ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION AT PARAGRAPH
[2] OF THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 20/09
5117674

	BETWEEN	FIONA ROSS-TAYLOR Applicant
	AND	CHIEF OF DEFENCE FORCE Respondent

Member of Authority:	Leon Robinson
Representatives:	Penny Swarbrick for Applicant Joanna Holden and Nigel Lucie-Smith for Respondent
Investigation Meeting:	1 & 2 July 2008
Submissions Received:	6 August 2008 20 August 2008 15 September 2008
Further evidence:	16 September 2008
Determination:	21 January 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Dr Fiona Ross-Taylor ("Dr Ross-Taylor") had worked as a medical officer at the Chief of Defence Force's Navy Hospital in Devonport ("the Navy Hospital") for nearly twelve years when her engagement was terminated in December 2007. Dr Ross-Taylor says she was unjustifiably dismissed.

[2] **The Authority orders that evidence and information gathered in this investigation and as may be disclosed in the pleadings lodged relating to the death of a diver in or about November 2007, may not be published. The Authority's file may not be inspected by any person without order of the Authority**.

[3] Dr Ross-Taylor and the Chief of Defence Force had entered into a written independent contractor agreement dated 2 May 2007 ("the ICA"). The ICA was the last in a succession of similar independent contractor agreements in 1998, 2003 and 2005. The ICA at schedule three specified the term of engagement as two years. It further specified this as to the nature of the relationship with Dr Ross-Taylor (the Provider):-

> *2 Independent Contractor*
> *2.1 The relationship between Navy Hospital and the Provider is and shall be for all purposes an independent contractor relationship and neither this agreement nor anything contained herein or implied shall constitute any other relationship.*
>
> *2.2 For the avoidance of doubt the parties acknowledge and agree that this agreement shall not operate as, or constitute, an offer or contract of employment either during its currency or on termination for whatever reason.*

[4] Dr Ross-Taylor claims the termination of her engagement amounts to an unjustifiable dismissal but the Chief of Defence Force denies this because he says Dr Ross-Taylor was an independent contractor and not an employee.

[5] The parties were unable to resolve the problem between them by the use of mediation.

The issues

[6] These issues arise for determination:-

(i) was Dr Ross-Taylor an employee?; and if she was

(ii) was the termination of Dr Ross-Taylor's engagement justifiable?; and if it was not

(iii) what resolution is appropriate to resolve the employment relationship problem?

(i) Employee or independent contractor?

[7] It is first necessary to diagnose the correct nature of the relationship between the parties. Section 6 of the *Employment Relations Act 2000* ("the Act") prescribes that the Authority must determine the real nature of the relationship. The intention of the

parties is still relevant but is no longer decisive. The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as the control, integration, and the "fundamental" test[1].

[8] In making the assessment, I am required to consider all relevant matters, including any matters that indicate the intention of the parties and I am prohibited from treating as a determining matter, any statement by the parties that describes the nature of the relationship. The assessment calls for an analysis of the actual operation of the relationship in practice.

Intention of parties

[9] The parties entered into multiple successive contractual documents purportedly reflecting the terms and conditions of the relationship between them. Dr Ross-Taylor negotiated four separate contracts over the years with the Navy Hospital in 1998, 2003, 2005 and 2007. She was not at a disadvantage in those discussions. She took advice. On a number of occasions she negotiated a legal document which had her as an independent contractor. I also accept that the Navy Hospital simply acted on its adviser's instructions in placing the contractual documents it did before Dr Ross-Taylor to sign.

[10] The issue was directly confronted in 2007 when Dr Ross-Taylor and her colleague Dr Sefton Moy ("Dr Moy") gave consideration as to the whether they should be employees. They did not pursue the matter further and thereby must be taken to have been content to remain independent contractors.

[11] I find that the intention of these parties was that Dr Ross-Taylor was to be an independent contractor.

Control test

[12] Dr Ross-Taylor was engaged by the Chief of Defence Force as a civilian medical officer. In that role she performed three main functions. Firstly, she provided general medical advice to navy personnel. Secondly, she was required to participate in the combined hyperbaric and general medical on-call roster. Finally, there was an administrative function including committee participation and audit.

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[1] *Bryson v Three Foot Six (No 2)* [2005] ERNZ 372

[13] Dr Ross-Taylor worked set hours by roster. Each medical officer's daily roster was divided into Treatment room and booked appointments. The roster was prepared by the Navy Hospital reception services manager and was provided to the medical officers usually fortnightly in advance. The rosters were largely unchanged each week and varied only by contingencies.

[14] The rostered treatment room work is similar to A&E where patients were seen without prior appointment. If not involved in rostered treatment room work, Dr Ross-Taylor saw patients by booked appointments. These appointments were booked by the Navy Hospital. Although there is some flexibility extended to medical officers in the composition of the rosters, it remains true the rosters are prepared at the Navy Hospital's instigation and the medical officers including Dr Ross-Taylor were bound to observe and comply with them.

[15] Dr Ross-Taylor had set regular lunch and meal breaks as rostered by the Navy Hospital.

[16] Dr Ross-Taylor was paid on invoices rendered by her. She was instructed to do so at her initial engagement. The ICA stipulates this requirement. In practice, the medical officers would render invoices on Monday morning of each week and would be paid the following Friday. The amount invoiced varied only for on-call weekend work. The Authority accepts Dr Ross-Taylor's evidence that where unrostered work was required, Dr Ross-Taylor was required to seek authorisation to perform such work and that authorisation was provided.

[17] The ICA specified at Schedule Two the medical services to be provided by Dr Ross-Taylor as the Provider. I accept that Dr Ross-Taylor was not permitted any real degree of choice as to which of the services she actually provided in practice.

[18] The patients seen by Dr Ross-Taylor were those approved by the Navy Hospital. The patients were not Dr Ross-Taylor's. They were the Chief of Defence Force's approved patients as specified at clause 8 of the ICA.

[19] I also accept Dr Ross-Taylor's evidence that she was required to attend staff meetings, receive and participate in on-going education and was obliged to see the patients scheduled by Navy Hospital for her to see. She was also required to participate in various committees.

[20] I find it established and I further regard it material and persuasive, that there is no difference between the work performed by military medical officers and civilian medical officers at the Navy Hospital. Both types of medical officers perform the same clinical functions.

[21] Dr Ross-Taylor was provided with all tools, equipment, and materials to perform her work by the Navy Hospital.

[22] Having regard to my findings above, I conclude that Dr Ross Taylor was subject to very significant and very real control by the Chief of Defence Force through the Navy Hospital in performing her duties as medical officer. I find the degree of control over Dr Ross-Taylor during her working day significant and I conclude that such control was characteristic and typical of an employment.

Integration test

[23] Dr Ross-Taylor performed duties as one of many medical officers engaged at the Navy Hospital. The duties performed by Dr Ross-Taylor and the other medical officers was an obvious core function of the Navy Hospital.

[24] Dr Ross-Taylor treated Navy Hospital patients and she was treated no differently on a day to day basis from military personnel.

[25] On two occasions the Navy Hospital sought to have Dr Ross-Taylor excused from jury service so that her duties were not interrupted.

[26] Dr Ross-Taylor was required to participate in various committee activities including policy development for the Navy Hospital operation. She also audited the performance of medics outside of her clinical duties.

[27] Having regard to the above matters, I find that Dr Ross-Taylor was an integral part of the Navy Hospital operation and her engagement as such was not an adjunct function of the operation.

Fundamental test

[28] I have reviewed Dr Ross-Taylor's personal end of year financial statements prepared by her accountants.

[29] Dr Ross-Taylor was registered for GST and that registration was noted on the invoices she tendered to the Navy Hospital for payment.

[30] The tender of invoices by Dr Ross-Taylor for payment in respect of her work was not in substance a definitive factor as to the nature of the relationship between these parties. I find that it was an arrangement that simply continued the same requirement made of her when she was a locum. In substance however, I find it was simply no more than a mere administrative requirement. If Dr Ross-Taylor wanted to be paid, she had to submit an invoice. That says nothing about the nature of the relationship. I accept the submission made on her behalf that the invoicing arrangement was a mere consequence of the contractual labelling of the apparent independent contractor arrangement.

[31] I find that Dr Ross-Taylor as from 1999 worked only at the Navy Hospital and that was her sole income.

[32] There is no evidence that Dr Ross-Taylor operated a business or commercial operation whether in her own right or through any corporate structure.

[33] I find that Dr Ross-Taylor had no scope in her contracted capacity to generate increasing earnings or profits. There was no profit motive involved.

[34] For these reasons, I find that Dr Ross-Taylor was not operating from the basis of her own business operation and she was not in business on her own account.

[35] Dr Ross-Taylor's first engagement in 1996 was as a temporary locum substituting for a former civilian medical officer who had left abruptly. It was not

until 1998 that there was a written contract between the parties. By the end of 1999 Dr Ross-Taylor worked exclusively at the Navy Hospital on effectively a full-time basis.

[36] Having applied the facts of this case according to the prevailing legal tests I conclude that while this relationship was apparently one of an independent contractor relationship, in substance the reality of it was an employment relationship. I make this finding as at the time of the termination of Dr Ross-Taylor's engagement, which I now refer to as an employment. It is therefore also logical and consistent to refer to the termination of Dr Ross-Taylor's employment as a dismissal.

[37] At this juncture I refrain from making a definitive finding as to the commencement of the employment. There are consequences of determining Dr Ross-Taylor was an employee as there are for other applicants in such proceedings. These include entitlements to public holidays and annual leave as well as tax implications for an employee must pay PAYE and not GST. Because of these implications, I leave the parties to negotiate between them the management of such consequential issues. In the event they cannot dispose of any such issues informally between them, leave is reserved for either party to apply in writing on 7 days notice for further intervention by the Authority.

(ii) A justifiable dismissal?

[38] The Navy Hospital General Manager Ms Jeanette Cahill ("Ms Cahill") wrote to Dr Ross-Taylor by letter dated 14 December 2007 terminating Dr Ross-Taylor's employment. Ms Cahill wrote:-

> *Due to Royal New Zealand Navy operational requirements that independently contracted medical providers perform hyperbaric services, I am required, having received notice of your inability to continue providing hyperbaric services, to invoke clause 15.2 of your independent contractor agreement and terminate the agreement between the Navy Hospital and yourself, effective immediately. Pursuant to the agreement, you will be paid one sixth of the total value of the previous six months invoices received from you.*

[39] The Navy Hospital relies on clause 15.2 of the ICA. That clause provides:-

> *15.2 Navy Hospital may terminate this agreement at any time by notice in writing effective immediately for the purpose of meeting the operational requirements of the Royal New Zealand Navy. If this agreement is terminated*

> *pursuant to this clause, Navy Hospital will pay to the Provider one sixth of the total value of the previous six months' invoices from the Provider.*

[40] However, I have found this relationship was in reality an employment. Clause 15.2 cannot assist the Chief of Defence Force as the basis for a lawful termination of the relationship between the parties. An employment can only be lawfully terminated for cause, meaning the employer must be justified in making the decision to terminate. There is a test of justification prescribed at Section 103A of the Act. That section provides:-

> *103A. Test of justification*
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[41] Critical in examining the actions of the parties and for present purposes the actions of the employer, is the statutory duty of good faith according to section 4 of the Act. The parties owed each other a mutual duty to act towards each other in good faith. In my view this means they must at all times act towards each other having an honesty of purpose and with a view to the relationship continuing, and continuing productively and harmoniously.

[42] I accept that Dr Ross-Taylor had genuine concerns surrounding the hyperbaric unit and her participation in the roster. It is unnecessary for me to make other comment with respect to the incident on the weekend of 10-11 November 2007 which led to the concerns.

[43] Dr Ross-Taylor's general concern was that without being under the formal oversight of a vocationally trained Hyperbaric medicine specialist and having no formal post-graduate qualification in Hyperbaric medicine, she may have been working contrary to the provisions of the *Health Practitioners Competency Assurance Act 2003*[2] ("HPCA"). She considered she did not have an appropriate level of competence nor adequate training to deal with acutely deteriorating hyperbaric cases. Her specific concerns were that there had been no professional development for

[2] The principal purpose of which is to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions.

medical officers that year in terms of the hyperbaric unit, brief 'osmotic' education that had formed part of morning medical officers' meetings had stopped about one year previously, that the NZ resuscitation level of training was too low for the work and that the medical officers were reliant on phone advice from consultants.

[44] Dr Ross-Taylor's other colleagues shared her concerns to varying degrees. As a group, the medical officers felt that they hyperbaric chamber faced numerous problems which cumulatively made the work environment dangerous both clinically and legally.

[45] On 12 November 2007 Dr Ross-Taylor and her colleague Dr Moy met with Ms Cahill to communicate the concerns they had in relation to the hyperbaric unit work. Dr Ross-Taylor indicated she felt she may need to withdraw from the hyperbaric unit roster work. Dr Moy had the same intention. Ms Cahill was sympathetic and said she would consider solutions and contact Professor Des Gorman about the issues. I do not accept Ms Cahill's evidence that the issue raised by the doctors was situation specific only. I find accepting both Dr Ross-Taylor and Dr Moy's evidence, that they raised issues and concerns about hyperbaric work generally.

[46] Dr Ross-Taylor consulted with colleagues and recorded the issues to Ms Cahill in an email of 13 November 2007. In acknowledgement of the legitimacy of Dr Ross-Taylor's concerns, Ms Cahill wrote in reply the following day:-

> *Thanks for all of this. I completely understand your position and I am pleased we are dealing with it, and these are very good ideas and I am sure we can come up with something to suit everyone. I will catch up with you later today.*

[47] There was a further meeting between Dr Ross-Taylor, Dr Moy and Ms Cahill on 14 November 2007. Ms Cahill asked for a list of issues which needed addressing.

[48] Ms Cahill wrote to Dr Ross-Taylor by email of 15 November 2007. She wrote:-

> *Fiona and [Dr Moy], I have arranged to meet with Des next week to give him a brief on the concerns about hyperbaric treatments, and once that has happened then we can meet and talk, but we need to give him a chance to think things over before we all meet.*
> …

> *We can address the longer term management of things next week, and Marie will come and have a chat with you tomorrow to see if there is anything further we need to do between now and when we all meet with Des.*

[49] Dr Ross-Taylor replied in an email the following day on 16 November 2007:-

> *In terms of the meeting with Des, this does affect everyone doing Hyperbaric call here, and it may go on to affect some doctors who currently don't.*
> *Can the time when we "all" meet with him be chosen such that all four rostered MOs and DNM can be present? I certainly don't want to be in a situation where it ends up being Des telling me and [Dr Moy] why he thinks we're over-reacting, nor one where part of the bigger group ends up making decisions for the rest without adequate discussion.*

[50] The Navy Hospital four hyperbaric rostered medical officers met on 21 November 2007. Dr Ross-Taylor emailed the Minutes of that meeting to Ms Cahill. She wrote:-

> *Further to the conversations [Dr Moy] and I had with you on November 12 and 14, the four rostered Medical Officers have now met and discussed the issues we see affecting the provision of acute hyperbaric services here. [Dr Moy] and I remain firm in our intention to leave the Hyperbaric roster as soon as is practicable and certainly before the coming dive season is underway.*

[51] Ms Cahill did not respond to Dr Ross-Taylor's communications of 21 November 2007 and 30 November 2007.

[52] On 26 November 2007 Ms Cahill informed Dr Ross-Taylor that the hyperbaric unit roster was not to be discussed at the medical management meeting that day. She said that as long as Professor Des Gorman signed off annual practising certificates he would take all the responsibility for clinical care as long as he had been given full details of the situation. Dr Ross-Taylor said such an assurance was probably not adequate.

[53] Dr Ross-Taylor communicated her concerns to and sought the assistance of the Medical Council of New Zealand ("MCNZ") in an email dated 27 November 2007. Dr Ross-Taylor did not provide this advice to the Navy Hospital she says because of confidentiality. However, she sent a copy to her colleague Dr Moy.

[54] The hyperbaric roster medical officers met on 30 November 2007 having been requested by Ms Cahill to do so for the purpose of isolating issues. The discussion was essentially the same as that which had occurred on 21 November 2007.

[55] By email that same day Dr Ross-Taylor received this advice from the MCNZ:-

> *You do not need to enroll(sic) in a training programme (unless you want to for career reasons) and you don't have to withdraw from this type of work. You could look at your Royal New Zealand College of General Practitioners MOPS programme to see if you can incorporate your hyperbaric CME into that. However in the circumstances you describe I would strongly suggest that you arrange a collegial relationship with an occupational medicine physician. Ideally you would work with the 'colleague' to draft up a 12 month CPD plan each year to ensure your schedule in the CR meetings, audit, peer review and CME requirements of a collegial relationship which would provide you with the support you need to ensure your skills and knowledge are kept up to date and to ensure you are well prepared to deal with emergencies. You may also wish to incorporate something into the relationship agreement where you are able to ask for backup assistance if specialist care is necessary.*

[56] Dr Ross-Taylor wrote this letter to Ms Cahill:-

> *Following recent meetings and email communication with you regarding issues around acute Hyperbaric work, I contacted the Medical Council of New Zealand (MCNZ), seeking its view on my status with respect to this work in terms of the Health Practitioners Competency Act (HPCA). I have today had a strongly worded response about the urgent need to formally enter into a Collegial (formerly "Oversight") relationship, which has a comprehensive annual requirement for Hyperbaric-related Continuing Medical Education. In effect, at present my acute Hyperbaric work does fall outside the HPCA.*
> *This response suggests that in the context of the HPCA, MCNZ would not currently regard me as "trained and competent" in acute Hyperbaric medicine (cf Schedule Two of my contract), and as such it is my good-faith belief that to continue in this work before these matters are addressed, would be unethical (clause 6.1). it would also inevitably jeopardise my medical protection insurance (clauses 11.1 and 11.2), to knowingly continue in what amounts at present to something of a professional vacuum.*
> *Complying with the identified requirements would incur significant and ongoing additional costs in terms of time and educational expense. I am not in a position to commit to either, and recent experience with funding of non-core GP CME related to Chamber work suggests that NH is unlikely to be forthcoming with funding. However, even were funding to be provided, I continue to hold previously-advised concerns about other aspects of Hyperbaric working conditions over which I as a contractor have no control.*
> *For these reasons, I hereby withdraw from Hyperbaric call, with immediate effect.*

[57] Dr Ross-Taylor wrote back to the NZMC in an email of 1 December 2007. She wrote:-

> *It is clear that it would be highly advisable to form of a collegial relationship in conjunction with ongoing appropriate hyperbaric CME, in order to comply with Council recommendations in the light of the HPCA. This strongly suggests that until such measures are in place, then at best, a professional and medico-legal grey area exists. By implication, for a doctor to be aware of the need to take such measures but fail to do so, or fail to do so in a timely fashion, would result in an increasingly unacceptable level of professional risk.*
>
> *I have reason to believe that formation of a supportive collegial relationship and organisation of the associated CPD requirements, would be a difficult and protracted process in the context of my role as a contractor; it would almost certainly also result in significant cost, both financial and otherwise. I have considered this alongside the fact that acute hyperbaric work is a small but high-risk and non-General Practice aspect of my career.*
>
> *I have decided that the most appropriate ethical course of action is to withdraw from acute hyperbaric work, and I have advised the holder of my contract accordingly. It has been a relief to have the situation clarified, and I look forward to focusing on core General Practice in future.*

[58] When Dr Ross-Taylor handed the letter to Ms Cahill, Ms Cahill said repeatedly that Dr Ross-Taylor could not work at Navy Hospital if she was not on the hyperbaric unit roster. Ms Cahill disagrees and says she actually said Dr Ross-Taylor's actions "could have an impact on her contract". Whatever was actually said, the end result was Dr Ross-Taylor's termination.

[59] Ms Cahill also advised Professor Gorman deemed her to be trained and competent. Dr Ross-Taylor said the advice from the MCNZ outweighed Professor Gorman's advice.

[60] The advised meeting with Professor Gorman in the week beginning 19 November 2007 did not take place.

[61] Ms Cahill met with Professor Gorman on 23 November 2007. The Director of Naval Medicine Surgeon Commander John Duncan ("Surgeon-Commander Duncan") also met with Professor Gorman.

[62] Surgeon-Commander Duncan gives evidence that he had worked with the MCNZ and had resolved the concerns Dr Ross-Taylor had raised, with the other doctors by the end of November 2007.

[63] Dr Ross-Taylor had a telephone discussion with Surgeon Commander John Duncan on the evening of 2 December 2007. Surgeon-Commander Duncan said he agreed with Ms Cahill that Dr Ross-Taylor could not work at Navy Hospital if she was not on the hyperbaric unit roster.

[64] By email of 3 December 2007 Surgeon Commander Duncan requested the advice Dr Ross-Taylor had received from the MCNZ. Dr Ross-Taylor advised she did not have the advice at work but provided Commander Duncan with the MCNZ contact details.

[65] I prefer Dr Ross-Taylor's evidence of both telephone discussions with Surgeon Commander Duncan.

[66] Professor Gorman met with the doctors on 3 December 2007. Dr Ross-Taylor did not attend as she was covering for Dr Moy while he attended. I accept Dr Ross-Taylor's evidence that between 30 November 2007 and 4 December 2007, she had no contact with Ms Cahill.

[67] On 5 December 2007 Dr Ross-Taylor was handed a letter written by Ms Cahill dated 4 December 2007:-

> *Thank you for your letter dated 30 November 2007. I note that under Clause 12.1 of your contract, you cannot vary the services specified in Schedule 2 unless by mutual agreement.*
> *You are deemed by Professor Des Gorman to be trained and competent to provide hyperbaric services so I do not agree to this variation.*
> *I require you to formally enter into a collegial relationship with Professor Des Gorman, or another appropriate supervisor.*
> *Should you not be willing to continue providing hyperbaric services, you are to inform me in writing by 12midday Thursday 6th December.*

[68] Dr Ross-Taylor became distressed with Ms Cahill's advice of 4 December 2007 and consequently was unfit for work. She retained counsel and her solicitors wrote by letter of 6 December 2007 advising of their instructions and Dr Ross-Taylor's incapacity. The solicitors further advised they would revert to Ms Cahill the following week with Dr Ross-Taylor's instructions.

[69] On 13 December 2007 Professor Gorman met with the doctors to discuss the hyperbaric roster and a training programme. Dr Ross-Taylor being absent from work did not attend. There was no communication to Dr Ross-Taylor of this discussion.

[70] Dr Ross-Taylor's solicitors wrote again to Ms Cahill by letter dated 14 December 2007 and sent by email at 12.06pm. They wrote that Dr Ross-Taylor maintained that until suitable arrangements endorsed by the MCNZ had been entered into Dr Ross-Taylor could not regard herself as "deemed trained and competent" to provide hyperbaric services. The solicitors further advised Dr Ross-Taylor would attend work on 17 December 2007 but would not be participating in the hyperbaric roster.

[71] In reply at 2.51pm the same day, Ms Cahill wrote to the lawyers terminating Dr Ross-Taylor's engagement.

[72] The lawyers responded by letter dated 17 December 2007 advising Dr Ross-Taylor did not accept the termination and giving notice that proceedings would issue.

[73] The Chief of Defence Force responded through his delegate Major Majboroda in a letter dated 18 December 2007. However, in an email of 19 December 2007 Major Majboroda wrote to the lawyers asking they disregard his letter of 18 December 2007 because further information had come to light and he wished to add to the letter. A revised letter dated 19 December 2007 was sent to the lawyers.

[74] Ms Cahill says that Dr Ross-Taylor's initial concern as presented to her by Dr Ross-Taylor and Dr Moy was that they did not wish to be presented with a patient diver not accompanied by a doctor. Ms Cahill says that in "mid November" Dr Ross-Taylor's position subtly changed to one of "not being trained and competent to manage any hyperbaric patients". Ms Cahill suggests Dr Ross-Taylor's position changed when she informed Dr Ross-Taylor she (Ms Cahill) had become aware the patient diver had been accompanied by a doctor. Ms Cahill also says Dr Ross-Taylor and Dr Moy did not tell her when they first approached her of their knowledge that an A&E doctor had in fact accompanied the patient diver.

[75] This is problematic because Dr Ross-Taylor is adamant she did not know of this fact until mediation in April 2008. The contentious fact is not clarified by any contemporaneous documentary evidence. I do not accept Ms Cahill's evidence. The documentary evidence is corroborative of the doctors' concerns about hyperbaric work generally.

[76] While Ms Cahill had discussions with Professor Gorman about the concerns Dr Ross-Taylor and her colleagues had raised, Dr Ross-Taylor was not involved. The meeting advised to take place in the week of 19 November 2007 did not proceed. Dr Ross-Taylor was not invited to the meeting Ms Cahill had with Professor Gorman on 23 November 2007.

[77] Ms Cahill did not engage with Dr Ross-Taylor about the concerns the doctors had raised. While Ms Cahill was initially sympathetic and acknowledged there were issues, that sympathy eventually dissipated. Ms Cahill has demonstrated she apprehended a subtle shift in Dr Ross-Taylor's position and means to suggest that Dr Ross-Taylor was insincere or had ulterior motives. Perhaps this mistrust by Ms Cahill led her into error for the manner of communication or rather lack of it with Dr Ross-Taylor thereafter is most regrettable.

[78] While Surgeon Commander Duncan's brief of evidence refers to arrangements he made with MCNZ, I find there was no discussion with Dr Ross-Taylor whatsoever about them whether as a solution to the situation the parties then found themselves in, or otherwise. I prefer Dr Ross-Taylor's evidence of the correspondence she had with Surgeon Commander Duncan.

[79] Ms Cahill's advice of 4 December 2007 is sterile and uncompromising. If she intended it as the answer to very complicated issues presented to the Chief of Defence Force through her, she could not reasonably have expected Dr Ross-Taylor to have regarded it that way. Whatever the resolution devised with Professor Gorman, I find there was no discussion with Dr Ross-Taylor. There was no discussion with Dr Ross-Taylor that Professor Gorman deemed her trained and competent. Nor was there any discussion as to whether that conclusion was meritorious or legitimate. Ms Cahill could not reasonably have expected Dr Ross-Taylor to have been placated or persuaded that matters were then resolved.

[80] The requirement that Dr Ross-Taylor respond within 24 hours indicates there was to be no discussion.

[81] The documentary evidence clearly spells out the doctors concerns, I find there was no substantive response from the Navy Hospital in reply. There was no communication of a such alleged remedial action by the Navy Hospital. The only response was Ms Cahill's letter of 4 December 2007 that Professor Gorman deemed Dr Ross-Taylor trained and competent.

[82] There was no direction issued to Dr Ross-Taylor that she was required to perform hyperbaric roster work in the form of an instruction. So Dr Ross-Taylor could not have been dismissed for failing to comply with a lawful and reasonable instruction of her employer.

[83] In any event, Dr Ross-Taylor's lawyers had advised on her behalf that her withdrawal from the hyperbaric roster was contingent upon appropriate and eventual endorsement from the MCNZ. There was no complete and absolute refusal to perform or a refusal to comply with a lawful and reasonable instruction.

[84] This being an employment relationship, the parties owed each other a mutual duty to act in good faith. They were required to be active, responsive and communicative in their dealings with each other.

[85] The ICA provided a dispute resolution procedure that proceeds initially by good faith endeavours to reach agreement. It then provides for independent mediation and ultimately arbitration. The Chief of Defence Force did not at any stage indicate a willingness to submit matters to these processes. **I find the Chief of Defence Force acted in breach of clause 13.1 of the ICA.**

[86] I find the Chief of Defence Force acting through his delegates failed to properly and fairly engage in a dialogue with Dr Ross-Taylor that was directed towards resolving the very real and genuine concerns that she and her colleagues had raised. I find that the Chief of Defence Force failed to act in good faith towards Dr Ross-Taylor contrary to section 4 of the Act.

[87] Sadly, the invitation to Dr Ross-Taylor to have coffee and inasmuch as that invitation was an indication of an appropriate and fitting desire to relate to her in an intimate and human way, it came too late. In my view, Dr Ross-Taylor's extensive period of service and very good work with the Navy Hospital came to an end in an entirely avoidable and unnecessary way. It should not have ended that way. The ending of this extended relationship was callous, hasty and rash.

[88] I do not regard the conclusion reached by the Chief of Defence Force as to the situation before him as concerns Dr Ross-Taylor was so serious as to require the immediate termination of her employment, in all the circumstances. The situation was not irretrievable. There was no requirement on Ms Cahill to invoke clause 15.2 as she wrote in her advice of 14 December 2007, as though that were an inevitable consequence of the unresolved dispute between the parties.

[89] There was clearly a very real dispute as to whether Dr Ross-Taylor was appropriately qualified to undertake hyperbaric work. The Chief of Defence Force's response to the medico-legal issues raised was seriously deficient. Dr Ross-Taylor's immediate termination, in the circumstances, was not the appropriate response. It was not the actions of a fair and reasonable employer.

The determination

[90] **I determine that Dr Ross-Taylor was engaged by the Chief of Defence Force at the Navy Hospital as an employee**.

[91] **I determine that Dr Ross-Taylor was dismissed from the employment. I further find that such dismissal was not justifiable. Dr Ross-Taylor has a personal grievance for unjustifiable dismissal. She is entitled to remedies in settlement of that personal grievance**.

The resolution

(iii) What resolution is appropriate to settle the personal grievance found?

[92] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the

extent to which Dr Ross-Taylor's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[93] It is submitted that Dr Ross-Taylor contributed to the situation that led to the personal grievance. Specifically the Chief of Defence Force refers to these matters in that regard:-

- Refusal to disclose the MCNZ advice;
- Misrepresenting the MCNZ advice;
- Dr Ross-Taylor falsely claiming she was not deemed trained and competent;
- Refusing to cooperate with the Navy Hospital;
- Acting in bad faith;
- Not being communicative.

[94] I do not read Dr Ross-Taylor's advice of 30 November 2007 as misrepresenting the advice from the MCNZ. I do not accept Dr Ross-Taylor refused to disclose the MCNZ advice. I do not accept Dr Ross-Taylor falsely claimed she was not deemed trained and competent. I do not accept the submission that Dr Ross-Taylor acted in bad faith and was not communicative.

[95] Dr Ross-Taylor's advice of 30 November 2007 states her position as contingent upon matters being addressed.

[96] I find there is no blameworthy conduct by Dr Ross-Taylor that is to be regarded as contributory fault and which requires a reduction in either or both of the nature and extent of any remedies to be provided to her.

Reimbursement

[97] I am satisfied that Dr Ross-Taylor has lost wages as a result of the personal grievance I have found. I am satisfied that she took steps to mitigate her losses. I award her the loss she claims and gives evidence of to 2 July 2008 in the gross sum of $44,250.61. I exercise my discretion to award actual loss up to the date of this determination or thereabouts. That I accept is represented by the monthly sum of

$6,136.93. This further loss is gross $36,821.58. **I order the Chief of Defence Force to pay to Fiona Ross-Taylor the gross sum of $81,072.19 as reimbursement.**

Compensation

[98] I accept Dr Ross-Taylor's evidence of her emotional trauma and distress she suffered as a result of the Chief of Defence Force's actions. I accept that Dr Ross-Taylor became physically unwell. Having regard to her evidence, the extended period of her engagement with the Navy Hospital and the nature of the personal grievance, I award her $20,000.00 compensation. **I order the Chief of the Defence Force to pay to Fiona Ross-Taylor the sum of $20,000.00 as compensation.**

Costs

[99] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Swarbrick is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Holden is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

[100] The investigation shall remain before the Authority for a period of 28 days after the date of this determination unless it is earlier withdrawn by notice in writing by the applicant[3].

Leon Robinson
Member of Employment Relations Authority

[3] Refer paragraph [37] above