

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-A-TARA ROHE**

[2022] NZERA 259  
3144082

BETWEEN AMANDA TURNER  
Applicant

AND WAIRARAPA DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: David G Beck

Representatives: Greg Lloyd, counsel for the Applicant  
Hamish Kynaston and Phina Conroy, counsel for the  
Respondent

Investigation Meeting: 23 May 2022 at Wellington

Submissions Received: 23 May 2022 from Applicant and Respondent.

Date of Determination: 23 June 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Amanda Turner was employed by the Wairarapa District Health Board (the DHB) as a registered, palliative care nurse working in the community until she was summarily dismissed on 20 April 2021 after being investigated for posting what her employer considered to be inappropriate material on a social media forum pertaining to Covid vaccination matters and comparative religious issues.

[2] Ms Turner alleged an unjustified dismissal and an unjustified disadvantage. Ms Turner claimed her employer had no substantive reasons to justify summarily dismissing her and that this was preceded by an unjustified suspension effected in a procedurally unfair manner. Ms Turner also asserted that the DHB acted in a discriminatory manner and ignored her rights to privacy and freedom of expression of political or ethical or religious opinion and did not act in accord with good faith obligations.

[3] The DHB by contrast, contend the suspension and dismissal were carried out in a procedurally fair manner in accord with good faith obligations. The DHB says the suspension was necessary in the circumstances and the investigation of the social media posts established grounds to warrant summary dismissal given the position occupied by Ms Turner and identified requirements of such.

[4] The parties subsequently attended mediation but the matter remained unresolved.

### **The Authority's investigation**

[5] The investigation meeting took one day. I received written and oral evidence from Amanda Turner, her husband Jeremy Were and from DHB employees: Kieran McCann, Chief Operating Officer and Phillip Halligan, Director of Nursing.

[6] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the helpful submissions and information received from both parties and refer to them where appropriate and relevant. Because of the sensitive content of the social media posts in dispute, I have chosen to use general descriptors.

### **Issues**

[7] The broad issues to be decided are:

- (a) Was Ms Turner unjustifiably suspended then unjustifiably dismissed?
- (b) If the DHB's actions in dismissing Ms Turner do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering the claims for:
  - (i) Lost wages under s 123(1)(b) of the Act.

- (ii) Compensation under s 123(1)(c)(i) of the Act.
- (c) If Ms Turner is successful in all or any element of her personal grievance, should the Authority reduce potential remedies due to any contributory conduct?
- (d) An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[8] Ms Turner graduated as a registered nurse in 2010 and after working in aged care, she commenced employment with the DHB as a community palliative care nurse in May 2015. Ms Turner was a member of The New Zealand Nurses Organisation (NZNO) and was at the time of her dismissal, a party to the District Health Boards/NZNO, Nursing and Midwifery, multi-employer collective employment agreement (4 June 2018-31 July 2020). Ms Turner disclosed she has considerable and varied life and work experience and was a mature nursing graduate.

[9] On 23 March 2021, Ms Turner's Associate Charge Nurse Manager, during a visit to a local aged care facility, was advised of a concern brought to the facility Nurse Manager's attention. The concern alleged that Ms Turner had posted anti-vaccination information/advice on her Facebook account and criticism of government actions to protect the community from Covid that was potentially impacting on staff's vaccine uptake. At around the same time, another unidentified individual provided the DHB with extracts of Ms Turner's Facebook posts that contained disparaging and generalised comment about the religious affiliation of a sector of the New Zealand populace.

### **The Suspension**

[10] On the afternoon of Friday 26 March 2021, Ms Turner's Charge Nurse Manager advised her that the DHB needed to meet with her the following Monday to discuss a complaint they had received. At 4:14pm on the same day, Ms Turner received an emailed letter from Kieran McCann, DHB Chief Operating officer. The letter was headed: "Investigation and Possible Suspension due to alleged Inappropriate Behaviour". The letter indicated the DHB had copies of inappropriate Facebook postings impliedly provided by the unnamed manager of a local aged care facility. The DHB suggested a meeting on Monday 29 March at 9 am, to discuss a proposal to suspend Ms Turner "while the investigation is undertaken" and that after hearing from Ms Turner the decision to suspend or not, would be

made at the meeting. The nature of the concern about the postings was expressed in general descriptive terms and copies of the posts at issue were not provided. The letter described the posts as giving rise to serious allegations that “may lead to disciplinary action being taken, which may include dismissal” and potentially a required report to the New Zealand Nursing Council. Ms Turner was apprised of her right to representation at the meeting and that the sole topic of discussion would be the proposed suspension.

[11] Ms Turner says she immediately contacted the NZNO initially via a national helpline and then forwarded the DHB’s letter to an NZNO official who advised Ms Turner to attend work on the Monday but not the meeting with Mr McCann until specific detail was provided of the allegations. By email of 9:02 am on the day of the meeting (29 March) Ms Turner declined to attend the meeting, until: “NZNO have received a copy of the ‘said serious allegation’”. Ms Turner provided an NZNO official contact who she said would “be in touch with you once they have viewed the ‘said information’”.

[12] On 29 March at 2:12 pm, an NZNO official emailed a DHB HR officer requesting the documents pertaining to the allegations be sent to her direct and confirmed the advice to Ms Turner (from NZNO) had been to postpone the meeting and, in the interim Ms Turner was to carry on working as normal. The NZNO official without expanding, said that they did not agree with the proposal to suspend Ms Turner and indicated once the documents were received and NZNO had had an opportunity to discuss them with Ms Turner, then the official would arrange a mutually agreeable time to meet.

[13] Mr McCann confirmed he received Ms Turner’s email as they were awaiting her arrival at the meeting and that he also viewed the later NZNO official’s email before he issued a decision to immediately suspend Ms Turner on pay - which he communicated by way of a letter of 29 March. The letter attached the Facebook postings at issue and indicated such would be copied to NZNO. Mr McCann gave “two key reasons” for the decision to suspend as:

1. Given the nature of the allegations it is not appropriate for you to be at work, while the investigation is undertaken.
2. That the details of the allegations are of a serious nature and as such we need to be sure we meet our obligations to protect the interests of and minimise potential risk to yourself, other members of staff and our patients.

[14] Mr McCann indicated that he would lead the investigation and be supported by Phill Halligan, Director of Nursing, Ms Turner’s Charge Nurse Manager and a Senior HR Advisor.

[15] When asked at the investigation why he moved to suspending Ms Turner without meeting her, Mr McCann said although he had had no other dealings with Ms Turner, he considered the issues and material under investigation to be highly emotive with a potential for further negative influence on co-workers should Ms Turner return to normal duties and that urgency was required.

[16] The 29 March letter suggested an initial meeting on 1 April (re-scheduled to 7 April), for Ms Turner to “have an opportunity to discuss with us the allegation of inappropriate behaviour and the documents you have been provided”. Mr McCann expanded on the potential outcome of the process, stating:

If the concerns raised are substantiated, they would breach the DHB’s values and Code of Conduct policy, Social Media Policy as well as the NZ Nursing Council’s Code of Conduct. Therefore it is important to note that the outcome of this investigation may lead to disciplinary action being taken, which may include your employment being terminated. The DHB has already taken advice from the NZ Nursing Council on this issue, and depending on the outcome of the investigation the DHB may also be required to notify them of the allegations and outcome.

[17] The letter closed by reiterating Ms Turner’s right to representation and offered free and confidential counselling support.

### **Assessment of suspension process**

[18] I find that the DHB did not give Ms Turner an opportunity to meet as initially envisaged and consistent with their own policy it could be argued they did not give Ms Turner an opportunity to respond to the suspension proposal in an informed manner.<sup>1</sup> However, Ms Turner was able to apprise NZNO of the general nature of the DHB concerns (inappropriate Facebook posts that she had access to) and NZNO communicated their view on the suspension proposal prior to the decision to suspend. The NZNO official’s email of 29 March opposing the suspension, did not provide a suggested alternative meeting date despite the pressing circumstances.

[19] I objectively consider that the haste and reasons given for suspending were appropriate in the circumstances and reject the notion latterly advanced by Ms Turner’s counsel, that it was unjustified because there was no wrongdoing the DHB could legitimately inquire into or that there was no risk to the employment relationship if Ms Turner remained at work.

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<sup>1</sup> Wairarapa DHB, Disciplinary Policy, issued 19 October 2015, page 7.

Applying s 103A(5) of the Act and considering if the DHB's actions in suspending Ms Turner were justified or not, I must also assess whether the identified process defect (not meeting to discuss the suspension proposal) was minor and "did not result in Ms Turner being treated unfairly".<sup>2</sup>

[20] I am of the view that had Ms Turner been able to meet as initially suggested, it was highly unlikely that she could have persuaded the DHB that a suspension was inappropriate. Whilst I make this assumption with the hindsight of looking at Ms Turner's subsequent approach to the disciplinary meetings' and hearing how distressed she was at the time; I consider that the DHB acted in a fair and reasonable manner. Ms Turner was given an opportunity for input before she was suspended albeit a limited one.

[21] I find that Ms Turner has not made out her claim that the suspension was procedurally or substantively unjustified to the extent she suffered any detriment. I also observe Ms Turner was placed on a relatively short paid suspension that allowed her time to consult the NZNO and then counsel to prepare for the first and subsequent disciplinary meetings. I can see no disadvantage to Ms Turner in these circumstances.

### **The 7 April 2021 meeting**

[22] Ms Turner attended the 7 April meeting with an NZNO official, her mother and husband also attended as supports and the latter two contributed to the meeting. Mr McCann was accompanied by Mr Halligan and two HR officers. Minutes were taken by one of the HR officers' present and later disclosed to Ms Turner on 12 April. During the investigation meeting Ms Turner confirmed the accuracy of the minutes that were also not challenged at the time of the disciplinary proceedings. No other contemporaneous notes were produced. When Mr McCann's written brief focusing on his recollection of the 7 April meeting was put to Ms Turner during the investigation meeting, she had no objection to the accuracy of his recollection of what was discussed except to express concern about the following matter.

[23] Just prior to the meeting commencing, the NZNO official briefly met with the DHB participants. Mr McCann says the NZNO official approached them and expressed a concern about feeling unsafe in Ms Turner's presence and said there was a 'lot of anger in the room'. Mr McCann asked the official, who he had had previous dealings with, if she was comfortable

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<sup>2</sup> Section 103A(5) Employment Relations Act 2000.

in proceeding and was assured by her that it was all right to do so. Ms Turner was not made aware of this interchange until written briefs of evidence were exchanged in these proceedings.

[24] Ms Turner during the investigation meeting, expressed a concern that the NZNO official failed to properly represent her. In support of this contention, Ms Turner says at one point in the 7 April meeting, the NZNO official remonstrated with her about the inappropriateness of her Facebook postings and generally appeared to side with the DHB during the meeting by not raising points in support of Ms Turner. Ms Turner's counsel in submissions, suggested the DHB was under a duty to apprise Ms Turner of the NZNO official's misgivings about attendance during the meeting. After the meeting Ms Turner separately engaged legal counsel.

[25] At the 7 April meeting, from viewing the notes, Ms Turner questioned the source of the disclosure of the Facebook posts. Ms Turner claimed the source had been part of a bullying campaign against her that had been going on for two years. Ms Turner then expressed anger at the disclosure, saying she was of the belief the posts were private and conducted with "likeminded people". Ms Turner then proceeded to explain the justification for the posts and said she was a good nurse and was "gobsmacked" that her Facebook posts were at issue (a point she made on several occasions throughout the meeting). To give the matter context, Ms Turner indicated the posts were shared with around 200 people including at least two co-workers.

[26] Mr Halligan who was brought into the investigation to assist the process from a nursing practice perspective, he asked the question – as an RN and registered health professional you don't see (the posts) as being inappropriate? Ms Turner responded by conceding the posts "may offend some people" but said she was entitled to express such as personal "opinion". Ms Turner claimed the comments made were not reflective of herself and that "everyone let's steam off". Ms Turner then claimed she was being unfairly singled out (describing it as a "witch hunt") and that she was seriously hurt that this has been brought up. Ms Turner denied speaking about the content of her posts in the workplace and opined that she could not therefore influence others thinking on the posts' subject matter.

[27] Ms Turner when asked toward the end of the meeting, whether she had anything to add - said she had been racking her brain to understand what's so bad, would she do it again and that she would maybe choose her words "more carefully". In a theme Ms Turner repeated during the investigation meeting, she suggested the disclosed Facebook posts needed to be read in context with other posts but Ms Turner did not provide any further contextual posts during the disciplinary process (or during the Authority investigation).

[28] After clarifying that the DHB would be looking at matters from the perspective of Ms Turner's professional obligations and the DHB code of conduct and distinguishing this from what the NZ Nursing Council may deal with, Mr McCann offered to reconvene or provide Ms Turner with a preliminary view in writing. Ms Turner opted for a written preliminary decision.

### **Comment**

[29] The first meeting was relatively brief and did not traverse much detail other than to ascertain Ms Turner's explanation for the content of the postings and to seek to understand whether she had an insight into why the DHB found the posts inappropriate. It was clear from Ms Turner's responses and evidence, that she was fixated on who had revealed the posts rather than displaying any insight into the professionally inappropriate nature of the posts and the perilous situation she had placed herself in.

[30] Ms Turner reinforced this lack of insight at the time she was the subject of the disciplinary process, in her written brief of evidence comment that:

I never for one minute thought that my posts on Facebook were wrong or could result in me losing my job. To me I was just sharing news stories and things and making a few comments myself.

[31] Mr Turner indicated during the first meeting that her posts were "political in nature" and: "I certainly do not believe my opinions on any topic affect my ability to work as a specialist palliative care nurse". Further, Ms Turner focused upon what she perceived as the DHB committing a serious breach of her right to privacy.

[32] Notwithstanding, Ms Turner's written brief of evidence also indicated that since being dismissed she had reflected and: "With the benefit of hindsight, I would not make those posts again".

[33] In hearing evidence during the investigation meeting, I struggled to conclude that Ms Turner had genuine insight into the harm her postings could cause. Ms Turner drew personal linkages with her allegedly being bullied by co-workers and would only go as far to acknowledge, that some people might be offended by her postings but she was just expressing an opinion and that some of it was grounded in her Christian faith.

[34] In retrospectively assessing Ms Turner's responses during the disciplinary process, I did not detect significant ownership of the objectively offensive nature of the postings she had made except that Ms Turner was sorry they had potentially ended her nursing career. A vocation, that I was in no doubt, Ms Turner was proud of and passionately committed to. The DHB likewise, cast no doubt on Ms Turner's clinical competency or any other previous issues of concern.

[35] Essentially, Ms Turner argued that a less formal approach would have been better. I observe however, that Ms Turner took no immediate steps to acknowledge her employer's concern and did not indicate she would take the postings down or commit to being more appreciative of the impact of the postings on an already marginalised and misunderstood community. Ms Turner also failed to acknowledge that her position and standing in the community made her specific posting about the then only available Covid vaccination inappropriate (for example describing it in one posting as a "murderous vaccine").

[36] Ms Turner says she was aware of the DHB social media policy but thought it did not extend to private Facebook posts. Instead, Ms Turner sought to justify her views and portray herself as the victim. I do consider the stress of appearing before the Authority and that Ms Turner genuinely believed she had an unfettered right to freedom of expression but I also consider several of her postings were objectively unthinking and reactive. The problem Ms Turner has, was her failing to reconcile the potential harm of her Facebook postings with her professional obligations and not taking note of the impact of such on her standing in the community. I do acknowledge that some of the postings were genuine political comment and otherwise not offensive.

### **DHB's preliminary view**

[37] By way of a letter of 12 April 2021, Mr McCann traversed applicable conduct codes and the DHB's social media policy that Ms Turner had affirmed she understood and he then summarised the 7 April meeting exchanges with his preliminary view that:

After hearing your response and considering all the information available to me, I am of the view that your behaviour has been inappropriate with regards to the information you have posted on social media and that this represents a serious breach of both the NZ Nursing Council and DHBs Codes of Conduct and professional standards.

[38] After indicating a view that the threshold had been met for considering Ms Turner's actions to be serious misconduct and that he had delegated decision-making authority, Mr McCann outlined that his trust and confidence in Ms Turner had been eroded to the point he could not be confident that she could "maintain expected standards of professional behaviours without having your personal views and values bringing the DHB into further disrepute". Mr McCann then proposed summary dismissal, without notice.

[39] The letter ended by offering a further meeting to hear Ms Turner's response to Mr McCann's preliminary view.

### **21 April 2021 meeting**

[40] Prior to reconvening for a second meeting and engaging counsel, Ms Turner had no correspondence with the DHB. The next meeting was also the subject of uncontested notes provided to the Authority and at the time, to Ms Turner. Ms Turner's counsel attended the 21 April meeting alongside his client. The DHB's Mr McCann and Mr Halligan attended with two other DHB employees.

[41] From viewing the notes, the meeting opened with Mr Lloyd confirming Ms Turner had nothing further exculpatory to add on the substance or content of her Facebook posts. Instead, Mr Lloyd sought clarification of how the DHB had obtained Ms Turner's Facebook postings and who was affected by the posts.

[42] In response, the DHB attendees refused to reveal their source of the disclosed postings and Mr Lloyd challenged the sufficiency of the conclusion that others had been influenced by the postings and suggested further investigative interviews were necessary to establish or refute the latter DHB assumption.

[43] After further exchanges, Mr Lloyd reiterated they were not going to discuss the merits or substance of the Facebook posts and that his client could not be directed on her opinions and that his client was “entitled to express her personal views” with there being no evidence of any causative link to the DHB or any harm. Mr McCann reminded that Ms Turner had already been linked to the DHB in her posts and identified as their employee in a small community setting (it had emerged that at least two other recipients of the Facebook postings were DHB nurses).

[44] The parties then debated whether the DHB was entitled to intrude on conduct outside the workplace and the standard of conduct expected of a registered nurse before Mr Lloyd questioned what alternatives to dismissal had been considered.

[45] In response, Mr McCann indicated he had assessed the nature of the Facebook posts and any mitigating factors (that he did not identify) and he had considered Ms Turner’s comments made at the earlier 7 April meeting.

[46] Ms Turner claimed the NZNO had not been properly representing her, it was a bullying meeting that should have been halted and the DHB could not troll through her private life. Ms Turner then suggested other nurses had done way worse than her and that she was being put through this process despite two years of relationship problems with co-workers in which she considered she had been bullied and generally had “done nothing wrong”.

[47] Further exchanges about disclosure of information ensued before Mr Lloyd confirmed that he had nothing further to add on his client’s behalf. The meeting concluded with Mr McCann asking if Mr Lloyd wished to meet and discuss the final decision or have it provided in writing with an offer to meet. Mr Lloyd indicated the decision should be communicated to him in writing.

### **Comment**

[48] It was evident from the meeting minutes, that Ms Turner forewent an opportunity to advance any mitigating circumstances or resile from defending her postings both in content and in her right to hold and express particular viewpoints. Ms Turner then chose to instruct counsel to continue to oppose the core reasoning behind the DHB proposal to dismiss.

### **The decision to dismiss**

[49] Mr McCann after saying he had discussed the situation with Mr Halligan and HR, resolved to affirm his preliminary view that dismissal was the only option. In coming to this view, both Mr McCann and Mr Halligan stressed at the investigation meeting, that Ms Turner had not taken ownership of her actions and at the second meeting, Ms Turner appeared to have hardened her view that nothing was amiss and consequently, she was unable to demonstrate reflective professional practice.

[50] Mr McCann confirmed the summary dismissal decision in a letter of 23 April 2022, sent to Ms Turner care of her counsel, Mr Lloyd. After detailing points of discussion made by Mr Lloyd during the 21 April meeting, Mr McCann indicated:

I have considered your responses at the meeting on Wednesday, alongside your other responses during this process. I am disappointed that you continue to focus on the how and why of this matter being raised, rather than on the substance of what was brought to our attention. I have seen no insight from you that as an employee of the DHB and a regulated healthcare professional the posts were entirely inappropriate, and that these would bring the DHB and nursing profession into disrepute. This lack of reflection does not provide me any considerations or mitigations against your actions to be taken that I could use to refine further my decision.

[51] Mr McCann then indicated of Ms Turner, that he no longer had:

... trust and confidence in you to perform your duties and responsibilities and maintain expected standards of professional behaviours without your personal views and values bringing the DHB into further disrepute. Your employment will be terminated due to serious misconduct and you will be summarily dismissed effective today, Friday 23 April 2021.

[52] By way of a letter from counsel of 5 May 2021, a personal grievance was identified claiming Ms Turner had been the subject of discrimination, unjustifiably dismissed and unjustifiably disadvantaged. Ms Turner initially sought reinstatement.

[53] The parties subsequently attended an unsuccessful mediation and a statement of problem was lodged in the Authority on 23 June 2021 alleging an unjustified dismissal and unjustified disadvantage and seeking compensatory remedies but not reinstatement.

### **Was the dismissal justified?**

[54] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the

circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[55] Section 103A of the Act details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner. These elements summarised and discussed further below, are:

- (a) Whether the employer properly identified the issues of concern with the employee prior to deciding to dismiss?
- (b) Whether given the resources available to the employer, did they sufficiently investigate the identified concerns?
- (c) Was the employee afforded a reasonable opportunity to respond to the identified concerns?
- (d) Did the employer genuinely consider any explanation provided by the employee before deciding to dismiss?
- (e) Any other contextual factor the Authority regards as appropriate to consider.

### ***Resources***

[56] I conclude the DHB had no problem with resources and ongoing access to specialist HR and legal advice during the investigation and disciplinary process.

### ***Identification of concerns***

[57] Having viewed the correspondence provided and the uncontested notes of the 7 and 21 April meetings, I am persuaded that the DHB properly identified the specific concerns they later assessed as being the grounds for dismissal (being the content of the Facebook postings and wider publication of such and the impact on Ms Turner's ability to continue in her allotted role). The Facebook postings and the timing of such (during the emergence of a Covid vaccination campaign) were sufficient evidence to justify a disciplinary investigation.

[58] I have carefully assessed Ms Turner's genuine perception that she was disadvantaged by not having the source of the disclosure of her Facebook pages identified and the lack of evidence on whether the posts influenced co-workers. I consider that each of these concerns lacks relevance to the admitted fact that the postings were made by Ms Turner and the legal test for establishing potential as opposed to actual disrepute is also at issue (discussed below).

[59] Ms Turner was sufficiently apprised of the objectively serious concerns about the Facebook postings. I find it difficult to comprehend why she would think otherwise.

[60] I find that the DHB properly identified that Ms Turner had presumptively failed to fulfil various known professional expectations placed upon her that were properly specified with attendant cross references to policy and codes of conduct. On the latter, I am not persuaded that an initial lack of specification on what policy or code had been transgressed was vital for procedural fairness as the DHB properly identified the general proposition that an employee should not engage in conduct (including outside the workplace) that may destroy the trust and confidence an employer is entitled to place in an employee in a professional setting. I make this finding given that Ms Turner was employed in a professional, community-based role and objectively was aware of her ethical obligations as a registered nurse.

### ***Sufficiency of investigation***

[61] My view of the investigation was that after identifying the concerns, the DHB fairly assessed available documentation and given the postings were not disputed, correctly focussed upon Ms Turner's justification for the postings. No further or wider investigation was warranted after Ms Turner had sought to vindicate her views.

[62] No procedural or good faith issue other than the concealment of the informant, was at issue during the investigation process. I find the investigation was adequate in the circumstances and it identified a range of well documented concerns seeking Ms Turner's responses. I find it was appropriate in the circumstances, to not disclose the source of the concerns.

### ***Reasonable opportunity to respond?***

[63] Having accepted that the DHB properly identified concerns and put such to Ms Turner, I consider whether Ms Turner had a reasonable opportunity to respond.

[64] Ms Turner claimed that she was bullied by the DHB at the first meeting and inadequately represented by her union (NZNO) and that the DHB impliedly exploited the latter situation in the knowledge that the NZNO official had expressed concerns to them prior to the first meeting. During the first meeting Ms Turner asserted NZNO failed to advocate on her behalf and essentially 'sided' with the DHB.

[65] Dealing with the first issue I could see no evidence from the minutes or recalled evidence at the investigation meetings, that the DHB acted in an overbearing way – I accept the evidence that open questions were asked and that Ms Turner unfortunately failed to

appreciate the seriousness of the situation she faced and chose a belligerent approach (at both meetings).

[66] On the second issue, whilst it was evident that the NZNO official said little or nothing in Ms Turner's support during the meeting, that is not unusual when the purpose of the meeting was for Ms Turner to explain and or justify her actions to the DHB. Ms Turner had time to reflect on how she would approach the meeting and the DHB was expecting her to show a level of understanding and perhaps contrition – a not unreasonable expectation in the circumstances.

[67] I heard no evidence from the NZNO official but could draw a reasonable conclusion based on Ms Turner indicating that the NZNO official had counselled her during the meeting to accept her posts were inappropriate, that Ms Turner's overall approach to the meeting may not have followed NZNO's advice. It is evident that Ms Turner's then high state of anger may have blinded her to any focus on her own conduct.

[68] Once Ms Turner obtained alternative legal advice, she had ample opportunity and time before the second meeting and during such, to focus upon a reflective and more conciliatory approach that, from evidence given by the DHB witnesses, may have led to a different response, short of dismissal. Ms Turner unfortunately chose to not take this opportunity and demonstrate that she had reflected on her actions.

[69] The DHB also took an appropriately fair approach in conducting a 'two step' process, to first make a preliminary view known to Ms Turner by setting out the reasons for such in writing and then they invited Ms Turner to make a submission to the decision-maker on preliminary findings. Ms Turner did not seize the opportunity to advance mitigating reasons at any point in the process, that objectively should have included her displaying an understanding of the harmful nature of her posts and the impact that such could have on her professional practice including relationships with her co-workers, patients, the public and the DHB.

***Did the DHB genuinely consider Ms Turner's explanations?***

[70] Whilst on the surface, the investigation was cursory around the impact of Ms Turner's postings on others, the dismissal process was not rushed.

[71] I heard evidence that Mr McCann as the decision-maker in consultation with Mr Halligan as a professional nurse advisor, did carefully consider Ms Turner's perspective of the situation. Mr McCann said this included reviewing Ms Turner's personal file and seeking advice on the allegation she had raised against a co-worker involved in forwarding the Facebook postings concern to the DHB. Mr McCann had not been aware of any previous allegations raised by Ms Turner against the co-worker. Mr McCann discovered through an HR review that in late 2019, after informal concerns had been raised by Ms Turner, a DHB led facilitation occurred between Ms Turner and a co-worker that led to agreed conciliation steps. A review of Ms Turner's file showed no record of any formal complaints.

[72] Mr McCann concluded that there was no suggestion to consider the co-worker's involvement in disclosing the Facebook postings as ill-motivated and even if it had been, the content of the Facebook posts was objectively sufficient to give rise to serious concerns.

[73] I also note that despite having ample time to expand further on the bullying suggestion as exculpatory, Ms Turner did not do so during the disciplinary process and only provided further detail in evidence during the investigation.

[74] Only latterly during the investigation meeting, did Ms Turner indicate she accepted she should have thought about the impact of her posts on others by saying: "I have no excuse" for them. I must assess the dismissal at the time it occurred but I accept that Ms Turner was latterly expressing a genuine reflective view and I hope that she can now begin to understand the reasons for her dismissal and her contribution to such.

### **Finding**

[75] The notes of both meetings and uncontested evidence, showed Ms Turner sought to vigorously justify her postings and displayed no insight on the content of her postings and any linkage to her professional obligations. I record that whilst not detailing the postings, they ranged over several subjects, including dispensing views on health-related vaccine matters that compromised the DHB and Ms Turner's professional credibility. At the investigation meeting, Ms Turner disclosed that she was awaiting a New Zealand Nursing Council disciplinary tribunal hearing that will examine her actions. Ms Turner also confirmed that because of her stance on one of the issues in her postings, she has not been able to secure an alternative nursing position since being dismissed by the DHB.

[76] I am satisfied that the DHB genuinely assessed and took account of Ms Turner's responses on the postings at issue when considering Ms Turner as a mature, experienced, and otherwise capable nurse.

*Other contextual factors*

[77] I find that given the content of Ms Turner's Facebook postings, that the DHB had an obligation to pursue the matter in a formal setting. An informal approach, as suggested by Ms Turner and her counsel, was simply not warranted to bring to her attention the gravity of her actions. Having said that, I conclude that Ms Turner was then the author of her own downfall in how she approached the two disciplinary meetings.

[78] Objectively, looking at the postings brought to the DHB's attention and Ms Turner's attempt, at the time, to justify her position on them and her inability to view matters from a professional perspective, I accept it left the DHB with few options other than dismissal.

[79] I observe the DHB was entitled to view the posts as both already having brought them into disrepute and potentially ongoing disrepute. In addition, issues arose over Ms Turner's ongoing nursing practice suitability, given the controversial views she expressed and did not resile from and, Ms Turner's lack of insight on the impact of disseminating such views on her credibility and professional practice as a community-based nurse.

[80] I am not persuaded by Ms Turner's counsel's contention that the DHB should have disclosed the content of the NZNO official's conversation expressing concern about Ms Turner's aggressive demeanour and safety prior to the first disciplinary meeting. I do not consider this had any bearing on the fairness of the process or that it caused Ms Turner to be disadvantaged. I conclude that any concerns Ms Turner had about the level of support and advice she got from the NZNO is a matter between Ms Turner and the NZNO. I heard no evidence that the NZNO compromised Ms Turner's position. The evidence by contrast, suggested Ms Turner, and her supports, took an uncompromising approach on their own volition and Ms Turner must accept ownership and the consequences of this approach.

**NZBORA**

[81] Both counsel provided thoughtful and well researched submissions on the relevance in an employment relationship context of notional freedoms afforded Ms Turner under the

New Zealand Bill of Rights Act 1990 (NZBORA) as a purported ‘shield’ for Ms Turner’s actions in posting material that the DHB assessed as offensive. I do not intend to extensively traverse the case law and submissions except to summarise their main points and my conclusion as follows.

[82] Ms Turner’s counsel extensively argued that the DHB’s actions infringed on Ms Turner’s rights to freedom of expression as outlined in s 14 of the NZBORA that provides

Freedom of expression - Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind or form; and s13 NZBORA that provides:

Freedom of thought, conscience, and religion – Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

[83] Mr Lloyd also referenced s 22 (1) Public Service Act 2020 that acknowledges that:

.... Public service employees have all the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 in accordance with the provisions of the Act.

[84] By contrast, the DHB’s counsel, Mr Kynaston argued that the Employment Court has held that NZBORA protections do not apply in the context of employment relationships involving state agencies <sup>3</sup> and even if that were so, rights conferred are the subject of reasonable limits under s 5 NZBORA. <sup>4</sup>

### **Potential privacy breach**

[85] Ms Turner’s also claimed that the DHB accessing her Facebook posts was in breach of privacy obligations contained in the Privacy Act 2020. However, the Authority has no jurisdiction to consider such claims or provide any potential remedies. I observe that the evidence showed the DHB did not directly access Ms Turner’s Facebook account as the postings were provided to the DHB by a co-worker of Ms Turner who had been a legitimate recipient of the postings. Prime facie, no privacy breach has occurred as the dissemination of material on Facebook is objectively in the public domain and likely to go beyond the Facebook group Ms Turner identified.

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<sup>3</sup> Including *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197.

<sup>4</sup> Section 5, New Zealand Bill of Rights Act 1990, provides that: “Justified Limitations – Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

## **Assessment**

[86] Whilst the Authority's approach to employment relationship problems may reasonably be informed by NZBORA considerations, the test of justification is a statutory one and in applying such, I have no jurisdiction to provide any remedies for breaches of the NZBORA or declarations on the applicability of such. If Ms Turner is of the view that the limitations placed on her NZBORA rights by her former employer are unreasonable then a course of action available is an application to the High Court to judicially review the lawfulness of the DHB's decision. I note in passing this would entail persuading the High Court to the view that the DHB's own policies, including various codes of conduct and the Public Service Code of Conduct, are inconsistent with the NZBORA - a premise that would prevent state sector employers from enforcing such codes of conduct.

[87] The Authority in adjudicating Ms Turner's claims is confined to applying s 103A of the Act, good faith obligations owed and case law around the issue of to what extent can an employer have regard to employee conduct outside the workplace.

### **Conduct outside the workplace – did it bring the DHB into disrepute?**

[88] Ms Turner's suggestion that her Facebook posts were private does not bear scrutiny as she shared them with up to 200 others and patently the complaints about such would not have arisen if they had not been accessed by a co-worker and brought to the attention of the DHB.

[89] The Authority has consistently accepted the legal premise affirmed by the Court of Appeal, that provided a nexus is established, conduct outside of the workplace that intrudes upon workplace relationships and obligations of employees can legitimately be the subject of disciplinary proceedings and that: "Similarly conduct outside work may demonstrate that an employee has lost the attributes essential for the particular job".<sup>5</sup>

[90] In the context of social media postings, the Employment Court in *Hook v Stream Group (NZ) Pty Limited* observed that:

The use of social networking posts in employment disputes has only risen sporadically in New Zealand, predominantly at an Authority level. It has received a greater degree of judicial attention elsewhere.

It is apparent that the increased use of social networking sites by individuals to express dissatisfaction with their employers is becoming more prevalent. This carries a risk. It is well established that conduct occurring outside the workplace

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<sup>5</sup> *Smith v Christchurch Press Company Ltd* [2000] 1 ERNZ 624 at [21] and [22].

may give rise to disciplinary action, and Facebook posts, even those ostensibly protected by a privacy setting, may not be regarded as protected communications beyond the reach of employment processes. After all, how private is a written conversation initiated over the internet with 200 ‘friends’, who can pass the information on to a limitless audience.<sup>6</sup>

[91] Ms Turner suggested she was unaware of the ‘reach’ of Facebook posts and claimed to be just sharing postings with family and others and that what she posted was opinions often shared by others. Even if I was to accept this, the fact was the postings were disclosed and the content of such brought to the DHB’s attention. Ms Turner took no steps to disassociate herself from the views expressed, admitted the posts were created by her and then sought to defend her views without reflection upon how they impacted on others (including the DHB) and her professional standing and obligations.

[92] I consider whether the postings either brought the DHB into disrepute or could potentially risk bring the DHB into disrepute. In *Wikaira v Chief Executive of the Department of Corrections*, Chief Judge Colgan formulated an approach as:

I conclude that a fair and reasonable employer, considering whether an employee’s conduct brought, or risked bringing, the employer into disrepute, must consider objectively several factors. These are whether a neutral, objective, fair minded and independent observer, apprised appropriately of the relevant circumstances, could have considered the relevant actions to have brought, or to be a reasonable risk of bringing, the employer into disrepute.<sup>7</sup>

[93] In having regard to the above formulation, I find that a significant risk existed of harm to the reputation of the DHB (and Ms Turner) had her postings been viewed by the wider public including her local community. The situation is aggravated by Ms Turner occupying a community based role, the fact that she nursed vulnerable ‘end of life’ patients and generally, a not unreasonable expectation from her employer that Ms Turner would desist from making critical and controversial comment on public health matters during a pandemic.

[94] There was also an element of Ms Turner, at the time, manifestly failing to appreciate her published views were hurtful to a vulnerable section of the community and ill-informed. I am easily satisfied there was a link between the conduct in question and the role Ms Turner undertook.

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<sup>6</sup> *Hook v Stream Group (NZ) Pty Limited* [2013] NZEmpC 188, [2013] ERNZ 357.

<sup>7</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 37.

[95] The conduct under scrutiny and Ms Turner's reactions leads me to conclude it was reasonable in all the circumstances for the DHB to have no trust and confidence in Ms Turner on an ongoing basis and this conclusion was one that a reasonable and fair employer could have made.

### **Unjustified discrimination**

[96] Less well developed in evidence and submissions, was the claim that in reaching a decision to dismiss Ms Turner the DHB acted in a discriminatory manner by a partial approach that did not take account of Ms Turner's political, ethical, or religious beliefs.

[97] Section 104(b) of the Act provides for discrimination to exist, Ms Turner has to establish that the DHB dismissed her "in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed"<sup>8</sup>

[98] In assessing these claims, I note the burden of proof in establishing the required indices of a discrimination claim rests with the applicant and the standard of proof is on the balance of probabilities. Ms Turner's counsel merely stated that it is "beyond doubt" that Ms Turner was dismissed "by reason of" her "expressed political, ethical, and religious beliefs on Facebook". No further exposition on whether this was direct (or open) or indirect discrimination was advanced.

[99] The Supreme Court has posited that:

The correct question raised by the phrase 'by reason of' is whether the prohibited ground was a material ingredient in the making of the decision to treat the complainant in the way he or she was treated ...<sup>9</sup>

[100] Ms Turner advanced no evidence of other employees being spared dismissal in similar or identical circumstances (for inappropriate social media postings) and could not point to any causative link that the dismissal was based on identified prohibited grounds.

### **Political opinion**

[101] I observe that whilst the definition of 'political opinion' is a somewhat amorphous concept and susceptible to a wider definition, Ms Turner did not disclose any links to a political grouping or movement and says her posted comments were merely the expression of personal views on random media stories from news sources. Whilst the definition of political

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<sup>8</sup> Section 104(1)(b) Employment Relations Act 2000.

<sup>9</sup> *McAlister v Air New Zealand Ltd* [2009] NZSC 78 at [49].

opinion includes ‘the lack of’ as a defining term, Ms Turner’s claim was firmly that her views were affirmative political views.

[102] The nearest New Zealand courts have come to defining political opinion is the High Court in *BHP Steel (NZ) Ltd v O’Dea* where Robertson J in a non-binding observation, suggested ‘political’ had to involve a “connection with Government or with the relationship between the state and its citizens”. I find this definition unhelpful but find that Ms Turner has failed to draw any inference of any political activism being used by the DHB as a reason for the dismissal.

[103] I am satisfied that the reasoning advanced by the DHB decision-maker bore no suggestion that the dismissal was motivated by a concern as to any political views Ms Turner held. I find that the DHBs consideration of the impact of Ms Turner’s posts on her ability to undertake her professional role and maintain professional credibility was at issue and nothing else.

### **Religious beliefs**

[104] Likewise, claiming (only by mere implication) that the DHB considered Ms Turner’s religious preference in their decision (she had disclosed during the disciplinary process that she was a Christian) would have to have a bearing on the matters under scrutiny. I could not detect that the DHB decision-maker discriminated against Ms Turner on the grounds of her religion. I accept Ms Turner did advance an observation to justify one post, that her own religious affiliation had been offended by an event in another country allegedly perpetrated by adherents of another religious grouping but I could see no suggestion that in decision-making the DHB took this into account from any perspective.

### **Ethical beliefs**

[105] In submissions, Mr Lloyd did not expand on any ethical belief that Ms Turner held and I note such a claim can logically not sit alongside a claim of discrimination based on Ms Turner’s expressed religion when the term “Ethical belief” has a statutory definition of “the lack of a religious belief, whether in respect of a particular religion or all religions”.<sup>10</sup>

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<sup>10</sup> Section 21(1)(d) Human Rights Act 1993.

## Conclusion

[106] Overall, in applying s 103A of the Act I find the issues are reasonably clear cut in that Ms Turner was afforded more than one opportunity to explain her Facebook postings and to display some understanding of their impact on her professional role.

[107] No further investigation was necessary as the misconduct in question had been established to a sufficient level of seriousness and was not contested at the two disciplinary meetings.<sup>11</sup>

[108] It is not appropriate that I ‘re-run’ the employer investigation or ‘step into the employer’s shoes’. I, have to be satisfied objectively that the DHB acted reasonably in all the circumstances and fairly assessed the responses Ms Turner provided – i.e. I must determine whether what the DHB did was “what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred ...”.<sup>12</sup> In this context, balancing Ms Turner’s concern about not being told who informed on her with her lack of awareness and attempts to justify her views on objectively spurious grounds and, Ms Turner’s failure to express that she understood the impact of the Facebook postings on several key relationships, I find the decision to dismiss was substantively a decision open to the DHB and they enacted it in a fair and reasonable manner in all the circumstances.

[109] In coming to the above conclusion, I did carefully consider Ms Turner’s counsel suggestion that a direction to ‘cease and desist’ her inappropriate Facebook postings coupled with an awareness training approach was more apt but I was not convinced that these were reasonable measures the DHB could have taken at the time when faced with Ms Turner’s obdurate defence of her views and lack of insight on her actions.

[110] In making this finding, I stress that Ms Turner assisted my investigation and presented as a capable person who was open and frank in responding to questions. If Ms Turner was

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<sup>11</sup> It has been suggested that when serious misconduct is admitted by an employee, it is not necessary for the employer to spend more time investigating the matter: *Murphy and Routhan t/an Enzo’s Pizza v van Beek* [1998] 2 ERNZ 607 (EmpC). See also *Smith v Datamail Ltd* ERA Wellington WA125/09, 2 September 2009; *Reynolds v Mount Cook Airline Ltd* [2013] NZERA Christchurch 155 (where the Authority expressly referred to *Enzo’s Pizza* and confirmed its continuing legal relevance under s 103A).

<sup>12</sup> Section 103(A)(2) Employment Relations Act 2000 and summarised in *Cowan v Idea Service Ltd* [2019] NZEmpC 172.

overwhelmed by negative workplace relationships and any external pressures, she sadly did not bring such to her former employer's attention at the time or properly identify any compelling mitigating matters during the disciplinary process.

[111] I find that the summary, dismissal was substantively justified on the grounds that despite her significant experience, expressed passion, and commitment to her job of nursing, Ms Turner neglected to recognise the impact of the inappropriate Facebook postings and this lack of awareness or remorse, destroyed the high level of trust and confidence that the DHB had previously placed in her.

### **Conclusion**

[112] I find that Amada Turner was not the subject of an unjustified disadvantage when she was suspended and was not unjustifiably dismissed or the subject of discriminatory actions by the Wairarapa District Health Board and is not entitled to any of the remedies sought.

### **Costs**

[113] Costs are at the discretion of the Authority and are reserved. The parties are encouraged to make an agreement on costs. If no agreement is achieved, the Wairarapa District Health Board has fourteen days following the date of this determination to make a written submission on costs and Amanda Turner has a further fourteen days to provide a response. I will then determine what costs are appropriate.<sup>13</sup>

**David G Beck**  
**Member of the Employment Relations Authority**

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<sup>13</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)