
IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2008-441-145

UNDER THE

IN THE MATTER OF

AN APPLICATION FOR REVIEW
UNDER THE JUDICATURE
AMENDMENT ACT 1972

BETWEEN

HAWKE'S BAY REGIONAL COUNCIL,
CENTRAL HAWKE'S BAY DISTRICT
COUNCIL, HASTINGS DISTRICT
COUNCIL, NAPIER CITY COUNCIL
AND WAIROA DISTRICT COUNCIL

APPLICANTS

AND

MINISTER OF HEALTH

RESPONDENT

AFFIDAVIT OF CHRISTOPHER EDWARD CLARKE

CROWN LAW
TE TARI TURE O TE KARAUNA
PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Contact Person:
MSR Palmer / UR Jagose

I, Christopher Edward Clarke, of Havelock North, swear:

1. I am the chief executive of the Hawke's Bay District Health Board.
2. I hold degrees in law and accounting from Canterbury University. I worked for Treasury from 1987 to 1989, and as Executive Assistant to the Minister of Health and Deputy Prime Minister from 1989 to 1990. I began work at the Ministry of Health in late 1990, and from 1991 to 1992 I was seconded to the Department of Prime Minister and Cabinet as part of the National Interim Provider Board, where I worked on implementing the National Government's health reforms. From 1992 to 1994 I was the Nuffield Fellow to the National Health Service in Wales, and from 1994 to 1995 worked as an adviser to the World Health Organisation's European office in Copenhagen.
3. I returned to New Zealand in 1995, and from 1995 to 1999 worked as a General Manager at the Southern Regional Health Authority. In 1999 I worked at the Crown Companies Monitoring and Advisory Unit, before taking up a position as Director of Health Services Development at the Capital and Coast District Health Board, where I remained until 2002.
4. I have held my present position since 2003. Mr Kevin Atkinson chaired the DHB at the time of my appointment, and led the appointment process. I also hold a number of other roles in the health sector. I am the national lead Chief Executive for primary health care implementation. I chair the DHB Research Fund and am the chair of the Corporate Workforce Group for DHBNZ, which is the shared services agency of the 21 DHBs.
5. First, I want to acknowledge the contribution of the former Board members to the DHB. I found, without exception, that the Board members were extremely hard working and motivated. They were very committed to improving the health of Hawke's Bay people and genuinely believed they were a high performing board. The Chairman, in particular, regularly worked 30 hours a week in his role and was always available to meet with staff and with members of the public.



6. Secondly, it is not my intention in this affidavit to apportion blame as to who was responsible for the deterioration in the relationship between Board and management, but rather to evidence my view as to the factors that led to the relationship deteriorating to such an extent that urgent remedial action was required to avoid the situation starting to impact on health services delivery.
7. The relationship between the Board and the CEO, and the Board and other senior managers at the DHB began to deteriorate after I had been in the job for around a year. The relationship began with enormous goodwill on both sides. The Board's approach to governance, however, was very different to any I had encountered in the health sector, and was also different to the conventional Board / management relationship in a corporate environment. The Board's style was to try to involve itself closely in day to day matters, to engage directly with staff and, to quote the Chairman, retain a "healthy, constructive tension" between Board and management.
8. One by-product of this hands-on style of governance was that management would produce vast quantities of Board and Advisory Committee papers, to enable the Board to satisfy itself that decisions were being made appropriately. It also meant that typically a Board meeting would start with a pre-Board session at 8.30am, followed by a public Board meeting at 10.30am and then a closed Board meeting that seldom finished before 5.30pm.
9. Relations that had started positively grew increasingly tense, particularly in 2006, and this got to the point where some Board members began commenting about management in the press. Various attempts, using external facilitators, were made to rebuild the relationship, but were not ultimately successful.
10. In general the Board/management relationship was more confrontational and less collegial than any other Board / management relationship I have ever experienced. This was also the experience of other senior managers.

Handwritten signature and initials, possibly "JDO" and "CE".

11. Having said that, despite having to devote far more time than was desirable to "managing" the interface between management and the Board, we were able to continue functioning tolerably well until the second half of 2007.
12. Despite our relationship sometimes being difficult, in January 2007, as part of my annual appraisal, the Board gave me a rating of 100% under the "Board Relations" heading. By November 2007, this rating had plunged to 9% under the same heading, the Board was actively seeking my dismissal, and several of my senior colleagues advised me that they were on the point of resignation.
13. The catalyst for the collapse of the relationship between the Board and me, and the Board and the wider senior management team, was the Ministry of Health's decision, in mid-2007, to establish an independent inquiry into allegations surrounding the handling of conflicts of interest in the organisation in 2005 and 2006.
14. The Board's reaction to the establishment of the review was extraordinary, and I did not appreciate the full extent of what it was seeking to do until the review had been in progress for several months. In August 2007, I met with Mr Atkinson in my office and the DHB legal advisor Dr Penny Andrew. The purpose of the meeting was to discuss the organisation's response to the review inquiry. Mr Atkinson indicated that given the vast amounts of written information being collated it was important that the information the panel received be managed and co-ordinated through a single channel, namely the Board's solicitors Sainsbury Logan Williams. I took from the meeting that the firm would only be responsible for collating and managing all the documentation the panel would receive, and for other Official Information Act requests, and I directed staff that responses to requests for documents should be channelled through the firm. It did not occur to me that the Board considered this directive applied to staff speaking to the review team.
15. I directed my management team to inform staff that support from within the law firm would be available to anyone who wished to avail themselves of it, and asked to be informed if anyone felt uncomfortable about any inquiries the



panel made, but apart from that I directed my senior managers that we were to be as open and co-operative with the review panel as possible.

16. It did not occur to me until later that Mr Atkinson had actually sought to decree that *no-one* within the organisation should speak directly to the review panel, and that the firm should be the conduit for *all* communications with the Board. It was my failure to prevent the DHB's legal advisor from speaking with the panel, and my subsequent refusal to be a party to the Board seeking to identify those who had spoken negatively about it, that ultimately led to the irretrievable breakdown of my relationship with Mr Atkinson and the rest of the Board.
17. In late October 2007, the panel presented the Board with an anonymised summary of some extremely negative comments made about it by the various people the panel had interviewed, including staff (the panel had given interviewees an undertaking that it would receive these comments in confidence, and would not identify who had said particular things). This summary is reproduced as attachment "C" to Mr Hausmann's letter to the Minister immediately before the Board was dismissed. The Board was shocked and considerably distressed by the contents of that document, particularly allegations that managers felt "bruised", "battered" and "bullied".
18. The Board's immediate response was to seek to arrange a series of meetings with senior management in an effort to identify who had said what. I was appalled at this suggestion. The panel had given assurances that staff members could speak freely to it, yet the Board appeared determined to confront senior managers with a view to putting names to comments. This was particularly inappropriate given that staff members' disclosures clearly indicated that some felt intimidated and bullied. I also considered these discussions to be ill timed and might be seen as pre-empting the Review Panel's findings.
19. Naturally, I was also very concerned about the threat that this posed to the integrity of the review panel's processes. Staff needed to be able to be frank with the panel, and if they knew that any negative comments would be met



with an inquiry designed to lead to their identification, their responses would become far more guarded.

20. I directed Penny Andrew, the DHB's legal adviser, to approach Mr Michael Wigley, who was part of the panel, to seek his guidance regarding Mr Atkinson's attempt to go behind the anonymity of staff members' comments.
21. Mr Atkinson was very upset that I had directed Penny to do this. He emailed me on 2 November 2007, accusing me of breaching our "agreement" that Sainsbury Logan Williams would be the sole point of contact with the review panel, and indicating, in effect, that he felt betrayed by my refusal to support his request to get to the bottom of the negative remarks. His email concluded:

"As I said during my conversation with you, I regard management's unwillingness to support this meeting as a serious matter that has a major impact on the Board CEO relationship. I intend to seek the Board's advice on how they wish this situation to be progressed".
22. A true copy of Mr Atkinson's email of 2 November 2007 is annexed to this affidavit and marked as Exhibit "A".
23. It was only at this point that I realised that Mr Atkinson had intended that *all* contact between staff and the panel should be channelled through the firm. I certainly never understood that we had reached an agreement to this effect, nor would I have been in a position to agree to such a proposition. For the review panel to do its job, it needed to have unfettered access to all staff, and my job was to facilitate this. So even if the Board had insisted upon this, as the Board's employee and as a public official, I could never have agreed to it.
24. On 6 November 2007, Mr Atkinson wrote to me formally. He opened by saying that he had discussed with Board members "what appears to be a serious breach of the formal process which the Board has laid down in relation to contact with the MOH Review Panel". He demanded to know what steps I had taken to ensure that "the agreed formal process" had been communicated to staff, what instructions I had given to Penny Andrew regarding her



contacting Michael Wigley, and details of communications between Penny and me following her discussion with Mr Wigley. Mr Atkinson also demanded copies of any documentation that this approach had generated. He indicated that disciplinary proceedings may follow depending on my response, and gave me 48 hours to reply. A true copy of Mr Atkinson's letter of 6 November is attached to this affidavit and marked as exhibit "B".

25. I immediately sought advice from Mr Peter Chemis, an employment lawyer at Buddle Findlay, and the Board engaged Mr Michael Quigg, a Wellington employment law specialist, to assist it with the disciplinary proceedings it was determined to bring against me.
26. I note that Mr Atkinson, at paragraph 54 of his second affidavit, alleges that disciplinary proceedings were to be commenced against me because of "non-performance or poor performance", and that Mr Quigg was engaged to assist the Board in this regard. This is not my understanding. True copies of letters from Mr Quigg to Mr Chemis dated 20 November 2007, 21 December 2007 and 1 February 2008 are attached to this affidavit and marked as exhibits "C", "D" and "E" respectively. As these letters show, the only issue under consideration in the disciplinary process related to contact with the review panel, and the ongoing request that I provide documentation arising from discussions between Penny Andrew and me regarding her conversation with Mr Wigley.
27. Meanwhile, I had my annual performance review on 13 November 2007. As noted above, my rating for maintaining a trusting relationship with the Board had dropped from 100% to 9%. Mr Atkinson explained to me that this was largely due to the effect of the review on Board / management relations. He also explained that at the end of the Review Panel process he would be undertaking his own review of management performance.
28. A normal Chair/CEO relationship ceased to function from this time. For example, during a discussion with me on 19 November Mr Atkinson asserted that none of the management team would be here in five years, and said that



the Board was convinced that management was "conspiring" against them. On 28 November, Mr Atkinson reiterated this view and told me that it was evidenced by various "lies" that management had told to the review team. I maintained a detailed file note of interactions with Mr Atkinson over this period. A true copy of my note is attached to this affidavit and marked as exhibit "F".

29. By February 2008, the relationship between Board and senior management had broken down completely. I knew, because I had regular discussions with them, that almost all of the seven-strong senior management team regarded the situation as intolerable. Five of my senior managers told me that they would feel compelled to resign unless there was significant change in the governance of the organisation.
30. I responded, in detail, to Mr Atkinson's request for information by letter dated 11 February 2008. A true copy of that letter is attached to this affidavit and marked as exhibit "G". The next day, on doctor's orders, I went on two weeks' stress leave.
31. There were various points where I considered resigning. I was well aware of the damage that a deteriorating governance/management relationship would have on the organisation and tried unsuccessfully to have a frank conversation with the Board's Remuneration Committee, which oversees the performance of the CEO. I decided, however, that I retained the strong support and confidence of other managers, the confidence of my clinical colleagues and officials in Wellington. Had I thought that the breakdown in the Board/management relationship was essentially a personality clash with its CEO, or a wider performance concern, I would have resigned. By this time, however, I was also aware that a similar pattern had emerged with a previous CEO and the Board, (which still included many members from that time) and my resigning would have served little purpose and would only have resulted in another person coming into an unworkable situation.



32. On the first day of my leave, I recorded, in a letter to Peter Chemis, my thoughts regarding where the relationship between the Board and management had reached. I told Mr Chemis that he could use this letter in his discretion, particularly if anyone purported, while I was away, to represent my views. A true copy is annexed to this affidavit and marked as Exhibit "H".
33. I turn to the various matters listed in the second amended statement of claim as "false" pieces of information supplied to the Minister prior to his decision to sack the Board. I understood from the Minister's comments at the time the Board was dismissed that he had not sought to decide whose version of events surrounding the Board's relationships with others was correct, however, for what it is worth, I can verify that almost all of the items of "false and/or misleading" information listed in paragraph 40(e) of the amended statement of claim are, in fact, true.
34. All of the matters listed in subparagraphs (i) to (iv) and (vi) to (ix) are true. I considered that the Board was focused on finding out what people had been saying about it rather than seeking to address the concerns and find a way forward.
35. While there is much more that could be said about the breakdown in the governance/ management relationship, I consider that the Review Panel report sums the relevant issues up fairly. As my letter to Peter Chemis outlined, the breakdown in the relationship had reached such a point that third party resolution was not possible. I would attest that the Board's decision to pursue disciplinary action against its CEO was evidence the Board had reached a similar conclusion.
36. As for the allegation in subparagraphs (x) and (xi) – that confidential information was used improperly by Board members and that issues at the DHB had been politicised to discredit the performance of the health sector, both statements are true. For example, Mr Atkinson has frequently, and publicly, criticised the Ministry and the Government over funding levels for the DHB, he expressed public reservations over the Government's decision to



appoint a particular Board member and he was critical of the Review Panel process.

37. I consider that the situation has improved markedly since the Minister's decision to appoint a Commissioner. The Board's financial position has stabilised and we have submitted a three year recovery plan to the Ministry which should see the elimination of the DHB's deficit by 2011. Management are motivated and the governance relationship is based less on personalities and far more on clear delegations, performance agreements and a culture of mutual respect.
38. Even more importantly, the DHB office is now a normal, and far healthier, workplace. The atmosphere of constant crisis, which had beset the organisation at least since the middle of 2007, has now passed. Commission meetings are brief and entirely businesslike, and take around two hours each month. They are held in public and media attend. I have clear performance targets and am held accountable for whether they are achieved or not. The management team has been freed to manage and the Commissioners only deal with the management team through the CEO. Only now that the governance/management interface has been addressed has it been possible to appreciate how much of our time and mental energy had been poured into managing the relationship with the Board at the expense of supporting the delivery of health services. Sir John Anderson's arrival has given the DHB a fresh start, and we are a far more focused and efficient organisation as a result.
39. In conclusion, from both the Board and management's perspective the governance/management relationship had broken down by the beginning of 2008. The Board had initiated disciplinary action against the CEO and five of my seven key managers had told me they would be leaving unless there was governance change. It would be wrong to see this as a personality or a performance dispute as many of the issues predated my time (and all but two of my managers' time) at the DHB. Both the Board and management considered they were acting in the best interests of the organisation. I also consider that both parties tried to mediate a workable solution but by early

Handwritten signature and initials, possibly "CE", at the bottom right of the page.

2008 this had moved beyond mediation. Regrettably the relationship had deteriorated to such a point that some form of urgent intervention was necessary to avoid the breakdown impacting further on organisational morale and focus, and thus ultimately impacting on patient care.

SWORN at HASTINGS this 3rd)
day of SEPTEMBER 2008)
before me:)



A Solicitor of the High Court of New Zealand

R. D. STONE
SOLICITOR
HASTINGS.