

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** George Blake Kingston (Applicant)  
**AND** Gen-I Limited (Respondent)  
**REPRESENTATIVES** Glenn Jones, Counsel for Applicant  
Victoria Donaghy, Counsel for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**INVESTIGATION MEETING** 23 August 2004  
24 August 2004  
25 August 2004  
**SUBMISSIONS RECEIVED** 21 September 2004, 19 November 2004  
**DATE OF DETERMINATION** 12 May 2005

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

- 1) Mr Kingston has had a long, successful and lucrative career in sales. In early 2002, after several years battling depression, he suffered a serious breakdown in his health. Over the next year he took extended periods of leave from his position as Christchurch based Sales Director for Gen-i Limited. In June 2003, unable to continue in his role, he resigned. He says that work pressures caused his collapse and as a result alleges that Gen-i was in breach of his employment agreement from 1997 (when he says he first disclosed his illness) until he left his job. He also claims that these breaches have given rise to a personal grievance of constructive dismissal.
- 2) Mr Kingston claims that his individual employment agreement contained the following express and implied terms:
  - a) To provide a fair workplace;
  - b) To provide a safe and healthy work environment;
  - c) To deal with the applicant in good faith;
  - d) Not to act in such a way as to damage or undermine the mutual trust and confidence between the parties;
  - e) To take reasonable care to avoid exposing the applicant to unnecessary risk of injury to his physical and psychological health;
  - f) To take reasonable care not to cause the applicant injury by reason of the volume, character, nature or circumstances of his work;
  - g) Not to act in such a manner as to cause the applicant humiliation, anxiety, distress or injury to his feelings.

- 3) Gen-I does not dispute that the employment agreement contained the terms set out above. It simply says that it did not breach any of those terms.
- 4) Mr Kingston's claim for breach of contract is based generally on what he says was Gen-i's failure to respond reasonably to his disclosures that he was suffering from depression which ultimately resulted in his 2002 breakdown. In submissions it is argued for him that:

*“Gen-i ought to have known that he was suffering from depression which ultimately resulted in his 2002 breakdown. Gen-I ought to have known that Mr Kingston's health was vulnerable and should have taken steps to investigate the situation, consider what reasonably practicable steps could be implemented to safeguard his health and put them into effect. It is not disputed that nothing was done prior to his 2002 breakdown.”*

- 5) Mr Kingston alleges the following specific breaches by Gen-i:
- a) Failing to adequately monitor and regulate his work load to ensure that he did not suffer undue stress and psychological harm;
  - b) Failing to take any or adequate steps to reduce his workload when it knew or ought to have known that he was suffering from a mental illness and was vulnerable to further stress related harm;
  - c) By failing to respond reasonably to his protests that he and the Christchurch sales team were under resourced and that he was unable to meet the performance targets imposed on him;
  - d) By failing to adjust his performance targets to realistic and reasonable levels from August 2002 onward when it knew or ought to have known that he was suffering from a mental illness and was vulnerable to further stress related harm;
  - e) By failing to take effective steps to provide him with resource support or modification or redistribution of his duties and responsibilities to protect him from further psychiatric harm in around 1997 following the onset of his depression, or subsequently.

## **Limitation Issues**

- 6) Although there was no dispute that the personal grievance claim is within the Authority's jurisdiction, limitation issues have been raised in respect of the breaches alleged prior to the coming into effect of the Employment Relations Act 2000. I consider all the allegations of breach (including those about which limitation issues have been raised) to be of potential relevance to the personal grievance claim. In this regard, the present case is similar to that of *Meyer and Ports of Auckland Ltd AC 41/04, 10 May 2004*. There Judge Shaw found that because the applicant had raised some of his complaints out of time they could not be considered as separate disadvantage grievances, but went on to say:

*“there is now a personal grievance on foot for the constructive dismissal. This means that potentially Mr Meyer is able to raise all of the complaints about his treatment by POAL which he says contributed to his decision to resign. A finding that the Authority has no jurisdiction to investigate [the earlier grievance] should not be taken to mean that Mr Meyer should be deprived on [sic] relying on the matters which he alleges set the course for the constructive dismissal...”*

- 7) Adopting the same approach, I decided that all the alleged breaches must be investigated in relation to the constructive dismissal claim. Since I would need to traverse all the evidence in the process, there was no purpose to a preliminary determination of the limitation issues. I proceeded to a full investigation of all the substantive issues.

## Substantive Issues

- 8) The overall question for determination here is whether the system of work posed a reasonably foreseeable risk to Mr Kingston's health and if so, whether Gen-i took all reasonably practicable steps to manage any such risk.
- 9) For Mr Kingston's case to succeed I must be satisfied that the system of work was a material factor in the development of the illness, although not necessarily the sole cause. (*Attorney-General v Gilbert* [2002] 1 ERNZ 31 para [64].) The first issue for determination is the issue of causation: whether the job was the problem for him. If the work did pose a risk to Mr Kingston's health then the next issue for determination is foreseeability: whether the employer knew or should have known this. Finally, if there was a foreseeable risk, I must consider what the employer did to manage this risk and whether it amounted to taking all reasonably practicable steps.

### (i) Was the job the problem?

- 10) Mr Jones has relied heavily in his submissions on the recent House of Lords decision *Barber v Somerset County Council* [2004] UKHL 13. However, in that case, causation was not a major issue. As Lord Walker observed in the majority opinion at paragraph [69] "*there is no doubt...that the job was the problem.*"
- 11) In this respect, Mr Barber's case is characteristic of many of the successful cases on workplace stress in which the work performed is of such nature or volume that a clear risk is associated with it. Local examples include the work of a police photographer (*Brickell v AG* [2000] 2 ERNZ 529) and a social worker charged with the assessment of child abuse risk (*Whelan v AG unreported decision of Travis J, 21 December 2004 AC71/04.*) Such work is fraught with psychological hazards just as some jobs are by their very nature fraught with physical ones. In such cases the principal issue which falls to be determined is whether all practicable steps were taken to manage the risk.
- 12) Mr Kingston's role was very different to these examples. He was first employed by Gen-i's predecessor, Wang, as a salesperson in 1990. He quickly proved himself a top performer and thrived on the job. As a sociable and well liked member of the community with wide interests outside work he was well placed to build and maintain relationships that proved very fruitful both to the company and to him, making good use of a generous expense account in the process. There was no dispute that his employer was eager to retain his services (and the custom of his loyal clientele) and nothing to indicate that this work posed a risk, by its very nature, to his psychological well being.
- 13) At paragraph [69] of the majority opinion in *Barber* Lord Walker noted the distinction between a case like that of Mr Barber, and the tragic *Cross v Highlands and Islands Enterprise* [2001] IRLR 336, from which he quoted the following:
 

*"...the evidence does not establish that objectively the job was the problem. For all the defenders knew, they were dealing with an employee who, for reasons that were not clear, had become unable to cope with the job that he had previously managed successfully."*
- 14) The management at Gen-i believe that they too were dealing with an employee who, for reasons that were not clear, had become unable to cope with the job that he had previously managed successfully.

15) The records of Mr Kingston's general practitioner, Dr Holland, show that he first reported symptoms of depression in October 1996. At that stage, Dr Holland surmised that these symptoms may have been a side-effect of medication that he had prescribed to treat Mr Kingston's cholesterol problems. Dr Holland treated Mr Kingston for depression throughout 1997, 1998 and 1999. In April 1999 he referred Mr Kingston to a psychiatrist, Dr Ding. At this time Dr Ding noted that Mr Kingston's drinking was excessive and could be aggravating his depression. Dr Ding adjusted Mr Kingston's medication after which Mr Kingston returned to Dr Holland's care apart from a review by Dr Ding in April 2001. At that point, it appears that Mr Kingston's medical advisers felt that his problems were being managed satisfactorily.

16) Then in March 2002 Mr Kingston suffered a serious relapse of his 'major depressive disorder'. He saw Dr Holland on 25 March, and in discussing his symptoms with him he expressed a view, for the first time, that work stress could be a factor in his illness. Dr Holland told me in his witness statement:

*"I remain of the opinion that stress relating to his work was the principal aggravating factor of his March 2002 episode and subsequent symptoms."*

17) In May 2002 Mr Kingston saw Dr Ding again. At the request of Mr Kingston's representative Mr Jones, Dr Ding provided a report on his assessment of Mr Kingston's health at this point. Mr Jones had asked Dr Ding to comment on: *"the extent to which, in your opinion, his illness was caused or exacerbated by work-related stress."*

18) Dr Ding responded as follows:

*"I reviewed my notes and there were some references to Mr Kingston's employment at Wang's. As far as I am aware, he was successful in his work as a sales representative but I have no record of any indications of significant work-related stressfulness. However, he did make some reference to this with regard to his current relapse, namely, on returning to work in 2002 after the Christmas break he encountered increased work proposals and projects. Mr Kingston referred to this in the context of anticipating an improvement in his depressive symptoms with the summer break, but upon returning to work the pressure appeared to have been increased compared with the previous year."*

19) By this time, Mr Kingston was feeling that he "didn't gell" with Dr Ding and decided to change psychiatrists. In September 2002, Mr Kingston saw Dr Young for the first time. She has looked after him ever since. He has been very ill. He believes that his work is the cause of his illness, and this is what he has told Dr Young. Her reports on his illness have also been provided to the Authority and she has noted (based on her interviews with him) that she can identify no cause of his health problems other than his work. Mr Kingston has also been seeing a clinical psychologist, Mr Alan Prosser, since April 2002. Like Dr Young, Mr Prosser can identify no cause for Mr Kingston's ill-health other than his work.

20) The reports of doctors Holland, Ding and Young and of Mr Prosser are all based entirely on self reporting by Mr Kingston himself. A patient's own assessment of the causes of his illness serves diagnostic and therapeutic purposes but this does not make it conclusive proof of what he or she alleges. I note that in *Nilson-Reid v Attorney General CC4/05, 7 March 2005*, paragraph [60] Judge Travis noted:

*"..the Court may reject specialist evidence based on the self reporting of a litigant if the specialist uncritically accepts what the litigant has said."*

- 21) I am therefore very cautious about relying on reports based on the patient's own opinion. In particular I do not consider I can rely on conclusions Dr Young and Mr Prosser have come to about the causes of Mr Kingston's ill health in the period before they had even met him. The two professionals with some historical knowledge of Mr Kingston (Dr Ding and Dr Holland) identify workplace stress as a factor in the illness from 2002 only.
- 22) It is my view that there is insufficient evidence for me to safely conclude that the job was even part of the problem for Mr Kingston prior to 2002.
- 23) What is clear is that from 2002, against a background of problems with depressive illness, Mr Kingston became unable to cope with the job he had previously managed successfully. At that point Mr Kingston identified workplace stress as a factor in his ill health. None of the professionals involved in his care were able to identify what else might be causing his health problems at that stage.
- 24) I am prepared to accept on the basis of this evidence that work pressures became a factor contributing to his ill health, but only from early 2002 onwards.

## **(ii) Foreseeability of Risk**

- 25) Complaints about workload, resourcing and support underlie all Mr Kingston's allegations. Mr Kingston was designated "Sales Director" to indicate his position as the most senior sales person in the Christchurch office. He was responsible for a portfolio of clients with complete discretion as to how and when he worked. He decided how he went about winning new business and on which clients he would focus his energies. He did put in more than 40 hours per week but his overtime was not excessive by the standards of today's workplace. Most of his time was spent on 'high-end' clients with whom he had worked over several years. At all times he resisted any suggestion that any of these clients be taken from his portfolio.
- 26) The company's expectation of him was simply to see a certain level of return on its investment in his salary. The level of revenue he was expected to bring in is one indicator of workload. Mr Kingston was in fact expected to generate less business than his North Island counterparts on comparable remuneration because of the particular characteristics of the South Island market.
- 27) His replacement also does what Mr Kingston did without difficulty. I heard nothing to indicate that Mr Kingston's workload was anything out of the ordinary for someone in this type of role in this industry. It was also comparable to that of colleagues at his level of seniority within the organisation.
- 28) Mr Jones has argued in submissions that the fact that a claimant's workload is no more than anyone else's is ultimately irrelevant. On this point he refers me to the *Barber* case (ibid.) Mr Barber was a hard pressed secondary school teacher surrounded by equally overworked colleagues. At paragraph [64] of that decision Lord Walker had this to say:

*"Overworked people have different capacities for absorbing stress, and different breaking points. Hence...the importance of what the employee tells the employer. Senior employees- especially professionals such as teachers- will usually have quite strong inhibitions against complaining about overwork and stress, even if it is becoming a threat to their health. Personal and professional pride, loyalty to the head teacher and to colleagues, and the wish not to add to their problems and workload, may all influence a teacher not to complain but to soldier on in the hope that things will soon get a little better."*

- 29) This brings me to the issue of notification. In the present case, Mr Jones says that Gen-i was in breach of its contractual duty to Mr Kingston from the time that he disclosed that he was suffering from depression and that he could not cope with his current workload. Mr Kingston says he spoke of this to managers of the respondent on occasions in 1997, 1999 and 2000.
- 30) Gen-i say that Mr Kingston first disclosure of his problems was in 2002, and further says that they did everything they should have for him from that point on. Gen-i's assertion is of course consistent with what Mr Kingston was also telling his medical advisors at that time and with my findings on causation. However, for completeness and in case I am wrong in my findings on causation I now set out my conclusions about whether Mr Kingston put his employer on notice of the risks to his health prior to 2002.
- 31) Mr Kingston says he disclosed his depression to his then manager, Mr Holmes, over a drink one night in 1997, and mentioned that it he thought it was in part due to work pressures. Mr Holmes cannot recall this although he did recall that Mr Kingston had been unwell around that time. Mr Kingston effectively asserts that a passing remark at the pub put his employer formally on notice that he believed his work was unsafe and was affecting his health. I totally reject this assertion.
- 32) Two years later the respondent underwent a restructure. It moved technical support people out of individual sales teams and into separate, specialist teams. The rationale behind this change was that products were becoming increasingly differentiated and sophisticated and the technical people needed to specialise accordingly. They could no longer assist sales personnel with the whole range of products with which those sales people dealt.
- 33) Mr Kingston did not support the new structure and argued strongly against it as it was being debated within the organisation. Although in the new structure he would in theory be able to call on the specialist teams as needed, he felt that in practice support would not be as readily available as before and he would not be able to use the technical people for day to day sales support. Mr Kingston says when he argued against the new structure in this way, he put his employer on notice that his workload was excessive. I do not accept this. What he said was part of a general discussion process about what was best for the business and gave no indication that he was having any personal difficulties.
- 34) In 2000 he formally requested additional sales support on the basis that it would free him up to bring in more new business. He did not suggest it as a way of reducing his workload. Nor did he say that he was not coping or that he believed his workplace was unsafe. This too fell short of putting his employer formally on notice that he believed he was at risk.
- 35) As at March 2002 Mr Kingston's reporting line was to the National Sales Manager, Ross Hamilton. Immediately after seeing Dr Holland on 25 March Mr Kingston telephoned Mr Hamilton and told him that he had had a massive breakdown and needed serious time off work.
- 36) Mr Kingston did not raise any work related reasons for his sick leave until May 2002. However, I am of the view that the advice that he had had a breakdown was sufficient on its own to put the respondent on notice of his general vulnerability to stress. The question now becomes whether the associated risk was managed satisfactorily.

### **(iii) Management of risk**

- 37) Several areas need to be addressed under this head. These are Mr Kingston's workload, paid sick leave, the consideration given to an alternative position for him, the termination of the

employment, and whether all of this taken together amounted to the taking of all reasonably practicable steps to protect Mr Kingston's health.

## **Workload**

38) Mr Kingston was off work from 25 March until 1 July. With his consent, Ms Vernon liaised with Dr Holland over issues that needed to be addressed for him to return to work. In an email to her dated 11 July and copied to Mr Kingston Dr Holland noted:

*“This is a difficult situation for all concerned. Understandably Gen-i needs Blake to be able to deliver at the level expected for his seniority. Equally Blake needs adequate recovery time. Clearly Blake had had good support from Gen-i over the last two months and I think we have in place a good transition programme.”*

39) In recognition of his need to ease back in to his role Mr Kingston worked part-time for the first month. Also, near the time of his return, an additional sale representative was employed to focus on new business and so relieve Mr Kingston's workload. Arrangements were also made at Mr Kingston's request for his work station to be situated away from a colleague with whom he had previously had work conflicts. I consider these to be appropriate and reasonable steps to manage the risks associated with the return to work.

40) However at the same time Mr Kingston's target was set for that year, and this was at a level higher than the year before. One of Mr Kingston's principal complaints in this case is that his sales targets were too high; he says that if they had been lower his workload and the consequent stress on him would have been reduced.

41) On 29 July he emailed Ross Smith (General Manager, Southern Region) telling him that he thought his target would be very hard to achieve and reiterating the concerns he had expressed in 2000 regarding the way his work was supported. Mr Smith replied the same day, asking Mr Kingston to elaborate on how he thought sales support could be improved. Regarding the target, he noted that it was lower than the sales Mr Kingston had actually achieved in the previous year. He added:

*“if you are saying that you want a lower target and more support for the same package then we have a disconnect.”*

42) Mr Kingston's package was made up of a base salary plus commission. Personal sales targets were set each year by negotiation between each sales person and his or her manager. Once the target was reached the percentage paid in commission increased. Commission based payment means that every dollar of sales increases the remuneration, but for each dollar above target that increase was exponential. Lower targets, quite simply, meant increased earnings.

43) By their very nature, targets had to increase from year to year to reflect the need to bring in new business, while maintaining existing business. Because the targets could have a major impact on remuneration, the setting of targets was always contentious. As one would expect where sales people were involved on both sides, negotiations could be intense and sometimes protracted, and there was no exception to this in Mr Kingston's case.

44) I called for and was shown sales targets, projected 'on target' personal earnings and actual personal earnings for Mr Kingston for the years 1997-2003. Over that six year period his sales targets increased by a total of 30%. No target was agreed for the 1999 financial year however this does not seem to have caused a problem since it proved to be the most lucrative year of Mr

Kingston's employment. His personal earnings (\$218,735.64) were well above the 'on target' earnings the company had anticipated for him. Mr Kingston failed to achieve his on target earnings in only one financial year (2001.) In 2002 (his last normal year of employment) he exceeded his on target earnings by approximately \$30,000.00 and even in his final year (during which he took extensive periods of sick leave) he exceeded it by \$10,000.00.

- 45) In submissions, Mr Jones has referred to Mr Kingston's targets as performance targets. I consider this to be something of a misnomer. The targets did not amount to performance standards that sales persons were required to meet. It was not expected that all or even most of the sales staff would reach their target in any given year. The target was designed to give a 'stretch' and was not intended to be readily attainable. In fact, across the organisation, sales people averaged 80-90% of target.
- 46) Mr Kingston, however, exceeded his by a substantial margin and saw the results reflected in very high personal earnings. He did tell me that he reached above target earnings by a different route to that upon which the targets had been based. He explained that he had taken advantage of 'side deals' on certain products which meant that he was able to maximise his earnings without actually reaching all of the new business goals that had been set for him.
- 47) This does not in my mind change the essential point: Mr Kingston had never been content to match the 80-90% of target achieved on average by his colleagues. Mr Kingston gave an above average performance in order to reap the financial benefits. I certainly saw nothing in the evidence to indicate that he would have slowed down if he had got a lower target.
- 48) Sales targets are a bonus system for rewarding above average sales figures. Factors such as the number and nature of the accounts for which the individual sales person was responsible also impacted on workload itself. There might be a high degree of variability in the amount of effort required to generate sales from different accounts. Because of his senior and respected position, Mr Kingston looked after a cluster of high value accounts which gave a very good return.
- 49) Sales people who held the bigger, more lucrative accounts could expect correspondingly higher targets. Conversely, it would have been necessary to accompany any substantial reduction in targets with a transfer of some key accounts to another salesperson who was able to maximise return on them. It was simply not an option to underdevelop those key accounts.
- 50) Mr Kingston emphatically did not want to give up any of his high value clients. He was however happy to shed some responsibility for chasing business from new accounts (the work which gave the lowest return on effort.) The employment of the additional sales person in July enabled him to do this, and left him to concentrate on his high value clients.
- 51) In his final year of employment, Mr Kingston remained on full salary, receiving total remuneration of \$180,301.81 plus benefits without deduction despite his reduced hours and extensive sick leave. I asked Mr Kingston how it was that he managed to exceed on target earnings even in his final year of employment when he took lengthy periods of sick leave. He told me that many of the high value clients in his portfolio had a very high level of personal loyalty to him and kept their business with Gen-I throughout his illness for his sake. This meant high levels of sales without a high level of input from him. I have to say that this evidence is not consistent with assertions that he had a heavy workload in that year.
- 52) I see no breach associated with the respondent's refusal to lower Mr Kingston's target in July 2002. It did not increase his workload or (as it turned out) reduce his remuneration.

## Discussion of alternative roles within the organisation

- 53) In the same (29 July 2002) email in which Mr Smith had declined to lower Mr Kingston's target, he also went on to make a suggestion regarding further ways in which the respondent might address Mr Kingston's particular needs, as follows:

*The fact is Sales is a stressful career, with regular highs and lows. Maybe the real solution is to develop an alternative to your current role. I am happy to work with you to review lifestyle based career changes that can allow you a reasonable remuneration for a low stress environment. Let's talk tomorrow."*

- 54) At this stage however Mr Kingston was not interested in looking at changing the nature of his role within the organisation. Within another two months, he felt he was struggling to cope. On 14 August Mr Kingston emailed Mr Smith again, advising of this and asking for more for help. Mr Smith responded by repeating his earlier suggestion that they discuss a move out of sales for Mr Kingston. Mr Kingston remained unready to discuss this idea.

- 55) In November, Mr Kingston again took considerable sick leave. On 27 November 2003 Mr Smith emailed Ms Vernon and CEO Garth Biggs saying:

*"I discussed with Blake yesterday the success of his return to work. I mentioned his absences over the last three weeks, his complaints of headaches and his short fuse when dealing with colleagues.*

*I expressed concern that leaving him in a high-pressure sales role might adversely affect his recovery and that an alternative might be for him to cut back to two days a week, drive an Executive Contact program across the location, give up his direct quota responsibilities and review after a year...*

*We agreed that we would review in mid-January after the effects of the new medication and four weeks leave break can be evaluated."*

- 56) In the event, it was February before the topic of an alternative position (reduced hours and an executive management role) was again discussed. Mr Kingston remained reluctant about it.

- 57) In early March 2003 Mr Kingston advised Gen-i that he needed further time off work due to a drug change. By this time, Mr Kingston had taken considerably more paid sick leave than he was entitled to in terms of his employment agreement (approximately 70-80 days). Mr Vernon advised him that any further absences would have to be taken as annual leave or leave without pay.

- 58) The parties met on 30 April 2003 to discuss the on going situation. There is some dispute as to what was said at this meeting. Ms Vernon says that Mr Kingston remained unwilling to consider a new position. Mr Kingston says he did not put it as strongly as this, and said only that it was his preference to remain in his existing role. In the context of the previous months, during which Mr Kingston had not shown any interest in looking at alternative roles, it was in my view reasonable for Ms Vernon to interpret his response here as she did.

- 59) The meeting concluded on the basis that he would obtain a report from Dr Young about his prognosis.

60) In the period from August 2002 through to late April therefore, on more than one occasion, Gen-i suggested to Mr Kingston that they discuss an alternative role for him. He did not take up these offers. I am satisfied that Gen-I could not have raised the issue any sooner since it was understood that Mr Kingston had medical advice that he could attempt a return to his previous duties. Nor would it have been appropriate for Gen-i to push this option more vigorously in the face of Mr Kingston's opposition. In short, I consider that the offers of alternative work amounted to further reasonable and practicable steps to manage the risk to Mr Kingston's health.

### **The termination of Mr Kingston's employment**

61) By mid-May 2003 Mr Kingston was again finding the stress of his work situation too much and went off on leave once more. He saw Dr Young again, and arranged for her report to be provided to Ms Vernon. Dr Young found that, contrary to what everyone had hoped just a short time before, Mr Kingston's health had deteriorated further. She now considered that it would be damaging for him to continue work at all.

62) On 28 May Mr Kingston and his solicitor met with Ms Vernon again and discussed (on a without prejudice basis) a proposal for an agreed termination of employment. No agreement was reached.

63) On 29 May Mr Kingston's solicitors wrote to Gen-i on his behalf, stating that:

*“subject to our receiving written confirmation from Dr Young, it appears certain that Mr Kingston will have to relinquish his employment at Gen-i for health reasons. Assuming that to be the case the most appropriate way forward appears to be:*

*...we obtain a medical report from Dr Young certifying that M Kingston is currently totally disabled in terms of the [insurance] policies.*

*Mr Kingston's employment terminates as at 30 June 2003...”*

64) It was not entirely clear between the parties at the time whether this constituted a letter of resignation. It is however now agreed that Mr Kingston resigned, effective 30 June, due to incapacity. As we have seen, he claims that this was a constructive dismissal because he alleges that the respondent's breaches caused his incapacity.

65) Since his employment ended he has received monthly net payments of \$7,013.00 from two separate income insurance policies. Gen-i had paid the premiums on one policy as part of the benefits under his package, while he had taken out the other at his own expense to 'top up' his income. Mr Kingston acknowledged that Gen-i had been co-operative in facilitating his insurance claims. He told me that the advice he had from Dr Young is that he will never be able to return to a job involving any stress. Mr Kingston is 49 years of age. His insurance payments will continue for up to five years if his health does not improve.

### **Were all reasonably practicable steps taken to manage the risk to Mr Kingston's health?**

66) In the year after the company was put on notice that Mr Kingston's health was at risk, it took the following steps to manage that risk:

- it liaised with Mr Kingston's medical adviser, Dr Holland regarding his return to work plans;
- it permitted a part-time return to work after the first period of leave;

- it gave additional and generous paid sick leave;
- it employed an additional sales person to take responsibility for pursuing new business;
- it repeatedly offered the opportunity to consider alternative, lower stress roles within the organisation, which were declined.

67) Despite all these efforts, Mr Kingston's health was no better at the end of the year and it was clear that things could not continue as they were. I am satisfied that Gen-i took all reasonably practicable steps to manage the risk to Mr Kingston's health.

## Summary

68) What the Courts can expect from employers has been summarised by the Court of Appeal as follows in *Attorney-General v Gilbert* [2002] 1 ERNZ 31 para [83]:

*“The standard of protection provided to employees by the Health and Safety in Employment Act is ... a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of “all practicable steps”. What is reasonably practicable requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s 19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing a breach of the contractual obligations. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgement on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.*

69) Prior to early 2002 Mr Kingston was not subjected to workplace stress that was unreasonable in the context. Nor had he alerted the employer to any particular vulnerability to the workplace conditions. There was no foreseeable risk to him then.

70) From 2002 Gen-i was on notice of Mr Kingston's particular vulnerability. After that, Gen-i went to considerable effort to assist and protect him, as set out above. These efforts amounted to all reasonably practicable steps to manage any risk to his health.

71) For his part, Mr Kingston was unwilling to relinquish any major accounts or to consider any other roles within the organisation. He was not therefore prepared to take all practicable steps to ensure his own safety while at work.

72) There have been no unacceptable employment practices or breaches of the employment agreement here. Gen-i has met its statutory and contractual obligations.

73) In such circumstances the termination of Mr Kingston's employment was sad but inevitable, and in no way the fault of Gen-i. I can do no more to assist Mr Kingston with his employment relationship problem. It now becomes unnecessary for me to determine the limitation issues.

## Costs

74) At this stage I leave it to the parties to discuss costs between themselves. If however they wish me to determine the issue, I require submissions from the party seeking costs no later than 28 days from the date of this determination.

Y S Oldfield  
Member of Employment Relations Authority