

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 311/09  
5050065**

BETWEEN      SHELLEY ROSENBERG  
                         Applicant

AND             AIR NEW ZEALAND LIMITED  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:          Susan Hornsby-Geluk, Counsel for Applicant  
                                 Kevin Thompson, Counsel for Respondent

Investigation Meeting:      29, 30 and 31 May 2007, 1 June 2007, 1 and 2 August 2007

Submissions Received:      24 August 2007, 5 and 10 September 2007, 3, 10, 11 and  
   18 April 2008

Determination:              1 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1]    The applicant Ms Shelley Rosenberg (“Ms Rosenberg”) worked for Air New Zealand Limited (“Air New Zealand”) for ten years from 30 January 1995 until her resignation in September 2004. She claims that Air New Zealand failed to provide her with a safe and healthy workplace and that she was unjustifiably constructively dismissed.

[2]    Air New Zealand denies Ms Rosenberg's claims. It says that she resigned after she had declined to take up a secondment role on a permanent basis. It says she has no entitlement to redundancy compensation in these circumstances. It says that it took practicable and reasonable steps to assist Ms Rosenberg when health issues arose for her.

[3] I apologise to the parties for the delay in issuing this determination. The evidence in this investigation has been overwhelming. I apologise to both parties for any inconvenience they have suffered as a result of my delay.

### The claims

[4] Ms Rosenberg says that Air New Zealand failed to address her persistent unrealistic workload in spite of her numerous requests and as a consequence, she suffered significant physical, personal and financial distress. She says Air New Zealand has taken unjustifiable action disadvantaging her in her employment and it has breached its obligations to her under the *Health and Safety in Employment Act 1992* and the implied term of her employment agreement requiring Air New Zealand to provide her with a safe workplace. She further says that Air New Zealand failed to keep her permanent position open for her whilst she was performing a temporary position to assist her recovery from her work-related illness and then it made her position redundant and dissuaded her from reapplying for that role on the grounds of her health. She says she is entitled to redundancy compensation and/or remedies for unjustifiable constructive dismissal. In addition to those claims, she says Air New Zealand has breached the terms of her employment agreement.

[5] Ms Rosenberg asks the Authority to make findings that Air New Zealand:-

- (i) Has taken unjustifiable action causing her disadvantage;
- (ii) Has breached the terms of her employment agreement;
- (iii) Has breached the *Health and Safety in Employment Act 1992*;
- (iv) Has made her permanent position redundant entitling her to redundancy compensation and/or; has constructively dismissed her from her employment.

[6] Ms Rosenberg seeks orders that Air New Zealand:-

- (i) reimburse her for all her lost wages as a result of its actions up to the date of investigation meeting;

- (ii) pay her redundancy compensation and additional entitlements provided to redundant employees in accordance with her employment agreement and its employment policy;
- (iii) pay her compensation for hurt feelings, humiliation, and loss of dignity in the sum of \$50,000.
- (iv) reimburse her for her medical expenses up to the date of investigation meeting;
- (v) pay her damages for breach of contract, and loss of career, loss of employment status, employability and future marketability;
- (vi) pay her exemplary damages of \$20,000;
- (vii) pay her costs.

[7] Air New Zealand says that Ms Rosenberg was not dismissed but rather she resigned on 3 August 2004 and that her claim for personal grievance must proceed on the basis that it was raised, ie as a unjustifiable constructive dismissal arising out of a failure/refusal to treat her as redundant and pay her redundancy compensation. It says that it was on that basis that Ms Rosenberg resigned. It is submitted that any claim of unjustifiable constructive dismissal falls into the third category of such claims, ie as one in which it is alleged that the employer breached a duty leading to the employee resigning. It says Ms Rosenberg must show repudiatory behaviour by Air New Zealand which was a breach of her employment agreement and that breach caused her to resign and further, that such breach was of sufficient seriousness to make it reasonably foreseeable by Air New Zealand that she would resign. Air New Zealand says these matters cannot be established.

[8] As concerns the redundancy, Air New Zealand says that Ms Rosenberg's training position, on secondment, was not surplus, but was continuing. As well, it says that Ms Rosenberg was offered "reasonably similar alternative employment" which she declined. It says that if that alternative employment was not reasonably similar, the parties had yet to explore redeployment opportunities which may have avoided redundancy for Ms Rosenberg. Air New Zealand says that the object being to preserve employment and avoid redundancy, Ms Rosenberg does not have the right to unilaterally declare herself redundant and thereby become entitled to redundancy compensation. It criticises Ms Rosenberg and says that she cannot treat herself as

constructively dismissed "*in anticipation of something which lay in the future and which may well never have occurred*". It suggests that Ms Rosenberg raises her breach of contract claim as a threat being made good following its refusal to agree that she was redundant.

[9] Air New Zealand says Ms Rosenberg's claim for breach of contract is now one limited to a simple breach of contract action and cannot be used to challenge a dismissal. It says there was no breach of contract.

[10] I proceed on the basis that there are two broad claims. Firstly a claim of breach of contract arising out of a failure by Air New Zealand to provide Ms Rosenberg with a healthy and safe workplace. Secondly, a claim of unjustifiable constructive dismissal and/or unjustifiable disadvantage because of a repudiation of contract by Air New Zealand by its failure to treat her redundant by 3 August 2004.

[11] A limitation question arises. For limitation purposes, I accept that Ms Rosenberg's initial statement of problem was lodged in August 2005. I consider the statement of problem lodged on 8 September 2006 was an amended statement of problem, that is, derived from that lodged in August 2005. I consider therefore that the limitation period goes back to August 1999. In any case, as shall become clear, I consider the event of September 2001 to be material which was well within the limitation period.

## The facts

[12] Ms Rosenberg commenced employment with Air New Zealand in January 1995 in the position of *Agency Support Officer – Temporary*. The employment became permanent in March 1995. Ms Rosenberg had extra responsibilities as a course facilitator for a nationwide customer service training initiative, project work and as a relief Sales Executive position.

[13] Ms Rosenberg moved to Auckland in September 1997 when she was appointed *Agency Sales Executive*. This role was primarily on the road and involved promoting Air New Zealand to travel agents, driving revenue through the distribution network to

achieve targets, arranging trade shows, promotions, negotiating preferred agreements, product updates, developing and maintaining relationships, problem solving, customer complaints, authorising airline rule variations and deviations, escorting educational and negotiating market support. In this role, Ms Rosenberg had 27 employees reporting to her.

[14] In October 1997, Ms Rosenberg was appointed as *Agency/Commercial Sales Support Supervisor*. For a short time she performed the sales executive role and the new promotion while a replacement for her in her former role was found. The new role as supervisor was a significant for Ms Rosenberg because she did not have previous supervisory experience. She was to supervise, coach and mentor a team of staff.

[15] The supervisory position required Ms Rosenberg to manage her staff day-to-day work loads, problem resolution as well as coaching and mentoring staff. There were managerial responsibilities some of which were team management responsibilities, including training, developing business unit plans, missions, visions, values, setting key performance indicators, monitoring resource flow, recruitment, restructuring, performance management, sick/annual leave applications, quarterly performance reviews, training and development plans, career development plans, staff meetings, team building initiatives, induction, change management, initiatives to ensure a committed and engaged workforce, planning days, recognition initiatives, and health and safety compliance issues.

[16] Ms Rosenberg was also responsible for administrative tasks relating to the management of Agency Sales Support. This included ensuring that budgets and targets were met, reporting results and liaising with Sales Executives. She was also responsible for liaising with other areas of the business including revenue management, special handling, marketing, managing and monitoring call statistics and call flow, liaising with other managers, liaising with customers, handling customer complaints, dealings with customer relations department, problem solving, restructures, running the temporary offsite call centre during the 1998 power crisis, developing and implementing policies and procedures, waivers of fare rules, presentations, continuous improvement, identification of new phone systems,

implementation of priority customer care initiatives, writing and/or proofing trade release, sales executive updates, monthly and weekly reporting, statistics, attendance at company meetings, regional sales meetings, attending at compulsory courses (OSH, progress review training, service management), office maintenance, stationery orders, authorising refunds and making commercial decisions.

[17] Ms Rosenberg began to realise that her workload was demanding and excessive. She began working after hours to fulfil the responsibilities of her role. There were constant interruptions each day from management, staff, suppliers, and customers. Ms Rosenberg began to experience stress from the pressure of her work and was working excessive hours. She says the high number of staff reporting to her required extensive guidance and supervision. There were three separate areas of staff under her supervision each requiring different levels of input and supervision, planning and implementation on policies.

[18] Ms Rosenberg reported to her Agency Support Manager Mr Brooke Jamieson (“Mr Jamieson”). Ms Rosenberg wrote formally to Mr Jamieson asking for help by an email of 2 June 1998. She wrote:-

*From: Rosenberg, Shelley  
Sent: Tuesday, 2 June 1998 15:16  
To: Jamieson, Brooke  
Subject: I need your Help!!!!  
Importance: High  
Hi Brooke*

*I believe that there are some major outstanding issues that I have that require resolutions, both for the benefit of my sanity/stress levels and for the company and as my manager, I would like to ask you to help me get some resolutions quickly!*

*1: My Contract situation is almost at the “enough is enough” stage. I understand that secondment people have been given contract - so why the delay with me? Is there not an interim contract that we can negotiate on. The impact of this is that I am feeling as though I am constantly fighting and am almost to the point where I will fight no longer – I hate the fact that I am hanging on to the car – I see this as no benefit to me and would much rather have a contract! It is only creating additional stress by making me feel pressured to give it up. A solution would be an interim contract*

*My appraisal issue - what is my value? I know this is not your problem, however, I feel like I have to fight this one too!*

*A solution would be to come to an arrangement this week in conjunction(sic) with yourself and Christian.*

*3: The fact that I have 27 direct reports - I am not able to do this 100 percent as well as other tasks you have asked me to do. I am in constant need by 1 of my 27 staff and believe that this is not a workable amount of people to have as direct reports. I have been making enquiries, both within Air New Zealand and in the commercial company world - and most are flabagasted(sic) at the number of direct reports - this needs to be solved immediately, as I cannot continue this way-*

*A solution would be team leaders (as a paid position) or shifting reporting lines.*

*Brooke, I feel as though I am constantly fighting and this is not good as these fights have been going on a while and are impacting me and how I feel about things. I have not let it impact the team yet, however I am sure the fact that I am too busy will have negative results before too long and I would ask your support in trying to solve these issues particularly with numbers 1 and 3).*

*I believe that I'm not being unreasonable for asking that the above be resolved. I have been very patient and flexible my requests and am wanting to resolve these issues quickly. Resolutions to these issues will help to remove some of the major factors contributing to my current stress levels and the barriers that are stopping from moving forward in this role and in fact inhibiting my enjoyment of this role.*

*Brooke, it has come to the end of the road for me, I am not wanting to continue on as I have been especially with these issues still unresolved. I believe there are solutions and I ask for your commitment to help me solve them, just as you have 110% of my commitment to be a valued member of your team and the company.*

*I would appreciate the opportunity of discussing this further - tomorrow or thursday - can you let me know what time suits.*

*Thanks  
Shel.*

[19] Ms Rosenberg and Mr Jamieson discussed the email and in particular her ability to manage 27 direct reports. Mr Jamieson was sympathetic. In response to Ms Rosenberg's situation he wrote a memorandum to Mr Christian Wilson the New Zealand Region Sales Director ("Mr Wilson") and copied to Mr Norman Thompson the Regional Director, New Zealand, Australia and Pacific Islands ("Mr Thompson"). Amongst other things, Mr Jamieson's memorandum proposed splitting Ms Rosenberg's role in half leaving her with Agency Support and setting up a new position to supervise Groups and Commercial Support. Ms Rosenberg would then have 16 staff reporting to her which would have included 2 Ansett staff. This

proposal for 16 staff reports was consistent with and based on a best practice benchmarking study. The memorandum noted that 16 reports was a maximum.

[20] Mr Jamieson's proposal was approved by Mr Wilson on 13 July 1998. Mr Wilson endorsed Mr Jamieson's memorandum "Go for it".

[21] Ms Rosenberg was provided with an employment agreement for her position as Agency/Commercial Sales Support Supervisor dated 28 September 1998.

[22] The second supervisor's role was not filled until October 1998 some three and one half months after approval by Mr Wilson. This followed a restructure where Ms Rosenberg's role changed to *Agency Support Supervisor*. Ms Rosenberg's new role was responsible only for *Agency* instead of previously an additional two others *Commercial* and *Groups*. It was only then that there was actual change for Ms Rosenberg. But she continued to carry out her heavy workload in the meantime.

[23] Ms Rosenberg says that from the appointment of the other supervisor she had 18 reports. Mr Jamieson says she had 16 and there were not 18 reports until April 2001. Ms Rosenberg says the 18 reports she had were very inexperienced. They required close supervision and continued to add onerously to her daily workload. As well, she says the unit was underperforming and new processes, systems and procedures were required. The Authority accepts that her workload was still excessive even with 18 reports. The Authority also accepts that Ms Rosenberg continued to communicate to Air New Zealand and Mr Jamieson that she was under pressure to keep the unit running as well as continue to manage her direct reports. Ms Rosenberg resolved that Air New Zealand were aware of the situation and because she still loved her job she continued on in the hope that matters would be addressed.

[24] It was intended that the Agency Support team be reduced to 14 and so the appointment of an additional supervisor was problematic for Mr Jamieson because it would have meant each supervisor would have seven reports each a situation he says was implausible.

[25] In her October 1998 progress review, Mr Jamieson wrote of Ms Rosenberg “*has done best possible under difficult circumstances. New structure should remove some of the stresses.*” In her performance review of the same time, Mr Jamieson wrote of Ms Rosenberg “*Shelly has put in a huge effort and sacrificed a lot of her personal time toward making it work and delivering the results. Circumstances have been extremely difficult with staff retention and shortage, an excessive number of direct reports and so on. A number of roadblocks to success have now been removed and I am positive that we will see excellent results from Shelley’s team. I know she will make 100% effort.*”

[26] In her section of the performance review Ms Rosenberg wrote of Mr Jamieson “*results achieved have been aided by total support from Brooke and working together as a team. I am driven and excited by challenges ahead and believe Brooke to be an integral part in moving forward.*”

[27] One particular day in October Ms Rosenberg saw the Regional Human Resources manager Ms Anna Lissaman (“Ms Lissaman”) in the elevator. Ms Rosenberg had tears in her eyes and Ms Lissaman enquired of Ms Rosenberg’s composure. Ms Rosenberg told Ms Lissaman she was extremely stressed and Ms Lissaman asked if Ms Rosenberg would like to meet to discuss matters. Ms Rosenberg said she would get back to Ms Lissaman. Ms Rosenberg subsequently wrote an email to Ms Lissaman of 26 October 1999 as follows:-

*Hi Anna  
 Hope you had a great weekend  
 I have not forgotten your offer of a chat and at this stage, I think I am in bad need of a holiday to re focus and to look at things from a different angle!  
 Things always look better after you have a wind down period – especially as I have been working reasonably long hours and most Saturdays for the last 8.  
 Undoubtedly, there are some big issues of frustration for me at the moment and I need to be able to look at these on fact and not be swayed by emotions. I am off on Saturday and I will be in touch when I get back – thanks again.  
 Kind regards*

[28] Ms Lissaman replied that she wished Ms Rosenberg well on holiday and looked forward to catching up upon Ms Rosenberg’s return.

[29] At the time, Ms Rosenberg was working six days per week and had done so for eight weeks continuously. She could not complete her administrative tasks during normal work hours because of constant interruptions. She believed these excess hours were a short term commitment to get the work unit ready.

[30] Ms Rosenberg's 1999 performance review identified that she had been working under unfavourable circumstances that year. Mr Jamieson wrote:-

*SR has dealt with a lot this year ... major review ... this has put the team on an emotional rollercoaster of which she has had to deal with. She really has worked hard to achieve this and dealt with the situation well. She should be commended for her efforts. Shelley well done ...*

[31] In January 2000, Ms Rosenberg declined an invitation for additional responsibility as harassment officer. She declined because she considered her workload excessive. She wrote an email to Ms Lissaman and copied to Mr Tony Moffatt Regional Manager ("Mr Moffatt") and Mr Jamieson, explaining the reasons why she declined.

[32] Ms Rosenberg says that at this time she was confused that while Air New Zealand management accepted that her workload was excessive, it still required her to do more. She says the invitation to be harassment officer was the first of many occasions where she was asked to accept more responsibility in addition to her excessive workload.

[33] Corroborative of workload Ms Rosenberg had carried, Mr Wilson wrote to Travel agents who dealt with the Agency Sales Support unit. He wrote:-

*Over the past few months our Agency Sales Support Unit has come under much pressure, which has resulted in less than satisfactory call wait times for our valued supporting Travel Agents.*

*This pressure has come as a result of a number of factors occurring within a short space of time. These factors include the planned centralisation of our Agency Sales Support Unit, which was successfully achieved by the planned date at the end of October 1999.*

*While we believe that overall the centralisation process has been successful, we have had some difficulties in obtaining the resource required and at the same*

*time have had an unusually high number of staff moving on to other jobs within the company. This has meant that the anticipated improvement in service levels have not yet been achieved. A number of recent changes in the market have also affected the demands put upon Agency Sales Support, exacerbating the difficulties.*

*The purpose of this letter is to keep you informed of work underway to further the Agency Sales Support Unit, and to assure you that we are working on rectifying these issues with the utmost of urgency.*

*Some of these initiatives include:*

- Recruitment of four new staff to fill the Agency Sales Support team.*
- The training and development of this new team.*
- The introduction of teams of dedicated agency sales support staff dealing with specific areas of enquiries, for example Fares and Ticketing advice, CRS and ET help, Capacity requests and General Sales assistance. Full details of this will be released in the coming weeks.*
- Implementation of an interactive touch tone telephone menu system which will direct your specific enquiry to the right source.*

*Can I finish by thanking your teams for their patience and support through what have been challenging times for us all. It would be greatly appreciated if you could take the time to explain this to your staff. We are very confident these initiatives will bring about a positive step in the drive to deliver excellent agency sales support and we will be keeping you informed as they progress.*

[34] Further corroborative of Ms Rosenberg's excessive workload, Mr Jamieson wrote a business case memorandum dated 26 May 2000 to Mr Moffat, Mr Grant Lilly the General Manager New Zealand and Australia ("Mr Lilly") and Ms Carolyn Tremain the General Manager Human Resources materially stating:-

*The Agency Sales Support team consists of 18 staff all currently reporting to one supervisor. History and benchmarking studies have shown this is too many direct reports for one person to effectively manage. In light of this we are wanting the CRS/ET component of Agency Sales Support to now report to the ECM*

[35] Mr Jamieson's business case memorandum was prepared specifically in response and to address Ms Rosenberg's concerns regarding her workload. That is clear from what Mr Jamieson wrote in a document in September 2003:-

*Although it does not specifically refer to Shelly being stressed this was an attempt to resolve the issue that Shelley had raised verbally in regards to work load. Tony and Christian had been made aware verbally that Shelley felt the job was too much for one person and in principle they agreed.*

[36] The business case was not approved by the company and Ms Rosenberg was very disappointed. Her acknowledged excessive workload continued.

[37] Ms Rosenberg found she had to work at home completing progress reviews where she would not be interrupted. Ms Jamieson was supportive and on occasions at Ms Rosenberg's request, let her work in his office and he worked in her place managing her team so that she could attend to her backlog of outstanding work. Mr Jamieson was well aware of the stress and pressure Ms Rosenberg was under and he agreed to cover for her.

[38] In August 2000, Ms Rosenberg spoke to Mr Moffatt about her situation. She told him of the stress and pressure she was under due to the number of direct reports and she sought a resolution from him. Mr Moffatt told her he understood her situation and that Air New Zealand was looking into the situation as an area under review. Ms Rosenberg took comfort from that advice. But there were no changes made.

[39] Mr Jamieson wrote a further business case memorandum dated 1 September 2000 seeking to introduce a new team leader/supervisor into Agency Support. It became clear that a reduction in team was unlikely. He wrote materially:-

*The day to day tasks that seem to heavily dominate the supervisor's time are all important and necessary. Some of these are:-*

*Recruitment and associated processes, 19 in the last 11 mths.*

*With the high number of new staff the induction and training demand is high. Take the last 11 months. If each new team member got the basic minimum of two weeks training the supervisor would have spent 38 weeks, just short of nine months training new staff. This impacts heavily on service levels, and the level of understanding of the trainer is in most cases insufficient.*

*For many, this is the first role where they have the autonomy to frequently make decisions that influence the companies(sic) performance. Due to this, the demand for day to day assistance from the supervisor is extremely high. One would describe this as a high maintenance team.*

*Progress reviews and October reviews alone, if performed to the company standard and effectively utilise 27 ½ days per year (approx 1 ½ months).*

*The above examples only represent a **small** part of the supervisor's role. In **two functions alone** we have utilised over 10 months of the year and if we add leave the year is almost up.*

[40] This business case was also rejected and Ms Rosenberg's acknowledged excessive workload continued. Not surprisingly, Ms Rosenberg found it very difficult

to accept that Air New Zealand knew her workload was excessive but was not prepared to remedy the situation.

[41] By email of 9 January 2001, Ms Rosenberg wrote to Mr Wilson and Mr Paul Abbott:-

*Hi there  
I am presuming that you are both working hard on the new structure. I came to find you, however you were "missing in action". Can I please remind you of the request that we in agency sales support require two supervisors. The team of 18 direct reports that I have had for the last year or so is far too big to manage and get top performance out of individuals who require a lot of training. If you would like to discuss this further, I am more than happy to have a chat.  
Regards  
Shel*

[42] Mr Wilson replied immediately:-

*Thanks for reminding us .... fully understand and agree  
Christian*

[43] Ms Rosenberg became more and more disheartened and distressed. Her issues and concerns were acknowledged by management but nothing was done. She contemplated leaving Air New Zealand but she still loved her job and relied on the promises made to her that help would be forthcoming. She was identified in line for succession. She resolved that she desired advancement. She remained loyal to Air New Zealand. She persevered believing that help was "around the corner".

[44] Mr Jamieson submitted a further business case memorandum, the third attempt to assist Ms Rosenberg. He repeated concerns he had set out in the September 2000 memorandum about the excessive direct reports and once again sought approval to introduce a new team leader/supervisor into Agency Support. Ms Rosenberg was never informed of the outcome of this request by Mr Jamieson. He says he would have spoken to her.

[45] In February 2001 Ms Rosenberg discussed her situation with Nadine Pereira Regional Human Resources Manager ("Ms Pereira"). Ms Rosenberg disclosed she was tired and exhausted. On one occasion she was in tears. Ms Pereira had seen Mr

Jamieson's proposal for an additional supervisor. She knew of Ms Rosenberg's excessive workload. Ms Pereira wrote to Ms Rosenberg by email of 28 February 2001 notifying Ms Rosenberg that she had submitted a proposal to have two supervisors in Ms Rosenberg's existing role in a new structure.

[46] Ms Rosenberg says at this time she was exhausted and was not sleeping well. She says that physical symptoms of stress were becoming apparent including reflux and a rash. She says too that she became snappy, irritable, tired and less approachable. She says she was tearful and anxious. She says this state was obvious to management. She says she was frustrated that while her workload was acknowledged as excessive, management told her to wait, that things were happening and help was on its way. But she started to become disillusioned.

[47] By email of 12 March 2001 Ms Rosenberg emailed Mr Jamieson enquiring as to progress with the appointment of a second supervisor. There was no response.

[48] Ms Rosenberg resolved that she would have Mr Jamieson prioritise tasks for her. When he asked for a certain task to be done, she would ask him what he wished she sacrificed in order to meet his request.

[49] By memorandum dated 15 March 2001 Mr Jamieson submitted a further business case seeking approval to introduce three new positions into the Agency Support team. He requested an additional three agency support officers which would have increased Ms Rosenberg's direct reports from 18 to 21. The request was a result of customer feedback that service levels were not satisfactory. Mr Wilson and Mr Jamieson had discussed with Ms Rosenberg that one of these positions was intended as a supervisor's role to sit beside Ms Rosenberg and share her responsibilities.

[50] There was particular pressure around this time as the Air New Zealand and Ansett merger was finalised. The Agency support service levels were not optimum.

[51] Ms Rosenberg's performance was reviewed in May 2001. Mr Jamieson identified two areas of her performance which required attention. Ms Rosenberg was

further distressed by this assessment because it was a result of her excessive workload. She was anxious about her bonus payments and future prospects.

[52] In June 2001 a new structure was announced pursuant to the Air New Zealand and Ansett merger. A new Sales and Distribution structure provided for a total of two supervisors and 22 staff in the Agency Support team. The restructure introduced four additional staff and one additional supervisor into the team.

[53] By letter dated 22 June 2001 as a result of the Air New Zealand Ansett merger, Mr Wilson confirmed Ms Rosenberg in her existing role as *Supervisor Agency Support* on identical terms and conditions.

[54] Ms Rosenberg took steps towards recruiting new staff members. The Agency Support team was under-resourced and was losing staff. Others were promoted. This created further work for Ms Rosenberg.

[55] In July 2001, according to her evidence, Ms Shiree Watt ("Ms Watt") was assigned to provide assistance to Ms Rosenberg after Ms Rosenberg and Mr Jamieson asked her to "help out". Ms Watt provided administration support, prepared reports, attended to updates and generally "helped out" Ms Rosenberg. Ms Watt made it clear she would not carry out any staff or disciplinary issues. She gradually did "more and more" and after the events of September 11 she "came off the phones" full time.

[56] In August 2001 Air New Zealand introduced a recruitment freeze. Mr Jamieson was appointed to a new position as *Agency Sales Manager* and was also caretaking a vacant sales support manager role. Ms Rosenberg began performing some of Mr Jamieson's previous tasks at Mr Wilson's request that she carry out those additional duties. Ms Rosenberg wrote to Regional HR Manager Ms Jennifer Robinson ("Ms Robinson") and advised that she would consider the request but would not take the other duties on without letting go of some of her existing responsibilities.

[57] Despite the recruitment freeze, Ms Rosenberg continued to request staff appointments. She wrote in that regard by email of 10 August 2001 to Mr Jamieson and Mr Wilson. She further wrote to head of Human Resources Ms Vicki Lodge

("Ms Lodge"), Ms Robinson, Barbara Templeton and Mr Jamieson again by email in the same terms on 27 August 2001. She wrote that the team was under "considerable stress and pressure".

[58] Ms Rosenberg applied for the vacant *Sales Support Manager* but withdrew her application. Mr Jamieson's role remained vacant for about 12 months. Ms Rosenberg performed some of the tasks of his former role as additional duties.

[59] Ms Rosenberg wrote again to Mr Jamieson and Mr Wilson by email of 6 September 2001 emphasising the need to replace outgoing staff and that the team was struggling being under re-resourced by one quarter.

[60] On 11 September 2001 there were terrorist attacks in the USA. That event had far reaching effects on international air travel and the industry including Air New Zealand.

[61] On 14 September 2001, Ansett Australia collapsed. Air New Zealand's financial position became extremely precarious.

[62] Mr Jamieson wrote a further memorandum to Ms Robinson and Ms Lodge dated 24 September 2001. He wrote:-

*We would like to request approval to fill the Agency Support vacancies. We understand that we may not be able to reach full compliment due to the company's circumstances, however the need to fill some positions is urgent. If we could at least fill the vacant Supervisors position and 2 Agency Support Officers we should be able to manage short term without a crises situation.*

*Our current establishment allows for 2 Supervisors who report to the Sales Support Manager and 21 Agency Support Officer's. currently the Sales Support Manager is performing two roles and only spends around 40% of available time on Sales Support, this is diminishing. There are 5 vacancies in Agency Support consisting of 1 supervisor and 4 Agency Support Officer's (this will increase to 6 on the 5th October). This leaves 1 Supervisor with 17 staff, 6 of whom are new starting within the last 8 weeks.*

*Agency Support is a technical role and takes some time to become proficient in, therefore the demands on the supervisor are high. This coupled with the 17 October reviews that need to be completed in October and the added responsibilities being passed on in the absence of the Sales Support Manager are just too much for one person to realistically manage.*

*We are concerned that the constant pressure on the team will lead to more stress related absences, putting yet more pressure on an already under resourced team. The signs are showing.*

...

*Now more than ever we need the support of the agents and the current situation is driving a lot of calls.*

*Your support on this is appreciated and we look forward to a resolve as soon as possible.*

[63] While there was approval for two additional Agency Support Officers in September 2001, there was no additional Agency Support Supervisor appointed. The number of direct reports to Ms Rosenberg increased.

[64] Ms Rosenberg took three days sick leave from 18 September 2001.

[65] By email dated 24 September 2001 Ms Rosenberg wrote to Ms Robinson:-

*Hi Jen – does this relate to the two that we had signed off?  
Also, I am presuming that the supervisor position has also been put on hold. What would be the chances of seconding one of my team into that position. The work load for me is currently far too big with more and more coming my way.*

[66] Ms Robinson wrote back “I know you must be frantic”. At this time Ms Rosenberg says her situation became dire. She says in her evidence:-

*I realised that the company was under pressure, however my situation had become dire and they blatantly ignored my pleas for help and assistance. I felt like I was on borrowed time as my stress levels were creeping up and there was no light at the end of the tunnel. I had held out for this help and had been told it was so close, yet once again, the boundary had been moved and it was as though my mind, body and spirit were closing down.*

[67] Ms Rosenberg says the extreme pressure and heavy workload placed on her had begun to take a serious emotional and physical toll on her. She says that in late September 2001 she collapsed, suffering from exhaustion and depression. Ms Rosenberg she suffered a breakdown. The Authority accepts she did. She gives evidence that she could not stop shaking, hypoventilating, could not think, was extremely anxious, crying, distraught, unapproachable, and could not cope with

anything to do with her work. She says the effect on her psychological and physical health was traumatic. Ms Rosenberg sought her GP Dr Jan White's ("Dr White") assistance. Dr White certified Ms Rosenberg unfit for work and Ms Rosenberg took time off work for 12 days over the following four weeks. But Dr White did not particularly diagnose Ms Rosenberg with "severe stress".

[68] I find that nobody at Air New Zealand observed Ms Rosenberg suffer a breakdown. I find that nobody at Air New Zealand saw Ms Rosenberg being physically unwell.

[69] Ms Rosenberg returned to work in October 2001 working reduced hours in order to assist her recovery. She returned to full-time hours at the start of 2002. During this time, she continued to seek the recruitment of a second Agency Support Supervisor to reduce her workload. In an email to Mr Jamieson on 17 October 2001, she specifically sought an explanation for why other positions had been signed off, including a replacement for his position, but the Agency Support Supervisor position had not. She did not receive an explanation or any assistance. She was told by Mr Wilson by email on 9 November 2001 that the company was aware of her situation, but was asked to be patient while the company considered restructuring. Mr Wilson wrote by email of 1 October 2001 to Ms Robinson, Ms Lodge and Paul Donovan telling them that she had been off work due to "STRESS" and that:-

*"This is now critical we simply need these positions signed off for an additional Agency Support Supervisor, I fear Shelley will not return otherwise and she is an excellent employee but simply unable to cope."*

and

*"This is an area that we need all hands on deck, unfortunately the recent events have increased the workload / calls / emails to the unit which has been added to the woes."*

[70] Ms Rosenberg's performance review recognised she had been working in very difficult circumstances" during the year and that:-

*“Shelley is an outstanding people manager with a very difficult task. She has done a wonderful job this year but I believe her many strengths would deliver greater results if she had an appropriate workload to deal with and a team that was resourced appropriately.”*

[71] Ms Rosenberg was returning to work slowly and took an extra week of annual leave. She felt unwell and says she continued suffering from breakdown, stress and associated symptoms. She says nobody from Air New Zealand approached her with help and she was left to her on her own to cope.

[72] On 5 November 2001, Ms Rosenberg wrote an email to Air New Zealand's Occupational Safety & Health Manager, Ms Robyne Whitehead ("Ms Whitehead"). Ms Rosenberg asked about the company's obligations in relation to workplace stress.

[73] On 19 November 2001, Ms Rosenberg described her situation to Ms Whitehead. She advised Ms Whitehead of her medical condition and that it had come about as a result of the excessive workload over a sustained period. She also stated that she felt the company ought to take some responsibility for her condition.

[74] On 20 November 2001, Ms Rosenberg met with Ms Whitehead. Ms Rosenberg told Ms Whitehead she was suffering from anxiety attacks, exhaustion and extremely high stress levels. Ms Rosenberg says that Ms Whitehead made comments to her that were insensitive.

[75] I find that Ms Whitehead arranged for Ms Rosenberg to meet with Dr Gael Ratcliffe ("Dr Ratcliffe") through the Air New Zealand Employee Assistance Programme (EAP).

[76] On 23 November 2001, Ms Rosenberg met with Mr Jamieson and Ms Whitehead. Mr Jamieson acknowledged that Ms Rosenberg's job was too much for one person and that the team was a high demand team.

[77] Ms Rosenberg wrote by email dated 30 November 2001 to Ms Whitehead. She raised several concerns about her medical condition, the company's obligation to accept responsibility and reimbursement of medical expenses. Ms Whitehead

responded that the company was neither liable for the work-related stress or for payment of medical expenses.

[78] An additional employee was appointed to Ms Rosenberg's team in December 2001. Ms Rosenberg wrote an email dated 4 December 2001 advising that the person would need to be trained, and that she would not be able to take on an increase in staff until she was given further support. She informed Air New Zealand that alternative arrangements would have to be made for the management of the new person.

[79] On 6 December 2001, Ms Rosenberg met with Mr Jamieson and Ms Whitehead together, and then Mr Jamieson separately afterwards. Mr Jamieson told her that the company anticipated her back full time by the start of 2002. Mr Jamieson also said that Ms Whitehead disagreed with her doctor's recommendation of the hours that she should be. He said that Ms Whitehead did not believe that her health problems were work related. Ms Rosenberg said she hoped to be back working full time hours in the new year, that she was doing the best that she could, but that she did not wish to return before she was well enough.

[80] I find that Ms Whitehead considered there was likely other "components" to Ms Rosenberg's ill health. I find that she did not consider four weeks leave would resolve the situation as she considered at the end of that time, the situation would remain the same. Ms Whitehead tells the Authority she did not see Ms Rosenberg exhibiting any signs of physical injury. She says she did not understand Ms Rosenberg to have been unwell. She tells the Authority however, that she certainly did know that Ms Rosenberg was not coping in her role.

[81] Ms Rosenberg returned to full time hours in January 2002. She asked Mr Jamieson whether it would be possible to make one of the current positions a supervisor's position in order to deal with her work overload.

[82] On 14 January 2002, Ms Rosenberg wrote an to Ms Robinson communicating the seriousness of her condition, and her view that she felt it was caused by the poor working environment provided to her by Air New Zealand.

[83] On 1 February 2002, Mr Jamieson advised Ms Rosenberg that he could not agree to reimburse her personal medical expenses. He suggested that she submit formal request in writing so he could escalate the matter to his superiors.

[84] On 5 February 2002, Ms Rosenberg wrote to Mr Jamieson setting out her concerns in relation to her ongoing high workload. She repeated her previous statements that she felt Ms Watt's assistance was not sufficient as she was still required to train, manage and guide Ms Watt with daily tasks. There were 20 in the team at that time. Ms Rosenberg felt that Ms Watt's assistance did not address the real problems she was experiencing.

[85] During February 2002 Ms Rosenberg continued to request a second supervisor in the Agency Support team to address her heavy workload.

[86] On 18 February 2002, Ms Jocelyn Anso, the Regional Human Resources Manager ("Ms Anso") acknowledged to Ms Rosenberg that she was aware of the staffing situation in Ms Rosenberg's area. Ms Anso informed Ms Rosenberg she could have one week off, after which time she could return to work on alternative duties for a period. Ms Rosenberg told Ms Anso she wanted to take four weeks off even if she had to take annual leave. Ms Anso said that she would phone Ms Rosenberg at home during the week and the company would review the situation.

[87] Ms Anso phoned Ms Rosenberg at home after the 18th of February and advised they would attend a meeting with Dr White and Dr Ratcliffe.

[88] Mr Wilson wrote an email dated 21 February 2002 to Ms Anso, Ms Whitehead and Mr Poulton:-

*“Roger, I am concerned about this one as expressed a week or so ago. Shelley is suffering from our inability to get things moving in that area which I acknowledge has been hampered by a number of issues over the past two years.. I am concerned Shelley may take this down a legal path...”*

[89] There was a meeting held on 25 February 2002 at Dr White's rooms. Present were Ms Rosenberg, Dr White, Dr Ratcliffe, Ms Anso and Ms Whitehead. Ms

Ratcliffe informed Air New Zealand's representatives that Ms Rosenberg's condition was work-related, and that she should have an additional four weeks off work. Ms Rosenberg read out a statement explaining how she was feeling.

[90] Ms Rosenberg duly took leave and during that period she met with Dr Anthony Asteriadis, a clinical Psychiatrist ("Dr Asteriadis"). On 1 March 2002 Dr Asteriadis diagnosed Ms Rosenberg with panic disorder and that she had symptoms of depression.

[91] On 22 March 2002 Ms Rosenberg attended a second meeting with Air New Zealand and Dr White. A plan was devised for Ms Rosenberg's return to work at gradually increased hours.

[92] On 30 April 2002, Ms Rosenberg was advised that she could have one more EAP session paid by the company but any further sessions would be at her own cost.

[93] In April 2002, Ms Rosenberg returned to work on reduced hours of four hours per day. This subsequently increased to between four and six hours per day.

[94] In April Ms Rosenberg was asked to take on an additional role as trainer for harassment workshops. Ms Rosenberg advised Ms Anso that she would be happy to undertake the role when the new structure was out and her responsibilities had been reduced, but she could not do it at that time.

[95] A structure was put in place for regular fortnightly "catch-ups". However this did not occur regularly.

[96] After a restructure Ms Rosenberg was confirmed in her role with the job title *Agency Support Supervisor*.

[97] In June 2002 Ms Watt was appointed to the role of second *Agency Support Supervisor*.

[98] The year continued to be hectic for the team as it merged with the Australian arm of industry support. Ms Rosenberg was working part-time but the work remained very demanding. Employee contracts had to be renegotiated. The team was asked to move to shift work. It was under resourced and the environment was tense and fragile.

[99] In her performance review for the year Mr Jamieson wrote:-

*“Shelley has had a year of unfavourable circumstances, not only the turmoil the business has been through but personal circumstances have added to the challenges.”*

[100] In December 2002, Ms Rosenberg began to experience problems with her eyes. The condition became worse in January and February 2003. The condition involved soreness of the eyes and bouts of frequent blinking to her eyes involuntarily clamping shut for periods of time. Ms Watt told the Authority she could see Ms Rosenberg's eyes being physically affected.

[101] Ms Robyne Toomath an Endocrinologist diagnosed Ms Rosenberg's eye condition as stress related. Ms Rosenberg was referred to a neurologist and the medical professionals determined that the condition was related to stress.

[102] In December 2002, Dr Asteriadis advised Ms Rosenberg that she should work in a less frontline role until she was completely ready to return to the permanent, fulltime supervisor position. Ms Rosenberg remained unwell and was not recovering. Ms Rosenberg informed Air New Zealand of Dr Asteriadis' recommendation and stressed that, in order for my health to improve, it was necessary for her to be in an environment which was more suitable for her recovery.

[103] Air New Zealand devised a temporary *Training and Development* role for Ms Rosenberg. Mr Jamieson made the proposal to Mr Wilson and Alan Roman in September 2002.

[104] On 31 January 2003, the company agreed to assign Ms Rosenberg to a temporary secondment position as *Training/Development Executive - Agency Sales*

for a 12 month period from March 2003 to March 2004. The Offer of Secondment stated that:

*“If the temporary role should finish early, you will be given two weeks’ notice of termination of this secondment and will return to your previous position.”*

[105] At the end of January 2003, Dr Asteriadis advised Ms Rosenberg that she needed to take four weeks’ sick leave to rest completely before taking on the new *Training and Development* role. Dr Asteriadis advised Air New Zealand of this recommendation on 31 January 2003. Ms Rosenberg was to take 18 days sick leave and two days annual leave.

[106] Due to ongoing problems with her eyes, Ms Rosenberg remained on leave without pay until June 2003.

[107] Ms Rosenberg commenced the new role of *Training/Development Executive - Agency Sales* in June 2003. The role was on reduced hours and Ms Rosenberg was paid only for the hours she worked.

[108] On 4 August 2003, Ms Rosenberg repeated to Mr Jamieson that her health problems were connected with her work-related stress and that she wished the company to pay her for full time hours even though she was working reduced hours. Mr Jamieson did not revert to her and so she asked him again in writing.

[109] By email 9 October 2003, Air New Zealand directed Ms Rosenberg to attend an assessment by the company’s doctor Dr David Powell ("Dr Powell") in order to prepare a return to work plan. Ms Rosenberg was reluctant as she considered she was already making gradual but steady progress towards improved health on the existing work plan.

[110] After several meetings and a number of email discussions, Ms Rosenberg agreed to attend a meeting with Dr Powell with her doctors on 1 December 2003. Dr Powell supported the recommendations of Ms Rosenberg's medical advisers in terms of her reduced hours and a return to work plan, and suggested a reassessment in

March 2004. Dr Powell said that unfortunately, “Robyne” Ms Whitehead had been too “territorial”.

[111] Air New Zealand eventually agreed to pay Ms Rosenberg full time wages for reduced hours, over the period from 1 December 2003 until 1 March 2004, at which time the situation would be reassessed in light of the scheduled assessment by Dr Powell.

[112] Air New Zealand extended the secondment role to 31 May 2004.

[113] On 16 March 2004, Ms Rosenberg met with Dr Powell for a review of the situation. Subsequent to this review, Dr Powell subsequently advised Air New Zealand that:

*“[Shelley] has been doing well, but there will clearly be difficulties with increasing to full-time hours in the next few months. It is also our assessment that she will struggle with returning to her previous role, and that therefore some other options may need to be considered. At this stage her specialist believes that she would need to stay on reduced hours for three months or longer.”*

[114] In April 2004, Air New Zealand proposed a restructure which impacted on Ms Rosenberg's permanent *Agency Sales Support Supervisor* role. Ms Rosenberg was not invited to meetings about the proposed restructure. Ms Rosenberg approached Mr Wilson for information about the situation. Mr Wilson told her he would send her a copy of the proposed structure.

[115] On 7 April 2004, Ms Rosenberg sent Mr Wilson a follow up email as she had not received the proposed structure from him.

[116] Air New Zealand wrote to Ms Rosenberg by letter dated 14 May 2004. The letter advised that:-

- a. The *Training Executive - Agency* position that she held on a temporary basis would be made permanent in the new structure, and she could be directly appointed to that permanent role if she wished; and

- b. The permanent role of *Agency Support Supervisor* would continue in the new structure, although the numbers were reduced from three positions to two, and would require a selection process; and
- c. She was “eligible to express interest” in this position.

[117] By letter dated 9 June 2004, Dr Asteriadis informed Air New Zealand that Ms Rosenberg was now able to work around 35 to 36 hours per week. Although she was able to work close to full time hours, she had not completely recovered.

[118] Ms Rosenberg resolved it would be a "waste of time" applying for the supervisor's position because of comments she says were made to her by Mr Jamieson and Ms Anso.

[119] On 22 June 2004, Mr Jamieson informed Ms Rosenberg by email that the two Agency Support Supervisor positions had been filled.

[120] During this process the secondment role was extended again to 31 July 2004.

[121] Ms Rosenberg met with Mr Jamieson and Ms Sewell the Regional HR Manager on 24 June 2004 and 12 July 2004. Ms Rosenberg was informed that if she did not take the *Training Executive - Agency* role she would not be entitled to any redundancy compensation. Ms Rosenberg did not agree that Air New Zealand had offered her a “reasonably similar alternative position” and considered she was therefore entitled to redundancy compensation.

[122] Ms Rosenberg was also informed that thereafter, she would only be paid for the hours she worked.

[123] Ms Rosenberg resigned on 3 August 2004. Her last day of work at Air New Zealand was Friday 3 September 2004.

## The merits

### A. The claim for breach of contract

#### *Failure to provide a safe and healthy workplace*

[124] The first claim is that Air New Zealand failed to provide a safe and healthy work environment for Ms Rosenberg and breached an implied term of Ms Rosenberg's employment agreement.

[125] All employment agreements have terms implied into them which impose duties on employers to take reasonable steps to maintain a safe workplace. This is a duty which was noted in *Attorney-General v Gilbert*<sup>1</sup> as informed and given by the *Health and Safety in Employment Act 1992*.

[126] Cited to the Authority where breach of contract principles have been considered are *Jack v Attorney-General*<sup>2</sup>, *Whelan v Attorney-General*<sup>3</sup>, *Davis v Portage Licensing Trust*<sup>4</sup> and *Nilson-Reid v Attorney-General*<sup>5</sup>. I agree that the cited cases are very fact specific and each case must be considered on its merits.

[127] In *Gilbert*, the Court of Appeal said:-

*[75] The duty to take reasonable steps to maintain a safe workplace is also a term now implied by common law into employment contracts, in recognition of their special nature ... The content of the duty implied by common law to maintain a safe workplace is informed and given content by modern legislation, including in New Zealand the provisions of the Health and Safety In Employment Act.*

*[83] The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. This 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 section 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 breach of the contractual obligation. **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***

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<sup>1</sup> *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA).

<sup>2</sup> unreported, Employment Court, Wellington, WC7/04, 11 June 2004, Shaw J

<sup>3</sup> [2004] ERNZ 554.

<sup>4</sup> [2006] 1 ERNZ 268.

<sup>5</sup> [2005] ERNZ 951.

***on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. Employer's obligations will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.***

(emphasis added)

[85] *Organisation symptoms identified in the literature as indicating burnout from stress include high levels of absenteeism and sick leave, high labour turnover, low morale, increased retirement rates and utilisation of grievance procedures.*

[128] Section 6 of *Health and Safety in Employment Act* obliges an employer "to take all practicable steps to ensure the safety of employees at work" including to "take all practicable steps to provide and maintain for employees a safe working environment".

[129] All practicable steps are defined in s2A of the *Health and Safety in Employment Act 1992* as:

- (1) *In this Act, all practicable steps, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to -*
  - (a) *the nature and severity of the harm that may be suffered if the result is not achieved; and*
  - (b) *the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and*
  - (c) *the current state of knowledge about harm of that nature;*
  - (d) *the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and*
  - (e) *the availability and cost of each of those means.*
- (2) *To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.*

[130] "Harm" is defined at section 2 meaning illness, injury or both and to include physical or mental harm caused by work related stress.

[131] It is said in *Gilbert* that a claimant has "formidable obstacles" to overcome in establishing a breach of the contractual obligations. An assessment of the foreseeability of harm and its risk must take account of the current state of knowledge and must not be made with the benefit of hindsight. The size and resources of the employer is relevant in this assessment.

[132] I find it was an implied term of Ms Rosenberg's employment agreement with Air New Zealand that it would provide her with a safe and healthy work environment. Section 5 of the *Health and Safety in Employment Act 1992* provides for the prevention of harm to employees at work.

### ***Serious harm***

[133] It is not disputed that Ms Rosenberg suffered serious harm and continued to be very unwell. Many medical professionals have given evidence to the Authority about Ms Rosenberg.

[134] In early 2001 Ms Rosenberg suffered reflux, rash and interrupted sleep. In September 2001 I find that Ms Rosenberg suffered a breakdown. The symptoms included anxiety, involuntary shaking, vomiting, exhaustion, hypoventilation, crying, and distress. She was unable to cope or enter the workplace office. I accept her description of the period between September 2001 and February 2002:-

*I recall this period vividly as it was a very painful time for me. I remember vomiting, uncontrollable shaking, inability to think clearly, I was confused, I didn't understand what was happening to me. I was agitated, distressed, nauseous and like a zombie. I phoned Jan White, I was crying and I said to her 'I don't know what is happening to me'. I said 'I cant come and see you as I can't even get in the car. I need your help and I don't know what to do'. I recall Jan phoning me back twice in one day to see how I was getting on. I recall sitting there and telling her how I was feeling over the phone. My whole world had just bottomed out.*

[135] I find Dr Radcliffe's evidence most compelling. I consider her evidence persuasive because she is the most independent of the medical professionals who give evidence. Dr Ratcliffe is clear that Ms Rosenberg suffered a "burnout" resulting from her work at Air New Zealand.

[136] Dr Ratcliffe first saw Ms Rosenberg on 21 November 2001. Ms Whitehead had referred Ms Rosenberg to Air New Zealand's employee assistance programme and from there Ms Rosenberg saw Dr Ratcliffe. Dr Ratcliffe saw Ms Rosenberg on thirteen occasions between that date and 19 June 2002. Twelve of those appointments were paid for by Air New Zealand; one was paid for by Ms Rosenberg. I accept Dr

Ratcliffe's evidence. She gives evidence to the Authority of harm caused suffered by Ms Rosenberg. Dr Ratcliffe tells the Authority:-

*At the time I first interviewed Ms Rosenberg, I assessed her as experiencing burnout, i.e. I considered her to have depression caused by being in a stressful work environment. My notes record that:*

1. *She had disturbed sleep. She was awake for two hours after going to bed and would wake at 4am and stay awake. She would wake with work matters in her head.*

2. *She had disturbed appetite. She was eating more carbohydrates than normal but losing weight.*

3. *She was experiencing a diminished enjoyment of life, she was finding it difficult to go out socially and enjoying less in her life overall. She felt exhausted. These are the three symptoms clinical psychologists ask about when screening for depression.*

4. *Ms Rosenberg was also anxious about work matters and experienced panic attacks in meetings at work and when thinking about work, as well as in large crowds, open spaces and at times when crossing the Harbour Bridge. These last three triggers for panic attacks are consistent with her having Panic Disorder as well as Depression.*

[137] On 16 February 2002 Ms Rosenberg telephoned Dr Ratcliffe. Ms Rosenberg said that she was still having considerable difficulties coping at work, that she was having a lot of physical symptoms of anxiety (she noted that her body was on alert), and if anyone asked her to do a meeting, these would be worse. She said she thought she needed four weeks off. She said she was having difficulty managing her emotions in the present situation. Dr Ratcliffe suggested that Ms Rosenberg contact her doctor about her experience with her medication i.e. that it was not effective, and discuss the four week's time off work with her doctor. Ms Rosenberg told Dr Ratcliffe that her boss thought that her problem was due to personal issues. Ms Rosenberg said that she would explain to Ms Whitehead that that was not the case and would ask her to ring Dr Ratcliffe. She gave Dr Ratcliffe permission to talk to Ms Whitehead if she did.

[138] On 20 February 2002 Dr Ratcliffe spoke to Dr White about Ms Rosenberg's medication and about her taking a month off. Dr White said that she was in agreement with Ms Rosenberg having a month off. She said she had not been in agreement initially when Ms Rosenberg spoke to her. Dr Ratcliffe says she remembers the reason for this is that Ms Rosenberg had not told Dr White that she was still not sleeping and that Dr White did not know how poorly Ms Rosenberg was coping. They discussed medication. Dr White said that Dr Ratcliffe should also talk

to Ms Rosenberg with regard to setting a rehabilitation meeting with Air New Zealand, Dr Ratcliffe and Dr White.

[139] Dr Ratcliffe called Ms Rosenberg to advise she had spoken to Dr White. Ms Rosenberg told Dr Ratcliffe that she had found it difficult for the previous two weeks. She said her boss had asked her to take two meetings and she had been so stressed that she started shaking. She said that she had told her employer that Dr Ratcliffe did not think she should be at work and they had ignored this. Ms Rosenberg told Dr Ratcliffe that she was waking anxious and going to bed anxious. She said she was going to start the medication on the Saturday coming. She told Dr Ratcliffe she believed that she would be better as a consequence of that. She said she felt that she could not cope at the present time. Dr Ratcliffe told Ms Rosenberg that she would call Dr White and set up a meeting. Ms Rosenberg said that she was concerned about Ms Whitehead and what she would say in the meeting.

[140] I find that Dr Ratcliffe communicated her assessment of Ms Rosenberg in a telephone conversation she had with Ms Whitehead on 21 February 2002. Dr Ratcliffe told Ms Whitehead that she believed Ms Rosenberg's symptoms were caused by her work situation. Dr Ratcliffe reiterated this again at greater length during the meeting on 25 February 2002 with Ms Rosenberg's doctor Dr White, and Ms Whitehead.

[141] Ms Whitehead said she felt that Ms Rosenberg should change her job rather than take time off. She said she had a couple of projects that Ms Rosenberg could work on. She did not say why she considered a change was preferable to time off.

[142] I find that Ms Whitehead telephoned Dr Ratcliffe on 21 February 2002 and at the commencement of the conversation said "*I owe you an apology*". When Dr Ratcliffe had first explained Ms Rosenberg's situation to Ms Whitehead, Ms Whitehead had said "We didn't know she was so ill". On 21 February 2002, Ms Whitehead was apologising to Dr Ratcliffe because she had learned that "someone" had been told by Ms Rosenberg ten days previously that she was not coping but this "someone" had ignored it.

[143] At the meeting on 25 February 2002 at Dr White's surgery, I find that initially Air New Zealand believed there were other causes for Ms Rosenberg's not coping at work. Dr Ratcliffe tells the Authority that she felt by the end of the interview, after Ms Rosenberg had spoken and both Dr White and herself had spoken, Air New Zealand had shifted in their belief and did see Ms Rosenberg's symptoms as work-related. Dr Ratcliffe is adamant that she told Air New Zealand's management that Ms Rosenberg's condition was work related.

[144] Ms Rosenberg sought clarification of the nature of the work she was to do, the time she was to spend at work and strategies to avoid overload of work. These issues and the causal factors of her condition were the focus of the meeting. Air New Zealand reduced Ms Rosenberg's work hours and its representatives said that they would move Ms Rosenberg from her current job, which was accepted as causing her stress, and give her project work.

[145] Dr Ratcliffe says that it is accepted in psychological literature that present stress levels may be intensified by traumatic events from the past. In her experience many clients with stress disorders have hundreds of traumatic memories by the time they are thirty (Ms Rosenberg's age at time of consultation). She says Ms Rosenberg had only seventeen.

[146] I asked Dr Ratcliffe what she considered was the predominant cause of Ms Rosenberg's "burnout". She said:-

*I felt the predominant cause of Shelley's burnout was the fact that she had been overloaded and under stress at work for at least two years. Also relevant was the fact that she described herself as a high achiever, i.e. she had very high expectations of herself.*

*In her initial interview with me she described herself as having been a very positive person and someone whose philosophy was bringing fun into work. She said she had seen herself as a motivator, was always there for her staff and someone who would help them talk through things. She said she was someone who trained and developed her staff but they got "head-hunted" by other people. She reported that four years prior to my seeing her, there had been a restructure and the team she managed had centralised to Auckland. She had employed nine new people which meant she then had eighteen direct reports. She said at this point she was experiencing interruptions all day. She said she felt that eleven or twelve direct reports was the maximum she could handle. She said with twenty-nine direct reports she had concentrated on one group at a time and let the others*

*“float”. In March 2000 she put the case for an additional supervisor to her managers and to the HR Department. She said management accepted the need for another supervisor but told her to “wait and see”.*

*She said she believed that she “crashed” because her Manager was appointed to another role and they did not replace him but put on a staff freeze and gave her his work. She said she wanted to make sure that she was not letting people down. She said her staff were in a stressful situation, all day they would have seventy to eighty calls on hold at any one time with six to seven queuing. She said she did the two jobs for six months to a year. She also said that her Manager’s manager was not supportive of her and she had to go to a counsellor to decide how to set boundaries with him.*

*At the time I saw her first she said she was receiving complaints (that things were not done) because she had been working reduced hours. She said the company had told her that they took no responsibility for her situation. She said her immediate boss did not agree and said she that she had asked for help enough. She said all of her team were stressed and off sick since she had been off work.*

[147] Dr Ratcliffe did not perceive Ms Rosenberg to have any general pre-disposition to stress or that she had been suffering from a generalised anxiety disorder for some time prior to her breakdown/burnout. Dr Ratcliffe says:-

*I do not feel that Shelley had any general predisposition to stress. It appears that she was a resilient person in the main (see question 15). She did have some prior instances of anxiety that were work-related, particularly when she was consulting for Air New Zealand and perceived her work load to be too high and collapsed at work, and also when she worked at British Airways, but it did not appear that this was an ongoing situation.*

*I do not think that Shelley was suffering from a generalised anxiety disorder at the time she “broke down” at Air New Zealand and was referred to me. If she had had a generalised anxiety disorder she would have been anxious about all events in her life rather than just about work-related events.*

[148] Ms Rosenberg began suffering a severe eye condition from December 2002 associated with her stress. Her eyes were dry, frequently blinking and clamped shut involuntarily. This condition is said to be a “somatic manifestation of anxiety”. Dr Robin Toomath Endocrinologist and Diabetologist wrote in a report dated 15 March 2003:-

*This was as a result of Shelley developing a new symptom of dry eyes and/or blepharospasm. This symptom has become really very disabling for Shelley to the extent that she can no longer read a book or watch television. She finds that when she wakes up in the morning she is able to keep her eyes open for an hour or so and at that time of the day goes out for a walk in order to maintain her*

*general level of health. From that time onwards however, her eyes are more or less permanently shut.*

[149] Dr Asteriadis wrote to Dr White by letter dated 4 March 2003. He initially diagnosed Ms Rosenberg as suffering from a panic disorder without agoraphobia. Dr Asteriadis considers Ms Rosenberg continues to suffer panic disorder. He noted that Ms Rosenberg's anxiety arises only from her work.

[150] Ms Rosenberg's former psychologist Mr Lauria began treating her in October 2004. He describes her condition when he began treating her:-

*She showed classical signs of panic: palpitations, pounding heart, and accelerated heart rate; sweating, trembling and shaking; feeling dizzy and unsteady and feared losing control. She reported a depressed mood most of the day every day; she had no interest in pleasure, was sleeping much more than she normally slept, had gained weight (she was at the highest weight she had ever been), felt fatigued even though she was not doing much of anything. Her mental/emotional system was clearly overloaded, her trust in humanity shaken, her physical body was overweight, and she reported that her eyesight was strongly affected by the stress she had been experiencing over the past months/years.*

[151] I prefer the evidence of the medical professionals who actually saw Ms Rosenberg. But I do not adopt evidence derived principally from self-reporting, uncritically. I weigh the evidence of all the medical professionals who gave evidence to the Authority. On balance, I accept the medical expert evidence that Ms Rosenberg suffered serious harm and from at least September 2001 she has continued to be very unwell. I find there is no evidence of any other stressors in Ms Rosenberg's life other than her work at Air New Zealand.

[152] Ms Rosenberg continues to suffer serious ill health. Ms Rosenberg's medical professional witnesses agree that she continues to suffer serious ongoing health problems as a result of the illness she experienced whilst employed by Air New Zealand.

[153] Dr Asteriadis in a report dated 1 March 2007 states:-

*I certainly recall that the termination of her employment was very upsetting for her and she felt let-down by this, and certainly made things quite difficult anxiety-*

*wise and eye-wise for some considerable time thereafter. In fact it can be argued that Ms Rosenberg is still suffering from the effects of these events, and she has certainly not fully recovered.*

[154] Ms Rosenberg's former psychologist Mr Salvatore Lauria wrote a report dated 27 February 2007. He states:-

*In summary, this loving, caring, and trusting woman has been suffering from panic attacks, anxiety, and depression that directly relate to what she describes as an unsafe, stressful workplace experience with Air New Zealand. Consequently her performance in any workplace has severely been affected in a negative direction.*

[155] Mr Van Niekirk, Ms Rosenberg's psychologist explains:-

*She has recurrent and intrusive distressing recollections of the events, she has nightmares of her situation at ANZ, she has physiological reactivity and psychological distress on exposure to cues that symbolize or resemble aspects of her situation with ANZ, she avoids thoughts, feelings, or conversations associated with her experience with ANZ, she has sleeping difficulties and still takes Clonazepam at night and she has an exaggerated startled response.*

[156] Ms Rosenberg's father Mr Ron Rosenberg tells the Authority of his daughter's continuing suffering:-

*Improvements have been slow, but certainly have been more evident in recent months. The eye situation, with rapid blinking is still evident if there is a stressful situation. She cannot cope with confrontational situations yet this was previously one of her strengths.*

*Shelley is still not back to her former self but some of her personality traits are starting to return. She is vulnerable and has not recovered her confidence which results in her being indecisive at times. She is still being medically treated for her condition, despite having very limited funds to pay for treatment and therefore has to be financially supported by the family trust.*

*Shelley is far from her former self – on the surface she appears to be fine but when confronted with issues that she formerly would have dealt with easily and competently, today she struggles in the same situations.*

[157] Ms Rosenberg describes her current condition this way:-

*I have been diagnosed as suffering from symptoms similar to post traumatic stress disorder and am unable to face the realities of everyday work situations. My resilience to any form of conflict, assertiveness, deadlines or demands is*

*depleted to such a level that I am immediately traumatised and unable to deal with the situation.*

*I have had to have regular visits to an osteopath to relieve the pain I now suffer in my back, neck and shoulders as a direct result of the stress I suffered during my employment and its ongoing impact on my health and well being.*

[158] In outlining the harm to Ms Rosenberg above, it can be seen that her medical professionals attribute the established harm she suffered to her work at Air New Zealand.

[159] I do not accept the argument that Ms Rosenberg had a predisposition or vulnerability to the health conditions which later affected her. I accept the submission that the medical professionals who examined Ms Rosenberg said that she did not suffer from a predisposition and in fact she had a higher than average ability to cope with stress. And I am not persuaded that issues around an existing OOS condition, smoking considerations and related bronchial problems, issues over weight loss, anaemia, medication issues and fibroids offer the explanation for the serious harm. Nor am I persuaded that the collapse of Ansett, the events of September 11, or conflict with a flatmate or a burglary<sup>6</sup> offer the explanation for the harm either.

[160] I find that Ms Rosenberg suffered serious harm by her breakdown in September 2001, the diagnosis of panic disorder and symptoms of depression, and her eye condition. This is what I refer to hereafter as serious harm.

[161] Is Air New Zealand legally liable to for the serious harm suffered by Ms Rosenberg ? I accept that liability for work place stress is founded on the work being a material cause of the stress related harm suffered (causation), the risk of harm being reasonably foreseeable to the employer (foreseeability) and the employer having failed to take all reasonably practicable steps to remedy the situation (all reasonably practicable steps). I proceed on this basis.

[162] It is convenient that I proceed to deal with matters in terms of two phases. The first phase is the period between August 1999 to September 2001 (prior to the breakdown), the second being the period after September 2001 (after the breakdown).

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<sup>6</sup> both occurring in 2006

## **The period before the breakdown**

### *Causation*

[163] The test for causation is that which is applied conventionally in cases for breach of contract, ie on the balance of probabilities is the harm to the applicant causally linked to the actions and/or omissions of the respondent? The Court of Appeal in *Gilbert* has said that an applicant is not required to prove that the employer's actions were the only cause of the loss suffered, provided it is a material factor:-

*The defendant's breach must have been a material factor in the loss suffered by the plaintiff. It need not be the sole cause. Beyond that, the Courts have not laid down a formal test for causation.*<sup>7</sup>

[164] Air New Zealand says that Ms Rosenberg's work was not the cause of harm to her. It is submitted that "cause and effect do not connect". It says that Ms Rosenberg's work may have been some kind of catalyst or initiating point for the deterioration of her health, but that would not be sufficient to attribute liability for it to Air New Zealand. The Authority is urged to regard Ms Rosenberg's medical evidence witnesses with real caution and not accept uncritically their evidence. It is also submitted that there is a glaring and real concern that none of the various medical practitioners questioned or sought independent verification of Ms Rosenberg's self reporting to them. I agree that the Authority must assess the medical evidence in the context of the legal question.

[165] I accept that the weight of the medical evidence is that the harm to Ms Rosenberg was caused by her work. Persuasive and compelling in that regard is Dr Ratcliffe's evidence that the "*predominant cause of [Ms Rosenberg]'s burnout was the fact that she had been overloaded and under stress at work for at least two years*". She made clear that view to Air New Zealand and I accept her evidence that it appeared accepted by Air New Zealand too. I note the submission that Dr Ratcliffe's interaction with Ms Rosenberg was in a treatment context and not a diagnostic setting.

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<sup>7</sup> at page 46.

[166] Air New Zealand's counsel submits that it is not sufficient to demonstrate that the work was the "cause" and to attempt to do so is to misconceive the nature of the enquiry. Counsel gives an example, an extreme one however. A new employed Flight Attendant who has a fear of heights does not disclose this matter to the employer. On duty, the flight attendant suffers an uncontrollable panic attack resulting in psychological damage. Of course, counsel says, the work caused the harm, but the employer could not be held responsible for it. Instead of focusing on strict causation, counsel says the nature of the job, the workplace conditions, Ms Rosenberg's own circumstances and all relevant "flags" must be considered. If Mr Thompson means that the causation must relate to the breach by the employer of the obligation to provide a safe and healthy workplace then I agree. It is not correct to confine the enquiry to simply a determination that the work caused the harm.

[167] Ms Rosenberg supervised a call centre team which was responsible for assisting travel agent customers. She supervised a team of employees who dealt with issues raised by travel agencies who had dealings with Air New Zealand and its products. In addition, Ms Rosenberg also dealt with administration work such as performance reviews. I agree that there was nothing inherently stressful in the supervisor position held by Ms Rosenberg, that it did not share characteristics that one would normally associate with high stress occupation, that the work is not negative and nor is it likely to evoke strong emotional reactions. I agree that the supervisor work was relatively constant, unambiguous and clear. I accept the submission that Ms Rosenberg accepted her work had a "real time" aspect to it in that interruptions occurred during the day and had to be addressed at the time and that all issues came within a known band of queries. I agree that Ms Rosenberg knew the scope of the role and she was a high achiever and she desired promotion and advancement in the company. I accept that the nature of the work performed was predictable in that it always involved queries and problems with travel agents requiring resolution. But I find it also involved an additional and significant function of supervising other employees. That people-management function was not so predictable.

[168] It is necessary to now find whether there was a breach of the obligation to provide a safe and healthy workplace, after August 1999, which caused the serious harm to Ms Rosenberg. I find that on the weight of evidence, Ms Rosenberg's

workload was excessive and was beyond the capabilities of one person. I also find the evidence establishes that this was acknowledged by Air New Zealand. While the submission on Ms Rosenberg's behalf is that the nature and volume of her work at Air New Zealand over a significant and sustained period caused her to suffer serious harm, I consider the correct legal question is whether the breach of the duty to provide a safe and healthy work environment caused the serious harm.

**[169] I find that Ms Rosenberg's workload was excessive and was beyond the capabilities of one person. I find that it was the nature and volume of the work that Ms Rosenberg performed for Air New Zealand over a significant and sustained period that caused Ms Rosenberg to suffer a breakdown or burnout. I accept her counsel's submission that Ms Rosenberg was doing the job of two people in an environment where resourcing was crucial to Ms Rosenberg's well-being.**

**[170] I find that Ms Rosenberg's superiors including Mr Jamieson and Mr Wilson accepted that Ms Rosenberg's workload was excessive and in acknowledgement, they submitted no less than four business cases for further assistance for Ms Rosenberg. Those submitted business cases were reasonable in terms of resource required and proportionate to the pertinent risk.**

**[171] But while those business cases were submitted they were not adopted by Air New Zealand for various reasons. I find that each of the submitted business cases would have constituted a reasonably practicable step by Air New Zealand to provide a safe and healthy workplace for Ms Rosenberg. But Air New Zealand failed to address the situation by adopting the business cases. In failing to adopt the business cases and thereby providing assistance for Ms Rosenberg, Air New Zealand, failed to take all practicable steps to ensure Ms Rosenberg's safety at work including all practicable steps to provide and maintain a safe working environment. I find that this breach of obligation caused the serious harm to Ms Rosenberg.**

### *Foreseeability*

[172] I accept the submission that foreseeability will turn on what the employer knew of the risk that the employee may suffer harm; and what the employer ought to have known about the risk of harm to the employee.

[173] In *Gilbert* the Court of Appeal said of the foreseeability test:-

*The loss must be "sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances" (McElroy Milne v Commercial Electronics Ltd [1993] 1 NZLR 39 at p 41 per Cooke P). Loss of the type suffered will usually be sufficiently linked to the breach if within the contemplation of the parties as a not unlikely consequence of breach. That is how the question of remoteness of damage in contract was addressed in the context of the employment contract in Mahmud v Bank of Credit and Commerce International SA [1998] AC 20 at p 37 per Lord Nicholls of Birkenhead:*

*"... if it was reasonably foreseeable that a particular type of loss of this character [in that case, impairment of employment prospects] was a serious possibility, and loss of this type is sustained in consequence of a breach, then in principle damages in respect of the loss should be recoverable."*<sup>8</sup>

[174] In particular, the Court said that it was knowledge reasonably attained by employers, who were mindful of their responsibilities, which was relevant to determining if the risk was reasonably foreseeable:-

*The legislation requires the employer to do what is practicable to contain known and unacceptable risks. The statute seeks to prevent harm to employees by promoting health and safety management. The reasonableness of the employer's conduct must therefore be measured against knowledge reasonably attained by employers mindful of their responsibilities.*<sup>9</sup>

[175] The Court also stated that not all circumstances will require particular information to be matched to a particular employee. Where there is a general risk to employee health and safety, the employer will be obligated to take all reasonable steps to protect the affected employees:-

*... it does not follow that in all cases the risk will need to be matched to the particular employee. If the risk is one which applies generally, then knowledge of specific vulnerability will be irrelevant. If the employer unreasonably fails to take all steps practicable to remove or manage the risk and it is reasonably foreseeable that any employee may suffer harm as a result, then the employer will*

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<sup>8</sup> at page 53.

<sup>9</sup> at page 52.

*be in breach of the contract to maintain safe working conditions. It was not necessary in the circumstances for there to be 'direct warning of imminent breakdown on the part of the respondent', as suggested on behalf of the appellant.<sup>10</sup>*

[176] In *Davis v Portage Licensing Trust*, the Employment Court found that the employer knew or ought to have known that there was a substantial risk of an armed robbery occurring which could endanger the health and safety of their staff:-

*All of this material satisfies me that the Trust either knew or ought to have known and foreseen that there was a real and substantial risk of an armed robbery at the tavern, which could endanger the health and safety of their staff.<sup>11</sup>*

[177] In *Whelan v Attorney-General*, the Employment Court was not concerned with whether or not the employer did know that Ms Whelan was not coping but rather, whether it ought to have known:-

*For the reasons I have given I consider the defendant ought to have known that Ms Whelan's condition was deteriorating and that she was no longer coping. Her collapse was reasonably foreseeable and may have been avoided by reasonable practicable steps.<sup>12</sup>*

[178] The steps taken by an employer to manage the risk of harm are relevant to the assessment of its compliance with its duty to provide and maintain a safe system of work. In *Gilbert* the Employment Court said:-

*In this case, considerations of volume, character, nature, or circumstances of the work the plaintiff was required to perform, of the employer's dealing with workplace health and safety issues, and the provision of a working environment and management processes that did not cause unreasonable and undue stress to the plaintiff, are all elements in assessing the employer's compliance with its duty to provide and maintain a safe system of work. They are also elements in assessing whether it conducted itself in a manner calculated or likely to destroy or seriously damage the parties' relationship of trust, confidence and fair dealing. Such considerations are also material in assessing, in this case, whether the employer breached the statutory and other express terms of the plaintiff's contract.<sup>13</sup>*

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<sup>10</sup> at page 52.

<sup>11</sup> [2006] 1 ERNZ 268, 291.

<sup>12</sup> [2004] 2 ERNZ 554, 600.

<sup>13</sup> [2000] 1 ERNZ 332, 378.

[179] In *Whelan*, management and systemic failures were found to be a failure to take all practicable steps. In particular, the Employment Court highlighted the failed efforts to lobby for further staff, the additional stress involved in having a high turnover of new staff, and the failure to transfer some work to a different team:-

*Ms Beddoe ... agreed that Mr Taylor's efforts to lobby further up the line to increase the resources was good management. The difficulty, however, is that there was no evidence that these efforts were fruitful, and, and the time of the plaintiff's medical retirement, the list was in worse shape than it had been earlier on. Ms Beddoe also said that where the pressure had become constant, that becomes a huge stress for the supervisor. If there is a constant turnover of new staff arriving and needing training, this can be as exhausting as not having new staff. A manager should therefore look to see whether another team could pick up the work and should rotate staff around rather than just rely on some staff to keep going on through a difficult time.<sup>14</sup>*

[180] Air New Zealand says there is nothing which could have put it on alert that Ms Rosenberg's health might be at risk. It says this is fatal to Ms Rosenberg's claim. Air New Zealand points to Ms Rosenberg's own evidence that she was in perfect health up to September 2001 and her father Mr Ron Rosenberg's evidence that he nor anyone else had "any inkling that [Ms Rosenberg] was about to suffer". Air New Zealand points out Ms Rosenberg had no record of sick leave absences. It refers to Ms Rosenberg's evidence that mid September 2001 was the first time she felt she needed help and this was the first time she told Mr Jamieson that she was unwell because of stress. Ms Rosenberg told the Authority:-

*I hadn't done it before the breakdown. This was the first time I felt I needed help - the first time I told [Mr Jamieson] that I was unwell because of stress.*

[181] Ms Rosenberg agreed that it was only from late September/October when Mr Jamieson became aware that she was suffering from stress-related illness.

[182] That is consistent with what Mr Jamieson says. I found Mr Jamieson to be a credible witness. It is true he did not have a perfect recall but he cannot be criticised for that. He does well to recall what he does. I accept his evidence. He says that he and Ms Rosenberg had a good working relationship and he says that he is both surprised and concerned at Ms Rosenberg's evidence to the Authority. He says her

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<sup>14</sup> at page 602.

evidence is not the Ms Rosenberg he worked with and says it does not reflect the overall relationship he had with her which was according to him, by and large, cordial and amicable. He says that when Ms Rosenberg gives evidence that she was "tired and exhausted", that was not his impression of her at all and her daily interactions with him did not give that indication. He says Ms Rosenberg's concern was not with the number of direct reports she had but rather, the increased level of dependence arising from a number of new staff.

[183] Mr Jamieson says he told Ms Rosenberg that the priority was to focus on training and coaching so as to reduce the interruptions for her. He says he let Ms Rosenberg know that if other activity was missed as a result they would have to live with it and he and Mr Christian would accept the situation. However, he says Ms Rosenberg insisted on everything she was doing needing to be done and that she was reluctant to take his advice. He refers to Ms Rosenberg's evidence that physical symptoms of her stress were becoming visible. He says that those symptoms were not visible and Ms Rosenberg did not bring them to his attention. He acknowledges Ms Rosenberg had workload issues, and that she often shared her frustration the proposed changes were taking too long and that she had to work long hours at times. But he is adamant that at no time was he made aware of Ms Rosenberg's health suffering to any significant degree as a result of her role. He says that he knew that Ms Rosenberg was under pressure but there was never anything to suggest to him that it was anything other than normal stress that one experiences in the roles that they have. He says he had no idea something as significant as Ms Rosenberg's health was at risk. He says at no stage did Ms Rosenberg suggest to him that she had any material health concerns. He says that it was a huge shock to him that Ms Rosenberg's sickness in September 2001 was a consequence of stress and certainly was not a situation he could have interpreted from any discussions he had with her.

[184] Air New Zealand points out that Dr White had no attendances on Ms Rosenberg prior to September/October 2001 for any health condition relating to Ms Rosenberg's work. Contrary to Ms Rosenberg's prepared evidence, Dr White did not diagnose "severe stress causing anxiety, involuntary shaking, vomiting and exhaustion" but instead, a sleep disorder and Ms Rosenberg being under "some" stress at work.

[185] Air New Zealand points to Ms Shiree Watt's evidence that she noticed nothing unusual about Ms Rosenberg prior to her absences for illness. I find Ms Watt sat two desks away from Ms Rosenberg. Air New Zealand points to Mr Jamieson's evidence that he saw no change in Ms Rosenberg and heard nothing from her that she was about to suffer health consequences due to stress at work.

[186] Finally on this point, Air New Zealand says there is nothing in contemporaneous documents which support statements made in Ms Rosenberg's prepared evidence concerning her state of health. Air New Zealand says the documents do not support the statements Ms Rosenberg now makes of her health. It points to particular paragraphs of Ms Rosenberg's prepared evidence to the Authority and contemporaneous documents to demonstrate divergence.

[187] Air New Zealand criticises Ms Rosenberg because she did not at any stage disclose to it her prior history and/or her susceptibility to anxiety/panic attacks so as to put it on alert. It says she had an existing anxiety disorder she appreciated might cause her difficulty in the workplace. It says that the conclusion must be when considering the nature of Ms Rosenberg's job, the workplace conditions, the unsignalled health issues that it was not foreseeable that Ms Rosenberg's health could have been endangered. It accepts that while her job was a busy one, and it was seeking an adjustment in workload, the relevant considerations do not support Ms Rosenberg's claim.

[188] I find that Ms Rosenberg disclosed to Mr Jamieson in late September/October 2001 that she was stressed and it is agreed that he did not actually know she was very unwell and suffering from stress before that. Dr Ratcliffe told Ms Whitehead on 21 February 2002 that Ms Rosenberg's symptoms were caused by her work situation. Ms Whitehead phoned Dr Ratcliffe and apologised to her saying they had not known how ill Ms Rosenberg was. Dr Ratcliffe reiterated her opinion at greater length during the meeting on 25 February 2002. I find Air New Zealand accepted Dr Ratcliffe's assessment that Ms Rosenberg was very unwell and was suffering serious work stress.

[189] I find that prior to late September/October 2001, Air New Zealand did not know that Ms Rosenberg was unwell. I accept Air New Zealand's witnesses' evidence in

that regard. I accept that nobody saw Ms Rosenberg having a breakdown. The issue then becomes whether Air New Zealand ought reasonably to have known of the risk of harm that did in fact eventuate.

[190] Ms Rosenberg's counsel particularises the evidence in support of the risk being foreseeable. I accept the following points as evidence that Ms Rosenberg communicated to Air New Zealand **prior to September 2001** that her workload was excessive and was causing her stress:-

- a In June 1998 she advised Mr Jamieson that her workload was excessive and she required this to be resolved urgently for the benefit of her stress/sanity levels;
- b She advised Ms Lissaman that she was "extremely stressed";
- c In January 2000, she advised Mr Tony Moffat, Ms Lissaman and Mr Jamieson of the large nature of her workload. Ms Lissaman advised that they were aware of Applicant's situation;
- d Ms Rosenberg raised verbally with Air New Zealand on a number of occasions, that she was overworked and could not cope, and this led to business cases for assistance. Ms Rosenberg advised Mr Jamieson that she was not sleeping well and was suffering from reflux. She regularly met with Mr Jamieson in his office at the end of the day and made comments regarding the pressure and stress she was under, including "I'm stressed", "I've had it", "I'm just about at the end of my tether", "I'm at my wits end", "I'm not sleeping well and I'm tired", "I am feeling under pressure", "too much to do and not enough time to do it in", "I can't do it anymore", "I am absolutely exhausted". Ms Rosenberg also had discussions with Mr Jamieson about her refusal to take on additional tasks;
- e Ms Rosenberg discussed her situation with Mr Moffat, and advised him of her pressure and stress and she sought resolution;
- f Ms Rosenberg advised Mr Wilson and Mr Paul Abbot that her team was "far too big to manage";
- g Ms Rosenberg had discussions with Ms Pereira, about her stress and pressure and advised that she was stressed, tired and exhausted;

- h Ms Rosenberg advised Mr Wilson, Mr Jamieson, Ms Robinson, Ms Lodge, Barbara Templeton and Greig Leighton of under-resourcing in her team and its impact;

[191] I find that Air New Zealand was particularly aware of Ms Rosenberg's situation prior to September 2001 as evidenced through these points, helpfully particularised by her counsel:-

- a The progress review of October 1998 acknowledged difficulties and stresses;
- b The performance review of October 1998 identified the extremely difficult circumstances the Applicant was working under;
- c In June 1998, there was an Air New Zealand memo stating that the maximum number of direct reports for Ms Rosenberg's position should be 16, at a time when she had 27 direct reports. The Technical Assistance Research Programs Study relied upon actually indicated that the New Zealand average was 8;
- d During the centralisation process Air New Zealand maintained Ms Rosenberg's number of direct reports at 18 (from April 2001), a level which it knew was too high as Mr Jamieson gave evidence:-

*“While the centralisation was being implemented we proposed to set the team up with 16 staff... It was intended that once the changes were in place and things were settled we would be able to operate with a team of only 14. We expected this to be in about 6 months.”*

- e During the period Oct 1998-1999, Ms Rosenberg regularly voiced her concerns to Mr Jamieson regarding her excessive workload:-

*“it would be fair to say that Shelley had mentioned on several occasions that she needed help with the workload.”*

- f Mr Jamieson describes Ms Rosenberg's working situation in late 1999 as including a “significant work load” with “staff turnover, restructures and voids/vacuums of staff” which caused the workload to be “greater than it normally would be”;

- g In January 2000, Air New Zealand wrote to Travel Agents acknowledging that the Agency Sales Support unit had been under pressure and advised of more initiatives;
- h In the first half of 2000, Air New Zealand acknowledged that Ms Rosenberg's number of direct reports was “not entirely satisfactory” and began looking for alternatives. It was not until July 2001 that Air New Zealand provided Ms Rosenberg with supervisory support and not until June 2002 that it formally appointed an additional supervisor;
- i In May 2000, Mr Jamieson produced a business case which sought to reduce Ms Rosenberg's workload by relocating a position from Wellington to Auckland:-

*“The Agency Sales Support team consists of 18 staff all currently reporting to one supervisor. History and benchmarking studies have shown this is too many direct reports for one person to effectively manage. In light of this we are wanting the CRS/ET component of Agency Sales to now report to the EDM.”*

- j Mr Jamieson links Ms Rosenberg's workload with her “being stressed”, and implicitly acknowledges that the Business Case was an attempt to address this:-

*“Although it does not specifically refer to Shelley being stressed this was an attempt to resolve the issue that Shelley had raised verbally in regards to her workload. Tony and Christian had been made verbally aware that Shelley felt the job was too much for one person and in principle they agreed.”*

- k According to Mr Jamieson's oral evidence the factors driving this business case included:

*“at that stage we agreed things were not ideal, with 18 direct reports, clearly Shelley couldn't effectively manage the team, ... it would help reduce the demand on Shelley.”*

- l Mr Jamieson's Brief of Evidence to the Authority confirms he was aware that Ms Rosenberg was under pressure/stressed:-

*“I knew that Shelley was under pressure but there was never anything to suggest to me that it was anything other than the normal stress that one experiences in the types of roles that we have.”*

*“She often shared her frustration that the proposed changes were taking too long and that she had to work long hours at times.”*

*“It is true that Shelley repeatedly asked for a second supervisor to reduce her workload and number of reports. It is also correct that she would often say that she was stressed”*

- m In September 2000 Mr Jamieson submitted a further business case to reduce Ms Rosenberg's workload:-

*“In September 2000, I sent another memorandum to Christian Wilson and Anna Lissaman, copying to Tony Moffat, requesting approval to introduce a new Team Leader/Supervisor into Agency Support. By this stage we had come to the realisation that our plans to reduce the team to 14 were now unachievable”.*

- n The business case stated:-

*“Currently the supervisor position has 18 direct reports. This is a difficult number to manage and achieve desirable results.*

*...*

*The day to day tasks that seem to heavily dominate the supervisor's time are all important and necessary. Some of these are:*

*- Recruitment and associated processes, 19 in the last 11mths.*

*- With the high number of new staff the induction and training demand is high. Take the last 11 months. If each new team member got the basic minimum 31 of two weeks training the supervisor would have spent 38 weeks, just short of 9 months training new staff. To compensate we are using staff to train staff. This impacts heavily on service levels, and the level of understanding, of the trainer is in most cases insufficient.*

*- For many, this is the first role where they have had the autonomy to frequently make decisions that influence the companies performance. Due to this, the demand for day to day assistance from the supervisor is extremely high. One would describe this as a high maintenance team.*

*- Progress reviews and October reviews alone, if performed to the company standard and effectively utilise 27 days per year (approx. 1 1/2 months).*

*The above examples only represent a small part of the supervisors role. In two functions alone we have utilised over 10 months of the year and if we add leave the year is almost up.”*

- o Ms Pereira confirmed she was aware that Ms Rosenberg was ‘anxious and tired’;

p The 12 February 2001 business case was submitted requesting a second supervisor to assist Ms Rosenberg and reiterated the points made in the September 2000 business case;

q As at 15 March 2001, Air New Zealand was aware of serious under-staffing in Ms Rosenberg's team. This level of under-staffing made it impracticable for Ms Rosenberg to delegate tasks to her team members

*“Based on 1217 calls, if we can average 9 per hour per consultant we need 21 consultants to manage the demand. We currently have 18.”*

r Mr Jamieson’s oral evidence was that he and Mr Wilson became aware around this time that the likelihood of a second supervisor being appointed was not great. In Mr Jamieson’s words:

*“If Plan A and B don’t work, you’ve got to go to Plan C.”*

Plan C was to have the headcount increased then use one of the members of the team to assist Ms Rosenberg, but not appoint them as a supervisor or remunerate them as a supervisor. As Mr Jamieson stated:-

*“We knew we could not put another Supervisor in place, we needed to do something.”*

Mr Jamieson and Mr Wilson had to resort to circumventing Air New Zealand's policies and procedures to assist Ms Rosenberg:-

*“We wanted to see change, the company was not allowing it so we had to have a plan to achieve it within the parameters.”*

According to Mr Jamieson’s evidence, they were thwarted in their attempt to use another agency employee in a supervisory capacity on this occasion because it did not comply with the Air New Zealand's “blue form” policy.

s In June 2001, a new structure was released with a second supervisor position included;

- t Air New Zealand was aware that the Sales Support Manager position was vacant from June 2001, leaving Ms Rosenberg covering 3 positions;
- u The work environment in September 2001, as described by Mr Jamieson was:

*“We were all running around madly ... people were waiting on the phones for an hour. We were open on weekends. Everyone was running round like crazy people ... I know Shelley worked hard, but a lot of people at Air New Zealand worked hard at that time. Everyone was very emotional. It was a busy time for everyone.”*

[192] There were business cases submitted directed at obtaining assistance for Ms Rosenberg in May 2000, September 2000, February 2001, March 2001 and September 2001. All but the case made in February 2001 were rejected by Air New Zealand senior management because further restructuring was pending. The February 2001 business case was rejected because of an internal policy relating to engaging staff in roles different from those which had been approved.

[193] While I accept Air New Zealand did not know how ill Ms Rosenberg was prior to late September/October 2001, I find that it ought reasonably to have known. I say that because I accept that Ms Rosenberg informed Air New Zealand on multiple occasions between 1998 and 2001 that her workload was excessive and that she was under pressure. She also requested a second supervisor to help her. I find that Ms Rosenberg repeatedly stated that she was under pressure and was not coping. I find her superiors agreed that Ms Rosenberg's workload was excessive and that she was in need of assistance.

[194] I find that Air New Zealand accepted Ms Rosenberg was unwell because of her work because it participated in discussions with her medical professionals that she required time off from work and how her return to work was to be managed and effected. Air New Zealand did not at any stage dispute Ms Rosenberg was unwell and it participated in managing her return to her full duties. Those steps must be taken to be an acknowledgement of the harm Ms Rosenberg suffered and her claims now.

[195] I consider that this situation would have put any reasonable employer on notice that there was a serious risk of harm to an employee in Ms Rosenberg's situation. I find that the circumstances were sufficient to put Air New Zealand on notice of serious harm to Ms Rosenberg. The harm I find Ms Rosenberg suffered leading to her breakdown in September 2001 and the diagnosis of panic disorder and depression, was foreseeable by Air New Zealand.

**[196] I conclude that Air New Zealand was put on notice of risk of serious harm to Ms Rosenberg. I find that the weight of evidence was that prior to the serious harm manifesting itself Air New Zealand ought reasonably to have appreciated there was a risk of serious harm eventuating. I consider that it ought reasonably have been in the contemplation of Air New Zealand that its failure to address Ms Rosenberg's excessive workload posed a risk of serious harm to her. I therefore find the risk of serious harm to Ms Rosenberg was reasonably foreseeable to Air New Zealand.**

### **The period after the breakdown**

[197] I turn now to the period after September 2001 which I have referred to above as the second phase.

[198] Ms Rosenberg criticises Air New Zealand and says that it failed to take appropriate steps to assist and support her following her breakdown.

[199] By February 2002, Air New Zealand did know that Ms Rosenberg was very unwell and had suffered and was continue to suffer from work-related stress. It was under the same obligation as previously to provide a safe workplace for Ms Rosenberg. Now I must assess the steps Air New Zealand took once it was fixed with actual knowledge that she was unwell.

[200] Mr Jamieson says that Mr Wilson and Ms Lodge were immediately informed of Ms Rosenberg's health concerns. He says that Ms Watt was assisting Ms Rosenberg with all but the reviews and performance issues of staff. I prefer Mr Jamieson's evidence and that of Ms Watt when I conclude that Ms Rosenberg is likely

minimising Ms Watt's assistance. I accept Mr Jamieson's evidence that Ms Rosenberg told him that Ms Watt's involvement was making a positive difference for her.

[201] It is correct that following her initial period of leave, Air New Zealand permitted Ms Rosenberg to work reduced hours until she returned to full health. Ms Rosenberg returned to full time work in January 2002. Ms Whitehead continued to be involved and she had arranged for Ms Rosenberg to see Dr Ratcliffe through Air New Zealand Employee Assistance Programme.

[202] Mr Jamieson arranged for Ms Rosenberg to take leave without it being deducted from her entitlement.

[203] On 18 February 2002 Ms Rosenberg told Air New Zealand that she was continuing to feel exhausted and that she desired a further four weeks leave. She was given the remainder of the week off work until the meeting with her medical professionals on 25 February 2002.

[204] I accept that the outcome of that meeting on 25 February 2002 was that Ms Rosenberg would take a further period of four weeks leave, that Air New Zealand would explore a less demanding position for Ms Rosenberg for an interim period before returning to her existing role and that she would work reduced hours building up to full time. The four weeks leave was not deducted from Ms Rosenberg's entitlements.

[205] At the meeting held on 22 March 2002, Ms Rosenberg indicated she preferred to return to her existing role rather than an interim project role. A plan was devised with her and her doctors' agreement for her hours over the following ten weeks, 2 hours per day for the next 2 weeks (until 8 April), 4 hours per day for the next 4 weeks (until 13 May), 6 hours per day for the next 4 weeks (until 10 June), and then the resumption of full time hours.

[206] Ms Rosenberg returned to work accordingly. Her progress was monitored by Ms Anso and Mr Jamieson. I accept Mr Jamieson's evidence that her permitted Ms

Rosenberg to work the hours she was comfortable with. Air New Zealand continued to pay Ms Rosenberg full time hours for her reduced hours.

[207] Mr Jamieson says that on 30 April 2002, Ms Rosenberg asked Air New Zealand to meet the cost of a further EAP session. He says he approved that request but told Ms Rosenberg that further sessions would have to be met by Ms Rosenberg because Air New Zealand would not continue to fund further sessions.

[208] On 20 June 2002 Ms Watt was formally appointed as second supervisor. The paperwork was concluded on 4 August 2002.

[209] Mr Jamieson says that in July 2002 Ms Rosenberg took one further weeks leave and this was gifted by Air New Zealand.

[210] When she returned from two weeks annual leave at the end of November 2002, she advised her medical advisor suggested she fill a less front line role and that she work 5-7 hours per day for the following three months until 3 February 2003.

[211] The alternative *Training Executive - Agency* role was devised for Ms Rosenberg. The position description for the role was approved by Ms Rosenberg's medical advisors. The role was offered to her on 31 January 2003. Air New Zealand agreed to Ms Rosenberg taking 4 weeks leave prior to starting the role. Ms Rosenberg commenced the new role from 24 February 2003. I accept Mr Jamieson's evidence that Ms Rosenberg had agreed to defer the commencement of this leave.

[212] Mr Jamieson says Air New Zealand was told by Ms Rosenberg that the problems she was having with her eyes were not stress related. While she was on leave she informed Mr Jamieson about her eye problem and that she could not return to work. Mr Jamieson permitted her leaving without pay until further notice expecting her return in two weeks. Ms Rosenberg had up to that time been paid for full time hours.

[213] On 19 June 2003 Ms Rosenberg provided a medical certificate advising she would be fit to return to work for 2-5 hours per day for the 4 week period from 24

June to 18 July. She returned to work on 24 June and was advised she would be paid from that point on for the hours she worked.

[214] On 23 July 2003 Ms Rosenberg provided a further medical certificate advising she was fit to work up to 5 hours per day due to her eye condition.

[215] On 4 August 2003 Ms Rosenberg informed Mr Jamieson her eyes specialist believed her eye condition was stress related. Ms Rosenberg then indicated her belief that Air New Zealand should take responsibility for her medical bills. Mr Jamieson raised the matter with his superiors. It was decided to involve Air New Zealand medical specialist Dr Powell. Dr Powell then became involved in managing Ms Rosenberg's recovery and return to full duties.

[216] It is submitted for Ms Rosenberg that Air New Zealand did not do enough. It is submitted on her behalf that after her ill health had become critical, Air New Zealand exacerbated the situation by failing to put in place appropriate protections and treated her very poorly prior to her resignation.

[217] I do not agree with that submission. I have outlined the steps Air New Zealand took once it was fixed with the knowledge of Ms Rosenberg's serious harm. I find that Air New Zealand, in acknowledgement of the serious harm suffered, took immediate action to manage the situation. I find that Air New Zealand permitted Ms Rosenberg the leave she required, appropriately reduced her work hours, permitted her graduated return to full time hours, paid her for full time hours, paid for consultations with Dr Ratcliffe, and provided additional support in Ms Watt, all of which was geared towards addressing Ms Rosenberg's ill health.

[218] I find that Ms Rosenberg did not take issue with the steps Air New Zealand was taking and participated in its management of the return to her duties.

[219] **I therefore find that post September 2001, Air New Zealand took all reasonably practicable steps to assist Ms Rosenberg and provided her with a safe and healthy workplace.**

## **B. Unjustifiable Constructive Dismissal**

[220] Ms Rosenberg claims she was unjustifiably constructively dismissed. The settled tests for constructive dismissal are:-

- (i) did the employee resign?
- (ii) was the resignation caused by a breach of duty on the part of the employer?
- (iii) if it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[221] It is clear that Ms Rosenberg did resign. She gave one months notice of resignation on 3 August 2004 effective 3 September 2004. Ms Rosenberg was asked to work out her period of notice because there were activities in place that needed to be finished.

[222] The next question is whether the resignation was caused by a breach of duty on Air New Zealand's part. I have already found that the steps Air New Zealand took towards managing Ms Rosenberg's ill health post September 2001, were reasonable and practicable. I refer also to Ms Rosenberg's evidence that she was "passionate to return to her former role". I accept that evidence. It is significant because if she considers Air New Zealand to have breached a duty to her, I take her to have rejected such breach and affirmed the continuing employment relationship. Therefore I find that there was no breach of duty in this regard.

[223] Then there is the restructure of May 2004. I assess now whether Air New Zealand breached any duty to Ms Rosenberg in respect of it that resulted in her resignation.

[224] Dr Powell wrote by email to Mr Jamieson and Ms Anso on 20 March 2004:-

*I met Shelley and her doctor last week as arranged. She has been doing well, but there will clearly be difficulties with increasing to full-time hours in the next few months. It is also our assessment that she will struggle with returning to her previous role, and that therefore some other options may need to be considered.*

*At this stage her specialist believes she would need to stay on reduced hours for three months or longer. If Shelley would like us to, either the specialist or I would be happy to attend any management meeting about her work capacity or options; I understand that at the moment there is a restructure and that any such meeting might need to be deferred for a few weeks. I hope this assists - cheers dp*

[225] I find that Ms Rosenberg had several meetings with Mr Jamieson about the restructure and there was a continuing dialogue between them from May 2004. Ms Rosenberg says that Mr Jamieson told her that while there was a supervisor's role available within the new structure, this was a full time position, and it was therefore very unlikely that she would be successful if she applied because of Dr Powell's recommendation that she was not yet ready to return to full-time work. She says it was made clear to her that the supervisor's role was not available to her and it would be a waste of time applying. She says Mr Jamieson informed her that Air New Zealand would instead like her to be placed in a new, permanent Training and Development role, similar to that she held on a temporary basis at that time. She says she was told the Training and Development Role was full time too. Mr Jamieson's advice about the new role was recorded in a letter presented to her on 17 June 2004. I accept his evidence that prior to that date he had shown her drafts of the advice and so the letter she actually received, she had been previously aware of its contents.

[226] Mr Jamieson says that Ms Rosenberg talked to him about concerns she had with the Training and Development role. He says she asked him whether her shortened hours would be a disadvantage if she applied for one of the supervisor roles. He says he advised her both roles were full time and that her shortened hours would be treated as a separate issue. He also says he told her that Air New Zealand would be concerned about putting her into one of the supervisor's roles without the support of her medical advisors because to that date, all the advice Air New Zealand had been given suggested that in doing so it would be putting Ms Rosenberg's health at risk and therefore it would be considered negligent. He says that at that point Ms Rosenberg told him she would not be applying for either of the supervisor's roles. Ms Rosenberg did not do so subsequently.

[227] On 22 June 2004, Ms Rosenberg was informed in an email from Mr Jamieson that the two *Agency Support Supervisor* positions had been filled. Ms Rosenberg says

she found the email hurtful because she had not been told of this and her own situation had not been sorted out, nor had she been spoken to about this or any other options. She says she felt humiliated, misplaced and unsure of what was going to happen. She says she felt like she was being penalised for having gotten sick and felt devastated that she did not have her permanent role to go back to. She says the key motivation in regaining her health was taken from under her. She says she felt like the promises that had been made were broken and she felt misled and disillusioned. She says she wanted her job back and yet she was told she could not because of her health. In her words "*[I] was so close, yet they were not prepared to wait. My world collapsed and the trust was broken*".

[228] By letter dated 9 June 2004 Dr Asteriadis wrote to Dr Powell:-

*You have asked for an update regarding Shelley's condition and I have her consent to write to you. Diagnostically, she continues to have a number of Anxiety and Stress related symptoms and possibly some Depressive Symptoms. Essentially, when she is under more stress, she tends to deteriorate from the point of view of problems with her eyes, in particular:- an increase in blinking rate, discomfort and having to keep her eyes closed, etc. From that perspective, she is able to work around 35 - 36 hours a week but I do not think "full-time", i.e 40 hours a week. She is gradually trying to work towards that but it is taking some time, so I would say there is slow but steady progress.*

[229] I find that Ms Rosenberg's medical advisors had advised that Ms Rosenberg was not fit to return to full time work. I find that the medical advice was that Ms Rosenberg was not that she was "so close" to returning to work full-time.

[230] I find that Ms Rosenberg was offered the permanent Training and Development role. I find that she was advised that if she did not accept that role Air New Zealand would work with her to find another similar and suitable role and that otherwise, she would be resigning. Ms Rosenberg asked if redundancy was an option and she was told Air New Zealand did not see the situation as a redundancy one because it was felt that a suitable and reasonably similar role was being offered to her - the same salary, the same job grade, the same location and the same manager. She was also told Air New Zealand intended reviewing her return to work plan and her pay situation.

[231] On 12 July 2004 Ms Rosenberg was advised she would return to being paid for the hours that she worked from 9 August 2004. Ms Rosenberg resigned before that date. Her lawyers wrote to Air New Zealand by letter dated 3 August 2004 accompanied with her letter of resignation which stated:-

*Dear Brooke*

*This letter is formal notification of my resignation from Air New Zealand Limited.*

[232] Although I find Ms Rosenberg was not as well as she now says she was, in terms of her being "so close" to return to her former role, I find that this situation did not relieve Air New Zealand of its duty to properly manage the redundancy situation concerning her permanent role as supervisor. If I accept that the seconded role was to end on 31 July 2004, I do not understand what role Ms Rosenberg was performing from 1 August 2004 until she left Air New Zealand.

[233] I conclude that Air New Zealand breached its duty of good faith owed to Ms Rosenberg in respect of the termination of her employment. Firstly, I find it failed to engage with her with respect to the redundancy of her full-time role. In this regard I refer to the failure to invite her to a meeting in April 2004 where the proposal for restructure was advised to staff. I do not see any justification or excuse for Air New Zealand failing to involve her by seeking her input or consulting with her about her permanent employment. Whether or not it was a mere oversight, I find this failure material. Further unsatisfactory is the failure to provide her with the information detailing the proposed restructure when she had expressly requested it. I am not persuaded Air New Zealand consulted with Ms Rosenberg in a real and meaningful about the redundancy of her permanent employment.

[234] Next, I regard it most unsatisfactory that Air New Zealand should fail to distinguish Ms Rosenberg's fitness for work from the question of whether her employment was redundant. Ms Rosenberg refers to a comment that Ms Anso made to her in a meeting on 30 October 2003 that she would be reluctant to return Ms Rosenberg to her supervisor role once the secondment had ended. Ms Rosenberg also refers to comments that Mr Jamieson made to her. She says during several meetings she and Mr Jamieson had in May 2004 he stated that:-

*"while there was a supervisor's role available within the new structure, this was a full-time position, and it was therefore very unlikely that I would be successful if I applied for that role due to the recommendation of the company's doctor that I was not yet ready to return to full-time work. It was made clear to me that the supervisor's role was not available to me and it would be a waste of time applying."*

[235] Mr Jamieson says that Ms Rosenberg asked him if her shortened hours would be a disadvantage if she applied for one of the supervisor's roles. He says he told her:-

*".. that both roles were full time roles and that her shortened hours would be treated as a separate issue. I did at the same time say to Shelley that we would be concerned about putting her into one of the supervisor's roles without the support of her medical advisors."*

[236] I find that while the language might be disputed, the point is the same. Air New Zealand made it clear to Ms Rosenberg that she would not be considered for the supervisor's role while she remained unwell. I consider this an entirely misguided and inappropriate approach for Air New Zealand to have taken. The question of whether Ms Rosenberg was fit for work should not have been confused with whether her employment was redundant. They are two separate issues and it was inconsistent for Air New Zealand to adopt that approach given it had participated in a gradual return to work programme for Ms Rosenberg which was ultimately aimed at securing her return to full-time duties.

[237] I regard it implicit in Air New Zealand's concern that it accepted the nature of the supervisor work was potentially harmful for Ms Rosenberg whereas it did not have such a concern with respect to the Training and Development role.

[238] I consider that Ms Rosenberg was entitled given the views communicated to her, to regard it as a futile exercise to apply for a supervisor position. Air New Zealand had ruled her out of such an appointment improperly and unfairly.

[239] I also agree that the *Agency Support Supervisor* role and the *Training and Development Executive* role were not reasonably similar. They were fundamentally different in nature. Firstly, that much is obvious I consider given it was intended to be

completely different so as to facilitate Ms Rosenberg's recovery. But I accept that the Training and Development role had no supervisory function. There were no staff reporting to the position. It was not part of a team. I find that the two roles were not reasonably similar and were fundamentally different. This finding I accept would have entitled Ms Rosenberg to redundancy compensation.

[240] I find that Air New Zealand took no other steps to find alternative roles for Ms Rosenberg.

[241] I find that Air New Zealand's failure to consult and engage with Ms Rosenberg in a meaningful and formal way about the potential redundancy of her permanent supervisor position, its improper regard for fitness for work considerations in a redundancy enquiry, its failure to investigate other alternatives, and its erroneous view that the two roles were reasonably similar, all lead me to conclude that Air New Zealand failed to act in good faith towards Ms Rosenberg and that such a failure constituted a breach of duty to her.

[242] I further find such a breach of duty was sufficiently serious so as to make it reasonably foreseeable that Ms Rosenberg would resign because of it.

[243] Accordingly, I conclude that Ms Rosenberg's resignation constitutes a constructive dismissal.

[244] I find that such a constructive dismissal is not justifiable. Air New Zealand's actions were contrary to the duty of good faith and therefore unjustifiable.

[245] As for the claim for redundancy compensation, I note that at the time that particular claim was apparently the principal demand. I note too Air New Zealand's submissions on the point. I do not agree that an order for redundancy compensation is the remedy for the wrong I have found. I incline to the view that if Ms Rosenberg had considered she was entitled to redundancy compensation, she ought to have formally forced the matter with her employer before she elected to resign. It is unfortunate that she did not articulate the particular reasons for her resignation at the time she tendered it. I find that when she resigned, she did so because she considered her employer's

actions repudiatory and the relationship had ended. I find that when she did so, the question of whether she had continuing employment at Air New Zealand had not been conclusively determined. She resigned before that question had been definitively answered. In such circumstances, I am unable to say with satisfactory certainty that an entitlement to redundancy compensation would very likely have arisen.

### The determination

[246] I determine that Air New Zealand is legally liable to Ms Rosenberg for the serious harm she suffered as I have defined it above, ie the breakdown in September 2001 and the diagnosis of panic disorder, depression and the eye condition. **I determine that Air New Zealand acted in breach of contract for failing to take all reasonably practicable steps to provide her with a safe workplace, and it is consequently liable in damages to her.**

[247] **I also determine that Ms Rosenberg was unjustifiably constructively dismissed from her employment as Agency Support Supervisor and she has a personal grievance for unjustifiable dismissal. She is entitled to remedies in respect of this personal grievance.**

[248] **Ms Rosenberg has established to my satisfaction that Air New Zealand is liable to her in damages for breach of contract and for statutory remedies for a personal grievance. I reserve leave to the parties to lodge memorandum as to the resolution of such matters if informal resolution cannot be reached between them.**

### Costs

[249] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Hornsby-Geluk is to lodge and serve a memorandum as to costs within 28 days of the date of this Determination. Mr Thompson is to lodge and serve a memorandum in reply within 21 days thereafter. I will not consider any application outside that timeframe without leave.

Leon Robinson  
**Member of Employment Relations Authority**