

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 548
5387457

BETWEEN DR PAUL HIRINI
Applicant

AND BAY OF PLENTY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: R A Monaghan

Representatives: A Hansen, counsel for applicant
G Bingham, counsel for respondent

Investigation Meeting: 8 and 9 April and 7 June 2013 at Tauranga

Determination: 28 November 2013

DETERMINATION OF THE AUTHORITY

- A. The Bay of Plenty District Health Board breached its obligations to Paul Hirini in that it:**
- (a) did not promptly or properly investigate his complaint that he was bullied;**
 - (b) did not take reasonably practicable steps to keep him safe while the investigation was underway;**
 - (c) suspended him unfairly during an investigation into his case file management; and**
 - (d) did not give him an opportunity to comment on allegations about him before they were put to the New Zealand Psychologists Board.**
- B. Dr Hirini's resignation as a result of the breaches was foreseeable and amounted to a constructive dismissal.**
- C. The dismissal was unjustified.**
- D. The BOPDHB is ordered to pay to Dr Hirini:**
- (a) three months' salary in reimbursement of remuneration lost as a result of his personal grievance; and**
 - (b) \$7,000 as compensation for injury to his feelings resulting from the personal grievance.**

Employment relationship problem

[1] Dr Paul Hirini has a PhD in psychology and is a clinical psychologist. He was employed by the Bay of Plenty District Health Board (BOPDHB), commencing in March 2009. From October 2009 he worked in the specialist Infant, Child and Adolescent Mental Health Service (ICAMHS)¹ at Tauranga Hospital. He was part of a multidisciplinary team which included a team leader, a nurse, an occupational therapist, a social worker, and a psychiatric registrar.

[2] On 18 January 2012 Dr Hirini submitted a written 'reportable event form' (REF) saying he had been bullied in the workplace.

[3] The incident of bullying he cited concerned the response to an opinion he gave on a case file during a team meeting earlier that day. He had expressed agreement with a peer review to the effect that the case was not appropriate for a referral for psychological testing. He said Gail Morley, an occupational therapist in the team, was aggressive and belittling in disagreeing with him. Judie Smith, the team leader, not only failed to curtail Ms Morley's response but supported it.

[4] The REF said further that the threats and criticism were part of an overall pattern of bullying, but no other incidents were identified.

[5] In a second REF dated 21 February 2012 Dr Hirini provided information about the behaviour comprising the 'overall pattern of bullying'. Much of the behaviour concerned interactions on case files. Some of it concerned Dr Hirini's view of discussions about particular case files occurring during particular team meetings over the previous two years. Additional allegations concerned discussions and disagreements in respect of particular case files outside the meetings but over the same period. The allegations centred on behaviour by Ms Smith and Ms Morley.

[6] The remaining allegations were concerned with: Dr Hirini's feelings of exclusion during mid-2011 when recurring difficulties following a sports injury included a number of absences; and his objections in July and August 2011 to what he considered an unfair allocation to him of crisis duties over that period.

¹ Also referred to as the Child and Adolescent Mental Health Specialist Service (CAMHSS)

[7] The parties met on 21 March 2012 to discuss the complaints in the REFs, and a procedure for addressing them.

[8] Ms Smith and Ms Morley were interviewed in early April. They denied the allegations against them, and raised concerns of their own to the effect that Dr Hirini was the bully. The BOPDHB sought to meet with Dr Hirini on 27 April to discuss their responses. Dr Hirini declined to attend the meeting on the ground that he did not have a sufficient understanding of what was to be discussed. By then he had become so dissatisfied with the procedure that, in a letter also dated 27 April, his solicitors raised a personal grievance alleging constructive dismissal.

[9] However Dr Hirini's employment continued. By letter dated 4 May 2012 the BOPDHB gave Dr Hirini a summary of its findings on his, Ms Smith's and Ms Morley's views of the alleged bullying. It said that, in the absence of witnesses, it could not prefer one version of events over another or commence any formal action. It also said the relationship between Dr Hirini and the two women was 'not positive' and that a form of externally facilitated mediation was required. It had intended to raise this proposal at the meeting of 27 April.

[10] Because other matters intervened, the proposal was not pursued in that form. Dr Hirini was eventually advised at a meeting on 7 June 2012 that an investigation into his complaints of bullying would continue.

[11] One of the intervening matters arose in early May when some of Dr Hirini's colleagues, including Ms Smith and Ms Morley, complained formally of his aggressive and intimidating behaviour towards them. By letter dated 16 May 2012 Dr Hirini was provided with details of their allegations. He was informed that he was suspended while an investigation was conducted, although the parties later agreed he would work from home.

[12] A second matter also arose in early May. Concerns were expressed about aspects of Dr Hirini's case management. The BOPDHB sought to meet on 4 May to discuss these concerns. Dr Hirini declined to attend the meeting until he had better information about the nature and content of the concerns, and sought access to his case files so he could work on updating them. By letter also dated 4 May the BOPDHB advised Dr Hirini he was to have no further contact with patients until after the meeting.

[13] At the same time the BOPDHB reviewed the files, and the result led it to engage an independent consultant to conduct a further review. The consultant completed a report dated 4 June 2012. The report was so critical of Dr Hirini's case management that, on 8 June 2012, the BOPDHB forwarded the matter to the psychologists' professional registration body - the New Zealand Psychologists Board (the Psychologists Board).

[14] By letter dated 11 June 2012 Dr Hirini was notified of the review. He was also provided with a copy of the report as well as a copy of the referral to the Psychologists Board.

[15] By letter dated 13 June 2012 Dr Hirini's solicitors advised that all of the foregoing events meant Dr Hirini had no safe choice but to treat the BOPDHB's conduct as constructive dismissal.

[16] His employment terminated accordingly.

The issues

[17] The statement of problem identified several concerns about the BOPDHB's conduct towards Dr Hirini. At the commencement of the investigation meeting counsel withdrew claims for penalties, and remaining matters were consolidated into the personal grievance on the ground of constructive and unjustified dismissal.

[18] There are three well-recognised grounds on which a resignation may be found to be a constructive dismissal. They are that: the resignation was coerced; the employer engaged in a course of conduct with the intention of obtaining a resignation, or a breach of duty by the employer caused the resignation². The third was relied on here. The issues arising are:

- (a) was there a breach of duty by the employer;
- (b) did it cause the resignation;

² Being two of the three categories in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; [1985] 2 NZLR 372

- (c) if so, was the breach so serious as to make it reasonably foreseeable resignation would follow;³
- (d) if so, was there an unjustified constructive dismissal; and
- (e) what are the remedies.

Was there a breach of duty by the employer

[19] The breaches of duty on which Dr Hirini relied are the:

- (i) failure to promptly or properly investigate his complaint that he was bullied;
- (ii) failure to keep him safe while the investigation was underway;
- (iii) unfair suspension and investigation in response to complaints of bullying later made about him;
- (iv) unfair removal of duties after concerns were raised about some of his case files; and
- (v) failure to allow an opportunity to respond to allegations about him before they were put to the Psychologists Board.

1. Failure to promptly or properly investigate the complaint that he was bullied

[20] The law applicable to a complaint of this kind is discussed in the judgment of the Court of Appeal in *Waikato District Health Board v Clear*.⁴ The employer is obliged to act as a fair and reasonable employer, and the applicable test concerns whether in all the circumstances it took reasonable steps to maintain the employee's safety in the workplace.⁵ That may include conducting an investigation and if, as here, a responsibility to investigate is assumed then a fair and reasonable employer would in turn take various steps.⁶

[21] Dr Hirini's concern that his complaint of bullying was not promptly or properly investigated was based on:

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 2 NZLR 415; [1994] 1 ERNZ 168

⁴ [2010] NZCA 305.

⁵ at [54]

⁶ at [55]

- his view that Ms Smith's role the investigation created a conflict of interest;
- the delays in reaching an outcome;
- the conduct of the meeting of 21 March 2012;
- his uncertainty about the purpose of both the meeting of 21 March and the proposed meeting of 27 April; and
- the adequacy of the interview process.

Ms Smith's role in the investigation

[22] Dr Hirini understood Ms Smith would receive the REF and would investigate his complaints. That was because he had submitted the REF on an electronic form, and a general reference to 'line manager' came up first in the field where the name of the recipient was to be entered. Although there was a drop down menu listing other possible recipients, Dr Hirini did not notice it. The difficulty was compounded when exchanges with another manager, shortly after he had submitted the REF, reinforced the notion that Ms Smith would be the manager required to 'complete or facilitate a resolution'.⁷

[23] Ms Smith was the initial recipient of the REF. However she did not attempt to any degree to act on or investigate the complaints. Her involvement was limited to participating as an interviewee, and responding to the allegations made against her. Not only was that appropriate, it was necessary.

[24] Any potential for Ms Smith to play a wider role was pre-empted when the manager with whom Dr Hirini had been discussing the matter referred his complaint to Ted Harper, manager of health and safety. Nothing in the subsequent investigation provided grounds for Dr Hirini's continued assertion that Ms Smith was in a conflict of interest. The prospective conflict of interest was remedied immediately.

Delay

[25] The BOPDHB has a policy manual setting out the disciplinary process applicable when there are allegations of misconduct or serious misconduct. Although bullying is not identified expressly as an act of misconduct behaviour of that kind is

⁷ Email message dated 23 January 2013

capable of being included, and there is a separate policy on bullying which is oriented towards identification and prevention. The disciplinary process includes a preliminary investigation for the purpose of ascertaining the facts if they are not otherwise apparent from the REF. The preliminary investigation must be commenced within 3 working days of the investigator becoming aware of the issue. It must be completed within 7 working days, unless it is varied in consultation with the complainant.

[26] Dr Hirini says the delay from the lodging of the first REF on 18 January was unfair. However, he met with Mr Harper on 26 January 2012 to discuss the REF. The outcome was that he would provide a more detailed account of the 'pattern of bullying' he said he had experienced. This was appropriate because the complaint concerned a single incident - the discussion on 18 January - coupled with a broad assertion that a pattern of bullying had occurred. The incident on its own did not necessarily amount to bullying, and the complaint could not be addressed in full without more details of the behaviour comprising the alleged pattern of bullying.

[27] The detailed account was provided in the second REF dated 21 February. I do not accept the period before that date should be included in the assessment of whether there was unfair delay.

[28] Mr Harper referred the 18 January and 21 February REFs to the Chief Operating Officer (COO), who was to conduct an investigation.

[29] The COO advised Dr Hirini in a message dated 9 March that the earliest date for a meeting was 21 March. He also said: *'I can ask someone else to look at this but given the level of leadership involvement I believe I need to lead the review.'* It was appropriate to recognise the seniority of those involved in the complaint, but there were other significant calls on the COO's time which caused delay. The period between 21 February and 21 March fell outside the timetable in the disciplinary process to an unwise degree given the nature of the complaint. The complaint raised serious matters and should have been given a higher priority, or alternatively the appointment of a suitable investigator able to give the matter prompt attention should have been considered.

[30] The 21 March meeting was attended by the COO, Dr Hirini, and Nick Cockroft, the newly-appointed human resources team leader. The outcome was that the BOPDHB would conduct an investigation which would:

- take about two weeks;
- involve interviews with 'key people' to obtain their responses;
- lead to the formulation of recommendations; and
- proceed to a further meeting.

[31] Mr Cockroft did not agree in evidence that a two-week timeframe was advised, but Dr Hirini's evidence was to that effect and for present purposes I accept there was such a timeframe. However it, too, did not meet the timetable in the disciplinary process. Further, on Mr Cockroft's evidence there was no consultation about an extension, and on Dr Hirini's evidence the two-week period was merely advised to him.

[32] The two-week period expired on 4 April.

[33] Dr Hirini had become very anxious by early April, as he made clear in a message to the COO dated 2 April 2012.

[34] Some of the concerns he expressed in the message - particularly that there was unfair delay dating back to 18 January (rather than 21 February), that Ms Smith had a conflict of interest in the investigation of his complaints (he knew the COO was the investigator and was supported by Mr Cockroft), and that the outcome of the 21 March meeting was unclear - were not well-founded.

[35] However the message also conveyed his deep insecurity regarding workplace relationships, and the stress associated with that. He raised important questions about how his day to day relationships with Ms Smith and Ms Morley would be conducted while the investigation continued. He also said he was very anxious about attending weekly team meetings, and further that he was not confident the investigation would offer a meaningful solution to his predicament. He ended by asking for feedback on the contents of the message, and for an update.

[36] The BOPDHB should have responded to the message. It should have advised Dr Hirini that the preliminary interviews had not yet been conducted, and that the interviews would go ahead on 4 April. It should also have indicated what the next step in the procedure was likely to be, and when it would occur. Most importantly, it should have responded to the concerns about the conduct of the parties' day to day relationships while the investigation continued.

[37] Instead the next approach took the form of a request to meet on 27 April. In particular in the light of the contents of the 2 April message, a further delay in excess of three weeks before Dr Hirini was even approached again was unacceptable.

[38] Mr Cockroft said the delay was appropriate given the complicated and extensive nature of Dr Hirini's complaint, and the need to arrange an investigator from outside the service. I do not accept this because the investigation eventually comprised only interviews on 4 April with Ms Smith and Ms Morley, and the investigator (the COO) had other priorities which made the prospect of a prompt investigation inherently unlikely.

[39] The delay between 21 February 2012 and 27 April 2012 was excessive for a complaint of this kind. That it took from 21 February to 21 March for the parties to meet again was undesirable. This was made worse by the lack of response to the 2 April message and the absence of any further communication until the attempt to arrange the 27 April meeting.

[40] For these reasons I find there was a breach of duty in the failure to complete the investigation in accordance with the disciplinary process, and in the failure to address Dr Hirini's concerns in a timely way.

The conduct of the 21 March meeting

[41] One of the matters discussed at the 21 March meeting was a concern Dr Hirini had raised with Mr Harper about why he was not appointed to the role of clinical co-ordinator earlier in 2012. As had been promised, that matter was investigated and the outcome was reported to Dr Hirini on 21 March. Some of the discussion to which he has taken exception amounted to a debate about the appointment process, but I do not accept the discussion amounted to any unfairness in the conduct of the meeting.

[42] Dr Hirini also felt that during the meeting he was treated as if he was at fault, and had simply been asked to re-state his case regarding bullying rather than there being any engagement addressing: *'the targeted discrimination and bullying concerns I had been asked to document and submit the month before'*.

[43] Although Dr Hirini experienced the behaviour as bullying, that did not necessarily mean bullying was a proper description of the behaviour from an objective point of view. Thus the BOPDHB sought to discuss the details of the behaviour considered to be bullying, while Dr Hirini sought to discuss wider aspects of his experience and background which were not directly relevant. However the BOPDHB also had obligations to the employees whose behaviour was complained of, and it was entitled to clarify of the details of the behaviour and the scope of Dr Hirini's concerns before proceeding. Based on that information it would make such further enquiries as it considered necessary, form a conclusion on whether the alleged behaviour occurred, in what context, whether it amounted to bullying, and what action should be taken as a result.

[44] Viewed in that light I do not accept the BOPDHB's approach amounted simply to an attempt to have Dr Hirini re-state his case. If what Dr Hirini characterised as a failure to engage was a reference to attempts to draw him back from his accounts of his experience and background, and to re-focus on the behaviour he said was bullying, I do not accept that characterisation.

[45] There was nothing unfair about the conduct of the 21 March meeting.

Uncertainty about purpose of meetings

[46] Dr Hirini said he was uncertain of the purpose of the 21 March and 27 April meetings.

[47] He was aware that the 21 March meeting was intended to 'discuss the investigation'. At the commencement of the meeting he was told the meeting was intended as a preliminary investigation into his complaint. While the purpose could have been better explained, no unfairness resulted and there was no breach of duty.

[48] As for the 27 April meeting, Dr Hirini's evidence was that the personal assistant (PA) to the COO contacted him to arrange the meeting and did not advise of its purpose. It was not appropriate to delegate the role of arranging a meeting of that kind to the PA, unless the PA was appropriately briefed and could provide proper information or explanation of the meeting and its purpose.

[49] However in what became a feature of this employment relationship problem, matters were escalated unnecessarily when better, prompter and less formal communication would have greatly assisted. Thus Dr Hirini's uncertainty meant he did not attend the 27 April meeting. Instead his solicitors wrote a letter dated 27 April to the COO. The letter said Dr Hirini felt there was no agenda and the parameters were unclear. He felt the meeting would be unsafe.

[50] The letter went on to say the BOPDHB had breached its obligations to act fairly towards Dr Hirini and to take measures to protect him in the workplace. It said Dr Hirini felt there was an intentional failure to properly address his concerns, with the intention of eliciting his resignation. The BOPDHB's inaction constituted constructive dismissal. Substantial financial remedies for the personal grievance raised in the letter were sought.

[51] The COO replied to Dr Hirini's solicitors in a letter dated 4 May 2012. The letter said the 27 April meeting was intended to discuss the outcome of the investigation. The outcome was advised instead in the letter, namely that the relationship between Mr Hirini on the one hand, and Ms Smith and Ms Morley on the other, was considered 'not positive'. Externally facilitated mediation was required. The COO had intended to discuss that proposal with Dr Hirini on 27 April. He hoped the proposal would be viewed as a more positive outcome than the termination of Dr Hirini's employment.

[52] While there was poor communication about the purpose of the 27 April meeting, I do not elevate the matter to a breach of duty. Further, Dr Hirini's belief that the BOPDHB sought to elicit his resignation was not well-founded, and it is unfortunate that the opportunity for a valuable discussion about the use of mediation was lost.

Adequacy of the interview process

[53] The COO's letter of 4 May contained two key conclusions:

- many of the complaints in the REFs concerned matters which occurred more than 90 days earlier and were '*not accepted as part of Paul's grievance as they are out of time in accordance with the Employment Relations Act 2000 s 114(1)*'; and
- none of the parties could identify witnesses to specific events, so it was difficult to justify the commencement of formal action or to give preference to one version of events over another.

[54] Because of the view that the 90-day limitation period applied, the allegations pre-dating the latter half of 2011 were not investigated. However the 90-day period applies to the raising of personal grievances. Until the 27 April letter Dr Hirini had not raised a personal grievance – he had complained of a pattern of bullying and provided details he was asked to provide for the purposes of an investigation.

[55] It is open to an employer to assess a series of complaints presented as Dr Hirini's were, and to conclude that some were historical and would not be investigated. Such assessment would encompass the age of the incidents in question, their bearing on more recent incidents and in particular whether the incidents were similar in kind, and whether the historical incidents were minor or trivial. It would be reasonable to exclude Dr Hirini's accounts of unrelated conduct towards other individuals and which were not recent, as well as incidents occurring in 2009 which I do not consider amounted to bullying.

[56] The remainder of the complaints called for further investigation. If some were without merit, that decision could have been made when better information was available. The imposition of an effective cut-off point of late 2011 meant the scope of the investigation was unduly limited.

[57] I also have difficulty with the conclusion regarding the availability of witnesses. There was nothing to suggest any effort was made to identify or interview additional witnesses to the conduct complained of, and aside from the letter there was nothing on the record to show what was discussed with Ms Smith and Ms Morley.

[58] Dr Hirini believed the attendees at the team meetings referred to in the REFs should have been interviewed. However obtaining the witnesses' confirmation of Dr Hirini's views of certain behaviour during the meetings - which was the gist of his concern about the failure to interview the witnesses - would have missed the point. I consider the real flaw lies in the extent to which Dr Hirini's complaints were considered, and put in their proper context.

[59] That context extends not only to the difficulties in the team as illustrated by Dr Hirini's view of the discussions about cases, but also to the concerns Ms Smith and Ms Morley expressed about his behaviour.

[60] Mr Cockroft acknowledged that Ms Smith and Ms Morley were not taken through the detail of Dr Hirini's allegations. Thus there was no discussion of the contents of the 18 January REF, or of the case file problems identified in the 21 February REF. It is likely that some of the more superficial complaints were discussed, Ms Smith and Ms Morley aired their concerns about Dr Hirini, and the questioning was not taken further.

[61] The evidence about the 18 January meeting highlighted significant aspects of the functioning of the team that required attention. The background to the discussion at the meeting was that Ms Morley had asked Dr Hirini to approve the testing of a client for a particular psychological disorder. She had done so on the request of a psychiatrist working with the client. Dr Hirini, and a colleague who reviewed the matter, did not consider the testing to be necessary and were opposed to it. It appears Ms Morley was unaware at the time of the underlying reason for the opposition, and was merely faced with the opposition. The discussion became tense.

[62] This was not bullying but it raised serious questions about the quality of the communication on the file, the interaction of the different professionals working with the client, and the effect of this on the ability of the group to work as a team.

[63] In a similar vein, the 21 February REF referred to a disagreement between Ms Smith and Dr Hirini over the appropriateness of seeking a second opinion from a psychiatrist. Again Dr Hirini believed the handling of the matter in a meeting amounted to bullying. A second case-related disagreement Dr Hirini described in the REF concerned Ms Smith's action in having a case closed while he was on leave, and

without consulting him. A third case-related disagreement concerned a difference between Dr Hirini and another team member over whether to act on a psychiatrist's wish to provide certain medication to a client. When the matter was brought to Ms Smith's attention, for reasons which I accept were genuine she agreed with the other team member.

[64] I accept the investigation was at a preliminary stage, and an attempt was later made to resume it. Further, Mr Cockroft said in evidence that he sought to deal with the matter informally as he viewed it as one of lack of communication and of shared understanding. Despite this I find the BOPDHB did not go far enough to identify the true scope of the problem, so that it did not turn soon enough to assessing the best method of managing both the continuing investigation and the parties' relationships. The difficulties Mr Cockroft identified from the interviews were part of the problem, but the underlying problem was more complex and the failure to embark on a wider investigation at the outset meant it was not properly addressed.

[65] Mr Cockroft also indicated that Dr Hirini's 2 April message was not drawn to his attention. If that is correct then the omission is unfortunate.

[66] Even so, mediation was eventually proposed. Again, it is unfortunate that it did not proceed.

Summary of conclusions

[67] The BOPDHB breached the duty to promptly and properly investigate Dr Hirini's complaint that he was bullied in that:

- there was undue delay in the investigation; and
- the scope of the complaint was wrongly limited.

2. Failure to keep Dr Hirini safe while the investigation was underway

[68] The duty to take reasonably practicable steps to maintain a safe workplace is implied by common law into employment agreements.⁸ It includes the avoidance of

⁸ *Attorney-General v Gilbert* [2002] 1 ERNZ 31, at [75]

risk to psychological health.⁹ What is ‘reasonably practicable’ requires a balance of the severity of the harm, the current state of knowledge of its likelihood, knowledge of the means to counter the risk, and the cost and availability of the means. The obligation is to take reasonable steps which are proportionate to known and avoidable risks, and can vary according to the particular circumstances.¹⁰ Employees, too, are obliged to take reasonably practicable steps to ensure their own safety at work.¹¹

[69] Counsel for Dr Hirini submitted that the BOPDHB failed to take all reasonable and practicable steps to provide him with safe working conditions. In particular it:

- did not undertake a prompt and proper investigation into his complaint of bullying;
- did not keep him informed;
- did not provide him with any assurances of safety and confidentiality; and
- required him to continue as normal with the colleagues he had complained about.

[70] The first two of these were addressed in the previous section of this determination.

Assurances of safety and confidentiality

[71] Dr Hirini made the bare assertion that assurances of safety and confidentiality were not provided. On its own the provision of these assurances does not add anything to whether the employer has met its obligation to keep Dr Hirini safe in the workplace. There is no independent duty to provide such assurances.

Continuing to work with colleagues complained about

[72] Dr Hirini made several observations about the conduct of Ms Smith and Ms Morley towards him after he had submitted the 18 January REF. These were listed in the 21 February REF. I do not detail them because my view of them is that Dr Hirini had become sensitised and unduly suspicious, and attributed a motivation that was not

⁹ at [76]

¹⁰ at [83]

¹¹ at [83]

present. I do not accept that the behaviour he described was bullying, or that the behaviour rendered the workplace unsafe.

[73] Dr Hirini was on firmer ground with his concern that he was expected to continue working, without having an opportunity to address how the investigation would impact on his professional relationships. This was significant because: of the need to work as part of a team; of the difficulties identified in some of his complaints; Ms Morley had an acting leadership role¹²; and Ms Smith was the team leader.

[74] The concern was set out in detail in Dr Hirini's 2 April message. He recorded that he found the weekly team meetings a challenge as he continually expected to be undermined or attacked. He expressed a similar concern to the clinical co-ordinator, Anja Theron, in a message dated 13 April 2012. He was due for a six-weekly case review meeting with Ms Smith, and asked if he could meet with Ms Theron instead.

[75] Then in a message to Dr Hirini dated 3 May, which I discuss again later in this determination, Ms Theron asked to meet on 4 May to discuss aspects of his case management. The meeting was to be in Ms Smith's office. Ms Theron was aware of Dr Hirini's concern about meeting with Ms Smith, and should have considered an alternative arrangement.

[76] The BOPDHB should have implemented a procedure under which Ms Theron or another suitable person took over liaising with Dr Hirini about his case management.

Summary of conclusions

[77] The BOPDHB breached its duty to take reasonably practicable steps to provide Dr Hirini with a safe workplace while the investigation into his complaints was pending in that it did not address his concerns about continuing to work with the employees who were the subject of his complaints. This was particularly significant because of the employees' leadership roles.

3. Unfair suspension and investigation in response to complaints against Dr Hirini

¹² This was exercised for the purposes of a qualification she sought, rather than being part of a management structure.

[78] Unfortunately another set of concerns crystallised in May 2012.

[79] By letter dated 27 April 2013 Ms Smith advised Ms Theron that staff members had reported concerns about Dr Hirini's aggressive behaviour, and expressed her own concern about his unpredictability and agitation. She had expressed a concern of a similar nature during her interview on 4 April.

[80] On 16 May Ms Theron wrote to Mr Cockroft advising she had received complaints from staff members. The staff members found Dr Hirini aggressive and intimidating. Ms Theron also:

- attached statements from 5 staff members, including Ms Smith's letter, detailing concerns about Dr Hirini's behaviour in the workplace and towards them;
- expressed her own difficulties in dealing with Dr Hirini's behaviour; and
- said she had received an expression of concern about Dr Hirini from a psychology advisor regarding Dr Hirini's conduct and his professional work.

[81] The other staff members who complained were Ms Morley, Bernice Roulston (a nurse), Jenny Lamberton (a nurse) and Julie Jensen (a nurse). All of them referred to Dr Hirini's agitated and aggressive behaviour, and the adverse effect of this in the workplace. They described conversations which centred on case files, and they expressed concern about his anger. One complainant reported that she was afraid to come to work and was experiencing headaches and sleeplessness, while Ms Morley reported that she had attended EAP sessions because of her fear of Dr Hirini's behaviour.

[82] By letter also dated 16 May the general manager human resources, Gordon Mackay, informed Dr Hirini of the receipt of the complaints. Copies of the complainants' written statements were attached to the letter, together with the written concerns which had prompted Ms Theron to request a meeting on 4 May to discuss case management. I return to that matter in the next section of this determination. Dr Hirini was further informed in the 16 May letter that he was suspended on pay for one

week while a preliminary investigation was commenced. By agreement with Dr Hirini's solicitors, Dr Hirini worked from home.

[83] Mr Cockcroft met with the complainants separately, in interviews commencing on 21 May. The interview notes were attached to the letter to Dr Hirini's solicitors dated 11 June.

[84] The 11 June letter sought either a written response or a meeting. Dr Hirini's resignation meant the investigation was not completed.

[85] Dr Hirini says this process was unfair because:

- Ms Morley knew Dr Hirini was to be suspended before he did, so the suspension was predetermined;
- the allegation of bullying against him was addressed more promptly than his own allegation of bullying had been; and
- the allegations against him were investigated more thoroughly than his own allegations.

Predetermination

[86] Ms Morley assumed from her understanding of the disciplinary process that Dr Hirini would be suspended, but she had no knowledge to that effect. In making that assumption she was acting on her own account, and her view is not attributable to the employer.

[87] A stronger argument for Dr Hirini concerns the action of the BOPDHB in imposing the suspension as it did in the letter of 16 May. The disciplinary process permitted suspension when it was necessary, in the interests of workplace safety, to separate employees. However this must be read together with the BOPDHB's obligation to allow Dr Hirini an opportunity to be heard on the prospect of suspension, and to consider his response before deciding to impose the suspension.¹³ Although the 16 May letter was headed 'proposed suspension' its contents did not amount to a proposal. The BOPDHB did not meet the obligation to allow Dr Hirini to be heard.

¹³ s 103A Employment Relations Act 2000

[88] For that reason I find there was a breach of duty in the imposition of the suspension.

Promptness with which complaint addressed

[89] Some of the factors which delayed the investigation of Dr Hirini's allegations of bullying were not present in the investigation of his colleagues' allegations – for example difficulties with the availability of the COO. Otherwise I have addressed any unfairness to Dr Hirini in the context of the investigation into his own allegation of bullying.

[90] I find no further breach of duty.

More thorough investigation

[91] The allegations about Dr Hirini's behaviour were genuine. The matters they raised were also very serious. The allegations were responded to as they should have been, namely by the initiation of an investigation. I do not accept that the BOPDHB was embarking on a process designed only to obtain evidence against Dr Hirini.

[92] I do not accept there was anything inappropriate in the selection of people to be interviewed during that investigation.

Summary of conclusions

[93] The BOPDHB suspended Dr Hirini unfairly in that it did not give him an opportunity to be heard on the prospect of suspension.

4. Unfair removal of duties after concerns raised about case files

[94] The final set of concerns arose in respect of Dr Hirini's clinical practice. They began with the unsuccessful attempt to meet with him on 4 May, and the eventual instruction that he not have patient contact. Dr Hirini says he was treated unfairly in that:

- the meeting sought for 4 May had an undisclosed purpose;
- the meeting was intended to be disciplinary and the procedure was unfair; and
- the instruction regarding patient contact was unfair.

Purpose of 4 May meeting

[95] By memorandum dated 1 May 2012 a visiting child and adolescent psychiatrist advised Ms Theron of a concern about Dr Hirini's assessment and reporting in a particular case. At or about that time Ms Roulston, who was assigned to another case, expressed concern to Ms Smith about Dr Hirini's delay in placing on that case file a formal psychologist's report on the child in question. By memorandum dated 3 May a nurse expressed concern about the absence from a case file of a report from Dr Hirini which she needed.

[96] Ms Theron's emailed message of 3 May asked Dr Hirini to attend a meeting to discuss: '*concerns raised by some team members around unfinished work*'; and '*a concern that was raised by one of our visiting psychiatrists around the protocol followed for an ... assessment*'. Dr Hirini's professional advisor had been invited to attend. Ms Theron asked Dr Hirini if he planned to bring a support person.

[97] The message made no mention of any disciplinary action, or of the personal grievance. Ms Theron was unaware of the grievance until Dr Hirini advised her of it. Her message simply indicated her wish to discuss case-related matters. This was within her role as clinical co-ordinator and she was entitled to ask for such a meeting.

[98] I do not accept the submission that the meeting was prompted by Ms Theron's receipt of complaints about Dr Hirini's bullying behaviour, or that the 'undisclosed purpose' of the meeting was to address those complaints.

[99] The meeting was not linked with or prompted by the raising of a personal grievance in the 27 April letter.

Meeting intended to be disciplinary

[100] Dr Hirini responded initially by attempting to answer what he thought the 'concerns' were, and advising that since a personal grievance had been raised he would consult his solicitor. A formal response dated 4 May from his solicitors to the COO - who was not involved in the meeting Ms Theron sought - stated that the meeting appeared to be disciplinary, and sought clarification. Details of the concerns in question were sought, and the letter advised that Dr Hirini would not attend the meeting until this information was received.

[101] I do not accept that the 3 May request appeared to seek a disciplinary meeting. It did not read as if it did, and Ms Theron did not intend to conduct a disciplinary meeting. Her enquiry about whether Dr Hirini wished to bring a support person was not unusual even if Dr Hirini had not experienced such an enquiry before, and it was not indicative of a disciplinary meeting. Secondly, the subsequent instruction not to have further client contact was a reaction to the perceived refusal to meet, and was not evidence that the original meeting was intended to be disciplinary.

Fairness of instruction to have no further contact

[102] By another letter also dated 4 May, the COO explained the meeting was not disciplinary. He went on to require Dr Hirini to attend a further meeting as a matter of urgency, in order to discuss three named case files. The letter contained the instruction that Dr Hirini have no further contact with patients (or clients) until the meeting had been held.

[103] The BOPDHB scheduled the required meeting for 8 May. By letter of that date Dr Hirini's solicitors said their view that the 4 May meeting was intended to be disciplinary was reconfirmed, and that the BOPDHB was attempting to force Dr Hirini's resignation by 'ongoing bullying'. The letter also said Dr Hirini remained concerned about what allegations were being made against him, with particular reference to why the allegations were considered serious enough to 'suspend his duties'. Until that information was available, he would not attend a meeting.

[104] The instruction that Dr Hirini have no further contact with patients until the meeting had been held was made because, as the COO explained in a letter dated 14 May, the BOPDHB was concerned to ensure the stress Dr Hirini was suffering was not impacting on patient care. It wanted to review his management of certain files for that reason. The COO also explained that the restriction on Dr Hirini's clinical duties had been imposed because of the frustrated attempts to meet.

[105] The requirement that Dr Hirini have no further contact with patients until the meeting had been held was fair and reasonable because:

- a. the possibility of problems with his case management had been identified and it was reasonable for Ms Theron to seek to discuss this;

- b. Dr Hirini was not being asked to attend a disciplinary meeting, and his insistence that the meeting was disciplinary was unreasonable;
- c. the accusation that the BOPDHB was seeking to elicit his resignation was unreasonable;
- d. the refusal to attend a meeting in the face of the assurance that the meeting was not disciplinary was unreasonable;
- e. on his own admission some of the work on his files was incomplete;
- f. the requirement was only for the limited period until a meeting could be held; and
- g. the requirement was a reasonable balance of the BOPDHB's obligations to Dr Hirini and to patients.

Summary of conclusions

[106] There was no unfair removal of Dr Hirini's duties.

5. Failure to allow opportunity to respond before complaint made to Psychologists Board

[107] Over the period when the above attempts to meet were being made, Dr Hirini sought his case files so he could update them. On 9 May he found most of his recent case files had been removed, ostensibly because of an 'audit.' Ms Theron took the files because she was concerned about the inability to meet with Dr Hirini. She consulted with the clinical director and Dr Hirini's psychology advisor, and decided to seek an independent report on Dr Hirini's practice.

[108] Seven of the files were made available to an independent consultant for that purpose.

[109] The consultant did not speak to Dr Hirini, who had commenced a period of stress-related sick leave on 1 June. On 4 June she conducted a review on the basis of the files made available to her, and complete a report the same day. The report detailed deficiencies in five files in particular. The deficiencies included the quality of Dr Hirini's assessments and the quality and timeliness of reports on the patients concerned. The report concluded: '*... based on the file reviews alone, in my opinion,*

this person should not be practising as a clinical psychologist as there is no evidence he has the necessary skills.'

[110] In a message to Dr Hirini's solicitors dated 5 June, Mr Cockroft mentioned the review, and said he expected to be able to make a summary of findings available the next day. That did not occur. The report was forwarded to the Psychologists Board three days later, without input from Dr Hirini.

[111] The reviewer made strong findings, although her report acknowledged the findings were based only on the review of the files. Dr Hirini said in evidence that, had he been able to meet with the reviewer, discuss the cases and respond to her queries, he would have been able to resolve her concerns. I cannot say whether the concerns would have been resolved, but I can say that without input from Dr Hirini the review was incomplete. That is not a criticism of the reviewer as I am unaware of her brief, but the BOPDHB should have ensured Dr Hirini was offered the opportunity to discuss the files with the reviewer and to address any concerns.

[112] In the circumstances Dr Hirini should also have been provided with the promised summary of findings, and an opportunity to comment on them, before the decision to forward the matter to the Psychologists Board was made.

6. Conclusion

[113] The BOPDHB breached duties to Dr Hirini in that it:

- did not promptly or properly investigate his complaint that he was bullied;
- did not take reasonably practicable steps to keep him safe while the investigation was underway;
- suspended him unfairly; and
- did not give him an opportunity to respond to allegations about him before the allegations were put to the Psychologists Board.

Did a breach of duty cause the resignation

[114] The breaches had a cumulative effect, which caused the resignation.

Was the breach so serious as to make resignation reasonably foreseeable

[115] The cumulative effect of the breaches was so serious as to make resignation reasonably foreseeable.

Was there an unjustified constructive dismissal

[116] Dr Hirini was constructively dismissed.

[117] The dismissal was unjustified.

Remedies

[118] Dr Hirini seeks:

- (i) the reimbursement of remuneration lost as a result of his personal grievance;
and
- (ii) \$20,000 as compensation for injury to his feelings.

1. Reimbursement of lost remuneration

[119] There was little evidence and argument addressing remedies. I have considered whether to refer the matter to the parties, but concluded it is desirable to resolve this employment relationship problem in full.

[120] I find an order for the reimbursement to Dr Hirini of 3 months' lost remuneration to be appropriate because:

- a. his ability to earn income was jeopardised by the limits the Psychologists' Board placed on his ability to practise, but I am not satisfied those circumstances are attributable to his personal grievance so that he should receive full reimbursement of earnings lost while the limits were in place;
- b. I am not satisfied any loss of income after the limits were lifted was attributable to the personal grievance; and
- c. Dr Hirini contributed to the circumstances of his grievance by taking stances that on occasion were unreasonable or unfounded.

[121] The BOPDHB is ordered to make payment to Dr Hirini accordingly.

2. Compensation for injury to feelings

[122] Dr Hirini is entitled to compensation for the matters giving rise to his personal grievance. Thus an award of compensation may encompass the injury to feelings caused by the breaches I have identified, but not for other injuries.

[123] There was evidence of injury to feelings. I have taken it into account, while bearing in mind the above limit.

[124] The BOPDHB is therefore ordered to compensate Dr Hirini for injury to his feelings in the sum of \$7,500.

Costs

[125] Costs are reserved.

[126] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have until the close of business on 17 January 2014 in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority