

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 163
5411571

BETWEEN MARY-ANNE BECKINGSALE
Applicant

AND CANTERBURY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Christine Hickey

Representatives: Peter Moore, Counsel for the Applicant
Penny Shaw, Counsel for the Respondent

Submissions received: 22 May 2015 at the investigation meeting from both parties

Investigation Meeting: 17 and 18 November 2014 and 21 and 22 May 2015

Determination: 6 November 2015

DETERMINATION OF THE AUTHORITY

- A. Mary-Anne Beckingsale was unjustifiably constructively dismissed.**
- B. Within 28 days of the date of this determination the Canterbury District Health Board must pay Mary-Anne Beckingsale:**
- (i) Lost wages of \$3,991 gross plus holiday pay of 8% and the employer's portion of Kiwisaver, and**
 - (ii) \$10,000 compensation for humiliation and loss of dignity.**
- C. Costs are reserved and a timetable for submissions has been set.**

Employment relationship problem

[1] Mary-Anne Beckingsale worked as a social worker for the Canterbury District Health Board (the DHB) in women's health from 2002 until she resigned in January

2013. Ms Beckingsale says that she was subjected to *16 months of systematic targeting, bullying and undermining of my ... work.*

[2] Ms Beckingsale claims she was constructively dismissed. In particular, Ms Beckingsale alleges that the DHB did not appropriately deal with her complaints of bullying in that it did not investigate them and address them, either at all, or adequately. She says that the DHB did not provide a safe workplace environment for her despite senior managers being aware of her concerns about her team leader, Keryn Burroughs.¹

[3] Ms Beckingsale seeks humiliation compensation of \$12,500 and lost wages and benefits, including Kiwisaver. She also seeks interest on lost wages, and legal costs.

[4] The DHB denies that Ms Beckingsale was constructively dismissed. It says that it acted appropriately and that Ms Beckingsale resigned without making a formal complaint and so did not give the DHB any opportunity to investigate and resolve any ongoing concerns after January 2012.

Issues

[5] The issues the Authority needs to determine are:

- (i) Whether the DHB breached any of its duties to Ms Beckingsale, causing her to resign. If so, did that lead to a breakdown in the implied term of trust and confidence that Ms Beckingsale was entitled to have in her employer?
- (ii) Whether Ms Beckingsale is entitled to remedies.
- (iii) Whether Ms Beckingsale contributed in any way to the situation giving rise to her personal grievance/s, if proved.
- (iv) Costs.

¹ In the alternative Ms Beckingsale claimed a number of personal grievances of unjustified disadvantage the majority of which had not been raised within 90 days of them occurring or coming to Ms Beckingsale's notice.

Procedural background

[6] An investigation meeting was set down for two days for November 2014. Further relevant documents were identified during the first investigation meeting and a process was put in place for them to be provided and exchanged with appropriate redactions. More witnesses were identified after the investigation meeting and a further two days of investigation meeting were held in May 2015.

[7] All the witnesses lodged written statements of evidence. Witnesses for Ms Beckingsale included her former social work colleagues, Sarah Kidd, Susan Radford, Sharron Eastwood, Jacqueline Bould; Nicci Weild who remains employed by the DHB and who was summoned; Ms Beckingsale's partner, David O'Neill and Darral Campbell, the former team leader of the women's social work team. Witnesses called by the DHB were Ms Burroughs; Mary-Anne Farr, who at the relevant time was the HR Advisor for Women's and Children's Health, Kim Gorrie, the Administrator of the Women's Social Work team at the relevant time, Sylvia Cramer-Roberts and Caroline Oliver, former social workers from the Women's Health team and Penny Maher, Clinical Manager of Social Work Services.

[8] Under oath or affirmation, each witness confirmed their own statement and answered questions from me and the parties' representatives. The representatives also had the opportunity to provide closing submissions on the facts and legal issues. Some of the witnesses gave evidence during the November 2014 investigation meeting as well as the May 2015 investigation meeting.

[9] I have not recorded all the evidence given by witnesses including that which was called to discredit the credibility of some of the other party's witnesses. I specifically wish to record here that I have not made a finding of fact about who sent the anonymous letter about Sylvia Cramer-Roberts to her new employer as it is not necessary for my determination. However, given the nature of the claim and the time over which Ms Beckingsale's concerns ran I have included a fairly full account of the events relied on by Ms Beckingsale and examined all the events and allegations set out in the revised statement of problem to consider whether they had the cumulative effect of amounting to constructive dismissal.²

² *Ramkissoon v Commissioner of New Zealand Police* [2013] NZEmpC 147 and *Pivott v Southern Adult Literacy Centre* [2013] ERNZ 377

The law on constructive dismissal

[10] The very nature of a claim for constructive dismissal is dependant on the events that preceded it; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.³

[11] One type of constructive dismissal scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence.⁴ If an employer acts that way it is not necessary to show that the employer intended to repudiate the contract.⁵

[12] To found a claim for constructive dismissal the breach or breaches of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable.⁶

[13] Repudiatory contract by the employer may involve a series of events over a period of time such that no single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect of all the events may be.⁷

[14] It is possible that the atmosphere in a work place, and not necessarily any actions directed at the complainant, could amount to or contribute to constructive dismissal. In the Employment Court case of *Harrod v DMG World Media*⁸ Judge Goddard wrote of constructive dismissal:

*I have no difficulty in accepting that it can consist of creating an atmosphere in which employment is unlikely to be able to continue or to continue for very long. This can take many forms but its existence still needs to be proved.*⁹

[15] Judge Goddard gave the example of an English case in which it was accepted that:

³ *Commissioner of Police v Hawkins* [2009] NZCA 209

⁴ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372

⁵ *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407

⁶ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

⁷ *Lewis v World Motor Services Limited* [1986] ICR 157 (CA)

⁸ [2002] 2 ERNZ 410

⁹ *Harrod*, *ibid* at paragraph [41]

*Conduct amounting to a repudiation of the contract of employment may be a series of small incidents and may be something which develops over a period of time.*¹⁰

[16] Relevant events amounting to the atmosphere or culture of an organisation can accumulate over time. Judge Goddard went on to recognise that any evidence of atmosphere could only be general in nature.¹¹

[17] Therefore, it is possible that the history of the relationship between Ms Beckingsale and Ms Burroughs could form part of the basis of a personal grievance of constructive dismissal. In the *Ramkissoo* case Chief Judge Colgan wrote:

*...there are many cases in which a dismissal takes place after a very long period of disputation, unsatisfactory relations, and the like which, to the extent that they are relevant, must all be taken into account in determining the question of justification for an actual or constructive dismissal.*¹²

[18] It appears Ms Beckingsale's claim falls into either the category of the DHB following a course of conduct with the deliberate purpose of coercing her to resign, as some of Ms Beckingsale's evidence suggests she believed at the time, or into the category of a series of events, at least some of which she alleges were breaches of contract, culminating in a "final straw" leading her to treat her employment contract as repudiated by her employer.

[19] The DHB appears only to have addressed the latter category in its submissions but from the evidence of its witnesses it is clear that the DHB rejects any suggestion it had the deliberate purpose of coercing Ms Beckingsale to resign.

[20] In *Pivott v Southern Adult Literacy Incorporated*¹³ Judge Ford drew from an English case¹⁴ which examined final straw cases in the UK and stated that he could

¹⁰ *Garner v Grange Furnishing Ltd* [1977] IRLR 206.

¹¹ *Harrod*, *ibid* at paragraph [44].

¹² *Ramkissoo v Commissioner of New Zealand Police*, *ibid*.

¹³ [2013] ERNZ 377

¹⁴ *Triggs v GAB robins (UK) Ltd* [2007] 3 All ER 590

not see any reason why the statements of principle in that case should not have equal application in New Zealand and reproduced a quote from that case¹⁵:

We derive the following principles from Omilajau.¹⁶ (1) the final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.

(2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, [she] cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.

(3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the “final straw” consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.

(4) An entirely innocuous act on the part of the employer cannot be a “final straw” even if the employee genuinely (and subjectively) but mistakenly interprets the employer’s act as destructive of the necessary trust and confidence.

[21] In deciding whether an employer’s conduct amounted to a breach of the implied term of trust and confidence in *Wellington etc. Clerical Workers Union IUOW v Greenwich*¹⁷ Justice Williamson said:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.

Factual background

[22] Ms Burroughs undertook her practical placement as a social work student at Christchurch Women’s Hospital. She returned to the DHB as a Maternity Social Worker in 2008 working alongside Ms Beckingsale and a number of the other witnesses, most of who had been employed longer than her. The position of Acting Team Leader was advertised internally in late 2010. Ms Burroughs was appointed to a .8 position as Team Leader and a .2 role as a social worker.

¹⁵ Ibid paragraph [32]

¹⁶ [2005] 1 All ER 75 at [19]-[22]

¹⁷ [1983] ACJ 965

[23] Ms Burroughs' appointment was not universally popular with the staff that reported to her, a number of whom believed she was too inexperienced to be in a management role. There was also dissatisfaction that the permanent position had not been externally advertised. In addition, shortly after Ms Burroughs was appointed the DHB instigated the first of two significant restructuring processes that had a significant impact on the social work team effectively disbanding it and requiring all social workers to become a part of the Allied Health services division of the DHB. Ms Burroughs was tasked with implementing those changes.

Pay for attending a union meeting and first assault allegation

[24] In later July or early August 2011 some social workers, including Ms Beckingsale, attended a union meeting in work time.

[25] On 3 August 2011 Ms Gorrie addressed the social work team and told them that the DHB was not obliged to pay them for the time during which they had attended the meeting. This was the catalyst for the first serious allegation against Ms Beckingsale.

[26] Ms Gorrie alleges that Ms Beckingsale spoke rudely and aggressively to her in that meeting and afterwards failed to acknowledge her or would *look me up and down in the corridor*.

[27] In a report written on 22 September 2011¹⁸ Ms Gorrie alleged that at 10.20 am on 17 August 2011 in the corridor between the social work office at Christchurch Women's Hospital and the physiotherapy office she and Ms Beckingsale were walking towards one another. She wrote that she acknowledged Ms Beckingsale:

with a smile, no response from Mary-Anne. Mary-Anne walked towards me and pushed her right shoulder into my right shoulder. ... Mary-Anne kept on walking.

[28] On 17 August 2011 at 11.05 am Ms Gorrie sent an email to Ms Beckingsale, copied to Ms Burroughs, informing her that she had made an appointment to:

see Helen Little¹⁹ with regards to your behaviour towards me since our last social work meeting on the 3rd August 2011.

¹⁸ Ms Gorrie did not make a formal written report until after Ms Waite asked her to fill in an incident report in late September 2011.

¹⁹ Who Ms Gorrie reported to.

[29] I note that Ms Gorrie does not refer to the alleged assault she later reported that allegedly happened about 45 minutes before she sent her email. I find that somewhat odd. However, I accept Ms Gorrie's evidence that she talked to Ms Little about the incident as well as what she considered other inappropriate behaviour towards her from Ms Beckingsale.

[30] Ms Beckingsale denies Ms Gorrie's allegation.

[31] On the same day Ms Beckingsale replied to Ms Gorrie by email, with a copy to Ms Burroughs :

By all means –

I went to a Union meeting. ... To my mind I have not done anything I was not entitled to do. It was suggested that my pay be docked. Why? I have since had referrals blatantly handed to a casual Social Worker in front of me – I have been excluded from group emails. Why? I work hard and don't expect to be treated in this vindictive manner so if what you are referring to is my decision to keep my distance from you then so be it.

There are more important things in my life so please address any further issues you have with me with Keryn. I'm sure they are too busy for such petty behaviour because I know I am.

[32] Ms Beckingsale does not appear to consider that the pay announcement by Ms Gorrie was evidence of Ms Burroughs bullying her. However, she has identified the events as part of the history of her claims. Ms Beckingsale considered Ms Gorrie to be Ms Burroughs' *side kick* and to be following management directions.

[33] Ms Burroughs says that Ms Gorrie made a verbal allegation of assault by Ms Beckingsale but she did not investigate that because she believed Ms Gorrie was mistaken. Ms Gorrie did not make a written complaint or file an incident report in August.

[34] Ms Beckingsale was not informed of Ms Gorrie's assault allegation until late September 2011 when she was informed verbally by Ms Waite of both Ms Burroughs' allegation of assault and Ms Gorrie's allegation at the meeting with Ms Beckingsale's lawyer on 21 September 2011 (see below). That was arguably too late to be a fair raising of such a serious allegation when it had been reported to management at the time but discounted and not raised with Ms Beckingsale. The ability to adequately investigate the allegation was also compromised by such a late attempt to deal with it. In any event no action was taken in relation to the allegation.

Ms Beckingsale's employment status and mutual assault allegations

[35] The first events that Ms Beckingsale says are evidence of Ms Burroughs bullying her began in August 2011. Ms Burroughs consulted Ms Farr about Ms Beckingsale's employment status. Ms Farr reported that according to Ms Beckingsale's individual employment agreement (IEA), signed on 4 May 2011, she was a *casual* employee but that there would be no harm in conducting a performance review.

[36] Ms Burroughs informed Ms Beckingsale that she was a casual employee, and also told her that the DHB did not intend in the future to engage casual social workers. That upset and unsettled Ms Beckingsale.

[37] Although the May 2011 IEA referred to Ms Beckingsale as a casual employee in fact she regularly worked a minimum of 6 hours a week after she signed that and other hours as requested to fill in for occasional vacancies.

[38] On 19 August 2011 Ms Farr notified Ms Burroughs that if Ms Beckingsale worked a regular pattern of hours and days she would be a part-time and not a casual employee. Ms Beckingsale understood that the IEA guaranteed her a minimum of six hours a week and told Ms Burroughs that. Ms Burroughs checked with Ms Farr whether the IEA said that Ms Beckingsale was entitled to 6 hours work a week and was told that it did not. However, neither Ms Burroughs nor Ms Farr checked the time and wages records to confirm whether Ms Beckingsale had been working a regular pattern of hours meaning that she was, in reality, a part-time and not a casual employee.

[39] Ms Beckingsale put in a form requesting paid annual leave in December. Ms Burroughs told Ms Beckingsale that she was not guaranteed any minimum hours of work and should not be accumulating paid annual leave. Her accrued annual leave was paid out to her at the DHB's initiative.

[40] On 12 September 2011 Ms Burroughs twice requested that Ms Beckingsale meet with her to *discuss her casual contract details*. Ms Beckingsale replied that she was too busy and on 13 September 2011 she was away on sick leave.

[41] Ms Beckingsale and Ms Burroughs have very different views about the interactions between them on 14 September 2011. Ms Beckingsale says that she went

to Ms Burroughs' office at her request where Ms Burroughs talked down to her and refused to listen to her point of view.

[42] They agree Ms Burroughs instructed Ms Beckingsale to surrender her key to the social work office. At the investigation meeting Ms Burroughs said she did so because of Jane Waite's concerns about how many people had keys after a key was lost. At the time Ms Burroughs did not tell Ms Beckingsale that was why she wanted the key back.

[43] Ms Beckingsale was upset by these events and felt that her professional competence was being questioned and her years of experience counted for nothing in not being trusted with a key to the office and having to ask others to lock and unlock the office. Previously she, and the other social workers, had worked with a great deal of autonomy from Ms Campbell's day to day management.

[44] Ms Burroughs says that at the end of the meeting Ms Beckingsale left saying *you are on a power trip and you and your sidekick should watch out.*

[45] Ms Beckingsale says she advised Ms Burroughs that she was thinking of resigning. She went back to her office and sent her resignation by way of email stating that her resignation was effective immediately:

I am extremely upset to leave a position I love ... You are destroying a very solid and good team of Social Workers and I will not watch people I have a huge respect for, myself included, be demoralised.

I don't know who you have become and who you think you are but team leader you aren't.

[46] Later, as Ms Beckingsale was getting ready to leave the department to go to external supervision Ms Burroughs asked her to come and have another discussion in her office. Ms Beckingsale did so. Ms Burroughs told her she did not accept her resignation.

[47] Ms Beckingsale says that Ms Burroughs shouted at her that as a casual she would have to report to Ms Burroughs every morning. She says that Ms Burroughs blocked her exit from the office and she felt very uncomfortable and had to manoeuvre herself out of the office. She went to her own office to collect some of her belongings when Ms Burroughs:

... confronted me in my own doorway again in a way so that I could not pass and again shouted at me and I felt threatened and intimidated ... She appeared extremely agitated – shouting at me that I should not be attending supervision as I was ‘only a casual’. Again I had to manoeuvre around her as she was blocking the doorway to which she shouted ‘do not push past me’.²⁰

[48] Ms Beckingsale had been provided with such supervision throughout her many years of employment with the DHB and was distressed to hear she may no longer be entitled to it.²¹

[49] Ms Burroughs’ view of the events was that she tried to engage with Ms Beckingsale to understand her point of view and why she was unhappy with her casual status but that Ms Beckingsale *was very unwilling to discuss anything with me.*

[50] She agrees that she did tell her that Ms Beckingsale should report to her at the commencement of each period of work so she could tell her where she would be needed for the day.

[51] However, Ms Burroughs says the encounter in which Ms Beckingsale describes being in her office with the door being blocked was in a corridor which was wide enough for Ms Beckingsale to pass without physical contact. Ms Burroughs says that:

I again said something like can we please just discuss this, she turned and grabbed my right arm and pushed²² me towards her and then shoved me away. She didn’t say anything and just walked off.

[52] Ms Burroughs went to report the incident to Ms Farr and wrote an account of it.

[53] There was some misunderstanding about whether or not Ms Beckingsale had resigned after Ms Burroughs had told her she did not accept her resignation. Ms Beckingsale made it clear that she withdrew her resignation and had engaged and employment lawyer who considered that she had grounds for a personal grievance.

[54] Ms Beckingsale sent Ms Waite a letter on 16 September in which she among other things wrote:

²⁰ Letter prepared for Ms Waite dated 16 September 2011.

²¹ It is a pre-requisite for ongoing registration as a social worker.

²² I am satisfied this was meant to say “pulled” because Ms Burroughs demonstrated to me what she alleges Ms Beckingsale did.

I am writing this letter to give notice of an employment grievance between myself and the Social Work team leader, Keryn Burroughs.²³ The circumstances of which are as follows:

... these events have humiliated me to the point where I feel singled out, bullied and no longer trusted by the Team Leader.

Finally, I wish to point out I have witnessed other staff members on more than one occasion being humiliated, bullied and shouted at in a manner similar to which I have described above. The Team Leader appears to have no respect for the dignity and experience held by many of the Social Workers at Christchurch Women's Hospital. As a result it is becoming a workplace where staff are often denigrated, sometimes publicly, and I do not feel this is a safe environment.

Blocking Darral Campbell's email access to the DHB

[55] Ms Beckingsale asked Ms Campbell for a written reference which Ms Campbell emailed through to her on 19 September 2011.

[56] Also on 19 September 2011 Ms Waite and Ms Burroughs decided to block Ms Campbell's email access to the DHB. An email between them to that effect was mistakenly sent to Ms Campbell. Ms Campbell informed Ms Beckingsale. Ms Beckingsale sees the blocking of Ms Campbell's emails as deliberately and unfairly targeting and isolating her. She also suspected the DHB of monitoring her emails, which it denies.

[57] The DHB says the timing was purely coincidental. The DHB witnesses say it was done because Ms Waite recognised that the social work team was unsettled and wondered if that was because of ongoing contact, seen as potentially interfering, by Ms Campbell now she was outside the DHB.

Resolution of employment status and notification of allegations against Ms Beckingsale

[58] On either 19 or 21 September 2011²⁴ Ms Farr, Ms Waite and Ms Beckingsale as well as her partner, Mr O'Neill, attended a meeting with Ms Beckingsale's lawyer. Ms Beckingsale spoke about what she called safety in her workplace and said the issues were not just about whether or not she was a casual employee but were about how Ms Burroughs treated her. The parties agreed that the DHB would arrange for mediation (or facilitation) between Ms Beckingsale and Ms Burroughs.

²³ The DHB later informed Ms Beckingsale that if she had a grievance it had to be with the DHB and not Ms Burroughs personally. However, I consider Ms Beckingsale's letter adequately raised a grievance with the DHB in that it informed it of her concerns in a way that it could address them.

²⁴ There are documents recording different dates but the precise date is not material.

[59] Eventually it was agreed that Ms Beckingsale would be appointed to a .4 permanent part-time role as a social worker and work in the Neo-Natal Intensive Care Unit (NICU). Ms Beckingsale signed a new IEA to that effect in October 2011. The role in NICU was apparently suggested by Ms Waite as a way obtaining some physical separation between Ms Burroughs and Ms Beckingsale as NICU was not near Ms Burroughs' office. Ms Beckingsale had a key to her office and did not have to report to Ms Burroughs at the beginning of every shift.

[60] On 26 September 2011 Ms Waite wrote to Ms Beckingsale about the allegation of her being threatening towards Ms Burroughs by pulling and pushing her as well as Ms Gorrie's allegation of 'shoulder butting'. Ms Waite proposed a meeting to allow Ms Beckingsale to respond to the allegations before she had a facilitation meeting with Ms Burroughs. Ms Waite also offered Ms Beckingsale counselling services through the employee assistance programme (EAP).

[61] Ms Beckingsale's lawyer responded with the suggestion those matters be held in abeyance until after the meeting between Ms Beckingsale and Ms Burroughs that was scheduled for 29 September 2011. He wrote that Ms Beckingsale denied the allegations and was extremely distressed by them.

[62] He also reminded Ms Waite of the formal complaint that Ms Beckingsale had made against Ms Burroughs in her letter of 16 September which had not been investigated and was not covered in Ms Waite's 26 September letter.

[63] On 27 September Ms Waite emailed Ms Beckingsale and said that she did not think the allegations of assault should be included in the mediation meeting and:

... we need to follow the CDHB investigation process.²⁵

[64] She sent a further email when Ms Beckingsale had requested copies of witness statements to say that she had spoken to:

Those in the department at the time of the alleged incidents and nothing was seen or heard (so there was no shouting!). However it was acknowledged (by Niamh, Kim and Maree) that Keryn was upset the same was observed by Helen Little for Kim. This of course does not give any absolutes!

²⁵ That process was not outlined in the letter and it is unclear whether Ms Waite was referring to the bullying policy.

[65] Ms Burroughs and Ms Beckingsale attended a meeting on 29 September which was facilitated by Juanita Wilson, an HR advisor who had been appointed by the DHB. According to Ms Beckingsale the meeting focused on clarification of her employment status and on expectations of Ms Burroughs as the team leader.

[66] Although she did not raise this as a concern until later Ms Beckingsale was apparently concerned that :

It was presumed to be an impartial process however at the follow up meeting Juanita made a comment indicating that she had been briefed as to my own personal circumstances outside the CDHB, and that of my partner²⁶. ... this information could only have come from Management ... This further added to my mistrust and doubts that any fair and due process would be undertaken.

[67] On 10 October 2011 Ms Waite wrote to Ms Beckingsale about her complaint of 15 September about Ms Burroughs' behaviour on 14 September. She apologised that it had taken so long to investigate Ms Beckingsale's complaint. However, she did not outline what investigation had taken place or outline an investigation process. She did not convey any conclusion on whether Ms Burroughs had threatened or intimidated Ms Beckingsale. Ms Waite responded to the issues of the key, the union meeting, and supervision and offered a more general apology while stating that Ms Beckingsale was a valued member of the Women's Health team.

Not paid for 6 weeks?

[68] Ms Beckingsale says that for a period of six weeks after her new IEA was entered into she was not paid. I find she was not paid for one pay period so that there was a gap of four weeks rather than two weeks between pays. I consider that was an error which in part arose from Ms Burroughs' unfamiliarity with how to resolve pay anomalies in time for pays to be corrected. I consider it happened as a result of the new IEA with different hours.

November and December 2011

[69] Ms Beckingsale had a family emergency in November 2011 and advised Ms Burroughs by email that she would not be able to work on 25 or 28 November. Ms Burroughs replied asking what type of leave it should be recorded as, and offered

²⁶ Ms Beckingsale's partner's business had a contract or contracts with the DHB.

any support she could give. Ms Beckingsale replied that it would be sick leave and she would provide a medical certificate when she returned.

[70] On 30 November Ms Burroughs emailed Ms Farr:

It is disappointing that Mary-Anne was trying to communicate with me through another team member and this is twice that I have received messages from one of her family members re that she is not coming in to work and the reason is unclear or ambiguous.

[71] Ms Burroughs also wrote that she would change the leave to annual leave.

[72] Ms Farr rang Ms Beckingsale's home and spoke to Mr O'Neill who told her that Ms Beckingsale was *very fragile and he was hopeful that we good people here would look after her*. Ms Farr advised Ms Burroughs that Ms Waite had the discretion to grant sick leave or special leave.

[73] On 2 December Ms Burroughs emailed Ms Beckingsale stating that it was inappropriate that she found out the details of her family emergency from another team member and also found out the same way that Ms Beckingsale had been tearful at work. She stated that they would have to schedule administrative supervision and noted there would be times in the future when they would have to communicate directly and asked how Ms Beckingsale would like to handle that.

[74] In reply Ms Beckingsale raised a number of concerns about Ms Burroughs' behaviour of ignoring her at the same time as sending an email about improved communication and said it made her:

... feel alienated and victimised and is clearly noted by other team members to the extent that I am feeling increasingly uncomfortable and unsafe in my work place.

... I am at a loss to see how to facilitate [administrative supervision] when you constantly ignore me and refuse to acknowledge my presence at work. Silent treatment, marginalisation, pulling faces and refusing to communicate with me, is bullying.

I do not feel comfortable addressing any form of admin supervision while this situation remains.

[75] She also wrote:

In September I attended a relationship building meeting with yourself. There has been no follow up as to outcome or if things have improved – little has changed.

[76] Ms Beckingsale then raised her concern that the facilitator had been pre-briefed about her partner's business arrangements with the DHB – *yet another breach of privacy*.

[77] On 2 December 2011 Ms Burroughs emailed Debbie O'Donoghue, who was the Neonatal Nurse Manager who worked with Ms Beckingsale in NICU, and asked her if she would sit in on Ms Beckingsale's administrative supervision. Ms O'Donoghue was willing to do so but only if it did not appear to Ms Beckingsale as if she was being marginalised because she was the only one to have Ms O'Donoghue present at her supervision. Instead group administrative supervision was held with a number of social workers at the same time. That arrangement was made to allow Ms Burroughs to give administrative supervision to Ms Beckingsale without them being alone together.

[78] On 9 December 2011 Ms Beckingsale wrote to Ms Burroughs asking what her comments about her needing to increase her workload meant:

Your comments insinuate that my work is in some ways sub-standard. I am unsure how you have reached this opinion given the lack of communication between us and the level of support I have received from you since starting in Nicu.

[79] Ms Waite was copied in to that email and her response was to ask Ms Farr to arrange more mediation.

[80] On 12 December 2011 Ms Beckingsale reported to Ms Waite that she had been *verbally insulted and intimidated* by Ms Burroughs in the NICU corridor. She wrote that Ms Burroughs said *what are you going to do to shame yourself today?* She said she was feeling threatened and asked Ms Waite what she should do. This was another complaint that Ms Beckingsale clearly saw as bullying.

[81] Ms Burroughs denies she said that but says that in response to Ms Beckingsale saying *you call yourself a social worker* she replied *shame on you*. She accepts that her comment was not appropriate.

[82] On 15 December 2011 Ms Beckingsale advised Ms Waite that she had not been contacted by anyone for the rest of the day after she made her complaint. In fact, Ms Waite had responded by email to Ms Beckingsale but she did not read the email

before she finished for the day. Ms Beckingsale also wrote that she had been advised by her doctor to stay away from work for a week *given the stress I am experiencing as a result of the Team Leader's ongoing treatment of me*. She offered to provide a medical certificate.

[83] On 19 December 2011 Ms Waite wrote to Ms Beckingsale acknowledging Ms Beckingsale's complaint about Ms Burroughs' words to her in the NICU corridor. She said she had spoken to Ms Burroughs and *the witness Carole Madden* and wanted to discuss her findings with Ms Beckingsale. She also wrote that she had instructed Ms Burroughs that it was appropriate for Ms Beckingsale to attend external supervision. She wrote that she was concerned to hear that Ms Beckingsale put her stress down to *your working relationship with your Line Manager*. She wrote that the DHB occupational health nurse would be happy to work with Ms Beckingsale's GP to provide medical support.

[84] Ms Waite also offered information about confidential counselling services through the EAP and said that she was:

... aware of some personal stressors which no doubt will be adding to your feelings of distress, e.g. the recent "family emergency" ... and your partner's cardiac event ... on ... 31 October 2011.²⁷

I will require you to meet with me prior to your return to work next Friday ...

[85] On 20 December 2011 that meeting took place in Ms Waite's office. Mr O'Neill was present and took notes. Ms Waite said that her investigation into Ms Beckingsale's NICU allegation was complete, although it was pointed out to her that she had not interviewed Ms Beckingsale. Ms Beckingsale asked for Ms Waite's interview notes from her investigation and Ms Waite said that there were none. Ms Beckingsale offered her diary notes from that day but Ms Waite did not wish to see them.

[86] Ms Beckingsale told Ms Waite that she viewed being placed in NICU only as a punitive measure. Ms Waite agreed to look at varying the women's health departments Ms Beckingsale worked in so she was not restricted to NICU, although

²⁷ Ms Beckingsale was offended by the suggestion that her family circumstances contributed to her stress levels and consequent poor health and the characterisation of stress as a symptom not a clinical diagnosis. Ms Beckingsale's view is her ill health was caused purely by her work situation.

*Jane said she had put Mary-Anne in NICU to protect her.*²⁸ Ms Beckingsale was not moved out of the NICU role before her resignation although according to her diary she did a small amount of work at Lyndhurst.

[87] Ms Waite followed the meeting up with a letter on 22 December 2011 in which she said that there was no witness to the December event in NICU and *on this basis, no further action can be taken*. She wrote that she had offered Ms Beckingsale the services of the occupational health nurse and reiterated the availability of the EAP. She wrote:

... you have signalled the working relationship between you and your team leader remains tense and uncomfortable for you. ...we explored other options such as formal mediation. You have opted for the more informal approach in the first instance, with me present. ...

We also discussed the possibility of your rotating through the service.

January to July 2012

[88] On 9 January 2012 Ms Waite facilitated a meeting with Ms Beckingsale and Ms Burroughs. Ms Waite recorded the tenor of what was discussed at the meeting in a letter to Ms Beckingsale dated 11 January 2012 which included:

*... the recent allegation against you of man-handling a member of staff.*²⁹ *As I have previously discussed with you, there were no witnesses to this event and as such no further action will be taken in regard to this.*

[89] She also reiterated that the DHB valued Ms Beckingsale and arranged a further meeting between Ms Beckingsale and Ms Burroughs and herself for 20 February 2012. That meeting took place and another was held on 19 March 2012.

[90] Ms Burroughs says that in those meetings, and the subsequent ones that year:

Mary-Anne was unwilling to communicate and it appeared wanted the meetings to end quickly.

If Ms Burroughs had those concerns at the time she did not communicate them to Ms Beckingsale or to Ms Waite.

[91] In April 2012 there was a dispute about whether Ms Beckingsale was entitled to claim pay for a half hour she had worked by not taking her unpaid lunch break

²⁸ Also from Mr O'Neill's notes.

²⁹ It was not clear which allegation this referred to

because she was so busy. Ms Burroughs invited Ms Beckingsale to come and discuss the matter with her and Ms Beckingsale replied, with a copy to Ms Waite:

...as I have already clearly indicated I do not feel safe having any one on one interactions with you due to your past unpredictable and unprofessional treatment of me.

... I further add that the punitive interpretations you are making both with regard to hours worked and the offer of a colleague last week to swap a day's work, are regarded by myself as targeting me personally and further examples of humiliation and workplace bullying.

[92] Around 30 April 2012 Ms Farr offered Ms Beckingsale the opportunity to attend a workshop on bullying run by the Nurses Organisation. Ms Burroughs attended one of the workshops.

[93] Ms Beckingsale emailed Ms Farr in response to the invitation thanking her and noting she was unable to attend that particular workshop but was interested if a similar one was to be run in the future. She also wrote *the issues are ongoing and relentless*. No specific issues or incidents were identified.

[94] Also on 30 April 2012 Ms Farr emailed Ms Waite about an incident Ms Burroughs had reported to her of attempting to engage Ms Beckingsale in conversation in a lift but Ms Beckingsale refusing to speak with her and telling her she did not have time that day to meet. Ms Farr told Ms Waite that she thought she needed to meet with the two again. Ms Farr wrote:

This is affecting service provision and needs to be addressed.

MAB should not be making accusations directly to Keryn of bullying and harassment.

[95] Ms Beckingsale was not informed of this email until these proceedings were underway.

[96] On 11 May 2012 Ms Farr emailed Ms Waite stating that the lunch break issue had been resolved and:

Keryn would like for Mary-Anne to stop making saying (sic) that she is bullying and harassing her when she writes any emails to her where Keryn has made a management decision – if MAB has a complaint she needs to raise it in the appropriate manner with Keryn's manager, either informally or formally. MAB should not be making those comments direct to Keryn.

[97] On 14 May 2012 Ms Waite held a meeting with Ms Beckingsale and Ms Burroughs at which Ms Farr and Mr O'Neill were present. Ms Beckingsale understood the purpose of the meeting was to discuss the collective agreement because the meeting took place in the aftermath of the debate about the paid/unpaid lunch break/s. Mr O'Neill's notes typed after the meeting say Ms Beckingsale was surprised to find who was at the meeting.

[98] Ms Beckingsale says she was told that her continuing assertions of bullying by Ms Burroughs were *hurtful* and that her refusal to meeting one-on-one with Ms Burroughs was not helpful and was affecting service and the other staff. Ms Beckingsale says that she was told her behaviour was responsible for *causing Keryn Burroughs to become unwell and lose weight*.

[99] Ms Farr's notes of the meeting state that it was acknowledged that Ms Beckingsale:

may still feel angry about events of 15 September and obviously this is not resolved for her but that 6 months has passed and several facilitated meetings have attempted to help both KB and MAB to repair the relationship and that it is important that both parties put things behind them and move forward. Suggested to try and reduce the email communication and talk one on one even if only on the phone. MAB indicated that she would be able to communicate with KB via phone.

[100] At the meeting Ms Beckingsale said Ms Burroughs should not conduct her performance appraisal. The performance appraisal was required by the DHB and also necessary so that Ms Beckingsale's competency could be attested to for her ongoing social work registration. She asked what other measures could be put in place. Ms Beckingsale says that at that point Ms Waite became angry and *slammed her hands on the desk* and told her *she had no choice as this was DHB policy*.

[101] Ms Farr denies that Ms Waite slammed her hands on the desk because she believes she would have remembered that if it had happened.

[102] There were further meetings on 28 May and 11 June 2012 between Ms Waite, Ms Beckingsale and Ms Burroughs. There were no more meetings of this type held.

[103] In 2012, probably June, a team building day for the Women's and Children's Health social work team was held. The DHB says that this was a measure it put in

place to assist Ms Burroughs and Ms Beckingsale. Members of the social work team found it a useful day.

August to December 2012

[104] There was a meeting on 23 August 2012 about how a performance review meeting for Ms Beckingsale could be undertaken. At the meeting were Ms Beckingsale, her PSA union representative, Stephany Mitchell, and Amanda Daniell, the acting service manager, as well as Ms Farr. Ms Beckingsale requested that Ms Daniell conduct the performance review but she was told that was not appropriate. Instead Ms O'Donoghue was offered as a facilitator *to ensure both parties safety*.

[105] Either in that meeting or the one in May 2012³⁰ Ms Farr stated:

... that CDHB had gone to considerable lengths to assist both MAB and KB and that internal resources to resolve the relationship issues were now exhausted. Only step now would be external mediation through a Consultant or the Department of Labour Mediation Service but of course KB and MAB would have to agree to this process.

[106] On 6 September 2012, in relation to her performance appraisal, Ms Beckingsale wrote to Ms Burroughs *I am unwilling to have any one on one interactions with yourself present based on historic events*. The following day she wrote:

I do not feel it would be an impartial or professional process if I was to undertake this with yourself based on your past treatment of me and the lengths you have gone to to discredit me.

[107] Group administrative supervision had been held for a number of months but in August 2012 after Ms Beckingsale returned from some annual leave she was advised by Ms Burroughs that there would no longer be group supervision but individual supervision again. Ms Burroughs sent Ms Beckingsale a calendar request to schedule regular administrative supervision.

[108] Ms Burroughs says that the group supervision stopped at the request of one of the group who did not believe that Ms Beckingsale was positively contributing.

³⁰ Ms Farr's typed notes of the meeting indicate that was said at the August 2012 meeting but at the investigation meeting Ms Farr was adamant that she had made a mistake when typing up the notes and that the mention of external mediation was in the May meeting.

Ms Burroughs' decision to stop the group supervision was undertaken after consulting Ms Waite but not Ms Beckingsale.

[109] Ms Beckingsale's evidence is she was unhappy that she was expected to have one-on-one supervision with Ms Burroughs again because she considered the problems remained unresolved. One one-on-one supervision meeting took place between them on 27 August 2012. After that Ms Beckingsale declined to attend administrative supervision alone with Ms Burroughs.

[110] Ms Beckingsale emailed Ms Burroughs on 1 October asking for confirmation that the NICU team could have administrative supervision with Ms Burroughs as *Nicci*³¹ had indicated that she was more than willing to return to the group admin. Ms Burroughs replied that she was only offering individual administrative supervision. The matter was not pushed by Ms Burroughs or the DHB and so no administrative supervision took place for the rest of the year.

[111] There is a requirement for registered social workers to also have professional or clinical supervision, which is not the same as administrative supervision, and until July 2012 Ms Beckingsale had attended external individual supervision funded by the DHB. Sadly her external supervisor died and around that time the DHB introduced a new policy of social workers only being supervised by other social workers employed by the DHB.

[112] Ms Burroughs' supervisor, Ms Maher, was suggested to Ms Beckingsale as a suitable supervisor. However, Ms Beckingsale disagreed she was a suitable supervisor as she thought it was disadvantageous to her to have the same supervisor as Ms Burroughs. She was concerned Ms Maher would have a conflict of interest given the difficult relationship between Ms Beckingsale and Ms Burroughs. I agree that this was a valid concern in all the circumstances.

[113] Ms Beckingsale was able to organise a suitable clinical supervisor for herself by the end of November with supervision to take place for the first time in mid-December. However, the issue of administrative supervision remained unresolved and the performance review had not taken place by the time Ms Beckingsale went on sick leave on 17 December.

³¹ Nicci Weild was another NICU social worker.

[114] Ms Burroughs' evidence was that by the end of 2012 given Ms Beckingsale's opposition to having a performance review *the matter had just been dropped*. It is unclear to me why that would have been dropped when it appears a mutually agreed solution of having Ms O'Donoghue present had been reached.

[115] In September 2012³² it appeared to Ms Beckingsale she was not receiving emails sent by Ms Burroughs to the social work team and she felt she was being deliberately isolated. Ms Burroughs confirmed that Ms Beckingsale was on her team email list and suggested the problem may have been a technical one. As I understand it Ms Beckingsale concluded she was being deliberately excluded when she received an email that was intended for the social work team but it came through to her individually and not as part of the team list. Ms Burroughs denies deliberately excluding Ms Beckingsale from team emails.

Ms Beckingsale's diary entries

[116] Ms Beckingsale's evidence is that as 2012 went by she felt progressively isolated from her colleagues in the wider team because she was in NICU, she felt unsupported by Ms Burroughs and the DHB management and she continued to observe distressing interactions between her colleagues and Ms Burroughs. She noted a number of things in her diary.

[117] There was also evidence from Ms Beckingsale that she deliberately had her lunch in NICU rather than with her other social work colleagues as she wished to avoid Ms Burroughs.

[118] Ms Beckingsale gave evidence that she had been told by other NICU staff that Ms Burroughs would come into the NICU social work office when Ms Beckingsale was not there and look through her files and criticise her out loud. Ms Weild gave evidence of Ms Burroughs looking at Ms Beckingsale's files and making comments such as *what's she doing? This isn't good enough*. Ms Burroughs denies such behaviour.

[119] Ms Weild impressed me as a calm and considered witness who was credible and very measured in her answers. She gave evidence of having witnessed what she regarded as bullying of Ms Beckingsale by Ms Burroughs. It was unclear within what

³² Noted in Ms Beckingsale's diary on 18 September 2012 *became aware K omitting me from some group emails*.

time period she observed this, however, Ms Beckingsale's diary notes in July 2012 that:

Nicci spoke to me privately – said “I need to take time off – feeling tearful all the time. When I think back so many things K has said to try & discredit you. So bad”.

[120] From 23 October Ms Beckingsale's diary records *no contact or support* on a number of days. She explained this was a reflection of feeling isolated and ignored in NICU and not being offered any support from management when she was at work.

[121] Ms Beckingsale's diaries also include observations about the impact on her of other social workers' interactions with Ms Burroughs. For example, on 13 September 2012 she wrote:

[named social worker] had admin supervision & said I felt slapped in the face – felt sick so had to ring in sick the next day ...

[122] Ms Beckingsale's evidence is that in November 2012 NICU was understaffed. She says that on two occasions in November she believed Ms Burroughs was aware that NICU needed extra social work staff, who she understood were available, but did not send them through to assist Ms Beckingsale. Her diary records one incident on 12 November that a social worker was away and:

no cover! Sarah did come up for an hour or so. Debbie copied into email saying both Natalie and Susan would be up. But not.

[123] Ms Beckingsale worked late to complete necessary work and claimed time in lieu but Ms Burroughs refused to allow her to take the time as time in lieu.

[124] On 28 November 2012 Ms Beckingsale's union representative contacted Ms Farr telling her that Ms Beckingsale had contacted her about why there was no documentation in Ms Beckingsale's personal file about the allegation she had assaulted another staff member. Ms Farr replied on the same day that no records were held about either Ms Burroughs' or Ms Gorrie's allegations. She wrote:

There were no witnesses to Keryn Burrough's allegation and no witnesses to Mary-Anne's allegations against Keryn. Jane did carry out an investigation but as I understand the situation nobody saw or heard anything to validate either party's statements. The matter of Kim Gorrie's complaint was withdrawn given it was not only out of time but again also because there were no witnesses to validate her statements. In this situation, the manager would be on very treacherous ground if they were to make an assumption about what

occurred without any evidence to support that decision. So the complaints of both parties³³ were not upheld.

[125] Ms Beckingsale went on sick leave again on 17 December 2102. By 21 December 2012 the DHB was aware that Ms Beckingsale was on sick leave due to *work place related stress* because Mr O'Neill replied to an email sent by Ms Burroughs who had wanted to speak to Ms Beckingsale about whether she would be in to work on 24 December. Mr O'Neill also wrote that Ms Burrough's email was viewed as *intrusive and causing [Ms Beckingsale] stress*.

[126] Ms Beckingsale remained on a combination of sick leave and annual leave until she submitted her resignation on 7 January 2013 after which she worked her three week notice period.

Non-provision of Ms Beckingsale's personnel file?

[127] Ms Beckingsale says she did not receive a copy of her personal file for over 12 months after she requested it. She says she did not receive it until her union representative asked for it and that is another example of how poorly she was treated by the DHB.

[128] On 15 September 2011 Ms Beckingsale requested a full copy of her personal file by the following day and specifically requested copies of her job description, her *contract of employment* and her records of hours of work for the past 12 months.

[129] Ms Beckingsale was not supplied with the documents she had requested before 7 October because on 7 October 2011 Ms Beckingsale's lawyer requested:

all documents signed by my client that relate to the terms and conditions of her employment

and

her wages and time records for the whole of her employment.

[130] Ms Farr says she is sure that a full copy of Ms Beckingsale's file was provided to Ms Beckingsale's lawyer. That was not able to be proved or disproved. Ms Farr also said that before a file is released it is checked by the DHB's solicitor.

[131] It is more likely than not that Ms Beckingsale was not provided with a copy of her file in response to her request of 15 September 2011. However, the DHB was

³³

Against Ms Beckingsale.

entitled to consider that her request was superseded by the request from her lawyer on 7 October 2011.

[132] Ms Beckingsale made a further request in December 2011 when Ms Beckingsale and Mr O'Neill met with Ms Waite. The file was not supplied to Ms Beckingsale until a further request was made by Stephany Mitchell, Ms Beckingsale's representative from the PSA, in late 2012.

Evidence from other social workers

[133] There was evidence from Ms Radford that I accept, despite challenges to her credibility from the DHB, that she had a meeting with Garth Munro, Director of Allied Health, in May 2013 after difficulties she had with Ms Burroughs. She says that he told her that there was one person in the social work team who made all the trouble and was stirring, and she was still stirring now, but that she would not know anything about that. Ms Radford says that said if you are talking about Mary-Anne Beckingsale you are wrong. She says that Mr Munro changed the subject.

[134] On 17 May 2013 Mr Munro wrote to Ms Radford about her complaint. His last paragraph reads:

We also discussed the generally unsatisfactory climate or culture within the Women's Health Social Work Team which I will need to address. As I indicated to you, Keryn commenced in the Team Leader role with a 'legacy' of historical behaviour she has attempted to address with limited success due to entrenched and sometimes deliberately mischievous behaviour from some team members. In order to achieve change, team members have to be adaptive, flexible and willing to embrace change, and achieving this culture is the challenge that is now facing me in my role.

[135] Ms Radford, Ms Eastwood, Ms Weild and Ms Bould gave evidence that they left their positions at least in part because of either what they had personally experienced or what they had observed happening to other staff under Ms Burroughs' management. I have no reason to doubt their evidence despite the fact that Ms Bould declined the opportunity to undertake an exit interview. Ms Eastwood and Ms Weild remain employed by the DHB as social workers at a different hospital. Despite Ms Burroughs' denial of the tenor of her encounter with Ms Bould I accept Ms Bould's view that Ms Burroughs' approach to her about where she had been on a particular day was an angry one. I also accept Ms Burroughs' evidence that she did not intend to be inappropriately angry with Ms Bould.

[136] Ms Beckingsale was not aware during her employment of any problems between Ms Radford and Ms Burroughs. Ms Weild's evidence is that although she observed unsatisfactory conduct from Ms Burroughs towards Ms Beckingsale Ms Burroughs did not focus on her until after Ms Beckingsale had resigned. Ms Radford's and Ms Weild's complaints about Ms Burroughs were not made until after Ms Beckingsale's resignation. On balance, I do not consider that Ms Weild's own problems working with Ms Burroughs contributed to Ms Beckingsale's resignation because in the main they only arose after Ms Beckingsale had left her employment.

Did the DHB breach any of its duties to Ms Beckingsale leading to a fundamental breakdown in trust and confidence?

[137] Ms Beckingsale's main focus is that she suffered a sustained and relentless form of bullying and intimidation from Ms Burroughs that was notified to the DHB many times but was inadequately addressed.

[138] The DHB submits that there was no final straw or straws falling into the category of bullying or intimidation and that it addressed and dealt with Ms Beckingsale's concerns appropriately over a long period of time.

[139] Bullying is defined in the DHB's Bullying and Harassment Policy as personal harassment:

*...any situation involving staff in their relationship with management
... as follows:*

- *Use of force or threats to pressure or coerce a person to do something they would otherwise feel comfortable to debate and/or dispute.*
- *Examples of bullying/personal harassment may include but are not limited to: intimidation (e.g. shouting, obscene language), Emotional abuse (e.g. patronising humiliation, name calling), isolation (e.g. stopping access to other managers/staff, withholding information), coercion and threats, economic abuse (e.g. withholding training and other benefits), positional abuse (e.g. unjustifiable and/or inconsistent disciplinary action, being set up to fail with an overload of work).*

[140] The policy goes on to say:

Any harassment by any person, ... will not be tolerated and appropriate action will be taken to remedy any complaint.

Any breach of this policy will be considered as serious misconduct within the terms of the Code of Conduct and upon investigation, may result in disciplinary action and/or dismissal.

[141] Workplace bullying is difficult to define and to prove. There is a useful definition in the Worksafe 2014 best practice Guidelines on Preventing and Responding to Workplace Bullying.

[142] The Guidelines define bullying as being:

...repeated and unreasonable behaviour directed towards a worker that creates a risk to health and safety.

- *Repeated behaviour is persistent and can involve a range of actions over time.*
- *Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.*

A single incident of unreasonable behaviour is not considered workplace bullying, but it could escalate and should not be ignored.

...ask yourself if the behaviour is unreasonable, repeated and health endangering. To be classified as bullying it usually needs all three aspects.³⁴

[143] The DHB Policy outlines a process for complainants to follow in making a formal complaint and contrasts that with an informal process. The DHB submits that Ms Beckingsale had not taken the steps to make her complaint formal and so it was not required to carry out the steps it identifies in the Policy. In relation to a formal complaint the steps the DHB was required to undertake were:

- *Act immediately should complaints be made to you and ensure that complaints are followed up appropriately, including advice from Human Resources.*
- *The person receiving the formal complaint must seek HR advice and manage the processes in a procedurally correct manner. In seeking HR advice, consideration should be given that there is sufficient grounds and evidence to carry out an investigation. This will include consultation with the complainant. The Manager, Human Resources shall be advised of all formal complaints.*

³⁴ Page 6 of the Guidelines.

- *Any investigation must respect the principles of natural justice and generally will follow the procedures set out in the disciplinary investigation flow chart.*

[144] Ms Beckingsale raised concerns that she identified as bullying or intimidation in September 2011. Her concerns were raised in writing, by email, and so as I see it she made a formal complaint as defined by the policy. The DHB did not embark on the kind of investigation it outlined in its policy. In particular, Ms Waite did not consult with Ms Beckingsale, the complainant, about what she alleged Ms Burroughs had done that day as the policy requires her to do. Only Ms Burroughs' and to a lesser extent Ms Gorrie's complaints about Ms Beckingsale appear to have been investigated. The failure to properly investigate Ms Beckingsale's September 2011 complaint was a breach of the DHB's duty of good faith by failing to follow its own policy.

[145] Again in December 2011 Ms Waite did not follow the DHB policy as she failed to consult with the complainant, even when Ms Beckingsale offered to provide her diary notes of the incident.

Was the DHB on notice that Ms Beckingsale considered there were ongoing problems despite no formal written complaint being made in the last half of 2012?

[146] A constructive dismissal finding could be based on the DHB's lack of reasonable action to solve the problems repeatedly identified by Ms Beckingsale as existing between her and Ms Burroughs.

[147] The DHB was on notice that Ms Beckingsale considered Ms Burroughs was targeting her by what she called bullying behaviour by the events in September and December 2011.

[148] In April 2012 Ms Beckingsale alerted Ms Farr that she considered the issues to be ongoing and relentless.

[149] In a meeting in May 2012 Ms Farr suggested that the next step would have to be independent mediation. The DHB submits that there were no incidents from May 2012 until the resignation in January 2013 that involved Ms Burroughs and Ms Beckingsale, apart from the discontinuance of administrative supervision.

[150] I do not agree. It was obvious to Ms Burroughs that in the facilitated meetings during 2012 Ms Beckingsale was not saying much and appeared to want the meetings to end quickly. That must have been obvious to Ms Waite and Ms Farr too.

[151] In April and then again in September 2012 Ms Beckingsale put in writing her concern about having one on one interactions with Ms Burroughs. Ms Farr was made aware of Ms Beckingsale's ongoing concerns about Ms Burroughs.

[152] In April and again in May 2012 Ms Farr asked Ms Waite to stop Ms Beckingsale making complaints of bullying and harassment directly to Ms Burroughs but that they should be made to her manager instead. I have not had any evidence that Ms Beckingsale was informed of this although in the facilitated meeting on 14 May 2012 Ms Beckingsale was told her refusal to meet Ms Burroughs one-on-one was not helpful and her continued assertions of bullying by Ms Burroughs were hurtful and she needed to get over her anger about the events in September 2011.

[153] At that point I consider that the DHB had ceased to see Ms Beckingsale's concerns about Ms Burroughs' behaviour to be the problem that required investigation and a solution but instead considered that Ms Beckingsale's behaviour of making complaints directly to Ms Burroughs was the problem. However, it remained clear that Ms Beckingsale did not consider matters were resolved.

[154] Ms Beckingsale and Mr O'Neill both say that Ms Waite said at the 20 December 2011 meeting that she could have let Ms Beckingsale *go in October you did push two people and I decided not to pursue it*. This allegation is supported by Mr O'Neill's notes taken at the meeting. Ms Waite was not present to give evidence. I accept Ms Beckingsale and Mr O'Neill's evidence. It was unfair of Ms Waite to bring up the old allegations that should have been dealt with and finalised back in September. She had not reached any formal conclusion whether or not Ms Beckingsale had assaulted Ms Gorrie and/or Ms Burroughs and could not justifiably have done so given the inadequacies of any investigation and, in particular, the late formal complaint from Ms Gorrie which would have hampered an adequate investigation.

[155] The DHB may have concluded in January 2012 that Ms Beckingsale had affirmed her contract, despite its failure to follow its own policy for investigating

allegations of bullying by Ms Burroughs and of assault by Ms Beckingsale, and that Ms Beckingsale's concerns were resolved by a combination of:

- the new IEA,
- the facilitated meeting on 29 September 2011,
- the December meeting with Ms Waite,
- Ms Waite's 22 December letter to Ms Beckingsale specifically stating that Ms Beckingsale had *opted for the more informal approach* (to deal with the working relationship between Ms Beckingsale and Ms Burroughs) ... *with me present*, and
- Ms Waite's 9 January 2012 letter stating no further action would be taken on the allegation made by Ms Burroughs.

[156] However, by April 2012 it was on notice that Ms Beckingsale considered the problems were ongoing.

[157] The unilateral decision of the DHB to cease group administrative supervision which had been put in place to assist the relationship between Ms Beckingsale and Ms Burroughs also occurred in the last half of 2012. That was disadvantageous to Ms Beckingsale and she made her concerns known to Ms Burroughs about this. It contributed to the sense of isolation and lack of support she felt.

[158] Ms Beckingsale worked in NICU almost exclusively during 2012 despite informing Ms Waite in December 2011 that she saw that as punitive and Ms Waite saying she would move her around different parts of the service during the coming year.

[159] Ms Beckingsale had her union representative assisting her in August to work out an acceptable method of ensuring her performance review was carried out and that she felt it was done so 'safely'. However, as late as December 2012 the performance review had not been held. At that date not only had Ms Beckingsale not had administrative supervision since late August there was no agreed way ahead.

[160] On 28 November 2012 it was clear that Ms Beckingsale still had concerns about the allegations of assault against her when Ms Mitchell wrote to Ms Farr asking

for documentation about the allegations. Ms Beckingsale's evidence is that the unsatisfactory way the complaints of assault against her and her complaints about Ms Burroughs' behaviour in September and December 2011 were dealt with left her with the feeling that allegations of assault remained hanging over her head. I consider that feeling was caused in large part by the DHB's failure to put the allegations of Ms Gorrie and Ms Burroughs to Ms Beckingsale and to hear her explanations. The investigation, such as it was, missed the step vital to a natural justice process of formally asking the person complained of for their explanation.

[161] It is clear that Ms Burroughs had a dogged approach to management and it is clear that was experienced as bullying by Ms Beckingsale despite a number of meetings initiated by the DHB. It is also clear that her complaints established repeated concerns, which is a part of the definition of bullying.

[162] In all the circumstances, including the history of mutual complaints, when there were repeated complaints by Ms Beckingsale about working with Ms Burroughs, a fair and reasonable employer could not have concluded that Ms Beckingsale's complaints to Ms Burroughs were the problem, or even that the working relationship between Ms Burroughs and Ms Beckingsale was the problem without undertaking a careful and objective investigation into Ms Beckingsale's allegations and those against her. If such a path was not obvious to the DHB before January 2012 certainly once in April 2012 Ms Beckingsale began to identify Ms Burroughs' management as a problem for her again it should have been an obvious step. To guarantee objectivity an investigation could best have been undertaken using a person who was independent of the women's health social work management and human resources teams.

[163] Ms Beckingsale felt increasingly isolated from her social work colleagues outside of NICU and had ongoing concerns about how she was going to be able to have administrative supervision. She simultaneously felt she was not supported in her work by Ms Burroughs or by the DHB management as well as being wary of one-on-one contact with Ms Burroughs.

[164] Stress can be a workplace hazard and if identified as such must be either eliminated or minimised as far as possible by the employer. Ms Beckingsale was off work at the end of 2011 and identified her interactions with Ms Burroughs as the source of workplace problems causing her stress and consequently her ill health.

[165] The DHB had duties to Ms Beckingsale to act as a good employer and provide good and safe working conditions. It was obliged to provide and maintain a safe working environment and management practices that were reasonable so as not to cause undue stress to Ms Beckingsale.³⁵

[166] In order to establish any breaches of DHB's duties related to avoidance of harm caused by stress Ms Beckingsale would have to show that the DHB knew or ought to have known that there was a risk of harm to her and failed to take all reasonably practicable steps to avoid that risk.³⁶

[167] Ms Beckingsale's general practitioner provided a medical certificate dated 21 May 2013 which was presented at the investigation meeting. Dr Hay wrote that Ms Beckingsale had been under *significant work stress* since her first consultation identifying that on 21 September 2011. She wrote:

She was having severe stress reaction and required time off work and medication to enable her to function. Unfortunately the situation did not improve and at further consults in September and December 2011 she was miserable, tearful and reporting an ongoing negative work situation. This situation carried through until December 2012. She required further time off work and further medication to control her stress and anxiety as a result of the ongoing situation.

[168] In late 2011 Ms Beckingsale made it clear to the DHB that she linked her stress and ill health to Ms Burroughs' ongoing treatment of her. The DHB offered EAP counselling and offered that its occupational health nurse work with Ms Beckingsale's GP. It required Ms Beckingsale to meet with Ms Waite on her return to work. These were reasonable responses directed at Ms Beckingsale's health but did not suggest a way of dealing with the identified cause of her workplace stress. However, that is likely to be because the parties had in mind the facilitated meeting that had been agreed to in September 2011. At that stage, both Ms Beckingsale and the DHB were attempting to remedy the employment relationship problem.

[169] The fact that Ms Beckingsale went on sick leave on 17 December 2012 should have been a significant alert for the DHB that all was not resolved in relation to her working relationship with Ms Burroughs. Indeed, Ms Burroughs and Ms Farr were specifically alerted to the fact that Ms Beckingsale's illness was considered by her to be due to workplace related stress on 21 December 2012 by Mr O'Neill's email.

³⁵ *Attorney-General v Gilbert* [2002] 1 ERNZ 31

³⁶ *Nilson-Reid v Attorney-General* [2005] ERNZ 951, at 972 to 973

[170] However, Ms Farr's written response to that was almost identical to the DHB response to Ms Beckingsale's stress leave a year earlier and only offered a little more; being a consultation with an occupational health physician. Certainly there was no recognition that this was a continuing issue that required dealing with what Ms Beckingsale identified as the source of her workplace stress.

[171] Overall I need to consider whether the actions, and inaction, of the DHB were unjustified. That requires the application of the statutory tests under s 103A of the Act, namely whether what the DHB did and how they did it, were what a fair and reasonable employer in all the circumstances could have done.

[172] A fair and reasonable employer could not have ignored the ongoing indications that the working relationship between Ms Beckingsale and Ms Burroughs was still very problematic without taking further steps to address it beyond what it had already tried.

[173] To be able to establish a finding of constructive dismissal Ms Beckingsale's eventual resignation would have to be a foreseeable consequence of the DHB's failures to follow its own policy and investigate the September and December complaints adequately. Ordinarily a failure to follow policy is a breach of good faith and it could be foreseeable that it may lead to an employee's resignation on the basis that the essential term of trust and confidence has been significantly eroded.

[174] It might be considered that any events prior to the last six months of Ms Beckingsale's resignation could not be relied on by her to found a successful claim of constructive dismissal because even if there were any breaches by the DHB sufficient to repudiate the contract Ms Beckingsale must be taken to have affirmed the contract by remaining at work.

[175] However, I consider that Ms Beckingsale had continued to demonstrate that she did not accept that she could work safely one-on-one with her team leader through raising her concerns including about the performance appraisal and administrative supervision.

[176] There is sufficient evidence of a negative atmosphere within the social work team outside of Ms Beckingsale and Ms Burroughs' working relationship to consider that contributed to Ms Beckingsale's decision to resign. Only four months later Mr Munro's letter to Ms Radford clearly recognises that there was a problem with an

unsatisfactory climate or culture within the Women's Health Social Work team. He also believed that Ms Burroughs inherited a legacy of problematic behaviour which she had had limited success in addressing due to entrenched and mischievous behaviour from some in the team. That demonstrates that the DHB was well aware of problems within the team under Ms Burroughs' management. It is not clear how Mr Munro reached the view that some team members, other than Ms Burroughs, were responsible for those problems. However, as early as September 2011 Ms Waite considered that Ms Campbell was interfering in the team and causing it to be unsettled and that is why she blocked Ms Campbell's email access.

[177] Despite many opportunities while Ms Beckingsale remained employed the DHB did not investigate whether there was any basis to consider that Ms Burroughs may have been a part of the cause of the unsatisfactory climate or culture or of Ms Beckingsale's problems.

[178] I am left with the impression that Ms Burroughs did her very best but was inexperienced in a management role and ill-equipped to deal with staff members who did not agree with her, particularly over a period of such significant change, and lacked insight into how she came across to many of the staff she managed. Even the DHB witnesses described her as being quite black and white. I do not consider that Ms Burroughs set out to bully or intimidate Ms Beckingsale at any stage, however, that is how her behaviour was experienced. The DHB failed both Ms Beckingsale and Ms Burroughs in 2012 when it failed to recognise that its efforts of facilitated meetings, a team building day and a bullying in the workplace workshop that only Ms Burroughs attended had been insufficient to resolve the problems Ms Beckingsale frequently drew to their attention.

[179] Viewed objectively the whole relationship of the parties over 2012 as well as the atmosphere in the social work team more generally lead me to the view that the DHB had, although certainly not intentionally, acted in ways that cumulatively amounted to an erosion of the trust and confidence Ms Beckingsale was entitled to have in her employer meaning that it was reasonably foreseeable that she would consider her employment contract to have been repudiated.

[180] The three entries in Ms Beckingsale's diary in the week before her sick leave are as follows. On 10 December 2012 Ms Burroughs came to the office *was chatting to Wendy – did not include myself* (sic). Ms Burroughs denies that but says that *I did*

become nervous about my interactions with her and consequently kept these to a minimum. The following day Ms Beckingsale wrote *TL to ward round – no discussion.* The last work day entry was 13 December and reads *no contact or support.*

[181] I consider it more likely than not that Ms Burroughs was in 2012 so acutely aware that any interaction with Ms Beckingsale could result in a complaint that she avoided contact with her even when they were in the same room. The last two in-person encounters with Ms Burroughs in NICU were the final straws for Ms Beckingsale. They were not trivial or innocuous acts and were of a similar nature to Ms Beckingsale's email in December 2011 identifying *silent treatment, marginalisation and refusing to communicate with me.* Viewed alone those two encounters would not be sufficient to rely on for constructive dismissal but viewed objectively and in the context of earlier events they added to a chain of events that were finally destructive of the trust and confidence Ms Beckingsale needed to have in her employer.

[182] Ms Beckingsale's resignation letter made it clear that she submitted her resignation because she felt *vulnerable and intimidated at work* and that she had *no other option but to resign my position* because she felt *degraded and humiliated to an unacceptable degree.* I am satisfied that her resignation amounted to an unjustified constructive dismissal.

Remedies

Lost wages

[183] Ms Beckingsale claims lost wages from 28 January 2013 until 4 November 2013 when she says she finally earned about as much as she had when she worked for the DHB. She also claims holiday pay on the lost wages and the employer Kiwisaver contribution on the wages.

[184] Although Ms Beckingsale had been off work on stress related sick leave at the end of 2012 she was well enough to return to work on 7 January and work out her notice period.

[185] Section 123(1)(b) of the Act allows me to provide for the reimbursement by the DHB of the whole or any part of wages Ms Beckingsale lost as a result of her

grievance. Section 128(2) of the Act provides that I must order the DHB to pay Ms Beckingsale the lesser of a sum equal to her lost remuneration or to 3 months' ordinary time remuneration. Since Ms Beckingsale earned some income over and above her usual part-time income for her other work in the three months after her dismissal I need to award her actual lost remuneration for the thirteen weeks after her dismissal.

[186] Ms Beckingsale's evidence of earnings discloses that in the 3 months (or thirteen weeks) after her dismissal she had lost wages of \$3,991 gross which I order the DHB to pay. It must also pay holiday pay of 8% on that amount and the employer's portion of Kiwisaver.

[187] In addition, s 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s 128(2); that is, for more than thirteen weeks.

[188] In exercising my discretion to award lost wages for more than three months I am required to undertake a counter-factual analysis and ask, if it was not for the events leading to the unjustified dismissal, how long Ms Beckingsale would have remained in her job. I do not consider that Ms Beckingsale would have remained employed by the DHB in her role in the women's health area more than three months past her last day of employment. Even had the DHB addressed Ms Beckingsale's ongoing concerns at that late date by holding an independent investigation unless Ms Burroughs ceased to be the team leader, an outcome that was by no means certain, I consider Ms Beckingsale would not have remained employed for long at the DHB. Therefore, I decline to award lost wages beyond the first three months.

Compensation

[189] Ms Beckingsale has claimed compensation of \$12,500 for humiliation, loss of dignity and injury to her feelings. Ms Beckingsale gave evidence of anxiety related to her work and to a feeling of loss of her identity and purpose when she felt she needed to resign and that she felt totally humiliated. She was also worried about her ongoing loss of income. Mr O'Neill says that Ms Beckingsale was humiliated, embarrassed and tearful and very upset. He also says that she lost confidence.

[190] Ms Beckingsale has established that she did suffer injury to her feelings and a loss of dignity warranting compensation under s 123(1)(c)(i) of the Act. I am mindful

of the need not to keep compensatory payments artificially low but need to balance that with a need for moderation in payments. That is the formulation for exercising discretion in awarding compensation recently expressed by Judge Inglis of the Employment Court in *Hall v Dionex Pty Ltd*.³⁷ I consider that \$10,000 is an appropriate award for Ms Beckingsale's particular circumstances.

Contribution

[191] There were two allegations of Ms Beckingsale acting inappropriately by assaulting Ms Gorrie and Ms Burroughs. However, partly because of the inadequacy of the DHB investigations of those complaints at the time and the amount of time that had elapsed before my investigation meeting there is insufficient evidence to prove Ms Beckingsale was at fault. There was no evidence of any blameworthy behaviour by her that contributed to the situation leading to her grievance. There are no grounds to reduce the remedies due to her.

Costs

[192] Costs are reserved. Legal costs are usually paid by the unsuccessful party to the successful party. Ms Beckingsale has been successful in her claims. The parties are invited to agree on the matter of costs.

[193] If they are unable to do so the party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

[194] In order to assist the parties I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is \$3,500 per day and the investigation meeting took four days. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority

³⁷ [2015] NZEmpC 29