

**THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 313/08  
File Number: 5081338

BETWEEN Peter Crutchley  
AND Chief Executive of the Ministry  
of Social Development (MSD)

Member of Authority: Janet Scott  
Representatives: Stephen Corlett for applicant  
Samantha Turner for respondent  
Investigation Meeting: 10 – 13 December 2007 & 27 February 2008  
Submissions Received 31 March & 26 May 2008 for applicant  
13 May for respondent  
Determination: 1 September 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant submits that his former employer MSD breached a number of contractual terms of his employment and that it failed to provide him with a safe working environment which led him to suffer mental harm by reason of work-related stress.

[2] It is also alleged that MSD's contractual breaches including its failure to provide the applicant with a safe working environment were unjustified actions which disadvantaged the applicant in his employment and constitute breaches of express and implied terms of the applicant's employment - being the respondent's duty to be a good employer (State Sector Act 1988), the duty to provide a safe working environment (HASEAct 1992) and the duty of good faith (S.4 ERAAct 2000).

[3] The applicant also alleges that the termination of his employment on the grounds of medical incapacity was unjustified because his medical incapacity was caused by the respondent's breaches of its contractual duties towards him.

[4] It is submitted by and for the applicant that the respondent's contractual breaches and unjustified actions have caused him physical and mental harm and financial harm.

[5] By way of remedies the applicant seeks lost remuneration including loss of future remuneration, compensation, interest, a penalty for breaches of the statutory duty of good faith, reimbursement of the applicant's medical and counselling expenses (past and future) and legal costs.

[6] The respondent denies that it breached the terms of Mr Crutchley's employment and denies that it failed to provide him with a safe place of work. It also denies that Mr Crutchley was unjustifiably dismissed or that he suffered unjustifiable disadvantage. It submits that therefore no remedies are warranted.

### **Issues for Determination**

- What duty did MSD owe to Mr Crutchley?
- Did MSD breach its duty to Mr Crutchley?
- What harm was suffered by Mr Crutchley?
- Was that harm reasonably foreseeable by the respondent?
- Was Mr Crutchley disadvantaged in his employment? If so, how should this be remedied?
- Was Mr Crutchley unjustifiably dismissed from his employment? If so, how should this be remedied?

### **Background**

[7] First it is necessary to set out Mr Crutchley's background and a description of the role he took up with MSD in 2002.

[8] Mr Crutchley is a South African. He and his family immigrated to New Zealand in 1998. Mr Crutchley is a qualified mechanical engineer and prior to coming to New Zealand he worked for South African Airways for 22 years. For 13 years of that period he was Manager, Flight Operations.

[9] The evidence also discloses that Mr Crutchley has made a study of management/ leadership principles and practice and that he embraces and always practiced "*people first management*" with a view to developing and empowering staff in their roles. A consultative and teamwork approach to management is very important to him and it would not be an exaggeration to say he has a passion for what he describes as "*people first management*".

[10] On his arrival in New Zealand, Mr Crutchley established a management consultancy practice based on this approach to management. While he did some work with small businesses Mr Crutchley said that a lack of networks in New Zealand hindered the development of this business.

[11] It was Mr Crutchley's evidence that in order to gain a better understanding of the New Zealand business culture and to supplement his family savings he applied for a position as a work broker with Work and Income New Zealand (WINZ, a division of MSD) early in January 2002. Mr Crutchley was successful in his application and he commenced work in the Hamilton Central office of Work and Income (WINZ) in March 2002.

[12] The purpose of the work broker role is to assist customers to access job vacancies or community work and to achieve placement. To achieve this, work brokers are required to establish linkages to potential sources of employment; to encourage the use of Work and Income to create work opportunities and to match customers with appropriate vacancies.

### **Individual Employment Agreement (IEA)**

[13] Mr Crutchley's employment was covered by an IEA (signed 10 February 2002). It is a straightforward agreement similar to thousands of others applying in the state sector.

[14] In addition to standard terms of employment e.g. hours, remuneration, annual leave, dispute resolution arrangements it details provisions including:

- A commitment to equal opportunity for staff;
- The principle of consultation over issues that affect staff at work;
- A mutual commitment on the employer and employee to observe the obligations governing health and safety in the workplace and a stipulation that the employer will provide a healthy and safe working environment;
- A mutual responsibility (employer & employee) to facilitate the employee's rehabilitation back into the workplace following absence due to personal injury or occupational illness.

- A definition of workplace harassment (including sexual harassment). The employer accepts the responsibility to promote and maintain an environment free of harassment and to provide (and make known) mechanisms for reporting and managing complaints of harassment;
- A performance assessment process and a process for reviewing performance assessments - details of which are contained in Ministry policy documents which are available to employees in every work place.
- Acknowledgement that employees appointed to one metropolitan office may be required to work in another office in the same metropolitan area, with reimbursement of additional travel costs (where additional travel time over 15 minutes by public transport is incurred).
- Access to EAP.
- A medical retirement clause which provides that MSD can approve an employee's early retirement on medical grounds with a minimum payment of 65 days pay.

[15] This IEA contained a sick leave clause which provided that during the first two years of service a permanent employee would be entitled to up to 10 days paid sick leave per year. Thereafter sick leave would be provided as required. In August 2002 the Ministry proposed a change to Mr Crutchley's sick leave entitlements (in line with changes to the Ministry's recently negotiated CEA) which would replace the right to unspecified leave (after 2 years) with a standard entitlement of 10 days per year accumulating to 260 days. A new provision was also proposed, for paid special circumstances leave - to apply where an employee has insufficient sick leave available. As I understand that provision it provides for an employee's manager to approve paid leave for serious illness including accident, surgery or suchlike where that paid leave will assist the employee's speedy recovery and return to the work place. The nature of the illness and the prognosis for recovery and a return to work are key considerations to be weighed in assessing an application for special circumstances leave.

[16] A payment of \$900 gross to Mr Crutchley was proposed to compensate him for accepting the variation to his sick leave entitlements. Mr Crutchley accepted this variation on 19 August 2002.

## What duty did MSD owe to Mr Crutchley?

[17] Mr Crutchley’s claims are founded on the premise that the respondent has breached its contractual duty to provide him with a safe place of work, thereby causing him to suffer mental harm. The test to be applied is that set out in the judgements in *Gilbert v Attorney-General* [2002] 1 ERNZ 332 and *Attorney-General v Gilbert* [2002] 1 ERNZ CA. At p.31 the Court of Appeal confirmed the common law duty on employers to maintain a safe place of work and it said:

*“The content of the duty implied by common law to maintain a safe workplace is informed and given content by modern legislation, including in New Zealand the provisions of the Health and Safety in Employment Act”. (Gilbert, CA cited above).*

[18] The object of the Health and Safety in Employment Act 1992 is to promote the prevention of harm to all persons at work (and others in the vicinity of a workplace). The primary responsibility is placed on employers who have the duty to *“take all practicable steps to ensure the safety of employees while at work”*. (S.6). The Act was amended with effect from 5 May 2003.<sup>1</sup> The definition of harm in s.2 (1) of the 1992 Act was amended to include *“physical or mental harm caused by work related stress”*<sup>2</sup>.

[19] Section 2A of the principal Act sets out the factors relevant to *“all practicable steps”*. It means all steps to achieve the result that it is *reasonably practicable to take in all the circumstances*, having regard to-

- The nature and severity of the harm that may be suffered if the result is not achieved, and
- And the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
- The current state of knowledge about harm of that nature; and
- The current state of knowledge about the means available to achieve the result, and about and about the likely efficacy of each of those means; and
- The availability and cost of each of those means.

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<sup>1</sup> Post *Gilbert*.

<sup>2</sup> Work-related stress is defined by OSH as “an interaction between a person and their (work) environment and is the awareness of not being able to cope with the demands of one’s environment, when this realisation is of concern to the person, in that both are associated with a negative emotional response”.

[20] S.2A(2) provides that “*a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about*”.

[21] The Court of Appeal in *Gilbert* also said:

*“The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of “all practicable steps”. What is “reasonably practicable” requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s.19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligations. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer’s obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risk”.*

[22] These are the duties the respondent owed to Mr Crutchley in relation to the provision of a safe place of work. It is to be noted from the above description that Mr Crutchley owed corresponding duties to his employer.

[23] In addition to the duty on the employer to take all practicable steps to provide a safe place of work and the corresponding s.19 obligation, which rests on employees, employers and employees must not do anything that would undermine the implied obligations of mutual trust and confidence. Parties to employment relationships also have a statutory duty of good faith towards each other.

[24] It is further recorded that it is for Mr Crutchley to show, on the balance of probabilities, that the stress he suffered was work-related i.e. that it was caused by a breach of duty by the employer; that he has suffered a medically recognisable condition as a result the work-related stress; that the employer must have known or

ought reasonably have known about the work-related stress and that the employer failed to take all practicable steps to deal with the stress.

### **Did MSD breach its duty to Mr Crutchley?**

[25] For ease of analysis the alleged breaches of duty relied upon by Mr Crutchley as the basis for the relief claimed by him are dealt with under a number of broad headings. Throughout my coverage of these topics I will chart the evidence relating to Mr Crutchley's developing illness.

- Training, supervision/support, staffing and workload issues.
- The Jackie Theobald email, PSA complaint, the H&S committee stress assessments and recommendations (the Stress Report(s)) and MSD's responses to the issues raised.
- The Vacancy Management Team (VMT) initiative and the abandonment of this approach to service delivery without consultation with work brokers.
- The handling of Mr Crutchley's return to work following stress leave in February 2004 and his assignment to the Dinsdale office.
- The downgrading of Mr Crutchley's performance assessment in October 2003.
- MSD interactions with Mr Crutchley whilst he was on extended sick leave from 17 February 2004 including MSD's management of his request for further EAP counselling; special circumstances leave and the management of his complaints and those of Mrs Crutchley, including his complaint of bullying in respect to the downgrading of his performance assessment.

### **Training, supervision/support, staffing and workload issues**

[26] Under this head Mr Crutchley alleges that:

- MSD failed to provide him with sufficient training for his position despite this being identified during his training.
- MSD failed to provide the applicant with sufficient support/mentoring in his role as work broker.
- MSD failed to maintain adequate staffing levels at the Hamilton Central office.

- MSD subjected him to an excessive workload and unrealistic performance targets.
- MSD failed to recognise the inherently stressful nature of the work broker role as shown by the fact the applicant was required to deal with aggressive clients and employers and violent incidents in the workplace and the very high turnover of work brokers.

[27] The evidence discloses that Mr Crutchley attended a two week induction course for the work broker role (4 – 15 March 2002). This covered the technical and personal skills required to undertake the role i.e. working with the relevant computer programmes and legislation, relationship building, sales and marketing. It was Mr Crutchley's evidence that the training was geared to persons who were already familiar with the organisation and he found the course challenging. However, at the conclusion of the course<sup>3</sup> Mr Crutchley's technical and personal skills were assessed as "good to excellent". The following general comments were made.

*... [Peter] came to the course with little prior knowledge or experience in the role and this caused frustration at times...*

*... with more practice and support from his team coach Peter will gain competency in the technical applications..*

[28] Mr Crutchley commenced his role as a work broker early in March 2002. It was his evidence that from day one he found his working environment very stressful and that during the period March – July 2002 he experienced headaches and dizziness which he submits were the result of the following work stressors:

- That he was expected to hit the ground running on limited training with no team coach/mentor to assist him.
- Hamilton Central was the busiest office in the Hamilton Metro region with the highest foot traffic and with large numbers of migrants accessing the office for placement assistance. Many clients had low self esteem and were in a stressed state. Some had criminal histories and/or drug and alcohol problems. Clients were sometimes aggressive or unruly.
- The emphasis was on placements regardless of the quality of the placement and placement targets were unrealistic. (It is clear on the evidence that Mr Crutchley has a dislike of goal/target based measurements of performance).

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<sup>3</sup> These ratings were on a scale that ranged from "Needs more support" to "Excellent"

- He was the only full-time work broker in the Hamilton office during 2002 (the other work broker worked only three days per week). This was despite an establishment figure for two full-time work brokers<sup>4</sup>. This also meant he frequently did not have access to a more experienced colleague to assist him. Mr Crutchley did, however, acknowledge that the part time work broker he worked with at the commencement of his employment - Janine Sturgeon - was very experienced and competent and that she assisted him, albeit he did feel she was under pressure to meet her own targets and this was a barrier to his seeking her assistance. He also acknowledged receiving assistance from other work brokers including Pamela Wingate and Lloyd Te Ruki
- Mr Crutchley also claims that he was the only work broker at the Hamilton Central from August to October 2003 and that he was left on his own to cope with the immense workload which required a minimum of two full time work brokers.

[29] For its part MSD witnesses gave evidence that the role of work broker is an entry level job that is not inherently stressful. In this regard the work broker role was compared with that of case managers who manage a caseload which involves making bookings and meeting with clients who are often very stressed and facing difficult circumstances. By comparison work brokers have control over their day to day activities and how they manage their work load. A fellow work broker (Irving Young) confirmed the respondent's evidence that work brokers have a high degree of control over their daily activities. It was also the evidence of the respondent's witnesses that the workload is not excessive. At the time that Mr Crutchley was employed work broker placement targets were described (variously) as being 20-25 per month. There were no penalties for failing to meet targets although discussions are held with brokers that fail to meet targets. The evidence was that work brokers work regular 7.5 hour days. They take morning and afternoon breaks and have an hour for lunch. Unlike case managers, work brokers have flexibility as to when they take these breaks. Work brokers are not permitted to work overtime without permission. Mr Crutchley did not need to work overtime to complete his work and the records show he did not work overtime during his employment with MSD.

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<sup>4</sup> Mr Crutchley acknowledges there were 2 full time work brokers at Hamilton Central office in the early part of 2003.

[30] Mr Williams (Regional Director Waikato) denied that Hamilton is the busiest office in the Waikato region – the reason being there is no carparking available.

[31] It was also Mr Williams' evidence that historically work brokers learned their role on the job and were mentored by more experienced staff. However, by the time that Mr Crutchley started, the Ministry had in place a comprehensive induction and training programme. Mr Crutchley completed that programme successfully and was rated "good" to "excellent" in respect of his technical and personal skills – he was not marked as "*needing more support*".

[32] Mr Crutchley was supported in the role and had access to a coach to assist him as needed. The evidence shows that following his induction training he had weekly training sessions with Kelly Hippolite.

[33] It was acknowledged by Mr Williams that Hamilton did not always have a full complement of staff but there were always enough staff to meet the demand.

[34] It was the evidence of Ministry witnesses that Mr Crutchley was a polite and cooperative employee. He was quiet and unassuming and incredibly meticulous in his work. As a result he did not achieve the same output as other work brokers. While it is Mr Crutchley's evidence that he felt under pressure to meet targets, the evidence does not support a finding Mr Crutchley's managers put any pressure on him regarding meeting targets or that this acquired the status of a performance issue.

[35] It is not in dispute that Mr Crutchley did not report to his managers that he had had insufficient training and support to undertake his job or that he was subjected to unreasonable placement targets and was struggling to cope with the workload. Neither did he report that he was suffering ill health as a result of the work related stress he now says he was experiencing in the period March – July 2002.

[36] However it is clear that Mr Crutchley was feeling unwell at this time. It is his evidence that by August 2002 he was concerned about the increasing incidence of headaches and migraines he was experiencing and his doctor referred him to a specialist (Dr Timmins). He reported his symptoms to Dr Timmins, who records *Mr Crutchley's advice* that his symptoms are "*worse when he is stressed*". In the event Mr Crutchley was prescribed medication for migraines.

[37] It is also noted that Mr Crutchley took only two days sick leave in 2002 (12-13 June)

## **Findings**

[38] Mr Crutchley was happy to take an entry level job with WINZ. I find it was not an inherently stressful role. Every job has its pressures and the work broker's position does call for dealing with unemployed persons who will sometimes be anxious or upset about their circumstances. But there is simply no comparison between Mr Crutchley's role and those of the employee applicants in *Gilbert* (cited above); *Brickell v Attorney-General* [2000] 2 ERNZ 529 and *Whelan v Attorney-General* [2004] 2 ERNZ 554. The roles described in these cases are, I find, inherently stressful.

[39] On the question of the support and training received by Mr Crutchley, the evidence does not support his claims that it was deficient. Mr Crutchley was not marked "*as needing more support*" following his induction training in March 2002. In fact, on the completion of his training, he was marked as "*good*" to "*excellent*" in the technical and personal skills required for the job.

[40] Further, the record reveals that Mr Crutchley received ongoing training immediately after his induction training (weekly training sessions with Kelly Hippolite). The records also show he received training with Colin Cox and that later Kate Hamilton was also available and accessed by him for assistance. Mr Crutchley also accepts that a number of other work brokers assisted him – Janine Sturgeon, Lloyd Te Ruki for example.

[41] There is, however, some evidence that Mr Crutchley did not avail himself of the support available to him, preferring to box on and to sort problems out by himself. That cannot be put down to any deficiency in the provision of support/training by the respondent.

[42] One of the concerns cited by Mr Crutchley (that he submits left him behind the 8 ball) related to his poor computer skills. I don't accept this as it is contradicted by his CV where he stated that he was computer literate - in Word and PowerPoint in particular.

[43] I find the workloads associated with the work – brokers role were not excessive. Placements targets were 20 - 25 per work broker per month. In particular, I find there was no demand on work brokers in the Metro region for 800 placements in the month of January 2004. If this figure ever had currency it was a reference to the YTD deficiency (against target placements) to January 2004.

[44] Mr Crutchley accepted in oral evidence that the primary function of the role was to achieve placements. That was what the job was about and Mr Crutchley knew that when he took the job. I find that Mr Crutchley's placement targets were reasonable and the same as all other work brokers and while it may have been difficult to achieve the "Competent" rating in performance assessments without achieving placement targets there were no penalties for not doing so. I also find that the real problem here was the fact that Mr Crutchley dislikes target based assessments of performance. This together with his meticulous approach to placements led him to experience pressure in relation to meeting the reasonable targets set and caused him discomfort. He did not raise this as a concern. On the matter of work loads I find work brokers, including Mr Crutchley worked a standard 7.5 hour day with regular breaks which they managed themselves. Mr Crutchley was not required to work overtime and did not do so during his employment with WINZ.

[45] I find that staffing levels at Hamilton central varied over the time of Mr Crutchley's employment but that at all times staffing levels were adequate. I also find that it is not the case that Mr Crutchley was the only work broker at Hamilton Central from August to October 2003. The records show that there were four work brokers working at Hamilton Central over this period. The apparent conflict in the evidence on this point may be explained by the fact the VMT model of delivery was operating at this time (see paras 97-100) where work brokers undertook only parts of the role. It would seem that Mr Crutchley may have been the only work broker working at Hamilton Central at that time on administration aspects of the role - being one third of the role. The other work brokers at Hamilton Central were engaged on other parts of the role (marketing and placement). However, together there were four staff engaged on the role at the time and I don't accept that Mr Crutchley was unreasonably overburdened.

[46] Lastly on the matter of the training, support, mentoring and work load issues raised by Mr Crutchley in this matter, none of the concerns that he was not coping were raised by him during performance assessment discussions or in any other forum during his employment. Indeed, with the exception of his concern re targets imposed after the VMT model was abandoned<sup>5</sup> these issues first surfaced in a wider sense in Mr Crutchley's reporting to a medical specialist in 2005, months after he had left the

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<sup>5</sup> Raised in Clive Bennetts letter raising ERP – 17 March 2004.

work place<sup>6</sup>. They were not even specified in the first Statement of Problem filed in this matter (July 2004).

[47] Mr Crutchley took minimal sick leave in 2002 so there was no pattern of unusual absence for sickness that might have alerted the respondent to any problem.

[48] *In conclusion I find that there nothing in the nature of the work itself that would lead to it being described as an inherently stressful role. Neither was there any breach of contractual duty by the respondent towards Mr Crutchley by reason of the training, the ongoing support provided to him, the work targets set or staffing levels.*

[49] *Mr Crutchley did not divulge to the respondent that he was struggling to cope or that he was becoming unwell and in the absence of indicators to the contrary the respondent was entitled to believe Mr Crutchley's training and support was sufficient and that he was coping with the job.*

**The Jackie Theobald email, PSA complaint, the H&S committee stress assessments and recommendations and MSD's response to the issues raised.**

[50] Mr Crutchley alleges that MSD breached its contractual duty to towards him by:

- Failing to implement recommendations of the H&S Committee in its report dated 8 August 2003 relating to stressors in the workplace; and
- Failing to address work broker stressors (identified and reported in the September 2003) after the Vacancy Management Team (VMT) was disbanded in February 2004.

[51] When Mr Crutchley commenced his employment at Hamilton Central branch Leah MacDonald was the Service Centre Manager (SCM). She was well liked. At the end of 2002 she was replaced first by Katherine Teddy, in an acting role. Ms Teddy was herself replaced by Fraser Kemp also in an acting role. Mr Crutchley and Mr Whittaker (PSA delegate at the time) were critical of the management styles of Ms Teddy and Mr Kemp whom they described variously as controlling, autocratic and distant. The evidence does suggest that they had a more assertive management style than Ms MacDonald and that some of the unhappiness that flowed from the changes of management at this time were associated with steps taken to correct some

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<sup>6</sup> Consultation with Dr Darby, September 2005.

undesirable work practices that had been allowed to develop during Ms MacDonald's time as SCM.

[52] Against this climate of change and discontent a Ministerial/National Office directive to case managers was advised – that case managers were to interview all their clients to make them aware of the availability of special benefits. This instruction was discussed at a staff meeting in early May 2003. There was considerable unhappiness about this instruction and I find that Mark Whittaker told Fraser Kemp that the instruction would not be followed because of its impact on the workload of case managers. I accept his evidence that case managers did in fact know they would have to follow the instruction but that in an expression of "*frustration*" he did communicate it would not be implemented by case managers.

[53] Mr Kemp reported this apparent refusal by Hamilton Central case managers to implement this directive to Jackie Theobald who was the Regional Operations Manager at that time. Ms Theobald's response was to issue an email to all staff in Hamilton including work brokers. In that email, dated 7 May 2003, she referred to "*some refusal among staff to adhere to the directive*". She described this as "*unfortunate but also unacceptable*". Ms Theobald referred to the Ministry's code of conduct and that of the Public Service and stated:

*"I view this refusal to carry out a lawful and reasonable instruction as serious and will have no hesitation to take disciplinary action should a situation of a similar nature happen again.*

*In future I would expect that if you have any ideas or inputs in relation to a policy change that you do so with your manager and in a constructive manner.*

*Please now put this unfortunate incident behind you and continue to provide the excellent service to the community that they deserve".*

[54] It was Mr Crutchley's evidence that this threatening email drastically increased stress levels within the branch even among work brokers who were not directly affected by the directive.

[55] As a result of this directive there was a complaint to the Regional Operations Manager about the management style of Fraser Kemp. His behaviour was described as "*dictatorial*" at times and it was advised that some staff felt they were being bullied and that they were working in a threatening environment. Ms Theobald was advised there was a breakdown in the relationship between staff and Mr Kemp. It was

suggested that a professional facilitator be brought in to work out how best staff and Mr Kemp could work together in future.

[56] Concurrently with all this a H&S committee had been established<sup>7</sup> in the workplace. It had its first meeting in March 2003. Mr Crutchley became the chair of that committee. One of its topics for development including changes in legislation and at this time the upcoming changes to HASEAct were topical. Ms Fitton and Mr Crutchley were charged by the committee with considering “stress in the workplace”.

[57] It was Mr Crutchley’s evidence that as a direct consequence of the threatening email from Jackie Theobald it was agreed by the H&S committee that stress assessments would be conducted in the workplace. Mr Crutchley obtained guidance on the task from the Department of Labour and the majority of the work associated with carrying out these stress assessments and the subsequent report and recommendations fell to him. It was not possible, he said, to do this work during normal work hours and he spent many hours, at nights and weekends, planning the survey, coordinating and analysing survey responses and preparing the report and recommendations. It was his evidence that Mr Kemp obstructed the stress assessment process and made it difficult for him to schedule time to conduct the surveys.

[58] The findings of the stress audit were recorded in a report dated 8 August 2003.

[59] In summary, that report indentified a number of workplace stressors<sup>8</sup> - the top four being:

- Non- supportive work culture
- Poor communication within the work place
- Workplace hierarchies, fear and anxiety
- Emotionally draining activity.

[60] It was pointed out that three of the above identified stressors related to the *context* in which work was done rather than the *content* of the work. The report also recorded that these stressors increased stress in the workplace and played a significant role in contributing to low staff morale, high staff turnover and sickness leave and a poor external image of WINZ. It was Mr Crutchley’s evidence that this latter conclusion was not based on any analysis of turnover/ sickness records but that this was simply his perception.

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<sup>7</sup> This was a requirement of the 2003 amendments to the HAESAct.

<sup>8</sup> Hamilton Central staff (excluding the super team)

[61] In this report Mr Crutchley went on to express views about leadership and management and stated that the stress assessment at Hamilton Central reflected a prevailing culture of coercion and fear. Mr Crutchley went on to question whether the cause of unnecessary stress at Work and Income could be put down to work place bullying and he highlighted his concerns on this point by reference to the Jackie Theobald email. The report concluded with some suggestions for consideration as steps in moving WINZ culture to the desired organisational culture. The recommendations included (among other things) carrying out stress assessments at all WINZ offices by an independent organisation; the definition of a leadership style for MSD managers including a no-bullying philosophy; the development and maintenance of sound feedback systems for performance management; a 360° management assessment tool to assess if management behaviour aligns with MSD desired leadership style and repeat stress assessments to determine if the recommended interventions had in fact reduced stress levels.

[62] The resulting report was signed by members of the H&S Committee and submitted to Jackie Theobald, Ann McKay (the new SCM) and Head Office.

[63] A second stress assessment was done – for work brokers in the Hamilton Metro region. That assessment was completed and submitted to Mr Watene (work broker supervisor) on 8 September 2003. It seems, however, there was some understanding that it would be put to one side given the establishment of the VMT (See paras 97-100) as this was expected to address the concerns expressed by work brokers.

[64] Ms McKay was appointed to the position of SCM at Hamilton Central in July 2003 although she did not take up her position until early August 2003. It was Ms McKay's evidence that among her key tasks<sup>9</sup> on taking up her appointment was the task of providing a safe and healthy environment for staff at Hamilton Central. She was advised there had been staff concerns at this office and problems with staff adhering to directions/general unrest. She said there seemed to be a level of mistrust at the centre on her appointment and Mark Whittaker asked her "*what her agenda was?*" She explained she wanted to help staff move on from workplace issues they may have had in the past.

[65] It is also clear on the evidence that Ms McKay was already addressing the brief she had been given to address work place concerns at Hamilton Central when the

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<sup>9</sup> Communicated by Ms Theobald (ROM).

August 2003 Stress Report and Recommendations was finalised and submitted to her and Ms Theobald.

[66] It was Ms McKay's evidence that the email from Jackie Theobald was a concern for some staff so she addressed it up front to dispel concerns that it was a formal warning that would be placed on personal files. She assured staff this would not be the case.

[67] Ms McKay described other actions she took to address issues of concern at Hamilton Central. It was her evidence she interviewed most or all staff at Hamilton Central and certainly she was clear she had spoken to all case managers. It is Mr Crutchley's evidence that Ms McKay did not speak with him.

[68] Ms McKay said that in her discussions with staff they expressed concerns with regard to their physical environment i.e. cleanliness and security in the workplace and access. Some staff were concerned at the development of factions in the workplace and there was concern about lack of clarification of instructions and lack of team discussions.

[69] Ms McKay said she addressed all the physical concerns and she initiated regular team meetings. At those meetings she explained her duty to provide a safe place of work and the fact she took this duty seriously. She encouraged staff to raise any concerns with her. She said staff were very appreciative of these steps but no one (including Mr Crutchley) raised any concern regarding stress.

[70] It was also Ms McKay's evidence that she was somewhat concerned at the signatories to the Stress Report as the staff involved were not known to be team players and as far as she knew none had qualifications to address stress in the workplace. It was her evidence too that the stressors raised did not accord with the messages she was receiving from those signatories in her discussions with them. It was also her evidence that she did not know that the work was primarily that of Mr Crutchley. However, she said she took the issues raised seriously albeit she did not see she had a brief to implement the recommendations of the report. What she could do she said was to address the stressors described e.g. non- supportive culture, poor communications etc. She said she could manage these things and she was focussed in her interviews with staff on identifying the specific concerns that underpinned the stressors described. The remedial steps she took were a direct response to the concerns expressed to her and she was clear no one described suffering harm from workplace stress.

[71] Ms McKay also said she took steps to ensure that staff both individually and as a group understood that bullying in the workplace would not be tolerated and she obtained information on the subject and provided it to staff. She met with Mark Whittaker and another staff member who were the only staff members who were describing bullying as an issue and discussed the material provided with them. They concluded from reading the available material and discussing the issue with her that they no longer considered they were or had been subjected to bullying. The issue was also discussed at team meetings as was the performance assessment process. She reassured everyone that performance assessments would be undertaken fairly and transparently under her management and in line with MSD practises and processes.

[72] Ms McKay said she met Ms Theobald in September 2003 to discuss what she had implemented on site and how she had addressed the Stress Report. She and Ms Theobald subsequently wrote to the H&S committee (8 October). They acknowledged the work of the committee. The committee was advised the Ministry had development programmes which defined its leadership style and advised that consideration was being given to extending the 180° leadership/management feedback system to a 360° model. Ms Theobald advised that Ms McKay had been working to address the concerns raised in the report and progress was being made to address and facilitate the concerns raised.

[73] On 7 November 2003 the Committee wrote to Ms Theobald and Ms McKay thanking them for their 8 October response and acknowledging aspects of that response. In that letter the committee wrote:

*The Service Centre Manager, Anne McKay, has indeed been active in addressing a number of site specific concerns such as cleanliness of facilities, keys for the front entrance, repairs to lighting, ergonomics, fire drills, hazard register etc. There is also a far more pleasant atmosphere in the office as a result of Anne's encouragement of discussion, and her willingness to listen. We wish to express our appreciation for Anne's efforts in this regard."*

[74] The Committee went on to say however that a number of the issues raised in its submission of 8 August had not been addressed e.g. the matter of independent stress assessments. It was proposed that a meeting be held between members of the committee and the SCM and ROM for an exchange of ideas on the topics raised to date.

[75] It was Ms McKay's evidence she met with Mr Whittaker that day (7 November) in response to that correspondence. She met with him as both Peter Crutchley and Ms Theobald were unavailable. She and Mr Whittaker have different views as to the purpose and outcome of that meeting but it is not in dispute between them that the outstanding issues were discussed. Ms McKay's evidence was that while it was not possible to reach agreement on all outstanding issues, understandings were arrived at as to moving forward in a positive manner. Mr Whittaker's evidence is that he remained concerned about the Jackie Theobald email and the fact there was no movement on independent stress assessments. He did, however, accept that most of the reports recommendations have been implemented over time.

[76] On 17 December 2003 Ms Theobald wrote to the committee commenting on the positive improvements achieved in respect to the issues raised by the committee. She advised she felt that the maintenance of health and safety requirements could now be managed within the Hamilton office.

[77] To digress for a moment. In May 2004 Mr Crutchley laid a complaint with OSH asking for an investigation to be carried out to assess the health of the work environment at Work and Income. OSH carried out an investigation. This will be addressed in greater detail elsewhere in this determination (paras 187-192).

[78] Among its recommendations to WINZ (dated July 26 2004), OSH noted that the HASEAct requires (s.19 (b)(4)) that an employer must adopt the recommendations of its health and safety committee (or H&S representative) or provide a written statement to the committee (or representative) setting out the reasons for not adopting the proposal(s). OSH wrote:

*“The Health and Safety in Employment Act 1992 is clear in its expectation that the employer responds to any recommendation regarding health and safety from a health and safety committee. Failure to respond to legitimate requests has prompted frustration and disillusionment in this committee. Therefore we strongly recommend that a response addressing the issues they have raised is forthcoming to this group. A competent health and safety committee with a trained safety officer is a valuable resource for any organisation. You are to be commended for having this group functioning and aware of their responsibilities.”*

[79] On 26 July 2004 Ms McKay wrote to the H&S committee. There she revisited the issues raised in the committee's letter to dated 7 November 2003 and reminded the committee of her meeting with Mark Whittaker on that date. As she considered all

matters resolved she congratulated the committee on their contribution to the health and wellbeing of staff at Hamilton Central and committed to continuing to work co-operatively with the committee to ensure the workplace remained happy safe and healthy.

[80] It was Ms McKay's evidence that she has attended the majority of the H&S committee meetings since February 2004 and that there have been no major issues with health and safety at Hamilton Central since that time.

[81] I note too, that the evidence discloses that Mr Williams (the current Regional Director) has been proactive in meeting with the H&S committee particularly in respect to the dissemination of the Department's procedures and processes for dealing with bullying in the workplace. In the Minutes of the H&S committee of 8 October 2004 it is also noted he spoke about workplace stress and the fact that training was needed for staff to recognise their own stress and to put in place the help the Ministry offers.

### **Findings**

[82] I find that in May 2003 there was a climate of dissension and dissatisfaction amongst staff at Hamilton Central office of WINZ brought about by management change, unpopular management decisions and exacerbated by the Fraser Kemp incident which was followed by the Jackie Theobald email. That email was blunt and the message could have been more appropriately communicated. However, it does need to be seen in context as a blunt response to an equally blunt and uncompromising position communicated by Mark Whittaker at a staff meeting in relation to a Ministerial/HO directive regarding special benefits.

[83] Following this incident the PSA made a complaint about bullying and a threatening working environment at Hamilton Central.

[84] Mr Crutchley commenced the stress survey, he said, as a direct response to Jackie Theobald's email. I cannot find on the evidence that Mr Kemp obstructed the survey process. He did, however, make suggestions for a broader ranging, balanced report and advised Mr Crutchley to balance the work he did on the report against his core duties. This was not unreasonable I find.

[85] The PSA complaint and the August 2003 Stress Report, between them identified stressors in the workplace, emphasised as relating (in the main) to the context rather than the content of the job. While these initiatives identified stressors in the

workplace, there was no claim that these stressors had had a harmful effect on any employee at Hamilton Central. Further, contrary to Mr Crutchley's perceptions, the sickness and turnover records do not support his view that the identified stressors were resulting in higher absence due to sickness and high turnover rates at this time.

[86] Nevertheless, with these stressors identified, WINZ was required to take reasonable steps to ensure the safety of its employees at work. I find that Ann McKay was appointed to the role of SCM at Hamilton Central with the specific brief of ensuring there was a safe and healthy work place there.

[87] I accept that Ms McKay did not interview Mr Crutchley in a formal sense. However, I find that she consulted widely with staff at Hamilton Central to identify the concerns of staff. No staff described suffering harmful levels of stress and it was Mr Crutchley's evidence that he knew that Ms McKay was addressing the stressors raised in the report at a local level and he saw no need to raise his concerns with her.

[88] I find that Ms McKay did focus on the stressors cited in the August 2003 Stress Report. Her brief, in this regard, is noted in the letter from Jackie Theobald and Ann McKay to the H&S committee (dated 8 October 2003) and, as noted, her actions were confirmed by Mr Crutchley in his oral evidence.

[89] I find the steps taken by Ms McKay between July and October 2003 led to a clear improvement in the well being of staff at Hamilton Central. The steps taken by her to address employees concerns - e.g. the status of Ms Theobald's email (that it did not amount to a disciplinary warning); to improve consultation and discussion and to disseminate material relating to bullying (MSD's attitude towards it and the processes available for addressing it) together with the physical improvements made to the workplace - were all steps commensurate with respondent's statutory obligations to take all practicable steps to ensure the safety of its employees at work. I find further that the steps taken met the s.2A test of the HAESAct having regard to the circumstances known to WINZ at the time.

[90] The positive changes evident in the workplace were confirmed by the H&S Committee in its correspondence to Ms Theobald and McKay dated 8 October 2003.

[91] I find further that the question of whether the respondent took all practicable steps to ensure the safety of its employees at work needs to be separated from the question as to whether the respondent acted on song with every requirement of the 2003 amendments to the HAESAct. It needs to be remembered that these explicit

amendments came into force only in May 2003<sup>10</sup> and for a period employers could be expected to be coming to terms with the changes and bringing their policies and processes into compliance with the changes to the Act. OSH recognised this and following the passage of the 2003 amendments it initially emphasised education as the first step in achieving compliance.

[92] I find, however, that MSD did not comply with the letter of s.19B of the Act. MSD's failure to comply with the letter of the Act on this point is not evidence that the workplace was unsafe and of course that section does not require that an employer implement the recommendations of a H&S committee (or representative). In any event the recommendations made have, over time, been largely implemented. The Ministry has clear policies on management/leadership and bullying and, following consultation is moving to 360° evaluations of all managers. Even the idea of further stress audits have been discussed at meetings of the local H&S committee meetings (Agenda item 31 May 2004, Note "Kay to do").

[93] *In conclusion I find that following the identification of stressors in the workplace at Hamilton Central in May-August 2003, MSD took all practicable steps commensurate with its obligations under the HAESAct to ensure the safety of its employees in the work place, including taking action on the recommendations made by OSH in 2004/5 to bring its policies and procedures into compliance with the Act.*

[94] *To answer Mr Crutchley's specific claims – that MSD breached its contractual duty to him because it did not implement the recommendations in the August 2003 Stress Report, I find there was no breach of duty towards Mr Crutchley in this regard because MSD was not required to implement those recommendations and that in any event most of them have been implemented over time. I find further, that the obligation that MSD did have in relation to those recommendations was, in fact, an obligation to the H&S Committee not to Mr Crutchley personally.*

[95] *On the matter of the September 2003 survey there is no evidence that this survey was ever submitted to or adopted by the H&S Committee for submission to management and in fact it seems on Mr Crutchley's own evidence that consideration of it was to be put aside because it was believed the VMT model of delivery would address Metro work brokers concerns expressed in the survey. In*

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<sup>10</sup> It is recognised that work related stress had long been held be a potential cause of harm within the meaning of the HASEAct.

*these circumstances I cannot find there was any breach of duty by the respondent in respect of the consideration or non-consideration, as the case may be, of the issues raised in this survey.*

**The Vacancy Management Team (VMT) initiative and the disbanding of that team.**

[96] Mr Crutchley alleges:

- That the decision to disband the VMT without consultation with work brokers amounted to unfair treatment.
- The requirement for 800 placements in January 2004 was unreasonable.

[97] In August 2003 Sonny Watene was appointed to the role of Work Broker Manager for the Hamilton region. He assumed responsibility for work brokers based at the five service centres in Hamilton<sup>11</sup>. He was also responsible for ensuring that the Hamilton work brokers met their key performance indicators and that they had good relationships with employers to bring in vacancies for clients to move into.

[98] It was the evidence of Mr Crutchley and Mr Watene that shortly after Mr Watene's appointment the team got together and came up with a proposal to take a "team" approach to the role rather than a site-based approach. The proposal developed by the team to sell this model stipulated the goals of improving placement performance, reducing work broker turnover and working closely with case managers and management.

[99] The model meant that work brokers would undertake only part of the job i.e. some would carry out the administration function (entering information into computers and setting up interviews for clients), three work brokers were to form a marketing team selling WINZ services to employers and others were to assume responsibility for placing clients in jobs. It was Mr Watene's evidence that Mr Crutchley was very keen to be part of the VMT model as he wanted to move away from dealing directly with clients and employers and to instead focus on administration.

[100] In the event regional management agreed to trial the approach and then to assess it. It was Mr Watene's evidence that work brokers were advised the key performance indicators had to be met and the VMT model would be judged on its performance. As I understand the evidence the VMT model was operational from August 2003.

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<sup>11</sup> Five Cross Roads, Dinsdale, Hamilton Central, Hamilton East & Glenview.

[101] Mr Crutchley was critical of the subsequent abandonment of the VMT model. He said it was a crucial issue for him as considerable effort had been put into the team approach and it was starting to make some headway. It is his evidence that the model was not properly resourced and it did not enjoy the support of Service Centre Managers. It was also his evidence that in December 2003 Mr Williams announced a requirement for 800 placements for the Metro region in January 2004. This meant a target of 80 placements per work broker – over 3 times the normal monthly target of 25 per work broker.

[102] However, it was Mr Watene's evidence that under the VMT model the team never got close to achieving its targets. In its worst month it only made 25 placements for the region. (To achieve the Metro target approximately 180 placements would have been expected). He accepted the model did not have its own budget but he denied it was not resourced – all the current resources available to work brokers remained available. He denied the model was not supported by SCM's. It was, however, the case that some work brokers pushed the envelope by failing to recognise they remained accountable to their SCM's. Such issues had to be addressed.

[103] In November/December 2003 Mr Williams became Acting ROM for Waikato whilst Jackie Theobald was on leave<sup>12</sup>. At this time the Hamilton Metro offices were the lowest performing in the country. There was a serious problem in terms of the lack of stable employment that was being achieved and there were a number of concerns about how the VMT model was operating.

[104] Mr Williams gave evidence that on his arrival in Hamilton he was also tasked with addressing serious financial issues. An internal risk audit uncovered a number of inappropriate practices among work brokers in applying Crown subsidies which led to a budget overspend in excess of \$1m to end January 2004. From the review it was very clear that this overspend of wage subsidy finding could be significantly attributed to the changes in the management of work brokers (VMT model). During that period there was a lack of controls and systems in place to manage and monitor Crown expenditure by work brokers. Therefore, based on operational requirements he determined in consultation with Mr Watene and the relevant SCM's that the team would be decentralised and that the national approach of having work brokers based at service centres would be resumed.

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<sup>12</sup> He was appointed Regional Director in January 2004.

[105] It was Mr Watene's evidence that he was meeting with the work brokers every week. They were aware they were not meeting the expected KPI's and he advised them of the possibility the VMT model would be abandoned. When it was put to work brokers on 2 February 2004 that the model needed to be abandoned with work brokers reverting to site based roles the views of work brokers were relayed by Mr Watene to regional management. However the decision to abandon the VMT model was confirmed and work brokers reverted to working in their Service Centres. The initial advice given to Mr Crutchley was that he would be assigned to the Five Cross Roads office.

[106] It is necessary to interpolate here on the subject of the deterioration in Mr Crutchley's health. He said that from August 2003 to February 2004 he was experiencing extreme stress. He put this down to:

- The lack of resourcing for the VMT model and an increased demands on work brokers who were required to do between one and three WRK4U seminars per day.
- The fact his Performance Assessment was unilaterally downgraded in October 2003.
- Shortage of staff after he returned from leave in December 2003.
- Rumours that the VMT model was to be disbanded and the actual abandonment of this model of delivery.
- The unilateral decision to direct him to work at the Dinsdale office where he believed great pressure would be applied to work brokers by the managers at that office – Melanie Nepe and Fraser Kemp - and where staff were under high stress associated with a new Task Force initiative put in place by Neville Williams.
- High demand for work placements (The demand for 800 placements in January 2004 was cited).

[107] Again it is not in dispute that Mr Crutchley did not confide in his managers that he was under *extreme stress* at this time.

[108] It was his evidence that as a result of the increasing pressure he was under and the fatigue he was suffering he applied for five weeks annual leave from 25 October to 30 November 2003. That leave was approved by Mr Watene who gave evidence that Mr Crutchley said nothing about being under pressure at work – just that he was taking a holiday. Ms McKay recalls having a chat with Mr Crutchley during the week

prior to his leave. He did not indicate he was unwell, fatigued or stressed but rather that he was looking forward to a well earned break.

[109] It was Mr Crutchley's evidence that it was only after he returned from leave that he realised how serious the situation was with his health. He had expected to be much better by the end of this leave period but this was not the case. He went for blood tests the results of which were normal. Mr Crutchley did not advise his employer of his deteriorating health.

### **Findings**

[110] Local WINZ management agreed to the VMT model of service delivery as a trial. It was not, I find a replication of the model operating in South Auckland and it was always clear that KPI's had to be met and that this model of service delivery would be assessed on its performance.

[111] I find the model was not under resourced. All the current resources available to work brokers continued to be available to them under the new model of delivery.

[112] The VMT model was operational for approximately six months – ample time to assess its performance, I find. I find, too, that performance under this model was dismal and by January 2004 Hamilton Metro Service Centres were performing at the bottom (or near bottom) of the national rankings on achievement of KPI's. The Crown subsidy for wages was seriously overspent and there was an urgent need to turn the situation around.

[113] I find that work brokers were kept up to speed in weekly discussions with their supervisor – Sonny Watene – about the poor performance (against target) in placements and the situation was clear to work brokers that the VMT model could not be continued if it did not meet KPI's. When it was put to work brokers on 2 February 2004 that the model needed to be abandoned with work brokers reverting to site based roles the views of work brokers were relayed by Mr Watene to regional management. It is not the case that work brokers views were not heard. However, the planned changes were confirmed. This was not a restructuring that required consultation with and agreement by work brokers – the VMT model of delivery was a licence to work differently on the clear understanding that it would not be continued if it did not meet objectives. When it did not meet objectives there was simply a reversion to former practice. It was not an arbitrary change forced on work brokers without notice,

[114] ***In conclusion there was no breach of contractual duty towards Mr Crutchley or any other work broker in reverting to the former practice of service delivery.***

[115] *For the sake of certainty too, I find that it is not the case that unreasonable targets were set following the abandonment of the VMT model albeit Mr Watene did exhort work brokers to improve their performance in relation to placements to recover the shortfall in YTD placements to January 2004. This was not unreasonable given the very poor placement performance under the VMT model of delivery.*

**The handling of Mr Crutchley's return to work following stress leave in February 2004 and his assignment to the Dinsdale office.**

[116] Mr Crutchley alleges:

- That MSD transferred him to Dinsdale branch on his return from stress leave when it was foreseeable that this would be detrimental to his health because Dinsdale was the most stressful place of work in the Hamilton Metro region and there had been incidents of bullying there. This amounted to bullying and/or unfair treatment.
- That MSD failed to provide the applicant with a reduced work load and additional assistance upon his return to work from stress leave in February 2004.
- That MSD also failed to provide him with a fixed desk when he transferred to the Dinsdale office after returning from stress leave. The Ministry's actions are alleged to amount to bullying and/or unfair treatment.

[117] On 4 February after he was advised that the VMT model was to be disestablished, Mr Crutchley visited his doctor and he was placed on sick leave for a period of 9 days commencing on 5 February 2004 "*due to stress and anxiety likely caused by workplace issues*". The certificate stated that Mr Crutchley would be fit for work again on 16/2/04.

[118] It was Mr Watene's evidence that while Mr Crutchley was on sick leave he met with the rest of the team to discuss their assignment to service centres – which was decided on a numbers/experience basis according to the needs of each Metro service centre. As a result of this exercise it was decided that Mr Crutchley would work at the Dinsdale service centre because experienced work brokers were needed there.

[119] It is noted that Mr Williams had initiated a Task Force initiative in this office. This initiative was put into operation at the Dinsdale office of WINZ over the period

January – March 2004. The initiative was developed in response to the need to improve outcomes for the Waikato region in terms of placements and stable employment outcomes for work brokers and it was implemented in the Dinsdale office because that was the largest Hamilton Metro service centre, it had a high percentage of Maori clients and with strong economic and employment growth it had potential and should have been achieving placement and stable outcome targets. Mr Williams appointed a very experienced team to the initiative to demonstrate and model proactive, credible practices and behaviours of frontline staff to lead by example.

[120] Returning to Mr Crutchley's situation, the evidence discloses that Mr Watene wrote to Mr Crutchley whilst he was on sick leave, advising him of the availability of EAP services and requesting a meeting with him, as a part of a return to work plan, to ensure he was ready to return to work on the date his doctor had suggested was appropriate. Mr Watene also telephoned Mr Crutchley.

[121] Mr Crutchley returned to work on 16 February 2004. He met with Mr Watene as planned. Mr Watene kept a record of their discussion. Mr Crutchley confirmed it was a "*very accurate reflection of their meeting*".

[122] That record shows that:

- Mr Watene asked how Mr Crutchley was feeling. Mr Crutchley advised he was not 100%. Mr Watene advised he had phoned Mr Crutchley to advise he should not return to work until he was well and that he should visit his doctor and talk to him before returning. Mr Crutchley acknowledged he had received the phone call but that he had decided to return to work.
- Mr Watene advised Mr Crutchley he had been assigned to work at the Dinsdale service centre rather than the Five Cross Roads office. This was because the most experienced brokers were to be assigned to the areas where there was a need to improve performance. Mr Crutchley was not happy. He advised he was not happy with the Ministry and that he was going to write to the CEO about putting numbers before people. He also advised that people should take a stance against the direction regional management and the Ministry were taking as management expectations were unrealistic and setting staff up to fail. He said he wasn't willing to work for an organisation that says one thing and means another (Values vs. Drive). Mr Watene asked if Mr

Crutchley talking about some kind of strike action. Mr Crutchley replied “no” but he was prepared to do something.

- Mr Watene advised Mr Crutchley to see his doctor and to advise his position on going to Dinsdale. Later that day Mr Crutchley advised he would report to the Dinsdale office on 17 February. He also advised he had an EAP appointment set for 10 am on the 17<sup>th</sup> and a doctor’s appointment at 10.30am.

[123] Mr Crutchley reported to work at Dinsdale on the morning of 17 February. It was his evidence he was unhappy to be assigned to the Dinsdale office because it was known to be the most stressful of the Metro offices and it was also the most distant from his home. He was concerned that the management at that office was known to be autocratic (Melanie Nepe and Fraser Kemp) and there were additional stressors arising from the Task Force initiative in place there with concerns regarding aggressive clients. He reported to Dinsdale because he felt he had been issued with an ultimatum – there was no discussion about his workload or what had caused his stress. Nor were there any steps taken to reintegrate him into his position.

[124] It was Mr Crutchley’s evidence that when he reported to the Dinsdale office on the morning of 17 February he was told there was no specific work station assigned to him and that he was required to “float” between work stations as they became available. He said his stress and anxiety levels were now such that he was not able to function effectively. He felt hopeless, and thought he had no option but to see his doctor immediately. He left the workplace to see his doctor.

[125] Mr Crutchley never returned to the work place.

### **Findings**

[126] When Mr Crutchley took sick leave from 5 February 2004 he submitted a medical certificate to his employer that advised that his illness “*was due to stress and anxiety likely caused by workplace issues*”. This assessment, which was based on self-reporting, was couched in terms of work place stress being the *likely* cause of Mr Crutchley and it does not amount to a diagnosis of mental harm caused by work-related stress. However, while I have found the workplace was not inherently stressful, this medical certificate should have rung some alarm bells with the respondent, particularly given another work broker went on sick leave for stress related reasons at the same time. I note that this was Craig McDonagh. He took a similar period of sick leave to that taken by Mr Crutchley and in all probability their absence was triggered by their unhappiness at the abandonment of the VMT model of

service delivery. After his period of sick leave Mr McDonagh returned to the workplace and continued in his role as work broker. He resigned later that year.

[127] I find that Mr Watene's actions in ensuring Mr Crutchley had access to EAP; in arranging to meet with Mr Crutchley on his return to work to develop a plan to facilitate his return to the workplace and in emphasising to Mr Crutchley the desirability that he consult with his doctor again on his fitness to return to work were all appropriate. However, Mr Watene did not go far enough and effectively much of the his response to the advice that Mr Crutchley had suffered ill health as a result of stress and anxiety (possibly as a result of workplace issues) was just empty words.

[128] I find the respondent through its manager Mr Watene was required to inquire of Mr Crutchley as to what workplace issues were causing him stress and anxiety. Once these things were ascertained the respondent was required to address any well founded causes of stress and anxiety affecting Mr Crutchley in the workplace and to develop an appropriate plan to facilitate his return to the workplace. This plan needed to balance Mr Crutchley's need to be supported back into the workplace along with the organisation's business needs. The evidence suggests that it was the organisation's business needs that were the dominant factor in determining how the organisation dealt with Mr Crutchley's return to work.

[129] I find that while Mr Crutchley may have complained about Melanie Nepe (the SCM at Dinsdale), he did not otherwise complain that he believed it to be a particularly stressful environment and I find he had no personal knowledge on which to base a claim that Ms Nepe was a demanding manager.

[130] However, while I have heard Mr Williams on the subject of the extra resources that were being put into the Dinsdale Service Centre as part of the Task Force initiative, I find that directing an employee to a new service centre engaged on a significant programme like the Task Force initiative (that was in already in full swing) without ascertaining the issues that could be causing him stress and anxiety and in the face of Mr Crutchley's advice that he was not 100% was foolhardy. Mr Watene's approach did not comply with MSD's own wellness policy and fell well short of the obligation which rested on the respondent to minimize and manage workplace stress.

[131] I am not saying that work related stress was the cause of harm to Mr Crutchley, just that the respondent made no inquiry of the causes of the stress and anxiety Mr Crutchley had apparently been suffering from and it did not prepare a return to work plan which balanced MSD's business needs with those of Mr Crutchley.

[132] ***I conclude on this issue by addressing Mr Crutchley's specific claims.***

[133] *There was, I find, no breach of duty per se in deciding to transfer Mr Crutchley to Dinsdale and he had had no personal experience of management at that centre<sup>13</sup> on which to base the claim that he now makes that it was the most stressful centre in the Hamilton Metro region.*

[134] *Neither was there a breach of duty in failing to provide Mr Crutchley with a fixed desk on his attendance at Dinsdale. WINZ has a “clear desk policy” and it was not unusual for work brokers to work at various stations as they became available.*

[135] *However, for the reasons stated above I find that the respondent breached its duty to the applicant when it made no inquiry of the possible causes of the stress and anxiety he was experiencing in February 2004 and when it directed him to a new service centre without developing a plan to facilitate his return to the workplace having balanced all considerations - including the needs of the business along with those of Mr Crutchley based on a proper inquiry.*

### **The downgrading of Mr Crutchley’s Performance Assessment in October 2003.**

[136] Mr Crutchley alleges that MSD breached its contractual duty towards him by:

- Subjecting him to bullying by marking down his performance assessment without his knowledge or consultation; by referring to him as a “*stirrer*” and “*trouble maker*”.

[137] During his employment Mr Crutchley’s performance had been evaluated in accordance with MSD’s performance assessment process. Performance assessments were carried out every six months and up until his April – September 2003 assessment Mr Crutchley’s assessments had shown positive improvements.

[138] On October 13 2003 Mr Watene met with Mr Crutchley to undertake his April – September performance appraisal. Mr Crutchley was marked as “*Competent*” in respect of all competencies except for team work where he was marked “*Proactive*”.

[139] However, on the day prior to his departure on annual leave (25 October) Mr Watene asked to see Mr Crutchley. It is Mr Crutchley’s evidence that they stood in the corridor and that Mr Watene told him that regional management had told him to mark down his performance appraisal in certain areas. He was not shown the performance appraisal or the revised ratings. Nor was he asked to sign the amended

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<sup>13</sup> I don’t accept Fraser Kemp was a manager at Dinsdale at that time.

appraisal document. It was only after he returned to work after his leave and obtained a copy of his performance appraisal that he realised the extent of the alterations. Overall he had been marked down from “*Competent*” to “*Development*” – meaning he would not qualify for a salary increase.

[140] Mr Watene’s evidence on this issue is very different. It is his evidence that in his initial assessment Mr Crutchley was given an overall rating of “*Competent*”. However, the performance assessment was subject to sign off by the Regional Manager. He said he was not “instructed” to mark Mr Crutchley down but Ms Theobald did ask him if he thought the rating given to Mr Crutchley was fair and on reassessment he marked Mr Crutchley as “*Development*”. He says he meet with Mr Crutchley in a private office at Hamilton Central to discuss the revision of his performance assessment and that meeting lasted an hour. He said Mr Crutchley asked him if he had been told by Ms Theobald to mark him down to which he advised “*No*” Mr Watene said it was not unknown for performance assessments to be marked down following the initial assessment and it had happened to him before. He said there were at least three other work brokers who received the rating of “*Development*” at that time. Mr Crutchley did not raise with him any concerns about his performance assessment.

[141] However, it was Mr Crutchley’s evidence that in light of the number of reports he had submitted over the period and his regular presentation of WRK4U seminars he did not feel the amended ratings affected the reality of his performance. He would never have voluntarily agreed to these changes if he had been consulted on them and unknown to him Mr Watene advised regional office that he had accepted the new assessment.

[142] While it is Mr Crutchley’s evidence that he did not realise the extent of the changes to his performance assessment until after his return from leave in December 2003, he was sufficiently concerned about the downgrading of his performance assessment to write to the Chief Executive of MSD (Peter Hughes) while he was on holiday. In summary, he advised that a “*minor*” incident took place recently and it could be that an accumulation of seemingly similar events are contributing to unnecessarily high levels of stress in the organisation. He advised his performance assessment had been marked down and emphasised that his manager “*handled this feedback to me in a considerate and sensitive manner*”. He advised he felt he was making a contribution to the organisation and said he was left wondering whether the

marking down of his performance assessment was the result of his involvement with the Hamilton Central H&S committee. He advised this committee had questioned the link between workplace bullying and unnecessary workplace stress and he expressed the view that the PA system at Work and Income, as it is presently structured, could be used as a means for workplace bullying. He also made it clear he was not raising the matter in order to request a pay rise but to bring to the Chief Executive's attention his experience which he felt might not be isolated.

[143] Mr Hughes replied to Mr Crutchley on 11 December. He stated that there was no place for workplace harassment in the Ministry and that management and staff take responsibility for creating a safe and healthy work environment. He said he had no information to suggest that Mr Crutchley's involvement in the H&S committee would have impacted on the outcome of his performance appraisal or that it could be used as an instrument of bullying. He expressed concern if this was the case and promised to take action to thoroughly investigate the matter if Mr Crutchley had reason to believe this was the case. He advised he would investigate the concerns if Mr Crutchley sent him more detailed information.

[144] Mr Crutchley responded to this correspondence on 21 January 2004. He outlined his concerns that his performance assessment had been amended without any discussion with himself and the fact that the final rankings did not accord with the comments made in the performance assessment. He noted he was not aware of action taken by him in any other forum than the OSH committee which could have led to the amended comment under the Communications competency "*Written and oral communications are of a high standard but Peter needs to know the correct forums to produce these*".

[145] Mr Crutchley went on to state that the KPI system can be used for bullying and what had happened in his case was an example of this.

[146] Mr Crutchley went on to state he did not believe that the Chief Executive was receiving the truth regarding what staff members were experiencing; that management accountability becomes limited with frequent management changes; that in the absence of independent stress assessments the starting point for determining where most bullying is taking place would be to look at the areas with the highest turnover of staff and based on what he saw around him it is evident the culture at Work and Income tends to be dominated by positional power, fear, mistrust and uncertainty and that he did not feel valued by the organisation and felt other staff members felt the

same. He said most of the work done on the H&S committee submission had been done after hours and this and the associated discussion relating to the action required and the fact he had received no salary increase had impacted on his family and he advised his wife Barbara would welcome the opportunity to provide a third party perspective on the effect of stress originating from the workplace.

[147] On 19 February Mr Hughes replied to Mr Crutchley. He reiterated that workplace bullying and harassment were completely unacceptable to him and that he would have the matter properly investigated. He said the investigation was underway and that it would take a few weeks and he would write to Mr Crutchley once it was finished. He also asked Mr Crutchley if he was intending to seek a review of his P.A. through the normal review process.

[148] Mr Crutchley replied by email to this offer of a review as follows:

*“In my view it is not necessary to include a review of the PA. I was satisfied that the original assessment was fair and reasonable”.*

[149] In response to questioning at the investigation meeting as to why he did not avail himself of the opportunity to have his performance assessment reviewed (because the reality of declining a review meant the original assessment would stand) Mr Crutchley professed not to understand the performance assessment system. I don't accept this evidence from Mr Crutchley. As an experienced manager he professed in his job application to have had considerable experience in the field of staff selection/appointment/development and performance management systems. Further, Cl. 4.4 of his IEA specifically deals with such reviews stating *“A process enabling employees to seek a review of the outcome of their performance assessment will be included as part of [MSD's] Performance Management System”*. And of course it was referred to in Mr Hughes letter offering Mr Crutchley a review of his performance assessment.

[150] Lastly on this issue it is Mr Crutchley's evidence that management's attitude towards him became clear following the submission of the August 2003 stress report when he heard reports of the following comments made by managers.

- *“Which wanker wrote this”?* Te Rehia Papesch (Regional Commissioner).
- *“Peter is like a dog with a bone”*. Ann McKay (SCM Hamilton Central)
- *“Peter should stop messing around with HR matters and get on with his job”*. Ann McKay.

[151] Mr Crutchley cites these comments as the basis for his belief his performance assessment was marked down because of his involvement in the H&S committee. I note nothing of this was reported by him in his contemporaneous correspondence with the CEO.

### **Findings**

[152] It is Mr Watene's evidence that I prefer in relation to the meeting between him and Mr Crutchley where the downgrading of the performance assessment was discussed. This is because I find it would have been extremely unlikely that Mr Crutchley would have described Mr Watene's approach as "*sensitive*" in his letter to Mr Hughes if it had been handled in the manner that Mr Crutchley now describes.

[153] However, it was an exaggeration, I find, for Mr Watene to report to Regional Office that Mr Crutchley was "*ok*" with the revised performance assessment. However, Mr Crutchley's claim that his PA was amended without consultation with him or his consent is also incorrect. I find that Mr Watene had a lengthy meeting in a private office with Mr Crutchley for approximately one hour to discuss the fact that his performance assessment, which was subject to sign off by the Regional Manager, had not been approved. I find the proposed amendments were discussed and disclosed to Mr Crutchley and that he acknowledged the changes made.

[154] I also find it is an unsatisfactory state of affairs that Mr Crutchley's supervisor could make a mistake of this magnitude in his original assessment and it is also the case that the resultant paper work was extremely sloppy.

[155] I can therefore understand the concern expressed by Mr Crutchley that a "*Competent*" marking could be down graded to "*Development*" this way and that he would question why this had happened.

[156] Having said this, the weight of evidence does not support a finding that the downgrading was linked to Mr Crutchley's involvement in the H&S Committee. It is more likely, I find, to have been the result of a poor initial assessment conducted by Mr Watene having regard to Mr Crutchley's performance over the period in question. (And be fair to Mr Watene it needs to be noted that he had only been in his supervisory role with work-brokers for two months when this review was undertaken). Further, on the evidence the comment on the revised PA that Mr Crutchley needed to be aware of the appropriate forums for raising issues was, in all probability, a reference to the situation described in Mr Watene's evidence that he had

spoken to Mr Crutchley about the appropriateness of using work broker team meetings to promote his stress survey among the work broker group.

[157] It is extremely unfortunate, I find, that Mr Crutchley did not engage with MSD when it offered him an inquiry into his complaints about the downgrading of his PA (see my findings at paras 212-215) because ultimately there was no contemporaneous in depth inquiry into the matter.

[158] Neither, is there any evidence to support the reported hearsay comments attributed to Ms Theobald and Ms McKay and it is my assessment of Ms McKay that it would be most improbable that she would make the comments attributed to her.

[159] I have also considered whether Mr Crutchley's references to "*unnecessary stress*" in his letter to Mr Hughes (dated 21 January 2004) should have alerted the respondent to the fact that Mr Crutchley's health had been impacted by the issues he was complaining about. By this time Mr Crutchley had been consulting his doctor in relation to "*symptoms of stress and anxiety*" since late November 2003 and with the aid of hindsight the references to stress in the letter to Mr Hughes of 21 January would seem to be a pointer to a problem.

[160] However, the foreseeability of harm is not to be made with the benefit of hindsight and on the face of it the focus of Mr Crutchley's 21 January letter to Mr Hughes was on an allegation that the KPI system had been used as an instrument of bullying, to punish him for his involvement in the H&S committee's Stress Survey/Report. Mr Crutchley went on to develop the theme of an organisational culture that was unaccountable and dominated by positional power, fear and mistrust where staff including himself did not feel valued - the result of which was unnecessary stress. This is a big picture assessment of the workplace and nowhere does Mr Crutchley directly advise *he* is suffering harm as a result of work-related stress. Given he had been consulting his doctor for months in relation to stress and anxiety he attributed to his work place experiences he had a duty to divulge this information clearly. I find the references to work related stress in this letter are too oblique, given the overall thrust of that communication, to have put the respondent on notice that Mr Crutchley's health was being negatively impacted by stress he believed was work-related.

[161] ***In conclusion, there is insufficient evidence to support a finding that there was a breach of duty by the respondent towards Mr Crutchley in regard to the downgrading of his PA. Further, I find that Mr Crutchley declined the most***

*appropriate remedy available to him to address the concerns he felt about the assessment i.e. that it be reviewed in accordance with the standard performance review process.*

[162] *Lastly I find that Mr Crutchley did not communicate clearly to the respondent (over the period November 2003-January 2004) that his health was deteriorating for reasons he put down to work related stress.*

**MSD interactions with Mr Crutchley whilst he was on extended sick leave from 17 February 2004 including MSD's management of his request for further EAP counselling; special circumstances leave and the management of his complaints and those of Mrs Crutchley, including his complaint of bullying in respect to the downgrading of his performance assessment.**

[163] Mr Crutchley alleges:

- That the results of the bullying investigation were not made known to him.
- MSD failed to provide him with additional EAP counselling in March 2004 following his express request for additional counselling.
- MSD discontinued his salary without advice or consultation.
- MSD failed to consider his request for paid “*special circumstances leave*” after he requested it in March 2004.
- MSD failed to consider properly, alternative duties as a strategy to facilitate Mr Crutchley's return to work following stress leave.

[164] After Mr Crutchley left the work place there were numerous interactions between the parties and other interested parties. I summarise the relevant matters and note there is some overlap between these communications and the other initiatives that occurred between February 2004 and the date of Mr Crutchley's dismissal with effect from 9 December 2005. I note in particular that an employment relationship problem/personal grievance emerged from March 2004 and steps taken with a view to resolving Mr Crutchley's grievances became inextricably entwined with other initiatives taken to address his concerns and to facilitate his return to the work place.

[165] After Mr Crutchley commenced what became extended sick leave Mr Watene wrote to him on 9 March to advise him that he had only 6.5 days sick leave entitlement up to 18 March 2004 and that any additional days taken after this would be recorded as unpaid leave. He also advised Mr Crutchley that if he needed sick leave for a specific reason (e.g. an operation) he could apply to have any days off

approved for paid sick leave under the Special Circumstances Leave (SCL) provision in his IEA.

[166] Mr Crutchley responded to this on 19 March thanking Mr Watene and acknowledging that the situation relating to his sick leave had been explained. He also asked that he be granted an extension of paid sick leave pursuant to the SCL provisions of his contract.

[167] The evidence discloses there was consideration of this request at HR level. This resulted in a memo that records, among other things, that Mr Crutchley's situation<sup>14</sup> did not fit the criteria for SCL given he had an open ended medical certificate. It was suggested that MSD write to Mr Crutchley to the effect that "*with his consent we could write to a doctor that we recommend and will pay for with the intent to ask whether with his prognosis if his illness is acute and when he will be able to return to work*".

[168] In the meantime Mr Crutchley's sick leave had run out on 18 March but MSD overlooked stopping his salary. The effect of this was that Mr Crutchley was paid up to 24 March.

[169] In the event, it was Mr Williams who got back to Mr Crutchley in relation to his request for SCL (after Mr Crutchley left a telephone message with Mr Williams saying he wanted an answer to his request). Mr Williams emailed Mr Crutchley on 30 March advising that he had been granted special leave with pay up to the 24<sup>th</sup>. Effectively this covered the overpayment made to Mr Crutchley. Mr Crutchley was also advised he would receive an additional 10 days sick leave on 11 February 2005.

[170] Mr Williams went on to note that in the medical certificate received from Mr Crutchley's doctor (dated 24 February) the doctor had recorded that Mr Crutchley was willing to undergo independent psychiatric or psychological assessment to assess/confirm the sources of the stress. Mr Williams advised that with Mr Crutchley's approval MSD would like to take him up on this offer and to refer him to a suitable medical practitioner with the intention of determining the acuteness of his condition and when he would be able to return to work. Mr Crutchley was requested to advise at his earliest convenience if this was an acceptable option.

[171] Mr Crutchley did not respond to this request. It was his evidence he was very stressed at the time, his issues had not been addressed and that he was very suspicious

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<sup>14</sup> Based on the medical information from his doctor.

of the request. He also said that by this time the employment relationship had broken down completely and he was leaving matters in the hands of his lawyer. He felt this was the best way to respond.

[172] Unfortunately with Mr Crutchley's failure to respond the MSD's request that he see a doctor of their choosing all further consideration of his request for SCL ceased until Mr Crutchley raised the issue again in 2005.

[173] Moving on now to the subject of how Mr Crutchley's issues were being addressed at the time.

[174] In late February 2004 the Department received a medical certificate from Mr Crutchley's doctor, Dr Fourie. This medical certificate made it clear that Dr Fourie had been treating Mr Crutchley since late November 2003 for symptoms caused by longstanding stress and anxiety. (To date the respondent's knowledge of any stress related issues with Mr Crutchley was limited to the nine days sick leave he took in February 2004).

[175] In response to this the Regional Commissioner wrote to Mr Crutchley on 12 March. She confirmed the Ministry's responsibilities under HASEAct to take steps to eliminate isolate or minimize any hazard and she asked Mr Crutchley to specify in writing what workplace issues were causing him stress. She emphasised it was important that he was clear about the causes of his stress because without detail it would be difficult for her to address his concerns. Ms Papesch also advised that she had been delegated to carry out the formal investigation into workplace bullying on behalf of the CEO. She requested a meeting with Mr Crutchley the purpose of which would be to discuss the identified workplace issues and how they can be managed to support his successful return to work and the alleged bullying. Mr Crutchley was advised he was welcome to have a support person or doctor present to support him at the meeting.

[176] The response to Ms Papesch's communication came by way of the raising of an employment relationship problem<sup>15</sup>. It was addressed to Peter Hughes (CEO) from Mr Crutchley's representative, Clive Bennett. That letter focused initially on the VMT model and its abandonment. In all Mr Crutchley's concerns were stated to be:

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<sup>15</sup> Mr Crutchley made it clear to MSD that the letter to Peter Hughes was his response to the correspondence from Ms Papesch. However, it was some time before this fact filtered through to all those responsible for the management of Mr Crutchley's concerns. However, it was acknowledged in the Ministry's response dated 8 April 2004.

- His assignment (an ultimatum) to Dinsdale on his return to work from sick leave in February 2004. He was concerned that a manager there (Fraser Kemp) had been involved in the 2003 incident that led to the Stress Report of August 2003. He was also concerned because it was widely known that the stress levels of staff at Dinsdale had been high for an extended period and they were exacerbated by the Task Force that was under way there over February-March 2004. He felt his concerns relating to the transfer to Dinsdale had been dismissed.
- That fact that when he turned up at the Dinsdale office there was no fixed desk for him and he had to float between work stations.
- The high stress levels he experienced as Chairman of the H&S committee in undertaking the stress survey in Hamilton Central and the long hours he put into the subsequent report.
- The pressures of work particularly the fact that he was the only work broker at Hamilton Central in the three months September-November 2003.
- The overturning of his personal assessment.
- There was extremely poor communication and little or no opportunity for work brokers to participate in decision making.
- Unrealistic work load and in particular the revised placement targets for February and March 2004.
- There had been a degree of bullying evident in the manner that staff had been forced to accept unwanted and unpopular changes.

[177] Besides this summary of Mr Crutchley's concerns, this letter from Clive Bennett is significant because it proposed that there be an urgently convened mediation (under the auspices of the Department of Labour).

[178] MSD responded (8 April) highlighting its preference to meet with Mr Crutchley to attempt to resolve his concerns before the parties resorted to mediation.

[179] Mr Crutchley's new advisor (Agnes McKay) wrote to the Ministry on 11 May 2004, confirming Mr Crutchley had a personal grievance and stating that it was Mr Crutchley's preference to meet in mediation.

[180] The Ministry agreed in a letter dated 28 June to attend mediation. It expressed concern about the time dragging on and the fact it had been unable to meet with Mr Crutchley. It asked a number of questions in an attempt to elicit the information it felt was necessary to have, to make mediation meaningful. It also requested the

independent medical report that had been requested of Mr Crutchley in March 2004. Mr Crutchley was also advised of the availability of additional counselling and he was advised to contact the Ministry to allow arrangements to be made for this.

[181] MSD also questioned whether a personal grievance had in fact been raised on Mr Crutchley's behalf. Clarification was sought on this.

[182] Lastly this letter is significant because appended to it is the Ministry's position on Mr Crutchley's concerns put to it to date. It stated in summary:

- On the information available to it to date the Ministry was not aware of information to support Mr Crutchley's claim that the PA system was used to bully, harass or favour staff.
- MSD did not consider there had been an undue number of management changes and competent managers had been in place throughout Mr Crutchley's employment.
- MSD remained committed to meeting with Mr Crutchley to address his concerns about WINZ culture and work place bullying/harassment.
- The relocation to Dinsdale was due to business requirements and was only a short distance from his previous base at Hamilton central. It was not intended as a ultimatum but as a response to a business need.
- At the time in question the performance of the Hamilton Metro region was close to the bottom of the national performance table. WINZ was satisfied the targets in place were realistic and that the measures in place to assist work brokers were reasonable.

[183] Ms Agnes McKay replied on 21 July clarifying that Mr Crutchley had a personal grievance (disadvantage) in relation to the downgrading of his performance assessment and the issues raised in Clive Bennett's letter of 17 March. She went on spell out the remedies sought by Mr Crutchley. These included lost income and benefits, compensation, legal fees and medical costs but also stretched to a demand that an independent health and safety assessor provide a written report to confirm MSD had taken steps to ensure the workplace was safe to return to; that recommendations of the H&S Committee of August 2003 be implemented and an Independent Commission of Inquiry into MSD be set up with a focus on the issues raised by the H&S Committee and the issues raised in Mr Crutchley's letter of 21 January (the complaint the PA system was being used to bully employees). Penalties and exemplary damages were also sought.

[184] Ms McKay advised that she had been instructed to lodge Mr Crutchley's grievance with the Employment Relations Authority. The first Statement of Problem in relation to this matter was lodged on 22 July 2004<sup>16</sup>.

[185] The parties attended mediation on 12 August 2004. That mediation was unsuccessful in resolving the issues between the parties. However, discussions between the parties continued right up to Christmas 2004. On 23 December 2004 Mr Crutchley declined to sign off on a settlement agreement that had been negotiated between the parties to resolve all matters.

[186] I note two other matters of significance occurred in 2004.

[187] In addition to the above initiatives Mr Crutchley wrote to OSH on 27 May 2004 requesting that an investigation be carried out to assess the health of the work environment at Work and Income. He cited the criteria required to found enforcement action (including harm to himself and others) and stated that Work and Income had not been proactive in creating a healthy work environment and that it had not responded appropriately to identified stressors in the workplace (the August 2003 Stress Report).

[188] OSH carried out an investigation and submitted its conclusions to MSD on 21 July 2004. It found that stress was identified as a significant hazard in the organisation and that while a stress management plan was documented in the health and safety manual the stressors had not been identified and the system lacked the detail and processes necessary to make it function successfully for Hamilton Central branch. It recommended that MSD work in consultation with its H&S committee to put in place a plan for the prevention, identification and management of stress using its current resources and the Department of Labour's guides together with measures to review the plan's effectiveness through auditing sick leave and the undertaking of stress audits. A system for stress notification and training in the system was also required.

[189] It also recommended that MSD respond to the H&S committee in respect to the issues raised by it in the August 2003 Stress Report (see para 78).

[190] OSH advised in this letter would take no further action in the matter although it seems it did issue an improvement notice requiring MSD to develop a stress management plan.<sup>17</sup>

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<sup>16</sup> Mr Crutchley withdrew this claim in the ERA in January 2005.

[191] OSH followed up with a letter to Mr Crutchley informing him of the outcome of its investigation. The evidence suggests that Mr Crutchley was unhappy that OSH took no action in respect of his personal situation and there has been ongoing correspondence between OSH and Mr Crutchley.

[192] OSH followed up its 2004 investigation with another visit to the Hamilton Central office of WINZ in June 2005. OSH commended WINZ on the steps that were in place to manage stress in the workplace. It did, however, note that staff spoken to could not source the written policy on stress and the associated procedures.

[193] The other matter of significance is the fact that in the latter part of 2004 Mr Crutchley was apparently requesting details from MSD of a suitable medical specialist in order to have an assessment of his condition carried out. The evidence is meagre on this but it seems that MSD did not respond to this request and that Mr Crutchley chose a medical specialist himself. At the last minute MSD advised Mr Crutchley's representative that it did not agree to Mr Crutchley seeing this specialist as it was MSD's view the medical specialist needed to be agreed to by both parties and briefed as to the content of the report.

[194] Eventually, however, because MSD took no further action Mr Crutchley visited psychiatrist John Collier who provided a report dated 3 February 2005. He said:

*“It is my opinion that Peter has described stress related symptoms which he identifies clearly and has documented as arising from his workplace. These symptoms are well recognised as stress related symptoms and would fulfil the criteria for the DSM-IV diagnosis of Major Depressive Disorder. He describes initial resolution of the symptoms within a month of stopping work but then a further increase in symptoms as he began to address the situation with his employer and has engaged in a significant battle for mediation and legal resolution of his problems”*

[195] Having received this report Mr Crutchley emailed MSD requesting that his request for SCL be considered. Mr Williams replied on 23 February 2005 saying the Ministry would look at the request. He asked for a copy of Dr Collier's report to consider against the criteria for SCL and he asked Mr Crutchley for an indication as to his intentions regarding a return work. It was also noted that given the time Mr Crutchley had been away and the serious nature of his condition he might like to consider applying for medical retirement. There followed correspondence between Mr

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<sup>17</sup> It was in dispute as to whether or not OSH issued MSD with an improvement notice in this matter. The evidence suggests it did but MSD is adamant it never received the improvement notice which if seems was addressed incorrectly.

Crutchley and Mr Williams seeking details of the criteria for SCL (7 March) and advice from Mr Crutchley that it was his intention to return to work when matters raised in previous correspondence with the Ministry had been addressed (email 24 March).

[196] On 19 March 2005 Mr Crutchley wrote to Mr Williams with the report from Dr Collier and stated that a number of issues related to the case had not been satisfactorily addressed and he intended to raise this with the Minister concerned.

[197] On 30 April Mrs Crutchley wrote a long letter to Mr Hughes (CEO-MSD) on the subject of stress in the workplace and 3<sup>rd</sup> party victims. It was copied to the Minister of Social Development, the Prime Minister and the General Manager of OSH. In that correspondence she asked for a meeting with Mr Hughes.

[198] Mr Hughes delegated the responsibility for having a meeting with the Crutchley's to Mr Williams.

[199] Mr Williams wrote to Mr Crutchley on 5 May 2005 advising:

- That he had been absent from work since February 2004 and his position had been held open for him while MSD worked with him to try and agree on a rehabilitation plan to get him back to work.
- That Mr Crutchley had advised he intended to return to work once outstanding issues had been addressed but Ministry was not sure what issues he was specifically referring to<sup>18</sup>.
- That the Department was finding it increasing difficult to cover his position and that it wanted to meet with Mr Crutchley to discuss to discuss his ongoing employment with him - specifically the current status of his health and whether it would impact on his ability to undertake normal duties; the prognosis for his recovery; his application for special circumstances leave and a rehabilitation programme.
- Mr Crutchley was advised he was entitled to a support person (possibly his doctor) at that meeting and he was advised it would be helpful if he brought along a medical report which addressed the medical issues in question.

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<sup>18</sup> This was a reference to the fact that Mr Crutchley had withdrawn his claim in the Authority.

- Mr Crutchley was advised that the Department wanted with him to achieve a full return to normal duties by 31 May and if this was not possible consideration would have to be given to terminating the employment.

[200] The evidence reveals that initially Mr Crutchley declined to meet with Mr Williams until a reply had been received to Mrs Crutchley's letter to the CEO of 30 April 2005. He also asked Mr Williams to specify what steps had been taken by MSD towards a rehabilitation plan and what had been done to address the outstanding and unresolved issues he had communicated since 8 August 2003.

[201] Mr Williams responded saying it was imperative that Mr Crutchley meet with him to address the vast array of issues he had raised and that the Ministry had an obligation to address those issues with him directly. Mr Williams went on to detail all the proposals the Ministry had put up to assist his rehabilitation and return to work.

- A review of his performance assessment.
- The obtaining of medical advice on a plan to return him to the workplace.
- Payment of additional EAP sessions.
- An offer that he nominate (for consideration) the branch within Hamilton Metro cluster that he thought the most suitable to return to.
- A meeting to bring him up to date with all the changes in workplace since he had left.
- Training and an individual coach to assist him to reach the levels of competency others were operating at.
- A plan to review his rehabilitation and to monitor any problems encountered.

[202] Mr Crutchley was advised that all these options remained open to him. He was also advised it was difficult to address the issues he had raised when he was reluctant to meet with the Ministry and he was advised he could nominate the venue for a meeting including mediation if he preferred. However, Mr Williams made it clear that if it was not possible to meet to resolve the issues in question then the Ministry would be left with no choice but to consider Mr Crutchley's ongoing employment.

[203] A meeting was between the Mr and Mrs Crutchley and Mr Williams on 10 June 2006. It was a lengthy meeting<sup>19</sup> and it canvassed the broad range of issues that were unresolved between the parties. It is also significant for the fact that Mr Williams

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<sup>19</sup> It was recorded and transcribed.

advised Mr Crutchley that his stress related issues were not substantiated and that he was focused on the steps that were necessary to get Mr Crutchley back to work.

[204] Mr & Mrs Crutchley, however, were focussed on the list of grievances that they wanted addressed and resolved before Mr Crutchley would consider a return to work. It was Mr Crutchley's position that certain terms needed to be met for him to return to work - being a payment of \$95,000 net, the resumption of his salary, payment of his medical expenses and medical expenses for his children to attend a psychologist. He advised he would be prepared to return to work as a H&S co-ordinator or as a work broker on the proviso that independent stress assessments were carried out and 360° assessments of managers were undertaken and that his PA was reviewed.

[205] There was no meeting of the minds between the parties at this meeting. At the conclusion of that meeting Mr Crutchley handed over a letter setting out his position. This, he said, set out a requirement for written responses to all the outstanding issues he had including responses to 50-60 questions (answers to which had been sought in previous correspondence including Mrs Crutchley's letter to Mr Hughes dated 30 April 2005)<sup>20</sup>. That letter also set out all the conditions for a return to work described in para 204 above.

[206] Mr Williams made it clear that MSD were not interested in entertaining these terms and conditions for a return to work. It was his view the workplace was safe and he stated that if OSH said (following its upcoming visit) that the workplace was safe and/or WINZ undertook any remedial steps required by OSH he would expect Mr Crutchley to return to work with the assistance and support already offered. Otherwise MSD would have to look at terminating the relationship. Mr Crutchley stated he would reserve his position on this.

[207] As already noted OSH required no further steps from WINZ in respect of ensuring the safety of the workplace and in fact commended the organisation for the programmes it did have in place. On 21 July Mr Williams wrote to Mr Crutchley advising him of this and also enclosing a report on an investigation he had promised to carry out regarding the PA assessments undertaken in 2003. He advised that on the basis of these reports MSD believed there were insufficient grounds to support Mr Crutchley's claim the workplace was unsafe and that a decision needed to be made in

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<sup>20</sup> He later emailed Mr Williams recommending – in addition to the recommendations contained in the August 2003 report - that MSD conduct corporate psychopathy tests on all MSD managers who had had an input into his situation and a recommendation that all new managers be similarly assessed.

respect of his future as he had been absent from the workplace for 16 months and the Ministry could not keep Mr Crutchley's job open for him indefinitely. Mr Crutchley was advised that despite assurances that there had been changes in the workplace since he left and the fact OSH had not identified it as being unsafe and the Ministry's offers to assist him with rehabilitation Mr Crutchley had advised he would not return to the workplace and MSD was now left with no option but to initiate the process of medical retirement which would result in him receiving a termination payment of 65 days pay.

[208] Mr Crutchley did not co-operate with the process required to enable this and MSD ultimately directed him (pursuant to s.82 of the State Sector Act) to a consultation with a specialist of its choosing (Dr Darby) for the purpose of assessing the prognosis for Mr Crutchley being able to return to work. Dr Darby's report concluded that the prognosis for Mr Crutchley returning to work at WINZ was not good because his ill health would probably continue if the issues raised by him were not addressed and that even if they were the past difficulties and the disintegration in the relationship would make working at WINZ a stressful environment for him.

[209] Given this, and Mr Crutchley's failure to co-operate in obtaining another medical report to facilitate the medical retirement option, MSD wrote to Mr Crutchley to invite him to a meeting to discuss the question as to whether his employment should be continued or terminated (on the grounds of medical incapacity). Mr Crutchley was invited to meet with Mr Williams (accompanied by a representative) to discuss this and to make submissions. He declined to meet with Mr Williams and declined (on invitation) to make written submissions on the proposals.

[210] Consequently, on 9 November Mr Williams wrote to Mr Crutchley terminating his employment by reason of medical incapacity with effect from 9 December 2005.

### **Findings**

[211] I address my findings under this head in order of the respective breaches of duty alleged by Mr Crutchley.

[212] Mr Crutchley alleges the results of the respondent's investigation into the bullying allegations relating to his performance assessment were not made known to him.

[213] As far as I can tell, the respondent did not progress its promised investigation into the bullying allegations and this was because Mr Crutchley failed, when, he was

asked by Te Rehia Papesch on 12 March 2004, to provide the detail necessary to advance the investigation into his concerns and to meet with Ms Papesch on this issue. Let me spell out what was known to the respondent in February/March 2004 about Mr Crutchley's allegations of bullying in relation to his performance assessment.

- On 21 January 2004 Mr Crutchley wrote to the Chief Executive describing the down-grading of his performance assessment as a “*minor*” incident. He said he was advised by his Manager that his PA had been reviewed by Regional Management and that he should be informed that one or more areas would now reflect “Development”. He said that Mr Watene had “*handled this feedback to me in a sensitive and considerate manner*”.
- However, he also advised, that given he felt he was contributing to the organisation, he was left wondering if his involvement in the H&S Committee had had anything to do with the downgrading of his PA given the Committee had questioned the link between bullying and workplace stress. He later expanded on this point (letter to CEO on 21 January) to say his involvement in this committee was the only reason he could think of to explain the rider to the positive comment made about his verbal and written communication skills “*but Peter needs to know the correct forum to produce these*”. He also advised he was not raising this issue to secure a pay rise.
- On 26 November 2003 Mr Crutchley expressed the view that the PA system at work *could* be used as a means of workplace bullying and in a later communication (21 January 2004) he stated categorically that the PA system had been used for bullying in his case.
- In his 21 January letter to the CEO Mr Crutchley also made sweeping global statements that Mr Hughes was not hearing the truth about the organisation, that high turnover was indicative of work place bullying, that WINZ was dominated by positional power, fear and uncertainty.
- On 8 March 2004 Mr Crutchley declined the offer made to him to have his PA reviewed in accordance the standard review process.
- Mr Crutchley provided no further information on this allegation of bullying in the 17 March letter from Clive Bennett raising an employment relationship problem.

[214] Clearly there was nothing about Mr Watene's actions in the matter that supported the allegations of bullying and much of the rest of the rest of the information provided was conjecture or opinion. Mr Crutchley provided no concrete information to found an investigation. He did not, for example, advise that local managers had been heard to criticise him in derogatory terms in relation to the August 8 Stress Survey/Recommendations.

***[215] I find, in concluding on this subject, that Mr Crutchley did not engage with the Ministry – either in writing or by meeting with the Ministry - to facilitate the promised investigation into his allegations that the PA system had been used to bully him. This was a failure on Mr Crutchley's part and it cannot give rise to a finding that the Ministry has breached its duty to him by failing to carry out and conclude an investigation into his complaint/advise him of the outcome.***

[216] Mr Crutchley also claims that he was denied additional EAP sessions.

[217] The evidence reveals that Mr Crutchley requested additional sessions on 4 March 2004. As I understand the evidence additional sessions (beyond three) are discretionary. Mr Crutchley did not get an immediate response to his request but it is clear that Mr Hughes offered additional counselling in a letter written to Mr Crutchley's representative on 28 June 2004. He asked that Mr Crutchley contact the Ministry to allow arrangements to be made for additional counselling. Mr Crutchley did not take up this offer. On 31 May 2005 Mr Williams reiterated that the provision of further EAP sessions was still an option available to Mr Crutchley. Mr Crutchley responded on 10 June and questioned how useful further EAP sessions would be "in light of the damage to my health".

***[218] I find that Mr Crutchley was offered additional counselling. He did not take up those offers and I find there was no breach of duty by the respondent in relation to the counselling made available to him.***

[219] Mr Crutchley complains that his salary was stopped without advice or consultation with him. I find that on 9 March 2004 Mr Watene wrote to Mr Crutchley advising him he had 6.5 days paid sick leave left. Mr Crutchley acknowledged in reply that the situation regarding his sick leave had been explained. It is not the case that Mr Crutchley's pay was stopped without advice to him. Further it was not a matter for consultation and agreement. Mr Crutchley had a contractual entitlement to certain amount of paid sick leave and when that ran out he could expect his pay to cease. This was explained to him and he advised he understood that advice.

[220] *There was no breach of duty towards Mr Crutchley in relation to the cessation of paid sick leave.*

[221] The matter of Mr Crutchley's claim for special circumstances leave was another situation where failures by Mr Crutchley to respond to the Ministry militated against constructive and timely consideration of his request.

[222] Mr Crutchley took Mr Watene's reference (in his letter dated 9 March 2005) to the availability of paid leave in special circumstances (e.g. surgery) as a cue to apply for paid leave to cover his illness which he put down to work-related stress. Mr Crutchley followed this up by leaving a telephone message with Mr Williams, who responded by email on 30 March, granting him Special Circumstances Leave up to 24 March 2004.

[223] Mr Crutchley is critical of this claiming it was only granted because a salary overpayment had been made to that date. That is one way to look at it. Another way to look at it is that the Ministry did not seek to recover the overpayment made (a step it was entitled to make). In addition and more importantly, however, Mr Williams advised Mr Crutchley (relying on previous advice that he was willing to attend medical specialist to determine the cause of his illness) that he would like to take him up on his offer and refer him to a suitable medical practitioner with the intention of determining the acuteness of his condition and when he would be able to return to work. These are critical criteria relevant to the granting of SCL.

[224] Mr Williams could have been clearer on this point but the invitation relied on a previously communicated willingness on Mr Crutchley's part to visit a specialist to determine the cause of his illness. Further, it was clear on this communication that the Ministry wished to make the referral.

[225] What did Mr Crutchley do in response? Nothing! It was Mr Crutchley's evidence that his salary had been stopped, his issues hadn't been addressed and he was very suspicious of the request. He did not even tell the Ministry he was not complying with the request, which might have elicited a more fulsome explanation as to the reasons for the request and the consequences for consideration of his SCL request if he did not reply.

[226] Mr Crutchley was very critical of the Ministry's inaction when he did finally seek to be referred to a specialist. The Ministry did not respond at the time probably because Mr Crutchley's request was made when negotiations were underway to

resolve all matters between the parties. As I understand these negotiations broke down on the eve of Christmas after Mr Crutchley declined to sign off on a settlement arrived at.

[227] In early 2005 (after he had seen Dr Collier) Mr Crutchley again raised the question of SCL. Mr Williams advised he wanted to consider the request but to do so he needed a copy of Dr Collier's report and an indication from Mr Crutchley regarding his intention to return to work. In response Mr Crutchley advised that he would return to work "*provided matters raised in previous correspondence with the Department have been addressed*". Mr Crutchley held to that position until the last day of his employment – he would not return to work until all his issues had been addressed to his satisfaction.

**[228] *Mr Crutchley's circumstances (on the face of it) did not meet the criteria for a grant of SCL and Mr Crutchley did not engage constructively and in good faith with the Ministry to allow a full consideration of his claim. I cannot, therefore, find that the Ministry breached any duty it owed to Mr Crutchley to consider/grant him SCL over and above the 4.5 days granted in March 2004.***

[229] Mr Crutchley also claims that MSD did not turn its mind to placing him into a suitable alternative position as a strategy to facilitate his return to work. Mr Crutchley mentioned a position of Wellness Officer or H&S Co-ordinator in this regard.

[230] The fact is that MSD did not have such a position and this was explained to Mr Crutchley. I accept, too, the Ministry's position (explained to Mr Crutchley) that even if such a position were available MSD was required to advertise and appoint on the basis of merit. Mr Crutchley's claims that others had been transferred into different positions overlooks the fact that such appointments and transfers were all managed in line with the Ministry's appointment processes.

**[231] *The Ministry has not breached any duty to Mr Crutchley when it did not accede to his requests to be appointed to a H&S Co-ordinators role***

**[232] *To conclude on this topic I find that the Regional Commissioner Te Rehia Papesch responded promptly to the information received from Mr Crutchley's doctor late in February 2004 that he had been treating Mr Crutchley for some months for symptoms of stress and anxiety. The Commissioner acknowledged MSD's obligations under the HAESAct to eliminate isolate or minimize any hazard in the workplace and she sought to engage with Mr Crutchley to understand and***

*address his concerns and to facilitate his return to work. Thereafter the history of this matter is characterised by repeated requests to Mr Crutchley from the Ministry for details of his concerns, for a specialist medical report and for meetings with Mr Crutchley to address and resolve his concerns.*

[233] *I find that Mr Crutchley simply failed to reply/comply with these requests or to the extent he did so he failed to provide information with the level of detail that would facilitate a meaningful investigation into his concerns. He also declined to meet with the Ministry other than in mediation (a position which the Ministry acceded to) which led to the inevitable delays that occur when a number of diaries have to be synchronised.*

[234] *For its part the Ministry, having acceded to Mr Crutchley's wish to meet in mediation, requested information to assist it to engage in mediation in a meaningful way. There was no response to this request albeit I accept that Mr Crutchley did commence the process of obtaining a medical specialist's report.*

[235] *Despite the paucity of information available to it the Ministry nevertheless outlined its position on Mr Crutchley's claims based on the information that was available.*

[236] *The Ministry went on over the ensuing months to work with OSH on its investigation – initiated by Mr Crutchley; to respond appropriately to the lodgement of Mr Crutchley's grievance with the Authority and all the while it worked in good faith to arrive at a settlement agreement to resolve the dispute between the parties.*

[237] *Once the settlement negotiations broke down the Ministry took every reasonable step available to it to engage with Mr Crutchley to satisfy him that the work place was safe for him to return to work and to facilitate his return with support and assistance.*

[238] *Effectively, however, Mr Crutchley refused to entertain a return to the workplace unless every detail and claim submitted by him was addressed to his complete satisfaction. The sheer scale of the matters he sought resolution on and the extravagance of his claims militated against any reasonable resolution of his concerns and grievances. Mr Crutchley had nestled into his basket of grievances and none of the reasonable steps taken by the Ministry assure and demonstrate to him that the workplace was safe and to facilitate his return to work with support and assistance could persuade him to do so.*

[239] *I find that after Mr Crutchley had been out of the workplace for approximately 15 months the Ministry was left with no choice but to turn its mind to the question as to whether his employment could be continued.*

### **What harm was suffered by Mr Crutchley? What caused that harm and was it foreseeable?**

[240] The initial assessments of Mr Crutchley's condition were those provided by his GP.

- On 4 February 2004 Dr Fourie provided a medical certificate stating Mr Crutchley was unfit for work for 9 days from 5 February *“due to stress and anxiety likely caused by workplace issues”*.
- On 17 February 2004 Dr Fourie provided a medical certificate stating that Mr Crutchley was unfit for work for 10 days from 18 February noting *“he is still having quite severe stress related symptoms and he is not fit to do his normal work as usual”*.
- On 26 February 2004 Dr Fourie wrote a letter at Mr Crutchley's request. He advised he had seen Mr Crutchley on 27 November 2003. He felt at that time that the complaints described were caused by longstanding stress and anxiety. He reported that (as of 26 February) he had seen Mr Crutchley five times in relation to these complaints. He said *“it is evident that he is suffering from severe stress and burnout related to work issues”* and that Mr Crutchley was receiving treatment for this condition. He advised Mr Crutchley would be prepared to undergo independent psychiatric or psychological assessment to assess/confirm the sources of the stress and he stated that *“until the causes of the stress in the workplace have been identified and addressed by the employer, it is unsafe for Mr Crutchley to return to work”*.
- On May 13 Dr Fourie wrote *“To confirm that Mr Crutchley has seen me today and his condition has improved. He is fit to go back to work, as long as his work environment is safe from an OSH perspective”*. This report was not provided to the Ministry until 21 July 2004<sup>21</sup>
- Then on 26 August Dr Fourie provided a follow-up medical assessment. He confirmed he had seen Mr Crutchley on five occasions in connection with

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<sup>21</sup> By which time Mr Crutchley's health had deteriorated again (see bullet point below).

symptoms associated with stress in the workplace. He advised that Mr Crutchley had been referred to physiotherapy and that he attended 13 sessions between December 3 2003 and 13 April 2004. He advised Mr Crutchley's condition had gradually improved as a result of being away from the workplace and the treatment he had received. However, he also stated that having seen Mr Crutchley on 30 July he was again having signs of stress. He stated *"It is my understanding that stress levels have increased as a result of him being without an income for an extended period of time (over four months) and the pressures this has brought to bear on Peter and his family.....These pressures, together with the considerable effort associated with the legal process for mediation have again resulted in a stressful situation. In spite of this Peter is not as stressed as he was while he was in the workplace"*. Dr Fourie concluded *"It would appear that he is fit to return to work provided that the workplace is safe from an OSH perspective, and management is supportive of him"*.

[241] The respondent has no record receiving this certificate.

[242] It is unfortunate that Mr Crutchley did not obtain a specialist's diagnosis until February 2005 after he met with Dr Collier.

[243] There were subsequently three other specialist reports obtained (Drs Darby, Black & Kenny) all of which have been submitted in evidence. Drs Darby, Black and Kenny attended the investigation meeting as expert witnesses.

[244] Dr Collier is a qualified psychiatrist. He was consulted by Mr Crutchley at his own initiative in January/February 2005. Dr Collier's report was made available to the Authority. In his report Dr Collier stated:

*"It is my opinion that Peter has described stress – related symptoms which he identifies clearly and has documented as arising from his work place. These symptoms are well recognised as stress-related symptoms and would fulfil the criteria for the DSM-IV diagnosis of Major Depressive Disorder. He describes initial resolution of the symptoms within a month of stopping work but then a further increase in symptoms as he began to address the situation with his employers and has engaged in a significant battle for mediation and legal resolution of his problems"*.

[245] Dr Darby is a qualified consultant psychiatrist and is registered with the New Zealand Medical Council to practice psychiatric medicine in New Zealand. In

September 2005 Mr Crutchley was referred to Dr Darby pursuant to s.82 of the State Sector Act for a prognosis on the likelihood of his being able to return to work.

[246] Dr Darby met with Mr Crutchley and took his history and also had regard to documentation provided to him by the Mr and Mrs Crutchley and by WINZ. Dr Darby stated in his report:

*“My impression was that Mr Crutchley was definitively suffering from depression, burnout and some symptoms of anxiety all of which were directly related to the stressful environment at work”*

And

*“Both Dr John Collier (Specialist Psychiatrist) and I believe that Mr Peter Crutchley’s psychiatric difficulties and consequent inability to work are directly related to workplace stress.*

*It is impossible to pinpoint any particular stress accounting for Mr Crutchley’s difficulties apart from a combination of multiple issues at work.”*

[247] Dr Darby concluded:

*“I do not believe that the prognosis for Mr Crutchley returning to work at WINZ is good. This is based on the likelihood of his depression/burnout/anxiety continuing if the issues raised by Mr Crutchley and the OSH Committee were not corrected. Even if they were addressed, it is likely that the difficulties experienced with management and the consequent disintegration in the relationship would continue to make working at WINZ a stressful environment. Consequently, I believe it is unlikely that Mr Crutchley will find the environment at WINZ supportive or therapeutic in view of his experiences and consequent difficulty in developing a trusting relationship with management based on his experience of workplace bullying”.*

[248] Dr Black is a vocationally registered medical specialist in occupational medicine and has practised in this area since 1986. He was instructed by the applicant to report on his current medical condition and to provide an expert opinion as to the causation of his illness. He met with Mr and Mrs Crutchley in September 2007 and he also had access to documentation provided by the Crutchleys.

[249] Dr Black stated in his report stated that *“it seems beyond doubt that Peter has been suffering from a major depressive disorder”* and that he was in the recovery phase. As to causation Dr Black’s opinion was *“that factors in his former employment were the predominant cause of his depression”* and that specifically *“the possibility of*

*passive aggressive behaviour in his immediate supervisor has to be considered*<sup>22</sup>. Dr Black continued on the subject of causation. “*On that basis, if that is pursued as a working hypothesis then the delegation of the workplace problems identified by Mr Crutchley to him and subsequent resentment of his identification and pursuit of them through the Department of Labour makes sense and is consistent with the history*”.

[250] I note that the above reports were based on Mr Crutchley’s self-reporting and this was acknowledged in different ways by the specialists concerned. On the matter of self-reporting, I must have regard to the caution confirmed by the Employment Court in *Elayne Margaret Nilson-Reid v Attorney--General of the Department of Conservation* CC 4/05 “*that the Court may reject specialist evidence based on the self reporting of a litigant if the specialist uncritically accepts what the litigant has said*”.

[251] It is in regard to causation issues that reliance on self-reporting becomes particularly problematic. The following examples (cited by Mr Crutchley as support for his position that the harm he suffered was work-related) illustrate my point.

- Mr Crutchley is reported to have advised Dr Darby that his last performance assessment was significantly altered without discussion with him. In fact he acknowledged in his evidence there was a discussion between himself and Mr Watene on the issue of the revision of his PA and the fact that it would be downgraded and I have found that there was a lengthy discussion on this (in private) between Mr Crutchley and Mr Watene.
- Mr Crutchley reported to Dr Black that, subsequent to the submission of the August 2003 Stress Report, the workplace culture did not change and he found his and others stress levels increasing until in late 2003 he felt the need to take a long holiday in the hope that things would be better on return. In fact it was Mr Crutchley’s oral evidence that he knew Ms McKay was addressing the stressors identified in the Report and her efforts “*certainly calmed things down*”. The positive changes brought about through Ann McKay’s intervention were also noted in the H&S committee letter to her and Jackie Theobald dated 8 October (see para 73)<sup>23</sup>.

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<sup>22</sup> This was not explained and there is nothing else in the evidence which would explain or throw light on this statement.

<sup>23</sup> And on the matter of his own rising stress levels it is not in dispute that Mr Crutchley did not advise his managers of his concerns or his deteriorating health.

[252] The last medical specialist seen by Mr Crutchley was Dr Kenney. He too is a qualified specialist in occupational medicine and has practised in this specialty for 25 years. For the last 10 years he has worked as the specialist occupational physician for Waitemata District Health Board and in private consultant practice in occupational medicine. He met with Mr and Mrs Crutchley on 30 January 2008 following a referral from the respondent's legal representative. Dr Kenny also had access to a significant amount of documentary material including the medical reports of Drs Collier, Darby and Black, Dr Fourie's medical certificates and all the witness statements provided to the Authority.

[253] Dr Kenny too was of the opinion that Mr Crutchley has suffered from a major depressive disorder. However, has a very different view from the other medical experts as to the cause of Mr Crutchley's illness. His evidence on causation has regard to the much broader range of information made available to him and it is not based solely on Mr Crutchley's self reporting. His opinion on causation and foreseeability is set out in full.

*“In my opinion while the employer did not have detailed and well – promulgated procedures in place for identifying and managing stress in the workplace, the workplace cannot be regarded as any more stressful than many similar service occupations, and Mr Crutchley did not bring to the attention of work colleagues or to his immediate or other line managers, his concerns about his perceived workload, or other workplace issues or his associated health symptoms, until the point he was recommended to go off work by his GP.*

*The only advice provided to management was a broad, self-reported survey of potential workplace stressors, substantially produced by Mr Crutchley which referred to the experience of others in the same workplace but which I understand did not identify either himself or others as having any adverse health effects from such stressors.*

*It would therefore be difficult to consider that the employer had breached the duty of care in providing a safe workplace, particularly since after the assessment by OSH, I understand further procedures were developed and other safety strategies implemented.*

*It is reasonable to accept that Mr Crutchley's 'harm' (the development of stress related health symptoms and eventually a Major Depressive Disorder) had resulted from his perceptions about his work environment, workload, reduced ability to cope with work demands, interpersonal relationship issues, sense of frustration as work changes etc.*

*However, it is not evident that these factors arose directly from breaches of external (workplace) health and safety systems, work policies and procedures, or the workplace*

*culture, all of which appear to have been quite satisfactory in the view of several other colleagues and managers at various levels. There is evidence that despite a wish to pursue a relatively stress-free and easily manageable occupation after arriving in New Zealand, that Mr Crutchley allowed himself to become increasingly involved with work organisation issues and to attempt procedural change leading to self-imposed additional pressure/stress, with unfortunate results when this was not successful.*

*Finally, it is difficult to see how WINZ, during the first two years of Mr Crutchley's employment, given his curriculum vitae, his very satisfactory completion of the initial training programme, the apparent absence of any 'cries for help' or other notification of concern about the work, work-load or workplace culture, could have predicted the deterioration in his health and well-being from about September 2003 onwards.*

*It is possible that if Mr Crutchley or his GP had taken his concerns to WINZ management in November 2003, then appropriate action may have been possible and may have been taken to prevent the subsequent deterioration in his condition".*

### **Findings**

**[254] *Having investigated this matter and reflected on all of the evidence I concur with Dr Kenny's assessment of the cause of Mr Crutchley's illness.***

**[255] *I find that Mr Crutchley has suffered a major depressive disorder. His illness was not caused by any breach of duty towards him by the respondent but rather it resulted from a combination of factors - his personality e.g. perfectionism, his intense dislike of target based service delivery systems which led to him being vulnerable to the pressure to achieve what were entirely reasonable targets and Mr Crutchley's expectations as to what amounts to an appropriate management style and the mismatch between his perceptions of WINZ management style – that it was awash with institutional bullying - and his ideal. He set about to effect change and became intensely invested in his proposals for change. He became frustrated, angry and unhappy when his proposals failed to gain traction (albeit that over time many of the recommendations have been adopted). Mr Crutchley's health failed under the burden of the above factors in combination.***

**[256] *WINZ was required to address the stressors identified in May and August 2003 and to take all practicable steps to ensure a safe place of work at Hamilton Central. Mr Crutchley was clear that he knew the workplace stressors identified were being addressed at local level by Ms McKay. He was of the view, however, that his prescription for addressing the identified stressors needed to be***

*embraced/implemented at regional and national level for the entire organisation. However, the problem identified was a problem at the Hamilton Central office of WINZ and I find it was open for WINZ management to determine how it went about ensuring there was a safe place of work for staff at that office. It delegated that task to Ann McKay. Her actions focused on the problems identified where they were identified and led to a clear improvement in the well-being of staff at that centre. WINZ met its statutory obligations to ensure the workplace was safe for its employees.*

*[257] Mr Crutchley did not divulge the deterioration in his health from October 2003 and it was not until early February 2004 that any question of his suffering from stress and anxiety came to the respondent's knowledge and it was not until late February 2004 (after Mr Crutchley had left the workplace) that the extent of his illness became known to WINZ i.e. that his doctor had been treating him for this illness for months.*

*[258] In all the circumstances the collapse in Mr Crutchley's health was not, I find, foreseeable to the respondent.*

*[259] Further, while I recognise that Dr Fourie is not a specialist, I must give some weight to his report of 13 May that Mr Crutchley was fit to return to work. This opinion is supported by the fact that between January and October 2004 Mr Crutchley applied for nine alternative positions. Given this, I find that (from May 2004) Mr Crutchley should have been engaging positively with MSD to resolve his concerns and return to work. I accept Mr Crutchley was working through his representative at this time with a view to resolution of his concerns but he was undoubtedly of the mind set as early as March 2004 (described in his oral evidence) that the relationship had broken down completely - a viewpoint that did not change. He did not inform the respondent (in May 2004) of the medical opinion that he was fit to return to work if the workplace was safe. Rather, he was refusing to meet with his employer (other than in mediation) and shortly thereafter he began putting up significant barriers to a return to work such that one must question if he ever had any intention of returning to work. This raises issues of good faith and I must find that taking these factors overall Mr Crutchley failed to engage with the respondent in good faith to resolve the issues that were troubling him with a view to his returning to the workplace.*

[260] *However, by August 2004 Mr Crutchley was again demonstrating symptoms of stress and anxiety now due to the financial and emotional pressure he and his family were experiencing as a result of the fact it had no income and as a result of the fact he was engaged “in a significant battle for mediation and a legal resolution to his problems”<sup>24</sup>. Even then Mr Crutchley’s doctor reported that Mr Crutchley was able to return to work as long as the workplace was safe and management were supportive of him. By this time, of course, OSH had carried out its investigation of the workplace and made recommendations which MSD was addressing and the respondent had also engaged in mediation to address Mr Crutchley’s concerns and to facilitate his return to the workplace. Mr Crutchley still did not engage constructively with the respondent to achieve a return to work but effectively was bent on proving the workplace was unsafe and on achieving resolution to his grievances on his terms alone – being terms that to a large extent defied common sense<sup>25</sup>.*

[261] *Lastly in relation to my overall findings in this matter it is necessary to address Mr Crutchley’s claims he has been a victim of bullying by the respondent.*

[262] *There is no single universally accepted definition of bullying. My colleague Dzintra King considered definitions in Karen Evans and Gen-i Ltd AA 333/05.*

*“As with many concepts, this is not easy as even a quick examination of the literature shows. Dan Olweus Bullying at School, Cambridge, MA : Blackwell, 1993, defined it as “negative behaviour” intended to inflict “injury or discomfort” and that it was likely to occur in situations where there was an imbalance of power The English criminologist, David Farrington, “Understanding and preventing bullying” in Crime and Justice, Vol 17, Chicago : University of Chicago Press, 1993 said it was “repeated oppression, psychological or physical, of a less powerful person by a more powerful person”. All behaviour needs to be looked at in the social context in which it occurs and the motivation for the behaviour is also relevant. A vulnerable person may perceive criticism of his or her work as bullying, regardless of how the criticism is couched. Bullying may be seen as something that someone repeatedly does or says to gain power and dominance over another, including any action or implied action, such as threats, intended to cause fear and distress. The behaviour has to be repeated on more than one occasion and there must be evidence that those involved intended or felt fear”.*

[263] *This definition is consistent with many of the definitions of bullying I have reviewed in that they uniformly refer to repeated unreasonable behaviours directed towards an employee or employees with the intention of causing harm.*

<sup>24</sup> Dr Collier’s report, confirmed in the reports of Drs Fourie and Darby.

<sup>25</sup> For example, the recommendation that managers undergo psychopathy testing.

[264] *I make the point too that it is important, in considering complaints of bullying, to test the evidence objectively. Are the behaviours complained of unreasonable by the standards a reasonable person?*

[265] *I must find on the evidence that Mr Crutchley has focused on two disparate and isolated incidents (the Jackie Theobald email in May 2003 and the downgrading of his PA in October that year) and has parlayed those incidents into a sweeping conclusion that Work and Income (as a organisation) was dominated by positional power, fear, mistrust and uncertainty and that he himself suffered bullying consequences when he pointed out the truth. From this Mr Crutchley has gone on in his evidence to identify 16 different instances of bullying conduct towards him – corresponding to all his allegations of breach of contractual duty towards him by the respondent. Mr Crutchley has marshalled meagre and subjective evidence to support his allegations. I note in particular Mr Crutchley's view that turnover among work brokers was an indication of bullying. In fact Mr Crutchley undertook no analysis of turnover/sickness records when he referred to these indicators as support for the connection he made between stressors in the workplace and bullying. He was relying on his own perceptions. In fact sickness records for the time show sick leave taken by work brokers in the region at that time was below the national average. Turnover was higher but I find that it was not in the region of 60% per annum for 2003/4 as claimed by Mr Crutchley<sup>26</sup>. Further, the reasons for staff leaving need to be evaluated in arriving at a real understanding of labour turnover and in an entry level job it is accepted that there will be a degree of churn as people develop and move on in their careers to better paid jobs.*

[266] *In conclusion I have made findings in relation to all of the matters raised by Mr Crutchley and for the sake of certainty I find that he has not been a victim of bullying in his employment. Nor, on the evidence, can I find that there was or is a bullying culture at MSD or that its systems and processes are used as instruments of bullying.*

## **Unjustified Disadvantage**

[267] It is submitted for the applicant that MSD contractual breaches including the failure to provide the applicant with a safe place of work were unjustified actions disadvantaging him in his employment.

[268] Based on the findings I have already made I decline to find that Mr Crutchley has suffered any disadvantage in his employment with one exception i.e. the respondent's failure on 16 February 2004 (through Mr Watene) to inquire of Mr Crutchley the reasons for the stress/anxiety symptoms he had experienced which Dr Fourie reported may have been related to workplace issues and the failure of the respondent to develop a plan to assist Mr Crutchley's return to work having regard to any justifiable concerns revealed as a result of that inquiry.

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<sup>26</sup> He based his calculations on invalid measures including internal movements of staff.

[269] I have found that Mr Crutchley's illness was not caused by any breach of duty by the respondent but, broadly speaking, was a result of his perceptions of MSD's management style (which did not match his own) and the frustration he experienced when his determination to influence MSD's management culture to conform to his ideal, and on his terms, was unsuccessful.

[270] Mr Watene's failure to inquire into the reasons for Mr Crutchley stress and anxiety and the failure to develop an appropriate return to work plan was not the final straw that precipitated Mr Crutchley's illness – he had been ill since October/November 2003. However, the failure described and Mr Crutchley's unhappiness at being directed to work at Dinsdale did precipitate his departure from the workplace.

[271] In breaching its duty to Mr Crutchley in the manner identified the respondent failed to *ensure* he was not exposed to any harm resulting from workplace stress and it undermined the essential trust and confidence/duty of good faith that is essential to the employment relationship.

[272] This breach of duty was rectified promptly by WINZ on receipt of Dr Fourie's letter of 27 February when Ms Papesch wrote to Mr Crutchley on 12 March 2004 acknowledging the requirement on the respondent to provide a safe place of work and seeking details from Mr Crutchley as to issues that were causing him stress in workplace with a view to meeting with him to address his concerns and to facilitate his return to work.

[273] This brings me to another point. There was a mutual obligation which rested with Mr Crutchley to ensure his own safety at work (s.19 HASEAct 1992). Mr Crutchley also had good faith obligations towards his employer. These obligations required Mr Crutchley to advise his employer of the seriousness of his illness which – on his own evidence - became clear to him in November 2003. He did not do so. If the respondent's prompt response to the receipt of this information in late February 2004 is anything to go by<sup>27</sup> it is likely that MSD would have taken a very different view of Mr Crutchley's situation when he returned to work on 16 February 2004 if it had then had knowledge of the serious and longstanding nature of Mr Crutchley's illness.

[274] Nevertheless, I have found that WINZ breached its duty to Mr Crutchley in relation to its failure to make inquires about the causes of the stress and anxiety he

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<sup>27</sup> Ms Papesch's letter 12 March 2004.

had suffered and to manage appropriately his return to work on 16 February 2004 and this breach must lead to a remedy for a disadvantage grievance.

[275] *For the reasons outlined above I find that Mr Crutchley has a disadvantage grievance against his former employer.*

### **Remedies**

#### **Contribution (S.124)**

[276] Mr Crutchley should have communicated in a timely manner to the respondent that he had been seeking medical treatment for stress and anxiety from November 2003 which he put down to work related stress. Had he advised Mr Watene of the serious and longstanding nature of his illness when he took sick leave from 5 February the Department may have upgraded its response to the situation. This failure to communicate openly and honestly on this issue is blameworthy conduct on Mr Crutchley's part and I set his contribution at 25%.

#### **Lost remuneration**

[277] I find the applicant did not lose remuneration as a result of his disadvantage grievance. He was on paid sick leave for some five weeks after he left the workplace and given Mr Crutchley's contribution in this matter I decline to award lost remuneration beyond this period. (*Salt v Fell CA 263/06*). In any event WINZ rectified its breach on 12 March 2004 when Ms Papesch wrote to Mr Crutchley to inquire what workplace issues were causing him stress and to invite him to meet with her to discuss his concerns and how they could be managed to support his successful return to work.

#### **Compensation under s.123 (1) (c) (i)**

[278] I direct the respondent to pay to the applicant the sum of \$5,000 under this head to remedy his grievance. After contribution the sum awarded is \$3,750 net and the respondent is ordered to pay this sum to the applicant.

### **Unjustified Dismissal**

[279] It is submitted by and for the applicant that his incapacity arose out of MSD's breaches of the express and implied terms of the employment agreement and that therefore his dismissal was unjustified. (*Cartwright v Commissioner of Police AC 110/99* and *Commissioner of Police v Cartwright* (2000) 2 ERNZ 106 referred to).

[280] An employer is not obliged to keep a job open for an sick employee indefinitely. The test has been described as whether the point has come “*at which an employer can fairly cry halt*” (*Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124, 127).

[281] The test to be applied in determining this matter is the same as that applied in any claim of unjustified dismissal. I must make an objective assessment of the employer’s actions *against the actions a fair and reasonable employer would have taken...in all the circumstances...at the time...*(S.103A test).

[282] I refer to my findings in paragraphs 232-239 including my conclusion that after 15 months the respondent was entitled to turn its mind to the question as to whether Mr Crutchley’s employment could be continued.

[283] Mr Williams wrote to Mr Crutchley on 5 May 2005 pointing out his lengthy absence from work and the difficulty the respondent now had in covering his position. It requested a meeting with him to discuss his on going employment and the prognosis for his return to work. Mr Crutchley was advised of his right to representation and invited to provide a medical report.

[284] The meeting between the parties took place on 10 June. Mr Crutchley’s issues/grievances were thoroughly canvassed. There was no resolution to the issues that Mr Crutchley wanted resolved before he would return to work and that meeting finished with Mr Crutchley tabling his requirements for a return to work and Mr Williams stating that if OSH confirmed the workplace was safe following its upcoming meeting he would expect Mr Crutchley to return to work.

[285] Following OSH’s visit in July 2004 which led to a confirmation of the steps taken by WINZ to manage stress in the workplace, Mr Williams advised Mr Crutchley that given his continued refusal to return to work he was left with no option but to initiate the medical retirement process. This would have resulted in Mr Crutchley’s employment being terminated and him being paid 65 days pay.

[286] Mr Crutchley did not co-operate with the procedure to assess his health for the purposes of medical retirement. It was his evidence that to have complied with this process would have implied his acceptance of the manner in which his concerns/situation had been managed by WINZ. In the event Mr Crutchley was directed (pursuant to s.82 of the State Sector Act) to a consultation with Dr Darby for assessment on the prognosis of the likelihood of his returning to work. Dr Darby’s

assessment was clear – that the prognosis for Mr Crutchley making a successful return to work not good.

[287] Given this and the fact that Mr Crutchley had not cooperated in respect of the medical retirement proposal Mr Williams wrote to Mr Crutchley on 26 October referring to the poor prognosis for his return to work and his lengthy and seemingly indefinite absence and advised him he wished to meet with him to discuss whether or not to continue or terminate his employment or alternatively Mr Crutchley was advised he could make submissions in writing. Mr Crutchley was advised of his right to representation.

[288] In the event Mr Crutchley declined to meet with the respondent and neither did he respond to the reiterated offer that he provide comments on the question. As a result the employer terminated Mr Crutchley's employment – advised by letter dated 9 November 2005 (to take effect 9 December).

[289] Clearly, given my previous finding that Mr Crutchley's illness was not caused by any breach of duty by the respondent - the findings in *Cartwright* (cited above) are distinguished and have no application here.

[290] I find further that the situation had been arrived at here where the employer could fairly cry halt and the respondent adopted a fair procedure in its dealings with Mr Crutchley in terminating his employment

[291] I find that the respondent has satisfied the s.103A test of justification and its actions in dismissing Mr Crutchley were entirely consistent with the actions a fair and reasonable employer would have taken in all the circumstances at the time.

[292] *Mr Crutchley was not unjustifiably dismissed.*

## **Penalty Claim**

[293] Mr Crutchley sought a penalty for a breach by the respondent of its duty of good faith towards him. Mr Crutchley has not met the burden of establishing there was a failure by the employer to comply with its duty of good faith towards him. On the contrary, the respondent acted (in the main) in good faith in its dealings with Mr Crutchley. I note too the claim also fails because it has been brought out of time.

## **Determination**

- Mr Crutchley has a unjustified disadvantage grievance against his former employer in respect of which remedies are set in the sum of \$3,750 net (S.123 (1) (c) (ii)).
- The remaining claims brought by Mr Crutchley are declined.

## **Costs**

[294] Costs are reserved and the parties are invited to resolve the question between them having regard to the fact that Mr Crutchley was legally aided and having regard to the fact that he has not, in the main, succeeded in his claims. If the question of costs cannot be resolved between the parties they are to advise the Authority promptly and file submissions to allow costs to be set.

Janet Scott

Member of the Employment Relations Authority