

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 97  
5572105

BETWEEN                    JENNINE HAURAKI-TUMU  
   Applicant

A N D                        NORTH CANTERBURY  
   DISTRIBUTORS (2003)  
   LIMITED  
   Respondent

Member of Authority:     Peter van Keulen

Representatives:         Chrissy Gordon, Advocate for Applicant  
   Linda Penno, Advocate for Respondent

Investigation Meeting:    31 March 2016 at Christchurch

Submissions Received:    31 March 2016 for Applicant  
   31 March 2016 for Respondent

Date of Determination:    27 June 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Mrs Hauraki-Tumu was not unjustifiably dismissed from her employment.**
- B. Mrs Hauraki-Tumu was unjustifiably disadvantaged in her employment.**
- C. North Canterbury Distributors (2003) Limited is to pay Mrs Hauraki-Tumu \$5,000.00 without deduction pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.**
- D. Costs are reserved with a timetable set for submissions if required.**

**Employment relationship problem**

[1] The applicant, Mrs Hauraki-Tumu, complains that the respondent, North Canterbury Distributors (2003) Limited (NCD) unjustifiably dismissed her from her employment. She also complains that she was disadvantaged in her employment by unjustified actions of NCD in relation to its dealings with ACC on her behalf.

[2] NCD says that it did not dismiss Mrs Hauraki-Tumu and it did not act in an unjustified manner nor did it cause her disadvantage by any of its actions.

**Factual background**

[3] Paul and Faye Johnstone own and operate NCD. NCD transports chilled and frozen foods to supermarkets and delivers its own product lines to food retailers and restaurants.

[4] Mrs Hauraki-Tumu first worked for NCD from November 2008 until April 2010. That employment ended when Mrs Hauraki-Tumu resigned because of back issues and problems with her hands.

[5] NCD employed Mrs Hauraki-Tumu for a second period from June 2012 as a driver. That was described as being a part-time role but the hours increased over time and the time sheets provided to me indicated quite clearly that Mrs Hauraki-Tumu regularly worked in excess of 40 hours per week i.e. she had a full time role with NCD.

[6] In late 2013, NCD promoted Mrs Hauraki-Tumu to Operations Manager. This role continued to be primarily a driving role but included some administration. NCD was aiming to increase the management and administration components of the role and reduce the amount of time Mrs Hauraki-Tumu spent driving.

[7] NCD was aware of Mrs Hauraki-Tumu's previous injuries that had caused her resignation and was conscious of not over-working her, particularly in the physical role of driving. However, there was only limited work available on the management and administration side of the business and there was, of course, tension between

reducing hours spent driving without providing corresponding administration or management time.

[8] In short, Mrs Hauraki-Tumu budgeted on being paid for a full time 40 hours per week and if she was not rostered on for at least that amount, that would cause her some difficulties.

[9] In April 2015, Mrs Hauraki-Tumu's left wrist was starting to become painful. She believed this was the result of excessive work but did not attend a doctor or seek any medical assistance with it. She did not raise the issue with NCD at the time. She simply decided she could continue to work and wore a wrist brace, took painkillers and used anti-inflammatory cream to try to self-manage her pain. This pain was not related to the previous medical conditions that had caused her to resign in 2010.

[10] On 23 April 2015, Mrs Hauraki-Tumu suffered a workplace injury. Mrs Hauraki-Tumu was loading a truck and as she swung the box onto the truck, she felt an instant pain in her left wrist. She carried on working, as there was no one to take over her shift. She did not report the injury to NCD, either by recording it in the accident log or by telling NCD of the incident.

[11] Mrs Hauraki-Tumu explained her reluctance to inform NCD of the accident or seek medical assistance immediately because she believed NCD would not tolerate the injury. She claims that staff that had previously hurt themselves had been treated poorly by NCD. There is no evidence to support this allegation, however, I do believe and accept that it was reflective of Mrs Hauraki-Tumu's state of mind at the time and explains why she did not report the injury to NCD. She put her own health at risk and continued to self-manage an injury because of a subjective concern over retaliation and fear of losing shifts.

[12] On 8 May 2015, Mrs Hauraki-Tumu was unloading two pallets of product when her wrist became very painful. She describes this as being unable to use her wrist any more. That afternoon, she went to see her doctor who signed her off for seven days on ACC.

[13] Mrs Hauraki-Tumu then attended at NCD to advise it of her injury and that she would be off work for at least seven days.

[14] Mrs Hauraki-Tumu describes the meeting with Mr and Mrs Johnstone as being difficult. Mr Johnstone was angry and accused her of not being prepared to work a 40-hour week and if that was the case, there might not be a job for her. Mrs Hauraki-Tumu said Mrs Johnstone had to step in because the meeting was getting heated.

[15] In his evidence, Mr Johnstone stated that he did not really recall much of what occurred in the 8 May 2015 meeting. He accepts that he was angry and describes himself as being a person who wears his heart on his sleeve. He denies raising his voice or abusing Mrs Hauraki-Tumu but accepts that he was stressed as other employees of NCD were off work at that time and to have an additional employee off work would create an enormous amount of pressure on the workload. In short, he was annoyed at Mrs Hauraki-Tumu taking time off.

[16] On 14 and 22 May 2015, Mrs Hauraki-Tumu returned for medical appointments with her doctor. On both occasions, she was signed off work for a further period. She passed on these medical certificates to NCD but provided no other information regarding her injury.

[17] On 28 May 2015, Mrs Hauraki-Tumu, Mrs Johnstone and Lisa Carter (a physiotherapist engaged by ACC) met to discuss a possible return-to-work programme for Mrs Hauraki-Tumu.

[18] From 8 June 2015, Mrs Hauraki-Tumu commenced a return-to-work programme. NCD assigned her light duties and she worked three hours a day for five days each week.

[19] Both Mr and Mrs Johnstone describe the frustration that they felt with the lack of information they received, either through ACC or through Mrs Hauraki-Tumu directly. Mrs Johnstone describes the return-to-work programme as being difficult to manage because of the lack of information she was receiving regarding the injury. However, both Mr and Mrs Johnstone say they were fully engaged in wanting to find a solution to Mrs Hauraki-Tumu's injury and seeing her return to full time work.

[20] Mr Johnstone was also concerned about the full extent of the injury and whether it was in fact related to previous injuries that had led to Mrs Hauraki-Tumu resigning in 2010 or some underlying symptoms of ongoing problems such as arthritis that he said had been mentioned to him by Mrs Hauraki-Tumu previously. Because of the possibility of there being some other underlying medical condition, because

Mrs Hauraki-Tumu had been wearing a wristband prior to the accident that she complained of, and because Mrs Hauraki-Tumu had not reported the accident immediately, Mr Johnstone had concerns about whether the workplace injury was in fact a real injury. Mr Johnstone knew he had a right to challenge the ACC finding regarding the workplace injury and had advised ACC he intended to do this.

[21] NCD was also having difficulty finding a suitable temporary replacement for Mrs Hauraki-Tumu's driving role.

[22] As a result of all of these concerns and because there was no visible end in sight and no date given for a full return to work, NCD made a decision to advise Mrs Hauraki-Tumu that her full time role would be removed from her. NCD explained this in a letter dated 26 June 2015 (the 26 June letter) that they gave to Mrs Hauraki-Tumu.

[23] The 26 June letter stated:

*It is with regret and much consideration and consultation that we advise the following changes relating to your employment with North Canterbury Distributors/Mediterranean Foods.*

*There is no longer a permanent full time position available for you given the nature of your injuries. The fact that this is the second time it has impacted on our business and had a negative effect on your ongoing condition cannot be overlooked. We are not prepared to be put in the same position again. We are sure you understand our need to find replacement staff who are able to carry out the physical aspects of the job.*

*Due to long relationship we have had the positive light in which our customers see your contribution, we can offer you the following.*

*Continue in a limited role similar to your current involvement. The exact role would be administration clerk at \$19 an hour and involve approximately three hours a day charging freight and loading orders.*

*Or*

*End your employment with us with one month redundancy pay.*

*Please note that as per clause 18 of your contract we are not required to give any more than one week's notice for termination due to incapacitation so we hope you will see this as a fair offer.*

*You appear to have an ongoing condition for which this type of work is not suitable. Claiming it to be a work injury will be very costly for us and you should know that we are considering refuting this with ACC.*

*Please take time to consider the above options and be available for a meeting and further discussion on Monday 29 June at a time to suit.*

*Kind regards,  
Paul and Faye Johnstone*

[24] Mrs Hauraki-Tumu believed that this letter amounted to the termination of her employment. She did not know what to do so on 29 June 2015 she contacted an employment advocate seeking some advice. Mrs Hauraki-Tumu's advocate, Ms Gordon, advised that the meeting scheduled for 29 June 2015 should be postponed. Ms Gordon contacted Mrs Johnstone and agreed the postponement of the meeting.

[25] On 30 June 2015, Ms Gordon wrote to NCD raising concerns with the 26 June 2015 letter. This letter recorded:

*I have read your letter of 26 June 2015 and I have several concerns with your proposal:*

1. *You are not able to unilaterally vary Jennine's contract and conditions without consultation and agreement from her.*
2. *You cannot make Jennine redundant – you are only able to make the position redundant.*
3. *You would need further medical examination and information to terminate her for incapacitation.*
4. *There is no evidence that Jennine's current condition is ongoing or that she would have difficulty in the future fulfilling her role.*

...

*I would like to propose the following:*

- (a) *A meeting to discuss Jennine's future employment be delayed until next week when she should have the results of an ultrasound and a better idea of her treatment plan going forward.*
- (b) *That you make arrangements so that information is sent to ACC in a timely manner so that Jennine receives payment on time.*
- (c) *That you arrange for one week of Jennine's annual leave be cashed up and paid to her immediately so she can continue to pay her bills.*

[26] On 30 June 2015, Mrs Johnstone replied to the letter as follows:

*We had no plans to change Jennine's contract without her agreement, hence the request to meet on Monday 29th and discuss options. The role she is fulfilling now (administration) was created after*

*consultation with a physio recommended by Jennine's ACC case officer for the tasks she can currently perform but is not what she is contracted to do and is not a role I would advertise or hire for but rather is work found just for Jennine as part of her return to work programme. All of our staff have as part of their duties lifting and unpacking. If she chooses the administration role it is one that has been created just for her.*

*We have a resignation letter from 2009 from Jennine where she stated that ongoing problems with her wrists and back means she regretfully has to resign. She joined us once again in 2012 stating that she was in full health. Before going to her doctor to report the wrist strain this year she started wearing the brace and informed one staff member it was RSI and another it was arthritis. We are not prepared to put Jennine back into a strenuous physical role and risk further injury.*

*A meeting with you next week would be most welcome once the results have arrived.*

[27] On 3 July 2015, Ms Gordon wrote an email to NCD stating:

*Jennine has been to see the specialist and the prognosis is good for a full recovery.*

*She aggravated the injury by returning to work too soon and they advise that she keep the wrist splintered and rest.*

*Now that we have further information I would like to arrange for us to have a meeting next week to discuss her employment options.*

[28] The proposed meeting was not organised immediately as NCD was endeavouring to meet with its employment lawyer to take further advice on the situation before it met. It advised Ms Gordon of this.

[29] On 16 July 2015, Ms Gordon followed up saying that she understood that NCD had met with its lawyer and was looking to schedule a meeting to discuss Mrs Hauraki-Tumu's future.

[30] In response to that follow up, Mr McCormick, the lawyer engaged by NCD, wrote to Ms Gordon on 21 July 2015. That letter stated, amongst other things:

*Our client noticed that in March and April of this year that your client started to wear a wrist brace to work and that she often took her 15 year old son with her if she had to drive a truck for delivery. At the time, your client told our client that she had some arthritis in her wrist.*

*On 8 May, your client provided my client with a letter seeking two weeks' sick leave due to a wrist injury. She then provided a doctor's certificate that referred to an injury she suffered two weeks prior to the date of her letter. After that two week period ended, your client*

*produced a further medical certificate ruling her unfit for a further two week period.*

*Your client never informed my client of any injury she suffered to her wrist while at work, nor did she record any such injury in the company's health and safety logbook until 9 June when queried by Mrs Johnstone.*

*We understand your client is limited by ACC to a maximum of three hours of employment per day and she has been undertaking some administration tasks in furtherance of that. We understand that this sees her effectively typing with one hand. Critically however, we are instructed that after two weeks in this position, your client produced a further medical certificate ruling her unfit for work again.*

*You will appreciate that from my client's perspective, for your client to transition from a 40 to 50 hours working week to a 15 hour week, being the maximum she can work due to her condition over a five day period, it is difficult in the extreme for our client to manage.*

*Our client would like to continue to offer your client employment, but can only do so in a reduced, administration type role. If your client is prepared to accept such a role, then it will be made available and the terms and conditions can be discussed. Finally, you should also note clause 18 of the employment agreement that allows either party to terminate the employment relationship on one week's notice.*

*We look forward to hearing from you.*

[31] On 28 July 2015, Ms Gordon responded to Mr McCormick raising a personal grievance on behalf of Mrs Hauraki-Tumu for unjustified dismissal, unjustified disadvantage and breach of good faith. That letter set out the background giving rise to the events including the injury suffered by Mrs Hauraki-Tumu in April 2015, the 8 May 2015 medical certificate, and the other events culminating in the 26 June letter. The personal grievance letter then recorded:

*NCD's decision to summarily dismiss Jennine due to her injury was made without consultation or process and prior to a diagnosis of the nature of Jennine's injury and prognosis in regard to recovery.*

*The statement that the company could terminate her employment for medical incapacity is not justifiable as there was no medical information available at the time on which to base the decision. The latest medical advice is that the injury should fully recover with rest.*

*There is no basis for NCD's claim that Jennine's injury is an ongoing condition that will prevent her doing the same type of work in the future; or that her injury may not be work related. Jennine's previous health issues related to her right hand and recent x-rays show that Jennine's left wrist has no sign of arthritis, repetitive strain injury or carpal tunnel syndrome.*

*NCD were involved in the assessment carried out by Work Rehab Limited on 28 May and indicated they could offer selected office duties to support a GRTW (gradual return to work). At no time was it indicated or implied that Jennine would be confined to working 15 hours per week on an ongoing basis.*

*NCD's delay in providing paperwork to ACC caused Jennine financial stress and hardship and she has been forced to use her annual leave to cover her expenses.*

[32] The personal grievance letter then set out some legal considerations including the duty of good faith imposed by s 4 of the Employment Relations Act 2000 (the Act), the justifiability test set out in s 103A of the Act and then it set out the requirements of constructive dismissal.

[33] The personal grievance letter then concluded as follows:

*It is quite clear that HCD have treated Jennine badly in relation to her injury and return to work. They have breached a number of their obligations to Jennine under the Employment Relations Act 2000, failed to carry out any process in regard to terminating her position and have caused Jennine to lose trust and confidence in NCD as her employer.*

*The emotional and financial cost to Jennine has been enormous. She has been a respected, hardworking and loyal employee for many years and feels humiliated and betrayed by the lack of support and good faith exhibited by NCD during a time when she needed time to recovery from an injury incurred while she was working.*

[34] Mrs Hauraki-Tumu never returned to work for NCD.

## **The issues**

### ***Unjustified dismissal***

[35] The issues are:

- (a) Was there an actual dismissal of Mrs Hauraki-Tumu effected by NCD;
- (b) If so, were NCD's actions, and how it acted, in carrying out the dismissal what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal?<sup>1</sup>

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<sup>1</sup> Section 103A(2) of the Employment Relations Act 2000

***Constructive dismissal***

[36] If there was not an actual dismissal effected by NCD, then the issues pertaining to constructive dismissal are<sup>2</sup>:

- (a) Was there a breach of duty or obligation by NCD;
- (b) Was that breach of duty sufficiently serious that it was reasonably foreseeable that Mrs Hauraki-Tumu might resign in response to that; and
- (c) Did Mrs Hauraki-Tumu resign in response to that breach of obligation or duty?

***Justified action causing disadvantage***

[37] The issues pertaining to personal grievance of unjustified action causing disadvantage include:

- (a) Was Mrs Hauraki-Tumu's employment, or a condition of her employment, affected to her disadvantage by an action of NCD;
- (b) If so, was that action by NCD justified?

**Discussion*****Unjustified dismissal***

[38] In order to succeed with her claim for unjustified dismissal Mrs Hauraki-Tumu must first establish that NCD dismissed her. If she establishes this then the onus shifts to NCD to prove that its actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[39] In many unjustified dismissal cases, the fact of dismissal is not in issue. That is not the case here. Mrs Hauraki-Tumu says the 26 June letter was a dismissal. NCD

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<sup>2</sup> Applying *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA)

says there was no actual dismissal and the 26 June letter was merely the commencement of consultation with Mrs Hauraki-Tumu over what role she could fulfil in the business going forward.

[40] In *Wellington Clerical IUOW v. Greenwich*<sup>3</sup> the Arbitration Court considered the meaning of dismissal in the context of constructive dismissal. It concluded that dismissal requires a sending away and is a termination of employment at the initiative of the employer. The Arbitration Court stated at p 102:

*"Dismissal" is a word with a wide meaning. It should not be construed narrowly. The word "dismiss" is derived from two words meaning "send" and "apart". A dismissal is a "sending apart" or "sending away" or "sending forth".*

[41] And then further at p 103 it stated:

*For our purposes, we define a dismissal as "the termination of employment at the initiative of the employer". Such a definition covers dismissals both upon notice and without notice, and dismissals both actual and constructive.*

[42] The Authority has applied this definition describing dismissal as a permanent sending away<sup>4</sup>. Therefore, I must decide if the 26 June letter, from NCD, amounts to a permanent sending away by NCD such that it is a termination of employment at the initiative of NCD.

[43] The 26 June letter is not a permanent sending away. It was the removal of Mrs Hauraki-Tumu's permanent operations management role leaving her with the option of either, discussing and agreeing a limited part-time role as an administration clerk or agreeing a departure with NCD paying her compensation, albeit that NCD incorrectly described this compensation as redundancy pay in the letter.

[44] I accept that in some circumstances it may be arguable that the termination of a role when the employee then undertakes a new role, with the same employer, may amount to termination of employment. However, this is limited to special situations in relation to redundancy and the question of whether an employer is obliged to pay contractual redundancy compensation.<sup>5</sup> In any event, this is not one of those situations.

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<sup>3</sup> (1983) ERNZ Sel Cas 95

<sup>4</sup> *Tropotova v OCS Ltd* ERA Christchurch CA157/10, 6 August 2010

<sup>5</sup> *Auckland regional Council v Sanson* (1999) CA 143/99

[45] I am satisfied that Mrs Hauraki-Tumu remained employed and that the 26 June letter was not a dismissal. She may have viewed it as a dismissal but NCD did not treat it as a dismissal, NCD did not intend it to be a dismissal and NCD remedied any misunderstanding as to the purpose of the 26 June letter as soon as it became aware of Mrs Hauraki-Tumu's concerns, in its email of 30 June 2015.<sup>6</sup>

[46] The other factor that informs my decision on the issue of dismissal is that Mrs Hauraki-Tumu's advisor did not treat the 26 June letter as a termination of employment as she continued to communicate with NCD regarding an ongoing role for Mrs Hauraki-Tumu.

[47] As NCD did not dismiss Mrs Hauraki-Tumu there is no unjustified dismissal.

### ***Constructive dismissal***

[48] In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*<sup>7</sup> the Court of Appeal set out three non-exhaustive categories of constructive dismissal:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with a deliberate and common purpose of coercing an employee to resign;
- (c) Where a breach of duty by the employer leads a worker to resign.

[49] The first two limbs of the *Woolworths* test do not apply in this case:

- (a) NCD gave Mrs Hauraki-Tumu the choice of resigning or discussing the terms of a part-time role. This is not a choice between resigning or being dismissed.
- (b) I do not accept that NCD carried out a course of conduct that had a deliberate and common purpose of causing Mrs Hauraki-Tumu to resign.

[50] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*<sup>8</sup>. The Court of Appeal stated at [172]:

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<sup>6</sup> Thus avoiding a finding of dismissal as in *New Zealand Cards Limited v Ramsay* [2012] NZEmpC 51  
<sup>7</sup> [1985] 2 NZLR 372 (CA) at 374-375

*In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[51] Therefore, in order to determine if Mrs Hauraki-Tumu has been constructively dismissed I must consider:

- (a) Was there a breach of duty by NCD;
- (b) Was that breach of duty sufficiently serious that it was reasonably foreseeable that Mrs Hauraki-Tumu might resign in response to that; and
- (c) Did Mrs Hauraki-Tumu resign in response to that breach of duty?

[52] I am satisfied that the letter of 26 June 2015 was a breach of a duty that NCD owed to Mrs Hauraki-Tumu. Whilst it did not amount to a dismissal, it did remove Mrs Hauraki-Tumu's full time role. NCD made that decision without any consultation with Mrs Hauraki-Tumu in breach of the duty of good faith.

[53] It was foreseeable that Mrs Hauraki-Tumu would resign if NCD removed her full time role from her. The significant reduction in duties is a basis on which someone might resign and it is reasonably foreseeable that someone would do so. NCD's own evidence was that prior to June 2015 any suggestion of a reduction in hours of work for Mrs Hauraki-Tumu raised an issue for her. I believe that NCD contemplated that Mrs Hauraki-Tumu might want to resign rather than take a part-time role hence the option in the 26 June letter for her to resign and accept a compensation payment.

[54] I do not accept that Mrs Hauraki-Tumu resigned in response to NCD's breach of obligation.

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<sup>8</sup> [1994] 2 NZLR 415 (CA)

[55] Mrs Hauraki-Tumu did not resign immediately. There was no notice of resignation and no act consistent with resignation, perhaps because Mrs Hauraki-Tumu believed NCD had terminated her employment by the 26 June letter. This is in contrast to Ms Gordon, who acting on Mrs Hauraki-Tumu's behalf, continued to try and agree a meeting in which Mrs Hauraki-Tumu's ongoing employment could be discussed. These actions, by Ms Gordon, do not constitute an actual resignation and are not consistent with any resignation.

[56] In fact the letter of 28 July 2015 (the 28 July letter) is, in my view, a resignation. That letter does not specifically state that Mrs Hauraki-Tumu resigns. However, the 28 July letter raises a personal grievance for unjustified dismissal based on two possibilities, summary dismissal due to Mrs Hauraki-Tumu's injuries or constructive dismissal because of a breach of duty by NCD without specifically linking that breach to any resignation. In the absence of a dismissal by NCD, the raising of a personal grievance for unjustified dismissal can only be constructive dismissal. In the absence of any notice of resignation prior to the raising a constructive dismissal grievance the raising of the grievance must amount to a resignation.

[57] The issues with this resignation in terms of constructive dismissal is the 28 July letter is equivocal as to resignation and any reasons for it; it is not clear from the 28 July letter that Mrs Hauraki-Tumu's resignation is in response to the breach by NCD or some other reason.

[58] Further, there is an issue with Mrs Hauraki-Tumu's acceptance and affirmation of the breach before she resigns.

[59] An employee need not resign immediately in response to a repudiatory breach by an employer. The Employment Court in *Premier Events Group Limited and others v Malcolm James Beattie and others*<sup>9</sup> stated (footnotes omitted):

*[188] Dealing with a further contention that the employees concerned had affirmed their contracts by continuing to work for several weeks after rejection of their claims to tax liabilities and only resigned after that period had elapsed, the Court of Appeal relied on the observations of Browne-Wilkinson J (as he then was) in WE Cox Toner (International) Ltd v Crook as follows:*

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<sup>9</sup> [2014] NZEmpC 231 at [188]

*Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence with the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his right to accept the repudiation ... such further performance does not prejudice his right subsequently to accept the repudiation.*

*[189] As Judge LJ observed in Cantor Fitzgerald, “the ultimate question is one, not of law, but of fact” including in circumstances from which the Court is invited to draw inferences about whether the contracts of employment were affirmed.*

[60] From the breach by NCD expressed in the 26 June letter until Mrs Hauraki-Tumu’s resignation on 28 July 2015 Mrs Hauraki-Tumu:

- (a) Requested payment of annual holiday pay to supplement ACC payments. Mrs Hauraki-Tumu did not request full payment of annual holiday pay that was payable upon the termination of her employment;
- (b) Requested that NCD provide ongoing employment and earnings information at the end of each pay cycle to ACC in a timely manner;
- (c) Negotiated to delay the meeting proposed by NCD in the 26 June letter until such time as she had further test results that would provide information about the treatment plan going forward;
- (d) Requested that the delayed meeting be arranged and followed up on this request; and
- (e) Complained of the breach by NCD as being a unilateral variation of her employment agreement but did not reserve her right to accept the breach and treat her employment as coming to an end.

[61] In these circumstances, I believe Mrs Hauraki-Tumu affirmed the employment agreement.

[62] Overall, I am satisfied that the resignation by Mrs Hauraki-Tumu does not amount to a constructive dismissal.

***Unjustified action causing disadvantage arising out of NCD's dealings with ACC***

[63] Mrs Hauraki-Tumu complains that NCD's failure to provide information to ACC caused her considerable financial stress and ongoing issues obtaining payments from it. She says this gives rise to her personal grievance for unjustified action causing disadvantage.

[64] The actions that Ms Gordon set out in her submission for Mrs Hauraki-Tumu, that support the personal grievance are:

- (a) Numerous failures to provide the required forms to ACC at the end of each pay cycle, in order for ACC to calculate her ACC entitlement, in a timely manner;
- (b) Paying her holiday pay when it had not been requested;
- (c) Informing ACC that it would continue to pay out holiday pay to Mrs Hauraki-Tumu when she had not requested this;
- (d) A failure to respond to a specific request from ACC regarding the payment of holiday pay to Mrs Hauraki-Tumu; and
- (e) Incorrectly filling out an ACC earnings form by approximately \$10,000 causing Mrs Hauraki-Tumu to be underpaid by ACC.

[65] Ms Gordon submits that these actions are not genuine mistakes and queries the motivation by NCD in acting as it did.

[66] There is no evidence to support this allegation.

[67] On the evidence I heard I accept there was only one incident when NCD was late in submitting pay information to ACC; this was three days and was remedied as soon as NCD became aware of it.

[68] NCD paid Mrs Hauraki-Tumu her holiday pay as requested. Mrs Hauraki-Tumu changed her instructions regarding payment of holiday pay and NCD responded appropriately. To the extent that there may have been some confusion over payments this was rectified in the email exchanges between NCD and Ms Gordon. NCD reported the holiday pay payments it made to Mrs Hauraki-Tumu and its understanding of the instructions regarding holiday pay from Mrs Hauraki-Tumu, correctly to ACC.

[69] There is insufficient evidence to establish that there was a mistake made by NCD in recording Mrs Hauraki-Tumu's earnings in the ACC earnings form.

[70] So, I have one small delay by NCD in providing earnings information to ACC and some confusion about the payment of holiday pay to supplement ACC payments that was remedied.

[71] I must determine if this gives rise to a grievance for unjustified action causing disadvantage.

[72] Section 103(1)(b) of the Act states:

*That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[73] Applying the elements of s103(1)(b) in order to determine if Mrs Hauraki-Tumu has a personal grievance for unjustified disadvantage I must decide if:

- (a) Mrs Hauraki-Tumu's employment, or a condition of her employment, was affected to her disadvantage by an action of NCD;
- (b) The action complained of, as causing the disadvantage, was unjustified.

[74] The first question is has there been any disadvantage to Mrs Hauraki-Tumu's employment or a condition of it. The disadvantage complained of is a delay in payment by ACC and/or incorrect payments being made by ACC, which were subsequently remedied.

[75] I do not accept that payments from ACC are a condition of Mrs Hauraki-Tumu's employment. They might be related to her employment in that the accident giving rise to the payments occurred at work and the payments are assessed against her earnings at the time, however the payments continue whether Mrs Hauraki-Tumu is employed or not and are made independently of NCD.

[76] On this basis alone, there cannot be a grievance for unjustified action as alleged.

[77] Even if I am wrong on this, I am not satisfied that NCD acted unjustifiably in any way in relation to its dealings with ACC. I accept that NCD was late by three days with providing one lot of earnings information to ACC but that was a genuine mistake. I also accept that there was some confusion about holiday pay that NCD should have paid to Mrs Hauraki-Tumu but this was remedied and NCD endeavoured to meet the instructions given to it regarding those payments.

***Unjustified action causing disadvantage arising out of the removal of Mrs Hauraki-Tumu's full-time role***

[78] As already explained, Mrs Hauraki-Tumu raised a personal grievance based upon NCD's action of removing her full-time role by the 26 June letter. Her personal grievance was expressed as being unjustified dismissal and I have already considered this in terms of both actual dismissal and constructive dismissal and determined the unjustified dismissal grievance is not established.

[79] However, under ss 122 and 160(3) of the Act I am not restricted to resolving Mrs Hauraki-Tumu's employment relationship problem as alleged. I can consider whether the removal of Mrs Hauraki-Tumu's full time role gives rise to an unjustified disadvantage grievance.

[80] The basis for that grievance was set out in Mrs Hauraki-Tumu's personal grievance letter so there is no issue as to it being raised within the requisite 90-day time frame<sup>10</sup>.

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<sup>10</sup> Section 114(1) of the Act.

[81] The removal of Mrs Hauraki-Tumu's full time role represents a significant reduction in her role. It was a permanent removal and I believe this action meant it was likely that Mrs Hauraki-Tumu would not be able to return to full-time work at NCD if she recovered fully from her injury.

[82] This action by NCD has caused disadvantage to Mrs Hauraki-Tumu's employment.

[83] The next question is, was the action of removing of Mrs Hauraki-Tumu's full time role justified. I find that NCD failed to act appropriately in relation to the decision it made to discontinue Mrs Hauraki-Tumu's role so that it could employ someone on a permanent basis. Essentially it made a unilateral decision that Mrs Hauraki-Tumu would not be able to return to that role, either because she would never fully recover from her injury or simply because it could not keep the job open and wanted to put a permanent full time employee in that position. This was not a decision it could make without further consultation, without further recourse to medical information and without properly understanding the prognosis on Mrs Hauraki-Tumu's return to work.

[84] Clearly NCD failed to meet the requirements of s 103A of the Act and s 4(1A) of the Act meaning its action was unjustified.

[85] Mrs Hauraki-Tumu has a grievance for unjustified action causing disadvantage arising out of NCD's unilateral decision to remove her full-time role.

### **Compensation**

[86] Having found that NCD carried out an unjustified action that caused disadvantage to Mrs Hauraki-Tumu's employment, I must consider what remedies are available to her.

[87] Mrs Hauraki-Tumu does not seek any lost remuneration. She continues to be in receipt of ACC payments and says there is no entitlement to lost remuneration.

[88] She is, however, entitled to compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act.

[89] Mrs Hauraki-Tumu's evidence about the impact of NCD's actions on her included that she suffered from stress and anxiety and was unable to sleep. She suffered from high blood pressure, which required medication and took naturopathic remedies to assist with sleep and anxiety. She had financial problems, which put significant strain on her family. She lost her self-worth and confidence stating she felt that she had been good at her job but NCD's actions showed she was nothing but money to them.

[90] Mr Hauraki-Tumu described the impact on Mrs Hauraki-Tumu as hitting her hard; she was not productive or positive around home and could not sleep.

[91] The complication with this evidence is that neither Mrs Hauraki-Tumu nor her husband were able to separate out the effect of the action of NCD removing Mrs Hauraki-Tumu's role from the effect of the wrist injury and the fact that she was unable to work because of the injury. Feelings of low self-worth may well emanate from the wrist injury and being unable to work because of the injury. Sleeplessness and anxiety may be generated by the wrist injury and anxiety may be generated by the reduced income from ACC.

[92] In cross-examination Mrs Hauraki-Tumu accepted that her low mood or as she described it feeling "pretty bummed out" stemmed from feelings of uselessness. This in turn was at least partly due to the wrist injury. She accepted that the way she felt was a culmination of things from being unable to do her job to the way NCD treated her.

[93] Mrs Hauraki-Tumu's ACC notes also record the stress and anxiety associated with her injury and financial concerns. So, for example, the ACC notes on 21 June 2015 record her case worker's notes of a conversation with her. Those notes record "*she discussed that the incapacity is raising anxiety issues, depression and feelings of worthlessness*" and "*compounding the issues are financial pressures*". The notes also record that "*she is increasingly worried about her job security.*"

[94] The ACC notes on 7 July 2015 record "*she has been put on anti-depressants to help with the nerve issue; however this has had side effects on her mood and energy which she is not happy about.*"

[95] In a doctor's report of 11 November 2015, commissioned for ACC, Dr Michael Antoniadis recorded that Mrs Hauraki-Tumu "*states that she can be kept awake at night because of the pain but also the stress is disturbing her sleep.*"

[96] So, I have reasonably clear evidence of symptoms that support a payment for humiliation, loss of dignity and injury to feelings. However I have evidence that indicates the cause of those symptoms are both the injury suffered including the consequences flowing from it of not being able to work and reduced income and NCD's action of removing the full-time role.

[97] There is no objective measure on which I can attribute causation between these two sets of factors to establish the amount of compensation payable for NCD's unjustified action. I can only assess the amount of compensation I would award under s 123(1)(c)(i) of the act based on the evidence I have. Then I can apply the principles set out in s 157 of the Act, in particular that I should act as I see fit in equity and good conscience, to decide how much of that amount should be awarded to Mrs Hauraki-Tumu for the humiliation, loss of dignity and injury to feelings arising from NCD's unjustified action.

[98] In the circumstances, I consider \$5,000.00 to be an appropriate sum for humiliation, loss of dignity and injury to feelings arising out of the unjustified action causing disadvantage.

[99] I must also consider contribution under s 124 of the Act. In order for there to be any contribution on Mrs Hauraki-Tumu's part, I must find that her conduct has been causative of the outcome and blameworthy<sup>11</sup>.

[100] In terms of NCD's decision to remove Mrs Hauraki-Tumu's full time role, I do not believe that Mrs Hauraki-Tumu contributed to that decision. What primarily drove that decision was the wrist injury, the lack of information about the possible return to work and the need to have a permanent replacement in that role.

[101] I cannot say that Mrs Hauraki-Tumu's decision not to report her initial injury and to self-manage it initially led to the accident and Mrs Hauraki-Tumu going on ACC. I cannot say that Mrs Hauraki's conduct in failing to provide information from ACC or her medical specialists prior to 26 June 2015 was blameworthy as there

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<sup>11</sup> *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82

was limited information available and in any event she believed NCD was dealing with ACC. And, Mrs Hauraki-Tumu did engage in the return to work discussion and programme.

[102] Overall I conclude that Mrs Hauraki-Tumu did not contribute to her grievance and there is no reduction to the remedy I have awarded.

### **Costs**

[103] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[104] If they are not able to do so and a determination on costs is needed, Mrs Hauraki-Tumu may lodge and serve a memorandum on costs within 28 days of this determination. NCD will have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority