

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 156/09  
5153819

BETWEEN                      BARRY BORMAN  
   Applicant  
  
AND                                THE DIRECTOR-GENERAL  
   OF HEALTH  
   Respondent

Member of Authority:        G J Wood  
  
Representatives:              Andrew Scott-Howman for the Applicant  
   Peter Churchman for the Respondent  
  
Investigation Meeting:        9 and 10 September 2009 at Wellington  
  
Determination:                19 October 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Dr Barry Borman, claims that he was unjustifiably disadvantaged in his employment and had the terms of his employment agreement breached by his employer, the Director-General of Health (the Ministry), through it failing to ensure his safety at work and seeks compensation accordingly. He also seeks a penalty against the Ministry for breaches of good faith.

[2]     The Ministry denies all of Dr Borman's claims.

**The Facts**

[3]     Dr Borman worked for the Ministry between 2000 and 2008 as its Manager, Public Health Intelligence Unit (PHI). As acknowledged by the Ministry, his employment went without incident until 2008. The only concerns held by Dr Borman

coincided with the appointment of Ms Deborah Roche, the new Deputy Director-General Health and Disabilities Systems Strategy, as his boss.

[4] After Ms Roche's appointment, she decided to restructure the areas under her control. She did this by way of focus groups and then a structured consultation process. Dr Borman supported the review because it meant that the PHI staff, with the exception of him, would be kept together as a group. The new focus for the PHI was to integrate it more within the health policy development process led by the Ministry, but the research it led and contracted in was to continue.

[5] Despite his support for the thrust of the review, I accept that Dr Borman found it difficult to deal with Ms Roche over the restructuring and accordingly engaged a consultant to assist him. However, on the advice of the consultant, Dr Borman never demonstrated to the Ministry any negative reactions, including displaying the degree of stress he was under. It could not therefore have considered him as an at risk employee, although he did ask for assistance during the restructuring process. The Ministry's Employee Assistance Programme was offered to him, but I accept the Ministry's evidence that this raised no flags for it over Dr Borman's health, because the use of these services is not unexpected in a restructuring situation. A senior HR adviser with the Ministry followed up with Dr Borman about his accessing of the services and was told that the situation was okay.

[6] Unfortunately, following the restructuring there was no equivalent position for Dr Borman, as the new PHI manager position was lower graded and focused more on management than professional skills. Dr Borman did not want this job and did not apply for it. While Dr Borman suggested a specialist role be created for himself as a principal adviser, I accept that that was rejected by Ms Roche because she knew the Director-General would never approve it, as he had declined to do so in similar circumstances beforehand. No alternative jobs were able to be found by the Ministry.

[7] Therefore, after a number of meetings, redundancy became the option taken by the parties. No dispute was made about the genuineness of the restructuring or the outcomes thereof. The new structure was to take effect from 18 August and Dr Borman's redundancy was to take effect from 15 August.

[8] Dr Borman had and maintains serious concerns, however, about the way he was treated by Ms Roche since her appointment and the grave implications it has had

on his health and employment. Dr Borman felt that, from the outset, he could never do anything right with Ms Roche. There is no independent evidence to support that claim and I reject it as it is inconsistent with the evidence of the witnesses for the Ministry.

[9] One example relied on by Dr Borman was the outcome of his performance review, which was discussed on 8 July 2008. Dr Borman's evidence about this meeting was quite general in nature, whereas Ms Roche's evidence was supported by her file note taken two days later. The file note reflects the pair of them discussing what had gone well and then what could have gone better. Ms Roche raised a number of concerns, including financial and contract management in the PHI; a concern about one function when no Maori welcome had been arranged (which had been raised with her by the Director-General); low salaries of staff; staff absences and the need for better communication between the two of them. No specific outcomes resulted from the meeting. I conclude that while the performance review did not go as well as Dr Borman had expected, no element of bullying or unfair treatment can be discerned.

[10] As a new Deputy Director-General, Ms Roche was, quite appropriately, developing an understanding of the units for which she was responsible and any business issues surrounding them. She had difficulty understanding the intricacies of the many contractual arrangements PHI had entered into. In particular, Ms Roche's concerns about the financial contract management matters in PHI were such that she had specialist staff attend meetings with Dr Borman to try and satisfy herself what was happening with respect to the contracts.

[11] She still could not understand how and why tender and contractual provisions seemed to be varied over time, so in late June she enlisted the assistance of the then Chief Internal Auditor at the Ministry. He was later to identify issues in two broad areas - namely compliance with contracting procedures and apparent conflicts of interest. One example of an apparent breach of contracting procedures was a contract signed by Dr Borman himself, when he did not appear to have the delegated authority. In fact it has never been established why that occurred or whether, indeed, Dr Borman was at that time acting Deputy Director-General and therefore there was no breach of delegated authority. In any event, it is now accepted by all parties that, on the face of it, an error had occurred.

[12] Ms Roche was so concerned about matters that she sought a formal report from the Chief Internal Auditor. On the direction of Ms Roche, employees in PHI were not contacted which meant, as the auditor found, it was not possible to review all information as would normally occur when carrying out this type of review, as it was held by PHI. The review was a desk review of the main contracts the PHI dealt with. Under the heading *What are the issues and why*, it was stated:

*A picture of poor planning and a lack of overall strategic direction in the management of the survey programme is forming.*

[13] The auditor's memo then goes on to look at issues such as delegated authority, variations to contracts, the adequacy of a mechanism in the contract to enforce quality performance etc. It is also noted that there appeared to be a significant issue in relation to conflicts of interest and the use of a consortium of universities to conduct data collection for a particular survey.

[14] The perceived conflict of interest related to contracts signed by senior staff in the PHI, including Dr Borman, with universities, while those staff held positions as adjunct professors at those universities, yet Dr Borman had not identified this as a potential conflict of interest in the Ministry's register.

[15] The concluding statement in the memo was:

*This review has raised more questions than it has answered, but they combine to produce an unsettling picture of management practices in PHI. No doubt you will wish to follow many of these up – please let us know if we can help, or if you wish to extend this review further.*

[16] The auditor gave evidence that despite doing numerous exercises such as the one on PHI he had never commenced one with the presumption that someone had done something wrong. He would normally review the documentation first without speaking to the people involved. This was because it could unnecessarily upset those involved, and that if any issues were established that needed to be raised with staff this could be dealt with in a subsequent disciplinary investigation process.

[17] The approach by the Chief Internal Auditor was said by an expert witness called by the Ministry (a highly experienced auditor and a Fellow of the New Zealand Institute of Chartered Accountants) to have been appropriate. In particular, it was his evidence that the fact that the Chief Internal Auditor did not go and speak directly

with Dr Borman or other staff of the PHI did not conflict with either standard internal audit practice or the Ministry's internal audit charter.

[18] He also stated that in the circumstances it was appropriate for Ms Roche to have asked him to conduct such an audit. I accept that an area with a budget of \$11m, which was being restructured, would necessarily be subject to oversight by a new manager. Furthermore, despite Dr Borman's view that Ms Roche was the cause of his problems in the Ministry, I note that the Director-General supported the audit approach.

[19] Ms Roche subsequently proposed to undertake an employment investigation into the issues uncovered in the audit report. Unfortunately, and I accept that this was a coincidence of timing, on the same day that Dr Borman was informed through his representative that his redundancy had been agreed on (31 July), Ms Roche later approached Dr Borman about the investigation.

[20] Ms Roche telephoned Dr Borman to tell him that she was emailing him some important documents so that they would not be seen by his personal assistant. I accept that, in the course of this conversation, Ms Roche referred to previous discussions about financing and contracting arrangements and for the first time told Dr Borman that the Chief Internal Auditor had been auditing those areas. While Dr Borman was told the issues were serious, he was not told what specifically had been investigated, or what any findings were. Ms Roche also informed Dr Borman in the phone call that one of the things that would have to be discussed at a subsequent meeting, preferably the next day, would be whether Dr Borman could remain in his role or should be suspended.

[21] This conversation is consistent with the documentation provided in the email sent straight afterward. Dr Borman was given a summary of the information of concern to Ms Roche (but not the auditor's report) and asked to meet with her as soon as possible, preferably the next day. The attachment to the email covered recommendations from the auditor following the due diligence exercise (as raised above) and that Ms Roche would be engaging the auditor as soon as possible to conduct a full review. Under the heading *Impact on your employment situation*, it was stated:

*I wish to stress that the only decision I have made to date is that it is necessary to conduct this review as soon as practicable. The question*

*then becomes what are the steps necessary to ensure that it can be conducted in a fair and impartial manner.*

*Given the nature of the issues it is my preliminary view that it is not practicable for you to remain in your current role during the review as your actions and decisions as the PHI manager are a major part of this.*

*One option in this situation is to invoke suspension on full pay during the course of the review – the suspension would be to ensure that the review team can conduct a full, open and impartial investigation but it also protects the manager from any allegations of interference with the conduct of the investigation.*

*Another potential option is a period of special leave with pay rather than a formal suspension.*

*I will not make a decision on either of these options until you have time to consider them and give me your view. Meantime, I must instruct you not to speak to anyone about any of the contents of this document, other than with your legal adviser and/or a support person, or to take any actions that may compromise the Ministry's ability to conduct a full and fair investigation. I would consider any breach of this instruction to be a serious matter.*

[22] Dr Borman was then told that although the meeting was sought as soon as possible, it may take time for him to obtain legal advice. He was also informed that the purpose of the meeting was to provide him with a copy of the audit report and to discuss with him Ms Roche's preliminary view that he would not be able to continue in his management role while the report was being conducted. It was, however, highlighted that the only conclusion she had reached to date was that it was necessary to conduct the review as soon as practicable.

[23] Dr Borman went into an emotional crisis as a result of receiving these communications. He needed to seek medical assistance, including from a psychologist. It was clear that Dr Borman suffered significant psychological damage from which he is not even now completely recovered, as a result of him believing that his whole life's work had been called into question and that the Ministry was seeing things as so serious that he might have to be suspended, that he could lose his job and that he might lose his redundancy entitlements. At the heart of this, Dr Borman saw a personal attack on him by Ms Roche, which he was simply unable to cope with.

[24] After seeing the doctor the next day, Dr Borman obtained the assistance of Mr Scott-Howman. He wrote that very day to Ms Roche, indicating that Dr Borman would be unable to address the issues until at least 25 August, because he had been certified as medically unfit.

[25] Unfortunately, Ms Roche was away most if not all of the following week and Mr Scott-Howman's letter went unanswered. He then wrote again on 5 August, indicating that Dr Borman's health had declined even further and that one factor which appeared to be contributing to this was the uncertainty about the allegations that might be made against him. In particular, he sought a copy of the audit report and indicated that any ongoing delay in receiving it would contribute to a regrettable decline in Dr Borman's state of health.

[26] Mr Churchman replied that day on behalf of the Ministry. He indicated that the Ministry was prepared to (and later did) accept the suggestion in Mr Scott-Howman's first letter that the matter of suspension would not have to be addressed, as Dr Borman would be absent from the workplace on sick leave. A copy of the audit report was provided and it was suggested that given Dr Borman's employment would terminate on 15 August, a prompt response from him on the issues raised remained important.

[27] On 11 August Mr Scott-Howman indicated that a response from Dr Borman would be provided in writing by the next day, which it was. Dr Borman provided a detailed response to all of the issues raised in the audit report. The Ministry decided, given that Dr Borman would not be returning to work, that it would not take those issues any further with him. It did not do any further investigations into the issues raised by the auditor, but rather determined to ensure that by changing practices within the new PHI such issues would not occur again.

[28] On 13 August, the Acting Director-General wrote to Dr Borman acknowledging his good service, wishing him success for the future and indicating that on 19 August he would be paid all his entitlements, including redundancy compensation. Fortunately, given his professional reputation and undoubted skills and integrity, Dr Borman was quickly able to take up new employment, which involves some ongoing contact with the Ministry.

[29] In late October, Mr Scott-Howman wrote again outlining an employment relationship problem with the Ministry, given the harm Dr Borman suffered as a consequence of workplace stress, in that the Ministry had not taken reasonable steps to safeguard his health and safety in the workplace. Mediation was sought.

[30] Mr Churchman promptly replied, indicating his opinion that there were no facts disclosed that could give rise to liability on the part of the Ministry for stress sustained by Dr Borman. Details of any alleged breaches of its obligation to take reasonable steps to safeguard Dr Borman's health was sought, before he saw any point in the Ministry attending mediation.

[31] The matter was not pursued again until 27 February 2009, when Dr Borman's statement of problem was filed. The parties attended mediation but were unsuccessful in resolving the matter. Despite discussions held between the parties in the course of the investigation meeting, they were still unable to resolve their differences and therefore it falls to the Authority to make a determination.

### **The Law**

[32] Personal grievances include claims that an employee's employment or one or more conditions of the employee's employment has been affected to the employee's disadvantage by some unjustifiable action by the employer. Conditions or terms which may be affected to an employee's disadvantage include, as held in *Wellington Area Health Board v. Wellington Hotel etc IUOW* [1992] 2 ERNZ 466 at 470:

*... physical conditions of employment, the environment in which the work is required to be performed, the amenities and facilities available to the worker, the payment to which the worker is entitled and matters of that kind.*

[33] Furthermore, as was held in *Alliance Freezing Co (Southland) Ltd v. NZ Amalgamated Engineering IUW* [1989] 3 NZILR 785, for there to be disadvantage there need not be material or demonstrable financial loss. A final warning was held to constitute disadvantage because it rendered an employee's employment less secure.

[34] A suspension also constitutes disadvantage, see for example *Graham v. Airways Corporation of New Zealand Ltd* [2005] ERNZ 587. In *McGavin v. Aoraki Corporation* [1996] 2 ERNZ 114, the Court held that restrictions placed on a worker's activities and the isolation forced on him constituted disadvantages in his employment.

[35] Regarding breach of contract claims against an employer to provide a healthy and safe workplace, the Court of Appeal held in *AG v. Gilbert* [2002] 1 ERNZ 31 that:

*The duty to take reasonable steps to maintain a safe workplace is also a term now implied by common law into employment contracts, in recognition of their special nature.*

[36] It was implicit in that judgement that an employer would take all reasonable care to avoid exposing an employee to unnecessary risk of injury or further injury to his or her physical or psychological health and in particular would provide and maintain a safe system of work. The Court of Appeal went on to state:

*... [there] are formidable obstacles which a potential plaintiff must overcome in establishing breach of a contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer the guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligations will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.*

*The reasonableness of the employer's conduct must therefore be measured against knowledge reasonably obtained by employers mindful of their responsibility.*

*... If a plaintiff is able to show that the employer failed to do what was reasonable at the time and was in breach of a contractual obligation, no reason of policy inhibits contractual liability for psychological injury.*

*... In some cases a risk may not be apparent without specific information about the vulnerability of a particular employee. That was the reason the plaintiff in Gillespie failed and why the plaintiff in Walker was successful only for injury suffered after the employer became aware that he had already suffered one breakdown.*

## **Determination**

[37] Until the severe psychological harm suffered by Dr Borman following advice that the Ministry had been investigating the activities of the PHI and that he was now to be the subject of a formal disciplinary process, Dr Borman had done an admirable job in continuing on with his work despite the stress that he was under. Therefore that stress was not apparent to the Ministry, except in the context of the restructuring.

When he asked for assistance in that context, it was provided and when asked by HR staff how he was feeling they were told after that that he was okay. It was therefore quite unforeseeable to the Ministry (and indeed to Dr Borman himself) that he would suffer the psychological harm he did, particularly its severity, and thus the Ministry had not failed in its duty to provide him with a safe and healthy workplace. That claim must therefore be dismissed.

[38] While the Ministry raised objections, due to its view that Dr Borman had never validly raised a personal grievance, I will address his concerns without deciding that point, as it is not necessary.

[39] Dr Borman's claims of disadvantage relate to his treatment by Ms Roche. In particular, his health has been gravely affected following the way that the audit process was pursued without any input from him, together with how the notice of the disciplinary process and possible suspension were raised with him, in the context of him already undergoing the stresses associated with being made redundant. I have no hesitation in accepting Dr Borman's evidence of how he felt as being entirely genuine. However, for reasons given above, I have rejected his claims of bullying by Ms Roche, or her being otherwise out to get him.

[40] I accept the evidence of the Chief Internal Auditor and the expert witness on audit practice that it was quite appropriate for the Ministry to have conducted its preliminary desk review without reference to the staff directly involved. Given Dr Borman's work record and undoubted integrity, it also had the option of including him in the review throughout, but I conclude that it was not unreasonable to choose another option.

[41] Having discovered a number of apparent irregularities, such as that of a contract being signed by Dr Borman apparently in breach of his delegated authority, I find that it was entirely reasonable for the Ministry to continue on with its investigations. In the light of this, it was incumbent on the Ministry to inform Dr Borman of its concerns at that point. While, in part because of Ms Roche's absences and in part due to Dr Borman's ill health, it was unfortunate that there was a delay in him receiving the detail of the allegations, that was not a breach of duty by the Ministry. I conclude that it met its duties by outlining the issues in a general way and indicating to Dr Borman that there would be a meeting the next day so that he could, with representation and support, hear face-to-face from Ms Roche how it

intended to investigate the issues and be provided directly with all the relevant documentation. Dr Borman accepted that he was told about that process before receiving the generalised documents.

[42] To the extent that the audit report made conclusions about activities Dr Borman had been associated with that were contrary to Ministry policy (such as the contract signing referred to above) he would have had (and did subsequently have) a full opportunity to explain. Ms Roche, not the auditor, was the decision maker with respect to Dr Borman's employment and she was conducting that investigation process. Had there been any disadvantage to him at the time it would have been justified, because the Ministry was following accepted audit policy and conducting a full separate employment investigation.

[43] Furthermore, Dr Borman was not suspended. The wording of the memo to Dr Borman could, however, have been better. It gives the appearance that the issue of suspension had already been determined in that Ms Roche gives a preliminary view that it is not practical for Dr Borman to remain in his current role during the review. This could cause an employee to consider the matter had been predetermined, particularly as the memo also states that a decision would not be made on either suspension or special leave on pay until Dr Borman had time to consider them and give his views. That implies that there were only two options, whereas in fact the Ministry was open to other options, one of which was indeed taken up.

[44] While the memo therefore unnecessarily raised concerns about Dr Borman being suspended, the conclusion to the memo did state that the only conclusion Ms Roche had reached to date was that it was necessary to conduct the review as soon as practicable. Similarly, he had been told on the phone that suspension would be an issue for discussion at the meeting. The Ministry's good faith on the issue of suspension can be gauged from its early acceptance that, as an alternative to suspension, Dr Borman could remain on paid sick leave during the course of the Ministry's investigations.

[45] On balance, I conclude that while the memo was ambiguous and not well worded, the Ministry, as proven by its later actions, had kept an open mind as to the matter of suspension. Following that, the Ministry failed to take any action to provide the results of its review (to the degree that there were any, as highlighted above), but on the other hand neither did Dr Borman seek them. Given that Dr Borman was no

longer an employee of the Ministry after 15 August, I conclude that there was no action to his disadvantage by the Ministry in this regard.

[46] I therefore determine that Dr Borman was not unjustifiably disadvantaged in his employment by any actions of the Ministry. In the light of the above findings, there can be no claim for penalty for breach of good faith. I therefore dismiss all of Dr Borman's claims against the Ministry.

**Costs**

[47] Costs are reserved.

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