

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 43
5358740

BETWEEN GARY HEPBURN
Applicant

AND HUHTAMAKI HENDERSON
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Tanya Kennedy, Counsel for the Applicant
Anthony Drake and Rosemary Childs, Counsel for the
Respondent

Investigation Meeting: 14 and 15 November 2011 at Wellington

Submissions Received: 13 January 2012 from the Applicant
15 November 2011 and 13 January 2012 from the
Respondent

Determination: 17 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Hepburn) alleges that he was unjustifiably dismissed from his employment by the respondent (Huhtamaki), that he was disadvantaged by unjustified actions of Huhtamaki, and that he suffered breaches of good faith as well. Those claims are all denied by Huhtamaki.

[2] Mr Hepburn sought interim reinstatement to his position pending the disposal of his substantive personal grievance and that application was, in the usual way, considered first by the Authority. By determination dated 18 November 2011, the Authority denied Mr Hepburn's application for interim reinstatement.

[3] Mr Hepburn was employed as the Regional Manager of Huhtamaki based at Wellington. Mr Hepburn was the only employee of Huhtamaki based in Wellington and he reported to Mr David Smeekes who was the Southern Regional Manager based at Christchurch. Mr Hepburn's role was sales focussed and he serviced the lower half of the North Island on behalf of Huhtamaki. His employment had continued without incident for six years.

[4] During the early winter of 2011, Mr Hepburn suffered health problems which were unexplained. In particular, there was an unexplained weight loss and an episode of cellulitis. The latter condition resulted in Mr Hepburn having a brief period in hospital.

[5] Mr Hepburn returned to duty on 1 August 2011 and while the evidence before the Authority is disputed about what happened next, there were conversations between Mr Hepburn and his manager, Mr Smeekes, about that ill health. The suggestion of a period of two weeks' sick leave to recover his health and resolve some issues of stress from home and the workplace, was canvassed.

[6] The proposed two weeks' sick leave was consented to by Huhtamaki. As part of the process of granting the leave, Mr Hepburn was spoken to by a senior manager of Huhtamaki, Mr Mosen, who had become aware of the issue because of a conversation he had had with Mr Smeekes. Mr Mosen spoken to Mr Hepburn because Huhtamaki wanted to understand more clearly what was causing the stress and what more Mr Hepburn could say about the nature of his illness. In the result, Huhtamaki simply confirmed to Mr Hepburn that he could use his accumulated sick leave to recover his health.

[7] Mr Hepburn took sick leave from 16 August 2011 to 30 August 2011. There is dispute between the parties as to what the various officers of Huhtamaki knew about Mr Hepburn's proposed usage of the period of sick leave. As a matter of fact, Mr Hepburn used the bulk of the time to travel overseas to Europe.

[8] While Mr Hepburn was away on sick leave, his work emails were accessed by Mr Smeekes who was seeking to ensure that there were no client contacts that needed to be followed up in Mr Hepburn's absence. That inquiry led to Mr Smeekes coming upon emails between Mr Hepburn and a young foreign woman. Huhtamaki say that the emails between Mr Hepburn and this young woman were romantic in nature and

they considered that the existence of these emails suggested that Mr Hepburn's real motive for obtaining time off was not in fact as he had described it at all.

[9] Huhtamaki decided to investigate and call Mr Hepburn to a meeting on 1 September 2011. Huhtamaki referred to the email exchanges noting the apparent disjunct between those emails and Mr Hepburn's request for sick leave. Mr Hepburn said that he had travelled first to London and then further afield to see friends and he indicated that he had stayed in hotels and "slept most of the time". Huhtamaki indicated at the meeting their preliminary view that they had lost all trust in Mr Hepburn and that the matter would be taken seriously and it seemed unlikely that the employment relationship could continue. Huhtamaki wrote to Mr Hepburn on 8 September 2011 setting out their principal concerns and indicating the likely outcome if those concerns were not satisfactorily addressed. Mr Hepburn was requested to attend a further meeting and this took place on 15 September 2011, at which Mr Hepburn was represented by counsel. At this meeting Mr Hepburn told Huhtamaki that the emails were merely flirting and he specifically denied requesting sick leave, saying that Huhtamaki (Mr Smeekes) had offered it to him. Mr Hepburn also contended that he had always told Mr Smeekes the truth about where he was going..

[10] By letter dated 19 September 2011, Huhtamaki set out their preliminary findings on the two concerns identified in the earlier letter of 8 September 2011 and also identified a fresh allegation of misleading Huhtamaki's employment investigation. An opportunity for Mr Hepburn to respond was provided and after consideration of those further submissions from Mr Hepburn, Huhtamaki wrote finally on 30 September 2011 confirming all three allegations were made out and proposing the penalty of instant dismissal. Mr Hepburn was given an opportunity to respond on penalty and on 10 October 2011 there was a video conference between the parties at which Mr Hepburn was summarily dismissed.

Issues

[11] The Authority needs to consider the following questions in reaching a determination in this matter:

- (a) Did Mr Hepburn ask for sick leave?
- (b) What knowledge did Huhtamaki have of Mr Hepburn's travel plans?

- (c) What is the significance of the emails?
- (d) Was the Huhtamaki investigation fair and balanced?
- (e) Was Mr Hepburn disadvantaged in his employment?
- (f) Was Mr Hepburn unjustifiably dismissed from his employment?

Did Mr Hepburn ask for sick leave?

[12] The Authority is satisfied on the evidence it heard that Mr Hepburn did ask for sick leave. His evidence on the point is that he did not ask for sick leave and simply had a conversation with his manager, Mr Smeekes in which he told the latter that he ... *wasn't completely right but will carry on for now* He says Mr Smeekes *offered to ask if there was any leave available* and Mr Hepburn said that if there was leave available *that would be great* but he was not sure if he would need it.

[13] Mr Hepburn claims that Mr Smeekes came back to him later that week, said that he had a lot of sick leave owing and that Huhtamaki was offering him two weeks leave off as paid sick leave. Mr Hepburn says that he subsequently rang Mr Smeekes to confirm that he would take up Huhtamaki's offer.

[14] But that recollection of events is completely contradicted by Mr Smeekes whose evidence the Authority prefers. That preference is based on the demeanour of the witnesses when giving their evidence, the lack of precision in Mr Hepburn's recollection of the actual dates on which these telephone discussions allegedly took place, particularly when contrasted with Mr Smeekes very clear recollections of the dates, and last but by no means least the inherent improbability of the proposed sick leave being initiated by Huhtamaki rather than by Mr Hepburn himself.

[15] Mr Smeekes says that he received a call from Mr Hepburn on 3 August 2011 (Mr Hepburn's third day back in the office after sick leave). Mr Smeekes says that Mr Hepburn told him ... *he was feeling extremely tired, stressed and needed a break*. Mr Hepburn said he was struggling following a recent illness, which he had just had a week off for, and had worked from home.

[16] Mr Smeekes is adamant that in this conversation on 3 August 2011, there was no offer of sick leave by him nor a request for it from Mr Hepburn. Indeed, Mr Smeekes is clear that the conversation was about clients and not about the taking of leave, save for the observations in the previous paragraph concerning Mr Hepburn's statements about his health.

[17] There was another conversation between the parties on 5 August 2011. Again it was initiated by Mr Hepburn ringing Mr Smeekes and again Mr Hepburn mentioned his health. In this conversation, Mr Smeekes says that Mr Hepburn again said that he was *tired, felt stressed and was struggling with the day-to-day duties*. Mr Smeekes says that Mr Hepburn asked what leave would be available. Mr Smeekes says that Mr Hepburn reported that he had spoken to friends and to his wife who agreed that he really needed to get away for a couple of weeks so that he could have a complete break. Mr Smeekes undertook to make inquiries.

[18] Mr Smeekes spoke to Mr Mosen, his superior, about the conversation he had had with Mr Hepburn and sought his advice. Mr Mosen gave no direct orders but said that he would talk personally to Mr Hepburn and make inquiries of human resources.

[19] Mr Mosen's evidence to the Authority confirmed receipt of the telephone call from Mr Smeekes on 5 August 2011 and detailed the steps that Mr Mosen then took in relation to the leave proposal. Mr Mosen spoke with the human resources manager, Ms Culpan, and his evidence (supported by the evidence from Ms Culpan to the Authority) is that during that conversation, the pair of them made the decision that if Mr Hepburn had adequate sick leave available, it was appropriate for him to take the time off as paid sick leave. Subsequently, after it had been established that Mr Hepburn did have adequate sick leave, there was a further conversation between Mr Mosen and Ms Culpan to confirm the proposal.

[20] Mr Mosen then rang Mr Hepburn (again on 8 August 2011) and spoke to Mr Hepburn at some length about his health. Mr Hepburn complains that this conversation was like the "Spanish Inquisition", but that allegation is rejected by Mr Mosen who says he had a duty to inquire into the circumstances giving rise to the request for a period of sick leave.

[21] It is clear to the Authority that at the end of the conversation with Mr Mosen, Mr Hepburn was offered two weeks' sick leave by Mr Mosen. This is in direct

contrast to the evidence given by Mr Hepburn which is first that he did not ask for sick leave and second that the sick leave was offered to him by Mr Smeekes.

[22] As the Authority has already noted, it thinks it inherently improbable that Huhtamaki would have come up with a proposal that Mr Hepburn take two weeks' sick leave and much prefers the evidence of the company's witnesses that the initiative for the proposal came from Mr Hepburn himself, despite his protestations to the contrary. Furthermore, Mr Hepburn's claim that the offer of sick leave was made by Mr Smeekes is also not accepted by the Authority; Mr Smeekes denies that he made such an offer and Mr Mosen is clear that the offer was made by him. There is no good reason why Huhtamaki would manufacture that evidence and it seems entirely improbable that Mr Smeekes made the offer of the sick leave which Mr Mosen says that he made. The better view, in the Authority's judgment, is that the Huhtamaki witnesses are absolutely correct in their recollection and that first Mr Hepburn requested a period of sick leave, second that that request was made to Mr Smeekes, thirdly that Mr Smeekes spoke to his manager Mr Mosen, fourthly that Mr Mosen spoke directly to Mr Hepburn and, having satisfied himself about Mr Hepburn's bona fides, granted him the requested leave.

[23] The Authority is satisfied then that the request for leave was made by Mr Hepburn and that the response to it in granting the leave was made, not by Mr Smeekes but by Mr Mosen.

What knowledge did Huhtamaki have of Mr Hepburn's travel plans?

[24] Mr Hepburn maintains that the various officers that he dealt with at Huhtamaki were aware of his intention to travel overseas during his period of sick leave and in particular aware of his decision to visit Europe. Those claims are dismissed in whole or in part by all of Huhtamaki's witnesses. For the purposes of this determination, it will be useful if each of Huhtamaki's witnesses is considered in turn.

[25] Mr Smeekes denies Mr Hepburn's claim that he was told Mr Hepburn planned to visit friends in Europe. At para.28 of Mr Hepburn's brief of evidence, he says that he spoke to Mr Smeekes on or about 5 August indicating that he would *take up the respondent's offer of the period of paid sick leave* and that he was *thinking of going*

to(Europe) to have a proper break. Mr Smeekes did not say anything about how I proposed to use the time or raise any concerns with the proposed overseas travel.

[26] But that evidence is contested by Mr Smeekes. First of all, Huhtamaki's evidence, which the Authority prefers, was that the decision to offer Mr Hepburn paid sick leave was not made on 5 August; the decision was not made until 8 August 2011 when Mr Mosen told Mr Hepburn that he could have two weeks' paid sick leave. Secondly, irrespective of the timing issue, Mr Smeekes is adamant that he was not told about Mr Hepburn's intention to visit Europe. Mr Smeekes said that when Mr Hepburn called him on 8 August 2011 (after Mr Hepburn had been told by Mr Mosen in an earlier conversation on that day that the leave was granted), Mr Hepburn had said he was planning a trip and leaving on around 13 August 2011 *to spend a couple of weeks with a friend in London*. Further on in his written brief of evidence, Mr Smeekes said:

At no time did Mr Hepburn tell me he was spending any time in (another European country). I note that Mr Hepburn says that is what he told me. Again I consider Mr Hepburn's claim is untrue. I am absolutely sure Mr Hepburn told me he was spending his time in London with a friend. I note he fervently denies that he said that to me. I consider Mr Hepburn's denial untruthful.

[27] In relation to the evidence of Mr Mosen, the position is similar. Mr Hepburn claims in his evidence (written brief at para.30) that he told Mr Mosen in their conversation of 8 August 2011 that he *may go overseas* but Mr Mosen is adamant there was no such message. He says at para.16 of his written brief:

At no time during his conversation with me did Mr Hepburn indicate he was going overseas.

[28] The only point at which the parties' views coincide on the evidence the Authority heard is in respect of the recollection of Mr Hepburn and Ms Culpan, the human resources manager. Mr Hepburn claims to have told Ms Culpan that he was thinking of going overseas during the paid sick leave and Ms Culpan remembers being told that and thinking it was unusual. Her evidence is that, at the time, she was looking after a sick child when Mr Hepburn spoke to her, and accordingly she did not challenge Mr Hepburn's statement.

[29] Finally in this sequence,, the Authority refers to the evidence of Mr Ronald Hill, who is Huhtamaki's sales and marketing manager. Mr Hill is the only one of Huhtamaki's senior managers who said on oath that he knew that Mr Hepburn was

going to a particular European country because he had spoken to Mr Hepburn about the use by Mr Hepburn of the Huhtamaki cellphone while Mr Hepburn was in Europe. But this evidence does not assist Mr Hepburn at all, because Mr Hill is adamant that he had no idea that Mr Hepburn was on paid sick leave from Huhtamaki. Indeed, Mr Hill's evidence proceeds on the mistaken belief that he had at the time, that Mr Hepburn was on annual leave.

[30] The Authority is satisfied then that Huhtamaki had an imperfect knowledge of Mr Hepburn's plans during the period of paid sick leave. Mr Hepburn's claim that Huhtamaki knew about his intention to go overseas during the sick leave simply cannot be accepted without more. It is true that both Mr Smeekes and Ms Culpan understood that Mr Hepburn was going to travel overseas, although Ms Culpan obviously thought that odd, although she did not say so. Mr Smeekes' evidence (which the Authority accepts) is that he was told by Mr Hepburn that the latter was going to stay with a friend in London.

[31] The short point is that, notwithstanding what Mr Hepburn conveyed to his employer, and the transmission of the various messages can only be described as imperfect, taking the most charitable view of the matter, the fact remained that he spent the bulk of the time he was overseas in a particular European country and there was no confirmed evidence that Huhtamaki ever understood he was going to that country.

[32] Mr Hepburn maintains that it matters not at all where he went; he says the fact is that he told the employer he was going overseas and nobody expressed a view in opposition to that. That observation is true as far as it goes, but the fact remains that Mr Hepburn was less than explicit about precisely what he intended doing during his two weeks' sick leave. The fact that he ended up in a particular European country, having not explicitly told his employer that that was his destination, is a relevant factor in the employer's subsequent assessment of his conduct. A contract of employment is a contract to be informed by the application of good faith from both parties and it seems quite extraordinary that a senior manager in a responsible position would imagine that it was appropriate to seek a significant period of paid sick leave and not disclose accurately to his employer his intentions on the disposition of that leave..

[33] Irrespective of the issues that were subsequently of concern to Huhtamaki about what Mr Hepburn was or was not doing overseas, it seems to the Authority that the very fact that he was less than frank with his employer about his intentions to travel overseas to a foreign jurisdiction during a period of paid sick leave, is itself a relevant factor in the good faith environment.

What is the significance of the emails?

[34] On 15 August 2011, Mr Smeekes initiated access to Mr Hepburn's emails while the latter was overseas. The purpose of this action was to ensure that there were no customer requests that needed attention while Mr Hepburn was on sick leave.

[35] Mr Smeekes certainly found some orders from customers in Mr Hepburn's inbox and dealt with those appropriately. But in addition, he also found email traffic between Mr Hepburn and two female foreign nationals. Both foreign nationals had corresponded with Mr Hepburn about his trip. With one of the foreign nationals, the email exchanges suggested that Mr Hepburn was travelling to her country to spend time with her. The emails were romantic in nature and suggested or sought an intimate relationship.

[36] Mr Smeekes raised the subject matter of these emails with Mr Mosen and Ms Culpan and it was agreed that on Mr Hepburn's return, the parties needed to meet to discuss matters further.

[37] Mr Smeekes' view, which he advances in his evidence to the Authority, was that Mr Hepburn may have misled him about the nature of his use of sick leave and had therefore been dishonest in the information that had been given. Mr Hepburn alleges that these statements demonstrate bias and predetermination by Mr Smeekes and similar statements by Ms Culpan evidence the same failings.

[38] But in the Authority's view, it is inevitable that the employer will at first blush take a jaundiced view of information which is greatly at variance from its expectations. After all, Huhtamaki had understood that Mr Hepburn was ill, was struggling with stress and various work and personal issues and needed time to recover his health so that he could continue to be a productive member of the team. In that connection, Huhtamaki understood that Mr Hepburn had sought a period of paid sick leave to give him that time to restore his health.

[39] Far from taking two weeks to nurse himself back to health, it seemed from this email exchange that Mr Hepburn had deliberately misled his employer about his intentions and was planning to visit with friends in their own country. The fact that the email traffic appeared to suggest a romantic/intimate relationship made things a whole lot worse. If Mr Hepburn was ill and needed time to recover his health, a fair and reasonable employer is, in the Authority's view, justified in raising a legitimate concern about the prospect that, far from being ill, Mr Hepburn was fit enough to contemplate a lengthy overseas trip and well enough to engage with a friend while there.

Was the Huhtamaki investigation fair and balanced?

[40] Mr Hepburn alleges that the company's officers had closed their minds to any possible explanation that he might offer about the circumstances of his trip to Europe because they formed a view about the nature of the relationship that Mr Hepburn was having with the foreign national and thus that Mr Hepburn had lied to Mr Smeekes and taken advantage of him.

[41] But the Authority has already made clear its view that Mr Hepburn has brought that conclusion on himself by failing to fulfil his good faith obligations to be open and communicative with his employer, and in particular to provide Huhtamaki with all relevant information about his circumstances. Had Mr Hepburn been explicit with Huhtamaki about his intentions, Huhtamaki could have made an informed decision about the paid sick leave proposal. As it was, whatever Mr Hepburn says now in his defence, the fact remains that, on the evidence before the Authority, Huhtamaki made its decision on the sick leave with an incomplete or erroneous set of particulars at its disposal. It follows that the Authority rejects the contention that Huhtamaki had prejudged the matter; rather, Huhtamaki has formed a provisional conclusion on the surprising evidence that it had come across, having previously been misled by Mr Hepburn as to the true nature of his situation.

[42] Nor is the Authority attracted by Mr Hepburn's contention that Huhtamaki failed to follow its own policies and procedures in relation to the investigation of misconduct. It is suggested by Mr Hepburn that he ought to have been provided with the allegation and given an opportunity to comment on it before the first disciplinary meeting. To find in favour of Mr Hepburn on this point, the Authority must accept Mr Hepburn's submission that the first meeting the parties had (on 1 September 2011)

was in truth a disciplinary meeting. Huhtamaki says the first meeting was an investigation meeting and not a disciplinary meeting.

[43] Mr Hepburn relies on the evidence of Ms Tracy Scott, who attended the 1 September meeting as Mr Hepburn's support person. Ms Scott maintained in her evidence that the meeting was disciplinary in character and that the employer's representatives at the meeting had formed a negative view of Mr Hepburn's behaviour before he even spoke.

[44] The Authority is not persuaded by this evidence. The employer is entitled to identify with as much particularity as it is able, the nature of its concerns. That is what happened at the first meeting on 1 September. It is true that Mr Hepburn asked for further and better particulars before the meeting, having simply had a letter from the company setting out its concerns in a general way. The company's position was that it had provided everything it had and it elaborated on the concerns that it had at the first meeting.

[45] As the Authority has already indicated, given the incomplete nature of the material which Mr Hepburn provided to his employer prior to taking sick leave, it was inevitable that the employer would have been transfixed by the email traffic which it came upon by accident and which was clearly at odds with the material which Mr Hepburn had previously provided.

[46] Ms Culpan, who presided at that first meeting for Huhtamaki, says that she expressed the views that she did on behalf of the company as a *preliminary view*, but Ms Scott does not remember that the *preliminary* tag was used at all. Either way, the Authority is not persuaded that there was anything improper in the arrangements made for the first meeting between the parties after Mr Hepburn returned from overseas. It was, in the Authority's view, absolutely inevitable that, given the inaccurate picture Mr Hepburn had given his employers about the nature of his intentions while on sick leave, they would respond in the way that they did when they inadvertently stumbled on information which seemed to run absolutely counter to the whole purpose of Mr Hepburn's request for paid sick leave.

[47] Next, Mr Hepburn complains that while Ms Culpan maintained in her written evidence to the Authority and in her advice to him during the disciplinary process, that she was the sole decision-maker, in fact Ms Culpan was not the sole decision

maker. Indeed, Mr Hepburn's counsel goes so far as to say that the decision to dismiss was made by the senior management team of Huhtamaki and not Ms Culpan. There is simply no evidence for this claim. What the evidence discloses is that Ms Culpan properly consulted with her senior management colleagues who were, after all, Mr Hepburn's line managers, before reaching any conclusion. She is perfectly entitled to do that, and indeed arguably would be failing in her responsibilities if she did not.

[48] After the initial meeting of 1 September 2011, Huhtamaki wrote to Mr Hepburn on 8 September 2011, during which communication it indicated its concerns were the alleged misrepresentation of the circumstances for requesting sick leave and the alleged failure to be open, honest and constructive. The meeting that took place in response on 15 September 2011 was taken up essentially with Mr Hepburn responding to the allegations made by the employer.

[49] At the 15 September 2011 meeting, Mr Hepburn denied being in an intimate or romantic relationship with the foreign national concerned and sought to explain the language in the relevant emails as being consistent with the other explanations of the relationship. In addition, counsel for Mr Hepburn who attended the 15 September disciplinary meeting took the opportunity to raise a large number of complaints about the nature of Huhtamaki's process. Despite those complaints, Huhtamaki continued with its investigations and with its disciplinary process. Those complaints have informed the approach taken by Mr Hepburn in his proceedings before the Authority. But as to the meeting of 15 September 2011, the Authority is not persuaded that the criticisms made by Mr Hepburn are valid. This was the first substantive opportunity for him to be heard in respect of various serious allegations made against him by the company and he took that opportunity. Huhtamaki seemed to have been a bit put off by counsel for Mr Hepburn's "*combative*" approach in the 15 September meeting but of course Mr Hepburn is entitled to instruct the counsel he chooses. From the Authority's standpoint, looking at the meeting as a dispassionate observer, the criticisms of it made at the time by counsel for Mr Hepburn have no validity. Certainly it is true that the meeting was not perfect in terms of its process, but that is true of all such meetings; there is ample judicial authority to support the principle that a council of perfection is not the appropriate standard to apply to a disciplinary meeting conducted by an employer, no matter how well resourced. For an example of a decision where minor procedural defects were found not to invalidate a dismissal,

see for instance *Air New Zealand Ltd v. Sutherland* [1993] 2 ERNZ 10 at 18 where Judge Colgan (as he then was) summarised the legal principles associated with minor procedural deficits in a disciplinary process.

[50] However, for the avoidance of doubt, it is appropriate that the various objections made by counsel for Mr Hepburn to Huhtamaki's process, as particularised in the meeting of 15 September 2011 and subsequently, are dealt with briefly in this determination.

[51] As the Authority has already noted, it is satisfied that at the commencement of the process, Mr Hepburn was given enough information to identify what the employer's concerns were, both in the letter of 29 August 2011 and in the subsequent meeting of 1 September. Then, on 8 September 2011, Huhtamaki wrote again to Mr Hepburn providing more detailed concerns and, as the Authority has just noted, the disciplinary meeting of 15 September 2011 was substantially taken up with Mr Hepburn's detailed responses to the allegations made against him. Because he had made some provisional responses at the initial meeting of the parties on 1 September 2011, when the allegations were first detailed face-to-face, the meeting of 15 September gave him a second and more fulsome opportunity to be heard on the allegations and to provide whatever mitigation he felt was appropriate. Nothing the Authority heard from Ms Scott (Mr Hepburn's support person in the first meeting on 1 September) supported Mr Hepburn's thesis that the 1 September meeting was in any way inappropriate by reaching conclusions in advance of evidence, or by being in any other way unfair or unjust to Mr Hepburn.

[52] After the first disciplinary meeting on 15 September 2011, Huhtamaki provided Mr Hepburn with a very detailed analysis of its provisional conclusions to that date by way of a letter dated 19 September 2011. This is a five page letter setting out with great particularity the working hypothesis that Huhtamaki had developed around the issues that had been put to Mr Hepburn as well as identifying a further allegation and putting that allegation to Mr Hepburn for response. Again, Mr Hepburn was given a proper opportunity to respond to that detailed analysis and he did so.

[53] Nor is the Authority attracted by Mr Hepburn's argument that he was somehow denied access to material that he was entitled to. The evidence before the Authority suggests that Mr Hepburn had his Privacy Act request complied with within

the statutory timeframe, that Huhtamaki complied appropriately with the requirements of s.4(1A)(c) including the analysis of that section by the Employment Court in *Wrigley v. Massey University* [2011] NZEmpC 37.

[54] The Authority is satisfied that the information provided by Huhtamaki was sufficient to “*give the employee an opportunity to comment before the decision is made ... and not limited by the extent of the information made available by the employer*”: *Wrigley*. Mr Hepburn made much of the contention that there were discussions between Ms Culpan (the decision-maker) and various members of the senior management team of Huhtamaki which he was somehow not privy to. The Authority is satisfied that Mr Hepburn was provided with all of the information that was reasonably sufficient for him to engage with his employer in respect of his disciplinary situation. When Mr Hepburn identified concerns about particular conversations which he claimed were material and which had not been disclosed to him, Huhtamaki conducted further inquiry and went to the trouble of providing written accounts from Mr Smeekes and Mr Mosen. As a further sign of the employer’s bona fides, when counsel for Mr Hepburn noted that Mr Hepburn had spoken with another senior manager at Huhtamaki (Mr Hill) who Ms Culpan was not aware had had any engagement with Mr Hepburn, Ms Culpan subsequently spoke with Mr Hill and Mr Hill’s recollection of the relevant conversation with Mr Hepburn was provided in written form to counsel for Mr Hepburn prior to any final determination of the issue.

[55] Despite counsel for Mr Hepburn persisting with her allegation that Mr Hepburn had been deprived of information because oral conversations between Ms Culpan and other senior managers were not relayed to Mr Hepburn in their entirety, the Authority is not persuaded that this argument has any force or effect. Ms Culpan was the decision-maker and the Authority is not persuaded that her conversations with other senior managers are directly relevant to Mr Hepburn’s defence of his position in the sense contemplated by *Wrigley*, that is to say, in regard to Mr Hepburn’s ability to participate appropriately in the process and to respond, insofar as he is able, to the employer’s allegations. All the conversations in question would do is simply reiterate the issues between the parties. The Authority is not satisfied that anything in those conversations was relevant to Mr Hepburn’s ability to participate in the process..

[56] Next, Ms Kennedy, for Mr Hepburn alleges bias and predetermination. In essence, she says that Huhtamaki conducted itself in such a way as to display that it had closed its mind to being persuaded of a different point of view. That view is hotly contested by Huhtamaki's counsel and the Authority has already commented on it to the extent of Ms Kennedy's criticism of the initial meeting on 1 September.

[57] The most important point that the Authority desires to emphasise in respect of the wider allegation around bias and predetermination that Ms Kennedy persisted with, is that the law allows an employer to make clear what conclusions, including preliminary conclusions, it has reached in relation to a disciplinary matter. Mr Hepburn's attacks seem to focus on the mistaken contention that, by expressing a view about disciplinary allegations, Huhtamaki was demonstrating that it had closed its mind to an alternative view. But as the Chief Judge made clear in *X v. Auckland District Health Board* [2007] ERNZ 66 at para.[153]:

An employer investigating serious allegations made against an employee cannot simply act as a proverbial sponge ... longstanding requirements of fair dealing require significant conclusions, including tentative ones, to be articulated to the employee.

[58] Next, there is Mr Hepburn's claim that, by failing to encourage Mr Hepburn to be represented by counsel at the earliest stage, Huhtamaki failed in its obligations to be a good and fair employer. Again, the Authority is not persuaded there is any reason for complaint. Mr Hepburn was always assisted in his engagement with Huhtamaki by a support person. The only time that he engaged with the company without his counsel involved was on the very first meeting where he took along Ms Scott whose evidence before the Authority disclosed a very capable woman who played a sensible role in that first meeting.

[59] Amongst other things Ms Scott encouraged Huhtamaki to conclude the meeting in order that Mr Hepburn could obtain legal advice once it became clear to Ms Scott that the matter was indeed serious. Huhtamaki readily agreed to that suggestion.

[60] It follows from the foregoing analysis that the Authority is not persuaded that, looked at in the round, there can be any viable criticism of the process adopted by Huhtamaki. Applying the law as stated in the *Air New Zealand* case, the Authority's obligation is to look at the "*fairness of the procedure to both parties and the overall fairness of the procedure*" and not try to identify specific procedural defects.

Although the Authority has, from a practical standpoint, looked at the various separate allegations made on Mr Hepburn's behalf, the Authority's considered view is that none stand up to serious scrutiny and, looked at in its totality, this investigation was a fair and balanced one.

Was Mr Hepburn disadvantaged in his employment?

[61] The Authority is not satisfied that Mr Hepburn was disadvantaged in his employment. This claim relates to Mr Hepburn's contention that he was unlawfully prevented from fulfilling part of his duties when a business trip to New Plymouth set down for 6 September 2011 was cancelled by Huhtamaki. In addition to the foregoing, Mr Hepburn (through counsel) raises no less than nine other grounds on which it is contended that Huhtamaki has been guilty of unjustified actions causing disadvantage. The other allegations just referred to are dealt with by the Authority in earlier sections of this determination; they refer to the process used by Huhtamaki in its investigation of the complaints about Mr Hepburn and the subsequent disciplinary proceeding.

[62] Allegations of disadvantage caused by unjustified action of necessity require evidence both of unjustified action and of a disadvantage being suffered as a consequence of that action. In the present case, it is difficult to see either element present. What Mr Hepburn was asked to do was to "*defer any non-essential travel*". This was a request by Huhtamaki and not an instruction. It is plain on the facts that the travel was non-essential; the reason for the travel was generated by one of Huhtamaki's distributors and they had asked to deal with Mr Hill on the matter rather than Mr Hepburn.

[63] But whatever the reason for the trip, it is difficult to see how an employer's request can be categorised as an unjustified action when, in the normal course, employers have a right to manage their affairs and to make lawful requests or directions to staff. In the Authority's opinion, there is nothing unlawful about Huhtamaki's request to Mr Hepburn.

[64] But even if that point is not accepted, there is no evidence that Mr Hepburn suffered any disadvantage as a consequence of the allegedly unjustified action of Huhtamaki in asking him not to undertake non-essential travel. He continued to receive his salary and continued in full employment with all the benefits of that

employment, including a busy work schedule at his home base so it is difficult to categorise Huhtamaki's request as creating any disadvantage to Mr Hepburn.

[65] For these reasons, the Authority rejects Mr Hepburn's claim in this regard also.

Was Mr Hepburn unjustifiably dismissed?

[66] The Authority's obligation is to apply the test for justification enunciated by the Parliament in the 2010 amendment to the Act. The burden of the amendment changes the test from, in shorthand terms, "would" to "could". In essence, the test requires the Authority to decide whether the employer's actions were what a fair and reasonable employer **could have done** in the circumstances at the time the dismissal occurred.

[67] It follows from the foregoing that, to use the words of His Honour Chief Judge Colgan in *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 160 at para.[23]:

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss ... the employee is one of those responses or outcomes, the dismissal ... must be found to be justified.

[68] Emphasising that point again, the Court, at para.[33] of the judgment, has this to say:

"Could have done" connotes several available possibilities whereas "would have done" indicates a single outcome.

[69] And again at para.[37] of the judgment, the following words appear:

The effect of new s.103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.

[70] In the present circumstances of this case, the Authority, after due reflection, concludes Huhtamaki's decision to dismiss Mr Hepburn is indeed one of the outcomes that a fair and reasonable employer could reach in responding to Mr Hepburn's behaviour.

[71] The law relating to the substitution by the tribunal of its own view for the view of the employer has not changed and it is not the role of the Authority to place itself in

the role of the employer. The obligation is to look objectively at what the employer did and how it did it, and reach a conclusion about whether that is one of the options that a fair and reasonable employer could have reached in all the circumstances of the case.

[72] As part of its determination of the matter, the Authority has already given detailed consideration to the procedure adopted by Huhtamaki in investigating its concerns about Mr Hepburn's conduct and then undertaking a disciplinary process thereafter. A wide number of complaints about that process was raised on Mr Hepburn's behalf and the Authority has already addressed the aspects of those matters that it wishes to. The conclusion reached from that inquiry is that the Authority is satisfied that, taken in the round, the process and procedure adopted by Huhtamaki was the process and procedure that a fair and reasonable employer could have adopted in the circumstances that it found itself in.

[73] The employer reached the conclusion at the end of that process that Mr Hepburn had been guilty of serious misconduct. In *Northern Distribution Union v. BP Oil New Zealand Ltd* [1992] 3 ERNZ at 487, the Court of Appeal held that conduct justifying summary dismissal was conduct that "*deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship*".

[74] The Authority considers that it was available to Huhtamaki to conclude that Mr Hepburn had misrepresented the circumstances in which he requested sick leave and failed to be open, honest and constructive and then misled Huhtamaki's investigation. The importance of the new test enunciated by the Parliament is that it is available to postulate that there might have been other conclusions reached by the notional standard of the objective, fair and reasonable employer, but because this conclusion **could** be reached in the present case, that is enough to satisfy the test. The Authority is satisfied that it was available to Huhtamaki to reach the conclusions it did. That there might have been other conclusions reached by the notional fair and reasonable employer is neither here nor there; Huhtamaki reached a conclusion which was available to it to reach.

[75] Whether Mr Hepburn went to an overseas jurisdiction in order to continue with a romantic relationship with a foreign national is not the issue; the issue is whether it was available to Huhtamaki to conclude that the reason Mr Hepburn

requested sick leave was not because he was sick at all but was for an entirely different purpose. There is ample judicial authority for the view that the use of sick leave is a matter requiring a significant level of trust between the parties. In *Griffith v. Sunbeam Corporation Ltd* WC13/06, the Court held that:

... the abuse of the right to paid sick leave will be serious because it involves obtaining payment by a false pretence or, at the least, attempting to do so.

[76] The conclusion reached by Huhtamaki in the instant case was that it had been misled by Mr Hepburn about the real reason for his request for leave. Not unnaturally, Huhtamaki had the mental image that Mr Hepburn, if sick, could be expected to be taking time off from the active pursuit of daily life to mend his health. That Huhtamaki was shocked to discover Mr Hepburn undertaking extensive overseas travel and being, on the finding of the Authority, less than explicit with his employer about what he was doing while overseas, is, in the Authority's judgment, hardly surprising.

[77] In summary then, the Authority is satisfied that Huhtamaki could have concluded that Mr Hepburn was not honest in relation to his request for sick leave. Not only is there the issue of the information that Mr Hepburn provided to Huhtamaki about his intentions while on sick leave, but there is also the issue of how to appropriately interpret the email traffic which Huhtamaki discovered after Mr Hepburn had left the jurisdiction. In the Authority's opinion, Huhtamaki was entitled to conclude that Mr Hepburn's explanations about those emails were unconvincing and that, coupled with the absence of frankness around what he was actually doing with his sick leave, conspires to create an image that is really antithetical to what a fair and reasonable employer could conclude was an appropriate use of sick leave.

[78] The second finding that Huhtamaki made against Mr Hepburn related to its conclusion that he had misled the investigation. Contrary to the submissions filed on Mr Hepburn's behalf, the Authority does not accept the view advanced therein that Mr Hepburn's evidence and credibility were to be preferred over the evidence and credibility of Huhtamaki. The Authority found Mr Hepburn evasive in some of his answers and certainly contradictory in others. Huhtamaki reached the same conclusion from a more detailed association with him. Mr Hepburn gave various answers to Huhtamaki about what he was doing while he was on sick leave and they

were inconsistent the one with the other. In those circumstances, the Authority finds that a fair and reasonable employer could have concluded that Mr Hepburn had tried to mislead his employer's investigation.

[79] Finally, Huhtamaki found Mr Hepburn failed to be open, honest and constructive in his relationship with the employer. Given the foregoing analysis in this determination, the Authority is satisfied that it was available to Huhtamaki to reach that conclusion and, for the avoidance of doubt, the Authority rejects absolutely Mr Hepburn's contention that Huhtamaki has somehow failed in its obligations of good faith.

Determination

[80] For reasons enunciated in the foregoing sections of this determination, the Authority is not persuaded that Mr Hepburn has any viable personal grievance and his claim therefore fails in its entirety.

Costs

[81] Costs are reserved.

James Crichton
Member of the Employment Relations Authority