



[4] In January 2011, Ms Roberts made a formal complaint against a colleague at Connect. That formal complaint was investigated by the Board and found to be unsubstantiated. It is common ground that during March 2011, Ms Roberts took two long periods of sick leave, the effect of which was that she was absent from the workplace for the bulk of March.

[5] At a 30 March 2011 meeting, Ms Roberts indicated her wish that, while she wanted to return to duty, she was not willing to return to her position at Connect. The Board undertook to consider Ms Roberts' request for redeployment, but indicated that a return to work plan would need to be developed and that Ms Roberts would need to provide a medical clearance before returning to duty.

[6] On 4 April 2011, the Board advised Ms Roberts that it could not redeploy her and that it intended that she return to her position at Connect. A meeting on 7 April 2011 was set up for the purposes of formulating a return to work plan and Ms Roberts returned to duty at Connect on 11 April 2011. As part of the process, Ms Roberts had provided a medical certificate certifying her fit to return to duty and on 28 April 2011, Ms Roberts attended a physician appointed by the Board who subsequently certified Ms Roberts fit to return to normal duties, including working a night shift which had been precluded in her 11 April return to duty.

[7] Despite those various attendances and engagements between the parties apparently resolving matters, Ms Roberts, who had, effective 3 April 2011, exhausted her paid sick leave entitlement, took a period of unplanned annual leave followed by various periods of sick leave. Again, the practical effect of these absences in a cumulative sense was to mean that Ms Roberts was effectively away from the workplace for around another month.

[8] Ms Roberts was asked by the Board to attend a meeting on 8 June 2011 to discuss matters. There was some disputation between the parties as to what was signalled by the Board as the purpose of this meeting. The Authority is satisfied that, having considered all of the documentation available, the Board signalled (albeit in different pieces of correspondence) that it wished to talk to Ms Roberts about the inappropriate process of her leave taking and a return to work programme.

[9] The meeting of 8 June 2011 was contentious in a number of respects. Both parties regarded the meeting as significant but each relied on different aspects of the meeting and different conclusions about what the outcome of the meeting was.

[10] It seems common ground that the issue of Ms Roberts' taking leave without authority was dealt with expeditiously and without disputation. Ms Roberts told the Authority at the investigation meeting that she accepted that she had not followed the Board's process in taking some of the periods of leave that she actually took.

[11] It seems that after that matter had been disposed of, Ms Roberts sought leave to read a statement in which, amongst other things, she was critical of two of the Board's executives, both of whom gave evidence to the Authority at the investigation meeting. Both of those individuals expressed surprise at Ms Roberts' criticisms of them, and claim that it was agreed that Ms Roberts' counsel (Mr Scott) would provide further and better particulars on the allegations so that the Board could respond appropriately. Furthermore, Mr Scott indicated on his client's behalf that it would not be appropriate for Ms Roberts to continue working at Connect in the light of her statements and the views expressed therein. That being the position, it seems that the Board agreed to investigate whether Ms Roberts could perform other duties in the meantime, but that a medical certificate would be required before she could return to what the Board referred to as her "*substantive*" position at Connect. The Authority is satisfied from the evidence it heard that the medical certificate was **not** required by the Board for the purposes of Ms Roberts' returning to any duty, only for the purposes of her returning to duty at Connect. This is the stated position in the brief of evidence filed by Mr Tousain, Ms Roberts' manager, and it was reiterated orally by Mr Tousain and also by the other Board witnesses.

[12] After that meeting, it is common ground that Mr Scott did not provide any further material to the Board; equally, it is accepted by the Board that, although some steps were taken to establish if there was alternative work available, there was in fact no immediate communication with Ms Roberts at all.

[13] In fact, Ms Roberts had to have her counsel take relatively extraordinary steps in order to get the Board to engage and in the result, Ms Roberts was eventually offered continued employment by the Board in another area altogether. She commenced those new duties on 15 August 2011 without being required to furnish a medical certificate and despite one of the Board's own witnesses, Mr Irwin, indicating

at the Authority's investigation meeting that the work that Ms Roberts was performing was always available "24/7". Of course, if Mr Irwin is right about that, then presumably the work would have been available on and from 8 June 2011, the date at which Ms Roberts went off pay.

### **Issues**

[14] The only issue in the present case is whether, on the evidence heard by the Authority, Ms Roberts has been disadvantaged by an unjustified action of the Board.

[15] It is convenient for the Authority to consider first the question of whether there has been a disadvantage to Ms Roberts and secondly the question of whether that disadvantage, if any, has been occasioned by an unjustified action of the Board.

### **Has Ms Roberts suffered disadvantage?**

[16] This question can be dealt with shortly. Ms Roberts has been off pay from 8 June 2011 down to 15 August 2011. Ms Roberts' evidence to the Authority is clear that the absence of money over that period, as well as causing her great distress, meant that she was unable to pay her normal living expenses, was fearful of having to give up her home and her dogs of which she was plainly fond.

[17] The Authority has no hesitation in concluding that Ms Roberts has suffered disadvantage by being off pay for the period in question.

### **Is the disadvantage caused by an unjustified action?**

[18] The Authority is satisfied that the disadvantage is caused by unjustified actions of the Board. It seems plain on the evidence the Authority heard that the vacancy that Ms Roberts filled on 15 August 2011 would have been available on 8 June 2011 (certainly according to Mr Irwin, one of the Board's witnesses at the Authority's investigation meeting) and, given that Ms Roberts commenced her re-employment on 15 August 2011 without supplying the Board with a medical certificate of a fitness to serve, it would seem axiomatic that the medical certificate which the Board placed so much reliance on was not in fact a prerequisite to re-employment at all.

[19] Indeed, the Board's own witnesses at the investigation meeting accepted that the medical certificate was only required for Ms Roberts to return to her "*substantive*" position, that is her position at Connect. But, with effect from the

meeting of 8 June 2011, even on the Board's evidence, it accepted an obligation to see if alternative employment could be found for Ms Roberts as an interim measure. The Authority has no difficulty in concluding that the Board took far too long to find these alternative duties and to notify Ms Roberts of their existence, particularly when Mr Irwin's evidence (unchallenged by his colleagues) was that the work was always available. On that basis, as the Authority has already noted, there would seem to be no difficulty at all about Ms Roberts commencing in that new role on and from 8 June 2011 rather than having to wait for around two months without pay in order for the Board to identify a role which it seems had always been there.

[20] The Authority is satisfied that that is not a process that a fair and just employer could undertake. If it had genuinely taken the Board two months to find an alternative role, and the Board had kept Ms Roberts in touch with what was going on, that would be a different matter altogether. But this was a situation where, on the Board's own evidence, the work was always available yet it took two months or thereabouts for the decision to be taken and Ms Roberts to be appraised of it. A fair and reasonable employer could not accept a two month delay in identifying a role for an affected employee (and a continuing employee) which had been there all along.

[21] The Authority is satisfied that the unjustified actions of the Board in this regard are both in the Board's failure to communicate adequately with Ms Roberts and in the Board's failure to identify this position (when it was known of all the time) within an acceptable timeframe, bearing in mind that Ms Roberts was off pay and known to be off pay by Board officers who were allegedly responsible for her circumstances. Ironically, the Authority's conclusion that it was unfair and unreasonable of the Board to have Ms Roberts waiting around off pay for two months is a conclusion shared by one of the Board's own witnesses, Mr Peter Astwood, human resource consultant who, at one time, was responsible for managing Ms Roberts' interface with the Board. He quite properly accepted, in answer to a question from the Authority, that the delay was unreasonable.

### **Determination**

[22] The Authority is satisfied that Ms Roberts has made out her case that she has been unjustifiably disadvantaged and accordingly she has suffered a personal grievance on that ground. In reaching the conclusion that the personal grievance is made out, the Authority is satisfied that a fair and reasonable employer could not have

taken two months to find a temporary role for Ms Roberts when it knew or ought to have known that he was off pay and when the role was available “24/7” according to one of the Board’s own witnesses before the Authority, Mr Irwin.

[23] The Authority is required by s.124 of the statute to consider whether the actions of Ms Roberts have contributed to the circumstances giving rise to her personal grievance.

[24] The Board says that Ms Roberts has been difficult to manage and by implication contends that she has been unreasonable in her refusal to return to her substantive position at Connect. Even if the Authority were, for the sake of argument, to accept that all of those contentions are made out (and the Authority is in no position to make such an assessment having not heard adequate testimony on the point), the signal fact remains that the Board, at the meeting on 8 June 2011, by common consent, undertook to look for an alternative temporary role for Ms Roberts. All of the evidence the Authority heard confirms that that was one of the outcomes of the 8 June meeting, as do the notes variously taken by Board officers of the same meeting.

[25] The Board also draws the Authority’s attention to the apparent failure of Mr Scott, counsel for Ms Roberts, to provide the Board with further and better particulars about the allegations Ms Roberts made in her statement read to the 8 June meeting. It is true that Mr Scott has not provided that information; but nothing turns on the failure to provide that material. It perhaps puts it too strongly to say that the Board used the failure to provide that material as an excuse for failing to act; it would be more accurate to simply conclude that the provision of that material was irrelevant to the Board’s obligation to do what it said it was going to do, namely to seek to find an alternative position for Ms Roberts.

[26] The Authority is satisfied then that Ms Roberts has in no way contributed to the events leading up to her personal grievance, at least in a causative sense. It follows that the Authority’s conclusion is that no contribution need be taken into account.

[27] That brings the Authority to consider the question of remedies. Compensation, costs, interest, and unpaid wages are sought. The Authority is satisfied that this is a case where compensation ought to be payable. The evidence of

Ms Roberts' hurt and distress at being unable to meet her obligations was palpable; accordingly, the Authority has no hesitation in determining that compensation ought to be payable in the instant case. Further, the factual matrix makes it clear that Ms Roberts was unjustly deprived of income over the period from 8 June 2011 down to 15 August 2011. She is entitled to be paid the wages that she would otherwise have earned over that period. In addition, the Authority considers this is a case where interest on the unpaid sums ought to apply. Costs will be reserved to enable the parties to make further submissions once this determination issues.

[28] To remedy Ms Roberts' personal grievance, the Board is to pay to her the following sum or sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$4,000;
- (b) The wages that she would otherwise have earned in the period from 8 June 2011 down to 15 August 2011, such sum to be calculated by the Board and submitted to counsel for Ms Roberts for verification and approval before paying out;
- (c) Interest at the rate of 4.25% per annum on the outstanding weekly amounts calculated from the date when such payment ought to have been made in the normal course of events down to the date of this determination;

### **Costs**

[29] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority