

**Attention is drawn to the Order Prohibiting
Publication of certain information in this
determination at [4].**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 477
3085012

BETWEEN	NADIA WINKS Applicant
AND	BALLANCE AGRI-NUTRIENTS LTD Respondent

Member of Authority: Trish MacKinnon

Representatives: Caroline Silk and Chelsea Phillips, counsel for the
Applicant
Emma Peterson and Isabella Moore, counsel for the
Respondent

Investigation Meeting: 28 and 29 July 2020 at New Plymouth

Submissions Received: Orally and in writing, from both parties

Date of Determination: 29 October 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nadia Winks was employed as a laboratory technician by Ballance Agri-Nutrients Ltd ("Ballance" or "the company") at its Kapuni Plant in May 2015. She was dismissed on notice for medical incapacity on 31 July 2019. Ms Winks claims her dismissal was unjustified and she was disadvantaged by her employer's failure to pay her a bonus for which she had been advised she was eligible.

[2] Ballance denies Ms Winks' claims. It says her dismissal was justified and it followed a full and fair procedure before terminating her employment for medical incapacity. It says when Ms Winks' employment was terminated, its board of directors had not yet signed off on bonuses and Ms Winks had no entitlement to a bonus.

[3] The parties attended mediation but were unable to resolve the matters between them.

[4] In the course of the Authority's investigation a non-publication order was sought in relation to sensitive and private information contained in the evidence of a witness for Ms Winks. Ballance did not oppose the granting of such an order and there is no public interest in that information being accessible to non-parties. Accordingly, a permanent order for non-publication was made in relation to paragraph 3 of the evidence given by Mr Reece Hunn.

Background

[5] Ms Winks had been employed by Ballance for approximately 11 months when, in April 2016, she was diagnosed with an aggressive form of breast cancer for which she underwent surgery. Under medical advice, she had six weeks off work after the surgery, then further time off to undergo chemotherapy treatment.

[6] An Occupational Health Nurse (OHN), one of a group providing contract services to Ballance, formulated a graduated return to work plan for Ms Winks from October 2016 which resulted in her being back to full-time hours by early January 2017.

[7] In her role as a laboratory technician, Ms Winks was on a roster and undertook on-call duties, working weekends when required, going out into the Plant to collect samples and working at heights.¹ Ms Winks was scheduled to go back on the roster and return to full duties from 20 February 2017.

[8] In early April 2017 she reported experiencing dizzy spells. On the recommendation of an OHN Ms Winks remained off Plant duties; was removed from the roster, including on-call and weekend hours; and did not work in the Plant area until further medical information could be obtained.

¹ "The Plant" is the Ammonia, Urea and Effluent process area of Ballance's Kapuni site.

[9] Ballance received that further information on 7 April 2017 by way of a medical report (the Koen report). This recommended that Ms Winks should not go out on the Plant, where she would be required to climb stairs and ladders, while she was on a particular oral chemotherapy drug, unless she had an asymptomatic period of six months. If that occurred, the report recommended a review. At the time the report was written, Ms Winks was scheduled to continue taking the oral chemotherapy drug for approximately nine and a half years. Dr Koen's report stated that Ms Winks was fit to continue working in the laboratory where she had time to sit down if symptomatic.

[10] Ms Winks continued to work full-time in the laboratory for the next two and a quarter years, performing all laboratory duties other than sampling duties that were undertaken on the Plant. She was not on the roster during this time and did not perform on-call or weekend duties. There was a brief period in, or from, December 2018 during which her GP cleared her to work on the Plant, during a shutdown period. At this time the Plant was not live and Ms Winks was required to perform one task only, which did not require climbing ladders.

[11] In early July 2019 Ms Winks underwent a medical assessment at her employer's request. This resulted in a further report ("the first McLeod report") on 8 July 2019 which noted the side effects on Ms Winks of the oral chemotherapy drug she had to continue taking for a further seven years.

[12] Dr McLeod recommended Ms Winks attend her GP to have further tests carried out. He was optimistic the side effects of the chemotherapy drug could be mitigated by treatment and that "consideration of (Ms Winks') return to her full role and plant access could then be reconsidered at the 2-3 month post-intervention mark."

[13] Dr McLeod's optimism was short-lived and, following receipt of the results of the additional tests Ms Winks had undertaken in the 10 days since his first report, he wrote a further report on 18 July 2019 ("the second McLeod report"). In this report Dr McLeod stated the tests had shown no easily treatable cause for Ms Winks' ongoing symptoms, which were likely to continue while she remained on the chemotherapy medication that was essential for the control of her cancer.

[14] Dr McLeod's report noted that Ms Winks would cease the medication in September 2026 and that a reassessment could take place shortly after that. Dr McLeod stated his opinion

that Ms Winks was "fit to continue in the altered duties, lab-based role she is currently working in."

[15] On 29 July 2019 Ms Winks was given a letter by Sam Stewart, the Production Co-ordinator at the Kapuni Plant. Mr Stewart had been seconded to the position of Laboratory Supervisor from 1 June 2019. In that role he had oversight of the laboratory and the laboratory technicians.

[16] The letter was an invitation to a meeting to be held on 31 July 2019, the purpose of which was to discuss the contents of the most recent medical report "and how this may impact on your capacity to perform your current role and your continued employment with Ballance Agri-Nutrients". The letter also stated:

On the basis of the information provided in the medical report, we are concerned that we may not be able to continue to employ you, given your medical issues are preventing you from fulfilling the requirements of your role and will continue to do so for the foreseeable future.

[17] Under the heading "Next Steps" in the letter, Mr Stewart noted that Ballance would also like to hear from Ms Winks regarding any further medical information she considered might be useful and whether there were any other available roles at Ballance in which she was interested. The letter stated that Ms Winks' feedback would be considered before any decision was made and that "one of the potential outcomes of this meeting is termination for medical incapacity (on notice)."

[18] Ms Winks attended the meeting without representation. In attendance for Ballance were six people including Mr Stewart. They were Mr Paul Stewart, the Technical Manager at the Kapuni Plant;² Ms Claire Perrin, the People and Capability Business Partner; a Payroll and Human Resources Coordinator; and two OHNs. During the meeting an adjournment was held after which Mr Stewart informed Ms Winks her employment was to be terminated for medical incapacity, with her final day of employment being proposed as 27 September 2019. Ms Winks later received a letter confirming the termination of her employment "due to medical grounds".

[19] Ms Winks worked until Thursday 8 August 2019, at which time she became upset by an incident at work. Mr Stewart sent her home for the rest of the week advising her he would

² In this determination Mr Sam Stewart will be referred to as Mr Stewart, while Mr Paul Stewart will be referred to by both his first name and surname.

see about her not working out her notice as she was not coping. After visiting her GP on 13 August 2019, Ms Winks was provided with a medical certificate stating she was medically unfit from 12 August 2019 and should be fit to resume work on 1 October 2019. It is not certain that Ballance received that medical certificate at the time.

[20] Ms Winks was paid salary to the end of her notice period in a lump sum on or around 16 August 2019 and was not required to return to work. A bonus she had anticipated receiving was not paid. Ms Winks' medical health insurance benefit, which formed part of her remuneration, remained available to her until 30 September 2019.

Issues

[21] The issues for determination are:

- (a) Whether Ms Winks was unjustifiably dismissed for medical incapacity.
- (b) Whether she was unjustifiably disadvantaged by not being paid a bonus for 2019.
- (c) A relevant question in determining (b) is when Ms Winks' employment ended.

The Authority's investigation

[22] As permitted by s 174E of the Employment Relations Act 2000 (the Act), I have not set out in this determination all the evidence and submissions received from the parties although I have carefully considered all such information. Instead, I have stated relevant findings on facts and law; expressed conclusions on issues requiring determination to dispose of the matter; and made orders where necessary.

[23] The Chief of the Authority has decided, in accordance with s 174C(4) of the Act, that exceptional circumstances exist for providing this determination outside the statutory time frame specified in s 174C (3).

Legal Considerations

[24] The starting point for determining whether a dismissal or other action by an employer is justifiable is the test of justification set out in s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[25] In applying the test, a number of specified factors must be considered. These broadly relate to considerations of natural justice. Additionally, other factors the Authority considers appropriate may be taken into account. A dismissal, however, is not to be found unjustifiable solely because of defects in the process followed by the employer if those defects were minor and did not result in the employee being treated unfairly.

Was dismissal for medical incapacity justified?

[26] A point of agreement in submissions for both Ms Winks and Ballance is that an employer is not obliged to retain indefinitely an employee who is medically incapable of fulfilling the duties of her role. The parties cited much of the same case law including *Hoskins v Coastal Fish Supplies Ltd* in which the Chief Judge of the Arbitration Court stated:

There can come a point at which an employer (particularly in a small shop) can fairly cry halt.³

[27] Unsurprisingly, the parties differ in their application of that proposition, and of other case law, to the decision Ballance made in relation to Ms Winks. Much of the case law concerns employees who were absent from the workplace for extended periods. Fewer of the cases cited by counsel concern employees, such as Ms Winks, who returned to the workplace and continued to be employed on a full-time basis with adjusted duties.

[28] Ms Winks submits there were numerous substantive and procedural failings in the way Ballance acted in relation to her and in its dismissal of her. Briefly these were that Ballance had:

- a) Left it too long to act and, by the time it did act, her duties had been altered by mutual agreement and common practice;
- b) Relied on information that had been improperly obtained or obtained for a different purpose to the purpose she had been advised;
- c) Relied on information that had not been put to her;
- d) Assessed her capability to return to work against the role she had before her duties had been altered by mutual agreement and/or common practice;
- e) Predetermined its decision to dismiss her; and
- f) Failed to hold a fair meeting with her to discuss possible medical incapacity.

³ *Hoskins v Coastal Fish Supplies Ltd* [1985] ACJ (AC) 124 at 127.

[29] Ballance submits Ms Winks' dismissal was substantively justified and it followed a fair and reasonable procedure. Its responses to the abbreviated version of Ms Winks' submissions may be summarised as follows:

- (a) It was obliged to give Ms Winks a reasonable time to recover and return to full duties: two years was a reasonable timeframe in the circumstances;
- (b) Ballance did not consider the possibility that the June 2019 medical assessment would result in termination of Ms Winks' employment;
- (c) Acknowledged in oral evidence there was some information that had not been put to Ms Winks that formed part of the decision to dismiss her;
- (d) The restricted duties Ms Winks carried out were always intended to be temporary and there was no documented change to the terms of her employment agreement;
- (e) There was no predetermination to dismiss Ms Winks; and
- (f) It followed a fair and reasonable process before terminating her employment.

[30] Additionally, Ballance submits that if there were any procedural deficiencies, which it does not concede, these were minor and did not result in Ms Winks being treated unfairly.

Discussion

Were Ms Winks' duties altered and, if so, was she assessed against the wrong standard?

[31] Ballance says it was obliged to give Ms Winks a reasonable opportunity to recover and return to full duties which, in the company's submission, explains the length of time that elapsed before it commenced a medical incapacity process. During that time Ballance submits there was ongoing monitoring of Ms Winks' symptoms and reporting to management as required. Mr Paul Stewart's evidence supported this. He said the OHNs reported to him at least monthly about Ms Winks' health.

[32] That came as a surprise to Ms Winks as there had been no communication with her over that monitoring. Her evidence was that she had developed a friendship with the OHNs following her surgery and chemotherapy treatment and she called in for a chat with them in their onsite office from time to time.

[33] Ms Winks did not realise the OHNs were treating those conversations as medical consultations, which they were recording in notes, or that they were regularly reporting on her to Mr Paul Stewart. She became aware of this only after her dismissal when her counsel made a Privacy Act request to Ballance. From Ms Winks' perspective, nothing had been said or done

after the Koen report to give her the impression there would be ongoing monitoring of her in the coming months or years.

[34] Ms Winks said she believed her employer had adjusted her duties to suit the limitations imposed on her by the oral chemotherapy medication she needed to take. The Koen report had made it clear to her employer that, unless she was symptom-free for six months, those restrictions would last as long as she was on the medication. Ballance had not taken action within that time and had instructed Ms Winks to perform her laboratory duties, excluding collecting samples on the Plant.

[35] That situation continued for more than two years with Ms Winks working a regular 40 hour week. The long delay in Ballance taking any action over her remaining on restricted duties gave her the belief her duties had been changed, if not permanently, then at least while she remained on oral chemotherapy medication.

[36] Ballance denied the restricted duties Ms Winks performed from early April 2017 were ever made permanent. It says at no time were discussions held between the employer and Ms Winks about this, and there was no documented variation to her role.

[37] The terms and conditions of Ms Winks' employment were contained in the *Ballance (Kapuni) Ltd General Terms of Employment for Individual Agreement Staff*. The document provided that any change to the terms of her employment required mutual agreement between herself and Ballance. In her counsel's submission, Ms Winks had never been told her restricted duties were a temporary measure, and after two years she was entitled to assume her role had changed. In that situation, it was neither fair nor reasonable of Ballance suddenly to act, long after she had become accustomed to her altered role, without advising her throughout of its concerns that she return to the roster, and resume collecting her own samples on the Plant in the intervening period.

[38] Counsel for Ms Winks submits that, in deciding to terminate Ms Winks' employment for medical incapacity, Ballance was holding her to a standard that no longer existed. Her capacity to work should not have been assessed against her original role, but on her current role as it had been adapted to her circumstances since April 2017. Counsel notes the second McLeod report in July 2019 had clearly stated Ms Winks was fit to continue with her altered role. Counsel also submits that Ballance's intention for Ms Winks to work out her eight week notice period was inconsistent with its finding of medical incapacity.

[39] Ms Winks' removal from the roster and from Plant sample collection duties was clearly to accommodate her inability to perform those aspects of her role safely while she was experiencing the side effects of her oral chemotherapy medication. It is feasible that, after 27 months of that accommodation, Ms Winks may have believed her employer was willing to continue the arrangement for as long as she was continuing to experience the side effects of her medication. However I am not persuaded that belief justifies an assertion that Ms Winks' role had been permanently changed and I do not accept that it did change on a permanent basis.

[40] I do find, however, that the employer's failure to make clear to Ms Winks its views and expectations for a 27 month period during which time it was, largely unbeknownst to her, monitoring her health through the OHN, gave rise to a false sense of employment security in Ms Winks. This was unfair to her as it affected the way she approached Mr Stewart's requests for a medical assessment in June 2019, and for a meeting on 31 July 2019.

Reliance on information improperly obtained?

[41] Ms Winks submits her employer misled her about the true purpose of obtaining the medical information that formed the basis of the two McLeod reports. In her view, having improperly obtained her consent to the medical assessment and resulting reports, it was not fair or reasonable for Ballance to rely on the information to dismiss her.

[42] In early June 2019, shortly after Mr Stewart had taken up the Laboratory Supervisor's role, he asked Ms Winks in passing, as she described it, if she would be willing to undergo another medical assessment when she returned from the planned annual leave she was about to commence.

[43] Ms Winks said her conversation with Mr Stewart was very short. When she asked what the medical assessment was for, Mr Stewart said it was about her ability to go back on the Plant: it was just procedural, and not something she should worry about. Ms Winks said she agreed to undergo the medical assessment as she had no concerns about it because of Mr Stewart's conversational tone and the informal nature of their discussion. She said she had no inkling the medical assessment could lead to the termination of her employment.

[44] Mr Stewart said he could not recall telling Ms Winks not to worry about the medical assessment and that it was just procedural, but did not deny doing so. He said he was not

making a casual request for her to undertake a medical assessment: he was trying to get Ms Winks back to undertaking full duties and the medical assessment was a necessary part of that.

[45] Ballance refers in its submissions to Mr Stewart's evidence that he had anticipated the outcome of the medical assessment would be a return to full duties for Ms Winks. Mr Stewart told the Authority it had never crossed his mind that the medical information obtained from Dr McLeod would be used to terminate Ms Winks' employment. He told the Authority his focus was on her returning to full duties and he fully expected that would happen.

[46] That may have been Mr Stewart's reasoning in early June 2019 when he asked Ms Winks to undergo a medical assessment. It does not appear to have been in his mind after receiving the first McLeod report on 8 July 2019, however. In email correspondence with Ms Perrin that day, enclosing the report, Mr Stewart said that, even though Dr McLeod suggested things may get better in two to three months, he (Mr Stewart) was "not confident of seeing her (Ms Winks) back on full duties at all."

[47] After receiving the blood test results and advice from her own GP that Dr McLeod had suggested she obtain, Ms Winks met, at Mr Stewart's request, with him and an OHN on 15 July 2019. Ms Winks' evidence was that both Mr Stewart and the OHN were very caring towards her during the meeting, in the course of which she relayed the advice she had received from her GP. This was essentially that she could expect to continue having the symptoms she was experiencing as long as she remained on the oral chemotherapy medication she was required to take.

[48] During the meeting Ms Winks consented to the OHN contacting Dr McLeod, at Mr Stewart and Ballance's request, for a follow-up report. The OHN's notes record this was to discuss the blood test results and determine whether there was a possibility Ms Winks could go back onto the Plant within the next two to three months. Ms Winks said she was very surprised to find later, after the termination of her employment, that the OHN had asked Dr McLeod for a final report on whether she would ever be able to work her full role at Ballance.

[49] The OHN's email referred to Ballance having looked at other possible roles for Ms Winks within the company that did not require her to go out on the Plant, but said there were no other job openings at the time. The email made it clear that Ms Winks was likely to lose her job if Dr McLeod's report indicated she would not be fit for undertaking her full role on the Plant, including being on call, in two to three months' time.

[50] Ms Winks' evidence was that nothing was said to her in the 15 July 2019 meeting about what would happen if she could not return to full duties after two to three months, and nor was she advised that staying off the Plant was a temporary measure that could not continue. There was no mention of the termination of her employment for medical incapacity, a term she was unfamiliar with until receiving Mr Stewart's letter of 29 July 2019.

[51] I accept Ms Winks' evidence on this. Mr Stewart confirmed, in answer to questioning in the Authority's investigation, that he had not raised with Ms Winks the possibility of her losing her job until 17 July 2019. Mr Stewart said he raised it at that time when Ms Winks visited him in an upset state because Dr McLeod had told her in a telephone conversation the previous afternoon that she was likely to lose her job over his second report.

[52] It was clearly in Mr Stewart's mind when he met with Ms Winks and the OHN on 15 July 2019 that he wanted a definitive answer from Dr McLeod whether Ms Winks would be capable of performing all the duties of her position within the next two to three months. That was evidenced by his email correspondence with Ms Perrin and by his request that the OHN obtain that information from Dr McLeod.

[53] In *Barry v Wilson Parking New Zealand (1992) Limited*⁴, the Employment Court, in referring to the obligation of the employer in that matter "to act with justice in a way that was fair to the employee" said:

What this amounts to, speaking generally, is that the employer has to wait a reasonable time to give the injured employee an opportunity to recover (what is reasonable being a question of fact in each case) and after that it has to inquire in a fair and open-minded way whether the employee has any realistic prospects of returning to work within a further reasonable time. **This necessarily has to include seeking information from the injured employee, making it known at the time that the information may be used for the purposes of a decision to discontinue the employment relationship.** This is to ensure that the employee understands the seriousness of the issue and will have a motive for ensuring that the information is as full and accurate as he or she can make it be.⁵ (emphasis added)

[54] In the current situation, Mr Stewart knew a possible outcome of a second report from Dr McLeod was Ms Winks' dismissal for medical incapacity. Ms Winks was unaware of this when she was asked by Mr Stewart and the OHN on 15 July 2019 for her consent to that second McLeod report. She knew it was to ascertain whether she could go out on the Plant: she did

⁴ [1998] 1 ERNZ 545.

⁵ N4 at 549.

not know the future of her employment with Ballance was at stake. I find Ballance did not act fairly towards Ms Winks in failing to disclose this information to her before seeking her consent to the second McLeod report. I will return to this shortly when considering the 31 July 2019 meeting at which Ms Winks was dismissed.

Information not put to Ms Winks for comment

[55] Ms Winks submits the decision to dismiss her included information that had not been put to her for comment and for which no substantiation had been provided. This included Mr Stewart referring, in both the letter of 29 July 2019 and the dismissal letter of 31 July 2019, to the negative impact on the wider team of laboratory technicians that resulted from Ms Winks not undertaking full roster and Plant collection duties.

[56] Mr Stewart confirmed in oral evidence this was one of the factors he took into account in making the decision to terminate Ms Winks' employment. He agreed it was not put to Ms Winks in the meeting of 31 July 2019 and she had no opportunity to comment on it.

[57] This was not in accordance with the test of justification I have referred to earlier in this determination. The test requires an employer to put its concerns to an employee; to give the employee a reasonable opportunity to respond to those concerns; and genuinely consider the employee's response before dismissing or taking action against the employee.

[58] In this instance Ballance's failure to provide Ms Winks with information about its concern and give her the opportunity to comment on it before deciding to dismiss her was not the action of a fair and reasonable employer.

Predetermination

[59] Counsel for Ms Winks referred to a number of documents that in her submission support the view that the decision to dismiss Ms Winks was predetermined. Emails Ms Winks was unaware of until after her dismissal show that Mr Stewart and Mr Paul Stewart were in communication with the OHN in May 2019, before Mr Stewart began in his role of Laboratory Supervisor, over formalising a plan that would see Ms Winks return to full duties. Mr Paul Stewart confirmed in oral evidence he had instigated this in discussions with OHNs.

[60] An email from Mr Stewart to an OHN on 24 May 2019, which was copied to Mr Paul Stewart, stated his view that Ballance had been more than fair and allowed a significant amount

of time to Ms Winks to recover after her surgery but that her "light" duties could not be opened and he needed "all of the Lab staff to fulfil all of their duties (albeit with a helping hand)".

[61] In the same email Mr Stewart had put forward a plan for managing Ms Winks' health issues in a way that allowed her to undertake all the duties of her role. Mr Paul Stewart agreed with his plan in a reply email.

[62] The email demonstrates that before taking on the Laboratory Supervisor's role, Mr Stewart had formed the view Ms Winks could not be permitted to continue on what he described as "light" duties and was focussed on her returning to full duties.

[63] Further emails from early July 2019 between Mr Stewart and Ms Perrin evidenced discussion of the options that were available to Ballance regarding Ms Winks. These included medical incapacity, as Ms Perrin emailed a link to information on that topic to Mr Stewart on 3 July 2019, referencing a discussion they had had the previous day.

[64] By 8 July 2019, after receiving the first McLeod report, Mr Stewart expressed in an email to Ms Perrin his lack of confidence about seeing Ms Winks back on full duties at all. He referred to Ms Winks in a critical manner, and asked Ms Perrin for suggestions about his options.

[65] On 11 July 2019 Ms Perrin emailed Mr Stewart, referencing their conversation earlier that day. She listed a number of bullet points including:

- It has been outlined from the doctor that there is an immediate plan we can work on for her to return to full duties
- That is seeing her GP and then to be referred to a specialist for us to completely understand and for her to get the testing that is required for us to know if and when she will be fit to return to work on full duties
- We need her to undergo this treatment/tests and return to her full role or we will need to go down medical incapacity
- If she is not willing to pay for these appointments then we will pay for these to happen
- If she is not willing to go and get these appointments done then we would need to make a decision based on the information we have on her ongoing ability to do her role

[66] These were followed by some points Ms Perrin advised Mr Stewart to cover off with Ms Winks, including how reasonable the employer had been for the past three and a half years;

and how they wished to help her to get back to performing all aspects of her role. This would include Ms Winks undergoing further tests; Ballance needing more medical information that she was able to do her job; and how long it would take her to get back to full capacity. The final point for Mr Stewart to cover off with Ms Winks was the expectation that this information be obtained "over the next couple of months".

[67] Mr Stewart responded to Ms Perrin's email on 12 July 2019, saying he was "really clear on the direction we are going." He referred to the meeting he had arranged with Ms Winks and the OHN for 15 July 2019. In the period between then and 29 July 2019, several further email exchanges between Mr Stewart and Ms Perrin took place, and some with Mr Paul Stewart.

[68] An email from Mr Stewart to Mr Paul Stewart on 19 July 2019 set out four "Key next steps". These were that Ms Perrin would check with "legal" on the next steps of the process; Mr Stewart would catch up with Mr Glenn Johnson, the Operations Manager at the Kapuni Plant, to discuss secondment options at Ballance Mount Maunganui; there would be a meeting with Ms Winks on 31 July 2019; and the final step was:

"Resignation or Medical Incapacity by 30.10.19?"

[69] Ms Winks submits that the documents make clear that Mr Stewart approached the meeting of 31 July 2019 with a closed mind and that nothing she could have said in the meeting would have changed his mind. This was denied by Mr Stewart in the Authority's investigation.

[70] There is some evidence that supports Ms Winks' perspective. Emails between Mr Stewart, Mr Paul Stewart, and OHNs pre-dating Mr Stewart's commencement in the Laboratory Supervisor's role reveal that, in late May 2019, Mr Stewart had decided Ms Winks needed to return to full duties. In his view Ballance had already been "more than fair" in the time it had allowed her to recover from her surgery and remain on what he termed "light duties."

[71] Mr Stewart's emails in late May 2019 suggest he was confident Ms Winks would be able to return to full duties with some assistance. The second McLeod report of 18 July 2019 made it clear that would not happen until Ms Winks completed her oral chemotherapy medication in September 2026. Mr Stewart's communications at this stage reflected the view that it was untenable for Ms Winks to continue on the restricted duties she had been undertaking for more than two years.

[72] The notes of the meeting of 31 July 2019 do not record any options being considered for Ms Winks other than a return to full duties, which was agreed not to be possible while she remained on oral chemotherapy medication, or termination for medical incapacity. Mr Stewart's letter of 29 July 2019 inviting Ms Winks to that meeting referred to the employer wanting to hear from Ms Winks about any other available roles at Ballance in which she was interested. Ms Winks' evidence was that she was unaware of any available roles at the time and none had been brought to her attention. The notes record she made clear her wish to remain working for Ballance but she understood there were no other roles currently available.

[73] It appears that Mr Stewart approached the meeting of 31 July 2019 with clear outcomes in mind: Ms Winks would bring forward some new medical information that would permit her to return to the roster and full Plant duties; she would identify an alternative available role for herself elsewhere in the company; or she would be dismissed for medical incapacity.

[74] Mr Stewart had access to the latest medical information through the assessment he had asked Ms Winks to undergo and the two medical reports from Dr McLeod that he had requested. There was no new medical evidence Ms Winks could supply. Mr Stewart was in a better position than Ms Winks to know what other roles were available within Ballance and had already made it known to the OHN who facilitated the second McLeod report that there were none available at the time. It was clear from Mr Stewart's evidence that he did not see the retention of Ms Winks as a tenable option while she continued to undertake restricted duties.

[75] In view of the above, I accept Ms Winks' submission that there was nothing she could have said at the meeting of 31 July 2019 to dissuade Mr Stewart from deciding to terminate her employment.

Fairness of the 31 July 2019 meeting

[76] The meeting of 31 July 2019 should be considered in the context of the events that led to it. Ms Winks' evidence is that the first time she became aware of the phrase "medical incapacity" was on 29 July 2019 when she read it in Mr Stewart's letter inviting her to the meeting due to take place two days later.

[77] Mr Stewart's evidence was that he gave Ms Winks the letter and told her to read it and get whatever advice she needed to be able to respond at the meeting. Mr Stewart said he went through the contents of the letter with Ms Winks and explained how serious it was.

[78] Ms Winks said Mr Stewart handed the letter to her at about 2 pm on 29 July 2019 and told her not to open it until she got home as it contained some quite heavy wording. He did not go through the letter with her or explain what was in it. Ms Winks said she did not wait until she got home that day, but opened the letter in a tea break and had to google "medical incapacity" to understand its meaning. I accept her account of receiving the letter, principally because her recall of the event was so vivid.

[79] Ballance submits that, regardless of the short timeframe between the phrase "medical incapacity" first being used and the decision being made to terminate Ms Winks' employment for that reason, Ms Winks had been aware since 17 July 2019 that dismissal was a possibility. As noted above, on 16 July 2019 Dr McLeod had apologised to Ms Winks for the report he was about to release to her employer, which he told her would likely result in the loss of her job.

[80] Ms Winks' evidence was that, when she went to inform Mr Stewart of that conversation with Dr McLeod, he assured her that "everything would be ok." According to Ms Winks, Mr Stewart told her he was doing everything he could to find her another position in the company and that, if it ever did come down to her losing her job, it would be a very long process and nothing would happen quickly.

[81] Mr Stewart's recollection of his discussion with Ms Winks on 17 July 2019 differed in that he denied reassuring her that everything would be alright. His evidence was that he was sympathetic because he could see Ms Winks was upset, but he did inform her that termination of her employment was a potential outcome.

[82] The accounts of Ms Winks and Mr Stewart of their discussion on 17 July have some points of similarity and I do not consider either of them to be deliberately untruthful. I find it likely Ms Winks was so shaken by her telephone conversation with Dr McLeod that she was willing to be reassured by Mr Stewart's sympathetic response.

[83] I also find it likely Mr Stewart downplayed the prospect of Ms Winks' employment being terminated, at least in the near future. The email I have referred to in [68] above, which he sent to Mr Paul Stewart on 19 July 2019, suggests Mr Stewart had 30 October 2019 in mind as a possible end date for Ms Winks' employment, either by resignation or medical incapacity. That was three and a half months away at the time he was talking with Ms Winks on 17 July 2019 which lends credence to her understanding that nothing would happen quickly.

[84] I accept Ms Winks' evidence that, although Mr Stewart had advised her on 17 July 2019 of the possibility her employment could be terminated, he "glossed over it" in her words. It seemed to her to be a remote prospect that would not occur any time soon, if at all, and that he would be seeking other opportunities within the company for her.

[85] Ms Winks said on the basis of that conversation with Mr Stewart, she believed Dr McLeod must have been mistaken and it was unlikely that she would lose her employment. She was reassured Ballance wanted to retain her and that was one of the factors that led her to not take Mr Stewart's letter of 29 July 2019 as seriously as she would have if she had genuine concerns for her employment. Other contributory factors were, as previously noted, the absence of any concerns over her restricted duties being expressed to her by Ballance for more than two years; her lack of knowledge that her health was being monitored and reported on; and her employer's failure to share with her its reason for seeking her consent to the second McLeod report.

[86] A witness for Ms Winks, who had read Mr Stewart's letter, said she had urged Ms Winks to ask for the meeting of 31 July to be postponed in order that she could obtain legal advice. The witness said Ms Winks told her not to worry because Ballance was looking for other roles for her and she believed it likely the meeting would be to discuss those options. Ms Winks did not ask for a postponement and nor did she take a representative to the meeting which, as earlier noted, was attended by four Ballance employees and two contracted OHN. One of the OHN was there to support Ms Winks according to Mr Stewart while the other was there to provide any medical related information.

[87] I find it disquieting that Ballance was not concerned by the number of its personnel at the meeting while Ms Winks had no independent person with her. Mr Stewart and Mr Paul Stewart knew of the involvement of the OHN in obtaining the second McLeod report, while Ms Winks remained oblivious of that until after her employment had been terminated. She was unrepresented because she had no notion that dismissal in the course of the meeting was likely.

[88] The 29 July 2019 letter encouraged Ms Winks to bring a support person to the meeting and alerted her that one of the potential outcomes was termination of her employment for medical incapacity. Those elements of the letter could be expected in most circumstances to alert an employee to the seriousness of their situation. They did not have that effect on Ms

Winks because, as she said in evidence, in the context of her discussions with Mr Stewart, she did not think dismissal was a real possibility.

[89] There is no evidence from the Ballance note taker's record of the meeting that any person present suggested the meeting be adjourned to allow Ms Winks to obtain representation. In the circumstances, I find it was remiss on the part of the employer to proceed with the meeting until it was satisfied Ms Winks was fully aware of the seriousness of the situation she was in and the likelihood of her dismissal. Encouragement to bring a support person in the letter inviting Ms Winks to the meeting was not sufficient in the circumstances.

[90] The notes of the meeting record that Mr Stewart outlined what had happened to that point and talked about Ms Winks' recent medical tests. There was some discussion of these and Ms Winks stated her belief that her current symptoms were her new "normal". She was asked if she wanted to provide any further medical reports and said she did not, as any further medical report would repeat what was in the current report and in the Koen report.

[91] Ms Winks is recorded in the meeting notes as saying her preference was to remain with Ballance but she understood there were no other roles currently available. In evidence, Ms Winks said she had expressed her disappointment over the lack of success she had in her efforts to find an alternative role within the company that she could undertake without restriction. She believed she had been stopped from pursuing those opportunities because she was needed in the laboratory.

[92] Evidence from Mr Stewart and Mr Paul Stewart supported her view to the extent that it was clear the laboratory was unwilling to release Ms Winks to undertake the necessary training for at least one of those roles. Their position was that the business needs of the laboratory took priority.

[93] The meeting notes of 31 July 2019 do not record any response to the frustration Ms Winks expressed about being unable to obtain another role in the company.

[94] There was no discussion in the meeting about any possible alternatives to dismissal and nor was Ms Winks invited to comment on possible alternatives. The 29 July 2019 letter had raised the negative impact on the rest of the laboratory team of Ms Winks' inability to undertake Plant sampling and be on call. As noted earlier, Mr Stewart acknowledged during the Authority's investigation that Ms Winks was not given the opportunity to comment on that

negative impact, or on how it could be mitigated. It does not appear that Ballance identified any reason for the sudden need for Ms Winks to be on the roster and out on the Plant collecting her own samples after she had been carrying out all laboratory duties except those for more than two years. The notes of the 31 July 2019 meeting contain nothing to suggest that was discussed.

[95] Taking all these matters into account I consider that the 31 July 2019 meeting was not conducted fairly.

[96] That meeting was the final step in a flawed process in which relevant information was not shared with Ms Winks. This included not making it clear to her that she had been monitored and reported upon to management since the Koen report; asking for her consent for Dr McLeod to provide a second report without advising her the report could be used to terminate her employment; having decided in advance that it was untenable for her to continue on restricted duties; and relying on information that had not been put to Ms Winks for comment in making the decision to dismiss her. None of these matters could be described as minor procedural flaws.

[97] Taking all the circumstances at the time into account, I consider Ms Winks' dismissal was not an action that a fair and reasonable employer could have taken. I will return to the matter of remedies and contribution shortly.

Unjustifiable disadvantage

[98] Ms Winks' evidence was that she received a bonus each year of her employment with Ballance other than in 2019. She says the reason her employer gave her an eight week notice period was in order that she retained her eligibility for the bonus. The notes of the 31 July 2019 meeting refer to the proposed "final" date for Ms Winks' employment being 27 September 2019 to allow her to be "eligible". It is her submission that refers to her being eligible for the annual bonus.

[99] Ballance's submissions on the bonus are that it is discretionary and Ms Winks' employment agreement contained no entitlement to a bonus. Ms Perrin's evidence was that bonuses were paid to eligible employees on 12 September 2019 and that the company's practice was that an employee had to be employed on the date the bonus payments were made in order to be eligible.

[100] Ms Perrin said the bonuses had not been finalised or signed off at the point of Ms Winks' termination: they were finalised and approved by Ballance's Board at the start of September 2019.

[101] Counsel for Ballance notes Ms Winks' notice period was to end on 27 September 2019 but a subsequent agreement was made whereby she was not required to work out the full notice period. Ballance paid out her remaining salary and entitlements on 16 August 2019 and regards that day as Ms Winks' last day of employment. The only evidence Ballance put forward in support of that being her last day of employment was a brief assertion to that effect in the written statements of Mr Stewart and Ms Perrin and an internal email from Ms Perrin to Mr Stewart and Mr Johnson on 16 August 2019.

[102] The Agreed Bundle of Documents provided to the Authority by the parties contained an email exchange between counsel for Ms Winks and Ms Perrin referencing a meeting that had taken place between the parties that day, 15 August 2019, on a *without prejudice* basis. Counsel for Ms Winks recorded in her email to Ms Perrin the "on the record" agreement the parties had reached, which included the following matters pertinent to the bonus and date of end of employment issues:

- (Ms Winks) would not be required to work out her notice and Ballance would pay the notice agreed to 27 September and statutory entitlements to and including 27 September 2019.
- (Kristen/(Ms Perrin) will send us the bonus scheme information and amount (including information about how this is calculated) and to consider whether this is a contractual entitlement that should be paid.
- ...

[103] Ms Perrin forwarded the email to Mr Stewart and Mr Johnson on 16 August 2019, as referenced in [101] above. In it she "confirmed" that Ms Winks' employment with Ballance ended that day; that her final payment was being worked through and would be signed off and sent through; and that her health insurance benefits were being held open until 30 September to allow time for Ms Winks to arrange her own insurance. Ms Perrin asked Mr Johnson for a copy of Ms Winks' employment agreement so she could send through the section on bonus payments to Ms Winks' lawyer.

[104] I do not consider that the first bullet point of the agreement supports Mr Stewart and Ms Perrin's assertions that Ms Winks' employment terminated on 16 August 2019. I note that the "Notice" provisions of Ms Winks' employment agreement provided in part that:

Where either party elects to terminate this Agreement on notice, Ballance may continue to employ you under the terms and conditions set out in this Agreement, but for all or part of the period of notice, not require you to perform alternative duties. During any such period you will continue to receive all remuneration and other entitlements under this Agreement for the remaining balance of the notice period and will be bound by all other terms of this Agreement.

[105] In *Poverty Bay Electric Power Board v Atkinson*, the Court considered "when the act of dismissal occurred" in a situation where a three month notice period had been given and the employee was not required to work out that period.⁶ The Court found the dismissal occurred at the end of the notice period.⁷ The pivotal fact for the Court was that the employer chose to permit the employee to cease work from the beginning of the notice period, while acknowledging its obligation to pay him for the full period of notice.⁸

[106] From the evidence given by both parties it seems the expectation on 31 July 2019 was that Ms Winks would work through her notice period. That changed when she became upset on 8 August 2019 and Mr Stewart advised her he would look into her not working out the rest of her notice because of her difficulty in coping. Although she was paid out remaining salary and holiday pay entitlements on 16 August 2019, I do not consider that day to be the last day of her employment which, I find, remained 27 September 2019. There is nothing in the "on the record" agreement between the parties of 15 August 2019 to suggest they had agreed on an earlier date.

[107] That does not assist Ms Winks, however, as there is no entitlement to a bonus under her employment agreement. The bonus is discretionary and no documentation was provided to the Authority as to any terms and conditions that applied to it.

[108] Counsel for Ms Winks submits Ballance had advised Ms Winks it would pay her the bonus but I find there is insufficient evidence for me to accept that submission. The second bullet point of the "on the record" agreement between the parties at [102] above refers to information being sent about the bonus to Ms Winks' lawyer and "to consider whether this is a

⁶ [1992] 3 ERNZ 413.

⁷ N6 at 418.

⁸ N6 at 419.

contractual entitlement that should be paid". It does not refer to any advice given to Ms Winks that she would receive the bonus.

[109] On the evidence before me I conclude Ms Winks does not have an entitlement to the bonus she seeks for 2019.

Remedies and contribution

[110] Ms Winks was fortunate to secure employment from 30 September 2019, albeit on slightly reduced remuneration, and does not seek the reimbursement of wages. She seeks compensation for the humiliation, loss of dignity and injury to feelings she suffered as a result of her unjustifiable dismissal in the sum of \$30,000.

[111] An element of the hurt and humiliation related to the communication Ballance sent out on 5 August 2019 regarding Ms Winks' departure from the company. Although the notes of the 31 July 2019 meeting record that the company wished to work with Ms Winks on the statement, when she asked for draft wording to be changed, her employer was unwilling to accommodate her. I took from Ms Perrin's evidence that concern over a potential backlash from other employees against Mr Stewart as the decision maker outweighed Ms Winks' wish to share with her colleagues that her employment was terminating for medical reasons.

[112] The wording of the email sent to staff implied she was leaving to take up other employment which Ms Winks said resulted in her receiving many messages of congratulations. She found it demoralising and embarrassing to have to correct that impression which then led to an erroneous assumption by a number of people that she was leaving because of a return of her cancer. A further short communication was sent out to Ballance employees on 16 August 2019, following agreement between the parties that Ms Winks would not work out her notice period. This communication corrected the assumption that her cancer had returned although by then the damage had already been done.

[113] As well as the evidence around the 5 August 2019 email to staff, I have taken into account the evidence Ms Winks gave of the shock she experienced at her sudden loss of employment; the loss of colleagues with whom she had enjoyed friendship; her feeling of being devastated and the loss of trust she experienced. I have balanced that against Ms Winks' ability to obtain alternative employment within a relatively short period and conclude that an

appropriate amount in compensation is \$24,000. I find Ms Winks did not contribute to the situation that led to her dismissal and no reduction will be made.

Orders

[114] Ballance Agri-Nutrients Limited is ordered to pay Ms Winks, without deduction, the sum of \$24,000 as compensation for her unjustifiable dismissal pursuant to s 123(1)(c)(i) of the Act.

Costs

[115] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority