

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 158/09
5086989

BETWEEN SHARON JOHNSON
 Applicant

AND NEW ZEALAND RACING
 BOARD
 Respondent

Member of Authority: Vicki Campbell

Representatives: David Beck for Applicant
 Megan Richards for Respondent

Investigation Meeting: 4 & 5 June 2009

Submissions Received: 19 June and 1 July 2009 from Applicant
 29 June 2009 from Respondent

Determination: 18 September 2009

DETERMINATION OF THE AUTHORITY

[1] Ms Johnson commenced employment with the New Zealand Racing Board at its TAB located at the Holy Grail in Christchurch (“the Branch”) on 7 February 2006. Her terms and conditions of employment were contained in a written employment agreement which was signed by Ms Johnson on 14 February 2006.

[2] Ms Johnson’s manager was Ms Monique Inglis. Ms Johnson was employed to serve customers, place their bets, pay winnings, answer questions from customers, keep the Branch tidy and when on sole duty, to open and close the Branch and take responsibility for money held at the Branch.

[3] During her employment Ms Johnson raised concerns about security arrangements and the number of hours she was rostered to work each week. Matters proceeded to mediation in May 2007 where the respondent offered a number of steps to resolve the problems raised by Ms Johnson but not by way of binding settlement.

[4] In July Ms Johnson commenced a period of one month's sick leave. A medical certificate reported Ms Johnson as requiring stress leave. When Ms Johnson returned to work in August 2007, the respondent requested, and Ms Johnson agreed, to have a medical assessment verifying her fitness for work.

[5] Overlapping these developments, Ms Johnson's position was disestablished as a result of restructuring and her employment was terminated by reason of redundancy on 2 September 2007. No grievance claim in respect of this last development is before the Authority.

Procedural history

[6] Ms Johnson lodged her Statement of Problem on 3 August 2007. On 4 October 2007 a Notice of Direction seeking written confirmation from Ms Johnson that she was prepared to return to mediation, or if not, the reasons why she was not prepared to do so was issued by the Authority. In addition the Authority sought from Ms Johnson written submissions as to whether a more detailed Statement of Problem should be lodged.

[7] In a second Notice of Direction dated 10 October 2007 the parties were directed to attend mediation. The parties were directed that in the event that mediation was unsuccessful Ms Johnson was to lodge an amended statement of problem. The respondent was directed to lodge any amended statement in reply within 14 days of receiving the amended statement of problem.

[8] On 5 December 2007 Ms Johnson lodged an application to have her matter removed to the Employment Court. That application was denied by Member Cheyne in his determination CA4/08 dated 16 January 2008.

[9] Ms Johnson did not lodge an amended statement of problem as required, and ultimately, following several more Directions from the Authority, the matter was set down for investigation on 4 June 2009. It is noted that bundles of documents, many of which were repeated, were lodged in the Authority on 5 December 2008.

The termination of Ms Johnson's employment

[10] In submissions, Mr Beck on behalf of Ms Johnson sought to raise an issue with regard to the termination of Ms Johnson's employment.

[11] I am satisfied that Ms Johnson has never raised a personal grievance for unjustified dismissal (certainly not within the requisite 90 day period), it was never included as an issue for resolution in her statement of problem, and there is no application for leave for Ms Johnson to now raise this issue outside the 90 day period. In reaching this conclusion I have taken into account that Ms Johnson was given adequate opportunity following 2 September, and indeed was directed, to lodge an amended statement of problem but failed to do so. For these reasons I have not considered any claim with regard to the ending of Ms Johnson's employment.

Unjustified disadvantage

[12] I am required to examine NZRB's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[13] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether NZRB's actions disadvantaged Ms Johnson in her employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[14] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If NZRB establishes justification for its disadvantageous actions, there is no grievance.²

[15] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

[16] Ms Johnson's claim for unjustified disadvantage is based on allegations of misconduct against her supervisor and others which she says led to health and safety issues and to the alleged unjustified actions by NZRB.

Working relationship between Ms Johnson and Ms Inglis

[17] Ms Inglis was Ms Johnson's Manager. It was common ground at the investigation meeting that Ms Inglis found Ms Johnson difficult to manage. It was also common ground that Ms Johnson was tenacious in her approach to her hours of work and her belief that she was entitled to work not less than 40 hours each week. Throughout Ms Johnson's employment the issue of her hours of work became an ongoing source of tension between herself and Ms Inglis. Ms Inglis herself, complained to her manager about the constant harassment from Ms Johnson regarding her hours of work.

[18] Another constant source of irritation to Ms Johnson was issues surrounding her safety at work. Ms Johnson says Ms Inglis and other members of the NZRB management team ignored her requests for a safety lock to be put on the door between the TAB and the office, and that she did not have access to the security cameras to rewind and replay the videos. Ms Johnson says her personal safety was jeopardised on at least two occasions when Ms Christina Low, NZRB's Retail Operations Manager told a stranger that she had found a packet of white powder in the branch and again after a punter had telephoned the TAB and had been told that the branch at the Holy Grail was the branch where the most cash was kept.

[19] Further, Ms Johnson says Ms Inglis abused and bullied her and these actions led to her taking a period of stress leave.

Hours of work

[20] Ms Johnson says that when Ms Inglis approached her about taking on the job in 2006 Ms Inglis advised her that her hours of work would be 40 hours per week. Ms Johnson says she needed to be assured of this as she was leaving a 40 hour week job and wished to ensure she would continue on the same income level. Ms Inglis denies making such a promise to Ms Johnson. Ms Inglis says she told Ms Johnson she would do her best to provide 40 hours each week.

[21] Ms Johnson's employment agreement states:

- 5.1 Your hours of work may be worked on any day of the week, Monday to Sunday inclusive.

- 5.2 Your hours of work will be determined by your manager and may be set by roster.
- 5.3 Your hours of work may vary from week to week as necessary to suit the requirements of the employer and may exceed 8 hours per day.
- 5.4 Except where you agree to a lesser period of work, the minimum time that you will be employed on any given day shall be 3 hours.

[22] This clause provides no minimum or maximum hours of work but specifically allows NZRB to roster Ms Johnson's hours according to its requirements. It was common ground that all employees employed at the Branch worked according to the hours set out on a roster which was available for all to see in advance.

[23] At the investigation meeting Ms Johnson told me she raised the matter of the 40 hours with Mr Karl Entwistle, NZRB's Area Sales Manager when she was in his office signing the employment agreement, but he did not appear to be listening. She does not appear to have taken it any further at the time and has signed the agreement in the knowledge of what the agreement contained with regard to hours of work.

[24] Further, clause 2.2 of the Employment Agreement states that the signed document supersedes written or oral representations. Given that Ms Johnson raised the matter with Mr Entwistle and received no response, it follows that when Ms Johnson signed the agreement she signed it confirming that she agreed to the terms of the agreement which included the ability for NZRB to roster her according to its terms.

[25] I find that throughout Ms Johnson's employment Ms Inglis did her best to accommodate Ms Johnson's desire to work at least 40 hours each week. I have reviewed a document provided to the Authority which sets out the total number of hours worked by Ms Johnson each week of her employment up to and including the week ending 20 May 2007. Ms Johnson worked between 6 and 54.25 hours each week. Of the 67 weeks recorded, Ms Johnson worked less than 40 hours for 17 weeks and in excess of 40 hours for 48 weeks. For the remaining 10 weeks, Ms Johnson worked 40 hours for each week.

[26] As can be seen, for a significant proportion (approximately 87%) of her employment Ms Johnson worked 40 hours per week or more. On average Ms Johnson worked 41.18 hours over the period of her employment.

[27] I find Ms Johnson was allocated hours in accordance with the employment agreement. For a significant period of her employment she received in excess of 40 hours per week.

Health and Safety

[28] On 17 February 2007 Ms Johnson says she found a bag of white powder which she took to the Police. Ms Johnson says she was told to keep the find confidential. She says Ms Low told a stranger about the find who then asked her about it. She says this put her life in danger.

[29] Ms Low acknowledged that she advised Mr Bruce Proudfoot, the Retail Channel Manager who sought advice from Mr Nick Ang, Human Resources Operations Manager, but denies passing the information on to anyone else.

[30] Ms Johnson also claims she was the only employee who did not have access to the playback function on the security camera. In a signed statement dated 2 December 2008, Ms Judy Hogg states that initially all staff had access to security cameras but that as a policy decision it was removed from all staff.

[31] In an email from Ms Low to Mr Ang and Mr Proudfoot, Ms Low states that she advised the staff at a meeting on 5 June 2007 that the playback function would be disabled and that this was to apply nationally.

[32] I take from that evidence that until 5 June 2007 all staff did have access to the playback function of the security camera system with the exception of Ms Johnson. Having said that however, there was no evidence that she needed to have access to the playback function in order to undertake her duties.

[33] Ms Johnson says she requested several times for a lock to be fixed to the door between the office and the TAB. After receiving no constructive response to her requests she wrote a comment in the Comment Book in October 2006 requesting a lock and some form of communication device for safety purposes. Ms Johnson says her suggestions were ridiculed and that it took more than 12 months for a lock to be fitted.

[34] Ms Inglis told me she recalls Ms Johnson requesting the lock, and she passed this request on to her manager, Mr Entwistle. Mr Entwistle did nothing about the request. Ms Inglis did not follow the matter up as she did not consider there was any

need for a lock and so she did not treat it as a priority. It does not appear that Ms Johnson was told at any stage that fixing a lock to the door was not seen as a priority.

[35] Finally, Ms Johnson claims a punter rang the helpline to ask what TAB held the most cash. She says the punter then came in to her branch and told her he was amazed at how easily this information was given out.

[36] NZRB operated a documented Health and Safety system which required incidents to be recorded on incident sheets as they occurred. Ms Johnson was aware of this requirement as she was asked to come in while on leave to record the finding of the white powder in February 2007. However, there is no evidence that Ms Johnson used the Incident Report system to notify NZRB of any of the other issues she now raises in support of her personal grievance. It seems to me that this would have been the appropriate place to raise these matters where safety and security at work is an issue.

Stress leave of 30 days – no communication or help given

[37] On 29 June 2007 Ms Johnson commenced a period of 30 days sick leave for stress. Ms Johnson produced a certificate on or about 5 July 2007 for NZRB. NZRB says this was the first notification it received that Ms Johnson was suffering from stress.

[38] I do not accept that evidence as being entirely accurate. On 29 June Ms Low, when advising Mr Proudfoot about Ms Johnsons sick leave she stated:

I've asked Sandy, the acting Branch Manager to arrange for a copy of the doctor's certificate. Sandy speculates that this will be stress related. Sharon has been very edgy and tearful over the past couple of weeks and has mentioned something about being on "medication". Sandy believes this is to do with Sharon's concerns around the possible conversion of the branch to an agency.

[39] Ms Johnson says the treatment she received from NZRB caused her to take the sick leave. In support of her claim Ms Johnson says she was denied a First aid Course which had been promised following mediation.

[40] Ms Johnson advised that she could attend a first aid course by way of letter on 1 June 2007. Ms Johnson commenced her sick leave on 29 June 2009. There is no evidence that between 1 June and 29 June Ms Johnson made any enquiries about what date she would undertake the first aid course. However, it is common ground that details of a proposed course and dates were provided to Ms Johnson after she returned

from her sick leave. I find Ms Johnson's claim that she was denied a first aid course to be inaccurate.

[41] Ms Johnson says she was abused by her manager when Ms Inglis called her a drama queen and was treated with disdain when Ms Inglis would purposefully sit with her back to her and ignore her. At the investigation meeting Ms Inglis acknowledged that before she was removed from her role as manager at the Branch she did take to sitting with her back to and ignoring Ms Johnson. She also accepted that she probably did call Ms Johnson a drama queen. I am satisfied that by the time these actions were occurring in the work place the relationship between Ms Johnson and Ms Inglis had broken down and was dysfunctional.

[42] While Ms Johnson did not proceed on sick leave until 29 June 2007 I am satisfied Ms Inglis's actions and inability to manage Ms Johnson in the workplace contributed to her sense that she was being ill-treated by her manager.

[43] Further, Ms Johnson says Ms Inglis belittled her request for a lock on the office door when she drew a box around Ms Johnson's request in the communications book in 2006 and drew a violin in the box. This incident occurred in October 2006. I am satisfied it is too far removed to have been a direct cause of Ms Johnson having to take sick leave, however, I do accept that it has contributed to part of the overall sense Ms Johnson had that she was treated indifferently in the workplace.

[44] In further support of her claims Ms Johnson says she was denied the opportunity to attend her performance review. It was common ground that Ms Inglis met with Mr Entwistle and discussed the performance of all the employees from the Branch. It seems the policy of NZRB is that employees do not participate in their own performance reviews. This process strikes me as unusual. Performance Reviews are to review performance and seek improvements and discuss and agree on goals for the following year. In NZRB's case it seems that performance reviews are also linked to possible pay increases. There is no evidence that not attending the performance review at the time was an issue for Ms Johnson, who was aware of the process as Ms Inglis had explained it to her. It was raised in a letter from Ms Aubrey in April 2007 but only in the context of a request that Ms Johnson be present at a future performance review in order to discuss issues with regard to hours of work.

[45] In addition Ms Johnson says Mr Ang ridiculed her in his email to Ms Low and Mr Proudfoot about the white powder incident, when he made the comment that he was concerned it was a frivolous complaint by Ms Johnson and indicated that he did not believe Ms Johnson was telling the truth. To add salt to the wound Ms Johnson says she had to cancel her first holiday in 12 months in order to come in and complete the incident report relating to this incident.

[46] The email from Mr Ang demonstrates a dismissive approach to Ms Johnson's concern about the white powder. To insist on Ms Johnson returning to work on an annual leave day to complete an incident report was, in my opinion, unnecessary and seems to me to have been required so that Mr Ang's conclusion that Ms Johnson was making things up, could be confirmed. I have reached that conclusion because there is no other explanation. There was no follow up after the incident report was completed.

[47] However, I am not satisfied this email contributed to Ms Johnson having to take sick leave. The email was one of a number of documents Ms Johnson discovered after her employment was terminated. Therefore it was not known to her at the time she commenced her sick leave. It does, however, show that Ms Johnson's perceptions of how her concerns were being regarded were well grounded.

[48] As already stated, Ms Johnson says it was a combination of all these factors including the way in which NZRB responded to her complaints and concerns which led to her having to take time off on sick leave for stress.

[49] I find it is more likely than not that while the situation between Ms Johnson and other employees at NZRB was causing some distress to her that was not the predominant reason for going on sick leave, but was a contributor to it. At the time Ms Johnson was also facing the prospect of redundancy as the Branch was being put into Agency hands. It is likely that this factor was a significant feature in Ms Johnson's overall sense of security and well being at work. I have discounted her relationship with Ms Inglis as being a major contributor as at the time Ms Johnson went on sick leave Ms Inglis had not been her manager for at least three weeks. If this was a factor it would have been insignificant.

Return to work

[50] Ms Johnson returned to work on 10 August 2007. On her return Ms Low met with her and advised her that Ms Claxton would be spending time with her during her first shift to support her.

[51] Ms Low also advised Ms Johnson that she had sent her an email with information regarding upcoming First Aid and conflict resolution courses and asked Ms Johnson to let her manager know if she wished to attend these.

[52] Finally, Ms Low requested that Ms Johnson attend a medical assessment by a medical professional to verify that she was fit to return to work and that her work would not negatively impact on her health. It seems that Ms Johnson acquiesced to this request and later that day she rang her manager and asked if she could take money out of the till to pay for her medical assessment. Her Manager told her she could not, but that she [the manager] would find out how the medical assessment could be paid for.

[53] By 13 August 2007 NZRB had arranged for a medical practitioner to assess Ms Johnson with the invoice going directly to NZRB. NZRB also provided an authorization form to allow the physician to share the findings of the assessment with NZRB.

[54] Ms Johnson continued working for NZRB until her employment ended on 2 September when the Branch was put in the hands of an Agent.

NZRB's response to Ms Johnson's concerns and complaints*February meeting*

[55] In January 2007 Ms Johnson raised concerns with Mr Entwistle about her hours of work and not being rostered on for the promised 40 hours per week. Ms Johnson then received a letter from Mr Proudfoot, requesting a meeting to discuss the issues raised with Mr Entwistle and the general relationship between herself and Ms Inglis.

[56] An email communication between Mr Ang and Ms Annie Qusted, Human Resources, indicates that they were of the view that the meeting was to investigate Ms Johnson's behaviour. On 8 February 2007 Ms Qusted contacted Mr Ang and outlined concerns that she felt Ms Johnson was bullying Ms Inglis with respect to wanting to work at least 40 hours each week.

[57] Concurrently with Ms Johnson making complaints about Ms Inglis and the hours of work, Ms Inglis, who had been struggling to manage Ms Johnson in the workplace, was also complaining to Mr Entwistle about the difficulties she was experiencing with Ms Johnson.

[58] Mr Proudfoot arranged for a meeting to take place on 12 February 2007 to discuss the general relationship between herself, Ms Inglis and other employees at the Branch. Present at that meeting were Mr Proudfoot, Ms Quested, Ms Johnson and her support person, Ms Trisha Aubrey.

[59] I have concluded that at that meeting NZRB and Ms Johnson were at cross purposes as to the reasons for the meeting. My conclusion is supported by the evidence of Mr Proudfoot that he met with Ms Inglis prior to the meeting to discuss the concerns and issues he was intending to raise with Ms Johnson. At the investigation meeting Mr Proudfoot said he met with Ms Inglis first because he wished to show balance in his approach to trying to resolve the issues between Ms Inglis and Ms Johnson. He says he wanted to assure Ms Inglis that he was looking for solutions rather than inflaming the situation and that it was not a witch hunt. This action by Mr Proudfoot demonstrates a lack of neutrality in dealing with the issues between the two women.

[60] Ms Johnson on the other hand had prepared a written statement outlining her concerns with regard to Ms Inglis capabilities as a manager, her security at work and her hours of work issues.

[61] During the meeting Ms Johnson also raised particular issues with regard to Ms Inglis personal conduct but was told that if she was making formal allegations against Ms Inglis that these would be addressed/investigated at a later time.

[62] It was common ground that during the meeting Ms Johnson requested that a meeting be held between Ms Inglis and herself to clear the air. Mr Proudfoot advised Ms Johnson that a team meeting would be held and that Ms Johnson and Ms Inglis could meet prior to the team meeting. The promised meeting never occurred.

[63] The comment by Mr Proudfoot that a team meeting would be held seems to be the only outcome achieved at the meeting. NZRB made no immediate response to any of the issues raised by Ms Johnson and did nothing further until 4 April. On that date

Mr Proudfoot wrote to Ms Aubrey and acknowledged the 12 February meeting and responded to some of the issues raised by Ms Johnson.

[64] I have two concerns about the process to this point. Firstly, the letter on 4 April seems to me to be an inordinately long time between the meeting and the confirmation of outcomes. Secondly the letter seems to confirm that Mr Proudfoot was investigating Ms Johnson's behaviour although he does acknowledge that the allegations about Ms Inglis will be investigated.

[65] Ms Aubrey responded on behalf of Ms Johnson on 13 April. She addressed some comments made by Mr Proudfoot, but highlights that Ms Johnson continues to have problems in the workplace. Ms Aubrey again seeks mediation between Ms Inglis and Ms Johnson to try and resolve the issues between them.

[66] I am concerned about the lack of any investigation by NZRB into the complaints raised by Ms Johnson. Mr Proudfoot advised Ms Aubrey on 4 April that an investigation into the complaints about Ms Inglis conduct towards Ms Johnson would be undertaken. He confirmed to Ms Aubrey in writing on 18 April that the complaints had been investigated and were being managed by NZRB and Ms Inglis.

[67] In answer to questions about the investigation into the complaints about Ms Inglis, Mr Proudfoot told me he spoke to Ms Inglis in depth about the allegations and he spoke to Ms Low and Mr Entwistle. He acknowledged that he did not speak to any other staff members but relied on what he was told by Ms Low and Mr Entwistle. He also viewed CCTV tapes to see if he could see anything untoward.

[68] I am not satisfied the investigation into Ms Johnson's complaints was as full and fair as Mr Proudfoot would have me believe. Ms Inglis in her oral evidence acknowledged that while she had been told some allegations had been made, she was never advised of the specific nature of the allegations. Ms Inglis, rather than being asked about the allegations, was told to start taking diary notes and not allow Ms Johnson to badger her. Ms Inglis was also advised not to provide Ms Johnson with reasons for her decisions at work. Mr Proudfoot's actions are suggestive of supporting Ms Inglis to the detriment of Ms Johnson.

Conclusion

[69] I am satisfied that all the events leading up to 29 June 2007 including the failure of the NZRB to give serious consideration to Ms Johnson's concerns and complaints contributed to her need to take sick leave in June 2007.

[70] Ms Johnson requested mediation in February with Ms Inglis to try and resolve the matters between them. I have received no satisfactory explanation as to why NZRB did not arrange a mediation, it seems to me this was a sensible way forward for all concerned. Ms Inglis, in her oral evidence told me she did not want to attend mediation as she felt the damage had been done by then. That answer must be contrasted by other evidence provided by Ms Inglis where she told me she understood that the meeting between Mr Proudfoot and Ms Johnson on 12 February was to see if Ms Johnson thought if the two of them could resolve the issues. Clearly Ms Johnson considered they could, with the assistance of a mediator.

[71] Instead of arranging a mediation between the two employees, more than two months later, on 1 May 2007 Ms Quested facilitated a team meeting between all the Branch employees, including Ms Johnson, and Ms Inglis. As a result of that meeting team rules were developed which were intended to assist the employees at the Branch to work better together. This process failed to address the specific issues between Ms Inglis and Ms Johnson.

[72] A couple of days before that meeting, on 27 April, Ms Johnson raised a personal grievance against NZRB. The parties entered into mediation over the personal grievance later in May 2007 but no resolution was achieved.

[73] Following mediation, on 1 June NZRB wrote to Ms Aubrey and advised her that the Board in attempting to address Ms Johnson's concerns confirmed it would provide Ms Johnson with the following:

- (a) One hour of additional pay in respect of sick leave taken on Saturday 7 April 2007;
- (b) The opportunity to attend a conflict resolution course, paid for by the NZ Racing Board; during paid work time for up to two days;
- (c) The opportunity to attend a First Aid Course, paid for by the NZ Racing Board, during work time and according to the standard St Johns course which is two days in length; and
- (d) Paid leave on Queen's Birthday (Monday 4 June 2007).

[74] NZRB also undertook to continue to explore options for addressing Ms Johnson's concerns regarding the workplace relationships. This was all too little, too late for Ms Johnson.

[75] On 5 June 2007 Ms Low called a staff meeting at the Branch to advise that Ms Inglis would be seconded to work for Ms Low in a sales support role and that Ms Sandra Claxton would be acting Branch Manager in the interim.

[76] Ms Claxton took over all of Ms Inglis duties. She was aware there was a history of tension between the employees working at the Branch, and in particular that the relationship between Ms Johnson and Ms Inglis had been problematic. That first day Ms Johnson queried her rostered hours and she and Ms Claxton discussed rosters. Ms Claxton understood that Ms Johnson's main complaint had been that she did not have two days off in a row. Ms Claxton discussed this with Ms Johnson and offered for her to have either Monday and Tuesdays off, or Friday and Monday.

[77] Ms Claxton says she tried to take a flexible approach to rostering Ms Johnson including providing time off when necessary to attend functions. It was common ground that Ms Johnson's preference was to have Monday and Tuesday as her days off.

[78] An employer who receives complaints from employees about the behaviour of other employees such as harassment has particular obligations⁴. NZRB was required to undertake a full and fair investigation into Ms Johnson's complaints, after which Ms Johnson was entitled to be told of the outcome of the investigation and the steps taken to address the situation.⁵

[79] I find NZRB failed to undertake a full and fair investigation. After advising Ms Johnson that an investigation had taken place, NZRB refused to confirm the outcome of the investigation or the steps it had taken to address her concerns.

[80] I find Ms Johnson did suffer from a disadvantage during her employment. The evidence discloses that she no longer felt tolerated at work and her relationship with her manager had become completely dysfunctional. The dismissive approach of management to concerns raised by Ms Johnson, the lack of a fair investigation into her

⁴ *Clear v Waikato District Health Board* [2008] ERNZ 646.

⁵ *Ibid* [125].

complaints about Ms Inglis including that apparent lack of neutrality contributed to that disadvantage.

[81] An employer acting fairly and reasonably in the circumstances of this case would have undertaken a comprehensive investigation of the workplace relationships, reached firm conclusions on the complaints from both Ms Johnson and Ms Inglis, and kept both employees fully informed of the process and taken steps to address the dysfunction.

[82] By failing properly to address the complaints and communicate outcomes NZRB has affected Ms Johnson's conditions of employment to her disadvantage. For all the foregoing reasons I find the disadvantage is unjustified. Ms Johnson is entitled to remedies.

[83] Having reached that conclusion I feel I must say something about Ms Johnson that I have observed throughout the investigation into her personal grievance. Ms Johnson lacked insight into the dynamics of the relationship between herself and Ms Inglis. She continues to put all the responsibility for the deterioration in their relationship on Ms Inglis. I found Ms Johnson's perceptions of Ms Inglis's behaviour and the seriousness of the behaviour was, at times, overstated and exaggerated.

Remedies

[84] The nature and extent of any remedies sought by Ms Johnson have not been clarified with any certainty. In her statement of problem Ms Johnson seeks (verbatim):

Each issue addressed as per complaint – retain my job. Financial settlement as per any remedies/damages within the employment act 2000 – Wages & any other entitlements under employment relations act 2000 backdated.

Contribution

[85] Section 124 of the Employment Relations Act 2000 requires the Authority to consider the extent to which Ms Johnson's actions contributed to the situation giving rise to her grievance. I am satisfied that Ms Johnson has contributed to her grievance. The unequivocal evidence of Ms Louise Allan and Ms Julie Mathers paint a picture of a person continually challenging her manager and of someone who took every opportunity to disagree with the decisions made by her manager in the workplace.

[86] Both Ms Allan and Ms Mathers told me they did not enjoy working with Ms Johnson and both had requested that they not be rostered to work alongside her. I assess Ms Johnson's contribution to be 50%.

Retaining my job

[87] As stated earlier in this determination Ms Johnson has not raised a personal grievance over the termination of her employment. The statement of problem was lodged while there was an ongoing employment relationship. At that time the claim would have been realistic.

[88] However, Ms Johnson's employment was terminated by reason of redundancy on 2 September and no personal grievance over that redundancy has been raised. This is so even though Ms Johnson was directed to lodge an amended statement of problem after her termination and at which time she could have raised such a grievance. Ms Johnson refused to comply with the direction and must now accept the consequences of that action.

Lost wages

[89] There is no evidence Ms Johnson has lost any wages as a result of her grievance and therefore no order under this heading will be made.

Compensation

[90] The principles to be applied in assessing compensation for hurt and humiliation include consideration of the injury suffered by Ms Johnson and the avoidance of penalising NZRB. In this case, I consider the effects of the employers treatment on Ms Johnson as being relevant.

[91] Evidence produced to the Authority indicates that Ms Johnson has had longstanding health issues which were exacerbated by the failure of the NZRB to deal with her concerns in a fair manner.

[92] I have assessed a suitable award under this heading as being \$10,000 which shall be subject to my findings on contribution.

The New Zealand Racing Board is order to pay to Ms Johnson \$5,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[93] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Johnson may file and serve a memorandum as to costs within 28 days of the date of this determination with submissions in reply 14 days later. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority