

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 24  
5415457

BETWEEN

BRIAN CAPPER  
Applicant

A N D

BROADLANDS FINANCE  
LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Dean Organ, Advocate for Applicant  
Ray Parmenter, Counsel for Respondent

Investigation Meeting: 12 November 2013, 20 November 2013, and  
2 December 2013 at Auckland

Date of Determination: 23 January 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Capper) alleges that he has been unjustifiably constructively dismissed from his employment by the respondent (Broadlands) and also alleges that he has been unjustifiably disadvantaged as a consequence of hostile bullying treatment associated with an excessive workload. Mr Capper also says that Broadlands has breached its obligation of good faith toward him.

[2] Those claims are all resisted by Broadlands and, amongst other things, Broadlands says that the allegations relating to unjustified disadvantage can only be investigated by the Authority insofar as they relate to events within 90 days of the raising of that grievance and that Broadlands does not consent to the raising of a grievance out of time in relation to matters outside the justiciable period.

[3] While Broadlands maintains that the unjustified disadvantage grievance was not persevered with, there was no formal withdrawal of that claim by Mr Capper and accordingly the Authority will deal with that as well as the alleged unjustified dismissal.

[4] A further issue arose while the matter was before the Authority but prior to the investigation meeting. An amended statement of problem filed on 12 August 2013 identified that an amount of \$8,317.31 gross remained owing to Mr Capper by Broadlands in regard to unpaid holiday pay. The Authority is pleased to record that, during the course of the proceedings, full payment of the overdue sum was made and so that issue is no longer before the Authority.

[5] Mr Capper was employed by Broadlands in an accounting role from 2006 and later was appointed Chief Financial Officer. More recently still, Mr Capper became responsible for the dual role of Chief Financial Officer and General Manager of Broadlands.

[6] Mr Capper alleges that bullying of him commenced in September 2012 in the context of an allegedly material increase in workload.

[7] Conversely, Broadlands says that the workload and business activity had "*slowed significantly from 2011*" and that from early 2012, Broadlands was commencing to address "*a number of underlying performance issues*" with Mr Capper.

[8] These "*underlying performance issues*" were identified particularly after one of Broadlands' independent directors, Mr Bruce Scott, reviewed Broadlands' accounting function and found a number of deficiencies.

[9] These matters were discussed at Board level. Mr Capper reassured the Board. Notwithstanding that, Broadlands failed to meet its statutory obligations under its Trust Deed for the filing of its Statutory Accounts.

[10] There was another review, this time in June 2012, which involved discussion with Broadlands' auditors.

[11] There were further discussions between Mr Capper, Mr Scott, and Mr Radisich who was the principal shareholder of Broadlands.

[12] Matters deteriorated still further in the final third of calendar 2012 with Broadlands blaming Mr Capper for the failure to complete the accounts on time. Mr Capper dates the alleged bullying from September 2012 onwards. His evidence is also that from virtually the beginning of September to the end of mid-December 2012, he worked seven days a week.

[13] Broadlands says it was unaware of Mr Capper's workload, that he never raised it with it, that it never observed it, that it had no idea that he was working the hours that he claimed to work and that there was absolutely no expectation on its part that he would work such hours.

[14] Indeed, Broadlands' evidence is that it regularly offered Mr Capper assistance which he refused. Broadlands also says that because of his role as General Manager, he maintained the leave records and never once protested either workload or working conditions.

[15] On 3 January 2013, Mr Scott sought a review with Mr Capper concerning his performance. The covering email is in the following terms:

*Brian [Mr Capper] the latest audited accounts exercise wasn't satisfactory – I've attached a note to that effect. We need to sit down with Tony [Mr Radisich] and work through our ongoing struggle to meet basic statutory requirements in an environment where we are planning to return to the debenture market. I propose we do this next Wednesday after the weekly meeting when Tony is back in the office.*  
Bruce [Mr Scott]

[16] Because the issue is an important tipping point, the relevant text of the note Mr Scott attached to his email is now set out in full:

*3 January 2013 Brian Capper 6 month review of BFL [Broadlands Finance Limited] finance function*

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*The six monthly statutory reporting exercise was unsatisfactory. We await the auditor's management letter; however they are also unhappy about how the exercise was completed. This exercise was your first priority, and followed an equally unsuccessful March performance. You established the processes and timetable and assured myself and the Board that staff changes and your personal attention to this would resolve the March problems.*

*Some of the key problems I saw were:*

- 1. Timetable not met. It required significant intervention and changes to the audit programme to complete (albeit at the last*

*possible moment) to avoid a second consecutive Trust Deed breach.*

- 2. On numerous occasions representations that the accounts or parts thereof, were completed and agreed with the auditors proved false.*
- 3. It required my interrogation of components of the financials, such as cashflows, to unveil errors of calculation – these were originally reported as accurate and complete.*
- 4. The supporting work papers set up to ensure accuracy and a trail to the notes to the accounts proved incomplete and contained errors. I evidenced a lot of confused understanding of how they came together.*
- 5. You generally failed to address issues before they arose and seek either assistance or provide an update on outstanding matters. In contrast where these were advised, the issues were resolved in a timely fashion.*
- 6. It became increasingly difficult to establish what the delays were and what the action plan was. As these continued it compromised the auditor's schedules and exacerbated the problem.*
- 7. Information was sent to the auditors for confirmation rather than as completed work in the expectation they were to complete any omissions or misunderstandings on your behalf.*
- 8. There were 22 iterations of the accounts involving significant extra review and audit work. This also made reviewing increasingly confusing to follow.*
- 9. Tax entries and processes were untaken [sic] without reference to me until after completion and subsequently had to be reviewed.*
- 10. There will be extra audit costs – a repeat of the March accounts problems.*

*In summary there has been little improvement in our ability to complete statutory reporting exercises in a timely and accurate manner.*

*You are currently providing the formal justification as to why these accounts were not required to be filed with the Companies Office by 31/12/2012 despite our impending Prospectus.*

*We were unable to hold a December Board meeting due to a lack of management accounts for November. These are still pending.*

...

*Bruce Scott  
Director*

[17] It is common ground that there was no response from Mr Capper although he told the Authority in oral evidence that he was in the office working on 3 January 2013.

[18] Mr Capper also told the Authority in his oral evidence that the “*tipping point*” for him was a meeting later in January 2013 involving Mr Scott and Mr Radisich. After that meeting, which according to Mr Capper went badly, Mr Capper made a personal approach to the Chair of the Broadlands Board seeking an exit package. Mr Capper was referred back to either Mr Scott or Mr Radisich.

[19] In the result, Mr Capper commenced a period of sick leave on 22 January 2013 and never returned to duty.

[20] In the meantime, Mr Scott wrote to Mr Capper seeking to try to establish in effect where Mr Capper was. The original information was that Mr Capper would return to duty on 29 January but did not do so.

[21] On 5 February 2013, a personal grievance was raised for Mr Capper by his advocate and on 14 April 2013, Mr Capper filed his resignation of that date with Broadlands and commenced a new role the following day.

[22] Broadlands says that it was never provided with adequate information about the prognosis in relation to Mr Capper’s health during the period from 22 January 2013 down to the date of his resignation and Mr Capper alleges that Broadlands failed to act as a good employer by refusing to go to mediation and refusing his request that, when his sick leave ran out, he be paid his annual leave instead.

### **Issues**

[23] The first issue the Authority will need to consider is whether Mr Capper was bullied in his employment.

[24] Then, the Authority will need to resolve the question whether unreasonable demands were made on Mr Capper during the employment.

[25] The Authority will then need to consider whether, once Mr Capper went on sick leave, he was treated appropriately by the respondent.

[26] The final question for the Authority, taking all of that into account, whether Mr Capper has either personal grievance he pleads, or has suffered a breach of good faith.

### **Was Mr Capper bullied during the employment?**

[27] Mr Capper alleges what counsel for Broadlands refers to as “*harsh treatment*” from Messrs Scott and Radisich during the employment and that harsh treatment included an instance of physical abuse when it is alleged Mr Radisich struck Mr Capper on the head with a pen.

[28] The evidence for the conduct complained of comes from Mr Capper himself and from Mr Michael Walsh. Mr Walsh is an economist by profession and worked as a consultant in Broadlands for two periods of time, the first between June and November 2009 and the second from May 2011 down to June 2013.

[29] While Mr Capper’s evidence is that other staff of Broadlands would have been aware of the allegedly unsavoury working environment during the period in question, the Authority was not offered any evidence of that other than from Mr Capper himself and from Mr Walsh.

[30] Mr Capper’s evidence is contained in two separate documents provided to the Authority; the traditional brief of evidence and an earlier statement filed with the statement of problem and entitled “*Statement of Brian Capper*”. That latter statement is then incorporated subsequently into Mr Capper’s brief of evidence which was filed some time later.

[31] Taken together and married to Mr Capper’s oral evidence before the Authority, the two documents and Mr Capper’s oral evidence identify, in a somewhat discursive style, the incidents that he relies upon. In the present section of this determination, the Authority is only concerned with allegations of bullying.

[32] Mr Capper alleges that he was placed under “*increased pressure*” once Mr Scott became more intimately involved in the day-to-day affairs of the business. Mr Scott’s increased involvement seems to have happened from July 2012. At para.12 of his brief of evidence, Mr Capper refers to “*verbal abuse*” being “*heightened*” and morale falling as a consequence. The Authority is invited to

conclude that other staff felt similarly to Mr Capper, but no evidence was adduced to support that conclusion.

[33] Later on in his evidence, Mr Capper referred to an incident where he broke down and wept at a staff function and he alleges that Mr Radisich subsequently mocked him at a Board meeting saying something to the effect that when things went wrong “*at least he did not cry about it*”.

[34] At para.19 of his brief, Mr Capper refers to an incident where he was criticised by Mr Radisich for paying Broadlands’ insurance bill. Mr Capper’s position was that the invoice was within his delegated authority and that he had an obligation to mitigate risk and so attended to the payment. He alleges that Mr Radisich “*berated and abused [him] constantly for making this payment*”.

[35] Then in the next paragraph of his brief of evidence, Mr Capper refers to other staff complaining about vulgar abuse directed at them by either Mr Radisich or Mr Scott.

[36] In his earlier statement, Mr Capper referred to an incident in November 2012 when he says that Mr Radisich “*admonished me by striking me on the head with a pen and yelling at me to ‘use my fucking head’*”.

[37] Further, Mr Capper alleges that at a meeting that he attended with both Mr Scott and Mr Radisich, he was advised that Mr Radisich was now “*the manager*” and that “*if I did not like it I could ‘fuck off’*”.

[38] Under the subheading “*January 2013*”, the month when by common consent matters came to a head, Mr Capper refers in his earlier set of notes to “*staff ... being constantly verbally abused owing to the perceived poor performance in the collections area*”. And again, in a meeting that took place between Mr Scott, Mr Radisich and Mr Capper in January 2013, Mr Capper claims to have been told that he should “*complete his tasks and then go home and think about whether he wanted to continue working at Broadlands*”, then later in the same sentence, that Mr Capper should “*fuck off*” and that he should “*sue him [presumably Broadlands] if I did not like it*”.

[39] In another meeting held just between Mr Capper and Mr Radisich, which Mr Capper dates as 21 January 2013, he says that he was “*abused by the shareholder*

[a reference to Mr Radisich] *owing to the lack of funds and told that I did not know what I was doing*".

[40] In support of these allegations, Mr Walsh first indicates that, having read Mr Capper's brief of evidence and supporting documentation, he told the Authority that he saw nothing "... *in that statement that I think is untrue or not correct ...*" and he then goes on to say that he thought Mr Capper would have survived:

*... had it not been for the persecution and personal abuse he received. From my perspective of observing what happened and especially from hearing from Brian on a day-to-day basis when I was at [Broadlands] of the adverse treatment he was receiving from Bruce Scott and Tony Radisich, it was the unreasonable criticism, personal abuse and pressure which made Brian sick. This seemed to me like a very clear case of constructive dismissal.*

[41] Mr Walsh does admit, however, that he personally saw little to criticise about Mr Radisich's behaviour but that he did have "*first hand experience of some of the unreasonable criticism and pressure on Brian [Mr Capper] from Bruce Scott*".

[42] Mr Walsh referred to Mr Scott pursuing "*his task in an aggressive manner, for example often questioning Brian [Mr Capper] loudly and at length (interrogation would not be an unfair description) usually tilting the discussion to make Brian look bad*".

[43] In his oral evidence to the Authority, Mr Walsh enlarged on his general observations about the alleged mistreatment of Mr Capper. He said that Mr Scott's analysis of Mr Capper's work was characterised by a "*lack of balance*" and that Mr Capper was "*fearful*" of Mr Scott who he described as "*more than direct and quite a frightening presence who spoke loudly and menacingly*".

[44] Broadlands absolutely denies bullying Mr Capper. It rejects his evidence and the evidence of Mr Walsh. Of most importance, in the Authority's view, and understanding Broadlands' position, is the context in which these events occurred.

[45] It is common ground that Mr Capper had worked for Broadlands for a number of years and that until the very end of the employment relationship, there appear to have been few problems identified by either party.

[46] For instance, Mr Capper told the Authority in his oral evidence that his difficulties with Broadlands were not a function of any psychological weakness

because he was able to do the job satisfactorily in the early days of the employment and there were no complaints about his performance then. Mr Capper went on to say that in the early days of the employment he was treated well and certainly the detailed evidence that he filed about the management changes prior to calendar 2012 suggest that there was a broadly satisfactory employment relationship between the parties in the early days.

[47] So what changed? Broadlands says that the global financial crisis put real pressure on the business and on Mr Radisich as the shareholder and effectively principal funder. It says that Mr Capper simply did not adjust to the new environment where the challenges were fundamentally different.

[48] In an environment where finance companies were falling like ninepins, Broadlands managed to survive but only by effectively changing its whole strategy.

[49] While Mr Capper alleges that the workload increased during the period when he says he was bullied (he claims this bullying started in September 2012), Broadlands says that, as a consequence of the global financial crisis, the workload actually reduced because the practical reality was that deposit taking was reduced, staff reduced commensurately, and, as the Authority has already noted, the business focus changed accordingly.

[50] Mr Scott told the Authority that while he regarded Mr Capper as an “*upright*” person, he also concluded that he was incompetent. That conclusion, if correct, was not based on a knee jerk response but significant inquiry. It is common ground that Mr Scott was commissioned by the Board to investigate the performance of Broadlands (effectively led by Mr Capper), both in early 2012 and again in mid-2012.

[51] Mr Scott’s first review was in early 2012 and that review, on Mr Scott’s evidence, concluded that Mr Capper was “*struggling*” and that “*the timeliness and accuracy of his work was declining*”.

[52] Mr Scott’s evidence is that before March 2012, the Board had indicated to Mr Capper that it was not impressed and that Mr Capper assured it that remedial action would be taken.

[53] Then there was the breach of Broadlands’ filing commitments under the Trust Deed for filing its statutory accounts which Mr Scott described as “*a serious error; it*

*was under Brian's [Mr Capper's] control and he let us down. He kept on reassuring us that all was in order and on time but then, we were late".*

[54] The Board commissioned a second review led by Mr Scott in June 2012 in conjunction with Broadlands' auditors, and again there were serious deficiencies identified. Mr Scott in his evidence referred to "*poor judgement, an inattention to timetable and misstatements to the Board on material business matters ...*" and "*... no apparent improvement in the management of the office*".

[55] Despite these very grave misgivings, Mr Scott's evidence is that Broadlands decided to take no disciplinary action and instead to try to put in place a strategy which would assist Mr Capper to correct his failings and get the job done. To do that, Broadlands determined to give Mr Capper unlimited access to Mr Scott and to have Mr Radisich increasing his day-to-day involvement in the business as well.

[56] It is from this programme of what might perhaps be called "*support and guidance*" that Mr Capper's claims of bullying are derived because on his evidence, the bullying did not start until September 2012 and it was originated by both Mr Scott and Mr Radisich and seems to have principally come about, according to Mr Capper, during various management meetings.

[57] Mr Scott's evidence is that further significant inadequacies were identified at the time of the "*six monthly statutory reporting cycle in October 2012*" and notwithstanding assurances given by Mr Capper, Broadlands had to take what amounted to evasive action in order to prevent "*breaches under the Reserve Bank Act and our Trust Deed*". The Board's intervention meant that the statutory reporting timetable "*was met on the last business day of the year*".

[58] This further failure to achieve targeted outcomes, seems to have galvanised Broadlands into action and resulted in Mr Scott's 3 January 2013 communication to Mr Capper which, by common consent, is the first indication of a possible disciplinary process.

[59] In short then, Broadlands says that Mr Capper was not being bullied but rather was subject to an informal performance improvement plan which was designed to remedy very serious deficiencies in his performance.

[60] As well, both Mr Scott and Mr Radisich deny bullying Mr Capper and say all they did was to try to get him to perform adequately in the business environment. They also both say that they offered him all the support they could including the right to bring in additional staff but Broadlands maintains that Mr Capper was always reluctant to accept that sort of additional support.

[61] Mr Radisich acknowledges swearing and certainly, in his evidence to the Authority, he gave every appearance of being a colourful character, but he said (and appeared to be) genuinely hurt by the contention that he had bullied a senior staff member. He denied each of the particular allegations referred to by Mr Capper including the assault with the pen, and the observations allegedly made about Mr Capper crying, and the contention that if Mr Capper did not like the situation he could leave. Mr Radisich said all of that was inconsistent with his view of Mr Capper, it being Mr Radisich who had promoted Mr Capper to his then current role.

[62] Mr Scott also denied the bullying allegation. Mr Scott said that he did not habitually swear and he denied the allegation that he “*interrogated*” Mr Capper and/or sought to “*belittle*” Mr Capper. Mr Scott said that he had a direct approach but he resented the suggestion that he was “*cross questioning*” Mr Capper at any time.

[63] On the evidence offered by Mr Walsh, Mr Scott said that Mr Walsh “*had little understanding on what was going on on a day-to-day basis because he wasn’t there day-to-day*”.

[64] Conversely, Mr Walsh claimed to have worked on average around 20 hours a week but in early 2012 he was working near enough to full time.

[65] Whatever the difference in hours, what is apparent is that Mr Walsh was clear that he never raised the alleged bullying with the employer (despite Mr Capper complaining to him about it), and Mr Capper was equally clear in his evidence that he never raised the alleged bullying with the employer either. Moreover, when Mr Capper met with the Chairman of the Board, Mr Storey, on 22 January 2013, Mr Storey was clear that Mr Capper did not mention bullying then either.

[66] So it is apparent on the evidence that at no stage was Broadlands put on notice until after the employment came to an end that bullying was alleged.

[67] Mr Capper relies on the Employment Court decision of *McGowan v. New Type Accessories Ltd* [2003] 1 ERNZ as authority for the proposition that bullying can ground a constructive dismissal. That proposition is undoubtedly true, but the difficulty with placing reliance on that decision for present purposes is that the decision of Judge Shaw can be distinguished from the present case because in *McGowan*, the employer knew about the bullying and even took steps to address it, whereas in the present case, the evidence is that the employer was never confronted with the allegation. It is clear from Her Honour's judgment that she determined that the employer's obligation arose from the time it became aware of it and thereafter the employer was under a duty to address the issue because a good and fair employer must take all reasonable practical steps to provide a safe workplace. Put another way, if the employer does not know that the workplace is not safe, it is unable to address the issue.

[68] Furthermore, Her Honour goes on to emphasise the point that even if the employer did not have full knowledge of the nature of the conduct complained of, it should have because of the "*repeated verbal complaints*": *McGowan* para.[56].

[69] Here, it is common ground that there were no complaints at all; no complaints from Mr Capper until long after the employment ceased and no complaints either from Mr Walsh.

[70] What is apposite in *McGowan* is that, like the present case, *McGowan* concerns itself with bullying of a chief executive and Judge Shaw emphasises that an employer in those circumstances has "*a particular responsibility*". This is because the chief executive has "*no other staff member or supervisor to turn to*": *McGowan* para.[58].

[71] But while Mr Capper was the de facto Chief Executive, it is plain on the evidence that he did turn to a person who was effectively a colleague (Mr Walsh) and raised matters with him, and yet neither of them took any steps to address the matter with the employer. In addition to raising matters with Mr Walsh, Mr Capper also spoke to the Chairman of the Board. By common consent, he had no involvement whatever in any allegations of bullying, had an absolutely traditional governance role and no hands-on involvement in the business at all. He would have been the ideal person to speak to about such an allegation and yet on the evidence the Authority heard, the matter was not raised with Mr Storey either.

[72] The Authority must conclude that Broadlands Finance Limited knew nothing about Mr Capper's claim to have been bullied by Messrs Scott and Radisich and accordingly Broadlands was never on notice that there was an issue it had to deal with in terms of providing Mr Capper with the safe workplace he was entitled to expect. The law does not require an employer to be psychic in these matters; as Judge Shaw emphasises in *McGowan*, the obligation to remedy commences with knowledge and in the absence of knowledge, there can be no requirement to act.

[73] Moreover, the context in which the events complained of happened is, in the Authority's judgment, a relevant consideration. This was one of a number of cases where exchanges between an employer and an employee were categorised by the employee as bullying and by the employer as an endeavour to get performance improvements.

[74] It is no coincidence that Mr Capper's identification of the point at which the bullying allegedly started was at about the time that the employer's focus on supporting performance improvements in Mr Capper's work commenced and it is also not a coincidence that Mr Capper's departure from the workplace on sick leave closely post-dated the employer's first formal disciplinary notification to Mr Capper.

[75] For the avoidance of doubt then, the Authority's considered view is that Mr Capper was not bullied at all but was simply subjected to the employer's attempts to improve his performance, that nothing that the employer did was what a fair and reasonable employer could not have considered doing in the circumstances the employer found itself in during the second half of calendar 2012 and that the employer was never on notice that Mr Capper saw the performance management as bullying.

[76] Nor is the Authority persuaded on the evidence it heard that either Mr Scott or Mr Radisich ought to have reflected on their own behaviour in the workplace and concluded that they might be putting staff at risk. The Authority has already made the observation that it considered Mr Radisich a colourful personality and amongst other things, he freely conceded that he swore, but he maintained that he did not swear at people and in relation to the complaints against him, literally the only evidence is the evidence of Mr Capper. This is because Mr Walsh did not have personal knowledge of any behaviour of Mr Radisich.

[77] Mr Capper's complaints about Mr Radisich's behaviour are frankly lacking in specificity and redolent perhaps of a deteriorating relationship more than evidence of bullying as such.

[78] Set against Mr Capper's very general and unspecific allegations are the clear and explicit denials by Mr Radisich of each of the handful of particular allegations that Mr Capper makes against him.

[79] On balance, the Authority is not persuaded that Mr Radisich was guilty of any improper behaviour towards Mr Capper. Mr Radisich may have been challenging to work with from time to time but that does not constitute bullying and in the face of Mr Radisich's explicit denials of the handful of allegations directly made against him, his apparent concern that anybody would think him a bully, the absence of anything other than the barest detail from Mr Capper and Mr Capper's failure to ever bring the matter to the employer's attention until after the employment ceased, the Authority is not persuaded that Mr Radisich's behaviour was inappropriate.

[80] Put another way, the Authority is persuaded that, as the shareholder and executive director of Broadlands, and therefore in a sense the personification of the company, the behaviour Mr Radisich exhibited was behaviour that a good and fair employer could have exhibited in the particular circumstances in which Broadlands was operating during the second half of calendar 2012.

[81] The Authority's conclusion in relation to the behaviour of Mr Scott is similar but for different reasons. Mr Scott's behaviour was observed by Mr Walsh and Mr Walsh maintained his view that Mr Scott's behaviour was inappropriate. That said, the bulk of the evidence the Authority heard suggested that Mr Scott did not swear in the workplace and that is the conclusion the Authority reaches on the balance of probabilities.

[82] Mr Scott reached the conclusion in his first review of 2012 that the Broadlands office (run by Mr Capper) was not operating effectively and efficiently and he had that view reconfirmed by his second review in June 2012 where he reached similar conclusions and probably at that point started to form the view which ultimately persuaded the Board that it needed to manage Mr Capper's performance.

[83] Mr Scott gave quite extensive evidence to the Authority and while Mr Walsh described him as interrogating Mr Capper, Mr Scott sought to encourage the Authority in the alternative view that he was simply being straightforward.

[84] In the context of the management of the performance of a senior manager where there are, on the evidence the Authority heard, major and embarrassing deficits, it is in the Authority's view inevitable that the Board's agent (in this case Mr Scott) might become a little exasperated, especially when, again on the evidence the Authority heard, Mr Capper gave various assurances at various times to the Board which were not made out in practice.

[85] In all the circumstances, the Authority is not persuaded that Mr Scott is guilty of bullying Mr Capper either. The Authority prefers the view that Mr Scott was endeavouring to manage Mr Capper's performance as an alternative to adopting a disciplinary approach which Broadlands ultimately found necessary at the turn of the year, having been embarrassed again by Mr Capper's failure.

#### **Did Mr Capper have an unreasonable workload?**

[86] Mr Capper's unchallenged evidence is that he effectively worked seven days a week from around the beginning of September 2012 to the middle of December 2012. That is, his uncontested evidence is that he worked seven days a week without a break for a third of a year.

[87] Broadlands says it simply did not know that Mr Capper was working those hours, that had it known, it would have immediately directed him to take leave and that in the absence of any notification from Mr Capper himself, there was no way that it would know that he was working those hours.

[88] Moreover, Broadlands says that there was absolutely no need for Mr Capper to work those sorts of hours and by implication the Authority can conclude that it would have been a whole lot better, both for Mr Capper and for Broadlands, if Mr Capper had taken proper breaks at the weekends, taken scheduled annual leave and generally worked fewer hours, which would have resulted in less criticism of his work.

[89] While it is plain, as the Authority has noted, that Mr Capper worked continuously over that four month period, and that he thought that was necessary in order to achieve the objectives that he had been set, Broadlands says it had no idea he

was working those hours and that there was no need for him to have worked those hours.

[90] So should Broadlands have known about the hours Mr Capper was keeping? The Authority taxed Broadlands' witnesses with this pretty obvious question during the investigation meeting. Their responses were essentially to point out both Mr Capper's position in the hierarchy and the physical location of the protagonists.

[91] As to the first, Mr Scott gave evidence that he would have expected Mr Capper to work a normal span of hours (that is not work at weekends) and that he would have expected him to take his annual leave, which was booked but apparently not taken.

[92] In relation to the annual leave position especially, Mr Scott's evidence was that because of Mr Capper's seniority in the organisation, there was no requirement for Broadlands to "*agree to grant him leave*" when he wanted to take it. It was a matter for Mr Capper to book and arrange his own annual leave because he was the General Manager.

[93] Furthermore, Mr Scott said that Mr Capper retained and maintained all the records relating to holiday leave, including records relating to his own leave. Mr Scott told the Authority:

*Mr Capper was the sole arbiter of how sick leave and annual leave was taken for staff (including himself).*

[94] Mr Scott also told the Authority that despite Mr Capper's evidence, the total workload of his role had reduced dramatically since "*pre-September 2011*" and that Mr Capper's direct line reports numbered only three and the total staff he managed was 11.

[95] Mr Scott also emphasised the point that during the regular exchanges that he and Mr Radisich had with Mr Capper, they offered Mr Capper further assistance in the way of additional personnel and that Mr Capper always rejected those overtures.

[96] So the summary position is that from Broadlands' perspective, there was no need for Mr Capper to work the hours that he did; the job did not require it, the scope of the role having reduced dramatically in the previous 12 months such that the total number of staff reporting to the role had diminished significantly and the functions of

the role had diminished as well. Moreover, no Board member was told by Mr Capper that he was working the hours that the evidence discloses he worked and Broadlands says that had it been told that he was working through weekends and not taking annual leave that he had booked, it would have immediately directed him to take regular breaks and to take his annual leave.

[97] But does that explain why Broadlands' directors did not know about Mr Capper's work habits? Mr Scott for Broadlands makes two pertinent observations. The first is that neither he (Mr Scott) nor Mr Radisich were full time employees. Indeed, the Authority accepts as a fact that both of them were bit players, attending at the Broadlands offices on a regular basis during the working week, but never being their full time and except in unusual circumstances, the Authority is satisfied that neither Mr Scott nor Mr Radisich would have been at the Broadlands offices during the weekend.

[98] The other point that Mr Scott makes is equally relevant. He points out that while Broadlands' office was in the central city, Mr Radisich's office was in Penrose and Mr Scott worked from a home office. While both Mr Radisich and Mr Scott used facilities at the Broadlands office when they were working there, neither of them were based there and nor were any other directors of Broadlands based at the Broadlands office.

[99] It follows that the only way that they would know what hours Mr Capper was working was if he told them and it is common ground that he did not. Moreover, it is common ground that the directors had no idea that Mr Capper was not taking annual leave that he had previously booked. Clearly, the directors would have known if Mr Capper was taking annual leave because they would have found he was not in the office; what the Authority accepts they did not know was that Mr Capper had booked leave and then not taken it.

[100] Mr Scott sees Mr Capper's behaviour as simply another example of his poor planning skills, his reluctance to engage with others, his absence of direct management of his people and his signal reluctance to delegate or to accept assistance when it was offered.

[101] It is true that during the period in question, Broadlands had what amounted to a sinking lid policy in place and had put a freeze on salaries. However, in relation to

Mr Capper, the evidence is clear that Broadlands offered him additional assistance to complete his central tasks including bringing in additional staff if required.

[102] Mr Capper complains that there was “*a lack of appreciation*” of his work from the Board and the shareholder and that that contributed to his negative feelings. But that is hardly surprising given the employer’s growing anxiety about Mr Capper’s performance.

[103] The Authority was understandably concerned at the evidence that Mr Capper was effectively working continuously for a third of the year and spent some considerable time during the investigation meeting ensuring that it understood Broadlands’ response to that evidence.

[104] In the result, the Authority has been persuaded that Mr Capper cannot rely on his unreasonable hours to demonstrate that the requirements of the employer were themselves unreasonable. The Authority has reached the conclusion that Mr Capper was the author of his own misfortunes in this regard. Mr Capper was the General Manager. He needed to ensure that he had proper breaks and took his annual leave and that he appropriately delegated to his small team the tasks that were required.

[105] Given that Mr Capper at no time told the employer the hours that he was working and the Authority is now satisfied that there was no way that the employer could reasonably have known of that, Mr Capper’s claim to have an unreasonable workload is simply not made out.

[106] In support of that conclusion, counsel for Broadlands has referred the Authority to an earlier decision of the Authority: *Nelson v. Air New Zealand Ltd* AA81/06, 22 March 2006, a decision of Member Ulrich. There the Authority concluded that a claim by a senior employee that she was not provided with a safe workplace because of excessive hours of work was rejected because of the Authority’s conclusion that “... *the hours Mrs Nelson worked resulted from Mrs Nelson’s assessment of what was necessary to get the job done....I received no evidence that Mrs Nelson was directed to work the excessive hours recorded..*” That decision is directly apposite in the present case where there simply is no evidence Broadlands directed Mr Capper to work the unreasonable hours he chose to work.

**Was Mr Capper fairly treated in relation to his sick leave?**

[107] As the Authority has already noted, after a difficult meeting with Mr Scott and Mr Radisich in mid-January 2013, Mr Capper commenced sick leave on and from 22 January 2013 and in fact he never returned to duty. When he left the workplace on sick leave on 22 January 2013, his initial indication was that he would return to duty on 29 January 2013. When that day came, Mr Capper indicated that he was not returning to duty but would advise later in the day when he was able to return. Nothing further was heard.

[108] Accordingly, Mr Scott wrote to Mr Capper on 31 January 2013.

[109] That letter could best be characterised as exhibiting Mr Scott's frustration at the lack of information being provided by Mr Capper.

[110] It is clear from Mr Capper's evidence to the Authority that when he commenced his sick leave, he sought medical advice and as a consequence undertook a series of medical tests. But none of that information was provided to Broadlands, which continued to have no idea what was wrong with Mr Capper or indeed what the prognosis was.

[111] Subsequently, the correspondence between the parties' representatives evidences an attempt to get that information but on the evidence the Authority heard, it was never forthcoming.

[112] Later on, a request was made through the parties' representatives for Broadlands to pay Mr Capper his annual leave on the footing that he had run out of paid sick leave. That request was denied and Broadlands is criticised for that. But as counsel for Broadlands makes plain in the employer's submissions, the statutory provision is clear; an employer confronted with such a request has a discretion and is entitled to exercise it.

[113] In all the circumstances, the Authority is not persuaded that Broadlands treated Mr Capper unfairly while he was on sick leave. The fact is that Mr Capper failed absolutely in his obligation to provide Broadlands with adequate detail of the nature of his ill health and the prognosis. This is a straightforward obligation of an employee in a sick leave situation and Mr Capper failed to discharge it.

[114] Broadlands might have been a great deal more sympathetic to Mr Capper's situation if it had any idea what was wrong with him and how long he was going to be away. In the absence of that information, it is difficult not to sympathise with Broadlands' characterisation of Mr Capper's behaviour as Mr Capper simply walking out of the employment and then failing to engage appropriately with the employer thereafter.

[115] The Authority must also comment on the criticism levelled at Broadlands for failing to engage in mediation. With respect, neither representative distinguished themselves in their exchanges with each other in the lead up to the Authority's investigation. Suggestions from the Broadlands camp that Mr Capper was seeking to "*buy his resignation*" is unnecessary sabre-rattling.

[116] Managed exits in the employment jurisdiction are a commonplace and there is nothing improper about suggesting such a process. In the Authority's judgment, the fact that a party proposes such an arrangement does not negative the value of mediation and indeed such arrangements are frequently formalised within the mediation context.

[117] Certainly, a more principled stance from the Broadlands camp evidencing a straightforward commitment to engage in mediation might have resolved the matter without the need for the Authority's intervention at all.

[118] In all the circumstances, the Authority is not persuaded that Mr Capper was treated unfairly during his sick leave because each party's rather shrill attitude was reflected in the like attitude from the other side. Of most moment though is the fundamental fact that it is difficult to claim fair and equitable treatment if you are not prepared to reciprocate and in failing to provide any information about the nature of his ill health or the prognosis, Mr Capper made it very difficult for Broadlands to take anything other than the dismissive approach that he complained about.

### **Was Mr Capper constructively dismissed from his employment?**

[119] The factual position is that on the very day that Mr Capper left the employment for the last time, he had met with the Chairman of Broadlands' Board seeking to "*get out*" of the employment and asking for help to "*do a deal*". Not unnaturally, the Board Chairman referred Mr Capper to either Mr Scott or

Mr Radisich on the basis that they were the directors most intimately involved in the day-to-day operation of the business.

[120] Then, during a period of extended sick leave (about which Broadlands had no detail and no prognosis), Mr Capper suddenly resigned his employment on 14 April 2013 and it became clear from the evidence the Authority heard that Mr Capper commenced a new role the following day (15 April 2013).

[121] The principal head under which constructive dismissal is pleaded is the third category in the traditional formulation where a breach of duty by the employer is so significant as to make it reasonably foreseeable that the employee will resign.

[122] Here, Mr Capper's identification of breaches of duty include the bullying allegation, the allegation of an unreasonable workload and the allegation that he was unfairly treated while on sick leave. Of course, as the Authority has already decided, neither of the first two and principal allegations were ever drawn to the attention of the employer during the employment and the Authority has already decided that Mr Capper has not made out his claim in either regard.

[123] In relation to the allegedly unfair treatment during the period of sick leave, the Authority is satisfied that Mr Capper is the author of his own misfortunes; if he had provided the employer with reasonable access to his medical records and information about his health status and prognosis and been treated in the way that Broadlands treated him, he might well have satisfied the Authority that he was not properly treated.

[124] But that is not what happened. Mr Capper failed absolutely in his obligation to provide the employer with proper details about his health status and the prognosis from that and given that approach, the Authority is not persuaded that Mr Capper can claim to have been unfairly treated.

[125] Mr Capper's argument is not greatly assisted by the factual matrix from the point he left the employment on 22 January 2013, either. On the Authority's analysis, Mr Capper made an approach to the employer (via the Chairman of the Board) for a managed exit, was directed to engage with either Mr Scott or Mr Radisich and for whatever reason, those negotiations were never brought to fruition. Certainly, on the evidence, the suggestion that Mr Capper made was never rejected by Broadlands, although its subsequent characterisation of Mr Capper's proposal as an attempt to

*“buy a resignation”* is churlish and unhelpful as well as being out of step with the reality of employment relationships.

[126] Then, in the context of maintaining that he was unwell but without providing any detail of that unwellness or the prognosis to his current employer, Mr Capper must have used some energy to find an alternative role and having found it, he resigned effective the day of his resignation and started work in the new position the next day.

[127] While Mr Capper told the Authority that he was not well when he commenced his new role but that he had to work because he needed the money, it is still difficult to square his alleged unwellness (about which Broadlands knew nothing at all) with his ability to secure a fresh management position and presumably fulfil his obligations in that position having previously maintained up to that point that he was too unwell to attend work with his current employer. Those factors, coupled with the complete absence of proper notice, does not reflect well on Mr Capper.

[128] Working backwards from the traditional order, it is difficult for the Authority to not conclude that Mr Capper’s resignation was caused by his failure to secure a managed exit and his successful application for a new role, rather than the alleged breaches by the employer which the Authority has not found to be made out.

[129] The Authority’s analysis is that, with the exception of the failure to willingly and without fetters attend mediation after the employment had effectively ended, there was no breach of the employer’s obligation to Mr Capper. The position might have been different if Mr Capper had raised a flag of protest, either in relation to the alleged bullying or in relation to the alleged unreasonable workload or both. But in the absence of either of those flags, the Authority is compelled to prefer the evidence of Broadlands that it was unaware Mr Capper felt bullied and unaware that Mr Capper felt overloaded. The reasons the Authority has reached those conclusions have been extensively set out already in this determination.

[130] Furthermore, the Authority is persuaded that the context of the end of the employment relationship is relevant; that is, that Broadlands was unhappy with Mr Capper’s performance, had put in a performance support programme to try to improve that performance but that notwithstanding that, there continued to be significant deficits which ultimately resulted in a disciplinary approach at the

beginning of January 2013 which, within a short number of weeks, had resulted in a proposal from Mr Capper that he exit the business, but a proposal which, on the evidence, raised none of the detail about bullying or unreasonable work hours that one would have expected if he was claiming that the employment was brought to an end, not at his behest, but at the behest of the employer.

[131] Put another way, given the Authority's findings that there were no significant breaches of the employer's duty, it follows that the resignation cannot be activated by those non-existent breaches and the absence of any significant breaches of duty makes a consideration of foreseeability otiose.

### **Determination**

[132] For the reasons advanced in this determination, the Authority has not been persuaded that Mr Capper has either personal grievance he has pleaded, nor has Broadlands breached its duty of good faith toward him. His claim is accordingly dismissed.

### **Costs**

[133] Costs are reserved but the parties are urged to endeavour to resolve matters by agreement.

[134] Should that prove impossible, Broadlands is to file its application for costs and Mr Capper is to have 14 days thereafter to file his response.

James Crichton  
Member of the Employment Relations Authority