

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 269  
5458942

BETWEEN	DARREN ABBOT Applicant
A N D	THE PALLET COMPANY (BOP) LIMITED (PREVIOUSLY KNOWN AS BAY PALLETS (2012) LIMITED) Respondent

Member of Authority: Rachel Larmer

Representatives: Frances Meikleham, Counsel for the Applicant  
Fiona Clifton, Advocate for the Respondent

Investigation Meeting: 24 and 25 August 2015 at Tauranga

Date of Determination: 18 September 2015

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**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] Mr Abbot is a former director and employee of Bay Pallets (2012) Limited. Prior to that he was in business with his ex-wife (Tracy Abbot) and her parents Michael and Katherine (Kathy) Sass. Together they owned a 25% shareholding in Webb Pallets which changed its name to Bay Pallets Limited (BPL). Mr and Mrs Sass were directors of BPL.

[2] Mrs Sass was the Chief Financial Officer and Managing Director of BPL and as such was responsible for overall financial operations including the monthly closing of books, IRD returns annual financial statements etc. Mr Abbot performed the day-to-day and management operations of BPL. Neither Mrs Abbot nor Mr Sass did any actual work for BPL.

[3] Mr Abbot and his ex-wife Tracy had what Mr Abbot describes as “*a messy separation*” in 2011. Shortly thereafter the relationship between the BPL shareholders

became strained and the business was sold to Bay Pallets 2012 Limited (BP12) in February 2012.

[4] Mr Abbot became Managing Director and a 5% shareholder in BP12.

[5] BP12 changed its name to The Pallet Company (BOP) Limited (which I shall refer to as PCL) on 04 November 2014.<sup>1</sup> Mr Nick Barton is the sole director of PCL which is owned by The Pallet Company (TPC).

[6] When BPL was sold to BP12 Mr Abbot was appointed as the Operations Manager/Managing Director of BP12. The other directors of BP12 were Mr Nick Barton who was director of TPC, Mr Edwin Potts and Mr Steven Watson who were both directors of Big Tough Pallets Limited. Mrs Sass was not a director of BP12 and was not employed by BP12.

[7] At the material time the shareholding of BP12 was:

- (a) Big Tough Pallets Limited – 375 shares;
- (b) The Pallet Company Limited (TPC) – 375 shares;
- (c) Mrs Katherine Sass – 200 shares; and
- (d) Mr Darren Abbot – 50 shares.

[8] Mr Abbot was the only director who was also employed by BP12. Mr Abbot continued to run the Tauranga factory for BP12 which is what he had been doing for BPL. The other three directors were all based in Auckland and each of them had other business interests that took their time and attention.

[9] In early 2013 the BP12 directors began to discuss the possibility of Mr Abbot purchasing a larger shareholding in BP12. These share purchase negotiations continued for a number of months due to differing views on the value of the shares. The proposed share sale was put on hold by the other directors at the end of July 2013. A few days later Mr Abbot commenced long term sick leave and never returned to work.

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<sup>1</sup> I shall refer to the entity that employed Mr Abbot in this determination as BP12 for ease of reference although I recognise that entity's current legal name is PCL.

[10] Mr Abbot's sick leave was certified. His first medical certificate was from 05-28 August and the second was from 29 August–26 September. The third and last medical certificate was dated 03 October and was backdated to cover the period 25 September–25 October 2013.

[11] BP12 says it did not receive Mr Abbot's third medical certificate until 16 October. Mr Abbot says he couriered it by track and trace courier on 03 October but does not have any records to show that occurred.

[12] In terms of this conflict of evidence I consider it more likely than not that BP12 did not receive Mr Abbot's third medical certificate until 16 October because Mr Watson's actions and communications were consistent with that date whilst Mr Abbot's subsequent actions and communications did not identify that his medical certificate had been couriered on 03 October.

[13] Mr Watson wrote to Mr Abbot's solicitor on 17 September asking if Mr Abbot would be returning to work or would be providing an additional medical certificate. Mr Abbot's solicitor emailed back on 18 September that he would take instructions. No substantive response was received after that.

[14] On 02 October 2013 Mr Abbot's lawyer wrote to BP12 informing it that he would be responding shortly about a further medical certificate for Mr Abbot and raising three unjustified disadvantage personal grievance claims. The disadvantage grievances involved claims BP12 had:

- (a) Placed Mr Abbot under undue stress during his employment;
- (b) Taken actions to prevent Mr Abbot from returning to his employment including requiring him to stay away from the premises, changing the locks, requesting return of company keys, car, fuel, card and phone;
- (c) Accessed his private information by having his email account "*broken into*" and his trade me account "*taken over*".

[15] Mr Watson responded on 07 October rejecting the grievance claims and stating that because BP12 had not been provided with an updated medical certificate it was "*its view as per section 22 of his employment agreement, Mr Abbot has*

*effectively terminated his employment with the company*". BP12 therefore considers Mr Abbot's employment ended that day as a result of Mr Abbot abandoning it.

[16] Mr Abbot claims he was unjustifiably dismissed when BP12 communicated its view to him that he had abandoned his employment when it knew he was on long term sick leave.

[17] BP12 denies dismissing Mr Abbot. BP12 says the abandonment clause in Mr Abbot's employment agreement operated to end his employment after he failed to return to work, or to provide an updated medical certificate or to communicate with it regarding his intentions regarding his employment. BP12 says Mr Abbot's certified sick leave expired on 26 September so in the absence of any further information from him BP12 was expecting him back at work on 27 September.

[18] BP12 says that by 27 September it had not heard from Mr Abbot since 26 August 2013 other than an email acknowledgment of Mr Watson's letter of 17 September from Mr Abbot's representative. BP12 also says that Mr Abbot did not correct its view that he had abandoned his employment.

[19] On 02 October (six days after Mr Abbot was expected back at work) BP12 received two letters from Mr Abbot's solicitor. The first letter raised three disadvantage grievances. It also advised that Mr Abbot's solicitors would "*get back to you shortly about a further medical certificate*". The second letter was a without prejudice communication.

[20] Mr Watson wrote back on 07 October rejecting grievance claims. Mr Watson also referred to the abandonment clause in Mr Abbot's employment agreement stated:

*Mr Abbot's medical certificate stated that he would be fit to return to work on Friday, 27 September. Mr Abbot did not return to work on this day and no further correspondence or notification was received by the company regarding his employment until 7.08pm on Wednesday 2 October when we received your [Holland Beckett Lawyers] letter via email. This correspondence was received four working days after Mr Abbot's medical certificate expired.*

*It is therefore our view that as per section 22 of his employment agreement, Mr Abbot has effectively terminated his agreement with the company.*

[21] BP12 says Mr Abbot did not seek to correct or contradict that he had abandoned his employment. BP12 says it did not receive Mr Abbot's third medical

certificate until 20 days after the expiry of his second medical certificate. BP12 says its view by then was that it was too late so it replied to Mr Abbot's solicitor acknowledging receipt of the third medical certificate but restating its view that Mr Abbot's employment had ended due to him abandoning it.

### **The issues**

[22] The following issues are to be determined:

- (a) Was Mr Abbot unjustifiably disadvantaged in his employment?
- (b) If so, what if any remedies should be awarded?
- (c) Was Mr Abbot dismissed?
- (d) If so, was dismissal justified?
- (e) If not, what if any remedies should be awarded;
- (f) What if any costs should be awarded?

### **Was Mr Abbot unjustifiably disadvantaged in his employment?**

[23] Mr Abbot has three unjustified disadvantage claims – undue stress, prevented him from returning to work and accessing of his private information.<sup>2</sup>

[24] Mr Abbot bears the onus of establishing on the balance of probabilities that he was disadvantaged. If Mr Abbot meets that threshold the onus passes to BP12 to justify its actions in accordance with the justification test in s.103A(3) of the Employment Relations Act 2000 (the Act).

[25] I now deal with each grievance in turn.

*Was Mr Abbot disadvantaged by being subjected to undue stress?*

[26] BP12 denies that it placed Mr Abbot under “*undue stress*.” It says the first it heard about undue work related stress was when Mr Abbot raised his disadvantage grievance on 02 October.

[27] Clause 30 of Mr Abbot's employment agreement dealt with health and safety. Clause 30.1 required BP12 to ensure a safe and healthy work environment which is

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<sup>2</sup> See para X for actual grievances.

consistent with an employer's obligations under the Health & Safety in Employment Act 1992 (HSEA). Clause 30.2 imposed a mutual obligation on the parties to "*promptly take all reasonable steps to eliminate, isolate or minimise any significant hazards observed in the course of employment*".

[28] Mr Abbot was responsible as per his job description (both as employee and effectively the employer on the Tauranga work site) for "*supervision and overall management of the company on a daily basis.*" Workplace stress is a potential hazard which must be appropriately managed under HSEA because stress could potentially result in harm to an employee or others.

[29] Mr Abbot therefore had an obligation to have either addressed the potential hazard (of undue stress) himself or if that was not possible to have identified undue workplace stress as a potential hazard to the other directors so they could take appropriate steps to eliminate, isolate, or minimise the potential hazard. I find that did not occur.

[30] Mr Abbot also regularly met with a health and safety contractor in his capacity as Managing Director to ensure BP12 met its obligations under BP12. However Mr Abbot did not raise any concerns about undue workplace stress with the health and safety contractor.

[31] Mr Abbot and Mr Watson had lunch together a few weeks before Mr Abbot's sick leave. That would have been a good opportunity for Mr Abbot to have raised any work related concerns with Mr Watson in person but Mr Abbot did not mention anything about undue work related stress.

[32] I accept Mr Watson's evidence that he and Mr Barton did not know that Mr Abbot believed he was suffering workplace stress because that was not communicated to them. The only stress the other directors knew Mr Abbot was suffering was personal stress relating to the breakdown of his marriage with the associated issues that caused.

[33] Mr Abbot received considerable support when employed by BP12 which had not been available to him when working for BPL. Mr Abbot went from having no support or business backup to a full support network from his business partners and fellow directors. This included payroll, administrative, taxation, health and safety,

staffing, sales and HR support. The financial burden of running the business, cashflow, and paying creditors was also removed from Mr Abbot.

[34] Mr Abbot acknowledges that prior to commencing sick leave he was suffering from various external stressors and that he was also very disappointed that the share purchase had been put on hold by the other directors at the end of July.

[35] Mr Abbot says that BP12 should have recognised his stress<sup>3</sup> and assisted him to separate his work from his personal life. I accept the evidence given by the other directors they tried to support Mr Abbot through his personal issues and also discouraged him from bringing such issues into work.

[36] I find that Mr Abbot has failed to discharge his onus of establishing that he was disadvantaged in his employment. The evidence does not establish that BP12 put Mr Abbot under “*undue stress leading up to his taking sick leave*” or that he suffered work related stress as a result of any act or omission by BP12 or that BP12 breached any duty to him regarding the provision of a safe workplace.

[37] Mr Abbot’s claim that he was unjustifiably disadvantaged as a result of being subjected to undue stress does not succeed.

*Did Bay Pallets unjustifiably disadvantage Mr Abbot by taking actions to prevent him from returning to his employment including requiring that he stay away from the premises, changing the locks on the premises, requesting he return his keys, car, fuel card and phone?*

[38] Mr Abbot emailed Mr Watson on the afternoon of 05 August saying that he was going to be on sick leave until 29 August and that he wanted to communicate only by email. Mr Abbot did not respond to phone calls from the other directors. This meant that steps were taken by the directors to ensure the business could continue to run while Mr Abbot was away.

[39] I find that the facts Mr Abbot relies on do not establish that he was prevented from returning to work. There was also no evidence that Mr Abbot had attempted to return to work but had been prevented from doing so. Nor did Mr Abbot ever express a desire to return to work while on sick leave.

[40] Mr Abbot was on sick leave so had no need to be at work. If Mr Abbot had needed to attend the factory outside of normal operational hours he could have

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<sup>3</sup> Which involved issues associated with his marriage breakdown.

contacted one of the directors or staff on site to arrange access. There was also nothing stopping Mr Abbot from turning up at work while the factory was open.

[41] BP12 told Mr Abbot to remain at home so he could focus entirely on getting well and not be worried about business concerns. Mr Abbot was integral to BP12 the business so it was in everyone's interests for him to fully recover as quickly as possible.

[42] The locks were changed because none of the directors had a set of keys to the factory and Mr Abbot had not responded to their calls about that. Mr Watson's evidence was that Mr Abbot would have been given a new set of keys upon his return to work.

[43] Mr Abbot's mobile phone was a business tool given to him to use for work purposes so he had no need for it while on sick leave. Many of BP12's customers had Mr Abbot's mobile number stored as the contact number for the business and the customer's contact details were also stored on the phone. BP12 asked for the phone back so they had a means of communicating with their customers while Mr Abbot was on sick leave.

[44] The company vehicle was another business tool. It did not form part of Mr Abbot's remuneration and was requested back so it could be used for business purposes whilst he was on sick leave. Mr Abbot did not in fact return the vehicle. He only relinquished use of the vehicle after deciding to leave it in the paid uncovered international carpark of Auckland airport on 01 October 2013.

[45] BP12 was not advised of the location of its vehicle until Mr Abbot couriered the car keys to Mr Watson on 11 March 2014. This was six months after Mr Abbot had left it at the international airport carpark, by which time parking charges of \$1,957 had been incurred.

[46] The fuel card was provided for business use only. It did not form part of Mr Abbot's remuneration and he was not entitled to use it for personal travel. Mr Abbot filled his vehicle up the day he notified BP12 he would be taking sick leave. He therefore had no use for it while on sick leave because he was not driving for work purposes while on sick leave.

[47] Mr Abbot has not discharged the onus of establishing that he was prevented from returning to work or that he was disadvantaged by the factors he relies on. Accordingly this disadvantage grievance does not succeed.

*Was Mr Abbot unjustifiably disadvantaged by Bay Pallet accessing his private information by having his email account “broken into” and his Trade Me account “taken over”?*

[48] BP12 had one computer and one email address (Mr Abbot’s email) for the entire Tauranga factory. That meant everything related to the business (sales, orders, clients/customers etc) had to go through that email.

[49] BP12 did not “break into” Mr Abbot’s email. The computer and email system were business tools owned by BP12 not Mr Abbot’s personal email.<sup>4</sup> These tools were fundamental to BP12’s ability to run its business.

[50] Mr Watson first attempted to contact Mr Abbot to get his log in. When Mr Abbot did not respond Mr Watson then engaged an IT expert to gain access to the business emails. That did not disadvantage Mr Abbot who was not required to do any work while on sick leave.

[51] The Trade Me account was set up and run by Mr Abbot for business purposes. It was in Mr Abbot’s name because he had set it up in his own name while working at BPL and the account transferred with the business purchase by BP12. BP12 used the account to relist firewood and sawdust for sale as was its ongoing usual business practice. Mr Abbot was not disadvantaged by that.

[52] Mr Abbot was concerned about his personal emails being kept confidential when he heard that Mrs Sass was covering his work while he was away. Mr Abbot was in litigation with Mrs Sass and her daughter about various issues so he did not want her seeing his personal material. Mr Watson assured Mr Abbot that BP12 was not interested in his personal information but just needed to keep the business running while he was away.

[53] Mr Watson made it clear to Mrs Sass that she was not to access Mr Abbot’s personal emails or information and she assured him she had no interest in doing so.

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<sup>4</sup> The fact Mr Abbot chose to store personal information on his work computer and to send and receive personal emails from his work email does not make the work computer or the work email address his personal property and such actions cannot prevent his employer from using its own business tools.

Mr Watson accepted Mrs Sass's assurance at face value. During the course of Mrs Sass's evidence to the Authority she admitted accessing Mr Abbot's personal information and private emails.

[54] Mrs Sass admitted that she had used Mr Abbot's non work related information to support her civil legal proceedings against him. Mrs Sass also admits to passing Mr Abbot's private information to an investigator from Ministry of Social Development (MSD). MSD then subsequently laid criminal charges against Mr Abbot, who is currently awaiting trial.

[55] Mrs Sass admitted that some of the non-work related information she accessed included legally privileged communications between Mr Abbot and his solicitor. The civil proceedings involving Mrs Sass and Mr Abbot were settled. Mr Abbot believes Mrs Sass's misuse of his private information contributed to that settlement which resulted in his shares in a former business being transferred to Mrs Sass.

[56] BP12 discovered this breach for the first time when Mrs Sass gave her evidence at the Authority's investigation meeting. Prior to that she had led the directors to believe that she had no interest in Mr Abbot's personal information and had confined herself to dealing with work-related matters only in terms of the emails that were going in and out of Mr Abbot's work email account.

[57] At the material time Mrs Sass was BP12's temporary employee so I consider BP12 is vicariously liable for Mrs Sass's actions. BP12 knew that there were relationship difficulties between Mr Abbot and his ex-wife and her family so it should have done more to protect Mr Abbot's personal information rather than merely rely on Mrs Sass's verbal assurances.

[58] Mrs Sass was not given a written employment agreement contrary to s.65 of the Act. An employment agreement could have contained a specific confidentiality clause to ensure that none of the information she had accessed while working for BP12 was used for other than genuine work purposes.

[59] BP12 could have required Mrs Sass to have provided a written undertaking and/or to have completed a confidentiality agreement so that legal action could have been taken against her for any breach.

[60] I find that Mrs Sass's inappropriate accessing of Mr Abbot's personal information disadvantaged him and that such action was unjustified. Mr Abbot's unjustified disadvantage grievance relating to the accessing of his personal information succeeds.

### **What if any remedies should be awarded?**

#### *Distress compensation*

[61] I am satisfied that Mr Abbot suffered considerable humiliation and distress as a result of Mrs Sass using his personal information (that she should not have been able to access) against him.

[62] I order Bay Pallets to pay Mr Abbot \$7,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of this unjustified disadvantage.

#### *Contribution*

[63] Having determined that Mr Abbot has a disadvantage grievance, s.124 of the Act requires me to consider the extent to which he contributed towards the situation which gave rise to his grievance and to reduce remedies accordingly. Contribution denotes blameworthy conduct which has been proven on the balance of probabilities.

[64] I find that Mr Abbot substantially contributed to the situation which gave rise to his disadvantage grievance. He stored personal information on his work computer. Mr Abbot attended work outside of business hours on the evening of 05 August (after he had commenced sick leave) and uplifted personal property (including furniture, chairs, carpet, underfelt and numerous other items including office items) but did not secure or delete his personal emails.

[65] Mr Abbot also went on sick leave without discussing that with the other directors. That left the other Auckland based directors in the challenging position of unexpectedly having to run the Tauranga factory. That was understandably their focus rather than investigating what personal information Mr Abbot had on his computer and then securing it.

[66] Mr Abbot contributed to the situation because he did not speak to the directors personally. This meant he did not adequately convey exactly what personal

information he had on his computer and why it would be detrimental to him if Mrs Sass accessed it. BP12 had no idea it included legally privileged communications about the litigation Mr Abbot and Mrs Sass were involved in. It was Mr Abbot's responsibility to make this clear and I find that he did not do so.

[67] Mr Abbot did not give the directors a list of the personal information which was of particular concern to him. It was unreasonable and unrealistic for Mr Abbot to expect the directors to go through all of Mr Abbot's personal information and attempt by themselves to check what could potentially prejudice him if Mrs Sass accessed it. Mr Abbot could and should have arranged to do this himself or have instructed someone to do it on his behalf.

[68] Mr Abbot should have known that BP12 would effectively have no option but to engage Mrs Sass to assist while he was away. Mrs Sass knew the business, its systems, customers, other employees etc because of her role with Bay Pallets. She was also the only Tauranga based shareholder (other than Mr Abbot) so she was the obvious choice.

[69] Mr Abbot should have taken more responsibility for securing his personal information in the circumstances. He could have copied the information to an external hard drive, he could have engaged an IT person to do that, he could have arranged to access his emails outside of normal business hours and/or he could have sent Mr Watson a hard drive and instructions about what items should be removed.

[70] Mr Abbot did not offer BP12 any practical options or suggestions to address the pressing situation that had arisen as a result of Mr Abbot's sick leave. He just expressed concern about Mrs Sass but appears to have left the situation entirely up to BP12 to resolve at a time when its focus was very much on ensuring the factory could continue to operate while Mr Abbot was away.

[71] It was Mr Abbot's decision to keep personal emails including information about his legal proceedings on his work computer under his work email address. He knew that there was only one computer at work and only one work email address. It must have been obvious to him that if he was away someone else would need access to the computer so would therefore by definition have access to his personal information.

[72] I assess Mr Abbot's contribution at 50% so his distress compensation should be reduced to \$3,500 for his disadvantage grievance.

### **Was Mr Abbot dismissed?**

[73] A dismissal is a sending away which occurs at the employer's initiative. BP denies dismissing Mr Abbot and says his employment ended in accordance with the abandonment clause in his employment agreement.<sup>5</sup> Clause 22 of Mr Abbot's employment agreement states:

*Where the employee is absent from work for a continuous period exceeding three days without notification to or consent from the employer or without good cause, they shall be deemed to have terminated their employment.*

[74] The effective operation of an abandonment clause in an employment agreement does not amount to a dismissal because the employment does not end at the employer's initiative - it ends as per the operation of the contractually agreed term.

[75] The issue is therefore whether or not the abandonment clause operated to end Mr Abbot's employment. If not, then did BP12 effectively dismiss Mr Abbot by insisting he had abandoned his employment when he had not?

[76] On 26 August 2013 Mr Abbot's lawyers wrote to Mr Watson asking for confirmation about what decisions had been made about Mr Abbot's employment, by whom and in what capacity such decisions had been made. They stated that once that had been clarified then they would respond regarding Mr Abbot's position in respect of his employment situation.

[77] Mr Watson responded by letter dated 27 August stating that Mr Abbot had not been given any indication either verbally or in writing from the directors that his employment was at an end and that there had been no meeting between the directors about Mr Abbot's future with the company. Mr Watson asked if Mr Abbot intended to return to work or whether a further medical certificate was going to be provided.

[78] Mr Abbot's solicitor responded by email on 29 August attaching a medical certificate advising that Mr Abbot would be on sick leave until 27 September 2013.

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<sup>5</sup> Clause 22 IEA.

[79] Mr Watson wrote to Mr Abbot's solicitors on 17 September and said he was still waiting for a response about whether Mr Abbot intended to return to work or would be providing a further medical certificate because his medical certificate expired on 26 August. Mr Abbot's solicitor acknowledged receipt of Mr Watson's letter in an email dated 18 September.

[80] BP12 did not hear back from Mr Abbot so assumed he would be back at work on 27 September. However Mr Abbot did not return to work and he did not communicate with BP12.

[81] Mr Abbot's solicitors wrote to BP12 on 02 October advising that "*we will get back to you shortly about a further medical certificate for additional sick leave for Mr Abbot*". This letter also raised disadvantage personal grievances and noted they would be writing to BP12 with a settlement proposal under a separate without prejudice letter.

[82] Mr Abbot saw his doctor on 03 October and received a new medical certificate which was backdated to the expiry of his previous medical certificate so that he was certified as unfit for 30 days from 25 September. This new medical certificate stated Mr Abbot would likely to be fit to return to work on 25 October 2013.

[83] Mr Abbot says he couriered this to BP12 on 03 October but BP12 says it did not receive it until 16 October.

[84] On 07 October, having not heard back from Mr Abbot about his intentions and having not received an updated medical certificate, Mr Watson concluded that Mr Abbot had abandoned his employment as per the abandonment clause in his employment agreement. BP12 wrote to Mr Abbot's solicitor on 07 October expressing its view that Mr Abbot had "*effectively terminated his employment.*"

[85] I find that BP12 was not entitled to rely on the abandonment clause as having ended Mr Abbot's employment because the contractual requirements of clause 22 were not met. Mr Abbot was not away from work without a good cause – he was away because he was medically unfit to work. The indication from Mr Abbot's solicitor that a further medical certificate would be forthcoming strongly suggested that Mr Abbot was not going to be well enough to return to work on 27 September.

[86] BP12 needed to follow up about why a further medical certificate had not been supplied. BP12 was also legally required to make reasonable inquiries into Mr Abbot's whereabouts before it could rely on the abandonment clause to end his employment.

[87] Furthermore, as per the backdated medical certificate, Mr Abbot had been signed off as medically unfit to return to work. BP12 therefore had an opportunity to reconsider Mr Abbot's employment status when he (Mr Watson) received the updated medical certificate on 16 October. Instead BP12 reconfirmed its view that Mr Abbot's employment had ended because he had abandoned it.

[88] I find that Bay Pallets' actions in maintaining that Mr Abbot had abandoned his employment and in acting consistently with such belief, in circumstances which required the employer to make further inquiries before forming that conclusion, amounted to a sending away of Mr Abbot so was therefore legally a dismissal.

[89] I am therefore satisfied that Mr Abbot has discharged the onus of establishing that his employment ended because he was dismissed rather than as a result of him abandoning his employment.

### **Was dismissal justified?**

[90] Justification is to be assessed in accordance with the justification test in s.103A(3) of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether BP12's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Abbot was dismissed.

[91] A fair and reasonable employer is expected to comply with its statutory obligations. In addition to good faith requirements these include the four procedural fairness tests in s.103A(3) of the Act.

[92] I find that BP12 did not comply with its good faith obligation in accordance with s4(1A) or with any of the four procedural fairness tests in s.103A(3) of the Act. These breaches fundamentally undermine BP12's ability to justify Mr Abbot's dismissal.

[93] I find that BP12 is unable to discharge the onus of establishing on the balance of probabilities that Mr Abbot's dismissal was justified. BP12 failed to comply with the good faith obligations in s.4(1A) of the Act which required it to provide Mr Abbot with information relevant to his ongoing employment and an opportunity to respond to that before he was dismissed. That did not occur, which undermines BP12s' ability to justify Mr Abbot's dismissal.

[94] The lack of a fair or proper process also undermines BP12s' ability to substantively justify Mr Abbot's dismissal. Accordingly, I find that BP12s' dismissal of Mr Abbot was procedurally and substantively unjustified.

### **What if any remedies should be awarded?**

#### *Mitigation*

[95] Mr Abbot was assessed by Dr Drummond on 19 December 2013 as unfit to work for two years. Despite that Mr Abbot obtained temporary work on 01 September 2014 with Trade Staff.

[96] Mr Abbot claims he mitigated his loss by claiming two months' mortgage protection insurance and then by obtaining a sickness benefit from 01 September 2013 until 09 September 2014 of which he has been ordered to repay \$8,000.

#### *Lost remuneration*

[97] I am not satisfied that it is appropriate to award Mr Abbot lost remuneration over a period when he was certified as unfit to work. Mr Abbot claims his ill health was caused by BP12. However the available evidence does not establish that to the required standard. I consider that the evidence tends to suggest that Mr Abbot suffered considerable personal stress arising from his marriage breakdown and associated flow on issues relating to that.

[98] Based on the evidence available to the Authority I am not prepared to fix BP12 with liability for Mr Abbot's inability to work. Mr Abbot's lost remuneration claim therefore does not succeed.

### *Loss of benefits*

[99] Mr Abbot claims total lost benefits of \$18,309.50. This comprises \$14,000 for use of the company vehicle, \$200 per month personal use of the fuel card, \$50 per month for use of a mobile phone and the employer's KiwiSaver contribution.

[100] I am not satisfied that it is appropriate to award Mr Abbot lost benefits of \$14,000 due to not having his work vehicle available for reasonable private use on the basis the evidence in support of this claim was unsatisfactory.

[101] I do not accept that Mr Abbot has lost the benefit of a mobile phone. Under the terms of Mr Abbot's employment agreement BP12 was responsible for paying for work calls only because as the phone was provided for company business use. There was no provision for private use and so this claim does not succeed.

[102] I am not prepared to award \$200 per month for the fuel card because the fuel card was provided for business use only.

[103] I also find that Mr Abbot is not entitled to KiwiSaver contributions post his dismissal as claimed because he has not been awarded lost remuneration.

### *Distress compensation*

[104] Mr Abbot has been compensated for the distress arising from his unjustified disadvantage so his distress about that is not to be taken into account when assessing distress compensation relating to his dismissal.

[105] Distress compensation must be set with regard to the particular evidence relating to the effects of the unjustified dismissal on Mr Abbot and not to other matters which BP12 was not responsible for or which are not related to the effects of the dismissal.

[106] Bay Pallets is ordered to pay Mr Abbot \$5,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings that he suffered as a result of his unjustified dismissal.

### *Contribution*

[107] Having determined that Mr Abbot has a dismissal grievance, s.124 of the Act requires the Authority to consider the extent to which his actions contributed towards

the situation that gave rise to his dismissal and if required to reduce remedies accordingly.

[108] I consider that Mr Abbot has a high level of contribution towards the situation which resulted in his dismissal. Mr Abbot allowed his personal problems to impact adversely on his work situation despite being counselled to keep his personal problems separate from his work.

[109] Mr Abbot kept personal information on his work computer and then objected to his employer accessing the only computer in the factory which was essential to the businesses operations. Mr Abbot did not respond to calls from the other directors and declined to discuss his situation with them. Nor did he make appropriate arrangements to continue the efficient business operations in his absence. It was left to the directors to do the best they could in Mr Abbot's absence.

[110] Mr Abbot told staff that he was going on a month's sick leave without talking to the directors. I find he did not make appropriate arrangements for the factory to continue operating in his absence.

[111] Mr Abbot did not respond to Mr Watson's request to know his intentions at the conclusion of his medical certificate which expired on 26 September 2013. Mr Abbot did not instruct his solicitors to respond to Mr Watson's request regarding his intention to return to work.

[112] Mr Abbot did not contact BP12 to advise that he had not abandoned his employment after receiving its letters of 07 and 16 October 2013. He did not advise BP12 that he had sent an updated medical certificate on October 3rd. The back dated October medical certificate was not received by BP12 until 16 October 2013 which was 19 days after his previous medical certificate had expired. There were no other communications from Mr Abbot or his solicitor in the interim.

[113] Mr Abbot appears to have involved his life partner (Ms Hogan) in work matters which lead to the other directors deciding to put the share sale on hold after they received emails they considered to be rude and aggressive. Mr Abbot says in his statement that he "*was sent over the edge*" by the decision to put the share purchase discussion on hold.

[114] I consider that Mr Abbot must bear a high level of responsibility for his dismissal. I consider that remedies should be reduced by 60% to reflect that. Accordingly, the amount of distress compensation should be reduced from \$5,000 to \$2,000.

**What if any costs should be awarded?**

[115] The parties are encouraged to resolve costs by agreement. If that is not possible, then Mr Abbot has seven days to file a costs memorandum. BP12 has a further seven days to file its costs memorandum and Mr Abbot then has three working days to file and serve his reply. This timetable will be strictly enforced and any departure from it requires prior leave of the Authority.

**Rachel Larmer**  
**Member of the Employment Relations Authority**