Society.

Bias

[86] There were two aspects of the disciplinary meeting to be held with Ms Lolohea and which took place on 1 May 2014. The first was the writing and circulation of the letter dated 7 April 2014; the second was related to the performance issues.

[87] It is important that an employer in carrying out a disciplinary process does so in a procedurally fair manner, that involves having an open mind and avoiding pre-determination. It is not wrong for an employer to have a bias, but it is wrong for that to unfairly influence the outcome.

[88] Since the letter dated 7 April 2014 concerned Dr Dougherty and Mr Toafa it was preferable that they were not involved in a disciplinary decision about the contents of the letter. In addition Ms Lolohea had raised a concern that since Dr Mafi had been involved in one of the performance issues, she should not be involved.

[89] The Society recognised that it was necessary to address these issues and ensure the matter was handled in a fair and reasonable manner. The ideal would have been to have the disciplinary process conducted by someone totally unconnected to the issues to be addressed; however the nature of the Society was such that it was difficult to identify a suitable person given the familial ties and relationships which existed within the Society.

[90] Given these constraints I accept that the Society tried to achieve the balance of fairness by dividing up the responsibilities and outcome decisions between Dr Dougherty, Mr Toafa, and Dr Mafi such that they focused on the matters in which they were not involved.

[91] I find that the focus on fairness can be seen in the detailed letters which were sent to Ms Lolohea, such that she was fully advised of the nature of the allegations against her, the reasoning for the preliminary findings and the final outcome.

[92] I find that in accordance with s 103A (3) of the Act the Society:

- Raised the concerns it wished to address with Ms Lolohea; they were set out at some length and in some detail in the letter dated 16 April 2014. Ms Lolohea confirmed at the Investigation Meeting that she had understood the nature of the issues which were being raised with her and which were to be discussed at the meeting held on 1 May 2014;

- Gave Ms Lolohea sufficient time to respond to the issues during the two hour meeting held on 1 May 2014. Ms Lolohea confirmed at the Investigation Meeting that the matters were fully discussed and she had been given sufficient time to respond to them.
- Genuinely considered Ms Lolohea's explanations before reaching the preliminary decision, to which she was given an opportunity to respond, and a final decision was made only after that.

Substantive Justification

[93] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*⁵. The Employment Court stated:⁶

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[94] In *Ministry of Maori Development v Travers-Jones*⁷ the Employment Court observed:

A personal grievance is not an appeal to the Employment Relations Authority from the employer's findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal.

[95] I find that the Society considered that four of the issues raised with Ms Lolohea were so serious as to merit dismissal. These were:

1. The writing and circulation of the letter dated 7 April 2014 which contained issues, a number of which were found upon investigation to have been ill-founded.

Given weight in the decision-making process was the fact that there were a number of avenues for Ms Lolohea to have pursued as set out in both the Constitution and the Employment Agreement, with which she was familiar.

⁵ [2011] NZEmpC 160

⁶ *Angus at para [23]*

⁷ [2003] 1 ERNZ 174

These included raising her concerns initially with Dr Dougherty and/or Mr Toafa, and mediation.

The Society found that the writing and circulation of the letter \breached Ms Lolohea's duty of fidelity and constituted serious misconduct.

2. The cold chain accreditation issue in which Ms Lolohea's failure to communicate and ensure the remedial action was taken had placed the vaccine programme at risk
3. The care of a patient presenting with chest pains in which Ms Lolohea's inaction was held to have placed a patient at risk, and
4. Ms Lolohea exceeding her financial authorisation levels in breach of the clear instructions given to her, contained in the email dated 24 January 2014/

[96] I find that the Society reached the conclusion that Ms Lolohea had committed serious misconduct in respect of these matters after a full investigation and consideration of her explanations.

[97] I find that the Society's conclusion to have been one that a fair and reasonable employer could have reached in all the circumstances at the time the dismissal occurred..

[98] I determine that Ms Lolohea was not unjustifiably dismissed by the Society.

Costs

[99] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority