

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 317
3164921

BETWEEN KRP
 Applicant

AND FYM
 Respondent

Member of Authority: Claire English

Representatives: Murray Grant, counsel for the Applicant
 Scott Worthy, counsel for the Respondent

Investigation Meeting: 19 May 2022

Submissions received: 27 May and 13 June 2022 from Applicant
 3 June 2022 from Respondent

Determination: 13 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant took sick leave in July 2021. After receiving medical support, he then wrote to the respondent proposing a return to work plan.

[2] The respondent considered the return to work plan did not contain adequate detail, and entered into correspondence about the level of detail it required. The respondent then ceased paying the applicant, while instructing him not to return to work. Correspondence continued between the parties with the aid of lawyers.

[3] The applicant's position is that he is fit to return to work, and that he has provided sufficient information to enable the respondent to facilitate his return. The respondent maintains that it does not have sufficient information.

[4] The application has been heard on an urgent basis.

[5] Given the personal nature of the medical information disclosed in this matter, an application has been made for the non-publication of the applicant's medical information, which of necessity will also include the non-publication of his name and the name of the respondent. The application for non-publication was not opposed by the respondent, and has been granted.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from the applicant, and the applicant's medical advisor, the Deputy Chief Executive of the respondent, the respondent's health and safety manager, and an occupational physician. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave written legal submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination are:

- (a) Was the respondent's decision to place the applicant on unpaid leave justified?
- (b) If the respondent's actions were not justified, what remedies should be awarded, considering:
 - Lost wages;
 - Compensation under s123(1)(c)(i) of the Act; and
 - Disbursements.
- (c) Should penalties be awarded for breaches of good faith and/or the Wages Protection Act 1983?

- (d) Should either party contribute to the costs of representation of the other party.

Reinstatement by Consent

[9] I also record that the applicant raised a claim for reinstatement to the workplace.

[10] This issue was also set down to be heard, but was resolved by the parties immediately prior to the investigation meeting, on the basis of new medical evidence that had become available to the respondent. The parties are to be commended on taking steps to resolve this matter between themselves, and I record the parties' agreement below as I have been requested to do.

[11] The applicant is to be reinstated to the workplace by consent on the following terms:

- a. The respondent will recommence payment of the applicant's salary from 23 May 2022;
- b. The parties will work together in good faith to agree a management plan concerning the applicant's return to the workplace;
- c. The applicant will be reinstated to his position effective 15 June 2022 according to the agreed management plan at paragraph (b) above;
- d. Leave is reserved to either party to return to the Authority for further relief should the parties be unable to comply with the above.

Background

[12] The applicant is a highly qualified specialist, holding a senior role with the respondent. He has been employed by the respondent in this role for 21 years.

[13] In late 2020, the applicant suffered the loss of his wife. He had been providing palliative care to her over what appears to have been a long and difficult decline. As a result, in the last 3 or 4 years, the applicant sought relatively lengthy periods of sick leave, to provide care for his wife and support his children.

[14] The applicant's sick leave was granted, on a paid basis, and in accordance with the terms of his employment agreement. No concerns were raised about the legitimacy of this leave or its compliance with the employment agreement.

[15] As might be expected, the applicant also took leave following the death of his wife. He returned to work in January 2021.

[16] The applicant gives evidence that his experience of grief was “fractured” or disjointed, given the specifics of his family situation.

[17] In late June/early July, the applicant describes that he noticed that he was experiencing difficulties coping at work, including that he had become uncharacteristically short with his colleagues, and was experiencing difficulties with concentration and focus. This was a change for him, as although his work was customarily challenging and required high level decision-making, he did not usually find it difficult.

[18] The timing was significant for the applicant, as it was immediately prior to his wedding anniversary, being the first wedding anniversary he had experienced since the death of his wife. At the investigation meeting, he explained that his inability to cope as he would normally do was related to the occurrence of this significant anniversary, and was part of his grieving process.

[19] The applicant recognised that he was not performing at work as he should, and that in his senior position, this created a potential risk for his employer. He left work, on 9 July 2021, and advised his manager that he needed to take sick leave by way of email, which stated:

...I have been experiencing a mental health spiral over the last several weeks. I didn't really recognise it until this week, and it 'peaked' with a vengeance yesterday – my wedding anniversary....I am seeking help with a doctor's appointment next week.

I cannot/should not work...in this state and will be heading home soon, planning to return only once a significant degree of resolution has been achieved...please accept my apologies...

[20] His manager accepted this, and the applicant was placed on paid sick leave.

[21] At this point, I record the sick leave provision in the applicant's employment agreement as follows:

Clause 22. Sick Leave

22.1 The employee is entitled to actual and reasonable sick leave provided that a medical certificate is provided to the employee's Controller or Manager for any absences longer than 3 days.

22.2 When an employee has been absent on paid or unpaid sick leave for a continuous period of 65 working days the employer shall arrange for the employee to be medically examined. The employer will request from the medical practitioner an opinion on the likely date of return to work and whether or not the employee will be able to resume full previous duties and/or any limitations to tasks.

22.3 Continued employment or terms of continued sick leave may be reviewed by the Director following consideration of the above medical report.

[22] The applicant then sought medical advice, including seeking advice from his GP, and the medical advisor I have previously referred to as giving evidence at the investigation meeting.

[23] The applicant gave evidence that he experienced some practical difficulties in obtaining professional medical advice, as many practitioners were and continue to be, fully subscribed or to have significant waiting times.

[24] During this time, the applicant exchanged emails with his manager including providing a medical certificate.

[25] On 11 August 2021, the applicant emailed his manager again. He advised that he had been able to spend time with his medical advisor to discuss a potential return to work plan. He referred to the potential for difficulty in accessing a clinical psychiatrist or equivalent. He ended his email by saying that he would work with his medical advisor to document a return to work plan, and noted he had copied his medical advisor into that email.

[26] The applicant's direct manager did not attend the investigation meeting or give evidence. This is because, for reasons unrelated to these proceedings, the applicant's manager took leave himself. He advised the applicant of this on 13 August 2021. From that point onwards, the Deputy Director took over correspondence with the applicant.

[27] I note that as early as 31 August 2021, the people advisor employed by the respondent who was supporting the Deputy Director noted that the applicant had "highlighted difficulty in accessing" certain doctors, and she suggested that the respondent make a referral for the applicant, as she believed this could be done with a

standard wait time of “roughly a week or so”, if done by the respondent rather than the applicant in his personal capacity.

[28] On 4 October 2020, the applicant wrote to the respondent, putting forward a draft return to work plan. This plan was in some respects very detailed, as it proposed a staggered return to work over almost 12 months (which time period the applicant indicated was taken from a template document used by the respondent), involved combinations of work from the office and working from home, and referred at key points to the applicant receiving support from colleagues. In other respects, the draft return to work plan was not detailed, in that it did not contain a diagnosis or prognosis, and did not contain any details as to what situations or types of work the applicant might need to take care over performing, or types of work he might need to reduce, limit, or avoid.

[29] On 13 October 2020, the Deputy Director wrote to the applicant expressing concerns with the draft return to work plan. The Deputy Director asked the applicant for more information, including a diagnosis, and information on any limitations, capabilities, or support needs that the applicant might have, as follows:

We consider the next step is for [the respondent] to be provided with a comprehensive and detailed diagnosis of your medical condition including how this impacts on your health and functioning ...[The respondent] also needs further information about the matters set out above in relation to the Plan, to ...allow [the respondent] to assess your current abilities or limitations and ensure that a return to work is carefully managed with appropriate support and safety provisions put in place.

[30] Unbeknownst to the Deputy Director, this put the applicant in a difficult position, as he had not received a formal clinical diagnosis from either his GP or his medical advisor. In addition, by this time (after some three and a half months), the applicant was relatively well. He gave evidence to the effect that he began seeking this more detailed level of information, from his GP, his medical advisor, and a psychiatrist. However, he immediately ran into practical difficulties getting timely appointments, and his GP and medical advisor were reluctant to provide a diagnosis as by this time, the applicant was essentially recovered.

[31] At the investigation meeting, the Deputy Director said that, when he had written the 13 October email asking for more information, he had anticipated that the information he was asking for was information that the applicant would already have

in his possession from his medical consultations. The Deputy Director had therefore also anticipated that the applicant would be able to provide this information relatively quickly and easily. By the time of the investigation meeting, it had become apparent that this had not been the case.

[32] The applicant then wrote to the Deputy Director, on 19 October, and again on 1 November, advising he was waiting on medical appointments with two different doctors.

[33] The Deputy Director was not satisfied by the applicant's response. The Deputy Director also considered that, over the past 3 years since 2017, the applicant had taken significant amounts of paid sick leave. I again note that the sick leave provided to the applicant (both in this instance, and in the past) was willingly provided to him by the respondent in each instance, and it was accepted at the relevant times that the applicant's sick leave was properly taken. At the investigation meeting, the Deputy Director confirmed this remained the case.

[34] On 5 November 2021, the Deputy Director wrote to the applicant, proposing to place him on unpaid sick leave. The reasons given for this were that the applicant:

- a. Had "corresponded with [the Deputy Director] but ha[s] failed to provide the information requested"; and
- b. Since July 2019, the applicant had taken a significant amount of time off work as paid sick leave.

[35] The letter concluded that because of these two matters, the respondent was considering whether it had "discharged" its obligation to provide paid sick leave.

[36] On 12 November 2021, the applicant responded. He outlined steps he had taken to obtain diagnostic information and some particular difficulties he had faced, including that he had obtained an appointment which had then been cancelled.

[37] He asked if the respondent had any access to medical specialists that he could speak with "in a timelier manner".

[38] On 18 November 2021, the Deputy Director replied, referring again to the total amount of paid sick leave provided to the applicant over the last 3 years, and stating

that the applicant's comments indicated "indefinite delay". On this basis, the applicant was placed on unpaid sick leave, commencing 22 November 2021. He was not permitted to return to work.

[39] On 19 November 2021, the applicant's medical advisor prepared a document headed "Confidential Medical Assessment". This document outlined the applicant's current state of health, and referred to information that had been provided by the applicant's GP and two other medical specialists who had seen the applicant, had declined to provide an "active diagnosis, but each confirming he was fit to return to work". The applicant's medical advisor also confirmed his own view that the applicant was now fit to return to work, ideally in a graduated manner.

[40] This confidential medical assessment was provided to the respondent by the applicant's medical advisor on Monday 22 November 2021.

[41] By way of letter dated 29 November 2021, the respondent declined to revisit its decision, and the applicant remained on unpaid leave. The reasons given for this were, that despite the advice from the applicant's medical advisor that the applicant was fit to return to work, the respondent required a diagnosis "with detailed information on abilities and limitations that may need to be accommodated in the workplace"¹.

[42] The Deputy Director explained his position at the investigation meeting. He explained that in his view, for the applicant to return to work, two things were needed: for the applicant to be fit to work, and for the applicant to provide the respondent with the medical information the respondent wanted. The Deputy Director then explained that because the applicant had not given the Deputy Director/the respondent sufficient evidence of his (the applicant's) condition, the applicant was directed to stay at home on an unpaid basis.

[43] In response to further questioning, he confirmed that the applicant's pay would be reinstated when the applicant provided the information the respondent required, "and that's been our position since 13 October".

[44] The parties continued to discuss matters over the first two to three months of the new year, with correspondence then being exchanged between the applicant's

¹ At paragraph 4 of the letter from the respondent to the applicant dated 29 November 2021.

lawyer and the respondent's lawyer, about the provision of adequate medical information.

[45] In the end, the respondent asked the applicant to attend a medical advisor selected by the respondent. The applicant did so, and it was this report that was provided to both parties immediately prior to the investigation meeting and which resulted in the parties agreeing on the applicant's return to the workplace.

Findings

[46] As the applicant has returned to the workplace on the terms already recorded in this determination, this determination will resolve the outstanding claims of unjustified disadvantage by way of the applicant being placed on unpaid leave from 22 November 2021; and the resulting remedies sought of reimbursement of lost remuneration for the period beginning 22 November 2021 through to 20 May 2022 inclusive; compensation for hurt and humiliation; reimbursement for the cost of specialist reports; penalties against the respondent in respect of the claimed breaches of good faith and the Wages Protection Act 1983; and costs.

[47] In respect of the applicant's claim of unjustified disadvantage, I must consider whether "1 or more conditions of the employee's employment ...was...affected to the employee's disadvantage by some unjustifiable action by the employer"². The respondent's decision to place the applicant on unpaid leave affected a condition of the applicant's employment, namely his right to be paid in full as his wages became due. Ceasing to make payment of wages is an action that disadvantages the applicant, in a direct financial way.

[48] I must then consider if this action was unjustifiable. The starting point is to consider the relevant terms in the applicant's employment agreement.

[49] Clause 22.1 of the applicant's employment agreement provides that he is entitled to receive paid sick leave on an "actual and reasonable" basis. This was on the condition that the applicant provide a medical certificate to his Controller or Manager for any absences longer than 3 days.

² Section 103(1)(b) of the Employment Relations Act 2000.

[50] The applicant had a genuine basis for requesting sick leave, and did provide medical certificates as necessary to meet his obligations under this clause. Prima facie, the applicant was entitled to continue to receive paid sick leave.

[51] There is no assumption in the employment agreement that the applicant would be entitled to receive paid sick leave on a long-term basis without review. Clause 22.2 and 22.3 of the agreement provide a process for when and how the applicant's paid sick leave may be re-visited by the respondent. It is worth setting out the relevant sub-clauses again:

22.2 When an employee has been absent on paid or unpaid sick leave for a continuous period of 65 working days the employer shall arrange for the employee to be medically examined. The employer will request from the medical practitioner an opinion on the likely date of return to work and whether or not the employee will be able to resume full previous duties and/or any limitations to tasks.

22.3 Continued employment or terms of continued sick leave may be reviewed by the Director following consideration of the above medical report.

[52] In the present case, the applicant was on leave continuously, and the period of 65 days was reached on 8 October 2021. At any point after 8 October 2021, the respondent had the ability to make its own arrangements for the applicant to be medically examined. Indeed, the clause required it to do so. It did not.

[53] The employment agreement provides that, once the medical report had been received, then the applicant's terms of continued sick leave may be reviewed by the Director, as provided for in clause 22.3. The respondent did review the applicant's continued sick leave, but did not do so following consideration of its own medical report, as none existed at that time, and it had taken no steps to require the applicant to undertake a medical examination. In addition, the review that did occur was undertaken by the Deputy Director.

[54] The Deputy Director advised that, at the time he was considering whether or not to continue with the applicant's paid sick leave in November 2021, he was not particularly aware of the provisions of clause 22. He said that looking at the clause now, he felt the respondent had overall satisfied the criteria, as the applicant's own medical advisor had been involved, but he accepted that the respondent "had not taken the lead".

[55] My view is that the respondent did not meet its contractual requirements under clause 22 of the employment agreement. If the respondent wished to review or reconsider the applicant's paid sick leave, it was open for the respondent to do so, following the process set out in the employment agreement at clause 22.2 and 22.3. The respondent took no steps to invoke those provisions.

[56] The rationale behind the decision to cease the applicant's paid sick leave is also relevant. The Deputy Director made the decision to cease paying the applicant while accepting that the applicant had produced medical evidence that he was fit to work as of either 19 November or 22 November 2022, but despite this, the respondent refused to allow the applicant to return to work until he also provided medical information in the way the respondent wanted. At this time, the Deputy Director could have utilised the provisions in clause 22.2 of the employment agreement to obtain the information he wanted in the form he wanted from a medical professional of his choosing, but elected not to.

[57] The respondent's ability to review (and potentially cease paying) the applicant's sick leave was contingent on information contained in a medical report. The contractual ability to review was not available for the reason actually given by the Deputy Director, that is, that the applicant's pay would be withheld until the applicant provided the information that the respondent was looking to receive.

[58] Having concluded that the respondent did not comply with the contractual requirements that would have allowed it to review the respondent's paid sick leave, I must also consider whether the respondent's decision to place the applicant on unpaid sick leave was, in all the circumstances at the time, an action that a fair and reasonable employer could have taken³.

[59] I must consider:

- a. Whether the respondent sufficiently investigated its concerns with the applicant;
- b. Whether the respondent raised the concerns it had with the applicant;
- c. Whether the applicant was given a reasonable opportunity to respond;

³ Section 103A(2) of the Employment Relations Act 2000.

- d. Whether the respondent genuinely considered the applicant's response;
and
- e. Any other factors I think appropriate⁴.

[60] Despite the Deputy Director being advised by his own staff (the people advisor) that timely access to suitable medical specialists was of concern to the applicant, and that a way around this potential problem was for the respondent to step in, despite the explicit contractual requirement for a medical report before the respondent could review the applicant's pay, and despite the applicant writing to the respondent asking if the respondent could help him access a suitable specialist in more timely way, the respondent did not take any steps to properly investigate its concerns.

[61] In response to questions as to why the respondent did not do this, the Deputy Director said that he thought at the time it was better to use the medical advisor that the applicant had already been seeing, while simultaneously expressing frustration that the applicant and/or his medical advisor was not providing information in the way and at the speed the Deputy Director wanted. It is unexplained why the respondent did not exercise the ability it had to investigate.

[62] I also consider that the respondent did not fairly or appropriately raise the concerns it had with the applicant, in respect of the applicant's prior authorised paid sick leave. The letters from the respondent to the applicant dated 5 November 2021 and 18 November 2021 both mention past sick leave use as a reason why the respondent considered it had provided enough paid sick leave to the applicant on this occasion, however, this was never raised with the applicant at an early enough stage to allow him to take any action to alleviate these concerns. Certainly, the applicant was never told when taking sick leave in prior years that if he continued to take sick leave into the future, past sick leave use would be held against him.

[63] There is also an element of unfairness in the applicant's circumstances, as the reason for the applicant taking relatively long periods of sick leave was understood by the respondent, that is, it was to provide palliative care to his wife and to mourn her passing.

⁴ Section 103A(3) of the Employment Relations Act 2000.

[64] The applicant was given an opportunity to respond, and did so, with detailed emails.

[65] It is also not clear that the respondent genuinely considered the applicant's explanation. This is particularly the case because on 18 November 2021, the Deputy Director advised of his decision to place the applicant on unpaid sick leave, based in large part on the idea that "diagnostic information has not been provided and your feedback provides no sense of when that information will be provided."⁵ The applicant's medical advisor provided a detailed "Confidential Medical Assessment" directly to the Deputy Director only 4 days later on Monday 22 November, and despite accepting that this new information showed the applicant could return to work, the Deputy Director declined to re-visit his decision to instruct the applicant to stay away from the work place and to place the applicant on unpaid leave.

[66] Finally, I take into account that the respondent is a large organisation with access to professional advice, including in-house human resources and health and safety advice, and the professional ability to access high level medical advisors.

[67] Standing back and considering matters, the respondent's decision to place the applicant on unpaid sick leave was unjustifiable. It was a decision made to achieve other purposes, namely, creating leverage to require the applicant to provide the respondent with information in a form and content satisfactory to the Deputy Director, while also to some extent rebuking him for taking authorised paid sick leave in the past. This was all done while the respondent chose not to action the contractual provisions which would have enabled it to properly access the information it required by appointing a medical expert of its own choosing, a task it was well suited to achieve.

[68] Accordingly, I find that the respondent's decision to place the applicant on unpaid leave for the reasons and in the manner that it did, was an unjustifiable action that affected a condition of the applicant's employment to the applicant's disadvantage. The applicant's personal grievance claim of unjustified disadvantage has been made out. Having reached this conclusion, I note that it is not necessary for me to reach any

⁵ Paragraph 16 of the respondent's letter to the applicant dated 18 November 2021.

conclusions on the applicant's pleadings in the alternative regarding discrimination, and so I have not done so.

Remedies

[69] I must now consider what remedies might result. The applicant has claimed for reimbursement of lost remuneration from 22 November 2021 through to 20 May 2022, being the period he remained unpaid, in accordance with section 123(1)(b) of the Act.

[70] The applicant has lost remuneration as a direct result of his personal grievance. The court has found that when considering the amount of an award under section 123 of the Act, "discretion must be exercised in the employee's favour once the conclusion is reached that a loss of remuneration has been sustained as a result of a personal grievance....there must be some good reason for refusing to award the full amount of the loss."⁶

[71] In the present case, there is no doubt that the salary payments lost by the applicant were lost as a direct result of his personal grievance, and there is likewise no doubt as to the amount or duration of that loss. Therefore, I find that the applicant is entitled to be paid for his base salary payments from 22 November 2021, through to 20 May 2022 inclusive, which I am advised amount to \$119,215.20⁷.

[72] For the avoidance of doubt, I also note that the applicant was entitled to be paid Kiwisaver payments by the respondent at the rate of 4% during this time⁸. This is a type of "other money lost" by the applicant as a direct result of his personal grievance, which he would otherwise have received. The respondent is ordered to pay this amount to the applicant also, as set out below.

[73] The applicant has also claimed that he has been "unable to access" attendances at professional conferences, associated travel and continuing professional development payments that he would normally expect to receive. While I acknowledge that the employment agreement does provide for these benefits, the difficulty the applicant faces is that he has not put forward any evidence showing that he has incurred a monetary

⁶ *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) at 693.

⁷ As calculated at paragraph 95 of the applicant's legal submissions.

⁸ At paragraph 96 of the applicant's legal submissions.

loss, what that loss might be for, or how it might be quantified. I note the comments of the court that:

In no circumstances should an award be made which exceeds the properly assessed loss of the employee⁹.

[74] Accordingly, as I cannot be satisfied on the evidence before me as to the nature or extent of the applicant's actual loss under this head, I am unable to make any award for losses relating to conference attendance and associated travel, or continuing professional development.

[75] The applicant also claims compensation for hurt and humiliation resulting from his personal grievance. In this respect, the applicant gave evidence of the financial difficulties the decision to place him on unpaid leave placed him in, especially as that decision was made close to Christmas. He gave evidence of the embarrassment this caused him in not being able to provide presents for his children, or the usual financial support for them that he would also provide, or being able to discuss this with those he knew.

[76] I have no reason to doubt that the applicant experienced hurt and humiliation as he described, and that this stemmed from the respondent's unjustifiable decision. In saying this, I note that there was no evidence of any aggravating factors, for example, any public mistreatment of the applicant by the respondent, which might have led to a higher award. Accordingly, I award the applicant \$15,000 in compensation for hurt and humiliation. There is no reason to reduce this in any way.

Penalties

[77] The applicant claims penalties against the respondent in respect of what the applicant claims are two breaches of statute: breaches of the duty of good faith¹⁰ and breaches of the Wages Protection Act 1983, namely the statutory requirement to pay wages in full when they fall due¹¹.

[78] I will deal with the claim for penalties relating to the Wages Protection Act 1983 first. The applicant's claim that there has been a breach of the Wages Protection Act

⁹ *Trotter v Telecom Corporation of New Zealand Limited*, [1993] 2 ERNZ 659, at para [81].

¹⁰ As set out in section 4 of the Employment Relations Act 2000.

¹¹ As set out in section 4 of the Wages Protection Act 1983.

1983 by the respondent is based on the respondent's failure to pay the applicant's wages from 22 November 2021 onwards. In other words, it is the same conduct that the applicant relies on for his personal grievance claim. I have found that the applicant has a personal grievance claim in respect of the respondent's failure to pay wages from 22 November 2021 onwards, and I have awarded reimbursement and compensation in respect of this failure. In my view, it is not appropriate to also then award penalties in respect of this same conduct. I note that the court has found that this type of "doubling up" may be wrong in principle, and that where a remedy has been sought and granted in respect of a personal grievance, it will be unusual for a penalty to be imposed in respect of that same conduct¹². I find that this is so in the present case, including because the respondent's actions were not part of continuing course of conduct – rather, the respondent believed that it was entitled to act as it did, even though I have found that the respondent was mistaken. Accordingly, no penalties will be awarded in respect of the failure to pay wages.

[79] This leaves the applicant's claim for penalties for breaches of the duty of good faith by the respondent. The applicant claims that the respondent has breached the duties of good faith it owes him by discriminating against him on the grounds of his health, and by failing to engage constructively to facilitate the applicant's return to work, by failing to take active steps to constructively engage with the applicant, eg by reaching out to the applicant's GP, medical advisor, or the psychologist the applicant later engaged at his own expense; and had taking no steps to require the applicant to see/be assessed by a medical specialist of the respondent's own choice.

[80] I am not entirely persuaded that the claim of discrimination is made out in the present case, and note that the court has previously found in a matter where an applicant claimed an excessively long return-to-work time amounted to discrimination, a lack of evidence "as to the timeframe which would have applied in respect of any other...employee, returning to the workplace after an absence for any reason other than disability", required the claim of discrimination to be dismissed¹³.

[81] However, I do not need to reach a decision on this matter here, as this is only part of the applicant's claim that a breach of good faith has occurred.

¹² See the discussion at paragraph [124] of *Salt v Fell*, [2006] NZEmpC 49.

¹³ *CBA v ONM* [2019] NZEmpC 144, at [136].

[82] As I have noted, the respondent did not fully explain why it did not seek out its own assessment of the applicant's fitness to return to work once it had decided that the information provided to it by the applicant was lacking, and/or propose its own return to work plan once it had decided the plan proposed by the applicant was lacking. The Deputy Director said he felt it would be better to ask for information from the medical advisor the applicant had already been seeing, however, it only took steps to contact the applicant's medical advisor in February 2022, and there is no evidence that the respondent attempted to seek information from the applicant's GP or the psychiatrist he engaged after the respondent had requested further information. Under the circumstances where the respondent had the specific contractual ability to require the applicant to be medically examined by an advisor of its own choice, my view is that the respondent was not sufficiently active or constructive in maintaining the employment relationship as section 4 of the Act required it to be.

[83] When considering if this is sufficient to render the respondent liable to a penalty, the Act provides at section 4A that:

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if —

- (a) the failure was deliberate, serious, and sustained; or
- [(b) the failure was intended to...
- (iii) undermine an employment relationship...

[84] This is a high threshold. The applicant needs to show that either the respondent's failure was "deliberate, serious, and sustained", or that the failure was "intended to undermine" the employment relationship. By way of example, the court has found "egregious bad faith"¹⁴ was required for an award of penalties under section 4A(a) of the Act. The court has also found that even though an employer may have been wrong to conduct itself in the way that it did, this is not enough for a penalty award, as the failure must be deliberate and this is not so in circumstances where the employer's conduct was based on an incorrect belief as to the justification for its actions¹⁵.

¹⁴ *Waikato District Health Board v New Zealand Public Service Assoc Inc* [2008] ERNZ 80 (EmpC)

¹⁵ *Fleming v Attorney-General* [2021] NZEmpC 77.

[85] In the present circumstances, it is relevant that the respondent did end up changing its position, sought out the information it needed from a medical specialist of its own choice, and then acted on that specialist's advice to return the applicant to the workplace. In these circumstances, I am unable to find that the respondent's failures were sustained, or that they were intended to undermine the employment relationship, which is a continuing one. Accordingly, no penalty can be awarded in relation to section 4 of the Act.

[86] The applicant has claimed for reimbursement for the costs of specialist reports he obtained at his own expense. In this regard, the applicant advises that he has spent almost \$3,000 on reports from his own medical advisor, particularly in the preparation of the draft return to work plan, and a further \$828.00 on the psychiatrist he consulted after the respondent requested further information as of about 13 October 2021 onwards.

[87] The applicant's position is that the respondent effectively chose to "adopt" the advice of the applicant's own medical advisor rather than seeking to use an advisor of its own, and so should be responsible for the costs incurred especially those around the preparation of the draft return to work plan, which should have been a cost incurred by the respondent in the normal course. And with respect to the psychiatrist costs, the applicant only incurred those costs in response to the respondent's own requests for further and better information.

[88] I take the view that the costs of the psychiatrist (at \$828) are costs that the applicant should not have to bear. These costs were incurred entirely as a result of the respondent's requests for more medical information after the date of 8 October 2021 when the respondent could have asked the applicant to attend its own medical advisor, and chose not to do so.

[89] It is not clear that the costs claimed in respect of the applicant's own medical advisor were costs that would have been avoided if the respondent had acted differently. Accordingly, I take the view that the claim for these costs is not made out. Accordingly, only the sum of \$828 will be awarded as disbursements.

Orders:

[90] The applicant is to be reinstated the workplace by consent, on the terms set out in paragraph 11 of this determination.

[91] The respondent is to pay to the applicant:

- a. His base salary from 22 November 2021 through to 20 May 2022 inclusive, being \$119,215.20;
- b. Contributions to Kiwisaver at the rate of 4% of his base salary from 22 November 2021 through to 20 May 2022 inclusive;
- c. Compensation for hurt and humiliation in the sum of \$15,000 without deduction;
- d. The sum of \$828.00 as disbursements.

Costs

[92] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[93] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[94] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁶

Claire English
Member of the Employment Relations Authority

¹⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].