IN THE EMPLOYMENT COURT
AUCKLAND

AC 10/07
ARC 52/05

IN THE MATTER OF	Personal grievances removed from the Employment Relations Authority
BETWEEN	X Plaintiff
AND	AUCKLAND DISTRICT HEALTH BOARD Defendant

Hearing: 7-11 and 14-16 November 2005
20-21 December 2005
(Heard at Auckland)

Appearances: Penelope Swarbrick and Kelly Rowell, Counsel for Plaintiff
Bernard Banks and Rachel Larmer, Counsel for Defendant

Judgment: 23 February 2007

JUDGMENT OF CHIEF JUDGE GL COLGAN

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Nature of proceeding

[1] The questions for decision in this case removed from the Employment Relations Authority for hearing in this Court at first instance are:

- whether the plaintiff was disadvantaged unjustifiably in his employment by the manner in which the defendant (ADHB) conducted its investigative and disciplinary inquiries into allegations of serious misconduct against him including:
  - by delaying unreasonably its notification to the plaintiff of the allegations against him;
  - by failing to provide for or ensure proper and fair representation of the plaintiff at the first disciplinary process meeting;
  - by seizing the plaintiff's computer in a manner that caused the plaintiff unnecessary distress;
  - by making further allegations of serious misconduct in the course of the inquiry and despite previously advising the plaintiff that these matters were not ones of discipline;
  - by breaching the plaintiff's confidence by unreasonable disclosure of personal information given in confidence;
- whether the plaintiff was dismissed justifiably by ADHB including (but not exclusively):
  - whether ADHB was motivated by reasons other than those for which it purportedly dismissed the plaintiff;
  - whether dismissal was unjustified by disparity of treatment of other employees by ADHB;
- whether, following the plaintiff's interim reinstatement by the Employment Relations Authority, he was disadvantaged unjustifiably in his employment by the acts or omissions of ADHB;

- if the plaintiff was dismissed unjustifiably, whether he is entitled to be reinstated in employment;
- if dismissed unjustifiably and/or disadvantaged unjustifiably, the other remedies to which the plaintiff may be entitled.

The principal actors

[2] The Court received the evidence of a large number of witnesses including many by unchallenged affidavit. The following identification of the leading actors in this saga may allow a better understanding of their roles and assessments of their conduct.

[3] In addition to the plaintiff himself (whose anonymity I have attempted to preserve under interim non-publication orders), his barrister, Harry Waalkens QC, was very closely involved in all aspects of the Board's inquiry that involved or were known to the plaintiff and from a very early stage. For appropriate professional reasons, Mr Waalkens relinquished his intended role as counsel for the plaintiff shortly before the commencement of the hearing and gave evidence as a witness on his behalf.

[4] The leading of several influential personalities for the Board in the dismissal process was its Deputy Chief Executive and General Manager of Auckland City Hospital, Nigel Murray. He was assisted in his role by two other significant players, the Board's Chief Medical Officer and leading clinician, David Sage, and its Deputy Human Resources Manager, Vivienne Rawlings. The decision to dismiss the plaintiff was Dr Murray's although taken in reliance on input and advice of Dr Sage and Ms Rawlings and also from the Board's lawyer, Andrew Caisley.

[5] Without in any way denigrating their roles, all of the other many witnesses who gave evidence for both parties did so either about particular events that affected the broader process of inquiry and decision making by the Board or on issues of reinstatement and, in particular, the appropriateness and practicability of the plaintiff returning to his former role with the Board on a "permanent" basis.

Relevant facts

[6] The plaintiff is a senior physician, having been registered as a medical practitioner since 1974 and employed by ADHB or its statutory predecessors since 1977. Over a long career of professional medical practice, the majority of which was in the employment of ADHB and its statutory predecessors, the plaintiff had attained a

very high professional standing. The performance of his work had never attracted any serious criticism and he enjoys prestigious respect internationally for his research work. The plaintiff is based at Auckland City Hospital where ADHB provides most, if not all, its services in his speciality. He works entirely within the public health sector.

[7] At the time of his dismissal, the plaintiff held the dual positions of Director of [the hospital's relevant specialist unit] and Director of Research [in this speciality] at Auckland City Hospital. His first directorate was a senior clinical position. In both roles, the plaintiff received and sent substantial numbers of e-mails: his estimate was that these totalled 25,000 per year. Except sometimes for reasons of professional confidentiality, the plaintiff's four support staff had more or less complete electronic access to his work-related e-mails.

[8] Leading a team of about 25 researchers, the plaintiff had a number of administrative and publishing assistants who, although ADHB employees, were answerable on a day to day basis for the performance of their duties to the plaintiff. His four administrative support staff included the plaintiff's personal assistant, Maria (known as Monique) Mearns.

[9] Not all of his staff found the plaintiff easy to work for. Although some, probably more resilient, women had enjoyed good working relationships with the plaintiff, others, including Ms Mearns, found him at times intimidating, domineering arrogant and irritable. Because of the very large volume of electronic mail, both created and especially received by the plaintiff, and because of his limited understanding of e-mail and computer record systems and his need to focus on his research, much of the work of the plaintiff's administrative staff included filing, storing and deleting his numerous e-mails and their contents.

[10] Some material to which the plaintiff had access in his research capacity was highly confidential in a commercial sense. Any electronic communications received or sent by him were, although filed securely in the hospital's IT system in the sense of being inaccessible by others, nevertheless freely accessible by him and his personal staff.

[11] It is important to state that this is not a case about internet access. There is no suggestion that any of the matters investigated by ADHB related to the plaintiff's electronic access of internet sites. The electronic material about which this case is

concerned came in two forms. First, some materials were attached to e-mails sent to the plaintiff by others and some of which he forwarded to other persons. The second category of material relates to a number of photographs that the plaintiff took with his cell phone's camera, downloaded to his laptop computer, and sent or attempted to send using ADHB's electronic mail system.

[12] Although the plaintiff believed that most, perhaps all, of these items had been deleted from his and ADHB's systems by what he knew as double or even treble deleting commands executed by him on his laptop computer, the case illustrates that nothing is ever thereby eliminated from the archived system. Rather, it is stored in a less easily accessible fashion.

[13] In mid to late 2004 there were several events occurring that caused disquiet to some senior doctors employed by ADHB including the plaintiff. Professional conflict between clinicians/researchers and hospital administrators is not uncommon. One of these exercises, in which the plaintiff played a leading role in opposing ADHB's position, was a proposal that research projects conducted within the hospital pay greater or lesser proportions of the overhead costs incurred. Although the plaintiff feared that the overhead costs of his research might increase, meaning there would be less net funding, the Board's case at the hearing before me was that his "public good" speciality research may have benefited from reduced charges. I accept, however, that this was not known to the plaintiff at material times.

[14] The second relevant event then going on was an audit of expenditure incurred by researcher clinicians including the plaintiff involving close scrutiny of travel and other expenditure. It is fair to say that the plaintiff was not enamoured of what he took by the nature of this audit to be implied personal criticism. There was also controversy about whether the plaintiff had identified inappropriately another clinician then facing serious criminal charges.

[15] Also in mid to late 2004 the plaintiff was under more than usual work and personal stress. In addition to the ADHB's projects just mentioned, that worried the plaintiff and a number of the members of his research staff who were dependent on him and continuing research projects and funding, several events in the plaintiff's personal life, including the deaths of persons close to him and a painful injury, affected his personal wellbeing.

[16] By early September the plaintiff had persuaded ADHB to contribute financially to his purchase of a new cell phone that incorporated a camera function. This cell phone synchronised electronically to the plaintiff's laptop computer that, in turn, synchronised electronically with the hospital's IT system when docked at the plaintiff's office as it frequently was.

[17] For reasons that still remain largely inexplicable, the plaintiff took a number of photographs on his cell phone camera at his home on Sunday 5 September 2004 including several of his exposed genitalia. By the electronic synchronisation processes just described, these photographs became stored on the plaintiff's electronic files within the hospital's IT system.

[18] On Tuesday 7 September the plaintiff attempted to send, as an attachment to an e-mail to a female friend, one of the penile photographs bearing the caption *"Before"*. Because of a single erroneous keystroke in the intended recipient's e-mail address, the communication was "bounced back" electronically to the hospital's IT system. When this failure came to the plaintiff's notice he attempted to delete the communication but, as in the case of most, if not all, inappropriate e-mails in this case, "delete" did not mean delete but, rather, archived although more difficult to find.

[19] Within a short time, it appears that three of the plaintiff's administrative assistants came across these penile electronic images in the course of their work and, for various reasons, although discussing their discoveries with each other and perhaps advising one or two others, decided to do nothing about them.

[20] In December 2004 a professional colleague in the United States of America with whom the plaintiff had e-mail correspondence, including the sending to the plaintiff of jokes and offensive e-mail material, transmitted to the plaintiff, but unsolicited, an electronic calendar entitled *"Arets Kalender 2005"*. The plaintiff looked at the cover and one or two of the preliminary pages before attempting to delete this attachment from his computer system. The cover page is deliberately misleading in the sense that it depicts a young woman in sexual positions and thereby tends to indicate that the following pages will be of pornographic images of young women. However, the following electronic pages consist of photographs of middle aged or elderly women, some obese, in various states of undress with many in sexually provocative poses as might be assumed more often by younger women in pornographic calendars.

[21] On about 22 December 2004 another ADHB employee, to whom I will refer as TW, e-mailed the plaintiff with the electronic address of a pornographic website. The plaintiff deleted that e-mail without accessing the site but then retrieved the *Arets Kalender* from his deleted items archive and sent it to TW *"to cheer him up"* and with Christmas wishes.

[22] At about this time, too, there were suggestions that the plaintiff was working one or more of his personal staff too hard. Despite the plaintiff's administrative staff members who had been aware of his penile photographs not doing anything about them for several months, one, his PA Ms Mearns, discovered the *Arets Kalender* in the plaintiff's electronic archives and reported its existence to ADHB. This generated investigations by its IT and human resources staff that escalated into a high-level inquiry headed by the Board's Deputy Chief Executive, Dr Murray.

[23] At about 5 pm on 7 February 2005 the plaintiff received a message from Dr Murray's secretary. The plaintiff was required to attend an urgent meeting on the following morning. The message gave no advice to the plaintiff of the nature of the meeting. The plaintiff made contact with Dr Sage, the hospital's Chief Medical Officer, who advised him that the subject matter of the following day's meeting was sensitive and could not be discussed with the plaintiff until then. In response to another specific inquiry from the plaintiff, Dr Sage indicated that, although he was entitled to do so, it would probably be unnecessary for the plaintiff to be represented at the following day's meeting. Dr Sage's advice was that the ADHB attendees would be Drs Murray and Sage and an ADHB human resources person.

[24] The defendant's strategy for this meeting had been devised in detail by ADHB's Deputy Director of Human Resources. Ms Rawlings had prepared a script for Dr Murray to follow at the meeting including what he was to say and do.

[25] Although Drs Murray and Sage were present at the meeting early on the following morning, 8 February, no human resources representative from ADHB was there. Instead, there was Mr Caisley, a partner in the law firm Kiely Thompson Caisley, the Board's legal advisers in this matter, and a very experienced employment lawyer. The plaintiff had not been forewarned of Mr Caisley's presence and was taken aback by it. Dr Murray read from his prepared statement and gave the plaintiff hard copies of a number of electronic images in a brown envelope that also contained a pre-prepared

letter over the hand of Dr Murray, detailing a number of electronic images said to have been taken from the plaintiff's work computer and his ADHB cell phone. The letter advised the plaintiff that Dr Murray viewed these matters most seriously as being a possible breach of the Board's Electronic Mail Policy, a copy of which was enclosed. The letter confirmed formal invoking of the Board's Disciplinary Policy and said that the plaintiff should attend a meeting three days later on 11 February to enable Dr Murray to hear and understand his explanation about the allegations. The plaintiff was advised:

> *If you are unable to provide a satisfactory explanation for your alleged actions dismissal may be an outcome.*

[26] Although Mr Caisley played no active part in this meeting except, very usefully as it transpires, to take notes, the lack of knowledgeable and detached representation of the plaintiff caused the loss of Ms Rawlings's plot in the sense that an angry and voluble plaintiff responded to the allegations at length and by making counter-allegations against the Board and other employees. Dr Murray did not bring the meeting to a close immediately but responded to the plaintiff's reactive statements and allegations. The meeting did not go as Ms Rawlings had carefully planned.

[27] Despite the surprise and disadvantage to which the plaintiff was put as a result of the absence of any prior advice about the subject matter of the meeting and not having a representative present, he nevertheless acknowledged his role in the sending of the penile photographs and the forwarding of the *Arets Kalender*. The plaintiff admitted what he had done was wrong and expressed his regret for this. Contrary to the defendant's case that this was not the plaintiff's response, I am satisfied from the notes taken at the meeting by Mr Caisley that the plaintiff's immediate and unrehearsed reaction was one of appropriate insight and regret. Although not denying two instances of the misconduct alleged and acknowledging his fault, the plaintiff alleged that he was being unfairly singled out for reasons related to other events then going on at the hospital in which he was involved with a high profile.

[28] The Board's preliminary investigations had also revealed a number of other pornographic e-mails that had been received by the plaintiff from others. It accepted his explanation that he had indeed received these items unsolicited but had not dealt with them except by attempting to delete them. The Board's acceptance of the

plaintiff's explanation about these other items meant that they were excluded from its inquiry thereafter.

[29] Immediately after the meeting with the ADHB representatives, the plaintiff was escorted to his office where his personal laptop computer was taken away by an information technology specialist for analysis. The Board suspected that it might have contained material other than had been stored on its servers which it had already searched.

[30] The plaintiff immediately instructed senior counsel, Mr Waalkens QC, who wrote to Dr Murray on the same day, 8 February, seeking copies of all documents that the Board held relevant to the allegations against the plaintiff including, in particular, notes of interviews that the Board had conducted with other staff about this matter. Mr Waalkens sought a postponement of the scheduled meeting for 11 February for a variety of reasons including that the plaintiff wished to have sufficient time after receiving copies of the relevant documents to consider his position. This was agreed to by the Board.

[31] The plaintiff's immediate assumption (expressed as early as the first meeting on the morning of 8 February) was that he considered that he had been unfairly singled out by ADHB on account of other issues that had arisen recently in which he had been in professional conflict with the Board and with Dr Murray in particular. The plaintiff also considered that it was likely that one of the employees who worked for him had made the complaint to ADHB about the electronic images on his computer system. The plaintiff had telephone and e-mail communications with Mary Denton, the ADHB manager who supervised about half his staff, requesting her to tell staff not to spread rumours and asserting strongly his innocence, saying that he had never accessed internet sites and had only opened *"unsolicited"* e-mails from known contacts. The plaintiff told Ms Denton:

> *If there is any suggestion that I am guilty from my staff I will consider it a dismissable (sic) offence. Could you pass that on to people who know of the investigation, …*

[32] By his own admission, the plaintiff wanted to find out who may have complained to ADHB against him.

[33] The staff members affected felt intimidated and Ms Mearns who had, as the plaintiff suspected but could not confirm, been the conduit of the information that

sparked the inquiry, complained about his responses to managerial and human resources personnel within the Board. They, in turn, elected to have the Board's solicitor, Mr Caisley, address these matters directly with Mr Waalkens who had, by midday on 9 February, become known to the Board as the plaintiff's representative to whom all communications about these matters were to be directed.

[34] Mr Caisley had a telephone discussion with Mr Waalkens that was described as a *"counsel to counsel"* courtesy call, that is with a view to resolving problems informally but immediately. Mr Caisley advised Mr Waalkens that if the plaintiff did not desist from involving other staff in the manner as he had been over the previous day and a half, this would be acted upon by the Board. Mr Waalkens in turn gave the plaintiff firm and unmistakable advice to desist that the plaintiff accepted. On the early afternoon of 9 February the plaintiff e-mailed those persons he had previously harangued, withdrawing his allegations and apologising. They, in turn, accepted his apologies, expressly or implicitly, and, even by the Board's account, the plaintiff desisted from similar behaviours, at least for the following week or so. For example, Ms Mearns, said by the Board to have been the recipient of most pressure from the plaintiff, accepted his apology. She acknowledged that, in reference to the reviews that the Board was undertaking, these had been *"hard for months"*, and said: *"How does the ADHB expect people to function in this atmosphere, do they think we have no feelings?"*. Not only does the genuineness of the plaintiff's apology appear to have been accepted but Ms Mearns attributed her stress and that of her colleagues to be the Board's inquiries and reviews affecting staff including the plaintiff, rather than its investigation into his misconduct.

[35] Also in the course of their discussions at about this time, Mr Caisley, assured Mr Waalkens that the Board would not have recourse to things said or done by the plaintiff in the first meeting with him on 8 February because its purpose had been only to present the matters of the complaint to him.

[36] On 10 February ADHB's solicitors responded to Mr Waalkens's request for documents, confirming that a number of the electronic images were to be sent to the plaintiff's counsel on a compact disk. The letter continued:

> *ADHB is not willing to advise how it became aware of the images. It does not consider the way in which the matter came to ADHB's attention to be relevant. Furthermore, ADHB has obligations to protect staff from bullying, intimidation and harassment.*

> *In the event that you consider the way in which the information came to ADHB's attention to be material, we would be grateful if you would advise us and we will endeavour to address the matter in a way that is consistent with ADHB's obligations to fair to [the plaintiff] and its obligations to other staff members.*

[37] On 11 February Mr Waalkens received a compact disk containing the images about which ADHB was concerned. These included:

- An e-mail from the plaintiff to another ADHB employee (TM) acknowledging appreciatively the receipt of an electronic image from TM on 10 December 2004 entitled *"Spot the Imposter"* and consisting of a photograph of two dressed fowl and a naked human being resembling the birds. The plaintiff claims to not have opened the attachment to TM's e-mail but deleted it immediately, although the e-mail response to TM (*"You little beauty – with kind regards"*) causes me to wonder about the defendant's preparedness to accept his explanation.

- An e-mail that the plaintiff sent to TM on 22 December 2004 containing a series of images in the form of a calendar entitled *"Arets Kalender 2005"* already described.

- A series of images entitled *"Get Exposed to Opera"* that had been sent to the plaintiff (among others) by an overseas colleague on 31 March 2004. The plaintiff says he did not open this attachment on any occasion and believed he had deleted it from his computer. The Board accepted this explanation. The attachment consists of a number of mildly pornographic images accompanied by music.

- A series of images entitled *"How to Properly Serve a Drink"*. These images were sent as an attachment to an e-mail to the plaintiff from the same overseas colleague in April 2004 and consist of seven images of alcoholic beverages in or adjacent to women's breasts and genitalia. The Board accepted these had not been seen or dealt with by the plaintiff.

- Several digital photographs of the plaintiff's own penis and scrotum taken by himself using the camera function of a new cellular telephone that had been sent as attachments to an e-mail from the plaintiff to a female friend (already described).

- A copy of the e-mail that the plaintiff had attempted to send to his female friend containing as an attachment one of the photographs of his genitalia but which had been returned by ADHB's electronic "Mail Marshall" as undeliverable.

[38] With the exception of the *Arets Kalender* and the penile photographs, the remaining items just listed and that were forwarded to the plaintiff's counsel were those in respect of which the plaintiff's explanation was accepted by the Board and had been, or were shortly to be, eliminated from its inquiry.

[39] The rescheduled meeting about these matters was held at the Auckland Hospital on 17 February 2005. The plaintiff attended with his counsel and present from ADHB were Drs Murray and Sage, its solicitor, Mr Caisley, and its human resources manager, Ms Rawlings. There were discussions about these allegations that are summarised in notes taken at the meeting, although there was little proactive response by the ADHB representatives.

[40] I have had recourse to the contemporaneous notes made during the meeting to assist in the resolution of conflicts between witnesses for the two sides as to what was said, if not as to how it was said. I am satisfied that the plaintiff personally, and through his counsel, again acknowledged the wrongfulness of his conduct, his regret of it and, importantly, his resolution not to do so again. He expressed his optimism in the resumption of the parties' working relationship despite these events. At the conclusion of the meeting, the plaintiff was asked why he had sent or forwarded these electronic images. He responded with a blank look or a shrug. I conclude this was an indication of his inability to explain logically and sensibly his foolish behaviour in the way generally that much uncharacteristic, aberrant or apparently bizarre human acts or failures are subsequently incapable of cogent explanation.

[41] The plaintiff and his counsel, Mr Waalkens, were left with the clear impression that, having heard from the plaintiff, ADHB did not regard the misconduct by the plaintiff as particularly serious. This was from the tone rather than the content of the meeting because active input by the Board's representatives was minimal. This impression was also given to the plaintiff and his counsel by the Board's response to arrangements initiated by Mr Waalkens to deal with these matters during the lawyer's forthcoming absence overseas. I accept that the plaintiff was led to believe that, having given explanations and assurances about his conduct, the position was not as dire as had

been indicated by the Board's previous correspondence. The ADHB people present (who gave evidence) claim not to have given this impression and instead emphasise what they say was the seriousness of the plaintiff's situation.

[42] I do not accept Ms Rawlings's evidence that the plaintiff's demeanour at the meeting on 17 February was *"curt, intolerant, dismissive and irritated"*. While the plaintiff was clearly uncomfortable, upset and defensive, I prefer Mr Waalkens's account of this meeting that the plaintiff responded appropriately and sincerely including in his apologies and acceptances of responsibility. Although the plaintiff may not have been *"frank and forthcoming"* as Ms Rawlings said caused her to reject the genuineness of his acceptances and apologies, I think it was reasonable for the plaintiff to answer questions and allegations as he did. It was unreasonable for the ADHB representatives to have expected the plaintiff to have bared his soul, to have prostrated himself figuratively and thrown himself on the Board's mercy. Although that may have impressed the inquirers more than the plaintiff's responses did, excessive subjugation would have been as easy to feign as his less effusive acceptances of responsibility, apologies, and assurances of non-repetition. I am satisfied that the Board's inquirers saw and heard from the genuine plaintiff.

[43] Following the 17 February meeting the plaintiff had conversations with Dr Sage initiated by the latter. Dr Sage presented himself as friendly and helpful and the plaintiff made a number of private revelations to him about relevant events and, in turn, the plaintiff says Dr Sage continued to give the plaintiff the impression that the Board's concerns were not particularly serious. Dr Sage denies giving this impression. As in the case of the supposition gained by the plaintiff at the 17 February meeting, I find that although ADBH representatives may not have intended such an impression, it was nevertheless left with the plaintiff

[44] On 24 February Dr Sage advised the plaintiff that the Chief Executive Officer and the Chair of the Board of ADHB had been advised of its investigations into the plaintiff and that it would be likely that the next meeting would be held during the following week. Although there is little evidence of the detail of how the Board Chair was advised about the investigation, the following emerged in evidence of the advice of it given to the Chief Executive. This included the handing over to the Chief Executive of an envelope containing hard copies of the electronic images discovered by the Board to that time. I am satisfied these included, however, the images that it had by then

excluded from its inquiry, the investigators having accepted the plaintiff's explanation for their receipt. I am also satisfied from the evidence that the Chief Executive expressed a firm and uncompromising view of the complete inappropriateness of such material within a hospital environment and on the Board's IT systems. These revelations to the Chief Executive amounted to the provision of sufficient information to keep him informed of the fact of the inquiry and, apart from periodic updatings, there is no evidence of further active participation in it, by either the CEO or the Board's Chair.

[45] On 1 March 2005 Dr Murray, on behalf of the Board, wrote formally to the plaintiff. The letter set out Dr Murray's conclusions of breaches of ADHB policy by *"1. Taking offensive photographs, downloading them on to the ADHB computer system and using the computer system to email one of those photos externally; and 2. Receiving a grossly offensive calendar which mocks and degrades older women and forwarding that calendar to another employee in the organisation"*. Dr Murray's letter noted that the plaintiff had acknowledged that his actions were wrong at the meeting on 17 February but asserted that he had not been able to offer any satisfactory justification for them. Dr Murray advised that the plaintiff's actions were *"of the utmost seriousness"*. Dr Murray asserted that the plaintiff's actions had fundamentally undermined ADHB's confidence in him to behave appropriately at all times and that it was giving serious consideration to terminating his employment on these grounds.

[46] In this letter Dr Murray raised a further concern relating to the plaintiff's behaviour after 8 February when these matters were brought to his attention. He made three points. First, Dr Murray alleged that despite having been asked to keep the matters confidential, the plaintiff instead discussed the issues widely with other staff indicating to them that he was innocent and that the Board's management was picking on him. This was described by Dr Murray as a further lapse of judgment and was said to indicate that the plaintiff did not understand the seriousness of the original issue.

[47] Next, Dr Murray alleged that the plaintiff *"bullied and intimidated the administrative staff, including by threatening to dismiss them"*. Although acknowledging that the plaintiff had subsequently apologised for this, Dr Murray said that his conduct was entirely inappropriate and was a further serious lapse of judgment. He noted, in this regard as well: *"Your conduct also suggests that you do not properly*

understand the seriousness of the issues, nor the need for you to take responsibility for your conduct".

[48] Third, and finally, Dr Murray asserted that despite having apologised when these matters were first drawn to his attention, the plaintiff had subsequently issued inappropriate instructions regarding access to his e-mail, electronic calendar and office facilities to his administrative staff and that this had impeded their ability to carry out their duties and caused significant distress. This too was said to represent a further serious lapse of judgment and to indicate to Dr Murray that the plaintiff did not fundamentally accept that his original conduct was entirely unacceptable.

[49] Dr Murray concluded these assessments by reiterating that ADHB was required to have the utmost trust and confidence in the plaintiff's behaviour and judgment and that in addition to his original misconduct, recent events appeared to have further undermined that confidence in his behaviour and judgment. The letter noted as regards his post 8 February conduct:

> *It also calls into question the sincerity of the apology you offered to us and the reliability of the assurance you gave us that you would not breach policy in the future. As a result, ADHB is seriously considering the termination of your employment.*

[50] Dr Murray invited any further or additional comments from the plaintiff in writing by the end of Monday 7 March 2005.

[51] Mr Waalkens responded promptly on the plaintiff's behalf by a letter to Dr Murray dated 2 March 2005. The plaintiff's counsel challenged the Board's assessment of the seriousness of these events and, while indicating that he would take all steps to protect his interests in that regard, the plaintiff reiterated that he was confident that the matter could be satisfactorily resolved by providing an explanation as requested by ADHB.

[52] Before doing so, however, Mr Waalkens indicated that he wished to have clarification of some of the points to which Dr Murray had referred generally. For example, Mr Waalkens asked that the Board identify when and how the plaintiff had been asked to keep matters about the original investigation confidential. Mr Waalkens asserted that this had not been mentioned previously, certainly in correspondence and not, to counsel's recollection, orally. He pointed out the unfairness of ADHB insisting that the plaintiff not discuss these matters where it had investigated them from at least

December 2004 including interviewing a number of other staff members. Mr Waalkens asserted that these interviews, together with the seizure for forensic analysis of the plaintiff's computer, had generated significant discussion within the department in which the plaintiff worked, and that it was unreasonable that the plaintiff should keep matters entirely confidential in these circumstances. Mr Waalkens repeated his request for details of what was said to have occurred that amounted to a breach of confidentiality and when.

[53] Mr Waalkens's letter of 2 March also challenged Dr Murray's conclusions that these three events or series of events after 8 February amounted to further lapses of judgment indicating that the plaintiff did not understand the seriousness of the original issue. Mr Waalkens pointed out that, from the time of the meeting on 17 February, the plaintiff had assured Board representatives and had undertaken that there would be no repetition of the earlier matters that had given rise to its concern and that he clearly understood his position.

[54] Similar requests were made by Mr Waalkens in answer to the allegations of *"bullying and intimidation of administrative staff"*. Apart from noting, as already referred to in this judgment, the plaintiff's oral and e-mail outbursts were then the subject of a telephone call from Mr Caisley to Mr Waalkens, counsel said that if there was anything beyond that which reflected concern, it was important that ADHB identify it with sufficient particularity. Similar requests were made in respect of the third allegation of post 8 February misconduct, the issuing of inappropriate instructions regarding e-mail, calendar and office to administrative staff.

[55] After dealing with the plaintiff's prospective temporary unavailability because of personal professional commitments overseas, Mr Waalkens repeated his request for confirmation that he had received all information about the matter as he had asked for on 17 February and had been assured that the plaintiff had. He reiterated that it had become apparent that ADHB had interviewed staff as early as December 2004 but had not supplied him with notes of those interviews.

[56] Next, Mr Waalkens referred to a discussion that he had had with Ms Rawlings that day, 2 March, in which she told him that she had concerns about the plaintiff including his mental state and his personal safety. These discussions appeared to Mr Waalkens to have come from discussions between the plaintiff and Dr Sage. Mr

Waalkens assured Dr Murray that there was no substance to any of those concerns but sought *"proper disclosure"* about them, particularly because Ms Rawlings had indicated to him they were matters of concern to ADHB.

[57] To conclude, Mr Waalkens reiterated that his client had expressed his true regret about what had happened at the meeting of 17 February and that the sincerity of his regret remained.

[58] ADHB's response to this correspondence was equally prompt. It was by a letter dated the following day, 3 March, from Dr Murray. His letter provided the particulars sought including references to a number of e-mails sent by the plaintiff to Ms Denton on 8 and 9 February before he was told, informally through Messrs Caisley and Waalkens, to stop doing so. Dr Murray's letter provided some further details of other allegations of *"bullying and intimidation"*. Dr Murray advised Mr Waalkens: *"I confirm that you have received all information that ADHB currently has relating to this matter"*.

[59] Dr Murray concluded by noting that Dr Sage, in his role as Chief Medical Officer, had a staff welfare role and that it would have been remiss of him not to have acted on potential warnings signs. Dr Murray assured the plaintiff's counsel that the detail of conversation between Dr Sage and the plaintiff had remained confidential.

[60] After delays because of the unavailability of the plaintiff and his counsel, the plaintiff himself responded to Dr Murray in writing by a detailed letter of 18 March 2005 addressing those matters raised by Dr Murray's letter of 1 March. As a consequence of the detail of the plaintiff's response, Ms Rawlings for ADHB postponed the scheduled 21 March meeting between the parties.

[61] Although the plaintiff's comprehensive written reply took issue with a number of statements attributed to other staff and indeed made explanations that put their conduct in question, the Board's inquirers did not go to, or go back to, any of those staff to confirm the veracity of the plaintiff's statements about them.

[62] On 30 March 2005 Dr Murray wrote to the plaintiff's counsel expressing the Board's extreme disappointment at the unavailability of both the plaintiff and his counsel to meet, and proposing that this now take place on 18 April to:

> *… hear any further submissions as to whether [the plaintiff] is terminated or not. We also advise that ADHB is considering matters in relation to [the plaintiff's] subsequent conduct.*

[63] Mr Waalkens responded on the plaintiff's behalf promptly by e-mail dated 31 March rejecting the Board's assertion of the plaintiff's responsibility for the delays but confirming, nevertheless, the meeting scheduled for 18 April. Mr Waalkens again addressed the question of disclosure including in his letter:

> *Would you please make quite sure that prior to that meeting ADHB has made full disclosure of its entire file with respect to this matter. I recognise, of course, that this is a repeat request but it is essential to make sure that [the plaintiff] has received all relevant information beforehand.*

[64] Ms Rawlings, on behalf of ADHB, e-mailed Mr Waalkens on 15 April confirming that *"…you have received all information that ADHB currently has relating to this matter"*.

[65] The next and final meeting took place on 18 April. In addition to the persons who had attended the previous meeting, the plaintiff also had a representative of his union, the Association of Salaried Medical Staff Inc, although, on this occasion, ADHB's lawyer was not present. The meeting, with adjournments, lasted a little more than four hours and was crucial to the matters now before the Court.

[66] I accept the evidence of the plaintiff and Mr Waalkens that the tone of the Board's investigators (Drs Murray and Sage and Ms Rawlings) had changed significantly from the time that they had all last met on 17 February. Although, by Mr Waalkens's account, this change manifested itself in the Board's representatives appearing to regard the same misbehaviour much more seriously than previously, I find also that it was probably connected to the Board's representatives' greater unwillingness to engage in dialogue, preferring to listen and observe the plaintiff and his representatives. I am not, however, able to make any findings as to what may have happened between 17 February and 18 April that brought about this change on the part of the members of the Board's inquiry. To do so would be purely speculative and, in any event, this change of attitude must be kept in perspective and is less important than what was said and done.

[67] Dr Murray reiterated that, following a consideration of the plaintiff's detailed written response, ADHB continued to believe that there had been a breach of the e-mail policy that it regarded as totally unacceptable and that the plaintiff's conduct as a senior member of staff had undermined its trust and confidence in the Board. Mr Waalkens spoke on the plaintiff's behalf. The plaintiff then told of his extenuating personal circumstances at the time of the genitalia photography and e-mailing and confirmed his

earlier advice that this had been intended to be a joke mimicking a then current mobile telephone advertisement on television. The plaintiff made a number of other explanations and emphasised his personal and working circumstances and those of other staff dependent on him. He confirmed his regret for what had happened, his assurance that it would not be repeated, and his desire to resolve the difficulties and move on with his employment with the Board.

[68] The plaintiff was at pains to emphasise that although he acknowledged the wrongness of his conduct in several respects, he was also concerned that a member of his staff, with whom he had worked for many years, apparently deliberately retained these images for the express purpose of using them to discredit him at some time in the future, for reasons of her own. After having been dealt with by him, the plaintiff said these materials were not in any place where they could be readily used by anyone else. He emphasised that there was also salacious gossip about the images among several of his staff some time before they were forwarded to ADHB's human resources department.

[69] Except initially to reiterate and summarise their position, the ADHB representatives at this meeting did not respond or engage in discussion with the plaintiff and his representative any more than minimally. Dr Murray took the view that his role was to listen and observe before making a decision about the consequences of what he assessed to have been the plaintiff's serious misconduct.

[70] The ADHB representatives left the meeting for almost half an hour, during which time Dr Murray contacted the CEO, his superior, and advised him that it was proposed to dismiss the plaintiff. The ADHB representatives returned to announce that they had concluded that the breaches of the e-mail policy and that the plaintiff's attempts to investigate who may have complained about the e-mail information to the ADHB had undermined their trust and confidence in him. He was told by Dr Murray, who spoke for ADHB, that he was therefore dismissed with immediate effect although he would receive three months' pay. Dr Murray then indicated ADHB's preparedness to allow the plaintiff to resign on terms and conditions to be agreed and including a dignified exit plan. The plaintiff rejected the suggestion of resignation although he subsequently had an opportunity to confer with his counsel in the absence of ADHB representatives.

[71] The defendant remained keen to allow the plaintiff to resign in these circumstances and made a number of proposals to this end including that the plaintiff might continue to work and conduct an orderly hand-over. Matters were left on the basis that at the end of the following day the plaintiff would determine whether to resign and he was placed on leave in the meantime. The plaintiff performed no further duties including those that had been scheduled for that afternoon. He subsequently advised the defendant that he did not wish to resign and so was provided with a letter formally confirming the termination of his employment dated 18 April 2005.

[72] ADHB's reasons for dismissal are encapsulated in the following extracts from a 3-page letter over the hand of Dr Murray:

> *… it is now clear that you have breached ADHB policy by:*
>
> - *Taking offensive photographs, downloading them on to the ADHB computer system and using the computer system to email one of those photos externally; and*
>
> - *Receiving a grossly offensive calendar which mocks and degrades older women and forwarding that calendar to another employee in the organisation.*
>
> *…*
> *ADHB is a provider of public health services. It is essential that the public have utmost faith and confidence in the organisation and its staff. We frequently deal with people in vulnerable and exposed situations. It is essential that the public trust us to treat them with utmost dignity and responsibility.*
> *…*
> *ADHB must have utmost trust and confidence in your behaviour and your judgement. Your conduct in connection with the photos and an email calendar, which contained a series of images which mocks and degrades older women, seriously undermined ADHB's confidence in you. Your conduct since these concerns [were] raised appeared to further undermine our confidence in your behaviour and judgement. It also called into question the sincerity of the apology you offered to us and the reliability of the assurance you gave us that you would not breach policy in the future. As a result, ADHB was seriously considering the termination of your employment and you were advised accordingly.*
> *…*
> *In respect to our concerns regarding your behaviour since the commencement of the disciplinary investigation on 8 February 2005. We note:*
> - *We asked you to keep this matter confidential, but instead you discussed the issues widely with other staff and indicated to them that you were "innocent" and that management were picking on you.*
> - *You bullied and intimidated administrative staff, including threatening to dismiss them. Although you subsequently apologised for this, your conduct was entirely inappropriate and was considered a further serious lapse of judgement.*
> - *Despite having apologised when ADHB first brought its concerns about your treatment of the administrative staff to your attention, you then issued inappropriate instructions regarding access to you[r] email, calendar and*

> *office to administrative staff. This impeded their ability to carry out their required duties and caused significant distress.*
>
> …
>
> *After reviewing all the information ADHB finds that your actions breached ADHB policy. Your actions were totally inappropriate and unacceptable behaviour for a senior medical practitioner. Furthermore, your conduct and serious lack of judgement both in respect to the initial breach and your subsequent treatment of other staff has deeply impaired and seriously undermined ADHB's confidence and trust in you. ADHB finds that your behaviour constitutes serious misconduct.*
>
> …
>
> *As you are aware, ADHB needed to decide whether to dismiss you or to impose some other penalty. In doing so, ADHB took into account all the relevant circumstances of your conduct and the particular employment relationship between ADHB and yourself. Your role of Director [of research] is a senior role. It is a responsible and privileged position in ADHB and the requirement of trust and confidence in this role is essential and fundamental to ADHB's employment relationship with you.*
>
> *I have given careful consideration to the matter of appropriate penalty and believe that this situation justifies dismissal. Your employment relationship with ADHB will ceased immediately and you will be paid the notice period of three months together with any other entitlements owing.*

[73] Following his dismissal, the plaintiff applied to the Employment Relations Authority for interim reinstatement. That was granted on 10 May. ADHB appealed against that decision and there was a hearing on the application for stay of its execution in this Court on 11 May following which the plaintiff was able to return to work on a limited basis from 12 May. ADHB's substantive appeal against the interim reinstatement order was dismissed on 26 May 2005. The plaintiff has continued to work pursuant to the Authority's order for interim reinstatement since that time.

[74] After he was dismissed and more especially after the Employment Relations Authority ordered his interim reinstatement, ADHB went to considerable lengths (and no doubt expense) to recover and analyse earlier e-mail records affecting the plaintiff. These disclosed the receipt by the plaintiff and, in some instances, the on-forwarding of e-mail messages and images that ranged from largely innocuous cartoons, through the risqué, to mildly pornographic images but falling short on a scale of offensiveness of the e-mail calendar that contributed to the plaintiff's dismissal. These documents were originally received and/or forwarded by the plaintiff in 2003 and 2004. None of these images, however, was illegal and none was located on the defendant's IT systems as a result of internet downloading. All were in the form of an e-mail or attachments to an e-mail. All had been deleted from the plaintiff's computer. Even as late as a few days

before the start of the trial, some of these images were still being located and disclosed to the plaintiff's solicitors. Despite strenuous applications by the plaintiff to exclude this evidence as being inadmissible, for reasons given at the time in interlocutory rulings, I declined to exclude evidence about these later discovered items. They were arguably relevant for both general credibility reasons and they affected questions of reinstatement.

The employment agreement

[75] The terms and conditions of the plaintiff's employment with ADHB were set in part by a collective employment agreement[1] and in part by an individual employment contract entered into in 1994. ADHB's relevant policies and procedures were incorporated into the parties' employment agreement.

[76] In January 2003 ADHB issued an e-mail policy to staff. It distinguishes categories of *"unacceptable use"* and *"illegal content"*. Examples of *"unacceptable use of email within ADHB"* included *"storage, sending or forwarding of email containing pornography, jokes or cartoon images, … and email content that could be taken as sexual … harassment"*. E-mails with *"illegal content"* (not further defined) were to be deleted immediately and under no circumstances forwarded to anyone. Persistent sending of e-mails with *"illegal"* content to Board staff required them to attempt to persuade senders to desist. A process for dealing with e-mail with "unacceptable" content was not provided for.

[77] What was meant by *"illegal content"* of electronic communications was unclear. On its face, *"illegal"* means unlawful or contrary to the provisions of the law. That is not the same thing, necessarily, as what ADHB regarded as *"unacceptable"*. Unacceptability included e-mail containing pornography, jokes or cartoon images and material that could be regarded as sexual harassment. Much of such material might not, however, be *"illegal"* in the sense of in breach of the law.

[78] The legality of the content of electronic communications and, in particular, of images in such electronic communications, is governed principally by the Films, Videos, and Publications Classification Act 1993. It was common ground between the parties in this case that none of the electronic communications or images dealt with by

[1] New Zealand District Health Boards Senior Medical and Dental Officers Collective Agreement: 1.7.03-30.6.06.

the plaintiff that led to his dismissal, amounted to objectionable or restricted publications in terms of the legislation and, therefore, the commission of a criminal offence. The defendant can only assert that the electronic communications and images with which the plaintiff dealt and that resulted in his dismissal, were *"unacceptable"* material in terms of its policies.

[79] I find that as with a number of other busy senior clinicians, the plaintiff was not aware of the content of the Board's e-mail policy. It is one of literally hundreds of policies that the Board has and promulgates to staff by e-mail or maintains on its staff intranet. In hard copy, they occupy many Eastlight folders. In the case of the plaintiff, such policy e-mails were among many that the Board sent to all staff that were dealt with by the plaintiff's administrative assistants and probably did not come to his notice personally at all. Such senior clinicians access these policies only as and when specifically needed. So it follows that I accept the plaintiff's evidence that the Board's e-mail policy and its contents were not in his mind at relevant times. That said, however, the e-mail policy is one that largely expresses common sense and appropriate professional expectations so that the restrictions contained in it could not have come as a great, or indeed any, surprise to the plaintiff.

[80] It follows that all of the electronic imagery received, deleted, created and sent by the plaintiff that led to his dismissal and that was relied upon by ADHB in opposing his reinstatement, was *"unacceptable"* use of e-mail but not the more serious *"illegal content"* differentiated by the policy.

[81] ADHB witnesses acknowledged that, despite the wording of the policy, the unsolicited electronic receipt alone of an objectionable item by e-mail could not itself constitute misconduct. The plaintiff did not solicit the calendar. Before he was aware of it, its receipt by the Board's IT system was complete. It must, therefore, follow that it was not the receipt of the calendar but the forwarding of it, in the knowledge of its contents, to another employee, that constituted this misconduct. No such distinctions arise in respect of the penile photographs that the plaintiff created, downloaded and, in one case, despatched. The photographs were also "*unacceptable*" rather than "*illegal content*".

[82] ADHB's Discipline and Dismissal Policy in force at the relevant time provided, among other things, that *"disciplinary action will be documented and available to the*

employee" and *"disciplinary decisions are to be arrived at in an evenhanded and culturally effective manner"*.

[83] Principles relating to *"Discipline & Dismissal"* included *"Impartiality"*, *"Consistency - Non-punitive"*, *"Fairness - Advance warning"*. More specifically under the heading *"Non-punitive"*, the policy stated:

> *The aim of disciplinary action is to improve the situation and prevent recurrence of unsatisfactory actions or behaviours. [It] must not be for the purpose of exacting revenge or inflicting punishment for its own sake.*

[84] Among grounds for *"Disciplinary Action"* was *"Serious Misconduct"*. The lesser *"Misconduct"* comprises:

> *... unacceptable or irresponsible actions or omissions which, regarded in isolation, do not warrant severe disciplinary action.*
>
> *Each incident must be assessed in context, and appropriate action taken on the basis of that assessment.*

[85] *"Serious misconduct"* was defined:

> *Serious misconduct may warrant dismissal without notice and is behaviour which:*
> - *undermines the contractual relationship between employee and company* ***AND/OR****,*
> - *seriously threatens the well-being of the organisation, the staff or clients.*

[86] *"Employee rights"*, where an employee was to be interviewed in the course of a disciplinary investigation, included:

> - *prior warning of the nature and subject of the allegations being investigated and the type of disciplinary action that could result*
> - *the opportunity to be accompanied at the interview by a representative of their choice*
> - *the opportunity to explain, or deny, the allegation*
> - *prompt written advice of the result of the investigation.*

[87] Also relating to *"Disciplinary Interviews and Investigation"* the policy required:

> *Written records outlining a summary of the disciplinary interview(s), including the outcome, must be made and kept in the employees Personal File*

[88] Under the heading *"Records"* the policy provided:

> *Copies of disciplinary documentation (interviews, suspension/transfer confirmations, warnings, etc.) will be held in the employees Personal File.*
>
> *At the employees request, records of disciplinary documentation will be forwarded to the employees representative.*

[89] Delegated authority in relation to matters of discipline and dismissal was determined by the Board's Delegated Authority Policy. The Board's Register of Delegations of Authority required, in relation to *"Terminate employment/offer downgraded position"* that this was to be *"In consultation Immediate Manager and HR Manager"*.

[90] Finally, the Board's *"Human Resources Principles"* set out a principle known as *"One Removed"* requiring consultation with, or gaining the approval of, an individual one senior to an individual making an HR decision. The *"One Removed"* (or, as it was referred to colloquially, *"one up"*) principle or guideline was, however, applicable to any human resource situation where authority was not clearly defined or specified. I have concluded that the Register of Delegations under the Board's Delegated Authority Policy defined and specified the conditions attaching to the delegation of dismissal authority from the Chief Executive and, in particular, requiring consultation with the Chief Executive in this case. So the *"One Removed"* principle had no application.

Legal tests of justification of dismissal or disadvantage in employment

[91] As the second interlocutory judgment in this case noted, the new s103A of the Employment Relations Act 2000 addressing tests of justification for dismissals and disadvantages in employment applies to the plaintiff's claims. Parliament has, for the first time, defined what it intends *"justification"* to mean. The section provides:

> ***103A Test of justification***
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[92] Parliament has directed that the Employment Relations Authority and the Employment Court apply, as their yardstick to decisions on justification for dismissals or disadvantages in employment, whether what the employer did and how it did it were what a notional fair and reasonable employer would have done in all the circumstances and must so determine on an objective basis. As Brooker's Employment Law text notes at ER103A.04, this harks back to the formulation expressed by the Court of Appeal in *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (sometimes known as "the second *BP Oil* case") and is to be distinguished from the

more recent judgment of the Court of Appeal in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448, in which the Court stated at 457:

> *The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of "could" rather than "would", used in the formulation expressed in the second* BP Oil *case ([1992] 3 ERNZ 483 (CA) at p 487).*

[93] After the hearing of this case, Judge CM Shaw delivered the first considered judgment on the effects in practice of the new s103A. Because I agree with the Judge's summary of the principles, I do not propose to address all of the arguments advanced by counsel in this case when it seemed that this may have been going to be the first judgment on the new tests.

[94] I summarise the principles in *Air NZ Ltd v Hudson* (2006) 3 NZELR 155 as follows:

- In s103A[2] Parliament expressed for the first time how it intended the concept of justification to be interpreted and applied in cases of dismissals and disadvantages in employment now under s103. Until now, Parliament has left it to the courts (the Employment Court and its predecessors and the Court of Appeal) to develop the principles. In the sense of being Judge-made law, this can be described as the common law of justification.
- The new section must be interpreted in light of the previous case law[3].
- Justification for dismissal must be determined on an objective basis, that is from the point of view of a neutral observer.
- The Employment Relations Authority and the Court are required to consider separately what the employer did and how the employer did it, to determine what a fair and reasonable employer would have done and how in these circumstances.

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[2] Inserted by s38 of the Employment Relations Amendment Act (No 2) 2004 with effect from 1 December 2004.

[3] This has been reiterated and applied (in respect of redundancy dismissals) in *Simpson Farms Ltd v Aberhart* (2006) 7 NZELC 98, 450.

- Although an employer may continue to have recourse to a range of legitimate options in determining whether the employer will dismiss an employee or disadvantage an employee in employment, it is for the Employment Relations Authority or the Court to evaluate that action against the objective standard of what a fair and reasonable employer would have done in the circumstances.
- This test does not, however, give the Authority or the Court unbridled licence to substitute their views for that of the employer.
- The Authority or the Court may, on an objective analysis, reach a different conclusion from that of the employer.
- In addition to the common law implied obligations of trust and confidence in employment relationships, s4(1A) is now also applicable so that considerations of good faith behaviour between the parties are also relevant.
- The objective test for justification does not differentiate between aspects of the dismissal process but, rather, refers in general to the employer's actions at all stages of the process including the decision that misconduct has occurred and the decision to dismiss.
- Such scrutiny is not to be undertaken in a mechanical or pedantic way and in many instances there is no clear distinction in practice between what an employer does and how the employer does it.
- The concept of *"unjustifiability"* is not confined to matters of legal justification but is, rather, a broader concept of whether what has happened was in accordance with justice and fairness.
- All the circumstances of the case must be taken into account in determining whether what the employer did and how the employer did it were what a fair and reasonable employer would have done.

[95] I would add the following to the foregoing principles extracted from the *Hudson* judgment with which I agree.

[96] The new test of justification under s103A is just that and not a legislative re-statement and entrenchment of the pre-2005 law set by the Court of Appeal in *Oram*.

The s103A test is not difficult to define or apply. The Court (and the Authority) must first consider justification objectively. That is to be compared to, subjectively, the way in which the affected employee or the affected employer may have considered justification. Objective in this sense may be likened to dispassionate or disinterested.

[97] The Court or Authority's focus is to be on *"the employer's"* actions, and *"how the employer acted"*. So it is the employer's conduct in dismissing or disadvantaging an employee in employment that is to be the focus of the inquiry. That phrase also directs that there be two separate considerations, first of what the employer did (the substantive dismissal or justification and the grounds for it) and, second, how the employer acted (the process leading to those outcomes). In both cases, substance and procedure, the Court and Authority must be satisfied that what the employer did and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or disadvantage occurred. As I found in the interlocutory injunction judgment in this case, the Court must apply the standards of a notional employer to the conduct of the actual employer. In doing so the Court (and the Authority) must draw on their knowledge and experience of, and expertise in, employment relations in determining whether they are satisfied that what the employer did met those notional standards.

[98] Section 103A makes it clear that questions of justification for dismissal must be judged *"at the time the dismissal … occurred"*. So even if relevant events may later come to light or the employer may consider that there were other grounds for the dismissal based on things known at the time, these cannot affect considerations of justification for dismissal. They may, however, be relevant to remedies including, in particular in this case, the remedy of reinstatement.

[99] ADHB must be taken to have dismissed the plaintiff for the reasons it set out, after careful consideration, in its letter to him dated 18 April 2005 although not sent until some days later to give him time to consider whether he would resign. Justification for the dismissal must therefore focus on the grounds ADHB had at the time and as it set out in its letter to the plaintiff as its relevant policies required.

The statutory requirements of "good faith" in employment relationships

[100] The relevant events in this case took place after the coming into force of the expanded and enhanced good faith requirements in s4 of the Employment Relations Act

2000. The fairness and reasonableness of the employer's actions and how it acted (the statutory tests for personal grievances just discussed) are to be judged by their compliance with those statutory requirements of good faith dealing, in addition to the established judge-made law of personal grievances.

[101] The relevant provisions of s4 applicable to these parties include the following:

- They were required to deal with each other in good faith and, in particular, whether directly or indirectly, not to do anything to mislead or deceive the other or that was likely to mislead or deceive the other: s4(1).
- These requirements included that the parties were to be active and constructive in maintaining a productive employment relationship in which they were, among other things, responsive and communicative: s4(1A)(b).
- In circumstances where ADHB was proposing to make a decision that would or was likely to have an adverse effect on the continuation of the plaintiff's employment, it was obliged to provide to him access to information relevant to the continuation of his employment and an opportunity to comment on the information before the decision was made: s4(1A)(c).
- The extended good faith obligations applied because ADHB's investigation of allegations of misconduct was a matter arising under or in relation to the plaintiff's individual employment agreement while it was in force: s4(4)(bb).
- In any event, I would hold that the investigation of allegations of serious misconduct having the potential to result in dismissal would be a circumstance in which the duties of good faith would apply: s4(5).

[102] If ADHB acted otherwise than in good faith (as defined in s4) towards the plaintiff in dismissing him or in its inquiry that led to his dismissal, that will be a factor going to justification. If breaches were serious and/or numerous and/or repeated, it may be difficult for it to contend that it had nevertheless conducted itself, and therefore dismissed him, justifiably as that is now defined in s103A.

Decision – Pre-dismissal unjustified disadvantage grievances

[103] First, the plaintiff says he was disadvantaged unjustifiably in his employment by the Board's delays in raising its allegations of serious misconduct with him. The period

of delay was from about 23 December 2004 when these matters came first to the notice of the Board until 8 February when it made the plaintiff aware of them.

[104] I do not agree that such delay was unreasonable in all the circumstances. Although the plaintiff is correct that on some individual days during that period all major players in this saga were at work, that did not alone mean that he should have been made aware of the allegations on one of those days.

[105] From the outset, the Board treated with appropriate seriousness the allegations levelled against the plaintiff. It directed an investigation of these by technically skilled staff. It ensured, appropriately, that these investigations and inquiries were conducted as discreetly as was possible in the circumstances. It assembled the evidence and formulated a series of specific complaints that it required the plaintiff to answer. I am not persuaded of any material disadvantage to the plaintiff attributable to any delay that I have concluded was, in any event, not unreasonable. The plaintiff cannot sustain an unjustified disadvantage grievance on this ground.

[106] Next, the plaintiff says that the defendant disadvantaged him unjustifiably in his employment by failing to provide for proper and fair representation at the first meeting to which the plaintiff was called on 8 February. He has a valid complaint in this regard. The Board's own policies make it clear that there is a positive obligation on the Board not simply to make its employees aware of their entitlement to representation, but to make reasonable attempts to ensure that an employee facing allegations of serious misconduct is properly represented at all stages of the inquiry. The Board's obligation was to provide an opportunity to be accompanied by a representative. Advice such as Dr Sage gave, that it was open for the plaintiff to do so but unnecessary, does not provide a real or effective opportunity to have a representative, especially where continued employment is at risk. That is by no means an unusual obligation on employers nowadays, often (as here) self-imposed by policy.

[107] Dr Sage's advice to the plaintiff that he could have representation, but that it would probably be unnecessary, did not meet the spirit or intent of that requirement. Knowing, as he did, of the nature of the allegations to be put on the following day, and having refused to tell the plaintiff what the meeting was about because of its seriousness, Dr Sage should have done more to ensure the plaintiff was represented. The disadvantage suffered by the plaintiff as a result of this breach of the Board's

obligations of fair dealing in employment and, in particular, of its own policies, was exacerbated by the previously undisclosed presence at the meeting of a senior legal practitioner representing the Board following advice to the plaintiff that an in-house human resources person would be there. Although Mr Caisley's presence was, in the event, benign in the sense that he played a role largely as an observer and recorder, the presence of an identified senior lawyer after the plaintiff had been advised an in-house human resources representative would be present, must have left with the plaintiff a clear impression of imbalance, unfairness and even deception at the outset.

[108] What was the consequence to the plaintiff of this misleading advice by his employer? Had the plaintiff been properly advised and, as I am satisfied he would have, obtained good legal advice as he did subsequently, he would probably not have said and done some of the things he did on 8 February. It follows that the defendant should not be able to rely upon its own failures to meet fair process standards by holding against him things that the plaintiff said and did that I find he would not have if the defendant had acted correctly. On the other hand, there are some elements of the plaintiff's conduct at that meeting that I find operate in his favour in determining the question of justification for his dismissal. So I conclude that while the defendant's failure to ensure adequate representation of the plaintiff was unfair and unreasonable, this should be regarded as an element in assessing justification for dismissal rather than simply a stand-alone disadvantage grievance.

[109] The next point that the plaintiff says constituted an unjustified disadvantage to him was the defendant's seizure of his laptop computer in a manner that was said to have caused him unnecessary distress. I find against the plaintiff in this respect also for the following reasons.

[110] To complete proper investigations, ADHB had to access not only its server-based IT records but also the hard disk drive on the plaintiff's laptop computer that was an integral part of his transmission of the photographs. The defendant made arrangements for prompt replacement of the laptop with other personal computer equipment so that there was no significant disruption to the plaintiff's work. The plaintiff was accompanied to his office by a staff technician and other than may have appeared from the plaintiff's own behaviour, the impression gained by others in the vicinity was probably unremarkable. It was not unusual for IT staff to be present or even to remove equipment.

[111] I have concluded that any embarrassment or distress suffered by the plaintiff and attributable to the laptop computer removal exercise, emanated from his own reaction to what had occurred. It cannot be attributed to the defendant which, in this regard, acted appropriately and with discretion.

[112] Penultimately, the plaintiff says that the defendant's further allegations of serious misconduct in the course of the inquiry disadvantaged him in employment unjustifiably because it had previously told him that the matters were not ones of discipline.

[113] It was unfair and unreasonable for ADHB to attempt to revive concerns about behaviours on which it elected to warn the plaintiff counsel-to-counsel. It held out that the plaintiff could expect a reaction if he continued or reiterated them. I conclude it is only what the plaintiff did in this regard after about midday on 9 February when he accepted the Board's advice and apologised, that can fairly be the subject of further critical inquiry and findings by the defendant.

[114] Therefore, just what it intended to be covered by its further allegations of misconduct set out in the Board's letter to the plaintiff's counsel of 1 March 2005 requires analysis. This letter identified three allegations. The first was that the plaintiff had *"bullied and intimidated the administrative staff, including by threatening to dismiss them"*. It is clear that the Board intended to refer to the plaintiff's conduct on 8 February and the morning of 9 February. This allegation was said to include that the plaintiff subsequently apologised for this alleged behaviour. I agree with the plaintiff, therefore, that it was neither fair nor reasonable for the defendant to attempt to claw back into consideration and rely on allegations that it had represented would be problematic for the plaintiff if they were repeated or continued.

[115] Second, the Board alleged a breach of confidentiality by the plaintiff. Although it was entitled to so allege, I am not satisfied that the allegation was soundly based and therefore the Board's conclusion justified. I find that the plaintiff was not told by ADHB representatives at the meeting on 8 February that he must maintain confidentiality about its allegations against him. Even if not, and quite apart from the propriety in principle of an employer seeking to gag an employee from communicating about a process affecting that employee, the plaintiff was entitled to communicate with others as part of preparing his responses to very serious allegations. Even if such an instruction had been given to him (as I am satisfied on balance it was not), it would not

have amounted to a lawful and reasonable instruction from an employer to an employee. Finally, it is significant in my view that it was not the manner in which the plaintiff interacted with other employees that was criticised by the Board but, rather, the fact that the plaintiff spoke to others about the allegations against him. The Board's complaint of breach of confidentiality is without foundation, both on the evidence and as a matter of principle.

[116] Third and finally in this regard, the Board alleged that the plaintiff had issued inappropriate instructions to his administrative staff about access to his e-mail, electronic calendar and other office facilities, impeding the ability of those staff to carry out their duties and causing them excessive distress. Although it may have been a legitimate allegation to have raised, there was no justification for it on the evidence heard by me. That is because what I am satisfied occurred was as follows.

[117] The plaintiff found his personal assistant, Ms Mearns, in his office in circumstances where he believed she was looking at confidential material relating to his research. I accept his uncontradicted evidence that he had previously told her that she was not to do this. In these circumstances the plaintiff, reasonably in my view, told Ms Mearns that she was not to have access to his office or to his e-mail systems. This was a lawful and reasonable instruction in all the circumstances. Although employed by ADHB, Ms Mearns's day to day duties were as directed by the plaintiff and he was entitled, in my view, to issue operating instructions consistent with that status to ensure the confidentiality of some of his research material. When the period for confidentiality had passed after a day or so, the plaintiff's restrictions on his PA's duties were cancelled. She was able to resume her usual duties.

[118] To the extent that I can ascertain from the evidence presented about this matter, it is difficult to see how it could reasonably have been distressing to Ms Mearns although I do not discount the general state of upset and sensitivity in which she may have been at that time. But the Board's allegations of misconduct having been directed at the plaintiff's entitlement to direct his subordinates about how to do their work, this allegation too is unfounded.

[119] Finally, in respect of alleged unjustified disadvantages, the plaintiff says that the defendant, through Dr Sage, breached the confidence of communications between him

and Dr Sage by disclosing unreasonably personal information that the plaintiff had been induced by Dr Sage to impart to him.

[120] Although not, or at least not solely, Dr Sage's fault, I consider that his role as both clinical adviser to Dr Murray's inquiry and as a professional colleague assisting the plaintiff to deal with the possible consequences of the investigative processes, was fundamentally in conflict. As Dr Sage told me, and as happened in the case of the other employee TW, in such circumstances a professional medical colleague would be asked to provide support and assistance to someone in the plaintiff's position, even where the employee being investigated may, as here, have very adequate legal representation. Dr Sage made some unsuccessful attempts to find such a professional colleague for the plaintiff. When he could not do so, took on that role himself that included inviting the plaintiff to make confidential and intimate disclosures about matters affecting and affected by the inquiry. Dr Sage does not seem to have suggested that the plaintiff himself find or nominate a colleague to undertake this role. That would have been the fair and appropriate thing for Dr Sage to have done. Many potential candidates for this role gave evidence in support of the plaintiff's case. It would have been surprising if none could have been found to do so earlier, especially if the plaintiff had been involved in the exercise.

[121] It was very unfortunate that, although I accept Dr Sage did not pass on all the detail the plaintiff told him, he nevertheless conveyed to the human resources manager, Ms Rawlings, the import of a number of things the plaintiff had told him which she, in turn, conveyed to the plaintiff's counsel. They were said by the plaintiff to Dr Sage in the expectation of confidentiality.

[122] It is important that roles in such inquiries are clearly established and not compromised. An important member of the investigative team should not also have a role as confidential adviser to, and supporter of, the person being investigated, however carefully and compassionately Dr Sage may have attempted to perform that latter role. The plaintiff was justifiably upset to learn that confidences he had imparted to Dr Sage at the latter's request had been passed on to others investigating his alleged misconduct and was entitled to consider that his trust in the fairness and impartiality of the inquiry was thereby diminished. Dr Sage's invitation to the plaintiff to discuss these matters with him also encouraged the plaintiff to think that his position was not as precarious as

it was. In this sense, Dr Sage misled the plaintiff about the Board's attitudes to the misconduct, albeit not deliberately.

[123] As with the other unjustified actions of the defendant, I consider that in addition to founding a separate personal grievance, these conclusions adverse to the defendant constitute elements of the other consideration under ss103 and 103A, whether the plaintiff was dismissed unjustifiably.

[124] Addressing these justified complaints collectively as unjustified disadvantages in the course of the inquiry, I have concluded that while the defendant cannot justify what it did, they also are so integrally connected to the dismissal that they should be considered as part of the assessment into the justification for the subsequent dismissal, at least for remedies. So the findings that I have just made and set out about these events will also form the basis of my assessment of their justification as grounds for dismissal dealt with subsequently in this judgment.

Decision – Unjustified disadvantage – Post-reinstatement

[125] I deal next with a number of events between ADHB and the plaintiff after his interim reinstatement in employment by the Employment Relations Authority that he categorised as being unjustifiable disadvantages in employment. Although individually and even collectively these events may well have annoyed the plaintiff, sensitised as he was in those circumstances, I do not think they either amount to disadvantage in employment or, even if so, unjustified disadvantage for which the plaintiff has a personal grievance.

[126] Because of relationship problems with certain staff members, ADHB redirected the plaintiff's mail to its Green Lane clinic site for collection there by the plaintiff himself. It seems that it was no more inconvenient for the plaintiff to uplift his mail at Green Lane than at Auckland City Hospital. At about the same time as the plaintiff's mail had remained at Green Lane uncollected for some period, a problem or potential problem arose with financial arrangements for a research project that ADHB staff suspected may have been addressed in some of the plaintiff's unopened mail. ADHB arranged for its in-house lawyer, Bruce Northey, to either open the plaintiff's mail in his absence or observe the plaintiff opening his mail at Green Lane to ascertain whether it contained information that was needed urgently in relation to this research. The

plaintiff objected to Mr Northey's actions. These, he said, were examples of unjustified disadvantage he suffered in his employment.

[127] Although why ADHB could not simply have telephoned the plaintiff, advised him of the problem and asked him to collect and inspect his mail so that it might be resolved, this apparently never occurred to it as an obvious solution. I do not consider that what it did nevertheless amounted to a grievance or conduct contributing to an unjustified disadvantage grievance.

[128] Both parties were, by then, considerably sensitive and probably overly ready to read into what would otherwise have been relatively innocuous situations, the worst interpretations of them.

[129] That was so, too, in relation to other allegations made by the plaintiff about events in this period including the detail of advices given by ADHB to his colleagues of his situation, the blameless and temporary cancellation of his electronic card access to Auckland City Hospital following his reinstatement and other similar events.

[130] These and other incidents may, on close and critical scrutiny, indicate that the defendant could have done things better and more sensitively but, whether individually or collectively, they do not amount to unjustifiable acts or omissions that disadvantaged the plaintiff materially in his employment. No less in this case, reinstatement, even interim reinstatement, is a problematic exercise that requires some give and take from both sides on practical issues. These aspects of the plaintiff's claims do not amount to personal grievances, let alone require monetary remedies for their resolution.

Summary of decision – Unjustified disadvantage(s)

[131] Although not all of the plaintiff's many complaints about his treatment, both leading to and following his dismissal, amount to unjustified disadvantages in employment under s103(1)(b) of the Employment Relations Act 2000, some others do, both individually and collectively. My conclusions in relation to these areas of valid complaint by the plaintiff are that they amount to unjustified disadvantage grievances. In the terminology of s103A, the employer's actions and how it acted in these regards were not what a fair and reasonable employer would have done in all the circumstances at the relevant times.

[132] Although existing independently as personal grievances, each of these factors was an integral part of the process that led to the plaintiff's dismissal. In these

circumstances it is more appropriate to consider their consequences, and especially remedies for them, as part of my overall assessment of remedies for unjustified dismissal that is the plaintiff's separate and major grievance.

Decision – Unjustified dismissal

[133] This case deals with material and issues on which there is a wide range of opinion, all of it sincerely, and some of it strongly held, about pornography and its significance not only in workplaces but also for hospital working and clinical relationships. So far as assessing the fairness and reasonableness of the Board's processes is concerned, the application of established statutory and common law principles ensures that such value judgments play little or no role. When, however, it comes to issues of substantive justification for dismissal (fairness and reasonableness of what the employer did) and reinstatement, and although there are also relevant objective criteria, some value judgments are unavoidable because of the Board's case both supporting dismissal and opposing reinstatement.

[134] It is important, on an issue on which there is such a variety of considered and sincere views, that I am not seduced into making value judgments that say more about me than about the merits of the case that I am to decide. In some respects, by applying established law, a Judge is able to determine such matters objectively and without influence from personal value judgments. It is, however, inevitable that on some aspects of these issues, a subjective (including a subconscious subjective) value judgment will influence the outcome. I think I can do no more than be aware of and attempt to minimise this.

[135] I have decided that a fair and reasonable employer would not have dismissed the plaintiff on 18 April 2005 for the reasons it did in all the circumstances that then prevailed. Because s103A also requires me to determine *"how the employer acted"*, I have considered and decided that the defendant's inquiry and decision making process was so unfair and in breach of statute, contract and ADHB's own policies, that no fair and reasonable employer would have so conducted itself in all the relevant circumstances at that time. So by each of the separate tests of s103A required to be considered by the Court, the plaintiff's dismissal was unjustified. Looked at in the round, also, I have reached the same conclusion. That is because the employer's flawed and unfair investigative and decision making process led to an unfair and unreasonable

outcome of dismissal. I now set out my reasons for these conclusions of lack of substantive justification.

Unjustified dismissal – Breach of good faith

[136] ADHB misled and deceived the plaintiff right from the outset of its inquiry that involved him. I adopt and now supplement my findings at paras [106] to [108] of this judgment. When, on the late afternoon or early evening of 7 February 2005, Dr Sage spoke to the plaintiff inviting him to a meeting to be held at 7.30 am the following morning, he was in breach of ADHB policy. This required the plaintiff to be advised of the allegations against him. Not only did Dr Sage not give any indication of these but, when asked about them, he refused to do so (no doubt on advice) on the grounds that they were too serious. That breach was arguably cured on the following day but by then had contributed to the unfairness of the Board's investigative process. The Board's policy required the advice to be provided as soon as practicably and it ought to have preceded the first investigative meeting.

[137] Next, when the plaintiff inquired of Dr Sage whether he, the plaintiff, should bring a representative to the meeting, I am satisfied Dr Sage responded that although it was the plaintiff's own decision whether to do so, it would probably be unnecessary. That advice contributed to the plaintiff's decision not to be represented on the following morning and, thereby, to his disadvantage in the process.

[138] Dr Sage also misled the plaintiff when, upon the latter's inquiry, he told him that the people present at the meeting on the following morning would be Drs Sage and Murray and *"someone from HR"*. By the time Dr Sage conveyed that advice to the plaintiff after 5 pm on 7 February, it was well-known to Ms Rawlings, who was orchestrating the process, and so ought to have been known to Dr Sage, both that no-one from HR would be attending and, more importantly, that ADHB's solicitor who had been advising it about these matters for some time, Andrew Caisley, would be present. Mr Caisley is a senior partner in the specialist employment law firm Kiely Thompson Caisley and, although not a human resources practitioner, nevertheless a very experienced and knowledgeable employment law practitioner. The plaintiff was misled in breach of s4.

[139] I am satisfied that when the plaintiff (unrepresented by anyone let alone a lawyer) was introduced to Mr Caisley at the start of the meeting at 7.30 am on the following

day, 8 February, he was at a disadvantage, both perceived and actual. This might have been controlled or minimised had the ADHB representatives at that meeting stuck to the prearranged and printed verbatim script that Ms Rawlings had prepared for Dr Murray to read out at that meeting. Predictably, because of the misleading advice given to the plaintiff, that did not happen. Alone and taken by surprise, the plaintiff was considerably upset and both wanted to know more and to defend himself. The ADHB participants at the meeting responded to his questions and statements contrary to the advice that Ms Rawlings had provided consistent with the script. The plaintiff's responses were, despite the unfair way in which they emerged, nevertheless included in the range of material that ADHB took into account in deciding to dismiss the plaintiff. That was contrary to the assurance Mr Caisley gave to Mr Waalkens that they would not be held against the plaintiff.

[140] The next element of bad faith in the Board's investigative process concerns disclosure of relevant information to the plaintiff. He immediately instructed Mr Waalkens to represent him. From the outset and repeatedly, both orally at meetings and in explicit correspondence to ADHB, Mr Waalkens asked on the plaintiff's behalf to have disclosed to him all of the board's records of relevant events in its inquiry about the plaintiff. These requests were both general, and specific in the sense that, for example, Mr Waalkens anticipated correctly that ADHB had interviewed other staff in December 2004 and January 2005 and had taken and retained notes of these interviews that were requested.

[141] In breach of the statute (s4(1A)(c)), its policies and fundamental principles of fairness in employment law, ADHB steadfastly failed or refused to even acknowledge the existence of these records, let alone to provide copies of these records as the plaintiff was entitled to. Not only did ADHB not acknowledge their existence but object to their disclosure as might have been expected, it consistently and blandly assured the plaintiff and Mr Waalkens that they had everything relevant to the inquiry. I do not accept Ms Rawlings's attempts in cross-examination to explain and justify ADHB's responses to these quite specific requests by saying that, in effect, the plaintiff was only entitled to and did receive notice of the adverse allegations made against him. Ms Rawlings appeared to consider that the plaintiff was only entitled to information adverse to him, but not to relevant information that may have assisted him or relevant information that may have been adverse to the complainants' or to the Board's position.

Even then, the information that the Board withheld from the plaintiff included material that was adverse to him, as I outline below.

[142] This was not a question of protecting the employer's sources as the Board may or may not have been able to justify. Rather, it did not merely conceal the identities of its informants but misled the plaintiff by asserting, in effect, it had no further written material that was relevant to the allegations, a patent untruth.

[143] On 10 February, ADHB advised the plaintiff's counsel that it did not intend to disclose to him the identities of those persons who had complained to it of his alleged misconduct. It indicated, by implication at least, that this was because those persons needed the protection of anonymity. However, that does not account for the defendant's failure or refusal to provide the plaintiff with relevant information about the matters it was investigating. Even if I were to accept that ADHB may have had good grounds to refuse to disclose the identities of these people to the plaintiff (and the defendant's case did not address this), documents in which relevant information was disclosed could have been altered by appropriate deletions of names. That would have preserved their anonymity but, at the same time, given the plaintiff information to which he was entitled to allow him to respond fully and fairly to the serious allegations made against him.

[144] So, for example, when the plaintiff's counsel asserted the existence, and asked for copies, of notes of interviews, the defendant did not reply that providing these may have disclosed an identity that should be protected. Rather, its response was to blandly assure Mr Waalkens that he and the plaintiff had copies of all relevant documentary records. That was misleading and deceptive conduct in breach of s4, the antithesis of good faith dealing.

[145] The Board also breached its own policies requiring the exchange of such information, not to mention long-established and well-known employment law principle that an employee accused of serious misconduct, potentially resulting in dismissal, is entitled to know not only of the allegations but of the evidence in support of them that the employer will consider. ADHB's conduct in its investigation of the very serious allegations was unfair and fundamentally flawed.

[146] This was not a procedural failing which had no substantive consequences. The Board's relevant records included notes of interviews with other staff about their

complaints against the plaintiff. These included serious allegations that were made known to the Board's inquirers but were never disclosed to the plaintiff until in discovery leading up to this proceeding. It is not to the point that these other allegations may not have been relied on by Dr Murray in making his decision to dismiss. The fact is that they were known to the Board and withheld from the plaintiff. Had they been provided to him and his counsel as they constantly sought but about which they were deceived, the plaintiff may have been able to answer the allegations of other staff said to have been bullied and harassed by him. These undisclosed interview notes included allegations about the plaintiff's treatment of past secretarial staff including that this had left them "*feeling like battered women*". They included serious allegations of misuse of public resources to support a private practice. These allegations included ones of affairs with other people on the staff and described him as a "*serial bully*". There was an allegation that Ms Mearns was "*in huge danger*" of the plaintiff and that his lawyer was "*digging for dirt*" on other staff. None of these serious allegations was proved in evidence. Significantly, the Board's documentary material included admissions by Ms Mearns that she had not been truthful in relation to some of these matters whereas the Board regarded her, and had held her out as, an innocent victim of the plaintiff's misconduct.

[147] Disclosure of relevant written materials would have revealed to the plaintiff and his counsel, as they did only for the first time in the Court, that there was no contemporaneous record of the investigators' assessments of the plaintiff's body language. This was a crucial factor in Dr Murray's decision to reject the plaintiff's explanations and assurances leading to his dismissal. The Board's representatives never confronted the plaintiff with their allegations that his body language caused them to disbelieve him, completely in the case of Dr Murray. Further, the defendant's refusal to supply relevant documents deprived the plaintiff of knowing that these serious and vital assessments had never been recorded at the times they were made or afterwards.

[148] It is not surprising in these circumstances that the plaintiff may have failed in the defendant's view to provide it with any or a sufficient explanation of his conduct, when all the details of it on which the defendant did rely or should have relied, were withheld from him. The most benign explanation for this stance, that ADHB witnesses sought doggedly to justify in evidence before the Court, is that it illustrates a profound misunderstanding by ADHB's human resources staff and other managers of

fundamental employment law obligations. These were serious and repeated breaches by the Board of s4 good faith obligations and of the Board's own policies and therefore of the plaintiff's employment agreement.

[149] As just noted, several of ADHB's crucial reasons for which it ultimately dismissed the plaintiff were never disclosed to him, at least adequately. These were the conclusions its representatives reached as a result of the plaintiff's *"body language"* purporting to indicate to ADHB representatives that the plaintiff's acknowledgement of his misconduct and his assurances of future avoidance of such misconduct were *"insincere"* and therefore not to be trusted. This was a serious and damning conclusion that, in material respects, ADHB did not believe the truth of the plaintiff's accounts.

[150] While ADHB witnesses spoke in evidence of what they said they had observed of the plaintiff's demeanour at meetings and their conclusions from it, his lawyer Mr Waalkens who was at the same meetings, gave evidence to contradict this. Not only was Mr Waalkens's evidence that the plaintiff had not exhibited the purportedly insincere behaviours contended for by ADHB witnesses but, in the lawyer's view, the plaintiff had been appropriately contrite and even excessively self-flagellating. There is some support for Mr Waalken's evidence from the account of the 8 February meeting of the Board's solicitor, Mr Caisley, given to the plaintiff's counsel. Mr Caisley told Mr Waalkens that the plaintiff had been excessively verbose. That was also Mr Waalkens' impression of his client at later meetings, but in stark contrast to Ms Rawlings' descriptions of his demeanour at all relevant times.

[151] But in the end it is very difficult, if not impossible, to reconcile these two completely contrary versions of how the plaintiff behaved at these meetings. They are perceptions that are subjective. Such notes as were taken at the meeting, or made later about them, might have given some indication of the plaintiff's demeanour but do not, even although they were taken by ADHB representatives. The notes are factually descriptive and, although useful to determine what was said, do not assist in confirming the Board's subjective analysis of the plaintiff's demeanour.

[152] I have concluded that it is unnecessary to resolve these stark evidential conflicts because, as fairness and natural justice required it to, ADHB never put to the plaintiff its purported disbelief of him that subsequently formed very significant grounds for his dismissal, so that he may have had a fair opportunity to dissuade them of their

assumptions. Section 4(1A)(b) now requires an employer in these circumstances to be *"responsive and communicative"*, the antithesis of how I find the Board's representatives dealt with the plaintiff at the meetings with him. It is again trite and fundamental employment law that grounds upon which an employer intends to rely to dismiss an employee must be made known to the employee and fair opportunity afforded to contradict them. Harsh and significant criticism of his demeanour extending to a total disbelief about his explanations, fell into that category in this case. ADHB simply failed or refused to make any or at least sufficient mention of them to the plaintiff before his dismissal. The single reference to an assessment of his credibility that was conveyed to him in ADHB's letter of 1 March concerned another aspect of the inquiry, his response to other staff in February 2005 but not his explanations to Board representatives in their meetings of 8 and 17 February and 18 April.

[153] An employer investigating serious allegations made against an employee cannot simply act as a proverbial sponge, a non-communicative observer and critic. In addition to the specific statutory requirements for responsiveness and communicativeness in s4(1A) of the Act, longstanding requirements of fair dealing require significant conclusions, including tentative ones, to be articulated to the employee. In this case the dangers of a blotter-like approach to interviews by the employer led to further mistaken body language. For example, whereas the plaintiff and his lawyer assumed that head nodding on the part of Board representatives indicated their acceptance of his explanation, their account was that this simply indicated their understanding of the explanations but not their acceptance. This, in turn, led to Mr Waalkens's frustrated rhetorical question to ADHB representatives, asking what more his client had to do or say to persuade them to his position and the refusal of the defendant's representatives to answer this. That is one practical illustration of the need for participatory discussion on such occasions.

[154] None of the three ADHB managers who conducted the interviews and investigation knew the plaintiff well. There were others, including his immediate manager in the hospital structure, who knew the plaintiff better (and might therefore have been better judges of his character) but were not involved as investigators. In the case of his immediate manager, at least one of the reasons for not involving her appeared to be that she was a woman. Although not suggesting this as a general practice in investigations, where such subjective and problematic considerations as

interpretation of *"body language"* are in issue, persons not well acquainted with the employee being investigated may not always be best suited to act as investigators and decision makers.

[155] A formal investigation into allegations of very serious misconduct potentially leading to dismissal from a lifetime's valued work, is not a usual or natural environment for human interaction and *"body language"* exhibited in such a forum may not necessarily give an accurate guide to such subjectively observed traits as contrition, sincerity and the like. While *"body language"* is one element of the assessments that a fair and reasonable employer in these circumstances may make, reliance upon it alone, or even substantially, may be problematic and will require considerable care and objective consideration.

[156] I observed the plaintiff giving evidence at length in this proceeding, a similarly unnatural environment for human interaction. He exhibited behaviours that might have appeared to some to indicate insincerity, impatience or other like characteristics but I do not consider that I could have reached any firm conclusions about the plaintiff's sincerity and credibility as a result of making such assessments by reference only or even substantially to his *"body language"*. Dr Murray, however, apparently shared none of these uncertainties in condemning what he assessed to be the plaintiff's complete insincerity and manipulative false contrition. I do not accept Dr Murray's conclusions about the plaintiff's sincerity based on his perception of the plaintiff's body language.

Decision – Unjustified dismissal – Breach of contract/policy

[157] I find that the plaintiff's dismissal was in breach of contract because it was in breach of the defendant's Delegated Authority Policy. As I have already noted, adherence by the defendant to its relevant policies was an expressed condition of the plaintiff's contract of employment.

[158] The Delegated Authority Policy allowed Dr Murray, as deputy CEO, to dismiss the plaintiff. That delegation was conditional upon *"consultation"* having taken place with the CEO. In this case, I find that such *"consultation"* was intended to have been about Dr Murray's intention to dismiss. Accepting, as I do, his evidence and that of ADHB's other relevant witnesses, Dr Murray did not arrive at his decision to dismiss the plaintiff until shortly before midday on 18 April 2005. That was at the conclusion

of an adjournment taken in conjunction with Dr Sage and Ms Rawlings immediately before the decision to dismiss was announced to the plaintiff.

[159] I am satisfied from the evidence about these events of Drs Murray and Sage and Ms Rawlings, that Dr Murray did not *"consult"* with the CEO about his final decision to dismiss as he was required to do. It is more probable and consistent with the evidence of Drs Murray and Sage and Ms Rawlings that Dr Murray's communication with the CEO simply advised him of the fact of dismissal or intended dismissal. That was in turn consistent with adherence to what Ms Rawlings believed to be the operative policy, *"One Removed"*, that required only advice to a superior. But neither that advice nor the earlier information Dr Murray had provided to the CEO about the investigation into misconduct by the plaintiff, was *"consultation"* about the decision to dismiss. The policy required Dr Murray to discuss his intention to dismiss and the reasons for it with his immediate superior, the CEO of ADHB, and to seek and take notice of the CEO's views about that decision. That simply did not occur as it should have.

[160] As well as being a self-imposed requirement, the obligation to consult was a sensible condition attached to the delegation of the power to dismiss someone in the plaintiff's position. It ensured a second or at least additional consideration of an intended dismissal, by ADHB's most senior officer, unaffected by the subjectivity of the investigative process that Dr Murray himself had undertaken.

[161] ADHB's own requirement of consultation with a detached, more senior manager, if there was to be a dismissal, was not an exercise in consultation for its own sake or otherwise a mere formality, the failure to comply with which may not have had much significance in this case. Rather, the policy was a sensible check on, and balance to, serious decision making of the sort that this case illustrates. Such consultation required the decision maker to justify to a superior the tentative decision made by reference to facts supporting it and compliance with a variety of regulatory regimes including employment law, the Board's own other policies, and the employment agreement. Consultation would have ensured a dialogue involving the superior manager. It was a policy intended to produce quality decision making by factors such as testing facts, objectivity, and the application of seniority and experience.

[162] It is not relevant that the CEO may have agreed with Dr Murray's decision to dismiss although there was no evidence of this in any event. The importance of the

requirement to consult was as much for the decision maker (Dr Murray) as for the consultee. A decision maker, knowing that he or she will have to justify an intended dismissal to a superior, will ensure the quality of the initial decision making. Nor is it to the point that the CEO may have agreed in this case because, as the evidence discloses, he was probably misled at an earlier stage of the inquiry about the allegations against the plaintiff when these were portrayed as being more serious than they were. It was wrong for ADHB's representatives to have made available to the CEO copies of all of the electronic images that were discovered before 8 February 2005 when, by the time of discussion with the CEO, most, by number, of these incidents had been discounted and were no longer relied on by ADHB that accepted the plaintiff's innocent explanation for these items. The "shock-horror" impact of some of these images, despite their lawfulness, cannot be underestimated, even although they had been eliminated from the Board's enquiry.

[163] Under the Delegated Authority Policy, and from this Court's experience of the performance and practice of similar requirements, the CEO could not simply have operated as a rubber stamp but would have needed to test, independently and even rigorously, the arguments for dismissal about which Dr Murray ought to have consulted. That did not happen at all. This was not a mere procedural technical requirement, the breach of which can be excused easily as a minor procedural failing.

[164] I have to say, regrettably, that ADHB's attempts to address this deficiency, when it must have been become obvious in evidence, were unconvincing. Its position put by Ms Rawlings was that this was not an operative policy or, if it was, it was somehow trumped by what is colloquially described as ADHB's *"one up"* policy that simply requires a manager undertaking an investigation of this sort to keep his or her immediate manager informed of progress. Although that is indeed one policy, it does not diminish or certainly trump the separate Delegated Authority Policy referred to. As I have already found, by its terms, the *"One Removed"* policy had to yield to the "Delegated Authority Policy" in this case. Dr Murray was obliged to consult about his decision to dismiss the plaintiff before that was done and he simply failed to do so. Compliance with the inapplicable *"one up"* policy was no substitute for necessary compliance with the Delegated Authority Policy.

Unjustified dismissal – Substantive justification

[165] I have already concluded that in several respects the process by which ADHB came to dismiss the plaintiff was so unfair and unlawful that the defendant has failed to establish that, to use the words of s103A, it acted as a fair and reasonable employer would have done in all the circumstances at the relevant times. The new statutory test also requires me to consider, again objectively, whether what the employer did (i.e. the dismissal of the plaintiff) met the same standard.

[166] ADHB was not entitled to have had regard to several of the factors upon which it relied in deciding to dismiss the plaintiff for serious misconduct and, on its assessment, for having breached irrevocably the trust and confidence that it was entitled to have in him. The plaintiff's aggressive and intimidatory conduct towards other staff on 8 and 9 February was then a matter that the Board elected to address by a warning conveyed by its counsel to the plaintiff's. In the absence of proven continuation or repetition of that conduct, the defendant was not entitled to rely upon it as a ground for dismissal. That it did so was unfair and unjustifiable.

[167] Next, I have already concluded that it was not open to the Board to use as a further ground for dismissal, the plaintiff's restriction upon his personal assistant's access to his records and office. That conduct has been explained reasonably by the plaintiff to both the Board's investigators and the Court. A fair and reasonable employer would not have concluded that it both reinforced a loss of trust and confidence and cast doubt upon the veracity and sincerity of the plaintiff's acknowledgements of misconduct and resolutions and non-repetition.

[168] I have already concluded, also, that the plaintiff was not instructed to keep confidential from other persons the fact and content of the Board's investigation of his misconduct. A fair and reasonable employer would not have concluded, as the defendant did, that the plaintiff's communications per se with other staff about his predicament was further misconduct that both confirmed its loss of trust and confidence in him and caused it to doubt his veracity and sincerity in response to the original complaints against him.

[169] By reference to the dismissal letter of 18 April, this leaves the two electronic items (the *Arets Kalender* and the penile photographs) and their consequences for

consideration. Would a fair and reasonable employer have dismissed the plaintiff for these incidents in all the circumstances?

[170] Both misconducts amounted to breaches of the Board's policies to which it expected employees to adhere. In the end, it matters little that the plaintiff may not have been aware of the particulars of the e-mail policy because, as he conceded, what he did was contrary to commonly accepted standards of conduct for senior clinicians in public hospitals. Put simply, the plaintiff's actions in respect of the penile photographs and of the *Arets Kalender* were wrong. Whether they met the policy's test of *"serious misconduct"* (that it undermined the contractual relationship and/or seriously threatened the wellbeing of the organisation, its staff or clients) is not a clear-cut decision. Those are weighty criteria that ADHB has set for itself. Even if the incidents with the penile photos and the forwarding of the *Arets Kalender* met those tests of serious misconduct as defined, it cannot be said that dismissal ought to have been the natural consequence of it.

[171] What should have been the sanction for or consequence of such behaviour is really at the nub of the case. I have decided that, viewed objectively in the context of all of the relevant evidence, a fair and reasonable employer would not have dismissed the plaintiff for the two instances of electronic misconduct that it had established and indeed that the plaintiff had admitted to from the outset.

[172] That there was misconduct by the plaintiff as a senior clinician is beyond doubt. Indeed, the plaintiff has so admitted from the outset. But if the defendant had acted in accordance with its relevant policies that were incorporated into the plaintiff's employment agreement and if it had fairly and reasonably taken into account matters that I am satisfied it precluded the plaintiff from putting forward for its consideration as had been established in evidence in this case, a fair and reasonable public health provider would not have dismissed the plaintiff. Rather, it would have applied a variety of sanctions and behavioural correctives and safeguards with a view to ensuring that such misconduct would not recur.

[173] The evidence shows that in other cases, ADHB has used a combination of sanctions and behavioural correctives to deal with similar circumstances. In the case of another employee who viewed internet pornography on a hospital computer, ADHB both gave a final warning and required the rearrangement of that employee's work area

to ensure that the computer screen could be observed by others. Although I do not suggest that that particular strategy might have been the appropriate one for the plaintiff, that example illustrates an innovative approach by ADHB to changing behaviours both specifically and of all staff.

[174] Although the plaintiff's case at all material times, including during the Board's investigation and before this Court, acknowledged the necessity for and ability of the plaintiff to change his behaviours, in addition to a sanction, Dr Murray's view was that this was simply impossible. I am not satisfied, however, that Dr Murray's absolute rejection of redemption was soundly based or, on the evidence heard and seen by me, correct. No inquiry was apparently made by ADHB as to what behavioural change strategies might have been available to it. As importantly, no or insufficient assessment was made by the employer after appropriate inquiry of the plaintiff and consideration of his responses to such a possibility.

[175] There are longstanding and effective workplace behavioural change strategies undertaken by bodies such as the Human Rights Commission in the field of sexual harassment. This includes with sexual harassers who may, at the outset, have little or no insight into the obnoxiousness of their behaviours or the profound effects of them on other employees or other persons in the workplace. The plaintiff's criticised behaviours were not sexual harassment but nor were they entirely dissimilar. There were a number of common elements. What the defendant categorised justifiably as the mocking and degrading content of the calendar exhibiting elderly women, shares those characteristics with some forms of sexual harassment. Even more closely associated was some of the sexually explicit and pornographic material that the plaintiff had passed on but not involving elderly women.

[176] In my assessment, a fair and reasonable employer in these parties' circumstances would have given substantially greater consideration to behavioural change strategies than did Dr Murray who rejected them out of hand by considering, unreasonably and wrongly in my conclusion, that the plaintiff was such an incorrigible recidivist pornographer that he could not be permitted to practise as a clinician in a public hospital under any circumstances.

[177] I do not consider that ADHB had sufficient regard to the objectives of its relevant disciplinary policies. There is a considerable emphasis by the Board in its policies on

behavioural change. In addition to its failures to adhere to its own principles of *"fairness"* and *"advance warning"*, the defendant had also bound itself to *"non-punitive"* outcomes to disciplinary matters. More particularly, its stated aim was to *"improve the situation and prevent recurrence of unsatisfactory actions or behaviours"*. Although dismissal might be said to be one very effective method of specific or even general deterrence, I do not read the policy in this way. Rather, it is an enlightened and progressive objective to enable both particular employees and staff generally to learn from unsatisfactory acts or omissions and for the avoidance of their repetition. Although I do not think that the plaintiff's dismissal was, to use the words of the policy, *"for the purpose of exacting revenge or inflicting punishment for its own sake"*, the punitive elements of this outcome may be seen to have outweighed the rehabilitative ones.

[178] I do not uphold the plaintiff's claim to unjustified dismissal on the basis of disparate treatment alone. However, fair and reasonable treatment of employees guilty of even serious misconduct requires a broad consistency of approach and outcome on the part of the employer. The other employee, to whom I have referred as TW, appears to have had some dealings with pornographic websites at work, details of one of which he sent on to the plaintiff but with which the plaintiff dealt appropriately. The Board's investigations of TW's IT systems disclosed the existence on those of a number of naked photographs of himself and subsequent inquiries revealed that TW may not have been entirely honest with the Board about his prior dealings with pornographic material on its IT systems. Like the plaintiff, TW acknowledged the wrongness of what he had done, apologised, and promised non-repetition. The genuineness of his responses was accepted by the Board unlike, the plaintiff's.

[179] I have concluded, however, that Dr Murray's assessments in the case of the plaintiff were not sound and this having been the point of distinction in the mind of Board investigators, the plaintiff's case can now be seen as one much more akin to TW's. Unlike the plaintiff, TW was not dismissed but appropriate sanctions were, nevertheless, applied by the Board in his case. I am satisfied that a fair and reasonable employer would have treated similar (but not identical) cases similarly (although again not identically) which would not have seen TW retained in employment and the plaintiff dismissed from it. Evidence of the outcome of investigations into other

employees' electronic access to pornography reinforces that conclusion. A fair and reasonable employer in all these circumstances would not have dismissed the plaintiff.

Decision - Unjustified dismissal - Wrong motive

[180] The plaintiff claims that ADHB was motivated in dismissing him, whether wholly or partially but in any event improperly, by the earlier unrelated conflicts between clinicians and the Board in which he had been a leading figure. In addition to these conflicts about recovery of research costs and investigations into expenditure, the plaintiff also believed that he had been made a scapegoat for his criticism of the way in which the Board dealt with publicity about another senior clinician who had been charged with serious criminal offending. While I have no doubt that the plaintiff believed and may even continue to believe that the Board and Dr Murray in particular were improperly motivated to dismiss him for these reasons, there is no objective evidence adduced to support this theory and it is not a ground supporting his unjustified dismissal.

Remedies claimed

[181] Having found the plaintiff to have been disadvantaged unjustifiably in his employment and dismissed unjustifiably, the remedies to which he is entitled have posed a number of serious questions, not least that of reinstatement.

[182] The plaintiff claims, in addition to a permanent (as opposed to his current interim) order for reinstatement in employment, compensation for some financial losses incurred by him as a consequence of his dismissal and substantial distress compensation under s123(1)(c)(i) of the Employment Relations Act 2000. His counsel has described these claims for distress compensation as being both substantial and warranted. They total $60,000 being $10,000 for unjustified disadvantage in employment and $50,000 for the non-pecuniary consequences of the plaintiff's unjustified dismissal. Because of the Employment Relations Authority's prompt order for interim reinstatement and the dismissal by this Court of a challenge to that interim order, there was little or no remuneration loss incurred by the plaintiff, his claims for specific losses relate to the purchases of IT equipment made by him immediately following dismissal.

Contributory conduct

[183] I conclude that the plaintiff's misconduct contributed substantially to the circumstances that gave rise to his dismissal. His adolescent and frankly stupid actions of photographing his own genitalia, later transferring the digital photographs to his laptop computer that was connected to ADHB's IT system, and later again sending or attempting to send at least one of these photographs as an attachment to an e-mail via that IT system, were the catalyst for the defendant's investigation that resulted in the plaintiff's dismissal. Put simply, had he not engaged in these logically inexplicable acts of self-gratification, it is unlikely that he would have been dismissed.

[184] That is so, too, in respect of the other catalyst for his dismissal, the dealing with the pornographic and offensive *Arets Kalender* in December 2004. Although the plaintiff cannot be criticised for receiving this item electronically and unsolicited from a professional colleague overseas or for attempting to delete it from his electronic mail records after ascertaining briefly its general nature, the plaintiff's subsequent conduct in relation to this item contributed towards the situation that gave rise to the personal grievances. In response to an e-mail from an ADHB colleague providing the plaintiff with the details of an apparently pornographic website (that the plaintiff ignored), he retrieved the *Arets Kalender* from its location on the electronic mail system as a deleted item and sent this on to his colleague via the hospital's IT system with Christmas wishes. Although, in my assessment, both more impulsive and less stupid than his conduct with the penile photographs, this was nevertheless blameworthy conduct by the plaintiff that contributed towards the situation that gave rise to his personal grievances.

[185] I agree with ADHB that there is no neat and logically convincing explanation for this aberrant conduct by the plaintiff. Although he attempted to attribute it, or the worst of it, to the effects of medication that he was prescribed for an injury, this was a very belated explanation (at least in the detail that it was advanced in evidence) and one that does not survive even cursory scrutiny. The medication that the plaintiff was prescribed was not taken by him until after the penile photograph incidents on 5 and 7 September 2004. By the time he came to forward the *Arets Kalender* to his colleague on about 22 December 2004, the evidence is that his medication had been altered and reduced so that it is unlikely that it would have contributed to, let alone caused, the plaintiff's retrieval and sending on the calendar.

[186] In any event, there is no suggestion that the plaintiff's intensive workload was affected adversely by his injury and its treatment. Although there were the additional stresses of the Board's audit and the research cost proposals in late 2004, it is not suggested that these caused or contributed to his relevant conduct. But, as I have already found, the plaintiff's photographic conduct probably falls into that category of human behaviour that defies rational explanation, the occasional and spectacular Zidane[4] "brain explosions" of human existence.

[187] In a more minor way, there are also elements of the plaintiff's responses to the Board's investigation following its disclosures to him on 8 February 2005, that contributed to the defendant's unjustified dismissal of him. Although I have certainly reached significantly different conclusions on the evidence about the plaintiff's conduct than did Dr Murray and Ms Rawlings, his dealings with other staff in reaction to the allegations against him did not help his cause. His initial reactions on 8 and 9 February are probably explicable by a combination of his response to the investigation and his own autocratic personality. These reactions were, as I have already found, dealt with informally by the Board. This resulted in an apparent acceptance by the plaintiff, no doubt acting on strong advice of senior counsel, and withdrawals and apologies by him to affected staff that were accepted by them. However, there were some later and more subtle influences that the plaintiff attempted to bring to bear on his staff as the real prospect of his dismissal began to register with the plaintiff. Although these dealings with staff did not amount to the serious harassment, intimidation and bullying that Dr Murray and Ms Rawlings concluded, they were nevertheless elements of the plaintiff's conduct that contributed to his dismissal and reactions to his situation that he ought to have curbed.

[188] All of these factors require a significant reduction in the remedies to which the plaintiff might otherwise have been entitled. On the other hand, in my assessment, they cannot negate all remedies because the defendant's lack of justification for what it did and how it did it, is significant and pervasive.

[189] Reimbursement of lost income cannot be reduced because the plaintiff is fortunate that he did not lose income after his dismissal. Reinstatement must, in all the circumstances, be an all-or-nothing remedy. Not only does the law not permit the Court to reinstate, for example, to a lower ranked position, but the combined research and

[4] Italy v France, FIFA World Cup Final, Germany July 2006

clinical role held by the plaintiff was unique and unalterable. He could not have been a full-time researcher or undertaking the research role other than within ADHB. The statutory alternative to reinstatement to a position no less advantageous is not open on the evidence. That leaves only the plaintiff's claim to reinstatement, if it is practicable, to which I turn shortly. In the circumstances, reinstatement will not be affected by s124, but his other remedies will be.

[190] So although I accept that the process leading to and of dismissal caused the plaintiff substantial upset, humiliation and distress for which he might otherwise have expected to have been compensated monetarily, by making no award for these consequences, I think the Court can thereby reflect appropriately the plaintiff's contributory conduct. Also reflecting the need for reduction of remedies as a result of contribution, I do not think it would be just in all the circumstances to require ADHB to contribute to the costs of purchase of the plaintiff's mobile telephone and another laptop computer as he has claimed as a loss of benefit and this is not allowed.

[191] Although I will, at the request of counsel for the parties, reserve costs, I should make clear also that any award may also reflect contributory conduct on the plaintiff's part if I am required to fix costs.

Reinstatement

[192] I have regard first to the statute's emphasis upon reinstatement as a remedy. Section 125 requires the Court to provide reinstatement (as defined in s123(1)(a) as being reinstatement to the employee's former position or the placement of the employee in a position no less advantageous to him), whether or not it provides for any of the other remedies set out in s123, wherever practicable.

[193] Reinstatement is, without doubt, the most important remedy for the plaintiff. The test of practicability reiterated in the current legislation's emphasis on reinstatement being a "*primary*" remedy, is a longstanding qualification. Considerations of practicability are broad and circumstance-dependent in the sense that the Court must consider all relevant factors by both considering the past employment history and looking to the future.

[194] Apart from what I accept are these instances of aberrant behaviour by the plaintiff in 2004, he has had a very long and mutually beneficial history of employment with ADHB and its predecessors. Until these incidents, there had been no suggestion of

criticism of the plaintiff either as a clinician or an employee generally. Indeed, the evidence is that the plaintiff was an especially valued senior medical specialist whose work in the public sector benefited not only his employer but his professional colleagues and the community generally.

[195] Nor was there any criticism, even from the plaintiff's most trenchant detractors who gave evidence for the Board, of his technical expertise as a specialist practitioner. The defendant's assertion of the impracticability of reinstatement turns on what its witnesses termed the necessary high level of trust and confidence in the plaintiff's skills and abilities as a clinician that include not merely those technical attributes just mentioned but also, and importantly, his relationships with patients, their relatives, and with his professional colleagues. These are very serious considerations that have weighed heavily on my mind.

[196] The plaintiff has, of course, been reinstated temporarily since very shortly after his dismissal. At the time of the hearing before this Court, about nine months later, there was no suggestion of any problems with that reinstatement. Further time has now passed and the plaintiff has, I assume, both continued to work in his clinical and research roles and, I imagine, to the same high standards as prevailed between his interim reinstatement by the Employment Relations Authority and the hearing of the personal grievances. Such a good recent history cannot, of course, affect either the preliminary question of justification for dismissal or, at least alone, the consequent question of the practicability of reinstatement if dismissal is found to have been unjustified. Therefore, I deal with reinstatement on its merits and by considering and determining the substantial body of evidence directed to this question.

[197] The main element of the defendant's case opposing reinstatement of the plaintiff is that the defendant's patients and other staff can not have the necessarily high degree of confidence in the plaintiff as a registered medical practitioner following the events that led to his dismissal. Put shortly, the defendant's case is that the plaintiff can not be trusted in future to deal appropriately with patients under his care or with professional colleagues.

[198] On the other hand, the plaintiff's case is that his indiscretions did not involve or affect the Board's patients and there has never been any suggestion of other than exemplary professional clinical dealings between the plaintiff and patients and other

staff of the hospital. The plaintiff's case is that even if he may not previously have been aware of the inappropriateness of his conduct in the respects that led the Board to dismiss him, the consequence of all that he has been through in the last two years will be a sure reminder not to engage in such conduct again so that patients and professional colleagues will be able to continue to have or regain appropriate trust and confidence in him.

[199] Each point of view has merit in my assessment. To not reinstate the plaintiff and to thereby bring about in large measure at least the cessation of his practice as a registered medical practitioner in New Zealand would obviously address the Board's concerns. But that would be all too draconian and unwarranted an outcome, especially where there are effective alternatives as I am satisfied there are.

[200] The defendant's opposition to the reinstatement was articulated through a number of witnesses. These included Dr Murray and Dr Sage but also witnesses who had no prior involvement in the case including the doctor to whom the plaintiff was and is immediately responsible, the Board's Director for Adult Health Services, Margaret Wilsher, and its General Manager of National Women's and Starship Children's Health, Kay Hyman. Also, in this regard, evidence was called from the Director of Advocacy at the Office of the Health and Disability Commissioner, Judi Strid.

[201] Ms Strid's evidence addressed her experience of patient expectations of medical professionals and, in particular, women hospital patients. I accept that doctors' patients, including patients in public hospitals, expect and are entitled to expect medical practitioners to show respect, good judgment and integrity as an inherent part of a trustworthy doctor/patient relationship. Ms Strid's further evidence, that I also accept, is that the presence or absence of complaints is not necessarily a reliable indicator of the acceptability of such relationships. So while the presence of complaints does not necessarily indicate that things are wrong, the absence of complaints does not necessarily mean that all is well.

[202] The evidence about the plaintiff's long history of employment with ADHB, however, goes further than simply being one in which there were no patient complaints. The plaintiff worked in what was essentially a team environment and was subject to close scrutiny by senior colleagues. All of those who gave evidence were not merely complimentary about the plaintiff's general clinical performance, but in most instances

were highly laudatory of it. Although I have attempted to be careful, when analysing the evidence and arguments about reinstatement, to bear in mind the self-evident truth of Ms Strid's evidence, the case for the plaintiff's reinstatement survives that analysis.

[203] The evidence of Ms Hyman was to similar effect but from a different perspective. The thrust of it was that there is a public expectation that those working in the health sector should have, and be seen to have, high personal standards. I accept that as a general proposition and it has constituted one of the several considerations that I have applied to the test of reinstatement in this case.

[204] Dr Wilsher addressed directly (as was appropriate) the plaintiff's application for reinstatement, and opposed it. She described the penile photographs incident as *"incomprehensible"* for a senior clinician and was concerned about the plaintiff's medical competence, particularly given his leadership responsibilities. In Dr Wilsher's assessment, the plaintiff's behaviours exhibited such a lack of judgment that she doubted that his employer could have confidence again in his leadership role. Dr Wilsher reiterated the evidence of other witnesses, that I accept generally, that patients reasonably expect their clinicians to show respect and demonstrate personal integrity within the work environment and, in particular, in the patient/physician relationship. I accept also that such trust is at the heart of that relationship. I agree, also in principle, that ADHB must uphold and be seen to uphold the values of respect and integrity, not only for itself but on behalf of its patients and their families and communities. I concur with Dr Wilsher's evidence that it is impossible to conceive of a health organisation or its employees condoning behaviours of the sort exhibited by the plaintiff. But of course they did not do so and nor does this Court. Rather, it is a question, as Dr Wilsher goes on to frame, whether these incidents display *"disrespect and a lack of integrity that is unacceptable from a clinician"*.

[205] Balanced against Dr Wilsher's evidence in this regard, I must place the equally considered evidence of a significant number of other senior clinicians who, having been aware of the plaintiff's actions and the pornographic and other inappropriate material, nevertheless continued to express their ongoing confidence in the plaintiff and in his ability to meet the expectations of patients as a clinician.

[206] Although according her views considerable respect, I do not necessarily agree with Dr Wilsher's absolute proposition that *"most patients would feel revulsion if*

shown the material involved in this case and most would not want to be treated by a doctor that indulged in the behaviours of acquiring, storing and disseminating such material whilst at work". I do agree that this may be the response of some. But as this case has illustrated graphically, the range of acceptable and unacceptable behaviours of people in the wider community is very broad. All of the many witnesses who gave evidence about these matters considered the plaintiff's relevant behaviours wrong and unacceptable. But there was by no means a consensus of views beyond that, both as to the level of unacceptability and as to the consequences of it for the plaintiff, ADHB, patients and other consumers, and the plaintiff's professional colleagues and other staff.

[207] It does not assist to speculate whether most patients would be revolted if shown the material involved in this case. That is because the principal focus is not on the nature and content of the material as such, but on the plaintiff's dealings with it. For the most part, he deleted these electronic images. On some occasions he forwarded them to colleagues. On others he replied with a brief message.

[208] Nor is Dr Wilsher accurate in her description of the plaintiff's behaviour as *"acquiring, storing, and disseminating"* such material. With the exception of the penile photographs that he created, the plaintiff did not acquire the material in question in the sense of soliciting it but was, rather, the passive recipient of it, albeit perhaps not unwillingly. The only incidents discovered by ADHB of solicitation of allegedly inappropriate material was by a former (female) secretary to the plaintiff who solicited the sending of a non-pornographic and non-sexual joke from an overseas colleague of a sort that she had previously enjoyed and passed on to the plaintiff.

[209] As to the plaintiff's storage of material that concerned Dr Wilsher, I have already concluded that electronic images, once received by the hospital's IT system, can never be destroyed in the same way that a paper copy of such material can be. The best that a recipient can do is to attempt to "delete" the item that, in reality, means to make it more difficult to access. In this sense, also, I think Dr Wilsher was mistaken in her description of the plaintiff's storage of this material. Likewise, although the plaintiff did disseminate some of the offensive and pornographic material that he received, most by number or volume was deleted without having been opened.

[210] As I have already noted, Dr Wilsher's views demand considerable respect in the exercise of determining appropriateness and practicability of reinstatement But her

non-involvement in both the Board's investigations and (with the exception of giving evidence late in the case) in this proceeding, may have meant that her beliefs about what the plaintiff did were not entirely accurate.

[211] Dr Wilsher's evidence also focused on the effect on patient care if the plaintiff is not reinstated. Although this may have been another relevant consideration, the plaintiff's case was not advanced primarily on the basis that there would be significant detriment to patients if he were not to return to work as previously. I do accept, however, that it would be very unlikely that the plaintiff's research work could be continued in the absence of a concurrent clinical practice in a public hospital, at least in New Zealand. So if he is not reinstated, it is probable that he will be unable to continue with the specialist research projects on which he has been engaged and which are ongoing and societally valuable.

[212] I accept, also, that the plaintiff's own reputation and ability attracts funding and research that might otherwise not be done either within Auckland City Hospital or even perhaps in New Zealand if he were not reinstated.

[213] Dr Wilsher's evidence also introduced for the first time as a consideration in these proceedings, the professional expectations of the Royal Australasian College of Physicians of which both she and the plaintiff are members. Dr Wilsher did not, of course, speak on behalf of the College and the Court must be careful to keep in perspective the rules of professional conduct set and administered by that professional organisation that were not the subject of professional expert evidence.

[214] I am conscious, also, of the possibility, theoretical at least, that the plaintiff's actions may be the subject of inquiry by the College as indeed they may be by the Office of the Health and Disability Commissioner[5]. Although potentially dealing with the same events, the functions of this Court, the College and the Health and Disability Commissioner are all very different and examine events according to different standards and with the potential for very different outcomes. That is why I think it is important that the Court should be reticent to attempt to apply the College's ethical

[5] During the hearing I was advised by the Registrar that counsel representing the Health and Disability Commissioner wished to see me in Chambers. After advising counsel for the parties, I declined this request but indicated through the Registrar that if counsel sought to intervene in the proceeding on behalf of the Health and Disability Commissioner, such an application should be made in open court. No such or any further application was made or intimated by the Commissioner.

standards to the plaintiff's claims to personal grievances and the statutory remedies for them including reinstatement.

[215] Some of Dr Wilsher's evidence must be discounted (although not for any reason attributable to her) because it seems clear that much of the basis of it was material that she was shown that had been found on the plaintiff's computer. As I have already concluded, the involuntary receipt of e-mails and their contents, together with the inability of a recipient to delete entirely such material, necessarily means that the simple presence of objectionable material on a computer or computer system cannot amount to blameworthy misconduct. A number of the items to which Dr Wilsher had regard were ones that ADHB accepted from the first communication with the plaintiff, had not been opened by him, and that he had attempted to delete. It is important to bear in mind that this is not a case about material that the plaintiff has actively sought out and/or downloaded from the internet. Rather, it is about what he has done with electronic images sent to him and also his creation and transmission of photographs of his own genitalia.

[216] So I find that the conduct that caused Dr Wilsher to consider the plaintiff to be so reprehensible that he ought not to be reinstated, is of less seriousness than she may have appreciated. That said, the plaintiff is, of course, not at all innocent of everything and I have given considerable attention to Dr Wilsher's concerns as the person immediately responsible for his performance of the plaintiff's clinical duties.

[217] I have also had considerable regard to Dr Sage's evidence affecting reinstatement, brief as it was in chief, because of his role as clinical leader in the hospital and his appreciation of all relevant events including his presence in Court for much, if not all, of the hearing. Dr Sage's evidence was less adamant or uncompromising than that of Drs Murray and Wilsher. Although by no means supporting reinstatement, it was more balanced and realistic in all the circumstances disclosed by the evidence.

[218] Dr Sage's concern was not with the plaintiff's technical skills but what he described as *"his persistent lack of insight into the implications of his actions"* that did not engender confidence in Dr Sage in the broader social requirements of the plaintiff's clinical practice. Dr Sage's concern was also what he categorised as the plaintiff's failure to accept full responsibility, meaning, in combination with his perceived lack of insight into his actions, a risk in terms of future inappropriate behaviour.

[219] My conclusions about the plaintiff's acceptance of responsibility for his actions must necessarily affect that concern expressed by Dr Sage. It is significant, also, that Dr Sage conceded in cross-examination that it is very unlikely that the plaintiff will ever again breach the hospital's electronic communication policies (internet and e-mail), especially following the events and consequences of this trial.

[220] Although giving Dr Sage's views the respect they deserve, I cannot concur with him that the plaintiff will even now not know of the hospital's appropriate standards of behaviour, particularly in connection with sexual matters.

[221] Much of Dr Murray's strongly expressed evidence in opposition to reinstatement is based on what I conclude from my reviews of all of the evidence, to be flawed assessments of the plaintiff by Dr Murray. Unlike other Board witnesses who were prepared, realistically, to accept some degrees of redemption from the sorts of bizarre behaviour engaged in by the plaintiff in late 2004, Dr Murray was both absolute and, I assess, extreme in his mistrustful and condemnatory assessments of the plaintiff's likely future clinical performance.

[222] The plaintiff had no internet pornography, as might have been expected had he been the incorrigible recidivist pornographer Dr Murray agreed with me was the import of his own evidence. Nor was the volume of inappropriate material such as would have illustrated the characteristics of such a person. None of the electronic imagery offended against the criminal law, also as one may have expected if the plaintiff had been the sort of person as Dr Murray categorised him. However, Dr Murray in his evidence could not have been more condemnatory of the plaintiff and his conduct. Although, by training and no doubt experience, a professional used to carefully assessing evidence and giving considered diagnoses and prognoses, I was surprised when Dr Murray agreed unhesitatingly, with my description of his conclusions, that *"… he [the plaintiff] is an incorrigible recidivist [pornographer] … and despite all of this [the investigation, dismissal and trial] … he will simply go back to these sorts of behaviours …"*. On the case heard by me, that assessment is so improbable that it must be discounted.

[223] One other factor causing me to doubt Dr Murray's very pessimistic assessment of the plaintiff's future conduct can be drawn from what it categorised as one of the most serious incidents of misconduct by the plaintiff. When he was sent the *Arets Kalender*, the plaintiff looked briefly at only the first couple of pages of this before deleting it.

ADHB had always accepted that was the extent of the plaintiff's curiosity in its contents. That is indicative of an absence of prurient interest in, or an unhealthy preoccupation with, its contents rather than what Dr Murray assessed to be the plaintiff's incorrigible serious attachment to this sort of pornography.

[224] I do not disagree that the plaintiff's bizarre and reprehensible behaviour caused ADHB to consider seriously whether its necessary high level of trust and confidence in him was broken and whether it could be restored. But, in all the circumstances of the evidence that I have heard, and if the defendant had gone about its investigations fairly and reasonably, I cannot agree that a fair and reasonable employer in ADHB's position would have concluded that there had been such an irretrievable loss of trust and confidence that the plaintiff both had to be dismissed and could not be reinstated.

[225] It is too simplistic and untenable on the evidence heard by me to attribute for the future and automatically to the plaintiff, all of the worst characteristics of his erroneous behaviour and to conclude thereby that he cannot be trusted to care adequately and professionally for patients generally. I disagree with Dr Murray's assessment in these terms on the evidence heard and seen by me. To conclude from the plaintiff's receipt, consideration and forwarding of the *Arets Kalender* that mocks and degrades elderly and obese women, that he cannot be trusted to have the care of such persons as patients, fails to acknowledge such elements of discernment, redemption and awareness of appropriate behaviours in clinical circumstances as I find, contrary to Dr Murray's conclusion, are not absent.

[226] Dr Murray's approach ignored completely the ability of humans generally, and the plaintiff in particular, to reform, to learn from their experiences, and would necessarily condemn him to suffer forever the consequences of what were really occasional and isolated, even if stupid and logically inexplicable, acts or omissions. Dr Murray's assessment in evidence was, in effect, that the plaintiff will believe that he has got away with it, has beaten the system and will go boldly on to similar or worse misconduct, believing that he is invincible. I do not accept that prognosis. It is more probable, in my assessment, that the plaintiff will henceforth be overly cautious in relation to electronic media, pornography, and even collegial humour. But most importantly, I do not accept that the plaintiff will be a risk to the Board, its other staff, and to its patients.

[227] A unique combination of remedies must be crafted to both meet the justice of a finding of unjustified dismissal and the statute's requirement for contributory conduct to sound in remedy reduction. In these circumstances the plaintiff will be reinstated but should have no other remedies.

Publication of plaintiff's identity

[228] Until now, the plaintiff's identity has been the subject of an interim non-publication order. He seeks to have that converted to a permanent order. That application is opposed by the defendant.

[229] Although in one sense an order prohibiting publication of a party's identity in employment litigation is independent of the merits of the proceeding, in another sense and in this case in particular, those issues overlap.

[230] Ironically in favour of suppression, ADHB's evidence established that in at least one previous case, publication of the name of a clinician whose innocent namesake was employed by ADHB caused a number of patients or potential patients to express great concern to the Board that they might be treated by the person whom they apparently thought, although erroneously, was a medical practitioner guilty of reprehensible conduct. If there had been no publication of the practitioner's name, those adverse effects may not have occurred, either to the District Health Board or to the patients concerned.

[231] Weighed against that is the protection of innocent senior clinicians at ADHB who might be the object of unjust suspicion of the misconduct of the plaintiff because he has only been identified so far as a senior clinician at ADHB.

[232] Another consideration is the general principle that there should not be suppression of identity of persons in public positions in public institutions and especially following conclusions of cases where the extent of misconduct can be clearly established by reference to a public judgment. Rights to receive and impart information under s14 of the New Zealand Bill of Rights Act 1990 and as espoused generally in open democratic societies will generally require compelling reasons to exist for continued suppression of a party's identity after a case has concluded.

[233] This has been a case in which there has been news media interest. The evidence shows that there was, before the Employment Relations Authority imposed the first

non-publication order, publicity about the plaintiff's dismissal both within and beyond New Zealand that identified him by name.

[234] I am sympathetic to the contention advanced by the defendant's witnesses that potential patients should be able to know that the plaintiff, in whose care they may be, has done what he did and, if they wish, to elect not to be treated by him. As I understand the evidence, that is a choice available to patients in public hospitals. There is no question that the plaintiff is a very experienced and highly skilled practitioner in his specialist clinical field whose work benefits considerably the health of many persons with serious illnesses. Many such patients will take the view that they do not care about the plaintiff's past indiscretions that saw him dismissed when those are compared to the skills that he can bring to improving their health or saving their lives. There may be, as the defendant's case establishes, some patients who would prefer treatment by another specialist if they became aware of the circumstances of the plaintiff's dismissal and reinstatement and his identity. The Auckland District Health Board employs a number of senior medical officers in this speciality (although, the evidence establishes, few as highly skilled or long experienced as the plaintiff) and it should not be impossible to arrange for an alternative specialist if that is desired by a patient.

[235] Although ending suppression of publication of his identity will probably cause the plaintiff embarrassment and even humiliation, at the same time he will have a public judgment concluding that he was unjustly treated and unjustly dismissed and that he is entitled to be reinstated in his employment, consistently his desired outcome in litigation since his dismissal. Further, he must be considered to have brought that consequence upon himself by his bizarre and inappropriate behaviour. I am confident that this will be seen as aberrant and immature behaviour but not the seriously exploitative and disgraceful conduct that the plaintiff is destined to repeat, as some of the Board's witnesses said they believed. So the disadvantages to the plaintiff of publication of his identity will be temporary and, compared to the benefits to him and the community of his reinstatement, ultimately in the interests of justice.

[236] The way to achieve the balance between the plaintiff's right to reinstatement that I am satisfied he has, and legitimate concerns of patients, is to allow details of the plaintiff's identity to be published in the usual way.

[237] As I have already addressed in relation to remedies, there is the additional consideration in an employment case of the requirement under s124 of the Employment Relations Act 2000 that the Court must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. Although, as already noted, orders for non-publication of parties' identities under clause 12 of Schedule 3 to the Act are not remedies as enumerated in s123, a permanent order prohibiting publication of his identity is claimed in a remedial sense by the plaintiff. Put another way, he says that among the orders the Court should make to remedy his unjustified dismissal is that there should not be publicity about it and the case, that identifies him.

[238] In that sense, therefore, I consider that the ends of justice are best met by declining that application for a permanent order for non-publication.

[239] The plaintiff has signalled the importance to him of such an order and, I infer, there is the potential for an appeal against a refusal to make a permanent non-publication order. To preserve the plaintiff's entitlement to appeal against this aspect of the judgment, I will make a further interim order for non-publication of the plaintiff's identity to operate for the period of 28 days from the date of this judgment unless renewed either by this Court or the Court of Appeal. This order will lapse at the expiry of that 28-day period so that unless the plaintiff takes steps to and obtains a further order within that period, there will be no restriction upon publication of his identity (including the position he holds with ADHB) at its expiry.

Costs

[240] I have already indicated that, on the very detailed case heard by me and, as one element of setting appropriate remedies and taking into account contributory conduct, my inclination is that although the plaintiff may be seen to have been successful, he should meet his own costs of representation in the proceedings without contribution from the defendant. I am conscious, however, that these cases sometimes include offers made without prejudice except as to costs that are not revealed to the Court before judgment but may affect significantly the incidence of costs. In these circumstances I do not propose to make a final order but, if either party wishes to apply, he or it should do so by written memorandum filed and served within 28 days of the date of the

judgment, with the respondent to such an application having a further period of 28 days within which to reply by memorandum.

GL Colgan
Chief Judge

Judgment signed at 1.30 pm on Friday 23 February 2007