

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2011] NZERA Auckland 220  
5318367**

BETWEEN                      KELLY TANNER  
   Applicant  
  
AND                                TODD & POLLOCK HAULAGE  
   (2006) LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Warwick Reid, Advocate for Applicant  
   Maria Dew, Counsel for Respondent  
  
Investigation Meeting:        16 and 17 March 2010 at Tauranga  
  
Submissions received:        31 March 2011 from Applicant  
   4 April 2011 from Respondent  
  
Determination:                23 May 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]        The applicant, Ms Kelly Tanner, claims that there has been a fundamental repudiatory breach of contract by the Respondent, Todd & Pollock Haulage (2006) Limited (“TP”), which resulted in her having been unjustifiably constructively dismissed.

[2]        Specifically, Ms Tanner claims that TP breached its duties to keep her safe at work by failing to deal properly with sexual harassment and workplace bullying, such that this resulted in her suffering stress and being unable to work.

[3]        TP deny that there has been a repudiatory breach of contract, claiming that as soon as Ms Tanner raised her complaints in a material way, TP acted to ensure it met its duties to Ms Tanner.

## Issues

[4] The issues for determination are whether:

- there was a fundamental repudiatory breach of contract by TP in respect of the duties owed under that contract to Ms Tanner
- it was reasonably foreseeable that a breach of the duties owed could result in Ms Tanner suffering psychological harm as a result
- Ms Tanner was unjustifiably constructively dismissed by TP.

## Background Facts

[5] TP and Te Kauwhata Transport Limited (“TK”) are companies jointly owned and managed by Mr Robert Pasley. TP is based at Mount Maunganui and TK is based at Te Kauwhata. Both companies are engaged in business as general freight carriers, operating short and medium line haul deliveries. TP operates Volvo tractor units, Nissan tail lifts and metro delivery vehicles.

[6] Ms Tanner commenced employment as a truck driver at TP in September 2007. The Manager at that time was Mr Cyril Friend who had previously worked for Mr Pasley over a period of 15 years in various capacities, including yardman, dispatcher and maintenance at TK, before Mr Pasley appointed him as Manager of TP.

[7] Mr Friend lived on site at TP. Mr Friend kept firearms on the site, including rifles and pistols. Mr Friend had police permission to store the guns in a locked container. Ms Tanner said that Mr Friend would often bring the guns into his office for cleaning purposes.

[8] At the time Ms Tanner commenced employment there were approximately 20 trucks and drivers at TP. Some of the drivers were line-haul drivers who were given directions on a daily basis as to pick-up and delivery locations by Mr Dave Matich, Operations Manager for TK. The line haul drivers work approximately 12 hours per day and drive the longer distances. Some of these drivers also work a permanent night shift, but from time to time any of the line haul drivers may need to be away from home overnight.

[9] Mr Friend was the manager in charge of the Metro drivers, of whom Ms Tanner was one, who carried general freight to areas of the Bay of Plenty, Rotorua, Taupo, and Whakatane. The Metro drivers did not work shifts and their working hours were generally 7 a.m. to 4-5 p.m., although Ms Tanner worked from 7.30 a.m. to 4.00 or 4.30 p.m. Mr Friend reported to Mr Pasley, and after March 2010, to Mr Mark Thorpe, General Manager of both TP and TK, who was based at the TK depot.

*Events prior to January 2010*

[10] Ms Tanner had been offered employment at TP by the then manager Mr Friend in September 2007 after she and Mr Friend had become known to each other socially through Ms Tanner's partner at the time, Mr Damon Saunders, who at that time worked as a driver at TP.

[11] Ms Tanner and Mr Friend had a good working relationship initially, and Mr Friend arranged for Ms Tanner to obtain a class 4 driving license. After 6 months employment, Ms Tanner was assisted by Mr Friend to get a class 5 driving licence and she occasionally did some line haul driving.

[12] In early 2008 Mr Saunders's relationship with Ms Tanner ended following some incidents of domestic violence against her. Mr Saunders's employment at TP also ceased at approximately the same time. Ms Tanner said that thereafter her relationship with Mr Friend changed. They no longer socialised outside work and Ms Tanner said Mr Friend became abrupt in his dealings with her, and he would frequently address her by swearing directly at her.

[13] During 2009 Ms Tanner said that Mr Friend's attitude towards her deteriorated further. During this period Ms Tanner, who had entered into a new positive relationship with Mr Matt Gillette, experienced difficulties with her son, which eventuated in his running away from home. This in turn created problems in the relationship between Ms Tanner and her parents. In April 2009 Ms Tanner commenced counselling sessions.

[14] Ms Tanner said that Mr Friend had not been sympathetic to her situation and had in fact taken disciplinary action against her in July 2009 for taking excessive time off work.

[15] Ms Tanner stated that she had informed Ms Brenda Lamb, Health and Safety Manager for TK, about the manner in which Mr Friend was treating her when Ms Lamb visited the TP site on occasions between September 2009 and December 2010, when Ms

Lamb left TK's employment. Ms Lamb agreed that she had been made aware by both Ms Tanner and Mr Friend that there were problems in their working relationship, but that Ms Tanner had never raised a formal complaint that Mr Friend was bullying her.

[16] Ms Lamb had not raised the bullying issue with Mr Friend, but said that Mr Friend's swearing was excessive and that she had spoken to him on the issue, making it clear to him that his level of swearing was not acceptable. However there was no evidence produced to the effect that Mr Friend's swearing abated after this conversation.

[17] Ms Tanner said that on or about November 2009 she was subjected to verbal sexual harassment by Mr Bryce Mott, a fellow employee, which she said had increased the stress she was experiencing. Ms Tanner reported the incidents to Mr Friend. Following Ms Tanner's complaint to Mr Friend, he had stated that he would speak to Mr Mott, and the sexual harassment ceased.

*Events post-January 2010*

[18] On 18 January 2010 Ms Tanner wrote to TK complaining of incidents of workplace bullying by Mr Friend. Ms Tanner referred specifically to an incident on 12 January 2010 when she was due to undertake a metro delivery which involved liquor deliveries, including delivery to the Te Puke Four Square site in Te Puke. These deliveries involved the manual unloading of boxes and kegs, which work Ms Tanner said she was fit to undertake.

[19] However prior to these deliveries Ms Tanner said that she had asked Mr Friend on 12 January 2010 if she could have a runner, on the basis that the hand unloading at the Te Puke Four Square site was unsafe. A runner was another employee who accompanied a driver on a delivery to assist them with unloading. Ms Tanner said the request had resulted in an altercation with Mr Friend, who had used foul language to her, and abused her, in front of Mr George McDonald, who was at that time one of the store men. Mr McDonald agreed with Ms Tanner's evidence, and said that when Ms Tanner had begun to cry, Mr Friend had sworn at her again.. The incident concluded with Mr Friend instructing Mr McDonald to load Ms Tanner's truck without the Te Puke Four Square site deliveries.

[20] Mr Kevin Hampton, who was appointed as the TK Human Resources and Compliance Manager in December 2009, discussed Ms Tanner's letter with Mr Pasley. Mr Pasley said he had spoken to Mr Friend in regards to the complaint, advised him that it needed to be resolved, and that he needed to apologise to Ms Tanner. Mr Friend had thereafter issued Ms Tanner with a written apology dated 22 January 2010.

[21] Mr Hampton said he had telephoned Ms Tanner on 27 January 2010 to check she had received the apology and to ask if she was satisfied with it. Mr Hampton stated that from her response, his impression had been that Ms Tanner had been happy that the matter had been dealt with.

[22] Ms Tanner said that following the letter of apology Mr Friend followed a policy of not addressing her directly, delegating instructions to her via Ms Darby or one of the store men. Ms Tanner said that as a consequence Mr Friend did not swear at her as often as he had done previously.

[23] Mr Hampton said he spoke to Mr Friend at this time, advising him that his behaviour was "*barbaric and unacceptable*". Mr Hampton stated that after this conversation Mr Friend would telephone him more frequently on human resource issues and was prepared to listen to his advice on human resource matters.

[24] Mr Hampton stated that he had investigated Ms Tanner's complaint concerning the Te Puke Four Square delivery raised in her letter of 18 January 2010. Mr Hampton said he had visited the Te Puke Four Square site in late January 2010 with Mr Friend and Ms Kylie Darby, the TP Dispatch Support Officer. Mr Hampton said that he agreed with Ms Tanner's view that it was a difficult site at which to unload as it involved unloading on a steep hill. However Mr Hampton's view was that, although it was not always possible to provide runners for these types of loads, there were safe alternatives to the unloading of the truck by hand by Ms Tanner.

[25] Mr Hampton stated that in discussing the matter with Ms Tanner, he had advised her that if she felt that any delivery could compromise her health, safety or well-being, she should not do the delivery and she should inform him of her concerns.

[26] Ms Tanner stated that it was her belief was that after writing the letter of apology, Mr Friend embarked on a course of action designed to make her resign. This included Mr Friend:

- reducing her working hours to less than the guaranteed 40 hours specified in Ms Tanner's Individual Employment Agreement
- giving her the worst loads to deliver
- continuing to abuse and humiliate her on numerous occasions.

[27] Mr Hampton said that after January 2010 Ms Tanner kept him informed on a regular basis of the incidents which concerned her. Mr Hampton stated that Ms Tanner would text him if she had problems at work and request that he call her back, which he said he did either immediately or on the same day. Ms Tanner said, and Mr Hampton agreed, that he had advised her to keep a diary of events

[28] Ms Tanner stated that she had telephoned Mr Hampton on many occasions, often in a very distraught state, to complain about Mr Friend's treatment of her. Mr Hampton stated that his recollection was that the complaints made by Ms Tanner during the period between January and July 2010 were not about Mr Friend abusing and humiliating her, but were in fact related to her hours and the type of work she was being allocated.

[29] Specifically Mr Hampton said that Ms Tanner complained that she was not being assigned delivery runs to Taupo and Rotorua. Mr Hampton said he had spoken to Mr Friend about this complaint and that he (Mr Friend) had explained that, because Ms Tanner could not start before 7.30 a.m. and had to finish at 4.30 p.m., he could not assign these runs to her as they necessitated working longer hours than Ms Tanner was able to work.

[30] Mr Hampton also stated that Ms Tanner complained that Mr Friend was giving her all the difficult hand unloads and her hours were being reduced. Ms Tanner said that Mr Friend had reduced her hours below the 40 hours level, which had come to light when she had received her payslip on 4 February 2011. Ms Tanner said she had contacted Mr Hampton and asked him to intervene. Later that evening Ms Tanner said that she had had a text message from the pay clerk at TK apologizing for the under payment and informing her that Mr Friend would pay her the shortfall in cash the next day.

[31] Mr Hampton said he had discussed with Mr Friend the complaints about the allocation of hand unloads and the reduction in hours. Mr Friend had explained he had taken into consideration that since it took Ms Tanner longer than Mr Jason Smith, a fellow TP Metro Driver, to complete the loads, he had allocated the loads to manage the resources available in a commercially viable manner. Mr Hampton did not carry out an investigation at this stage, said he was satisfied that Mr Friend was making reasonable business decisions, and explained at the Investigation Meeting that he was aware that January was a quiet month for TP with employees being placed on holiday during that time.

[32] Ms Tanner said that Mr Hampton had informed her that matters were being dealt with but that it would take time to resolve them, and that he had given her the name of some

lawyers who might assist her. Mr Hampton said that on 4 February 2010 Ms Tanner had told him she was struggling financially as a result of Mr Friend limiting her hours to no more than 40 per week. Mr Hampton stated he had explained to Ms Tanner that this was in accordance with the guaranteed hours in her employment agreement, and agreed that he had recommended a lawyer she could contact if she wanted to pursue the matter. Mr Hampton gave the reason he had suggested Ms Tanner contact a lawyer as being that matters were becoming “*outside my scope*”.

[33] The following morning the pay clerk telephoned Ms Tanner to enquire if she had been paid by Mr Friend. Ms Tanner said that she had not been paid at this stage, although Mr Friend had paid her later that day. Ms Tanner said in her conversation with the pay clerk, she had enquired about her entitlement to stress leave, and had told the pay clerk that she was under great stress.

[34] On 5 February 2010 Mr Hampton said that Ms Tanner had texted him, and when he had returned her call, she had told her that she was at the end of her patience as the atmosphere at work had become unbearable and she was stressed. Mr Hampton said he had been concerned for her safety given the level of stress she was conveying to him and that he had advised her to try to relax over the weekend. Mr Hampton said he had told Ms Tanner that if she felt she needed assistance, to contact him on the Tuesday, the Monday being a statutory holiday. Mr Hampton had also told Ms Tanner that if she needed some assistance, he would talk to Mr Pasley about providing her with some professional counselling.

[35] Mr Hampton stated that, not having heard from Ms Tanner on the Tuesday, he had assumed the weekend break had resolved the situation. However he had contacted her on 18 February 2010 to enquire as to her well-being and that she had told him she was reasonably happy but still concerned that Mr Friend was intentionally restricting her to working 40 hours.

[36] Ms Tanner said that on 10 February 2010 Mr Jason Smith had confirmed to her that Mr Friend had told him not to speak to her. At the Investigation Meeting, Mr Smith denied that Mr Friend had issued him with this instruction.

[37] Ms Tanner stated that on 10 March 2010 she had asked Mr Friend if she could finish her shift early in order to attend a parent teacher interview. Ms Tanner said that she had initially had 1 load to deliver but that this had been changed to 2 loads, the second load being timber. Ms Tanner said that Mr Friend had abused her loudly in front of fellow employees

[38] Ms Tanner said she had discussed this incident with Mr Hampton the same morning and that he had asked if she had obtained advice from a lawyer. Ms Tanner informed Mr Hampton that she had contacted the Department of Labour and had been told that she did not need a lawyer. Ms Tanner said that Mr Hampton had disagreed with this view and had told her he would deal with this on her behalf. At the Investigation Meeting Mr Hampton agreed that he had contacted Ms Joanne Watson, an employment lawyer, and asked her if she would contact Ms Tanner direct if she was interested in assisting her in an employment related matter. However Mr Hampton denied that he had discussed the situation with Ms Watson as a constructive dismissal issue.

[39] Ms Tanner said that there had been a number of incidents in which there had been problems involving the vehicles she was driving:

- On 17 February 2010 Ms Tanner said that she had noticed a knocking noise coming from the rear of her vehicle. This had worried her, but when she had telephoned to inform Mr Friend about it, he had made a joke of it. The next day Mr Friend was away from work and Ms Tanner had reported the knocking noise to Ms Darby, who instructed Ms Tanner to keep working. Ms Tanner said that the vehicle was subsequently taken to Volvo where it was reported the brakes were in an extremely dangerous state.
- On 15 March 2010 Ms Tanner stated she had been stopped by the Police at a vehicle checkpoint, who had noted several defects on the vehicle. Ms Tanner said she had reported this to Mr Friend, but that his attitude had been dismissive.
- Ms Tanner said that she had had concerns about the air pressure in a vehicle she was driving but that Mr Friend had not appeared to take any of these concerns seriously. On 14 July 2010 Ms Tanner said she had taken the vehicle to a repair shop, who had informed her that they had advised Mr Friend at the last service of the truck that the vehicle would not pass a C.O.F. because of the air pressure leak.

[40] Mr Hampton stated that Ms Tanner had not raised any issues of vehicle safety with him. In light of Mr Hampton's detailed evidence concerning the other issues, I find it more likely than not that Ms Tanner had not raised these specific concerns with Mr Hampton.

[41] Ms Tanner stated that on 23 March 2010 Mr Hampton had telephoned her with the news that Mr Friend had had "*the hard word*" and that if her complaints went to court, the company would not support Mr Friend. Ms Tanner had made a diary note to this effect that same day. Mr Hampton's evidence was that he could not recall such a conversation, that it would have been unprofessional of him to have made such comments, and that he believed it was most unlikely he would have given Mr Friend 'the hard word' at this time as his behaviour towards Ms Tanner had improved and Ms Tanner was not complaining of any abuse.

[42] Throughout April 2010 Ms Tanner continued to raise the issue of her hours with Mr Hampton, whose response was that, as Mr Friend was the Depot Manager, it was his prerogative to schedule her hours, provided she was paid for a minimum of 40 hours.

[43] Ms Tanner stated that during May and June she continued to contact Mr Hampton about her work related stress, but that it became apparent to her that he was not in a position to help, other than to assist her in gaining legal representation. Ms Tanner also stated that Mr Hampton encouraged her to look for alternative employment.

[44] Mr Hampton stated that on 30 June 2010 he was at TP carrying out inductions and during Ms Tanner's induction had asked her how she was finding the situation at work. Ms Tanner's response had been to say that she was sick of all the hand unloads, the reduced hours and of Mr Friend being difficult. When he had asked Ms Tanner to explain further, she said that Mr Friend was avoiding her, but issuing instructions that she was to carry out only 1 load per day.

[45] Mr Hampton raised this latter issue with Mr Friend whose response had been that he had issues with Ms Tanner's performance, as a result of which he preferred to use Mr Smith for the second deliveries. Mr Hampton said he had advised Mr Friend that if he had an issue with Ms Tanner's standard of work, performance management was an option which was available to him. However there was no performance management undertaken.

[46] Mr Hampton said that in early July 2010 Ms Tanner had contacted him as her mother was gravely ill and she required his assistance in organising time off from work for her as she felt she could not approach Mr Friend. Mr Hampton had made the necessary arrangements.

[47] At approximately the same time during email exchange, Mr Hampton had informed Ms Tanner that he had resigned from his role and would be leaving TK. The email exchange discussed Mr Hampton's impending departure, and the implications for Ms Tanner's stress

level and her belief that she needed to obtain alternative employment. Specifically Ms Tanner commented in an email sent on 8 July 2010: *“I really can’t handle the stress anymore.”* And in an email sent to Mr Hampton on 15 July 2010: *“I am stressing soooo much about not having another job to go to, I can’t afford not to have a job even for 1 week. But I am just getting sick all the time now, and I know I can’t keep going the way I am.”*

[48] Mr Hampton stated that Mr Friend did not appear to have any problem with Ms Tanner having the time off in early July, and that as far as he was aware no repercussions followed, since Ms Tanner had not alerted him to these.

[49] However Ms Tanner stated that when she had returned to work on 12 July 2010 she wasn’t allowed to drive. On 13 July 2010 Ms Tanner said that Mr Friend instructed her to make up 32 pallets of beer crates and to unload containers of horse feed, which resulted in her suffering back pain.

[50] Mr Hampton stated that Ms Tanner had contacted him and informed him that Mr Friend was keeping her in the yard on manual duties and that she was struggling to manage them. Mr Hampton said that he had pointed out to Ms Tanner that under employment health and safety rules, she could refuse to do a job if she felt it was unsafe for her to do it.

[51] On 15 July 2010 Ms Tanner said that on arriving at work she had found her truck loaded and ready to leave. At her first delivery stop she had discovered goods on her truck which should have been on the truck bound for Rotorua. Being unable to contact the TP office, Ms Tanner had called the TK office and said she would drop the Rotorua goods off back at the TP site. Upon arrival back at the site, she said Mr Friend had been extremely abusive to her, using foul language and shouting at her.

[52] Ms Tanner said this last incidence of abuse resulted in her being unable to drive or to do her job. Ms Tanner said Mr Gillette had telephoned Mr Friend the following day to explain that Ms Tanner would not be at work and that Mr Friend had been hostile towards him.

[53] Mr Hampton explained that Mr Gillette had telephoned him and complained that Mr Friend had threatened him during the telephone call he had made to inform Mr Friend that Ms Tanner would not be in to work. Mr Hampton said he had contacted Mr Friend, who had given him a different version of events, which Mr Hampton said he had accepted as evidence that Mr Friend had not been abusive to Mr Gillette. Given that Mr Hampton stated that Mr Friend had been annoyed at the disruption, and on the basis of the evidence of Mr Friend’s

irascible temperament, I consider it likely that the version of events as presented by Mr Gillette was the correct one.

[54] On 16 July 2010 Mr Hampton said Ms Tanner texted him to say that she could no longer handle the working environment, was going to resign, and consider legal action.

[55] That same day TK received a letter sent by Ms Rachel Rolston, Ms Tanner's personal advocate, advising that Ms Tanner would be off work for 2 weeks and that she was alleging workplace bullying. Ms Rolston wrote:

*Ms Tanner has today been taken off work by her physician for a period of 2 weeks, and has been prescribed both anti-depressants and sleeping tablets to help her cope with the stress that the formally identified workplace bullying hazard causes.*

[56] Attached to the letter was a notification of accident or serious harm which stated: *"Bullying began approx May 2008 & has escalated to a point where employee has been out of the workplace for a period of 14 days by a physician."*

[57] On 21 July 2010 Mr Mark Thorpe, General Manager of TK and TP, and Mr Hampton, met with Ms Tanner and Ms Rolston. Mr Thorpe said that the particular complaints Ms Tanner and Ms Rolston raised were:

- a. Mr Friend was giving Ms Tanner particularly heavy loads and most of them had to be hand unloaded;
- b. The delivery to Te Puke Four Square had been unsafe as the loading dock was not level with the truck;
- c. Ms Tanner's hours had been reduced over the previous 6 months and at times she was doing less than 40 hours;
- d. Mr Friend was abusive with an unnecessary use of foul language to her when Ms Tanner complained about these matters;
- e. Ms Tanner believed Mr Friend singled her out and that this had commenced in December 2009;

- f. That the last straw had been on 15 July 2010 when Mr Friend had abused Ms Tanner following her return to the yard with the pallets for delivery to Rotorua;
- g. Ms Tanner had been sexually harassed by Mr Mott;
- h. At some time on or about October/November 2009 Mr Mott had deliberately backed a forklift towards her and that when she raised her arm to fend it off, it had not hit her but she was shaken by the incident.

[58] Mr Thorpe stated that a complaint of bullying by Mr Friend which had been made by Ms Tanner in January 2010 was also discussed.

[59] During the meeting Mr Thorpe said that he had discussed his impression that there signs of a poor culture at TP, and it was his intention to change that. The meeting concluded with Mr Thorpe informing Ms Tanner and Ms Rolston that he would be investigating the allegations fully and would decide on an outcome thereafter. Mr Thorpe said he had assured Ms Tanner and Ms Rolston that if the investigation showed Mr Friend or any other person to have been at fault, the appropriate action would be taken, which could include termination of Mr Friend's employment.

[60] Ms Rolston said that Mr Thorpe had agreed that Ms Tanner would continue to be paid for as long as was necessary, but that after 6 months there would need to be a review. Mr Thorpe stated that he had said TP would support Ms Tanner financially but that there was no definite time frame put on the period, although his expectation was that completion of the investigation would take approximately 1 month.

[61] Following the meeting Mr Thorpe and Mr Hampton arranged to commence a formal investigation of Ms Tanner's complaints. Mr Hampton issued letters regarding Ms Tanner's complaints to Mr Friend and Mr Mott. Mr Thorpe had also sent a copy of the meeting notes to Ms Rolston, which she had amended and returned to him. Mr Thorpe said that he had not agreed with all of Ms Rolston's amendments, but that he was satisfied that Ms Rolston had confirmed all of the allegations Ms Tanner had wanted him to investigate.

[62] Mr Thorpe stated that he arranged for Mr Hampton to interview some of the witnesses, some he interviewed and some he and Mr Hampton interviewed together:

- (i) Mr Norman Paige, Store man for TP from April 2009 to 18 February 2011, was interviewed on 22 July 2010 (Mr Thorpe)
- (ii) Ms Sharron Marsden, interviewed on 23 July 2010 (Mr Hampton)
- (iii) Ms Darby, interviewed on 27 July 2010 (Mr Thorpe)
- (iv) Mr Friend, interviewed on 26 July (Mr Hampton and Mr Thorpe)
- (v) Mr McDonald, interviewed on 27 July 2010 (Mr Hampton)
- (vi) Mr Dean Gordon, former TP employee, interviewed on 27 July 2010 (Mr Hampton and subsequently Mr Thorpe)
- (vii) Mr Anthony Woods, interviewed on 28 July (Mr Hampton and Mr Thorpe)

[63] A few days after the investigation commenced, Mr Hampton said he had telephoned Ms Tanner to see how she was feeling and he arranged to meet her in a café. Mr Hampton said he had wanted to explore what options Ms Tanner considered feasible and to ascertain if she felt she could work with Mr Friend again. Mr Hampton stated that Ms Tanner had told him she could never work with Mr Friend again.

[64] Mr Thorpe explained that he had received a letter from Ms Rolston on 28 July 2010 which had concerned him. Mr Thorpe said the letter appeared to acknowledge that the meeting on 21 July 2010 had been satisfactory, but that it appeared that Ms Rolston had gained the wrong impression that the investigation would be completed in one week and that Mr Hampton and Mr Thorpe had shown the investigation report to ex-employees and others. Ms Rolston had also been critical of Mr Hampton's café meeting with Ms Tanner. Ms Rolston further advised that Ms Tanner would be completing a new personal grievance and making an application to the Authority.

[65] Mr Thorpe discussed this letter with Mr Hampton and they responded to Ms Rolston, with an assurance that they were committed to carrying out a transparent and thorough investigation.

[66] Mr Thorpe and Mr Hampton met with Ms Tanner and Ms Rolston on 3 August 2010 to discuss their progress with the investigation. Various options were aired at the meeting, these included Mr Friend moving to work at the TK site, Ms Tanner working out of the TK

site, or Ms Tanner working line haul if she could change her hours to avoid contact with Mr Friend. The latter two options were not acceptable to Ms Tanner due to her family arrangements, although Mr Thorpe said that Mr Friend's move was an option.

[67] Ms Rolston stated that she and Ms Tanner had been told that the investigation had not produced witness evidence that corroborated Ms Tanner's version of events and that no action would be taken against Mr Friend as TP was concerned he would bring a personal grievance. Mr Thorpe refuted this, but said that he had explained that TP had to be careful in that it would only be possible to dismiss Mr Friend if there was sufficient evidence.

[68] Mr Thorpe said that shortly after this meeting Ms Rolston had informed him that she wanted to present some further information to the investigation. Mr Thorpe said he received this information on 17 August 2010. It consisted of an affidavit from Ms Tanner and an affidavit from Mr McDonald,, together with further medical certificates for Ms Tanner certifying that she remained unfit to work until 21 August 2010.

[69] Mr Thorpe noted from Ms Rolston's email that Ms Tanner was becoming increasingly concerned about returning to work after she had reviewed the witness interview statements. Mr Thorpe reached the conclusion that the investigation was causing Ms Tanner stress. Mr Thorpe had engaged legal counsel, from August 2010, and he now instructed legal counsel to send a letter to Ms Tanner confirming the investigation process the company intended to follow, to extend an offer to pay for Ms Tanner to have four sessions with a psychologist, and to make the offer of mediation. Mr Thorpe stated that TP also agreed that Ms Tanner could continue to remain on paid leave of absence. Ms Tanner took up the offer of counselling, but not the offer of mediation at that point.

[70] Mr Thorpe continued with the investigation and there were communications between Mr Thorpe and Ms Tanner and Ms Rolston during this period which culminated in a meeting on 8 September 2010. At this stage arrangements had been put in place for a mediation with the Department of Labour Mediation service in Hamilton on 13 September 2010.

[71] At that meeting Mr Thorpe said Ms Tanner's sick leave was discussed and also the arrangements for the forthcoming mediation. Mr Thorpe agreed to pay Ms Tanner's sick pay until the mediation date and at Ms Tanner's request, to interview two other employees as part of the investigation process.

[72] A few days after this meeting Ms Tanner cancelled the arranged mediation meeting. There was a further investigation update meeting with Ms Tanner and Ms Rolston on 27

September 2010. At the meeting Mr Thorpe informed Ms Tanner that TP could not continue to pay her sick pay after the end of payroll that week.

[73] On 5 October 2010 Mr Thorpe said he received an email from Ms Rolston saying that Ms Tanner wanted to reactivate the request for urgent mediation and accused Mr Thorpe of deliberately refusing to complete his investigation. On 11 October 2010 Mr Thorpe sent an email to Ms Rolston enclosing signed copies of further witness statements.

[74] On 13 October 2010 Mr Thorpe received a further medical certificate for Ms Tanner, certifying her as unfit to work for 3 months until 13 January 2011.

[75] Ms Tanner suffered and continues to suffer from a major depressive disorder and from post-traumatic stress disorder.

[76] The parties attended mediation on 21 October 2010, but this did not resolve the issues between the parties. Ms Tanner filed her claim in the Authority on 10 November 2010. Mr Thorpe said he completed his final reports in November 2010. Ms Tanner filed an amended Statement of Problem in which she stated that she had resigned from her employment with TP.

## **Discussion**

### **The Law**

[77] Ms Tanner's Individual Employment agreement contains an express health and safety clause, which states at clause 16.1:

*16.1 The company shall take all practicable steps to ensure the safety of employees while at work.*

[78] Moreover, the duty to take reasonable steps to maintain a safe workplace is an implied term of all employment agreements: *Attorney General v Gilbert*<sup>1</sup>. In particular the employer must:

- take all reasonable care to avoid exposing the employee to unnecessary risk of injury or further injury to his or her physical or psychological health and in particular to provide and maintain a safe system of work;

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<sup>1</sup> [2002] 1 ERNZ 31, at para [75] (CA)

- take all reasonable care not to cause the employee physical or psychological injury or further injury by reason of the volume, character, nature or circumstances of the work which the employee was required to perform;
- not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust, confidence and fair dealing between it and the employee

[79] In *Gilbert* the Court of Appeal stated:<sup>2</sup>

*...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. That is made clear by the definition of “all practicable steps”. What is “reasonably practicable” requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s 19 the employee must himself take all practicable steps to ensure his own safety 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 judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer’s obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.*

[80] The Court in commenting upon the nature of the risk stated:<sup>3</sup>

*In some cases, a risk may not be apparent without specific information about the vulnerability of a particular employee...*

*...But 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 may 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 be in breach of the term of the contract to maintain safe working conditions. It was not necessary in the circumstances for there to be*

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<sup>2</sup> At para [83]

<sup>3</sup> Ibid at paras [91] and [92]

*“direct warning of imminent breakdown on the part of the respondent” as suggested on behalf of the appellant.*

[81] In respect of the issue of foreseeability, the Employment Court in *Edmonds v Attorney-General*<sup>4</sup>, a case in which the Court held it was unable to conclude, on the evidence, that a supervisor’s conduct had exposed the plaintiff to a reasonably foreseeable risk to his mental health, stated that:<sup>5</sup>

*I have held there was excessive verbal abuse which became a feature of his job and which led to his mental ill-health and to his resignation. I do not think it is reasonable however, to hold, for the purposes which I am required to serve, that his depressive condition was a reasonably foreseeable risk. The conduct was in the doctor’s opinion the medical cause, however, it must be objectively reasonable and foreseeable. To me, that means it must have been foreseeable that any normal employee would have developed symptoms of mental illness if treated in the way that the plaintiff was here. I am unable to go that far.*

**Was there was a fundamental repudiatory breach of contract by TP in respect of the duties owed under that contract to Ms Tanner?**

*Was Mr Mott’s conduct towards Ms Tanner Sexual Harassment?*

[82] Mr Mott was employed as a store man at TP. Ms Tanner said that during 2009 Mr Mott sexually harassed her by making indecent comments and suggestions to her.

[83] Ms Tanner gave evidence to the effect that, following her complaint about the harassment by Mr Mott to Mr Friend, the sexual harassment by Mr Mott ceased in November 2009, Ms Tanner stating that “Cyril put a stop to it”. Ms Tanner made no further complaints of sexual harassment by Mr Mott after this time until raising the matter again in July 2010.

*Was Mr Friend’s conduct towards Ms Tanner workplace bullying?*

[84] Bullying has been defined as:<sup>6</sup>

*Unwanted and unwarranted behaviour that a person finds offensive, intimidating or humiliating and is repeated so as to have a detrimental effect on a person’s dignity, safety and well-being.*

[85] Mr Friend was in sole charge of the TP site and was Ms Tanner’s direct manager. From the evidence given by various witnesses at the Investigation Meeting, Mr Friend was a

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<sup>4</sup> [1998] 1 ERNZ 1

<sup>5</sup> Ibid at page 24 per Judge Finnegan

<sup>6</sup> Hayden-Olsen, *Workplace Bullying and Harassment* (CCH New Zealand Ltd) Auckland 2005

difficult personality, being variously described as a “*gruff personality*”, a “*racist*”, “*agricultural*” and “*deficient in people skills*”.

[86] It is also clear that Mr Friend was an habitual user of foul language. In an environment in which it was acknowledged that foul language was in general usage, it appears overwhelmingly from the evidence of the witnesses at the Investigation Meeting that Mr Friend’s use of this type of language was regarded as exceptionally high. Ms Tanner’s evidence was that Mr Friend would yell at her and, although she was accustomed to the use of foul language in her work environment, it was the fact that Mr Friend would swear directly at her which she found stressful and distressing.

[87] Mr Friend kept guns on the site. Although these were meant to be kept in a locked gun cabinet, I accept from the evidence given that on occasion these were not in the gun cabinet but in the general office area, albeit for short periods of time. Mr Hampton said that during the time he was employed, he had not seen the guns out of the gun cabinet, however Mr Paige’s evidence did corroborate Ms Tanner’s in that he stated that he had seen the guns in the office on occasion.

[88] Ms Tanner had given evidence that she found the presence of the guns intimidating in a situation in which she otherwise felt bullied. I accept that this was a reasonable reaction from a person in Ms Tanner’s situation and that it heightened the level of stress Ms Tanner was experiencing.

[89] In January 2010 Ms Tanner complained to the management of TP about workplace bullying by Mr Friend, referring specifically to the incident on 12 January 2010 when Ms Tanner’s request for a runner on the Te Puke Four Square delivery had resulted in Mr Friend having sworn at, and abused, her. Following this complaint, Mr Friend had, as instructed, apologised to Ms Tanner. However Mr Friend’s ongoing interaction with Ms Tanner had consisted of his conveying instructions to her via Ms Darby or one of the store men. While this meant that for a period Ms Tanner was not subjected to being directly abused by Mr Friend, Ms Tanner told Mr Hampton that Mr Friend was avoiding her, and Mr Hampton confirmed that he was aware that for Ms Tanner, Mr Friend’s avoiding her was one of her biggest problems.

[90] I find that a policy of deliberate avoidance by a direct manager of a subordinate in this manner could constitute workplace bullying, being behaviour which was inappropriate, and detrimental to Ms Tanner’s health and well-being, and that in this case it did contribute to Ms Tanner’s stress level and mental health.

[91] Following the incident in January 2010 Ms Tanner raised issues alleging a reduction in her working hours to 40 per week or less, and to Mr Friend giving her the worst loads. Based on the evidence of an analysis between the period January 2010 to July 2010 and the period 25 July 2009 to 16 January 2010, I find that Ms Tanner's perception that her working hours being altered by Mr Friend to her detriment was not correct, there was no material difference in her working hours.

[92] However in respect of the allegation that Ms Tanner was bullied by Mr Friend giving her the worst loads, I find that an analysis produced in evidence supported this allegation, in that it showed that in the month of June 2010 Ms Tanner, in Truck 517 was required to manually unload 65.591335 tonnes of alcohol products, while Mr Smith had 36.58642 tonnes to unload. These figures are particularly significant in view of the fact that Mr Smith was usually assigned a runner whilst Ms Tanner was not.

[93] Ms Tanner's allegation of verbal abuse of her by Mr Friend on 15 July 2010 was supported by Mr Paige, although Mr Paige said that Mr Friend did not actually swear at Ms Tanner, he confirmed that Mr Friend did shout at her, Mr Paige stating that Mr Friend was angry and Ms Tanner got the "*the full force of it*".

[94] In summary, I find evidence that Ms Tanner was subjected to workplace bullying by Mr Friend in that she was subjected to repeated unwanted and unwarranted behaviour which she found to be offensive, intimidating or humiliating and which resulted in it having a detrimental effect on her dignity, safety and well-being

Did TP do enough to respond to Ms Tanner's concerns?

#### *Mr Mott's Sexual Harassment*

[95] Once apprised by Ms Tanner of Mr Mott's verbal sexual harassment of her, Mr Friend as her manager had taken immediate and effective action. After Ms Tanner raised the issue with TP in July 2010, Mr Mott's conduct was investigated by the company, admitted to by Mr Mott and following the investigation by TP, Mr Mott was issued with a formal written warning in relation to his behaviour.

[96] I find that TP responded as a fair and reasonable employer to Ms Tanner's complaints in respect of the conduct of Mr Mott. I find that TP did not breach any express or implied contractual duties owed to Ms Tanner, the response was adequate in resolving the problem at the time it occurred.

*Mr Friend's Bullying*

[97] TP became aware of Ms Tanner's allegations of workplace bullying by Mr Friend in January 2010 after receiving Ms Tanner's letter of 18 January 2010. The complaint was accepted; I believe on the basis that the management of TP were fully aware that the behaviour of which Ms Tanner complained was more likely to be true, in light of what was known about Mr Friend's manner. Indeed Mr Hampton said in his evidence that Mr Friend would yell and swear at employees and that his manner was not always conducive to a happy working place.

[98] The action taken was that Mr Pasley, the managing director of TK and TP, had spoken to Mr Friend and instructed him to apologise. There was no formal investigation at that stage, and no meeting with Mr Friend to discuss the complaint.

[99] Mr Hampton also spoke to Mr Friend shortly after the complaint was received, advising him that his behaviour was "*barbaric and unacceptable*". Thereafter Mr Hampton said that he had commenced a process of mentoring Mr Friend, considering this to be the most appropriate way of affecting a change in Mr Friend's behaviour. Mr Hampton explained this decision as being based on the fact that "*if you took away the gruff manner there was a reasonable manager*", and his belief that mentoring would be a more effective intervention than any other.

[100] Mr Hampton also asked Ms Tanner to keep in touch with him, which she did on a regular basis. Although Ms Tanner complained about Mr Friend ignoring her, there was no specific intervention by Mr Hampton to address this behaviour.

[101] Mr Hampton regarded Mr Friend's behaviour as systemic. Although Mr Hampton believed that Mr Friend's behaviour was improving, I find no real evidence that this was the case.

[102] I believe that a fair and reasonable employer in this situation would have considered addressing Mr Friend's behaviour with professional interventions such as sending Mr Friend on anger management or interpersonal skills courses, or appointing an independent conciliator to work with Mr Friend and Ms Tanner on improving their relationship.

[103] Ms Tanner also alleged that her hours were being reduced and that she was being given 'the worst loads'. Mr Hampton had discussed the complaints with Mr Friend. In his evidence at the Investigation Meeting it became apparent that Mr Hampton had accepted the

explanations given by Mr Friend, and further that he had believed that the allocation of work was within the prerogative of Mr Friend in his capacity as the Depot Manager. In fact Mr Hampton's response to Ms Tanner at this time had been to advise her to seek legal advice and indeed he himself had spoken to an employment lawyer on her behalf.

[104] It was not until after 16 July 2010 when Mr Thorpe and Mr Hampton undertook a full investigation into Ms Tanner's complaints that there was any analysis of the facts behind the reduction in hours and allocation of loads complaints carried out. I consider that a fair and reasonable employer would have undertaken an investigation to ascertain the true facts much earlier than was undertaken by TP.

[105] Ms Tanner complained to Mr Hampton about the Te Puke Four Square delivery and at this time Mr Hampton (who had carried out an investigation into the complaint) advised her that she should not carry out work she believed it to be unsafe for her to do. Mr Hampton repeated this advice following Ms Tanner's complaint on 12 July 2010 when Ms Tanner was carrying out manual work at the TP site.

[106] I do not believe that a fair and reasonable employer would have placed an employee who was complaining about being bullied by her manager, in a position where she would be expected to refuse duties assigned by that manager, on the basis that what she was being asked to do was in breach of employment health and safety rules. There was too great an imbalance in power to reasonably hold this expectation, and a fair and reasonable employer I find would have addressed the issue directly.

[107] After receiving the letter from Ms Rolston on 16 July 2010 Mr Hampton and Mr Thorpe commenced what appears from the evidence to have been a thorough and comprehensive investigation. However by this time Ms Tanner was no longer at work, because she was under medical care for a stress related illness, and certified as unfit to return to work until Ms Tanner notified her resignation in the amended Statement of Problem filed in the Authority on 5 January 2011.

[108] I find that although TP took action following the receipt of the letter of 16 July 2010, this was too late; Ms Tanner had already suffered psychological damage by that stage. I consider that TP failed to take appropriate action in addressing the problems affecting Ms Tanner in her employment in the period from January to 15 July 2010, and that there was enough information conveyed to Mr Hampton during this period for TP to have been aware of the risk of injury to Ms Tanner's mental health. I find there was a fundamental repudiatory breach of contract by TP in respect of the duties owed under that contract to Ms Tanner.

**Was it was reasonably foreseeable that a breach of the duties owed could result in Ms Tanner suffering psychological harm as a result?**

[109] Ms Tanner worked for Mr Friend in what Mr Thorpe described as a culture of “*management by fear*”. Ms Tanner’s letter of 18 January 2010 had put TP on notice of her concerns regarding Mr Friend’s behaviour towards her. TP’s management were well aware of Mr Friend’s personality traits. This may explain why Mr Pasley had not found it necessary to investigate Ms Tanner’s complaint, rather accepting it at face value and instructing Mr Friend to apologise.

[110] Mr Hampton, who was in constant communication with Ms Tanner during the period January to July 2010, was aware of two important factors: he was aware of Mr Friend’s “*dangerous and unacceptable*” behaviour and he was aware that Ms Tanner was emotionally vulnerable.

[111] On 5 February 2010 Mr Hampton, having spoken by telephone to Ms Tanner and being told that she was stressed because of the atmosphere at work, said in his evidence that he had been concerned for Ms Tanner’s safety due to the level of stress he felt she was conveying to him, and considered speaking to Mr Pasley on her behalf with a view to TP providing professional counselling support.

[112] Following this date, there were further telephone calls and meetings from which Mr Hampton had ample opportunity to assess Ms Tanner’s mental state. Mr Hampton’s assessment as stated at the Investigation Meeting was that he “*knew Kelly would eventually crack*”.

[113] Mr Hampton said that he was aware that there were pressures other than just the work related ones on Ms Tanner in that her hours were not right for her and she was facing financial difficulties. In *Attorney General v Gilbert* the Court of Appeal stated:<sup>7</sup>

*The defendant’s breach must have been a material breach in the loss suffered by the plaintiff. It need not be the sole cause. Beyond that, the courts have not laid down formal tests for causation. Whether a breach of contract is a material cause of the loss suffered is a question of fact.*

[114] I find that the workplace bullying by Mr Friend was a material breach. I note that the two reports supplied by the parties from two different psychologists, Dr Jane O’Dwyer and Dr

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<sup>7</sup> [2002] 1 ERNZ 31, at para 64 (CA)

Hans Laven, concur on the finding that Ms Tanner's illness was principally attributable to events occurring in the workplace. Also Mr Hampton, the Human Resources and Compliance Manager of TP, said in evidence that he was concerned for Ms Tanner's safety given her distress about the conditions at work. I find that it was reasonably foreseeable to TP that the breach of duties would result in Ms Tanner suffering psychological harm.

[115] I determine that there was a fundamental repudiatory breach of contract by TP as a result of which it was reasonably foreseeable that Ms Tanner would suffer psychological harm.

**Was Ms Tanner unjustifiably constructively dismissed by TP?**

[116] Ms Tanner's resignation became apparent from the amended Statement of Problem received by the Authority on 5 January 2011. A personal grievance, pursuant to s114 of the Employment Relations Act 2000 ("the Act") must be raised: "*within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later*".

[117] From the time of Mr Friend's apology on 22 January 2010 until 15 July 2010, there was a situation of workplace bullying of which Ms Tanner had made TP aware and which it had failed to adequately address. After the incident on 15 July 2010, as a result of which Ms Tanner's mental health broke down to the extent that she was certified as unfit to return to work, TP was made aware that Ms Tanner had a personal grievance and a full investigation was commenced. During that investigation it became apparent to Ms Tanner that it was possible she might have to return to work in a situation in which Mr Friend was still employed. This was totally unacceptable to Ms Tanner.

[118] On this basis I accept that there was a continuing conduct situation, Ms Tanner had raised the bullying issue repeatedly with Mr Hampton during the period between January and July 2010, she had made him aware of the impact upon her emotionally, and she was made aware after July 2010 that she might have to return to work with Mr Friend. That Ms Tanner would decide to resign in these circumstances I consider to have been inevitable.

[119] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[120] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*<sup>8</sup> the Court of Appeal said regarding the correct approach to constructive dismissal:<sup>9</sup>

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

[121] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- First, has there been a breach of duty on the part of the employer which has caused the resignation,
- and secondly if there was such a breach was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[122] I have determined that Ms Tanner suffered psychological injury as a result of a fundamental repudiatory breach of Ms Tanner's employment agreement by TP. On the same basis of facts, I find that there was a breach of duty on the part of the employer which caused Ms Tanner's resignation.

[123] I also find that it was sufficiently serious as to make it reasonably foreseeable to TP that Ms Tanner would resign as a result. Indeed Mr Hampton, who had ample opportunity assess Ms Tanner's mental state, said at the Investigation Meeting that he "*knew Kelly would eventually crack*".

[124] I determine that this is a case of constructive dismissal and that Ms Tanner was unjustifiably constructively dismissed by TP.

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<sup>8</sup> [1994] 1 ERNZ 168

<sup>9</sup> Ibid At p 172

**Remedies**

[125] Ms Tanner has been found to have suffered psychological harm as a result of a breach of the duty owed to her by TP, and that the breach resulted in her having been unjustifiably constructively dismissed. Ms Tanner is entitled to remedies, which I shall address by means of global awards.

[126] I accept that the financial impact of the termination of her employment, coupled with Ms Tanner's continuing inability to work, has been devastating for her family.

*Reimbursement of Lost Wages*

[127] Ms Tanner has lost remuneration as a result of the breach of duty. Ms Tanner had been paid by TP until the end of September 2010. Ms Tanner has not been able to obtain alternative employment since that date due to her continuing health issues. Mr Reid is also, on behalf of Ms Tanner, seeking compensation for loss of future earnings.

[128] Before I consider the issue of loss of future earnings, pursuant to s 123(1)(b) of the Act, Ms Tanner is entitled to be reimbursed for the income lost from the end of September 2010 until the date of the hearing. I would anticipate that the parties can resolve the amount due to Ms Tanner for this period. If not, leave is reserved to return to the Authority

[129] As regards loss of future earnings, the Court of Appeal in *Telecom New Zealand Ltd v Nutter*<sup>10</sup> considered that in assessing the period of reimbursement, the contingencies of life, the possibility of alternative employment, the unemployment benefit and the need for moderation needed to be considered.

[130] In *Telecom South Ltd v Post Office Union*<sup>11</sup> the Court of Appeal stated: “awards of compensation are discretionary and that there is no automatic entitlement to an award reflecting the balance of the expected working career of the employee or any similar approach”.

[131] Judge Travis in *Prebble v Coastline FM Lt*<sup>12</sup> indicated that in addition to giving consideration to the contingencies of life, consideration should also be given to what constituted a reasonable period.

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<sup>10</sup> [2004] 1 ERNZ 315

<sup>11</sup> [1992] 1 ERNZ 711

<sup>12</sup> [1992] 3 ERNZ 294

[132] I am satisfied that in this case it is fair and equitable to consider my making an award in respect of future earnings.

[133] Ms Tanner is a young woman. In her psychiatric report dated 9 December 2010 Dr Dwyer provided a prognosis in which she indicated that Ms Tanner would in due course recover fully from both her depressive illness and from the post traumatic stress disorder.

[134] Having taken into consideration all these considerations, I order that Ms Tanner is to be paid 24 weeks' salary, based on 40 hours per working week at \$17.00 per hour, with effect from 16 March 2011, in respect of loss of future earnings pursuant to s. 123(1)(c)(ii) of the Act, in the sum of \$16,320.00.

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[135] Ms Tanner is also entitled to compensation for humiliation and distress. I find that in respect of the issues giving rise to a personal grievance, Ms Tanner suffered significant distress, resulting in her being medically unfit to attend work due to a depressive illness and post-traumatic stress disorder.

[136] I order TP to pay Ms Tanner the sum of \$25,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i).

[137] I have considered the matter of contribution as I am required to do under s124. Ms Tanner did not contribute to the situation which gave rise to illness and personal grievance. There is to be no reduction in remedies.

*Summary of Awards*

[138] TP is ordered to make the following payments to Ms Tanner:

- reimbursement for the income lost from the end of September 2010 until the date of the hearing, to be agreed by the parties
- a payment in respect of loss of future earnings in the sum of \$16,320.00.
- a payment of \$25,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i)

**Costs**

[139] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior le Txt continues

**Eleanor Robinson**  
**Member of the Employment Relations Authority**