IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2008-441-145

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

RESPONDENT'S SUBMISSIONS

Judicial Officer: Randerson J
Next Event Date: 24 November 2008

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SUMMARY OF ARGUMENT

1. The applicants challenge the decision of the Minister of Health, the respondent, to dismiss the Board of the Hawke's Bay District Health Board ("the DHB") and to appoint a Commissioner in its place. In doing so, the Minister exercised his statutory power under s 31 New Zealand Public Health and Disability Services Act 2000 ("the PH Act"), which provides that the Minister may take this decision if seriously dissatisfied with the Board's performance.

2. The Minister was seriously dissatisfied with the Board's performance because of the significant governance problems - including financial problems – that were evident at the DHB. His conclusion that the relationship between the Board and management at the DHB had become dysfunctional was subsequently confirmed by an independent Review Panel, established in mid-2007 by the Director-General of Health, which had conducted a thorough and detailed investigation.

3. The Minister of Health is at the centre of the accountability framework established by the PH Act and Crown Entities Act 2004 ("CE Act"). DHBs ensure that health services are provided for their resident population. The Minister is responsible for providing the framework for the Government's direction of the health sector, as well as for specific authorisations and directions to DHBs, agreeing to key DHB future planning documents, monitoring DHBs' performance, and holding them to account. It was the Minister's prerogative to act, if he became seriously dissatisfied with the Board's performance, in the interests of the safe and efficacious delivery of health and disability services to the people of the Hawke's Bay. He was responsible to Parliament for this, and thereby to the wider New Zealand electorate. The power of decision to dismiss the Board was conferred by Parliament directly on him. The Minister made that decision properly, after having put his concerns to the Board and considering its response.

4. The applicants' submissions invite the Court to determine the merits of the disputes that had arisen between the Board and management and the Board and

Minister. Neither is an appropriate matter for determination in a judicial review proceeding.

5. It goes without saying that this proceeding cannot be an appeal against the Minister's decision. Moreover, the evidence of both parties demonstrates that the Minister was correct when he concluded that the Board's relationships, especially with its own management, had become seriously dysfunctional. It does not matter legally if the Court ultimately disagrees with the Minister's decision. The Act entrusts the decision to dismiss the Board to the Minister.

6. The threshold for the Minister's decision depended on whether the Minister was seriously dissatisfied with the Board's performance. Subject to his obligation to act fairly, once that state was attained it was open to the Minister, in his discretion, to dismiss the Board. While the Minister may not act irrationally in reaching that conclusion, the assessment of the Board's performance was a matter for him alone, and turned entirely on his analysis of the material before him.

7. Conclusions on factual matters were also for the Minister. As the House of Lords observed in *Puhlhofer v Hillingdon London Borough Council* [1986] 1 All ER 467, 474 (HL):

> "The Act abounds with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that. Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. ... Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

8. Similarly, the weight the Minister attached to the matters he was considering was a matter for him. The orthodox principle that, absent irrationality, the weight to be given to various relevant factors is a question for the decision-maker, undoubtedly

applies in the present context: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 764 (HL); *Edwards v Toime* [2005] NZAR 228 at paragraph [93], citing *May v May* (1982) 1 NZFLR 165, 170 (CA); *Hoechst Marion Roussel (NZ) Ltd v Pharmaceutical Management Agency Ltd* (High Court, Wellington Registry, CP 13/98, 25 June 1988, Gallen ACJ.

9. These submissions will address:

9.1 The applicants' power to bring this proceeding;

9.2 The legislative framework;

9.3 The factual background to the dispute;

9.4 The conflicts of evidence between the applicants and the respondent;

9.5 Why the Minister's decision to dismiss the Board was reasonable, and accorded with the principles of natural justice.

JURISDICTION

10. It is submitted that the applicants' decision to bring this proceeding, and their action in bringing the proceeding, are *ultra vires* the Local Government Act 2002. The argument can be expressed in two ways.

11. First, the applicants are local authorities pursuant to the Local Government Act 2002, and exercise the powers conferred on local authorities by that Act subject to the provisions of that Act: ref ss 10, 11, 12 and 14 of the Act, paragraphs 1 to 7 of the Third Amended Statement of Claim.

12. Section 12 sets out the powers of a local authority. Subsection (2) vests a local authority with the powers of a natural person. But the power is not untrammelled to the same extent as that of a natural person. The power must be exercised by the local authority "for the purposes of performing its role" (s 12(2)), and its role includes giving "effect, in relation to its district ... **to the purpose of local government stated in section 10**": s 11(a), emphasis added. Section 10 reads:

> The purpose of local government is -
>
> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
>
> (b) to promote the social, economic, environmental, and cultural well-being of communities ... .

13. The phrase "local government" does not include DHBs. A DHB is not a "local authority" as defined in the Local Government Act (see s 5) or otherwise subject to that Act. As explained below, DHBs are Crown entities subject to the CE Act.

14. The phrase "to enable democratic local decision-making" in s 10(a) refers to the democratic decision-making of local authorities subject to the Local Government Act and the "communities" referred to in s 10(a) and (b) are the communities contemplated by that Act. To seek to ensure that the decision-making of an external organisation such as the Hawke's Bay DHB is "democratic ... by and on behalf of communities" is outside the purview of the Act. Paragraph (b) does not widen this focus.

15. Paragraph 7 of the applicants' Third Amended Statement of Claim provides the gist of the applicants' reason for, and objective in, bringing this proceeding. It is stated to be for the purpose of performing its role under s 11, **which refers back to s 10**, and of enabling democratic local decision-making and action by or on behalf of communities, etc, **under s 10**. Henceforth the applicants' rationale for bringing the proceeding will be summarised as "preserving the democratic integrity of local government and promoting the well-being of communities".

16. Consequently, the applicants have proceeded on a fundamental misunderstanding. They have sought to enlarge the purpose of local government to include DHBs. There is a mismatch between the section and the status of DHBs. It is no part of the purpose of s 10 (to which the wide scope of s 12(2) is directed and confined) "to enable democratic decision-making and action by" Crown entities or "to promote the social ... well-being of communities" which are not part of or contemplated in the Local Government Act (cf paragraphs 11, 14, and 16 of the applicants' submissions).

17. Furthermore, although the PH Act provides for local representation on DHBs, the applicants have evidently failed to note (for example, at paragraph 8 of their submissions) that the system of governance provided in the Act for the delivery of health services is not the system of local governance adopted in the Local Government Act. Their assumption, therefore, that the action of the Minister in dismissing the Board was contrary to the democratic integrity of local government under that Act is misplaced.

18. Secondly, under s 12(4) a territorial authority must exercise its powers under s 12 "wholly or principally for the benefit of its district". It is submitted that the applicants' decision to bring this proceeding, and their action in bringing the proceeding, is not for the "benefit" of their districts.

19. For the exercise of a power to be wholly or principally for the benefit of a territorial authority's district it must benefit that district. The subsection presupposes that whatever the territorial authority does it will benefit its district or be for the benefit of its district.

20. It is acknowledged that the question of what is or is not for the benefit of a territorial authority's district vests territorial authorities with a wide discretionary power. It is also accepted that the Court will wish to allow the applicants considerable latitude in determining what is for the benefit of their districts.

21. That said, it is contended that the applicants' decision and action is *ultra vires* in two respects:

    21.1 There is no evidence to suggest that the applicants have had regard to the standard and quality of health services in their districts, or the effect of this proceeding, if successful, on those services; and/or

    21.2 The question whether this proceeding is for the benefit of their districts is incomplete without knowledge of, or an assessment of, the effect of this proceeding, if successful, on the standard and quality of health services in their districts.

22. For the purposes of this submission it is assumed that the question whether the proceeding is for the benefit of the applicant's districts is one for the applicants to decide (subject to the Act and subject to review) and not a question to be determined objectively. But an objective approach would lead to the same result; this proceeding cannot be for the benefit of the applicants' districts in the absence of evidence that the standard and quality of the health services in their districts would be improved or, at least maintained, should the applicants succeed.

23. It is not possible to reach a decision that the proceeding will preserve the democratic integrity of local government and promote the well-being of communities without placing the decision in context. That context is the process established for the delivery of health services under the PH Act. The objectives relating to the delivery of health services are set out in s 22 of that Act. Pertinent among these objectives is the need "to improve, promote and protect the health of people and communities": s 22(a). Any decision to take proceedings that does not have regard to that context is necessarily incomplete.

24. For the purposes of s 12 that question has to be addressed.

25. The point can be illustrated by postulating the situation where the standard and quality of health services are or would be substantially improved under the control of the Commissioner appointed by the Minister. How could it then be said, having regard to the context provided by the PH Act, that the proceeding to replace the Commissioner with the Board is for the "benefit" of the applicants' districts. Again, the question cannot be avoided. In the Minister's decision under s 31(1), the applicants' stated motivation, the integrity of local government, has to take second place to the standard and quality of the health services provided in the Hawke's Bay.

26. Any argument made by the applicants to the effect that the benefit of seeking to preserve the democratic integrity of local government and well-being of the community outweighs any possible benefit from improved health services in the region only has to be stated to be self-evidently untenable. The argument simply

ignores the existence of the PH Act. By focussing (misguidedly) on the question of local governance only, the applicants have ignored and failed to address the standard and quality of the health services to be delivered under that Act and the system of governance that pertains under that Act.

27. In large part, the applicants' problem is that they are effectively bringing this proceeding as a surrogate for the dissatisfied members of the former Board. The pleadings and pertinent affidavits are exactly what they would be if the former Board members were in fact the applicants. Had former members brought this proceeding no question would arise as to whether their action was *ultra vires* ss 10 to 12 or for the benefit of the region under s 12(4). In bringing the proceeding in their own names, however, the applicants must contend with the express scope of those empowering sections.

28. It is to be clarified that this point is <u>not</u> a standing argument. Whether or not a natural person would have standing for this proceeding is not in issue, and the issue is not argued. Section 12(2) vests a local authority with the powers of a natural person but the powers are confined by the combined effect of ss 11 and 10 (in that order). Thus, the applicants' decision to bring the proceeding is *ultra vires* those sections as it is outside the purpose of local government as defined in s 10 and/or the proceeding cannot be said to be for the benefit of the applicants' districts without regard being had to the standard and quality of health services being provided to those districts under the PH Act.

29. Advancing this argument as part of the substantive hearing may, at first glance, seem inappropriate. Jurisdictional arguments are generally raised at the outset of proceedings. There is, however, no absolute rule to that effect, and in practical terms it was not feasible for the respondent to take the point as a preliminary point or, indeed, any earlier. As the Court is aware, the respondent has faced considerable difficulties getting the applicants' pleadings in proper form to be defended. The Third Amended Statement of Claim was only filed, and that at the direction of the Court, as recently as 17 October.

30. Moreover, Crown Law drew the applicants' solicitors' attention to this point in a letter dated 15 July 2008.[1] The reports of the closed extraordinary meetings of the Napier City Council and the Hastings District Council, which are referred to in that letter, do not address these jurisdictional issues. Since then, the respondent has pleaded the issue as an affirmative defence in the Amended Statement of Defence. The applicants have repeated paragraphs 1 to 7 referred to above. Hence, the question is now ripe for resolution.

STATUTORY FRAMEWORK

31. To resolve the dispute it is necessary to examine the nature of the power Parliament has set the Minister at s 31(1).

> "For when considering judicial review the Courts have long recognised that it is impossible to judge the limits or authority of a decision maker without first understanding thoroughly the task that has been set by Parliament": *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR 252, para [33], citing *CREEDNZ v Governor General* [1981] 1 NZLR 172, 178.

32. The PH Act and the CE Act provide the legislative framework for the organisation of the public health system and the relationship between the Crown and the Board of the DHB. This statutory context is key to analysing the Minister's power under s 31(1) PH Act and his decision on 27 February 2008.

New Zealand Public Health and Disability Services Act 2000

33. When enacted in 2000, the PH Act initiated significant changes in the health sector, amalgamating the purchase and provision of health services in the community and decentralising some decision-making from central government to part-elected, part-appointed district health boards.

34. The PH Act reorganised the health sector and prescribed the responsibilities, duties and relationship between the key actors such as the Minister and the 21 DHBs it established.

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1 Bundle.

35. Ministerial control is critical to the legislative scheme laid out in PH Act, and underpins the decentralised decision-making and community participation that the PH Act seeks to achieve. The wider statutory scheme will not work unless the Minister exercises this control. The Minister's responsibilities are set out at Part One of the Act. He is to:

35.1 Determine strategies for health services and disability services (the New Zealand Health Strategy and the New Zealand Disability Strategy): s 8;

35.2 Determine the strategy for the use and development of nationally consistent standards and quality assurance for health services and consumer safety, and for performance monitoring against these: s 9;

35.3 Enter into Crown funding agreements with providers of health services: s 10;

35.4 Establish committees to advise him on public health matters: ss 13-18.

36. Part Two of the Act addresses DHBs. A DHB is a statutory entity owned by the Crown and its Board members are explicitly made accountable to the Minister of Health: s 21(1) PH Act and s 26 CE Act.

37. DHBs are charged with a number of statutory functions, which include (s 23) to:

37.1 Provide or arrange for the provision of health services on behalf of the Crown;

37.2 Ensure the provision of health services for its resident population and others as specified in its Crown funding agreement;

37.3 Actively investigate and develop co-operative and collaborative arrangements with others to improve, promote and protect the health of people and the inclusion and participation of those with disabilities; and

37.4 Provide information to the Minister for the purposes of policy developing, planning and monitoring.

38. In addition, the Minister may direct the Board to perform a specific function, as the Minister sees fit: s 23(1)(n) PH Act.

39. DHBs are instruments of the Crown. Under the PH Act and the CE Act and the doctrine of ministerial responsibility the Minister of Health is responsible to Parliament for overseeing and managing the Crown's interests in, and relationships with the DHB.

40. For this reason, the Minister has powers under both statutes to hold the DHB to account. The Minister, through the Ministry of Health, enters into accountability arrangements with DHBs to allocate funding among the DHBs, and may amend these agreements: s 10 PH Act. He must appoint one member from the Board (elected or appointed) to be chair, and another as deputy chair: clause 10, Schedule 3.

41. He may also:

41.1 Direct the Board (s 32) and direct the DHB to provide or arrange for the provision of particular services (s 33).

41.2 Dismiss a member of the Board (appointed or elected): clause 8, Schedule 3.

41.3 Dismiss the Board and replace it with a Commissioner if he is seriously dissatisfied with the Board's performance: (s 31).

41.4 Remove a chairperson or deputy chairperson from that office: clause 13, Schedule 3.

41.5 Appoint one or more Crown monitors to the Board for the purpose of improving the performance of the Board: s 30(1). The functions of a Crown monitor are to observe the Board's decision-making, assist the Board "in understanding the policies and wishes of the Government so that they can be appropriately reflected in Board decisions"; and advise the Minister on any matters relating to the Board or DHB: s 30(3);

42. The Board is the governing body of the DHB, exercising and performing the functions of the DHB in accordance with the PH Act and CE Act: s 25 CE Act and s 26 PH Act.

43. Each Board has up to 11 members, seven of which are elected by the community at triennial elections: cl 9, schedule 2, PH Act. The Minister of Health appoints up to four of the members, with regard to ensuring proportional representation and at least two Māori members: s 29.

44. A more detailed analysis of s 31 is set out at paragraphs 57-68 below.

Crown Entities Act 2004

45. The Crown Entities Act 2004 is a reforming piece of legislation that has as its purpose the provision of a consistent framework for the establishment, governance and operation of Crown entities and to clarify accountability relationships: s 3 CE Act. Amongst other things, the Act provides for different categories of Crown entities, sets out collective duties of Crown entity boards, such as DHBs, as well as the individual duties of Board members.

46. The CE Act declares that the role of the responsible Minister is to "oversee and manage the Crown's interests in, and relationship with, a statutory entity and to exercise any statutory responsibilities given to the Minster": s 27(1).

47. Board members are specifically accountable to their responsible Minister for complying with the Board's collective duties, their individual duties, and any directions applicable to the entity: s 27 PH Act, s 26 CE Act.

48. The collective duties are owed to the Crown and breach of these does not give rise to liability but entitles the Minister to remove a member: ss 48-52, 58 CE Act. Collective duties include ensuring that the DHB acts in a manner consistent with the DHB's district strategy plan, annual plan, and any directions issued by the Minister under s 33 of that Act or ss 103 or 107 of the CE Act (s 49 CE Act); performing its functions efficiently and effectively and in a manner consistent with

the spirit of service to the public (s 50 CE Act); and act in a financially responsible manner: s 51 CE Act.

49. Individual duties are owed to the Minister and the DHB, and breach of such a duty allows the Minister to remove a member and the DHB to bring an action against the member: ss 26, 53-57 and 59 CE Act. Individual duties include to act with honesty and integrity (s 54 CE Act), in good faith (s 55 CE Act), with reasonable skill and care (s 56 CE Act) and not to disclose Board information: s 57 CE Act.

50. The CE Act applies to DHBs, except as expressly provided in the PH Act: s 21(2) PH Act. Specific provisions of the CE Act do not apply to DHBs, their Boards, or members (including the provisions in the CE Act for removal of elected members).

Accountability Documents

51. There are also several other documents that govern the relationship between the Crown and the DHB, such as the District Strategic Plan, Statement of Intent, District Annual Plan and Crown Funding Agreement.

52. The District Strategic Plan contains the DHB's strategic plan for its organisation over a 5-10 year timeframe, with local priorities placed within the context of national priorities outline in the New Zealand Health Strategy. The DHB must prepare a Statement of Intent every financial year in accordance with ss 138-149 of the CE Act. The purpose of the Statement of Intent is to promote the public accountability of the DHB and to involve the Crown in the setting of the DHB's medium term intentions and undertakings.

53. The District Annual Plan sets out what the DHB intends to do over the financial year, how much is to be spent on intended outputs and how the DHB will measures its success. The DHB and the Minister must agree on a DAP each financial year: s 39 PH Act.

54. The Crown Funding Agreement is a contract that specifies the outputs and services, including elective services, which a DHB is required to provide in exchange for a specified amount of funding. It is negotiated between the Minister

on behalf of the Crown (through his agent the Ministry) and the Board. The CFA is an output agreement for the purposes of Part 4 of the CE Act; thus, the CFA gives rises to legally enforceable duties on Board members under s 49 of the CE Act.

55. The CFA also requires the DHB to comply with the Operational Policy Framework, which is part of the documents known as the Policy Component of the DHB Planning Package, which sets out the operational level accountabilities of DHBs. It is reviewed and updated annually and subsequently approved by the Minister of Health.

56. Finally, the Minister provides an annual letter of expectation to the DHB, which sets out his priorities and expectations for each planning period. This provides guidance for the Board on the areas of priority for the year.

Section 31 PH Act and the Minister's Power to Dismiss the Board

57. Key to this proceeding is s 31 of the PH Act. The operative part of s 31 simply states:

> "(1) Where the Minister is seriously dissatisfied with the performance of a Board of DHB, the Minister may, by written notice to the Board and the commissioner, dismiss all members of the Board and replace the Board with a commissioner."

58. The Minister of Health has not previously used the power to dismiss the Board under s 31(1) (although two health boards were dismissed under earlier health sector legislation) and there is no case law about the interpretation or implementation of this section. The respondent submits that his decision under s 31 is a high-level decision that is not amenable to the interpretation the applicant seeks to put on it.

59. Section 31 sits within a cluster of provisions concerning the Minister's control over the DHBs. For example, the Minister's power to appoint members of the Board (s 29), appoint Crown monitors (s 30), give directions to the Board (s 32) and require the DHB to provide services: s 33.

60. This can be contrasted with the Minister's power to remove an individual member of the Board pursuant to Schedule 3 of the PH Act, which sets out in a much more prescriptive fashion when such a power may be exercised and the process that must be followed in doing so.

61. Clause 8 of Schedule 3 provides that the Minister may remove an appointed member of the Board in accordance with s 36 of the CE Act, and an elected member of a Board if he has consulted the member and the Board about the removal, and only for a reason stated in clause 9. The reasons for which the Minister may remove an elected member are if: cl 9:

61.1 The person is disqualified under s 30(2)(a)-(f) of the CE Act (for example because they are an undischarged bankrupt or subject to a property order under the Protection of Personal and Property Rights Act);

61.2 The Minister is satisfied that the member failed to declare an interest in circumstances where clause 6 of Schedule 2 or clause 35 required the member to do so;

61.3 The Minister is satisfied that the integrity of the Board, or of the DHB to which the Board relates, has been seriously compromised because the member has neglected or failed to perform his material duties.

61.4 The member has, without permission and reasonable excuse, been absent from four consecutive Board meetings;

61.5 The member has breached any of the obligations and duties of a Board member and ss 58(2) or 59(2) of the CE Act applies.

62. Schedule 3, the home of clauses 8 and 9, is a repository of mechanistic provisions on Board processes, for example, the provisions for the training of Board members (cl 5), resignation of Board members (cl 6 now repealed), and vacation of office: cl 7.

63. There is an obvious distinction in the Act between s 31(1), by which the Minister may, as an accountability and performance tool dismiss the entire Board and replace it with a Commissioner, and dismissal of a non-performing Board member under Schedule 3. The latter is analogous to the termination of an employment arrangement and thus procedures are put in place for the protection of the individual member. For example the Schedule 3 measures would protect a member from being removed for individual characteristics such as political views.

64. Section 31(1) and the Schedule 3 dismissal powers have different purposes and are very differently worded and the Schedule 3 processes are not laid on top of the s 31(1) power. There is no question of the respondent "[placing] a lower threshold on dismissing an entire Board than the threshold for dismissing an individual elected member": applicant's submissions, para 65.

65. The applicants have argued that the Minister's discretion to dismiss the Board must be viewed in light of provisions in the CE Act, and that it requires an assessment of "the performance of the Board", which must to be determined by objective criteria and accountability mechanisms under the Act.

66. That is incorrect. Section 31(1) requires the Minister to be "seriously dissatisfied" with the Board's performance. If there were specific factors as to performance that the Minister were obliged to take account of, these would be specified. Schedule 3 provides a clear indication that where the exercise of a power of this kind is confined to particular grounds, these will be set out clearly.

67. Moreover, it is submitted that the applicants misread s 31(1) when they submit the exercise of the s 31(1) power requires the respondent to "actually make a decision that he was seriously dissatisfied with the performance of the Board" and "that requirements involves an adverse finding, a finding essentially of fault against the Board, and can not be satisfied in the manner that it was approached by the respondent": applicants' submission, para 153 and earlier.

68. If the Minister is seriously dissatisfied "the Minister **may**" dismiss the Board. This discretion is the decision-making power in the subsection. It is not until the

Minister determines that he is seriously dissatisfied and thus s 31(1) is engaged that the potential exists for the interests of Board members to be affected. At any time, the Minister may be "dissatisfied" or even "seriously dissatisfied" with one or more of the 21 DHB Board. The Minister's view of a Board's performance will not be of any effect unless and until he considers taking action as a result. Given that a Minister's view of a particular Board may change from week to week, he cannot be expected to seek the Board's response every time he feels that he may be approaching the statutory threshold. It is when the Minister decides to take the further step of considering his s 31(1) power that the need to seek the Board's view arises: cf applicants' submissions, para 109.

Intensity of Review

69. The Minister has submitted a substantial body of evidence explaining his decision to dismiss the Board. The nature of that decision is such that the Court should be particularly slow to intervene in the substantive merits of the decision. The decision reflected, in part, the Minister's opinion regarding the proper role of DHB and their relationship with the Crown. As such, it contained elements of policy as well as judgement.

70. Moreover, much as the applicants have sought to disavow it, there is a strong political dimension to the present case. The Minister's decision was the subject of widespread public and political debate. He was challenged strongly in Parliament. More recently, the (then) Opposition made the status of the Hawke's Bay Board an election issue, and sought electoral support in the Hawke's Bay on the basis that the incoming Government would take a different approach. All this well illustrates the political nature, through the democratically elected Parliament, of the Minister's accountability.

71. Not all ministerial decisions are the subject of such intense political scrutiny, but this decision, predictably, gave rise to an immediate political response. This factor distinguishes the present decision from purely administrative or quasi-judicial decisions with no political dimension. The greater the likelihood that a Minister

will be held accountable in Parliament and to the electorate, the smaller the scope for judicial intervention; indeed, a decision that is squarely met with a political response, which generates debate designed to persuade the Government to adopt a different policy, and which is susceptible to political remedy, is one the Court should scrutinise only in the most exceptional circumstances.

72. In *Hawkins v Minister of Justice* [1991] 2 NZLR 530 at 536, Richardson J observed:

> "The larger the policy content the greater the exercise of judgment by the statutory decision maker, the less scope there is for a conclusion that the legislature intended that the Courts by way of judicial review should determine whether the statutory criteria were established was a precondition to the exercise of a statutory power. To put it another way, the legislature may implicitly entrust the jurisdiction to determine whether the criteria are present to the statutory decision maker. In some such cases the statutory analysis will lead to the conclusion that the identification and weighing of relevant policies and considerations is for the decision maker alone, and in that sense is not justiciable at all. In others the conclusion will be that it is for the Courts to determine by way of judicial review whether there was material before the Minister on which the minister could properly have concluded that the statutory criteria were present. In the end it is a question of statutory interpretation whether, and if so on what principled basis, judicial review of the exercise of the particular statutory power is available."

73. Wild J dealt with the relevance of both policy content and the prospect of political accountability in *Powerco & anor v Commerce Commission & anor* CIV 2005-485-1066 & 1220, Wellington Registry, 14 December 2007. In a passage not challenged in the subsequent (unsuccessful) appeal, he observed:

> "[367] ... The Court's willingness to intervene should be inversely proportionate to the policy content of the decision. Richardson J put this point succinctly in *Hawkins* ...[His Honour cited the passage from *Hawkins* set out above].
>
> [368] Second, and closely related to the point just made, the Minister(s) are politically accountable; the Court is not."

74. The very high threshold for review, and the nature of the statutory threshold for dismissal, is relevant to the dispute that has arisen regarding the underlying facts on which the Minister based his decision. As noted above, the facts were for the Minister to assess, and it was his dissatisfaction with the Board that is relevant. As

long as the Minister does not act irrationally, it is not relevant that the Board may disagree with his assessment of particular events. Similarly, it is irrelevant that the Board considers that it was doing good things, and that these should have outweighed the matters that caused the Minister to lose confidence in it. It was for the Minister to decide what factors were relevant in assessing the Board's performance, and what weight should be attached to them. It was that for which he was responsible to Parliament.

75. In this context, it is also notable that there has been no application to cross-examine the Minister or any of the respondent's other witnesses, despite the applicants' assertion, both in their affidavits in reply and in submissions, that the evidence of various deponents is untrue. As the Court reminded the applicants' counsel during the interlocutory hearing on 1 October 2008, while cross-examination is ordered only reluctantly in judicial review matters, the applicants cannot ask the Court to reject any part of the Minister's evidence if they do not at least seek to have that evidence tested. To the extent that the applicants seek to assert that any part of the Minister's affidavit – or that of Dr Anderson, Mr Clarke, Ms Andrew or Dr Grayson – should be rejected as untrue, s 92(1) Evidence Act 2006 continues to apply, notwithstanding the judicial review context.

76. As stressed in paragraph 3 above, in this statutory framework the Minister's role in the provision of health services is critical. He is ultimately responsible and accountable for the health system under which the standard and quality of health services are provided. Ultimate responsibility has not been delegated to the DHB (and certainly not to local government). It remains with the Minister. It is imperative, therefore, that the Minister be able to effectively implement such of the statutory measures as he sees fit in terms of the Act. For that, he is responsible to Parliament. The Court should, in these circumstances, be reluctant to intervene. To hold otherwise would be to encourage further politically motivated litigation, and confuse the accountability relationships between the branches of government that is appropriately the subject of understandings of comity.

77. It is against this background that the Minister's decision-making process must be considered.

THE MINISTER'S DECISION: BACKGROUND

78. The Minister's decision-making process is set out in detail in his affidavit, as well as in the affidavits of key officials with whom he worked in the period leading up to the dismissal of the Board. This evidence answers each of the allegations the applicants have made. In particular, aside from showing that the Minister had a well-founded basis for his dissatisfaction with the Board, the evidence disposes of any suggestion that the decision reflected bias or predetermination, and answers the applicants' concerns about natural justice.

79. Another Minister may not have reached the same conclusion – indeed it is apparent that the Minister hesitated before making the decision to dismiss the Board, and that his initial inclination was to appoint a new Chair and a Crown Monitor. In the end he dismissed the Board only reluctantly. Nonetheless, he had a clear basis to reach the conclusions that he did.

80. Minister Cunliffe assumed the Health portfolio on 5 November 2007. He received a series of written and oral briefings from officials, and was alerted to what he describes as "serious and worsening problems at the Hawke's Bay DHB".[2] These issues concerned the Board's financial position, and general issues regarding the governance of the organisation. The Minister was advised that the Review Panel inquiry was underway, and decided that it would be appropriate to defer decisions around the chairmanship of the Hawke's Bay Board, and any ministerial appointments for the forthcoming term, until after the Review Panel reported.

81. Though this decision became the focus of sustained public criticism from the Hawke's Bay Board, it was a sensible one, particularly as the Minister understood that the Panel would report in the next few weeks. The Review Panel's report would, when released, provide an expert and objective assessment of the performance of the Board, and in particular Mr Atkinson as Chair; it would not

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2 Minister's affidavit, paragraph 16.

have been prudent either to reappoint Mr Atkinson, or to prefer someone else, when this report was (apparently) imminent.

82. It was in this context that the Minister advised Mr Atkinson that he had decided to defer the appointment of a new Chair and any other appointed members to the Board while the Review Panel completed its work, but that he was happy for Mr Atkinson to continue as Chair in the meantime. The Minister telephoned Mr Atkinson on 13 November 2007; the Minister intended the call to be a friendly and personal chat.[3] The Minister notes that Mr Atkinson's remarks during that conversation shocked and concerned him. First (and Mr Atkinson does not seriously dispute this), Mr Atkinson took the opportunity to press the Minister to reappoint him. Secondly (again not disputed by Mr Atkinson), Mr Atkinson advised the Minister of his intention to ask the Director-General to exclude governance issues from the Review Panel's terms of reference. This revelation takes on a new dimension when it is noted that Mr Atkinson had been informed that he and the Board had been the subject of very strong criticism from upwards of 20 staff members to whom the Review Panel had spoken, including present and former managers at the DHB and clinicians, though this was not known to the Minister at the time.[4]

83. The Minister's contemporaneous note records that Mr Atkinson sought to advance his reappointment in a manner that linked it with the possibility that embarrassing information would otherwise enter the public domain. It is also plain, even from the Minister's note, that the nature and tone of Mr Atkinson's remarks shook the Minister's confidence in him. In his affidavit, the Minister notes his astonishment, and the unmistakeable overtones in Mr Atkinson's remarks.

84. Mr Atkinson seeks to advance a different interpretation of that discussion. Leaving aside the fact that the Minister's account of the discussion was supported by an immediate note, that it plainly surprised him, and that it prompted him to ask his

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3 Minister's affidavit, paragraph 41.

4 As Mr Wilson noted at paragraph 13, with only a handful of exceptions, the only people to whom the Panel spoke that were not critical of the Board were Board members themselves, and all interviewees mentioned tension between the Board and management.

Senior Adviser for advice on the "governance issues" arising from the call, it is not open to Mr Atkinson to assert that the Minister's account "could not be further from the truth" without seeking leave to cross-examine him.

85. Moreover, Mr Atkinson's attempt, in this Court, to suggest that he was indifferent as to whether he was reappointed as Chair (see, for example, paragraph 37 of Mr Atkinson's third affidavit) cannot be sustained, unless he also seeks to assert that the Minister's contemporaneous note, which records Mr Atkinson repeatedly pressing for "continuity", should be rejected as untruthful. Indeed, it is an absurd suggestion – Mr Atkinson himself was highly critical of the Minister's failure to reappoint him as Chair at the next Board meeting.[5] The Minister was well entitled to lose confidence in Mr Atkinson in light of his remarks during this discussion.

86. The Minister and Mr Atkinson spoke again on 21 November. This call was to discuss a draft report from the Office of the Auditor-General, and Mr Atkinson advised that there might be "employment issues" arising from this report.[6] Mr Atkinson cautioned the Minister that the Deputy Director-General, Antony Hill, was "best friends" with Mr Clarke. The Minister noted that this conversation highlighted the apparent disharmony between the Board and management; the Minister was concerned that this extended to Mr Atkinson warning the Minister about officials who might be sympathetic to the Chief Executive.

87. Two important events occurred in early December 2007. On 4 December, Mr Atkinson wrote to the Minister regarding the Board's financial position.[7] This was already a matter of considerable concern – the Board had reported an unfavourable variance against budget of $2.1 million for the quarter ending 30 September. In his

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5 See Exhibit F to Mr Atkinson's third affidavit, and exhibit **DC7** to the Minister's affidavit.

6 Again, the background to this call is now known. The relationship between Mr Clarke and Mr Atkinson had collapsed in the weeks preceding this discussion, and the source of this had been Mr Clarke's refusal to co-operate in the inquiry the Board wished to conduct into negative remarks staff members had made to the Review Panel. As is discussed in more detail below (paragraphs 219 to 232), despite the Board's protestations that the "employment issues" it had with Mr Clarke concerned matters of performance, or conflicts of interest, it is apparent that the only matters raised with Mr Clarke, when he was approached by the employment lawyer the Board had engaged, concerned his interactions with the Review Panel.

7 Exhibit **DC1** to the Minister's affidavit.

4 December letter, Mr Atkinson reported that the position had deteriorated further in October, to the point where the Board was $3 million behind its planned position. Mr Atkinson blamed $1.5 million of this on the nurses' pay settlement, and $2 million on unrealised efficiencies – i.e. savings that were within the Board's power, but which the Board had not achieved. As the Minister notes in his affidavit, both the deteriorating nature of the Board's position, and the fact that the Board was failing to realise efficiency savings that were available to it, highlighted the need for a strong Board that was capable of working with management to turn the position around quickly.

88. It is notable that in his reply affidavit, Mr Atkinson makes only passing reference to his 4 December letter. He observes that variances against budget are often due to matters outside the Board's control[8], and that variance against budget is not necessarily an indication of deteriorating financial performance. This is undoubtedly correct. That said, Mr Atkinson's letter of 4 December acknowledged that $2 million of the forecast shortfall arose from factors within the Board's control, namely its achievement of efficiencies it had counted on when setting its budget. The Minister was entitled to conclude that remedial action was required, and that this factor pointed to the need for a Board that was capable of addressing this issue decisively, and working well with management to achieve the required results. The Board was placed on performance watch soon afterwards.

89. The second important event was the 5 December Board meeting. Mr Atkinson took the opportunity to mount a strong criticism of the Minister for his decision to defer the appointment of the Board Chair until after the Review Panel reported. The *Dominion Post* of 6 December reported Mr Atkinson complaining about the Minister's failure to reappoint him, and describing the Review Panel's inquiry as long and unnecessarily convoluted.

90. Both *The Dominion Post* and *Hawke's Bay Today*[9] quoted Mr Atkinson as saying that health services would be jeopardised as a result (though in this Court Mr Atkinson

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8 Mr Atkinson's third affidavit, paragraph 50.

9 Exhibit **DC8** to the Minister's affidavit.

asserts that *both* newspapers misquoted him). Mr Atkinson has now produced a minute of his remarks that indicated that he had been even more critical of the Minister's decision than the newspapers reported – Mr Atkinson told the public meeting that he found the situation "quite untenable and unhelpful".

91. A few days later, Mr Atkinson tried to publicly pre-empt the findings of the Ministry's Review Panel by authoring an article that purported to set out the differences between his style of governance and that apparently favoured by the Panel. This article, published on 10 December 2007, is Exhibit **DC10** to the Minister's affidavit. The article anticipated criticism of the Board's approach to governance, and appears designed to ensure that the Panel's conclusions, when they were made public, were undermined in advance. The most notable feature of the article – a series of general, and obvious, statements with little reference to events at the DHB – was the assertion that the Panel held a view that was at odds with the straightforward and commonsense propositions Mr Atkinson outlined. This theme is explored further in Mr Atkinson's third affidavit. He asserts that the Panel considered that the appropriate role of a Board was to "rubber stamp" management's recommendations. Of course, the Review Panel's report expressed no such sentiment.[10]

92. Again, the Minister was entitled to be concerned about Mr Atkinson's judgment in publishing an article that purported to disagree with the attitude of the Review Panel before its report had even been issued. The Minister was entitled to expect the Board to be publicly respectful of the Panel and its views, at least until it had completed its work.

93. The Minister was on leave from 11 December 2007 to 23 January 2008. Nonetheless, he had expected the Panel's report before Christmas, and was frustrated when he learned, in early December, that it would not be available until the New Year. The Minister learned that the delay had been occasioned by an

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[10] See Mr Atkinson's third affidavit, paragraphs 75 and 76; see also the Review Panel's report, exhibit **DC36**, pp 88-90.

intensely disputed legal process, and that management, the Board and individual Board members had hired lawyers.

94. The Minister was advised in January 2008 that the Review Panel report had been further delayed, and that much of this arose because Mr Hausmann had made extensive representations regarding an early draft of the report. By the end of that month he was aware that the Panel's report would not be released until late February 2008 at the earliest.

95. It is apparent that the ongoing delays in the Review Panel's report were a source of considerable frustration for the Minister, and he came to regard the entrenched and adversarial positions taken by the Board, management and Mr Hausmann as symptomatic of an organisation whose members were expending valuable time and resources seeking to preserve their own positions, rather than working together to advance the delivery of health services.

96. By early February, the Minister resolved that he could no longer afford to wait for the Panel's report before moving to bring some certainty to the issues surrounding the Hawke's Bay Board. As the Minister observes in his affidavit, "when I decided to wait for the Review Panel's report, I had never expected that I would have to wait so long".[11]

97. On 28 January, the Office of the Auditor-General issued a report concerning the Hawke's Bay DHB.[12] It noted a number of areas of concern. These included "sustainability" – i.e. the Board's poor financial position and the existence of a $3.1 million deficit – the Board's management of conflicts of interest and the absence of a DHB-wide policy to identify and manage conflicts where they arose, difficulties with procurement policy and practice. The Minister considered that the criticisms in the report further contributed to the picture of a poorly-performing Board.[13]

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11 Minister's affidavit, paragraph 23.

12 Minister's affidavit, exhibit **DC4**.

13 Minister's affidavit, paragraph 38.

98. By early February, momentum had started to build which compelled the Minister to move decisively. On 1 February, the Minister received a report from his Economic Adviser, Mr Johnson, outlining the state of the Board's finances.[14] The Board's criticisms of that document are addressed below, but Mr Johnson's report provided the Minister with further grounds to be very concerned about the escalating crisis in Hawke's Bay. This document set out both the Board's financial position and the drivers of the escalating deficit the Board was facing. Mr Johnson noted that the nurses' settlement, to which Mr Atkinson had referred in December, was only a minor factor at that stage, and that a key factor appeared to be the unrealised efficiency savings, also referred to by Mr Atkinson in his 4 December letter. Operating expenses – a heading that excluded personnel costs – were running more than $2 million behind plan, and it was in this area where the Board had failed to deliver the efficiencies it had promised. Moreover, Mr Johnson compared the Hawke's Bay DHB's position with that of eight other DHBs of similar size, and concluded that the Hawke's Bay Board's deficit was by far the worst within this group.

99. In the second week of February, the Minister learned that Mr Clarke had been forced to take two weeks' stress leave only days after returning from vacation, and that there was no guarantee that he would return. When this was combined with the Minister's knowledge that the Board and management had instructed lawyers to protect their positions with respect to the Review Panel – which had been set up to provide constructive feedback and help the organisation function better – it was open to the Minister to conclude that an unhealthy environment had developed at the top of the DHB. In addition, Mr Clarke's absence, at a time when the Board had serious financial issues to address, was unlikely to help the Board regain control of the organisation's finances.

100. At about this time, the Minister began receiving correspondence from the Hawke's Bay community urging him to take action. This included a letter dated 11 February from Dr Dinesh Arya, the Board's Chief Medical Adviser, which was signed by

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14 Minister's affidavit, exhibit **DC2**.

three other senior clinicians as well.[15] That letter referred to the need to end the uncertainty the lack of a permanent Chair was causing, and referred both to the need for good governance and the existence of tensions within the organisation.

101. In mid-February, the Minister instructed officials to progress discussions with potential ministerial appointments to the Board, and to advance the process of appointing a Chair.[16] On 12 February, Dr Anderson of the Ministry of Health drew up a paper listing possible candidates for the Minister to consider. The Minister expressed his views on those candidates, and Dr Anderson followed those indications up over the next few days.

102. On 13 February, an article appeared in *The Dominion Post* that reported "Chairman Kevin Atkinson said it was never a realistic goal to cut $5 million from the board's costs, but it had factored that expectation into its budget simply to get it signed off by the health minister, who refused to accept anything less than a break-even budget".[17] The Minister deposes that he was troubled by this statement, given that it indicated that the Board had sought to deceive him in order to receive ministerial sign-off on its budget. Mr Atkinson asserts that he has been misquoted, and now says that he sought a retraction, which was never published.

103. The public criticism of the Minister continued. On 14 February, Dr David Davidson appeared on Radio New Zealand describing the Minister's decision to defer the appointment of ministerial appointees and a permanent Chair as "very destabilising", and "very insulting" to the Board's two (appointed) Māori members. He described Mr Atkinson being asked to operate on a day-to-day basis as "hopeless".[18] On the same day, Mr Atkinson was quoted in *The Dominion Post* affirming that operating on a day-to-day basis was frustrating and emotionally difficult.

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15 Minister's affidavit, exhibit **DC14**.

16 Affidavit of Dr Bruce Anderson, paragraph 2.

17 Minister's affidavit, paragraph 49.4, exhibit **DC10**.

18 Minister's affidavit, exhibit **DC11**.

104. The Minister was entitled to be concerned about these comments and the Board's apparent distraction from their statutory functions. The decision to await the Review Panel's report was the Minister's decision to make, and effectively represented the Government's view of the appropriate constitution of the Board at that time. Having made that decision, the Minister received constant criticism from Board members who hoped to see Mr Atkinson reappointed. Whether it was appropriate for members of the Board to be so openly critical of this decision, as they now assert, is a matter on which they and the Minister plainly disagree.

105. Having subjected the Minister's approach to this issue to very strong public criticism over the course of three months, it is not open to members of the Board to deny that they ever publicly criticised the Minister. Dr Davidson, at least, is open about the fact that he did criticise the Minister in the media, and says that he stands by his comments,[19] though his attempt to draw a distinction between criticism of the Minister and criticism of the Government makes little sense.

106. The Minister decided to contact one of the clinicians who had written to him to obtain more information about what was occurring on the ground in Hawke's Bay. In his affidavit, the Minister notes that he was concerned about the implication in Dr Arya's letter that the DHB was not enjoying good governance, and about the reference to tensions within the organisation. The Minister also notes that he regarded Dr Arya's letter as carefully worded, and wished to explore what lay behind it. The Minister discussed the letter with Dr Ian Powell, the Executive Director of the Association of Salaried Medical Specialists. Dr Powell expressed complete confidence in the character, integrity and impartiality of Dr David Grayson, one of the signatories to the letter, so on Dr Powell's recommendation the Minister telephoned Dr Grayson.

107. The Minister and Dr Grayson discussed the various options the Minister was considering at that time. In particular, the Minister asked Dr Grayson for his opinion as to whether the appointment of a new Chair, possibly in conjunction with a Crown monitor, would meet his concerns. Dr Grayson told the Minister

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19 Third affidavit of David Davidson, paragraph 3.

about the tension that had infected the organisation, particularly as a result of the Review Panel's inquiry, and observed that the relationship between the Board and management had deteriorated to one of complete dysfunction, where neither party trusted the other. Dr Grayson offered the opinion that only the removal of the Board would get things back on track.

108. While Dr Grayson's opinion has attracted criticism from the applicants, it is clear, even from the applicants' own evidence, that his description of the antagonism that existed between the Board and management was accurate, especially his reference to the mutual breakdown in trust. For example, Mr Atkinson (presumably supported by the other Board members who have adopted the contents of his affidavit) admits that the majority of the Board did not trust Mr Clarke and other senior managers – it considered Mr Clarke to be dishonest[20], and believed that from January 2008 on Mr Clarke, with the support of other senior managers, "turned on the Board and did everything in his power to ensure that the Board would be dismissed".[21] It is equally clear, from the affidavits of Mr Clarke, Ms Andrew and Mr Wilson, along with the letter Mr Clarke wrote shortly after being placed on sick leave[22], that management did not trust the Board. At least four senior managers indicated that they would resign if there was not significant change in the governance of the DHB.[23]

109. Dr Grayson's concerns were echoed soon afterwards in an email from Dr Richard Tustin.[24] Importantly, the Minister recognised that these representations were only one point of view, and that a number of senior clinicians supported the Board.[25] Nonetheless, the Minister was entitled to be concerned, particularly as the dysfunctional relationship between the Board and management that Dr Grayson described was so consistent with the other information the Minister had received.

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20 See, for example, Mr Atkinson's third affidavit, paragraph 103.
21 Mr Atkinson's third affidavit, paragraph 117.
22 Minister's affidavit, exhibit **DC29**, Document A.
23 Affidavit of Chris Clarke paragraph 29; affidavit of Penny Andrew, paragraph 27.
24 Minister's affidavit, exhibit **DC 15**.
25 Minister's affidavit, paragraph 60.

110. It was at this point that the Minister decided to give serious and urgent consideration to exercising his power under s 31(1). Up until 19 February, while increasingly concerned about what he had learned about the situation in Hawke's Bay, the Minister was canvassing possible appointees both as Board members and as Chair. By 19 February, however, the evidence that matters were too serious to be resolved by a conventional round of appointments had become very strong, and it was apparent that dismissal of the Board should be explored.

111. It is to be emphasised that many of the incidents and exchanges canvassed by the applicants are irrelevant, other than that they point to the fact the Board was being distracted form the urgent task of addressing the essential issues in providing the best possible standard and quality of health services in the Hawke's Bay. The Minister was entitled to be concerned at the level of distraction involved in the Board's attempts to defend itself and blame others. In part, at least, this level of distraction inhibited the Board from focussing on the measures and program required to improve its performance.

Decision-making Process

112. In the days leading up to the Minister's letter to the Board of 20 February, the "dismissal" option appeared increasingly appropriate. By 20 February, he had narrowed the options available for resolving the Hawke's Bay situation to two, namely the appointment of a combination of a Monitor, a new Chair and new appointed members, and the dismissal of the Board and appointment of a Commissioner. The Minister's affidavit repeatedly notes that his sole objective was to get the organisation functioning again as quickly as possible; he was not interested in taking sides as between the Board and management. That said, he was, at all times, acutely aware of how serious a step it was to appoint a Commissioner, and resolved that he would only choose that option if satisfied that no lesser option would be effective.[26]

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26 Minister's affidavit, paragraph 72.

113. The Minister met with officials and advisers on 19 February, and again on the morning of 20 February. At that time, the balance of opinion still favoured the appointment of a Monitor and a new Chair who would be given a firm instruction to set about repairing the breach between the Board and management. On 20 February, the Minister briefed his colleagues on the Cabinet Policy Committee, and presented a paper which, while noting his serious dissatisfaction with the performance of the Board, indicated that he intended, in effect, to warn the Board that it risked dismissal if it did not address his concerns quickly, but that he would, in the meantime, proceed to appoint a new Chair and new members.[27]

114. It is apparent that the Minister refined his preferred approach after discussing the matter with the Cabinet Committee. The Minister took further advice following the Committee meeting and, particularly, gave further consideration to the option of providing the Board with a letter noting his dissatisfaction, recording that he was giving consideration to exercising his power under s 31, and inviting it to address his concerns. The Minister discussed the matter with the Solicitor-General, who advised him that a week's notice would be sufficient for these purposes. That afternoon, the Minister resolved to adopt this course, with a view to making a final decision between dismissal and the appointment of a new Chair and new members after the Board had had the opportunity to address the matters the Minister was concerned about.

Correspondence with the Board

115. The Minister wrote to the Board on 20 February setting out four reasons why he had reached a state of serious dissatisfaction with the Board's performance.[28] These were: the Board's financial position; its public comments critical of the Minister and in furtherance of members' own interests; the dysfunctional relationships that had come to exist between the Board and the Minister and the Board and management; and the Minister's concerns arising from the Auditor-General's report of 28 January 2008.

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27 Minister's affidavit, exhibit **DC16**.

28 Minister's affidavit, exhibit **DC19**.

116. The Minister's letter reflected the events of the previous few months, which, as set out above, gave him serious cause for concern. Nonetheless, he understood that the Board might be able to provide adequate reassurance. As he notes in his affidavit, he would have been very receptive to a response from the Board that indicated that it had some insight into the difficulties that existed, and had a plan to resolve them. On the other hand, he hoped that the Board would not take the opportunity to engage in another round of seeking to blame others.[29]

117. In his letter, the Minister asked the Board to respect the integrity of the process by refraining from further public comment until he had had the opportunity to consider the Board's response. The Board ignored this request. Both Mr Atkinson and Dr David Davidson commented publicly on the Minister's letter to the Board. Mr Atkinson and Dr Davidson both say that they were unaware of the Minister's request, and had not seen his letter, when they gave their interviews. Yet these interviews both took place on 21 February – the day after the Minister's letter, and even Radio New Zealand was aware that the Minister's letter included a request that members refrain from public comment.[30]

118. This issue should not be overstated – it was open to Board members to ignore the Minister's request if they wished, but equally it was open to the Minister to observe that these members had continued the pattern of pleading their case in public rather than through the formal process he envisaged. It was also open to the Minister to take account of the disrespectful tone Dr Davidson, in particular, adopted in his remarks – for example his (false) assertion that Mr Atkinson had written several letters to the Minister over the previous five months to which he had not "even had the courtesy of a reply", and the assertion (also false) that the Minister and his predecessor "[hadn't] been interested" in finding a way forward.[31] On the same day, Dr Grayson and Dr Tustin spoke publicly about their concerns regarding the Board's performance.

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29 Minister's affidavit, paragraphs 85-86.

30 Minister's affidavit, exhibit **DC22**, third page.

31 Minister's affidavit, exhibit **DC22**, second page.

119. The Board wrote to the Minister on 21 February seeking clarification of some of the matters referred to in the Minister's letter of the previous day. In particular, the Board asked for more details of the "public challenges" it was said to have engaged in, what the Minister meant by the word "dysfunctional", and how the Minister believed that this was impacting upon the Board's performance. The Board expressed no confusion about the Minister's inquiry regarding its financial position or the Auditor-General's report, and noted that it was working to provide him with a response.[32]

120. The Minister took advice and replied the next day. He referred specifically to Mr Atkinson's reported remarks concerning a $5 million cut in the Board's costs that had been included in the budget only to get the Minister's sign-off, and reaffirmed his view that the Board had inappropriately sought to advance its position through comment in the media. He noted that his concerns were exacerbated by the fact that Board members had engaged in public debate, and had disregarded his request that they refrain from doing so.[33] After taking advice, the Minister also declined Mr Atkinson's request for an informal meeting, preferring to adhere to the formal process he had set out in his letter of 20 February.

121. The next relevant event occurred on 25 February. The Minister learned that the Board had sought an injunction to prevent the Review Panel from releasing its report. Understandably, the Minister regarded this as an extraordinary and inappropriate development in light of the delays that had already beset the process. The Minister observes that this deepened his misgivings about the Board's judgement.[34] It is also noteworthy that Mr Atkinson's account of this episode is wrong in two respects. First, the Board had not been denied a "reasonable time" to respond to the Panel's most recent draft. Next, Mr Atkinson is quite wrong when he says that the injunction was "readily obtained". While the application was filed, it was never heard, and no injunction was ever issued. The proceeding was discontinued after the dismissal of the Board.

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32 Minister's affidavit, exhibit **DC26**.

33 Minister's affidavit, exhibit **DC27**.

34 Minister's affidavit, paragraph 96.

The Board's Reply

122. On 26 February, the Board transmitted its response to the Minister's letter. The Minister also received a "dissenting" response from Mr Hausmann.

123. Once again, it goes without saying that the Minister's assessment of the two responses was a matter for him alone. That said, the substance of the "majority" response provides considerable support for the Minister's decision to dismiss the Board. When read in conjunction with the affidavits filed in this Court, it also substantially disposes of the suggestion that further information would have been available if the Minister had articulated his concerns differently.

124. The detail of the Board's response is discussed below. However, it is fair to characterise the Board's reply as an attempt to deflect criticism from itself to management and to Mr Hausmann. For example, when referring to its relationship with management, the Board submitted that "ultimate accountability for the actions of all management and service delivery performance lies with the Chief Executive". The Minister was entitled to note that ultimate accountability lies with the Board, and that it is the Board's responsibility to ensure that management is performing satisfactorily. It was open to the Minister to conclude that it did not matter whether the fault lay with the Board directly, or because management was not performing.

The Board's Financial Position

125. The Minister immediately took further advice on the matters contained in the Board's response. In particular, he referred the Board's comments about its financial situation to his economic adviser. This advice was important. The Board sought to blame the projected $8 million deficit on the nurses' pay settlement, the fact that a $3.7 million debt had rolled over from the previous year and additional costs associated with unfilled vacancies. It asserted that the Board had been significantly under-funded in the past, and indicated that it had "instructed management" that it wished to see at least a $4 million reduction in 2008/9 and a balanced budget by 2010/11.

126. Mr Johnson noted that the Board's explanations for the deficit had changed between December and February. In particular, it sought to shift the explanation away from factors within the Board's control to matters outside its control. Each component of the Board's explanation was analysed and rejected by Mr Johnson. He noted that the nurses' settlement could account for less than $1 million of the existing $3.5 million deficit, though he agreed that subsequent settlements might account for a greater proportion of the projected deficit.

127. Mr Johnson noted that Mr Atkinson had made no mention of the "carry over" deficit in his 4 December letter. He added that "the previous year's deficit in funding would not 'carry over' to the present year, except insofar as the same factors that led to the 2006/07 position may still exist".

128. Significantly, Mr Johnson noted that, while Mr Atkinson had said in December that the deficit was underpinned by $2 million in unrealised efficiency savings, there was no mention of this factor in the Board's 26 February response. In his second affidavit, Mr Atkinson refers to the Board's failure to realise efficiencies, and blames this on management[35]; he does not refer to this factor at all in his third affidavit.

129. It is notable that, while Mr Atkinson's third affidavit criticises Mr Johnson's 1 February paper, he does not engage with Mr Johnson's 27 February analysis. Instead, he seeks to outline a new range of explanations for the deficit, including a conservative approach to accruals and the fact that the Board had budgeted for an increase in elective surgery, but had not included the available funding boost in its revenues because it was uncertain as to whether this funding would be forthcoming.

130. Moreover, other than indicating that the Board had made it "very clear" to management that it should bring the budget back into balance, the letter outlined little by way of a specific or remotely constructive plan, something that was critically required. The Board's response also highlighted the need for extensive

35 Mr Atkinson's second affidavit, paragraph 59.

and urgent action on the part of both the Board and management to remedy the situation over the next few months, and that a harmonious relationship would be essential if this were to be successful.

Dysfunction

131. Similarly, the Minister was entitled to be unconvinced by the remainder of the Board's response. The Board's response to the Minister's concerns about the dysfunction that existed between the Board and management was telling. As the Minister noted, the Board sought to engage in further finger pointing. It introduced extensive material about the Community Services RFP, and the Wellcare contract – matters that had never formed part of the Minister's dissatisfaction with the Board – and complained about the appointment and conduct of Mr Hausmann.

132. Importantly, the Board did not, at that time, seek to deny that a dysfunctional relationship existed between itself and management. Instead it included a lengthy criticism of management's conduct. Many of these criticisms were general; they included comments such as "the Board has been greatly troubled by competence issues and behavioural aspects", and referred to "the many ongoing difficulties faced by the Board in achieving satisfactory performance from its chief executive and maintaining the credibility of the HBDHB as a publicly accountable entity". The Board strongly criticised management's conduct with respect to particular contracts, implying that it had been dishonest, and had sought to destroy evidence of its misconduct.

133. The Board blamed the poor state of its relationship with management on Mr Clarke, and assured the Minister that there was a process in place to address this (a euphemism for the Board's plan to dismiss Mr Clarke). It is only in the course of the present proceeding that the Board has sought, on one hand, to maintain that the relationship remained healthy, while on the other labelling management deceitful and incompetent, and accusing it of conspiring to bring about the Board's dismissal.

The Minister's Assessment

134. As noted above, it was for the Minister to decide what he made of the Board's response. The "majority" submission highlighted how divided the organisation had become. Its effective acknowledgement of the degree to which its relationship with management had broken down, and its acceptance that significant work was needed to remedy the Board's financial position, entitled the Minister to decide that the Board's response did nothing to restore his confidence in it. Indeed, the Board's "majority" response effectively confirmed what Dr Grayson had told the Minister about the lack of trust between the Board and management.

135. The applicants seek to criticise the Minister for not referring Mr Hausmann's "dissenting" response to the majority of the Board for comment. This course was unnecessary. The Minister was acutely conscious that Mr Hausmann's submission conveyed only Mr Hausmann's views, which were plainly not shared by the rest of the Board. In light of this, he resolved to treat Mr Hausmann's comments with caution and, importantly, gave no weight to the substance of Mr Hausmann's comments where they differed from the majority of the Board.[36]

136. The applicants, who appear to recognise the difficulty that this aspect of the Minister's affidavit places them in, suggest that there is a contradiction between treating Mr Hausmann's comments with caution, and disregarding them altogether. There is not. Because of Mr Hausmann's isolation the Minister resolved to treat his remarks with caution. He gave practical effect to that caution, when making his decision, by disregarding the substance of Mr Hausmann's remarks where they conflicted with the views of the remainder of the Board. Tellingly, the Minister confirmed that he would have dismissed the Board even if the "majority" Board submission had been the only one he received[37].

137. That said, there could be no objection to the Minister noting that the fact that Mr Hausmann's submission confirmed some of what was evident from the "majority"

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36 Minister's affidavit, paragraph 99.

37 Minister's affidavit, paragraph 119.5.

remarks. It highlighted, in particular, the depth of the rift between the Board and management. While it offered a completely different perspective on the collapse of that relationship, and included a letter that Mr Clarke had written to his lawyer which outlined the breakdown from Mr Clarke's perspective, it was clear that the two submissions, when read together, confirmed the picture of Board-management dysfunction that the Minister had raised in his 20 February letter. As the Minister observed:

> "[118] ... As I have repeatedly said, I did not form a view of, or rely upon, the allegations that [Mr Hausmann] made in his letter to me. Mr Hausmann's letter did further illustrate the highly divided nature of the organisation, but this fact was already clear to me without his contribution."

138. The applicants have never acknowledged the Minister's perspective on this conflict. Both in its 26 February response, and in this Court, the Board has approached the issue as though the Minister should have been concerned with who was to blame, and with who was right and who was wrong. It is on this basis that the applicants assert that if Mr Clarke's letter had been referred to the Board, its contents could have been "readily refuted". The Minister's affidavit makes it clear that this had never been his concern. It was the *fact* that the relationship had collapsed – something effectively confirmed by both replies – that concerned him, not whose fault it was. The dismissal of the Board was designed to cut through the dysfunctional relationship that had developed, and to give the organisation a fresh start.

139. Finally, given the accusations levelled at Mr Clarke and other managers by Board members, both at the time of the dismissal and in this proceeding, it is impossible for the applicants to maintain that the relationship was fundamentally healthy. These accusations have included allegations of incompetence, dishonesty, corruption and persistent under-performance. Mr Atkinson, both before the dismissal[38] and in this proceeding, has asserted that Mr Clarke and other managers

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[38] See, for example, Exhibit F to Mr Clarke's affidavit – Mr Clarke records a meeting with Mr Atkinson on 19 November 2007 in which Mr Atkinson expressed his view that there was "a conspiracy among management to get rid of the Board".

had "turned on" the Board and conspired to bring about its dismissal. It is difficult to imagine clearer evidence of a relationship that had ceased to function.

The Decision

140. On the morning of 27 February, the Minister spoke by telephone with the Director-General of Health, Mr Stephen McKernan, shortly before the Minister flew to Wellington. The Director-General deposes that he and the Minister discussed the two options still under active consideration, and that it was apparent that the Minister had still not made a final decision.[39]

141. The Minister met with key advisers and went through the material the Board had supplied. The Minister deposes that he was looking for significant new information in the Board's response that might give him confidence that an option short of dismissal might be appropriate.[40] After the Board's response was received, the Minister asked his communications staff to prepare two press releases, one announcing the appointment of a Crown Monitor, the other announcing the appointment of a Commissioner.[41] The former included a paragraph that began "[t]he Minister has studied the Board's written submission and he says he was persuaded to allow the Board to continue with the appointment of a Crown Monitor".

142. After meeting with advisers, the Minister took some quiet time to reflect on the material before him. He deposes that he spent around half an hour alone weighing the options and arguments. Far from disregarding the fact that the Board had recently been elected by the local community, the Minister notes that the fact that the Board enjoyed the community's confidence was the factor that made him pause longest before deciding to dismiss it. The Minister was acutely aware of how

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39 Mr McKernan's affidavit, paragraph 18.

40 Minister's affidavit, paragraph 108.

41 Minister's affidavit, exhibits **DC31** and **DC32**.

significant a step it was to dismiss a Board on which there were locally elected members.[42]

143. Nonetheless, the Minister reached two clear conclusions – first, that he did not have sufficient information to determine where the fault lay in the dispute that had arisen between the Board and management, and second, that no matter how blame was apportioned, there was clear evidence of dysfunction which had brought the Board to a state where it was unable to discharge its obligations effectively. The Minister formed the judgement that only the dismissal of the Board would provide the immediate resolution of the conflict that the situation demanded. The Minister concluded that it would be unfair to put a new Chair into this environment, and did not believe that this was an appropriate case for the appointment of a Monitor.

144. The Minister's ultimate judgement was that things could not continue as they were. As the Minister observes, this was not a decision to side with management or Mr Hausmann at the expense of the Board.[43] Rather, it was attempt to get a divided and dysfunctional organisation working again, at a time when urgent action was required.

145. Analysing the decision against the statutory criteria, it is plain that the Minister *was* seriously dissatisfied with the Board's performance. The applicants do not, and cannot, allege otherwise. Instead, they say that the Minister should not have been seriously dissatisfied. As noted above, what others think of the Minister's assessment is irrelevant. It was the Minister's view that mattered. Moreover, this view cannot be dismissed as irrational. The Minister had a clear foundation, both in the course of events that had unfolded over the previous three months, and in the Board's own remarks, for the conclusion he reached.

146. The Minister's decision was conveyed to Mr Atkinson by telephone. Ironically Mr Atkinson, who denies that he sought to use the media to his advantage throughout the months leading to his dismissal, had seen to it that journalists from both the

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42 Minister's affidavit, paragraph 121.

43 Minister's affidavit, paragraph 113.

print and broadcast media were present, as were representatives of the public relations firm Mr Atkinson had hired.[44]

147. While relevant only to the issue of relief, should it arise for consideration, it is notable that all concerned have attested to the immediate improvement in the DHB's performance, and the great improvement in the organisation's environment, since the appointment of the Commissioner. Mr Roche, who serves as Deputy Commissioner, observes that, when he and Sir John Anderson arrived, they found senior management in a state of distress, fatigue and uncertainty, where conflicts had become personalised and where there had ultimately been a breakdown in normal functioning between management and the Board. Nonetheless, Mr Roche found that the organisation was managed in a competent manner, and deposes that it is now running smoothly. Progress has been made toward financial sustainability and more efficient service delivery, and management is able to get on with its task without improper interference, and without rancour or acrimony.[45]

148. The Review Panel, when it reported, reached conclusions that were entirely consistent with the Minister's. Though the Panel had access to far more evidence than the Minister, had conducted a very wide-ranging inquiry, and had obtained detailed feedback from Board members, the conclusions it reached were essentially identical to those which prompted the Minister to dismiss the Board. In particular, the Panel concluded that the Board had consistently sought to blame management while accepting little responsibility itself, yet the Board had substantial problems. It also noted that a seriously eroded and dysfunctional relationship had existed for some time between the Board and management, and would not have been resolved between the Board and management on their own, without external input.[46]

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44 See, for example, Minister's affidavit paragraph 114, and exhibit **DC13**. Mr Atkinson's evidence that he engaged the public relations firm only for the purposes of assisting with his re-election, and that the firm's role was "completed prior to the October 2007 elections" (Mr Atkinson's third affidavit, paragraph 70) appears to be incorrect.

45 Affidavit of Brian Roche, paragraph 6.

46 See paragraphs 7.9-7.11 of the Review Panel's report, reproduced in full at paragraph 233 below.

GROUNDS OF REVIEW

149. The most recent statement of claim appears to challenge the dismissal on four grounds, namely:

149.1 The decision was "unreasonable and disproportionate";

149.2 The Minister acted with bias and/or predetermination in dismissing the Board;

149.3 The decision was undertaken without regard to the principles of natural justice; and

149.4 The Minister acted in excess of the power conferred on him by s 31(1) of the Act.

Unreasonableness

150. The applicants cite no authority in support of their submissions under this heading. As a result, they misconstrue the (very limited) basis on which the Court will intervene on the grounds of unreasonableness / irrationality.

151. Though it is pleaded, the applicants make no separate submissions regarding proportionality. This is probably deliberate as proportionality has not, to date, been adopted as a discrete ground of review in New Zealand, and its emergence in England is closely tied to Britain's membership of the European Union. (See *Powerco and anor v Commerce Commission and anor* CIV 2005-485-1066, Wellington Registry, 6 June 2006 per Wild J.) In New Zealand the concept tends to have been incorporated in the intensity with which the courts will review the reasonableness of a decision.

152. As for the boundaries of so-called *Wednesbury* unreasonableness, these were also helpfully summarised by Wild J in *Powerco.* His Honour observed:

> [21] ... the grounds for judicial review recognised in New Zealand remain firmly those stated by Lord Diplock in *CCSU v Minister for Civil Service* [1985] 1 AC 374 (HL), namely illegality (unlawfulness is perhaps a more

contemporary expression), irrationality (by which Lord Diplock explained he meant *Wednesbury* unreasonableness) and procedural impropriety. These grounds are captured in Cooke J's wonderfully succinct statement in *New Zealand Fishing Industry Association Inc. v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) that the Minister "was bound to act in accordance with law, fairly and reasonably" (at p 552). Obviously, I have excluded proportionality as a ground for review recognised in this country.

[22] Second, the focus remains firmly on the decision-making process, rather than the correctness (or otherwise) of the decision itself. If the unlawfulness ground seems irreconcilable with this, the explanation is that a decision-maker which misdirects itself in law ("asks itself the wrong question" or "applies the wrong legal test" – as it is often put) cannot, by definition, arrive at the correct answer. However, a Court will not interfere with a decision reached by a faultless process, although it might heartily disagree with it. In this case the Court will not be intervening unless it is satisfied that no reasonable regulatory authority with the Commission's powers, properly directing itself as to the law, would have imposed control on Powerco and Vector. That emerges from this passage in the judgment of Lord Ackner in the House of Lords in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 757G-758A:

> Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its view, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court, in the exercise of its supervisory role, will quash that decision. Such a decision is correctly, though unattractively, described as a 'perverse' decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made, is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision, that is to invite an abuse of power by the judiciary."

153. Wild J's observations were not challenged on the subsequent appeal, nor did either the High Court or the Court of Appeal depart from them when the substantive review was determined.

154. As noted above, the intensity with which the Court will review the reasonableness of the Minister's decision will depend, in large part, on the nature and context of the particular decision. In *Powerco*, Wild J observed that the Courts have moved

away from a single *Wednesbury* standard to an intensity of review appropriate to the subject-matter.

155. Having regard to the nature and context of the Minister's decision, including the statutory framework, only a clearly discernable irrationality on the Minister's part would warrant the Court's intervention. The reasons for this have already been discussed (see paragraphs 69 to 74 above). In short:

155.1 The Minister's decision was not a purely administrative or quasi-judicial one; it was a matter of intense public interest and debate with obvious potential for political controversy. It is a decision for which a Minister is responsible to Parliament.

155.2 The decision reflected the Minister's view of the appropriate lines of accountability between the Crown and DHBs. The decision to dismiss the Board reflected policy considerations that were appropriately within the Minister's province. The legislative framework requires the Minister to hold the DHB accountable for the provision of public health services in New Zealand. In selecting a threshold for dismissal that turns on the Minister's assessment of the Board's performance, and providing the Minister with a broad discretion to intervene, or decline to intervene, in the case of poorly performing Boards, Parliament conferred responsibility on the Minister of Health.

155.3 The selection of a threshold that turns on the Minister's satisfaction is also a significant indication that Parliament did not intend the Courts to entertain an appeal, or to conduct a general inquiry into the success or otherwise of a sacked Board.

156. In light of this analysis, it goes without saying that it would be inappropriate for the Court to embark upon the exercise proposed by the applicants – effectively a broad appeal by the Hawke's Bay Board, with a view to establishing that this was a "good Board" that should not have been dismissed. The focus of an application for judicial review must remain on the Minister's decision. The applicants effectively

invite the Court to consider different evidence, and to substitute its own view of the merits of the decision for the one reached by the Minister.

157. The applicants assert that because the DHB had, in the year prior to the dismissal, met many of its key performance indicators, had continued to deliver services satisfactorily, and had, for the year ended 30 June 2007, produced outcomes consistent with the District Annual Plan, the Minister should not have been seriously dissatisfied with its performance.

158. The answer to this submission is obvious – the Minister *was* seriously dissatisfied with the Board's performance. The reasons for this are set out above. The applicants' submission that the Minister may only become seriously dissatisfied with a Board based on "objective criteria and accountability mechanisms under the Act" is simply incorrect, and contrary to the plain words of the section (as discussed above at para 66).

159. As outlined above, there is no dispute or evidence but that the Minister *was* seriously dissatisfied with the Board's performance. Moreover, the evidence disclosed a clear and rational basis for reaching that state. There is no basis on which the Minister's decision might be said to be unreasonable.

The brief tenure of the 2007 Board

160. As part of their submission about the reasonableness of the Minister's decision, the applicants submit that the Minister could not be seriously dissatisfied with the performance of the 2007 Board because it had only been elected the previous October. This submission ignores two things. First, the breakdown in the Board's relationship with management, and the other matters that were of concern to the Minister (such as the Board's inappropriate public comments, and the Board's deteriorating financial position) were immediate rather than historic problems. The relationship with management had been poor for some time, but it reached a state of complete collapse from November 2007 onwards. The public and private pressure designed to undermine the Minister's deferral of the appointment of a new Chair occurred after the DHB elections. Though the Board's finances had been in

a difficult state for some time, the Minister's concern about them became acute after Mr Atkinson's letter of 4 December 2007.

161. Secondly, this was scarcely a new Board. It had only two new elected members. As the Minister observed in his affidavit:

> "[112] ... As to the criticism that the Board had only just been elected, as previously noted I did not consider this was a completely 'new Board' as has been claimed. Such a view was not consistent with the practical reality of the situation. Almost all the Board members had been on the Board during the 2004 - 2007 term (only two new members were elected in October 2007) and the majority had been members since 2001. The dysfunctional relationship between the Board and others had persisted for some time (another matter the Review Panel later confirmed), and I considered that I could not correct this through simply appointing new members to the Board."

Irrelevant Considerations

162. The applicants allege that the Minister took account of two irrelevant considerations; these allegations are pleaded as part of the complaint of unreasonableness rather than as a separate ground. The applicants allege that the Board's relationship with the Chief Executive was irrelevant, as were the views of Dr Grayson and Dr Tustin.

163. The suggestion that a Minister is obliged to ignore the fact that a Board's relationship with its Chief Executive and senior managers has become dysfunctional is a surprising one. Section 31(1) creates no such restriction; a Minister may take account of any relevant factor that causes him or her to become seriously dissatisfied with a DHB's performance. Building a successful working relationship with the organisation as a whole, and the Chief Executive in particular, is a core function of a Board of a DHB. A failure in that relationship has obvious potential to damage the integrity of the organisation and impact upon the delivery of health services. It was entirely open to the Minister to conclude that a state of entrenched dysfunction between Board and management was a relevant (indeed decisive) factor when considering his discretion under s 31(1).

164. Similarly, it was open to the Minister to take account of the information he received from Drs Grayson and Tustin. Indeed, the applicants' submission does not really suggest otherwise; rather, the applicants submit that the Minister erred by not taking account of the views of other clinicians who were supportive of the Board.

165. There can be no complaint about the Minister obtaining information from whatever source he wished, provided that information is capable of bearing on the performance of the Board. It was for the Minister to decide what weight to attach to the information provided by Drs Grayson and Tustin. The complaint that the Minister should, in fairness, have put these clinicians' views to the Board for comment is addressed under the natural justice heading below, though it is clear that the Minister recognised that many clinicians strongly supported the Board, and did take this into account when reaching his decision.[47]

Bias / Predetermination

166. The applicants have not sought to link their submissions under this heading with the applicable law. While the evidence clearly demonstrates that the Minister made up his mind to dismiss the Board only on 27 February 2008, it would not matter particularly if he had expressed an intention to do so earlier, provided he genuinely satisfied himself that the statutory criteria had been met at the time the decision was actually made. As Cooke J observed in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 179:

> "In relation to decisions under s 3(3) I think that no test of impartiality or apparent absence of predetermination has to be satisfied. Any other approach would make the legislation practically unworkable. The only relevant question can be whether *at the time of advising* the making of the Order in Council the Ministers genuinely addressed themselves to the statutory criteria and were of the opinion that the criteria were satisfied. If they did hold that opinion at the time, the fact that all or some of them may have formed and declared the same opinion previously does not make the order invalid. No doubt, if Ministers had approached the matter with minds already made up, the inference could be drawn that they could not genuinely have considered the statutory criteria when making the Order in Council. But the newspaper reports fall short of

47 Minister's affidavit, paragraphs 60 and 61.

showing closed minds. And the terms of the Order in Council show that minds were not closed."

167. The detail of the applicants' allegations under this heading is unclear. This part of the claim was based initially on a series of innocuous documents that Mr Atkinson characterised as "smoking guns" showing that the Minister had resolved to appoint a Commissioner well before 27 February. All of these documents had been misunderstood or misconstrued by Mr Atkinson, and all are explained in the affidavits of the Minister and Dr Anderson.

168. In particular, two draft and incomplete papers, written by Dr Anderson and mistakenly disclosed to the National Party Research Unit which in turn passed them to the applicants (exhibits JJ and KK to Mr Atkinson's second affidavit), were not written in December 2007, as Mr Atkinson wrongly continues to assert, but were begun on 18 February, and completed the next day.[48] Exhibit KK used an earlier Capital & Coast DHB paper, from the previous December, as a template. Even a cursory reading of that document, which contained comments such as "The Minister of Health recommends that Cabinet note that I intend to choose from two possible options for appointment to the Capital & Coast DHB Board", should have alerted Mr Atkinson to his error. Similarly, Exhibit JJ is a Ministry of Health report and Dr Anderson used an earlier document, which covered appointments to a number of Boards, as a template.[49]

169. Dr Anderson worked on the documents at home on the evening of 18 February 2008 and emailed both drafts back to his work address, in an unfinished state, shortly before 9pm that evening.[50]

170. Mr Atkinson also misread a letter the Minister wrote to Mr Hausmann in March 2008 (Exhibit II to Mr Atkinson's second affidavit). In that letter, the Minister responded to Mr Hausmann's request to take leave from the Hawke's Bay Board by

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48 For example, the completed version of Mr Atkinson's exhibit KK is exhibit E to Dr Anderson's affidavit.

49 Dr Anderson's affidavit, paragraph 8.

50 See Dr Anderson's affidavit, paragraph 9; see also exhibit JJ to Mr Atkinson's second affidavit, indicating that the two documents were emailed to Dr Anderson's Ministry of Health address at 20:52 on 18 February 2008.

noting that "events [had] now overtaken" the request.[51] Mr Atkinson mistook the date that the letter was sent to the Ministry for draft reply (13 February 2008) for the date of the letter itself. Again, even a quick reading of Mr Atkinson's exhibit HH, which indicated that the Ministry's draft reply was due in the Minister's office by 7 March, and that the reply itself was due by 12 March, should have forestalled the feelings of nausea that Mr Atkinson says he experienced when reading this correspondence.[52] Surprisingly, in light of this, the applicants appear to persist with the allegation that Exhibit II was written on 13 February 2008.[53]

171. Similarly, the applicants do not appear to have abandoned their reliance on Mr Atkinson's Exhibit JJ, and continue to assert that it was prepared before 13 February 2008, with the apparent implication that consideration was being given to the dismissal of the Board more than a week before the Minister wrote to the Board on 20 February. Even if this were true, it would scarcely be evidence of bias or predetermination. That said, Exhibit JJ itself, which incorporates Dr Anderson's email of the half-finished health report to himself on the evening of 18 February, confirms that this document was still in preparation at that time. The applicants effectively assert that Dr Anderson's evidence in this regard should not be believed; such an assertion is not open to them given the absence of evidence to the contrary and that they have made no application for leave to cross-examine him.

172. Leaving aside Mr Atkinson's foray into the field of forensic document analysis, there is a wealth of material which shows that the Minister did not decide to dismiss the Board until the around midday on 27 February, and that he retained an open mind until that point.

173. First, the Minister instructed Dr Anderson, on or about 12 February, to get on with the process of organising Ministerial appointments to the Board, having decided that he could no longer wait for the Review Panel's report. Dr Anderson presented

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51 Mr Atkinson's second affidavit, exhibits HH and II.

52 Mr Atkinson's second affidavit, paragraph 104; see also paragraphs 136-138 of the Minister's affidavit, which confirm that the letter in question was actually signed out on or about 20 March 2008, more than three weeks after the dismissal of the Board.

53 Applicants' submissions, paragraph 102.

the Minister with a paper indicating possible appointees, and the Minister gave instructions concerning those he preferred. Dr Anderson spent the next few days approaching possible appointees.

174. Next, though Dr Anderson's 18-19 February draft of the Cabinet Policy Committee paper referred to an intention to dismiss the Board, the paper the Minister actually presented to the Committee indicated that he had decided not to do so, despite his serious dissatisfaction with the Board's performance. As noted above (paragraph 113), the Minister had discussed the issue extensively with officials on 19 February, and advised the Committee on 20 February of his intention to appoint Sir John Anderson *as chairperson or member*, and Mr Roche *as deputy chairperson or Crown Monitor.*[54] It noted his intention to make three other Ministerial appointments as well.

175. After discussion with Cabinet colleagues the Minister decided to further consider the option of dismissing the Board. After that meeting, and after further discussion with officials, the Minister decided to write to the Board to seek its response to the matters that had led him to become seriously dissatisfied with its performance.

176. The evidence of the Director-General, Mr McKernan, is also telling in this regard. He notes that he discussed the Hawke's Bay situation with the Minister at their weekly meetings on 11 and 18 February. He deposes:

> "[17] ... We discussed the Hawke's Bay Board at both meetings, and talked both about the options open to him and the advice he was receiving. It was apparent at both meetings that the Minister was genuinely concerned about the state of dysfunction that existed in the Hawke's Bay Board, and was searching for options that would help to resolve this. I can categorically state he had not taken any decision at the time of either meeting."

177. Even after the Board replied to the Minister's letters of 20 and 21 February, the Minister retained an open mind until the afternoon of the 27th. He took advice on the Board's response, which included a detailed analysis from his economic adviser Mr Johnson. On the morning of the 27th, he spoke by telephone with the Director-

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54 Minister's affidavit, exhibit **DC16**, page 6.

General, who deposes that it was clear that the Minister had still not made a final decision, and was still working through the two options under consideration. The Minister directed his staff to prepare two press releases, one announcing a decision not to dismiss the Board. He met with key advisers on the morning of 27 February, and deposes that he went carefully through the material the Board supplied, looking for reasons not to dismiss it.

178. All of the independent evidence, including contemporaneous documents and the evidence of Dr Anderson and the Director-General, confirms the Minister's evidence that he did not make up his mind to dismiss the Board until the day the decision was announced.

179. In addition, and critically, the applicants cannot persist with their allegation that the Minister displayed bias and predetermination without inviting the Court to reject the Minister's evidence (and that of his officials) as untrue. The applicants were warned during the interlocutory arguments on 1 October that they could not make such a submission without seeking leave to cross examine any deponents they will invite the Court to disbelieve.

Natural Justice

180. "Natural justice" is also known as a duty of fairness. The duty is flexible and what is required in a particular situation will vary with regard to the nature of the public body, the particular function being performed, the context in which the function is being performed, and what is said to have gone wrong: *Lab Tests Auckland Ltd v Auckland District Health Board & Ors* [2008] NZCA 385, 25 September 2008.

181. Relevant to this case, as examined above is that: the legislature has left this decision at s 31(1) for the Minister; s 31(1) is broadly worded and requires only that the Minister personally is "seriously dissatisfied" with the Board's performance; that the PH Act does not lay down process requirements for the power to be exercised; and the PH Act does not provide an appeal right against the Minister's decision - instead the Minister is responsible to Parliament.

182. The Minister observed principles of natural justice in reaching his decision by notifying the Board of his dissatisfaction and intention to act, conveying to the Board the reasons he had become dissatisfied, and inviting the Board to respond before deciding whether to dismiss the Board and replace it with a Commissioner or to take another option. He considered the information received with an open mind and sought advice on matters of substance and of process during his decision-making.

183. The Minister was not obliged to consult in the manner the applicants contend. While he conveyed his concerns to the Board, he was not obliged to convey to Board members each piece of evidence that had led him to that view and seek their comment, or to engage in a round of cross-submissions when faced with conflicting evidence. In *CREEDNZ*, at p 178, the Court noted that it is inappropriate to treat the Executive Council or Cabinet as under any duty to follow a procedure analogous to judicial procedure; that comment applies, with equal force, in the present case.

184. The applicants cite *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 in support of the argument that "As in any consultation, being properly informed of the issues and allegations is necessary for effective participation in the consultation process" (para 142), without any reference to context of that decision. In *Wellington International Airport*, various airlines challenged the decision of Wellington International Airport Ltd (a joint venture between the Government and the Wellington City Council under the Wellington Airport Act 1990), to set landing fees for aircraft using Wellington Airport. The airport company was empowered to fix charges but only "after consultation with airlines which use the airport" (s 4(2)(a), see p 674). The Court of Appeal considered what proper consultation would be in **that** statutory and practical context: p 683-684.

185. The alleged duty to consult in this context was limited by the Minister's assessment of what was relevant to his decision. While the Minister had received a wide range of information, much of which was hotly disputed, he was satisfied that the matters about which there was disagreement – for example who was to blame for the

breakdown between Board and management, whether specific criticisms of the Board levelled by Mr Clarke and Mr Hausmann were fair – were not directly material when weighing his decision. The Minister appreciated that he did not have sufficient information to resolve these matters, and would not have dismissed the Board, without obtaining more information, if they had been material.[55] On the other hand, he regarded the matters about which there was no real dispute – the fact that the relationship of trust and confidence between the Board and management had completely collapsed – as very important. There was no need for the Minister to consult further about matters that did not bear on his decision.

186. The applicants cite two particular areas where they say that further information would have been available if the Minister had asked for it. The first concerned the Board's financial performance, the second arose from what the applicants characterise as a series of complaints the Minister had received about the Board, but which he did not ask the Board to comment upon.

Financial performance

187. The Minister did refer his concerns about the Board's rapidly deteriorating financial state to the Board for comment. In particular, he asked the Board to comment on the fact that it was presently running a $3 million deficit, which represented a variance of $3.5 million against budget. He also referred to the predicted year-end deficit of $7.7 million.

188. Plainly, the Minister sought any information the Board might be able to provide by way of explanation for the deficit, and information regarding its plans to bring the budget back into balance. The Board understood this; it did not seek further information under this heading, and made a detailed submission designed to answer the Minister's concerns, which identified a number of factors, said to be beyond the Board's control, that had put it in that position.

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55 Minister's affidavit, paragraph 110.

189. The applicants complain that Mr Johnson's 1 February analysis was not disclosed to them, and say that the Board could have explained why its deficit was, on its face, substantially higher than that of similar-sized Boards if it had had the opportunity.

190. It is certainly true that the Hawke's Bay Board's position appeared to be well behind that of similar Boards; this was one of the factors that prompted the Minister to be concerned by the size of the deficit and to seek an explanation. That said, it was the explanation for the deficit itself that was important, not the size of the deficit relative to other DHBs. If, as the applicants now assert, one of the reasons for the Board's apparently poor position was because it had accrued its MECA liabilities on a monthly basis, then it needed only to say so. In fact, the applicants have only belatedly advanced this explanation.

191. Similarly, if part of the deficit were explained by the fact that the Board had accrued the costs associated with elective procedures for which it had yet to receive funding[56], there was no reason why this could not have been included in the Board's 26 February letter.

192. The suggestion that part of the deficit was underpinned by travel costs associated with the population-based funding formula[57] was referred to by the Board in its letter to the Minister[58], and was taken into account by him.

193. It is apparent that the applicants' complaint under this heading is not about natural justice considerations at all. Rather, the substance of their complaint is that the Minister, acting on the advice of officials, did not accept the explanations the Board offered. Mr Johnson's 27 February paper does not refer to the factor the applicants take gravest exception to, namely the position of the Hawke's Bay Board relative others of similar size.[59] Rather, it includes a detailed analysis of each "driver" of the deficit identified by the Board, and Mr Johnson's opinion regarding its validity. The Minister was entitled to note that the Board's explanation for the deficit had

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56 Mr Atkinson's third affidavit, paragraphs 60-61.

57 Applicants' submissions, paragraph 114.

58 Minister's affidavit, exhibit **DC28**, p 2.

59 See, for example, Mr Atkinson's third affidavit, paragraph 52-58.

changed between December and February, and to accept or reject Mr Johnson's advice as he saw fit.

"Complaints"

194. The applicants assert that the Minister was obliged to refer to the Board any complaints that he received, whether from Mr Hausmann, unhappy clinicians, or otherwise, to the Board for comment. Despite the Minister's repeated confirmation that nothing Mr Hausmann said contributed in any way to his decision to dismiss the Board, the applicants continue, in effect, to allege that the Minister allowed himself to be deceived by false representations that Mr Hausmann had made, and that these figured prominently when the Board was sacked.

195. Mr Hausmann wrote to Minister Hodgson on 4 December 2006 with some suggestions as to Ministerial appointees. He received a standard letter of acknowledgement, which noted that his suggestions had "been referred to the Ministry of Health for its information".[60] More than a year later – on 6 December 2007 – in response to a letter from the Ministry asking him to continue serving as an appointed member while the process of appointments was finalised, Mr Hausmann wrote to the Director-General noting his difficulties in serving on the Board, a letter he copied to the Minister. This letter also discussed his concerns about the draft Review Panel findings. On 30 January 2008 he wrote to the Ministry seeking leave of absence. On 1 February he wrote to the Ministry concerning representations the Board had made to the Auditor-General.

196. There is no evidence that Minister Cunliffe even saw this correspondence; the 6 December letter arrived shortly before the Minister went on leave (11 December), and there were systems in place to ensure that he was not exposed to information or correspondence regarding the Review Panel's work before it finally reported.[61] He did not acknowledge or reply to it. The Minister's office referred the 30 January letter directly to the Ministry for draft reply. The Director-General replied to Mr

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60 Mr Atkinson's second affidavit, paragraph 229.

61 Mr McKernan's affidavit, paragraph 16, Minister's affidavit, paragraph 26.

Hausmann's 6 December letter on 4 February 2008, advising him it would be inappropriate to engage with him on the substance of either of Mr Hausmann's most recent letters until the Panel had reported.[62] More importantly, neither letter featured in any way in the Minister's decision to dismiss the Board. The Minister summed up his attitude to this correspondence in his affidavit:

> "[118] A consistent theme in the applicants' claim is that Mr Hausmann was a key source of information for me, and that I was heavily influenced by him in deciding to dismiss the Board. Nothing could be further from the truth. I have never met Mr Hausmann. I do not know him. I was acutely aware that there was conflict between him and other members of the Board and that allegations against him were under investigation. I knew that his views represented a minority of one on the Board."

197. It follows that whether or not Mr Hausmann's allegations could have been "readily refuted" is irrelevant. The material he provided played no part in the dismissal of the Board, except to the extent that his "dissenting" submission was consistent with the material provided by the majority.

198. In order to give traction to their submission under this heading, the applicants attempt to assert that the relationship between management and the Board was "dented" but had not been damaged beyond repair. The difficulty with this submission is that even the majority of the Board did not argue that its relationship with management was healthy. Moreover, a brief reference to the allegations made about management by Mr Atkinson in this proceeding is all that is required to prove the depth of the antipathy that characterised (and still characterises) that relationship. As noted above, Mr Atkinson considers members of the senior management team to be dishonest, accuses them of attempting to destroy evidence of wrongdoing, describes them as incompetent, and accuses them of conspiring together to destroy the Board. The Board was seeking Mr Clarke's dismissal. In the applicants' submissions, they refer to Mr Newland's opinion that Mr Clarke exhibited no leadership, and accuse Mr Clarke of attempting to suppress this. Equally, Mr Clarke had entirely lost confidence in the integrity of the Board. It is disingenuous to seek to minimise these matters as mere "tension" or "dents".

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62 Bundle

199. As noted in the passage reproduced in paragraph 137 above, the Minister observed that Mr Hausmann's perspective on the breakdown in the relationship between the Board and management, and the letter from Mr Clarke that it attached, provided a further illustration of the highly divided nature of the organisation. As the Minister noted later, this material highlighted divisions that he was already aware of, but he immediately recognised that he was in no position to draw any conclusion as to who was right and who was wrong.

200. The Minister drew his conclusions regarding the breakdown in the relationship from a variety of sources, including Mr Atkinson, and the Board's "majority" submission. As has already been discussed, Mr Hausmann's letter alone, while it made the same point a different way, did not lead the Minister to conclude that the relationship had become dysfunctional. Accordingly, no natural justice issue arises.

201. As noted above, and crucially, the Minister deposes that he would have dismissed the Board even if Mr Hausmann had not written to him at all.[63] Given that Mr Hausmann's submission changed nothing, it is impossible for the applicants to assert that the Minister was obliged to refer it to them for comment, even if an obligation to engage in multiple rounds of consultation on every piece of information available to the Minister could be implied where the Minister is exercising a discretion under s 31(1).

Overreaching

202. The applicants' fourth cause of action alleges that in dismissing the Board the Minister "overreached" his powers by acting in excess of the statutory power conferred by s 31(1) and failing to comply with ss 58 and 41 CE Act.

203. Section 58 CE Act sets out the accountability of Board members for breach of collective Board duties.

204. Section 41 CE Act provides:

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63 Minister's affidavit, paragraph 119.5.

41 Process for removal

A responsible Minister may remove, or advise the removal of, a member, as the case may be, with as little formality and technicality, and as much expedition, as is permitted by—

(a) the principles of natural justice; and

(b) a proper consideration of the matter; and

(c) the different requirements of this Act in relation to the different types of statutory entity.

205. In their written submissions, the applicants appear to argue that:

205.1 Board members did not breach their collective duties and were not advised by the respondent that they had breached collective duties: (para 145-146);

205.2 In taking actions against the Board, the Minister was subject to ss 36-42 of the CE Act, which required the Minister to have regard to the principles of natural justice and a proper consideration of the matter, which he failed to do (para 148-154).

206. In response the respondent submits that whether the Board breached collective duties or not is not at issue; the Minister's decision under s 31(1) had nothing to do with the statutory accountability processes for the breach of collective duties. Second, the applicants are trying to graft a process on top of s 31(1) that is at odds with the legislative framework.

207. The first point is that s 41 CE Act does not apply to dismissal of a Board under s 31(1) of the PH Act. Section 41 applies where an individual member is removed from a Board. The Minister's powers to dismiss a Board and replace it with a Commissioner under s 31(1) and to remove a member under Schedule 3 are

different tools, with different statutory contexts and requirements, as discussed above at para 59-64.[64]

208. The second point is the applicants misunderstand the relationship between the PH Act and the CE Act.

209. The PH Act provides a particular scheme for the removal of members at Schedule 3, as set out above. Clauses 8 and 9 of Schedule 3 expressly cross-reference the CE Act in two respects: clause 8 incorporates s 36 CE Act (so that an elected member of a DHB Board can be removed in accordance with the CE Act provisions for the removal of member of a Crown agent); and clause 9(e) incorporates ss 58(2) and 59(2) CE Act (so that an elected member can be removed for having breached a collective or individual duty).

210. These cross-references were added to the PH Act when the CE Act was enacted in 2004: s 200, CE Act. The PH Act provisions as to the removal of members are more detailed and prescriptive than those in the CE Act; this must be kept in mind when considering the provisions in the CE Act on their own.

211. Section 41 CE Act provides the only procedural guidance in the CE Act as to how the Minister's power to remove, or advise the removal of, members of various types of Crown entities should be exercised. The Minister's powers to remove members of various types of entities (ss 36-39 CE Act) are broadly drafted: for example, s 36 regarding the removal of members of Crown agents simply states that the responsible Minister may remove "at any time and entirely at his or her discretion" a Crown agent; that the removal must be by written notice to the member with a copy to the entity, the notice must state the date on which the removal takes effect, and the removal must be notified in the *Gazette* as soon as possible.

[64] The CE Act envisages that all of a Board may be dismissed at the same time for breach of collective duties: see s 42(2) CE Act, but the CE Act itself does not have a provision similar to s 31(1) where the Board of the statutory entity is removed and replaced with a Commissioner.

212. The purpose of s 41 CE Act, in its statutory context, is to make clear that the process to be followed for removal of a member of various types of Crown entities will vary, but that the principles of natural justice, "a proper consideration of the matter", and the different statutory requirements of different statutory entities will be relevant. It does not prescribe what natural justice obligations will be relevant in which situation. Again, in contrast, the PH Act provides a process in respect of the removal of an individual member and thus does not need an overall guidance provision such as s 41. Thus, while s 41 may be relevant to the removal of Board member under Schedule 3 or s 31(1A) (but not to s 31(1)), it must be read against the detailed provisions already in the PH Act.

213. Thirdly, and in any case, the respondent submits that in making his decision to use s 31 there was no breach of natural justice, for the reasons at paragraphs 182-201 above.

RELIEF

214. The applicants seek an order "declaring the democratically elected members of the Board to be reinstated". This is an unusual formula – if the Minister's decision is valid, and the Court is persuaded to restore the *status quo ante*, the effect would be the restoration of all Board members who were serving at the time of the dismissal, both elected and appointed. The applicants – ironically, given their insistence that the Board was functioning well – appear to be asking the Court to reinstate Board members who they favour, but want to exclude others, notably Mr Hausmann.

215. In any event, it is respectfully submitted that if the Court concludes that there was indeed some formal error in the process that led the Minister to dismiss the Board, it should nonetheless exercise its discretion against quashing the Minister's decision and restoring the Board.

216. It goes without saying that in order for a DHB to function well, its management and governing Board must enjoy a good working relationship. The evidence before the Court – which is far more extensive than was before the Minister – clearly establishes two propositions.

217. First, the relationship between the Board and management had degenerated into a personalised and bitter one, characterised by mutual fear and distrust. The Board had been accusing senior staff of conspiring to bring about the Board's dismissal, and doing so to prevent evidence of its own wrongdoing from emerging. It also accused managers (and Mr Clarke particularly) of lying repeatedly, and corruptly seeking to destroy evidence. On the other side of the coin, management accused the Board of seeking to bully and intimidate it. It accused the Board of seeking to subvert and suppress the Review Panel's inquiry, of lacking any insight into its own (numerous) shortcomings, and reacting vindictively when criticised.

218. Secondly, a sound working relationship, and a harmonious and healthy working environment, has been restored since the arrival of the Commissioner. This is attested to by all of the key participants, including Mr Clarke, Mr Roche and Ms Andrew. The applicants, who represent the wider community of Hawke's Bay and have ongoing dealings with the DHB, have not offered a word of criticism of the governance and management of the organisation since the arrival of the Commissioner.

The breakdown of the relationship between Board and management

219. The affidavit of Mr Clarke, in particular, offers a clear, and fully documented, account of the decline and ultimate collapse of the relationship between the Board and management in late 2007 and early 2008. As has already been noted above, while the applicants seek, in this Court, to characterise the relationship as merely "dented", the substance of Board members' criticisms of senior managers make it plain that the relationship had collapsed completely.

220. The analysis set out below, which largely relies on Mr Atkinson's own communications with Mr Clarke in November 2007, is necessary only because the applicants have sought to depict the Board as blameless in the breakdown of the relationship between the Board and management. As the Minister observed, it was the Board's responsibility to ensure that it maintained a strong working relationship with staff, and if the relationship between Board and management had ceased to

function, it did not matter particularly how this had arisen, as ultimate responsibility lay with the Board.

221. In effect, the Board has depicted itself as having suffered for many years at the hands of a chief executive who was neither competent nor honest. It asserts that the disciplinary process it initiated was designed to rid itself of a poor performer, and that in doing so it was acting responsibly, and in accordance with its duty. These suggestions are entirely incorrect.

222. At a meeting on 20 August 2007, Mr Atkinson believed that he had secured Mr Clarke's agreement that "all communications with the Review Panel would be channelled through one source [the Board's solicitors, Sainsbury Logan Williams]". Mr Atkinson later wrote that the purpose of this process "was to ensure that Hawke's Bay District Health Board as an entity had a properly controlled and co-ordinated interface for all information and involvements with the Review Panel."[65]

223. Instead of requiring all staff to communicate with the Panel through the medium of, or in the presence of, Sainsbury Logan Williams, Mr Clarke directed staff that legal support was available should they wish to avail themselves of it, but that they should co-operate with the Panel, and should be open and frank when answering questions.[66]

224. Mr Wilson deposes that the Panel spoke to more than 20 staff members, including past and present managers and clinicians. All but one was critical of the Board to some degree. Indeed, he observes that:

> "[13] ... With maybe three exceptions – Ms Houston, and two members of the management team whose views were more neutral – members of the Board were the only interviewees who did not make comments that were, to some degree, critical of the Board's performance. Also, while not necessarily critical of the Board, the two more neutral members of management, as well as a number of the Board members, did comment on difficulties between the Board and management, particularly the Chief Executive."

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65 Letter from Mr Atkinson to Mr Clarke, exhibit B to Mr Clarke's affidavit.

66 Mr Clarke's affidavit, paragraph 15.

225. The Panel reduced these criticisms into a document that it circulated to the Board. In most cases, this document did not match names with comments. It included references to the Board bullying staff, Board members undermining individual managers behind their backs, and discussed the general deterioration in trust and confidence as between Board and management over the preceding few months.

226. The Board reacted with disbelief. It immediately sought to arrange a series of meetings with managers designed to identify who had said what. Mr Clarke records that he was appalled at this suggestion. Given that names had deliberately been removed from the document in order to allow interviewees to speak freely and without fear of recrimination, a series of meetings designed to defeat that process would be the worst possible response.[67]

227. Mr Atkinson accepts that the Board was shocked by the staff comments[68], and sought a meeting with senior managers. When Mr Clarke advised that he could not allow such a meeting to occur, Mr Atkinson was furious. He emailed Mr Clarke on 2 November 2007, and said:

> "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".[69]

228. In this Court the applicants, and Mr Atkinson, have sought to portray the disciplinary proceedings – intended to secure Mr Clarke's dismissal – which followed as the culmination of years of dissatisfaction with his general performance. In fact, it is apparent that Mr Clarke's decision to engage in behaviour the Board regarded as obstructive with respect to the Review Panel was the only issue that was ever formally raised. For example, on 6 November 2007, Mr Atkinson wrote to Mr Clarke demanding that he and Ms Andrew turn over notes of Ms Andrew's recent discussion with Mr Wigley, and required Mr Clarke to

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67 Mr Clarke's affidavit, paragraphs 18-19.

68 Mr Atkinson's third affidavit, paragraph 100.

69 Exhibit A to Mr Clarke's affidavit.

explain why he had asked Ms Andrew to approach a member of the Panel without going through Sainsbury Logan Williams. He added:

> "You should be aware that depending on the content of your explanation, a disciplinary process may be commenced. In that regard please carefully consider your response, but provide it to me as soon as possible. ... naturally, please ensure that there is no further apparent breach of the formal agreed process as regards contact with the MOH review panel."[70]

229. Mr Clarke's performance review took place soon after. His rating, under question 4 (which asks whether he had established a trusting relationship with the Board), dropped to 9%. Mr Atkinson has provided a copy of Mr Clarke's previous full year performance review. He has omitted Mr Clarke's more recent interim performance report, completed in February 2007, which noted a 100% improvement under that heading[71]; seven members of the Board had rated his performance satisfactory or better. When Mr Clarke asked why his score under this heading had fallen to 9%, Mr Atkinson told him that it was largely because of the effect of the review on Board-management relations.[72]

230. All of the letters Mr Quigg – the employment lawyer engaged by the Board – wrote to Mr Clarke's counsel concerned his interactions with the Panel. None made any mention of wider performance issues.[73]

231. As has already been observed, Mr Atkinson has apparently been convinced, for some time, that members of senior management at the DHB have been conspiring against the Board. This was a view he held well before the so-called email audit. He made similar remarks to Mr Clarke as early as 19 November 2007.[74]

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70 Exhibit B to Mr Clarke's affidavit.

71 See bundle of documents. It should be noted that the only percentage figure under this column records the degree to which Mr Clarke's performance had improved, and this gives Mr Clarke 100%. In fact, a direct comparison with the scoring system used later in the year, which recorded the percentage of Board members who ranked Mr Clarke's performance "satisfactory or better" would have seen him record a score of 64% – or seven Board members out of eleven.

72 Mr Clarke's affidavit, paragraph 27.

73 See exhibits C, D and E to Mr Clarke's affidavit.

74 See exhibit F to Mr Clarke's affidavit, 19 November entry.

232. It follows that the immediate catalyst for the collapse of the relationship between Board and management had nothing to do with Mr Clarke's performance, but arose because the Board considered him to have been insubordinate in his refusal to assist it to control communications with the review Panel, and to conduct an inquisition regarding those managers who had spoken of it critically. It was exacerbated by Mr Atkinson's conviction that management were conspiring against him, and he was undermining the Board to the Review Panel.

233. It is clear that the relationship between Board and management was indeed dysfunctional at the time of the dismissal, and had been for some time. Ms Andrew described it as intolerable[75], and immensely stressful for all involved. As noted above, every staff member spoken to by the Review Panel mentioned the difficulties in this relationship. As the Review Panel concluded:

> "[7.9] While the CEO suggested a way forward in his 17 August 2007 paper on the 'Lessons for management from the Reviews', a consistent theme of the Board's submissions is to blame management, accepting little responsibility itself. We have concluded in Parts 4 and 6 of our report that there are substantial problems in relation to the Board.
>
> [7.10] In the Panel's view, the relationship problems between the Board and management would not have been resolved between the Board and management on their own, without external input.
>
> [7.11] Without resolving who is right or wrong, a seriously eroded and dysfunctional relationship between the Board and management is readily apparent. With the Minister now having taken the step of appointing a Commissioner, the opportunity is available to reduce any negative impact on health service delivery and to deal with relationship and confidence issues, so that an incoming Board can start afresh."

234. The extreme criticism levelled at management, and Mr Clarke in particular, by the Board in this proceeding confirms the Review Panel's analysis. It also confirms that it would be an extraordinarily ill-advised decision for a court to exercise its discretion by returning the Board to its original position. Both Mr Clarke and Ms Andrew confirmed that a number of senior managers were poised to resign unless

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75 Ms Andrew's affidavit, paragraph 8.

there was significant governance change; that outcome was averted by the appointment of the Commissioner.

235. By contrast, the relationship between management and governors in Hawke's Bay is now a productive and healthy one. For example, Mr Roche deposed:

> "[4] A clear picture of the organisation emerged fairly quickly. As the Commissioner's Annual Report will shortly state, we found that operations were being managed in a competent manner by both management staff and the clinical leadership team. At the same time, the senior management team was exhibiting clear signs of fatigue, distress and uncertainty. It was plain that the environment, prior to our arrival, had been characterised by considerable tension, where conflicts had become personalised, and which had ultimately led to a breakdown in communication and normal functioning between management and governors.
>
> [5] The relationship between governors and management should always strike a balance between harmony and a healthy tension, with management's performance both supported and tested by the Board. From my observations, it became clear that this relationship had been out of balance, and that matters had escalated to the point where the conflict itself was consuming the bulk of senior management's energy. It was my understanding that both sides had hired lawyers, and the normal relationship of trust and confidence appeared to be absent. I have no doubt that there was fault on both sides, but I am also certain that a circuit-breaker was needed to get the DHB working again, and focused on the normal business of providing health care services.
>
> "[6] In the time since our appointment, progress has been made on addressing the key issues facing the organisation. Our priority has been to ensure that management has focused on its core tasks, including drawing up a "future directions" project, which is designed to address the long term causes of the organisation's poor financial performance, with a view to more effective and efficient delivery of services. Progress is already being made. Moreover, the organisation is now functioning smoothly. It has sometimes been necessary to test and push managers, but this is normal. Importantly, there is now a proper balance between setting expectations, providing support and direction, and holding management accountable for the outcomes they produce. Management is able to get on with its tasks without rancour or acrimony, and without governors seeking to involve themselves in management's role."

236. Similarly, Mr Clarke noted:

> [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."

CONCLUSION

237. Ministers are often called upon to make difficult decisions; indeed, hard and contentious decisions are often expressly left for the responsible Minister. For such decisions a Minister is responsible to the democratically elected Parliament of New Zealand. The power to dismiss a DHB Board under s 31(1) of the PH Act is such a decision. Indeed, Ministerial control of DHBs is critical to the legislative framework set out in the PH Act and the CE Act.

238. In this case, before the Minister took the decision to use his s 31(1) power, he sought advice both as to the process and to the substance of that decision and as to other options available to him. He followed that advice, although the decision was ultimately his. He gave very careful consideration to the matter, and retained an open mind until the decision was made.

239. At the time of his decision, the financial performance of the Board of the Hawke's Bay DHB was poor, and its relationships with others, most notably its own senior

managers, had become highly dysfunctional. While there were conflicts in the accounts given to the Minister of the source of that dysfunction, all reports agree that conflict existed between the majority of the Board and Mr Hausmann, and between the majority of the Board and senior management at the DHB. Indeed, the relationships had, very publicly, broken down. The Minister's concerns were subsequently borne out by the report of the independent Review Panel.

240. It follows that the Minister of Health was well entitled to dismiss the Hawke's Bay Board, and that in doing so he properly discharged the responsibilities he owed to Parliament.

18 November 2008

J Farmer QC/M S R Palmer
Counsel for the respondents

CHRONOLOGY

Date	Event	Key documents
13 October 2007	Election of 2007 Board: Atkinson, Dunkerley, Kirton, Barry (new), Davidson, Ritchie, Francis (new). Appointed members (Manuel, Mulligan and Hausmann) remained members of 2007 Board.	
5 November 2007	Minister Cunliffe assumes Health portfolio, in briefings is alerted to "serious and worsening problems" at the Hawke's Bay DHB.	Cunliffe, para 15-16
15 November 2007	Telephone conversation between Minister and Mr Atkinson re deferral of ministerial appointments until the Review Panel reports, and regarding deaths of cardiothoracic patients.	Cunliffe, para 41-43 DC5 (p 49)
21 November 2007	Telephone conversation between Minister and Mr Atkinson re draft report from the Office of the Auditor-General.	DC6 (p 51)
4 December 2007	Mr Atkinson writes to the Minister regarding DHB financial performance for the three-month period ended 30 September, reports the situation has worsened and much of the deficit comprises of unrealised efficiencies.	DC1 (p 1)
5 December 2007	HB DHB Board meeting, public criticism by Atkinson of the Minister (reported on 6 December 2007).	DC8 (p 53)
10 December 2007	Elected Board members sworn into office. The Ministry writes to the HBDHB giving notice that officials are considering the Board's Monitoring and Intervention Framework status, notes concerns with financial issues and electives services. Mr Atkinson's article on governance published.	 2KAS (p 207) DC9 (p 54)

Date	Event	Key documents
11 December 2007	Minister on leave from now until 23 January 2008.	Cunliffe, para 20
7 January 2008	Mr Atkinson responds to the letter from the Ministry, notes financial performance, deteriorating elective services performance.	2KAT (p 209)
28 January 2008	Audit New Zealand releases its report on the HB DHB for the year ended 30 June 2007, notes areas of concern including financial sustainability, the Board's management of conflicts of interests, difficulties with procurement policy etc.	DC4 (p 11)
1 February 2008	Minister receives analysis from his financial advisor, Andrew Johnson, on the HBDHB financial situation.	DC2 (p 3)
February 2008	Minister writes to Mr Atkinson and incorporates his response to the letters from 19 September 2007 and 4 December 2007.	DC25 (p 171)
11 February 2008	Minister receives a letter from the Board's Chief Medical Advisor and other senior clinicians.	DC14 (p 60)
12 February 2008	Dr Anderson (MOH) prepares paper for Minister listing possible candidates for appointment to the HB DHB. Letter sent from the Ministry to the Board formally advising the DHB will be moved to "performance watch" for reasons outlined in 10 December letter.	BAA, BAB DC3 (p 8)
13 February 2008	*The Dominion Post* reports Mr Atkinson commenting on the DHB's unrealistic budget.	DC10 (p 56)
14 February 2008	Dr Davidson comments on Radio New Zealand. Telephone conversation between the Minister and Dr Grayson.	DC11 (p 57) Cunliffe, para 56-58
18 February 2008	The Minister requests the Ministry to provide advice on	Anderson, para 7-8

Date	Event	Key documents
	possible options to address his concerns with the HBDHB Board.	
19 February 2008	The Minister meets with officials and advisors to discuss options to address Minister's concerns with the Board. The Minister receives an email from Dr Tustin, and letter from the mayors of Hastings, Napier, Central Hawke's Bay, Wairoa, and the Chair of the Hawke's Bay Regional Council.	Cunliffe, para 78, DC16 (para 67) DC15 (p 61), DC20 (p 94)
20 February 2008	Further meeting between the Minister and officials. Minister briefs Cabinet Policy Committee and discusses with them options for HBDHB. Minister discusses the matter with the Solicitor-General. Minister writes to the Board advising of his serious dissatisfaction with its performance and that he is considering appointing a Commissioner.	Cunliffe para 81-84 DC16 (p 63), DC18 (p 89) DC 19 (p 91)
21 February 2008	Public comment by Mr Atkinson and Dr Dunkerley on the Minister's letter of 20 February. Mr Atkinson writes to Minister on behalf of Board, asking for details of the 'public challenge' referred to in letter of 20 February 2008.	DC21 (p 96), DC22 (p 104), DC23 (p 114) DC26 (p 123)
22 February 2008	The Minister has a teleconference with officials to discuss the Board's letter of 21 February 2008. Minister writes to the Board with examples of public challenges.	DC27 (p 125)
25 February 2008	The Board files an application to injunct the release of the Review Panel's report.	

Date	Event	Key documents
26 February 2008	The Board responds to the Minister's letter of 20 February 2008. Mr Hausmann responds to issues raised in Minister's letter of 20 February 2008. The Minister receives advice from his officials.	DC28 (p 127) DC29 (p 145) DC17 (p 86)
27 February 2008	Minister receives report from his economic advisor Andrew Johnson on the Board's comments on its financial situation and meets with officials for further discussion on the options. Minister speaks with the Director-General of Health about the two options still under active consideration. Minister dismisses Board and appoints Commissioner, advises the Board orally at 3.25pm. The Minister sends a letter to Mr Atkinson outlining the reasons for his decision and why he was seriously dissatisfied with the Board's performance.	Cunliffe para 108-110 DC30 (p 213) McKernan, para 18 DC33 (p 221) DC34 (p 222)
17 March 2008	Report for the Director-General on Conflicts of Interest and other matters at the HBDHB publicly issued	DC36 and DC37 (p 229)