

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2016] NZEmpC 123
EMPC 363/2015**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN ROBYN ELIZABETH HENDERSON
Plaintiff

AND NELSON MARLBOROUGH DISTRICT
HEALTH BOARD
Defendant

EMPC 364/2015

AND IN THE MATTER of a challenge to a determination of the
Employment Relations Authority

AND BETWEEN NELSON MARLBOROUGH DISTRICT
HEALTH BOARD
Plaintiff

AND ROBYN ELIZABETH HENDERSON
Defendant

Hearing: 23, 24, 25, 26 and 27 May 2016
(heard at Nelson)

Appearances: A Sharma, counsel for R Henderson
P McBride, counsel for Nelson Marlborough District Health
Board

Judgment: 30 September 2016

JUDGMENT OF JUDGE K G SMITH

Introduction

[1] These proceedings are challenges to a determination of the Employment Relations Authority (the Authority) dated 3 November 2015.¹ Dr Henderson has challenged the determination that she was not constructively dismissed and seeks a penalty. The Nelson Marlborough Health Board (DHB) has challenged the determination that it unjustifiably disadvantaged Dr Henderson in her employment.

Background

[2] Dr Henderson was the DHB's Director of Nursing and Midwifery reporting directly to its Chief Executive, Mr Fleming. The catalyst for these proceedings were events which occurred between 22 August 2014 and 11 September 2014 when an unsuccessful attempt was made by Mr Fleming to complete a performance review of Dr Henderson's work. Those events culminated in Dr Henderson's resignation, conveyed to the DHB in her lawyer's letter of 26 September 2014.

[3] On 7 December 2009, Dr Henderson and the DHB entered into an individual employment agreement with effect from 8 February 2010. As well as containing a detailed description of her position and its responsibilities, that agreement included a list of key relationships for which the position was responsible. Internal and external relationships were provided for covering a total of 14 groups or categories. Internal relationships listed included the Board of the DHB and its Advisory Committee and the Chief Executive, nursing and midwifery staff, Allied Health providers and other DHB staff as required. The external relationships listed included primary and community providers, professional colleges, directors of nursing or nursing and midwifery of other DHBs, the Nursing and Midwifery Councils and the Ministry of Health.

[4] The employment agreement provided for performance reviews in cl 6 which reads as follows:

6. PERFORMANCE REVIEW

¹ *Henderson v Nelson Marlborough District Health Board* [2015] NZERA Christchurch 166.

- 6.1 The Chief Executive will be responsible for reviewing your work performance and will meet with you to discuss and agree on a process for performance review during that year.
- 6.2 This process will take into account your general performance, your primary accountabilities, duties and responsibilities, and any objectives agreed between you and the Chief Executive for the year.

[5] Clause 7 of this agreement provided that Dr Henderson could undertake courses of study and was entitled to reasonable paid study leave. At the time when Dr Henderson's employment ended she had nearly completed a PhD, which she has subsequently been awarded.

First performance review

[6] Dr Henderson participated in her first performance review with the DHB's former Chief Executive, Mr John Peters, during July 2012. In anticipation of that review, she completed a self-assessment form for the period from 1 July 2011 to 30 June 2012.

[7] The outcome of this review was recorded by Dr Henderson and Mr Peters on 10 December 2012. Three outcomes of interest to these proceedings were noted, she was to show more tolerance and flexibility and less of her evident frustration.

[8] Dr Henderson's work was not subjected to any further performance review until Mr Fleming requested she participate in one in July 2014. Mr Fleming was reviewing all senior positions at that time. However, Dr Henderson had received a pay rise effective from 1 July 2013 in recognition of her work.

Second performance review

[9] On 5 July 2014, Mr Fleming sent Dr Henderson an email and memorandum about a performance review for the DHB's financial year 2013/2014, scheduling a meeting for Thursday, 31 July 2014. Four documents were included with this email:

1. A self-appraisal form for Dr Henderson to complete;

2. A draft of performance objectives for Dr Henderson for 2014/2015 for discussion;
3. CEO performance objectives for 2014/2015; and
4. The DHB's action plans schedule identifying actions and executive leadership team responsibilities.

[10] Mr Fleming's memorandum ended with the following statement:

I encourage you to come to the Performance Appraisal to be ready to reflect on your own development needs as I would like to be able to identify these clearly so that I can support you through the coming year to develop in relevant areas.

[11] Neither the email of 5 July 2014, nor the accompanying documents, criticised Dr Henderson's performance or gave advance notice that any criticisms might be made during the meeting.

[12] The requested meeting was held on 22 August 2014.

22 August 2014 meeting

[13] Although Dr Henderson had been asked to send her completed self-appraisal form to Mr Fleming before their meeting, she did not do so. Instead, it was handed to Mr Fleming at the beginning of their meeting on 22 August 2014.

[14] In her self-appraisal Dr Henderson listed achievements in the preceding year that had been most satisfying to her and recorded that there were no objectives that were unachieved. Two remarks attracted Mr Fleming's attention. In a section providing for comments about key job skills, Dr Henderson's first comment was tolerance and her last was "Capability to get alongside idiots".

[15] Dr Henderson also identified a career aspiration of completing her PhD by May 2015 and that assistance was being provided to achieve this by being able to take a month off work for her degree in October 2014.

[16] By the time the meeting of 22 August 2014 took place, Mr Fleming had formed an opinion that Dr Henderson was a capable Director of Nursing and Midwifery but needed to improve what he referred to as her interpersonal style and relationships (for convenience referred to as professional relationships). Mr Fleming had experienced Dr Henderson's way of dealing with her colleagues and on occasion she was blunt or forthright when that approach was inappropriate. He had also received comments about her professional relationships from a range of sources including unions, staff and the community. He had also been informed by other staff that she intended to leave for a job elsewhere once her PhD was completed.

[17] Mr Fleming began the meeting by asking where Dr Henderson saw her future, which was his way of inquiring about any intentions she had to leave the DHB on completing her degree. He did not see this question as inappropriate or intrusive, because it was part of a discussion with a senior manager to enable him to tailor the rest of the performance review. He explained that he asked because the answer would shape the resources the DHB committed to a senior manager. Had Dr Henderson said she intended to seek a job elsewhere after being awarded her degree, Mr Fleming's attitude was that the status quo could be maintained for a time while she sought alternative employment. He thought six months was reasonable. If Dr Henderson did not intend to seek a job elsewhere, so that what he had been told was incorrect, steps needed to be taken to address the way in which Dr Henderson related to, and dealt with, her professional relationships. Dr Henderson accepted Mr Fleming had the right to ask her this question.

[18] As part of illustrating his concerns about Dr Henderson's professional relationships they talked about an exit interview provided by a departing employee which contained comments about her. Mr Fleming did not give a copy of that interview to Dr Henderson; nor was the departing employee named. However, from what was said Dr Henderson identified the person concerned, and explained why little weight should be placed on her comments.

[19] That explanation was not sufficient to address Mr Fleming's concerns about Dr Henderson's professional relationships and he told her she wrote people off quickly and, having done so, it was difficult for them to get back on the right side of

her. The meeting also involved Mr Fleming telling Dr Henderson that she had two options, one was to continue in her job long-term and address these professional relationship issues and the other was maintaining the status quo while seeking her next career move. Both options are discussed later.

[20] This meeting did not spend much time, if any, in reviewing Dr Henderson's self-appraisal form or discussing her achievements during the year. No notes were taken of this meeting, and it was common ground that they did not record anything in that part of the appraisal form set aside for combined comments. The only record of what transpired was Mr Fleming's subsequent memorandum of 27 August 2014 where he attempted to capture their discussion and the options he had stated.

27 August 2014 memorandum

[21] This memorandum is not a verbatim record but contains the options Mr Fleming had proposed on 22 August 2014. The third paragraph of this memorandum said:

In terms of our conversations I want to reiterate that we are at a critical juncture. As discussed at the performance appraisal, I believe your vision, direction and passion for growing the nursing and midwifery profession is admirable, and I believe overall it is on the right track. However the big challenge facing you is the fact that there are many concerns raised over you in your role. While the concerns raised are varied, they come from all levels of the organisation. At the centre of these concerns are your approach and relationships.

[22] This memorandum does not describe the concerns mentioned beyond referring to Dr Henderson's approach and relationships, although it was clear Mr Fleming was referring to her bluntness and forthright way of dealing with people.

[23] The memorandum said:

One of the things I often enjoy about working with you is you are rather forthright and at times blunt, a good example is in your performance appraisal document which you completed was where you said [one of] the key job skills required for your position was "capability to get alongside idiots". While I acknowledge you may have intended on deleting this before you sent it to me, the same can at times arise in verbal communication where you may express a view which later could have been represented more tactfully.

[24] The options presented were:

... I should note that I am prepared to support you on either pathway however I would appreciate you considering your options carefully and we can discuss the next actions depending on your decision. The two pathways are:

1. Continue long term in the role

If you choose this pathway then there will be a number of performance improvement initiatives that we will need to agree. The areas of attention include:

- Full engagement with the Clinical Governance Group. This includes building stronger relationships with the CMO, ACO, and the DAH, as well as the GM Clinical Governance Support.² Please note this is not a one-way street, if you choose to pursue this pathway then I think we need to have a dialogue with this group to ensure that we are all moving forward together.
- Strengthening the dynamic and linkages with Senior Nursing. I appreciate that Senior Nursing across Nelson Marlborough has a degree of frigidity in approach to things, and at times can appear to be change resistant. Reality however is that we have to work with our workforce and we can only lead if staff are prepared to follow.
- Selling the vision to the workforce. While I agree with your overall direction and vision, I am concerned you don't have the overall nursing and midwifery workforce behind you. While I acknowledge that some of the views that you see which are entrenched is out of date, one does not open a walnut with a sledgehammer.

2. Seek your next career move

Continuing in your current role long term will mean making changes to your approach with colleagues, staff and stakeholders within the Nelson Marlborough Health System. One of the great things about you personally is your views are clear and you are always forthright with them. The challenge however as you have acknowledged is changing your style and approach. While I am prepared to support you if you face that challenge, the other alternative would be to decide to look for opportunities outside of the organisation. As discussed I am aware that you are nearing the end of your PhD study and this is something important for you to conclude. I am prepared to support you to finish this; you have already applied for the month of October off to finish your academic work. If you wish to bring this period forward I am open to discussions.

However if you choose to take the option of a career change outside the organisation I would be happy to support you to remain in your

² Chief Medical Officer, Associate Chief Medical Officer and Director of Allied Health.

current role for a period of up to 6 months while you seek your next move. During this time I would expect you to continue to deliver within your role and to support the organisation, particularly focusing on the strengthening of the Clinical Governance Group and the upcoming Workforce Strategy Plan development.

[25] Mr Fleming invited Dr Henderson to carefully consider these options over the following week. She was invited to meet him again so that they could finalise performance objectives which he described as: "... objectives which are best aligned to the pathway you wish to take."

[26] The memorandum ended with:

I need to stress, the option of remaining as the Director of Nursing and Midwifery is yours to take, it is just simply unfair on both yourself personally, and the organisation, if we don't tackle the issues impacting your ability to excel if this is the direction you choose.

11 September 2014 meeting

[27] The follow-up meeting was delayed until 11 September 2014. Between the meeting of 22 August 2014 and 11 September 2014, Dr Henderson had decided to tell Mr Fleming she would continue in her job (Option 1). She did so after consulting her family and taking advice from colleagues, including Ms Smith, the DHB's General Manager – Human Resources. She recorded her decision in a letter dated 31 August 2014 delivered to Mr Fleming at the meeting on 11 September 2014. She confirmed her commitment to working to improve her performance with Mr Fleming's support. In her letter Dr Henderson said:

... I acknowledge and confirm my commitment to working with the business to improve my performance with your support to achieve this as articulated by you below:

- Accepting your [CEO] identified performance improvement initiatives namely:
 1. Full engagement with the Clinical [G]overnance Group.
 2. Strengthening the dynamic linkages with senior nursing.
 3. Selling the vision to the workforce.

[28] Those numbered paragraphs repeated the three bullet points in Option 1 of Mr Fleming's 27 August 2014 memorandum including accepting, in point 3, his concern that she did not always have support from her staff.

[29] At this meeting Mr Fleming accepted this commitment, and raised the possibility of Dr Henderson participating in a 360 degree review, something he had not raised during their previous meeting. What this review would entail was not decided at any time before Dr Henderson's resignation, although they both knew it would involve a type of detailed survey of a selected group of DHB staff members (and perhaps others) with whom she had a professional relationship where anonymous comments could be made. Those comments would be analysed and it was possible a plan for improvement might follow depending on the results of that survey.

11 September 2014 memorandum

[30] Immediately after the 11 September 2014 meeting, Mr Fleming recorded his expectations, and their conversation, in a memorandum. He repeated what had been said previously about Dr Henderson's passion for nursing development in the DHB's area of responsibility, but went on to say she was challenged when dealing with her interpersonal styles and relationships. The tenor of this memorandum was that Dr Henderson's leadership skills needed to improve to complement her work. This memorandum also stated their agreement for a consultant to be engaged to undertake this 360 degree review. He set out his expectations for involvement in that review by listing staff positions reporting to Dr Henderson, her peers and members of the Executive Leadership Team. Dr Henderson was invited to nominate others she thought it might be beneficial to include as the review was developed. Mr Fleming stated his intention to use a consultant for this review ensuring confidentiality of the results, so that they could focus on themes emerging from it and any differences in feedback from different groups who participated in it.

[31] This memorandum included a comment that Dr Henderson would be supported through any external coaching that came from the review. Importantly, her agreement to participate was sought by inviting her to sign the performance objectives enclosed with this memorandum. Mr Fleming finished his memorandum by saying:

... I urge you to consider what you are committing [to] as the road will indeed have challenges, however with the right intent I am sure these challenges will be able to be conquered.

[32] Dr Henderson did not reply. Nor did she sign the performance objectives. The content of a 360 degree review, including who would be surveyed, was not settled and a consultant was not engaged to prepare that review.

Subsequent events

[33] After Dr Henderson read this memorandum the employment relationship rapidly unravelled. She received it on 12 September 2014 when she arrived at work. On 15 September 2014, she supplied the DHB with a medical certificate declaring her medically unfit for work until 29 September 2014. That certificate was later replaced with one describing Dr Henderson as medically unfit due to workplace stress. Dr Henderson never returned to the DHB.

[34] Those medical certificates were sent to Ms Smith who passed them on to Mr Fleming. On 16 September 2014 he wrote to Dr Henderson inviting her to meet with him, and Ms Smith, on 22 September 2014, to discuss what was referred to as “this matter” and to take steps “... to identify any actions that can be taken to assist your return to work on the 29th of September”.

[35] This invitation was declined on Dr Henderson’s behalf by her lawyer, Ms Sharma. Matters did not rest there. On 19 September 2014, Mr Fleming wrote to Ms Sharma pointing out that a medical certificate certifying unfitness for work did not mean Dr Henderson was unfit to meet and stating his desire to have a meeting. A meeting did not take place.

[36] On 26 September 2014 another medical certificate for the period from 26 September to 12 October 2014 was provided by Ms Sharma. On the same day, Ms Sharma wrote a long letter to Mr Fleming claiming Dr Henderson had been unjustifiably disadvantaged in her employment and constructively dismissed. That letter contained a detailed critique of the inadequacy of the process used by Mr Fleming in the performance review and said he had set up Dr Henderson to fail. The criticisms levelled at Mr Fleming were that he had undertaken a performance

review that was not based on a fair process, had conducted a disciplinary process departing from the DHB's procedures for them, or what he did was an unfair conflation of a performance review and a disciplinary process.

[37] Ms Sharma's letter also advised Mr Fleming his decisions were pre-determined and were not taken in good faith. His options were criticised as vague and insufficient to justify what was described as a performance improvement process. What lay behind this assertion of vagueness was that Mr Fleming had information in his possession about Dr Henderson's professional relationships that had come to him from several sources but he did not provide that information, other than generally mentioning his concerns, to Dr Henderson before or during the meetings or in his memoranda.

[38] Dr Henderson saw that lack of information, and the invitation to participate in a 360 degree review, as setting her up to fail. She was alarmed by the possibility that the people Mr Fleming thought should be surveyed in the proposed review would include far more than she may have originally anticipated; in the region of 80 to 85 individuals. Dr Henderson saw a group of that size, drawn from all levels of the DHB, as presenting an opportunity for anonymous, and unfair, comments to be made about her possibly in retaliation for difficult and unpopular decisions she had made or had been required to make. Ms Sharma's closing submissions described the review as "a fishing expedition to throw dirt" on Dr Henderson.

[39] Dr Henderson's resignation was contained in Ms Sharma's letter and she tendered four weeks' notice backdated to 15 September 2014 when she was first assessed as being medically unfit for work. The notice period was calculated to expire on 12 October 2014. No issue arises as to whether the correct period of notice was given because the DHB waived any deficiency.

[40] Dr Henderson is now employed as the Executive Director of Nursing and Midwifery by Darling Downs Hospital and Health Service in Queensland. She was aware of the vacancy on 11 September 2014, prior to meeting Mr Fleming, and applied for that job on or about 4 October 2014. A formal offer of employment was

made to her on 2 December 2014 and she started her new job on 8 December 2014. Her current salary exceeds what she was paid by the DHB.

Was Dr Henderson constructively dismissed?

[41] The parties concentrated their submissions on what happened at the meetings of 22 August 2014 and 11 September 2014, and the consequences of what happened. There is no disagreement about the legal test to apply.

[42] In *Auckland Shop Employees Union v Woolworths (New Zealand) Ltd* the Court of Appeal described three non-exhaustive situations where constructive dismissal may occur:³

1. An employer gives an employee an option of resigning or being dismissed;
2. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign;
3. There has been a breach of duty by the employer leading the employee to resign.

[43] In relation to the duties owed by an employer and an employee the Court of Appeal noted:⁴

It may well be that in New Zealand a term recognising that there ought to be a relationship of confidence and trust is implied as a normal incident of the relationship of employer and employee. It would be a corollary of the employee's duty of fidelity (see *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 (CA)). No formulation of duties in general terms can relieve a tribunal from assessing the overall seriousness of the particular conduct about which a complaint is made. And the seriousness of any breach of an employer's duties will often be important in deciding whether a resignation was in substance a dismissal. ...

³ *Auckland Shop Employees Union v Woolworths (New Zealand) Ltd* [1985] 2 NZLR 372 (CA) at 374 – 375.

⁴ At 376.

[44] Causation and foreseeability are also relevant. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*, the Court of Appeal addressed both subjects in the following passage:⁵

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[45] In considering Dr Henderson's claim that she was constructively dismissed, it is therefore necessary to consider all of the surrounding circumstances to decide if there was a breach by the DHB of sufficient seriousness that it was foreseeable it would cause her to resign.

Discussion

[46] Dr Henderson's second amended statement of claim does not identify the breach, or breaches, attributed to the DHB that were alleged to be causative of her resignation. She pleaded that the Authority erred in fact and law in finding that she was not constructively dismissed, but there are no particulars explaining that pleading.

[47] Dr Henderson's case appears to be based on an alleged breach of duty to her by the DHB arising from a course of conduct by Mr Fleming in how he structured and conducted their meetings in August and September and in offering her options that were unpalatable, followed by an unacceptable invitation to participate in a 360 degree review that was onerous.

[48] Ms Sharma submitted that at every opportunity Mr Fleming had to discuss Dr Henderson's performance review with her he "escalated the situation". I have

⁵ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA) at 419.

interpreted that submission to be that he placed pressure on Dr Henderson, making it clear she chose the wrong option by electing to stay, and to show her she had done so, proposed the 360 degree review to make things difficult. Proposing that review, while saying it would be difficult, illustrates that submission.

[49] I consider Dr Henderson has over-reacted to what was proposed and assumed, without justification, that Mr Fleming had an ulterior purpose in conducting the performance review and proposing she participate in a 360 degree review.

[50] What Mr Fleming was trying to do was conclude a performance review encompassing what had been discussed in their meetings and responding to Dr Henderson's letter of 31 August 2014. They had agreed improvement was required but until decisions were made about the 360 degree review, including Dr Henderson signing the memorandum of 11 September and settling objectives for the next year, the performance review was incomplete. Mr Fleming's 11 September 2014 memorandum only recorded agreement to participate and to engage an appropriate person to undertake that review. He stated who he expected to be involved and invited Dr Henderson's comment about his suggestions. He was outlining a framework that he considered to be appropriate, subject to professional advice yet to be obtained.

[51] At the Court hearing, Ms Sharma cross-examined Mr Fleming about the DHB's policies published in its handbook including those dealing with performance reviews and disciplinary processes, referred to respectively as Performance Planning and Review and Disciplinary Process. Her questions were aimed at demonstrating that the process used in the August and September 2014 meetings departed from those policies and therefore gave rise to a breach of duty. There was a foretaste of this questioning in Ms Sharma's letter of 26 September 2014 because it contained hints that Dr Henderson viewed the process in which she was participating as having evolved to become disciplinary in nature.

[52] Ms Sharma relied on these policies, and an assertion that the process being used had become disciplinary, but did not present any submissions to explain how

what had started out as a performance review required by the employment agreement had changed into being a disciplinary process invoking the DHB's policy on that subject. The implication in Ms Sharma's correspondence, and in her questioning of Mr Fleming, was that his dissatisfaction with Dr Henderson's professional relationships was the start of this disciplinary process. That does not sit comfortably with either cl 6.1 of the employment agreement or what the DHB's policy on performance reviews contemplates.

[53] Not surprisingly, the Performance Planning and Review policy produced in evidence contains advice about how to undertake a performance review. It combines advice to senior managers about what might be expected as well as making it clear that what is intended is an opportunity for a frank exchange of views about the performance of the person being reviewed. In the policy, there is a section dealing with the principles for a performance review meeting, including having a discussion about areas of work needing improvement. That policy contemplates the manager stating his or her own views about where improvement is needed. This policy also refers to discussing the causes for the problem that has been identified and what can be done in the future to address them. This policy distinguishes between undertaking a performance review, where what is asked for is improvement from the existing level of performance and situations where the DHB is dealing with work so unsatisfactory that a failure to improve could lead to disciplinary action, such as dismissal. Unsatisfactory performance in that sense is addressed in the policy dealing with disciplinary processes.

[54] Mr Fleming was using the performance review as a way of seeking improvement and he was not trying to manage unsatisfactory performance. He saw the 360 degree review as a positive step although it was one not then commonly used by the DHB. He described the process as a tool he considered using where relationships or leadership might be an issue, saying that in his experience it helped to identify the existence and scope of any issues. He did not see that review, or the feedback from it, as punitive but instead regarded it as a way to gather information. If that information identified areas needing attention, they could be addressed. Explaining why he raised the subject of this type of review with Dr Henderson, he

said that while she had a good strategic outlook, she was struggling to build effective relationships to ensure “that as a leader she was being followed”.

[55] Mr Fleming thought this 360 degree review would provide an opportunity for balanced feedback. He was convinced that there would have been very supportive feedback for Dr Henderson and that, while she had real strengths in some areas, there was room for development in others. He anticipated others might share his opinions and express them in this sort of review.

[56] Mr Fleming’s approach was consistent with the DHB’s policy for conducting performance reviews and cl 6 of the employment agreement.

[57] I do not accept Ms Sharma’s submission that after Dr Henderson communicated her decision to stay at the DHB, Mr Fleming signalled to her that she had made the wrong choice or that he had embarked on a disciplinary process. In cross-examination the concept put to Mr Fleming was that he took the opportunity to “escalate the situation”, meaning to make it clear to her that she would face a difficult time in the 360 degree review, as if she was being invited to recant the choice she had made. Mr Fleming rejected that proposition, saying he only ever wanted to make Dr Henderson aware that the 360 degree review process would be rigorous.

[58] Dr Henderson must have appreciated that the way in which she related to others was likely to be something which Mr Fleming would be interested in during her performance review. That subject had been touched on in her performance review with Mr Peters in 2012, and she was aware of concerns about her professional relationships, as is evident from the remarks she made in her self-assessment. I do not accept Mr Fleming was trying to persuade Dr Henderson to leave or that it was a breach of duty by the DHB for him to have raised the subject of Dr Henderson’s professional relationships. Nor was it a breach to have proposed a method to obtain more information to inform future decisions about how those relationships would be handled.

[59] For completeness, it is also necessary to address two matters of disagreement between Mr Fleming and Dr Henderson about the meetings on 22 August and 11 September 2014. The first was an allegation Mr Fleming had proposed to pay Dr Henderson six months' salary to leave, if she chose Option 2, and the second is an allegation that when discussing participating in the 360 degree review he told Dr Henderson that "all of the demons" would come out, meaning she would inevitably find her performance would be found wanting.

[60] Mr Fleming said he had not made a financial offer to Dr Henderson to leave and he had no authority to propose an exit payment to her. He explained that the only reference he made to six months was being able to accept the status quo (meaning Dr Henderson continuing as she had previously worked) for that length of time if she intended to leave to pursue her career elsewhere after earning her PhD. He also pointed out that he had no authority delegated to him by the Board of the DHB to enter into a compromise of Dr Henderson's employment by paying her six months' salary. All staff-related delegations, including those held by Dr Henderson in her role, were published on the DHB's intranet. Those delegations showed the extent of Mr Fleming's autonomy and he was not empowered to make an offer of the sort Dr Henderson said was made to her.

[61] Mr Fleming accepted he did refer to "demons coming out", but not in the way described and not with the emphasis attributed to his remarks. All he meant was that the process would be robust and if areas to address were identified, coaching support would be provided to address them. That much is also contained in Mr Fleming's 11 September 2014 memorandum although in less colourful language.

[62] I prefer Mr Fleming's recollection of what happened in those meetings and find that he did not make an exit offer, or refer to "demons coming out" in the way referred to by Dr Henderson. Mr Fleming had the advantage of being able to refer to the memoranda prepared shortly after each meeting, both as a record of what had been said and also from which to refresh his memory. There were also aspects of Dr Henderson's evidence that suggested her recollection was questionable. As an example, she said that at one of their meetings Mr Fleming had a calculator with him, indicating he would work out how much she would be paid if six months' salary

was agreed on as an exit package. What Dr Henderson said was hyperbole and overlooked the fact that immediately before discussing her performance review they had been talking about nursing metrics that required calculations to be made. Furthermore, Mr Fleming is an accountant by profession and is unlikely to have needed a calculator to work out six months' worth of Dr Henderson's annual salary.

[63] There were other aspects of Dr Henderson's evidence that indicated her recollection was not accurate. To attempt to illustrate the accuracy of her recollection of the meeting of 22 August 2014, Dr Henderson gave evidence of being so distressed about what she had been confronted with she attempted to contact her daughter, Ms Ursula O'Donohue. Having been unable to contact Ms O'Donohue, by chance she came across her while driving home. According to Dr Henderson, she saw her daughter's car outside a doctor's clinic and a conversation followed. The implication was that the impact of what had happened was significant and, coupled with this conversation, was accurately remembered. That is not what happened. In her written brief of evidence, Ms O'Donohue referred to meeting her mother on 22 August 2014, at a doctor's clinic, as Dr Henderson had said. However, when giving evidence, Ms O'Donohue corrected what she said having checked her records and ascertained that she had visited the doctor on 11 September 2014 and not on 22 August 2014. There was no chance meeting on 22 August 2014.

[64] Other inadequately explained matters reinforce my view that Mr Fleming's recollection is preferable. There were several, but four examples illustrate this point. The first example was a disagreement about whether Dr Henderson had sent her letter of 31 August 2014 to Mr Fleming prior to their meeting on 11 September 2014 or delivered it to him at that meeting or had done both. When questioned, Dr Henderson was confused about when she wrote the letter and could not recollect when it had been delivered.

[65] In the second example, Dr Henderson said that the performance objectives proposed by Mr Fleming were first seen by her when they were attached to his memorandum of 11 September 2014. That was not correct. They were attached to his email of 5 July 2014 along with the self-appraisal form she completed.

[66] The third example is about the medical certificates provided to the DHB. Explaining why a replacement medical certificate had been obtained, referring to stress, Dr Henderson's evidence was that on reflecting about the certificate after having obtained it, she consulted her doctor again and requested that the certificate specify her absence was on the grounds of workplace stress. However, when she was cross-examined, Dr Henderson said that her doctor had asked her to come back for a replacement certificate and that is what she did.

[67] The final example is about the performance review conducted by Mr Peters in 2012. Dr Henderson's evidence was that there were no concerns raised about her performance and she did not recall any issues that Mr Peters may have raised with her. That evidence can be contrasted with the record of the performance review where comments were made about her needing to be more tolerant and to show less evident frustration.

[68] It follows that I am satisfied Mr Fleming did not say or do anything in either of the meetings of 22 August 2014 and 11 September 2014 that was a breach of duty by the DHB to Dr Henderson. The process used by him was not so egregious that it was a breach of duty in the context referred to in *Woolworths*, so that he caused Dr Henderson to resign.

[69] In the context of a performance review Mr Fleming was entitled to raise with Dr Henderson a matter of concern to him, one that had been raised previously. While the words used in Options 1 and 2 were injudicious in the circumstances, they did not convey a message that Mr Fleming intended her departure. Nor did they depart from the terms and conditions of Dr Henderson's employment agreement with the DHB. Under cl 6.1 of that agreement what was contemplated was a meeting to discuss and agree on a performance review process and that was what they were doing. Expressing a desire for a 360 degree review was part of that process and, in that context, Mr Fleming could not foresee that she would resign as a result.

[70] Clause 6.1 of the employment agreement also provided Dr Henderson with the ability to decline to agree to this performance review process if it was unacceptable for any reason. Although Dr Henderson had agreed to participate in

improvement initiatives in her letter of 31 August 2014, that decision could not have placed her in a position of being irrevocably committed to an unacceptable 360 degree review where the DHB had not been able to outline to her all of the features of that review.

[71] Ms Sharma submitted that Mr Fleming's actions were not in good faith although she did not go on to say how what was said and done by him breached that statutory duty. At one level, Mr Fleming complied with the duty by being communicative.

[72] There is no basis for considering that it would have been foreseeable to Mr Fleming that Dr Henderson would resign. Dr Henderson is a robust and strong-minded person who is forthright and determined. There is nothing in the events which occurred in August and September 2014, from which it could reasonably be said that Mr Fleming should have foreseen Dr Henderson's response was likely to be her resignation. Mr Fleming had already stated his desire to support Dr Henderson throughout the process and believed he had secured her agreement to participate. From that information there is no basis to conclude that he did foresee, or should have foreseen, Dr Henderson would resign.

[73] Dr Henderson was not constructively dismissed.

Was Dr Henderson disadvantaged?

[74] The DHB challenged the Authority's determination that Dr Henderson was unjustifiably disadvantaged in her employment and, as a consequence, was entitled to compensation. Unjustified disadvantage is provided for in s 103(1)(b) of the Employment Relations Act 2000 (the Act) which reads:

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment

that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or

...

[75] The test of unjustified disadvantage was stated in *Victoria University of Wellington v Haddon*, where the Court of Appeal held that the comparable provision of the Employment Contracts Act 1991 (s 27(1)(b)) meant that employment embraced the employment activity so a personal grievance could arise where "the on the job situation" was unjustifiably altered.⁶

[76] Despite the passage of time, that test remains unaltered. In *Air Nelson v Neill*, the Employment Court noted the approach in *Haddon*, to the "on the job situation" remains.⁷

[77] Mr McBride submitted that the key to deciding if there has been an unjustified disadvantage is whether the employer's actions involve the following three elements:

- a) Some retrograde step in the employment or conditions of employment;
- b) That retrograde step actually adversely impacts on the employee and in the "on the job situation"; and
- c) The action was unjustifiable.

[78] The only circumstances which could be referred to by Dr Henderson all arise from the initiation of the performance review and the steps taken by the DHB from 5 July 2014 until 11 September 2014. The DHB's case is that nothing happened that impacted on Dr Henderson's job either by being a breach of the terms and conditions of her employment or affecting her "on the job situation" and it was justified in:

- a) Undertaking a performance review required by the employment agreement;

⁶ *Victoria University of Wellington v Haddon* [1996] 2 NZLR 409 (CA).

⁷ *Air Nelson v Neill* [2008] ERNZ 483 (EmpC).

- b) Raising concerns about professional relationships in the context of a review; and
- c) Raising areas for possible improvement.

[79] Put another way, the performance review was a vehicle to address any matters of concern that were not disciplinary and the DHB had to start in some way.

[80] In response, Ms Sharma relied on *Auckland City Council v Hennessey* to argue that the course of conduct by the DHB gave rise to this grievance.⁸ Her submissions relied on broad concepts of justice and fairness to argue the DHB's actions were unjustified. Mr Fleming was asked several times if he thought that the steps he was taking were unfair to Dr Henderson, such as saying that he was aware of difficulties she had in dealing with others but failed to name the persons he was referring to, or to provide information from which Dr Henderson could ascertain what event, or events, his remarks related to.

[81] Ms Sharma did not refer to any terms or conditions of employment that had been impacted on in some way or altered. Nor did Ms Sharma refer to any aspect of Dr Henderson's job that was adversely affected that would fit within the concept of the "on the job situation" to describe how her employment had been disadvantaged unjustifiably. Instead, the submission settled on the broad-brushed notion that Mr Fleming had acted unfairly. I do not accept those submissions.

[82] The parties had a contractual obligation to participate in a performance review and to establish the process for it. It is difficult to accept criticisms of the steps taken on behalf of the DHB by Mr Fleming which initiated that performance review where the DHB was contractually obliged to participate in one. An inevitability of undertaking a performance review is the possibility that areas for improvement might be identified but, as has already been noted, that is different from the employment relationship having reached the stage where the employee's employment is in jeopardy for unsatisfactory performance. Mr Fleming said more than once that he regarded Dr Henderson as a capable Director of Nursing and

⁸ *Auckland City Council v Hennessey* (1982) ERNZ Sel Cas 4 (CA) at 9.

Midwifery. He was looking for improvement from her, not seeking to manage under-performance. Proposing a 360 degree review as part of that process complied with the employment agreement and could not be seen as impacting adversely on the terms and conditions of Dr Henderson's employment agreement or her "on the job situation".

[83] The way Dr Henderson related to others might have been required to change over time, depending on the outcome of the 360 degree review, but that prospect was in the future. It depended on that review providing an adverse outcome. Just as easily, the review might have provided a positive outcome. The possibility of having to make a change in the future was not something that impacted on Dr Henderson's "on the job situation".

[84] Furthermore, Mr Fleming did not take any steps after 22 August 2014 that impacted on Dr Henderson's actual work. Her duties were not altered or removed. Her staff responsibilities were not altered in any way. No attempt was made to remove the functions she performed, such as being on the Executive Leadership Team.

[85] From Dr Henderson's perspective the most that can be said is that as at 11 September 2014 she faced the prospect of being subjected to a review she did not welcome. That is not sufficient to fall within s 103(1)(b) of the Act.

[86] I am satisfied that Dr Henderson was not unjustifiably disadvantaged in her employment within the meaning of s 103(1)(b) of the Act.

Penalty

Finally, I need to address the penalty claim in the second amended statement of claim. A claim for a penalty was made on the basis that there had been breaches of the employment agreement by the DHB justifying a penalty. This judgment means there is no basis to consider a penalty and it is not necessary to deal with Mr McBride's submissions that the challenge to the Authority's determination was brought out of time and the Court therefore lacked jurisdiction to consider it.

Disposition

[87] Dr Henderson's challenge to the determination of the Authority is dismissed. The DHB's challenge to the determination of the Authority is successful and the decision that Dr Henderson was unjustifiably disadvantaged in her employment is set aside and replaced by this judgment.

[88] Costs are reserved. If the parties are unable to agree on costs arising from this proceeding, the DHB may lodge a memorandum within 20 working days and Dr Henderson may have a further 20 working days to respond.

K G Smith
Judge

Judgment signed at 12.45 pm on 30 September 2016