

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Les Watt (Applicant)
AND Canterbury District Health Board (Respondent)
REPRESENTATIVES Andrew McKenzie, Counsel for Applicant
Penny Shaw, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING Christchurch 11, 12 and 28 April 2006
DATE OF DETERMINATION 11 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Les Watt worked as a psychiatric nurse for the Canterbury District Health Board (CDHB) and its predecessors from 1983 until his dismissal on four week's notice given on 6 October 2004 for *serious incompatibility*. In his amended statement of problem, Mr Watt says that he has personal grievances of unjustified disadvantage and unjustified dismissal, as well as claims for damages for breach of contract.

[2] Mr Watt had an earlier grievance and breach of contract claim that was resolved in the CDHB's favour by a decision of the Employment Relations Authority dated 19 February 2004. That problem concerned Mr Watt's non-appointment to a Service Clinical Coordinator position established by a restructuring when Mr Watt had been Acting Unit Manager and believed he should have been appointed to the Clinical Coordinator position. It is accepted that Mr Watt cannot in the present matter mount a collateral challenge to the findings in the earlier case. However, the earlier claims affected relationships between Mr Watt and various colleagues and they provide a convenient starting point for resolving the present problem.

Workplace Organisation

[3] At relevant times, Mr Watt and the CDHB were party to a collective employment agreement, the National Union of Public Employees Mental Health Division and the Princess Margaret Hospital Collective Agreement. I will refer to relevant provisions later. Mr Watt's position was as a Nurse Specialist with the Youth Speciality Service (YSS), a mental health service for young people with serious mental health concerns. Dr Bronwyn Dunnachie was the clinical head of YSS at the time. Sarah Shaughnessey was the YSS Clinical Coordinator. David Buist was the YSS Unit Manager although he managed other units as well. He reported to Kay Johnston, the CDHB manager

responsible for youth and family mental health services, who in turn reported to Vince Barry, the Division General Manager. Two HR advisers were involved at different times: Melanie Lindroos worked for the CDHB up to July 2004 and Valencia van Dyk was involved as an adviser and an HR manager from July 2004.

[4] Patients at YSS are grouped into three streams based on the sorts of problems they present with. Staff members are assigned to a stream as part of a multi-disciplinary team to work with that stream's patients. Dr Doug Selman is a psychiatrist who was assigned to Stream 1. Mr Watt was assigned to Stream 2. Mr Watt was also involved in the Family Therapy Team (FTT) which received referrals from any of the three streams. The FTT comprised clinicians with an interest in that method of working from across the 3 streams.

The first ERA determination

[5] The first investigation meeting was on 20 November 2003. Mr Watt returned to work afterwards, then took annual leave over Christmas, returning to work again on 19 January 2004. The FTT had been inactive for some months, at least partly because of Mr Watt's first grievance hearing. On 9 January 2004, Ms Shaughnessey sent an email to FTT members about a meeting scheduled for 21 January 2004. After the meeting, Dr Dunnachie sent an email to FTT members (including Mr Watt):

To reiterate the decisions for all of the team:

Les will stand down from the family team in the interim

The option of an independent facilitator has been offered to address team dynamics, and this option is favoured by the majority of the team. ...

Mr Watt responded two days later, referring to his agreement to stand down from the FTT because he had the impression that that was the preference of most members, including Dr Dunnachie. It is clear from this email that Mr Watt was told during the 21 January 2004 meeting that there were issues of trust raised by FTT members. Mr Watt felt he could not respond pending release of the ERA determination. For the same reason, he thought that the involvement of an independent facilitator was not appropriate at that time.

[6] Mr Watt's evidence is that he was required to leave the meeting on 21 January 2004, that he found this *incredibly humiliating* and that he was ... *removed from the family therapy team, without my consent or any semblance of a hearing ...*. However, it is clear that Mr Watt consented to standing down from involvement in the FTT in January 2004 pending determination of his first grievance claim. His evidence is also that Dr Dunnachie was *malevolent* during the meeting. I do not accept that as an accurate description of Dr Dunnachie's conduct or intentions.

[7] The ERA determination is dated Thursday, 19 February 2004. Shortly after its release, Mr Buist went to see Mr Watt in his office. In evidence, Mr Watt is critical of Mr Buist saying that his approach and body language were hostile. Mr Buist's evidence is that he spoke to Mr Watt out of courtesy because he intended to advise other staff of the outcome at the weekly staff meeting. Mr Buist denies any improper conduct. I do not accept that there is any validity to the criticisms of Mr Buist now made by Mr Watt. Mr Buist was entitled to advise other staff of the grievance outcome given that it involved allegations about some of Mr Watt's colleagues and he quite properly gave Mr Watt prior notice of this. I reject the claim that there was any hostility on the part of Mr Buist at this time.

[8] Mr Watt's evidence is that he then experienced isolating behaviour where colleagues would refrain from talking to him and stopped talking to one another if he entered a room. As a result, Mr Watt took sick leave from 8 March, returning to work on Monday, 22 March 2004.

[9] It is unsurprising that colleagues who might be talking about the grievance outcome would stop their discussion if Mr Watt arrived on the scene. I do not accept that there was any intention to isolate or humiliate Mr Watt by such conduct.

[10] Ms Shaughnessey and Mr Buist met with Mr Watt on Wednesday, 24 March 2004 to discuss the future. Mr Watt says that this was a positive meeting. He expressed a desire to return to his involvement with the FTT and told them about his perception of isolating behaviour after the decision had been announced. Mr Buist and Ms Shaughnessey asked to be notified of any future such problems to allow them to deal with them. Several hours later the same day, Ms Shaughnessey and Dr Dunnachie came into Mr Watt's office. They told Mr Watt that there had been a meeting of the FTT who had asked them to decide if Mr Watt could resume his involvement with the FTT. Their decision, which they described as a clinical decision, was that he should not rejoin the FTT, and they conveyed that to Mr Watt. Mr Watt was told that some team members would not refer youth and their families if Mr Watt was part of the FTT.

[11] Later, on 24 March 2004, Mr Watt wrote to Mr Buist raising a complaint about his exclusion from involvement with the FTT based on the refusal of unnamed colleague(s) to refer if he was involved. Mr Watt characterised this behaviour as *mobbing*. In the same letter, Mr Watt also referred to the 21 January 2004 meeting and criticised Dr Dunnachie for allowing the FTT to stand him down.

[12] On 29 March 2004, Mr Watt learned from another staff member that Dr Doug Selman had told Dr Dunnachie that he would not refer to the FTT if Mr Watt was involved. That prompted Dr Selman to approach Mr Watt directly, which he did the same day. Dr Selman felt that he could not trust Mr Watt because of an earlier exchange between them relating to the first grievance, while Mr Watt considered Dr Selman's threat about referrals was part of mobbing behaviour. In evidence Mr Watt says that Dr Selman's approach was hostile. However I consider that their exchange would be better characterised as frank or blunt. I do not accept that Dr Selman was hostile.

[13] In evidence Mr Watt is critical of the CDHB because an issue about his practising certificate was raised with him by email dated 1 April 2004 rather than personally. However, it is clear from the evidence that currency of practising certificates was a CDHB-wide issue and no negative inference can properly be taken because of the way in which the matter was raised with Mr Watt.

[14] On 7 April 2004, Mr Watt and his Union representative met with Mr Buist, Ms Johnston and Ms Lindroos to follow up on Mr Watt's written complaints about 24 March 2004 and Dr Selman. Mr Watt provided further material about workplace mobbing. On 16 April 2004, the two managers and Ms Lindroos met with Dr Dunnachie and her representative to investigate Mr Watt's complaints. Dr Dunnachie said that the decision not to involve Mr Watt in the FTT was based on clinical safety concerns, Mr Watt having accused others of lying in connection with the first grievance and several staff threatening not to refer clients to the FTT. She did not accept that there had been any mobbing behaviour. The managers and Ms Lindroos also met with Ms Shaughnessey and her representative. Ms Shaughnessey said that Mr Watt was stuck and bitter about the first grievance and had accused several colleagues of lying in their evidence. Ms Shaughnessey supported Dr Dunnachie's point that they had told Mr Watt that he could not be involved in the FTT *at this time*. Ms Shaughnessey also said that she was unaware of mobbing being an issue at YSS previously. She expressed concern about her ability in the future to manage Mr Watt. Less than two weeks later, on 27 April 2004, the managers and Ms Lindroos met with Dr Selman. Because

there had been this delay, the CDHB had told Mr Watt on 20 April that it expected to complete its investigation into his complaint by *early to mid next week* (ie: about Wednesday, 28 April).

[15] Having not heard anything further, Mr Watt wrote to Mr Buist on 4 May 2004. He raised the delay and an issue about workload expectations of him. He provided a letter from his GP to support the view that his current capacity to take on new work was limited. Mr Watt also asked the CDHB to fund further sessions with a psychologist (Alan Prosser). Mr Buist and Ms Shaughnessey responded with separate emails on 4 May 2004. Mr Buist explained the delay and conveyed the General Manager's decision declining further funding for Alan Prosser. Ms Shaughnessey referred to workload arrangements.

[16] The outcome of the complaints investigation was announced at a meeting on 6 May 2004 involving Mr Watt, Ms Marshall (NUPE Secretary), Mr Buist, Ms Johnston and Ms Lindroos. Ms Johnston said that the March decision not to involve Mr Watt in the FTT had been based on clinical concerns given disharmony in the team; that it was not intended as a permanent arrangement; that it could have been handled better and preferably would have been referred to Ms Johnston; and that the decision was not malicious or intended as harassment or mobbing. Ms Johnston proposed a process of facilitation as a means of Mr Watt resuming his normal work. Mr Watt agreed to consider that proposal with Ms Lindroos to draft terms of reference for consideration. A draft was provided on 12 May 2004.

[17] There followed a series of correspondence and communications between the parties about the proper form of a process by which Mr Watt might resume all aspects of his work. It is unnecessary for present purposes to expand on those exchanges other than to accept that both Mr Watt and the CDHB advanced their respective views. As Ms Marshall puts it, *with reluctance Les capitulated to the employer's request to attend mediation ...*. The mediation was intended to be a form of facilitation led by an external facilitator (Lynette Blake-Palmer) involving Mr Watt and a number of YSS staff. Mr Watt agreed in early September 2004 to involve himself in this process. Before turning to the facilitation, it is necessary to outline some other developments that occurred between June and September 2004.

[18] Part of Mr Watt's work involved coordinating the supervision of university post-graduate students on clinical placements. He and others provided the supervision. In this context, Mr Watt took on the supervision of a student at short notice when her original supervisor became unavailable. There was a brief meeting between Mr Watt and the student following which she made a complaint to Ms Shaughnessey about being bullied by Mr Watt. Ms Shaughnessey made arrangements for the student to engage another supervisor without first speaking to Mr Watt. Later, on 23 April 2004, Ms Shaughnessey told Mr Watt of these events. Ms Marshall took up Mr Watt's complaint about this, following which Ms Shaughnessey sent an apology by email dated 26 April 2004. Ms Shaughnessey also withdrew from any future supervision involvement. Mr Watt makes a fair point that he should have been given an opportunity to defend the allegation (which he denies) and that Ms Shaughnessey should not have usurped his coordination role without consulting him.

[19] Mr Watt experienced disturbed sleep patterns and took some time off work in mid June 2004. He saw a GP on 21 June 2004. The GP wrote a letter dated 28 June 2004 setting out a description of Mr Watt's symptoms and some history of his presentation. The letter makes it clear that Mr Watt's symptoms were first recorded in June 2003. Mr Watt saw his GP again in November 2003, around the time of the first grievance hearing. He next saw his GP about these symptoms in March 2004 when he was prescribed anti-depressant medication. Some further medication was trialled in May 2004. The GP put Mr Watt on sick leave and, except for one day, he never returned to duty.

[20] Ms Marshall spoke to a CDHB health and safety adviser who sent Mr Watt a form for him to report his stress as a serious harm incident. Mr Watt completed the form, dated 8 July 2004, describing the incident as *mobbing* which had caused psychological harm. Mr Watt annexed a fuller account of his complaint entitled *A case of mobbing at Youth Specialty Services*. That paper sets out Mr Watt's view of mobbing experienced by him since 1995.

[21] As part of the usual exchange of relevant material before an investigation meeting, Ms Marshall and Mr Watt learned of an email dated 15 July 2004 from Ms Johnston to the health and safety adviser saying that the CDHB management were working at providing a facilitation process to resolve YSS difficulties. The adviser was asked to record that information and in reply, he said he would print the email and attach it to the incident form. In evidence Ms Marshall talks of Ms Johnston intervening and stopping an investigation into the incident form. Mr Watt puts the claim perhaps more strongly. Ms Johnston denies intervening to stop the investigation. The email exchange between Ms Johnston and the adviser does not support Mr Watt's claim that the adviser was (*effectively*) *told by Kay to stop his investigation*. There is no other evidence to support the claim so I accept Ms Johnston's denial.

[22] By letter dated 28 July 2004, Ms Marshall referred Mr Watt's serious harm complaint to Occupational Safety and Health (OSH). OSH acknowledged receipt of the notification and indicated that they would need to consider the material and seek advice given that the notification raised matters more often dealt with by ERS, another service of the Department of Labour. Later, Ms Marshall provided further information to OSH, and OSH met with the CDHB managers to give them an opportunity to respond to the issues raised by Mr Watt. Eventually, in a letter dated 13 September 2004, OSH reported on its investigation. OSH was unable to prove either that mobbing had or had not occurred, but accepted that Mr Watt's view of an unhealthy work climate had caused him stress that affected his health and wellbeing. OSH also referred to the pending facilitation process. The only other thing OSH intended to do was to follow up after the facilitation.

[23] The CDHB is paid to provide some services in connection with the University. Mr Watt had a role coordinating supervision services for students, referred to above. YSS staff, including Mr Watt, provided supervision. During his sick leave there was contact between Mr Watt and the University lecturer and an arrangement was apparently made for Mr Watt to continue with at least some of his work in connection with the University. This came to CDHB management attention when Mr Watt requested some of the sick leave be reclassified as work time to account for the work done by Mr Watt from home. That resulted in some communications at the time between Ms Shaughnessey and Ms Johnston about the general arrangement between the University and YSS. In evidence, Mr Watt says that there was strong opposition to his request for reclassification from Ms Shaughnessey and others at YSS. The view advocated by Ms Shaughnessey is that the arrangement with the University was not personal to Mr Watt but was part of what he did fulfilling his employment obligations to the CDHB. The sick leave covered all his employment obligations, including the University-related work. That is a legitimate view and Ms Shaughnessey cannot fairly be criticised for expressing it. In any event, it came to Mr Watt's attention after the termination of his employment. Mr Watt makes no complaint about his request not being accepted.

The facilitation

[24] Mr Watt returned to the workplace on 13 September 2004 because his entitlement to paid sick leave had expired. He had obtained a letter from his GP on 9 September suggesting that he initially work part time for three weeks from 13 September 2004. However, the CDHB thought it had agreed at a meeting on 2 September 2004 or subsequently for Mr Watt to have a period of special leave pending the facilitation process due to start on 21 September 2004. Mr Watt did not get this message, hence his appearance on 13 September. After a little while, Ms Johnston phoned Mr Watt

and he left the workplace. In evidence, Mr Watt described 13 September as a *rather shocking event*. Mr Watt also referred to an email dated 10 September 2004 between Ms Johnston and Ms van Dyk as evidence that he was excluded from the workplace. He learned of this email in preparation for the investigation meeting. In the email Ms Johnston requested Ms van Dyk to ... *ensure that in between he does not come back to YSS*. At the time, Ms Johnston understood that a period of special leave had been agreed to span the gap between the expiry of the sick leave entitlement and the facilitation. At the investigation meeting, it was accepted that Mr Watt's appearance on 13 September was the result of a communication mix-up. In that context there is nothing improper in the email communication.

[25] The facilitator was Lynette Blake-Palmer, a person experienced in facilitation. She initially set up the process, getting a briefing from Ms Johnston and talking with YSS staff as necessary. A joint session was scheduled for 21 September with Mr Watt, Ms Shaughnessey, Dr Dunnachie, and Mr Buist. On that day Ms Blake-Palmer made notes of what happened which I accept as a substantially accurate description of events. Ms Blake-Palmer set the scene, then Mr Watt had an opportunity to speak. He said that he had a choice of going or staying and that he had decided to stay. He wanted a healthy workplace but had been subjected to exclusionary behaviour. Ms Shaughnessey then spoke and outlined their expectations for Mr Watt's re-entry to YSS. He would have a minimum of six assessments per week until his case load reached 25-30 clients; he had to demonstrate respect for the reporting line to Ms Shaughnessey, Dr Dunnachie and Mr Buist; there would be a role review when he started and after six months; he had to demonstrate greater flexibility and less rigidity; his primary role would be case management and other roles would be by negotiation after six months; he would not be a member of the FTT; he had to acknowledge hurt caused with an apology to Dr Dunnachie and others as needed; and he had to acknowledge that responsibility for the University supervision rested with the Service rather than any individual.

[26] Mr Watt responded to this statement by saying that this was a continuation of mobbing and that it was a removal of his responsibilities. Dr Dunnachie and Mr Buist said they wanted a safe process and it would give Mr Watt time to ease back in. Mr Watt said that he was not prepared to apologise as he had no need to do so. Mr Buist said that when they were performing their management role, Mr Watt saw them as mobbing him. Mr Watt said that he wanted to continue the supervision, debriefing, family therapy and post-graduate coordination. Mr Watt then retired to a separate room. Ms Blake-Palmer spoke to the management team who said they were not withdrawing from facilitation, they would meet tomorrow, but their expectations would remain the same. That was conveyed to Mr Watt and an agreement was reached to resume next morning. The participants then left.

[27] There followed some phone exchanges between Mr Watt, Ms Blake-Palmer, Ms Marshall, Ms van Dyk and Ms Johnston. It is not necessary to give any greater detail as Mr Watt's position was clearly set out in Ms Marshall's letter of 23 September 2004. The letter first sets out Mr Watt's view of the events of 21 September 2004, then says :

It is within this context that Les and his family feel that he should no longer subject himself to a process which is damaging his health and the future employment relationships in YSS beyond repair. He resignedly accepts that he will be unable to pursue his chosen career as a nurse specialist in the child, adolescent and family service and therefore requests consideration of redeployment to alternative work areas in the Mental Health Service.

That took matters back to the 2 September 2004 meeting which Mr Barry attended in order to respond to an earlier request from Mr Watt to identify redeployment options.

Redeployment options

[28] Ms van Dyk responded to Ms Marshall by letter dated 24 September 2004. The letter conveys an offer of transfer to a registered nurse position with the acute in-patient service. It says that the position is lower graded and carries a lower salary. Reference is made to historical arrangements where Mr Watt was granted a higher grade but only while in his position at YSS. The letter asks for a response *as soon as possible, preferably before 1700 today*. It was sent to Ms Marshall by email.

[29] Within less than an hour, Ms Marshall was able to contact Mr Watt, convey the offer and obtain his instructions to decline the offer. Ms Marshall then emailed that advice to Ms van Dyk. In evidence, Mr Watt is critical of the short time allowed for his response saying that it left ... *little time to consider matters with my family in the considered way it deserved*. There is no merit in this criticism. This was not an offer that automatically expired at a fixed time and if Mr Watt needed more time, he should have taken it and advised the CDHB accordingly. Later a letter dated 24 September 2004 was delivered to Mr Watt. The letter is from Vince Barry. It refers to the correspondence from 23 and 24 September which ended with Mr Watt declining the transfer offer, then says:

In view of your advice that you cannot continue in your current role and have declined the transfer option offered, we have no alternative but to consider that your employment with CDHB has ended. Any final salary and/or holiday pay owing will be paid to you early next week.

[30] That conclusion was a misreading of Ms Marshall's 23 September 2004 letter. Mr Watt had not terminated his employment and the CDHB would have been quite wrong to persist with the view that the employment had ended. Sensibly, Ms Marshall and Mr Barry arranged a meeting for 28 September 2004 to discuss the situation. Mr Watt, Ms van Dyk and another NUPE organiser were also present at the meeting. There was discussion about the difference of interpretation, the substantive problems and redeployment options. The meeting concluded with the CDHB to reconsider the position and respond on 29 September 2004.

Disciplinary investigation

[31] Mr Barry responded by letter dated 29 September 2004. The letter sets out a summary of events since March 2004; states that Mr Watt's refusal to participate in facilitation prevents any further consideration of his return to YSS; it concludes that other placements within the CAF service would not be viable because of Mr Watt's statement that he would not work with Dr Dunnachie and Dr Selman; reports that the NASC service has no current vacancies nor any positions at the level of nurse specialist; and repeats the offer of a staff nurse position at AIS. The letter concludes by requiring Mr Watt to attend a meeting on 4 October to consider his future in the Mental Health Service given Mr Watt's inability to work with others at YSS. The letter notes that a possible outcome is the termination of the employment and that Mr Watt could bring a representative to the meeting.

[32] Mr Watt prepared a paper dated 1 October 2004 summarising his views about events. It was forwarded to Mr Barry before the meeting. The paper describes Mr Watt's experience of mobbing at and before the time of his unsuccessful application for the clinical coordinator position, the subject of the first proceedings. It also refers to several events since the release of the ERA's determination, such as the exclusion from the FTT work, Dr Selman's objection to his involvement with the FTT team, Ms Shaughnessey's arranging for the post-graduate student to change supervisors, the refusal of further sessions with Alan Prosser, the requirement to engage in facilitation before a return to work, and the mobbing behaviour of Ms Shaughnessey, Dr Dunnachie

and Mr Buist during the facilitation. Mr Watt deploys the term *Interpersonal Terrorism* to describe his view of what he had been subjected to over a long period of time. Based on his account, Mr Watt saw the solution as a directive to the mobbers to stop that behaviour, his own return to normal duties, case work expectations set at an appropriate level once his post traumatic stress disorder symptomology had recovered, and not allowing his terms of employment to be subject to the whim of individuals.

[33] There was then a meeting on 4 October 2004. Mr Watt, Ms Marshall, Mr Barry, Ms Johnston and Ms van Dyk were all present. Mr Barry said that dismissal was a possible outcome. He then said that Mr Watt had made it clear he could not return to YSS and in respect of possible redeployment options elsewhere in CAF, Mr Watt had said he could not work with Dr Dunnachie and Dr Selman. Mr Barry said that there were no positions available in NASC, and that Mr Watt should reconsider the AIS option. Mr Watt confirmed that he would not participate in facilitation or accept the AIS transfer. Mr Barry told Mr Watt that while he might terminate the employment he wanted some time to consider the situation. Arrangements were made for a further meeting for 6 October 2004.

[34] Present on 6 October 2004 were Mr Watt, Ms Marshall, Mr Barry, Ms Johnston and Ms van Dyk. Mr Barry said that he had come to a conclusion but first wanted to check if Mr Watt had reconsidered the AIS option. Mr Watt confirmed that it was unacceptable. Mr Barry then told Mr Watt that his employment was terminated on the grounds of serious incompatibility. Mr Barry provided a letter, dated 4 October 2004, setting out reasons for the decision. Mr Watt and Ms Marshall adjourned to read the letter. When they returned, Ms Marshall said that this was mobbing from start to finish, that they did not believe the decision was in the best interests of YSS as scapegoating Mr Watt would not resolve the mobbing problem which would be ongoing. Mr Barry asked about arrangements for Mr Watt to clear out his office and Mr Watt nominated Saturday morning. Mr Barry said that they would get someone to supervise this and asked who would be acceptable.

Post dismissal

[35] Mr Watt cleared out his office on the Saturday morning. Mr Buist and a security guard were in attendance. I accept Mr Buist's evidence that they conducted themselves appropriately in the circumstances.

[36] Ms Marshall wrote to Mr Barry on 13 December 2004 raising a personal grievance of unjustified dismissal. The letter describes the CDHB's investigation into Mr Watt's mobbing complaint as *wholly inadequate*. The EAP support and payment of only one session with Alan Prosser is described as *extremely limited*. Regarding the facilitation, the letter says :

... you effectively made a "take it or leave it" offer of facilitation between Les and his mobbers in order for him to return to the Unit.

There is criticism of a lack of management contact during Mr Watt's three month's sick leave. There is a denial that Mr Watt said he would not work with senior team members, and that he demanded that there be no performance management. Issue is taken with whether Mr Watt refused to participate in facilitation, or suggested alternatives. The letter makes the point that YSS functionality was not dependent on Mr Watt given staff turnover during his sick leave. A point is also made about Mr Watt's ability to secure alternative employment with organisations funded by the CDHB or working alongside the CDHB.

[37] The parties attempted directly with one another and with mediation assistance to resolve the problem but could not. These proceedings were lodged in September 2005.

[38] Mr Watt commenced alternative employment in January 2005.

Submissions for Mr Watt

[39] The first issue is the unjustified dismissal claim. I am referred to *Mowbray v West Auckland Living Skills Home Trust Board Inc.* 19/11/01, Travis J, AC86/01, for a three limb test for justification: whether the employer was entitled to come to the conclusion that the relationship was irreparable; whether the irreconcilable breakdown was attributable wholly or substantially to the employee; and whether the manner in which the employer carried out the dismissal was procedurally fair.

[40] Mr Watt says that the evidence bears out a conflict between himself and a handful of senior clinicians at YSS. However, he says that there is no evidence of widespread incompatibility between him and others across the CDHB, a very large organisation. Regarding the second limb, Mr Watt says that the root of the incompatibility was the *unjustified, isolating and mobbing actions of senior clinicians at YSS*. That is directed principally at Ms Shaughnessey, Dr Dunnachie and Dr Selman. I am referred to 20 aspects of the evidence, not all of which reflect the findings expressed earlier. Mr Watt also says that his refusal to continue with the facilitation required by the CDHB as a condition of his return to work was completely justified. A number of criticisms are made of the dismissal process. It is said to have been pre-determined and effected too quickly. Mr Watt had no opportunity to alter any problematical behaviour on his part because there was no forewarning that he might be dismissed if the incompatibility did not subside. The CDHB's consideration of redeployment was inadequate, particularly the requirement for him to respond within two hours while on sick leave, a reference to events of 27 September 2004. The CDHB is criticised for continuing the dismissal process during Mr Watt's illness.

[41] The second issue is the unjustified disadvantage claim. I am referred to *Hayward v Tairāwhiti Polytechnic*, 3/8/05, Travis J, AC43/05 as a similar situation. The grievance is about removing duties from him without his consent and the requirement to take on six new cases each month. This is said to be part of the mobbing behaviour by the senior clinicians. The point is also made that several of these duties required no interaction with the senior clinicians who are the subject of the incompatibility.

[42] The third issue is an alleged breach of contract. This is based on an implied term and the express terms set out at clauses 3 and 26 of the collective agreement. The evidence of a breach is said to be the same as that leading to the conclusion that the senior clinicians embarked on a campaign to isolate Mr Watt in the workplace, with senior management either colluding or standing by. It is said that these breaches caused Mr Watt to be ill, necessitating three months off work. The OSH investigation is said to support the claim.

[43] In Mr Watt's view he is entitled to lost remuneration amounting to \$33,405.12 as at the date of the investigation meeting, plus a sum for future loss. He also claims \$10,000 distress compensation for the unjustified disadvantage, and \$25,000 distress compensation for the unjustified dismissal.

Submissions for the CDHB

[44] The respondent accepts that *Mowbray* summarises the factors to be considered when determining justification for an incompatibility dismissal. The CDHB says that there is little trouble in establishing that there were irreparable relationships. I am referred to Mr Watt's evidence that he could not work with certain members of the Service, and the facilitator's view that the conflict at YSS rated 10 on 1 to 10 scale. The respondent says that the breakdown in relationships is largely attributable to Mr Watt's vocal criticism of other team members and his own inability to accept responsibility for his role in the breakdown. It says that breakdown was irreconcilable because of Mr Watt's refusal to participate in a process to resolve the conflict. The CDHB acted fairly and reasonably by identifying redeployment opportunities despite the constraints arising from Mr Watt's refusal to deal with certain staff even though there was no legal obligation to negotiate a different position. Mr Watt was given notice that he might be dismissed, he was represented and had a fair opportunity to explain. Mr Barry took time to consider how to deal with the matter having listened to Mr Watt's explanation. Accordingly the dismissal is justified.

[45] The CDHB refers to the amended statement of problem to identify the unjustified disadvantage claim as Mr Watt being told at the facilitation meeting on 21 September 2004 that he would no longer be undertaking clinical supervision of staff, debriefing staff, a coordination role with the University, doing parent work for clinicians outside YSS, or a member of the FTT. The respondent says that these were simply statements made during facilitation so that there was no disadvantageous effect on Mr Watt's employment. The statements were no more than a starting point for discussion and had no effect on his employment.

[46] The third claim is that Mr Watt was harassed in breach of the CDHB's obligation to provide a safe workplace. The CDHB says that Mr Watt formed this view based on incidents in the 18 months leading up to his dismissal. All the incidents prior to November 2003 were resolved in the first ERA determination which established that Mr Watt did not have a grievance. In large measure that outcome turned on the ERA's rejection of Mr Watt's perception of events which cannot now be challenged. The several incidents relied on since then do not amount to harassment. The various actions by the CDHB are said to be management actions raising issues about team relationships in the context of a service where patient safety is the paramount concern.

Conclusions

[47] It is useful to start with what this problem cannot be about. In the first proceedings Mr Watt's problem was a personal grievance and a claim that there had been breaches of implied and express duties of fair and reasonable treatment and good employer behaviour. In those proceedings, Mr Watt was particularly critical of Dr Dunnachie and alleged that he was bullied by Dr Dunnachie and others both through the appointment process and earlier. In that case Mr Watt spoke about a culture at the CDHB that he had experienced for many years. However, the Authority comprehensively rejected Mr Watt's claims.

[48] Mr Watt's present case, particularly the breach of contract claim, is significantly influenced by his assertions of a history of mobbing and bullying behaviour by Dr Dunnachie and others. However, that history either was or should have been raised in the earlier proceedings and Mr Watt is estopped from raising those assertions in the present proceedings. For the purposes of the present proceedings, if there was mobbing or bullying in breach of express or implied terms of the employment relationship, that must be based on events after November 2003. That point was made to counsel at a very early stage of the present proceedings. However it is clear from the evidence that the historical allegations and Mr Watt's unwavering belief in their truth are a powerful factor in

explaining Mr Watt's actions after November 2003. Having said that, I will turn to the first grievance.

Unjustified disadvantage

[49] There is a grievance where an employee's employment or conditions of employment are affected to their disadvantage by an unjustifiable action on the part of the employer. The amended statement of problem focuses on what Ms Shaughnessey, Dr Dunnachie and Mr Buist told Mr Watt at the facilitation meeting. The disadvantage consists of the changes announced at the facilitation meeting to Mr Watt's usual work. I accept that being required to do only case management work and prevented from involvement in other roles such as the FTT and the University coordination role in particular would make work significantly less satisfying. Mr Watt's work with the FTT, the University coordination role and the other work were sources of professional development, achievement and matters of some pride. Their loss as a condition of re-entry to YSS, even if they had been restored after six months, disadvantaged Mr Watt.

[50] The CDHB says that the statements at the facilitation meeting were a *wish list* or a starting point for discussion during the facilitation. *Starting point* is recorded in the facilitator's notes but it clearly refers to Mr Watt's return to work rather than an opening gambit in a negotiation. The managers intended to affect Mr Watt's employment by limiting his role to case management upon his return to work.

[51] There was some suggestion in the evidence that the exclusion of Mr Watt from the FTT and the other limitations were justified as clinical decisions based on patient safety. However, Mr Watt had always been regarded as a sound and experienced clinician. The clinical safety issue concerned feelings of distrust towards Mr Watt by one or more of the FTT members based on their perceptions of Mr Watt's pursuit of his earlier grievance. Dr Dunnachie, Ms Shaughnessey and Mr Buist shared those views, but they should have canvassed them with Mr Watt before deciding to restrict his work.

[52] Accordingly, Mr Watt has a personal grievance as defined by section 103(1)(b). I will return to remedies later.

Breach of contract

[53] Clause 3.1 of the collective agreement states :

The employer shall act as a good employer in dealings with employees.

For the purposes of this agreement a good employer is an employer who treats employees fairly, properly and openly in all aspects of their employment.

Clause 26 provides :

HEALTH AND SAFETY

Attention is drawn to the provisions of the Health and Safety in Employment Act 1992 and the Health and Safety in Employment Amendment Act 2002, concerning safety, health and welfare matters. The parties to this agreement agree that employees shall be adequately protected from any safety and health hazard arising in the workplace. All reasonable precautions for the health and safety of employees shall be taken.

[54] While the amended statement of problem and Mr Watt's submissions referred to an implied term, there was no attempt to formulate that term. I assume that Mr Watt is relying on terms referred to in cases such as *Gilbert v Attorney-General* [2002] 1 ERNZ 31. The implied term in *Gilbert* was an obligation to provide a working environment and management processes so that undue stress would not be caused to the employee. That was said to be the operation in practice of the duty to retain a relationship of trust and confidence and to take all reasonable care to avoid exposing the employee to unnecessary risk of injury or further injury to their physical or psychological health. I will deal in turn with each of the alleged breaches as identified in Mr Watt's submissions.

[55] There is a contest in evidence about whether Dr Dunnachie commenced the discussion at the FTT meeting on 21 January 2004 by asking *who's angry at Les?* On balance, I do not accept Mr Watt's evidence that this was said. In submissions counsel accepted that it could have been appropriate to initiate a discussion on team dynamics in a neutral manner and I find that is what happened. The exchange of emails on 21 January and 23 January 2004 demonstrates that the matter was raised in a respectful manner resulting in Mr Watt's agreement to stand down.

[56] It is alleged that Mr Watt was not permitted to attend courses, isolating him from professional peers. Mr Watt was given approval to attend one course but not another. There is no evidence to suggest that the decision about professional development leave and course approval was not properly made in accordance with CDHB guidelines. Mr Watt may have been dissatisfied with the decision to decline support for attendance at the second course, but he cannot escalate that into isolating or mobbing behaviour.

[57] Complaint is made about the announcement of the result of the first grievance being tactless. I disagree. Mr Buist first advised Mr Watt that he intended to announce the outcome to others, there was no objection and an announcement was made. There was nothing improper in any of this.

[58] There is a complaint that there was no reply to three of Mr Watt's emails, having the effect of isolating him. The first is an email of 23 January 2004 to Mr Buist about the decision not to approve leave for one of the courses. The exchange of emails was initiated by Dr Dunnachie. Mr Watt responded, then received an explanation from Mr Buist. Mr Watt responded to Mr Buist, attempting to put words into his mouth, but it seems that Mr Buist did not respond further. I see no reason to criticise Mr Buist for choosing not to be drawn into a pointless exchange. There are two other emails, 19 May and 28 May 2004 to Nigel Laughton. The evidence is that Mr Laughton was in an acting role for a short time. Most probably, he overlooked responding. At worst, that is a discourtesy, not a breach of contract.

[59] There is a complaint that Mr Watt was dehumanised by referring to him as "L" in five exhibited documents. The documents are emails on 18 March and 30 June 2004. First, there is some duplication. Secondly, it is quite common for people to utilise abbreviations in informal communications such as emails without that implying anything negative. Thirdly, Mr Watt never saw the emails until preparation for the investigation meeting. Even if there had been a breach of contract (which I do not accept) it could not have been the cause of any damage or harm to Mr Watt.

[60] A complaint is made about leaving Mr Watt out of the loop regarding practising certificates. There is no evidence that Mr Watt did not receive the same reminders as everyone else and I also accept that it is the clinician's responsibility in any event. He was the only person in YSS who had not complied, presumably because of his earlier absence on leave. However, prudence required Ms Shaughnessey to keep a paper trail of her follow-up to Mr Watt about the requirement. I see no merit in the criticism that her approach was via email rather than in person.

[61] The next alleged breach is that important people refused on untenable grounds to work with Mr Watt. The evidence establishes that Dr Selman refused to work in the FTT with Mr Watt. Dr Selman is an employee of the University Medical School. His refusal is not a breach of any obligation owed by the CDHB to Mr Watt. Ms Shaughnessey withdrew from providing supervision to post-graduate students to avoid working with Mr Watt after his complaint about her dealings with the student. Ms Shaughnessey's withdrawal had no effect on Mr Watt's ability to do this work and it was largely inconsequential. I do not accept that it was a breach of trust and confidence or any express term of the employment.

[62] In an email dated 17 March 2004 to Mr Buist, Dr Dunnachie stated :

Given Les' clear statements regarding his continued mistrust of other clinicians at YSS, and taking into account our multi-disciplinary mode of service delivery, I firmly believe that Les can no longer practice in a clinically safe manner at YSS.

Les is currently due to return to YSS from sick leave on Monday, 22 March. I feel that in support of Les, the team at YSS, but most importantly of the young people in our care, a plan is put into place to ensure clinical safety can be maintained.

Following that, Mr Buist and Ms Shaughnessey spoke with Mr Watt on 24 March 2004 and later the same day, Dr Dunnachie and Ms Shaughnessey announced to Mr Watt their decision that he would not be part of the FTT. The concerns that caused Dr Dunnachie and Ms Shaughnessey to come to that decision were not put to Mr Watt for comment before the decision was announced. This action by two of Mr Watt's managers breached clause 3.1 of the collective agreement. Mr Watt was not treated *fairly, properly and openly*. To some extent, that point was conceded by the later CDHB investigation that somewhat weakly found that the decision could have been better handled.

[63] I find that this action was also a breach of the *Gilbert* implied term. It would have been reasonable for Dr Dunnachie and Ms Shaughnessey to initiate a discussion with Mr Watt on their and others' concerns about working with him as part of the FTT. Precisely that had been done in January 2004 and resulted in Mr Watt's agreement not to resume FTT involvement at that point. Not taking that step in March 2004 did cause Mr Watt undue stress. A proper measure of the level of that stress can be obtained from reading his letter of complaint written shortly after the incident.

[64] The next alleged breach is the removal of duties without consent in September 2004. This founds the unjustified disadvantage grievance, already discussed. I accept that this can also be seen as a breach of express and implied terms of the employment agreement.

[65] There is a complaint about the use of the *royal we* and *our* in documents such as an email in August 2004 between Ms Shaughnessey and Ms Johnston. Mr Watt learned of the email (and other documents) when preparing for the investigation meeting so it could not have caused him any damage during his employment. The point is a subtle one about the language perpetuating a dynamic of Mr Watt versus the team. However, as will be explained, Mr Watt created the situation where a number of his colleagues objected to working with him so the language simply reflected that reality. That is not a breach of any obligation owed by an employer to an employee.

[66] It is alleged that the respondent procured other employees to ignore Mr Watt. That allegation is based on the evidence of Nabell Pirwani, a psychiatrist who has worked at YSS since 1999. Mr Pirwani appeared under summons and was reluctant to give specific evidence until I informed him that he had a legal duty to truthfully answer questions that were being put to him. His evidence, which for current purposes I accept, is that Dr Selman several times told colleagues his view that Mr Watt should not work at YSS as people no longer trusted him. Dr Selman also attempted to dissuade colleagues from attending a seminar presentation given by Mr Watt. These events

occurred in February 2004 or later. Dr Pirwani did not tell CDHB management of these events, nor did he report them to Mr Watt during the employment. As before, I do not accept that the actions of Dr Selman can properly be regarded as breaches by the CDHB of obligations owed to Mr Watt. Nor can such matters not known of by Mr Watt at the time have caused him any distress.

[67] There is a complaint about the lack of proper process regarding a student complaint. Properly, Mr Watt should have had an opportunity to comment and Ms Shaughnessey should not have acted without first speaking to Mr Watt. When Mr Watt raised the matter in April 2004, that was acknowledged and Ms Shaughnessey apologised. The matter cannot be elevated to a breach of contract.

[68] There is a complaint that Mr Watt was not kept informed of proper progress on the 24 March complaint. There was a meeting with Mr Watt on 7 April 2004. The CDHB met with the subjects of the complaint on 16 April 2004 and 27 April 2004. In the meantime Mr Buist had emailed Mr Watt on 20 April 2004 to advise progress. Mr Watt complained of the delay and other issues on 4 May 2004 and received a prompt response from Mr Buist. The results of the CDHB investigation were discussed with Mr Watt on 6 May 2004, that meeting having been arranged before Mr Buist's 4 May 2004 email. Mr Buist did not initiate contact with Mr Watt when the expectation expressed in his 20 April 2004 email could not be met, but I do not accept that there was a breach of any express or implied term of the employment agreement.

[69] It is alleged that the CDHB failed to follow up on significant medical information, isolating Mr Watt and making it his problem. It is also alleged that the CDHB failed to provide counselling with Alan Prosser, again isolating Mr Watt. Mr Watt took two week's sick leave from 8 March 2004. There was a discussion between him and Ms Shaughnessey on 18 March during which Mr Watt indicated he was managing his health situation. There was agreement for the CDHB to fund one session with Alan Prosser and Mr Watt requested a further session in his letter of 4 May 2004. Mr Watt also copied his GP's letter of 3 May 2004 to the CDHB. That referred to Mr Watt's limited capacity to take on new work for the following month or longer. Ms Shaughnessey responded to the workload concern in an email of 4 May 2004 by adjusting Mr Watt's case management workload. There is no evidence that Mr Watt had any subsequent concern with too much work before he went on sick leave in June 2004. Ms Shaughnessey had earlier responded to a workload point mentioned by Mr Watt during April by giving Mr Watt a form headed *PERFORMANCE PLANNING 2004* asking him to detail his work activities. In evidence, Mr Watt is dismissive of this, saying *this I found strange as a few days earlier Sarah said she couldn't work with me and now she was wanting to performance manage me*. Mr Watt knew perfectly well that it was an attempt to quantify his workload in response to his request for it to be lessened. It had nothing to do with performance management. It is apparent that the CDHB took reasonable steps to respond to and manage Mr Watt's concerns about his workload and his health. There was no breach of any obligation owed to Mr Watt.

[70] There is a complaint about a failure to keep in touch with Mr Watt during his sick leave between June and September 2004. The complaint is not accurate. There was some contact between several YSS team members and Mr Watt. In addition, there was ongoing dialogue between Mr Watt's representative and the CDHB seeking an agreed strategy for Mr Watt's return to work. The complaint is without substance.

[71] The sending home of Mr Watt on 13 September 2004 is said to be a breach of the employment agreement. As recorded above, Mr Watt's attendance at work that morning was the result of a miscommunication. The evidence is that Mr Watt only returned to work on that day because his paid sick leave had ended. His preference was not to be at work, pending the facilitation process. There is no evidence that the exchange between him and Ms Johnston on 13 September was in any

way inappropriate and I do not accept Mr Watt's evidence that it was a rather shocking. Nothing about it amounts to a breach of contract.

[72] There is a complaint about the *positional, non-negotiable stance* taken by the CDHB managers at the facilitation. This has already been dealt with as a personal grievance and it is unnecessary to repeat the same conclusions here.

[73] It is said that Mr Watt was denied natural justice. The only aspect not already dealt with relates to the alleged intervention in the health and safety notification. The evidence does not support a conclusion that the CDHB manager intervened to stop the investigation. Accordingly, there was no breach.

[74] Standing back from the detail, Mr Watt's claims about breach of contract are an attempt by him to persuade the Authority that he was the victim of continued bullying and mobbing during 2004 for the purposes of excluding him from the workplace, that conduct being encouraged and sanctioned by his managers such as Dr Dunnachie and Ms Shaughnessey. For Mr Watt, the context of the foregoing claims is his belief that he was bullied and mobbed in respect of the events that led to the first proceedings. However I do not accept that Mr Watt's view of the context is accurate. In the earlier proceedings Mr Watt made strong claims about the conduct of various people and it is clear that he did not accept the Authority's rejection of those claims. He repeated his views about various colleagues to some staff after the November hearing, he says *in private*. Inevitably, some colleagues took strong positions based on limited exposure to first hand accounts of events. However, for the most part the CDHB management, including YSS management, attempted to manage the conflictual situation appropriately. The evidence establishes some lapse in judgement in these endeavours, but does not support Mr Watt's claim that he was the victim of mobbing or bullying.

Unjustified dismissal

[75] I accept that *Hayward v Tairāwhiti Polytechnic* is an analogous case. There, the Employment Court held that the law requires the employer to establish that the necessary level of incompatibility existed, that it was largely the employee's fault, that the facts were entirely convincing and that the employer acted in a procedurally fair manner.

[76] It is accepted by Mr Watt that he could not return to YSS because of the conflict between him and some senior clinicians. He says that the incompatibility must be shown to exist beyond YSS, but I do not accept that point. Mr Watt was engaged as a clinician within the YSS service. The conflict created a significant barrier to the performance by him of many of his duties within YSS. He was not employed to work in other parts of the CDHB's admittedly diverse operation. The point overlaps with consideration of the employer's attempts to avoid dismissal, more of which later.

[77] Was the conflict largely Mr Watt's fault? The answer is *yes*. Mr Watt was free to think that he was a victim of bullying over many years. He was free not to accept the first determination of the Authority rejecting that view. He was entitled to make a complaint to his employer about Ms Shaughnessey's and Dr Dunnachie's announcement to him on 24 March 2004. He was entitled to take issue with Ms Shaughnessey's handling of the student supervision matter. However Mr Watt was not entitled to persist with claims of historical pernicious bullying and interact with others on the basis that his beliefs were correct. On or about 18 March 2004, Mr Watt told Ms Shaughnessey that he believed the truth needed to come out and that he had been unfairly treated prior to and after the appointment process, the subject of the first hearing. Mr Watt's 24 March complaint, when discussed on 7 April 2004 was predicated on the truth of the historical claims. Mr Watt's complaint to the CDHB Health and Safety Officer attempted to relitigate his

historical mobbing allegations as constituting a serious harm incident. Next, he referred his historical claims to OSH. Mr Watt's resistance to the facilitation proposal was also predicated on the truth of the historical allegations. In summary, it was Mr Watt's failure to conduct himself with his colleagues on the basis that his historical claims were wrong that largely caused the conflict with others at YSS after the first hearing.

[78] A number of complaints are made about the dismissal process. It is said that the decision was premeditated. Mr Watt points to the 24 September 2004 letter saying that the CDHB was very quick to assert a resignation by him. The letter was a commendably prompt response to Ms Marshall's letter of 23 September following on from the dialogue after 21 September 2004. There is no merit in a complaint based on the speed of the CDHB response. The 24 September 2004 letter misconstrued the situation but the CDHB resiled from that error. There simply is no evidence to support a claim of pre-determination on the part of Mr Barry and I accept his evidence that he considered the situation carefully after meeting with Mr Watt and Ms Marshall before reaching his decision as described in the 4 October 2004 letter but conveyed at the 6 October 2004 meeting.

[79] It is said that it was unfair to dismiss Mr Watt while he was still unwell. That does not accurately reflect the evidence. Mr Watt's GP had certified him fit on 9 September 2004 for a return to work on 13 September 2004, suggesting that he would work part time over the following three weeks. No doubt because of that certification, Mr Watt raised no objection at the time to involving himself in the agreed facilitation for the purpose of returning to YSS. Nor was there any concern raised during the disciplinary process about Mr Watt being unfit to participate. A complaint now is without merit.

[80] Complaint is made about inadequate attempts to identify redeployment, a *take it or leave it Employment Contracts Act* approach to negotiating a redeployment option and the failure to consider mediation. There is no merit in these complaints. Mr Watt was asked to respond to the redeployment option quickly and declined the offer within the time suggested. More time could have been requested if that had been necessary but it obviously was not. The offer was rejected again later on in any event. There is no evidence to suggest that the CDHB withheld other redeployment options. It was Mr Watt himself who limited the scope of possibilities by his attitude towards contact with Dr Dunnachie and Dr Selman. The mention now of mediation makes no sense given Mr Watt's firmly expressed view that mediation is not an appropriate forum for resolution of mobbing complaints, just as it is not appropriate for resolving domestic violence.

[81] There is a point made about a lack of warning especially given Mr Watt's long service. The submission is advanced on the basis that Mr Watt should have been put on notice that if the incompatibility did not subside then he might be dismissed, to give him an opportunity to get on with colleagues and avoid dismissal. However, put that way, the point ignores the attempts to achieve compatibility and Mr Watt's conduct inconsistent with that after the first hearing. This is not a complaint for which the employer has to show that it first gave a formal warning in accordance with a disciplinary code of conduct before it can justify a dismissal decision.

[82] For the foregoing reasons, I find Mr Watt's dismissal to be justified. There is no sustainable personal grievance about the termination of his employment.

Remedies

[83] There is a finding that the actions of Ms Shaughnessey, Dr Dunnachie and Mr Buist at the facilitation give rise to an unjustified disadvantage personal grievance as well as amounting to a breach of express and implied terms of the employment agreement between CDHB and Mr Watt. None of that could have caused the distress reportedly suffered by Mr Watt leading to 3 months off

work from June 2004. These established breaches did not cause any lost remuneration or other pecuniary loss and it is not possible for there to be any account of the harm he says he suffered from the dismissal, that having been judged as justifiable. Compensation must be limited to the relatively brief impact of the events of 21 September before that was overtaken by the process leading up to the dismissal. There cannot be a double recovery of compensation and damages from the same incident.

[84] There is also a finding that the actions of Ms Shaughnessey and Dr Dunnachie on 24 March 2004 were a breach of implied and express terms of the employment relationship. This was not argued as a personal grievance. The breach caused Mr Watt's complaint of the same date and I find the tone of Mr Watt's letter of complaint gives a good indication of the appropriate measure of damages. I do not accept that this breach was a material cause of the irreconcilable conflict that eventually resulted in the dismissal, nor do I accept that the breach contributed in any material way to the sick leave taken by Mr Watt from late June 2004. Both those matters resulted from Mr Watt's wrong belief that he had been the target of workplace mobbing.

[85] It is not possible to say that either the March or the September 2004 breach caused any greater harm than the other. Considered globally, I find that an appropriate total measure of damages is \$5,000.00 or \$2,500.00 for each breach.

Summary

[86] The respondent is to pay Mr Watt damages of \$5,000.00.

[87] All other claims are rejected

[88] Costs are reserved. If either party considers that there should be an order of costs and that cannot be resolved directly, they may make an application by lodging and serving a memorandum and the other party may then lodge and serve a reply within 14 days.

Philip Cheyne
Member of Employment Relations Authority