

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 181
3004815

BETWEEN LAURA MORGAN
Applicant

A N D AUCKLAND DISTRICT
HEALTH BOARD
Respondent

Member of Authority: David Appleton

Representatives: Allan Halse, Advocate for Applicant
Phillipa Muir and Carl Blake, Co-Counsel for
Respondent

Investigation Meeting: 16 June 2017 at Auckland

Submissions Received: 16 & 22 June 2017 from Applicant
16 and 21 June from Respondent

Date of Determination: 26 June 2017

DETERMINATION OF THE AUTHORITY

- A. The respondent did not act in bad faith in declining to exercise its discretion to grant special paid leave under clause 14.2 of the individual employment agreement as at 21 February 2017.**
- B. However, the respondent has not considered exercising the discretion under clause 14.2 in respect of the period of the applicant's sick leave after her sick leave entitlement ran out, and the respondent is directed to consider its discretion in relation to this period in good faith.**
- C. The respondent has also not considered exercising the Chief Executive's discretion in respect of the period of the applicant's absence commencing when she ceased to be certificated as medically unfit to work, and the respondent is directed to**

consider its discretion in relation to this period in good faith.

D. Whilst the respondent did not communicate adequately with the applicant on two occasions, she has not raised personal grievances about those failings.

E. The parties are directed to participate in further mediation.

F. Costs are reserved.

Employment relationship problem

[1] Ms Morgan seeks an order from the Authority that the respondent grant special paid leave to her, including reinstating sick leave and annual leave she has taken since early February 2017, until such time that her workplace 'is deemed safe to return to'.

[2] In her statement of problem Ms Morgan alleges various breaches by the respondent and seeks additional orders, including the imposition of penalties, but it has been agreed by Mr Halse on behalf of Ms Morgan that the application in relation to special leave should be investigated first, and separately.

[3] The respondent opposes the order sought by Ms Morgan, asserting that the respondent is not required to grant paid special leave to Ms Morgan in the circumstances.

WorkSafe New Zealand investigation – effect on the Authority's process

[4] Ms Morgan submitted a formal complaint to WorkSafe New Zealand (WorkSafe) on or around 9 February 2017 alleging breaches of the Health and Safety at Work Act 2015 (HSWA) by the respondent. It is not clear exactly what stage has been reached within WorkSafe in regard to the complaint, but there is a possibility that it may formally investigate the complaint and that a prosecution may follow.

[5] For this reason, the respondent wishes to exercise its right under s 60 of the Evidence Act 2006 not to provide evidence in the current proceedings that relates to the substance of the complaint to WorkSafe in case such evidence could incriminate the respondent's witnesses and/or the respondent itself.

[6] Whilst this right of the respondent to exercise its privilege does not prevent the Authority from investigating Ms Morgan's application completely, it does currently prevent the Authority from investigating whether the respondent has breached, and continues to be in breach of s 110A of the Employment Relations Act 2000 (the Act)¹, as that investigation would require the Authority to assess whether Ms Morgan's refusal to work was based on reasonable grounds, which in turn would require an assessment of the substance of her complaint.

Account of the key events leading to the application

[7] Ms Morgan is employed as a forensic pathology technician working in the Auckland City mortuary. In or around December 2014 Ms Morgan made a complaint against a colleague of an assault and she was asked to remain away from the workplace until her complaint was investigated. An independent investigator was appointed to conduct an investigation into this complaint and in January 2015 Ms Morgan raised a personal grievance for unjustified disadvantage and breach of good faith. The preliminary finding of the investigation was that the complaint did not have substance and bullying and harassment was not established.

[8] Following mediation, Ms Morgan and the respondent came to an understanding with respect to Ms Morgan's return to work. Several months then passed during which Ms Morgan and the respondent were unable to agree how she could be assessed as being fit to return to the workplace. This arose out of concerns by the respondent that Ms Morgan was suffering from a condition or conditions that could impact upon her ability to return to her work.

[9] In order to return to work Ms Morgan also had to satisfy the respondent of her then current technical competency in meeting requirements for CPD, and to renew her practising certificate. Eventually a return to work plan was agreed between the parties.

[10] On 16 June 2016 Ms Morgan commenced part time work at the Hamilton mortuary, under supervision, and returned to work at the Auckland City mortuary on 27 September 2016. In total, according to the respondent, Ms Morgan was provided with paid discretionary leave between 11 November 2014 until 27 September 2016, amounting to 463 days.

¹ Adverse conduct for prohibited health and safety reasons

[11] In October 2016 Ms Morgan and her representative met with the respondent to raise some concerns about various workplace issues, and on 18 October her representative wrote to the respondent seeking a substantial sum as compensation for Ms Morgan in relation to her previous absence from the workplace on special leave. This claim was rejected by the respondent by way of a letter from its lawyers on 8 November 2016.

[12] On 8 November Ms Morgan emailed Mr Ian Costello, Director of Clinical Support Services Directorate and Services Clinical Director Pharmacy and Medicines Management, to complain that the colleague about whom she had previously complained had been placed in a position of authority over her. She stated that she had to remain on leave until the “issues and matters are addressed and resolved”. She asked that special leave should resume until her “return to work plan and details are managed in accordance with the agreements previously made and my working environment is safe again for me to return”.

[13] Mr Costello replied the same day denying that this colleague had been placed “in charge of” Ms Morgan, denying that the workplace was unsafe, and refusing to allow her to remain away from work on paid special leave. She was issued with an instruction to continue to work and to “participate, in good faith, in the return to work plan that [she has] agreed to”.

[14] On 11 December 2016 Ms Morgan wrote an email to the Chief Executive of the respondent, Ailsa Claire OBE, stating that, since her return to work, she had been further disadvantaged “in many ways throughout this time and to date” and setting out a number of alleged actions and omissions of the respondent that she said were obstacles and disadvantages she had experienced since returning to work. Ms Claire replied on 10 January 2017 asking her to raise her concerns with her line manager, and to meet with Mr Costello to discuss her personal grievance.

[15] On 18 January 2017 Ms Morgan requested a decrease in her hours from 40 hours per week to 32 hours per week. She was advised by her manager, Ross Hewitt, that a review of her health was necessary through the respondent’s own Occupational Health and Safety Department (OHSD) first. Ms Morgan completed a referral form on 2 February and was told the following day that the OHSD would be meeting to discuss her situation. Despite sending emails requesting further information on 15 and 21 February 2017, no further information was provided to her, and she says she

received no further replies from Mr Hewitt. According to Ms Morgan, she has not ever been contacted by the OHSD, and the last direct contact she has received from the respondent was on 3 February.

[16] During her evidence, Ms Morgan handed a copy email to the Authority which showed that a member of the OHSD had emailed Mr Hewitt and others at the respondent on 9 February 2017 recommending a reduction in Ms Morgan's hours, as she had requested, for a period of three months, together with other actions to support her. Ms Morgan says she only became incidentally aware of these recommendations two weeks before the Authority's investigation meeting via a doctor in the OHSD.

[17] Ms Morgan was absent sick from her workplace on 3 February 2017 and visited her general practitioner on 7 February and obtained a medical certificate. This signed her off until 20 February. She then obtained further medical certificates declaring her unfit for work until 6 March, and then 17 March, or until her work situation had "improved enough".

[18] On 11 February 2017 Mr Halse, on behalf of Ms Morgan, wrote to Ms Claire to advise her that a formal complaint about Ms Morgan being bullied at the Auckland City mortuary had been submitted to WorkSafe on 9 February. A copy of the complaint was attached to Mr Halse's letter. It consisted of 11 pages of alleged actions and omissions which Ms Morgan said amounted to bullying of her.

[19] On 16 February Mr Halse wrote to Ms Claire asking that Ms Morgan be placed on paid special leave until "such time as the WorkSafe New Zealand investigation has been completed and it is safe for her to return to work in the Auckland City mortuary". Mr Costello responded to Mr Halse on 21 February stating the following:

"The Chief Executive has referred to me Laura's request for special leave on pay. The DHB has determined that it is not appropriate for paid special leave to be provided in the circumstances. Laura has 31 hours of sick leave and 30.25 days (242 hours) annual leave remaining. Once the sick leave entitlement is exceeded, I can confirm that Laura is welcome to use her annual leave to cover any further sick leave."

[20] Mr Halse requested that Ms Claire reconsider this refusal to grant Ms Morgan special paid leave, but it is not evident whether or not Ms Claire or anyone else responded.

The issues

[21] Although there is only one principal issue to determine, it does break down into the following sub issues:

- a. What is the nature of the discretion that the respondent was asked to exercise?
- b. Has the respondent exercised that discretion in good faith?
- c. Has Ms Morgan suffered an unjustified disadvantage in her employment by the way that the respondent has dealt with her application for special paid leave?

[22] First, I shall set out the overarching governing legal principles.

Legal principles

[23] The Act provides, at s.4(1)(a) and (b), the following:

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence;

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;

[24] By virtue of s.100D of the Act, the respondent is subject to the “Code of Good Faith for Public Health Sector” (the Code). Section 100D of the Act provides as follows:

100D Code of good faith for public health sector

(1) Schedule 1B contains a code of good faith for the public health sector.

(2) The code—

- (a) applies subject to the other provisions of this Act and any other enactment; and
- (b) in particular, does not limit the application of the duty of good faith in section 4 in relation to the public health sector.
- (3) Compliance with the code does not, of itself, necessarily mean that the duty of good faith in section 4 has been complied with.
- (4) It is a breach of the duty of good faith in section 4 for a person to whom the code applies to fail to comply with the code.
- (5) This section does not prevent a code of good faith approved under section 35 or a code of employment practice approved under section 100A applying in relation to the public health sector.
- (6) However, in the case of any inconsistency, the code set out in Schedule 1B prevails over a code approved under section 35 or section 100A.

[25] The Code provides materially as follows:

2. Purpose

The purpose of this code is—

- (a) to promote productive employment relationships in the public health sector;
- (b) to require the parties to make or continue a commitment—
 - (i) to develop, maintain, and provide high quality public health services; and
 - (ii) to the safety of patients; and
 - (iii) to engage constructively and participate fully and effectively in all aspects of their employment relationships:

4. General requirements

In all aspects of their employment relationship, the parties must—

- (a) engage constructively; and
- (b) participate fully and effectively.
- (2) In their employment relationship, the parties must—
 - (a) behave openly and with courtesy and respect towards each other; and
 - (b) create and maintain open, effective, and clear lines of communication, including providing information in a timely manner; and
 - (c) recognise the role of health professionals as advocates for patients; and
 - (d) make time to meet as and when required—
 - (i) to address not only the industrial issues between the parties but also issues facing the public health sector, the employer, and the employees; and
 - (ii) to search for solutions that will result in productive employment relationships and the enhanced delivery of services; and
 - (iii) to ensure that any change is managed effectively; and
 - (e) recognise the time and resource constraints that may affect their ability to participate fully, and make allowances for those constraints.

(3) To enable employees and their unions to comply with subclause (1), employers must ensure that appropriate steps are taken in their workplaces to encourage, enable, and facilitate employee and union involvement.

(4) The parties must use their best endeavours to resolve, in a constructive manner, any differences between them.

(5) Subclauses (2) to (4) do not limit subclause (1).

What was the nature of the discretion that the respondent was asked to exercise?

[26] Ms Morgan is employed pursuant to an individual employment agreement. Her terms and conditions are incorporated in a Core Conditions Document for Medical Laboratory Scientists and Technicians dated 2012, which is based upon the current Multi Employer Collective Agreement for Medical Laboratory Workers. Clause 14 of the Core Conditions document sets out the terms and conditions relating to sick leave. At clause 14.1 these conditions grant employees five working days sick leave on ordinary pay, increasing by five additional days for every subsequent six months worked, up to a maximum entitlement of 260 working days.

[27] Clause 14.2 materially states as follows:

14.2 Discretionary powers of ADHB to grant leave in excess of the above-prescribed limits

14.2.1 Where a full time employee is incapacitated by sickness or injury arising out of and in the course of employment, full salary may be paid at the discretion of ADHB.

[28] The respondent's Leave Policy sets out the factors that managers have to consider when deciding whether to exercise a discretion to approve leave of any type. These factors, which are expressed in an exclusive list, are:

- a. The individual's agreement entitlements
- b. The individual's level of performance
- c. The individual's length of service
- d. Benefits/costs to the organisation (of the approval or denial of requested leave)
- e. The individual's level of need and obligation

- f. Other similar cases which have been approved/denied in the past (i.e. exercise a degree of consistency between employees without being restricted by precedence).

[29] It is the evidence of the respondent that, when Ms Morgan was first granted special paid leave in 2014, she was assessed as being very unwell. I understand that the discretion was therefore exercised to grant her this paid leave under clause 14.2 as the respondent was satisfied that Ms Morgan fulfilled the requirement of clause 14.2.1, of being incapacitated by sickness arising out of and in the course of employment.

[30] On 15 November 2015 Ms Morgan was declared fit to return to work according to the evidence of Elizabeth Jeffs, Director of Human Resources at the respondent. However, Ms Morgan continued to be granted special paid leave until September 2016, despite no longer being eligible under clause 14.2.

[31] This decision was, according to the respondent, because there were a number of hurdles that Ms Morgan had to surmount before the respondent felt confident she was capable of resuming her work. These included such matters as renewal of her practising certificate, ensuring her CDP points were current, and obtaining a medical evaluation. The delay was exacerbated, it appears, by additional factors which were not in the control of Ms Morgan.

[32] My understanding of the respondent's position is that a special discretion was granted by the Chief Executive to allow Ms Morgan to continue to receive her pay during her absence after she was declared fit for work because Ms Morgan wished to return, but was unable to because of conditions imposed by the respondent.

[33] Therefore, there appears to have been two discretions that have been exercised in favour of Ms Morgan hitherto; the discretion expressly contemplated under clause 14.2, and a special discretion, possibly not contemplated in any formal document, which resides in the Chief Executive once clause 14.2 ceased to apply.

[34] The current situation potentially engages, I believe, the same two forms of discretion, which I shall explain below. Ms Morgan's current absence divides into three periods, and by corollary, three categories in respect of the discretions available to the respondent:

- a. The period from 16 February 2017, when the request for special paid leave was first made, until her sick leave entitlement ran out (31 hours counting from 21 February 2017) (the First Period);
- b. the period when Ms Morgan's sick leave entitlement ran out until the date she ceased to be incapacitated (17 March, according to the respondent) (the Second Period); and
- c. The period from 17 March, to date, during which Ms Morgan is fit to work² (the Current Period).

[35] The First Period of Ms Morgan's absence was covered by her sick leave entitlement, and so she was not eligible for the discretion at clause 14.2 to be exercised. This is because clause 14.2 grants discretionary power to the respondent to grant leave in excess of the above-prescribed limited. As at the time of her request, and its refusal, Ms Morgan's leave period had not been in excess of her normal sick leave entitlement. The respondent's decision not to grant discretionary sick leave was not incorrectly reached in respect of this First Period therefore.

[36] The Second Period potentially engaged clause 14.2, as Ms Morgan was still signed off sick, and her sick leave had expired. The exercise of the discretion under clause 14.2 does not depend upon other leave, such as annual leave, being first exhausted. The respondent was therefore empowered to consider the factors set out in the Leave Policy, set out above.

[37] The Current Period falls outside of clause 14.2 as Ms Morgan is no longer incapacitated by sickness or injury. Any discretion would therefore have to be exercised by the Chief Executive on an exceptional basis.

Has the respondent exercised its discretion in good faith?

[38] The respondent held an internal meeting on 17 February 2017 to consider Ms Morgan's request for special paid leave. Mr Costello set out in his evidence to the Authority the factors that were considered by the respondent in declining the request. These factors needed to be considered against the factors that the respondent's Leave Policy required it to consider at that point.

² Ms Morgan confirmed in her evidence at the Authority's investigation meeting that she is now fit for work, and ready, willing and able to work but for her concerns about her safety.

[39] The factors cited by Mr Costello were as follows:

- a. The respondent was not clear what Ms Morgan's claimed sickness or injury was. This reason, presumably, falls under the Leave Policy factor of "the individual's level of need". However, this reason is not correct in my view, as a medical certificate dated 7 February had been issued (and, presumably, sent to the respondent, as no evidence has been given that it was not) which set out in detail that Ms Morgan was suffering from "work related stress' and the (presumably self-reported) reasons why. A further certificate dated 16 February repeated this reason for sickness.
- b. Ms Morgan still had accrued sick and annual leave. This relates to the factor of the individual's employment entitlements.
- c. Ms Morgan had had significant extended paid discretionary leave granted previously. This may relate to the factor of "other similar cases", although that factor seems to be more focussed on other employees, and consistency between them.
- d. Ms Morgan's request could be differentiated from her past request (with three differentiating facts cited). This again may relate to the factor of "other similar cases".
- e. The length of time that the WorkSafe investigation could take. This relates to the benefits/costs to the organisation.
- f. The pressure that other staff members in the mortuary would be under if paid leave were to be granted. This also relates to the benefits/costs to the organisation.
- g. The respondent had undertaken values workshops. It is not clear which Leave Policy factor this reason engages, and it is not clear to me how this is relevant.
- h. Ms Morgan appeared to be raising the same issues that they had already investigated. Again, it is not clear which Leave Policy factor

this reason engages, although it could engage a general factor of whether the request has “merit”.

[40] I pause here to note that this final reason concerns me. It seems to echo paragraph 3.2 of the statement in reply which gives reasons for the respondent declining the application for discretionary paid leave. These reasons are cited as follows:

- a. The respondent does not consider that the workplace or culture within the Auckland City Mortuary are, of themselves, giving rise to the current disharmony or conflicts that the applicant is complaining of;
- b. The respondent considers that the Auckland City Mortuary is a safe work environment for the applicant; and
- c. The respondent does not consider that it is in breach of its obligations under the HSWA.

[41] Whilst I suspect that these statements were drafted into the statement in reply to preserve the respondent’s position in the WorkSafe investigation, in case of a prosecution, from an employment perspective it appears that the respondent is predetermining the outcome of Ms Morgan’s complaint. Until it has investigated that complaint, either directly or in conjunction with WorkSafe, it is not in a position to reach these conclusions. Additionally, even if Ms Morgan did appear to be raising the same issues that the respondent had previously investigated, that could be because the issues had, in her view, re-emerged since her return to work.

[42] Returning to the core question of whether the respondent exercised its discretion to decline the grant of special paid leave in good faith, I shall first consider Mr Halse’s submission. It is a simple one, although I paraphrase it slightly. Namely, that the fact that WorkSafe has decided to investigate the complaint shows that it must regard the workplace as unsafe. Therefore, as no reasonable employer can expect an employee to attend an unsafe workplace, it must exercise its discretion to grant Ms Morgan paid leave as it is not her fault she cannot attend work.

[43] The fundamental flaw in this argument is that it cannot follow that the mere fact that WorkSafe has initiated an investigation (if it has) means that the workplace is unsafe. Indeed, Mr Halse sent to the Authority a document entitled “Mai Chen:

Mental health in workplace is new frontier for health and safety” dated 4 April 2016, which appears to be from an online publication of the Herald newspaper. In this it states that in “the past year alone” WorkSafe conducted over 780 investigations, 14,500 proactive assessments of workplaces, 106 prosecutions (91% of which were successful) and 3,300 serious harm notifications”. This shows that an investigation does not inevitably result in a prosecution, let alone a conviction.

[44] Turning to Ms Muir’s submissions, I accept her statement of the law in relation to the exercise of a discretion by an employer. This is that:

In exercising a discretion, an employer is ‘...required to act in good faith...and not act arbitrarily, capriciously, dishonestly, covertly, or with ulterior motive’.³

[45] Trite though it may be to state it, a discretion is fundamentally different to a contractual or statutory obligation. There is no positive obligation upon an employer to exercise a discretion, so long as it acts in good faith when considering it and declining to do so.

[46] Turning to the respondent’s reasons for declining to grant paid special leave in February 2017, I have already found that it was correct to reject the application at that point, as Ms Morgan still had sick leave entitlements remaining, so that the respondent’s power to exercise the clause 14.2 discretion had not yet been engaged.

[47] However, the respondent knows that Ms Morgan wishes the discretion to be exercised in her favour in respect the Second Period and the Current Period⁴. The respondent has not carried out any further consideration of her request since her request was rejected on 21 February. The respondent purports to have exercised its discretion properly and in good faith in respect of Ms Morgan’s entire period of absence but, as at 21 February when it reached its decision, it could only have exercised its discretion knowing what it knew at that date; namely, that Ms Morgan still had sick leave entitlements owing.

[48] The respondent cannot in good faith rely on the 21 February reasons in continuing to reject Ms Morgan’s request for special paid leave given that her

³ Citing *Dorset v Chemcolour Industries (NZ) Ltd*, Employment Relations Authority, 8 April 2004, AA117/04.

⁴ Ms Morgan has not sought to divide up her continuous period of absence in the way that I have in this determination, but she seeks special paid leave in respect for the entire period of absence.

circumstances have changed. I believe therefore that the respondent owes a duty of good faith to Ms Morgan under s 4 of the Act, and under the Code, to undertake the 21 February exercise again, this time expressly in respect of the Second and Current Periods.

[49] The discretion in respect of the Second Period is the one contemplated under clause 14.2. The discretion in relation to the Current Period is the one that I believe resides in the Chief Executive, which was exercised previously. In undertaking consideration of exercising these two categories of discretion, the respondent owes a duty of good faith to Ms Morgan to do so correctly, taking into account all relevant factors, as they apply respectively to the Second and Current Periods.

[50] In summary, in light of the general duty of good faith, and the obligations upon the respondent as set out in the Code, I believe that it is incumbent upon the respondent to give consideration to exercising the discretion under clause 14.2 in respect of the Second Period, and the Chief Executive's special discretion in respect of the Current Period, taking into account all relevant circumstances that prevailed, and continue to prevail during those respective periods.

[51] The Authority has no jurisdiction to direct what the outcome of the consideration of exercising those discretions is to be, save that the consideration must be undertaken in good faith. However, I consider that the following factors, without limitation, are relevant as part of the exercise:

- a. The factors set out in the Leave Policy;
- b. The fact that the reason for Ms Morgan being certificated sick during the First and Second periods was known, or should reasonably have been known to the respondent;
- c. The fact that the considerable amount of discretionary paid leave provided previously was due to the respondent not allowing Ms Morgan to return until certain requirements had been met;
- d. The fact that Ms Morgan has been away from the workplace without pay since her annual leave entitlement was used up;

- e. The fact that, under clause 14.2, there is no expressed right to take into account annual leave, or other leave entitlements save for sick leave entitlements;
- f. The fact that, at present, unless circumstances change, there is no known end point in sight as to when Ms Morgan will be likely to return to paid work with the respondent;
- g. The fact that I find that Ms Morgan genuinely believes that she would not be safe if she were to return to her workplace at present (although I cannot make any finding one way or the other as to whether those genuine beliefs are well founded);
- h. The fact that the respondent does not know whether Ms Morgan's concerns are well founded or not, not having yet investigated them; and
- i. The fact that the respondent described itself, by way of Ms Jeff's evidence, as "stuck" because of the complaint to WorkSafe and the risk of self-incrimination. Therefore, the respondent cannot carry out an internal investigation into Ms Morgan's concerns, and cannot, therefore, take steps to resolve them.

[52] No doubt there will be other relevant factors, some countervailing, some complementary to the above which the respondent will be obliged to take into account.

[53] In addition to considering the exercise of its discretion to grant special paid leave in respect of the Second and Current periods, I believe that the respondent's duties require it to not only communicate the outcome of that consideration to Ms Morgan promptly, but to also give detailed reasons for the outcome, whether positive or negative, including the factors considered and how they influenced the decision. This was not done after the internal meeting on 17 February I believe.

[54] I would add that, whilst the difficult situation that the parties are in, where the respondent cannot carry out an internal investigation to progress matters because of self-incrimination fears, arises out of Ms Morgan's decision to complain to WorkSafe, that decision was one she was legally entitled to take.

[55] I also add that I accept the respondent's submissions that it has a right to protect itself and its staff against self-incrimination by not undertaking the internal investigation given that there is likely to be a complete overlap between the subject matter of that investigation and that of WorkSafe.

[56] Finally, the respondent maintains that no formal complaint has been made to the respondent by Ms Morgan in any event. This is strongly contested by Mr Halse on behalf of Ms Morgan, and there is certainly evidence to suggest that Ms Morgan and Mr Halse have made known their concerns about various issues since she returned to work. Whether such concerns were made in a formal way, or not, if the self-incrimination issue were not an impediment to an internal investigation, the raising of her concerns, together with the 11 page complaint to WorkSafe that was copied to the respondent, were undoubtedly enough to trigger its duty to investigate the matters complained of.

[57] However, I am satisfied that the privilege against self-incrimination imposes a practical impediment upon the respondent, preventing the respondent from internally investigating the complaints in a manner that would otherwise be required.

Has Ms Morgan suffered an unjustified disadvantage in her employment by the way that the respondent has dealt with her application for special paid leave?

[58] Ms Morgan did not expressly raise an application in her statement of problem for a finding that she was subjected to unjustified disadvantage. However, she does seek compensation under s 123(1)(c)(i) of the Act. Such compensation is only available where the Authority finds that an employee has a personal grievance. The Authority signalled in its notice of direction dated 29 May 2017 that it inferred from this that Ms Morgan had raised a personal grievance in respect of the respondent's refusal to grant special paid leave. The respondent has not objected to that inference being drawn.

[59] I have found that the respondent did not act in bad faith on 21 February in declining to exercise its discretion under clause 14.2, as that clause had not yet been engaged. Accordingly, no unjustified disadvantage can flow from that decision.

[60] In respect of the respondent's discretion under clause 14.2 in respect of the Second Period, and the Chief Executive's discretion that I infer exists in respect of the Current Period, I am directing that the respondent consider in good faith whether to

grant these discretions in favour of Ms Morgan. Should the respondent have undertaken consideration of these discretions before now? Whilst the respondent has continued to rely upon its 21 February reasons for not exercising its discretions even though Ms Morgan's circumstances changed (taking her into the Second, and then the Current periods) Ms Morgan did not put a new request in to the respondent expressly referring to her changed circumstances and asking it to consider granting paid leave in light of them.

[61] In addition, whilst Ms Morgan's continued absence without pay is causing her disadvantage, I cannot be satisfied at this stage that the reasons for not granting the discretions are unjustified until the respondent has carried out the consideration exercise, which it has not yet done. In conclusion, no unjustified disadvantage can be found at this stage.

[62] I will note that I believe that the respondent may not have acted in accordance with its obligations of good faith in relation to the following:

- a. Its failure to communicate with Ms Morgan or her representative relating to her request for flexible working in early February 2017;
- b. Its failure to advise Ms Morgan as to the reasons for it declining to grant her special paid leave when it communicated its decision on 21 February 2017.

[63] However, I do not believe that a personal grievance has been raised by Ms Morgan in relation to these two possible lapses. If it has been raised, it is certainly not clear to me what disadvantage she says she has suffered as a result. I therefore cannot make any findings of unjustified disadvantage because I have heard no evidence about the disadvantage suffered. It would not be appropriate for me to guess them on her behalf.

Determination

[64] I order the respondent to undertake formal consideration of exercising its discretion under clause 14.2 in respect of the Second Period, and the Chief Executive's discretion in respect of the Current Period in relation to Ms Morgan's request for special paid leave, such consideration to take into account all relevant

factors that could reasonably apply in light of all relevant information known to the respondent at the time.

[65] The respondent is to ensure that the consideration is carried out in good faith.

[66] This consideration is to be undertaken as soon as is reasonably practicable.

[67] Ms Morgan is to co-operate in good faith with the respondent in answering any questions it may reasonably have as soon as she reasonably can to assist the respondent in its consideration.

[68] The respondent's decision is to be communicated to Ms Morgan in writing, and must set out all the factors that were taken into account and how they each weighed in the overall decision in respect of consideration of the Second Period and, separately, the Current Period.

[69] If the request for special paid leave is granted to Ms Morgan in respect of either period, it is to promptly reinstate to her annual leave balance such annual leave that she utilised during the period for which such special paid leave is granted.

[70] If the request for special paid leave is granted to Ms Morgan in respect of the Current Period, the decision must make clear the duration for which it is to be granted, the nature of the remuneration to be received during that period and any conditions which must prevail for the paid leave to continue.

[71] If the request for special paid leave is granted to Ms Morgan in respect of the Current Period, the decision must also state what reasonable notice the respondent will give to Ms Morgan if it determines that material circumstances have changed and that any paid leave is to cease.

[72] If the decision is to decline paid leave to Ms Morgan in respect of the Current Period, it must indicate any factors that are known to the respondent that may persuade it to grant special paid leave to Ms Morgan in the future, if she continues to be away from the workplace.

[73] The Authority will review the progress of the parties' compliance with these directions after 28 days from the date of this determination have elapsed. A timetable for determining the remaining aspects of Ms Morgan's claim as set out in her

statement of problem, which have not been addressed in this determination by consent, will be discussed with the parties after that review of progress.

[74] The Authority is aware that Ms Morgan and the Authority have attempted to resolve their differences in mediation. However, I believe that further mediation may assist the parties to find a pragmatic and practical way out of the current impasse in which they find themselves. I therefore direct them to attend mediation in good faith.

Costs

[75] Costs are reserved. A determination on costs shall be made after the directions in this determination have been complied with, subject to submissions from the parties.

David Appleton
Member of the Employment Relations Authority