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## Hay v Gisborne District Council (Auckland) [2016] NZERA 654; [2016] NZERA Auckland 392 (30 November 2016)

Last Updated: 2 April 2017

### IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 392  
5465092

BETWEEN DAPHNE DOREEN HAY Applicant

A N D GISBORNE DISTRICT COUNCIL

Respondent

Member of Authority: James Crichton

Representatives: Stan Austin, Advocate for Applicant

Libby Brown, Counsel for Respondent

Investigation Meeting: 10 October 2016 at Gisborne

Submissions Received: 26 July 2016, 31 October 2016 and 25 November 2016 from Applicant

18 November 2016 from Respondent

Date of Determination: 30 November 2016

### SECOND DETERMINATION OF THE AUTHORITY

#### Name suppression order

[1] When this matter was first brought before the Authority in terms of a statement of problem filed on 16 July 2015, the applicant (Ms Hay) foreshadowed an intention to seek name suppression orders and a formal request for a non-publication order was filed by the applicant on 22 March 2016.

[2] On the footing that the non-publication order applied to both parties, the respondent (Gisborne District Council) advised the Authority on 23 March 2016 that it did not oppose the application.

[3] On that same date then, I made the appropriate orders suppressing the names of both parties in reliance upon clause 10(1) of the Second Schedule to the [Employment Relations Act 2000](#) (the Act).

[4] Then, at the commencement of my investigation meeting on 10 October last, the parties jointly agreed to those orders being vacated and I so ordered.

#### History

[5] As I have already noted, the statement of problem was filed and served on 16 July 2015. The statement in reply was due to be filed on 5 August 2015 after the Authority granted a short extension.

[6] The statement in reply that was filed was referred to a Member of the Authority because it was thought that some of the attachments to the statement in reply and one paragraph within the statement in reply proper was privileged and therefore not to be seen by the presiding Member.

[7] By Minute dated 7 August 2015, the Authority directed that certain of the attachments to the statement in reply be removed and a paragraph in the statement in reply be redacted. Staff were directed to return the documents to counsel for Gisborne District Council and have them refile with the directed amendments.

[8] The amended statement in reply was filed and served on 12 August 2015 but by virtue of the orders the Authority had made in its Minute of 7 August 2015, the letter raising the personal grievance was required to be removed from the attachments to the statement in reply thus encouraging the Gisborne District Council to contend that the personal grievance had never been properly raised.

[9] By memorandum dated 12 August 2015, the respondent Council sought a preliminary hearing on its claim that Ms Hay's personal grievance had not been raised within time (as a consequence of the directions of the Authority in its Minute of 7 August 2015) and that memorandum was responded to by Ms Hay's advocate on 13 August 2015.

[10] On 13 November 2015, I convened a telephone conference with the parties after the matter had come onto my list and in that telephone conference, the

representatives helpfully agreed that I could deal with three preliminary matters on the papers after receipt of submissions from the parties.

[11] I canvassed the history of the matter in more detail in that first determination of the Authority dated 11 January 2016, and issued as [2016] NZERA Auckland 12, but for present purposes it is enough for me to say that I considered that the decision made by another Member of the Authority to remove the letter raising the personal grievance in its entirety was wrong in principle. What should have happened was that the Authority ought to have ordered that the letter raising the personal grievance be redacted so as to remove the without prejudice material in that letter but not to remove the letter in its totality.

[12] However, I also decided that, notwithstanding the Authority's error in removing the personal grievance letter in its totality, Gisborne District Council was also wrong to seek to rely on that Authority order to claim that the personal grievance had never been raised within time. I reached this conclusion because the evidence was as plain as can be that the Gisborne District Council had received the letter of personal grievance and indeed had acknowledged receipt of it and dealt with Ms Hay's advisers on the footing that there was a personal grievance in place.

[13] So whether or not the personal grievance letter was before the Authority was beside the point; it was before the employer and had formed the basis of discussion between the parties from the moment of its receipt. On that footing, I had no hesitation in concluding that the personal grievance was raised within time and so the matter should proceed in the normal way.

[14] Ms Hay was employed by the Council in September 2011 as a Customer Service Officer at the Gisborne Vehicle Testing Station. As such, Ms Hay was a frontline staff member providing direct customer service at Gisborne's Vehicle Testing Station.

[15] On 24 February 2014, Ms Hay phoned her place of work, did not speak to the manager, Mr Maclean, but told a work colleague that she was ill and not able to come to work.

[16] The following day, 25 February 2014, Ms Hay telephoned Mr Maclean and said that it was her father who was sick and that she was taking him to the doctor.

[17] By 27 February 2014, Ms Hay had extinguished all of her paid sick leave and accordingly she asked Mr Maclean if she could take annual leave to cover the period that she would need to look after her father.

[18] That evening, she rang Mr Maclean at home. Mr Maclean thought the conversation was inappropriate and terminated it.

[19] The following day, Friday, 28 February 2014, Ms Hay again telephoned Mr Maclean and demanded that Mr Maclean speak with Ms Hay's daughter who then came onto the phone and raised concerns with Mr Maclean about her mother's mental health. The conversation became difficult for Mr Maclean to continue because Ms Hay could be heard in the background talking loudly and making comments such as "*I am not crazy*".

[20] On Saturday, 2 March 2014, Ms Hay again rang Mr Maclean at home saying her father was no better and then suddenly started talking about the 11 year anniversary of her mother's death. Again Mr Maclean thought the conversation inappropriate and brought it to an end.

[21] The next day was Sunday, 3 March 2014 and Ms Hay again rang Mr Maclean at home saying she had a medical certificate regarding her father's illness and would deliver it to Human Resources.

[22] The following day, Monday, 4 March 2014, Ms Hay presented at the reception counter of the Council with two medical certificates neither of which related to Ms Hay's father at all but both of which concerned Ms Hay herself. Each said that Ms Hay was the patient and that she was unable to work.

[23] Ms Hay behaved strangely while she was at the counter, demanding that the medical certificates be signed as received and that overtime which she claimed should be paid. Amongst other things, she said that people had to be "*in the know*" to get a job at the Council.

[24] Later the same day, Ms Hay phoned Mr Maclean saying that people were out to get her and that there were people at the Council who practised witchcraft.

[25] On Tuesday, 5 March 2014, Ms Hay contacted Mr Maclean to discuss how much paid leave she could get. She also sought an additional week's paid

discretionary leave and the following day she phoned Mr Maclean again seeking to return to work. She was advised that she would need to have a full medical clearance from her doctor before she could return to work. Ms Hay said that her doctors were refusing to see her and she wanted to come back to work anyway.

[26] On 11 March 2014, Ms Hay presented at the workplace to drop off a medical certificate which said that she was fit to return to work on and from 10 March 2014. But she presented as being agitated, said that people were out to get her and that she was uncertain who she could depend on.

[27] Then on 12 March 2014, the Council received an email message from the manager of the Waikanae Motor Camp who indicated that Ms Hay had been at the motor camp the previous day, behaving strangely and asking a range of questions which were odd.

[28] The following day, Ms Hay announced that she was coming back to work in a telephone call to Mr Maclean. Mr Maclean said that Ms Hay could not return to work without a full medical clearance and that the Council did not yet have that. Ms Hay became agitated at that advice and the following day she rang Mr Maclean again to apologise for her behaviour the previous day.

[29] Then on Tuesday, 18 March 2014, Ms Hay phoned Mr Maclean to advise that she had been admitted to hospital on Sunday, 16 March 2014 and on 19 March 2014

Ms Hay phoned again to say that she had a medical certificate from a psychiatrist saying that from 11 March 2014 onwards she was unfit for work.

[30] The following day, Ms Hay dropped off the medical certificate from the psychiatrist which simply stated that she was unfit to resume work for a period from

11 March 2014 "*until further notice*".

[31] On 25 March 2014, Mr Matthew Feisst, the Council's Commercial Operations Manager, wrote to Ms Hay concerning her leave position and asked Ms Hay to stop telephone Mr Maclean and other staff at the Vehicle Testing Station; in parallel with Ms Hay's calls to Mr Maclean, she had also been ringing co-workers at the Vehicle Testing Station from 24 February 2014 until 20 March 2014 talking erratically about all sorts of things and upsetting and concerning her work colleagues. Mr Feisst directed Ms Hay to communicate only with him.

[32] Notwithstanding that, the following day (26 March 2014), Ms Hay contacted the Payroll Department to talk about her leave situation.

[33] On 31 March 2014, Ms Hay left a message with Mr Feisst to say she was going to the doctor and would get back to him.

[34] She repeated that message the following day.

[35] On 2 April 2014, Ms Hay called Mr Feisst again and left a message to say that she had just come out of hospital and had a medical certificate saying she was fit to return to work. Later the same day, there was another message to Mr Feisst's voicemail saying that Ms Hay would not be coming into work.

[36] Then, Ms Hay left a letter from the psychiatrist at the Council's reception counter. The letter is dated 1 April 2014, gives no indication of Ms Hay's state of health, and says only that she may be ready to commence a phased return to work from 7 April 2014 and that light duties were recommended.

[37] On 4 April 2014, Mr Feisst contacted Ms Hay and said that the Council needed a more detailed medical report than the

one provided and Ms Hay said that she had signed the necessary consent forms to enable that to happen.

[38] Mr Feisst then wrote to the Community Mental Health Service on 7 April

2014 requesting medical information and the following day got a letter back saying that the Community Mental Health Service would need Ms Hay's consent to disclose that information and then subsequently on 10 April 2014 a further letter from the Community Mental Health Service saying that the report required would take a considerable amount of time and that it would not be ready until the end of April

2014.

[39] Mr Feisst wrote to Ms Hay on 14 April 2014 to communicate that information and to indicate that once he had received the report he would organise a meeting with Ms Hay and her supports.

[40] On 15 April 2014, Ms Hay came to the Council's front counter and completed

a serious harm workplace injury form claiming an injury had happened on either 20 or 21 February 2014.

[41] While she was there, Ms Hay made uncharitable comments about Mr Maclean's competence saying that he had no idea what he was doing and that he only got his job because he knew Mr Feisst.

[42] The workplace injury Ms Hay claimed was, she said, caused by powered equipment tools or appliances and environmental agencies and had resulted in a head injury and mental disorder.

[43] At about this time, Ms Hay was seen in The Warehouse, Gisborne wearing a bright red wig.

[44] By letter dated 29 April 2014, the Council heard from the Community Mental Health Service but the Council formed the view that the letter did not provide sufficient detail and that view was conveyed by Mr Feisst in a letter dated 7 May 2014 to the Clinical Director of the Community Mental Health Service.

[45] On 23 May 2014, the Council received a letter from a lawyer acting for Ms Hay suggesting that Ms Hay could return to work on a part time basis and the Council's response on 3 June 2014 was to indicate a preparedness to meet with the lawyer and Ms Hay but indicated that Ms Hay would not be returning to work until the Council had further medical information. Mediation was suggested by the Council.

[46] On 20 June 2014, the Council's lawyers wrote to the Community Mental Health Service's Clinical Director to seek to expedite the further medical information sought and finally on 14 July 2014, a Dr Brown provided a full and satisfactory response to the Council's request for particulars pertaining to Ms Hay's health.

[47] Then on 21 July 2014, the parties attended mediation and the Council understood that the matter had been resolved in mediation.

[48] Ms Hay returned to work on 4 August 2014. For the sake of completeness, I note that the employment relationship between these parties has now ended but that is not germane in any way to the issues before the Authority in this matter. I also made it clear to the parties at the beginning of the investigation meeting that evidence about what had happened in the employment relationship after Ms Hay's return to work were quite irrelevant because the issue before me was exclusively whether the Council had properly directed itself in respect of Ms Hay's prospective return to work

during her period of ill health starting in February 2014 and concluding with her return to duty on 4 August 2014.

### **The issues**

[49] While Ms Hay raises a range of complaints, including a breach of the obligation of good faith, all of those allegations are subsets of the central theme which is effectively whether the Council ought to have allowed Ms Hay to return to duty sooner than it did.

[50] Put shortly, Ms Hay says that she was ready, willing and able to return to work at the point at which she first provided evidence from her psychiatrist that she was fit to do so (the opinion of 1 April 2014), while the Council maintains that until it received further and better particulars on 14 July 2014, it was in no position to contemplate Ms Hay's return.

### **At what date ought Ms Hay have returned to duty?**

[51] It is the essence of Ms Hay's claim that she ought to have been returned to duty on and from 7 April 2014, that being the effective date from which her initial psychiatrist thought she could recommence employment, and said as much in her medical opinion of 1 April 2014. Conversely, the Council said that the information provided in the 1 April 2014 medical opinion was just insufficient for them to make a reasoned judgement as to whether Ms Hay was fit to return to duty or not

and it was not until the opinion of a subsequent psychiatrist was received on 14 July 2014 that the Council was satisfied that Ms Hay could return to her duties.

[52] I have not been persuaded that a good and fair employer could conclude that Ms Hay was ready to return to duty on and from 7 April 2014 and accordingly, I am satisfied on the evidence before me that the Gisborne District Court did not misdirect itself in seeking further and better particulars on Ms Hay's health and not restoring her to the employment until that material became available.

[53] There may be an issue as to whether there was an unreasonable delay in obtaining those further and better medical particulars, whether that delay was occasioned by inaction or neglect by the Council, and whether the Council knew or ought to have known sooner than it did of the relevant particulars relating to Ms Hay's health.

[54] In that last connection, I allude to the contention made for Ms Hay that the Council had received the material from the second psychiatrist (Dr Alison Brown) well before 14 July 2014 and therefore, even if I were to find that the Council was entitled to seek further and better particulars about Ms Hay's health, those further particulars were available to the Council earlier than the date the Council postulates.

[55] The conclusion I have reached, that the Council was entitled to seek further medical advice beyond that provided to them on 1 April 2014, is based on a number of factors and I refer to them now.

[56] The first and most significant factor is the context in which the parties engaged with each other from the point at which Ms Hay went off on sick leave on

24 February 2014. I am satisfied that it is idle to pretend that Ms Hay's behaviour

from that date through until the date she says she could have returned to duty (7 April

2014) can be ignored.

[57] Put shortly, Ms Hay's behaviour in that period was so unusual and so out of character as to raise significant concerns in any reasonable employer about the state of her health.

[58] I have set out in some detail in an earlier section of this determination the various engagements and exchanges between the principal protagonists from the date of Ms Hay going off on sick leave on 24 February 2014 down to the receipt of the medical opinion from her first psychiatrist on 1 April 2014.

[59] It is self-evident from the factual matrix, which does not seem to be disputed in any material particular by Ms Hay, that her behaviour was both odd and out of character during the relevant period.

[60] Amongst other things, she indicated first of all that it was her father that was ill, but there was never any evidence provided to the Council that that was the position; indeed, when Ms Hay produced the very first medical certificates concerning her taking of sick leave, which were delivered to the employer on 4 March 2014, both of those medical certificates referred to the patient being Ms Hay and not her father.

[61] For the avoidance of doubt, I also observe neither of those medical certificates complied with the New Zealand Medical Council Statement on Medical Certification,

but more importantly, they provide no information whatever on which a fair and reasonable employer could make a decision about medical status.

[62] Contemporaneously with Ms Hay's advice to the Council that she was caring for her unwell father, she began the process of telephoning her immediate manager, Mr Maclean, at home and also for a period of nearly one calendar month, began ringing her workplace and having random, odd conversations with her colleagues.

[63] I heard evidence from Mr Maclean personally and I was absolutely satisfied that his recollection of the events in question was accurate. Moreover, Ms Hay did not deny the thrust of Mr Maclean's evidence.

[64] While I did not hear from any of her co-workers, I did not understand her to deny that she had rung her colleagues on a reasonably regular basis during the period in question and that she may have made a variety of odd observations during those calls. Certainly it has to be said that all of the evidence before the Authority about Ms Hay's behaviour during the period in question suggested some quite odd and out of character behaviour and it seems more likely than not that any discussions that she had with her colleagues during the same period would have had the same broad character.

[65] Mr Maclean remembers a number of particular conversations that he had with Ms Hay. Two in particular are illustrative of the odd and concerning nature of them. On 28 February 2014, Ms Hay telephoned Mr Maclean and demanded that Mr Maclean talk to Ms Hay's daughter who then came on to the line and spoke to Mr Maclean about her concern for her mother's mental health. During that call, Mr Maclean could hear Ms Hay in the background making comments like *I am not crazy*.

[66] Then on 2 March 2014 Ms Hay rang Mr Maclean again and continuing to maintain the fiction that it was her father who was ill, she then suddenly talked about the eleventh anniversary of her mother's death. Mr Maclean terminated the call as he thought the discussion was an inappropriate one.

[67] When Ms Hay brought in the initial medical certificates on 4 March 2014, she behaved strangely at the Council's front counter and amongst other things said that people had to be "in the know" to get a job at the Council. Later that same day she rang Mr Maclean and said that people were out to get her and that people at the Council practised witchcraft.

[68] Matters continued in the same vein during the rest of March. On 11 March

2014, Ms Hay dropped into the workplace a medical certificate which said she was fit to return to work from the previous day, but her persona was agitated and she said people were out to get her and that she was uncertain who she could depend on.

[69] The next day, the Council got an email from the Manager of the Waikanae Motor Camp indicating that Ms Hay had been out there behaving strangely and the following day Ms Hay again announced that she was coming back to work in a telephone call with Mr Maclean who said that she could not return to work without a full medical clearance and that the Council did not have that yet. Ms Hay became agitated at that advice and rang off and the following day she rang Mr Maclean again to apologise for her behaviour.

[70] Then on Tuesday 18 March 2014 Ms Hay rang to say that she had been admitted to hospital on Sunday 16 March 2014 and was accordingly unfit for work. The medical certificate simply said that she was unfit for work *until further notice*.

[71] In the meantime, Mr Feisst, the Council's Commercial Operations Manager at the relevant time, wrote to Ms Hay asking her to stop contacting Mr Maclean and other staff and to direct all her inquiries to Mr Feisst.

[72] I heard Mr Feisst's evidence as well and, like Mr Maclean, I thought him a straightforward and honest witness.

[73] Mr Feisst said that he got a call from Ms Hay on 2 April 2014 to say that she had now been discharged from hospital and had a medical certificate saying she was fit to return to work. Later the same day Mr Feisst received another telephone call from Ms Hay saying that she was not coming back to work.

[74] At this point, Ms Hay delivered the medical opinion of 1 April 2014 and Mr Feisst responded on 4 April 2014 indicating to Ms Hay that the Council needed a more detailed medical report than the one that she provided on 1 April 2014.

[75] I am satisfied on the basis of the evidence I heard that the Council's determination in that matter was appropriate in all the circumstances and was what a

fair and reasonable employer could have done in the particular circumstances of the case. As I have already noted by way of summary, Ms Hay behaved strangely and in a totally out of character way from 24 February 2014 down to the point at which she delivered the medical opinion dated 1 April 2014.

[76] The evidence of Mr Maclean and Mr Feisst together with the absence of any denial from Ms Hay herself, all lead me to the conclusion that her behaviour was odd, was out of character, and would have put any reasonable employer on notice that there needed to be a clear diagnosis and prognosis of Ms Hay's condition before a return to work could be contemplated.

[77] Apart entirely from the odd statements that Ms Hay made during the period in question, there was also her obsessive telephoning of Council staff, the content of those exchanges, the fact that she on more than one occasion stated that she was returning to work and then resiled from that, and that by talking to the range of people at the Council that she had, Mr Maclean, Mr Feisst, her immediate work colleagues, and the people at the front counter, Ms Hay had created a degree of apprehension and anxiety which the Council was duty bound to reflect upon.

[78] I am satisfied that a good and fair employer must comply with the law and the effect of the [Health and Safety in Employment Act 1992](#) put a firm onus on the Council to not just have regard to Ms Hay's health in the workplace and whether the workplace stresses might further exacerbate her condition, but also consider whether Ms Hay's health status could impact negatively on co-workers.

[79] In that regard, the Council reminds me of the Court of Appeal's conclusions in *Attorney-General v. Gilbert* [\[2002\] NZCA 55; \[2002\] 1 ERNZ 31](#), where, amongst other things, the Court held:

(a) That it was contrary to the employer's duty if an employee was exposed to unnecessary risk of psychological harm;

(b) The foreseeability of harm would be important in considering whether the employer had failed in its duty;

(c) The employer's obligation required reasonable steps proportionate to

known and avoidable risks;

(d) The employer would be in breach if it failed to take all steps that were practicable to remove or manage a reasonably foreseeable risk.

[80] Of course, as I have mentioned, the obligation on the Council is not just an obligation to keep Ms Hay safe but also an obligation to keep other staff safe as well. Given Ms Hay's behaviour over the short period from when she first took sick leave, it is difficult to see how any reasonable employer could not have been put on notice that it needed to get further and better particulars about Ms Hay's condition before proceeding to allow her back to the workplace.

[81] Because much turns on this document, I set out below the full text of the

1 April 2014 opinion from Dr Jastrzebska, Ms Hay's initial consultant psychiatrist:

I reviewed Daphne today on 1st August 2014, and I expect that she may be ready to commence a phased return to work plan, the week beginning 7 April 2014. I recommend that she starts part-time with light duties and gradually builds up to the usual full duties level over a period of time.

I suggest that a meeting is established between Daphne, her Manager and the Occupational Health Department to formulate the plan of the phased return to work and have supports in place before she actually returns to work.

I will review her again in one to two weeks time and determine if she is able to return to her full duties.

[82] When that opinion is set against the behaviour that a large number of Council staff had witnessed from Ms Hay over a five week period from her first taking sick leave, I am satisfied that a good and fair employer would be failing its statutory and contractual duties by not seeking more information after the receipt of that medical opinion.

[83] The medical opinion from Dr Jastrzebska says that Ms Hay is able to start a phased return to work on light duties but provides no information which would assist the Council to understand Ms Hay's behaviour, the risks to her and to others were she to return to the workplace and the relationship between this opinion and Ms Hay's own messages, some of which said she was returning to work and some of which said she was not.

[84] In addition to the Council's obligations under the Health and Safety in

Employment Act 1992 and its successors, the parties are also bound by s.4 of the Act

requiring as they do, evidence of good faith behaviour including the obligation to ... *be active and constructive in establishing and maintaining a productive employment relationship which the parties are, amongst other things, responsive and communicative.*

[85] I am satisfied this latter position placed on onus on an employee in Ms Hay's position to ensure that the employer is provided with a full and complete analysis of whatever information is sought. In the present case, even if it was unclear to Ms Hay at the point at which Dr Jastrzebska's medical opinion was issued that it was insufficient for the Council's purposes, she could not have been under any illusion immediately thereafter because the evidence is that Mr Feisst contacted her on 4 April

2014 to make it clear that the Council needed a more detailed medical report and Ms Hay indicated that she had signed the necessary consent in order to enable that to happen.

[86] In fact, it was three and a half months from that point until the Council says that it got the report that it needed. Conversely, even if Ms Hay were to accept that the 1 April 2014 report was insufficient for the Council's purposes, her position would still be that the delay from that point to the Council finally being satisfied was too long.

[87] The question, of course, is whether that delay can be sheeted home to the Council. A further question is whether Ms Hay's behaviour during the period from the receipt of the 1 April 2014 report down to the receipt of the final report contributed positively or negatively to the Council's assessment of the position.

[88] Dealing with that latter proposition first, it is apparent on the evidence before me that Ms Hay's behaviour from 1 April 2014 down to 14 July 2014 continued to be unusual and out of character.

[89] For instance, on 15 April 2014, Ms Hay came to the Council's front counter and completed the serious harm in workplace injury form claiming that she had been injured at work by powered equipment tools or appliances and environmental agencies and that she had suffered a head injury and mental disorder. Whilst she was completing that form, she made uncharitable comments about Mr Maclean's competence, said that he did not know what he was doing and that he only got

his job because he knew Mr Feisst.

[90] Around that time, Ms Hay was seen in the Warehouse, Gisborne wearing a bright red wig. She told me in her evidence that while it was true that she was wearing a bright red wig (and not just in the Warehouse apparently) she was doing it as a dare from a friend. That evidence, such as it is, raises more questions than it answers. Given the position that she would have been in at that point, it is difficult to understand why she would think that was appropriate behaviour unless of course she was deprived, at the time, of her usual faculties of judgement which simply supports a Council's anxiety.

[91] I turn now to the question whether the delay after April 2014 in getting full medical particulars, is the responsibility or not of the Council.

[92] First, I note that Mr Feisst wrote promptly to the Community Mental Health Service setting out over three pages the history of Ms Hay's behaviour over the relevant period and then concluding with a request for clinical observations about Ms Hay together with an overview of the condition, whether the condition will impact on her ability to perform her duties, the likely timeframe in which the condition may resolve or be controlled, and any side effects of any medication she is on and how this might impact her role.

[93] I am satisfied that those are sensible questions for the employer to ask and had they been responded to promptly, the matter could have been resolved more quickly.

[94] Also relevant is this paragraph towards the end of Mr Feisst's letter which I consider represents the Council's provisional conclusion based on the incomplete evidence they had then about Ms Hay's condition:

Based on the conduct we have been experiencing, we are extremely concerned about Ms Hay's mental health status and whether placing her back into our workplace is the correct course of action at this time. We not only have her health to consider but that of other staff. Our customers and the business are other considerations for us.

[95] Dr Jastrzebska responded to this detailed request for information by saying it would take her until the end of April to complete the task and Mr Feisst immediately advised Ms Hay of that timeframe.

[96] A letter dated 14 April 2014, but received on 29 April 2014, from Dr

Jastrzebska provided two additional pieces of information from the earlier letter,

namely the intelligence that Ms Hay had had a recent episode of mood disorder which was *now in remission* and was prescribed medication which might make her drowsy but that if that was a problem the medication could be adjusted.

[97] The 14 April 2014 letter does not respond to the specific questions raised in

Mr Feisst's letter of 7 April 2014.

[98] Moreover, Ms Hay's continuing behaviour issues gave the Council no confidence that they could rely on the sketchy information being provided. The red wig issue and the serious harm claim, both of which post-dated the first opinion of Dr Jastrzebska, suggested that Ms Hay was still unwell.

[99] On 7 May 2014, Mr Feisst wrote again seeking further and better particulars and there is a draft letter in the bundle of documents before the Authority from a locum psychiatrist, Dr Alison Brown, which said it was dictated on 21 May 2014 and typed on 23 May 2014. The letter is not signed by Dr Brown although it is annotated by Ms Hay in the following terms:

I Daphne Hay give my consent for this letter to be sent to my employer.

And then what appears to Ms Hay's signature

[100] The letterhead for this letter, for whatever reason, is different from the letterhead used in the two previous letters from Dr Jastrzebska and of particular importance is that Mr Feisst's evidence is that he never saw this letter until he was preparing his witness statement in this matter. That is, his evidence is that he did not receive the letter in May 2014.

[101] In submissions for Ms Hay, it is said that correspondence from the Council's lawyer dated 20 June 2014 does not make sense unless the Council had received the draft letter.

[102] Certainly, the 20 June 2014 letter from the Council's lawyer makes a clear reference to the draft letter from Dr Brown and it is apparent that Mr Feisst must have been mistaken in his evidence that he did not receive that draft letter from Dr Brown.

[103] But that does not deal with the point; the issue remains that the Council has still not been provided with the information it needs on which to make a reasoned decision about whether it is safe for Ms Hay to be returned to the workplace both in terms of her health and in terms of the health and safety of others. Indeed, the whole point of the letter of 20 June 2014 from

the Council's lawyer is to seek from Dr Brown further and better particulars about Ms Hay's health status.

[104] That letter from the Council's lawyer was responded to by a full opinion from

Dr Alison Brown which was forwarded by email on 20 July 2014.

[105] Having dwelt on the various exchanges between the parties at some length, I am not persuaded that there has been any unreasonable delay in the Council dealing with its request for further and better particulars. The delay which I agree is significant has been a function of delay by Ms Hay's medical advisers in responding to the Council's inquiries. I imply no criticism of those busy clinicians; I simply make the point that the delay was not occasioned by any default of the part of the Council.

[106] The final medical opinion dated 14 July 2014 gave the Council all the information it needed to make a reasoned judgement about whether Ms Hay was well enough to return to the workplace and as a matter of fact she recommenced her duties on and from 7 August 2014. The Council says this was a direct result of their assessing the medical opinion that was finally provided on 14 July 2014 and therefore that they acted promptly having received the medical opinion that they had always sought.

[107] Conversely, Ms Hay says that her return to work had nothing whatever to do with the Council's receipt of the medical report that answered its questions, but rather was a function of Ms Hay taking legal advice, raising a personal grievance, and then entering into a mediation with the Council, all of which put pressure on the Council, it is said, and resulted in the Council giving way and reinstating Ms Hay to her duties.

[108] The Council stoutly maintain that their motivation in restoring Ms Hay to the employment was the receipt, at long last, of a clear statement from Ms Hay's clinician about her health status and while Ms Hay's then counsel became involved towards the end of May 2014, it is apparent from the engagements between the Council and Ms Hay's counsel that the Council remained of the same mind as they had been throughout, that is that unless and until they were provided with the information they sought about Ms Hay's medical condition, they could not make a reasoned decision.

[109] The personal grievance was raised on 13 June 2014, a month before Dr Brown's final medical opinion became available and some seven weeks before Ms Hay returned to her duties, so it is difficult, logically, to link the raising of the personal grievance.

[110] The mediation took place exactly seven days after the receipt of Dr Brown's final medical opinion. The evidence I heard was that after the mediation the parties engaged collaboratively in making arrangements for Ms Hay's return to work so the start date of 4 August 2014 was agreed between the Council and her then adviser in the context of a phased return to work programme.

[111] Those being the facts as I discern them, I am not persuaded that Ms Hay's return to work was a function of anything other than the Council's final receipt of a medical opinion which responded to the Council's legitimate inquiries.

[112] As I have already noted, this process took too long, but I am not been persuaded that any of the delay can be sheeted home to the Council. The Council was reliant on busy clinicians to provide it with information which I am satisfied that the Council was absolutely entitled to receive, before making a definitive decision and until it received that material, the Council could take matters no further.

### **Determination**

[113] I have not been persuaded that Ms Hay has any entitlement to remedies as I think the Gisborne District Council behaved entirely properly in persisting with its requests for further and better medical evidence to support Ms Hay's desire to return to her duties and that once that material finally came to hand, the Council engaged collaboratively with Ms Hay's then representative to ensure that she returned to work speedily.

[114] It follows from the foregoing that Ms Hay's claim failed in its entirety.

[115] In communicating with Ms Hay, however, the Council erred in doing that informally, principally by telephone, when it ought to have copied to her all the correspondence it was generating with her doctors. She was entitled to see this material and it is conceivable that it may have brought home to her the earnestness of the Council's endeavours to get further and better particulars. I am not persuaded the

Council breached its obligations, though, because I am satisfied they communicated fully and completely with Ms Hay, albeit informally.

### **Costs**

[116] Costs are reserved, but the parties are encouraged to try to resolve costs on their own terms.

[117] If that proves unsuccessful, the Council may apply to the Authority to fix costs, by filing and serving an application to that effect and Ms Hay then has fourteen days from that date to file her own memorandum in response.

**James Crichton**

**Chief of the Employment Relations Authority**

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