

NOTE: An order prohibiting the publication of details identifying a witness appears at p 2.

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Christine Wikaira (Applicant)
AND Hokianga Health Enterprises Trust (Respondent)
REPRESENTATIVES Jock Lawrie, Counsel for Applicant
Murray Broadbelt, Advocate for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 8 November 2004, 20 January 2005
SUBMISSIONS RECEIVED 11 February 2005
DATE OF DETERMINATION 8 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christine Wikaira says she was unjustifiably dismissed by her former employer, Hokianga Health Enterprises Trust (“Hokianga Health”), and seeks reinstatement. Her dismissal followed an allegation that she had slapped an elderly patient at Hokianga Hospital on the hands. Hokianga Health operates Hokianga Hospital.

[2] Mrs Wikaira was suspended while the investigation into the allegation proceeded. She says she has a further personal grievance on the ground that the suspension affected her terms and conditions of employment to her disadvantage and was an unjustifiable action. The action was unjustifiable because Mrs Wikaira did not have an opportunity for input into the decision to suspend before it was made.

[3] The dismissal has been challenged on the grounds that:

- (a) the failure to disclose the identities of the witnesses to the alleged slapping was unfair to Mrs Wikaira;
- (b) the evidence of those witnesses should be treated with considerable caution, and in any event was not sufficient to support Hokianga Health’s conclusions; and
- (c) Hokianga Health should have extended its investigation and spoken to other staff members on duty at the relevant time.

[4] Hokianga Health says that, following a full and fair investigation, it was entitled to conclude Mrs Wikaira had slapped the patient and to dismiss her. It says the suspension, too, was justified.

The allegation of slapping

[5] Hokianga Health employed Mrs Wikaira as a health care assistant at Hokianga Hospital. On or about 29 December 2003 Mrs Wikaira was rostered to work the afternoon shift, which began at 2.45 pm. The allegation against her arose out of an incident in the dining room, when patients and staff had gathered there for a meal.

[6] One of the patients in Mrs Wikaira's care was Mavis Fyfe, who is now deceased. Mrs Fyfe was sitting at a table in the dining room, ready for her meal. She had a medical condition which meant, among other things, that her mental abilities were affected, she was blind and she needed assistance to eat. She was also prone to waving her arms around to the extent that some physical control of this was needed from time to time. As I understand the evidence about her condition Mrs Fyfe was very vulnerable and dependent, and for much of the time was unlikely to be capable of communicating any concerns for herself.

[7] As well as several patients, Mrs Wikaira and another assistant, Delia Morunga, were present. There was a service hatch between the dining room and the kitchen. Kitchen and other staff members were also on duty, but there was no allegation that any of them observed the incident.

[8] Two of the patients were referred to as Witness 1 and Witness 2 both during Hokianga Health's investigation and subsequently. Both sought protection of their identity from the outset, although pursuant to a promise of further protection of identity Witness 1 agreed to attend the investigation meeting and gave evidence. As far as I am aware Witness 2 has never been identified to Mrs Wikaira, and the witness neither gave evidence nor was identified to the Authority. I now confirm my order that neither the name of Witness 1 nor any other identifying details, nor documents containing identifying details, are to be published.

[9] Ms Morunga, too, was interviewed about the incident, on the basis that her identity would not be disclosed. She was referred to as Witness 3 during Hokianga Health's investigation, although she had agreed to be identified by the commencement of the Authority's investigation. She attended the investigation meeting and gave evidence.

[10] Returning to the allegation, it was in essence that the meal had not yet been served and Mrs Fyfe was fiddling with her cutlery and pulling at the table cloth. In an apparent attempt to stop this, Mrs Wikaira slapped Mrs Fyfe's hands some three to five times. As she did so she said things to Mrs Fyfe like 'stop it', 'stop fiddling'. Mrs Fyfe's response was to cry as she was slapped, although in evidence before the Authority the response was characterised as more of a squeal. The response of others present was to laugh, although the evidence before the Authority was that the laughter was reflective more of nerves than hilarity.

[11] The incident was not brought to Hokianga Health's attention for some time. On or about 28 January 2004 a member of the Fyfe family telephoned Linda Melville-Smith, the hospital services manager, to complain of it. During one of the complainant's visits to the hospital Witness 1 had advised her that a staff member had slapped Mrs Fyfe, naming Mrs Wikaira. The complainant did not specify a date or time for the alleged slapping, but indicated it occurred in the dining room 'a few weeks earlier'. The complainant gave Ms Melville-Smith Witness 1's name. She told Ms Melville-Smith the family delayed reporting the matter out of a fear of retribution.

[12] The family member made other complaints during the conversation with Ms Melville-Smith. Some involved general matters of nursing practice and are not relevant here. One, however, involved an allegation that Ms Morunga 'hit' Mrs Fyfe while showering her. Hokianga Health

began investigating that allegation and the complaint was withdrawn after the Fyfe family was satisfied with the explanation provided.

[13] Ms Melville-Smith completed a patient accident/incident form dated 28 January 2004, setting out the various complaints as well as the reason for the delay in reporting the allegation against Mrs Wikaira. Because of the seriousness of some of the complaints she also reported them to Lyn Rostern, the clinical manager. In turn Ms Rostern informed the chief executive officer, John Wigglesworth, of them.

Mrs Wikaira's suspension

[14] Hokianga Health had a disciplinary policy which made the following provision for suspension:

"8.7.3 Suspension

An employee is suspended when, though employment is not terminated, he/she is not required to carry out normal duties. In serious cases where it would be inappropriate or unsafe for the employee to remain on duty, an employee will be suspended from duty or transferred to other work while an investigation of misconduct is being investigated.

Suspension will be only for the amount of time necessary to resolve the issue, and will usually be on full pay.
..."

[15] After a discussion about the complaints with Ms Rostern, Ms Melville-Smith and the human resources manager, Mr Wigglesworth concluded Mrs Wikaira should be suspended while the allegation against her was investigated. This was said to be in the interests of both Mrs Fyfe's and Mrs Wikaira's safety.

[16] Mrs Wikaira was rostered to work the afternoon shift on 29 January 2004. Early that morning Ms Rostern and Ms Melville-Smith visited her at home to advise of the suspension. They also told Mrs Wikaira there had been a complaint that she had slapped a patient, and that the complaint was to be investigated. Ms Rostern suggested a preliminary meeting on 30 January, although a meeting eventually went ahead on 2 February.

[17] **Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice** [1993] 2 ERNZ 546 is authority for the principle that, even where disciplinary suspension is authorised by the parties' employment agreement, the obligations of procedural fairness must be met. This includes giving employees the opportunity to be heard on whether suspension is appropriate even where an investigation is pending. Mrs Wikaira did not have this opportunity.

[18] In some circumstances it may be arguable that the lack of an opportunity to be heard does not vitiate a suspension. Such circumstances might involve serious allegations which already appear to be supported by probative evidence, where the immediate suspension of the employee's right to attend work is reasonably necessary, and there is a reasonable apprehension of risk if that does not happen. I accept that allegations amounting to elder abuse might warrant suspension without the employer first giving the employee an opportunity to be heard.

[19] Here, however, there was a significant delay in bringing the allegations about Mrs Wikaira to Hokianga Health's attention. The delay was deliberate. Without wishing to detract from Mrs Fyfe's rights under the Health and Disability Commissioner (Code of Health and Disability Services Consumers Rights) Regulations 1996 ("the HDC Code"), or from the family's concerns, I take into account that Mrs Wikaira had rights too. I do not believe there was enough in the circumstances to warrant a finding that, despite the failure to offer Mrs Wikaira an opportunity to be heard on the matter, her suspension was justified.

[20] Accordingly I find Mrs Wikaira has a personal grievance on the ground that her employment was affected to her disadvantage by her unjustified suspension.

[21] Compensation for the resulting injury to her feelings was sought in the sum of \$3,000. There was evidence of Mrs Wikaira's upset on being informed of her suspension but much of that upset was because of the nature of the allegation and her fear that her employment was already over, rather than the fact of her suspension. I therefore order Hokianga Health to compensate Mrs Wikaira in the sum of \$1,500.

Mrs Wikaira's dismissal

1. Failure to disclose the identity of witnesses

[22] Mrs Wikaira's lack of awareness of the identities of 'Witnesses 1, 2 and 3' at the time of her dismissal has been a major issue in this employment relationship problem. Withholding witness' identities said to amount to unfairness rendering the dismissal unjustified.

[23] An Employment Court decision on the point is **Porter v The Board of Trustees of Westlake Girls' High School** [1998] 1 ERNZ 377. After summarising a number of earlier decisions Judge Colgan said:

"What can be said of these cases is that an analysis of the particular circumstances of each dictates whether, in them, the deliberate and considered withholding of relevant information including the identity of complainants amounts to an unfairness going to determination of whether the resulting dismissal was justified.

... There may, however, be circumstances in which, although unfair to the employee, an employer is nevertheless justified in then withholding details of identity for good reason. This case was, on the evidence, I think one falling into that exceptional category. But the question is not simply one of disclosure or non-disclosure per se. If the identities of the complainants are justifiably to be withheld, it was incumbent on the employer, acting fairly and reasonably as it was obliged to, to have ensured the process was fair in other respects." (p 388, ll 8 – 20)

[24] In the **Porter** case the Court found the process was not fair in other respects. For example the employer had received complaints from students whom it did not name, making general allegations that Ms Porter was unlawfully in possession of bus tickets and had misappropriated lost property. Initially Ms Porter was told the employer was investigating 'missing bus tickets from the office'. She was not provided with any more specific detail of the allegation about the bus tickets, nor of the other allegations on which the employer eventually relied. Not only that, developments in and the results of the employer's investigation were not put to Ms Porter either. Thus Ms Porter did not receive a fair opportunity to answer the totality of the allegations against her.

[25] Counsel also referred in submissions to **Daly v Chief Executive of the Department of Corrections** [2003] 2 ERNZ 330. Regarding the receipt of information from 'secret witnesses', at paragraph [36] Chief Judge Goddard quoted the following from an earlier decision of his in **Dallas v Wellington Newspapers** [1998] 2 ERNZ 456:

"The essential point is that, unless the person complained of is given full information, he or she cannot answer the matters that have been advanced in confidence and such matters may turn out to be far less illuminating than they may have appeared at the time. They may be incapable of being relied upon and may expose the inquiry to the reproach that it allowed itself to be influenced by persons acting from undisclosed motives."

[26] In **Daly** there was again a wide range of serious allegations of misconduct, supported by few specifics. The court voiced a concern that the accuracy and motives of the anonymous informants remained unknown, and commented that in the circumstances the informants' motives might well be open to question.

[27] Further to any justification for withholding details of identity here, I refer first to Hokianga Health's obligations to the people in its care. In particular Mrs Fyfe had rights - and Hokianga Health had corresponding obligations - under the HDC Code. If the allegations against Mrs Wikaira were true, it is likely they would amount to a breach of Mrs Fyfe's rights under the HDC Code. I consider there is a public interest in preserving a flow of information about the observance or not of those rights and obligations.

[28] Witnesses 1 and 2 were in a position to provide such information in respect of Mrs Fyfe. There was no evidence that either of them faced any actual threat in relation to the matter, but both were in inherently vulnerable positions themselves. Both provided their information on the understanding that their identity would be protected. Bearing in mind the public interest to which I have referred, I therefore conclude there was good reason for withholding their identity.

[29] Ms Morunga was in a less vulnerable position than Witnesses 1 and 2. However the public interest in preserving a flow of information about the observance of rights and obligations under the HDC Code applies to her as well as to Witnesses 1 and 2. Ms Morunga also provided information on the basis that her identity would be protected, and told Ms Rostern that she feared repercussions if her identity became known. Again on the basis of the public interest, I conclude there was good reason for withholding Ms Morunga's identity.

[30] Thus to the extent that Mrs Wikaira says her dismissal was unjustified because the identity of the witnesses was withheld, I do not agree that fact of itself meant the dismissal was unjustified. Instead Hokianga Health needed to ensure its disciplinary process was fair to Mrs Wikaira in other respects. For example in circumstances where the identity of a witness has been withheld, there remains a question of whether the affected employee has received a fair opportunity to answer the allegations against that employee. I address that matter in the next section of this determination.

2. Whether the available evidence was sufficient to support Hokianga Health's conclusions

[31] The issue of whether the evidence available to it supported Hokianga Health's conclusions is associated with a more general test for assessing the justification for a dismissal, namely whether the employer has conducted a full and fair investigation and, as a result, has reached conclusions reasonably open to it. I address the concerns raised about the employer's investigation under this head of submissions by considering:

- . the evidence available to Hokianga Health;
- . the reliability of the unidentified witnesses; and
- . whether Mrs Wikaira had a fair opportunity to answer the allegations against her.

(a) The evidence available to Hokianga Health

[32] The complainant's approach on 28 January gave Hokianga Health basic information about the allegations against Mrs Wikaira, which Hokianga Health proceeded to investigate. Because it was aware the complaint was not specific about the date of the relevant incident, using its staff and patient records Hokianga Health concluded the likely date was 29 or 30 December 2003.

[33] Ms Melville-Smith spoke to Witness 1 by telephone on 29 January, and completed a note of the conversation which she attached to an accident/incident hazard assessment form dated 30 January. According to the note, Witness 1 said the incident occurred in the dining room at lunchtime. Mrs Fyfe was fiddling with the cutlery and pulling at the tablecloth when Mrs Wikaira smacked her on the hand 3 – 5 times. Mrs Fyfe cried. The witness had observed such slapping before, but that allegation was not pursued. Witness 1 said Witness 2 was present, and provided

Witness 2's name. Witness 1 did not report the incident because of a wish not to make trouble, but was nevertheless disturbed by it.

[34] For her part, on 30 January Ms Rostern spoke to the complainant by telephone to hear about the complaint 'first hand'. She concluded that the account of events given to her was consistent with the account Ms Melville-Smith had recorded. When questioned about the reasons for not reporting the incident any sooner, the complainant repeated her concern about retribution. She said the family decided to report the matter anyway when it became clear Mrs Fyfe might be in hospital for longer than the family had expected.

[35] Ms Rostern also spoke by telephone to Witness 1 on 30 January. Witness 1 gave an account of the witness' conversation with the complainant about Mrs Fyfe's treatment, and the circumstances in which the conversation occurred. The witness also told Ms Rostern that Mrs Wikaira hit Mrs Fyfe 3 – 5 times in a rough and hard manner, hard enough to make her cry. Witness 1 gave the name of Witness 2, and said all the patients were present at the time together with two staff members.

[36] Ms Rostern spoke to Witness 2 on 30 January, as well. The witness said an incident occurred in the dining room at tea time, but the witness was eating at the time and did not see Mrs Wikaira slap Mrs Fyfe. Instead the witness told Ms Rostern that Mrs Fyfe told the witness she had been slapped, and that Mrs Fyfe was distressed. In evidence before the Authority Witness 1 confirmed Witness 2's presence, and I accept Ms Rostern's evidence that she spoke to Witness 2 and obtained the information she said she obtained.

[37] At a preliminary meeting between the parties on 2 February, Ms Rostern advised of Hokianga Health's conclusion about the likely date of the incident. She said she had spoken to Witnesses 1 and 2, indicating that at least one of them was a patient present at the time.

[38] At the same meeting Hokianga Health provided Mrs Wikaira with a copy of Ms Melville-Smith's patient accident/incident form, but did not give her a copy of the accident/incident/hazard assessment form of 30 January. There was some confusion in the evidence about what the patient accident/incident form of 29 January comprised. Reference to the originals of both forms revealed it is very unlikely that on 2 February Mrs Wikaira was given a copy of the summary of Ms Melville-Smith's conversation with Witness 1. Nevertheless she was aware a Fyfe family member made a complaint and how the incident had been brought to the family member's attention, as well as the nature of the complaint and when the incident was said to have occurred.

[39] Mrs Wikaira denied the allegation and said she had no recollection of the incident. When asked whether the allegation might be the result of a misconstruction of her actions, she spoke about difficulties she had when caring for Mrs Fyfe as well as the need to control Mrs Fyfe's hands at the dining table. Mrs Fyfe tended to flail and lash out. When she did so at the dining table Mrs Wikaira would put Mrs Fyfe's hands under the table or at her side. This was for safety reasons, particularly if there was hot food on the table.

[40] Ms Rostern interviewed Ms Morunga on 3 February. Ms Morunga told Ms Rostern that Mrs Fyfe was feeling for the tablecloth and touching the forks, and demonstrated the slap she said was administered more than once. The essential nature of the slap was consistent with what Witness 1 said about it. Ms Morunga also said Mrs Wikaira used words like 'stop it', 'stop fiddling', 'cut it out' and 'keep still'. She confirmed that she and Mrs Wikaira were the only two staff members present at the time, and said there was some laughter after the incident.

[41] Witnesses 1 and 2 had differed over whether the mealtime in question was lunch or tea, and Ms Morunga said it was tea. When asked whether the meal had been served, she said the food was not on the table. Ms Rostern later followed up with Witness 1, who did not insist that the incident occurred at lunchtime but did say "I know what I saw."

[42] The parties met again on 4 February. Hokianga Health advised it had spoken to two witnesses to the incident, as well as a patient who witnessed Mrs Fyfe's subsequent distress. It refused to provide copies of the statements it had taken. Instead it said the result of its investigation was that the witnesses confirmed Mrs Wikaira had slapped Mrs Fyfe's hands to the extent that she cried. Someone had laughed – it was said this was because Mrs Wikaira became aware her actions had been observed. Hokianga Health also said Mrs Fyfe was not agitated, rather was disoriented and was fumbling with the tablecloth and cutlery, and there was no reason for Mrs Wikaira to have a safety concern as the meal had not been served.

[43] The meeting was adjourned to enable Mrs Wikaira to reconsider her response. On the resumption Mrs Wikaira said again that she could not recall the event, and denied the incident occurred. A further adjournment was sought, and agreed, to enable Mrs Wikaira to obtain legal advice.

[44] During that adjournment Mrs Wikaira's representative, the NZNO delegate Pip Lewis, telephoned Julie Governor, the local NZNO organiser, for assistance. Ms Lewis conveyed her concern about Hokianga Health's refusal to provide documentation in support of the allegation against Mrs Wikaira. Ms Governor telephoned Mr Wigglesworth to discuss a further adjournment. Mr Wigglesworth replied that Hokianga Health was 100% certain the incident had occurred. Ms Governor asked for the witness' statements and Mr Wigglesworth declined. Mr Wigglesworth also indicated that if Mrs Wikaira admitted to the incident there would be 'something to work with', but without this Hokianga Health could not have someone on staff it was unable to trust.

[45] By letter to Mrs Wikaira dated 9 February 2004, Ms Rostern referred to having interviewed the complainant, two witnesses to the incident and a patient who observed Mrs Fyfe's distress. She said patient admission and staff timesheets were also checked. She also confirmed the view of the evidence that had been conveyed at the 4 February meeting, saying further: "We have completed our investigation. I have no doubt the incident occurred".

[46] The meeting resumed on 11 February 2004. Also attending this time were Ms Governor and Carol Gilmour, an NZNO employee who was acting as mentor to Ms Governor because Ms Governor was newly-appointed.

[47] Ms Gilmour urged that all of the staff on duty at the time of the incident be questioned. Ms Rostern replied that she spoke only to those identified as being present at the time the incident occurred. Ms Gilmour also raised Mrs Wikaira's length of service and unblemished record, and made an unsuccessful attempt to obtain copies of witnesses' statements.

[48] Ms Gilmour also referred to a letter from Mrs Wikaira's general practitioner dated 4 February 2004, characterising that matter as 'clutching at straws' when giving evidence to the Authority. The letter detailed Mrs Wikaira's recent suffering from stress as a result of a number of personal matters also detailed. It suggested stress may be a reason for Mrs Wikaira's lack of recall. Ms Gilmour said repeatedly at the investigation meeting that she raised it to 'delay the process and buy us some time' so further attempts could be made to obtain the documentation sought.

[49] From this evidence I took it that the NZNO was not otherwise relying on Mrs Wikaira's mental health as a response to the allegations, or in respect of her lack of recollection. That was not

quite the impression given in the meeting notes, and although Ms Gilmour was seeking to challenge it she may have tried to over correct it. In any event it seems to me that the 'something to work with' Mr Wigglesworth sought required an admission to the incident coupled with an explanation based on matters such as those set out in the general practitioner's letter. In such circumstances the incident could be addressed without necessarily destroying Hokianga Health's trust in Mrs Wikaira. However Mr Wigglesworth did not obtain an admission, despite seeking one.

[50] Mr Wigglesworth believed the weight of evidence indicated a high probability that the incident occurred. It amounted to serious misconduct. As for the possibility that Mrs Wikaira did not recall the incident, Mr Wigglesworth's concern was that in those circumstances Hokianga Health could not be assured she would take responsibility for her actions. As a result patient safety could not be guaranteed. In the absence of any recall, not even ongoing treatment would be sufficient to guarantee patient safety. Finally, Mrs Wikaira's length of service did not affect the serious nature of the incident or the strength of the evidence in support of its having occurred. Accordingly Mrs Wikaira was advised of her dismissal, effective that day.

(b) The reliability of the unidentified witnesses

[51] Regarding Witness 1's information, counsel for Mrs Wikaira submitted it should be treated with caution because:

- . during their conversation at the hospital the complainant had asked Witness 1 to 'keep an eye out' for anything that might be causing harm to Mrs Fyfe; and
- . there was no evidence that Hokianga Health had given proper consideration to the impact of Witness 1's medical condition on the accuracy of the witness' information.

[52] In association with the first of these, nothing in the evidence suggests Mrs Wikaira was told of the complainant's request during Hokianga Health's investigation. Since a request of that kind was indeed made, there was a suggestion that it might have predisposed Witness 1 to draw adverse conclusions from observations of acts for which there was a reasonable explanation.

[53] However, while Witness 1 did react to the observations with deep concern, Hokianga Health investigated the factual basis of the observations, put the content of them to Mrs Wikaira, sought her explanation, and drew its conclusions as a result. In association with this, it did investigate the possibility of an innocent explanation of the witness' observations. It was not satisfied there was one. It had reasonable grounds for reaching that conclusion.

[54] The second submission also bears on the reliability of Witness 1's observations as they were communicated to Hokianga Health. It is fair to question whether the witness' medical condition or medication at the time could have affected those observations, but there is no presumption that the witness' medical circumstances meant the observations were unreliable. Ms Rostern made a judgment about Witness 1's ability to make and recount the observations, and I saw nothing to suggest her judgment in that regard was faulty.

[55] Moreover, Ms Morunga was giving an essentially consistent account. There was nothing to indicate Ms Morunga and Witness 1 were colluding on the matter, let alone any evidence of a connection between them or of any reason why they would collude in such a way. Witness 1 had even told Ms Rostern - and it was apparent to me - that Mrs Wikaira's dismissal was not sought, rather the concern was that this aspect of Mrs Fyfe's treatment be addressed.

[56] Regarding Ms Morunga's information, reference was made to the fact that she, too, was the subject of an allegation of misconduct in respect of Mrs Fyfe. It was submitted further that, by the

time Hokianga Health interviewed her, Ms Morunga had probably become aware of the allegations against Mrs Wikaira so that her subsequent statements were tainted.

[57] The latter submission was speculative and I do not accept it. Similarly there was nothing to support an assertion that Ms Morunga was motivated by the existence of the allegation about her – that, too, was speculative. Overall I do not accept there were reasonable grounds for impugning Ms Morunga’s motives. In not being aware of Ms Morunga’s identity during the disciplinary investigation, Mrs Wikaira lost only an opportunity to speculate about those motives.

[58] Overall, since it knew the witnesses would not be identified to Mrs Wikaira, Hokianga Health was obliged to test their evidence particularly carefully. It attempted to do so. I do not believe that the disclosure of the witness’ identities would have given Mrs Wikaira an opportunity, otherwise denied, to raise a reasonably-founded question about the witnesses’ reliability. Because of the essential consistency in their accounts, the lack of any reason to call into question the witnesses’ motives, and the lack of any reason to indicate any kind of collusion, Hokianga Health was entitled to consider Witness 1 and Ms Morunga to be reliable.

(c) Whether Mrs Wikaira had a fair opportunity to answer the allegations against her

[59] Having commented on the extent of Mrs Wikaira’s ability to challenge the reliability of the witnesses, I turn to the wider question of the extent to which she was aware of - and able to answer - the content of the allegations against her.

[60] Unlike the employees in the **Porter** and **Daly** cases, here Mrs Wikaira was aware of key details of the allegations against her, including:

- . who she was alleged to have slapped - Mrs Fyfe;
- . what form the slapping took - three to five slaps on Mrs Fyfe’s hands;
- . where the incident occurred - in the dining room;
- . when it occurred - at tea time on 29 December 2003, before the service of the meal; and
- . how it occurred - Mrs Fyfe was fiddling with cutlery and pulling at the tablecloth, thus attracting the slaps.

[61] Mrs Wikaira was also told of the reactions in the room - in the form of Mrs Fyfe’s crying and the laughter.

[62] Mrs Wikaira was aware further that the person who brought the incident to Hokianga Health’s attention was a family member who had been told of it by a witness. She knew that Hokianga Health identified and spoke to three witnesses who were present at the time, at least two of whom were patients. She knew when and how the incident had been reported, that there had been a delay in reporting it, and the explanation for that. She was aware the initial complaint did not identify the date of the incident, but was also told how Hokianga Health had identified the date.

[63] Her responses to this information were to deny outright that the incident occurred, while also saying she did not remember it. Nevertheless she was able to suggest a potential explanation in describing her difficulties with Mrs Fyfe, and in particular the need to restrain Mrs Fyfe’s arms on occasion at mealtimes and when hot food was present. That was investigated, and Hokianga Health reached conclusions that were open to it. I do not believe that disclosing the identity of the witnesses would have made any difference to the outcome of that part of the investigation.

[64] I do, however, believe Hokianga Health should have provided Mrs Wikaira and her representatives with copies of the notes it made of the witnesses’ accounts. They were initially

provided to the Authority with identifying details blacked out, and at least the same could have been done at the time of the disciplinary investigation. Were it not for my findings that the essential content of the accounts was put to Mrs Wikaira in any event, and that Hokianga Health was entitled to treat the accounts as reliable, I might have found this was a sufficient flaw to render the dismissal unjustified.

[65] In making that comment I also bear in mind some of the challenges to the reliability of the evidence which did not touch on the issue of the witnesses' identity, and that not all of the detail of the witnesses' accounts was put to Mrs Wikaira. However I do not believe those matters affected the essence of what was put to Mrs Wikaira, or her reply.

(d) Conclusion

[66] Taking into account all of the foregoing, the evidence available to Hokianga Health was sufficient to support its conclusions. The unfairness inherent in not advising Mrs Wikaira of the identities of 'Witnesses 1, 2 and 3' was balanced by the amount of detail otherwise provided to her, to the extent that I am satisfied she had sufficient opportunity to answer the allegations against her.

3. Need to interview other staff members

[67] With the exception of Ms Morunga, Hokianga Health did not interview other staff members on duty at the time of the alleged incident. In a submission that bears on the overall question of the quality of the employer's investigation and the conclusion it reached, counsel submitted that the investigation was unfair because it should have done so.

[68] **Man O'War Farm Ltd v Bree** [2003] 1 ERNZ 83 is a judgment of the Court of Appeal which addresses the alleged failure by an employer to interview witnesses. At [31] of the judgment the Court, adopting what was said in an earlier judgment, said: "... the employer is not required to continue investigations indefinitely, only to carry out inquiries to a reasonable extent in all the circumstances of the case."

[69] Here, Hokianga Health obtained the names of three people said to have witnessed Mrs Wikaira's alleged actions, and interviewed them. It turned its mind to the possibility of interviewing other patients present, and formed appropriate conclusions about that. It was told only two staff members were present – Ms Morunga and Mrs Wikaira – and it interviewed them.

[70] It remained possible that members of the kitchen staff observed events in the dining room from time to time. However there has been no allegation that any other staff member was present in the dining room at the time of the incident – on the contrary the nurse in charge, for example, was not present. Nor has there been an allegation that any member of the kitchen staff has anything to add beyond a general statement of ability to observe events in the dining room.

[71] On the evidence available to me, I consider it possible that a wider casting of the investigatory net would have yielded statements from people who said they did not see or hear Mrs Wikaira slap Mrs Fyfe, but those people would have to admit to the possibility of not being present in or observing the dining room at the relevant time. While it would have been prudent for Hokianga Health to question the kitchen staff, it is unlikely the result would have shed any further light on what happened.

[72] For these reasons I do not believe there was any unfairness to Mrs Wikaira in Hokianga Health's failure to question other staff on duty.

4. Conclusion

[73] For the above reasons I find Mrs Wikaira's dismissal was justified. She does not have a personal grievance in that respect.

Summary of orders

[74] Hokianga Health is to compensate Mrs Wikaira in the sum of \$1,500 for the injury to her feelings caused by her unjustified suspension.

Costs

[75] Costs are reserved. The parties are invited to agree on the matter, but if they are unable do to do they may approach the Authority for a determination.

R A Monaghan
Member, Employment Relations Authority