

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 272/10  
5147635

BETWEEN                      ANATOLE SERGEJEW  
   Applicant  
  
AND                                MINISTRY OF TRANSPORT  
   Respondent

Member of Authority:        Yvonne Oldfield  
  
Representatives:              Rodger Pool for Applicant  
   Peter Cullen for Respondent  
  
Investigation Meeting:        15 and 16 October 2009  
  
Submissions received:        29 October 2009, 25 November 2009 from Applicant  
   18 November 2009 from Respondent  
  
Determination:                10 June 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Until his resignation in late 2008 Mr Sergejew was a Principal Advisor with the respondent Ministry. Mr Sergejew does not argue constructive dismissal. His employment relationship problem is in three parts. The first is a claim of breach of contract (or, in the alternative, a disadvantage claim.) It relates to an alleged failure by the Ministry to take reasonable steps, consistent with the express and implied terms of the employment agreement, to safeguard Mr Sergejew's health. As a result of this failure Mr Sergejew says that he was exposed to workplace stress which caused him harm.

[2]     The second part of the employment relationship problem is a claim of disadvantage in relation to a written warning issued to Mr Sergejew by Claire Johnstone (General Manager, Corporate) in late August 2008. The third part concerns

a claim to be paid out the value of a week's long service leave to which Mr Sergejew had become entitled before he left the Ministry but had not taken.

### **Application for non-publication order**

[3] Early in the Authority's investigation of this matter both parties sought non-publication orders. Mr Sergejew sought orders preventing his medical records and other evidence relating to his health issues from entering the public domain. The Ministry sought similar protections for evidence relating to the progress of the Bill. Interim orders were made for the period to the conclusion of the investigation, and submissions were sought from both parties as to whether those orders should be made permanent.

[4] In the event, the respondent has withdrawn its application for non-publication orders and nothing more needs to be said about that.

[5] Submissions have been lodged on Mr Sergejew's behalf in support of an application for a permanent order for non-publication of the evidence described above. Those submissions assert that the information concerned is highly sensitive personal information and of no legitimate public interest. For the most part, this submission is accepted. Indeed it was not necessary, in this determination, to make any reference to most of the evidence in question.

[6] However in determining a claim that an employer has failed to provide a safe workplace it is impossible to avoid a discussion of the nature and extent of the harm alleged and its cause. This determination therefore records what Mr Sergejew was diagnosed with and refers briefly to his medical notes in charting the development of his illness. At paragraph [81] it records his doctor's view as to the cause of Mr Sergejew's ill health. To this extent, Mr Sergejew's application for non-publication is declined.

### **The background to the claims**

[7] In 2007 Mr Sergejew had for the first time in his career taken on the task of leading advice to Select Committee on a major piece of legislation. By early 2008 he

was experiencing difficulties in managing his workload and relationships within his team and in dealing with some of the processes required in relation to the project. On 12 March 2008, after talking with an EAP advisor he emailed his manager, Megan Beecroft, to advise her that he believed he was suffering from the effects of workplace stress.

[8] Ms Beecroft discussed this email with her manager, Elizabeth Anderson, and human resources consultant David Jones. Mr Jones suggested that Mr Sergejew and (with Mr Sergejew's consent) the Ministry might usefully obtain guidance from Mr Sergejew's own GP as to how the situation should be managed. Ms Anderson rejected this suggestion however she gave approval for counselling to be made available to Mr Sergejew and for there to be an increase in the level of resourcing for the project.

[9] This led to the appointment of a project manager for the Bill who started work on 7 April 2008. Initially Mr Sergejew had been hopeful that this additional support would address the issues that he believed to be causing him stress. Meanwhile, however, the Minister announced significant policy changes affecting the Bill. This increased Mr Sergejew's workload again and in his view eroded the value of the extra help which had been provided: he told the Authority that deadlines were unreasonable and travel to Wellington (from his base in Auckland) was frequent.

[10] The proposed changes to the Bill caused Mr Sergejew concern in other areas besides his workload. As early as March he had declined to have his name associated with a briefing paper on the change proposals. In late April, in communications which were for publication outside the Ministry, he commented that he did not agree with the changes. Mr Sergejew told the Authority that he felt unclear about the reasons for the changes and had "*no idea how to deal with being questioned about this turnaround.*" He did not feel able to advocate for the changes and felt this put him in a difficult position professionally.

[11] As a result, on 2 May he told Ms Beecroft that although he would continue to be part of the team he "*could not continue to lead advice to Select Committee on the Bill.*"

[12] This happened at a critical point in the Bill's progress. Ms Beecroft quickly moved to find a replacement Lead Advisor, while keeping Mr Sergejew on in the role of policy expert. From the respondent's point of view, however, this was not the end of the matter. On 30 July Claire Johnstone called him to a disciplinary meeting and told him that its purpose was "*to primarily discuss your refusal in May 2008 to continue in your role as lead advisor to the select committee on the ... Bill.*" Her letter also noted the background set out in paragraph [6] above and the fact that "*we are concerned that you are not able to remain neutral in respect of policy development, which is a requirement of being a public servant.*"

[13] Mr Sergejew responded in a written statement and at the disciplinary meeting (on 22 August.) He explained his reasons for what he had done in relation to the primary issue (stepping down as Lead Advisor) as well as the background issues, saying that there had been a difference of professional (not personal) opinion between him and the Ministry. He said he had acted in order to maintain his professional integrity and to avoid possible risk to the Ministry. He noted that as a Principal Advisor he felt he had a responsibility to "*speak up when disagreeing with management or influential customers and/or stakeholders.*" He also noted that he was "*already succumbing to stress from work overload. It would not have been feasible for me to lead new work on [the changes.]*"

[14] Later that day he received a formal written warning "*regarding your refusal to undertake work as lead advisor on [the Bill]*" and the fact that: "*your action and behaviour around this project were inappropriate for a senior public servant.*" In the same letter he was also instructed to take a month's sick leave and advised that the respondent would provide him with coaching in his role.

[15] Even before he received the warning he had already begun to consider what alternative employment options might be available to him. In December 2008 he left the Ministry to take up a position elsewhere.

[16] On 13 August Mr Sergejew had seen his doctor and been diagnosed with depression. Mr Sergejew told the Authority that he believes workplace stress caused this depression and said that he was still not fully recovered at the time of the Authority investigation meeting.

**Issues**

[17] Clause 6.1 of the Collective Agreement which covered Mr Sergejew's employment provided:

*“The Ministry is committed to providing a safe and healthy work environment and shall comply with the requirements of the Health and Safety in Employment Act 1992, its Regulations and relevant Occupational Safety and Health (OSH) Codes of Practice.*

[18] It is argued for the applicant that insufficient steps were taken by management to eliminate, isolate or minimise his work related stressors. Specifically, the applicant says that the respondent:

- i. made a deliberate and calculated decision to take a risk with Mr Sergejew's health by not seeking medical input when first advised of his health problems;
- ii. failed to manage Mr Sergejew's workload appropriately, failing to reduce hours of work and travel to Wellington and failing to provide time off, and
- iii. unfairly warned Mr Sergejew thus increasing the levels of stress upon him.

[19] It is further argued for the applicant that these matters were a material cause of the breakdown in Mr Sergejew's health, and that this breakdown was foreseeable. It is also argued that there was a systemic failure in that the respondent did not identify stress as a hazard and did not have an appropriate system in place to monitor or manage stress.

[20] Appendix 2 of the collective agreement contains the following provisions relating to warnings:

*“prior to any warning, the employee must have been advised of the expected standards of performance and behaviour and be given any necessary coaching and assistance required*

*... A verbal warning is an initial admonishment in the form of a caution (not a formal warning) that the expected standard is not being met...*

*If counselling and assistance do not produce the desired result then a formal warning should be used...”*

[21] Mr Sergejew considers the warning to be unfair in a number of respects. He argues that the process that gave rise to it was not consistent with the provisions of the respondent’s disciplinary policy, that the matters to which it related were not raised with him in a timely fashion, and that the points he put forward in response (including the impact of his health issues on his performance in his role) were not given due consideration by the respondent. He also says that if those points were properly weighed, the warning could not be justified substantively.

[22] In submissions for Mr Sergejew it is argued that the two parts of the employment relationship problem are interconnected, with the respondent having *“perversely treated the Applicant’s deteriorating ability to cope as misconduct”* and with the consequent disciplinary process and written warning further compounding the stress Mr Sergejew was already suffering.

[23] The respondent says that it did take all reasonable steps to safeguard Mr Sergejew’s health and to provide a safe and healthy work environment. It says that when it was made aware that Mr Sergejew was suffering from stress it put in place reasonable measures to assist him including counselling, provision of additional resources, and a reduction in the amount of travel required of him.

[24] As for the warning, the respondent says that it did take Mr Sergejew’s stress into consideration along with other matters such as his long and satisfactory work history. It said however that he refused to acknowledge the inappropriateness of some of his behaviour and in these circumstances it seemed only a warning could convey to him the seriousness of his actions.

**(i) The need for medical input**

[25] Mr Sergejew started working on the Bill (which related to the provision of public transport) at about the beginning of 2006. He was personally responsible for drafting the Project Plan for the Bill which identified him as the proposed Lead Policy Advisor (effectively the team leader responsible for managing the Bill through parliament.) By the end of 2006 Megan Beecroft had taken over as Manager of the team in which Mr Sergejew worked and in 2007 Mr Sergejew's role as Lead Policy Advisor for the Bill was formalised. The team working on the Bill also included an experienced Lead Legal Advisor, Lisa Nickson.

[26] There is no dispute that before being formally confirmed as Lead Advisor for the Bill Mr Sergejew had expressed his readiness to take the role on. He was certainly well qualified for it, having Masters Degrees in transport engineering and public policy and over 25 years experience in the transport industry. He had first worked for the Ministry as a traffic engineer in the 1980s and then spent some time in the private and local government sectors. He returned to the Ministry as a policy adviser in 2000.

[27] Mr Sergejew agrees that up until 2008 he had no employment issues, although he realised from an early stage that the role of Lead Advisor was demanding. Initially only three months were given from the time public submissions on the Bill were due (14 December 2007) to hear and assess submissions and for the Select Committee to make its report to Parliament (on 14 March 2008.) Later however this timeframe was to be adjusted.

[28] As a result of this timetable Mr Sergejew did not arrange holidays (apart from the statutory days) over Christmas 2007. Unfortunately even this short break was no rest for him as he injured his back leading to two days sick leave on 3 and 4 January, and continued to experience some back pain after his return to work on 7 January.

[29] On Saturday 1 March Mr Sergejew visited his doctor with flulike symptoms and in the following week he took two and a half days sick leave. On his return, on 6 March he advised Ms Beecroft that he was not coping. She passed on to him the relevant contact details for the Ministry's Employee Assistance Programme. He

returned to the doctor on Saturday 8 March and then, on Sunday 9 March, contacted EAP for help. On their advice, on 12 March, he emailed Ms Beecroft as follows:

*“The adviser thought I was showing classic symptoms of stress, and that there was a risk of “burnout” if things didn’t change.*

*The adviser pointed out to me that I really need to let people like you know that I am experiencing stress at work and that it is affecting me, rather than just assuming you know or rather than just hoping it will go away.*

*Then we discussed what might be done to reduce the level of stress I’m experiencing...*

*where I seem to have difficulty coping is where I am at odds with people within the team, where there seems to be a lot of process and “red tape” slowing down progress and where I feel accountable for things that I ultimately don’t decide or don’t have control over...Unfortunately its what I have been experiencing at work since at least the beginning of the year.”*

[30] Mr Sergejew went on to suggest that the Ministry could assist by funding one on one counselling for him. He noted that the Ministry might also help him by reducing his work hours although he also noted that:

*“given that a big part of my stress is that the work to be done exceeds the time/capacity to do the work, I suspect that unless we address the workload problem, my taking “time out” would make my stress levels worse rather than better.*

*The ways I might be helped are by adding a senior PT<sup>1</sup> –experienced policy person full time to the Bill team ...and/or by getting good project management support...”*

[31] On 14 March Ms Beecroft discussed the contents of this email, with human resources manager, David Jones and her own manager, Elizabeth Anderson. Ms Beecroft’s notes of these discussions record that Mr Jones suggested that it might be useful for Mr Sergejew to talk to his doctor regarding his mental and physical stress

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<sup>1</sup> Public Transport

and that he noted that while the Ministry could not force him to go to the doctor<sup>2</sup>, it would “*welcome guidance [from] his GP on how we can assist workwise other than what we are doing.*” The notes go on to say that if Mr Sergejew agreed, the respondent could write to the GP outlining what was proposed and asking for advice.

[32] Ms Beecroft’s notes also record that Mr Sergejew had available 43 days sick leave and 17 days annual leave. She also notes “*GP may say 3 wks*” which I infer was a comment about the amount of leave a GP might suggest. Ms Beecroft’s notes then record that Ms Anderson said “*not keen go Dr if result 1 month off. Wants to take risk that more resources will address.*” The notes then record a discussion about getting someone in to assist Mr Sergejew.

[33] In the final outcome the respondent did not request Mr Sergejew to see a doctor, but he did so anyway on 8, 15, 20 and 25 March. There is no record of the issue of stress having been raised on those visits. The first mention of that is in the notes of a visit on 4 April, when he took a day’s sick leave and called Ms Beecroft to tell her that his stress symptoms “*had returned.*” Mr Sergejew’s medical notes for that visit record:

*“work stress for the last three months, issues with frustration at work, gets angry episodes, not depressed or anxious, having counselling unable to sleep some nights...”*

[34] Mr Sergejew’s doctor prescribed medication to help him to sleep but there is no record of any discussion or advice regarding Mr Sergejew taking time off work.

[35] During April, May and June Mr Sergejew visited his counsellor which he found useful but after the 4 April visit he did not seek medical advice again until 23 July. On this occasion (which was upon his return from two weeks annual leave) he discussed his stress induced asthma with his doctor but again there was no suggestion of any need for him to take leave. Mr Sergejew did not inform Ms Beecroft of this

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<sup>2</sup> Part 8 of the Respondent’s Personnel Manual sets out that the Respondent “*reserves the right to request staff to have a medical examination by a nominated doctor to assess their fitness for work.*”

visit, but during his performance review on 24 July he mentioned to her that he was still having stress symptoms.

[36] As noted above, he was diagnosed with depression on 13 August.

### **Determination**

[37] It is argued in submissions for the applicant that the Respondent “*made a deliberate and calculated decision to take a risk with the Applicant’s health by not seeking medical input rather than face the possibility that he might need a month off. This also confirms the high level of work pressure that the Applicant was experiencing.*”

[38] It is accepted that this submission is consistent with what Ms Anderson decided when she, Ms Beecroft and Mr Jones discussed the issue in March 2008. However, neither the EAP advisor (whose feedback Mr Sergejew passed on to his manager) nor Mr Sergejew himself had said anything to indicate that either medical help or leave was needed at that point.

[39] As it was, Mr Sergejew’s evidence is that he did see a doctor several times in March but there is no evidence that the issue of stress was raised on any of those occasions. Even when it finally was (on 4 April), he was not put on sick leave.

[40] I am not satisfied that there was sufficient basis for the respondent to request Mr Sergejew to have a medical examination. The respondent was not taking an inappropriate risk by electing not to do so and the decision did not amount to a breach of duty.

### **(ii) Workload, hours and travel**

[41] The original team working on the Bill consisted of Mr Sergejew as Lead Advisor, Ms Nickson as Lead Legal Advisor and three other policy advisors. As we have seen by April 7, within a month of Mr Sergejew first bringing the issue of his stress to the attention of his managers, the Ministry responded by appointing an

additional full time dedicated project manager for the Bill. It also provided an initial 3 counselling sessions, with 3 additional sessions approved later.

[42] Mr Sergejew welcomed the appointment of the project manager although he asserts that increases in the workload arising out of the changes to the Bill quickly nullified the value of the extra help. During April Mr Sergejew continued to raise with Ms Beecroft his concerns that his workload was too great. He noted that “*internal processes were impeding turn-around of advice to Committee and Minister*” and that the extra work associated with the changes would be at the expense of meeting the deadlines on the Bill. (When the Minister first advised the Ministry of the proposed changes, the Ministry had responded that it would need several extra months to work through the changes, but this request was declined.)

[43] Ms Beecroft acknowledged to Mr Sergejew that incorporating the extra work without changes to the timeline (which at that stage required reporting to Select Committee by mid June) could affect the “*quality and workability of the product.*” She told him (and the rest of the team) that she was trying to secure additional resources to help with the extra work. By early May she had been successful. Two additional staff members (one policy and one legal) were recruited to work on the Bill. A little extra time was also gained for reporting to Select Committee, with the deadline pushed back from mid June to 1 July 2008.

[44] For a variety of reasons (including health and safety as well as the need to audit resourcing levels of its various projects) the respondent required all staff to keep and file accurate records of the hours they worked.<sup>3</sup> Between January and March Mr Sergejew had recorded on average a 40 hour week. In the period from 12 March to the end of July he recorded, on average, just under 43 hours per week. (Two weeks during July were annual leave; once the departmental report had been completed on 1 July the immediate workload reduced enabling Mr Sergejew to take holidays.) Thereafter his hours dropped off again. From the beginning of August to the end of his employment he averaged fewer than 40 hours per week. By way of comparison, one of the additional policy advisors appointed to work on the Bill in May 2008 averaged 47 hours during the period to the end of July.

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<sup>3</sup> The Collective Agreement specifies that the standard hours of work for a full time employee are 38 per week (clause 2.1.1.) Employees at the level of Principal Advisor are not entitled to overtime (clause 3.4.5.)

[45] As for travel, Mr Sergejew told the Authority that because his home is in Albany, north of Auckland, he had a long drive to the airport and found travelling to Wellington very tiring (especially when returning in the same day).

[46] Respondent witnesses noted that of necessity the role of Lead Advisor to Select Committee involved time in Wellington. They pointed out that Mr Sergejew knew this when he took on the role. As it was, the respondent says that once his health issues had been raised the level of travel was minimised and arrangements made for Mr Sergejew to do much of his work in Auckland.

[47] During January and February 2008 Mr Sergejew spent 17 days out of Auckland (approximately two days per week on average.) However this was reduced after he brought his health concerns to the respondent's attention. In the period between 12 March and the end of July Mr Sergejew spent 19 days (approximately one day per week on average) out of Auckland. Thereafter (in the final four months of his employment) he was out of Auckland for eight days altogether (less than one day per fortnight on average.)

### **Determination**

[48] The measures which helped to address Mr Sergejew's burden between early March and the end of July (the busiest period) can be summarised as follows:

- i. three full time personnel were recruited in addition to the five original members of the team: a dedicated project manager on 7 April and in early May a full time legal consultant and a full time policy person;
- ii. arrangements were made for most of Mr Sergejew's work to be done from Auckland;
- iii. Mr Sergejew stepped down from the role of Lead Advisor at the beginning of May;

- iv. the deadline for reporting to Select Committee was pushed back from mid June to the beginning of July, and
- v. Mr Sergejew took two weeks annual leave during July.

[49] These were significant steps. The net result was that even during the busiest period Mr Sergejew averaged only 42-43 hours per week and was not required to travel out of Auckland more than one day per week. During the rest of 2008 Mr Sergejew averaged no more than forty hours per week.

[50] The hours and travel required of Mr Sergejew were, in fact, relatively modest for someone at his level of seniority (especially whilst he held the role of Lead Advisor.) Much longer working weeks have become commonplace across both the public and private sectors. Even given Mr Sergejew's health circumstances, I am satisfied that his workload, travel and hours of work were reasonable and were reduced, appropriately, in light of his health issues.

**(iii) The warning**

[51] After May 2, when Mr Sergejew had advised that he could no longer fill the role of lead advisor, Ms Beecroft and Ms Anderson discussed the situation and decided that "*it was too risky to try and force him to do what we thought he should be doing. That didn't mean we accepted his refusal to do the work. We did not. However we accepted that we would find someone else to appear before the Select Committee along with Lisa.*"

[52] Ms Beecroft told the Authority that her immediate concern was to minimise the impact of Mr Sergejew's refusal at "*a very busy, critical time in the progress of the Bill.*" A suitably senior and experienced person was found to take Mr Sergejew's place however Ms Beecroft noted that moving this person from her current work environment "*was not without implications*" for the management of the work that person had previously been doing.

[53] Mr Sergejew's views on the changes to the Bill continued to have an effect even after he had stepped down from the role of Lead Advisor. On 21 May he

declined to find alternative wording for a draft document (as requested) and told Ms Beecroft that he felt it would be misleading to change the language used in the draft in question. Another team member did the required redrafting instead.

[54] Then, on 21 July Ms Beecroft asked him to prepare a Cabinet paper recommending the changes proposed to be incorporated into the Bill. Mr Sergejew questioned aspects of the policy changes and the reasons for them, suggesting that he contact the Minister's office for clarification. Ms Beecroft rejected the suggestion as inappropriate. Her expectation was that the paper would simply incorporate the reasons previously advanced for the policy in question.

[55] Ms Beecroft told me that she planned to discuss these issues with Mr Sergejew at his regular performance review meeting. This meeting was well overdue when it finally took place on 24 July. After a brief discussion they were able to agree that his decision not to work on the changes was a serious issue and that he needed to be clear about the expectations of a public servant.

[56] Afterwards Ms Beecroft talked things over with Claire Johnstone, General Manager Corporate. On 30 July Ms Beecroft emailed Mr Sergejew and told him that the next step would be a formal meeting with Ms Johnstone. (On 24 July Mr Sergejew had asked Ms Beecroft whether there was to be a disciplinary meeting on the issue and she had undertaken to let him know once she had talked to Ms Johnstone.) In a letter of the same date Ms Johnstone wrote to Mr Sergejew calling him to a disciplinary meeting and setting out the concerns to be discussed.

[57] The meeting proceeded on 22 August. Present were Mr Sergejew and his representatives along with Ms Johnstone and Ms Beecroft. Shortly before the meeting began Ms Beecroft handed Ms Johnstone a doctor's certificate stating that Mr Sergejew was suffering from stress. Ms Johnstone asked Mr Sergejew if he wished to proceed with the meeting and he confirmed that he did.

[58] Mr Sergejew tabled his response in an eight page document. There was no major factual disagreement between the respondent and Mr Sergejew about what had happened in relation to him stepping down as Lead Advisor or in relation to the other background issues. Essentially Mr Sergejew found some tasks difficult or even

impossible because he felt he could not support the change in the direction of government policy.

[59] Where the parties differed was in their respective conceptions of a senior public servant's role and obligations. Mr Sergejew believed he could not be expected to take a lead role in relation to policy he had previously advised against and felt unable to champion. He felt that for him to continue in a lead role on the Bill would have jeopardised his professional integrity.

[60] For their part, Ms Beecroft and Ms Johnstone did not see it as the role of a public servant to "champion" any particular piece of legislation. They did consider it highly unethical for a senior public servant to express a contrary view after the government of the day had determined the policy direction to be followed.

[61] In relation to the ethical requirements of Mr Sergejew's job I was referred to the relevant State Services Commission publications.<sup>4</sup> I summarise this evidence as follows. There is a time and place for robust advice, even including advice which challenges a Minister's thinking, but that time is prior to a decision being taken. Afterwards it is the place of a senior public servant to implement the decision, not to dispute it, even if the decision itself represents a major policy shift. To do otherwise would be to undermine the political neutrality of the public service.

[62] Only in the event of a fundamental matter of conscience might a public servant seek to be excused from his or her obligations in this regard. This would be a very rare event which might never occur in most careers. Should any doubt arise about whether a particular situation could be categorised in this way the matter should be escalated to the Chief Executive for guidance.

[63] There is no suggestion in submissions for the applicant that the policy turnaround in this case amounted to a matter of this type. Mr Sergejew himself has characterised his view as a difference of professional opinion, not a fundamental conscience issue.

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<sup>4</sup> *"The Senior Public Servant"* (1994) *"Integrity and Conduct- A code of conduct issued by the State Services Commissioner under the State Services Act 1988, section 57"* (2007) and *"Understanding the Code of Conduct"* (2007)

[64] In her evidence, Ms Johnstone said that during the meeting of 22 August Mr Sergejew spent considerable time relitigating why he disagreed with the turnaround in direction. She told the Authority that Mr Sergejew did not resile from his position making it impossible to step back from a warning. The outcome of the meeting was a written (but not final) warning. With Mr Sergejew's agreement he was put on four weeks special leave (additional to his contractual entitlements) to address his health problems. An arrangement was also made that when he came back he would attend coaching to help him better manage issues at work.

[65] After the formal warning was issued Mr Sergejew requested that the Chief Executive review the matter. The Chief Executive was provided with copies of all relevant documentation and on 22 September met with Mr Sergejew and his representative to hear Mr Sergejew's concerns about the warning. Once again, Mr Sergejew expressed his thoughts on the government's policy changes. The role of a public servant was also discussed as was the provision of extra resourcing to the team that had worked on the Bill. On 24 September the Acting Chief Executive wrote to Mr Sergejew advising that he had decided that the warning letter would stand and would remain on Mr Sergejew's file until his next performance review in February 2009.

[66] When Mr Sergejew returned from his four weeks leave he commenced coaching. He was also, at his request, moved to another team.

[67] The applicant claims the warning was unjustified because the Respondent:

- a. *“Failed to place sufficient weight on the Applicant's stress related condition and the impact it had on the Applicant's ability to cope with the workplace pressure he was experiencing. This was particularly so in view of the Applicant's previously unblemished record;*
- b. *Accepted his actions at the relevant time (albeit privately disagreeing) and failed to give the Applicant the opportunity to correct what it considered he had done wrong;*
- c. *Unfairly saved up allegations that it did not address at the relevant time;*

- d. *Failed to act in good faith and in particular as a responsive and communicative employer, and then shifted the blame for the consequences of that failure on to the Applicant;*
- e. *Unreasonably misjudged and/or incorrectly assumed the reasons for the Applicant's actions ...*
- f. *Unfairly proceeded with the disciplinary meeting and promptly made a decision to issue a written warning despite:*
  - i. *Knowing of the Applicant's depressive disorder; and:*
  - ii. *Observing that the Applicant was distressed at the meeting;*
- g. *Failed to follow the progressive disciplinary process in the employment agreement, and*
- h. *Predetermined the outcome of the disciplinary process."*

[68] In her evidence Ms Johnstone noted that Clause 9.5.1 of the Collective Agreement provides that:

*"depending on the seriousness of the misconduct, an oral warning should usually precede a written warning."*

[69] Ms Johnstone says that the misconduct in question was serious and it was important that Mr Sergejew be told in writing what he had done wrong and what was required of him. Indeed, Ms Johnstone believes that Mr Sergejew's conduct warranted a final warning. She told the Authority that she applied a lesser sanction after taking his health issues into consideration.

### **Determination**

[70] I accept that the concerns identified at points (b) (c) and (d) above have merit. The respondent has not satisfactorily explained why it took from May 2 to July 30 to instigate disciplinary action, and the evidence does not establish that the respondent

made it clear to Mr Sergejew in May that disciplinary proceedings could result. Although his on-going attempts to justify his actions (even before the Authority) tend to indicate that he would not have altered his position, it remains that he was not given a fully informed opportunity to step back from it. There was no evidence to support the submission that this amounted to a breach of good faith on the part of the respondent but I accept that it was a failure of good practice.

[71] The applicant's remaining submissions on the warning issue are however rejected.

[72] I am satisfied that Mr Sergejew effectively refused to lead advice to Select Committee on the Bill. His statement to Ms Beecroft that he "*could not continue to do so*" was unequivocal and cannot be characterised as a request. I am also satisfied that his reason for doing so was that he disagreed with the turnaround in policy. The background issues canvassed at the time of the disciplinary proceedings confirmed that.

[73] To act as he did, for the reason he did, was not consistent with public service ethics and risked jeopardising the neutrality of the public service. I accept that it was a serious matter, justifying not just a warning, but as Ms Johnstone has argued, a final written warning.

[74] I reject the assertion that having been apprised that Mr Sergejew was suffering from depression the respondent should not have proceeded with the disciplinary meeting. Mr Sergejew's doctor did not suggest this and when Ms Johnstone checked, Mr Sergejew advised her that he wished to go ahead with the meeting.

[75] I am also satisfied that Ms Johnstone took Mr Sergejew's health issues into full consideration and weighed them appropriately. Those issues formed at least part of her reason for reducing the sanction against Mr Sergejew to a first warning, and rightly so.

[76] I reject the assertion that the outcome of the disciplinary process was predetermined. I accept Ms Johnstone's evidence that she decided to issue the warning only after the meeting of 22 August where she heard Mr Sergejew continue

his attempts to justify the position he had taken. She perceived that he neither understood nor accepted the respondent's concerns about what he had done and concluded that a warning was needed to make those concerns clear to him. I accept that these were reasonable conclusions for her to draw, and that the warning was substantively justified.

[77] Finally there is no evidence to support a conclusion that Mr Sergejew was materially disadvantaged by the warning. It was to remain on his file until February 2009 however his departure in early December meant that it was current for just three months, during which time it did not directly affect his employment in any way.

[78] In summary then the respondent can be criticised for failing to address in a timely way the conduct for which Mr Sergejew was eventually warned. However the warning was otherwise substantively justified and procedurally fair and no material disadvantage resulted from it. The alleged disadvantage grievance has not been made out either as a stand alone cause of action or as a breach of duty causing injury to Mr Sergejew's health.

**(iv) The cause and foreseeability of Mr Sergejew's depression**

[79] As far as the Authority is aware Mr Sergejew has not seen a specialist about his depressive disorder. The principal evidence as to what caused Mr Sergejew's depression consists of Mr Sergejew's own assessment and a letter from his general practitioner Dr Kyle. Some thoughts about the possible causes of the depression were also expressed by Mr Sergejew's coach however he acknowledged that the focus of his meetings with Mr Sergejew was not to diagnose his depression and I do not consider that I can rely on that evidence as being definitive.

[80] Dr Kyle first saw Mr Sergejew on 23 July 2008 although Mr Sergejew had previously seen other practitioners in the same family medical centre. Attached to Dr Kyle's letter were Mr Sergejew's medical notes from September 2005 onwards, some of which have already been referred to earlier in this determination.

[81] It was Dr Kyle who first diagnosed that Mr Sergejew had chronic depression (on 13 August 2008.) In a letter tabled in the Authority Dr Kyle records that:

*“... the considerable demands of his employer and the conflicts arising from his ethical standards being compromised were a key trigger in the development of at least a moderate (and possibly moderately severe, at one stage) depressive disorder.*

[82] Dr Kyle was of course relying on Mr Sergejew’s self reporting as to the demands of his job and in relation to the conflict with the Ministry over his conduct. Nonetheless I am prepared to accept that the demands of his role were a factor in the development of Mr Sergejew’s illness.

[83] On the issue of foreseeability I note that Ms Beecroft maintained that the deterioration of Mr Sergejew’s health between April and July was not properly brought to her attention. In submissions for the applicant Mr Pool provided the following helpful summary of the evidence about the information Mr Sergejew provided to the respondent about his stress symptoms:

*“On 8 April 2008 the Applicant advised his manager that he did not have his normal energy or calmness...*

*On 26 May 2008 the Applicant advised the respondent that he was still working through what caused his stress reaction and how to deal with it...*

*On 6 June 2008 the Applicant advised the respondent that he was still making poor judgements...*

*On 24 July 2008 he advised that he still had stress symptoms...*

*On 12 August 2008 the Applicant advised the Respondent that he had developed stress-induced asthma...*

*On 19 August 2008 the Applicant asked to talk to his manager in private about his health issues...*

*On 21 August 2008 the Applicant gave the respondent a medical certificate concerning his depressive disorder...”*

[84] This shows that between 8 April and 24 July Mr Sergejew made two brief references to stress. Neither of these comments indicates that he is not coping or that his health is under threat. This is consistent with the fact that he did not see his doctor about stress issues (or anything else) between 4 April and 23 July. It is also consistent with Ms Beecroft's assertion that it was not brought to her attention that Mr Sergejew's health was deteriorating.

[85] I accept that it was reasonable for her to believe that Mr Sergejew was coping adequately and that the measures which had been put in place to assist him and the rest of the team were adequate. Although I accept that the pressures of his work situation were a factor in the worsening of Mr Sergejew's ill health I do not accept that this was foreseeable.

**(v) Was there a systemic failure?**

[86] It has been established that when informed of Mr Sergejew's health concerns the respondent acted to manage potential risk to him by substantially increasing the level of resourcing to Mr Sergejew's team and providing him with counselling support. The net result was that his workload and travel requirements were kept to a reasonable level. It has also been established that while the demands of Mr Sergejew's role were a factor in the development of his depressive disorder this was not foreseeable. Finally, it has been established that the warning was fair and justified.

[87] It remains necessary now to stand back and address a further submission which has been made for the applicant: that there was a systemic failure that rendered the workplace unsafe for Mr Sergejew irrespective of any specific actions taken to assist him. Mr Pool argues that the Ministry has failed to put in place effective methods to identify and assess hazards. Had it done so, he says, the applicant's stress would have been properly monitored and it would not have been left to ill-equipped line managers to manage his stress.

[88] In support of this submission Mr Pool points to the fact that the respondent did not have in place a comprehensive plan for the identification and management of hazards including stress.

[89] It is correct that the respondent was not able to produce a codified hazard identification and management plan. However, the respondent did recognise that stress was a potential hazard for an employee in a role such as Principal Advisor. Furthermore it recognised an obligation to deal with this potential hazard. Both Ms Beecroft's prompt advice about EAP and Mr Jones's early involvement demonstrate that. The respondent has also shown that it was aware of what steps were appropriate to manage the hazard and took them. (These included management of workload and travel, provision of counselling and provision of special leave.)

[90] In summary, although there were no documented organisation-wide protocols for the management of this type of health and safety issue it has not been established that there has been a systemic failure of the type alleged.

**(vi) Long Service Leave**

[91] Clause 5.10.1 of the Collective Agreement provides:

*“Employees who have completed five years’ service will be granted, once only, one week Long Service leave.”*

[92] Clause 4.7.3 provides:

*“all outstanding monies and holiday pay will be paid without undue delay on termination of employment.”*

[93] There is no dispute about the facts that Mr Sergejew completed five years service and never took long service leave. Mr Sergejew says he should have been paid out an additional week's holiday pay at the end of his employment in respect of this outstanding long service leave.

[94] The respondent argues that Long Service Leave is an entitlement aimed at rewarding loyal employees and is not connected in any way to the Holidays Act 2003. It says:

*“Long Service Leave ...clearly does not come within the definition of Holiday Pay as defined in section 5(1) of the Holidays Act 2003.”*

[95] In the alternative the applicant argues that there is an implied term that Long Service Leave be paid out on termination. The respondent counters this submission by arguing that this is in direct contradiction to the fundamental purpose of Long Service Leave which is to reward employees in continuing employment with an extra week's break.

[96] I see no bar to Long Service leave being taken immediately prior to termination so that the final week of employment becomes a week of leave. However I heard no evidence to suggest that Mr Sergejew requested this. In these circumstances I am unable to find a basis to treat this leave entitlement as an entitlement to arrears of wages and must accept the respondent's submission.

### **Summary**

[97] In relation to the first cause of action the overall question for determination was whether the respondent took all reasonable and practicable steps to ensure a safe system of work. It has been established that it did. Mr Sergejew's claim of breach of contract (or in the alternative, disadvantage) fails.

[98] It has also been established that the Ministry was justified in warning Mr Sergejew notwithstanding the delay in the disciplinary proceedings, because Mr Sergejew did not resile from the conduct which was the subject of the disciplinary proceedings and because that conduct was inconsistent with his responsibilities as a senior public servant. Mr Sergejew's claim of disadvantage in relation to the warning fails.

[99] Finally Mr Sergejew has not shown that he is entitled to receive arrears of wages in relation to unused long service leave. That claim also fails.

**Costs**

[100] The issue of costs is reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority