

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 47
5352404

BETWEEN KATHERINE SPAKE
 Applicant

AND VEHICLE TESTING NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Warwick Reid, Advocate for Applicant
 David Patten, Counsel for Respondent

Investigation Meeting: 14, 15, 16 November and 2 December 2011 at Tauranga

Submissions Received 02 December 2011 from Applicant
 20 December 2011 from Respondent

Additional Information: 19 December 2011 from Applicant
 13 January 2012 from Respondent

Determination: 03 February 2012

DETERMINATION OF THE AUTHORITY

- A. Ms Katherine Spake was unjustifiably dismissed by Vehicle Testing New Zealand Limited (“VTNZ”).**
- B. VTNZ is ordered to pay Ms Spake:**
- (a) \$10,500 distress compensation; and**
 - (b) 12 months lost remuneration to be reduced by 30% to reflect contribution.**
- C. Costs are reserved.**

Employment relationship problem

[1] Ms Katherine Spake alleged that she had been unjustifiably dismissed by VTNZ from her job as a Customer Service Representative (“CSR”). She sought distress compensation of \$40,000 together with (unquantified) reimbursement of lost remuneration and future earnings.

[2] VTNZ denied that Ms Spake had been dismissed. It said that her employment ended by operation of the abandonment clause in her individual employment agreement (“IEA”).

Relevant facts

Employment Agreement

[3] Ms Spake commenced employment with VTNZ on 6 March 2006. She received a written IEA on 8 March 2006, which both parties signed.

[4] Relevant clauses in the IEA include:

“12.5 Notification

Except where circumstances make it unreasonable or impractical, the employee shall notify the employer of any absence due to sick leave, bereavement leave or other instances of personal leave no later than one hour before normal start times.”

“15.5 Abandonment

If the employee is absent from work for a period of three working days or more without the consent of the employer or without notifying the employer of a good and sufficient reason for absence, the employee shall be deemed to have resigned his/her employment without notice.”

“15.6 Incapacity

*If, for any reason, the employee is unable to work for a continuous period exceeding two months or for an aggregate of more than 60 days in a six month period, the employer shall be entitled to terminate the employee’s employment on **four** weeks’ notice.”*

CSR Role

[5] Ms Spake was employed on a part-time basis for approximately 27 hours per week, which she worked from Monday to Wednesdays and every second Saturday. The CSR role required her to issue WOFs, perform administrative tasks, and deal with customer enquiries. She was based at the VTNZ Hewlett Road Station (“the Station”).

Prior health issues

[6] In July 2008 Ms Spake had ten days off work as a result of anxiety and tiredness which she said had arisen as a result of the introduction of a new office system and associated processes at the Station. She also had a period of sick leave in or around August 2009 which she attributed to her distress at HR having involved her with its investigation of two other staff (one of whom was her manager) at the Station. Ms Spake said her relationships with other staff were adversely affected by her involvement, which she had found stressful.

[7] Although Ms Spake attributed both of these periods of sickness absence to work related stress, there was no evidence that VTNZ had been alerted to her view about that prior to receiving her written statement in respect of this matter.

Hewlett Road Station

[8] Mr Keith Johnston was employed by VTNZ in May 2010 as the Station Manager of the Hewlett Road Station. At that time the Station office staff consisted of Ms Karen Bain, Ms Maxine Donald, and Ms Spake. All of these people gave evidence in person. Ms Donald and Ms Spake no longer work for VTNZ, whilst Ms Bain and Mr Johnston are still employed by VTNZ.

[9] There were also a number of Vehicle Inspectors based at the Station, but none of them gave evidence.

[10] Although Mr Johnston had his own office, on 2 August 2010 the three CSRs were moved into his office (so four of them shared his office) whilst renovations to the Station occurred. This arrangement put Mr Johnston and the CSRs in close proximity for a number of weeks.

Issues with Mr Johnston

[11] Ms Spake gave evidence that she found Mr Johnston to be “*creepy*” and said it got to the stage where she was “*quite frankly frightened of him*”. Ms Donald and Ms Bain gave evidence that they both felt that Mr Johnston acted differently around Ms Spake because he paid her particular attention and would stand unnecessarily close to her. Both Ms Donald and Ms Bain expressed concern or unease about the way Mr Johnston acted towards Ms Spake.

[12] Ms Spake said that she became increasingly unhappy over the period during which she had worked with Mr Johnston to the extent that by 21 March 2011 she commenced sick leave which she alleged had been caused by Mr Johnston’s conduct towards her.

Touching incident(s)

[13] Although it was agreed that in or around August 2010 Mr Johnston walked past Ms Spake’s desk and touched her ponytail, the nature and extent of the touching involved was disputed.

[14] Mr Johnston admitted to only touching Ms Spake once by pulling on her ponytail. Ms Spake said Mr Johnston touched her twice, first on her ponytail and then a few minutes later across the top of her back. She said these were two separate incidents which had occurred a few minutes apart and that Ms Donald was also in the office and saw what had occurred.

[15] Ms Spake alleged that Mr Johnston took hold of her ponytail and started twirling it around in his hand. She also said that a few minutes later Mr Johnston walked past her again and touched her back. She alleged that the touching had consisted of Mr Johnston lightly pinching his fingers across the top of her back in a line from one side of her shoulder across to the other shoulder.

[16] Mr Johnston “*did not deny*” that he had “*tugged on or flicked*” Ms Spake’s hair with his finger but he described his actions as having been done “*in fun only*”.

[17] On the balance of probabilities, I have preferred Ms Spake’s evidence about the nature and extent of the touching incidents over Mr Johnston’s evidence on the basis it is more likely to be correct.

[18] Ms Spake was disturbed by this incident and it was something she was able to recall clearly and in detail. In contrast Mr Johnston did not have a clear recall of the incident. Despite being asked to describe both incidents a number of times, Ms Spake's account of both touching allegations remained consistent. Ms Donald witnessed both incidents and her evidence corroborated Ms Spake's account of what had occurred.

[19] I therefore find that Mr Johnston touched Ms Spake twice; the first time he twirled her ponytail around his hand, and a few minutes later he then pinched his fingers in a line across the top of her back from one shoulder to the other.

[20] Ms Spake said that she was uncomfortable and offended by Mr Johnston touching her but did not complain because she had lost faith in HR after the August 2009 HR investigation so did not want to involve them.

Mr McNaught's involvement

[21] In March 2011 a Vehicle Inspector at the Tauranga Station heard other Vehicle Inspectors talking about the hair touching incident. This was reported to management, who informed Mr Gavin McNaught who is the VTNZ Bay of Plenty Area Manager.

[22] Mr McNaught initially thought the incident had involved Ms Bain, so he asked her about it on 4 March 2011 and she told him that it was not her. Ms Bain subsequently discussed Mr McNaught's conversation with Ms Spake and they both concluded that he must have been referring to Mr Johnston's touching of Ms Spake which had occurred in August 2010.

[23] On 7 March 2011 Ms Spake met with Mr McNaught and told him about Mr Johnston touching her. There was no dispute that what Ms Spake communicated to Mr McNaught was consistent with her evidence to the Authority about the incident, namely that there were two incidents of touching a few minutes apart involving first her hair and then the top of her back (from shoulder to shoulder).

[24] Although Mr McNaught informed Ms Melanie Ault, VTNZ Senior HR Consultant, of his discussion with Ms Spake he only told her about the first allegation, that Mr Johnston had touched Ms Spake's hair. He failed to mention the second allegation involving the back/shoulder pinching.

[25] Ms Ault told me that her view of the seriousness of the touching allegation would have changed had she been made aware that it involved two separate incidences of touching that had involved both Ms Spake's hair and the top of her back. Ms Ault was not sure what she would have done if she had been given that information, but her view was that she would have taken it upon herself to do something.

[26] Although Ms Spake had told Mr McNaught that she did not want to make a formal complaint, Mr McNaught told her that Mr Johnston should not have touched her so he intended to speak to Mr Johnston to ensure he knew that. Ms Spake was happy with that outcome.

[27] Mr McNaught did speak to Mr Johnston who admitted touching Ms Spake's hair but said his actions had been light hearted and not intended to offend. Mr McNaught told Mr Johnston "*it was not appropriate behaviour and was not to occur again.*" It appears that Mr McNaught did not raise the shoulder/back pinching allegation with Mr Johnston.

Mr Johnston's discussion about the touching incident with Ms Spake

[28] On 7 March 2011 (after her discussion with Mr McNaught) Ms Spake had to go into Mr Johnston's office. Mr Johnston was in his office at the time and when he saw Ms Spake he asked her to close the door and then proceeded to raise the touching incident with her. There was a conflict about what was actually said and done during this discussion.

[29] Ms Ault and Mr McNaught both thought it was reasonable and appropriate for Mr Johnston to have initiated a discussion about the touching incident with Ms Spake in person and they were not at all concerned about the circumstances in which that discussion had occurred. I disagree with them.

[30] I consider that a fair and reasonable employer would have considered that it was inappropriate for Mr Johnston to raise the touching incident with Ms Spake in his closed office at the end of the day without anyone else around. She was his subordinate and it should have been obvious that this type of one on one discussion was likely to have made her uncomfortable.

[31] I was sceptical about Mr Johnston's evidence that he had raised the matter with Ms Spake in order to apologise to her because that appeared to be inconsistent with his refusal to apologise to Ms Spake for a comment he admitted making one week later which had included a reference to "*udders*" and which had caused Ms Spake considerable distress.¹ When I asked Mr Johnston why he would want to apologise for one matter but not the other he was unable to provide a satisfactory explanation for that inconsistency.

[32] Mr Johnston said that when he spoke to Ms Spake on 7 March 2011 he assured her that his actions had been meant as a bit of a laugh and that there was no intent to harm her in any way. Mr Johnston said Ms Spake told him she was "*not concerned about it*".

[33] Ms Spake said that she felt uncomfortable having this discussion with Mr Johnston particularly when it occurred in his closed office at the end of the day when no other people were around. She said Mr Johnston told her that he was embarrassed because there had been rumours going around which he was worried would ruin his reputation and that he did not want people thinking he was sexually harassing his CSRs.

[34] Ms Spake alleged that Mr Johnston attempted to down-play the incident by saying "*it's not like I grabbed your ...*" and instead of finishing that sentence he gestured his hands towards her as if he was about to take hold of her breasts. Ms Spake said Mr Johnston's gesture made her uncomfortable and frightened of him.

[35] I accept Ms Spake's evidence that she was genuinely distressed by whatever it was that Mr Johnston had actually said or done during this discussion. I consider it unlikely that Ms Spake would have been as distressed as she was if Mr Johnston's account of this discussion (i.e. that he was sorry and had just been having a laugh) had been correct.

[36] Ms Spake complained about this discussion in her written complaint to Mr McNaught dated 18 March 2011.

¹ See paragraph 41.

Udders comment

[37] On 15 March 2011 Ms Spake and Mr Johnston were working together doing the close-up procedure (no other people were around) when Ms Spake alleged that Mr Johnston made a comment to her about udders. The circumstances of his comment are set out below.

[38] Ms Bain was holding a cowgirl themed hen party on 17 March 2011 which Ms Spake (and other female staff) had been invited to. A copy of Ms Bain's invitation had been brought in to the Station and someone (not Ms Spake) had pinned it on the wall. The invitation was on A4 paper and included a colour picture of a sexy cartoon cowgirl who was wearing a bustier top, jeans, boots, a cowboy hat, and who was holding a lasso. The invitation encouraged attendees to "*try to dress in black (even with a splash of pink if you wish)!*"

[39] Ms Spake said she was on the phone to a friend explaining that she was not going to dress up for the hen night when Mr Johnston walked in and overheard that part of her call. Ms Spake alleged that after she got off the phone Mr Johnston said to her "*you don't need a costume anyway Kate, you can go along mooing*". Ms Spake said she asked him what he meant by that and he replied "*You know, like a cow. Then you can get your udders out*".

[40] Ms Spake said that she felt extremely uncomfortable by these comments and wanted to get away from Mr Johnston as fast as possible.

[41] Mr Johnston admitted making a comment about udders. However he denied it had been directed at Ms Spake because he said he had been talking to the poster. Mr Johnston said:

"What I said was in reference to a poster that was in the office. The poster had a large breasted cow girl looking figure on it, and wording inviting cow girls to a party, to which I commented "Looks like a lot of udders and mooing required at that party". I made no gestures what so ever."

[42] When giving evidence to the Authority Mr Johnston denied that his reference to udders was an implied reference to breasts. He was also not prepared to accept that it was inappropriate for him to have made a comment about udders in front of a female subordinate. His view was that it was just a harmless joke.

[43] I consider it more likely than not that Mr Johnston's admitted reference to udders was in fact a reference to breasts. I also consider it likely that Mr Johnston's udder comment was directed at Ms Spake and not the poster because she was the only person in the room and it was her and not the poster who would be attending the hen party where there would be (according to Mr Johnston's admitted comment) "*a lot of udders*".

[44] I did not find Mr Johnston's evidence that he had been referring to a cow's anatomy credible. The invitation pictured a cartoon woman, it did not picture a cow. The woman on the invitation was dressed as a busty cowgirl in western style attire, she was not dressed up in a cow costume. The invitation did not suggest that attendees dress up in a cow costume, rather they were asked to wear black dresses. The invitation invited women, not cows to the hen party. I find that there was no cow to which Mr Johnston could reasonably have been referring to.

[45] Ms Spake said that Mr Johnston's comments had embarrassed and disgusted her and made her feel belittled. I accept that Ms Spake was very distressed by Mr Johnston's udders comment. I accept her evidence that she did not want to be at work the next day because she was still so emotional, to the extent that she was shaking, about the incident.

[46] However Ms Spake did attend work on the following two days because she said she had wanted to talk to Mr McNaught about the incident. Mr McNaught was not at work on 16 or 17 March 2011, so Ms Spake did not get to speak to him until 18 March 2011. Ms Spake said that by then she was absolutely beside herself.

[47] Mr McNaught accepted that when he spoke to Ms Spake she was visibly distressed and crying. He told her she had to put her concerns in writing so that he could investigate them.

Written complaint

[48] Ms Spake said at the time she wrote her complaint letter she was not sleeping properly, was very anxious and apprehensive, and had regular bouts of crying. She said she did not want to have to write a letter explaining why she was fearful of Mr Johnston and explained that she had felt emotionally drained.

[49] Ms Spake's complaint letter dated 18 March 2011 was emailed to Mr McNaught on Sunday, 20 March 2011, so he received it on Monday, 21 March 2011. Ms Spake's written complaint consisted of:

- (a) The alleged udders comment on 15 March 2011; and
- (b) The alleged gesture towards her breasts on 7 March 2011.

Sickness absence

[50] Ms Spake saw her doctor on the morning of Monday 21 March 2011 and was signed off work for two weeks. Ms Spake's evidence was that by the time she saw her doctor she was not sleeping, she was shaking, crying, depressed, worried, afraid for her job, and had not been able to eat properly. Her General Practitioner, Dr Erhorn gave evidence which confirmed that when Ms Spake presented on 21 March 2011 she was very distressed and tearful.

[51] Ms Spake emailed Mr McNaught on the morning of 21 March 2011 attaching a medical certificate from Dr Erhorn which stated:

"This is to certify, that the patient described above is unfit to resume work for a period of 14 days from 21 March 2011."

[52] Ms Spake's email stated that she would not be contacting Mr Johnston so asked Mr McNaught to let him know she was on sick leave. Mr McNaught emailed Ms Spake in response:

"You should advise Keith but I will in this instance.

Hope everything is okay. Is there anything I need to know regarding this? Seems a bit short on detail."

[53] Ms Spake then sent a second email to Mr McNaught on the afternoon of 21 March 2011 which stated:

"The reason I have this time off work is because of the way things have gone at work with Keith, that has been building for a long time now, with his uncalled for comments, the way he ignores me and his outbursts relating to other team members and former team members.

I feel as Karen is away at this time and that she has been my support person and rock at work that I don't feel comfortable being there without her.

This situation has a huge effect on me, my stress levels, my self esteem and my relationships with my family and friends as I am continually on edge.

Hope this clarifies it for you and why I didn't feel comfortable contacting Keith on this matter."

VTNZ's response to Ms Spake's complaint

[54] Mr McNaught wrote to Ms Spake on 22 March 2011 acknowledging receipt of her complaint dated 18 March 2011 and advising that it would be investigated. He also stated that VTNZ did not accept she had suffered work related stress and that her absence from work would have to be either leave without pay or annual leave. A meeting was scheduled for 9.30am on Monday 4 April 2011 (the date her medical certificate expired) to discuss "*the findings of our investigation and your ongoing work relationship with Keith*".

[55] Mr Johnston was made aware of Ms Spake's complaint and he sent an email to Mr McNaught on 23 March 2011 denying that he had done anything inappropriate or had made unwelcome comments to Ms Spake either on 7 or 15 March 2011. He also made a number of adverse comments about Ms Spake.

VTNZ's request for medical information

[56] On 28 March 2011 Ms Spake provided Mr McNaught with a letter from her doctor² which stated:

"This is confirm that Katherine is a patient of mine and receiving acute care for an acute disease arising from her work environment. However due to patient doctor confidentiality, I cannot release more information [...]"

[57] VTNZ decided not to ask Ms Spake to authorise her doctor to provide further medical information but instead wrote to her on 29 March 2011 expressing concern about the lack of information from her GP and requiring her to attend a medical examination/assessment with VTNZ's nominated medical practitioner.

[58] Although VTNZ had no contractual right to require Ms Spake to attend a medical examination with its own nominated medical practitioner, Ms Spake

² This was dated 25 March 2011.

nevertheless voluntarily agreed to do so. She was seen by Dr Prankas of Bayfair Doctors³ on 7 April 2011.

[59] Dr Pankras' letter to Ms Ault on 7 April 2011 stated:

"Today I saw Kate.

She is suffering from an acute stress reaction due to a work related incident. This is currently under investigation.

We are asking for a swift resolve of this incident, so Kate can resume her duties again.

Until this has been resolved, Kate is unable to work. I have provided her with a medical certificate for another 2 weeks.

She has applied for counselling."

[60] This letter was accompanied by a medical certificate also dated 7 April 2011 which recorded that Ms Spake was "*medically unfit from 07/04/11 and should be fit to resume work on 21 April 2011*".

[61] Ms Ault emailed Bayfair Doctors on 7 April 2011 asking for further information about the nature of Ms Spake's ill health. Dr Pankras responded on 14 April 2011 by faxing VTNZ a letter dated 12 April 2011⁴ which stated:

"[...] I have diagnosed Kate with 'an acute stress reaction' due to a work related incident. The implications of an 'acute stress reaction' can include and are not confined to: anxiety, tearful, fearful, feelings of inadequacy, helplessness.

Clearly, a situation has arisen within the workplace and is under investigation. I have recommended that this situation requires swift resolve. In doing so, I believe Kate can resume her duties again.

Kate is not my enrolled patient and I have seen her for your requested assessment only. I hold no patient information history on file. Kate has applied for counselling. Pending the outcome of counselling, enlisting the assistance of a trained psychologist may be an option for the organisation to consider as part of the resolution process for all involved parties."

[62] Dr Prankas' letter was not received by VTNZ until the afternoon of 14 April 2011 and it arrived whilst Ms Spake was meeting with Ms Ault and Mr McNaught.

³ VTNZ instructed Bayfair Doctors.

⁴ This was Dr Prankas' second letter to VTNZ, the first being her letter dated 7 April 2011.

Ms Spake's attendances on her own GP

[63] Ms Spake saw Dr Erhorn again on 1 April 2011 and was given another medical certificate which stated that Ms Spake *"is unfit to resume work for a period of 14 days from 01 April 2011."*

[64] Ms Spake saw Dr Erhorn again on 4 April 2011 and was provided with a letter of that same date which stated:

"This is to confirm that Katherine is my patient and has been seen since mid March 2011 because of acute reaction to stress, depression and high anxiety concurring with post traumatic syndrome due to an allegedly [sexual] harassment at work. I confirm that she has been clearly unable to return to work."

[65] Ms Spake did not pass this on to VTNZ because by then she had been referred by VTNZ to Bayfair Doctors which she knew would provide its own medical report to VTNZ regarding her health issues.

[66] Ms Spake saw Dr Erhorn again on 6 April 2011. During this attendance Dr Erhorn recommended that Ms Spake apply for ACC. Dr Erhorn completed the ACC form, which Ms Spake signed on 6 April 2011.

[67] Dr Erhorn recorded contradictory information on the ACC claim form about when Ms Spake would be fit to return to work (20, 26 and 29 April 2011). When giving her evidence Dr Erhorn said the correct date was meant to be 26 April 2011. Ms Spake's ACC claim was declined. VTNZ was never given a copy of the ACC form so it was not aware of the information Dr Erhorn had provided regarding Ms Spake's expected date of to return to work.

Meeting between Ms Spake and VTNZ

[68] The meeting with Mr McNaught and Ms Ault which had originally been scheduled for 9.30am on 4 April 2011 took place on 14 April 2011. Despite being on sick leave Ms Spake readily agreed to attend the meeting because she was keen to get her concerns resolved. Ms Spake was accompanied to the meeting by her mother. Ms Ault and Mr McNaught both took notes during the meeting.

[69] Ms Spake described the meeting as disjointed. VTNZ accepted that there had been a number of interruptions during the meeting so that additional information

could be obtained from Bayfair Doctors and to enable Ms Ault and Mr McNaught to speak to Mr Lachie Cooper, who was the Vehicle Inspector Supervisor, and who was based at the Station, in order to obtain his observations of the relationship between Ms Spake and Mr Johnston.

New concerns about Mr Johnston raised on 14 April 2011

[70] During the meeting on 14 April 2011 Ms Spake raised new concerns about Mr Johnston's conduct which included allegations that:

- (a) When she and Mr Johnston cashed up together he often talked to her about other staff members and made adverse comments or complained about them.
- (b) Mr Johnston had told her that he been employed by head office "*to get rid of on-road staff.*"
- (c) Mr Johnston would buy Ms Hollis morning tea or chocolates.
- (d) Mr Johnston had asked her to "*boss*" Ms Donald, which she was uncomfortable doing.

[71] Ms Spake also said that she did not want Mr Johnston to continue to approach her after work or to vent about people.

[72] VTNZ said it investigated these other complaints and concluded that Mr Johnston had been having inappropriate conversations with Ms Spake and at least one other CSR around closing time, which should not have been occurring.

New concerns about Mr Johnston raised during Authority's investigation

[73] During the Authority's investigation Ms Spake raised a number of new complaints about Mr Johnston. When questioned about them she accepted that either she had not raised these matters with VTNZ or that she had only mentioned these issues informally with no expectation that the matters she had referred to would be investigated or dealt with.

[74] Ms Spake accepted that VTNZ could not be expected to address any issues she had with Mr Johnston which she had not properly raised as concerns she wanted VTNZ to investigate and/or address.

VTNZ's view of Ms Spake's complaint

[75] Ms Ault told the Authority that VTNZ had accepted all of Ms Spake's complaints about Mr Johnston's conduct were valid, with the exception of the alleged:

- (a) Udders comment on 15 March 2011; and
- (b) Breasts gesture on 7 March 2011.

[76] Ms Ault said that Ms Spake was told during the 14 April 2011 meeting that it was difficult for VTNZ to reach a conclusion about the udders comment because it was one person's word against the others. Ms Ault said VTNZ believed there had been a joking culture within the Station, and that staff sometimes made smutty comments full of innuendo.

[77] Ms Ault said she and Mr McNaught did not accept that Ms Spake was entitled to be upset about innuendo from Mr Johnston when she had previously accepted a comment by a colleague which had also involved innuendo.⁵ They believed her adverse reaction to Mr Johnston's comment was due to her dislike of him.

[78] Neither Ms Ault nor Mr McNaught were prepared to admit that the udders comment (as per the words Mr Johnston had admitted saying) had been inappropriate when they should have. They also did not think Mr Johnston should have had to apologise to Ms Spake for his admitted comment, despite her obvious distress over whatever it was he had actually said.

[79] I attribute Ms Ault's and Mr McNaught's views on these matters to the adverse perception that I find Ms Ault had formed about Ms Spake from the outset. When giving evidence Ms Ault made some strong adverse comments about Ms Spake. Ms Ault told me that she believed Ms Spake was someone who was quite capable of targeting anyone she did not like and that she believed Ms Spake's complaints about Mr Johnston were an example of that.

[80] Although Ms Ault had not had any personal dealings with Ms Spake that would have supported her adverse view, she had been very heavily influenced by her

⁵ A colleague had made a comment along the lines of "*you've got a big box Kate*", as she had walked past him with a large box. Ms Spake accepted that she had not taken exception to that comment. Although the comment could be viewed as innuendo the statement was also factually correct because Ms Spake was holding a large box at the time the comment was made.

manager's adverse comments about Ms Spake. This adverse view had apparently arisen as a result of the August 2009 HR investigation.

[81] Ms Ault told me that she had also reviewed the HR files relating to the 2009 matter and believed they reflected badly on Ms Spake. Ms Ault had not had any involvement in the 2009 HR investigation and she never gave Ms Spake an opportunity to address the adverse views that she had formed by reviewing the 2009 HR files. I consider that was unfair to Ms Spake.

[82] I find that Ms Ault improperly allowed her adverse view of Ms Spake to colour her perception and investigation of Ms Spake's complaints about Mr Johnston. The evidence satisfied me that Ms Ault unfairly approached the complaints with the biased view that Ms Spake was a trouble maker who was out to get Mr Johnston because of her resistance to his management changes. I find that the evidence I heard did not support that view.

[83] Ms Ault was responsible for drafting the communications⁶ to Ms Spake which had been sent out under Mr McNaught's name, some of which I find were unnecessarily aggressive.⁷ I consider such unnecessary aggression was unwarranted especially in light of Ms Spake's genuine and serious health problems and her apparent full co-operation with VTNZ's investigations into her complaints and health issues.

[84] Further examples of how I believe Ms Ault's adverse view of Ms Spake improperly coloured her view of events could be seen in Ms Ault's refusal to accept that Mr Johnston's position as Ms Spake's manager meant there was an inherent power imbalance between him and Ms Spake which did not exist between Ms Spake and her colleagues, which may have explained why she was uncomfortable about innuendo from Mr Johnston but had accepted innuendo from a colleague without complaint.

⁶ With the exception of the 18 and 20 April 2011 letters.

⁷ Letter of 22 March 2011 – did not accept she was suffering from work related stress; Letter of 29 March 2011 – required her to be medically examined by a doctor of VTNZ's choice despite no contractual right to do so; Letter of 6 April 2011 (incorrectly dated 6 March 11) – incorrect allegation that Ms Spake had turned up to Bayfair Doctors without an appointment and waited five minutes before leaving; Letter of 15 April 11 – told Ms Spake she could not choose to let others in the Station joke with her but not Mr Johnston; Email of 15 April 11 - Told Ms Spake VTNZ would not accept further time away from work relating to her complaint about Mr Johnston, regardless of what her GP said.

[85] Nor did Ms Ault accept that the prior touching incidents may have caused Ms Spake to view smutty comments or innuendo from Mr Johnston differently than she viewed such comments from someone who had not previously inappropriately touched her on two occasions.

[86] Ms Ault also concluded that because Mr Johnston's comment may have been a joke VTNZ would not take any action regarding it, despite Ms Spake's evident distress. I find that a fair and reasonable employer would not have formed that conclusion or have acted in that way.

Outcome of complaint

[87] VTNZ verbally communicated the outcome of Ms Spake's complaint to her at the meeting on 14 April 2011 and it also recorded it in a letter dated 15 April 2011, which it emailed to her that day and also had hand delivered to Ms Spake's house on 18 April 2011.

[88] At the meeting on 14 April 2011 Ms Spake was told:

- (a) No conclusion could be reached about whether the udders comment was a joke or not;
- (b) She could not complain about comments by Mr Johnston when she had accepted an innuendo from a colleague without complaint;
- (c) Mr Johnston had a different style from the previous manager and CSRs had to adjust to that;
- (d) Mr Johnston could be brusque but that was due to frustration at CSRs not making the changes he wanted;
- (e) Mr Johnston was having conversations with her after hours which were inappropriate and he would be told to cease immediately;
- (f) A CSR focus group would be held in 2 weeks to explore the issues and come up with a way everyone could work together appropriately;
- (g) Until the CSR focus group meeting had occurred she would not have to cash up at the end of the day with Mr Johnston.

[89] Ms Spake said that she did not know what the purpose of the proposed CSR focus group meeting was or why it was relevant to her complaint. Ms Ault said that had been fully explained to Ms Spake on 14 April 2011 but I do not accept her evidence about that. If it was explained, then that did not occur in a way which had enabled Ms Spake to understand the relevance of the proposed CSR focus group.

[90] Mr McNaught told the Authority the purpose of the CSR focus group “*was a chance for everyone to put all the blood on the floor*”. When asked to explain what he meant by that, Mr McNaught said the purpose of the CSR focus group meeting was to get everyone in the same room to disclose all their problems or issues so that everything was out in the open. He told me he thought it was quite appropriate for Ms Spake to have to do that, notwithstanding the personal nature of some aspects of her complaints about Mr Johnston.

[91] Ms Ault sought to distance herself from Mr McNaught’s comments. She told me that Mr McNaught had it all wrong and had completely misunderstood what the CSR focus group would be about because he had not previously been involved in one.

[92] Mr McNaught’s evidence, which showed he had fundamentally misunderstood the purpose of the CSR focus group, supports Ms Spake’s evidence that it was never properly explained to her. It was therefore understandable that she did not see it as a viable solution to her complaints about Mr Johnston.

Agreement to return to work

[93] VTNZ’s position was that it had satisfactorily resolved Ms Spake’s complaint so there was no impediment to her immediately returning to work.

[94] Ms Spake told the Authority that she felt pressured during the 14 April 2011 meeting to return to work and that she only agreed to do so because she was exhausted and had wanted the meeting to end. VTNZ denied that she had been pressured to agree to return to work on Monday 18 April 2011.

[95] I find that Ms Spake was unfairly pressured to return to work. She was still on certified sick leave during the meeting and with all of the interruptions the meeting was extremely long. There was no evidence that VTNZ showed any sensitivity or understanding about Ms Spake’s genuine poor health or the effect that may have had on her during such a long meeting.

[96] Ms Spake did not have the benefit of a representative and her mother was there as support only and did not feel it was appropriate for her to speak up on Ms Spake's behalf. Ms Spake had not had any legal advice prior to the meeting. Nor had she been given an opportunity to obtain updated medical advice about her fitness to return to her normal duties.

[97] VTNZ were in communication with Bayfair Doctors on 14 April 2011 and the letter it received from Dr Prankas by fax that day clearly recorded that Ms Spake had been diagnosed with "*an Acute Stress Reaction*". I consider that advice should have put VTNZ on notice that Ms Spake's health situation was serious.

[98] Although VTNZ had a medical certificate from Dr Prankas which certified that Ms Spake was unfit to work until 21 April 2011 it did not take any steps to ascertain if that position had changed.

[99] I also find that VTNZ had not in fact resolved all of Ms Spake's complaints because no outcome had been achieved regarding the two most serious allegations (the breasts gesture and the udders comment). It was unreasonable and unfair for VTNZ to expect Ms Spake to return to work under Mr Johnston before her complaints had been properly addressed.

[100] VTNZ admitted that it had overlooked Ms Spake's complaint about Mr Johnston's alleged breast gesture. It also failed to make a decision on her udders comment complaint in circumstances where it should have done so. Putting to one side the conflict between Ms Spake and Mr Johnston over what had been said, I find that Mr Johnston's admitted comments were something VTNZ should have taken action over.

[101] I consider that VTNZ failed to reach a conclusion on the udders complaint because it did not approach the matter with an open mind and it did not fully or properly consider the circumstances in which the udders comment was made. A fair and reasonable employer would have taken into account that:

- (a) Mr Johnston made his admitted udders comment at the end of the day, when all other staff had gone home;

- (b) VTNZ had concluded that Mr Johnston had been engaging in inappropriate discussions with female CSRs at the end of the day⁸;
- (c) The admitted udders comment was made to one of his female subordinate staff;
- (d) Given the absence of any cows, pictures of cows, or cow costumes, Mr Johnston's admitted udders comment could only have been referring to the breasts of Ms Spake and/or the other women who would be attending the hen party;
- (e) Because Ms Spake was the only person present and Mr Johnston knew she would be attending the hen party and was speaking to her about the party it was understandable that she viewed his admitted udders comment as a reference to her breasts;
- (f) Mr Johnston had previously inappropriately touched Ms Spake;
- (g) Mr Johnston had been spoken to about inappropriately touching Ms Spake on 7 April 2011 and just one week later he admitted making an udders comment in front of her;
- (h) Ms Spake was so upset about whatever had been said that she was visibly distressed three days later when she disclosed Mr Johnston's comment to Mr McNaught on 18 March 2011;
- (i) Ms Spake's other complaints (excepting the udders comment and breasts gesture allegation) about Mr Johnston had been upheld;
- (j) Ms Spake's work required her to work closely with Mr Johnston in a relatively small area;
- (k) Ms Spake's job required her to cash up with Mr Johnston at the end of the day when they were the only two staff in the Station;
- (l) Mr Johnston was Ms Spake's manager.

⁸ This complaint was corroborated by Mr Cooper.

[102] When I asked Ms Ault whether any of the above matters had raised any red flags about Mr Johnston's conduct she told me they did not. When asked if any of the above factors suggested that some action by VTNZ was appropriate she did not accept that. I consider those unreasonable responses were indicative of Ms Ault's bias against Ms Spake.

[103] Even if VTNZ's evidence that it was unable to decide on what exactly had been said regarding the udders comment is accepted it nevertheless still had evidence (based on Mr Johnston's admitted comments) which would have enabled it to conclude that his comment and the circumstances in which it was made were inappropriate. I consider that a fair and reasonable employer would have made that finding.

[104] I consider also that a fair and reasonable employer would have at least:

- (a) Acknowledged to Ms Spake that Mr Johnston's udders comment (in the form of words he had admitted using) was inappropriate;
- (b) Instructed Mr Johnston to immediately desist from making smutty jokes or engaging in innuendo or sexual banter with his subordinates;
- (c) Asked Mr Johnston to apologise to Ms Spake for the distress his comment had obviously caused her.

Medical issues relevant to Ms Spake's return to work

[105] Ms Spake said that she told VTNZ that she would not be able to work on 20 April 2011 because she had an appointment at Waikato Hospital. VTNZ said she had mentioned she had a medical appointment but not that it was at the hospital or that she would be away for the whole day.⁹

[106] I find, on the balance of probabilities, that Ms Spake did inform VTNZ that she was not available to work on Wednesday, 20 April 2011 because of her hospital appointment. This was a pre-arranged appointment for a surgical procedure, the nature of which meant she had always known that she would be unable to work at all that day. Ms Spake also knew she had to travel to and from Hamilton to attend the

⁹ Mr McNaught's notes make reference to a medical appointment on Wednesday 20 April 2011.

hospital so she would never have thought that she would have been available to work part of the day.

[107] I therefore consider it unlikely Ms Spake would have mentioned her appointment without saying that it meant that she would be unable to work at all that day. Accordingly, on the balance of probabilities, I find that the parties agreed at the meeting on 14 April 2011 that Ms Spake would not be at work on 20 April 2011.

[108] Ms Ault said VTNZ had required Ms Spake to return to work immediately because Dr Prankas' letter dated 7 April 2011 stated "*We are asking for a quick resolve of this incident,, so that Kate can resume her duties again*" and her letter dated 12 April 2011¹⁰ had stated "*I have recommended this situation requires a swift resolve*".

[109] Ms Ault believed that because Ms Spake's complaints had been swiftly resolved she would then have automatically been well enough to return to work immediately.

[110] I find that was an incorrect and unreasonable interpretation of the available medical information. It was unreasonable for VTNZ to conclude that Ms Spake's very real health problems would have immediately disappeared just because she had been told that VTNZ considered it had resolved her complaints.

[111] I have already found that her complaints had not in fact been resolved, but even if they had been, VTNZ had a duty to ensure that Ms Spake was fit to return to work before her current medical certificate had expired if that was what it was requiring her to do.¹¹ Instead VTNZ did nothing to ensure Ms Spake was well enough to return to work.

[112] The evidence produced to the Authority clearly established that Ms Spake had in fact been unfit to work from 18 -20 April 2011 and VTNZ did not dispute that.

[113] If, as Ms Ault believed, Ms Spake's health problems had immediately resolved as soon as VTNZ had told her it believed it had resolved her complaints, then VTNZ had an obligation to obtain updated medical advice to confirm that was indeed the case.

¹⁰ Received by fax during the 14 April 2011 meeting.

¹¹ See the medical certificate from Dr Prankas dated 7 April 2011 which certified Ms Spake was unfit to work until 21 April 2011.

[114] Ms Ault had no medical training and she was not qualified to make decisions about Ms Spake's health problems or fitness to attend work, particularly when such views obviously contradicted the medical information which was available at the time.

Ms Spake's decision not to return to work

[115] Ms Spake said that after reflecting on the meeting of 14 April 2011 and having spoken to her counsellor she realised she could not face going back to work with Mr Johnston on Monday 18 April 2011. She emailed Mr McNaught on 15 April 2011 and stated (among other things) "*I would also like to inform you that I will be consulting my doctor on my ability to return to work*".

[116] I consider that it was reasonable and appropriate for Ms Spake to want to see her doctor to discuss her return to work before she actually returned to work. VTNZ should have given her a reasonable opportunity to do so.

[117] Instead Mr McNaught responded by email on 15 April 2011 which attached VTNZ's letter recording the outcome of Ms Spake's complaints. His email also stated (among other things):

"We will not accept further time away from work, regarding this incident, regardless of what the GP says, as we have done what is required under the Health and Safety Act and are providing a (sic) safe conditions for you to return to."

Communications between the parties from 18 April 2011

[118] Ms Spake also said that about 11am on Tuesday 19 April 2011 a Vehicle Inspector come to her house and hand delivered a letter dated 18 April 2011, signed by Mr McNaught, which stated:

"We refer to our letter dated 15 April 2011 advising you of the outcome of our meeting on 14 April 2011. It was agreed at that meeting that you would return to work on Monday 18 April 2011.

It is noted that you failed to return to work as agreed today, Monday 18 April 2011. You have not informed VTNZ of the reason for your continued absence. Your continued absence from work is unacceptable given the impact on operational requirements.

You have left us with no option but to advise that unless you return to work immediately, VTNZ will have no option but to terminate your employment effective Wednesday 20 April 2011.

You are entitled to seek professional advice on this matter.”

[119] Ms Spake’s evidence was that she told the Vehicle Inspector that she was sick and had a medical certificate so would not be going to work. VTNZ did not challenge her evidence about that.

[120] Ms Spake consulted Mr Kerry Single, an employment advocate, who prepared a letter dated 19 April 2011 which was posted to Mr McNaught, and which stated, (among other things):

“We are instructed to raise a personal grievance for the manner in which her complaint was handled, which has caused our client to lose all trust and confidence in those involved. This is to such a degree that she was forced into a position that her continued employment is no longer tenable, which has resulted in forced/constructive resignation.”

[121] Mr McNaught said Mr Single’s letter dated 19 April 2011 was received on 21 April 2011, after his letter dated 20 April 2011 which had advised Ms Spake of the termination of her employment had been delivered to her.

[122] Ms Spake did not return from her hospital appointment on 20 April 2011 until around 9.30pm that evening. She said that when she got up on 21 April 2011 she found Mr McNaught’s letter dated 20 April 2011, which stated:

“Further to our letters to you dated 15 and 18 April 2011. It is noted that despite our agreement during our meeting on 14 April 2011 and our follow-up letter dated 18 April 2011, you have not returned to work by 20 April 2011 as requested. Your continued unauthorised absence is a breach of your terms and conditions of employment with VTNZ. VTNZ is unable to sustain your unauthorised absence due to the impact on its business.

Given your continued unauthorised absence from work VTNZ is left with no other option but to conclude that you have resigned your employment with VTNZ, effective today 20 April 2011. [...]”

Issues to be determined

[123] The issues for the Authority to determine include:

- (a) Did Ms Spake abandon her employment?
- (b) If not, then how and when did her employment end?

- (c) If she was dismissed, was her dismissal justified?
- (d) What if any remedies are appropriate?

Did Ms Spake abandon her employment?

[124] If Ms Spake's absence from work met the requirements of clause 15.5 in her IEA, and if VTNZ had made the inquiries it was required to make under its abandonment policy¹² in order to ascertain whether Ms Spake had intended to abandon her employment, then the operation of clause 15.5 would end her employment.

[125] If Ms Spake had abandoned her employment in accordance with the terms of her IEA then her employment would have ended by operation of contract. That meant that VTNZ would not have dismissed her, so her unjustified dismissal claim would have to be dismissed.

[126] In terms of the relevant legal principles:

- (a) An employer cannot rely on an abandonment clause where it has consented to the employee's absence¹³;
- (b) An employer should be cautious in inferring that an employee has abandoned their employment¹⁴;
- (c) An employer is required to comply with its applicable policies or procedures;
- (d) Where there is no clear expression of an intention to finally end the employment relationship, the employer must make inquiries with the employee.¹⁵

[127] What is relevant is what VTNZ said and did at the time Ms Spake's employment ended because its actions/inactions have to be considered at that point in time. I find that the evidence did not support VTNZ's claim that Ms Spake had abandoned her employment.

¹² I have not set out the terms of the abandonment policy because Ms Ault and Mr McNaught both accepted it had not been complied with.

¹³ *Adams Sawmilling Co Ltd v Patrick* 9/6/95, Palmer J, CEC25/95

¹⁴ *Pitolua v Auckland CC Abattoir* [1992] 1 ERNZ 693 (CA)

¹⁵ *Lwin v A Honest International Co Ltd* [2003] 1 ERNZ 387

[128] VTNZ's letters of 18 and 20 April 2011 record its view of the situation around the time Ms Spake's employment ended. It is telling that neither refers to clause 15.5 of her IEA or to abandonment.

[129] Mr McNaught's letter dated 18 April 2011 did not refer to abandonment at all. It stated:

"[...] Your continued absence from work is unacceptable given the impact on operational requirements.

You have left us with no option but to advise that unless you return to work immediately, VTNZ will have no option but to terminate your employment effective Wednesday, 20 April 2011. [...]"

[130] This indicated that VTNZ's concern was about the operational impact Ms Spake's sickness absence was having, not about whether or not she intended to abandon her employment. Concern about the impact Ms Spake's ongoing absence was having on VTNZ's operations was an incapacity issue. Clause 15.6 of her IEA set out the circumstances in which VTNZ would have been entitled to have dismissed Ms Spake on the grounds of incapacity.¹⁶

[131] Mr McNaught's letter also made it clear that Ms Spake's employment would be "*terminated*" if she did not return to work immediately. A termination is inconsistent with Ms Spake's employment ending on the grounds of abandonment by operation of contract.¹⁷

[132] Mr McNaught's letter dated 20 April 2011 (which was hand delivered on 21 April 2011) stated:

"[...] Your continued unauthorised absence is a breach of your terms and conditions of employment with VTNZ. VTNZ is unable to sustain your unauthorised absence due to the impact on its business.

Given your continued unauthorised absence from work VTNZ is left with no option but to conclude that you have resigned your employment with VTNZ, effective today, 20 April 2011.

Any wages and holiday pay due to you will be available in your bank account on 27 April 2011. You are required to return all VTNZ property in your possession by Wednesday 27 April 2011."

¹⁶ I note that the circumstances of Ms Spake's absence did not meet the requirements of that clause.

¹⁷ As per clause 15.5 of her IEA.

[133] The letter refers to unauthorised absence, incapacity, and resignation. It does not refer to clause 15.5 of her IEA or to abandonment.

[134] VTNZ's concern about what it said was Ms Spake's unauthorised absence was a disciplinary concern which it should have dealt with in accordance with its disciplinary procedure. The inability of VTNZ to sustain her ongoing absence was an incapacity issue, to which clause 15.6 of her IEA applied.

[135] VTNZ's reference to Ms Spake having resigned was inconsistent with the requirement in clause 15.1 of her IEA for either party to give the other four weeks' written notice of termination. VTNZ did not waive the notice period and it did not pay Ms Spake in lieu of notice, so its actions were inconsistent with a genuine resignation situation.

[136] In addition to the matters referred to above, other evidence which precluded VTNZ from relying on the abandonment clause in her IEA included:

- (a) Ms Spake's email of 15 April 2011 recorded her intention to consult her doctor about her ability to return to work. I find that advice notified VTNZ that she had a good and sufficient reason for her absence, so clause 15.5 was not met;
- (b) VTNZ had agreed to Ms Spake's absence on 20 April 2011, so she had not been absent for three or more working days, as required by clause 15.5;
- (c) Ms Spake had told the Vehicle Inspector who dropped the letter to her house on 19 April 2011 that she would not be attending work because she was on certified sick leave. I therefore find that Ms Spake notified VTNZ (via the Vehicle Inspector) of a good and sufficient reason for her absence (namely certified sick leave) so her absence did not meet the requirements of clause 15.5;
- (d) VTNZ's own medical practitioner¹⁸ had certified that Ms Spake was unfit to work until 21 April 2011. I find this was notification to VTNZ of a good and sufficient reason for Ms Spake to be absent from work

¹⁸ Dr Prankas of Bayfair Doctors in her medical certificate dated 7 April 2011.

from 18-20 April 2011, so the requirements of clause 15.5 do not apply;

- (e) VTNZ failed to comply with the requirements of its own abandonment policy,¹⁹ by failing to take the necessary steps it was required to take in order to ascertain from Ms Spake whether or not she had intended to abandon her employment;
- (f) VTNZ never attempted to inform Ms Spake that it believed clause 15.5 of her IEA applied or that it believed she either had intended to abandon or had actually abandoned her employment by not attending work on 18, 19 and 20 April 2011.

[137] I reject Mr Patten's submission that VTNZ's abandonment policy was a "guide only" which was "varied by the respondent given the actions of the applicant in failing to return to work". The policy set out steps VTNZ had agreed to take before it relied on the abandonment clause in the IEA to end an employee's employment. A fair and reasonable employer would comply with the standard it had set itself.

[138] I find that Ms Spake did not abandon her employment and that her employment did not end by operation of clause 15.5 in her IEA.

How and when did Ms Spake's employment end?

[139] I find that Ms Spake's employment ended because VTNZ's letter dated 20 April 2011 was an actual dismissal. The initiative for ending her employment came from VTNZ, not from Ms Spake.

[140] VTNZ did not ask Ms Spake to clarify her intentions. It just proceeded as if the employment had ended because it made arrangements for her to return company property and for it to process her final pay.

[141] Although Ms Spake did not become aware of her dismissal until 21 April 2011, I find that the date of termination of her employment was 20 April 2011, in

¹⁹ The abandonment policy required a manager to "take reasonable steps to contact the team member prior to terminating their employment due to abandonment" and it set out how the employee was to be contacted.

accordance with VTNZ's advice that her employment had ended "*effective today, 20 April 2011*".

Was dismissal justified?

[142] VTNZ's position was that there was no dismissal and it acknowledged that its case stood or fell on that basis. It did not seek to justify Ms Spake's dismissal.

[143] Even if VTNZ had sought to justify its dismissal of Ms Spake, I find that it would not have been able to because it did not have a good reason for dismissing Ms Spake and it did not follow a fair and proper process before doing so.

[144] VTNZ also failed to comply with the good faith requirements in s.4(1A)(b) of the Employment Relations Act 2000 ("the Act") because she was not given information relevant to her ongoing employment or an opportunity to comment on information relevant to her ongoing employment.

[145] I find that VTNZ dismissed Ms Spake and that her dismissal was unjustified.

Remedies

Issues to be determined

[146] When assessing remedies, the Authority must determine the following issues:

- (a) Did Ms Spake's resignation²⁰ break the chain of causation regarding her lost remuneration claim?
- (b) Did Ms Spake's failure to mitigate her loss break the chain of causation regarding her lost remuneration claim?
- (c) What distress compensation should be awarded?
- (d) What lost remuneration should be awarded?
- (e) Should remedies be reduced for contribution?

[147] It goes without saying that any remedies awarded to Ms Spake must be caused by her unjustified dismissal and not by some other unrelated reason. If her lost remuneration was caused by her resignation and/or by her failure to take appropriate

²⁰ As per Mr Single's letter dated 19 April 2011.

steps to mitigate her loss then she would not be entitled to be compensated for that loss because it would not have been caused by her unjustified dismissal.

Did Ms Spake's resignation break the chain of causation?

[148] If Ms Spake's resignation²¹ was not a genuine resignation and if it was, as she has alleged, a constructive dismissal then it would not break the chain of causation in terms of her lost remuneration claim.

[149] Whether a resignation amounts to constructive dismissal requires consideration of issues of causation and foreseeability. In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*²² the Court of Appeal identified three situations in which a resignation may amount to a constructive dismissal. The third *Woolworths* category involved a situation where a breach of duty by the employer caused the employee to resign, which is the scenario that applied in this case.

[150] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW*²³ recognised the implied duty of an employer not to conduct itself in a manner calculated or likely to destroy or seriously damage the trust and confidence inherent in an employment relationship. Mutual obligations of trust and confidence have subsequently been incorporated into s.4 of the Act.

[151] There were a number of factors or actions by VTNZ which led to Ms Spake's resignation, and I find that the combination of these factors and actions sufficiently met the standard of causation required for a constructive dismissal.

[152] First, VTNZ failed to respond to Ms Spake's allegation that Mr Johnston had gestured towards her breasts during a closed door end of day conversation about the disclosure she had made that day to Mr McNaught about Mr Johnston having inappropriately touched her on two occasions. VTNZ could not have resolved Ms Spake's complaint when it had completely overlooked one of the two issues she had raised in her written complaint of 18 March 2011.

[153] Second, VTNZ refused to take any action over her udders comment allegation and it refused her reasonable request that Mr Johnston apologise to her despite

²¹ See Mr Single's letter dated 19 April 2011 to Mr McNaught, received on 21 April 2011.

²² [1985] 2 NZLR 372

²³ [1994] 1 ERNZ 168

Mr Johnston having admitted to making a reference to udders in front of Ms Spake at the end of the day when no other staff were around.

[154] Third, VTNZ told Ms Spake that she could not complain about risqué jokes or comments made by Mr Johnston because she had not previously complained about a comment which involved innuendo made by a colleague.²⁴ That was an unreasonable position to adopt.

[155] That ignored Mr Johnston's prior touching of Ms Spake and the power imbalance inherent in his position as her manager. It also ignored that her colleague's supposed innuendo could also have been entirely innocent because it was factually correct comment as Ms Spake had a large box with her at the time the comment was made. I do not consider that Mr Johnston's comment could have had an innocent interpretation because there were no cows, and therefore udders, around when he made his admitted comment.

[156] Fourth, VTNZ pressured Ms Spake on 14 April 2011 when she was still very unwell to agree to return to work. This pressure occurred in circumstances where Ms Spake had voluntarily agreed to attend the meeting despite being genuinely unwell and in the face of a current medical certificate which had certified that she was medically unfit to attend work. Ms Spake was unrepresented at the meeting, she had at that point been off work since 21 March 2011, and she was not given an opportunity to consult her own doctor about the possible health implications her return to work may have on her.

[157] Fifth, VTNZ maintained to Ms Spake that it had resolved her complaints about Mr Johnston, when it had not actually done so.

[158] Sixth, despite VTNZ being advised by its own medical practitioner on 14 April 2011 that Ms Spake was suffering from "*an Acute Stress Reaction*" Ms Ault nevertheless concluded, without any medical evidence to support her view, that Ms Spake was fit to attend work on 18 April 2011. This completely ignored Ms Spake's serious health issues.

²⁴ Ibid 5.

[159] Seventh, notwithstanding that VTNZ's own medical practitioner had certified that Ms Spake was unfit to work until 21 April 2011, VTNZ insisted that Ms Spake return to work on 18 April 2011.

[160] Eighth, when Ms Spake advised VTNZ that she would be consulting her own doctor about her ability to return to work, VTNZ told her it would not accept any more time off work relating to her issues with Mr Johnston, regardless of what her GP said. Whether or not Ms Spake was fit to attend work was a medical issue. VTNZ was not entitled to compel her to attend work contrary to medical advice that she was unfit to attend work, regardless of the reasons why she may have been unwell.

[161] VTNZ's stance was particularly unreasonable because Ms Spake had been on unpaid leave during her entire sickness absence and she also had unused annual leave which she could have taken if VTNZ had agreed to that. I consider that there was no good reason for VTNZ to have attempted to compel Ms Spake to attend work on 18 April 2011.

[162] When considered together and over the short period of time this behaviour occurred, I find that all of the requirements for a constructive dismissal exist here.

[163] VTNZ's conduct breached its implied duty not to act in a way that destroyed the trust and confidence inherent in its employment relationship with Ms Spake. I also find that it also breached its s.4(1A) statutory duty of good faith. I find that the nature and extent of these breaches of duty, in the circumstances in which they occurred, made it reasonably foreseeable that Ms Spake would resign.

[164] VTNZ did not seek to justify the constructive dismissal, instead maintaining it was a genuine resignation. I conclude that VTNZ was unable to discharge its burden of showing that its actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the constructive dismissal occurred.²⁵

[165] I find that Ms Spake's resignation was a constructive dismissal, so it does not break the chain of causation in terms of her claim for lost remuneration.

²⁵ Section 103A ERA.

Mitigation of loss

[166] An employee is required to mitigate their loss. Failure to mitigate loss may break the chain of causation if subsequent lost remuneration arises not from the dismissal (which may be compensated for) but as a result of the employee's failure to take appropriate steps to mitigate their loss.

[167] Ms Spake accepted that she had not taken any steps to mitigate her loss. However, she said that her unjustified dismissal had adversely impacted her health to such an extent that she was too unwell to seek or undertake work. Ms Spake attributed all of her lost remuneration to her health problems which she alleged had been caused by VTNZ.

[168] I heard extensive evidence from two registered clinical psychologists who appeared as expert witnesses; Mr Hans Laven who was called by the applicant and Ms Tanya Breen who was called by the respondent. Both experts had interviewed Ms Spake. Their respective written reports identified the sources of information that they had used when forming their professional opinions.²⁶

[169] The evidence given by Ms Breen and Mr Laven was of considerable assistance to the Authority.

[170] Mr Laven's evidence was that given the severity of Ms Spake's symptoms, since her employment ended on 20 April 2011 she had not been capable of successfully completing normal paid employment. He said that it was unrealistic to expect that she would have been able to have undertaken the necessary steps required to find alternative employment since that time.

[171] Ms Breen agreed that Ms Spake had not been well enough to seek work since her employment had ended. Ms Breen believed it was likely be many months²⁷ before Ms Spake was well enough to seek work and re-enter the workforce.

[172] There was no dispute that Ms Spake had been too unwell to work since her dismissal. The issue for the Authority to determine was therefore whether Ms Spake's ill health was caused by, or significantly contributed to by, her unjustified dismissal or whether it could be attributed to reasons unrelated to her dismissal grievance.

²⁶ This included medical records and some of the information which had been filed with the Authority.

²⁷ Probably well in excess of three months from any determination.

[173] Ms Breen identified a number of stressors in Ms Spake's life which could have been associated with Ms Spake's diagnosis of depression and anxiety²⁸ but said that it was not possible to identify any one factor or event as the sole cause of Ms Spake's current health problems.

[174] Ms Breen did not dispute that Ms Spake's dismissal had contributed towards her current serious ill health. However, Ms Breen also told me that the nature of Ms Spake's work related issues were unlikely to have caused such serious health problems for most people. I accept that evidence.

[175] I also accept Mr Reid's submission that VTNZ had to take Ms Spake as it found her. This means that Ms Spake is entitled to be compensated for the actual effects of the dismissal on her notwithstanding that other people may not have suffered such serious consequences had the same events happened to them.

[176] Ms Spake cannot be compensated for anything unconnected to her unjustified dismissal, so I have been careful to limit any compensation to the actual effects of the dismissal on her as assessed from the evidence provided in support of her compensation claims.

[177] Mr Laven agreed that the various stressors identified by Ms Breen were likely to have adversely affected Ms Spake, but said that although Ms Spake had other stressors in her life she had been able to adequately manage any prior anxiety or depression that she may have been suffering before her employment had ended in a way that did not adversely impact on her ability to work or undertake other normal activities. Mr Laven considered that Ms Spake's health had seriously and significantly deteriorated as a result of her employment ending in the manner in which it did.

[178] I accept Mr Laven's evidence. I find that although Ms Spake had other stressors in her life these had not adversely affected her health to the extent that she was unable to work until she commenced sick leave on 21 March 2011. I accept Ms Spake's evidence that her ill health over this period was caused by her upset over Mr Johnston's actions towards her.

[179] Although Ms Spake commenced sick leave on 21 March 2011 both Dr Erhorn and Dr Prankas both believed that she would be fit to return to work in late April

²⁸ See section 8.0 of Ms Breen's report.

2011. Ms Spake also appeared to believe that herself because she actively participated in VTNZ's investigation of her complaints in the hope that her concerns would be resolved so she could return to work.

[180] That changed with Ms Spake's dismissal, so I consider it more likely than not that her unjustified dismissal was the cause of, or a significant contribution to, her inability to work from 21 April 2011 onwards.

[181] Because I consider that VTNZ was significantly and substantially responsible for Ms Spake's health problems which made her unable to seek alternative work then her failure to mitigate her loss did not break the chain of causation in terms of her lost remuneration claim.

Distress compensation

[182] I heard extensive evidence about the effects of the dismissal on Ms Spake. Ms Spake's evidence about the effect her dismissal had on her was supported by medical evidence which confirmed that she was very troubled and had not been coping well at all. Ms Spake had required medical attention, ongoing medication and counselling, all of which was continuing more than seven months after her dismissal and was expected to continue for a number of months. Mr Laven and Ms Breen both agreed that Ms Spake would require ongoing professional support to assist her to get well.

[183] Mr Laven confirmed that Ms Spake had suffered from serious depression which caused a significant impairment in all areas of her functioning. Mr Laven told me that Ms Spake had suffered a major depressive episode and generalised anxiety disorder on 20 April 2011 and that her depression had increased in severity since then. Ms Breen concurred with Mr Laven's diagnostic opinion about Ms Spake's depression, and described her as "*very depressed*".

[184] Ms Spake gave detailed and compelling evidence to support her claim that her unjustified dismissal had "*devastated her*".²⁹ She described feelings of embarrassment, betrayal, humiliation, frustration, anger, and distress. She also emphasised the distress she had felt by finding out about her dismissal via a letter which had been left on her doorstep.

²⁹ See paragraphs 115-127 of her statement.

[185] Ms Spake also said that VTNZ's decision to send an employee to her home to hand deliver letters had adversely affected her sense of security to the extent that it caused her to keep her door locked, her curtains closed, and her telephone off the hook. She also put a sign on her door that said "*beware of the dog*" to discourage visitors. Ms Spake avoided leaving the house and on some days she was unable to get out of bed.

[186] Ms Spake described the financial impact on her as having been "*enormous*". She has had to do grocery shopping and buy petrol on credit and she has had to rely on financial support from her estranged husband to help with household expenses.

[187] She has also had to dip into her children's saving accounts in order to be able to afford to buy groceries. She has not been able to afford the ongoing medical treatment she required, was unable to afford to renew some of her prescriptions which meant she had to skip her medication from time to time in order to make them last longer. She was also unable to pay for normal activities for her dependant child.

[188] I accept that all of these matters caused Ms Spake significant hurt, humiliation, and distress. The evidence in support of Ms Spake's claim for distress compensation satisfied me that Ms Spake's unjustified dismissal effectively destroyed her ability to function normally in all areas of her life.

[189] VTNZ is ordered to pay Ms Spake \$15,000 pursuant to s.123(1)(i)(c) of the for the hurt, humiliation, and injury to feelings her unjustified dismissal caused her.

Lost remuneration

[190] Ms Spake has not worked since her dismissal. I am satisfied that she has lost more than three months' lost remuneration as a result of her unjustified dismissal.

[191] Mr Laven and Ms Breen agreed that it would be at least three months from the date of my determination before Ms Spake would be likely to be well enough to seek work. Ms Breen believed it was likely to be considerably longer than three months, but was unable to give a specific time period.

[192] VTNZ is ordered to pay Ms Spake 12 months' lost remuneration pursuant to s.128(3) of the Act. This award of lost remuneration is to be calculated based on what

Ms Spake would have earned from 21 April 2011 to 20 April 2012 had she not been dismissed.

Did Ms Spake contribute to the situation which gave rise to her dismissal grievance?

[193] Having determined that Ms Spake's has a dismissal grievance, s.124 of the Act requires the Authority to consider the extent to which her actions contributed towards the situation that gave rise to her dismissal grievance and, if those actions so require, reduce remedies accordingly.

[194] The s.4 duty of good faith in the Act requires parties to an employment relationship to be "*active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*"³⁰

[195] This is a mutual obligation which applies equally to employees as to employers.

[196] Ms Spake engaged in blameworthy conduct at the meeting on 14 April 2011 when she led VTNZ to believe that she had agreed to return to work on 18 April 2011. Ms Spake should have, but did not, actively and constructively communicate her unwillingness to return to work on 18 April 2011 when it was discussed with her during the meeting with Ms Ault and Mr McNaught on 14 April 2011.

[197] Ms Spake's decision not to do so because she had wanted the meeting to end as soon as possible was a breach of her s.4(1A) good faith obligations. Ms Spake should have clearly communicated to VTNZ that:

- (a) She did not believe she was well enough to return to work;
- (b) She did not agree that it had resolved her complaints;
- (c) She wanted to consult her own doctor before agreeing to return to work;
- (d) Dr Prankas had certified that she was unfit to work until 21 April 2011.³¹

³⁰ Section 4(1A)(b) of the Act.

³¹ Medical certificate dated 7 April 2011.

[198] I also find that Ms Spake was not “*responsive and communicative*” in the way she responded to Mr McNaught’s letter of 18 April 2011, in breach of her good faith obligations. Although I accept that Ms Spake explained the reason for her absence to the Vehicle Inspector who had hand delivered Mr McNaught’s letter, she should have communicated directly with Mr McNaught to ensure he was fully and properly aware of her certified sickness absence.

[199] Ms Spake also failed to follow the proper reporting procedures for her sickness absence on 18, 19 and 20 April 2011 which lead VTNZ to view her failure to attend work as unauthorised absences. VTNZ’s letter of 15 April 2011 recorded its expectation that she would attend work on 18 April 2011, so she should have properly reported her sickness absence in accordance with normal sickness absence reporting procedures.

[200] Ms Spake’s decision to communicate solely with the Vehicle Inspector about her reasons for not attending work did not comply with VTNZ’s sickness absence reporting procedure which required her to report her sickness absence to her manager, or in her case to Mr McNaught.³² I find that Ms Spake was aware of the sickness absence reporting procedure but did not follow it.

[201] I also consider that Ms Spake should also have reminded Mr McNaught that her absence from 18-20 April 2011 was covered by Dr Prankas’ medical certificate dated 7 April 2011 because it was apparent from his letter of 18 April 2011 that he had overlooked that.

[202] It was obvious from Mr McNaught’s letter of 18 April 2011 that he was expecting Ms Spake at work on 20 April 2011. Ms Spake should therefore have actively and constructively communicated with Mr McNaught to remind him he had already agreed to her absence from work on 20 April 2011 to enable her to attend her appointment at Waikato Hospital.

[203] I find that Ms Spake’s failure to actively or constructively communicate with Mr McNaught, contrary to her good faith obligations, was blameworthy conduct which contributed towards the situation which gave rise to her dismissal grievance.

³² Given she did not want to contact her manager, Mr Johnston.

[204] Ms Spake's remedies should be reduced by 30% to reflect her contribution to the situation which gave rise to her unjustified dismissal.

Orders

[205] VTNZ is order to pay Ms Spake:

- (a) \$10,500 (being \$15,000 less 30% to reflect contribution) pursuant to s.123(1)(c)(i) of the Act; and
- (b) 12 months lost remuneration (less 30% to reflect contribution) pursuant to s128(3) of the Act.

[206] The parties have 14 days within which to calculate and, if possible, agree on the amount Ms Spake is to be paid under paragraph 201 above. If agreement is not reached within 14 days, either party has a further 14 days within which to apply to the Authority to fix the amount of lost remuneration to be paid. A timetable to enable that to occur will then be agreed with the parties.

Costs

[207] Ms Spake as the successful party is entitled to a contribution towards her costs.

[208] Although this matter appears to have been heard over four days, I will be approaching costs on the basis that it involved a five day investigation meeting. This investigation involved exceptionally long days, with what was effectively a five day matter being condensed into four very long days of meeting time.

[209] The parties are encouraged to resolve costs by agreement. If that is not possible, then the applicant has 14 days within which to file her costs application, the respondent has 14 days thereafter within which to respond, with the applicant having a further 7 days within which to reply.

[210] This timetable must be strictly complied with and any departure from it requires the prior consent of the Authority.

Mediation

[211] Either party is to advise the Authority if they consider a further direction to mediation would assist the parties to reach agreement on the quantum of lost remuneration or on costs.

Rachel Larmer
Member of the Employment Relations Authority