

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 196
5453247

BETWEEN BRIAN HARTLEY
 Applicant

AND CARTER HOLT HARVEY
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Graham Malone, counsel for Applicant
 Daniel Erickson, counsel for Respondent

Investigation Meeting: 9 & 10 September 2014 at Nelson

Submissions: At the investigation meeting

Determination: 27 November 2014

DETERMINATION OF THE AUTHORITY

- A. Brian Hartley was not unjustifiably disadvantaged, constructively dismissed or made redundant.**

Employment relationship problem

[1] Brian Hartley claims that beginning in November 2013 he was unjustifiably disadvantaged in his employment by Carter Holt Harvey Limited (CHH) making substantial unilateral changes to his terms and conditions of employment and subjecting him to bullying, intimidation and unacceptable behaviour causing him stress, fear and indignity.

[2] Mr Hartley claims that CHH's actions caused him to resign. He relies on the same breaches above to say that he was unjustifiably constructively dismissed.

[3] Mr Hartley also claims that as the changes made were so substantial a fair and reasonable employer would have consulted with him and had he not consented to the changes CHH should have made him redundant.

[4] By way of remedy Mr Hartley claims either redundancy payment in line with his individual employment agreement (IEA) or reimbursement for lost remuneration, including future earnings, and compensation of \$30,000.

[5] CHH denies all Mr Hartley's claims and says that it acted fairly and reasonably.

[6] At the investigation meeting I heard sworn or affirmed evidence from Mr Hartley, Mrs Sandra Hartley, Roydon Weston, the former sawmill manager, Peter Moffat, the former kilns supervisor, Nigel Cuthill, the site manager, Gary Andrews CHH's human resources manager for wood products and Diedrick Huyser, the sawmill's quality compliance manager.

Issues

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

- (a) Whether Mr Hartley's terms and conditions of employment were unilaterally changed and whether he was unjustifiably disadvantaged by that;
- (b) If so, were the changes so significant his position should have been made redundant and should he have been paid redundancy compensation?
- (c) Whether Mr Hartley suffered unjustified actions leading to his disadvantage by being bullied or exposed to a management style that caused him unnecessary stress, indignity or fear;
- (d) If CHH did breach any duty, including its duty to provide a safe workplace, was the breach, or were the breaches, sufficiently serious to amount to repudiatory conduct and did that breach and/or other breaches cause Mr Hartley's resignation?
- (e) If Mr Hartley was unjustifiably disadvantaged or unjustifiably dismissed what remedies is he entitled to?

Factual background

[8] Mr Hartley had been the manager of the planer mill at the Eve's Valley Sawmill since 1997. He was also responsible for the kilns and managed about 53 staff. He had been employed by CHH, and its predecessor, from 1981.

[9] On 11 November 2013 a new site manager, Nigel Cuthill, became the senior manager on site. He became Mr Hartley's direct manager.

[10] Mr Cuthill was tasked with improving the site's overall performance. Prior to his arrival the Nelson sawmill had been undertaking a programme of continuous manufacturing improvement (CMI). Within the first couple of days Mr Cuthill, partly through feedback from the CMI programme and talking with staff, identified staff dissatisfaction with Mr Hartley's management, and a poor relationship between Mr Hartley and the planer mill shift supervisors.

[11] Mr Hartley was on annual leave on the day Mr Cuthill started and returned to work on 12 November 2013. Either the next day or the day after that Mr Cuthill advised Mr Hartley that he would have to start attending all 6 am shift meetings, Monday to Friday.

[12] Within his first fortnight there Mr Cuthill organised a meeting between Mr Hartley and the shift supervisors aimed at clearing the air and improving their working relationship.

[13] Mr Hartley began to attend the morning meetings. He arrived at work at about 5.40 am. However, he found it difficult to get away from work early so often worked until 5 pm or 6 pm. Mr Hartley began to find it difficult to sleep at nights and says that the lack of sleep and over-work, caused by increased demands on him under Mr Cuthill's management, began to have an impact on his stress levels and caused him depression. He says that the depression was not caused solely by the change in hours imposed on him but also by Mr Cuthill's treatment of him.

[14] Mr Hartley says Mr Cuthill also changed the requirements for him to be contacted by supervisors in the evenings and on weekends every time there was a machinery breakdown at the planer mill. Mr Hartley knew that there were usually

small stoppages every hour but previously he would only get called if the supervisors could not fix a stoppage within 20 minutes.

[15] Mr Hartley says that previously he would be called about quality issues approximately 2-3 times a week, and sometimes twice a night. After Mr Cuthill's instruction he was probably getting more calls but he does not believe he was being called every time there was a small stoppage.

[16] Mr Hartley did not see the need to be on call for 24 hours a day 7 days a week and feared that it was possible he could be called every hour during the night every night. He says that anxiety about this contributed to his inability to sleep at nights.

[17] One morning after a 6am shift meeting Mr Hartley asked Mr Cuthill what time he went to bed and was told between 9 and 10pm. Mr Hartley told Mr Cuthill he had been going to bed about 8pm but was having difficulty sleeping because *work was going round and round in my head* and he was only getting 1.5 to 2 hours of sleep a night. Mr Cuthill says that discussion happened on the day that Mr Hartley went off sick; 28 November 2013. I accept that.

[18] Mr Hartley says that Mr Cuthill responded that he worked 12 hour days and he expected his managers to do the same.

[19] Also on 28 November 2013 Mr Hartley came to work and told Mr Cuthill that he was not well and had a doctor's appointment later that day. Mr Cuthill told him he should go home if he was ill but Mr Hartley said he would remain at work until his appointment. Mr Hartley attended his appointment and then rang Mr Cuthill telling him he would be off work sick and he would call Mr Cuthill the following week to *see if he had a future with CHH*. Mr Cuthill says he was surprised by that comment and rang Mr Andrews to see if he knew of any reason Mr Hartley would question his future with CHH.

[20] On 11 December 2013 Mr Andrews and Guy McKenzie, the sawmill's engineering manager who by then was second-in-charge to Mr Cuthill, went to Mr Hartley's home to discuss his illness and his return to work. Mr McKenzie was chosen to attend rather than Mr Cuthill because he had worked with Mr Hartley longer than Mr Cuthill. Before this date CHH had not been informed what illness

Mr Hartley was suffering from. However, Mr McKenzie had previously been a minister and Mr Cuthill and Mr Andrews thought that his training and experience as a minister may have been useful.

[21] At the meeting Mr Hartley disclosed that he had been diagnosed with and was receiving treatment for depression. Although he disclosed that he had been suffering from stress at work he did not mention Mr Cuthill's management as being a cause of that stress. He did not mention the requirement to attend morning meetings or the expectation of more out-of-work phone calls, or the increased hours he considers he was required to work to meet Mr Cuthill's demands. There was some discussion about a fire at the planer mill some months earlier and Mr Andrews was left with the impression the fire *had hit him hard and it was this that had resulted in his depression.*

[22] At the meeting the possibility of Mr Hartley returning early in the New Year was discussed, as long as he was well enough. A graduated return to work was discussed, whether shorter days, shorter weeks or project work, leading up to full-time work and a resumption of his full planer mill management duties. A further meeting was arranged for the New Year.

[23] Mr Andrews and Mr McKenzie told Mr and Mrs Hartley that they were available to talk at any time. CHH offered to extend the EAP counselling to provide as many extra sessions as Mr Hartley needed. Mr Hartley took advantage of the extended EAP.

[24] On 15 January 2014 Mr and Mrs Hartley, Mr Andrews and Mr McKenzie met again. Mr Hartley considers this meeting demonstrated that CHH's position on his returning to work had changed drastically. CHH disagrees.

[25] At the meeting Mr Hartley was told that the temporary arrangements made in his absence were not ideal. Mr Hartley says he was told that responsibility for the treatment plants would be added to his role as planer mill manager. He asked for that not to happen.

[26] Mr Hartley says that he was told that when he came back long days would be the norm for at least 12 months because Mr Cuthill had been brought in to turn

performance around and that if performance did not improve in those 12 months the site would be shut down.

[27] Mr Andrews says he did say Mr Cuthill had been brought in to improve performance but not that the site would definitely be shut down if performance did not improve but that *if things did not improve within a year then the future of the mill would be looked at*.

[28] Mr Hartley raised his concern about his hours of work. Mr Andrews got the impression that Mr Hartley's concern related specifically to being on call when away from the planer mill. He undertook to discuss Mr Hartley's concern about that with Mr Cuthill. Mr Hartley and Mr Andrews agreed that it would be useful to ask Mr Hartley's psychologist, who he was due to see the following day, his opinion on when Mr Hartley would be ready to return to work.

[29] Mr Hartley says he suffered a setback in his health as a result of the pressure he felt CHH was putting on him at the 15 January meeting.

[30] Mr Andrews says the purpose of the meeting was to ensure that Mr Hartley did not come back to work before he was well enough to successfully perform his role as planer mill manager. He says that while Mr McKenzie did say something like *the long hours will continue* that was not specifically about Mr Hartley but was to let him know that the lead team would be expected to work long hours so he should not rush back to work and should only come back once he was fully recovered.

[31] Mr Hartley says he did not mention his view that Mr Cuthill's management style and increased requirements of him had caused his depression because he:

*intended to come back to work and I didn't want to rubbish my boss if I was coming back.*¹

[32] On 20 January 2014 Mr Andrews emailed Mr Hartley reporting that he and Mr Cuthill:

- Had put the addition of the treatment plant responsibility on hold until Mr Hartley was ready;

¹ Oral evidence at the investigation meeting.

- Asked for feedback on how calls from the site during the evening and night could be minimised and emphasised that the need was *driven by the plant*;
- Stated that there were no alternative duties available but committed to continuing to look for some;
- Affirmed that a phased return to full time hours was still being considered:

...but we would need to look at how this is structured due to the critical nature of your role and the length of time the mill runs every day. Obviously there are things that you must do every day with both shifts and then there are all the other things which get in the way of production which need to be dealt with immediately as we both know! If this is an option for you then I suggest we use medical guidance to formulate a timetable for a phased return to ensure that we do not put you at risk of a relapse, which I know we are both concerned about.

[33] Mr Andrews also offered to meet Mr Hartley again either that week or the following week.

[34] At some point after that email Mr Hartley was told that as his sick leave and annual leave entitlements were dwindling he would be required to take leave without pay while he was still off work.

[35] On 27 January 2014 Mr Malone wrote to Mr Andrews raising a personal grievance of unjustified disadvantage because of:

...sudden changes made in management practices and Brian's working hours and workload [causing] significant stress which led to him becoming severely depressed and unfit for work.

[36] The letter identified to CHH for the first time that Mr Cuthill's management style was a cause of Mr Hartley's illness - *the method of management changed ...a more dictatorial style.*

[37] The letter also stated that Mr Hartley had a medical certificate stating that he was unfit to return to work fulltime for six to eight weeks and:

has been advised by his psychologist that a return to work under the conditions that existed immediately prior to his time off conditions (sic) is not practicable. Brian believes that he can return to his job and is willing to do so but is unable to return under the terms that were imposed in November.

[38] Mr Malone asked that CHH recognise Mr Hartley's long and loyal service and that if it considered that the job required more than Mr Hartley *can now give* that CHH make him redundant and allow him to leave with dignity.

[39] On 30 January 2014, after discussing Mr Hartley's concerns with Mr Cuthill, Mr Andrews responded to Mr Malone that CHH considered that there were no grounds for a personal grievance of unjustified disadvantage and there had been no unilateral variation of Mr Hartley's terms and conditions of employment. CHH denied that the planer mill manager's role had been made redundant and said it remained a key position.

[40] CHH advised it remained prepared to consider a graduated return to work for Mr Hartley under medical guidance. It proposed Mr Hartley be assessed by a medical practitioner chosen by CHH to clarify his condition, identify the possible causes of his condition and the prospects of and a timeframe for a *return to work at full capacity*. It invited Mr Hartley to also provide a report from his own psychologist if he chose to do so.

[41] Mr Andrews elaborated on the areas of concern Mr Cuthill had identified with the planer mill and which CHH says were raised with Mr Hartley before Mr Hartley went off work and were the background to the requirement that Mr Hartley attend the morning shift meetings. These included a perception of a lack of leadership from Mr Hartley and a perception Mr Hartley did not address his employees' concerns about health and safety. Mr Andrews also stated that the planer mill had not been reaching its *throughput targets*.

[42] Mr Andrews agreed that at the 15 January meeting Mr McKenzie had made comments about long hours continuing and the temporary cover for Mr Hartley not being satisfactory. However, he said the context was that CHH wanted to reassure Mr Hartley of his importance to the Nelson operation and to ensure he did not come back too early and risk a relapse.

[43] On 17 February 2014 the parties met to try and resolve issues but were unable to do so.

[44] On 23 February 2014 Mr Malone wrote on Mr Hartley's behalf stating that Mr Hartley *no longer has the necessary trust and confidence in the company to be*

able to continue his employment. Mr Hartley resigned and raised a claim of unjustified dismissal.

Were Mr Hartley's employment terms or conditions unilaterally changed?

Was Mr Hartley disadvantaged by being required to attend the morning meetings?

[45] Mr Hartley's individual employment agreement contains the following about his hours of work:

Your normal hours of work are 8.00 am to 5.00 pm Monday to Friday. However from time to time you may be required to work outside these hours in order to satisfactorily perform your duties. No additional payment will be made for that work.

[46] The planer mill runs with two shifts a day. The first shift begins at 6 am with a meeting. The second shift begins at 3.30 pm, also with a meeting. Each shift has a supervisor who reported to Mr Hartley.

[47] Under the previous site manager, Darryn Adams, Mr Hartley had been asked to attend one 6 am shift meeting a week; which he did. On the days he attended the early shift meeting he started work at about 5.40 am and he left work earlier than usual that day. However, on other days he usually worked from about 7.40 am until about 4-5 pm.

[48] CHH says that because Mr Hartley was a senior manager and the clause outlining his hours of work says that from time to time he would be required to work outside of those hours it was not unreasonable for Mr Cuthill to direct Mr Hartley to attend the 6 am shift meetings and from time to time require he work longer hours than the hours per day set out in his IEA.

[49] CHH says that Mr Cuthill only required Mr Hartley to attend the morning meetings to assist him to improve the management of the mill and particularly to improve how Mr Hartley's staff viewed him. Mr Cuthill offered to attend the meetings with Mr Hartley to show staff that Mr Hartley had Mr Cuthill's support and backing. Mr Cuthill says he could not see how Mr Hartley could rebuild his team and do his job if he did not attend the morning meetings.

[50] Mr Hartley says that the requirement he begin work every day at or before 6 am was a fundamental and significant change to his working conditions imposed on him without consultation which caused him unjustified disadvantage.

[51] Mr Hartley says his difficulty was the requirement to attend morning meetings coupled with Mr Cuthill's increased expectation of his work performance which meant he could not leave earlier in the day as he used to do when he attended an early meeting.

[52] CHH says that Mr Hartley was never required to work longer hours than in his employment agreement as there was always flexibility to allow him to leave earlier than 5 or 6 pm.

[53] There are two limbs to the test for unjustifiable disadvantage set out in s103(1)(b) of the Employment Relations Act (the Act); firstly there must be an unjustifiable action by the employer, and secondly that action must have caused disadvantage to the employee.

[54] The test of justification for an employer's action is the same test set out in section 103A that applies to dismissals. I need to look at whether the way that CHH, through Mr Cuthill, acted in relation to requiring attendance at morning meetings was what a fair and reasonable employer could have done in all the circumstances at the time. I also need to consider the procedural aspects of subsection (3), as far as they can sensibly be applied to this situation.

[55] Section 4(1A)(b) of the Act is also relevant. It requires employers and employees to deal with each other in good faith which:

requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative ...

[56] Mr Cuthill raised his concerns with Mr Hartley and proposed a way forward, that included attending the early shift meetings and organising a meeting between him and Mr Hartley and the two shift supervisors, aimed at improving relationships. Mr Cuthill explained the purpose of attending the morning meetings to Mr Hartley. I am satisfied that Mr Hartley had an opportunity to respond to Mr Cuthill's concerns and proposed solutions, but did not raise any concern or objection at that time.

Mr Hartley began to attend the morning meetings and did so over the period of approximately 13-28 November, a maximum of 11 early starts, without expressing concern until 28 November and without seeking to explore with Mr Cuthill how long he intended that pattern of work to continue.

[57] At the investigation meeting Mr Hartley's evidence was that during November 2013 he thought the requirement to attend every morning meeting would be for 2-3 months and then it would only be required 2 or 3 times a week. However, he did not explore this with Mr Cuthill at any time.

[58] Although Mr Hartley mentioned to Mr Cuthill that he was finding the early starts difficult because he was not sleeping properly he did not bring that up until he was already so unwell that upon seeing his doctor that day he was put off work. By then it was too late for any meaningful communication between Mr Hartley and Mr Cuthill to allow Mr Cuthill to reconsider or adjust the requirement Mr Hartley attend all the meetings.

[59] Viewed separately from Mr Hartley's other allegations Mr Cuthill's direction that Mr Hartley attend the early morning meetings was reasonable in the circumstances of his concerns about the working relationship between Mr Hartley and the morning shift supervisor and staff. No additional duties or responsibility were unilaterally added to Mr Hartley's role, instead what was required of him was that he undertook his duties differently.

[60] There is no evidence that before Mr Hartley became ill he thought the requirement would become a permanent change in his hours of work. I consider that the requirement to attend morning meetings was necessary at the time for Mr Hartley to satisfactorily manage the planer mill and that need is covered by Mr Hartley's employment agreement. If the early starts were disadvantageous to Mr Hartley, which on their own I do not consider they could have been, the requirement was justified as something a fair and reasonable employer could have done in all the circumstances.

Did Mr Cuthill's other behaviour toward Mr Hartley cause him unjustified disadvantage?

[61] The parties agree that Mr Cuthill was employed to *shake things* up or improving the site's overall performance. They acknowledge that the previous site manager had a *more laid-back style*.

[62] CHH says that it accepts Mr Cuthill's style was different, and more demanding, than that of the previous site manager. However, it says that the main change was that Mr Cuthill required a higher level of accountability by requiring managers to be able to explain shortfalls against their department's targets. He was required to do that by CHH. The expectation was the same for all managers, not just Mr Hartley. CHH says Mr Cuthill's behaviour was part of a reasonable attempt to lift the performance of the mill and its senior leadership team.

[63] Mr Hartley, and his witnesses Mr Weston and Mr Moffat, consider that Mr Cuthill was a *bully* and treated Mr Hartley unfairly and too harshly.

[64] Mr Hartley says he was bullied by Mr Cuthill or exposed to a management style that caused him unnecessary stress, indignity and fear. He gave evidence of two particular situations in which he felt belittled and humiliated by Mr Cuthill's treatment of him. Both of the situations occurred at lead team meetings in front of Mr Hartley's peers.

[65] Lead team meetings were held daily at 8.45 am and chaired by Mr Cuthill. Mr Cuthill required all managers to complete actions that had been assigned at previous meetings within agreed or prescribed timeframes.

[66] Mr Hartley described having been asked to complete a root cause analysis of a planer mill breakdown that was required to be presented at the following morning's meeting. He said that he completed the analysis at about 5 pm the previous day and asked Mr Cuthill to have a look at it. Mr Cuthill said that Mr Hartley's analysis was not good enough and he should do it again. However, Mr Hartley considered that it was too late for him to do any more work on it and went home.

[67] At the lead team meeting the next day Mr Hartley was the third manager that Mr Cuthill considered had not completed his assigned task and abruptly terminated the meeting saying that people should not come to the next day's meeting until they had completed their actions.

[68] Mr Hartley felt humiliated by that and personally targeted. He wondered why the meeting was terminated over his alleged failure to complete his action when it had not been over the previous two managers' failures.

[69] Mr Cuthill denies that he personally targeted Mr Cuthill and instead says that because he was the third person not to have completed his action Mr Cuthill decided that he needed to end the meeting to emphasise that was not acceptable.

[70] The second situation described by Mr Hartley was in another meeting during which a senior manager from head office asked why there had been a production dip in the planer mill the previous day between 12 and 1 pm, during an otherwise well performing day. Mr Hartley answered that there had been no down time recorded and that he did not know why the dip occurred but that he would check. Mr Cuthill told him that he should already know the answer. Mr Hartley says he *objected* to that, although I do not understand him to say that he voiced that objection. Again he says he felt singled out by Mr Cuthill and humiliated. He felt that Mr Cuthill was harder on him than he was on the other managers.

[71] In both cases Mr Hartley felt he had not been treated fairly, especially in not being given an opportunity to explain why he did not meet the deadline in the first situation and to explain why he did not yet know the answer in the second situation.

[72] These events coupled with the early starts and increased demands on him made him feel as if Mr Cuthill was targeting him and CHH wanted to get rid of him.

[73] Workplace bullying is difficult to define. I accept Mr Erickson's submission that the Worksafe 2014 Best Practice Guidelines on Preventing and Responding to Workplace Bullying are useful to assist in defining bullying. 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.²

[74] The Guidelines also list *What Bullying Isn't*:

- *One-off or occasional instances of forgetfulness, rudeness or tactlessness*
- *Setting high performance standards because of quality or safety*
- *Constructive feedback and legitimate advice or peer review*
- *A manager requiring reasonable verbal or written work instructions to be carried out*
- *Warning or disciplining employees in line with the workplace's code of conduct*
- *A single incident of unreasonable behaviour (but it could escalate).³*

[75] I am satisfied that there were avenues available to Mr Hartley to address his concerns about Mr Cuthill's style of management and specifically his treatment of him before he became so ill. Mr Hartley mentioned his concerns to other managers at his level, a number of whom were also struggling with Mr Cuthill's style, but did not make any official complaint to the site health and safety manager, to a confidential speak-out line or to Mr Andrews. I accept that given what Mr Hartley had been told about Mr Cuthill's manager wanting to get rid of some managers it was not realistic for him to complain to Mr Cuthill's manager.

[76] If Mr Hartley had told Mr Andrews and Mr McKenzie of his concerns in the first meeting CHH may have been able to address them more squarely and directly with Mr Cuthill before Mr Hartley reached the point, as he says he did after the 15 January meeting, of losing all trust and confidence in CHH.

[77] It is also possible to view Mr Hartley's failure to raise with CHH what he believed to be the root cause of his stress and illness until 27 January 2014 as a failure on his part to honour his s4(1A) duty to be active and communicative in order to maintain a productive employment relationship in which he was responsive and communicative. However, I understand that Mr Hartley's illness made raising his real concerns difficult while he was ill.

² Page 6 of the Guidelines.

³ Page 11 of the Guidelines.

[78] The examples Mr Hartley has given of Mr Cuthill's behaviour towards him in two meetings show Mr Cuthill has an abrasive and abrupt manner. Mr Cuthill was demanding and he may even be described as rude. However, I do not accept that Mr Hartley was personally targeted. Overall I do not consider that Mr Cuthill's actions when viewed objectively by a reasonable person amount to workplace bullying. Although Mr Hartley felt humiliated he was not victimised, intimidated or threatened by Mr Cuthill. The evidence I heard at the investigation meeting makes it clear all managers were being held to new and more stringent reporting and performance requirements by Mr Cuthill. I do not consider the two described examples of Mr Cuthill's behaviour at meetings amounted to bullying, or another type of unjustified disadvantage to Mr Hartley or a breach of CHH's obligation to provide a safe and healthy workplace.

[79] CHH was justified in attempting to lift the performance of the planer mill.

Was Mr Hartley constructively dismissed?

[80] In examining whether a constructive dismissal has occurred in these circumstances two questions arise:

- First, has there been a breach of duty on the part of the employer which has caused the resignation?
- Secondly, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation?

[81] It needs to be established whether any of CHH's behaviour amounted to a breach or breaches which caused Mr Hartley's depression/stress related illness and directly caused his resignation.

[82] In addition, if there was a breach of a duty or duties to Mr Hartley on CHH's part it needs to be established that it was reasonably foreseeable to CHH that Mr Hartley would not have been prepared to return to work under the prevailing

conditions. Was a substantial risk of resignation reasonably foreseeable, having regard to the seriousness of the breach?⁴

[83] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁵ observed in describing this type of constructive dismissal:

*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 border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.*⁶

[84] Mr Hartley says that as a result of the meeting on 15 January he lost trust and confidence in CHH addressing his concerns and considered it was not committed to reducing his stress. Although Mr Andrews' 20 January 2104 email set out CHH's commitment to facilitate a gradual return to work with medical guidance he says CHH was offering *too little, too late*.

[85] CHH had duties to Mr Hartley to act as a good employer and provide good and safe working conditions. CHH was obliged to provide and maintain a safe working environment and management practices that were reasonable so as not to cause undue stress to Mr Hartley.⁷

[86] In order to establish any breaches of CHH's duties related to avoidance of harm caused by stress, Mr Hartley would have to show that CHH knew or ought to have known that there was a risk of harm to him and failed to take all reasonably practicable steps to avoid that risk.⁸

[87] The difficulty with that is that Mr Hartley did not spell out to CHH before 27 January what he considered to be the root cause of his stress and his subsequent illness. There is no way that CHH could have known that Mr Hartley did not consider he could return to work unless his problems with Mr Cuthill were resolved. Mr Cuthill did not know that Mr Hartley had problems with him.

⁴ *Auckland etc Local Authorities Officers' IUOW v Auckland Electric Power Board* [1992] 1 ERNZ 87

⁵ 1983 ACJ 965

⁶ *Ibid*, at 975.

⁷ *Attorney-General v Gilbert* [2002] 1 ERNZ 31

⁸ *Nilson-Reid v Attorney-General* [2005] ERNZ 951, at 972 to 973

[88] I have carefully considered the evidence about what was said at the two meetings on 11 December and 15 January and the correspondence between the parties.

[89] In its email of 20 January 2014 CHH recognised that it could not simply add responsibility for the treatment plants to Mr Hartley's role as it had proposed and as at that date had put that idea on hold until Mr Hartley was ready. Mr Hartley considered the proposed addition of the treatment plant to be further evidence of his becoming overburdened. However, that proposed change was something that could have been explored in the future, and objected to by Mr Hartley if he chose to do so. The proposal to add the treatment plant responsibility to Mr Hartley's role did not amount to any unilateral change in Mr Hartley's terms and conditions or to any unjustified disadvantage.

[90] I am satisfied that before 27 January 2014 when Mr Malone's letter identified Mr Hartley's concern about Mr Cuthill's management style, and raised a personal grievance of unjustified disadvantage, CHH was not in breach of any duty to Mr Hartley or of any term or condition of his employment agreement. Therefore, nothing done before then could have given rise to a constructive dismissal.

[91] Mr Malone submitted that the company's failure after 27 January 2014 to take steps to investigate the management practices and culture imposed by Mr Cuthill was a failure to act as a fair and reasonable employer would have by investigating the allegations and attempting to remedy the problem. He criticised Mr Andrews' response to the allegation of bullying by Mr Cuthill.

[92] I have carefully analysed the correspondence between the parties from the first notification to CHH that Mr Cuthill's management style was a problem for Mr Hartley on 27 January to Mr Hartley's resignation on 23 February 2014, to identify whether CHH failed in any duty to Mr Hartley from 27 January onwards.

[93] CHH's response to Mr Hartley's concern that Mr Cuthill's style was *dictatorial* and had subjected him to *unnecessary fear, stress and indignity* was to deny it and to say that Mr Cuthill had not behaved inappropriately. Mr Andrews used his own judgment of the situation having been at the plant for a few days when both Mr Cuthill and Mr Hartley were there and having attended the lead team meeting that

Mr Cuthill terminated early, to Mr Hartley's distress. His evidence at the investigation meeting was that he had not seen any inappropriate behaviour by Mr Cuthill and that he did not consider Mr Cuthill's behaviour at that meeting was inappropriate or bullying.

[94] Although that letter also raised CHH's concerns about Mr Hartley's management of the planer mill there was no suggestion of disciplinary action being proposed against Mr Hartley and although the timing of raising those issues in the light of Mr Hartley's illness was perhaps unfortunate I do not consider the letter *crossed the border line separating inconsiderate conduct causing some unhappiness or resentment ... from dismissive or repudiatory conduct sufficient to justify the termination of the employment relationship.*

[95] In addition, Mr Hartley's evidence was very clear that as at 15 January he had already lost the necessary trust and confidence in CHH. It follows that I do not consider that Mr Hartley was constructively dismissed.

Should CHH have made Mr Hartley redundant?

[96] Mr Hartley submits that CHH required substantial changes to his position, including his hours of work. He says he did not want to and was not able to work those hours. If he had refused to work those hours as he was entitled to do and CHH continued to wish to make those changes it would have had to make him redundant.

[97] Redundancy arises in a situation where an existing role becomes superfluous to an employer's needs. Redundancy can also arise when substantial changes have been made to an employee's role such that the position no longer substantially exists.

[98] The planer mill manager's role still existed and was important to CHH's mill operation. I am not persuaded that the requirement to attend early morning meetings and the possibility of more out-of-work calls from mill staff and increased reporting and performance demands can be characterised as so significant that the position Mr Hartley held had so significantly changed that in reality it no longer existed. Any changes did not break the essential continuity of Mr Hartley's employment with CHH as planer mill manager.⁹ I consider Mr Hartley's situation different to those cases that

⁹ *Carter Holt Harvey v Wallis* [1998] 3 ERNZ 984

Mr Malone submitted I should be bound by because changes made, if any, by CHH were minor in the context of Mr Hartley's overall role.

[99] Mr Hartley's claim for redundancy compensation is similar to that described in *Pilgrim v Director General of Health*.¹⁰

*To demand in such circumstances payment of severance compensation is to insist upon the employer agreeing to the termination of the contract of employment by mutual consent when the employer is not willing to terminate it because it is against the employer's interests to do so.*¹¹

[100] In the circumstances Mr Hartley was not entitled to insist that CHH declare the role redundant and pay him redundancy entitlements¹² when CHH did not consider the role was redundant. Instead CHH was keen to have Mr Hartley return to his role when he was well and was willing to assist his transition back to working full-time under medical advice.

Costs

[101] Costs are reserved. Generally the successful party can expect a contribution towards their reasonable legal costs.

[102] The Authority usually awards costs on a daily tariff approach of \$3,500 for a full day of hearing. This hearing took one and a half days and so would usually attract a contribution of \$5,250 in legal costs. I invite the parties to reach agreement on costs. Otherwise any party seeking costs should file a memorandum with the Authority within 28 days of this determination and the other party should file a memorandum in response within a further 14 days.

Christine Hickey
Member of the Employment Relations Authority

¹⁰ [1992] 3 ERNZ 190

¹¹ *Ibid*, at 208.

¹² If they could even have been adequately calculated given the lack of the correct agreement.