IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 206
ARC 82/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LAINE FALANAIPUPU FAAPITO Plaintiff
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: 4-7 April 2011
(Heard at Auckland)

Counsel: Kirsty McDonald and Adam Weal, counsel for plaintiff
Karen Radich and David Traylor, counsel for defendant

Judgment: 5 December 2012

JUDGMENT OF CHIEF JUDGE G L COLGAN

Introduction

[1] The questions for decision in this challenge by hearing de novo to a determination[1] of the Employment Relations Authority are whether Laine Faapito was suspended and then dismissed unjustifiably and, if so, the remedies to which she may be entitled.

[2] In its determination delivered on 23 June 2010 the Authority concluded that Ms Faapito had first been suspended justifiably, and was subsequently dismissed justifiably, from her senior nursing management position at Mt Eden Prison.

[1] AA295/10, 23 June 2010.

[3] The events culminating in, and concerning, Ms Faapito's dismissal itself occurred in or before August 2009 and so are not affected by the statutory changes to the tests of justification for dismissal and for reinstatement that came into effect in April 2011. The tests of justification for suspension and dismissal under the now former s 103A of the Employment Relations Act 2000 (the Act) are whether what the employer did and how it did it, were what a fair and reasonable employer would have done in all the circumstances at the time. The test for reinstatement in employment which Ms Faapito seeks is whether, in all the relevant circumstances, that is a practicable remedy.

[4] The plaintiff seeks reinstatement to her former position or one no less advantageous to her including:

- Reinstatement to a nursing position;
- reimbursement of a sum equal to the whole or any part of the wages or other money lost by her as a result of the grievance;
- compensation of $25,000 for humiliation, loss of dignity and injury to feelings as a result of the dismissal;
- compensation of $10,000 for humiliation, loss of dignity and injury to feelings as a result of unjustified suspension;
- interest on remuneration loss;
- and reimbursement of her legal costs.

[5] Ms Faapito was a nurse holding a managerial position at what was formerly the Department of Corrections' Mt Eden Prison in central Auckland. Since the events with which this case is concerned, that institution has been replaced by a modern building on an adjacent site and this is operated not by staff employed by the Department but, rather, by a private prison operator known as Serco. The case concerns Ms Faapito's management and dispensation of medication (prescribed by a

psychiatrist) to an inmate and what the employer concluded were such serious failings by her that her misconduct and, crucially, her response to proposals to address this, warranted her dismissal from her managerial nursing role. A not insignificant element of the case, however, was the employer's preparedness to continue Ms Faapito's employment but as a non-managerial and supervised nurse and at another institution than Mt Eden Prison. When she declined to agree to this outcome, Ms Faapito was dismissed.

Order prohibiting publication

[6] As in the Authority, there is an order made under cl 12 of Schedule 3 to the Act prohibiting publication of the name or any other information that might identify the inmate/patient whose treatment by Ms Faapito led to her dismissal. As in the Authority's determination, he will be referred to simply as "A".

Relevant facts

[7] Because of the nature and scope of some of the evidence called for both parties, it is important to state that the focus of the Court's inquiry is on relevant circumstances at the time of Ms Faapito's dismissal. So, for example, whilst each party has relied on an expert witness to provide her opinion about whether Ms Faapito's conduct met professional nursing standards, the defendant did not seek and have such advice at the time it dismissed the plaintiff. Nor, by the same token, did Ms Faapito either propose to her employer that the Department should obtain expert advice about her conduct, or herself tender the same sort of advice to the employer before she was dismissed. Finally, Ms Faapito concedes that her nursing practice fell below acceptable standards in several respects.

[8] I have, nevertheless, been assisted by the expert evidence called for the parties about whether Ms Faapito's relevant conduct met expected professional nursing standards. In concluding that it did not, I have generally accepted the expert evidence of the defendant's witness, Dr Frances Hughes, and, where it was in conflict with the evidence of the plaintiff's expert, I have preferred Dr Hughes's.

[9] At the time of these events, Mt Eden Prison, and in particular the areas of it where nurses worked, was undergoing significant building refurbishment. Ms Faapito described the situation as undertaking medical and administrative work in a building site. This led to a number of tensions between nursing staff generally and Ms Faapito in particular on the one hand, and the Department on the other. In Ms Faapito's case these were manifested especially in its concerns about her standards of dress and particularly on the day of a visit to the Prison by the Minister of Corrections. The Authority mentioned, but discarded, these concerns, being satisfied that they neither led to any sanction of Ms Faapito nor contributed to her later dismissal.

[10] I concur with the Authority's conclusion on this point. Although Ms Faapito was an independently minded, sometimes assertive and challenging staff member who did not always endear herself to those who supervised her, the events that led to her dismissal were independent of these previous contretemps involving her. Although she believes sincerely that the defendant applied a harsher sanction (dismissal) for the events with which this case is concerned because she was not a submissive and compliant employee, I do not find this established on the evidence. That is, as much as anything, because Ms Faapito's dismissal was not the employer's initial response to its adverse conclusions about her work performance. In these circumstances, nothing more needs to be said about this background material.

[11] The plaintiff is an experienced registered nurse who had, for some time, held the position of Team Leader of nurses based at Auckland's Mt Eden Prison. For inmate mental health issues into which category this case falls, Auckland Regional Psychiatric Services (known colloquially as the Mason Clinic), a division of the Auckland District Heath Board, provided inmate psychiatric services on contract to the Prison. Mason Clinic psychiatrists would visit the institution regularly and inmates were the patients of these registered medical practitioners for purposes including prescribing medications. Prison nurses were responsible for the dispensation of prescribed medications to inmates.

[12] An inmate (A) was transferred to Mt Eden Prison from the neighbouring Auckland Central Remand Prison (ACRP) in early March 2009. A had a history of

minor to moderate psychiatric illness. For a number of reasons A did not enjoy the prospect of being at Mt Eden Prison after being at ACRP and was prescribed a low dosage (a 25 milligram tablet twice daily) of a medicine known as Quetiapine for anxiety and sleeplessness. Although Quetiapine is a recognised and widely used medication for major psychiatric illnesses including bi-polar disorder and psychoses, that is in doses far exceeding those prescribed for A so that his dosage was commensurate with the conditions of mild anxiety and sleeplessness from which he suffered.

[13] On 11 March 2009 a corrections officer discovered a number of medicine tablets in A's cell. It appeared initially that some of these enteric coated tablets may have been regurgitated and had lost part or all of their enteric coatings, or may have been secreted temporarily in A's mouth while the dispensing nurse was present but then removed. There is, and was at the time of the employer's inquiry, no or very little sure evidence about the quantity or condition of the tablets discovered, their whereabouts, or the circumstances in which they appear not to have been taken by A for some period. Such discoveries are not uncommon and are often (but not necessarily) indicative of nefarious or even criminal behaviour by inmates involved.

[14] The corrections officer reported the discovered tablets to a nurse who, in turn, reported their discovery to Ms Faapito. It seems that no nurse or other medical professional spoke to A at that time about why he may not have taken, but rather hoarded, his prescribed medication. Ms Faapito assumed that he was hoarding his tablets for unjustifiable reasons which may have included their later supply to other inmates, whether voluntary or under coercion, or possibly for mass consumption by A himself. Ms Faapito directed that A should not have any further Quetiapine until his situation was reviewed by the prescribing psychiatrist and she isolated A's remaining prescribed but undispensed Quetiapine tablets in their blister pack in a drawer in the Prison's Health Centre.

[15] Ms Faapito created some but insufficient and inadequate medical records about her decision to stop A's medication. She did not either assess A herself or direct any other nurse to do so. The temporarily discontinued tablets prescribed for a

specific patient were not dealt with securely and identifiably as they ought to have been by Ms Faapito.

[16] There were a number of entries in the inmate's medical records made by the plaintiff and other nurses about the inmate's medication at relevant times. The first was on 11 March 2009 by a nurse who recorded the finding by a corrections officer about the inmate's tablets: it said that he had been "found saving" them.

[17] On the following day, 12 March 2009, Ms Faapito noted in the inmate's records that his medication had been stopped temporarily by her as Team Leader "as appears medication is being used as a trade or being stood over". Ms Faapito recorded the quantity found as "a week supply" and noted that the position would be reviewed by the Mason Clinic psychiatrist responsible for the inmate's treatment on the psychiatrist's next visit to the Prison, and that the alternatives were to recommence or stop the inmate's medication. This reinforced the temporary or suspensory nature of Ms Faapito's direction.

[18] A week later, in an entry dated 19 March 2009, a psychiatric nurse from the Mason Clinic noted that the inmate had been seen in the Prison's medical unit on that day, was angry that his medication had been stopped, denied hoarding it for ulterior motives, and explained that he had kept it because his morning dose was incorrect. The notes record that the inmate told the nurse that he wanted to resume taking the evening doses of the medication because he was not sleeping and because he remained anxious and distressed, was eating intermittently and was losing weight. The nurse's assessment was that the inmate was not suffering from a formal thought disorder but feared being pursued and attacked by other inmates. He was assessed as being of low risk to others but at moderate risk of self-harm due to his previous history. The medical plan was then to restart the medication with its review by a psychiatrist within one week and nursing follow-up within two weeks.

[19] Later on the same day, 19 March 2009, another entry in the nursing notes records a discussion with a psychiatrist about restarting the inmate on his night-time dose and that the previously sequestered tablets could not be found. Arrangements

were made with the Mason Clinic for a new prescription to be prepared by a psychiatrist.

[20] Yet later that day, Ms Faapito recorded the receipt of the new prescription from the psychiatric team and that a week's supply of the inmate's medication had been made available but put aside until reviewed by a psychiatrist.

[21] Subsequently, there is an entry from another nurse recording that following discussion with Ms Faapito, the inmate's night-time dose was to be reviewed on Monday 23 March 2009 by the psychiatrist on the basis that the inmate was unhappy with his morning dose. This entry recorded Ms Faapito's ongoing concern about medication hoarding and her recommendation that the nursing staff dispensing it should crush the tablets to prevent this.

[22] The complaint against Ms Faapito that led to her dismissal was instigated by a nurse colleague, was made to the Prison's Health Centre Manager, and alleged that Ms Faapito may have discontinued the inmate's medication without consultation. This was confirmed in a preliminary way by the records just referred to. Accordingly, the Acting Regional Health Services Manager (Northern) for Public Prisons, Debbie Gell, called for a clinical quality assurance adviser to conduct a "fact-finding review". The purpose of this was to make a preliminary establishment of facts before a decision was taken about investigating the complaint against Ms Faapito in a disciplinary context.

[23] The plaintiff and other nursing staff were interviewed by telephone as part of the fact-finding review which concluded that the plaintiff had instructed the stopping of the inmate's anti-psychotic medication without consultation with forensic staff, and had removed the medication so it could not continue to be given. The preliminary review concluded that although the inmate did receive some morning doses, his prescribed medication was not recommenced until nine days after receipt of a new prescription from a psychiatric consultant. This fact-finding report generated an employment investigation of the plaintiff's conduct.

[24] On 7 April 2009 Ms Faapito was placed on special leave on pay for two days to allow her to prepare submissions about these allegations and to address the question whether she should be suspended. She met with Ms Gell on 7 April 2009, telling the latter that she had told the Mason Clinic psychiatrist of her decision to discontinue the medication although she could not recall when she had done so. Ms Gell undertook further inquiries with the preliminary fact-finder and the psychiatrist, the latter of whom acknowledged that Ms Faapito had contacted her but could not recall the date. The investigator spoken to by Ms Gell told her that Ms Faapito had not previously given this explanation but, equally, she had not been questioned about it which may have meant that there was no appropriate opportunity for the plaintiff to have made the explanation.

[25] Initially Ms Gell accepted that Ms Faapito's account of her communication with the psychiatrist was supported by the psychiatrist's account, and therefore determined that, although suspension was not warranted, an employment investigation was still appropriate. This was delegated by Ms Gell to an external quality assurance adviser and another departmental Health Centre manager. The employment investigation was about whether Ms Faapito failed to follow the processes expected of a registered nurse in a team leader position when discontinuing medication to the inmate.

[26] The investigators conducted face to face interviews with a number of registered nurses and other relevant people although not with all. Ms Faapito was interviewed on 21 April 2009 and confirmed that she did not discuss with the inmate stopping his medication before she did so. Ms Faapito could not recall whether she was at a meeting on 16 March 2009, known as an HRAT[2] team meeting, at which there were Mason Clinic personnel who became aware that A's medication had been discontinued, but Ms Faapito thought that she probably would have been at that meeting. She told the investigators that she did not recall whether it was before or after the 16 March 2009 meeting that she discussed A's medication with the psychiatrist. She explained where the inmate's tablet medication had been put in the pharmacy and also the medication chart. She accepted that she had not

[2] High Risk Assessment Team.

communicated with members of her nursing team in writing but only orally as she did in respect of her conversation with the psychiatrist.

[27] It appears that the Mason Clinic psychiatrist then had second thoughts about her earlier admission to investigators of having spoken with Ms Faapito and when. In her interview with the employment investigation interviewers, the psychiatrist is recorded as stating that, as far as she could recall, it was at the HRAT meeting on 16 March 2009 that she first found out about A's medication being stopped although she could not be sure about this and often did not take notes of telephone conversations when these occurred about medical matters. The psychiatrist said that she did not recall a telephone conversation with Ms Faapito and that the cessation of A's medication was news to her at the HRAT meeting.

[28] When Ms Gell was told of these responses by the psychiatrist, she wrote to Ms Faapito, describing "this new information" as "serious" and advising her that if this was correct, there was potential risk to the health and safety of others. She also warned the plaintiff of a potential breach of the Department's Code of Conduct, in particular the requirement that the plaintiff should "carry out [her] duties in an efficient and competent manner in compliance with policies and prescribed operating standards and procedures of the Department".

[29] Ms Faapito was then placed on further special leave to prepare submissions about her possible suspension. There was a meeting on 27 May 2009 at which Ms Faapito said that the information received by the Department was not new and that the psychiatrist was not uncertain about receiving a telephone call from her. Ms Gell nevertheless decided that suspension would be appropriate because of her concern about whether Ms Faapito met the basic standard of informing an appropriate health professional of discontinuation of medication.

[30] During Ms Faapito's suspension, the investigators continued their inquiries, concluding eventually that Ms Faapito had not met expected standards in a number of respects. These were her:

- failure to gather relevant information of events prior to making a decision to stop the prescribed medication;
- failure to consult and discuss the proposed actions with A;
- failure to incorporate previous clinical information to assist in the assessment process;
- failure to promptly advise the prescribing doctor;
- failure to complete a clinical assessment of all the risks involved;
- failure to promptly advise the other nursing staff in the correct manner that the medication had been removed;
- failure to update the medication chart of the actions taken;
- failure to adequately record actions taken in the medication administration signing sheet;
- failure to appropriately record and store medication retrieved from the prisoner's cell; and
- failure to document the electronic clinical record to meet the required standards.

[31] The assessors' conclusions were that these failures breached the Department's Health Services Manual's Key Accountabilities for team leaders, the New Zealand Nursing Council's Competencies for Registered Nurses, the Practitioners Competence Assurance Act 2003, the Medicines Act 1981, the Medicines Regulations 1984, and the Health and Disability Code of Rights.

[32] The investigators recommended, among other things, that Ms Faapito be referred to the Nursing Council of New Zealand for a comprehensive review of her nursing practice and that she practise under supervision as a registered nurse until the

competency review of the New Zealand Nursing Council was completed. The investigators also recommended that the management of medication at the Mt Eden Prison Health Centre be reviewed to meet all departmental and professional requirements.

[33] Ms Faapito responded to the report both in writing and at meetings with Ms Gell. The plaintiff focused on her assertion that she had telephoned the Mason Clinic psychiatrist and apprised her of the relevant circumstances about A in which case Ms Faapito said that responsibility for A's treatment passed from her to the Mason Clinic. She did, however, admit to some failings in her adherence to nursing procedures but denied others which the defendant investigated and found established.

[34] Although much of the evidence addressed whether Ms Faapito had notified the appropriate medical practitioner of her suspension of the inmate's medication, this was only one of a number of alleged failings investigated by the defendant and which led eventually to her dismissal. The defendant's investigation concluded that Ms Faapito had not communicated this development in the inmate's treatment to the appropriate registered medical practitioner.

[35] However, on the evidence heard by me, I think it is more probable than not that Ms Faapito did so. She gave detailed evidence of the circumstances in which she spoke by telephone with a psychiatrist at the Mason Clinic who was responsible for the inmate's treatment in the absence of the prescribing doctor. Ms Faapito's account was corroborated by the evidence of others which was not impeached. The defendant did not call as a witness the medical practitioner concerned, possibly because the psychiatrist had provided a number of different and sometimes contradictory accounts of these events during the defendant's investigation and could probably be described as a (potentially) unreliable witness about these matters.

[36] Although the defendant concluded that Ms Faapito did not communicate, at least sufficiently, about the patient's medication situation to the doctor with responsibility for his treatment and I, like the Authority, have concluded that this was erroneous, that is not the end of the matter. That is because the defendant relied on a

number of professional failings by Ms Faapito of which the alleged absence of communication with the doctor was only one. Those other failings were either admitted by Ms Faapito or were established otherwise in evidence to a satisfactory standard, both for the employer during its inquiries, and in this proceeding.

[37] More significant than the fact of Ms Faapito telephoning the psychiatrist about A were the quality of the information she conveyed in that call and the other steps she took as a professional nurse in the absence of on-site psychiatric staff to deal with A's situation until the psychiatrist could have a consultation with him. Put another way, whether or not Ms Faapito spoke to the psychiatrist was not crucial to the proper and sufficient performance by her of her professional nursing and nurse management responsibilities.

[38] The defendant concluded that Ms Faapito's multiple failures to meet prescribed nursing standards amounted to misconduct by her in her senior nursing managerial role. The defendant did not, however, want to lose Ms Faapito's services and so proposed that the outcome should be a combination of demotion, supervision, retraining and, necessarily, relocation at another institution. It was this last proposal that was resisted particularly by Ms Faapito and ultimately led to her dismissal.

[39] The defendant's decision to demote the plaintiff, to place her under the supervision of an appropriately qualified and skilled senior nurse, and to retrain her, could not have taken place at Mt Eden Prison where she then worked. The defendant considered the possibilities of other prisons in the Auckland area but there was then none which could have accommodated those other rehabilitative requirements than the two prisons at Paremoremo known as Auckland East and Auckland West but which, at least in terms of nursing services, appear to operate as one institution.

[40] Ms Faapito resisted the defendant's proposed regime which would nevertheless have retained her employment, albeit on less beneficial terms and conditions, but contained the prospect of her eventual return to her previous role. Ms Faapito's adamant refusal to transfer to Paremoremo as the defendant proposed left the defendant with the unusual and difficult decision of what to do in these circumstances. The defendant concluded that he could not leave Ms Faapito at Mt

Eden Prison or achieve his other goals of her supervised rehabilitation at any other institution in the Auckland region so that, in the end, the defendant's decision was to dismiss Ms Faapito.

The Employment Relations Authority's determination

[41] Because the plaintiff has elected to challenge the Authority's determination by hearing de novo, its conclusions and the reasons for them are largely irrelevant. The plaintiff does not bear any onus of showing that the Authority's determination was wrong. In addition, it is possible, if not likely, that the parties have presented significantly different cases than those they put before the Authority for investigation.

[42] The Authority concluded that Ms Faapito's period of suspension from employment was not disadvantageous to her. However, it was critical of the Department for its failure to interview other nurses who could have provided relevant evidence favourable to Ms Faapito. Indeed at [59] of its determination the Authority went so far as to conclude:

> The nurse's evidence was the sort of evidence that Ms Gell should have accepted as exculpatory of Ms Faapito, because she made it clear to that nurse and other staff that she had withheld the medication and that the psychiatrist had been informed.

[43] A similar criticism was levelled by the Authority at the employer for its failure or refusal to interview other staff who could have confirmed that Ms Faapito did not attend an important meeting. Again, at [61] of its determination, the Authority went so far as to conclude:

> … these are fundamental failings which may well have led to a different conclusion as to whether or not Ms Faapito had informed the psychiatrist of her temporarily withholding the prisoner's medications.

[44] The Authority concluded that the employer had decided unjustifiably that Ms Faapito had not informed a psychiatrist of her discontinuation of A's medication and that this had not been discussed with the psychiatrist at the subsequent meeting. However, it accepted the employer's case that even in these circumstances, it had

sufficient grounds to dismiss Ms Faapito justifiably because of independent serious misconduct by her. These other failings included:

- the absence of a full clinical assessment of the prisoner (including a face to face meeting) by Ms Faapito;

- Ms Faapito's (admitted) failure to update the prisoner's medical records and to safely store the medication retrieved;

- Ms Faapito's failure to advise promptly other nursing staff in the correct manner that the prisoner's medication had been removed and where it had been stored;

- Ms Faapito's failure to put in place a follow up care plan for the inmate.

[45] The Authority concluded that these failures together were more than negligence and could not simply be categorised as performance concerns, whilst acknowledging that "a more lenient employer may have chosen to deal with the failings in a different way". The Authority concluded that these failings amounted to serious misconduct, particularly in Ms Faapito's role as the nursing Team Leader at the institution. Despite departmental investigators discovering more widespread and significant failures in the management of medication control and dispensation at Mt Eden Prison, the Authority concluded that Ms Faapito was more to blame than anyone else for her situation.

[46] As to whether what it considered was Ms Faapito's serious misconduct warranted the sanction of dismissal, the Authority noted that the employer offered her an ongoing role as a nurse which showed "… the degree to which it did not wish to overly punish Ms Faapito for these failings, and her undoubted abilities as a health worker in the Prison system." The Authority concluded that the employer was justified in deciding that it was impracticable for Ms Faapito to remain at Mt Eden Prison under new private management and that the only realistic solution was that offered, a transfer to the Auckland Prisons at Paremoremo. The Authority noted Ms

Faapito's refusal to agree to this solution. It concluded in these circumstances that the Department decided justifiably that it could not have trust and confidence in her as a team leader. It said that even if her failings had amounted to negligence, "the negligence was serious and ongoing over many days." It ended its determination:

> I therefore conclude, as did Corrections, that in all the circumstances, the decision to dismiss was what a fair and reasonable employer would have done at the time.

Nursing Council proceedings

[47] Since the Authority's determination was delivered, a Professional Conduct Committee of the Nursing Council of New Zealand has determined a complaint made to it by the defendant concerning the same events that led to Ms Faapito's dismissal. This complaint was made and dealt with under the Health Practitioners Competency Assurance Act 2003. The Committee determined that no charge of professional misconduct should go to the Health Practitioners Disciplinary Tribunal. The Committee was not satisfied that the plaintiff acted outside the scope of her practice as a registered nurse which would have formed the basis of a misconduct charge. The Committee did, however, find that the plaintiff had fallen short of the standards expected of a registered nurse in certain areas including patient assessment and documentation, but that these were issues of competence rather than professional misconduct. The Committee determined that no further disciplinary action should be taken against the plaintiff under the Health Practitioners Competency Assurance Act 2003 and recommended that she be referred for a competence review pursuant to s 80(2)(c) of that Act.

[48] The Nursing Council required Ms Faapito to undertake a professional competence programme under s 38(1) of the Health Practitioners Competence Assurance Act 2003. The Council required her to undertake 60 hours of professional development including supervision and practice to address the professional competence issues identified by the defendant in this case.

[49] This means that although Ms Faapito was not prosecuted for professional misconduct before the Health Practitioners Disciplinary Tribunal, her professional body nevertheless found serious professional practice competency concerns which it

required be rectified as a condition of Ms Faapito's continued professional practice as a nurse. That was an outcome which was consistent with, albeit independent of, the employer's decision and proposed corrective sanction in Ms Faapito's employment.

[50] The plaintiff does not contest those findings by the Committee and the Employment Relations Authority that she breached her responsibilities as a nurse. Rather, the plaintiff's case is that the Authority's categorisation of that breach as serious misconduct justifying dismissal, was wrong.

[51] For a number of reasons, the Committee's decision is not a relevant consideration in the Court's determination of justification for Ms Faapito's suspension and dismissal. The Committee was applying different statutory standards. Questions of justification in this case must be determined by reference to the circumstances at the time the decisions to suspend and dismiss were taken: the Committee's investigation took place not only after Ms Faapito's employment ended but indeed after the Employment Relations Authority's determination had been issued. Nevertheless, both the Committee and this Court were and are required to address the same issue of nursing practice, albeit in this judgment, as that affects employment as a nurse in a prison.

[52] The justification for Ms Faapito's suspension and (especially) dismissal must be assessed by employment law standards at the time of their occurrence. However, the additional information from the respective professional bodies does confirm my assessment of the seriousness of Ms Faapito's lapses which are relevant elements of deciding whether a fair and reasonable employer would have suspended and then dismissed her for electing not to address those errors reasonably and fairly.

Relevant procedures

[53] Because the Court is required to assess whether what the employer did was how a fair and reasonable employer would have acted in all the relevant circumstances, published procedures for dealing with allegations such as were made against Ms Faapito are an important part of that. Although employed as a nurse, Ms

Faapito was a member of the Corrections Association of New Zealand, a union comprised principally of corrections (prison) officers. She was, therefore, subject to the Department of Corrections Prison Services Collective Agreement 2008-2009. Relevant parts of that collective agreement include the following. At p18 (clauses are unhelpfully unnumbered) under the heading "Principles for disciplinary matters" the following "will be followed when dealing with disciplinary matters":

- Staff must be advised of their right to request CANZ assistance or representation at any stage.

- Staff must be advised of the specific matters(s) causing concern and a reasonable opportunity provided to state reasons or make explanation.

- Staff must be advised of the corrective nature required to amend their conduct and given a reasonable opportunity to do so.

- Before any substantive disciplinary action is taken an appropriate investigation is to be taken by a manager.

- Depending on the seriousness of the misconduct an oral warning should usually precede a written warning.

- The process and results of any disciplinary action are to be recorded in writing, sighted and signed by the staff member and placed on his/her personal file.

- If the offence is sufficiently serious the staff member may be suspended pending an investigation.

- If the staff member is aggrieved by any action taken by the Prison Service, he/she must be advised of his/her right to pursue a personal grievance in accordance with the appropriate procedure.

[54] All of these procedural requirements as were relevant were met by the defendant, more or less sufficiently. To the extent that they were not, however, any minor departure from the ideal did not result in unfairness or disadvantage to Ms Faapito such that her suspension or dismissal could, thereby, be categorised as unjustified.

Union assistance

[55] At all relevant times Ms Faapito had the assistance of union representatives. The evidence establishes that at times she made decisions in reliance upon their advice. Not insignificantly, at the final meeting before her dismissal and for reasons that are not entirely clear from the evidence, Ms Faapito was not present but had authorised her union representatives to make decisions for her in her absence.

[56] I regret to conclude that at times and on crucial issues during the process that led eventually to her dismissal, Ms Faapito did not appear to have been well advised. That may have been attributable to the fact that the union of which she was a member represented only a small number of prison nursing staff in comparison to a quite different occupational group, corrections officers. Nurses, as health professionals, have different and additional obligations that augment their employment terms and conditions which are probably best appreciated and advanced by those familiar with professional nursing standards and expectations. As the evidence establishes, nursing in prisons is very different from and, in many respects, more onerous than nursing in hospitals or private medical practices. More importantly for this case, it is also quite different to the role of a corrections officer, although undertaken in the same workplace.

[57] Although Ms Faapito must bear ultimate responsibility for decisions she made or delegated to others to make, I am left with the impression that the uncompromising nature of her participation in the investigation into serious concerns may not have best assisted her.

Plaintiff's case for unjustified disadvantage and unjustified dismissal

[58] Ms Faapito relies on what she says was the defendant's wrong conclusion that she did not call and advise the Mason Clinic psychiatrist of her decision to suspend A's medication. The plaintiff says that this conclusion, which was relied on by the defendant to dismiss her, was against the weight of evidence.

[59] The plaintiff's case is that when the weakness of this conclusion became apparent to the defendant, he moved to rely on grounds of inadequate performance by the plaintiff. She says that even if her relevant conduct amounted to serious misconduct, there were such significant mitigating factors about this (including her employer's own contribution to that serious misconduct) that no fair and reasonable employer would have suspended and subsequently dismissed her in these circumstances.

[60] The plaintiff says that the defendant's initial "fact-finding" investigation was flawed and reached an erroneous conclusion that permeated his subsequent employment investigation.

[61] The plaintiff categorises the allegation levelled at and found against her as "a single act of negligence". She says that, as such, established case law is that this will not normally justify dismissal unless there are exceptional circumstances. She relies on the judgment of the Labour Court in *FINSEC v AMP Fire and General Insurance Co (NZ) Ltd.*[3] In support of the proposition that, for a single act of negligence to justify dismissal, the omission or omissions by the employee must be "extreme in character" and/or has been accompanied by serious consequences or detriment to the employer, the plaintiff also invokes the judgment in *ORIX New Zealand Ltd v Gurney.*[4]

[62] However, even if these very broad propositions can still be said to be correct under the applicable legislative tests for justification, the flaw in this submission is that there was not a single act of negligence by Ms Faapito. Although her conduct

[3] [1990] 3 NZILR 103.
[4] [2005] ERNZ 165 at [39].

arose from a single incident and affected one patient, the identified shortcomings (negligence) were several and were failures to comply with a series of professional obligations. So this is not a "single act of negligence" case in the event.

[63] Next, counsel for Ms Faapito submitted that summary dismissal is only available for the most serious cases of misconduct and before an employer can dismiss for incompetence or unsatisfactory work performance, the employee's shortcomings must be identified, assistance with improvement given, measurable goals or targets set, and a reasonable time allowed in which to achieve these. In the absence of such steps, counsel submitted that the courts have held that no reasonable employer would conclude that the employee's performance or capability was sufficiently seriously poor to justify dismissal.

[64] This submission also misapplies the facts. The defendant's response to the conclusion of unsatisfactory work performance was not to dismiss but to address those shortcomings by a combination of the removal of Ms Faapito's supervisory or team leader responsibilities and a period of supervised and monitored retraining. It was only when the plaintiff refused to agree to such a regime in the only reasonable practicable manner that could be offered by the employer, that it concluded that dismissal was the only outcome available.

[65] Next, the plaintiff submits that the seriousness of the allegations against Ms Faapito were such that a high standard of proof commensurate with that seriousness was required but had not been met. Accepting that this was so in this case, it is nevertheless difficult for the plaintiff to maintain this argument in the face of her own admissions of the number of her failings and what was really incontrovertible evidence about others of them. The appropriately high standards of proof, commensurate with the seriousness of these allegations, were met at the end of the employer's investigation.

[66] Turning to the plaintiff's challenges to the employer's process, Ms McDonald submitted, first, that the employer's fact-finding review was fundamentally flawed because of the failure of the investigator to interview a number of relevant witnesses; because of an alleged failure to alert the plaintiff to the possibility of a disciplinary

investigation; and because of an insufficiency of evidence even to find a prima facie case that the plaintiff had not consulted with forensic services staff about the inmate's condition. The plaintiff says that these earlier erroneous conclusions permeated the defendant's subsequent investigations.

[67] This submission overlooks the fact that the psychiatrist's uncertain and inconsistent accounts of the same event caused the defendant, in the course of its investigation of Ms Faapito, to reach an interim conclusion that she should not be suspended because her account of these events was supported by the psychiatrist. So the plaintiff was, in effect, given the benefit of the doubt at that stage of the inquiry although, subsequently and after receipt of further information, that doubt was removed (or at least lessened) and the benefit with it.

[68] I turn next to the plaintiff's allegation of the defendant's failure to identify and interview relevant witnesses. The principal potential witness was Pauline Mahmud but, as I find elsewhere in this judgment, the defendant's reasonable attempts to obtain her account were frustrated by Ms Faapito's union representative who was also advising Ms Mahmud. The attempts to obtain her account were reasonable and, unfortunately for Ms Faapito, she cannot transfer the responsibility of that failure from her union to the employer.

[69] Next, the plaintiff says that the defendant did not consider, or at least adequately:

- relevant surrounding circumstances including her seven years of trouble-free service with the Department;
- the difficult working conditions in the Prison at the time;
- the Mason Clinic's delay in reviewing the inmate's condition;
- the psychiatrist's views about the level of seriousness of the inmate's medical circumstances;

- the fact that Ms Faapito had exercised a professional judgment in good faith that was neither wilful nor reckless conduct on her part; and

- the commonality of such failings in prison health clinics generally.

[70] In my conclusion, however, none of these relevant factors, whether independently or in combination, outweighed the admitted and proven breaches of nursing standards for which Ms Faapito was responsible. Her employment record was reflected in the Department's preparedness to maintain her employment, albeit in a demoted and supervised role at another institution initially. The difficult working conditions at the institution may have contributed in a minor way to the loss of the sequestered tablets but did not excuse or even ameliorate, at least sufficiently, Ms Faapito's other failings to cause her dismissal to have been unjustified. Any delay in reviewing the inmate's condition by the Mason Clinic would not have altered the fact or significance of Ms Faapito's negligence. It was for this that the defendant imposed sanctions rather than for the consequence to A of delayed treatment.

[71] Whilst the psychiatrist may have exhibited a level of laissez faire concern about the inmate's medical circumstances, that appears to be more a criticism of the psychiatrist rather than an element going to justification of Ms Faapito's conduct. There is no question that the plaintiff wilfully, in the sense of deliberately and knowingly, intended to harm A. Nor, as confirmed subsequently by the Nursing Council's independent assessment, did her conduct amount to recklessness. If it had been wilful or reckless, it is very likely that her summary dismissal would have been justified but that was not the employer's response to her negligence. Whilst Ms Faapito was expected to have exercised professional judgment in her dealings with A, she did so unprofessionally.

[72] Finally, in answer to Ms Faapito's argument that she was unfairly singled out for harsh sanction for widespread similar failings in other prison health centres, but for which other staff were not penalised, much of that information had not been revealed at the time of the plaintiff's dismissal and, in any event, supervised

retraining of the persons responsible would have been an appropriate response by the Department as it proposed in Ms Faapito's case.

[73] Nor, the plaintiff says, did the defendant consider, or at least adequately, the contribution of its own responsible employees to the situation that gave rise to Ms Faapito's dismissal. These factors included what was described as "a systemic failure in the management of medication" at the Mt Eden Prison Health Centre such that "legislative, departmental and professional requirements" were not met. The investigators noted this as "significant" and recommended to the defendant that there be an overall review of the management of medication to ensure that such standards were met. That was a fair and reasonable response by the defendant, but could not have accounted adequately for Ms Faapito's failures and could not reasonably have excused them.

[74] Next, the Department's audit (undertaken and published subsequently to Ms Faapito's dismissal) confirmed those conclusions about the Mt Eden Prison Health Centre but on a wider basis. The audit is also said to have identified failings in the particular areas for which Ms Faapito was criticised including documenting medications, consulting with patients about their treatment, preparing care plans, and recording follow-up actions. Again I conclude, however, that this discovery after the dismissal could not reasonably have affected it by causing it to have been unjustified.

[75] Turning to what were described as the "substantive" as opposed to the "procedural" justifications for Ms Faapito's dismissal, the following submissions were made on behalf of the plaintiff. First, she said that she acted at all times in good faith and that her errors were professional "judgment calls". The plaintiff says she acted within her authority as a team leader and that the issue affected how she made decisions and the process after doing so. Fundamentally, however, the plaintiff says that her decision to withhold the medication was one made within her authority to do so and for genuine reasons.

[76] I disagree that Ms Faapito's impugned professional actions were "professional judgment calls" in the sense that she made reasonable professional decisions from a range of possibilities, each of which may have been justifiable

clinically. Rather, most of her failures were with adherence to prescribed professional standards which did not allow her the option of a "judgment call". The fact of her team leadership role did not give Ms Faapito a broader discretion about whether she complied: indeed, as a professional leader of other nurses expected to comply, it is more likely that the expectation of standards' adherence was higher in her case. As already noted, there is no question that Ms Faapito acted deliberately, consciously, and for ulterior motives, but these are not constituents of negligence or even recklessness.

[77] Turning to the vexed question of the timing and content of a telephone call by the plaintiff to the Mason Clinic psychiatrist, the plaintiff's case criticises the defendant's on the basis that the latter's relies on three possible scenarios. These are, first, that the plaintiff did not contact the psychiatrist; second, that if there was a communication, it was not made in a timely fashion; and, in any event, no communication was made by the plaintiff before she decided to withdraw temporarily the inmate's medication so that she was acting without authority in doing so.

[78] These are said to be inconsistent theories and not in accord with the defendant's preliminary view set out in a letter to the plaintiff of 20 July 2009 which referred to her "failure to promptly advise the prescribing doctor". That, the plaintiff says, was the allegation but there was no requirement for Ms Faapito to do so before deciding to temporarily withhold the medication.

[79] Next, the plaintiff says that her failings were not so "extreme in character or degree" to make any misconduct "serious misconduct". That is because the plaintiff is said to have made the decision to temporarily withhold medication based on her knowledge and skill including knowledge of the inmate, of the medication in question, of the inmate's dosage, of the problem within prisons of "hoarding" prescribed medications (and Quietiapine in particular), the number of pills recovered, and, finally, their appearance which indicated that some at least may have been regurgitated.

[80] Ms McDonald submitted that the plaintiff's task in these circumstances was a difficult one and that she undertook this accordingly and weighed the respective risks. Her conclusion was that there was a greater risk to A if he continued to be supplied with the medication (which he was not taking) because of the possibility that he was being "stood over" by other inmates or was storing his tablets to consume them all at once. The plaintiff says that she took into account the inmate's low dosage of the medication and that the risk of harm to him by its temporary removal was likewise low.

[81] The plaintiff says, albeit perhaps wrongly with the benefit of hindsight, that she understood that the inmate would be reviewed promptly but that the Mason Clinic staff took at least three working days before seeing the inmate after the meeting on 16 March 2009 even if this was when forensic psychiatric staff first learned of these events. This is said to have indicated that the doctors involved did not consider the matter to be urgent or serious and was reinforced by the fact that a psychiatric nurse, rather than a registered medical practitioner, reviewed the inmate. Ms Faapito, through counsel, suggested that if she had decided to leave the medication regime in place pending medical review, she may have been criticised because the inmate would continue to have the opportunity to hoard his medication until such a review took place.

[82] These submissions do not account for Ms Faapito's failure to undertake a clinical assessment of the patient herself or to direct another nurse to do so upon the discovery of the hoarded medication being reported to her. Combined with this failure, Ms Faapito took such steps as she did based on stereotypical assumptions that, in the case of A, appear to have been erroneous as stereotypes can sometimes be.

[83] The plaintiff rejects the degree of responsibility that the defendant contends was hers to follow up her assessment of the inmate's position and ensure that he was reviewed. The plaintiff says that a significant part of that responsibility necessarily passed to the Mason Clinic once it was informed of the situation but that it did not do so promptly. In this regard, the plaintiff says that it was not on 16 March 2009 at the

HRAT meeting (as the defendant says) that Mason Clinic staff first became aware of the inmate's situation but, rather, when she rang the psychiatrist on 12 March 2009.

[84] Given the only intermittent presence of Mason Clinic psychiatrists in the Prison, I do not agree that responsibility for patient medication could be transferred so substantially by informal telephone advice as is the plaintiff's case. Proper electronic record keeping, which was accessible to Mason Clinic staff, was the responsibility of the prison nurses and, in this case, Ms Faapito.

[85] Next, the plaintiff says that while she did document her decisions and the reasons for them, the issue was, rather, one of the adequacy of those records. She says that she advised other Mt Eden Prison nurses and the Mason Clinic psychiatrist of the situation and that is recorded in what are known as MedTech notes. The plaintiff accepts that she should have made better records including one of a conversation with the psychiatrist, but the absence of a record of this does not mean, as the plaintiff says the defendant assumed, that she did not have this conversation.

[86] The plaintiff accepts that her documentation and follow-up were "less than optimal" but says that she had always been prepared to accept this responsibility and to work to improve her performance including under supervision as the Nursing Council later required.

[87] It is not insignificant that, at para 7.25 of the plaintiff's written final submissions, she accepted that: "There were practical alternatives to dismissal, including demotion, warning, training and/or supervision, or review by the Nursing Council". That is both so and the approach that the defendant elected to take. It was Ms Faapito's rejection of those sanctions and strategies at a particular location which required the defendant to consider what should be done in the circumstances and which led him to conclude that dismissal was appropriate.

[88] The plaintiff says that the size of the defendant's operations in Auckland means that "it is difficult to believe that if the Plaintiff could not remain in her current position that there was not another suitable position available". The evidence, however, established convincingly that the only realistic alternative was a

transfer to Paremoremo and I find that this was reasonable in all the circumstances. I do not accept that the defendant did not make genuine or adequate attempts to find an alternative position. Some were found but discounted because of their unsuitability for the necessary supervision of the plaintiff's rehabilitation.

[89] Turning finally to the defendant's suspension which was said to have been an unjustified disadvantage to her in employment, Ms Faapito relies on a letter of 7 April 2009 which, although it was never given to her, is said to have shown predetermination by the defendant before any discussion with the plaintiff. The "special leave" on which the plaintiff was placed is said to have been, in effect, a suspension and one to which the plaintiff did not agree but was compelled to take. The plaintiff says that there was insufficient seriousness in the circumstances at that time for her to be removed from the workplace under escort as she was. She says that there could have been no suggestion that she would interfere improperly with the defendant's investigation which was, in any event, largely complete by that time.

An unjustified suspension?

[90] Although the defendant acknowledges that Ms Faapito's employment was suspended before her dismissal and for which it claims justification, there is a preliminary question about whether what the defendant describes as its placement of Ms Faapito on "special leave" amounted to a suspension. Although that is one way in which the defendant categorised it, the essential question for decision is nevertheless whether the unilateral placement by the defendant of Ms Faapito on (paid) "special leave" on 7 April 2009 amounted to disadvantageous action in employment that was unjustifiable.

[91] When I raised with Ms Radich the contractual or other justification for so-called "special leave", counsel submitted that such arrangements had been considered by this Court in at least one previous case and found not to constitute unjustified disadvantage in employment. That judgment relied on by the defendant

is one of several dealing with the serial documented travails of a corrections officer, Mr Tawhiwhirangi.[5]

[92] The relevant collective agreement makes provision for what it describes as "special leave" but this is not what the defendant purported to do in respect of Ms Faapito in this case. The collective agreement's special leave contemplates a class of leave applied for by an employee that is not covered specifically in the collective agreement but which, nevertheless, the employer may exercise a discretion to allow. That is not the same as in this case where the employer placed Ms Faapito on paid "special leave" irrespective of her wishes and purportedly to enable her to attend to answering the allegations of misconduct made against her. That was, in reality, a suspension.

[93] Nor do I accept that such a practice of placing employees on "special leave" has been "sanctioned" by this Court as Ms Radich submitted by reference to the *Tawhiwhirangi* case.

[94] At [56]-[58] of the *Tawhiwhirangi* judgment, Judge Shaw recorded that the corrections officer in that case had been placed on special leave on pay and asked to make submissions about why he should not be suspended before he was suspended. The Judge was satisfied that Mr Tawhiwhirangi's suspension was done in accordance with departmental policy and on appropriate grounds. I read the Judge's decision as being an endorsement, on the particular facts of that case, of the fairness and reasonableness of suspending the corrections officer, which action included both his placement on special leave on pay and, after hearing from him about why he should not be suspended, his subsequent suspension.

[95] That is not to say, however, that this action in respect of Ms Faapito was unjustified: that will depend on the circumstances in which it was exercised. The so-called "special leave" was, however, a suspension by another name.

[96] On 7 April 2009 during the earliest stages of the investigation, Ms Faapito discovered a signed letter of the same date from her employer which advised her of

[5] *Chief Executive of the Department of Corrections v Tawhiwhirangi* [2007] ERNZ 610.

her suspension in employment. This letter was prepared and signed before the defendant purported to make inquiries including meeting with Ms Faapito on that day. That is said by her to be evidence of predetermination of the issue by the employer's representative. Although, as Ms Radich submitted, Ms Faapito was not suspended on that day as her employer's representative anticipated she might be, the letter is evidence of at least a propensity to pre-determination of issues during inquiries by the defendant. This should cause the Court to be very careful in assessing the defendant's assertions of conducting open-minded inquiries and rejecting Ms Faapito's allegations of bias and predetermination.

[97] The second contended failure was to interview one of Ms Faapito's colleagues, Pauline Mahmud, after having been asked to do so by the grievant. Although an employer should usually do so, in this case there were unusual difficulties in how Ms Mahmud agreed to be interviewed. Despite a number of proposals made by the employer to the union representatives who were acting for both Ms Faapito and Ms Mahmud, there was ultimately no reply from those union representatives and so Ms Mahmud was never interviewed. There was, however, a responsibility on those union representatives to be responsive and communicative and I consider that they failed to so act towards the employer. The defendant cannot be criticised now for failing to do what he tried reasonably to achieve but in which he was thwarted by Ms Faapito's representative. There was no procedural flaw in this regard such as to cause the dismissal to have been unjustified as contended by the plaintiff.

[98] In the particular circumstances, including in light of the defendant's preliminary fact-finding investigation, it was reasonable for the defendant to consider suspending Ms Faapito on pay. That the defendant did not do so immediately, when it appeared that the psychiatrist's account of events coincided with Ms Faapito's, indicates that Ms Gell was open-minded about whether the plaintiff was to be suspended. Although Ms Faapito found a letter advising her of her suspension, this was not given to her by Ms Gell and was prepared in advance to allow for the fact of suspension if it was decided upon, and to confirm this promptly in writing.

[99] The initial period of suspension was imposed to enable Ms Faapito to prepare a response to serious allegations against her. It provided her with additional paid time away from work to do so more comprehensively than if she had had to be at work as well.

[100] The employer both advised Ms Faapito of its intended course of action and considered her response before suspending her. The defendant had a proper concern about the dispensing of medications to inmates by Ms Faapito which was a fundamental element of her position which would have had to continue had she not been suspended.

[101] In these circumstances, I conclude that suspension (including the placement of the plaintiff on "special leave") was what a fair and reasonable employer would have done in the circumstances, and the way in which that was imposed and maintained was how a fair and reasonable employer would have done so. It follows that the plaintiff's suspension was not an unjustified disadvantagement of the plaintiff by the defendant.

Dismissal - procedural unfairness?

[102] The plaintiff has made wide-ranging and comprehensive challenges to the propriety and lawfulness of the manner of the defendant's investigations and decision making that led to her dismissal. It is therefore necessary to address these in determining whether Ms Faapito was dismissed justifiably. I have already expressed my conclusions about many of the plaintiff's submissions between [58] and [89].

[103] As the Court has said repeatedly and for a long time, it is overall substantial fairness and substantial reasonableness with which it should be concerned rather than minute and pedantic scrutiny of individual elements of a comprehensive process by which justification must be judged under s 103A of the Act. There may well be some minor elements of a lengthy and detailed process which, in isolation, might be said to have had flaws or elements of unfairness. The same conclusion cannot be reached, however, when overall fairness and reasonableness is assessed. There may

have been steps that, with the benefit of hindsight, the employer ought to have taken in its investigation process but did not. However, the checks and balances in this case of a dual investigative process, which involved the plaintiff and allowed her to have input into the employer's process, means that what may have been initial inadequacies ceased to be so by the time of final decision making. Initial procedural flaws can be rectified and negated by subsequent adherence to proper standards of fair and reasonable process.

[104] Two examples of this phenomenon, of the many procedural errors alleged by Ms Faapito, should suffice. It is indisputable that the Department's investigators did not interview another nurse who was present at the time of a telephone discussion between Ms Faapito and another nursing colleague, some of which was conveyed by that nursing colleague to the psychiatrist responsible for A's care. Although the nursing colleague was not initially interviewed by the Department's investigators, her account of this event was subsequently put before the departmental decision maker and taken into account.

[105] Second, the locum psychiatrist responsible for A's prescription medication was not interviewed at an early stage of the proceedings but was nevertheless spoken to by the defendant's decision makers before the dismissal took place. The psychiatrist was probably not a reliable witness in the sense that she gave both differing and vague accounts of the same events on different occasions. However, in the end, the Department's erroneous conclusion about whether Ms Faapito had advised the psychiatrist that she had withheld A's medication did not cause an otherwise justified dismissal to be so unfair that it should be categorised as unjustified. That was the Authority's conclusion and is mine too.

[106] The way in which the defendant concluded that Ms Faapito should be dismissed was how a fair and reasonable employer would have done so in all the circumstances at the time.

Unequal treatment?

[107] A significant part of Ms Faapito's case was her assertion that those faults of which she was guilty were so widespread within prison health centres staffed by nurses, that her dismissal was unfair and unjustified. In this regard she relied upon an audit document assessing the compliance by a number of prisons in the northern regions of New Zealand with relevant specified departmental health standards. The inference from those audits was that in many respects, including those for which Ms Faapito was censured personally, the performance of other staff was substantially inadequate.

[108] I accept that there appear to have been substandard medication dispensation practices at other prisons and I do not understand the defendant to contest that seriously. But Ms Faapito was not dismissed for doing or omitting to do something that was widespread in such institutions and for which others were not censured. Rather, the plaintiff's employment came to an end when she refused to accept a proposed way of dealing with her failings which would both have seen her employment continue and, upon proven improvement, probably have allowed her to return to her former position of responsibility and to progress in her nursing career in the prison service. It is no answer for the plaintiff to say, rhetorically and in effect: "Lots of others are doing it, so it is unfair to penalise me alone". The plaintiff's argument of disparately harsh treatment of her alone misses the point of the defendant's constructive response to her failings in spite of this having disadvantageous effects on her employment. Ms Faapito's treatment was not so unfairly disparate as to have caused her dismissal to have been unjustified.

Dismissal justification - decision

[109] Registered nurses employed in prisons have complicated and difficult professional and ethical obligations as compared to nurses working in other environments such as in hospitals, on industrial sites, and in the variety of other circumstances in which they practise their profession in the community. In prisons,

patients are also inmates who are detained compulsorily although, for the most part (including in this case), not treatable compulsorily.

[110] There are additional considerations that must be taken into account by prison nurses as are illustrated by this case. Patients who are also prison inmates may misuse or abuse medications, not only their own consumptions of them but their use in the prison environment where there may be extortion to obtain medicines or an incentive to accumulate and sell or trade these with other inmates. Nurses dispensing and making other decisions about medication need to be cognisant of the physical safety of other inmates and prison staff who are confined closely with inmate patients. There are patient behaviours in relation to medications and treatments that are probably unique and of which experienced nursing staff become aware. This leads to the necessity for a high standard of documented procedures affecting inmates' medications and strict adherence to documentary procedures.

[111] Nevertheless, registered nurses employed in prisons are expected to adhere to the practice and ethical standards of all registered nurses but many of which may be at least more difficult to attain in a prison environment and cannot therefore always be as rigidly applicable as they may be in more benign hospital environments.

[112] Ms Faapito's admitted failures were two. First, she admits to having directed a temporary cessation of A's medication pending a review of that by a registered medical practitioner, without consulting the patient or conducting an assessment of the patient's condition relative to that intervention. Second, Ms Faapito admits to having recorded insufficiently the cessation of the patient's medication and of her consultation with the relevant medical practitioner about that.

[113] The admitted breaches by her of both professional nursing obligations and those obligations as an employee nurse, together with other failures that it found caused the Department to conclude justifiably that there were serious competence issues which could not be ignored by it.

[114] The Department's proposal for dealing with these was initially to move Ms Faapito from her team leadership role to one as a supervised registered nurse which

would have both enabled the competence issues to be addressed under supervision and, in the long term, to have left the way open for a resumption by her of the Team Leader role. Dismissal was not the employer's first response to these justified conclusions.

[115] Ms Faapito did not oppose that outcome which would have amounted to a temporary demotion and supervised retraining per se. Rather, implementation of this solution could not take place because of her adamant refusal to transfer from Mt Eden Prison to Auckland Prison at Paremoremo. Although convinced in her own mind that the Department proposed this physical transfer both because it was surprised that she was agreeable to a demotion and because it expected that she would refuse to undertake the additional travel, there is no evidence to support objectively that belief by the plaintiff. A detailed account in evidence of the availability of a registered nursing position and, most importantly, a suitably qualified nursing supervisor, meant that the only option for implementing that solution was at Paremoremo. Other prisons in the Auckland area were not suitable options for a variety of appropriate reasons.

[116] Ms Faapito's objection was said by her to be the additional travelling distance and time between her home and her place of work. She claimed in evidence that "on a good day" travelling from her home in the suburb of Favona in South Auckland to Paremoremo Prison would take no less than one hour and, on a bad day, no less than two hours. These travelling times were said to be approximately twice those between Favona and Mt Eden.

[117] These fears were exaggerated. I treat the 'good day/bad day' descriptions as metaphorical and acknowledge that the days on which travel is undertaken, and more particularly the times at which it is, affect significantly the temporal and cost elements of the journey. The evidence shows both that Ms Faapito worked variable shifts at Mt Eden Prison, that is that she would not always be travelling at peak traffic times, but also that she would on occasions start earlier and finish late to meet the exigencies of the work. That would also have been the probable pattern of work at Paremoremo. She would not always, or even necessarily frequently, have been travelling at peak traffic times.

[118] The route from the suburb of Favona, adjacent to Otahuhu in South Auckland, and the Paremoremo Prisons' site is approximately 30 kilometres. This can be accomplished largely on a combination of motorways and open rural roads although I do not discount often substantial delays on Auckland's southern motorway and the Auckland Harbour Bridge. It is, nevertheless, difficult to accept that this journey in either direction could take two hours, at least more than very occasionally and in extraordinary traffic circumstances. I do not accept that, whether on average or on the vast majority of days, travel times for that journey would exceed between 45 and 60 minutes.

[119] For the sake of completeness I record that it was not suggested that public transport was a realistic alternative for Ms Faapito and I accept it would not have been. But Ms Faapito had her own vehicle and used this to travel to and from her home and Mt Eden Prison before her dismissal.

[120] Although involving significantly more travelling time than when she had been at Mt Eden Prison, when weighed against the consequences of the likely complete loss of employment, I consider Ms Faapito's implacable opposition to working at Paremoremo Prison was unreasonable in all the circumstances. Whether that stance was taken on advice or was Ms Faapito's alone, she must unfortunately bear the consequences of it.

[121] I note, also, that in the course of discussions with departmental representatives about the consequence of Ms Faapito's failings, her union representative proposed that she would resign from the Department if it undertook not to make a complaint of professional misconduct against her. The Department rejected that proposal, and properly and reasonably so in my view. It was bound by statute to report its concerns about Ms Faapito's professional performance of her work to the Nursing Council so that acceptance of this compromise suggested on behalf of Ms Faapito was not an option open to the Department.

[122] In finding that Ms Faapito's failures or errors constituted a lack of competence or performance failings, the Nursing Council required her to undertake a professional competence programme under s 38(1) of the Health Practitioners

Competence Assurance Act 2003. In addition to the competence programme, the Nursing Council required Ms Faapito to undertake 60 hours of professional development including supervision and practice to address the professional competence issues illustrated by the facts of this case. As already noted, although this is not a factor affecting the justification for the employer's actions in employment law, it affirms the reasonableness of its reaction to Ms Faapito's failures.

[123] In the circumstances of Ms Faapito's refusal to transfer to a position as an appropriately supervised registered nurse, the employer could be forgiven for asking himself rhetorically what else he could do, given his serious concerns about the plaintiff's performance of her work and the need to address these, if she was to remain in employment. Despite a consensus that in many respects Ms Faapito was a valued prison nurse in a branch of nursing in which recruitment and retention are difficult, a fair and reasonable employer in the circumstances of the parties would have had no alternative but to bring Ms Faapito's employment to an end as he did.

[124] This is an unusual case in the sense that, despite what may have appeared to have been a summary dismissal for serious misconduct, careful examination reveals that it cannot be categorised so narrowly. The statutory test is not whether dismissal for serious misconduct was justified: the words 'serious misconduct' do not appear in the statute. Although many cases of dismissal turn on whether there was or was not serious misconduct in employment, the statutory test is whether what the employer did (dismissal), and how the employer did it, were justifiable.

[125] Irrespective of whether the employer categorised Ms Faapito's omissions as misconduct or even serious misconduct, he concluded justifiably that there were multiple and serious omissions in her performance of her professional nursing duties. The important point, however, is that the employer determined that these omissions should be addressed by Ms Faapito and by her employer, and corrected for the future. There really can be no argument that this was a justified conclusion.

[126] So too was the employer's decision that Ms Faapito should be supervised for a period and for that purpose. In my conclusion, it cannot be said to be unreasonable

that the defendant determined that such professional supervision could only really take place in one prison in the Auckland area. Also reasonable were the defendant's conclusions that staff at other Auckland prison health centres were not in a position to provide Ms Faapito with appropriate professional supervision.

[127] In these circumstances, it was reasonable, fair and proper for the defendant to have offered Ms Faapito a transfer and demotion to enable her to be supervised as a registered nurse at the Auckland Prisons' health centre at Paremoremo. Although this would have involved additional travelling time and cost for Ms Faapito, and a reduction in her income by removal of her team leadership and on-call remuneration, it was nevertheless a practicable and reasonable outcome. If it had been accepted by her, it would probably have been temporary in the sense of allowing her to improve and re-establish her professional competencies and to return to a more conveniently located prison nursing position and, potentially, a resumption of her team leadership role.

[128] Ms Faapito's response to this proposal (conveyed through her union representatives but which she accepted was indeed hers) was to reject the employer's proposal and that, as an alternative, she be permitted to resign from her employment with the Department on the basis that no complaint would be made by it to the Nursing Council.

[129] The defendant's response to this uncompromising and legally dubious proposal was reasonable and indeed, in law, the defendant probably had no alternative. Having reached the conclusions he did, he was obliged to report these to Ms Faapito's professional body and so could not simply ignore them.

[130] The question for decision then becomes the fairness and reasonableness of what the employer did in these circumstances. It was fair and reasonable for the employer to reject Ms Faapito's conditional offer of resignation. It could not compel her to transfer to a demoted position at another institution. Equally, it could not fairly and reasonably expect to continue to employ her at Mt Eden Prison either in her unsupervised position as Team Leader or, in the circumstances, in a supervised role, even if that might have been able to be arranged. Given Ms Faapito's response

to the defendant's proposed course of action, he was really left with no viable alternative than to end her employment which was necessarily by dismissal.

Conclusion

[131] I agree with the Employment Relations Authority that, in the unusual circumstances of this case, the defendant dismissed Ms Faapito justifiably. Her challenge must be, and is, dismissed. Costs are reserved.

GL Colgan
Chief Judge

Judgment signed at 9.15 am on Wednesday 5 December 2012