

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 62  
5499467

BETWEEN           WARREN NEWETT BANKS  
Applicant

AND                 HOCKEY MANAWATU  
INCORPORATED  
Respondent

Member of Authority:     Trish MacKinnon

Representatives:         Barbara Buckett, Counsel for Applicant  
Phillip Drummond and Ruth Oakley, Counsel for  
Respondent

Investigation Meeting:   24 and 25 February 2015 at Palmerston North

Submissions Received:   11 March and 1 April 2015, from the Applicant  
23 March 2015, from the Respondent

Determination:           29 June 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Mr Banks had been employed as Operations Manager with Hockey Manawatu Incorporated (HM) for six years before his employment was terminated for medical incapacity on 28 September 2014. He claims he was unjustifiably dismissed and that his dismissal was unlawful in terms of HM's Constitution.

[2]     He also claims to have been disadvantaged during his employment by the actions of his employer. These include HM's instigation of a disciplinary process based on a "*facetious allegation*" and its refusal to allow him to do his job as set out in his employment agreement. Mr Banks says HM unilaterally imposed fresh terms and conditions of employment on him and threatened the security of his employment by

means of formal performance management, suspension and dismissal. He claims HM failed to act as a fair and reasonable employer and did not act in good faith to build a productive employment relationship.

[3] Mr Banks applied for interim reinstatement to his employment until such time as those matters could be determined. That application was unsuccessful.<sup>1</sup> The current determination deals with the substantive investigation into Mr Banks' claims. Issues he raised over HM's alleged failures in relation to Privacy Act requests are not within the jurisdiction of the Authority and will not be considered.

[4] A personal grievance over the employer's request for the return of Mr Banks' work vehicle while he was on sick leave was withdrawn at the investigation meeting. His personal grievance over HM's request for the return of his work mobile phone remained live. However, following Mr Banks' acknowledgement under questioning that it was fair and reasonable for HM to have requested the return of the phone while he was on sick leave, I have dismissed that matter.

[5] Hockey Manawatu Incorporated says Mr Banks' termination of employment for medical incapacity was justified. It denies all other claims he has made.

### **Issues**

[6] The issues for determination are:

- a. Whether HM:
  - i. refused to allow Mr Banks to do his job as per his employment agreement;
  - ii. unilaterally imposed fresh terms and conditions of employment on him;
  - iii. threatened the security of his employment by imposing formal performance management and suspension;and, if so,
- b. whether such actions unjustifiably disadvantaged Mr Banks.
- c. Whether HM breached Mr Banks' employment agreement and failed to act in good faith in its dealings with him.
- d. Whether Mr Banks was unjustifiably disadvantaged by HM instigating an employment investigation.

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<sup>1</sup> [2014] NZERA Wellington 114, 10 November 2014

- e. Whether Mr Banks was unjustifiably dismissed.
- f. Whether his dismissal was lawful within HM's Constitution; and
- g. if he was unjustifiably or unlawfully dismissed, whether he should be reinstated to his employment.

[7] For completion, I note that in the course of the investigation meeting an issue arose over the admissibility of evidence contained in email exchanges between HM's legal representative, Ms Oakley, and a witness appearing under summons from Mr Banks. Without sighting the evidence in question, I arranged for it to be examined by another Member. Acting on that Member's written advice, I determined it was not admissible as it was covered by professional legal privilege.

### **Applicable Law**

[8] Whether a dismissal or action is justifiable is to be determined, on an objective basis, by applying the test in s.103A of the Employment Relations Act 2000 (the Act). The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. This test applies equally whether a dismissal is for serious misconduct, redundancy, or other reason such as, in Mr Banks' situation, on grounds of medical incapacity.

### **Relevant background and evidence of the parties**

[9] HM is a community-based incorporated society which is affiliated to the New Zealand Hockey Federation. Among its objects are the fostering, encouragement and development of hockey within Manawatu, and the promotion of hockey competition. HM has few employees and the members of its Management Board are volunteers. It derives its funding from subscriptions, sponsorship and community grants. Mr Banks was the organisation's most senior employee, holding staff management responsibilities over two part-time employees. He also held operational and financial responsibilities. He reported to the Chair of the Board.

[10] Their employment relationship appears to have been uneventful until 2013 although it was Mr Banks' evidence his role increased significantly over time. He said he raised a number of organisational issues of concern to him with his employer with mixed success. Some tensions arose in 2013 after the Board engaged a consultant to carry out a review of the organisation and personnel processes. Mr Banks was

unhappy he was not consulted in advance about this engagement but said he welcomed the consultant's report (the Third Bearing report), completed in October 2013, as it highlighted some matters he had been raising with the Board. The report found many positive aspects to the organisation but concluded some governance, management and operational issues needed addressing. Mr Banks received a verbal briefing on its contents from the report's author in October 2013.

[11] Two members of the Board (Perry Kingsbeer and the Board Chair, David Annear) met Mr Banks in December 2013 to discuss a number of issues of concern to the Board. Notes taken by the Board show that Mr Banks' management of staff, vehicles, and internal organisation were discussed. The Board set some expectations for Mr Banks in relation to these matters.

[12] Mr Kingsbeer's evidence was that the Board perceived a lack of progress on those expectations over following months and invited Mr Banks to attend mediation with it in June 2014. Mr Annear, who issued the invitation, noted in his letter to Mr Banks it was being made because the Board believed both parties to the employment relationship were experiencing difficulties. Mediation was seen as a safe space for everyone to explore the issues and possible options for resolution. Mr Kingsbeer said in evidence the Board wanted to resolve the difficulties between them at a low level and Mr Annear had signalled this in his letter by telling Mr Banks the Board was not intending to take a lawyer to the mediation.

[13] Following correspondence between the parties, in which the lawyer engaged by Mr Banks notified the Board her client was considering the invitation to mediation but was unaware of specific concerns the Board wished to address, Mr Annear retracted the invitation. His letter of retraction said the Board did not wish to invite Mr Banks to mediation if he could not recall the conversations that had taken place with him.

[14] Mr Annear's letter informed Mr Banks the Board intended to engage a consultant, Rachel Shepherd from Shepherd HR Consulting Limited, who would work with the Board and Mr Banks *"to develop clear KPIs and put in place a system whereby there is continuous feedback on those measures"*. Mr Banks was informed he would be hearing from Ms Shepherd in the next week or so.

[15] Mr Banks raised a personal grievance on 8 July 2014 over the Board's advice that he should work with Ms Shepherd. The letter stated there was "*no valid or justifiable reason identified as to why (Mr Banks) should engage with Rachel Shepherd....*" The letter informed HM it had "*no entitlement to unilaterally vary (Mr Banks') employment terms and conditions*" and that HM was on clear notice Mr Banks did not agree to such variation. He wished to attend mediation with his employer and asked for details of the Board's specific concerns with him.

[16] In his written response Mr Annear noted, amongst other matters, the Board's willingness to attend mediation. The Board denied Ms Shepherd's engagement entailed any attempt by the Board unilaterally to vary Mr Banks' terms and conditions of employment.

[17] On 13 August 2014 Mr Banks attended his general practitioner and obtained a medical certificate stating that he was "*medically unfit for work*" and was on "*indefinite sick leave on medical grounds. To be reviewed according to progress.*" The medical certificate was sent to HM. No details of the nature of Mr Banks' illness were provided.

[18] Two weeks later HM, through its legal representative, emailed Mr Banks' lawyer raising issues around his work vehicle, mobile phone, and work computer. He was asked to return the vehicle and the cell phone, which would be available to him upon his return to work once he had medical clearance.

[19] With regard to the computer, the email noted that Mr Banks had returned to the workplace while on sick leave, accessing his computer and deleting information belonging to HM. A number of terse communications ensued between the parties' legal representatives before the vehicle and mobile phone were returned "*under protest*", accompanied by the raising of a further personal grievance.

[20] On 14 September 2014, after Mr Banks had been on sick leave for one month, HM sought an update as to his current medical status and a prognosis of his return to work. The update could be provided by way of a further medical certificate from Mr Banks' medical practitioner, Dr Parry, or following examination by a registered medical practitioner of HM's choice, and at HM's expense. HM stated its expectation of hearing from Mr Banks within seven working days.

[21] On 18 September 2014 Mr Banks' legal representative responded that HM was not entitled "*to that which it demands*". The letter stated Mr Banks was not absent for reasons of a medical condition, but because the unhealthy workplace was having an impact on his wellbeing. Nonetheless, a medical certificate was provided the following day. It stated:

*"This note is to advise that I have seen and examined Warren again today. Further to my earlier note 13/08/14 indicating he was not fit to work as employed for Hockey Manawatu, I regret to say that in the interval the situation affecting his health is worse rather than improved and an extension of "unfit to work" certificate is necessary.*

*I conclude that for his own health and for the good the association, he should remain off work. It is clear he could not concentrate or communicate well with others on the Board meetings while there is such conflict of ideas. This has built up over the last year and resulted in September 2013 in recurrent severe headaches needing a neurology specialist referral. His life sleep and general health are still disrupted by stress and increasingly a feeling of anger at the poor progress to achieving any resolution of matters.*

*I therefore advise that Warren is to remain off work for another month with review of situation in mid-October."*

[22] On 22 September 2014 HM emailed a memorandum to Mr Banks. It noted the length of his absence and the difference between the information contained in his two medical certificates and the recent advice from his lawyer that he was not absent for reasons of a medical condition. HM advised Mr Banks this raised two issues. The first was whether he had breached his obligation of good faith, as he had been in receipt of paid sick leave on the basis of his medical certificates, whereas his lawyer was now asserting he was not absent for reasons of a medical condition.

[23] The second issue was HM's inability to hold Mr Banks' role open indefinitely. The employer noted Mr Banks held the most senior paid employee role within HM which was community-based and predominantly run by volunteers. During Mr Banks' absence it had managed to carry on with volunteers stepping up and some paid staff taking on more responsibilities. HM said this could not continue indefinitely: it was unable to carry on its day to day business for yet another month, and potentially longer, without an Operations Manager particularly in view of an upcoming national test and two internationals.

[24] HM's memorandum noted it was not plausible to suggest work-related duties had been the cause of deterioration in Mr Banks' condition over the last month that

was referred to in the medical certificate as he had been away from work during this time. HM wished to investigate these two issues and proposed a meeting with Mr Banks and his lawyer for that purpose. The memorandum stated Mr Banks needed to be aware "*that the result of this investigation into the potential issue of alleged dishonesty around his production of the medical certificate dated 13 August 2014 and his acceptance of paid sick leave could result in the summary termination of this employment.*"

[25] In relation to the second issue, HM's memorandum noted Mr Banks had already had more than a month on sick leave and had now produced another medical certificate for a further month's sick leave. It said there was the possibility his employment could be terminated, after due consideration of his submissions on this issue, pursuant to clause 13.4 of his employment agreement.

[26] A time, date and venue were proposed for a meeting which was to take place on Friday 26 September. Mr Banks was invited to advise HM if the date and time were not suitable. He was advised if he wished to make any submissions in writing they should either be made available before the proposed time for meeting or available at the meeting.

[27] Through his lawyer Mr Banks responded he was unwell as evidenced by his medical certificate of 18 September. He rejected any dishonesty and noted he was unwell due to the work situation and not by reason of a medical condition as defined in his employment agreement. The letter stated this was "*a legal opinion on the matter and not a medical opinion*".

[28] On 24 September 2014 HM's lawyer replied that the matters set out on behalf of Mr Banks would be taken into account by the employer in its decision making. It was reiterated that Mr Banks had the option of providing written submissions on or before the scheduled meeting. It was made it clear that, in the event Mr Banks did not attend the proposed meeting, a decision would be made by HM on the information it currently had in its possession as at 3.30pm on Friday 26 September.

[29] In response Mr Banks notified a further personal grievance for disadvantage relating to HM's initiation of a "*disciplinary process*". Further correspondence from Mr Banks' lawyer alleged HM was not acting as a fair and reasonable employer both

generally, and specifically in relation to the allegation of dishonesty with regard to his medical certificate.

[30] That letter stated matters remained in an unsatisfactory state due to the employer's refusal to engage with Mr Banks in relation to the situation that was causing him to be unwell. It was critical of the employer's decision to require Mr Banks to attend a disciplinary matter when he was unwell and referred to Mr Banks' absence from the workplace as being "*as a result of a dysfunctional, unhealthy and toxic work environment*" which was having an impact on his wellbeing and his ability to be at work. Mr Banks confirmed by email on Friday 26 September 2014 he would not be attending the meeting scheduled for that day.

[31] On 28 September HM wrote to Mr Banks informing him that it had concluded his medical certificate of 13 August 2014 was likely to be genuine and able to be relied upon by both Mr Banks and HM. As a result HM considered the first matter to be at an end.

[32] In relation to the second matter, and for reasoning set out in some length in the communication, HM concluded Mr Banks was incapable of the proper performance of his duties by reason of illness (medical condition). Accordingly the employer had decided to invoke clause 13.4 of its employment agreement with Mr Banks to terminate his employment on four weeks' notice.

[33] The communication concluded with arrangements for payment of any outstanding annual leave and unpaid commissions, advice to staff of HM and stakeholders, and return of property.

## **Discussion**

***Did Hockey Manawatu refuse to allow Mr Banks to do his job in accordance with his employment agreement; unilaterally impose fresh terms and conditions of employment on him; threaten the security of his employment, including formally performance managing and suspending him, thereby unjustifiably disadvantaging him?***

[34] Much of this allegation arose from HM's letter of 30 June 2014 to Mr Banks informing him it intended to engage an HR consultant to work with him and the Board. The reasoning provided by the Board to Mr Banks in response to his raising a personal grievance over this included the need to conduct performance reviews, both

of Mr Banks, and by Mr Banks of the employees who reported to him. The Third Bearing report had identified the lack of such reviews over the previous four years and the Board wished to address this issue. The lack of job descriptions and performance objectives were related issues of concern.

[35] The evidence on behalf of the Board was that the organisation lacked the HR expertise to conduct the annual performance reviews provided for in Mr Banks', and other employees', employment agreements and it intended to engage an HR consultant to assist it and Mr Banks. I do not agree with Mr Banks that the intended engagement of Rachel Shepherd represented any change to his terms and conditions of employment or that it threatened the security of his employment. There was no evidence of the Board refusing to allow Mr Banks to perform his job in accordance with his employment agreement. There was, however, evidence from Mr Banks and from the Third Bearing report that the lack of current job descriptions was an issue that needed to be addressed.

[36] Ms Shepherd appeared under summons from Mr Banks. She said she first met Mr Kingsbeer on 8 July 2014 when he briefed her on the work HM intended to engage her to undertake and her instructions from him were in the first instance to work with Mr Banks to carry out job analyses within HM with the aim of streamlining job descriptions. She did not get the opportunity to do that as her engagement was terminated when Mr Banks raised a personal grievance. She had not met Mr Banks before this happened. Ms Shepherd denied she had been engaged to performance manage Mr Banks. She said her impression from Mr Kingsbeer was that her engagement was intended to assist and support Mr Banks in his role as Operations Manager.

[37] I accept Ms Shepherd's evidence which impressed me as direct and truthful. I find Mr Banks suffered no disadvantage from HM's intended engagement of her. There was no evidence provided to support of Mr Banks's claim of suspension. As I have found no grounds for Mr Banks' claim to have been disadvantaged over any of these matters, I dismiss that claim.

***Did Hockey Manawatu breach its obligation to build a productive employment relationship with Mr Banks by failing to act in good faith in its dealings with him?***

[38] Submissions made on Mr Banks' behalf were that HM "*failed to engage with (Mr Banks) and "fix" the underlying environmental issues*" that related to his ill-health. This was also submitted to be in breach of HM's health and safety obligations.

[39] Mr Banks attributed his health issues, such as stress, recurrent headaches, anxiety, depression and difficulty in sleeping, to problems he experienced in the workplace and to what he described as the HM Board's "*deliberate lack of engagement.*" He claimed his employer had consistently rebuffed his efforts to engage and believed he had been excluded from Board meetings during 2014. He also complained the Board had interfered in operational matters, including staff management issues.

[40] An example of interference in a staff management matter related to an issue Mr Banks had been asked to address with an employee. He had disagreed with the instruction and had told the Board member, Mr Kingsbeer, to raise the issue with the employee himself. I find Mr Banks could have no reasonable cause for complaint when the Board member took him at his word.

[41] Minutes of the Board meetings for 2014 were provided to me. I found no evidence either of exclusion of Mr Banks from any meetings or of any inappropriate discussion about him at meetings he elected not to attend.

[42] Nor did Mr Banks provide any persuasive evidence of a lack of engagement by the Board, or of its rebuffing of his efforts to engage. His main example was a memorandum dated 30 May 2014 which he said he had emailed to Mr Annear at his place of employment. Mr Banks had expressed concern about various matters in the memorandum, including a lack of positive support from the Board, interference of certain named Board members in staff matters, and performance issues with a recently resigned staff member.

[43] In evidence he expressed disappointment that the Board did not discuss his memorandum at its next meeting. Mr Annear did not give evidence to the Authority. However, Mr Kingsbeer said the Board did not know of the existence of the memorandum until Mr Banks had commenced proceedings in the Authority when it was included in the documentation. He said Mr Annear told him that was also when

he first sighted the document. Mr Kingsbeer was adamant the Board would have dealt with the issues raised by Mr Banks if it had received the memorandum at the time.

[44] I am unable to determine whether or not the memorandum was received by Mr Annear, but I accept it was not received by Mr Kingsbeer. I also accept it is more likely than not that no Board member received the memorandum until proceedings were lodged in the Authority. While Mr Banks provided the memorandum in the bundle of documents prepared for the investigation meeting, he provided no evidence of having emailed it to Mr Annear other than his assertion to have done so. I note that Mr Banks was the organiser of the Board meetings. He could have circulated the memorandum to all Board members and included it on the agenda if he wished it to be discussed. He did not. Mr Banks also acknowledged he did not follow the matter up with Mr Annear and he provided no other evidence of having attempted to engage with the Board on the issues he says were of such concern to him. Under questioning about the Board's alleged rebuffing of his efforts to engage, Mr Banks accepted he was probably not proactive in seeking out opportunities to talk to the Board.

[45] Mr Banks made a further complaint in the investigation meeting that the Board did not engage in dialogue with him to facilitate his return to work after he commenced sick leave in August 2013. This claim can have no merit as he had not given his employer any reason to believe a facilitated return to work was necessary. At this time the only information the Board had about Mr Banks' health was that he was medically unfit for work and would be so indefinitely. It had no information about the nature of his illness.

[46] Mr Banks acknowledged he did not inform his employer about health issues he experienced in 2013 which led to his doctor advising him to take time out from work. The 30 May 2014 memorandum he says he emailed to Mr Annear raised no issues relating to his health. Mr Banks was under no obligation to inform HM of the reason for his sick leave but, having chosen not to share the information, he could not reasonably accuse it of failure to be more proactive in its response.

[47] Taking all of the above into account I find no evidence to support Mr Banks' claims that the Board failed to engage with him or that it rebuffed his efforts to engage or that it failed to build a productive relationship with him.

*Health and safety*

[48] The evidence before the Authority suggests the Board was not provided with reasons for Mr Banks' sick leave until it received his second medical certificate dated 18 September 2014. This referred to a deterioration in "*the situation affecting his health*" in the interval since the first medical certificate was issued. It said it was the "*conflict of ideas*" with the Board, and Mr Banks' "*feeling of anger at the poor progress to achieving any resolution of matters*", that had led to the need for an extension of the "*unfit to work*" certificate.

[49] A review of the correspondence between the parties provided in the bundles of evidence shows that counsel for Mr Banks referred for the first time to environmental issues in her letter to HM of 18 September 2014, five weeks after Mr Banks had left the workplace. In that letter counsel stated his absence was due to the "*unhealthy workplace*" which was having an impact on his well-being. No details were provided of what made the workplace unhealthy.

[50] The deterioration in Mr Banks' health had occurred in the time he had been absent from the workplace. His medical certificate referred to ideological differences and feelings of anger. It did not identify any environmental workplace issues that were capable of being addressed and fixed by HM alone. The clear inference to be drawn from the medical certificate and his lawyer's letter is that it was the unresolved matters referred to by Dr Parry that made the workplace unhealthy.

[51] Those matters are better described as an employment relationship problem than a health and safety issue. I am aware the parties attended mediation during the period of Mr Banks' sick leave over the personal grievances he had raised. Quite properly I have no knowledge of the content of the mediation but assume both parties attended it in good faith and tried to resolve the matters between them. In the circumstances I find no breach by HM of its health and safety obligations to Mr Banks.

***Was Mr Banks unjustifiably disadvantaged by HM's instigation of an investigation?***

[52] Mr Banks' statement of problem referred to the instigation of a disciplinary process based on a facetious allegation. This relates to HM's decision to investigate whether Mr Banks had dealt with his employer in good faith in receiving paid sick

leave in light of his lawyer's assertion he was not absent for reasons of a medical condition.

[53] The notion of a person being medically unfit for work yet not having a medical condition is confusing to the layperson. In the investigation meeting Dr Perry, who described Mr Banks as having a serious illness in August 2014, struggled to distinguish between the various terms used on medical certificates for employment purposes. In circumstances in which HM was confronted with apparently conflicting statements about Mr Banks' health I find it was reasonable for the employer to put Mr Banks on notice of its concerns. Its decision to investigate whether Mr Banks had taken paid sick leave in good faith was reasonable and I find Mr Banks did not suffer an unjustifiable disadvantage from that decision. Any disadvantage he may have suffered arose from the confusion he had, through his representative, inadvertently created.

***Was Mr Banks unjustifiably dismissed?***

[54] The investigation HM proposed to hold was for a twofold purpose: firstly, the issue referred to immediately above and, secondly, the matter of the employer's inability to hold open Mr Banks' role indefinitely. Mr Banks had by this time been away from the workplace for more than five weeks. His latest medical certificate gave no assurance of his ability to return within the foreseeable future. HM could not be expected to continue indefinitely without its full-time Operations Manager. Since Mr Banks' departure on sick leave, it was Mr Kingsbeer's evidence that other employees and volunteers had stepped up, but this was not a viable situation in the longer term.

[55] It was reasonable for HM to put Mr Banks on notice of this and of the possibility his employment could be terminated in accordance with the *Termination on Medical Grounds* provision of his employment agreement. The meeting it proposed was to be held at a neutral venue and Mr Banks had the option of attending with his lawyer and/or making written submissions. The matters for investigation were set out comprehensively in HM's four page communication to Mr Banks' representative advising its intention. Mr Banks was made aware that, if he did not attend, a decision would be made by his employer on the basis of the information it had as at the scheduled start time of the meeting.

[56] Mr Banks' decision not to attend the meeting, on the basis it would be inappropriate as he was unwell and on sick leave, was unfortunate. He was clear in his evidence that he was exasperated at what he perceived to be his employer's lack of engagement with him. However, faced with an opportunity to engage, he chose not to take it, citing his medical certificate and work-related stress. I find Mr Banks' refusal to meet his employer undermines his claims of frustration at HM's lack of engagement with him.

[57] That finding accords with his own medical practitioner's evidence. Dr Parry had referred in the medical certificate of 18 September to Mr Banks' growing sense of anger at the "*poor progress to achieving any resolution of matters*". He told the Authority Mr Banks needed to talk with his employer to try to resolve the matters at issue between them and said that, if he had been asked, he would have advised Mr Banks to attend the meeting, with appropriate support.

[58] Counsel for Mr Banks provided a written response to HM's invitation to the meeting which, according to Mr Kingsbeer's evidence, the Board took into account in its decision-making. The focus of counsel's letter was to take issue with HM's raising of "*unsubstantiated allegations of dishonesty*" over the medical certificate and to accuse HM of not acting in good faith towards Mr Banks. The letter did not address the other major issue of concern to the Board, that of its inability to hold open indefinitely the position of Operations Manager. This was regrettable given the Board had put Mr Banks clearly on notice of its concerns in this regard.

[59] HM relied on the following provision of its employment agreement with Mr Banks to terminate his employment:

*13.4 Termination on Medical Grounds:*

*In the event the Employee has been absent from work for 4 weeks which should represent an extended break from employment because of illness, the Employer shall be entitled to require the Employee to undergo a medical examination by a registered medical practitioner nominated by the Employer at the Employer's cost. In assessing the Employee's fitness for work, the Employer shall take into account any report provided as a result of that examination, and any other medical report provided by the Employee within a reasonable time-frame. If, in the reasonable opinion of the Employer, the Employee is incapable of the proper performance of their duties by reason of illness, the Employer may terminate this agreement by the provision of at least 4 weeks notice.*

[60] It has long been established that an employer is not obliged to hold an employee's position open indefinitely in the event of the employee's absence by reason of illness<sup>2</sup>. Both parties' interests must be balanced and a fair investigation must be held.<sup>3</sup> Dismissal is justifiable where the employer's reasonable needs cannot be met by an employee who is incapacitated and there is no prospect of the employee returning to the workplace within a reasonable time.<sup>4</sup>

[61] When the Board of HM made the decision to terminate Mr Banks' employment under clause 13.4 of his employment agreement he had been on sick leave for more than six weeks. His most recent medical certificate extended that period with a further review being scheduled for mid-October. The medical certificate referred to the worsening of his condition since the first medical certificate of 13 August. This, and Mr Banks' unwillingness to meet, provided no assurance to HM of his fitness to return to work in the foreseeable future.

[62] Had HM been a larger organisation with a greater number of employees who could be asked to fill the Operations Manager's role during Mr Banks' absence, it may not have been appropriate to terminate his employment after six weeks' absence. That was not the situation in this instance. I am obliged to consider all the circumstances which includes the size of the organisation and the evidence of the difficulties it faced without its key, and most senior, manager. Taking all relevant factors into account I find HM's decision to invoke the termination for medical incapacity clause of Mr Banks' employment agreement was one a fair and reasonable employer could reach in the circumstances at the time.

[63] I have considered Mr Banks' submission that HM should have given him the opportunity to comment on the outcome of its investigation before making any decision to dismiss him. He said he has been denied natural justice and should, for example, have had the opportunity to provide further medical evidence, and the opportunity to dissuade HM from its intended course of action.

[64] HM accepted in its submissions that in the normal course of events it would have provided Mr Banks with a preliminary decision for his consideration and submission before a final decision was made. It said it did not do so because of the

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<sup>2</sup> For example, *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124 at [127].

<sup>3</sup> *Dunn v Waitemata District Health Board* [2014] NZEmpC 201 at [25].

<sup>4</sup> *Barnett v Northern Region Trust Board of the Order of St John* [2003] 2 ERNZ 730 (EmpC) at [35].

advice it had received from Mr Banks' lawyer that it was not entitled to further medical information. Two days before the scheduled meeting his representative had notified HM it had all the information it was entitled to including "*full some medical certification*". HM's view was that it was apparent there would be no further input from Mr Banks and there was therefore no reason to provide a preliminary decision.

[65] I find in the particular circumstances HM was not obliged to give Mr Banks the opportunity to respond to comment on its decision before making it final. I have come to this conclusion after taking into account the correspondence from Mr Banks' representative and the fact that Mr Banks chose to make no submissions on the medical termination issue before the 26 September meeting.

*Was Mr Banks' dismissal unlawful in terms of HM's constitution?*

[66] Mr Banks raised an issue over the validity of Mr Kingsbeer's involvement in the dismissal decision. Submissions on his behalf were that the dismissal may have been ineffective because of constitutional issues relating to Mr Kingsbeer's status as a Board member. If Mr Kingsbeer were not a valid member of the Board the dismissal would be a nullity, leading to Mr Banks' employment remaining afoot.

[67] In considering that submission I have reviewed the provisions of the constitution and find they are somewhat ambiguous in relation to the tenure of Board members before they must stand down. Briefly, the constitution provides for members of the Board to stand down on a Board-nominated and rotational basis. The Board can co-opt members in certain circumstances.

[68] The submissions on this point may have had some merit if Mr Kingsbeer had been the sole decision maker. However, I accept his evidence that the decision to terminate Mr Banks' employment on medical grounds was taken by the whole board. Board members arrived at that decision after the Mr Banks' non-attendance at the scheduled 26 September meeting during a period in which they had access to all relevant documentation. HM's solicitor was instructed to convey the decision to Mr Banks, which she duly did.

[69] Counsel for Mr Banks submits there is no evidence of the in-committee discussions of Board members that led to Mr Banks' dismissal and the Authority should infer the decision to dismiss was not made in accordance with the requirements of HM's constitution and therefore a nullity. I reject that submission. The

constitution specifies a quorum to be four members of the Board but does not prescribe any decision-making process.

[70] Mr Kingsbeer gave evidence of five Board members, whom he named, being involved in the decision making process and unanimously reaching the decision to terminate Mr Banks' employment on medical grounds. I found Mr Kingsbeer to be a credible and honest witness who remained consistent under rigorous questioning and I accept his evidence. I find Mr Banks' dismissal was not in breach of HM's constitution which gives the Board the power to appoint and dismiss salaried staff.

### **Determination**

[71] I have considered, and dismissed, each of Mr Banks' claims. The issue of reinstatement therefore does not arise.

### **Costs**

[72] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority