

ATTENTION IS DRAWN TO THE  
ORDER PROHIBITING PUBLICATION  
OF CERTAIN INFORMATION REFERRED  
TO AT PARAGRAPH 2 IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 295/10  
5276178

BETWEEN

LAINE FAAPITO  
Applicant

AND

CHIEF EXECUTIVE OF THE  
DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority: G J Wood

Representatives: Mark Lawlor and Adam Weal for the Applicant  
David Traylor for the Respondent

Investigation Meeting: 11 and 12 May 2010

Submissions Received: By 3 June 2010

Determination: 23 June 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Ms Laine Faapito, claims that her suspension and subsequent dismissal for serious misconduct (allegedly for breaching her duty of care to a prisoner after deciding to temporarily withhold his medication, including failing to inform a medical practitioner of her decision and otherwise improperly assessing him, together with ensuing documentation failures) were unjustified. The respondent (the Department/Corrections) refutes each and every claim, and claims that even if Ms Faapito did contact a medical professional her dismissal was justifiable for all the other reasons it relied on.

[2] I have ordered the prohibition from publication of the name (or any details that may lead to the identification of the name) of the prisoner whose treatment is under scrutiny in this case.

[3] The issues for determination are:

- Was Ms Faapito unjustifiably suspended?
- Would a fair and reasonable employer have concluded that Ms Faapito did not promptly contact a medical practitioner about withholding the prisoner's medication?
- If not, would a fair and reasonable employer have still concluded that Ms Faapito had committed serious misconduct?
- If there was serious misconduct, would a fair and reasonable employer have dismissed Ms Faapito?
- If not, what remedies should be awarded to Ms Faapito?

### **The Facts**

[4] Ms Faapito had been employed as Team Leader, Health at Mt Eden Prison since 2003. As such, she was responsible for the day-to-day co-ordination and management of health centre staff, and ensuring the provision of quality health services to prisoners. One of her key responsibilities was to ensure that all incidents were recorded and appropriately managed in a timely manner, using departmental processes, and that any necessary follow-up action was undertaken. Her *person specification* required her to have advanced knowledge and expertise in nursing, and to be a registered nurse with at least three years relevant post-registration experience.

[5] There were a number of tensions between Ms Faapito and Corrections' management over the course of her employment. Many of these were associated with the rebuilding of the prison, which impacted significantly on nursing staff, due to them having to work in less than ideal conditions. There were also consequent issues over whether staff were appropriately valued by Corrections, and over Ms Faapito's standards of dress. These tensions are not mentioned any further, however, as I am satisfied that these matters, which never led to any disciplinary investigations, were not related to Ms Faapito's later dismissal.

[6] Ms Faapito reported, during the relevant period, through the Health Centre Manager, to Ms Debbie Gell, Acting Regional Health Services Manager, Northern Region Public Prisons.

[7] The issue that led to Ms Faapito's dismissal related to her treatment of a prisoner described as Prisoner A. Prisoner A's medical notes provide the basis for Corrections' concerns about her treatment of him. The notes state the following, in date order. An entry by a nurse on 11 March reads:

*Prisoner has been found saving his ? Quetiapine Fumarete 25mg x 4 (? spitted as enteric coating been dissolved) from cell search by Unit Co/Officer.*

[8] The next two relevant extracts are from 12 March, where first Ms Faapito states:

*Medication temporarily stopped by medical T/L [Team Leader] as appears medication is being used as a trade or being stood over. Has a week supply.  
For review by James next visit to prison to ? recommence or stop meds.*

[9] The following was from a nurse, stating:

*Medication collected and shown to T/L to stop giving [Patient A] his Quetiapine and she will show to doctor from Mason Clinic who charted same.*

[10] The next is from an outside psychiatric nurse, from the Mason clinic (Nurse J), dated 19 March, stating:

*Seen in medical unit today.  
Is angry that his medication was being stopped. He adamantly denied keeping it for swapping with other prisoners. He informed me that he has kept it because the morning dose is wrong. He wants the medication and states that he is now not sleeping. Remains anxious and distressed about other prisoners attacking him. He continues to eat intermittently. Believes he has lost about 10kg. Mood is 5, he is anxious and effect restricted but congruent. Denies any hallucinations, delusions or TOSH [thoughts of self harm]. No formal thought disorder elicited, but thought content contained fear of being pursued and attacked by other prisoners. Risk to others would appear to be low to others, but due to previous DSH [deliberate self harm] would be low-moderate for himself...  
Plan:  
Needs to be restarted on his medication.  
For review by psychiatrist within one week, nursing follow up within two weeks.*

[11] Later that day there was another entry from a nurse stating:

*Advised by nurse [J] to start his seroquel Nocte [night] dose only as prisoner has been having difficulty sleeping. Discussed with [psychiatrist] (as per notes – 12/3/09 to be r/ved by DR, and she is happy to start him on his nocte dose. Wanted him to have syrup instead of tabs but will r/v him on Monday and make changes then. No blister for him at present – must have been discarded. Have faxed to Mason Clinic, for Dr [psychiatrist] to do a script for him. Will get a dose of 50mg Seroquel as per Dr [psychiatrist]'s instruction today.*

[12] Ms Faapito then entered into the journal:

*Fax script received this afternoon for new blister as requested by psych team attachment placed in medical chart until charted by psych service on Monday.*

*PP discussion with [J] (Mason). A request to recommence quetiapine at nocte to be faxed through today for confirmation on medication chart.*

*A week's supply of nocte supply for 7/7 available for use as has been put aside until reviewed by psychs.*

[13] Nurse J also subsequently stated on that date:

*As per discussion with Laine this morning. Quetiapine to be restarted at 50mg nocte. Will review Monday 23rd by [the psychiatrist] as [Prisoner A] unhappy with morning dose. While Corrections and medical remain concerned about hoarding I have recommended that they crush medication. Faxed script through to pharmacy for 5 days worth. Also discussion with Health Manager about process of returning [Prisoner A] back to ACRP [Auckland Central Remand Prison] where he was more stable and can be seen and monitored more regularly in SNU.*

[14] The notes indicate that the psychiatrist saw Prisoner A on 23 March. The notes state, amongst other things:

*He stated that he has had ongoing problems with poor sleep. This has improved dramatically since his quetiapine was recommenced late last week. Feeling better in his mood as a result. Long discussion re his history of substance abuse. He was aware that this was a problem for him. Willing to look at options for drug rehab. Keen to d/w the FPT social worker re options. He described affective instability in the community setting and difficulties in his interpersonal relationships. He was aware that his drug use impacted adversely on this.*

*Still has problems re nightmare of incident of assault in prison in September last year. Nightmares decreased on quetiapine. No flash backs and no problems with perceptual abnormality. Mood somewhat low. Is concerned re assault from others on the unit. Is in segs as a result. He is gang affiliated which impacts adversely on his safety from others in the prison setting.*

*However, no idea or intent re self-harm or suicide. Has cut self in the past to relieve distress. Feels responsible re his three children. Wants to be a better father for them.*

*D/w [Prisoner A] reports of him storing up meds. He stated that he had not liked taking the mane doses in the morning so had saved them to take later in the day when feeling anxious. He denied trading them. Aware that meds will need to be stopped if hoarding continued. He has agreed to refuse the meds if he does not want them.*

*Impression*

*22 year old Maori youth with a history of mild depression and poly substance abuse complicated by antisocial personality traits. Background of trauma in childhood and poor academic achievement secondary to conduct disordered behaviour and substance abuse. Note that he reportedly stopped Fluoxetine last year after taking this for three years. Assault in prison followed this. Caution re recurrence of depression.*

*Current risk to self and others relatively low. Note however that at baseline he likely has a moderate risk of harm to self and to others secondary to personality and coping style.*

*Plan:*

- 1. Continue quetiapine 50mg nocte. If hoards this again then will need to consider stopping it. As d/w nursing staff recommend that tablets be crushed or quartered.*
- 2. Review by FPT nurse within next two weeks.*
- 3. Contact mother for collateral info.*
- 4. FPT s/w to review re drug rehab options available.*

[15] The issues formally came to Corrections' attention when Nurse J complained, soon afterwards, to the Health Centre manager, that Ms Faapito may have discontinued Prisoner A's medicine without consultation. The medical administration signing sheets also showed that the medication was withheld for several days.

[16] Ms Gell was concerned about this and instructed a clinical quality assurance adviser to conduct a fact-finding review. The collective agreement provides certain principles for disciplinary matters, which include that before any substantive disciplinary action is taken an appropriate investigation (known widely as a fact-finding review) is to be undertaken by a manager, and that if an offence is sufficiently serious the staff member may be suspended pending an investigation.

[17] The fact-finding review was undertaken through telephone interviews with Nurse J and Ms Faapito, together with an assessment of the relevant documentation. The findings of the review state:

*On 11 March 2009 a supply of medication was found in the cell of [Prisoner A] following a cell search by custody. It was thought to be a week's supply of Quetiapine 25mg tabs. Quetiapine is prescribed for the treatment of acute and chronic psychosis including schizophrenia and manic episodes associated with bipolar disorder*

*and it is not normally a medication which should be stopped suddenly.*

*The Team Leader was informed the following day and on her advice the anti-psychotic medication for [Prisoner A] was discontinued from 12 March until the evening of 20 March 2009. The basis for stopping his medication was that approximately one week's (? morning only) supply was located in a prisoner's cell upon a cell search by custody.*

*Nurses at Mt Eden do not stop prisoners' medication other than the Team Leader.*

*The medication was removed from the drug room by the Team Leader so the nurses could not administer it. According to the Team Leader staff were informed that the medication was not to be given however the drug signing sheet was signed for on the mornings of 17, 18 and 19 March. It is unclear where this medication had come from.*

*The weekly HRAT team meeting was held on 16 March. At this meeting the issue of Patient A's medication was discussed.*

...

### ***Conclusions***

*Anti-psychotic medication was stopped on advice from the Team Leader without consultation with forensic staff. The Team Leader had removed the medication so that it could not continue to be given. Despite this [Prisoner A] received three morning doses although it is unclear where this medication was obtained from. Medication was recommenced nine days later after receipt of a new script from a psychiatric consultant.*

[18] On 7 April Ms Faapito was placed on special leave on pay until 9 April, to allow her to prepare submissions about her actions and whether or not she should be suspended. Ms Faapito met with Ms Gell on 9 April. During that meeting Ms Faapito stated that she had informed the psychiatrist of her decision to discontinue the medication, although she was unclear when she had done so. Ms Gell left the meeting to talk to the fact-finder and the psychiatrist. The psychiatrist acknowledged that Ms Faapito had contacted her, however she could not remember off-hand what day that was. The fact-finder stated that Ms Faapito had not mentioned that contact to her, but on the other hand it appears that she did not ask her any direct questions about this.

[19] Ms Gell accepted that Ms Faapito's account was supported by the psychiatrist and therefore determined that suspension was not warranted, although an employment investigation would still be required. Ms Gell then provided for an outside clinical

quality assurance adviser and a health centre manager to conduct the employment investigation. In essence, the investigation was to be about whether Ms Faapito had failed to follow the processes expected of a registered nurse in the position of team leader when discontinuing medication to a prisoner.

[20] The investigators held personal interviews with a number of registered nurses and other relevant people, with the exception of some of the nurses. Of relevance in Ms Faapito's interview of 21 April is that she said she did not have a discussion with the prisoner about stopping his medication. She also stated that she could not remember whether she had been at the HRAT team meeting on 16 March (which Nurse J claimed was the first time staff from the Mason clinic became aware Prisoner A's medication had been discontinued), but that she probably would have been present. She did say that she did discuss the medication with the psychiatrist, but that she did not know whether it was on or before the HRAT meeting. She informed the investigators that the blister pack was put in a drawer in the pharmacy and that, similarly, the medication chart was taken away. She also accepted that she did not provide any of her communications to her team in writing, but rather orally, and that the same applied to her conversation with the psychiatrist.

[21] During that interview Ms Faapito later recalled discussing with Patient A, on a morning pill round, his denial of hoarding the pills and that he still wanted them at night. Ms Faapito also noted that subsequently Prisoner A had appeared under the influence of illicit drugs.

[22] On a site visit, the investigators noted that the medical unit was in disarray, that staff were in the process of shifting for the fourth time, and that the dispensary was small in size and cluttered. In discussions with Ms Faapito, she was reminded that she had not made a formal appointment for Patient A to be seen by staff from the Mason clinic.

[23] A nurse on temporary transfer recommended to the investigators that the system at Mt Eden be audited, for reasons such as someone else packing medications for dispensing, staff not signing medication sheets at the time and not having *photo musters* to ensure that the right prisoners were treated.

[24] In her interview, the psychiatrist was recorded as stating that as far as she could recall, it was at the HRAT meeting that she first found out about the stopping of

Prisoner A's medication, although she could not be 100% sure, and did not often take notes of telephone conversations. She was further recorded as stating that she did not recall the telephone call and that the stopping of the medication was *news* to her at the HRAT meeting.

[25] When Ms Gell was told of the psychiatrist's alleged statements to the investigators, Ms Faapito was written to, stating:

*The Department considers this new information to be serious. If this allegation is substantiated there is potential risk to the health and safety of others and could represent a breach of the Department's code of conduct, Second Principle; "Performance of Duties" which states that:*

*"You should carry out your duties in an efficient and competent manner in compliance with the policies and prescribed operating standards and procedures of the Department".*

[26] She was therefore placed on special leave to prepare submissions about her possible suspension. A meeting then took place on 27 May 2009. At the meeting, Ms Faapito submitted that the information received was not new and that the psychiatrist was not that uncertain as to when she had received a call from her.

[27] Ms Gell decided that suspension was appropriate, because there were concerns about whether or not Ms Faapito had met the basic standard of informing an appropriate health professional that she had discontinued medication. She therefore escorted Ms Faapito off the premises for the period of the investigation.

[28] The investigators' report concluded that Ms Faapito had failed to undertake basic and fundamental nursing interventions, which meant that she did not follow aspects of the framework which nurses must apply to their practice. The report found:

*Specifically, the nursing interventions she failed to undertake were:*

- *Failure to gather relevant information of events prior to making a decision to stop the prescribed medication*
- *Failure to discuss and consult the proposed actions with Prisoner 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 on the medication administration signing sheet*
- *Failure to appropriately record and store the medication retrieved from the prisoner's cell*
- *Failure to document in the electronic clinical record to meet the required standards*

[29] These failures were said to breach the Health Services Manual's key accountabilities for a team leader; New Zealand Nursing Council competencies for registered nurses; the Practitioners Competence Assurance Act 2003; the Medicines Act 1981 and the Medicines Regulations 1984; and the Health and Disability Code of Rights.

[30] In conclusion, the report stated:

*9.1 The required standard of practice for a Registered Nurse in relation to the management of medication was not met. This potentially placed [Prisoner A] at risk.*

*9.2 The key areas of practice that have not been met have been noted and discussed in the findings. However, one other key area not discussed is how Laine Faapito met or did not meet the Nursing Council of New Zealand Code of Conduct for Nurses. We (the investigators) believe that this is a matter for the Nursing Council of New Zealand and our recommendations reflect this.*

*9.3 Evidence submitted and gathered leads the investigators to conclude that the alleged action did occur.*

*9.4 Laine Faapito acted without:*

- *discussion with a prescribing Doctor;*
- *consultation with the prisoner;*
- *clinical assessment of the risks involved;*
- *consideration of the potential for the prisoner to decompensate without medication;*
- *adequately documenting clinical decision making;*

- *communication to an adequate standard expected from a registered nurse with all involved parties;*
- *knowledge of nursing competencies required for her practice.*

[31] Amongst the recommendations were ones that required the decision-maker to note that, whether in the employment of the Department or elsewhere:

- *that Laine Faapito is referred to the Nursing Council of New Zealand for a competency review of her nursing practice;*
- *That Laine Faapito practice under supervision as a Registered Nurse until the competency review by the New Zealand Nursing Council is completed.*

[32] It was also recommended *that the management of medication at Mt Eden Health Centre be reviewed to meet all legislative departmental and professional requirements.*

[33] Ms Faapito responded to the report, both in writing and at meetings with Ms Gell. In particular, she noted that:

- a. she had seen the prisoner soon after stopping his medication and he had not indicated disagreement with that;
- b. he had a history of not complying with medication requirements;
- c. that it was well known that quetiapine was hoarded by prisoners as it could be used to come off a high created by the drug P;
- d. the Mason Clinic did not review Patient A urgently - indeed at least three days after Nurse J became aware of the situation, and therefore the matter was not urgent;
- e. the prisoner chose to hoard his medication rather than return it, and that prisoners do not admit to breaking rules;
- f. she was not present at the HRAT meeting of 16 March and therefore the psychiatrist must have known about it from her phone call to her earlier; and
- g. she had been on call 24 hours a day, 7 days a week for six years and that the recent appointment of a Health Centre manager would assist.

[34] Ms Faapito also strongly recommended that another nurse be interviewed, because she could provide relevant information. The relevant information was that Ms Faapito had told her and other nurses, on the day, that Patient A's medication had been temporarily withheld.

[35] Ms Faapito also stated:

- a. *It is fair to say that this investigation has clearly outlined that I failed to document correctly and adequately under Nursing Council standards.*
- b. *I take full responsibility for not providing adequate information both electronically on Medtech 32 and [Prisoner A] manual documents and have failed to explain my actions clearly on a legal document for other people to follow.*

[36] It was claimed at a meeting on 10 June, by Ms Faapito's union, CANZ, that the investigation should be stopped in favour of an operational review of systems at the Mt Eden Health Centre. This request was declined by Ms Gell. Ms Faapito also recalled making the call from the old health team leader's office to the psychiatrist's cell phone, via the operator. Despite a request to end it, her suspension was continued.

[37] On 12 June, the psychiatrist wrote to Ms Gell stating that she was not comfortable to sign the transcript of her earlier interview, because before the interview she had not had time to review her file notes, and the investigators had declined to postpone the meeting as she had requested. She also noted that she had told the investigators that because of work pressures her recall of events that she believed were relatively minor, such as a phone call about stopping medication, would have been adversely affected. She concluded by stating:

*...nobody has actually told me whether or not the nurse involved has claimed to have phoned me (or [another psychiatrist]) prior to the HRAT meeting on 16 March 2009 re the stopping of the patient's medication. If this nurse has stated that she did phone me, then I would accept this unreservedly. I had thought that this was what I had indicated to you when you contacted me urgently by phone a few weeks ago, which is why I thought the issue had been resolved.*

[38] At a meeting on 16 June an email was provided from a nurse friend of Ms Faapito, who recalled overhearing a call from Ms Faapito to the psychiatrist on 11 or 12 March. She wrote that at the end of the call the psychiatrist said that there were problems with the hoarding of quetiapine and she therefore made a file note to cover the issue off with her staff.

[39] Telephone records were provided by Corrections that purportedly showed that there were no calls made between Mt Eden Prison and the psychiatrist's cell phone on the date in question.

[40] Ms Gell then met with the psychiatrist again, at which time she could not remember the phone call, but could not put her hand on her heart and say it did not happen. The first time she could recall hearing about the medication issue was on 16 March, but she did not want her poor memory to cause difficulty for someone and that she would not have gone to see the patient immediately anyway.

[41] Ms Faapito then raised a personal grievance about the investigation and the suspension continuing. A further meeting was held on 7 July. Ms Faapito was again told there were no telephone records that could support her claim that she had called Dr Bevan on 12 March. The only new issue raised was another request for the other nurses to be interviewed. The nurse who recalled the telephone call between Ms Faapito and the psychiatrist was interviewed.

[42] Ms Gell intended to meet the other nurse, but she wanted to speak with Ms Gell in person. Ms Gell responded to CANZ that it was difficult to meet face-to-face as she was not in Auckland, but suggested a telephone conference. The nurse wanted to wait until a face to face meeting could take place in Auckland, for reasons of her accent. Ms Gell responded by suggesting a video conference, but CANZ did not respond in the three weeks before the decision to dismiss was taken.

[43] Despite being requested again to abandon the investigation, on 20 July Ms Gell formally accepted the finding of the investigation report. She stated:

*The failures set out in the report, in my view, breach the Department's health services policy and procedures, the Nursing Council competencies for registered nurses, and legal requirements relating to health professionals. As such I have formed the view that these breaches constitute serious misconduct as outlined in the Department's code of conduct. ...*

*Having decided that these failures constitute serious misconduct I must now decide on an appropriate disciplinary outcome.*

*As your employer it is important that I have the trust and confidence in you to perform your duties honestly, faithfully and efficiently and in compliance with legislation and the operating standards and procedures of our service. These failures have seriously compromised the employment relationship and my trust and confidence in you as the Team Leader and has led me to conclude*

*that you are not suitable to remain in the employment of the Department.*

*However, this is a preliminary view and I would like to you offer you the opportunity to come and talk to me about why the termination of your employment may not be an appropriate outcome.*

[44] At that meeting, Ms Faapito did not attend, but her union representatives did, with full authority to represent her. Ms Gell put forward an option for Ms Faapito to work as a registered nurse at another site, Auckland Prison, with support from an experienced manager. She did not wish Ms Faapito to go back to Mt Eden to work amongst staff she had once supervised. CANZ suggested resignation and the withdrawal of any reporting to the Nursing Council. Ms Gell quite rightly stated that that was not possible. The union response to Ms Gell's suggestion, also quite reasonably, was that it was too far for Ms Faapito to commute to Auckland Prison, which is in the northern part of Auckland, as she lived in South Auckland. The union's position on the finding of serious misconduct was, simply put, that this was a one-off case of poor documentation, but not serious misconduct, and that Ms Faapito could continue as team leader under supervision.

[45] On 6 August, Ms Gell wrote to Ms Faapito terminating her employment for serious misconduct. The reasons given to the Authority for Ms Gell's decision were that:

- Ms Faapito had made the decision to temporarily withhold Prisoner A's medication without any clinical assessment and without visiting the prisoner (as there was no documentation to support an assessment) and that any meeting with the prisoner was later and of minimal depth;
- she had not looked into his medical history;
- she did not call the psychiatrist;
- she did not deal with the withheld medication properly, by failing to update the medication chart and the medication administration signing sheet, and not recording and safely storing the medication;
- she provided no clear direction to other nurses regarding Prisoner A, as his medication had been signed for on subsequent days, it had been withheld for a long period and it was not adequately documented; and

- she had not put in place a follow up care plan as required, because there was no documentation of such and this appeared to be accepted by Ms Faapito.

[46] On the basis of these conclusions, Ms Gell decided to dismiss Ms Faapito, because her standards fell well below the minimum standards for a registered nurse, yet she was required to be a role model and act autonomously as a team leader. She also noted the significant risk involved in removing the medication, which was prescribed to assist Prisoner A cope with his anxieties.

[47] Ms Faapito filed promptly for reinstatement, although not interim reinstatement. She has had some agency nursing work subsequently, but still wishes to be reinstated to her position as Team Leader at the Mt Eden Prison Health Centre.

[48] The parties attended mediation and have made numerous subsequent attempts to resolve the matters between them, which unfortunately have all been unsuccessful. It therefore it falls to the Authority to make a determination.

[49] At the investigation meeting, in addition to Ms Faapito and Ms Gell, evidence of particular relevance was given by:

- the nurse who was never interviewed by Corrections, who stated that Ms Faapito had told her and others the next day about the withholding of Prisoner A's medication and her call to the psychiatrist;
- the nurse friend of Ms Faapito, who spoke of the conversation she overheard between the psychiatrist and Ms Faapito;
- Ms Faapito's union representative; and
- Ms Gigi Lim, a senior lecturer at the School of Nursing, who gave evidence that it was a logical and reasonable decision to discontinue Prisoner A's medication; that Ms Faapito met her professional obligations in terms of documentation and consultation; that she was under no professional obligation to review Prisoner A, as that was a matter for the psychiatrist and that there were not enough checks and balances in place at Mt Eden Prison to prevent situations like that happening.

**The Law**

[50] The Department's policy on suspensions was approved by the Employment Court in *Chief Executive of the Department of Corrections v. Tawhiwhirangi* [2007] ERNZ 610 at 721.

[51] As is made clear in *Air New Zealand v. V* (unreported, Full Court, AC15/09, 3 June 2009), the Authority must determine the question of justification on an objective basis and in all the circumstances at the relevant time. The Authority is required to judge the actions of the employer against the objective standard of what a fair and reasonable employer, in the circumstances of the actual employment, would have decided, and how those decisions would have been made. This encompasses not just the employer's inquiry and the decision about whether misconduct has occurred and its seriousness, but also an inquiry into the employer's ultimate decision, i.e. dismissal, in the light of that finding.

[52] Where allegations of misconduct are particularly serious, then the evidence in support of such allegations must be as convincing in its nature as the charge is grave (*Honda NZ Ltd v. NZ (with exception) Shipwrights etc Union* [1990] 3 NZILR 23 (CA)).

[53] In *Health Waikato Ltd v. Tebbutt* [2003] 2 ERNZ 3098, it was held that whether there was a case of serious misconduct had to be assessed in the light of the type of employment that was being scrutinised which, in that case, also involved a nurse, as to whether or not her behaviour was of a nature and degree that it went beyond matters of performance and could reasonably have been regarded as a matter of serious misconduct. In *Tebbutt*, the Nursing Council had already determined that the proven particulars cumulatively amounted to professional misconduct in that the conduct was negligent. She was therefore ordered by the Council to practise under clinical supervision for three months. Those findings were able to be taken into account by the Employment Court in determining that serious misconduct had occurred. In this case, however, for reasons of its own, the Nursing Council has decided to defer its involvement until after the Authority has concluded its investigation. That does not, however, assist the Authority in its objective assessment of the employer's and Ms Faapito's actions, given that the Authority has no particular expertise in nursing standards.

[54] Similarly, as was held in *Orix New Zealand Ltd v. Gurney* [2005] ERNZ 165, where negligence is involved, the omission or omissions must have been extreme in character and/or been accompanied by serious consequences or detriment to the employer to justify dismissal for serious misconduct.

[55] In *Chief Executive of the Department of Inland Revenue v. Buchanan and Symes (No 2)* [2005] ERNZ 767, the Court of Appeal held that what was necessary in the test for serious misconduct was to evaluate whether a fair and reasonable employer would characterise the offending conduct as deeply impairing or destructive of the basic confidence and trust essential to the employment relationship, thus justifying dismissal. It was held at 777:

*We do not agree with the Chief Judge that a failure to establish wilfulness creates a presumption that the conduct is not serious misconduct. What must be evaluated is the nature of the obligations placed on the employee by the employment contract, the nature of the breach that has occurred and the circumstances of the breach.*

[56] *Zendel Consumer Products Ltd v. Henderson* [1992] 2 ERNZ 377 provides that where an employer dismisses for a number of reasons and some of those reasons cannot be sustained, dismissal can only be justified where there is sufficient evidence that the employer would have dismissed the worker for the independent grounds justifying summary dismissal.

### **Discussion and findings**

[57] Given previous acceptance of Corrections' policy on suspension, I conclude there was no disadvantage to Ms Faapito, even although the suspension did continue for a long period of time.

[58] Ms Gell is legally trained and therefore must be taken to understand that the more serious an accusation the more convincing the proof should be. In this case, the most serious accusation against Ms Faapito was failing to inform a medical practitioner that she had ceased a patient's medication, albeit temporarily. This allegation is extremely serious and Ms Gell should have done more to interview the nurses on duty as to what Ms Faapito told them about withholding the medication. In particular, I accept the nurse's evidence that because of her accent she did not want to speak with Ms Gell over the telephone. Corrections had other options to get her account, which it somehow neglected to pursue - including getting a written statement

from her, or having another Auckland-based representative interview her in person. Neither of these would have been particularly inconvenient, even although I accept that Ms Gell must have been genuinely confused at the union's involvement and failure to respond to her suggestion of a video conference. The responsibility, however, for the conduct of an investigation must lie with Corrections. As the Employment Court made clear in *Lewis v. Howick College Board of Trustees* [2010] NZEMPC 4 ARC82/08, 19 January 2010, it is an important part of a fair inquiry that all relevant witnesses should be interviewed. In that case it was found to be not sufficient that the investigator may not have identified particular staff:

*The obligation rested with the principal and the Board to do so themselves in the event of a dispute which clearly existed.*

[59] 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.

[60] Similarly, Ms Gell did not pursue, with anyone other than the two professionals from the Mason Clinic, whether or not Ms Faapito actually attended the HRAT meeting on 16 March. There were several Corrections employees who also attended the meeting, but who were never questioned by the Department. Again, these were Corrections' own employees who could reasonably have been interviewed, had Corrections chosen to do so.

[61] Together, 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.

[62] In any event, I conclude that, there was evidence given to her to support Ms Faapito's claims, even although Ms Gell stated that there was no positive evidence to prove that she did make the call. While she could not find any records of such a phone call, Nurse J believed that she had only mentioned it at the HRAT meeting, and the psychiatrist was equivocal at best, the evidence in support was that of Ms Faapito herself, her nursing friend and many of the comments of the psychiatrist, who made it very clear that should there be a conflict of evidence between her and Ms Faapito, Ms Faapito's recollections should prevail.

[63] Given the seriousness of the allegations, I conclude that a fair and reasonable employer would have given Ms Faapito the benefit of the doubt on the allegation of failing to inform the medical professional of her temporarily withholding the prisoner's medication.

[64] That does not dispose of the case, however, because Ms Gell was adamant that even if her decision on that issue was wrong, she would still have dismissed Ms Faapito for her other discovered failings. If dismissal was an appropriate outcome for such failings, if proven, then Corrections may still be able to justify the dismissal.

[65] Ms Gell concluded, and I agree, that Ms Faapito decided to temporarily withhold Prisoner A's medication without any full clinical assessment of him and without visiting him. While Ms Lim considered that it was acceptable for Ms Faapito to make such a judgment without any meeting with the prisoner or assessment of his file, based on Ms Faapito's past experience, I can not accept that as acceptable nursing practice. Withholding a prisoner's medication without medical clearance, even on a temporary basis, is a very serious decision. A team leader nurse should only do so in accordance with standard nursing practice.

[66] The Health Services Manual, Medicines Policies and Procedures 6, provides that the prisoner's current condition and care plan must be considered in such circumstances, and the Healthcare Pathway policy provides for clinical assessments that are appropriate to the clinical presentation, to be provided in a timely manner and to promote prisoners' active involvement in the health assessment process, and requires the obtaining of all relevant information about a prisoner to facilitate health assessments. Under the New Zealand Nursing Council competencies for registered nursing, competency 2.4 provides that a nurse must ensure that a client has adequate explanation of the effects, consequences and alternatives of proposed treatment options. The indicator of this is said to be that the nurse seeks clarification from relevant members of the health care team regarding the individual's request to change or refuse treatment. Clause 4.2 of the Health and Disability Code of Rights provides that every consumer has the right to have services provided that comply with legal, professional, ethical and/or other relevant standards.

[67] Here Prisoner A was not involved in the decision, although he may have been informed a bit later, which of course he would have known anyway, because he was not getting the treatment. It follows that by not involving Prisoner A in the decision

to withhold his medication, and without checking his file, Ms Faapito made an important decision about his treatment without sufficient information. Although, in hindsight, it was a safe decision and probably for the best, the fact remains that such important decisions should not be made in such an ad hoc, arbitrary manner. I accept that this was a serious failing on Ms Faapito's part, as did Corrections. There was always the potential, given Prisoner A's troubled medical history, that there could have been severe medical consequences, for which Corrections could have been held at fault.

[68] I also accept, as does Ms Faapito, that she failed to update the medical chart, failed to record what had happened on the medical administration sheet and failed to record and safely store the medication retrieved. The Health Services Manual, Health Information Policy and Procedure, s.14, documentation, provides that documentation must be sufficient to ensure that assessment and/or intervention is accurately and adequately described, that the rationale for any intervention is adequately and accurately described and that anyone else reading the entry is able to gain a clear understanding of any intervention, to ensure ongoing care can be given. Even Ms Faapito accepted that she had failed to adequately document her actions on the system. These records are vital for the proper care and treatment of a patient. I therefore reject Ms Lim's evidence that the documentation was adequate for professional purposes.

[69] The Nursing Council's competency 2.3 provides that a competent nurse will ensure documentation is accurate, indicated by maintenance of clear, concise, timely, accurate and current client records within a legal and ethical framework. Clearly there was also no documentation that supported a clinical assessment of all the risks involved being undertaken, although I do accept that Ms Faapito did this, albeit in an ad hoc and arbitrary manner. Had something happened to Ms Faapito for instance, given the inadequate documentation, there may have been real problems for Corrections in working out what had happened with Prisoner A, because of the failure to properly document what actions had been taken by her. For all the reasons given above, I again conclude, as did Corrections, that this was a serious failing on Ms Faapito's part.

[70] I also accept that Ms Faapito failed to promptly advise the other nursing staff in the correct manner that the medication had been removed and where it had been

stored. While I accept that Ms Faapito did inform some nurses who were on duty that day that the medication had been temporarily withheld for reasons of hoarding, she did not document this decision and therefore all staff did not necessarily find out about it.

[71] Thus there was no documentation to show what had happened to it; it had been signed out three times by another nurse, perhaps mistakenly; and a different nurse had indicated on 19 March that the medication must have been discarded. Ms Faapito had not only failed to update the medical chart and the medical administration signing sheet, she had failed to record and store the medication safely. Ms Faapito accepted there was no such documentation. She had simply put the medication in a drawer. It should have been returned to the pharmacy. Having a drug of choice for prisoners such as quetiapine sitting in a drawer, even in a safe area such as where the nurses worked, was simply an inadequate way to deal with such a drug. This failing was compounded by the failure to record what had happened to the drug. It must be important for a department like Corrections to have full records as to where such drugs are at any given time. Leaving it in a drawer is a fundamental failing by Ms Faapito.

[72] Finally, I accept there was no follow up care plan provided for Prisoner A, which is necessary for obvious reasons.

[73] Having accepted all these failings, it is then necessary to determine whether or not a fair and reasonable employer would first conclude there was serious misconduct and if so, whether dismissal was what a fair and reasonable employer would do in all the circumstances.

[74] I accept that Ms Faapito's failings went beyond mere negligence or performance concerns, although perhaps a more lenient employer may have chosen to deal with the failings in a different way. These matters were serious misconduct in the sense outlined in *Buchanan* (as tempered by the s.103A test), particularly because of Ms Faapito's role as team leader. She had to lead a small team of registered nurses and she did so in fairly much an autonomous role. Her failings were not those that one would expect from someone in such a role.

[75] Ms Faapito's lack of clinical documentation was not to the standard expected of someone in her role. Most importantly, however, her failure to do the necessary in-

depth assessment before and after withholding Prisoner A's medication was extremely serious, as was her failure to properly store the medication. There were risks to Prisoner A given his history, particularly with regard to his emotional state (he later reported reduced nightmares once his medication was restored, for instance) and simply because the risks did not come to fruition does not absolve her from her failings in this regard.

[76] Taken in combination, these failings were such that I accept that a fair and reasonable employer would conclude that they constituted serious misconduct. I do not accept that there were any procedural faults in the way that Corrections otherwise investigated the matter. The fact-finding review was merely that, and it was reviewed and analysed in depth by Ms Gell throughout the process, which fully involved Ms Faapito.

[77] I also accept that Corrections did take into account Ms Faapito's service record and the difficult working conditions at Mt Eden at the time, together with the fact that the other medical professionals did not treat the issue with any particular urgency. That does not, however, obscure the fundamental failings of addressed above. Furthermore, while the investigators did find significant failings in the management of medication at Mt Eden, Ms Faapito was more to blame than anyone else for her own situation.

[78] The next issue for consideration is whether or not Ms Faapito should have been dismissed. I accept that Corrections carefully considered alternatives to dismissal. The fact that it was prepared to offer Ms Faapito a role as a nurse shows 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. However, I accept that, in all the circumstances, it was open to Corrections to conclude that it was not practicable to return Ms Faapito to Mt Eden under a new manager and that the only practical solution appeared to be the one offered, which was appointment to Auckland Prison. Unfortunately, Ms Faapito could not accept such an offer because of the travel distance involved from the south of Auckland to the north of Auckland. This is extremely unfortunate, as I am sure that Ms Faapito, particularly under experienced management, has a lot to offer the prison service as a nurse.

[79] The fact remains, however, that Ms Faapito's position was as team leader and it was open to Corrections to conclude that it could not have trust and confidence in

her to continue in such a role given her demonstrated failings. The failings went beyond mere negligence or performance concerns to matters of trust and confidence. Furthermore, even if described as negligence, the negligence was serious and ongoing over many days. 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. I therefore dismiss Ms Faapito's claims.

### **Costs**

[80] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**