

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 120
5365455**

BETWEEN

ROY BARTON
Applicant

AND

DARGAVILLE HIGH SCHOOL
BOARD OF TRUSTEES
Respondent

Member of Authority: Eleanor Robinson

Representatives: Emma Smith, Advocate for Applicant
Richard Harrison, Counsel for Respondent

Investigation Meeting: 26 – 28 February 2013 at Whangarei

Submissions received: 28 February & 5 March 2013 from Applicant
28 February & 28 March 2013 from Respondent

Determination: 9 April 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Dr Roy Barton, who resigned from his employment with Dargaville High School (DHS) on or about 21 May 2012, is claiming unjustifiable constructive dismissal and unjustifiable disadvantage.

[2] Specifically Dr Barton claims that the Respondent, DHS Board of Trustees (the Board), breached its duty towards him as regards acting in good faith with respect to his original written complaint dated 5 September 2011, in breaching an express term of the collective agreement which covered his employment, and in also failing to ensure he had a safe work environment.

[3] The Board denies that Dr Barton was unjustifiably dismissed or unjustifiably disadvantaged in his employment.

Issues

[4] The issues for determination are whether Dr Barton:

- a. was unjustifiably constructively dismissed.
- b. was unjustifiably disadvantaged in his employment with the DHS by the Board

Background Facts

[5] DHS is a co-educational bi-cultural rural secondary school providing education from years 9 – 13. DHS has approximately 500 pupils. The management of DHS accords with that usually to be found in State schools in that:

- i. The Board of Trustees controls the management of the school as it thinks fit pursuant to s 75 of the Education Act 1989 which states:

s 75 Boards to control management of schools

Except to the extent that any enactment or the general law of New Zealand provides otherwise, a school's board has complete discretion to control the management of the school as it thinks fit

- ii. Subject to the Board's general policy directions, the Principal has complete discretion to manage the school's day-to-day administration as he or she thinks fit pursuant to s 76 of the Education Act 1989 which states:

s 76 Principals

(1) A school's principal is the board's chief executive in relation to the school's control and management.

(2) Except to the extent that any enactment, or the general law of New Zealand, provides otherwise, the principal -

*(a) shall comply with the board's general policy directions,
and*

(b) Subject to paragraph (a). has complete discretion to manage as the principal thinks fit the school's day-to-day management

- iii. There is a senior management team (SMT) whose membership is by invitation of the Principal.

[6] Dr Barton commenced employment at DHS in 2004 when he had been appointed as a teacher of mathematics and science. Dr Barton said his relationship with Mr Bargh, DHS Principal, had been a very good one initially.

[7] Mr Bargh confirmed this view and said he had found Dr Barton an interesting person with whom to discuss issues. Mr Bargh said that although Dr Barton had a strong personality, he had considered that he was able to work with him constructively. Mr Bargh said he had an 'open door management policy' and Dr Barton had made frequent use of this to discuss any matter or issue he wished to raise.

[8] At the conclusion of Dr Barton's first year of employment Mr Bargh said that Ms Helen Weissing, Head of Department (HoD) Mathematics, had completed a performance appraisal which had been critical of Dr Barton's performance in the Mathematics department.

[9] In early 2006 Dr Barton, who has a PhD in Geography, had been appointed to the position as HOD Geography. Mr Bargh said that this appointment had the effect of assisting the issues concerning Dr Barton's performance in respect of the mathematics department.

[10] Dr Barton said that in mid-2007 he had been appointed to the role of Principal's Nominee and Timetabler. Dr Barton explained that the role required him to:

- a. Receive and verify candidate entries and fees, and forward them to the New Zealand Qualifications Authority (NZQA) at set times;
- b. Verify that candidates were eligible to enter for the qualifications;
- c. Monitor quality assurance of internal assessment;
- d. Ensure that DHS engaged in the external moderation process and met all requirements;
- e. Ensure that issues identified by the external moderation process were addressed;
- f. Respond to NZQA communications and all requests for information;

- g. Verify and report internal assessment results for all qualifications to meet published deadlines; and
- h. Liaise with and support DHS employees and the examination centre manager to ensure the integrity of external assessment was not compromised.

[11] Dr Barton said that as he became more involved in the management of DHS he had become concerned about the management style of Mr Bargh, in particular he had noticed poor communication, avoidance and a lack of support for the management team, as demonstrated by Mr Bargh's unilateral decision-making which either overrode the decision of senior members of staff or undermined their actions.

[12] Dr Barton said he had also been concerned that Mr Bargh had been appointing as members of staff personal contacts, rather than advertising the vacant positions or notifying them in accordance with contractual obligations or by manipulation of those procedures.

Issues with the mathematics department

[13] Of particular concern to Dr Barton had been the actions of Mr Bargh in relation to new NCEA standards and the Mathematics Department.

[14] Dr Barton explained that despite a SMT decision in mid-2010 that all subjects taught comply with new NCEA standards, Mr Bargh had allowed the mathematics department to maintain the old standards without consultation of himself or the SMT.

[15] Mr Bargh explained that Dr Barton had wanted all departments to move to the new standards from 2011; however Ms Weissing had had reservations about this proposal. Mr Bargh said he had checked the situation with Ms Sandra Cathcart, Team Solutions Maths Adviser for Northland who had confirmed that Ms Weissing's approach had been the same as virtually all other schools north of the Harbour Bridge.

[16] Dr Barton said he had considered, as had been highlighted by this situation, that Mr Bargh had been overriding the SMT decisions in contravention of an assurance he had provided in December 2010, and that this had impacted on his own ability to carry out his role as Principal's Nominee and Timetabler.

[17] Dr Barton said the mathematics department was continuously poor at internal and external moderation and concerns were raised regarding the viability of their moderation results, however when he had raised these concerns with Mr Bargh, he had taken no action.

[18] Ms Weissing said that Dr Barton had disliked both her personally and the mathematics department as a whole, and this had had a toxic impact on the operation of her department. Ms Weissing explained that Dr Barton interfered with decisions as to which teachers would take which classes, did not enter unit standards on the NCEA database, and constantly tried to interfere with what the mathematics department taught and assessed.

[19] Ms Weissing said that as a direct result of Dr Barton's behaviour towards her, she had reached a decision to resign during 2011. Following a meeting of the mathematics department personnel with Mr Bargh during which they had voiced their concern about Dr Barton and the effect he was having on the department, Ms Weissing said she had asked to share the role of Head of Department with Ms Karen Exley, who had agreed to interface with Dr Barton.

[20] Mr Bargh said Ms Weissing was an accomplished teacher who had assisted her students to achieve good results in the mathematics department, and he had urged her to retract her resignation, resulting in an agreement for the role of HoD Mathematics to be a shared position.

[21] Mr Bargh said that Dr Barton had been furious when Ms Weissing had withdrawn her resignation, and he considered from this point in time that Dr Barton's attitude towards him had changed.

[22] Dr Barton said that he had been disappointed by Ms Weissing's retraction of her resignation, and he had realised that Mr Bargh's actions had not been transparent in regard to Ms Exley's appointment having been made without it first having been advertised in compliance the requirements for advertising posts as required by School Teachers Collective Agreement.

[23] Dr Barton said that he had dated the change in his relationship with Mr Bargh from late 2010 when he had found Mr Bargh to be less communicative than previously, avoiding discussion of difficult issues, and this had caused him concern.

[24] Dr Barton said as a result he had become disheartened and distressed, and that he considered Mr Bargh's failure to acknowledge his communications sent via both email and memorandum expressing these concerns a personal and professional insult.

[25] Mr Bargh said that he did not accept that his approach to various issues, particularly those regarding the mathematics department were poor communication or avoidance, but explained that there were occasions when he would take steps or make decisions with which Dr Barton disagreed.

[26] Dr Barton said that at the beginning of September 2011 he felt so frustrated by Mr Bargh's lack of communication that he considered it was impossible to continue to do his job with any confidence, and with the preparation of the timetable for 2012 approaching he decided to raise a complaint with the Board.

Complaint to the Board 15 September 2011

[27] Dr Barton said that he had believed Mr Bargh's actions to be in breach of agreed school policies, procedures and practices and accordingly he had written to Ms Shirley Baume, Chairperson of the Board, to make a formal complaint about Mr Bargh. In the letter of complaint dated 5 September 2011 Dr Barton had written:

I wish to make another formal complaint against David Bargh for

- a) His continued failure to support decisions made by the Senior Management Team and failure to consult over changes to policy and procedures determined by SMT and Heads of Department*
- b) His failure to comply with requirements for advertising posts, as laid down in the STCA*
- c) His failure to acknowledge, let alone act upon, complaints made to him about the running of SMT meetings.*

I expect these concerns to be addressed by the whole Board

[28] The lengthy and detailed letter from Dr Barton had provided full details in relation to each specified head of complaint, and in summary asked the Board to:

- a) Insist on the Terms of Reference and Standing Orders be drawn up for formal meetings of SMT*
- b) Instruct David to take training on chairing meetings*
- c) Instruct David to respond to all requests made in e-mails (even if only as a courtesy acknowledgement).*

[29] In relation to the third head of complaint, the letter of complaint explained this as referring to Mr Bargh not responding to emails of complaint made by Dr Barton regarding the management of the SMT meetings.

[30] Of particular concern to Dr Barton as set out in the letter of complaint had been the decision taken during the SMT meeting on 31 August 2011 to defer discussion of his draft

paper suggesting that the SMT had 'Terms of Reference'. Following this decision Dr Barton wrote that he had prematurely left the meeting and refused to attend any other meetings until: "*they are better organised and run*".

[31] In the early section of the letter Dr Barton had written: "*Two issues in particular have impacted on my work as Principal's Nominee, one of which has been a continuous source of stress.*" In the concluding paragraph of the letter, Dr Barton had written: "*You may have gathered Shirley that I am at the end of my tether*".

[32] Dr Neil Hopkins, a member of the Board, explained that following receipt of Dr Barton's letter of complaint, the Board had met the following day, 6 September 2011, to discuss Dr Barton's complaint and the correct forum for dealing with the complaint.

[33] Dr Hopkins said that as part of the complaint investigation process, the Board had interviewed Mr Bargh and two members of the SMT, Ms Angela Troath and Mr Jaco Dreyer on 6 September 2011.

[34] Ms Troath said that the Board had questioned her about Mr Bargh's management of SMT meetings, particularly his management style and the manner in which the SMT meetings were run by Mr Bargh.

[35] Ms Troath explained at the Investigation Meeting that membership of the SMT is at the invitation of the Principal, and that Mr Bargh had treated her as a valued member since she had joined the SMT in 2005.

[36] Ms Troath explained that the SMT is a forum for the presentation of ideas to the Principal, who made the final decision on the issues discussed, and said that Dr Barton could be vocal and on occasion disruptive in the SMT meetings, however Mr Bargh had never shown any animosity towards him during the meetings.

[37] Following the interviews and discussions, the Board Minutes dated 6 September 2011 confirm the Board's decision that it required more time to discuss the issues, and that this meeting would take place on 14 September 2011.

[38] At the Board meeting of 14 September 2011 further discussions had taken place on Dr Barton's letter of complaint and it had been agreed that an appropriate letter of response be sent to Dr Barton.

[39] Dr Hopkins explained that the complaint from Dr Barton requested the Board to censure Mr Bargh and issue directives to him to set out what Mr Bargh must do in the various

situations complained of by Dr Barton. Dr Hopkins said that the Board had not been prepared to censure Mr Bargh or issue such directives to the Principal.

[40] Dr Hopkins said he had drafted the letter of response to Dr Barton dated 15 September 2012 and it had been critiqued and amended by the Board as a whole. The letter of response, signed by Ms Baume on behalf of the Board, stated:

Dear Roy,

We are in receipt of your letter detailing concerns with the procedures followed in SMT meetings, perceived unjust applications of the NCEA credit allowance with respect to the Maths department and HOD appointment potentially not using the formal gazetting process.

There are a number of implications that the letter carries. That SMT is bound to a fixed process, that the NCEA credit limits are mandatory and that the integrity of the Principal is open to dispute.

[41] The letter continued to outline the view of the Board that:

- a) The procedures at SMT meetings were to be determined by the Principal as to how they were to operate, who was to be appointed, and that it: *“was not the Board’s role to critique the SMT meeting process.*
- b) In respect to decisions on specific issues such as credit limits for courses, these were the responsibility of the Principal and upon which he could act even if these were not accepted or agreed by all parties.

[42] In relation to the specific complaint alleging that in respect of the appointment of Ms Exley to the shared position of Mathematics Head of Department, there had been a failure to follow to comply with the requirements for advertising posts, the letter stated:

It is expected that DHS fully complies with all relevant legislation, including employment law. If there are any significant uncertainties in employment matters, the Board expects the situation to be clarified. This is well understood by our Principal. We are asking for independent confirmation that the appointment was made appropriately.

[43] The independent confirmation that the appointment to the shared position of Mathematics Head of Department was made appropriately appeared to have been undertaken as indicated in the Board Committee Minutes dated 4 October 2011 which stated:

Specific to assist HoD Maths – was advertised on noticeboard and in staffroom to staff.

Discussion with G Kay – common mistake, needs to be advertised in Gazette and put regarded or internally filed.

Has not been advertised in the Gazette.

[44] Dr Barton, who had by this time withdrawn from the SMT, said he had been upset by the response he had received from the Board, and had felt unsupported. Dr Barton said he had been particularly concerned that he had been given no opportunity to address a meeting of the Board, and that the Board refused to release the notes of the meeting to him.

[45] Dr Hopkins said that he did not believe that Dr Barton had asked to address the Board and explained that for a person to speak to the Board they must either be invited or make a request, which may or may not be granted.

[46] Dr Hopkins said that in considering Dr Barton's complaint, the Board had determined that it had all the information necessary for it to make a decision, and that a face-to-face meeting had not been required since the detailed letter from Dr Barton had set out clearly his concerns.

[47] Dr Hopkins said that because no minutes of the Board's in-committee meetings had been taken, it had not been possible to provide these to Dr Barton as requested.

Mediation

[48] Dr Barton, a member of the New Zealand Post Primary Association ("PPTA"), said he had consequently decided to seek the support of the PPTA which had resulted in a letter dated 23 October 2011, being sent by Mr Gavin Kay, PPTA Field Officer, to the Board which stated:

The board's response has put Roy into a stressful situation, and left him feeling unsupported by his employer. I suggest that we request mediation assistance for this employment relationship problem.

[49] Mr Kay concluded the letter by advising that he would contact the mediation service of the then Department of Labour.

[50] Dr Hopkins said that the Board had believed that the concerns raised by Dr Barton in his letter of complaint did not fall into the category of governance which was the province of the Board, rather they fell into the category of non-governance and were therefore within the province of the Principal. Accordingly the Board had responded to Mr Kay on 2 November 2011 refusing to attend mediation.

[51] On 14 November 2011 Mr Kay had sent a further letter on behalf of Dr Barton. In the letter Mr Kay had acknowledged that day to day management of DHS the responsibility of the Principal and not the Board, but commented:

That point is acknowledged, but the board is also responsible for the health and wellbeing of its employees. If an employee is saying that decisions made by the principal are making him feel frustrated and stressed, and that he has been unable to address these issues satisfactorily with the principal, that is something the board should be prepared to discuss.

...

Any employee is entitled to have a complaint addressed. Refusal to acknowledge complaints creates a cause of grievance in itself, and the board has continued to avoid this issue.

[52] Mr Kay concluded the letter by advising that a personal grievance was being raised for disadvantage under section 103 (1)(b) of the Employment Relations Act 2000 (“the Act”).

[53] Dr Hopkins said that following receipt of the second letter from Mr Kay, the Board had reflected and acknowledged that mediation would be appropriate given that Dr Barton felt personally aggrieved that the issue had not been adequately addressed.

[54] Dr Hopkins said that Mr Eric Woodward, an Advisor for the New Zealand School Trustees Association (“NZSTA”), had been instructed by the Board to liaise with Mr Kay and organise a mediation.

[55] Dr Hopkins explained that the Board believed mediation would be a process for resolving issues between Mr Bargh and Dr Barton and re-establishing their working relationship.

[56] Mr Bargh said he had had no issue about attending mediation as he acknowledged that the issues Dr Barton were raising were about his management of DHS and he had hoped that mediation might be a means of resolving these issues.

[57] Dr Barton said he had hoped mediation would take place before the end of the year, however this had not been possible. Mr Bargh said his availability for a mediation meeting before the end of the year had not been in issue; however the proposed date of 19 December 2011 had to be postponed due to the mediator being unavailable.

[58] Dr Barton said the delay in attending mediation caused him further stress over the Christmas/New Year period, and stated that the entire complaint process had been having a detrimental effect on his health and well-being.

[59] A date had eventually been agreed for mediation to be held on 17 January 2012 and had been attended by Mr Bargh and Mr Rob Stephenson on behalf of the Board. Dr Hopkins said Mr Stephenson had been asked to attend the mediation on the basis that he had been involved in several mediations and had employment relations experience.

[60] Dr Barton said the understanding on which he had entered into the mediation process had been to agree steps for his safe return to the workplace at the start of the new academic year. However Dr Barton stated that following mediation four of the agreed steps for his return had been breached or not complied with almost immediately. The four agreed steps were:

- i. That Mr Bargh would acknowledge and address Dr Barton's communications in writing, particularly those in which concerns had been raised, and acknowledge emails from Dr Barton.
- ii. A meeting would be held between Dr Barton and the full Board, this meeting to take place within two weeks;
- iii. All matters discussed in mediation would remain confidential to the parties; and
- iv. If Mr Bargh overruled a SMT decision he would inform Dr Barton of it and the reason for it before it was generally communicated.

[61] Mr Bargh said that due to the fact that Dr Barton had left DHS on sick leave on 13 February 2012, there had been little opportunity to put the agreed steps into practice.

[62] Mr Bargh said that one step that could be put into practice had been the initiation of weekly meetings with Dr Barton as it had been agreed that face to face meetings were

important. Mr Bargh explained that he had initiated weekly meetings, the first of which had taken place on 26 January 2012.

[63] Mr Bargh said, and Dr Barton confirmed, that the second scheduled meeting on 7 February 2012 had not taken place at Dr Barton's request. Dr Barton explained that he had cancelled the meeting upon the advice of Mr Kay.

[64] At the Investigation Meeting Dr Barton accepted that the only alleged breach upon which he was relying was that in relation to the agreed facilitated meeting with the Board.

[65] Dr Barton said that he had been very upset by the delay in the holding of the agreed meeting between himself and the Board, which was to be facilitated by a mediator, and which he had understood was to take place within two weeks of the mediation.

[66] Mr Bargh said he had contacted Mr Kay following the mediation and had been awaiting details from him as to where and when the meeting would take place.

[67] On 3 February 2012 Mr Kay had emailed Dr Barton to update him on the facilitated meeting. In the mail Mr Kay had written:

I've talked to David about this. He said he was waiting to hear from us about organisation for the meeting. This is my fault really. I should have ensured that there was clear understanding in the mediation about how the second meeting was to be organised. An end not tied off. However, I will email [the mediator] and ask her to suggest a couple of dates/times when she is available, and then email those to David and ask him to organise the board end of it. This should happen quite quickly.

[68] The Board Minutes of 14 February 2012 refer to the Record of Agreement in relation to which they state:

A discussion had re: mediation meeting. The Record of Agreement was also discussed.

- *Need to have another meeting with Roy.*
- *David has spoken to Gavin and Gavin will contact David with details. BOT would like it to happen as soon as possible.*

- *David to follow up.*

[69] Mr Bargh said that once Dr Barton had gone off on sick leave, Mr Woodward had continued to liaise with Mr Kay and the PPTA on the basis that this was appropriate given Dr Barton was on sick leave.

[70] Mr Bargh said a further mediation had taken place on 20 April 2012 attended by Dr Barton and his counsel, Ms Smith, and by Mr Bargh, Mr Woodward, Mr Stephenson and Ms Baume.

[71] Dr Barton said that his health improved during the time he was on sick leave from DHS however his doctor had reported that the triggers for stress remained in the workplace and that it would not be possible to return to work whilst the triggers were unresolved.

[72] Dr Barton said he had felt that he had been left with no option but to resign, and on 21 May 2012 his solicitor had advised by email that he would not be returning to DHS.

Determination

Was Dr Barton unjustifiably constructively dismissed by the Board?

The Law

[73] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[74] In the Court of Appeal case *Auckland Shop Employees Union v Woolworths (NZ) Ltd*¹ Cooke J listed three situations in which a constructive dismissal might occur, although noted that these were not exhaustive. The three situations were:

1. Where the employees is given a choice of resignation or dismissal;
2. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
3. Where a breach of duty leads a worker to resign.

¹ [1985] 2 NZLR 372

[75] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*² the Court of Appeal said regarding the correct approach to constructive dismissal:³

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

[76] Therefore in examining whether a constructive dismissal has occurred the two relevant questions are:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation.
- ii. and secondly if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[77] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁴ observed in describing this type of constructive dismissal:⁵

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

Was there a breach of the duty owed to Dr Barton by the Board?

² [1994] 1 ERNZ 168

³ Ibid At p 172

⁴ [1983] ACJ 965

⁵ at [975]

[78] The Board was Dr Barton's employer and as such owed him a duty to consider and address complaints which he raised in the course of his employment in good faith.

[79] The complaints raised by Dr Barton were clearly set out at length in the letter which he had sent to the Board on 15 September 2011 and focussed on Mr Bargh's management style, specifically his failure to support decisions made at SMT meetings or to consult over changes to policy and procedures determined by SMT and HoDs, his failure to comply with requirements for advertising posts, and to deal with complaints made to him about the running of SMT meetings.

[80] In the letter Dr Barton set out the steps which he requested the Board to take in order to resolve these complaints. The steps as set out by Dr Barton effectively required the Board to direct Mr Bargh in his management of DHS.

[81] A school board of trustees has complete discretion to control the management of the school in accordance with s 75 of the Education Act 1989. Section 76 of the Education Act 1989 provides that a principal has complete discretion to manage the school's day-to-day administration provided that he or she complies with the board's general policy directions.

[82] I consider that the Board had rightly concluded that the steps required by Dr Barton for resolving his complaint required it to direct Mr Bargh in the day-to-day management of DHS which, in the absence of any failure by the Principal to comply with the board's general policy instructions, it was precluded from doing by s 76 of the Education Act 1989.

[83] However in the letter of complaint I find that Dr Barton had made the Board aware of the fact that he was suffering from stress related to his employment by the reference to the two issues which had impacted on his work as Principal's Nominee: "*one of which has been a continuous source of stress*", and his comment of being: "*at end of my tether*".

[84] I accept that the Board was precluded from directing Mr Bargh on day-to-day management of DHS, and specifically on the manner in which he ran the SMT meetings, and that it was a matter for its own discretion of whether or not it interviewed Dr Barton.

[85] I also find that the Board had treated Dr Barton's complaint with due consideration, carrying out an adequate investigation into the heads of complaint made by Dr Barton.

[86] However I consider that a reasonable employer, alerted to the fact that Dr Barton had referred in the letter of complaint to feeling stressed, would have exercised its discretion and have interviewed him, irrespective of whether or not he had requested an interview.

[87] I consider that such an interview would have given Dr Barton an opportunity to be heard in relation to his concerns, which may have gone some way to relieving them, and have been an opportunity for the Board to ascertain what assistance could be offered to him in relation to his stress.

[88] The fact that Dr Barton had been under stress had been further highlighted in the letter from Mr Kay dated 23 October 2011 which advised the Board that Dr Barton was: “*in a stressful situation*” and had been: “*feeling unsupported by his employer*”. Despite having this information, the Board had refused to attend a proposed mediation.

[89] Dr Hopkins said that the reason for the Board’s non-agreement to attend mediation had been that it considered that the complaints raised by Dr Barton fell into the category of non-governance.

[90] In this situation I consider that the fair and reasonable employer would have attended mediation to, at the very least, ascertain the cause of and reasons for Dr Barton’s stress and to offer appropriate assistance.

[91] Following the receipt of Mr Kay’s letter dated 14 November 2011 advising that the PPTA considered that the Board had failed to address Dr Barton’s complaints and that it was raising a personal grievance, the Board had decided that mediation might be appropriate and had attended mediation.

[92] I find that the delay in attending that mediation within the timeframe preferred by Dr Barton had not been occasioned by the Board, and that there are no grounds for believing that Mr Stephenson who attended the mediation on behalf of the Board did not do so in good faith.

[93] Dr Barton said, and Mr Bargh agreed, that the outcome of the mediation held on 17 January 2012 included four agreed steps for Dr Barton’s return to DHS at the beginning of the new academic year.

[94] At the Investigation Meeting it had been agreed by Dr Barton that there was only one breached step, that being that the Board had breached the agreed step relating the setting up of a facilitated meeting between the parties and a mediator.

[95] I find that the evidence presented to the Authority supports the position that there had been a lack of clarity at the mediation about whose responsibility it had been to organise the meeting.

[96] I find that the email sent by Mr Kay to Dr Barton on 3 February 2012 confirms that Mr Bargh had been active in liaising with Mr Kay over the organisation of the proposed meeting, and that Mr Kay took responsibility for the delay in organising the meeting.

[97] I further find that the Board Minutes of 14 February 2012 indicate that Board wanted the facilitated meeting to happen: “*as soon as possible*”.

[98] Considering all the circumstances, I find that there had been a breach of the duty owed to Dr Barton by the Board during the period of the raising of his complaint to the Board on 5 September 2012, and the letter raising a personal grievance from Mr Kay on 14 November 2011, however there had been no subsequent breach of duty from 14 November 2011 onwards when the Board had been pro-active in addressing Dr Barton’s concerns.

Was the breach of sufficient seriousness to make it foreseeable that Dr Barton would resign?

[99] Although I have found that there was a breach of duty on the part of the Board prior to 14 November 2011, I do not find that there was any breach following 14 November 2011.

[100] From 14 November 2011 I find that the Board had acted in good faith by being ‘*active and constructive*’ in terms of s 4 (1A)(b) of the Act . Steps had been agreed at the mediation on 17 January 2012 for the safe return of Dr Barton to the workplace at the beginning of the new academic term, and I find that these had not been breached either by Mr Bargh or by the Board.

[101] In these circumstances, although subsequently Dr Barton had been absent on sick leave from 13 February 2012, I find that it was not reasonably foreseeable to the Board that Dr Barton would resign.

[102] I determine that Dr Barton was not unjustifiably constructively dismissed by the Board.

Was Dr Barton unjustifiably disadvantaged in his employment at DHS by the Board?

[103] Dr Barton is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee’s employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the

employee's disadvantage by some unjustifiable action by the employer;

[104] The elements of s103 (1) (b) are:

- An action
- The action was unjustifiable
- The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[105] I have found that there had been a breach of duty as a result of the Board's failure to respond to Dr Barton's indication that he was suffering from stress as indicated in his letter of complaint dated 5 September 2011 and as further advised by Mr Kay in the letter dated 23 October 2011. The Board did not in fact respond to the stress complaint until 14 November 2011.

[106] I consider that a fair and reasonable employer would have (i) interviewed Dr Barton to provide him with the opportunity to be heard, (ii) have considered providing Dr Barton with EAP assistance prior to 14 November 2011, and (iii) attended the first proposed mediation.

[107] I find that Dr Barton had not been given the opportunity to address his concerns in person to the Board, nor had he been offered EAP or other assistance, and this had resulted in further distress to Dr Barton in the period 15 September to 14 November 2011 which I find constituted a disadvantage in his employment to him.

[108] In all the circumstances I determine that the breach of duty by the Board as regards the period 15 September 2011 to 14 November was an unjustifiable action. As such it constitutes a disadvantage pursuant to s.103A of the Act.

[109] I determine that Dr Barton was unjustifiably disadvantaged in his employment during the period 15 September to 14 November 2011.

Remedies

[110] Dr Barton has been unjustifiably disadvantaged in his employment and is entitled to remedies.

[111] I find that in respect of the disadvantage grievance, Dr Barton suffered hurt and humiliation and injury to feelings..

[112] In respect of disadvantage grievance, the Board to pay Dr Barton the sum of \$7,500.00, pursuant to s 123(1) (c) (i) of the Act.

Costs

[113] In respect of this determination, costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, submissions may be filed by the parties within 28 days of the date of this determination

Eleanor Robinson
Member of the Employment Relations Authority