IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 144
EMPC 70/2019

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
BETWEEN	CBA Plaintiff
AND	ONM Defendant

Hearing:	13 August 2019 (heard at Wellington)
Appearances:	S Henderson and D O'Leary, counsel for CBA S Dyhrberg and M Joyes, counsel for ONM
Judgment:	15 October 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] On 29 November 2018, CBA as an existing employee entered into a settlement agreement with her employer, ONM. That settlement resolved claims made by CBA that she was entitled to substantial remedies because of the way she had been treated at work, which had resulted in significant ill-health and a long absence.

[2] It was common ground that underlying the settlement agreement was an expectation CBA would be able to return to work.

[3] Subsequently, CBA filed a statement of problem in the Employment Relations Authority. She said she should have been in receipt of wages from the date of

settlement, and that undue delay in the return to work (RTW) process had caused significant stress entitling her to compensation for humiliation, loss of dignity and injury to feelings. That proceeding was removed to the Court by the Authority soon after.

[4] The Court held several timetabling conferences with the object of advancing the RTW issues.

[5] A fixture was then scheduled for 7 May 2019; however, it had to be adjourned.[1] Some RTW issues were resolved at mediation on 8 August 2019. The balance of CBA's claims in which she said her employment had been affected to her disadvantage, came on for hearing on 13 August 2019.

The pleadings

[6] In the operative statement of claim received 24 June 2019, three causes of action were raised for CBA.

[7] The first asserted that ONM had unjustifiably suspended its contractual obligations from 29 November 2018 and had thereby disadvantaged CBA. The settlement agreement did not vary the obligations contained in the applicable collective employment agreement (CEA): that she would be provided with work and be remunerated as an employee under that document. She had been medically cleared to return to work. She asserted that ONM was not justified in failing to meet its contractual obligations to pay her in full.

[8] Second, it was alleged that CBA's health was put at risk unjustifiably because a senior manager, Ms A, who had been involved in the circumstances which gave rise to CBA's absence from the workplace in 2016, was involved in the RTW planning, from late November 2018 to mid-April 2019, causing her further distress.

[9] The third cause of action alleged that unnecessary delay amounted to discrimination on the ground of disability; and that the discrimination was catalysed

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1 *CBA v ONM* [2019] NZEmpC 53.

by the fact that the health circumstances of another existing employee, Ms B, were favoured ahead of those of CBA. Harm had been suffered because the extended delay caused a significant deterioration in CBA's mental health. It was alleged that this conduct was unjustified.

[10] The remedies sought at the hearing for each of these alleged disadvantage grievances were:

(a) compensation in the sum of $110,000 for humiliation, loss of dignity, injury to feelings and to her general health, having regard to the alleged aggravating conduct of ONM; and

(b) reimbursement of lost remuneration and benefits, which at the hearing was said to be $6,526.

[11] ONM's operative statement of defence contested, first, liability. It was alleged that the steps taken by ONM were entirely reasonable in the circumstances, and that a return to work for CBA involved a number of complexities that needed to be worked through for ONM to comply with its statutory obligations under the Health and Safety Act 2015 and the Employment Relations Act 2000 (the Act).

[12] Second, it was pleaded that as soon as ONM became aware that the involvement of a particular manager was creating difficulties for CBA, her involvement ceased, and a senior manager, Ms C, became more directly involved.

[13] Third, it was pleaded that there was no qualifying discrimination on the grounds of disability in the difficult circumstances which had arisen.

[14] It was also pleaded that were liability to be established, the remedies sought were excessive. The amount sought for lost remuneration was submitted to be inappropriate having regard to the provisions of the CEA. The amount sought for humiliation, loss of dignity and injury to feelings was said to be not justified in the circumstances.

[15] Shortly before the hearing, the parties agreed on the details of a comprehensive RTW plan with the assistance of a private mediator. They are to be commended for concluding what was, in the circumstances, a significant agreement. It was accordingly unnecessary for the Court to consider making an order directing ONM to permit CBA to return to work immediately, as had been pleaded.

[16] I mention a final preliminary point. In the first interlocutory judgment, I directed that an interim order on non-publication of name and details, which had been made at an earlier stage of the proceedings, should continue.[2] I stated I was persuaded that there were significant health issues on both sides which justified the continuation of the interim order.

[17] I remain of the view that CBA's health circumstances justify the making of a permanent order of non-publication in relation to her name and identifying details.

[18] The position with regard to ONM turns on Ms B's health circumstances. Although it may have been possible to make an order in respect of her only, and to publish the identity of the employer and other staff involved, I am satisfied that such a step would not have been sufficient to preclude Ms B's identification. It is accordingly appropriate to make a permanent order in relation to ONM.

Essential facts

[19] As mentioned, on 29 November 2018 the parties entered into a settlement agreement, a term of which was that issues to that point were resolved on a full and final basis.

[20] Between 11 December and 21 December 2018, counsel exchanged emails as to whether there should be a consultation between CBA and a specialist occupational physician, Dr Ryder-Lewis and, if so, the appropriate terms of reference.

[21] Previous medical assessments had been obtained by CBA from a general practitioner (GP) and from a forensic psychiatrist; these stated she was fit to return to

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2 *CBA v ONM*, above n 1, at [25].

work. There was some debate as to whether, in these circumstances, a further report was necessary. Mr Henderson, counsel for CBA, stated in correspondence that the medical evidence previously provided had been unchallenged; and there was a concern as to the time the process was taking.

[22] In her evidence, CBA said ONM gave her good grounds for believing at the time of settlement that an appointment with Dr Ryder-Lewis could be obtained before Christmas 2018. She therefore thought she would be back at work soon after, and on that basis, she confirmed she would participate in such a consultation.

[23] On 19 December 2018, Mr Henderson said that if real progress was not made during January 2019, CBA would seek orders to enforce her rights under her employment agreement. Ms Dyhrberg, counsel for ONM, said the employer needed answers to questions as to CBA's medical condition which might be affected by the rigours of a return to full time work. She also said that if CBA was not considered fit to return to work safely, medical retirement would be considered.

[24] On 21 December 2018, Mr Henderson confirmed that the terms of the draft referral letter to Dr Ryder-Lewis, which had been under discussion, were agreed. He also said that CBA's mother had secured an appointment for CBA to see Dr Ryder-Lewis on 16 January 2019.

[25] The consultation duly took place on that date. The next day, CBA filed a statement of problem in the Authority seeking a return to work, lost wages and compensation for hurt, humiliation and distress.

[26] On 22 January 2019, Mr Clarke, one of ONM's lawyers, asked Mr Henderson to consent to a copy of CBA's statement of problem being provided to Dr Ryder-Lewis. He said this was necessary since it referred to ONM's mental state regarding the workplace and views about individuals within it. This was a reference to what was described in the statement of problem as a "principal problem" for CBA, that Ms A had been involved in dealing with issues relating to CBA's return to work, a possibility which she recorded in the statement of problem as giving her "good grounds for being

frightened". She also said there was a prospect of her workplace being rendered unsafe again.

[27] The statement of problem was provided to Dr Ryder-Lewis on 30 January 2019. Then he prepared his report which was forwarded to ONM's lawyers on 11 February 2019. It confirmed CBA was well enough to consider a graduated return to work. The risk of her becoming unwell again was assessed as being moderate. In summary, his recommendations included:

- That CBA should not return to the same team/work environment where she was originally employed.

- She should see a psychologist, as had been recommended previously.

- That CBA return to work on a graduated basis. This should be half days for two weeks followed by a medical review; then, if CBA was coping well, she could continue working three days per week for another two weeks, and after a further medical review consider increasing to six hours per day for the next month. Following another medical review, she could be able to increase to full-time work; alternatively, she could continue working six hours per day for another month. Flexibility was desirable. CBA should continue to see her GP/specialist and take medical advice as offered.

- CBA's condition rendered her more sensitive to criticism and stress, which could affect her ability to work both in the short and long term. Recommendations were made as to suitable strategies for coping with this.

- It was suggested that it may also be helpful for CBA to meet with a trusted colleague on a regular basis to discuss issues relating to her work.

[28] On 19 February 2019, lawyers for ONM asked for the names of persons with whom CBA would not be able to work. Some of these had been mentioned in Dr Ryder-Lewis' report, and included Ms A and Ms B.

[29] On 26 February 2019, Mr Henderson responded to this request, stating that the provision of yet further information was unnecessary; he reaffirmed CBA's availability for work.

[30] On 1 March 2019, Ms Dyhrberg responded to this letter, stating that, in order to ensure there was no risk to CBA's health, it would be helpful if the information were able to be provided.

[31] On 12 March 2019, an application for urgency was filed by CBA in respect of her proceeding which had by this time been removed to the Court. This was timetabled for response by ONM; a telephone directions conference was scheduled for 27 March 2019.

[32] On 22 March 2019, ONM proposed as a gesture of good faith to place CBA on paid special leave, calculated at 15 hours per week backdated to 9 December 2018, based on a notional salary of $43,350 per annum. In a memorandum filed by Ms Dyhrberg on the same day, it was submitted CBA's claim was misconceived and premature. Counsel also said that CBA had not requested reinstatement to ONM's payroll. The Court was also advised that ONM hoped to be in a position to consult further with CBA within the next two weeks.

[33] On 26 March 2019, Mr Henderson confirmed that CBA declined ONM's offer on the grounds her contractual pay exceeded the amount offered and that such a payment would affect the WINZ benefit which she was receiving. He said her full entitlements should be paid.

[34] Discussions with counsel as to urgency took place by telephone conference with the Court on 27 March 2019. In a subsequent minute, I indicated I was surprised arrangements had not been completed for CBA's return to work, particularly as Dr Ryder-Lewis' report had been available since 10 February 2019. However, I also

acknowledged Ms Dyhrberg's explanation there were some complexities involved in ensuring any return to work would proceed as smoothly as possible. I said I anticipated both parties would work hard to expedite the appropriate arrangements. The case was set down for hearing on 7 May 2019.

[35] At about this time, a senior member of ONM's management team, Ms C, assumed more direct control of the process. She told the Court in her evidence that although Ms A had been involved initially in advancing the RTW process, she had taken no material decisions, and that she herself had been appointed the independent decision-maker in mid-January 2019.

[36] On 2 April 2019, Ms C conducted a meeting with Ms B to consider "whether it's safe for [Ms B] and others to have [CBA] back in the workplace". Based on this conversation, Ms C concluded that the relationship between CBA and Ms B was irreparably broken as a result of previous events. She said she did not want to victimise or punish CBA for the situation, but it was one which she had to resolve.

[37] At the meeting, Ms B described feeling considerable anxiety; she said she might "go into panic mode" were ONM to return to work and were they to meet each other. As a result of these issues, it was decided that medical advice should be obtained as to Ms B's health.

[38] Also, on 2 April 2019, CBA filed an amended statement of claim; the claim for compensation for hurt and humiliation was increased from $20,000 to $35,000.

[39] On 10 April 2019, Ms Dyhrberg filed a memorandum seeking an adjournment of the upcoming fixture. In that memorandum, it was explained ONM had faced a number of complexities in arranging CBA's return to work. This involved arranging suitable part-time duties, reinduction training, establishing a suitable team within which CBA could work, and resolving location issues. A broad outline was given setting out how a return to work may be implemented. It was noted that this information had yet to be discussed with CBA. It was submitted that delay in doing so had been necessary to ensure that the specifics of the plan were implemented in line with medical advice. This timeline had been affected by the fact that discussions had

taken place with Ms B, and that it was now necessary to obtain advice as to her health and wellbeing. An adjournment was sought to allow time to receive the medical report regarding Ms B, and to make a decision regarding the feasibility of a RTW plan. A further complication was the upcoming absence of Ms C, on medical leave, for the month of May.

[40] Ms Dyhrberg also informed the Court that ONM had now reinstated CBA to its payroll, backdated to 29 November 2018, on a pro-rated salary (0.375 FTE) of $43,350, consistent with medical clearance for her to return to work for 15 hours per week; in her evidence, Ms C said that it was understood there was no longer a potential WINZ issue. The arrears were paid on or about 24 April 2019, and the pro-rated regular payments commenced on 1 May 2019.

[41] Mr Henderson responded to this memorandum, opposing the adjournment.

[42] In a minute of 15 April 2019, I noted that the Court had to balance the circumstances of the plaintiff on the one hand, and those of the defendant on the other. I referred to the earlier observation made by the Court on 28 March 2019 that it was surprising arrangements had not by that date been completed for CBA's return to work. I stated that I remained concerned at the delay which had not been satisfactorily explained. I concluded that the interests of justice did not require an adjournment of the fixture. The obtaining of a medical report relating to Ms B's circumstances did not mean that discussions between the parties as to CBA's return to work should necessarily be deferred, or that the circumstances required an adjournment of the fixture. Nor was I persuaded that Ms C's unavailability as decision-maker meant the fixture had to be adjourned, since I would have anticipated a substitute senior manager could become involved. I emphasised that there was no reason why the parties should not now be in direct dialogue as to the details of CBA's return to work, if necessary via urgent mediation.

[43] On 26 April 2019, I conducted a telephone directions conference, which had been scheduled previously, to ensure all arrangements were on track for the upcoming hearing. Mr Henderson applied for, and was granted, leave to amend the sum sought

by CBA for compensation for humiliation, loss of dignity and injury to feelings, from $35,000 to $55,000. Other logistical arrangements were also discussed.

[44] On 2 May 2019, ONM brought a further application for an adjournment of the imminent fixture scheduled for 7 May 2019. This was brought on the basis that a medical report had now been received from a psychiatrist in relation to Ms B. Referring to the report, Ms Dyhrberg provided a detailed assessment of Ms B's current state of health, noting the medical practitioner, Dr Cowley, had indicated there were very significant wellbeing risks were Ms B to have contact with CBA at work. It was submitted that more time was needed to put appropriate interventions in place to protect her health. Ms Dyhrberg also told the Court that ONM envisaged a period of two months would be needed to obtain necessary medical support for Ms B, and to fully understand how it could meet its obligations to both her and ONM.

[45] Also, on 2 May 2019, evidence for the intended hearing on 7 May 2019 was filed by ONM, being an affidavit from Ms C, and a brief of evidence from Ms D, a member of its Human Resources team. These witnesses provided detailed information as to the steps taken by ONM since the date of settlement, including those summarised above. Ms C acknowledged ONM was adopting a very cautious approach to the RTW issues, and that she was aware CBA was suffering some distress and health issues as a result of these circumstances. She said ONM had accordingly decided to reinstate her to its payroll effective from 29 November 2018. She acknowledged the delays had been frustrating for CBA, but the situation was not as straightforward as may have been assumed, and ONM needed to prioritise the health, safety and wellbeing of all employees concerned.

[46] Memoranda from both counsel were filed with regard to the adjournment application, outlining their respective points of view. Mr Henderson stated that having regard to the information provided about Ms B, CBA was compelled to conditionally consent to an adjournment of the substantive part of her case, although, this was subject to her receiving salary entitlements. Mr Henderson also placed on the record CBA's strong objection to the "gross delay" which had arisen in dealing with RTW issues.

[47] On 7 May 2019, I heard counsel further on these issues, which included detailed submissions as to interim pay arrangements for CBA. Later that day I issued a judgment granting the adjournment. I also directed that ONM should make payments to CBA based on a salary of $43,350, assuming a graduated return from March 2019.[3] I said this was necessarily a provisional assessment, in order to fix a fair sum for a two-month adjournment. I noted Mr Henderson had accepted the salary level of $43,350 for interim purposes only.

[48] During the hearing, I discussed alternative dispute resolution options with counsel, raising the possibility of private mediation. In the judgment I reserved leave to both parties to return to the Court on that issue, if need be. I also directed that in four weeks' time, the Registrar was to seek the views of counsel as to suitable dates for a rescheduled fixture.[4]

[49] During May, ONM approved four sessions of counselling to be paid in order for CBA to attend a clinical psychologist, Ms Dyne.

[50] Ms C stated that when she returned to work at the end of May 2019, she decided she would speak directly with CBA; however, she said other events intervened and this did not occur.

[51] On 28 May 2019, Mr Henderson requested the Register to schedule a two-day hearing. Two days later, he filed a memorandum to which was attached a communication from Ms Dyne which verified a marked decline in CBA's health. Ms Dyne stated she was very worried about the severity of CBA's mood state and raised the possibility of an acute psychiatric referral. In his memorandum, Mr Henderson stated that the declining health was a direct result of the issues which had arisen over CBA's return to work. He also noted there had been no move by ONM to communicate personally with CBA.

[52] Ms Dyhrberg responded in a memorandum filed on 31 May 2019. She said Ms C had been absent from work until 27 May 2019 and had intended to contact CBA

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3 *CBA v ONM*, above n 1, at [21]-[22].
4 At [34].

to request a meeting; but the indication that CBA's health had deteriorated meant this was no longer appropriate; nor was private mediation for the time being.

[53] Due to my unavailability, Chief Judge Inglis conducted a telephone directions conference with counsel on 13 June 2019. In a subsequent minute, she noted that no steps had been taken to organise mediation. She recorded she had been told this was because of absences within ONM, and recent commitments of counsel for ONM. However, there were also concerns that CBA may not be in a fit state to attend mediation, based on the memorandum filed by Mr Henderson which attached the brief report from CBA's psychologist.

[54] It was agreed Ms Dyhrberg would contact a senior mediator following the telephone conference, and then liaise with Mr Henderson with regard to the necessary arrangements. She told the Court she would explore dates for the week of 8 July 2019.

[55] Ms Dyhrberg told the Court that ONM had been taking steps to put together a RTW plan. A draft plan was to be considered at an internal meeting on 18 June 2019. It would then be provided to Mr Henderson, so it could be discussed between the parties.

[56] Chief Judge Inglis went on to record that having regard to the ongoing delays, it was appropriate to direct that the proceedings be set down for a hearing, the preparations for which should run in parallel with the mediated discussions. She directed that a two-day fixture was to be established for the first available dates after 30 July 2019. The Registrar then issued a notice of hearing for 13 and 14 August 2019.

[57] On 24 June 2019, Ms Dyhrberg wrote to Mr Henderson providing a draft RTW plan for CBA's consideration. It proposed a return on a graduated-hours basis, as recommended by the various medical personnel who had previously provided opinions; the nature of duties which would be undertaken, together with a description of the location, team leaders and colleagues with whom CBA would be working. It was recorded that the appropriate salary as from 1 July 2019 would be $47,633. It was anticipated these issues would be discussed at the upcoming mediation.

[58] On 27 June 2019, Chief Judge Inglis held a further telephone directions conference with counsel, for updating purposes. In a subsequent minute, Ms Dyhrberg was recorded as having confirmed that a detailed RTW programme had been prepared and provided to Mr Henderson for consideration. However, it was noted that two issues had arisen which might derail that process. The first related to the scope of matters to be covered at mediation, and the second related to costs. These issues were discussed, with the Court strongly encouraging the parties to make full use of the opportunity which presented itself on 8 July 2019 when mediation would occur, with a view to resolving all outstanding matters.

[59] It was also recorded that an amended statement of claim had been filed, incorporating an additional (third) cause of action, and increasing the quantum of compensation from $55,000 to $110,000.

[60] On 9 July 2019, a memorandum was filed by Ms Dyhrberg, which stated difficulties had arisen prior to the scheduled mediation, with the result that a new date had to be arranged. It ultimately occurred on 8 August 2019. As mentioned earlier, save for the issues which are now before the Court, a comprehensive RTW plan was agreed on that occasion.

[61] Prior to the fixture, both sides filed comprehensive evidence relating to events that had occurred since the date of settlement. At the commencement of the hearing, counsel advised that all evidence would be placed before the Court by consent, with no need for any witness to give evidence by way of examination-in-chief or cross-examination. The hearing would be restricted to submissions-only. That was a sensible approach in the circumstances.

Overview of parties' cases

CBA's case

[62] The essence of Mr Henderson's submissions is as follows:

(a) Between 2016 and 2018, CBA was on unpaid sick leave. This circumstance ended, however, at the time of the settlement agreement.

By this stage, CBA had been certified as fit to return to work by two medical practitioners; all issues to that point, including CBA's leave status, were thereby settled. The obligations of the collective employment agreement placed both parties in the situation where CBA was willing and ready to work, and ONM had an obligation to pay her contracted wages. He said that from that date, ONM's obligation to pay and provide work sprang into life.

From February 2019, CBA suffered psychiatrically and psychologically as a result of ONM's failure to meet its obligations imposed not only by the employment contract, but by the provisions of the Health and Safety at Work Act 2015 and the Human Rights Act 1993 (HR Act), from which it was clear she had the right to be free from hazards to her health and safety at work, and free from discrimination on the prohibited grounds of "psychiatric illness" and "psychological disability". These conditions were created by ONM's delay in addressing the RTW arrangements.

(b) With regard to the second cause of action, Mr Henderson submitted that ONM had wrongfully left Ms A as its delegate, exercising its powers and responsibilities from the date of settlement onwards. He argued this was a breach of the legislative provisions referred to above. It was Ms A's decision to suspend pay, and provision of work, from 30 November 2018. She also proposed to freeze CBA's salary at the 2015 level following her return to work. Then on 22 March 2019, she proposed a backdated pro rata payment of wages, based on 15 hours only per week from 9 December 2018 until a return to work plan could be finalised and implemented, conditional on her accepting placement on "special leave"; this offer, if accepted, would have compromised her contractual entitlements. It was asserted that Ms A then withdrew this offer on 29 March 2019. She had also proposed medical retirement. CBA had suffered humiliation, loss of dignity and damage to her physical, psychological and psychiatric health, and injury to feelings by Ms A's continued control of the RTW process until 16 April 2019.

It was asserted that on this date Ms A ceased to be involved in the process.

(c) Turning to the third cause of action, Mr Henderson submitted that unlawful discrimination occurred because of CBA's psychiatric illness and psychological disability; because of her condition, serious delay occurred at each step of the return to work process, causing harm to CBA. The discrimination was evident when compared to the preference given by ONM to Ms B, another employee involved in similar work.

(d) On the issue of quantum of compensation for humiliation, loss of dignity and injury to feelings, Mr Henderson submitted that the high claim of $110,000 was justified. He submitted that, given the aspects of the claim relating to alleged discrimination, it was appropriate to have regard to awards given by the Human Rights Review Tribunal in such cases as *Hammond v Credit Union Baywide*.[5] In his supplementary submissions, Mr Henderson stated that a number of judgments from this Court suggested that compensatory awards should be increased and that, where discrimination is accepted, awards in the employment jurisdiction should be in line with awards in the human rights jurisdiction. This was a band 3 case, except for the discrimination cause of action which justified a very high award, as sought.

(e) Finally, Mr Henderson produced a memorandum showing calculations of lost wages. As it was necessary for counsel for ONM to check the figures involved, I received supplementary submissions after the hearing on this point, to which I will refer later.

ONM's case

[63] The essence of Ms Dyhrberg's submissions is as follows:

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5 *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66.

(a) ONM's approach to the RTW issues was justified, fair and reasonable. The settlement agreement resolved only claims to that point. No other contractual obligations were created. It was necessary for CBA to rely on her existing contractual obligations.

ONM needed to work through a process to assess the feasibility of a proposed return to work plan. To do this, it needed, first, an assessment by an occupational specialist; then it needed to develop a detailed RTW plan. It went through a proper process for settling the referral to Dr Ryder-Lewis; once this was received and considered, it needed to deal with other staff, including Ms B. An unforeseen reaction to that consultation caused significant concerns which had to be dealt with. Circumstances had arisen which were not of ONM's making. The entire process took longer than would have been preferred, and to the extent that it was of its own making, there had been an apology.

Reference was made to an Authority determination in which it was held that the extended time taken to determine issues relating to return to work of an employee suffering from bipolar disorder, did not cause the employee unjustified disadvantage.[6] Ms Dyhrberg said perfection is not the standard; to establish the grievance, there would have to be a real failure.

Turning to the issues relating to salary and associated benefits, counsel submitted that as at the date of the settlement agreement, CBA was on sick leave; that continued to be the contractual position until she actually returned to work to the extent that she did; or there was an agreed variation; or ONM was directed by the Court to do otherwise.

Initially, CBA remained on unpaid sick leave. Then ONM chose to place CBA on its payroll. It also complied with the Court's direction. As a gesture of good faith, it increased CBA's salary to the current rate of $47,633 from 1 July 2019. She had been adequately remunerated

6 *Atley v Southland District Health Board* (2009) 8 HRNZ 888, (2010) 9 NZELC 93,427.

for the period from the date of settlement until the present time. She was currently in receipt of full-time income, despite not working. She needed to establish on the evidence that she had lost income for the period. ONM had acted as a fair and reasonable employer.

(b) Turning to the second cause of action, Ms A had been involved only in initiating CBA's assessment with Dr Ryder-Lewis because of her familiarity with the situation; she had not made any relevant decisions concerning CBA's return to work. She was removed from involvement in the process after it became apparent CBA objected to her involvement. The steps Ms A took were neither unlawful nor unreasonable. Reference was made to an Authority determination which had held that it would not be unreasonable to require an employee to report to a manager on his return, despite that manager having been held to have previously caused an employee disadvantage.[7]

(c) With regard to CBA's assertion she had been discriminated against, Ms Dyhrberg referred to the key provisions of the HR Act and applicable case law. She submitted that a relevant comparator could not be Ms B – if anything, her circumstances could only be relevant to an issue of disparity if such an assertion was alleged. Rather, the applicable comparator would be any other employee, not having a psychiatric or psychological disability. Since reasonable measures had been taken, the applicable legal tests under the various provisions of the HR Act as to discrimination on the grounds of disability were not met.

(d) Dealing with the issue of compensation, Ms Dyhrberg said the amount sought was excessive. Compensation should only be awarded in respect of hurt and humiliation which was directly attributable to the unjustified action at issue. She summarised recent Court decisions

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7 *Coomer v JA McCallum & Son Ltd* [2017] NZERA Christchurch 75 at [57].

which refer to a banding approach to compensation. She submitted that if CBA was successful in establishing her grievance, CBA's circumstances would fall within band 2, justifying an award of between $10,000 and $40,000. In a supplementary submission dealing with HRRT compensatory awards, Ms Dyhrberg referred to authorities which had noted the distinction between compensation awards made in the employment jurisdiction, and awards under the human rights jurisdiction.[8]

(e) Ms Dyhrberg also made reference in her supplementary submission to the calculations advanced in support of the claim for lost wages, which I shall describe in detail shortly.

First cause of action

[64] Distilling the pleadings and submissions, there are four issues requiring determination for the purposes of the first cause of action:

a) What were the parties' expectations as to CBA's return to work when they settled their previous issues on 29 November 2018?

b) Did ONM delay CBA's return to work?

c) Is ONM liable to pay CBA any further wages for the period 30 November 2018 to 31 May 2019, as claimed?

d) Is the personal grievance raised by the first cause of action established?

Expectations

[65] It is first necessary to consider the parties' understanding as to the timing of CBA's return to work; and as to the payment of wages to her.

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[8] *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 34 at [133]-[135]; *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, (2017) 14 NZELR 789 at [113]-[114]; *Richora Group Ltd v Cheng* [2018] NZEmpC 113, (2018) 10 NZELC 79-094 at [60]-[63].

[66] When the parties settled on 29 November 2018, they obviously anticipated that arrangements would be made for CBA to return to work.

[67] Both medical reports which had been obtained recommended this, but on a graduated basis.

[68] CBA's GP suggested this occur over a period of 12 weeks, given the duration of time she had been off work; and that she be considered permanently unfit to work in her previous work environment. This advice was given on 3 August 2018.

[69] On 27 October 2018, the forensic psychiatrist whom CBA also saw stated that she was fit to return to work, albeit acknowledging that the ultimate test of her fitness to do so was for her employer to manage successfully. He said he would support the approach recommended by CBA's GP, who had suggested a transitional period of up to three months with an incremental increase in hours, and with a degree of flexibility.

[70] Given these opinions, it was appropriate for ONM to obtain its own independent opinion from Dr Ryder-Lewis, as a specialist occupational physician, who would provide detailed recommendations.

[71] CBA herself said in evidence that in the settlement negotiations, she affirmed her longstanding agreement to attend Dr Ryder-Lewis, subject to him seeing the medical opinions she had obtained.

[72] She also said that she was led to believe that an appointment to see Dr Ryder-Lewis would be secured before the end of 2018, from which she assumed she would be back at work soon thereafter. No evidence was led to the contrary on this point. The correspondence which followed thereafter suggested, at least initially, that this much was common ground.

[73] The first issue that falls for consideration, therefore, is whether these expectations of a prompt return to work were fulfilled.

[74] Turning to the issue of wages, there is no evidence of the parties having reached any agreement on the subject of wages at the time of settlement. As will be seen,

differences of opinion soon emerged; it will accordingly be necessary to analyse the competing contentions in some detail.

[75] Accordingly, the next issue that falls for consideration turns on an analysis of the legal position as to the payment of wages.

Delay

[76] There were several phases of the process over which ONM had control where events did not occur in a timely way. In the remaining four weeks of 2018 after the settlement, no step was taken by ONM to arrange a consultation with Dr Ryder-Lewis. In fact, it was CBA's mother who felt it necessary to make this arrangement late in December. By then it was no longer possible for the consultation to take place during that month. Although there was debate as to the terms of reference for Dr Ryder-Lewis, a fair and reasonable employer could have arranged the appointment and worked towards it. This was the first phase of unjustified delay.

[77] Dr Ryder-Lewis' report was dated 10 February 2019 and was received the next day. Another phase of unjustified delay then occurred. On 19 February 2019, CBA's lawyers noted that Dr Ryder-Lewis in his report stated she did not wish to work with four named individuals, including Ms A and Ms B. Confirmation was sought of the names of all individuals with whom CBA did not wish to work with. It appears this request was made from an abundance of caution, because the identity of the persons CBA was concerned about was already known. They were referred to by Dr Ryder-Lewis. Mr Henderson indicated on 26 February 2019 that such questions were unnecessary, and that it was obvious what needed to occur. Despite this response, on 1 March 2019, a further request for information was made. Over the period of this exchange, there is no evidence that any other steps to frame a RTW plan were taken.

[78] In March 2019, the focus appears to have been on CBA's application for urgency in her Court proceedings, and on the telephone directions conference which took place at the end of the month. Apart from the offer of 22 March 2019 to place CBA on paid special leave, there is no evidence before the Court of any other step being taken to advance RTW planning.

[79] It was not until 2 April 2019 that any discussions with Ms B were commenced. It was entirely reasonable for that meeting to occur, but I consider a fair and reasonable employer could have undertaken such a step much earlier.

[80] In the result, CBA was disadvantaged by this second phase of delay, because she had expected to be back at work in early 2019.

[81] The third phase of delay occurred in May 2019. Whilst it was unfortunate that Ms C was unavailable, it is unclear why at the very least arrangements could not have been made to schedule a mediation date for soon after Ms C's return from medical leave, and communicate with CBA as to the elements of a RTW plan, noting that on 22 March 2019, the Court had been advised that it was hoped a consultation with CBA could occur within two weeks.

[82] On 13 June 2019, the Court was told that no steps had been taken to organise mediation, because of absences within ONM, recent commitments of counsel for ONM, and especially because CBA may not be in a fit state to attend.

[83] Later evidence from Ms Dyne referred to the fact that there had been a notable change in CBA's mood and demeanour by mid-April 2019. She referred to the fact that the return to work had still not been agreed to by the employer, and that CBA was feeling "unwanted and alienated and wondered when it would all end". She noted that ongoing delays as to RTW issues had continued, and that by the end of May she made contact with CBA's GP, as she needed urgent psychiatric treatment. It is evident that CBA's health was affected by the significant ongoing delay which was not of her making; an aspect of her distress related to the fact her wages were not being paid correctly.

[84] I find that during May, a fair and reasonable employer could have taken steps to show that it was advancing the RTW process. Mediation was not arranged in a timely way. Moreover, ONM had an obligation to be active and constructive in establishing and maintaining a productive employment relationship in which the parties were responsive and communicative. There were no direct communications with CBA to discuss with her the issues it was considering and how it proposed to deal

with them. The third phase of delay, from May to mid-June, when the Court noted that mediation had not been arranged and needed to be, was unjustified.

[85] The delay that occurred thereafter was unfortunately the consequence of events which had occurred to that point. CBA became increasingly affected by the circumstances, so that mediation could not be conducted on the original date for which it was scheduled. This event had to be deferred until 8 August 2019.

Wages

[86] From the date following settlement, 30 November 2018, CBA was recorded as being on "leave without pay" (LWOP).

[87] In her evidence, CBA said that almost immediately after settlement, ONM proposed that her applicable annual remuneration would be that which had applied at the time she ceased working in 2016. That rate had applied since mid-2015; it provided for an annual remuneration of $41,253.

[88] As noted earlier, on 22 March 2019, ONM proposed as a gesture of good faith to place CBA on "paid special leave", calculated at 15 hours per week back-dated to 9 December 2018; a notional salary of $43,350 per annum would be adopted. As mentioned, this offer was declined because of a concern that a part-payment of income would impact on CBA's WINZ benefit. ONM, through its lawyers, stated this particular issue was not its concern, and that if the offer was not accepted no salary payments would be made until a RTW plan was agreed.

[89] On 9 April 2019, Ms Dyhrberg confirmed to the Court that ONM had by then reinstated CBA to its payroll on a pro-rated salary (0.375 FTE) of $43,350; in effect this was a pro-rated rate based on 15 hours; the commencement date was now 29 November 2018. The payment of arrears, that is from 29 November 2018 to 17 April 2019, was paid on or about the latter date, with the LWOP status being reversed to show restoration to the payroll. The cycle of regular pro-rated payments recommenced on 1 May 2019.

[90] On 7 May 2019, the Court's interlocutory judgment was issued directing ONM to increase the pro-rated payment of 15 hours per week to 30 hours per week in April and May, and 40 hours per week from the start of June.[9] ONM complied with the Court's direction.

[91] ONM increased CBA's annual remuneration from $43,350 to $47,633, on 1 July 2019; there is no issue as to payment thereafter. The Court has not been advised as to which step this corresponds to on the pay matrix of the CEA.

[92] The first issue raised for resolution in light of this history is whether it was fair and reasonable for ONM to have made payments from 29 November 2018 to 30 June 2019, on the basis of annual remuneration of $43,350. This was, as noted, the step of the pay matrix on which CBA had been positioned from 2015 to 2016.

[93] Mr Henderson submitted had she remained at work from 2016 to 2018, she would have achieved successful performance ratings each year, and would by 2018 have been on step 7.

[94] Would CBA have achieved those ratings up to late 2018, had she worked in that period?

[95] On this question, Mr Henderson submitted there was evidence before the Court which compared CBA's workflow when she was at work until 2016 with that of her colleagues, the inference being that the comparison was sufficiently favourable as to lead to a conclusion that she would have achieved a "successful" performance rating not only in that year but in each subsequent year.

[96] However, whatever claims may have been open to CBA with regard to her wages up to the date of settlement, these were resolved on a full and final basis at that point. There is no evidence before the Court that an aspect of the agreement was that the parties, in their ongoing relationship, agreed that CBA thereafter would be on step 7, not step 4.

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9 *CBA v ONM*, above n 1, at [21].

[97] Accordingly, I find that in the absence of an agreement to the contrary, it was not unreasonable to adopt the figure for step 4, $43,350.

[98] The second issue relates to the question as to whether full remuneration should have been paid from 29 November 2018, rather than pro-rated remuneration.

[99] Mr Henderson argued that under the CEA, an employee was either working conventional hours, agreed part-time work, or was on one of the various contractually identified leave categories such as paid sick leave, unpaid sick leave, paternity or maternity leave, bereavement leave, or special leave. There was no provision giving the employer the right to reduce wage entitlements, on a pro-rata basis.

[100] He submitted that although ONM had placed CBA on unpaid sick leave in 2016, the position had altered by the date of settlement, because by then two medical practitioners had certified she was fit to return to work.

[101] Ms Dyhrberg argued that the CEA provided a variety of options for managing sick leave, which could be applied according to the employee's particular circumstances. Included in the available options was placement of a sick employee on unpaid leave. She submitted that CBA was indeed on unpaid leave from 2016 to 2018, and that this status continued until a process had been conducted which allowed ONM to ensure its health and safety obligations were respected. She said that in these circumstances a graduated return to work was justified.

[102] I note that in the amended statement of claim, reference was made to the reciprocal obligation of parties whereby an employee must provide work, and an employer must pay; this obligation was pleaded as being "the foundational condition of the employment relationship".

[103] This assertion is indeed relevant. It requires consideration of the wage-work bargain, which underpins all employment agreements.[10] It is fundamental that an

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[10] See generally, Mark Freeland *The Contract of Employment* (Oxford University Press, Oxford, 2016) ch 3.

entitlement to be paid arises once an employee is ready and able to work in accordance with his or her contractual terms and conditions.

[104] This topic has often been discussed with regard to withdrawal of labour in connection with a strike, where the issue becomes whether there is in those circumstances a breach of the contract of employment, and hence the employment agreement.[11]

[105] But a wage-pay bargain analysis may well fall for consideration not only in the context of collective industrial action, but in other circumstances where an employee is, or has been, absent from work for other reasons. In such a case, the question is whether the employee is ready and able to work in accordance with his or her contractual terms and conditions.

[106] Although it is an authority which should be treated cautiously given the different industrial landscape in New Zealand, the speeches in *Miles v Wakefield Metropolitan District Council*, on this particular point, are of assistance.[12] In particular, I refer to the observations of Lord Oliver of Alymerton, when he wrote:[13]

> A plaintiff in an action for remuneration under a contract of employment must, in my judgment, assume the initial burden of averring and proving his readiness and willingness to render the services required by the contract (subject, no doubt, to any implied term exonerating him from inability to perform due, for instance, to illness).

[107] In my view, the employment agreement between the parties did not cover expressly the circumstances which arose, namely an employee whose sick leave had long expired, and who was returning to work on a graduated basis after a significant period away from the workplace. This appears to have been recognised because CBA was recorded in the payroll as simply being on LWOP, and not on sick leave.

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11 For example, *New Zealand Labourers etc IUOW v Fletcher Challenge Ltd* (1989) 3 NZILR 129, (1989) ERNZ Sel Cas 424.

12 *Miles v Wakefield Metropolitan District Council* [1987] AC 539, [1987] 1 All ER 1089.

13 At 574, 1108.

[108] There was no longer any issue between the parties as to any liability for CBA's absence, since the parties had entered into a full and final settlement on 29 November 2018.

[109] The position thereafter was that CBA wished to return to work but was only ready and able to do so on an incremental basis, as all medical practitioners who had provided advice confirmed; it was first necessary to undertake the RTW process.

[110] In my view, the work-pay bargain between the parties meant that CBA was entitled to payment in accordance with her ability to work, once that process had taken place.

[111] CBA has been paid according to the timeline outlined in the findings I made in my judgment of 7 May 2019.[14] Indeed, she has been paid more, because ONM paid her from 29 November 2018, albeit by way of a decision in early April 2019 and as a gesture of good faith.

[112] Whilst it would be open to the Court to conclude that a timely processing of RTW issues might have led to her returning to the workplace slightly earlier than the analysis I undertook for the purposes of the interlocutory judgment, perhaps by mid-February 2019, I have concluded that no further adjustment for wages should be made.

[113] CBA has had the benefit of a payment made as from 29 November 2018 according to a gesture made in good faith – which was appropriate having regard to the delays which had arisen by early April 2019. As at that date, she had not received any wages either from the date of settlement, or from the date when she should have returned to work in mid-February, or even from early March 2019.

[114] In all the circumstances, I conclude that ONM is not obligated to make any further payment of wages to CBA for the period up to 31 May 2019.

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[14] *CBA v ONM* [2019] NZEmpC 53.

Conclusion as to personal grievance

[115] Returning to the wage-work bargain analysis, I find that ONM did not fulfil its obligation to provide work in a timely way, as was the joint expectation of the parties at the time of settlement. It eventually met its wage obligations to CBA, but that was not the full extent of the parties' bargain.

[116] ONM has not satisfied me that the time taken was justified; CBA's first personal grievance is accordingly established.

[117] It is unnecessary to have regard to the provisions of the Health and Safety at Work Act 2015, or the HR Act, for the purposes of this cause of action, since the claim has been resolved on the basis of the contractual position between the parties, and what a fair and reasonable employer could be expected to do in all the circumstances.

Second cause of action

[118] As noted earlier, the second cause of action relates to the fact that Ms A continued to be involved in the RTW arrangements.

[119] By the end of 2018, CBA believed Ms A was responsible for the statement that medical retirement would be considered; the delay in establishing the consultation with Dr Ryder-Lewis; the proposed salary at a 2016 rate and that salary was not being paid at all.

[120] In mid-January 2019, CBA in her statement of problem made it clear that the principal problem for her was the continuing role of Ms A, who was, she understood, controlling the RTW arrangements. About the same time, Ms C was appointed a "neutral decisionmaker"; but Ms A remained involved.

[121] CBA's concerns as to Ms A's involvement were referred to in Dr Ryder-Lewis' report of 10 February 2019, as already discussed.

[122] There could be no doubt from then onwards, that the continued involvement of Ms A was a matter which affected her, given the past history between the parties.

[123] A fair and reasonable employer could have appreciated from mid-January 2019 that CBA was understandably concerned at the delays which had arisen, was aggrieved at the continued involvement of Ms A as indicated in her statement of problem, and that Ms A should withdraw from the process.

[124] As CBA understood it, Ms A continued to be actively involved in the RTW process until 16 April 2019. According to Ms C's evidence, by then it had been realised that the relationship between CBA and Ms A had broken down. A fair and reasonable employer could be expected to recognise Ms A should withdraw from management of CBA's return to work much earlier than occurred. This problem was an aspect of CBA's distress and anguish. Although there is overlap between the first and second causes of action, the second cause of action is established.

Third cause of action: discrimination

[125] Section 103(1)(c) of the Act provides that a personal grievance includes a grievance an employee may have against his or her employer, that the employee has been discriminated against in the employee's employment.

[126] For the purposes of such a grievance, an employee is discriminated against in that employee's employment, if the employer by reason directly or indirectly of any of the prohibited grounds of discrimination specified in s 105 refuses or omits to offer or afford the employee the same terms of employment or conditions of work as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances: s 104(1) of the Act.

[127] Section 105 of the Act states that one of the prohibited grounds of discrimination is that of disability, a term which is to have the meaning given to it by s 21(1) of the HR Act.

[128] Section 106 of the Act provides that two exceptions contained in the HR Act are to apply: s 29, which provides for exceptions in relation to disability; and s 35, which provides a general qualification on exceptions.

[129] There is an extended definition of disability in s 21(1)(h) of the HR Act, which includes psychiatric illness and psychological disability. Both were pleaded for CBA. ONM did not submit that either definition could not potentially apply to CBA. In relation to her underlying condition, she has sought both psychiatric and psychological assistance. I find that the term "disability" accordingly applies under both heads.

[130] Distilling the claim made for CBA, it was asserted that discrimination arose by one or more of the following grounds:

a) that CBA was kept out of the workforce while Ms B, also suffering a psychiatric disability, was kept in the workforce;

b) that CBA was not offered time off work on full pay, as occurred for Ms B, another person with a psychiatric disability; and

c) that there was a long delay in effecting RTW arrangements, which was also discriminatory when compared with the favourable treatment given to Ms B.

[131] There was some discussion with counsel as to the correct comparator. Mr Henderson said that the comparator was Ms B, being another person suffering disability in the workplace. Ms Dyhrberg submitted that the comparator would be another person in the workplace who does not suffer disability.

[132] Mr Henderson's submission raises the question of whether "intra-ground discrimination" is relevant when considering disability under the HR Act, that is, where two people with a disability may be treated differently by reason of the nature, degree or cause of their disability.

[133] In *B v Waitemata District Health Board*, the Court of Appeal discussed this topic.[15] It commented that although the term "intra-ground discrimination" is not used in the New Zealand Bill of Rights Act 1990 or the HR Act, it is sometimes used to describe a situation where, say, blind persons are treated differently from deaf persons.

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15 *B v Waitemata District Health Board* [2016] NZCA 184, [2016] 3 NZLR 569 at [87]-[89].

As it stated, both grounds share a protected "ground", disability, but this manifests in different forms. Then it stated:[16]

> The Attorney-General accepts that in principle there may exist a category of intra-ground discrimination. This could occur, for example, where there is a distinction arising from a rule about age. It could not be on the ground of "having an age" – because everyone has an age – but rather on the basis of having reached a particular age, compared to a younger or older comparator age. The distinction will be within (or intra) the ground of age. Thus, at the level of principle, it could be postulated that patients with a certain type, or level, of psychiatric illness are differentiated (by some policy or rule) from those with a different type or level.

[134] I am not persuaded that this is a case where it is appropriate to conclude there was intra-ground discrimination. CBA on the one hand, and Ms B on the other, each suffered a disability of a similar type and level. If it were to be concluded that CBA was treated differently from Ms B, the issue would be one of disparity. Accordingly, I do not consider Ms B to be an appropriate comparator for discrimination under the HR Act. For discrimination purposes, CBA's circumstances are to be compared with any other person employed in the same or substantially similar circumstances at the subject workplace. If it were to be concluded that CBA was treated differently from Ms B, the issue would be one of disparity. Disparity was not pleaded.

[135] This conclusion rules out the first and second possibilities referred to by Mr Henderson. The third possibility is more general. Accepting for the moment that the correct comparator would be another employee not suffering a disability, has a case for discrimination been established on the grounds of delay?

[136] No evidence was led for CBA as to the timeframe which would have applied in respect of any other ONM employee, returning to the workplace after an absence for any reason other than disability. In the absence of that evidence, I am not satisfied that there is an actionable discrimination.

[137] Accordingly, the third cause of action is dismissed.

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16 At [89].

Remedies

Compensation for humiliation, loss of dignity and injury to feelings

[138] In assessing this aspect of CBA's claim, it is necessary to focus on the significant delay of the RTW process, and on the continued involvement of Ms A, both of which disadvantaged her.

[139] The Court has detailed evidence from CBA herself as to this in her two briefs in which she explains the psychological impact of the delay in reinstating her. It is clear that she has, as she puts it, felt frustrated, sad and lonely. Her isolation has been emphasised by the fact that until she attended mediation in early August 2019, there were no direct communications with her from any representative of ONM notwithstanding its good faith obligation to be responsive and communicative. As she stated, she expected to discuss face-to-face practical ways of returning to the workplace with a responsible and kind person.

[140] She was worried by an apparent prospect of medical retirement; and about her finances. She was not entitled to legal aid, was dependent on her lawyer, and had to utilise her settlement funds to address the RTW issues. She had settled in 2018 with a sense of hope about her future. That diminished as time went on in the first half of 2019.

[141] She was worried about Ms A's continued involvement because CBA considered Ms A had been a central figure in the circumstances that led her to falling ill in 2016. She said she was frightened that Ms A's continued involvement could affect her health.

[142] As recorded earlier, the psychological impacts on CBA escalated from mid-April 2019, as confirmed by the evidence of CBA's mother, and her psychologist Ms Dyne. She fell into a state of serious depression. These difficulties persisted for several months.

[143] In summary, I accept that CBA has made out a significant claim under s 123(1)(c)(i), as a result of the established grievances.

[144] In assessing this, however, the Court must be careful not to award compensation for the impact of any events which occurred between 2016 and 2018 up to the date of settlement; or to duplicate awards where there is an overlap in the three causes of action.

[145] Turning to the quantum of compensation awards, I was referred to the various recent authorities where a banding approach has been adopted.

[146] In particular, although the case relates to a dismissal grievance, counsel referred to the parameters described by Chief Judge Inglis in *Richora Group Ltd v Cheng*, as follows:[17]

- Band 1: up to $10,000
- Band 2: $10,000 to $40,000
- Band 3: $40,000 plus

[147] It was common ground that the banding approach would be suitable in respect of the issues covered by the first two causes of action. Mr Henderson submitted that the Court should recognise there has been a recent upswing in quantum, and that this was a band 3 case involving the infliction of an avoidable illness. Ms Dyhrberg submitted that the appropriate category would be band 2.

[148] As mentioned earlier, Mr Henderson had also submitted that were the discrimination cause of action to be established, the Court would need to recognise the more significant awards made under this head in the Human Rights Review Tribunal, such as *Hammond v Credit Union Baywide*, where $98,000 was awarded for humiliation, loss of dignity and injury to feelings, under a statutory provision which is in similar terms to that of s 123(1)(c)(i).[18]

[149] Since the discrimination cause of action has not been established, it is not, strictly speaking, necessary to dwell on this submission, save only to observe that the

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17 *Richora Group Ltd v Cheng,* above n 8.
18 *Hammond v Credit Union Baywide,* above n 5.

Court must proceed on the basis of the extensive jurisprudence relating to the fixing of compensatory awards in the Court. The Court of Appeal has emphasised the need for moderation and the appropriateness of reasonable consistency; and that any award must address the actual consequences for the employee of the grievance.[19] It is of course open for a claimant who perceives there to be an advantage in seeking compensation under a different statute and before a different judicial body to do so.

[150] I acknowledge the point made by Ms Dyhrberg that compensatory awards are not intended to punish. Indeed, although CBA's disadvantage and discrimination grievances have been established, these were not due to a deliberate strategy to exclude CBA from the workplace. In my assessment, the problems arose because sufficient priority was not given to the RTW issues, and when ONM began to focus on them in early April 2019, they proved to be more complex than had been anticipated because of Ms B's circumstances. I emphasise that the Court makes no criticism whatsoever of her; it was necessary for ONM to address those circumstances. But even when those issues arose, a cessation of RTW planning was not justified; and there should have been effective communication with CBA herself, as should have been the position throughout the period under review.

[151] After outlining the recent authorities relating to banding, Ms Dyhrberg also referred to two particular cases which she submitted showed a moderate approach. The first of these was *Marx v Southern Cross Campus Board of Trustees*.[20] There the Court was required to consider the detrimental impacts of an unjustified dismissal on an employee. Findings were made that the employee had suffered significant stress over a period of years, but some of it was as a result of her own actions and her decision to litigate the dismissal in a complex and delayed fashion without legal advice or representation. In those circumstances, the Court categorised the matter as being in the medium range of compensation awards, determining that $25,000 would be appropriate. This case is obviously distinguishable from the present case, as CBA has established disadvantage grievances; this case does not involve an unjustified dismissal.

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19 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 at [85].
20 *Marx v Southern Cross Campus Board of Trustees* [2018] NZEmpC 76.

[152] Reference was also made to *Roach v Nazareth Care Charitable Trust*.[21] This case also involved a dismissal grievance, where an employment agreement was terminated under trial provisions, in a manner found to be deeply upsetting. The Court considered that the employee's circumstances fell in the middle band, and that $25,000 reflected an appropriate level of compensation. In my view, this case is also distinguishable on the facts.

[153] Although the present case involves a disadvantage grievance rather than a dismissal grievance, it is one where there have been serious consequences for CBA. Where a disadvantage grievance involves very serious health issues, it is appropriate to conclude that the claim justifies a higher award.

[154] There are two established personal grievances, which it is appropriate to assess for compensation on a global basis. Standing back, I am satisfied that the correct award on the particular facts of this case should be made at the higher end of band 2, in the sum of $30,000.

Contribution

[155] The Court is required to consider contribution under s 124 of the Act. Has CBA contributed towards the situation that gave rise to her grievance, and should the payment under s 123(1)(c)(i) be reduced accordingly?

[156] ONM has appropriately not argued that this is the case. I find that there was no material contribution by CBA to her grievances. No reduction for contribution is necessary.

Disposition

[157] CBA's personal grievance is established.

[158] I order ONM to pay CBA the sum of $30,000 for humiliation, loss of dignity and injury to feelings, within 21 days.

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[21] *Roach v Nazareth Care Charitable Trust Board* [2018] NZEmpC 123.

[159] Mr Henderson submitted that this proceeding should be adjourned so that CBA could return to Court if difficulties arise in the RTW process. I do not consider it is appropriate to do so. I have resolved all the pleaded issues, save for costs. Moreover, I expect the parties will now be able to move forward in good faith.

[160] Costs should follow the event. Provisionally, I indicate that the starting point for these should be on a Category 2, Band B basis. If counsel are unable to reach agreement on this issue, CBA may make an application within 21 days, and ONM should respond within 21 days thereafter.

B A Corkill
Judge

Judgment signed at 3.35 pm on 15 October 2019