

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 10
3162641

BETWEEN ALANA YVONNE BURN
Applicant
AND TSP CONSTRUCTION LIMITED
Respondent

Member of Authority: Michael Loftus
Representatives: Phil Mitchell, counsel for the Applicant
Kelly Coley, advocate for the Respondent
Investigation Meeting: 14 November 2022 at Palmerston North
Submissions Received: 18 November and 9 December 2022 from the Applicant
2 December 2022 from the Respondent
Date of Determination: 12 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The applicant, Alana Burn, claims she has been:
- (a) Unjustifiably disadvantaged in the workplace through the actions of her employer, TSP Construction Limited (TSP); and
 - (b) Improperly treated with respect to parental leave; and
 - (c) Unjustifiably dismissed, albeit constructively, on 29 November 2021.
- [2] TSP denies the allegations.

This Determination

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[4] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[5] Ms Burn was employed by TSP on 21 April 2021 in an administrative support role. She says she was initially offered the position on a fixed term agreement to cover a maternity absence but declined. TSP states there was never a fixed term offer and while the issue arose again on 22 October (refer paragraph [22]) the parties now agree the arrangement, as entered into, was permanent. Ms Burn initially worked 36.5 hours a week at \$26 an hour.

[6] Ms Burn says that in late May she advised her manager, Carleen Taylor, that she had time on her hands. As a result she gained some additional duties which, amidst other things, included the acquisition of quotes, liaising with contractors and clients, chasing up site instructions and preparing purchase orders. Also included was some work with a project scheduling tool.

[7] In early July Ms Burn attended a meeting along with TSP's Managing Director, Todd Strode-Penny, Ms Taylor and a scheduler. She says it was said that Mr Strode-Penny's wife would be focussing on a new factory project and Ms Burn was to take over her former home order tasks. TSP agrees but adds that later in the month Mesdames Burns and Taylor discussed the fact Ms Burns was not coping and the tasks would return to Mrs Strode-Penny.

[8] Ms Burn says that over the following months she and Ms Taylor had several discussions in which the latter advised TSP had plans for her which included working closely with Ms Taylor and taking over some of her work. Ms Burn says this led her to believe she was progressing well and she was looking forward to additional responsibilities. She says the

last of these conversations occurred on 4 October with Ms Taylor saying “Exciting changes are coming” and Ms Burn would be very happy with them.

[9] Ms Burn also says positive feedback came from other sources with a consultant who worked for TSP, Sally Duxfield, advising she had received a lot of positive feedback about Ms Burn before adding TSP offered both growth and opportunity. She says Ms Duxfield said she hoped Ms Burn was not planning on going anywhere. It is Ms Burns evidence this conversation probably occurred on 8 October.

[10] In the interim, and on 7 October, Ms Burn told Ms Taylor she was pregnant. She says she did so in confidence having advised it was early in the pregnancy and stating she did not want it to go any further at that stage. Ms Burn says Ms Taylor congratulated her, agreed no one else need know at that stage and said “We can let Todd know either before or after Christmas”. Ms Burn says she then said she hoped the news wouldn’t have any impact on her job to which Ms Taylor responded “Why would you think that? Not a chance.” Ms Burn says Ms Taylor then said she would find someone a couple of months before the maternity leave so Ms Burn could train the replacement to cover while she was absent. TSP has no dispute with this evidence.

[11] Ms Burn goes on to say that on 15 October Ms Taylor called her and apologised as she had had to tell Mr Strode-Penney about the pregnancy. Ms Burn says she asked why, to which Ms Taylor said he was about to spend a couple of thousand dollars on training that won’t be needed now. Ms Burn says she was later told the training was for Excel and Word courses.

[12] Ms Burn claims Ms Taylor then started a conversation about her hours of work and asked how she was coping as she seemed to be struggling. Ms Burn says Ms Taylor then went on to ask what hours she would work if she could choose, before suggesting 30 hours over four days would be ideal. Ms Burn claims the conversation then moved to a change in her role before Ms Taylor said Ms Burn could probably do three full days but she would ask Mr Strode-Penny about a fourth.

[13] TSP has a different view saying Ms Taylor had to tell Mr Strode Penney about the pregnancy due to an impending restructure and the fact a temporary maternity leave replacement would have to be considered in that context. TSP accepts upskilling by completing Excel and Word courses had been discussed but at an earlier time.

[14] TSP also accepts Ms Taylor asked if Ms Burn was okay, saying she seemed to be struggling with her work. TSP says Ms Burn then “broke down crying” before asking if it might be possible to work reduced hours. Ms Taylor then asked what might help and Ms Burn replied 30 hours over 4 days. TSP says Ms Taylor then said she would ask Mr Strode-Penney.

[15] Ms Burn denies the restructure was raised and says she started to feel uncomfortable and asked for a reassurance that changing her hours would not affect her being able to take maternity leave. She says Ms Taylor advised she was unsure.

[16] Again TSP disagrees with these claims saying Ms Taylor was not in a position to discuss the restructure as she was not involved in that process. This part of the conversation was, from its perspective, about the criteria for parental leave.

[17] Ms Burn claims the conversation then turned with Ms Taylor saying she had taken fifteen days off work since commencing which was considered excessive. Ms Burn says she did not believe the figure was correct and that when she subsequently checked she found she had taken 8.5. TSP accepts sick leave was raised but states the number cited was 12. It also accepts Ms Burn said this was incorrect and a subsequent check suggested the number was 9.

[18] Ms Burn says she noticed a change in Ms Taylor’s attitude the following week with the latter going from being friendly and collaborative to distant and cold. Ms Burn says Ms Taylor also began to micromanage her work. TSP denies these claims.

[19] On 21 October, Ms Burn noticed an online job advertisement for what appeared to be her role, though renamed Office Administrator. TSP accepts she presented a copy of the ad to Mrs Taylor who advised it was incorrect as the job should have been entitled “Administrative Team Lead”.

[20] The following day, 22 October, Ms Burn says Ms Taylor called her to her office and advised “A restructure had been underway for a while and a new role of Admin Manager had been created”. Ms Burns says this was the first she had heard of the restructure and that she asked if the new role was one she would be offered given the earlier conversation in which she was told there was a new development she would be excited about. Ms Burn claims Ms Taylor confirmed the answer was yes had it not been for the pregnancy.

[21] In the Statement of Problem Ms Burn claims Ms Taylor then said the company was very busy and needed someone working the role up to 50 hours a week. Ms Burn says she advised she could not commit to that given two small children and another on the way but she confirmed she loved her job and wanted a future with TSP. Ms Burn says she also asked what would happen to her and would she get notice when the new person started to which Ms Taylor said yes. She says Mr Taylor also said it would be good if Ms Burn could train the new person before again asking how she was coping.

[22] In her brief Ms Burn adds a claim that between the comment about notice being likely and the question about how she was coping Ms Taylor asked “whether I realised I was on a fixed term maternity cover contract to which I responded that I had a permanent position. Ms Taylor was taken back, “... From that conversation I had with Ms Taylor, I understood that I would not have a role at TSP going forward”.

[23] Again TSP disagrees. It says Mr Burn was advised a restructure was being undertaken by a consultant and the new role was additional to current resources and Ms Burn’s position remained. As a result TSP denies any suggestion Ms Burn was told she would be given notice.

[24] TSP accepts Ms Burn asked if she would be offered the role but denies any suggestion she was told yes. It says the reply was that she could apply, as could any other current employee. TSP also accepts Ms Taylor advised that with a new factory and an influx of work the new employee would be required to work longer hours though it says 45 was mentioned. TSP also accepts Ms Taylor asked Ms Burn how she was coping though this was, in its view, a reference to apparent distress she was showing as a result of the pregnancy.

[25] Here it should also be noted Ms Burn now suggests, in her statement of problem, that the new lead role only requires its incumbent work between 35 and 40 hours a week which is not dissimilar to her 36.5.

[26] Ms Burn says the two had a further conversation on 26 October in which she said it would be unfair if she was not given the new job and that she felt her pregnancy was the only reason this was not occurring. She says Ms Taylor stated the pregnancy had affected TSP’s plans for her as she would be on maternity leave for a while. Ms Burn said she would still be there in the long term, to which Ms Taylor replied the restructuring plans were going to happen and had nothing to do with the pregnancy – it was just a coincidence.

[27] TSP strongly disputes these claims, saying Ms Burn never raised the issue of being offered the new job. It does agree the restructure was attributable to its opening of a new factory and had been in train well before it knew of the pregnancy and that was said.

[28] There was a further conversation on 27 October at which Ms Burn says Ms Taylor told her TSP could offer her two days a week working between 8.00am and 5.00pm. Ms Burn says she replied by asking if there was any chance of working three or four days a week but was told there was not. Ms Burn says she then pointed out that it would be hard covering her bills on two days a week but she would accept as it was better than nothing. She says Ms Taylor then said that if Ms Burn found other employment, she should take it and not feel obliged to stay.

[29] TSP accepts two days a week was offered and says this was in response to Ms Burn requesting reduced hours. It also accepts three days was requested but says two was the best it could consider for a part time role and adds this was never implemented in any event. TSP also accepts the comment about seeking alternate work was made.

[30] Ms Burn says she then asked for some feedback on her performance as prior to 4 October it had been positive but was now confused. She says Ms Taylor advised she was doing well, though there were a few important things she (Ms Burn) had forgotten to mention but that was not elaborated upon. She says Ms Taylor said TSP should also shoulder some blame as Ms Burn had been thrown in the deep end from day one and the training could have been better.

[31] TSP disagrees saying Ms Burn was well aware of various “mistakes” as these had been previously discussed. It says training was raised but in the context of more being required should Ms Burn take over Ms Strobe-Penney’s duties and accepts this could have been better arranged.

[32] Ms Burn says that later that day Ms Duxfield apologised for the new job being advertised before Ms Burn was made aware of what was happening. She says Ms Duxfield said that had occurred in error before saying TSP had previously failed to follow procedure when laying off two other employees. Ms Burn says Ms Duxfield then asked if she was happy with the offer of two days a week to which she replied she would have preferred three or four but two was better than nothing. Ms Burn says Ms Duxfield then advised more hours may be

available as there was plenty of administrative work to be done and, as events transpired, that occurred with Ms Burn ultimately working two and a half days a week.

[33] TSP accepts an apology was made as the advert had been erroneously placed but denies any admission in respect to earlier failures.

[34] Ms Burn states that in late October she reported an incident where Mr Strode-Penny shouted and swore at her in the office which she found humiliating and upsetting. She did not say to whom she reported and TSP denies either the incident or the report.

[35] On 1 November, Ms Burn says she was called to Ms Taylor's office and asked to continue working later that day to make up for an ultrasound appointment she had that morning. Ms Burn said she could not and referred to an email she had sent on 27 October explaining she could not arrange childcare outside of her normal working hours. She advised she had 10 days sick leave and 10 days annual leave that she could use to which Ms Taylor replied she would take the time out of the annual leave balance. TSP accepts it had forgotten about the e-mail and says Mr Taylor responded by advising Ms Burn could apply for annual leave if the time could not be made.

[36] Ms Burn says Ms Taylor then said she wanted to talk about work breaks and said Ms Burn was going for her first 10 minute break one and a half hours after starting. Ms Burn says she replied she had done that since commencement and never been told of any contrary rules. She says she was then told that employees must work for two hours before taking a break with a further two and a half to three hours before lunch and then another two hours before the last break. Ms Burn says she advised she would take her breaks accordingly.

[37] TSP disputes Ms Burn was unaware of its requirements saying they were explained during induction, though the key requirement was that breaks were advised so arrangements could be made to cover phones and reception.

[38] On 8 November, Ms Taylor sent an email to TSP staff advising she was advertising for the administration team leader role and that Ms Burn would work two days a week once the position was filled.

[39] The same day Ms Burn sent Ms Taylor an email asking for clarification regarding her job and hours. In it, and amidst other things, she said she would like to continue working her

original hours and if Ms Taylor wanted to discuss this in a meeting could she please give notice so Ms Taylor could get a support person. Ms Burn says Ms Taylor phoned to advise she had received the email but was busy and would reply in the next few days. TSP essentially agrees but says Ms Burn was told the response would be within two days.

[40] Ms Burn says that on 9 November Ms Taylor approached and asked if she really needed a support person or if they could discuss everything quickly. Ms Burn says she asked for a written response. TSP disputes any comment about really needing a support person but agrees with the gist of the rest of this evidence.

[41] Ms Taylor's response came on 10 November. In it Ms Taylor put TSP's position and clearly rejected any suggestion the changes it proposed had anything to do with Ms Burn's pregnancy. She also rejected suggestions there were performance concerns and asked Ms Burn "pop up" in 20 minutes to discuss the response.

[42] Ms Burn neither replied nor went to Ms Taylor's office and later that day Ms Taylor called Ms Burn to her office. She asked if Ms Burn understood the reply and whether she had any questions. Ms Burn says Ms Taylor also said that she, Ms Burn, had earlier advised she was grateful for the new part time role to which she commented that was in the context of no real alternative. TSP deny reduced hours were discussed.

[43] Ms Burn says Ms Taylor advised TSP was offering the new team leader role to someone who would start on 10 January and that meant Ms Burn would have full time employment until mid-February before dropping to two and a half days a week. The extra half day came about as a result of the new employee having to pick up her child every Friday afternoon and Ms Burn could cover that absence.

[44] Ms Burn says she advised she did not want to agree to anything then, to which the response was she had to make a decision by 11 November (the next day) and Ms Taylor could not issue a letter confirming the restructure and the new hours until they were agreed. TSP again disagrees saying no decision was required and the new structure was not discussed as that was being handled by Ms Duxfield.

[45] It was then Ms Burn sought legal advice which was followed on 18 November by a request TSP send a letter outlining any changes to her job by the end of the day. That led to what was entitled a "letter for consultation" that Ms Burn was sent at 4.11 that afternoon and

to which was attached a document entitled “Phase Four – The Way Forward”. It discussed a proposed future administration structure which might include a new role of Administrative Lead and a three day a week “Admin Support” role. The lead role purported to require an employee working 45-50 hours a week.

[46] The letter also contains advise that should the proposal progress the position occupied by Ms Burn faced disestablishment.

[47] The content of this document gives rise to Ms Burn’s claim the duties identified for the lead were essentially those she was already undertaking and that she could easily have picked up the rest with a little training. TSP disagrees, saying the new role was not Ms Burn’s and required experience and skills she did not practice and which would require significant training or experience to acquire.

[48] Ms Burn also observes that at paragraph 13 of the letter it was stated that she had “indicated to Carleen Taylor that you do not desire to take on any full time role” and that she had verbally declined such a role. It is Ms Burn’s view that misrepresents the conversation she and Ms Taylor had on 15 October though accepts she was not seeking full time work. TSP remains adamant it is accurate.

[49] On 19 November Ms Burn met with Ms Duxfield and the wider team to discuss the restructure. Ms Burn says that at the commencement of the meeting Ms Duxfield asked Ms Burn about stress headaches she had been having and questioned whether they were normal for her during pregnancy. Ms Burn says this made her uncomfortable.

[50] Ms Burn says a proposed structure was handed out headed “2021” and which stated the administrative lead would take on the admin support role (Ms Burn’s then current role), as well as their own duties from 10 January 2022. The letter stated this situation would remain until an employee then on maternity leave returned in April 2022 and also advised Ms Burn would finish up in December 2021. This, according to Ms Burn, illustrates predetermination.

[51] Ms Burn says Ms Duxfield then realised this was the wrong document and took it back. Ms Burn says it was also said the document was irrelevant as it related to a restructure mooted in 2018, which she found hard to reconcile with the fact the document was headed otherwise.

[52] Ms Burn says she asked for a copy but was refused. She says she also asked about the reference to the person on maternity leave and Ms Duxfield identified an individual who was not on maternity leave in 2018.

[53] TSP accepts Ms Duxfield asked about Ms Burn's health as she had recently been unwell but denies any mention of stress headaches, saying instead that Ms Burn appeared quite happy to discuss the issue. TSP also accepts an incorrect document was handed out but remains adamant it pertained to a restructure planned in 2018. It agrees the correct document was then printed and distributed and that Ms Burn requested a copy of the original which was denied. TSP also states the person allegedly on parental leave in 2018 was never identified so a mistake cannot be alleged.

[54] Ms Burn states that on 24 November she was doing some filing in Mr Strode-Penny's office which was part of her normal duties. She says she decided she would try and find the document Ms Duxfield had initially shown her on 19 November but then taken back. She says she accessed Mr Strode-Penny's emails looking for the document and justifies this by saying she had previously been given authority to access his computer, check emails and print them. She says she located an email from Ms Duxfield that she thought could be the one she sought and forwarded it to her personal email address. She says she later realised it was not the correct document and deleted the email without reading it further.

[55] The following day, 25 November, Ms Burn instructed her lawyer to raise a personal grievance and parental leave complaint. That he did with the letter alleging Ms Burn had been unjustifiably treated a number of times as a result of the way the restructure had been handled. The parental leave complaint is based on a premise the new role would have been hers but for her pregnancy and that had led to an attempt to "orchestrate Ms Burn's consent to termination".

[56] The following day, 26 November, and after TSP become aware of what it says was the unauthorised access of Mr Strode-Penny's emails, there was a without prejudice conversation between it and Ms Burn's lawyer. That was followed by an email stating "that unless the claim Ms Burn has submitted is withdrawn immediately we will be escalating to the police for Theft of Intellectual Property as covered in her current contract (Breach of employment contract) we will then continue to prosecution".

[57] TSP claims the email was the result of it having "been 'set up' into sending this email" during the discussion.

[58] Also on 26 November Ms Burn obtained a medical certificate advising she was unfit for work for a fortnight though there is no indication as to why.

[59] The days final event was an email Ms Duxfield sent Ms Burn at 6.19pm advising that “After consultation with your lawyer this afternoon, I have been advised to convey to you, that TSP/Greenhaven will be withdrawing from the possible restructuring process” and that Ms Burn’s “... current signed employment contract remain in place”.

[60] These events were followed on 29 November with a letter from Ms Burn advising she was resigning “immediately and without notice.” The letter states she felt she had been severely disadvantaged and discriminated against since advising her pregnancy. She also takes issue with the fact the email of 26 November was sent before requesting an explanation and states her actions would not have been necessary had the document she requested been provided on 19 November. That same day a further personal grievance alleging constructive dismissal was raised.

Analysis

[61] As already said Ms Burn, in her statement of problem, claimed she had been:

- (a) Unjustifiably disadvantaged; and
- (b) Improperly treated with respect to parental leave; and
- (c) Constructively dismissed.

[62] The disadvantage allegation relies on a view Ms Burn was unjustifiably disadvantaged by reason of a prohibited ground of discrimination - namely pregnancy.¹ It is enunciated as follows:

The disadvantage is clearly made out – but for her declaring her pregnancy to Carleen on 7 October 2021, Alana would have been trained up and offered the new role that began in January 2022, or retained in the same or an alternate role. Instead, once the Respondent realised Alana was on a permanent employment agreement they attempted a sham restructure and redundancy – as outlined in the mysteriously missing document.²

¹ Section 21(1)(a) of the Human Rights Act 1993

² Closing submission at [24]

[63] The last comment relates to the fact the document originally produced on 19 November is not before the Authority with the last being said about its unavailability is that it could no longer be located.

[64] In other words, and as was confirmed by her evidence, the argument is based on two main contentions – the restructure was a sham designed to remove Ms Burn once she announced her pregnancy though there is an additional overlay as a result of an argument the sham redundancy might also have been the result of TSP's believe the employment had originally been fixed term and was designed to procure Ms Burn's termination when disavowed of that.

[65] In support of the claim reference is then made to various documents such as the exchange of 8 and 10 November as evidencing efforts to pressure Ms Burn into accepting terms which would render her employment nugatory given an inability to live on two days work a week.

[66] For TSP it is accepted there were issues that might be considered disadvantageous had they have been unilaterally imposed with, in particular, agreement there was discussion about a reduction in hours. It is also accepted that while it remains unclear who initiated them, the reason is known – namely a need to address TSP's development as a company and apparent difficulties Ms Burn was having with her work and hours.

[67] In essence each of her claims relies upon acceptance of Ms Burn's evidence notwithstanding the fact a number of her allegations are contested and/or denied. In this regard it should be noted witnesses for both parties essentially remained true to their written evidence when questioned.

[68] The issue for Ms Burn is the evidence leads me to reject an assertion fundamental to her claims – namely that the proposed restructure was a sham. The evidence is clear that TSP was undergoing a period of change and expansion with the build and fitout of a new factory. It follows, as asserted by its witnesses, that change was not only a possibility – it was needed and it was entitled to consider that and evaluate options. Final confirmation comes, in my view, from Ms Burns' acceptance when questioned that she now accepted the restructure was not related to her pregnancy.

[69] In the interim, however, issues arose with Ms Burn and again I accept TSP's evidence as while Ms Burn remained true to her view of events she fell short when addressing TSP's responses with, for example, a failure to respond to questions about the assertion the extra duties she picked up from Mrs Strode-Penny were later removed. Similarly, she was reticent about answering questions about concerns TSP might have had with her recent performance.

[70] There are again some significant concessions in Ms Burn's oral evidence with an acceptance she discussed altered hours, though not to the extent TSP proposed and, more importantly, she accepts she ultimately agreed to two days even if it was never imposed. This, I also note, undermines the claim the exchange of 8 and 10 November evidenced TSP's desire to be rid of Ms Burn. Given her acceptance of two days I do not consider it inordinate TSP would then advise others.

[71] There is then the claim regarding an initial fixed term agreement and the suggestion the redundancy was in order to reinstate that situation. Again, and aside from TSP's denial, I reject this approach mainly on the basis of Ms Burn's own evidence. Assuming there ever was a fixed term agreement and there is no evidence there was, her evidence TSP was supportive prior to advice of the pregnancy and promising future advancement strongly refutes a suggestion it needed to rely on it. There is no evidence TSP ever attempted to rely on a fixed term to remove Ms Burn which is not a surprise given their denial one ever existed.

[72] There is then the claim Ms Burn was promised the new role which again fails as, aside from Ms Burn's claim, there is no supporting evidence. Furthermore, I have to suggest it would be highly unlikely given the fact change was legitimately afoot and Ms Burn had made it clear she was not available for the full time role that would be required.

[73] In summary and for the above reasons I do not accept Ms Burn's claim she was disadvantaged as a result of the pregnancy but was instead involved in discussions which naturally emanated as a result of the situation TSP was in and issues with her ability to address her duties at the time.

[74] Having said that I have no doubt Ms Burn had, for whatever reason, come to believe she had some form of entitlement and it was that, along with tardiness in the way TSP approached the restructuring meeting on 19 November, which influenced later events. It also, and notwithstanding my rejection of the claim Ms Burn was improperly treated by reason of a sham redundancy, leaves the claim of constructive dismissal live.

[75] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*³ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign.

[76] The breach must be repudiatory as opposed to a nuisance or unpleasantness and there must be a causal link between the employer's conduct and the tendering of the resignation.⁴ Resignation in response to that conduct must also be foreseeable.⁵

[77] While when asked why she resigned Ms Burn concentrated on the view TSP was trying to get rid of her on the pretext of a sham restructure, she also mentioned TSP's reaction to her accessing Mr Strode-Penny's computer as being a final and fundamental breach which ensured her departure. That reaction is the e-mail of 26 November (paragraph 56 above), and "the blackmail fatally impacted on the relationship of trust and confidence".

[78] While I have already rejected the claim the restructure was a sham and that Ms Burn was improperly treated with respect to it as a result of her pregnancy I accept from her evidence and the way it was presented that she had, whether properly or not, come to that view.

[79] That led to two events. The first was Ms Burn's raising of her first personal grievance. Whether right or wrong she had an absolute right to do that. The second was what can only be considered the unwise decision to forward documents from Mr Strode-Penny's computer to her own. I say unwise as there are other ways to procure the documents in question given the valid raising of a personal grievance. Those actions then led to TSP's reaction which intertwined the two and effectively made them inseparable.

[80] That reaction can only be characterised as a totally improper attempt to coerce Ms Burn into dropping her legitimate personal grievance or face potentially serious consequences. It is effectively blackmail and here I note that is defined as "the action, ..., of demanding payment or another benefit from someone in return for not revealing compromising or damaging information about them."

³ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

⁴ *Z v A* [1993] 2 ERNZ 469

⁵ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[81] Blackmail is illegal.⁶ It is also, in my view, a serious breach to attempt to deprive one of a statutory right in such a way and one I accept is repudiatory.

[82] It should also have been entirely foreseeable that Ms Burn would resign once threatened in such a way and I do not accept an argument the medical certificate meant TSP could not foresee the resignation as it expected something else to occur. That is because the evidence shows she already had the certificate when the email which finally triggered the decision to resign was sent.

[83] A dismissal in such circumstances must be unjustifiable given a resignation in the face of a serious breach must mean there was no compliance with the requirements of s103A of the Act and there is no evidence there was. I accept Ms Burn was constructively dismissed.

[84] Finally I note that as an adjunct it is also suggested Ms Burn was unjustifiably dismissed by reason of her pregnancy contrary to s 49(1) of the Parental Leave and Employment Protection Act 1987. The dismissal was constructive and I have found its reasons had nothing to do with the pregnancy – they were a reaction to TSP’s response to the disadvantage grievance and its discovery that Ms Burn had accessed Mr Strode-Penny’s computer.

[85] The conclusion Ms Burn was unjustifiably dismissed raises the question of remedies. She sought “an award of lost wages and compensation”. This was later quantified as being three months lost wages, compensation of \$40,000 pursuant to s123(1)(c)(i) and an amount to compensate for the loss of paid parental leave.

[86] It was also suggested I consider penalties but for two reasons I take that no further. First they were not claimed and that is acknowledged in the submission where the issue is first raised. Second they are sought in relation to issues largely pertaining to the sham redundancy which I have rejected.

[87] Section 128(2) of the Act requires the payment of three months wages or the actual loss if less. Ms Burn’s loss is three months and while that may be attributable to her decision not to seek alternate employment largely as a result of her pregnancy, that is not something I can criticise her for. Three months must be due.

⁶ Section 237(1) of the Crimes Act 1961

[88] Turning to compensation where, as already said, Ms Burn seeks \$40,000. That said a large part of the argument relies on the hurt that was said to emanate from the alleged discrimination and pursuit of the sham redundancy. As said already, I reject those claims but notwithstanding the evidence Ms Burn gave about the hurt she felt, the submission does raise an issue in that it and her evidence supports a conclusion Ms Burn was incapable of separating the perceived hurt generated by those events and that with which I have concluded she is successful.

[89] Having considered the evidence and current precedent I consider \$18,000 appropriate.

[90] Finally there is the issue of Ms Burn's lost parental leave payment. There can be little doubt that is something she would have been entitled to had she not been constructively dismissed and is a benefit she might reasonably have expected to receive.

[91] Finally the conclusion Mr Burn has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.⁷ While I consider her actions in accessing Mr Strobe-Penny's computer unwise and forwarding what she accessed to herself even worse I consider the answer is no. The evidence raises a possibility Ms Burn was authorised to access the computer and frankly she cannot, in any way, be held responsible for TSP's reaction which is the reason for my finding.

Conclusion and Orders

[92] For the above reasons I conclude Ms Burn has a personal grievance in that she was unjustifiably constructively dismissed. Her other claims fail.

[93] As a result I order TSP Construction Limited pay Alana Burn:

- (a) Three months (thirteen weeks) wages at the rate she earned as at the point of dismissal being wages lost as a result of the dismissal; and
- (b) A further \$18,000.00 (eighteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and

⁷ Section 124 of the Employment Relations Act 2000

- (c) A further 26 weeks pay being reimbursement for the paid parental leave she would otherwise have received.

[94] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Ms Burn may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date TSP will then have 14 days to lodge any reply memorandum. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁸

Michael Loftus
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.