

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 47
5441824

BETWEEN ANGELA WATSON
 Applicant

AND CAPITAL & COAST DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Michele Ryan

Representatives: Andrew McKenzie, Counsel for Applicant
 Paul White, Counsel for Respondent

Investigation Meeting: 29, 30, 31 July 2014 at Wellington

Submissions and
additional information
received: 22 August, 23 September and 24 December 2014 from the
 Applicant
 10 September 2014 from the Respondent

Determination: 4 May 2015

DETERMINATION OF THE AUTHORITY

Summary of relevant background information

[1] The events pertinent to Ms Angela Watson's claims occurred between October 2011 and December 2013 at which point she lodged a statement of problem with the Authority. It has not been practical to set out every transaction between the parties. Instead I have broadly summarised the relevant material facts as follows.

[2] Ms Watson commenced her employment with Capital & Coast District Health Board (the DHB) in 2009 as a Registered Nurse. She remains employed by the DHB. Her general nursing and 'Registered Sick Children's Nurse' qualifications were both obtained in the UK.

[3] Ms Watson initially accepted an offer to work on Ward 19 (now renamed Ward 1) at Wellington Hospital but when her employment began she agreed to be reassigned to Ward 18 (now Ward 2). For ease of reference I refer to these wards by their more recent numbering.

[4] Wards 1 and 2 (the Children's Hospital), the Neonatal Intensive Care Unit (NICU) and Ambulatory Paediatrics¹ form the DHB's Children's Health Service which is operated and managed under the 'Surgical, Women's and Children's Directorate' (the SWC Directorate) within the DHB.

[5] In March 2011 Ms Alison Slade moved from the UK to Wellington to take up the position of Ward 2 Charge Nurse Manager (CNM). Her nursing qualifications are similar to those of Ms Watson although she additionally holds a BSc in Professional Nursing Practice.

[6] Between 20 September and 10 October 2011 Ms Slade received seven written complaints from nursing staff. The allegations contained in the complaints were predominantly about Ms Watson's style of communication. Ms Watson and her union representative were advised of the complaints and on 21 October 2011 the parties agreed Ms Watson would receive paid special leave while the DHB conducted a preliminary investigation into those matters.

[7] By 9 November 2011 the preliminary investigation was concluded. The DHB determined that a formal disciplinary investigation (the Watson investigation) would be undertaken to establish whether or not Ms Watson's alleged behaviour was in breach of the DHB's Code of Conduct. Terms of Reference governing the investigation were agreed on 13 January 2012.

[8] The Watson investigation was comprehensive and did not finish until 17 January 2013. Two material events occurred while the Watson investigation advanced, as follows:

- In mid-April 2012, the DHB made arrangements to meet with Ms Watson on 2 May 2012 to discuss its expectation that she return to work and stop payment of special leave. Ms Watson obtained a medical certificate and did not attend the meeting. She was paid sick leave for the 3 days recorded as not fit to work. The DHB placed Ms Watson on leave without pay on 5 May 2012. On 7 May 2012 a claim for breach of contract and a personal grievance was raised stating Ms Watson had been unlawfully suspended as a consequence of this action.

¹ A small area of service that facilitates transport for children between health services

- In August 2012 Ms Watson made a formal complaint alleging bullying and harassment towards her by Ms Slade. The DHB commissioned an independent investigator to conduct a preliminary investigation (the Slade investigation) into the allegations.

[9] At the end of the Watson investigation the DHB's decision maker decided against taking disciplinary action but considered Ms Watson should engage in a Performance Improvement Plan (PIP) focussing on communication and interaction with staff.

[10] The parties agreed that a managed reintegration back to work was required for Ms Watson. Between February 2013 and mid 2013 the parties exchanged correspondence reflecting their differing views on what was needed to expedite Ms Watson's return.

[11] The DHB's position was that Ward 1, Ward 2 and NICU were available options for Ms Watson to return to work. The DHB considered that no matter which area Ms Watson returned to work, she needed to obtain clearance from its Occupational Health Service. It considered that reintegration to Ward 2 (or Ward 1) would likely require Ms Watson to participate in facilitated counselling with Ms Slade² and the complainants.

[12] Ms Watson's preference was to return to Ward 2 although she was reluctant to do so until her complaint against Ms Slade was concluded. She was unwilling to work in NICU or Ward 1 but informed the DHB that she would be prepared to consider other paediatric positions outside the SWC Directorate if available.³

[13] An additional impediment to Ms Watson's return to work centred around whether Ms Watson was obliged to obtain an clearance from the DHB's occupational health services. The dispute has two strands: firstly Ms Watson became aware that in April 2012 the Operations Manager for Children's Health Services had scheduled an appointment for Ms Watson to attend Occupational Health Services and had misrepresented the reason for Ms Watson's attendance. Ms Watson considered (and remains of the view) that the DHB's requirement to have her obtain a health clearance

² Letter of 12 March 2013

³ There is some evidence that a position in Ambulatory Paediatrics became available in May 2012 however the DHB required Ms Watson to apply for the position. Although it is not entirely clear from the evidence Ms Watson wished to be transferred to the position and says if she was made to apply for the role she would have been disadvantaged and therefore did not apply.

through that service may be used as a means to preclude her from work. Ms Watson also says there is no contractual obligation to complete an occupational health clearance to return to Ward 2. This matter is addressed later in this determination.

[14] On or about 25 March 2013 Ms Watson was advised that the Slade investigation preliminary findings found insufficient evidence of bullying or harassment by Ms Slade. On 1 May 2013 the Slade investigation decision maker informed Ms Watson that the DHB would not be proceeding with a full disciplinary investigation into Ms Slade's conduct.

[15] Over the course of the first half of 2013 there were also concurrent discussions between the parties representatives to timetable further mediation. The DHB anticipated that two consecutive days would be required to canvass Ms Watson's grievances. Difficulties in reaching agreement as to when that would occur arose because Ms Watson was only willing to attend mediation on Fridays when her support person was available.

[16] The parties finally met (outside the confines of mediation) on 12 July 2013 to discuss Ms Watson's return to Ward 2. The focus of the meeting centred on the relationship between Ms Watson and Ms Slade. Ms Watson indicated that a barrier to returning to Ward 2 was her lack of trust in Ms Slade which she partially attributed to comments made about her during the Slade investigation. She requested that she receive the statement Ms Slade had given to the independent investigator. There is an ongoing dispute about whether Ms Watson was entitled to obtain a written statement Ms Slade supplied to the independent investigator during that investigation. That matter is the subject of proceedings in the Human Rights Review Tribunal which I shall return to later in this determination.

[17] The parties also attended mediation on 23 July 2013 but required further time to canvass the issues between them and matters were not resolved.

[18] In the weeks following the 12 July meeting and the 23 July mediation the parties each appear to change their respective positions.

[19] On 19 August Ms Watson informed the DHB that she would not participate in further mediation or meetings. She requested to be returned immediately to Ward 2 unimpeded and to payroll with immediate effect. She asked to be promptly enrolled

in the mandatory clinical re-certifications courses needed to practise as a Registered Nurse.

[20] On 6 September 2013 the DHB advised that it was the DHB's expectation that Ms Watson return to work in Ward 1 (as opposed to Ward 2) and attached a corresponding Return to Work plan to that end.

[21] Between 6 September and mid October 2013 the DHB furnished several proposed Ward 1 roster formations for Ms Watson. On 16 October 2013 the DHB provided a schedule of clinical re-certifications Ms Watson needed to undertake to return to work and advised that she was booked to attend the relevant courses on 30 October 2013. The DHB reaffirmed its view that Ward 2 was not suitable for Ms Watson to return to in the interim. The DHB emphasised that it required an occupational health clearance for Ms Watson on the basis of safety. It agreed to downsize the PIP to attendance and completion of four communication skills workshop courses.

[22] Ms Watson obtained new representation. On 23 October 2013 her representative advised that that the actions of the DHB raised sufficient grounds for a constructive dismissal action, although that claim has not been pursued in the Authority. The letter requested Ms Watson be restored to the payroll and allowed an unrestricted return to Ward 2 or redeployment to an agreed equivalent alternative position outside the SWC without transfer or application restrictions, occupational health requirements or a PIP.

[23] Ms Watson did not attend the clinical re-certification courses on 30 October 2013. Nor has she returned to work and remains on leave without pay. The parties each allege that the other has unreasonably impeded the resolution of their differences.

The Authority's investigation

Events prior to the investigation meeting

[24] Ms Watson's application was originally lodged with the Authority on 4 December 2013 as a claim for urgent interim reinstatement. On 10 December 2013 the Authority proposed to investigate that matter on 23 December 2013⁴. Ms

⁴ During a case management conference

Watson's representative indicated a preference for the parties to be directed to mediation and agreed to withdraw the urgent application in exchange for an early substantive investigation meeting on 13-14 February 2014.

[25] On 20 January 2014, Ms Watson's representative advised that preparations for the Authority's investigation meeting in February had been hindered due to the separate personal circumstances of both Ms Watson and her instructing solicitor. An adjournment was granted. Tentative arrangements for an investigation meeting in early April were agreed, but in a case management conference on 6 March 2014 it was apparent that Ms Watson required further time to prepare. The Authority's investigation was rescheduled for 27-28 May 2014. Agreed timeframes for the exchange of evidence were not met and the matter was again adjourned. The Authority's investigation meeting went ahead on 29, 30 and 31 July 2014.

[26] Ms Watson's initial statement of problem claimed various breaches of express and implied terms of employment and that she had been unjustifiably disadvantaged. I requested further particulars about the claims and an amended statement of problem was provided. That document recorded that Ms Watson sought reimbursement of wages for the period between the date paid special leave was halted and the conclusion of the Watson investigation (5 May 2012-17 January 2013). The claim was couched as being both an unjustified disadvantage and/or a breach of contract. In addition, the amended statement of problem stated that Ms Watson:

“generally contends that she has been the subject of a series of unjustified actions causing ongoing disadvantage and that she has been unreasonably excluded from her normal pre-investigation work role and as a result incurred significant lost wages and has suffered ongoing humiliation ...and career detriment”.

[27] By the end of 2013 Ms Watson had raised at least 8 separate notices of personal grievance claims⁵ covering a wide range of matters, but it was unclear from the amended statement of problem which of those grievances she wished to pursue.

[28] During a subsequent telephone conference, counsel for Ms Watson advised that the unjustified action *“was the [DHB's] whole process”*. No further particulars were provided to identify exactly what actions were claimed as an unjustifiably disadvantage.

⁵ 1 March 2012, 7 May 2012, 11 June 2012, 21 December 2012, 21 January 2013, 20 February 2013, 10 July 2013, 23 October 2013

The investigation meeting and following

[29] Ms Watson provided written and oral evidence. In support of Ms Watson, evidence was furnished by two friends; psychiatric assistant, Lawrence Hannah and social worker, Mervyn Taueki-Ranson. In addition, Ms Watson's GP, Dr Indrathavy Rajendran and her counsellor, Janette Roberts, also provided evidence.

[30] On behalf of the DHB; Human Resources Manager, Ms Valerie McHardy; Executive Director of the SWC Directorate, Ms Delwyn Hunter; Director of Nursing and Midwifery, Ms Andrea McCance; Ward 2 CNM, Alison Slade; independent investigator, Murray French; and two Registered Nurses⁶ who worked on Ward 2 at the material time, each provided written and oral evidence.

[31] The role of the Authority is to deliver speedy, informal and practical justice to the parties. At the time the Authority's investigation commenced, four A4 lever arch folders comprising approximately 1500 pages of documents (not including briefs of evidence) were lodged with the Authority. Despite a direction that the contents of the bundle of documents be placed in chronological order they were not and I have struggled to locate and cross reference documents. Nor has it been efficient or practical to refer to all the information or determine every factual conflict raised by Ms Watson. Those difficulties combined with the unfocused nature of Ms Watson's claims have contributed to the delay in concluding this determination.

[32] During the course of the investigation meeting broad themes emerged in Ms Watson's evidence as being of particular importance to her and her counsel agreed to have the Authority determine those matters.

[33] Prior to lodging her application with the Authority, Ms Watson initiated proceedings before the Human Rights Review Tribunal (HRRT) in respect to a written statement Ms Slade gave to the DHB's independent investigator during his preliminary investigation into Ms Watson's the allegations against her. In the lead up to the Authority's investigation several requests for an order to have the DHB to release that statement were made. Ms Watson is concerned that Ms Slade furnished a copy of a determination from the Employment Relations Authority involving her [Ms Watson] and a previous employer, and made comments about that matter to generate doubt about her claims against Ms Slade and to negatively influence the investigator.

⁶ I have not recorded the names of the two nurses who provided evidence as I consider each of them to be periphery to Ms Watson's claims. Neither were involved in the DHB's decision making processes.

Ms Watson's requests to the Authority for that information focussed on her wish to understand what Ms Slade had said to the investigator so that she could address these with Ms Slade and answer any concerns that may arise for the Authority when determining whether Ms Watson should return to Ward 2. I indicated during two telephone case management calls that I would be able to assess the working relationship between Ms Watson and Ms Slade without that material.

[34] Ms Watson wanted me to determine whether the DHB's decision not to conduct a formal investigation (following the preliminary investigation) into Ms Slade was fair and reasonable in all the circumstances. On reflection I am unwilling to determine Ms Watson's concerns about the Slade investigation where there was a dispute about the provision of information (that may or may not be relevant) which is being decided in an alternative jurisdiction. Ms Watson is free to return to the Authority to have that matter addressed when her application with the HRRT is determined.

The Issues

[35] The question of whether Ms Watson has been unjustifiably disadvantaged is determined by applying the test set out s. 103A(2): "*whether the employer's actions, [the DHB] and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred*".

[36] For Ms Watson to succeed with any unjustified disadvantage personal grievance claim⁷ she must first establish that her employment or one or more conditions of employment was affected to her disadvantage by an action of the DHB. The onus then shifts to the DHB to show that the action causing the disadvantage was what a fair and reasonable employer could have done in all the circumstances.

[37] The particular issues that are required to be determined in this matter are as follows:

- (a) whether it was fair and reasonable for the DHB to commence a disciplinary investigation;
- (b) whether the disciplinary investigation was undertaken fairly and were conclusions reasonable;

⁷ s.103A(1)(b) of the Employment Relations Act 2000

- (c) whether the decision to cease paid special leave fair and reasonable;
- (d) whether Ms Watson was unjustifiably disadvantaged by the length of the investigation meeting;
- (e) whether Ms Watson was effectively suspended from Ward 2, and if so when;
- (f) whether Ms Watson is entitled to return to work at Ward 2;
- (g) whether remedies should be awarded.

[38] Ms Watson seeks an order that she is immediately reinstated to payroll and returned to her position at Ward 2 pending an agreed graduated return to work plan and facilitation, or an agreed paediatric focused position outside the SWC Directorate. She seeks lost wages from 2 May 2012 until 17 January 2013 and \$25,000 in compensation.

Was it fair and reasonable for the DHB to commence a disciplinary investigation into the complaints made against Ms Watson?

[39] Ms Watson alleges she was unjustifiably disadvantaged by the DHB's decision to conduct a formal disciplinary investigation into the complaints. She says that it should have been immediately evident to the DHB that the matters of complaint were minor incidents of miscommunication and not about her clinical performance. To support her argument she points to the findings of the investigation report where many of the complaints were either found to not be substantiated or inconclusive.

[40] Ms Watson also contends that Ms Slade "*orchestrated*" staff to elevate minor incidents into formal written complaints in order to procure her resignation.

[41] In the 6 months before the formal complaints arose Ms Slade says several staff had approached her with concerns about Ms Watson's conduct. She says staff invariably reported that they did not want to approach Ms Watson nor did they wish to have Ms Slade raise concerns on their behalf. I accept her evidence that she was unsure how to manage those matters given she was new to the DHB, and that she sought advice from her direct manger⁸, Ms Joyce about how to manage the situation.

⁸ Operations Manager for Children's Health Service

[42] Ms Slade says she was informed by Ms Joyce to advise Ward 2 nurses that if they were unwilling to use self-help or informal mechanisms but wanted the problems dealt with then they would need to document their concerns in accordance with the Harassment Prevention Policy.

[43] The DHB's Harassment Prevention Policy provides three separate procedures to manage complaints of harassment. The first and second procedures titled "*Self-help*" and "*Informal Intervention*" respectively, allow a complainant to approach the individual harassing them on their own or with a support person to discuss the matter. A complainant is not obliged to engage in either of those methods at first instance.

[44] The third procedure, "*Formal complaint*", is used "*where informal approach has not resolved the problem, or the allegations are serious enough to warrant a formal investigation...*". Initiating a formal complaint requires a complainant to write and sign a written complaint and forward to their manager who is obliged to obtain assistance from HR to establish the appropriate process to investigate the complaint. The policy states "*The investigation will be conducted in accordance with the Capital and Coast DHB Disciplinary Procedures*".

[45] Two of the seven nurses who raised complaints against Ms Watson provided evidence to the Authority. Each witness gave compelling evidence as to why she was unwilling to utilise the self-help or informal mechanisms. One witness reported she did not feel sufficiently confident as a junior nurse to approach Ms Watson with concerns and the other nurse stated that she was fearful of Ms Watson. Both witnesses independently testified that she anticipated any direct discussion with Ms Watson would be met with a verbal attack both professionally and personally. Each witness strongly denied that she had been asked or persuaded by Ms Slade (or anyone else) to make a formal complaint about Ms Watson.

[46] DHB Human Resources Manager, Valerie McHardy became involved on 3 October 2011 when she was asked to give advice to nursing management about how best to manage the complaints. She says in circumstances where the complainants did not wish to access the self-help or informal mechanisms but wanted the concerns addressed, she recommended the DHB perform an initial investigation in accordance with the DHB's Disciplinary Policy.

[47] Ms McHardy says that the initial investigation was to be undertaken by herself and Ms Slade, but the DHB agreed to Ms Watson's early request to have Ms Slade replaced by an alternative manager. The Disciplinary Policy states that on receipt of an explanation "*the Manager then decides whether the complaint should be investigated*". In this respect the Disciplinary policy provides the investigating manager with discretion to advance to a formal investigation.

[48] Ms Hardy says that both her and the replacement manager discussed alternatives to implementing a formal disciplinary investigation such as a performance improvement plan. She says however, that there were disparities between Ms Watson's account of the material incidents compared to that expressed by the complainants which did not resolve their concerns. This factor together with the volume of complaints and a common theme raising the potential of bullying led the investigators to conclude that they could not ignore the complaints and a formal investigation was warranted.

Findings

[49] I find that Ms Slade advised some nurses on Ward 2 of the DHB's policies and mechanisms to deal with concerns about harassment. Her guidance to nursing staff in this way is likely to have had fostered Ms Watson's view that Ms Slade bolstered complaints against her, but I am not persuaded that Ms Slade's managerial obligation to advise nurses of DHB policy can be characterised as a campaign to generate Ms Watson's resignation as is claimed. I was not furnished with any evidence which supports Ms Watson's allegation that Ms Slade orchestrated staff to make formal complaints or that Ms Slade and staff colluded to engineer complaints. I accept the testimony of the two junior nurses that each made an individual and independent decision to formalise a complaint and was unwilling to deal with concerns directly with Ms Watson.

[50] Ms Watson's allegation that that it should have been obvious to the DHB that many of the complaints were not serious and it should have been dealt with these informally is problematic. The argument assumes that the DHB was able to foresee the outcome of the investigation. There is no evidence that the decision to advance to a formal investigation was an abuse of managerial discretion or that the DHB's actions were not open to a fair and reasonable employer in all the circumstances. Faced with 7 complaints from staff about Ms Watson's interpersonal style I am

satisfied that the decision to undertake a formal investigation into the complaints was justifiable. I dismiss this aspect of Ms Watson's claims.

Was the Watson investigation undertaken fairly and were the conclusions reasonable?

[51] Putting aside Ms Watson's view that a formal investigation should never have occurred, she alleged the investigation was procedurally and substantially unfair, including that:

- the DHB did not adequately investigate the historical dysfunction of Ward 2 or Ms Slade's management style which Ms Watson says created a divisive culture, and
- the DHB did not afford Ms Watson an opportunity to view or comment on the final investigation report
- she was not provided with full copies of interview notes from the complainants

Was the Watson investigation conducted in a procedurally fair manner?

Did the DHB comply with s.103A(3) of the Act?

[52] The Watson investigation report comprised 35 pages, 27 of these devoted to findings. A further 326 pages of associated relevant documentation was attached to the report⁹. Separate to Ms Watson's input, 22 people were interviewed (some of these twice), and an additional 7 statements were supplied to the investigators by other individuals. The report notes a further 7 staff members or ex-staff members either declined or did not respond to requests to participate, or could not be located.

[53] I have no doubt that the DHB complied with the minimum procedural requirements set out at s.103A(3) of the Act. Ms Watson was fully apprised of the complaints. She was given a reasonable opportunity to respond to those concerns and the DHB genuinely considered Ms Watson's explanations.

The Terms of Reference

[54] The other factor that requires consideration is whether the DHB conducted the investigation in accordance the Terms of Reference that had been agreed between the

⁹ Largely comprising interview notes, meeting notes and written responses.

parties at the beginning of the formal investigation.¹⁰ In addition to investigating the complaints, the Terms of Reference state that the DHB agreed to:

- (a) inquire as to why so many complaints arose within a short timeframe and were not resolved informally,
- (b) look into Ms Watson's "*concerns regarding the difficult and divisive culture within the ward*" including that "*interviewees will be asked about the culture, teamwork, communication and management style within the ward*"
- (c) Ms Watson was able to suggest questions to be put to the interviewees, and
- (d) the DHB would provide the completed draft report for Ms Watson's comment and these would be recorded for the attention of the decision maker.

Did the DHB provide Ms Watson with a completed draft report for her comment?

[55] Ms Watson was provided with a copy of the draft final report on 5 October 2012 as per the Terms of Settlement. Her response to the draft report was attached to the final report given to the decision maker. Ms Watson says there were material changes between the draft final report and the final report and she was unjustifiably disadvantaged by this action. By way of example she refers to a portion of the text of the draft report which recommended a PIP "*which focusses on the following principles of the Code of Conduct for Nurses*". The draft final report set out Code of Conduct standards of communication expected between nurses.

[56] Ms Watson says the final report's recommendation for a PIP was changed to include the following statement "*to aid in addressing Ms Watson's communication skills and interactions with staff*". The Code of Conduct standards were repeated in the final report. I do not accept the addition of the phrase referred to by Ms Watson fundamentally changed the DHB's findings.

[57] The evidence is that having provided Ms Watson with the draft report and received her comments, the DHB amended the report to include further information provided by her.

[58] I find the DHB complied with its obligation pursuant to the Terms of Reference to allow Ms Watson to comment on the draft findings and

¹⁰ On 13 January 2012

recommendations of the investigators and I am not persuaded that the DHB's action was unjustified. I note also that Ms Watson had further opportunity to provide additional comments which were attached to the final report before it was sent to the decision maker.

Was Ms Watson disadvantaged by the DHB's decision not to provide all the information given to it during interviews with staff?

[59] During the Authority's investigation evidence emerged that some of the interviewees in the Watson investigation discussed matters with the investigation team which were not put to Ms Watson.

[60] During questioning Ms McHardy stated that some staff were unwilling to sign off the entire content of their interviews. As a consequence, she says interview notes contained only information that staff were willing to "stand by", and Ms Watson was expected to respond to that information only.

[61] I do not consider Ms Watson was disadvantaged by this action. The signed interview notes and written responses were attached to the final report furnished to the decision maker. There is no evidence to suggest that the final decision maker was provided with or influenced by information obtained outside that provided in and attached to the final report.

Did the DHB fairly investigate and consider the relationship between Ms Slade and Ms Watson and the culture of Ward 2?

[62] It is plain from the contents of the Watson investigation report that substantial information was gathered about the culture of Ward 2. The investigation report observed the ward had been unsettled and no individual Charge Nurse Manager had tenure long enough to build a positive work environment.

[63] Ms Slade's management style was acknowledged as different to a previous manager (whom Ms Watson had found to be effective) but noted Ms Slade had not been in Ward 2 for a sufficient period to reliably assess where her management style contributed to the negative environment. The report did note: "*there is cause for concern regarding the working relationship between Ms Slade and Ms Watson*".

[64] I do not accept the allegation that the DHB did not properly investigate and consider the culture of Ward 2 or the relationship between Ms Watson and Ms Slade. It is clear that the information about Ward 2's culture and how Ms Watson and Ms

Slade interacted was carefully considered and impacted on the investigators conclusions as evidenced by their recommendation that disciplinary action not be taken.

Were the findings of the Watson investigation substantially fair?

[65] Ms Watson does not deny that a portion of the alleged incidents occurred. She considers the events should be regarded as instances of miscommunication as opposed to a failure to treat colleagues with respect and dignity in breach of the Code of Conduct.

[66] The investigation report noted that a leading theme attached to the incidents of complaint was that Ms Watson's pattern of communication was often to the point of being perceived as confrontational and threatening for some complainants (predominantly more junior nurses). The report noted there is a disparity between how Ms Watson perceives her style of communication compared to the majority of her colleagues.

[67] I agree that the incidents complained of are at the low end of what could objectively be regarded as misconduct. However it is important to note that the DHB decided not to take disciplinary action about those matters.

[68] The decision maker found that while some of the complaints were "inconclusive" he did not think it was appropriate to "reject the complaints in totality". He advised:

It is clear there are development needs in relation to communication that are worth the DHB working with you to improve".

The decision that a performance improvement plan be set up makes sense based on the report findings.

[69] The DHB's Disciplinary Policy advises that performance improvement procedures are not regarded as disciplinary action at first instance.

[70] Ms Watson says that her clinical performance is not at issue and the decision to implement a PIP is unreasonable, unjustified and impacts on her career prospects to her disadvantage.

[71] I find the DHB's decision to have Ms Watson undertake a PIP pursuant to standards contained in its Code of Conduct as a consequence of identifiable concerns about Ms Watson's style of communication was one that was open to it as a fair and reasonable employer in all the circumstances. Moreover there is nothing in the DHB's policy which limits PIPs to clinical matters only. I do not accept that concerns about communication skills cannot to be subject to a PIP. Respectful communication between nurses and colleagues is a requirement of both the DHB and the New Zealand Nurses Council respective Code(s) of Conduct for Nurses.

Was Ms Watson unjustifiably disadvantaged by the length of the Watson investigation?

[72] The Watson investigation took just over 12 months to conclude¹¹. Approximately six weeks after the Terms of Reference were agreed Ms Watson was provided with 10 interview notes obtained from the complainants and some agreed witnesses. A further 5 sets of notes were forwarded to Ms Watson by the end of March (in total 15 statements¹²). Ms Watson sent her written response to those interviews to the DHB on 30 April 2012. In early May the DHB advised that it anticipated that the investigation would be concluded by 31 May 2012.

[73] Ms Watson provided a verbal response in respect to the complaints on 21 June and 17 July 2012. Additional individuals were interviewed and some staff re-interviewed. By 27 August 2012 Ms Watson had provided a written response to all statements. On 5 October 2012 the DHB provided Ms Watson with a draft report and her comments to the document were received on 30 October 2012. Ms Watson met with the investigators on 5 November 2012. There was some subsequent debate about the content of the report which was resolved by agreement on 21 November whereby Ms Watson's comments on the report were attached to the body of the document.

[74] The decision maker received the final report on 28 November 2012 and Ms Watson was advised of the preliminary decision on 18 December 2012. Ms Watson's representative provided feedback on 13 January 2013 and Ms Watson was informed of the final decision on 17 January 2013.

¹¹ From the date the parties agreed to Terms of Reference on 13/01/2012 until Ms Watson was advised of the final decision on 17/01/2013

¹² 10 separate interview notes were sent on 24/02/2012; 3 sets on 29/02/2012, 2 further sets were sent in March 2012

[75] The Watson investigation was exceptionally long. As the investigation progressed there was an ongoing disagreement about the extent to which the investigators should investigate Ms Slade's conduct. Ms Watson raised concerns that the investigators had not prioritised interviews with staff she requested and that the DHB had held interviews with individuals it should not have. The DHB says Ms Watson required it to interview staff that can now be identified as not providing information which affected the outcome of the investigation.

[76] It is clear that the number of witnesses regarded as relevant to the investigation significantly increased over time and is one factor which led to such a lengthy investigation. Ms Watson suggested further individuals be interviewed as new information came to light. The DHB largely accommodated Ms Watson's requests for additional interviews and to have particular questions put to the staff, but it was obliged to do so according to the Terms of Reference. I consider that Ms Watson was entitled to have the DHB interview staff she thought relevant to the investigation information and to defend herself as she saw fit.

[77] I do consider however that some aspects of Ms Watson's approach to the investigation did cause delay. The identity of the decision maker was changed twice at Ms Watson's request and Ms Watson was often slow to provide a response to information sent to her. By way of example she did not provide her comments on the content of the 12 written statements sent to her on or by 29 February 2012 until 30 April 2012. Ms Watson's verbal response to the complaints required two scheduled meetings over a 4 week period due to difficulties in Ms Watson and her representative's availability. A notable feature of the Watson investigation is the frequency of rescheduling of previously agreed meetings¹³, and timeframes to accommodate Ms Watson and her representative's limited availability. Ms Watson must take responsibility for the deferral of key events which impacted on the completion of the investigation.

[78] My overall assessment is that the DHB sought to conduct an efficient investigation but the scope of the matters in which the parties agreed the investigators would inquire into almost inevitably led to its length. I consider the DHB acted as a fair and reasonable employer in all the circumstances. If Ms Watson was

¹³ And meeting agenda

disadvantaged by the time it took to complete the investigation I consider she was primarily the architect of that outcome.

Were the actions of the DHB fair and reasonable when it ceased payment of special leave?

[79] The statement of problem alleged that the DHB's action to stop payment of special paid leave in May 2012 unjustifiably disadvantaged Ms Watson and/or was a breach of contract (although this latter claim was not advanced in either of the final submission documents provided).

[80] An assessment of whether it was fair and reasonable for the DHB to cease payment of special leave requires an assessment of the circumstances in which special leave was granted, and then ceased.

[81] Consideration must also be given to whether the DHB's decision to cease payment of special leave resulted in an unlawful suspension which unjustifiably disadvantaged Ms Watson as is claimed, or whether she was unwilling to return to work as is claimed by the DHB.

Was it reasonable of the DHB to propose discontinuing paid special leave?

[82] On Ms Watson's behalf it is contended that the DHB agreed on 12 January 2012 to provide Ms Watson paid special leave until the investigation was finished and that the arrangement was not conditional or time bound.

[83] The DHB's notes record (and I accept) is that on 9 November 2011 when the DHB advised it would be conducting a formal investigation, it suggested Ms Watson work in NICU on a temporary basis. The notes reveal that Ms Watson believed placement in NICU was too stressful in circumstances where she felt already distressed by the complaints. Ms Watson's representative advised that the DHB's disciplinary policy did not allow the DHB to redeploy Ms Watson to another area and requested suspension or special leave rather than have Ms Watson work on Ward 2. The DHB agreed to paid special leave whilst Terms of Reference were negotiated¹⁴.

[84] On 12 January 2012 when the parties were finalising Terms of Reference the issue of paid special leave was revisited. The DHB proposed Ms Watson return to Ward 2 (at that point both wards 1 and 2 were combined due to refurbishment) or

¹⁴ DHB notes of 9 November 2011 meeting

NICU. Ms Watson's representative emphasised that each location was "*too risky and would cause significant harm and stress*" and requested Ms Watson be suspended for the duration of the investigation. That request appears to be based on Ms Watson's view that NICU would be too pressured for her alongside the commencement of the investigation¹⁵ and her concern about her ability to practise safely in Ward 1 & 2 at that time. The DHB rejected the proposal to suspend Ms Watson as it did not consider the complaints against her could be yet regarded as serious misconduct such that suspension was warranted. Ms McHardy's evidence is that Ms Watson reported feeling very stressed by the investigation and the DHB agreed to continue payment of special leave on that basis. The meeting notes state the following: "*...given the distress you are showing and telling us about we will allow you to stay on special leave for the period of the investigation*"¹⁶. The DHB advised that it wished to refer Ms Watson to Occupational Health Service given the level of stress Ms Watson displayed during the meeting although it does not appear this offer was taken up.

[85] I find the DHB approved payment of special leave in a context whereby Ms Watson asserted she needed time to adjust to being the subject of a large number of complaints and that her confidence had been negatively impacted to an extent she felt unable to safely work at that time. I am satisfied that neither party contemplated that the investigation and payment of special leave would extend beyond six months nor did they discuss the length of time Ms Watson might receive paid special leave.

[86] By May 2012 Ms Watson had responded to the majority of complaints against her and her initial response to being the subject of complaints had abated. I find the grounds on which special leave had been granted no longer existed and consider it I was open and reasonable of the DHB to revisit and discuss the issue of paid special leave 6 months after payment had been initially granted.

Events leading to the cessation of special leave

[87] The evidence of the DHB is that by mid April 2012 it was becoming concerned about the duration of Ms Watson's paid special leave. That concern appears to have been heightened on 19 April 2012 when it did not receive Ms Watson's responses to the interview statements as scheduled and agreed. The Operations Manager for Children's Health Services, Ms Joyce, wrote to Ms Watson

¹⁵ Ms Watson acknowledged that in different circumstances she would be likely able to work in NICU

¹⁶ DHB notes of 12 January 2012 meeting

that day. She expressed disappointment that the DHB had not received a response [to interview statements] but extended the time frame for Ms Watson to furnish her comments. Ms Joyce also advised that that the DHB was seeking further mediation and stated:

Special leave will continue up to and including the day of mediation, provided mediation takes place within the next two weeks. Depending on the outcome of our discussions we expect that you would be available to work from the day following mediation.

The last day of special leave will be the day of mediation.

[88] Ms Watson's representative responded the following day (20 April 2012). He asked for the timeframe for Ms Watson's response be further extended to 30 April 2012 and advised Ms Watson's preference was to meet outside mediation. No specific response was given on the issue of special leave.

[89] On 26 April 2012 Ms Joyce agreed to extend the deadline for Ms Watson to respond to interview statements. She advised mediation was scheduled for 2 May 2012 and asked for confirmation of attendance. She noted:

Should mediation occur on the day, special leave will continue up to and including 2 May 2012. Depending on the outcome of the mediation, it is our expectation that Angie will be available for work starting on Thursday 3 May 2012. Provided mediation takes place, special leave will not be paid on or from Thursday 3 May.

...

If mediation does not occur on Wednesday 2 May 2012 our expectation is that Angie will be available to work on and from Tuesday 1 May 2012. Under this scenario, the last day of special leave will be on 30 April 2012...

[90] Ms Watson's representative declined mediation but advised both he and Ms Watson were willing to meet on 2 May "on the record". He noted that Ms Watson's response to witness statements would not constitute the end of the investigation process. He advised it would be useful for the investigators to discuss Ms Watson's responses with her and that she would need to comment on the draft report. He advised "all of this constitutes significant work and stress for Angie and any return to work is premature and prejudicial. Angie's reintegration at the end of the [investigation] process will need to be discussed and agreed..." Again, the issue of paid special leave was not specifically referred to but her representative noted the

DHB had not indicated where Ms Watson was to work and that a discussion on that matter was premature.

[91] Ms Joyce replied on 27 April 2012 and agreed to meet on 2 May 2012 outside a mediation setting. She advised that the DHB had serious concerns about the delays and protracted nature of issues in dispute. She stated:

Ms Watson's Special Leave cannot continue indefinitely. The length of time Ms Watson has been in receipt of Special Leave Payments is of concern to the DHB.

Please note that as indicated in my letter of 24 April 2012 Special Leave will continue to be paid up to and including 2 May 2012. We will discuss the issue of Special Leave at the meeting.

[92] On 30 April HR Manager, Ms McHardy emailed Ms Watson's representative and suggested an agenda for the meeting on 2 May including; (1) completion of the investigation, (2) special leave to be discontinued from 2 May with the expectation that Angie be available or work from Thursday 3 May, (3) return to work – alternative duties during the investigation, and (4) the DHB's rationale for an occupational health clearance.

[93] Ms Watson's representative responded to Ms McHardy the next day (1 May). He proposed to have the meeting's agenda altered to focus on the progress of the Watson investigation and Ms Watson's concerns about the investigators' inquiries. He advised that Ms Joyce, (as the decision maker [at that time] of the Watson investigation) should not attend the following days meeting. He recorded that his view on redeployment was clear (the implication being that the DHB could not require Ms Watson to work outside Ward 2) and stated:

...We believe Angie should be placed back on Ward 2 following an appropriate reintegration process at the conclusion of the investigation and in the interim special leave remains appropriate.

Our preference is to enter into correspondence on items 2-4" [these being special leave; return to work and the occupational health clearance].

[94] Ms McHardy responded later that day. She said the meeting should cover Ms Watson's return to work and discontinuance of special leave. She suggested that matters relevant to the investigation be discussed on 9 May.

[95] Several hours before the meeting of 2 May 2012 was due to commence Ms Watson's representative informed Ms McHardy and Ms Joyce by email that the meeting needed to be cancelled. He advised that Ms Watson's GP had deemed her unfit to work. Amongst other things he requested the DHB provide its proposal in writing with respect to Ms Watson's status during the investigation so as enable conversation to continue despite Ms Watson's incapacity. Ms Joyce responded and advised "*as indicated in earlier emails Special leave will discontinue as of today...*".

Was the DHB's decision to halt special leave fair?

[96] Submissions on behalf of Ms Watson allege that the DHB should have scheduled a further meeting so as to provide Ms Watson with an opportunity for her to comment on the DHB's proposal. Ms Watson claims the DHB's omission caused her to be unjustifiably disadvantaged and seeks remedies as a consequence.

[97] The DHB says that payment of special leave was always discretionary and Ms Watson had no contractual entitlement to receive it. It referred to *Alliance Freezing Co (Southland) Ltd v. New Zealand Amalgamated Engineering & Related Trades IUOW*¹⁷ as legal proposition that there cannot be a disadvantage in terms of s.103(1)(b) to cease providing a discretionary benefit. That judgment was referred to in *Snowdon v Radio NZ*¹⁸. Judge Ford accepted the analysis of the contractual position in the *Alliance* case where the Court of Appeal held that there cannot be an entitlement to a discretionary bonus merit scheme because it did not form part of the employment contract. He noted however that a fair and reasonable employer would have consulted with an employee before making its decision.

[98] I am satisfied that the DHB put Ms Watson on notice on no less than five occasions that it intended to cease payment of special leave on 2 May (with a corresponding expectation that she return to work on 3 May) subject to any comment she wished to make on the issue.

[99] The difficulty is that Ms Watson did not attend the meeting on 2 May to provide comment on the matter. I consider it likely that the DHB perceived Ms Watson's absence was a means for her to avoid direct discussion with the DHB about its intention to halt special leave. But the DHB did not challenge Ms Watson's

¹⁷ *Alliance Freezing Co (Southland) Ltd v New Zealand Amalgamated Engineering & Related Trades IUOW* [1990] 1 NZLR 533 (CA)

¹⁸ *Snowdon v Radio NZ* [2014] NZEmpC 45 at 67-68

inability to attend the meeting and it must be taken to have accepted Ms Watson's explanation for her non-attendance at the meeting as genuine.

[100] Given that the subject matter of the meeting was important to the DHB I consider it would have been prudent to have asked Ms Watson's representative to provide comment on its proposal (as had been Ms Watson's previously indicated preference) or to have rescheduled the meeting.

[101] I find the DHB should have provided Ms Watson with a further (perhaps final) opportunity to obtain her comments before it made a decision about whether paid special leave would continue. I find its omission to do so was not minor and Ms Watson was treated unfairly as a result.

[102] I consider Ms Watson was unjustifiably disadvantaged in this way.

Was Ms Watson unlawfully suspended from work and if so when?

[103] Sitting alongside but separate to Ms Watson's claim about the way DHB's decided to cease payment of special leave referred to above, Ms Watson claims when the DHB halted payment of special leave she was, in effect, unlawfully suspended because the DHB had prevented her from work on Ward 2. She claims she was unjustifiably disadvantaged by the DHB's actions.

Was Ms Watson obliged to work outside Ward 2?

[104] Throughout the Watson investigation (and subsequently) the parties have been in dispute about whether Ms Watson was obliged to work in an alternative paediatric service with the SWC.

[105] I agree with Ms Watson's submission that there is no provision within the DHB's policies which compelled her to work away from Ward 2 (her contractual place of work) during a disciplinary investigation. I accept that Ms Watson was not required to accept the DHB's various proposals that she transfer to another paediatric ward or unit for the duration of the Watson investigation. I shall return to the content of the DHB's standard job description for Registered Nurses later in this determination.

Was Ms Watson effectively suspended from Ward 2 when the DHB stopped payment of special leave?

[106] During the Authority's investigation meeting Ms Watson focused on the meetings held with the DHB on 9 November 2011 and 12 January 2012 to support her view that the DHB had prevented her from working on Ward 2 when the investigation commenced. Ms Watson's challenge to the accuracy of the DHB's meeting notes from those events did not survive appraisal when compared to her own notes. I find that on 9 November 2011 Ms Watson asked to be placed back on her usual afternoon and night shifts on Ward 2 but both parties agreed this arrangement would be unsuitable given the potential for difficulty working alongside complainants on back shifts where fewer senior staff are generally rostered.¹⁹ On the same date the DHB proposed to have Ms Watson work day shifts²⁰ on Ward 2 with the support of Ms Slade, but this offer was rejected by Ms Watson and her representative.²¹

[107] In this regard I find that work was available for Ms Watson on Ward 2. The differences between the parties' was that the DHB wanted Ms Watson to work day shifts on Ward 2 (which it is entitled to require²²) where there is a greater density of staff including senior staff, whereas Ms Watson wished to return to a roster pattern of afternoon and/or night shifts. I do not accept that the DHB excluded Ms Watson from returning to Ward 2 in or around the time the investigation began. In evidence Ms Watson agreed that she chose not to accept the day shift pattern and/or oversight of Ms Slade.

[108] Next, Ms Watson points to correspondence from the DHB to her representative dated 5 September 2012 and 10 August 2012 respectively. The September letter refers to a meeting held on 23 July 2012 (between the parties' representatives) and that a discussion was held around the work available for Ms Watson during the investigation. It states:

"We have noted that Ward 1 was the preference and confirmed that Ward 2 was not an option during the investigation".

[109] The August email also refers to the meeting of 23 July 2011 and says "*Ward 2 does not appear to be a practical option at the moment*".

¹⁹ As reflected in the DHB's notes which record the meeting of 9 November 2011.

²⁰ Ms Watson's terms of employment requires her to be available to work rostered and rotating shifts

²¹ Ms Watson's handwritten notes of the meeting of 9 November 2011.

²² Ms Watson's employment agreement requires she work rostered and rotating shifts and is therefore not entitled or confined to any particular roster pattern,

[110] There is a further DHB letter, written on 25 May 2012, which advises that Ms Watson had declined alternative duties in NICU. Soon after it states “*As mentioned above there is work for Angie, however it is Angie who has chosen not to return*”.

[111] The problem with these documents is that they were written after 2 May 2012; the date on which the DHB planned to stop special leave and discuss which ward or unit Ms Watson would be placed.

[112] It has been difficult to assess whether Ms Watson was excluded by the DHB from returning to work at Ward 2 at some point from 12 January 2012 and 2 May 2012 when paid special leave ceased. I have been unable to locate any documents which confirm that position. Ms Watson says the DHB’s focus was always to have her work on NICU. Ms Hunter agrees it was the DHB’s preference to have Ms Watson work away from Ward 2 but that this view was a result of Ms Watson’s repeated assertions that a return to Ward 2 was not appropriate until the Watson investigation concluded²³. The evidence persuades me that the meeting of May was (amongst other things) convened so as to discuss when and where Ms Watson would return to work and that the matter remained up for debate. I am further persuaded by the content of an email (drafted on 26 April 2012 by Ms Watson’s representative) that Ward 2 had not been precluded by the DHB by the statement that “*whether Angie returns to Ward [2] or whether you intend to redeploy her*” had not been addressed in Ms Joyce’s correspondence. On balance I am not satisfied that the DHB excluded Ms Watson from returning to Ward 2.

[113] Even if I am wrong and the DHB had formed a view that Ms Watson could not work in Ward 2, I am not satisfied Ms Watson was disadvantaged by that action. It is clear from the correspondence that Ms Watson was unwilling to return to Ward 2 until after the investigation was completed.

[114] Had Ms Watson presented herself for work at Ward 2 the DHB would have been obliged to allow her to carry out her duties? Ms Watson did not attend the workplace on or after 5 May nor at any other time over the remainder of the investigation. I find that Ms Watson, by her choice, had made herself unavailable to work on Ward 2 (or anywhere else) for the duration of the investigation and I dismiss this aspect of Ms Watson’s claims.

²³ See for example correspondence from Ms Watson’s representative 20 April to 1 May 2012

Was Ms Watson effectively suspended from Ward 2 on 6 September 2013?

[115] At the conclusion of the Watson investigation in January 2013 until mid-2013 the parties discussed (largely in writing) Ms Watson's return to work. Ms Watson's preference was Ward 2 but was open to working in an alternative paediatric environment with the exception of Ward 1 or Neonates. The parties met on 12 July 2013 to canvas reintegration into Ward 2. They also attended mediation on 23 July 2012 to discuss Ms Watson's various personal grievances.

[116] Ms Watson's evidence is that following mediation she instructed the mediator and her representative to inform the DHB that she was no longer interested in further meetings or mediation and simply wanted to return to Ward 2. It is unclear from the evidence when that information was relayed to the DHB but on 19 August 2013 Ms Watson advised the DHB by email that she was "*electing to return to my workplace (Ward 2)*" and requested to be returned to the payroll from the date of mediation.

[117] On 6 September 2013 the DHB advised Ms Watson in writing that it was the DHB's expectation that Ms Watson return to work in Ward 1 and attached a corresponding Return to Work plan. The DHB advised that this decision was largely made in response to statements Ms Watson had made about Ms Slade on 12 July. Ms Hunter's evidence is that during the meeting of 12 July 2013 (or soon after) the DHB formed a view that it would be untenable to have Ms Watson work alongside Ms Slade, although that concern was not put to Ms Watson. The letter noted that working relationships between Ms Watson and Ward 2 staff would need to be re-established. By implication it appears the DHB considered this would need to occur before Ms Watson returned to Ward 2. The DHB reconfirmed that position on 20 September and 16 October 2013.

[118] On 23 October 2013 a personal grievance was raised in respect to this aspect of the DHB's actions. Although claims for lost wages were pleaded in Ms Watson statement of problem it was not clearly identified whether Ms Watson sought wages as a consequence of those particular actions. However evidence was furnished by both parties about this time period and I consider the DHB's actions form part of the employment relationship problem between the parties which needs to be resolved.²⁴

²⁴ Section 160(3)

[119] I find that the letter of 6 September (and subsequent correspondence) notified Ms Watson that she was, in effect, suspended from Ward 2. That decision appears to have been made as a consequence of the DHB's mistaken that it was able to require Ms Watson to work (in the absence of a restructuring) outside her Ward 2 as her contractually designated place of work. The DHB points to the contents of a generic Registered Nurse 'Role Description' (RD) as justification for its decision. That document provides a Registered Nurse "*may work across the DHB as required due to patient safety and workforce necessities*". I do not accept that the plain words of the RD can be extended to transfer Ms Watson to Ward 1 for an undefined period due to a breakdown in staff relations. I understand the practice of transferring staff pursuant to the JD is generally only applicable on a shift by shift basis to address admission peaks and staffing issues. If the DHB's concern was centred on the working relationship between Ms Watson and Ms Slade, then a better approach would have been to place Ms Watson back on the payroll, have her attend the mechanisms it envisaged to restore the relationship with Ms Slade and others and have Ms Watson return to Ward 2.

[120] I find the DHB unjustifiably suspended Ms Watson 6 September 2013 and she was disadvantaged by this action.

Where should Ms Watson work?

[121] Ms Watson requests the Authority to make an order that she be returned to Ward 2 or to an alternative (paediatric focussed) position outside the SWC that is no less advantageous.

[122] The DHB submits Ward 2 (and Ward 1) are inappropriate to have Ms Watson return to. It says the two wards are now closely aligned and staff are rotated through both wards. It contends Ms Watson should work in NICU while the relationship between Ms Watson, Ms Slade and Ward 2 staff is addressed.

[123] The DHB emphasised Ms Watson's right to work in Ward 2 is not absolute and is subject to an implied term that the workplace is safe. The DHB refers to Ms Watson's ongoing proceedings in the Human Rights Tribunal as evidence of Ms Watson's continued animosity towards Ms Slade. It contends that the level of distrust Ms Watson has for Ms Slade may impact negatively on patient care.

[124] Ms Slade and the two junior nurses who gave evidence²⁵ each expressed reluctance to engage in facilitated counselling with Ms Watson. Ms Slade has doubts as to whether a productive employment relationship with Ms Watson can be re-built.

[125] Ms Watson says she is willing to reconcile with Ms Slade and participate in facilitated counselling with both her and other nurses in Ward 2. She says many staff who worked in Ward 2 at the time the complaints against her were made, have since left.

[126] Ms Watson has fiercely opposed any kind of temporary transfer to NICU. I found her various explanations as to why NICU is unsuitable, including that NICU would “downskill her”, were not credible. Ms Watson is a senior Registered Nurse with additional paediatric qualifications. I consider NICU is well within her scope of practice, albeit that she has not had recent clinical experience within that area. I accept evidence on behalf of the DHB that Registered Nurses new to the neo-natal environment (including new graduates) are guided and developed. I have no doubt that the same level of support would be available to Ms Watson.

[127] I accept that the DHB has concerns about the prospects of re-establishing a productive employment relationship between Ms Watson and Ms Slade. However I am not satisfied that placement back on Ward 2 will result in a risk to safety for patients or staff to a degree where I am willing to disregard Ms Watson’s terms of employment. Ms Watson was employed to work on Ward 2 and has a contractual right to return to Ward 2.

[128] I order the DHB to return Ms Watson to the payroll with immediate effect. The parties each accept facilitated counselling will be necessary to restore a working relationship. I recommend the parties attend mediation within 2 weeks of this determination to discuss what arrangements are required to have Ms Watson return to Ward 2 or to reach agreement on an alternative position.

Are there any other conditions to Ms Watson’s return to work?

[129] The DHB requires all staff to obtain an occupational health clearance before commencing work and when transferring within the DHB. The policy is extensive but is silent about what is required by an employee who is returning to their area of

²⁵ One of the nurses now works elsewhere within Wellington Hospital but says in her current role it is likely she will have relatively frequent interactions with Ms Watson

work after an extended absence. As noted Ms Watson views the DHB's request that she obtain a DHB Occupational Health clearance before returning to Ward 2 as a means to punish her. I accept submissions on behalf of the DHB that Ms Watson's concern is unwarranted. DHB policy (supported by evidence) is that medical information obtained in an occupational health screen remains confidential. The only information given to line managers is recommendations on fitness for work, job restrictions, workplace modifications, and clearance to start work.

[130] It remains however that should Ms Watson return to Ward 2 there is no contractual obligation for her to obtain a DHB occupational health clearance. If Ms Watson is unwilling to undergo the health screen I consider she must assume personal responsibility of ensuring she is fit to resume work. If the parties agree to an alternative role within the DHB Ms Watson must comply with the DHB's policy regarding staff transfers.

Remedies

[131] Where the Authority determines that an employee has a personal grievance s.123 of the Employment Relations Act provides for a range of remedies that may be granted.

[132] I have found that Ms Watson has two separate personal grievances where she was unjustifiably disadvantaged by the DHB's actions.

The first personal grievance

[133] Section 123(b) of the Employment Relations Act provides for reimbursement of wages or other money lost by the employee as a result of the grievance. I found Ms Watson was disadvantaged by the DHB's failure to provide her with an opportunity to comment on its proposal to cease special leave during the Watson investigation. She claims reimbursement of wages and benefits as a consequence of the DHB's action. With respect to wages, I found that Ms Watson was not available to work in Ward 2 in any event over that period in time. In these circumstances I do not consider wages can have been lost by her and it would be inappropriate to make an order to that effect.

[134] Section 123(c)(ii) provides for compensation for loss of a benefit, which the employee might reasonably have expected to obtain if the personal grievance had not

arisen. If I apply the reasoning contained in *Alliance Freezing Co (Southland) Ltd v. New Zealand Amalgamated Engineering & Related Trades IUOW*²⁶ and accepted in *Snowden*²⁷, Ms Watson's grievance cannot concern the loss of paid special leave as an entitlement because the DHB was not contractually obliged to provide that benefit. The question becomes; could Ms Watson have reasonably expected reasonably the discretionary benefit of paid special leave to continue but for the DHB's actions? In the two week lead up to the anticipated meeting to discuss special leave the DHB made it clear that it intended to cease the payment on or about 2 May subject to Ms Watson's comment. Ms Watson's representative communicated with the DHB no less than three times during that period. He did not provide any substantive reason for the continuation of paid special leave other than that Ms Watson may be required to engage in further activity associated with the disciplinary investigation, and her preference to continue to receive it while the investigation progressed. No evidence was produced at the Authority's investigation to indicate that Ms Watson had any additional planned comment to give to the DHB at the scheduled meeting. On balance I find it unlikely that the DHB would have continued to pay special leave after 2 May 2012 and Ms Watson could not have reasonably expected payment of that benefit to continue after that date, and is therefore not a loss that should be compensated.

[135] The appropriate available remedy for the DHB's procedural failing is compensation under s.123(1)(c)(i). Ms Watson's evidence about the effect of the DHB's decision to cease payment of special leave centred on her concern about loss of income, but I accept that she experienced a level of distress that there was no opportunity for further consultation on the matter. I assess she should be compensated by \$2,000 under s.123(1)(c)(i) of the Act. Ms Watson did not contribute to the DHB's omission to consult further and her remedy is not impacted by s.124 considerations.

The second personal grievance

[136] I have found Ms Watson was unjustifiably disadvantaged by the DHB's actions when it advised on 6 September 2013 that she was unable to return to Ward 2 for an indefinite period. Pursuant to s.123(b) Ms Watson is entitled to wages lost as a result of that personal grievance. Section 128(2) provides that where an employee has

²⁶ Refer to para [93] and n.18

²⁷ Ibid and n.19

a personal grievance and has lost wages as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of the sum equal to that lost remuneration or three month's ordinary time remuneration. Section 128(3) provides the Authority with a discretion to order an employer to compensate for lost remuneration a sum greater than the methodology set out at s.128(2).

[137] I find Ms Watson should be reimbursed for lost wages for the period from 6 September 2013 until 20 January 2014. I do not consider Ms Watson lost any additional wages "*as a result of the grievance*" beyond 20 January 2014 for the following reasons. Ms Watson was offered but rejected the Authority's offer to investigate on 23 December 2013 her application for interim reinstatement. The parties could have expected a determination of that matter by mid-January 2014 (in accordance with the urgency the Authority gives to such applications) and the DHB would have been ordered to return Ms Watson to Ward 2 or, at the very least, to the payroll. The issue of lost wages would have been crystallised at that point. Instead Ms Watson elected to have her substantive claims investigated on 13-14 February 2014 which she was entitled to do. However on 20 January via her counsel, she requested the Authority's investigation be rescheduled to a later date due to personal reasons. I consider any loss of wages by Ms Watson from that date onwards were as a consequence of Ms Watson's ongoing unpreparedness for the Authority's investigation and not as a consequence of her personal grievance.

[138] There is an argument that Ms Watson contributed to the situation that gave rise to her second personal grievance when she did not present at scheduled recertification courses²⁸ necessary before she could work in any clinical area, whether it be Ward 1, 2, or NICU. Ms Watson was unable to provide an adequate explanation as to why she did not attend the prerequisite programmes. I consider Ms Watson's decision was unwise given that the omission would have precluded a prompt return to Ward 2 even if it had been available for her. I consider it likely that Ms Watson did not attend the recertification course as a means to resist any plans the DHB had to place her on Ward 1. However Ms Watson's failure to attend the recertification occurred after the DHB had made it clear that Ward 2 was no longer available to her and cannot be regarded as contributing to the situation that gave rise to her personal grievance.

²⁸ scheduled by the DHB for 30 October 2013

[139] Ms Watson provided oral evidence of her attempts to find alternative work outside the DHB although she was unclear about when exactly she applied for casual work and her assertions were not supported by any documentary evidence. I consider her evidence about mitigation of loss was marginal however on balance I am unwilling to reduce her entitlement to lost wages in the circumstances.

[140] Ms Watson gave evidence of her experience when she became aware that the DHB was unwilling to have her back on Ward 2. I accept she felt distressed by that action against the backdrop of a lengthy and difficult disciplinary investigation and in circumstances where she considered headway had been made in the meeting of 12 July 2013 to have her return to Ward 2. I assess her distress, humiliation, loss of dignity and injury to feelings associated with her suspension from Ward 2 on 6 September 2013 should be compensated by an award of \$7,000 pursuant to s.123(1)(c)(i).

Costs

[141] Costs are reserved.

Orders

- (a) Capital and Coast District Health Board is to reinstate Ms Watson to its payroll from the date of this determination.
- (b) I recommend the parties attend mediation within 2 weeks of this determination to discuss what arrangements are required to have Ms Watson return to Ward 2, or to reach agreement on an alternative position. Should the parties agree to an alternative role within the DHB Ms Watson must comply with the DHB's health assessment policy regarding internal transfer.
- (c) Pursuant to s.128 Capital and Coast District Health Board is ordered to reimburse Ms Watson the sum equal to ordinary time lost wages for the period between 6 September 2013 and 20 January 2014.
- (d) Pursuant to s.123(1)(c)(i) Capital and Coast District Health Board is ordered to pay Ms Watson a total sum of \$9,000 as

compensation for humiliation, loss of dignity and injury to feelings associated with her two personal grievance claims.

Michele Ryan
Member of the Employment Relations Authority