

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 367  
3136730

BETWEEN            CAROLE MARSHALL  
                                 Applicant  
  
AND                    ERIC FORSTER  
                                 Respondent

Member of Authority:     Sarah Kennedy

Representatives:         Michael McAleer, advocate for the Applicant  
                                 Chris Patterson, counsel for the Respondent

Investigation Meeting:    14 January 2022

Submissions     Received     3 February 2022, 26 and 27 April 2022 from the Applicant  
(and further information):     13 January 2022, 22 April 2022 and 26 April 2022 from  
                                 the Respondent

Date of Determination:    5 August 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Carole Marshall was employed by Eric Forster from 2002 until she resigned on 13 November 2020. Ms Marshall claims that she was constructively dismissed during a period of extended leave she took to take care of her extremely unwell daughter. Ms Marshall says that Mr Forster's actions and communications over text and phone calls culminating in the final meeting on 11 November caused her to believe that she had no option other than to resign.

[2]     Mr Forster was in legal practice as a criminal defence barrister and Ms Marshall was employed as a legal secretary and office administrator. After Ms Marshall's daughter became very ill in August 2020, and after approximately seven weeks of leave, Mr Forster discussed

options regarding the employment relationship with her. Mr Forster says that there was no action or combination of actions by him that objectively made it reasonably clear to Ms Marshall that he no longer intended to comply with the essential terms of the employment relationship. He was trying to work through the issues to find a solution.

### **The issues**

[3] The issues requiring determination were:

- (a) Did Mr Forster breach the terms of employment or duties owed to Ms Marshall and, if so, was it reasonably foreseeable that she would resign in those circumstances so that her employment should be seen as having ended by constructive dismissal rather than resignation?
- (b) If Ms Marshall's employment did end by such unjustified actions by Mr Forster, what remedies should be awarded to her considering:
  - (i) Lost wages;
  - (ii) Compensation under s 123(1)(c)(i) of the Act;
  - (iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Marshall that contributed to the situation giving rise to her grievance;
  - (iv) Should either party contribute to the costs of representation of the other party.

### **The Authority's investigation**

[4] For the Authority's investigation written statements were lodged by Ms Marshall and Mr Forster. They both answered questions under oath or affirmation from me and the parties' representatives who also provided oral and written submissions.

[5] I sought further submissions from the parties on the operation of s 122 of the Employment Relations Act 2000 (the Act), should I reach the conclusion that Ms Marshall's resignation did not amount to a constructive dismissal. Submissions were received from both parties.

[6] Having regard to s 174E the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[7] As permitted by 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

### **Background**

[8] Mr Forster described Ms Marshall as being an integral part of his business and attributed some of his success to the role that she had played. They enjoyed a good communicative and productive employment relationship until October 2020.

[9] Ms Marshall's daughter suffered from a significant health event in August 2020 and Ms Marshall took leave to care for her from 18 September onwards. In total Ms Marshall was on sick leave caring for her very sick daughter for approximately seven weeks until she resigned on 12 November 2020.

#### *Return to work and first setback*

[10] The parties were in regular contact by text about the daughter's progress and once it was known the surgery had been successful it was agreed Ms Marshall would return to work on 12 October. However, two days later she had to leave and return to Wellington with her daughter who had suffered a serious setback and now required further urgent surgery.

[11] Mr Forster was supportive and indicated his concern for Ms Marshall's daughter who he had known since she was little. The text communications show that when asked, Mr Forster always said that the office was functioning okay and encouraged Ms Marshall to continue to be with her daughter. He had a temporary arrangement in that his wife was working with him, which he referred to in the texts reassuring Ms Marshall that he was coping without her.

#### *Second setback*

[12] On Sunday 4 October the parties had exchanged text messages. Ms Marshall updated Mr Forster as to what was happening with her daughter health wise and said she would update him again on Sunday. She finished by saying "If you've got work & can set [sic] me here I'd love it". He responded saying "no problems. office is okay. My surface pro not back yet. Not really anything you can do from home. Just stay in touch". He sent a further text asking if there was anything he could do to help pack up the daughters flat in Dunedin while he was there.

[13] The next text messages on 7 October discussed a limited licence application for a friend of Ms Marshall's that she wanted to do in her own time and Mr Forster agreed.

*Return from Wellington*

[14] On 27 October 2020, Ms Marshall had returned from Wellington and the text she sent that day is important because Ms Marshall's evidence was that she was communicating about when she could return to work. Although her daughter was doing well, the medical advice was that she could not be left alone for the next two weeks. This meant Ms Marshall could not return to work until 9 November.

[15] Ms Marshall knew she was about to run out of all leave types so in her text message she asked for two days leave without pay (on 5 and 6 November) to allow her to return to work on 9 November. That way she could spend two weeks at home with her daughter and had a plan for her return to work. She repeated that she was more than happy to work from home and said that she would let Mr Forster mull things over and get back to her with his thoughts. She thanked him for being so understanding through her daughter's illness.

[16] This was the first communication they had had about return to work after the setback on 12 October.

[17] Mr Forster's evidence was that he did not read Ms Marshall's text on 27 October to mean that she would return to work on 9 November. He was unclear from that text whether she wanted to return to work on 9 November or whether that was a holding pattern until 9 November and he sets out his rationale for thinking that in his written evidence as follows:

- (a) The first line said at least two weeks, she did not actually say she anticipated being back at work on Monday 9 November;
- (b) I had reservations about the certainty of Carole being able to return to work on 9 November, because of the previous setback on 14 October could be repeated;
- (c) Because 14 days was only an estimate from the surgeon;
- (d) Carole's own text said [her daughter] could not be left alone for at least two weeks and as far as I knew, Carole was the only caregiver;
- (e) Carole immediately transitioning to working a full day might be too difficult.

[18] I do not find the text message to be ambiguous about the fact that Ms Marshall was arranging a return to work date of 9 November and seeking two days leave without pay for that to happen. A return date of 9 November equated to two weeks from the date she was notifying him, was consistent with the medical advice (albeit one day short of 14 days) and conveniently the 9 November was a Monday.

[19] Mr Forster said that at that point he expected to have a conversation about what a return would look like and what level of support would be required. He was also thinking about a graduated return to work. He said in his written evidence “An overambitious complete return to work plan might have worsened the difficulties we were both facing.”. He decided to adopt a wait and see approach and did not talk to Ms Marshall about the fact he found the text to be unclear or that his expectation was that they would have a conversation about return to work and what that might look like before planning her return to work.

*Telephone call – 28 October*

[20] The next day (on 28 October), Ms Marshall telephoned Mr Forster because she had not heard back from him. There is a dispute in the evidence about this conversation. Ms Marshall says this is when things changed for her. It was an 18-minute call. Her recollection was that she was told she should terminate her employment and go on a caregiver’s benefit so she could care for her daughter through to the New Year, that Mr Forster noted she did not have much leave entitlement anyway for the Christmas/New Year period and he was unwilling to provide her with anymore paid leave and that there was a chance his business would close in the New Year anyway.

[21] Ms Marshall says she was taken aback as she thought they were going to be discussing her taking two days unpaid leave so she could return to work on 9 November. She says Mr Forster told her his wife was helping and mentioned that there was a possibility someone could come in one day a week to assist.

[22] Ms Marshall said that he went on to say she needed “all the tools” suggested she get onto the Ministry of Social Development as soon as possible as her leave entitlement ran out on 4 November.

[23] On 29 October Mr Forster sent Ms Marshall a text about the benefits he was suggesting for both Ms Marshall and her daughter, which is in two parts and reads as follows:

How's the day start  
 Caregiver benefit – expect hoops  
 Accommodation supplement

[Daughter's name]  
 Get off student allowance  
 Get on sickness  
 Accom supplement  
 Call [person who used to be a friend of Mr Forster] and explain the situation

[24] Mr Forster agrees they had a long conversation that day but said he was worried Ms Marshall was putting too much pressure on herself and possibly her daughter by setting unrealistic targets about getting back to work. Mr Forster denies using the word “tools” but was trying to suggest options.

[25] His evidence was that he tried to discuss the option as an alternative to returning on 9 November which was going on unpaid leave until after the Christmas break until 11 January 2021, to take the pressure off her and her daughter. He records in his written evidence that he also talked to her about the significant commitment he had made in paying her 100 per-cent during Covid level 4 and that if he paid leave in advance to cover her after Christmas, and she ultimately did not return to work, he would be caught having to pay her accrued holiday entitlement on top of leave in advance, which he said in his written evidence that he was not prepared to do.

[26] Importantly Mr Forster denies that he told Ms Marshall that she should terminate her employment and go on a caregiver's benefit but accepts he did say he would not pay her leave in advance and that the conversation moved into state assistance for both Ms Marshall and her daughter. He suggested she could enquire about whether she was entitled to any state assistance, if she was on leave without pay until after the Christmas shutdown. He said he told her this could be explored in her daughter's capacity as a caregiver's allowance attached to her daughter's entitlement, given the exceptional circumstances. He says this was just a conversation about making an enquiry so she could see whether a return to work after the Christmas break was affordable to her.

[27] In relation to the possibility that his business might close in the New Year there is a conflict in the evidence as to whether this was presented as a foregone conclusion or simply a possibility to consider, Mr Forster said in evidence that he now regrets raising his long term plan with Ms Marshall. He explained he did not want to have to “subsequently make a change

of circumstances call to her, if that did eventuate. She was making life affecting decisions and needed the best information.”

*Second setback*

[28] The following day on 30 October, Ms Marshall sent a text advising Mr Forster her daughter had had a setback and they had flown back to Wellington as she had been readmitted for further surgery. Ms Marshall had taken some initial legal advice after the phone call on 28 October but due to the trip back to Wellington, she was still in the process of discussing options. She recorded in the text “I haven’t had a chance to give your suggestions any thought” as she says she did not want to alert him to the fact she was seeking legal advice. From her perspective, the relationship was very damaged at that point.

*Return from Wellington*

[29] On 3 November she advised by text that she was home. Mr Forster says there was no further information in that text so he had no information about whether she was in a position to start back at work on 9 November and the setback demonstrated how uncertain a return to work on 9 November would be.

[30] On 4 November, Mr Forster sent the following text and included a screen shot showing her leave entitlement had ended:

Carole this shows your annual leave entitlement ended yesterday  
 We need to follow up on previous conversation  
 I’ll write to you today  
 We will shut down over Christmas and you’ll not have [sic] much entitlement  
 I realise it’s difficult  
 We need to make decisions for your economic security and my business certainty  
 I’m free all afternoon if want to meet

*Letter from advocate*

[31] On 4 November, Ms Marshall, having received that text had her advocate send a letter to Mr Forster raising constructive dismissal because of the suggestion that she go on a carer’s benefit and the follow up text suggesting decisions needed to be made for her economic security and his business certainty. Mr Forster responded by email saying that he hoped she was returning to work or at least would confirm whether she was returning on 9 November. He set out that he was waiting for her to respond after he sent a screen shot of her leave balance to

her. That was after she had she raised the prospect of leave without pay for two days for the period from 4 November to 9 November in her text of 27 October. They agreed to meet on 11 November 2020.

[32] I note at this point that the parties appear to have been talking at cross purposes. Ms Marshall had made it clear she sought two days leave without pay in order to return on 9 November and was waiting to hear back about that. From Mr Forster's perspective he had discussed options with her and was waiting to hear back from her about those options.

[33] On 6 November, Mr McAleer responded on Ms Marshall's behalf saying that he thought something had been "lost in translation. The basic issue is that you have told Carole to resign and go on a carer's benefit.". Mr Forster responded on the same day saying that what he wanted was a "time frame" and an indication of what a return to work might look like. He also states that given her previous text had raised the issue of leave without pay until 9 November, he confirmed he agreed that she could have those two days on leave without pay.

#### *Meeting – 11 November*

[34] The meeting did not help in resolving the issues between them and ended with Mr Forster being asked to leave by Mr McAleer, Ms Marshall's advocate. During the meeting several things were discussed. Ms Marshall's position was communicated by Mr McAleer that it was always her intention to return to work on 9 November but when she called Mr Forster on 28 October to discuss taking two days unpaid leave and returning on the 9 November, she says Mr Forster told her she should terminate her employment and go on a benefit and went on to say that he could not guarantee work in the New Year.

[35] Mr Foster disputed that he was advised of a return to work date, and if he was it was not confirmed. Mr Forster was interested in knowing about facilitating a return to work and when she could be back at work. Mr McAleer said Ms Marshall would take a further week or two caring for her daughter before she would be ready for work.

[36] During the meeting, a dispute arose over what Mr Forster had said in the telephone conversation on 28 October about getting additional help at the office one day a week. It appears that when he denied he has said something in relation to that additional help, things became heated. The end result was Mr McAleer asked Mr Forster to leave the meeting.

[37] In his written evidence about the meeting Mr Forster explained he did have temporary cover for Ms Marshall but not for a full day only an hour or two each day to assist a junior barrister with administration and that had commenced on an informal basis to start with. It became a 0.5 full time equivalent, but it ended in February 2021. It transpired that he was working long hours and finding it very difficult to manage without Ms Marshall, but that does not appear to have been communicated to her at the time in those terms.

[38] Mr Forster also said Ms Marshall had not kept in touch about her daughter's health and Ms Marshall disputed that because up until the 30 October she had kept in touch and kept him fully updated and that is not disputed.

[39] Ms Marshall was clearly considering her options after she understood him to be suggesting she resign and go on a carer's benefit. In any event, there was a period of reduced communication but that was understandable in the context of where each party thought the other one was at. Previously the communication had been very good.

[40] Mr Forster accepts that he got "a little upset in the meeting". From his perspective he was "upset" because Ms Marshall had not been communicative and in his view did not turn up for work on 9 November when he had expected her to and she was now falsely claiming that he had told her to leave her job and go on a benefit. Ms Marshall said he was treating her in a way she felt she was being cross examined and was upset by his demeanour towards her, especially as she had worked so closely with him for so long.

[41] Mr Forster also says he was upset that she had not been open about having a partner and work had been done for a friend who was actually her partner. The relevance of this was not entirely clear. Noting that it was not raised with Ms Marshall at the time, if there was an employment issue that necessitated Mr Forster knowing who her current partner was, and it was possibly the limited licence application for this person, that would have needed to have been raised with her at the time. The fact Ms Marshall had a partner is not relevant to this investigation.

[42] In relation to his correspondence, Mr Forster says that some of his text messages require the benefit of context and the relevant correspondence speaks for itself. Importantly, he says nothing in his correspondence objectively indicates any intention on his part to permanently end the employment relationship.

*After the meeting*

[43] Ms Marshall said Mr Forster was “uncomfortable, twitchy and called the meeting disingenuous.”. She formed the view after that meeting, that she could no longer work for Mr Forster because from her perspective he had lied to her in the meeting, and she had lost trust and confidence in the employment relationship. She instructed her advocate to tender her resignation on her behalf.

[44] After the meeting, on 11 November, Mr Forster emailed her pointing out various things that remained unresolved. He said he was happy to meet again to see if they could take things further, but he was unavailable for the next two weeks. He rejected outright any claim for constructive dismissal.

[45] On 13 November 2020, Ms Marshall resigned by way of a letter from Mr McAleer. The letter set out that the primary issue was Mr Forster’s suggestion that Ms Marshall resign and go on a carer’s benefit and the suggestion that there would be no work for her in the New Year.

[46] On 16 November 2020, the following working day, Ms Marshall commenced employment with another law firm.

[47] On 4 December, Mr McAleer wrote a more detailed letter raising the personal grievance of unjustified dismissal and breaches of good faith. Mr Forster replied by email on 5 December and told Mr McAleer that as Ms Marshall had left her employment, then the claim is for constructive dismissal. It is clear from that email that he felt let down and he recorded that if the claim was to continue he suggested mediation and set out the counter claim he would make relating to her obligation to communicate about her return to work and that he would be seeking security for costs from her.

[48] Mr Forster expressed some regret about that email at the investigation meeting and indicated that by that stage the long hours he was working had taken a toll on him.

**Constructive dismissal**

[49] The doctrine of constructive dismissal concerns situations where an employer's conduct compels a worker to resign. A resignation may be held, in employment law, to be as much a dismissal as where an employer has actually dismissed the worker.

[50] One recognised category of constructive dismissal is whether the resignation is caused by the employer's actions including any breach of duties owed to that employee. A resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee that an employee would resign rather than put up with such breaches.

*Duties owed by an employer*

[51] The law concerning claims of constructive dismissal is well settled. *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* provides three non-exclusive categories of constructive dismissal as follows:<sup>1</sup>

1. Where the employee is given the choice of resignation or dismissal;
2. Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign; and
3. Where a breach of duty by the employer leads an employee to resign.

[52] For the purposes of this matter, I do not find that the course of conduct by the employer reaches the level of the first two categories. The focus is then on whether there was a breach or breaches of any duty that lead the employee to resign.

[53] Mr Forster's actions as an employer will be a breach of duty where they breach a specific term of Ms Marshall's employment agreement or amount to a breach of implied terms such as the duty of fair treatment or a breach of the statutory duty of good faith.

[54] Ms Marshall alleges that Mr Forster told her that she should resign and go on a carer's benefit and by indicating he might be taking up a further opportunity with the Ministry of Justice in the New Year, put her on notice that his legal practice might close. Raising that option further led her to believe that her employment was coming to an end.

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<sup>1</sup> *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374 – 375.

[55] Mr Forster said in evidence that he regretted his decision to discuss the potential closing of his business at that point.

[56] The obligation to act in good faith requires an employer who is proposing to make any decision that will have an adverse effect on an employee's employment to provide the employee with information about the decision and an opportunity to comment on the information before any decisions are made.<sup>2</sup>

[57] It is fair to say that things changed quickly because up until that point, none of their communications (mostly texts) had indicated that Mr Forster raised or even contemplated changes or that the temporary arrangements he had in place were insufficient in her absence. I accept that it was reasonable for Mr Forster to raise these issues, but Ms Marshall at that point in time was seeking two days leave without pay so she could return to work. He finally responded on the 6 November in relation to the two days leave without pay.

[58] I am satisfied that Mr Forster had decided the situation was no longer sustainable by the time he sent the text to Ms Marshall on 4 November because he had already sent the text message which is evidence that his position had changed significantly. He recorded in that text that decisions had to be made for Ms Marshall's economic security and his business certainty. That meant that the communication changed from discussion about Ms Marshall coming back to work to why she could not or perhaps should not come back to work.

[59] There were genuine reasons for the discussion to occur because Ms Marshall had been away for seven weeks by that stage, and Ms Marshall herself accepted that. The issue in embarking on that conversation is the way that it unfolded. The possibility of adverse effects on the continuation of Ms Marshall's employment were obvious and Mr Forster had abruptly changed his position from being extremely supportive and encouraging to signalling that a major decision had to be made about her employment. Ms Marshall meanwhile was wanting to return to work on 9 November but Mr Forster appears to have discounted that as an option.

[60] A fair and reasonable employer could be expected to provide Ms Marshall with a clear indication of the position that Mr Forster had reached, which appeared by virtue of the request for leave without pay not being addressed, that a return to work on 9 November was not acceptable. Ms Marshall needed a full opportunity to comment on the position he had reached

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<sup>2</sup> Employment Relations Act 2000, s4 (1A)

and the options he proposed and to give her an opportunity to propose solutions and make comment before any decision was made.

[61] A conversation about an employee seeking Government support even if only in the short term, followed up by a suggestion that there was a possibility of redundancy in the future because of another opportunity Mr Forster wanted to pursue, taken together in the context, would objectively suggest that the employment relationship was coming to an end. The combination of the topics traversed in that phone call, in response to a request for two days leave without pay, helped Ms Marshall to believe that her job was no longer available.

[62] I find that Mr Forster has committed a breach of his duties of good faith and fair treatment through what Mr Forster did or decided, in three ways. Firstly, by making a decision he could no longer take the supportive approach he had previously taken and not telling Ms Marshall that was what he wished to discuss at that point in time; secondly, by entering into a number of text messages and phone conversations where he was not clear about what it was that he was trying to communicate; and thirdly, by failing to remain calm and discuss the issues objectively at the meeting between the parties.

*Sufficiently serious breaches to cause resignation*

[63] Having established those breaches of duty owed to Ms Marshall, the question turned to whether they were, individually or taken together, sufficiently serious to make it reasonably foreseeable that an employee would not be prepared to keep working under such conditions. This determination has already set out an examination of the facts of what happened.

[64] The abruptness with how Mr Forster has approached the decision that he had reached and then engaged Ms Marshall in discussion regarding her ongoing employment, regardless of whether it was short term or long term, the fact he ignored Ms Marshall's request for two days leave without pay, and her desire to return to work on 9 November, demonstrate how Mr Forster has dealt with the issues.

[65] In addition to the breaches of duty owed to Ms Marshall I also am satisfied that the combination of these actions by Mr Forster objectively made it clear to Ms Marshall that he no longer intended to comply with the essential terms of the employment relationship and this conduct crossed the line from causing Ms Marshall some unhappiness and distress to being repudiatory conduct. It was reasonably foreseeable that she would reach the conclusion that

he wanted her to resign because there was no prospect of ongoing employment. In those circumstances, Ms Marshall's resignation was caused by what Mr Forster did, so this is really a case of constructive dismissal rather than merely resignation<sup>3</sup> and that dismissal was unjustified.

### **Remedies**

[66] Having established that Ms Marshall's employment ended by way of unjustified dismissal, Ms Marshall is entitled to an assessment of remedies for her personal grievance.

### **Lost wages**

[67] Ms Marshall's employment with Mr Forster ended in November and she began work immediately in employment that she says paid \$10,000 less per year than what she had previously been on. She sought an order for \$2,500.00 in lost wages.

[68] By having gained new employment relatively quickly, after a short period in her job search, Ms Marshall has made reasonable endeavours to mitigate her loss. In those circumstances the Authority must order the lesser sum equal to the lost remuneration or three months' ordinary pay.<sup>4</sup>

### *Compensation for humiliation, loss of dignity and injury to feelings*

[69] Ms Marshall's evidence established she was humiliated by how she was unfairly treated over the use of her sick leave and then the sudden withdrawal of Mr Forster's support and was distressed by the problems caused by the shortcomings in Mr Forster's arrangements. This situation damaged her health and impacted on her at a time when she was already impacted because of the significant health issues that her daughter had that had led to her needing to take the time off to care for her daughter.

[70] Considering the distress experienced by Ms Marshall around the time leading to her resignation, the evidence of the ongoing effects on her and the general range of awards in similar cases, an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$10,000.00. This is the amount that Mr Forster must pay Ms Marshall without deduction and

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<sup>3</sup> *Wellington Clerical IUOW v Greenwich* [1983] ERNZ Sel Cas 95 at [104].

<sup>4</sup> Employment Relations Act 2000, s 123(1)(b) and s 128(2).

within 28 days of the date of this determination, as compensation for humiliation, loss of dignity and injury to feelings.

### *Contributory conduct*

[71] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance. In this case Mr Forster has submitted that three aspects of Ms Marshall's conduct contributed to the situation. Firstly, that Ms Marshall was not truthfully communicative of her relationship with her partner, secondly that she was not communicative and responsive concerning her daughters condition and return to work after 31 October 2020 and that she failed to raise concerns as they arose and also elected to resign without proposing mediation.

[72] I have already recorded above that I do not consider Ms Marshall's relationship status to be relevant to this matter. I have also found that responsiveness and communications between the parties was good about the daughter's condition until the conversation when the carer's benefit was raised. Because that was such a short period of time in the history of this matter, and Ms Marshall was in the process of obtaining advice and caring for her unwell daughter from 31 October, and that Ms Marshall did communicate that a return date and requested two days leave without pay, I do not consider any issues to with communication about her daughter's condition a contributory factor that was sufficiently blameworthy to require a reduction of the remedies awarded for her grievance.

[73] I do consider that Ms Marshall could have raised her concerns in response to direction their discussions had taken. She was taken aback after the conversation with Mr Forster and could have raised how seriously she was taking the conversation but given the cumulative effect of what was being raised and the fact that Mr Forster's conduct at the meeting was accepted, to a degree by Mr Forster in his oral and written evidence, I do not consider it to be reasonable to consider it to contributory conduct on Ms Marshall's part.

[74] Accordingly, no reduction in remedies is required.

### **Orders**

[75] Eric Forster is ordered to make the following payments to Carole Marshall:

- (a) Lost wages amounting to \$2,500.00 under s 123(1)(b) of the Act; and
- (b) The sum of \$10,000.00 under s 123(1)(c)(i) of the Act as compensation for the hurt and humiliation suffered by Ms Marshall because of her constructive dismissal.

### **Costs**

[76] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Marshall may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Forster would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[77] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

**Sarah Kennedy**  
**Member of the Employment Relations Authority**

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<sup>5</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)