

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 437/09
5087854

BETWEEN RAYMOND PATRICK
 WYNNE
 Applicant

AND THE ORDER OF ST JOHN
 MIDLAND REGIONAL
 TRUST BOARD
 Respondent

Member of Authority: Dzintra King

Representatives: Damian Chesterman and Karen Jones, Counsel for
 Applicant
 Mark Hammond, Counsel for Respondent

Investigation Meeting: 25 to 29 February 2008

Submissions Received 8 April 2008, 9 June 2008, 8 December 2008, 29 May
 2009, 28 August 2009, 1 September 2009 from
 Applicant

 16 May 2008, 19 December 2008, 3 June 2009, 21 July
 2009 from Respondent

Affidavit of Mr Nielsen: 24 August 2009

Determination: 7 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1) The applicant, Mr Patrick Wynne, says he has been unjustifiably dismissed and disadvantaged by the respondent, The Order of St John Midland Regional Trust Board ("St John"). The respondent is a charitable organisation and operates with about 80% volunteers and 20% paid staff.

- 2) Mr Wynne was an advanced paramedic who had worked for the respondent for 31 years.
- 3) In October 2006 he was suspended on pay from his position as Eastern Bay of Plenty Area Manager while a lengthy investigation was carried out. Between 9 October 2006 and 8 June 2007 the respondent and its regional counterpart underwent a nationwide restructuring during which the respondent's eight area manager positions, one of which was filled by Mr Wynne, were disestablished. He was dismissed on 8 June 2007.
- 4) The respondent says there has been no disadvantage and the dismissal was justified.

Allegations and Background

- 5) From 2 September 2006 to 4 October 2006 St John received ten complaints from six different complainants. The allegations were made by staff and volunteers from the Opotiki and Whakatane stations.
- 6) The allegations against Mr Wynne were serious. They included:
 - Sexual harassment;
 - Bullying, intimidation and threatening behaviour;
 - Unprofessional and unauthorised disclosure of sexual orientation;
 - Bringing personal matters into the workplace with detrimental effect upon other employees;
 - Misleading the respondent about his relationship with another staff member;
 - Attempting to discredit the integrity of other employees;
 - Inappropriate, uncaring and insensitive behaviour as a clinical leader, causing disharmony and resentment.
- 7) Part of the background to this matter is Mr Wynne's marriage breakup. His wife, Linda Wynne, also worked at St John. Mr Wynne had a subsequent relationship

with another staff member who also worked for the respondent – Ms Wendy Kendall - who changed her surname by deed poll to Wynne. In this decision, to avoid confusion, I refer to Linda Wynne as Ms Wynne and Wendy Wynne as Ms Kendall. Her husband, Mr Bill Kendall, was also a St John employee. Mr Wynne maintained that the allegations stemmed from polarised reactions to his personal situation and that this fact was not adequately taken into account by St John. Ms Wynne notified a personal grievance on 29 August 2006.

8) Ms Vanessa Woodcock was the newly appointed Senior Human Resources Advisor for the North Island when Ms Tamara Lomas first made contact with her at a conference. Ms Woodcock did not know her or Mr Wynne. Ms Woodcock subsequently received a number of additional complaints.

9) Ms Sandy Connelly complained about comments made by Mr Wynne at a staff meeting on 18 September and single crewing safety issues. Attached was a report on a fatality in the Waioweka Gorge in 2004 in which she alleged that Mr Wynne had been cold and insensitive. She also referred to a 30 November 2004 incident at Whakatane Hospital where she felt Mr Wynne had been critical of Ms Mackie in front of a patient's brother.

10) Ms Karol Newell complained about single crewing and safety issues.

11) Ms Shirley Mackie wrote to Ms Woodcock saying she had been referred to her regarding the circumstances surrounding her resignation on 25 April. She claimed her resignation was a result of abuse and bullying. A complaint was also received from Ms Barbara Aim.

12) Ms Woodcock explained that she could not investigate their complaints but that Mr Brent Nielsen, the Regional Operations Manager, could. The complainants asked her to pass their concerns on to Mr Nielsen.

13) On 25 September 2006 Ms Lomas, who was on stress leave, wrote regarding concerns she had with Mr Wynne. These included claims that he bullied and verbally attacked staff and was untruthful. She also had concerns regarding her health and safety and stated she had been told she was being "*fucking stupid*," "*overreacting*," that she did not have a choice and was to "*just get on with it*." She complained about Mr Wynne's inappropriate behaviour with another staff member, sometimes in front of his wife, and said the situation was very awkward. She also alleged that he had

touched her. Shortly after she started he slapped her on the backside. She claimed he tickled her while she was with Ms Wynne at their home and pushed her onto the bed and that while she was working at the Te Teko races he had tickled her in the ambulance. As a result of these incidents she felt intimidated and uncomfortable at work.

14) Ms Woodcock then received another complaint in a fax headed "Threatening behaviour" from Mr David Cawte, a friend of Ms Wynne's. He said that during a meeting at the bank, which Mr Wynne had attended wearing St John's uniform, he had been abusive towards Ms Wynne and when Mr Cawte had intervened Mr Wynne had said "*I know where you live and I know what car you drive.*" Mr Cawte perceived this as threatening. In the notification of her personal grievance Ms Wynne's solicitor had referred to this incident also but had asserted that the threats had been made against Ms Wynne. Much was made of this "inconsistency" by the applicant, who admitted making the remark but denied it was threatening. Mr Wynne knew to whom he had addressed the remark and in the context of the conversation it was clear that it had been addressed to Mr Cawte. The assertion in Ms Wynne's Statement of Problem was an error.

15) She contacted Mr Nielsen who read the complaints and discussed them with Ms Woodcock.

16) At this stage Mr Wynne was on leave. Ms Woodcock and Mr Nielsen determined that they would need to meet with Mr Wynne upon his return.

17) Much of the applicant's case related to a purported ulterior motivation for the making of those complaints and the failure by St John to take this into account when undertaking the disciplinary process and making the decision to dismiss. I am satisfied that there is a very simple explanation for the making of the complaints. It was the appointment of Ms Woodcock and the fact that she provided a new and sympathetic ear to people who had had concerns that had clearly been present for some period of time. The previous Human Resources person, Mr John Dewar, had been suspended for a lengthy period and staff had not had a person whom they trusted to deal with their complaints to go to. Even if complaints are motivated by vindictiveness that does not necessarily mean that the complaints have no substance and should be dismissed out of hand.

18) Mr Nielsen said two of the complaints struck him as being the most important and serious: these were the inappropriate touching of Ms Lomas by Mr Wynne and also the complaint by Mr Cawte. The concern was the implication of St John by the fact that Mr Wynne had worn the St John uniform when he behaved as alleged by Mr Cawte.

19) While there had been tensions between Ms Mackie and Mr Wynne over the years, he had never received complaints like this of such a serious nature.

20) Mr Nielsen said that given the serious nature of some of the complaints he considered that Mr Wynne should not remain in the workplace while they were being investigated. In reaching that decision he took into account the need to protect the complainants and others and to avoid any further incidents, if there was any substance to the complaints.

21) On 9 October 2006 he telephoned Mr Wynne to alert him to the need to meet to discuss matters of a serious nature and to advise him to have a support person present. Ms Woodcock and Mr Nielsen travelled to Whakatane to meet with Mr Wynne.

9 October 2006 Meeting - Suspension

22) Mr Wynne, accompanied by Mr Shane Clapperton, his support person, was presented with written complaints from six complainants and was told that an investigation would be initiated. Mr Wynne was not given the complaint from Ms Aim or some of the supporting documents supplied by Ms Mackie because Mr Nielsen and Ms Woodcock were unsure of their relevance and wanted to gather more information as to whether or not they warranted investigation. Mr Wynne was told that if the allegations of serious misconduct were founded then St John would need to consider a full range of options including dismissal.

23) At the meeting, which lasted about an hour, there was a discussion about concerns regarding Mr Wynne remaining in the workplace and what the arrangements for payment would be while Mr Wynne was suspended. After Mr Wynne and Mr Clapperton discussed matters during an adjournment Mr Wynne agreed it would be better if he did not remain in the workplace. Contrary to what is asserted in the Statement of Problem there was not an offer of leave on full pay at the meeting and then a later assertion on 19 October that Mr Wynne was suspended. Mr Wynne was

represented and given the opportunity to comment on the suspension before it took place; and he agreed to it.

Meetings with Staff

24) On 9 and 10 October 2006 Ms Woodcock and Mr Nielsen went to Opotiki where they met with Ms Connelly, Ms Lomas, Ms Mackie and Ms Wynne. While they were in Opotiki Ms Rose Foster, Mr Louis Robson, Ms Leighan Drummond and Mr C asked to meet with them. The approaches were made separately and not as a group.

25) Ms Connelly said staff were told by Mr Wynne that Mr Robson could drive with patients on board despite not having a full licence. She had had to get the Health and Safety Officer to intervene. Mr Wynne had put his hands on her while she was driving and on her shoulder when he used the radio. He had touched the front of her jacket, ostensibly to remove a thread. She said she was afraid of him.

26) Ms Foster complained about the comments at the staff meeting.

27) Mr Robson also spoke about the staff meeting and threats made regarding his practising under supervision. He said he had been told to drive when he did not have a full licence. He recalled an incident where Mr Wynne had put his hand on the buttocks of a female staff member in an ambulance.

28) Ms Drummond had felt threatened by comments that he controlled who got what work when.

29) Mr C referred to the staff meeting and also to an incident in the Waioweka Gorge where Mr Wynne had behaved in an insensitive manner. Mr Wynne had approached him at the accident scene and accused him of spreading rumours about Mr Wynne. Mr Wynne had later apologised for his actions.

30) Mr Chesterman submitted that the interviews were an information gathering exercise and were not designed to investigate or test the evidence. It is difficult to see what else they could have been at that stage. Mr Wynne had not had an opportunity to comment on the initial complaints he had been given and St John was receiving new information. St John had an obligation to put the information it had before Mr Wynne.

31) The people who had been met with were asked to review and confirm the contents of the notes that had been taken during the meetings. These were provided to Mr Wynne.

32) On 17 October Mr Kendall wrote complaining about Mr Wynne's use of the cell phone to text Ms Kendall and saying he placed partial blame on Mr Wynne for the breakup of his marriage. He said Mr Wynne had said Ms Wynne was mentally unstable and needed medication and that he talked to staff about the breakup of his marriage. He said letters from Ms Wynne's lawyer were shown around the station and shown to Mr Kendall. The matters were private and it was an unpleasant thing to do.

33) On 3 November Mr C wrote to Ms Woodcock setting out three incidents which he had not mentioned before. One related to a work dance on 9 April 2005 when Mr Wynne had pinched his buttocks as he walked past him. Mr C told him to "*bugger off.*" Later in the evening Mr Wynne danced behind him and placed his hands on his buttocks and started gyrating behind him, laughing. Mr C hit his hands away and Mr Wynne said "*I'm just having you on.*" Mr C said this incident had been witnessed by Ms Newell, who was his dance partner at the time; and that Ms Wynne had not looked very impressed.

34) In the first week of March 2005 Mr Lyle Brewster had started as relief officer. Mr C had not previously met him. Mr C said he was shocked to find that Mr Brewster had been told by Mr Wynne that Mr C was gay and had been told to watch out for him as Mr C liked his white boys.

35) The third incident related to an episode where Mr Wynne had been to assist him and Ms Newell. He sat between Mr C and Ms Newell and leaned against her. She shrugged him off and Mr Wynne then tried to do the same to Mr C and said to the patient "*Oh, it's ok, he wants to be my boyfriend.*"

10 November 2006 Meeting

36) On 9 November St John wrote saying the investigation was continuing and it was not yet a formal disciplinary.

37) By this stage Mr Wynne had instructed counsel – Mr Mark Beech and his junior, Ms Michelle Paddison. Mr Beech complained that the allegations were

unclear and not detailed. I accept that some of the complaints were diffuse and lacked specificity. However, during the hearing it was evident that Mr Wynne, Ms Paddision and Mr Beech all understood the allegations and had understood them at the time. A great deal of correspondence was generated regarding the purported lack of clarity. Unfortunately, much of this was obfuscatory, creating confusion regarding allegations, sub allegations and categories when fundamentally the allegations were clear. While I accept that the allegations may have changed over time in that some were dropped and some were clarified and added to during the course of a lengthy investigation and disciplinary process there was nothing sinister in that; nor was it difficult to comprehend what was being alleged.

38) At the time of this first post-suspension meeting the employer had not had a response from Mr Wynne and was unsure whether further investigation was needed or whether the matter should progress to a disciplinary phase. The purpose of the meeting was to give Mr Wynne an opportunity to provide comment and explanation. I agree with the respondent that this was not forthcoming. Mr Wynne either denied matters or blamed organisational factors. Mr Wynne was asked about his relationship with Ms Kendall and said they were flatmates.

39) After this meeting St John engaged legal counsel to review all the information to date.

40) On 15 November Mr Beech forwarded a copy of a table setting out the complaints and resulting issues.

41) On 8 December St John sent a letter which set out the allegations: inappropriate behaviour, bullying and intimidation, sexual harassment, threatening behaviour and inappropriate use of the cell phone. The names of the complainants were provided and preliminary views set out. St John asked for a meeting to enable Mr Wynne to respond.

42) The forming of preliminary views does not constitute predetermination. Placing the preliminary views before Mr Wynne gave him an opportunity to understand the employer's perspective and to be able to respond to it.

43) On 14 December Mr Wynne was asked to attend a disciplinary meeting.

22 December 2006 Meeting

44) This was attended by Mr Wynne, Mr Beech, Ms Paddison, Mr Nielsen and Ms Prue Dawson, counsel for St John.

45) St John made it clear that Mr Wynne's suitability to continue as a manager was at issue and that trust and confidence was also a concern. Looking at the meeting notes, St John made it clear what the issues of concern were and that it wanted to hear from Mr Wynne.

January 2007

46) Mr Nielsen spoke to Mr Brewster who confirmed that Mr Wynne had said that Mr C was the gay guy at Station X. He also spoke to Ms Wynne, who had been with Mr Wynne at the Kingsgate Hotel at the time of the alleged touching incident of Mr C by Mr Wynne. She did not recall it. Had Ms Wynne been part of a conspiracy or plot to discredit Mr Wynne it is highly unlikely that she would have stated she did not recall the incident.

47) Ms Wynne mentioned that when Mr Wynne had spoken to her and Mr Cawte at the bank he had said he just come from resuscitating a baby. Mr Nielsen followed up on this and found it to be incorrect. The applicant says this inquiry was irrelevant but it was not. If true, it may have provided mitigating circumstances for Mr Wynne's comments at the time; and it was also a factor going to credibility, which was an important issue.

48) Mr Nielsen spoke to Mr Kendall who confirmed that Mr Wynne had shown him a letter from his wife's lawyer which contained personal material. Mr Kendall felt this was unprofessional as Ms Wynne was still an employee. Mr Kendall said this had been shown to him and Ms Kendall on separate occasions in the workplace. Mr Kendall was able to provide detail about the contents of the letter. The applicant expressed concerns about St John taking statements made by Mr Kendall into account given his feelings regarding Mr Wynne's contribution to the breakup of his marriage. Mr Nielsen said he had considered that. Given Mr Kendall's knowledge of the contents of the letter (which does not appear to have been disputed) the employer could legitimately take this information into account.

49) Mr C was spoken to on 16 January and sent an email confirming the discussion on 25 January. He also explained why he had not raised the issues earlier saying there were privacy concerns. The applicant disputed that Mr C was a private

person. Reference was also made to the fact that the “white boys” comment was subsequently the subject of joking. A person may choose to reveal details of his or her private life (and clearly one’s sexuality falls within that category) to whomever he or she chooses. The matter of choice is the important element. The fact that people may have private jokes about personal matters does not mean that the comment, when initially made, was not offensive.

50) Ms Newell was spoken to by Mr Nielsen and she sent a confirming letter to Ms Dawson about her recollection of the dance matter. She had been Mr C’s partner and suddenly saw a strange look had come over his face. She had asked him what was wrong. He replied that Mr Wynne had just squeezed his bum. Mr C then had words with Mr Wynne. She could recollect what had been said. She also recalled the incident in the ambulance where Mr Wynne had sat between her and Mr C and when she had moved away had put his hand on Mr C’s knee.

51) The person who Mr Robson said he had seen Mr Wynne touch on the backside was interviewed but she did not recollect the incident.

52) In late January Ms Sandra Laing and Mr Lance Laing contacted Ms Woodcock and put their concerns into writing on 9 February. Ms Laing complained that Mr Wynne had involved her in discussions regarding his marriage breakup and had shown her a letter from his wife’s lawyer. Mr and Ms Laing said Mr Wynne and Ms Kendall had told them that Ms Pauline Fahey had suggested they move in together. The Laings doubted this as Ms Fahey had strong Christian beliefs. Ms Laing had discussed the matter up with Ms Fahey who had denied it. Mr Laing said that at a dinner with Mr Wynne had said he would not sign off Ms Kryszciewicz’s ATP and that Mr Laing would not get his until he signed him off. Mr Laing found this threatening.

53) Ms Dawson spoke to Ms Carolyn Gibbs and Ms Drummond and Ms Laing.

54) On 27 January she returned a phone call from Ms Fahey raising an issue about Mr Wynne lying. This related to the moving in matter raised by the Laings. On 31 January Mr Nielsen and Ms Dawson spoke to Ms Fahey and she provided a statement to the effect that she had raised the matter with Mr Wynne, who had denied it until Ms Fahey told him she had a text message. She had supported Mr Wynne, who had

brought his personal life into the workplace, but now had lost respect for and confidence in him.

55) Ms Gibbs provided information about her knowledge of the Waioweka Gorge incident referred to by Mr C.

56) Ms Drummond referred to the “chat” Mr Wynne had had with her during which he had said he controlled the work and who got it when and that she had felt threatened.

57) Ms Foster said that in early 2006 Mr Wynne had said to her and Ms Lomas “*how are all the girls at X? And how’s Mr C, he’s a girl too isn’t he?*” Ms Lomas had told her about the Te Teko race incident and that Mr Wynne had touched her on the backside prior to that. Mr Wynne had told Ms Lomas that three people would have trouble getting their National Certificates and he had named them. They included Ms Drummond and Mr Robson.

58) On 9 February 2007 Mr Wynne was sent additional documents and on 12 February 2007 a letter with a summary updating progress on the matter. St John said that the view had been formed that Mr Wynne had deliberately misled his employer during the investigation regarding his relationship with Ms Kendall.

14 February 2007 Meeting

59) In February 2007 having met with Mr Wynne for the second time post suspension and confirmed what allegations it was laying against him and what complaints it was not pursuing (the complaints of Ms Mackie, Ms Aim and Mr Robson in regard to the touching incident); and having heard his responses to some of the allegations, St John continued its inquiries into the 12 allegations set out in the 12 February letter.

Response to Allegations

60) On 2 April 2007, having received Mr Wynne’s written response on 15 March to the allegations, St John outlined in a 32 page letter the information it had considered and the views it had formed to date. The letter also contained an invitation to meet so Mr Wynne could provide an explanation in person regarding his conduct,

the complaints, voice his concerns and provide any other information he wanted to place before St John.

Further Meetings April and May

61) There were three further meetings: 17 April, 30 April and 10 May. During these the parties endeavoured to work through all the information outlined in the 2 April 2007 letter and Mr Wynn's responses so St John would be able to determine whether or not any of the allegations had been sustained.

Further consideration

62) Before reaching conclusions on 22 May 2007 regarding the allegations, Mr Neilson further questioned Ms Drummond, Mr Kendall, Ms Linda Wynne, Mr Laing, Mr C and Mr Robson and in each instance put that information before Mr Wynne in the letter of 22 May with the proposed sanctions it was considering. They were put to him for comment before finalising and implementing the decisions and sanctions.

63) On 8 June 2007 St John summarily dismissed Mr Wynne after having completed an inquiry into 12 allegations of misconduct and serious misconduct. The 12 allegations involved 20 sub-allegations/complaints. Of these 20, 16 were upheld resulting in 10 allegations being upheld. Of those 16 upheld sub-allegations/complaints.

64) Five, each on their own, disclosed serious misconduct justifying summary dismissal (plus 1 sub-allegation/complaint disclosing misconduct that in conjunction with two others justified dismissal). These were:

- Ms Drummond's unofficial chat and the threat re National Certificate;
- Mr C and the dance incident in April 2005;
- The tickling of Ms A in the ambulance;
- Three incidents looked at together: bringing his personal life into the workplace with detrimental effects, discrediting Ms Wynne and causing staff to view him as untrustworthy;
- The misleading of St John regarding his relationship with Ms Kendall.

65) Three incidents disclosed misconduct or serious misconduct justifying a final warning:

- The comments made to Mr Brewster in March 2005 regarding Mr C's sexual orientation;
- Remark about Mr C wanting to be Mr Wynne's boyfriend;
- Discrediting colleagues' personal lives.

66) Five incidents disclosed misconduct justifying a warning:

- Episode in the Waioeka Gorge on 4 August 2006;
- The incident at the bank with Mr Cawte;
- Remarks at the staff meeting in September;
- Comments to Mr Robson regarding attaining the National Certificate;
- Inappropriate use of the cell phone.

67) One allegation disclosed misconduct justifying demotion: Mr Wynne's insensitivity to staff and creation of disharmony.

68) The reasoning behind the decisions and the evidence substantiating them is set out clearly in the respondent's 22 May 2007 and 15 June letters.

Justification

69) Section 103A Employment Relations Act 2000 provides that there is a need to consider whether the actions were justifiable because they were what a fair and reasonable employer would have done in all the circumstances at the relevant time.

70) In *Chief Executive of Unitec Institute of Technology v. Henderson* (2007) 8 NZELC 98,793, the Court said at para [56]:

Section 103A requires the Court to consider both elements to standards of fairness and reasonableness although I do not understand parliament to have altered the long-established case law that fairness and reasonableness must be assessed broadly and not by the application of inflexible principles by minute and pedantic

scrutiny. Put another way, even if in some instances over a long process, the employer might be found to have failed to meet all ideal standards of a fair and reasonable employer, this will not necessarily mean that the resultant dismissal that may itself have been justified, will thereby be declared to have been unjustified and that remedies should be awarded accordingly.

Procedural Deficits

- 71) The procedural problems asserted by the applicant are that the respondent:
- (i) Did not specify its allegations until 12 February 2007;
 - (ii) Did not disclose all the information relevant to the allegations;
 - (iii) Did not conduct a full and fair investigation;
 - (iv) Was biased and had pre-determined its decision to suspend and then uphold allegations against the applicant;
 - (v) Delegated significant areas of the investigation decision making process.

Specifying allegations

72) Mr Wynne understood the complaints in front of him. He was clear about them when I questioned him during the hearing. He was able to discern what concerns the employer had about his conduct. He also understood the allegations that had been made against him after 12 February because he answered those allegations between February and May 2007.

73) St John revealed its preliminary conclusion, thoughts and all of its contentions to Mr Wynne as it was required to do. In *X v. Auckland District Health Board* [2007] ERNZ 66 the Court said that:

... longstanding requirements of fair dealing require significant conclusions, including tentative ones, to be articulated to the employee.

Failure to disclose all the information relevant to the allegations

74) The information upon which St John relied in making its decisions was put to Mr Wynne. Some documents relating to Ms Mackie's complaint were not provided

nor was the Ms Aim material. As these complaints was not taken into account in making the decisions no detriment was suffered by Mr Wynne.

75) Mr Wynne knew by 12 February 2007 that Ms Aim's and Ms Mackie's complaints had fallen away. He knew in January 2007 that the touching complaint made by Mr Robson had not been corroborated. This was confirmed by St John on 14 February 2007.

Failure to conduct a full and fair investigation

76) In making the decisions it did on 22 May 2007 (set out in the letter of the same date) St John had satisfactorily tested the information provided by Mr Brewster, Mr C, Ms Foster, Ms Gibbs, Mr Robson, Ms Drummond, Ms A, Mr Laing, Ms Connelly, Ms Wynne, Mr Cawte, Ms Laing, Ms Fahey, Ms Newell and Mr Kendall.

77) St John was entitled to conclude that the majority of the conduct complained of had occurred in the way described despite the fact that there were some differences in some of the information. St John believed on balance what the complainants and witnesses had told it over what Mr Wynne had said and that credibility finding was fair and reasonable in all the circumstances.

Bias and pre-determination

78) Mr Nielsen had no reason to suspend Mr Wynne other than the seriousness of the complaints before him on 9 October. Mr Neilson had no reason to dismiss Mr Wynne, an advanced paramedic of 31 years service with a previously sound employment record with whom he had enjoyed a good working relationship, other than the allegations of misconduct and serious misconduct he had upheld on 22 May 2007 that had caused him to reach the view that he could not do other than dismiss Mr Wynne.

79) Mr Wynne's individual employment agreement provided for suspension where there were reasonable and probable grounds for the employer to believe that the employee had committed an act of serious misconduct or the employer had a reasonably held belief that the employee would disrupt any investigation into alleged misconduct.

80) St John made the decisions it did on 22 May and 8 June only on the basis of the information that had been provided to Mr Wynne.

81) There was no bias or predetermination either in the decision to suspend or in the any of the decisions regarding disciplinary actions and dismissal.

82) Any procedural defects that there might have been were minor and not such that they had a detrimental effect upon Mr Wynne

Substantive Justification

83) The respondent says that the decision to dismiss was substantively wrong because:

- There was no clear evidence of the allegations upon the respondent could safely rely;
- The evidence of the complainants and witnesses was embellished or inconsistent and motivated by other reasons;
- The evidence was not as strong as the allegations were grave;
- Historical allegations were relied upon;
- Reasonable inquiries were not carried out;
- The decision making was pre-determined and biased;
- The respondent wrongly blamed performance issues as misconduct;
- The respondent did not act in good faith;
- The allegations did not meet the appropriate legal tests;
- The respondent should not have applied the sanction of dismissal.

84) Some of these allegations overlap and are repetitive. There was clear evidence that entitled the employer to conclude that Mr Wynne had:

- (a) Divulged Mr C's sexual orientation to Mr Brewster.

- (b) Raised personal matters and accused Mr C of gossiping at a fatal accident scene in the Waioweka Gorge on 4 August 2006.
- (c) Made an inappropriate and offensive comment at the staff meeting on 18 September 2006;
- (d) Told Mr Robson that he could not practise after he had gained his National Certificate in GGN until he said so;
- (e) Threatened Leighan Drummond regarding her job and not gaining the National Certificate when he had an unofficial chat with her about gossiping;
- (f) Threatened Mr Cawte in the Whakatane ASB while in St John uniform;
- (g) Sexually harassed Mr C on 9 April 2005 at the Hamilton Kingsgate;
- (h) Sexually harassed Mr C when he leaned into his personal space and told the patient in the ambulance that Mr C to be his boyfriend;
- (i) Sexually harassed Ms Lomas at the Te Teko races on 5 September 2006. Ms Foster confirmed that she had been told about this incident by Ms A. Mr Wynne complained that St John declined to investigate further by talking to other people who had been at the races. As the incident took place within the ambulance it is difficult to see what interviewing other people could have achieved.
- (j) Used a cell phone inappropriately while he had sent text messages driving an ambulance during a Priority 1 event;
- (k) Brought his personal life into the work place with detrimental effect. While I understand that it can be difficult to draw a clear boundary between work and personal life, especially when there is a small community, many employees and volunteers found Mr Wynne's references to his personal affairs unpleasant and distressing.
- (l) Been insensitive to his colleagues in his position as clinical supervisor and manager.

85) With regard to the conclusion that Mr Wynne misled St John about his personal relationship with Ms Kendall, I find the evidence regarding this was sufficiently ambiguous to render this finding unsafe.

86) I do not agree that the evidence of the complainants and witnesses was embellished or inconsistent or motivated by other reasons or that reasonable enquiries were not carried out. While some of allegations were “historical” in the sense that they had taken place in the past, that fact in itself does not mean that the allegations could not be true or that they did not warrant investigation or disciplinary action. Complaints regarding inappropriate sexual behaviour, for example, are often not made at the time the behaviour occurs. Some may not be made for years.

87) Mr Beech’s evidence that Mr C was not challenged regarding whether he had misinterpreted the alleged harassment does not make sense. Mr Wynne denied carrying out the actions Mr C said constituted harassment so it is difficult to understand how any issue regarding misinterpretation could have raised. Furthermore, the issue regarding sexual harassment is how the action is perceived by the person being harassed. This was unwelcome and offensive physical and verbal behaviour of a sexual nature.

88) There can be no doubt that behaviour of the sort complained of by Mr C and Ms Lomas constituted sexual behaviour which cannot have had other than a detrimental effect upon job satisfaction. It was repeated behaviour and it was unwanted behaviour. To suggest that the tickling of Ms Lomas was “horseplay” is unacceptable. Mr Wynne was Ms Lomas’ superior officer; he touched her in the midriff and he touched her on the backside.

89) I do not accept the assertion that the efforts of St John were focused on finding evidence to support the complainants. Where people who were asked for information could not substantiate allegations or did not recall incidents the issue was not proceeded with.

90) There is no substance to the assertion that St John did not act in good faith.

91) Whether or not Mr Wynne had actually used his position to prevent staff becoming qualified is not the issue; the issue is that he threatened to do so.

92) Mr Wynne was given the opportunity to comment on the proposed sanction of dismissal.

93) Fair and reasonable consideration was given by the employer regarding the issues of who made the complaints and the physical locations from which they emanated.

94) Over the course of the inquiry the applicant was represented and Mr Wynne and St John met seven times post-suspension. Over the course of the inquiry and before it made the decision to dismiss St John wrote three comprehensive letters setting out the information between the parties at the time of the letter and explaining its position and concerns regarding all the allegations, including those that had fallen away.

95) St John considered all the complaints, provided further information when it came to light and extended deadlines so that Mr Wynne was not prejudiced or disadvantaged in replying to the allegations.

96) Mr Wynne claimed there was a “complaint culture” at Opotiki. Such labelling fails to address the fundamental issues. That a number of complaints may have emanated from Opotiki does not per se mean that the complaints are unjustified.

97) Performance issues were not wrongly treated as misconduct and the correct legal tests were applied.

Delegation of Decision Making

98) Mr Nielsen made the decision to discuss suspension. No aspect of this decision or the information on which it was based was delegated. Mr Wynne consented.

99) The company’s Disciplinary Policy provides at HR 8.3 that:

To ensure consistency, and in the interest of all parties, Human Resources must be contacted for advice and guidance prior to any disciplinary action being taken by the manager.

100) The Policy also provides that Human Resources must be consulted before the Investigating Manager reaches a decision on the action to taken.

101) Ms Woodcock provided a sounding board for Mr Nielsen and carried out interviews for him as did Ms Dawson. Mr Nielsen was, however, the person who made the decision.

Restructuring

102) Mr Wynne was given an equal opportunity to apply for vacant positions during the phase to restructure. He was not selected because he was not the most qualified and experienced candidate in either instance. Mr Wynne applied for only two vacant positions before his dismissal. I accept that had he applied for other vacant positions before his dismissal the applications would have been considered; and that had he not been dismissed for serious misconduct, he would have been re-deployed.

103) Mr Wynne was properly consulted and not misled.

Consideration of Material from Linda Wynne Personal Grievance

104) The Employment Relations Authority determined Ms Wynne's personal grievance on 25 November 2008. Mr Wynne applied to have the Statement of Problem and Statement in Reply and the evidence released to him for consideration in the matter of his personal grievance. On 16 April 2009 the Authority allowed the release of the documents.

105) I considered an application by Mr Wynne that I take those documents into account when making my determination; and determined on 15 July 2009 that I would do so. I gave Ms Woodcock and Mr Nielsen the opportunity to provide affidavits regarding the evidence. Mr Nielsen did so. I subsequently received submissions regarding the additional evidence.

106) The concerns expressed related to questions that had been asked of them during the hearing of Mr Wynne's personal grievance regarding their knowledge of Ms Wynne's and Ms Lomas' personal grievances. The issue was whether their responses would have an effect upon my assessment of their credibility and whether such an assessment could or would affect the outcome of my determination regarding Mr Wynne's personal grievance.

107) Mr Chesterman contended that the respondent's two key witnesses may have misled the Authority when providing sworn evidence during the hearing. He maintained the evidence demonstrated that the respondent's approach to and decisions about the allegations made by Ms Wynne and Ms Lomas against Mr Wynne were inconsistent when the conclusions it reached regarding Ms Wynne's and Ms Lomas' claims.

108) Both witnesses were questioned regarding their knowledge of the claims made by Ms Wynne and Ms Lomas and St John's legal position regarding those claims. Both claims related to the behaviour of Mr Wynne.

109) Both Mr Nielsen and Ms Woodcock said they had little recollection and could not recall whether St John had defended the claims and that it had been a long time since the grievances had been raised. However, in the same week that this evidence was given they signed briefs of evidence which were used in Ms Wynne's personal grievance.

110) There is a conflict regarding the knowledge asserted by Ms Woodcock and Mr Nielsen regarding Ms Wynne's personal grievance but I do not see any conflict in the assessment St John made regarding Ms Wynne's claims and the findings made regarding Mr Wynne's behaviour.

111) Mr Nielsen explained in his affidavit that St John accepted that Ms Lomas had been sexually harassed by Mr Wynne but did not accept that she had been sexually harassed by St John; and St John believed that her grievance was statute barred.

112) With regard to Ms Wynne's personal grievance St John did not uphold Ms Wynne's complaints regarding Mr Wynne but did uphold the complaint by Mr Cawte regarding the threatening behaviour of Mr Wynne in the bank. St John also believed that Ms Wynne had not raised her grievance within the 90 day period. The concerns about Mr Wynne showing private letters did not emanate from Ms Wynne but from other staff.

113) The additional evidence does not, in my assessment, render the conclusions reached by St John regarding the complaints made by Ms Wynne and Ms Lomas about Mr Wynne untenable.

114) St John conducted a fair process and reached conclusions that it was reasonable for it to reach in the circumstances. It was able to conclude that Mr Wynne had acted in a manner that constituted serious misconduct. The sexual harassment findings alone would clearly fall within that category.

115) St John did consider whether dismissal was the appropriate penalty and took all relevant considerations into account in making that assessment.

116) Mr Wynne was justifiably dismissed and did not suffer an unjustified disadvantage. He does not have a personal grievance.

Name Suppression

117) The name of the complainant referred to as Mr C is permanently suppressed.

Costs

118) Costs were reserved. If the parties are unable to resolve the issue of costs, the respondent should file a memorandum within 42 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority