

Attention is drawn to paragraph 1 prohibiting publication of certain information contained in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 22A/07
5045881

BETWEEN

CAROL FRASER
Applicant

AND

THE VICE CHANCELLOR OF
THE UNIVERSITY OF
OTAGO
Respondent

Member of Authority: Helen Doyle

Representatives: Jenny Beck, Counsel for Applicant
Barry Dorking, Counsel for Respondent

Investigation Meeting: 9 May 2007 at Dunedin
18 June 2007 at Dunedin

Determination: 22 August 2007

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] I prohibit from publication under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 the name of the employee who worked in the same Department as the applicant at the University at the material time. I shall need to refer to that employee in this Determination and will do so when required by the letter "S".

Employment relationship problem

[2] The applicant, Carol Fraser, was employed at the University of Otago in the Department of Physiology as an Administrative Secretary/Personal Assistant to the Departmental Head from 13 March 1995 until 30 June 2006. She says that a difficult personal interpersonal relationship between herself and “S” was mismanaged by the Head of Department, Dr Patricia Cragg, from 2003. Ms Fraser said that she had no option but to give written notice of her intention to resign in March 2006 because of the situation. Ms Fraser gave four months notice with her final day being 30 June 2006. Ms Fraser says that her resignation was in the nature of an unjustified constructive dismissal.

[3] Ms Fraser seeks payment of 13 weeks lost wages, compensation in the sum of \$15,000 for humiliation and loss of dignity and contribution towards her legal costs.

[4] The respondent is The Vice Chancellor, University of Otago (“the University”).

[5] There was a preliminary investigation meeting to determine whether the personal grievance had been raised within 90 days. That preliminary matter was the subject of Determination 22/07 in which I found that the grievance had been raised within 90 days.

[6] The University say that Ms Fraser affirmed her contract of employment by giving a period of notice longer than the contractual requirement of one month and failing to communicate clearly and unambiguously the reason for her dismissal when she resigned. The University says Ms Fraser offering to remain if S was dismissed after the date of giving notice, requesting continuity of service and a medical retirement gratuity and advising that she hoped to return to the University but not to the Department of Physiology when she had de-stressed, were inconsistent actions with a claim of constructive dismissal.

[7] The University also said that Ms Fraser had no reasonable grounds to claim that there was a breach of its contractual or statutory obligations toward her, or if there was a breach, it was not sufficiently serious that it was reasonable for Ms Fraser to resign or that such resignation was foreseeable.

[8] The investigation of this matter took place over two separate meeting dates. I advised the parties during the first of those days after I had heard part of the evidence, that I may not necessarily treat the problem as an alleged unjustified constructive dismissal but may consider whether there were any unjustified actions which disadvantaged Ms Fraser, including during her notice period of four months. I note in that regard the power of the Authority under s.160(3) of the Employment Relations Act 2000 that

The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating a matter, concentrate on resolving the employment relationship problem, however described.

[9] Both parties addressed this in addition to the allegation of constructive dismissal in their final submissions. Mr Dorking, on behalf of the University, provided a supplementary brief of evidence for the Human Resource Adviser for Health Sciences, Simone McNichol, to deal in more depth with the interactions between Human Resources and Ms Fraser during her notice period. I heard from Ms McNichol on the second day of the investigation meeting.

The issues

[10] Ms Fraser relies on the third situation listed by the Court of Appeal in *Auckland Shop Employees v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 where a constructive dismissal might occur. Ms Beck, in final submissions, says that the University breached its duty to Ms Fraser by not keeping her safe in the workplace and by not protecting her as a good employer should.

[11] The issues for determination in this matter are:

- Was Ms Fraser's resignation caused by a breach of duty on the part of the University?
- Did Ms Fraser take steps that affirmed her employment agreement after becoming aware of the alleged breaches?
- If it is found that there were breaches of duty on the part of the University and Ms Fraser did not affirm the contract with knowledge of the breaches, then were they breaches of sufficient seriousness to make it

reasonably foreseeable by the University that Ms Fraser would not be prepared to continue working?

- If Ms Fraser was unjustifiably constructively dismissed, then what remedies is she entitled to?
- Was Ms Fraser's employment or a condition of that employment affected to her disadvantage by an action or actions of the University?
- If Ms Fraser was disadvantaged, then were the actions unjustified?
- If the actions caused disadvantage and were not justified then what remedies is Ms Fraser entitled to and are there issues of contribution?

Ms Fraser's work history with the University

[12] Ms Fraser had worked a number of years in various capacities for the University. The number of years Ms Fraser worked at the University is correctly set out in Dr Cragg's written evidence, as 17 years from May 1989 to June 2006, with a further single year spanning 1979 and 1980.

[13] At the material time Ms Fraser was employed on the University of Otago General Staff Individual Employment Agreement.

Ms Fraser's working environment

[14] Ms Fraser relies on a series of events over a period from about 2003 that she says caused her to resign. It is necessary to set out the relevant history of events and what took place after Ms Fraser gave notice of her resignation.

[15] When Ms Fraser commenced with the Department of Physiology in March 1995 "S" was already working in the Department on a part-time basis. The Head of Department and Ms Fraser's supervisor at that time was Professor MacKnight. S was required to report to Ms Fraser.

[16] There were difficulties in the relationship between Ms Fraser and "S" even at that early time. Ms Fraser was concerned about S's work performance and the manner in which S communicated with Ms Fraser. Ms Fraser felt that with Professor

MacKnight's assistance and encouragement a meeting with S in September 1999 had resolved some of those issues and the relationship between them had settled down.

[17] Ms Fraser attached notes of the meeting which were headed up *Performance*. From the notes it is clear that Ms Fraser advised S of the areas in which she was dissatisfied with her performance, which would no doubt have been consistent with her supervisory role at that time. I did not take from the notes that it was in the nature of a mediation meeting.

[18] Dr Cragg became the Head of Department and Ms Fraser's supervisor in January 2001. At the end of 2001 the part-time assistant secretary left and S indicated that she would like to work full-time and assume those duties as well. Ms Fraser was supportive of this because she felt S had been working consistently and willingly since the September 1999 meeting.

[19] The consistent theme in the various documents produced about Ms Fraser's performance was that her performance in her position in the Department of Physiology was outstanding. Dr Cragg said that Ms Fraser always performed at an outstanding level with an exceptionally high productivity level that few would match. She said that Ms Fraser had very high standards and continually produced far more than was required.

[20] Ms Fraser said that after S became a full-time employee, she became difficult to work with again. The job descriptions at that time required some collaboration between Ms Fraser and S to ensure the deadlines and expectations in relation to tasks in the Department were met. Ms Fraser's supervisory role was continued.

[21] Ms Fraser raised her frustrations about her working relationship with S with Dr Cragg in mid 2003. Her 2003 Performance Development Review (PDR) records an agreed professional objective for 2003-4 is *to continue to strive to have a good working relationship with the* Under training and support required to reach objectives it is recorded *to expect support from the HoD in matters related to working with the* A very similar objective and support was recorded in the 2004 PDR . The evidence does not support any significant issues between S and Ms Fraser during 2001 or 2002.

[22] Ms Fraser said that by the second semester of 2003 she was having to do all the tasks herself as S would not assist and that there was an enormous workload.

[23] Dr Cragg said that she sensed that Ms Fraser may have been critical of S because she was not doing the work as fast as Ms Fraser. She recalls saying something to the effect of *are you trying to benchmark S against yourself?*. Ms Fraser did not accept that was the situation. Dr Cragg said that it would have been rare for anyone to have matched Ms Fraser's productivity levels because they were so high. Dr Cragg said that she was happy with S's performance and that S had different strengths to Ms Fraser.

[24] Dr Cragg made some modifications to both S's and Ms Fraser's job descriptions in late 2003 and 2005. Dr Cragg thought that defining the roles more may reduce the friction between them. She said that both S and Ms Fraser liked ownership of the jobs they were working on and some of the overlap between the tasks they had to complete was removed. There was still requirement for the two of them to work on some projects together. Ms Fraser said that S refused to overlap in any task and I accept that S was not particularly motivated to assist Ms Fraser.

[25] There were issues about S playing the radio as both S and Ms Fraser worked in the same area. Dr Cragg talked to S about the matter. Ms Fraser said the radio continued to be played and S played a talkback station that was, as Ms Fraser put it, unbearable. Ms Fraser said that S continued to do this even after Dr Cragg spoke to her about this matter. I accept Dr Cragg's evidence that she was not aware that the radio was still an issue for Ms Fraser.

[26] Ms Fraser also raised some concerns about S's use of personal emails. Dr Cragg said that she did not think it was unreasonable for S to send some personal emails at work. She said that was an example of Ms Fraser's black and white views on things that she thought any personal emails were a form of stealing time.

[27] The evidence from Ms Fraser was that S's behaviour could be abusive because she would shout at her. I find that Dr Cragg was aware of one such incident where there were raised voices. She did not consider on that occasion it was necessary to intervene and I am not satisfied that the decision not to do so in that case was unreasonable.

[28] Ms Fraser took some leave over the Christmas period at the end of 2003 and on returning to work at the beginning of February 2004 said that she was faced with a backlog of work. Ms Fraser said that S would not answer her when she asked for

information about work dealt with in her absence. Ms Fraser said that her migraines, back and neck pain returned within a week of going back to work.

[29] At that time Ms Fraser advised Dr Cragg that she was having difficulty supervising S. Dr Cragg changed S's reporting line from early 2004 so that S reported directly to Dr Cragg and not to Ms Fraser. There is a dispute about whether Ms Fraser told Dr Cragg that she would have to leave because of S at that time. Dr Cragg denies that Ms Fraser ever told her that she was considering leaving because of S until she actually announced her resignation in February 2006. I accept, that Ms Fraser probably felt like leaving because of S. I find on the balance of probabilities, though, that she did not articulate that to Dr Cragg. It is more likely that she expected Dr Cragg to realise the depth of her feelings about the problems in the relationship from her raising of issues about S with Dr Cragg. Even if I am wrong in that conclusion, then it is likely at that time that Dr Cragg considered the solution was to take over the direct supervision of S and that did occur.

[30] Dr Cragg said that she frequently found Ms Fraser's statements very convoluted and ambiguous and full of mixed messages. I formed the view from the evidence that when Ms Fraser clearly communicated what was concerning her in relation to S then Dr Cragg took some step that she thought appropriate toward addressing the matter. It may not have been the approach though that Ms Fraser wanted Dr Cragg to take.

[31] Ms Fraser did discuss the possibility of working part-time in 2004 and 2005. Dr Cragg took that discussion to be a sounding out of thoughts rather than a specific request. I accept that Dr Cragg did not understand Ms Fraser raised the possibility of part-time work because of the difficulties in the working relationship with S. Given that Ms Fraser was a full-time employee, it was not unreasonable, for Dr Cragg to want to be very clear that Ms Fraser wanted to go part-time before she took steps in that regard. It is important not to consider these conversations with the benefit of hindsight.

[32] Ms Fraser commenced taking medication for anxiety in September 2004. Ms Fraser's did not tell Dr Cragg that she had been diagnosed with an anxiety disorder. Dr Cragg was aware that there were periods during Ms Fraser's employment when she suffered from back pain, but thought the pain came from

Ms Fraser working at the computer for extended periods of time, not as a result of tension stemming from the difficulties with S.

[33] Ms Fraser said that she would raise with Dr Cragg that she was stressed by her workload. Dr Cragg said in her evidence that she did not recall stress being raised in that way in terms of workload. It would be less apparent to Dr Cragg that Ms Fraser was not coping than it may be with other employees because Ms Fraser's performance was always outstanding. I think there would in all probability have been discussions between Ms Fraser and Dr Cragg about work pressure because there were busy periods. Dr Cragg would talk about how the work could be reprioritised. I am not satisfied that Dr Cragg was told, or should have realised, that Ms Fraser was not coping with her workload and/or that it was because of S's failure to assist.

[34] In reaching that view I have considered the evidence as a whole including what was discussed at the first meeting Ms Fraser had with Ms McNichol after she handed in her notice of resignation. I shall come to that meeting shortly. I have also placed reliance on the record of outcomes of the PDR s 2003-2005 (inclusive). Had workload been an issue for Ms Fraser then I would have expected something to appear in those records, particularly in terms of the support Ms Fraser required to reach the objectives which are set out. It is certainly recorded in 2003 and 2004 that Dr Cragg was to support Ms Fraser in matters relating to working with S, but that is not specific in terms of any difficulties with the workload.

[35] Throughout the time that Dr Cragg was Head of Department there would be a few occasions each year when she would observe Ms Fraser in tears. I accept Dr Cragg's evidence that when she enquired she was told the tearfulness was caused by hormonal issues due to menopause or allergens rather than because of S or stress. Toward the later period of her employment particularly during the notice period, Ms Fraser said that she would put Dr Cragg *off the scent* as to the reasons behind her tearfulness.

[36] There was some discussion in or about 2004 and 2005 about the possibility of introducing a departmental administrator into the Department. Ms Fraser thought this may provide considerable assistance to her. As it happened, this possibility did not come to fruition.

[37] Dr Cragg instigated timesheets for S and Ms Fraser in early 2005 to give her a better understanding of any workload issues. She said that she wanted to know if S had enough to do and whether extra secretarial assistance was required. Ms Fraser hoped that the truth would come out that S was not working or, that she would actually start working. She was disappointed that nothing seemed to change.

[38] Dr Cragg did look at the timesheets, but said that S and Ms Fraser completed the timesheets differently which made formal analysis impossible. Dr Cragg said that the timesheets were useful in giving her a better appreciation of what both employees were doing and she was able to observe some strengths and weaknesses of each employee.

[39] Ms Fraser said that she could not understand why S was getting away with her time recording and did some monitoring herself of S. During one week in July 2005 Ms Fraser monitored S's comings and goings from the office and discovered that she was over estimating the amount of time spent on tasks so it looked as if she was busy and that the fact she was writing personal emails or away from the desk was not obvious. Ms Fraser recorded S's movements in writing for the week.

[40] Dr Cragg completed a PDR in August 2005 for Ms Fraser. Ms Fraser commenced her performance review by raising issues about S particularly with respect to recording of timesheets. Dr Cragg was quite firm with Ms Fraser and would not discuss issues with S. She would not permit Ms Fraser to present her own findings for the week in July 2005. Dr Cragg said that a performance development review was not the correct time for discussing issues about S. No other time was made by Dr Cragg to do so and no further discussion about this matter. Ms Fraser cried at the meeting and the PDR records in terms of S, *discussed the ongoing problem she has of job sharing with the ... and agreed reluctantly that there did not appear to be an immediate solution.*

[41] 2005 was a particularly busy year because the Department celebrated its 100th anniversary. Ms Fraser received a bonus of \$900 for her extra efforts, on the recommendation of Dr Cragg. Ms Fraser said that she became depressed and disillusioned that nothing would be done in terms of her relationship with S and applied for other jobs within the University that year.

[42] The relationship between S and Ms Fraser deteriorated to the extent in 2005 that there was no real communication between them. Dr Cragg said that she knew the relationship between the two employees was not a good one but she did not assess it as dysfunctional.

[43] I accept that Ms Fraser approached Dr Cragg in or about December 2005 about issues in the office. Dr Cragg advised Ms Fraser to the effect that she was working separately to S and she needed to accept that fact. I am cautious in placing too much weight on that because much depends on the context of the conversation which was less than clear. It was indeed true and S and Ms Fraser were mainly working separately in that Ms Fraser was no longer supervising and therefore monitoring S's work.

[44] Ms Fraser took a month's holiday at the end of 2005 and felt much better during that time. She was able to reduce her medication for anxiety and her back and shoulder pain almost disappeared.

[45] When she returned from holiday, Ms Fraser said that all her symptoms returned with *fury*. She said that there was a backlog of work that had only been partly attended to or ignored. Ms Fraser said she understood from another staff member that S had been playing board games with other staff over the period.

[46] Ms Fraser raised the issue about emails not being cleared with Dr Cragg. Dr Cragg said that she made a mental note to talk to S at Christmas 2006 about that matter.

[47] Ms Fraser made an appointment with the University Mediator in late January 2006. The Mediator suggested three options to Ms Fraser. These were to maintain the status quo and care less, to take time off and the third was to participate in a mediation process the University follows to help restore the relationship with S.

[48] Ms Fraser decided to resign.

Circumstances of the resignation and notice period

[49] Ms Fraser approached Dr Cragg on 24 February 2006 and told her that she was resigning but would work through until 30 June 2006. She said that the reason she was resigning was that she could no longer work with S. Ms Fraser explained in

her evidence that she had given four months notice to assist the University and for financial reasons.

[50] There was agreement that Ms Fraser told Dr Cragg that there should have been mediation initiated between S and Ms Fraser. Mediation had not been mentioned prior to that time as an option to deal with the issues between the two employees. Ms Fraser probably told Dr Cragg that she had undermined Ms Fraser's relationship with S. Ms Fraser may have mentioned that she was suffering some stress because of the difficulties in the relationship with S. In any event, stress was mentioned in the resignation letter provided some days later on 6 March. The resignation letter stated:

6 March 2006

Dear Pat,

Following our discussion on 24 February I confirm that I will be leaving on 30 June.

I am immensely appreciative of the 11 years employment I have had in the Department but do not wish to continue in this type of employment due to stress related problems that have worsened in recent years.

*Yours sincerely,
Carol Fraser*

[51] I find that this was the first time Dr Cragg had actual notice that Ms Fraser suffered from stress related problems in terms of the interpersonal issues with S.

[52] Ms Fraser included with her resignation a copy of a report dated 2 March 2006 from her physiotherapist, Wendy Lockhart. The report from Ms Lockhart set out details of the pain that Ms Fraser was experiencing with her neck, shoulders and headaches. Ms Lockhart said in her report that with regard to the nature of Ms Fraser's work, the combination of time restraint pressures and the increasing irritability of her symptoms that she had discussed the various options that may be open to her. Ms Lockhart concluded her report by saying:

I do believe that she will continue to experience these persistent symptoms long as she remains working in her current environment. I have encouraged her to be proactive with regards to her health, recommending she considers all aspects of her work and leisure activities.

[53] Ms Fraser said that Ms Lockhart advised her verbally that she should not continue even working on computers and that it would take 2 or 3 months for her back and neck to come right. Ms Fraser said that the neck and shoulder pain was caused by tension and stress from the work environment rather than the workstation itself.

[54] I think it more likely that Ms Fraser's evidence that Dr Cragg said in late February 2006 *I can't get rid of S* and there is *nothing I can do* was in the context of Ms Fraser advising that she would stay in the department if S was dismissed. If that was not said in late February 2006 then it was at some later stage during the notice period. I accept Dr Cragg's evidence that she said words to the effect that there were no grounds to dismiss S. This was because Dr Cragg considered S's performance satisfactory and did not consider there were grounds to dismiss or performance manage her.

Meeting 16 March 2006

[55] After Ms Fraser had handed in written notice, she attended a meeting on 16 March 2006 with Ms McNichol and Cath Logan, the University's Occupational Health Nurse.

[56] There is considerable dispute about what occurred at the meeting. The most reliable evidence as to what was said is a letter dated 30 March 2006 which Ms McNichol wrote to Dr John Heydon, who specialises in the area of industrial health, after her discussion with Ms Fraser. Ms Fraser emailed Ms McNichol about the letter and advised that the information to Dr Heydon had been relayed clearly and accurately in the letter. I am of the view that some of Ms Fraser's written evidence about the meeting is more likely to be confused with a later meeting or email sent.

[57] I find there was a discussion during the meeting about the key stressors for Ms Fraser. Ms Fraser said her primary stressor was her working relationship with S. Ms Fraser did not advise that workload issues and the work environment were potential stressors and said that they were manageable. Any muscular-skeletal complaints were seen as secondary to the interpersonal relationship issue. Ms Fraser did talk about getting some sort of gratuity or medical retirement allowance from the University at that meeting because she would not be able to work for some time at the end of her notice period.

[58] Ms Fraser said that she wished to ultimately take up a position in a smaller department of the University or elsewhere. I am not satisfied that Ms Fraser asked for, or that it was clear to Ms McNichol that she wanted, a transfer to another department to be considered for her notice period. Ms McNichol advised Dr Heydon that Ms Fraser had visited her General Practitioner as well as Mr Lockhart and that both had apparently advised she should have a break before working again in the future. Ms McNichol attacked Mr Lockhart's report

[59] Ms Fraser said that she had told Ms McNichol and Ms Logan at that first meeting that she had not been supported by Dr Cragg in terms of her relationship with S. I am not satisfied that was discussed at that first meeting, but it was raised subsequently by Ms Fraser.

[60] Ms Fraser made it clear that she did not want to pursue any resolution of potential workplace interpersonal relationship issues because the process would be too stressful.

[61] The letter to Dr Heydon reflects that Ms Fraser said she was looking forward to assisting the Department with statistical analysis and mapping projects over the next few months. EAP was also offered to Ms Fraser at the meeting.

[62] Ms McNichol asked Dr Heydon in her letter to attend upon Ms Fraser and advise whether:

1. *From a medical perspective, there are any steps or processes, that the University can assist Carol with during her notice period. Whilst Carol does not wish to pursue any potential resolution of the interpersonal relationship issues within her workplace, if there are any other methods that can be utilised to provide support with any stress related components, this would be most useful.*
2. *Carol's expectation (and perhaps that of her medical advisers) that she will be able to return to work, is a reasonable one. If not, then the University may consider retirement on medical grounds as an alternative to resignation.*

[63] Ms Fraser said it was never put to her to have some leave during her notice period. Ms Fraser told me that unless she was unable to get out of bed she would not have felt good about taking a sick day. She said though that she would have taken

leave if there were other things offered by way of assistance as well with respect to identifying how sick she was and what was required for her rehabilitation.

[64] Ms McNichol said that she could not specifically record discussing with Ms Fraser the possibility of taking time out to consider options, but that it is highly likely that she did. Ms McNichol said that she knew Ms Fraser had 90 plus days of sick leave and Ms Fraser was aware of this as well.

[65] I am satisfied that there were some questions put to Ms Fraser during the meeting about the length of Ms Fraser's notice period and whether she would be safe during that period, given that she did not want workplace intervention. I accept that Ms Fraser was quite clear that she did not want workplace intervention in the sense of attempting to resolve issues between her and S and she accepted that she could carry on for the notice period. That did not in my view extend to Ms Fraser not wanting any investigation at all into how the situation between her and S had been managed in the past and/or could be during the notice period. Ms Mc Nichol did not meet with Dr Cragg until late May.

[66] I think it likely that if Ms Fraser had been offered some time away from the workplace on sick leave then that would have been recorded in the letter to Dr Heydon. I also think it likely that part of the advice requested from Dr Heydon would, in those circumstances, have been whether Ms Fraser was well enough to work during her notice period.

[67] I find in conclusion that it is less probably that Ms McNichol did suggest some time away from the workplace during the meeting.

Following 16 March meeting

[68] Ms Logan conducted a workstation evaluation after the meeting and Dr Heydon met with Ms Fraser and sent a letter to Ms McNichol recording the visit dated 2 May 2006.

[69] The letter from Dr Heydon said that he had clarified with Ms Fraser that it remained her firm intention to resign on 30 June 2006. Dr Heydon said that he agreed with Ms Fraser's expectation that she would be able to return to paid employment. He said that from a medical perspective the interventions available would include workplace intervention, which Ms Fraser did not wish to pursue. He noted that in

terms of personal treatment, Ms Fraser was already attending her own doctor and had access to her physiotherapist. Dr Heydon did advise that one way the University could assist would be counselling.

[70] Ms Fraser took up the option of counselling. She also sent the following email to Ms Logan, the Occupational Health Nurse, on 2 May 2006. The email provided:

Understandably Cath I do feel angry that the situation has come to me having to make the decision to leave. I do not wish to damage my relationship with the University – I hope to return to work at the University when I have de-stressed.

I have a history of working for the University dating back to when I was 20 (I'm 48 now). I have worked for the Printery, OUSA, Consulting Group. Physical Education and Physiology over this period of time. (Not continuous, I've had children during this period and part-time jobs elsewhere).

The help you are offering has come far far too late. I don't ask for money, but I am asking for a sick leave payment for the period of recuperating and not being able to work. Additionally I seek continuation of service if and when I return.

My current situation started occurring with the changeover of HoD in 2001 – that is a long time. I've stuck it out, even changed my direction of study to attempt to solve the problem. That's a long long time to work in the stressful situation. No wonder my doctor has diagnosed me with an anxiety disorder.

I don't wish to threaten, I'm just asking for some consideration and the chance to return when I'm better.

Carol.

PS My physio visits cost-\$35 a visit and my doctor \$50 not to mention the prescriptions – it will be interesting, for me, to see if these visits reduce substantially when I stop.

[71] That email was the first time there had been reference to Ms Fraser's doctor diagnosing her with an anxiety disorder. Ms McNichol said it was the first time that there was a suggestion that Dr Cragg had potentially caused or contributed to the stress. As a result, Ms McNichol and Ms Logan went for the first time to talk to Dr Cragg on 26 May 2006. There was no further follow up with Ms Fraser at this time from Human Resources as Ms Logan had confirmed that the counselling sessions were under way. There was nothing arising from Ms McNichol's discussion with Dr Cragg that suggested to her that Dr Cragg was responsible for the situation.

[72] On 29 May 2006 the psychologist that Ms Fraser was seeing under the employee's assistance scheme (counselling) wrote to Ms Fraser's doctor and advised that Ms Fraser reported to her of vomiting blood, sleep difficulties and nearly collapsing at work. The psychologist advised *I think she is pushing herself too hard to continue with the date of resignation, and should immediately take some stress leave, in order to be able to recover from the physical effects the situation is having on her.*

[73] Ms Fraser said that she was told by the psychologist that she *may one day just get into her car and not know where she lives.*

[74] Ms Fraser went directly to her doctor and took about one week's sick leave at that time.

[75] Ms McNichol did not know about this correspondence or the reason Ms Fraser took some sick leave. There did not appear to have been consideration after the 2 May email whether Ms Fraser was still well enough to keep on working or investigation into the reason for her absence in late May 2006.

20 June 2006

[76] Ms McNichol met with Ms Fraser again on 20 June 2006. Ms McNichol and Ms Fraser have different recollections with respect to how the meeting opened. I do not need to determine that matter for my purposes. I accept Ms McNichol's evidence that the purpose of the meeting was to provide Ms Fraser with a letter about her request for payment and about continuation of service. I find that meeting was the first time Ms Fraser mentioned that her workload was a stressor. Ms Fraser probably used words like *sweetie* and *lovely* to describe Dr Cragg but also said that Dr Cragg had let the situation with S go from bad to worse. Ms Fraser mentioned her PDR 's and said that they contained her request for support.

[77] Ms Fraser then advised Ms McNichol that the counsellor's opinion was that she needed at least six months off work before returning to any work. Ms Fraser asked Ms McNichol to contact her counsellor and gave her the counsellor's card. Ms McNichol did not make any direct contact with the counsellor before Ms Fraser left her employment on 30 June 2006. It seemed that the only contact made with the counsellor was by Ms Logan.

[78] Ms McNichol gave Ms Fraser her letter in a sealed envelope. Ms Fraser did not take the letter. Ms McNichol advised Ms Fraser that she would not be entitled to payment of a medical retirement gratuity as it was clear she wanted to return to work. She confirmed that there was no entitlement to other money. Ms McNichol advised that as Ms Fraser had resigned and further employment was not guaranteed, continuity of service could not be available.

Last few days of employment

[79] On 22 June 2006 Ms McNichol emailed Ms Fraser about some concerns that Ms Fraser had expressed with respect to being able to cope with her last week of work. Ms McNichol suggested that they talk about the concerns with Dr Cragg with a view to having a plan in place. Ms McNichol requested that Ms Fraser meet to work through any issues that may affect her last working week.

[80] Ms Fraser emailed Ms McNichol back and said that she did not want her support for her last week. She advised that she preferred the EAP appointments and again asked Ms McNichol to obtain a report from the EAP adviser prior to making any decision about her case.

[81] Ms McNichol wrote to Ms Fraser by letter dated 30 June 2006 about her resignation and request for monetary compensation. Ms McNichol said, in the letter that there was no reasonable basis in her opinion for payment of the sick leave gratuity or the like. She said amongst other matters –

... it appears that Dr Cragg has been proactive in the support that has been offered when issues have been raised, that she has taken reasonable steps so as not to expose you to unnecessary risk of injury to physical or psychological health. You have also declined offers made by the University to assist you with seeking potential resolution with the various issues you have raised.

[82] Ms McNichol in the letter did offer to extend Ms Fraser's resignation by one month as a gesture of goodwill.

[83] The parties then attended mediation in July 2006. However, matters were not resolved. The offer in the letter of 30 June was subsequently withdrawn.

[84] Ms Fraser did not feel well enough to work for a period of about seven months following her resignation and at the time of the investigation meeting was only working part-time hours.

Was Ms Fraser's resignation cause by a breach of duty on the part of the University?

[85] Mr Dorking accepted in his submissions that the University had a duty to provide Ms Fraser with a safe workplace and a safe system of work.

[86] Ms Beck in her submissions said that Ms Fraser resigned because of serious issues with S and the inadequate support that Dr Cragg provided. Ms Beck said that Dr Cragg was not willing to engage in proper discussion and conflict resolution and essentially left the parties to sort matters out themselves. Ms Beck submits that Dr Cragg knew that Ms Fraser was experiencing significant stress and hardship as a result of the relationship with S and that it was a breach of duty to provide a safe workplace which resulted in the resignation.

[87] I accept that Ms Fraser resigned because she did not want to continue working with S and that she felt unwell and unhappy at the time she gave her notice. She thought that Dr Cragg should have done more to assist. I find that view intensified during the notice period possibly as a result of the EAP sessions with Ms Guttridge.

[88] The University was obliged to provide good and safe working conditions and take care not to place Ms Fraser at risk of injury or further injury to her physical and/or psychological health. Ms Fraser has to establish that prior to her resignation Dr Cragg knew or ought to have known that there was a risk of harm to her and failed to take reasonable steps to avoid that risk.

[89] Dr Cragg knew there were difficulties in the relationship between S and Ms Fraser. She thought the issues could be resolved by defining their respective tasks, controlling work flow as much as possible and removing Ms Fraser's supervision of S. Dr Cragg would raise issues with S from time to time as well. I find that these were reasonable steps to take.

[90] Ms Fraser had a fairly heavy workload but I have not found that it was evident to Dr Cragg that it was unmanageable or that Ms Fraser said that she could not cope. Dr Cragg would intervene if she thought it necessary and reprioritise the work to make the workload more manageable. I am not satisfied that the evidence supports

the workload was unreasonable or excessive. There was no evidence of hours worked being unusually long. I do not find that Dr Cragg had actual knowledge or should have known that S's performance contributed to an unreasonable increase in Ms Fraser's workload.

[91] It was only well into the notice period that I find concerns about workload were clearly mentioned. I cannot rule out the possibility that these concerns were mentioned because Ms Fraser was under the misunderstanding that she was going to be replaced by two full-time workers when she left on 30 June 2006. Dr Cragg said at the time of the investigation meeting that the work continues to be performed by only two people although the Department size has increased. A striking example of Ms Fraser's work ethic is that during her notice period she chose to prepare an instruction manual for the new person to be employed in her position. Dr Cragg did not request the manual, though clearly found it to be a highly beneficial document. Ms Fraser's consistently high standard of work and her initiative in terms of doing additional tasks, does not support that she could not cope with the workload or that would/should have been evident to Dr Cragg.

[92] Any employment relationship has its ups and downs which can include interpersonal conflict between employees or groups of employees. It is easy with the benefit of hindsight, knowing that Ms Fraser became unwell to be critical of what was done or what was not done about the conflict between Ms Fraser and S. That is not, however, the appropriate way to consider the events and the steps taken. Whether or not the steps taken were reasonable has to be considered in light of the knowledge Dr Cragg had at the time.

[93] I have not found that the evidence supports Dr Cragg had actual knowledge or should have known that Ms Fraser was suffering physical and mental health difficulties as a result of the workload or the conflict between S and Ms Fraser. There was no significant sick leave taken over the period. Ms Fraser led Dr Cragg to believe that other medical conditions were causing her tearfulness on the occasions when that was observed.

[94] The events also have to be considered in light of the fact that the University had obligations and duties to S as well as Ms Fraser. Dr Cragg felt that S's performance was perfectly adequate. She had no difficulty with S's time keeping,

work performance or using work time to send/receive personal emails. Dr Cragg had taken over the supervision of S and that was no longer Ms Fraser's role.

[95] There is one matter though which I think was poorly handled by Dr Cragg. That is the events at the time of the 2005 PDR . Dr Cragg was probably justified in not dealing with the time recording or S's performance during the meeting. Dr Cragg should, however, have made a time after the meeting with Ms Fraser to discuss the issues.

[96] I am of the view that Ms Fraser recording S's time worked and absences for a week was quite unusual. This should have raised some real concerns for Dr Cragg which she should have talked to Ms Fraser about. The parties to an employment relationship must deal with each other in good faith and in accordance with the obligations of trust and confidence. Dr Cragg was required to be responsive and communicative with Ms Fraser. Those obligations in my view required a further meeting to discuss issues rather than simply leaving the matter.

[97] Ms Fraser signed off the record that there was no immediate solution to her difficulty job sharing with S. The University has good solutions to inter personal relationship difficulties. Dr Cragg could and in my view, should have asked for assistance from elsewhere in the University, including the Human Resources team about how to address the difficulty between Ms Fraser and S.

[98] Ms Fraser was unhappy at and following the PDR. She internalised some, but I do not find all, of her issues about S from that point on. I do not find though that the evidence is sufficient to conclude that that event caused her illness and that it was a serious enough breach to be repudiatory in nature in terms of a failure to provide a safe workplace.

[99] Aside from that matter, I find that Dr Cragg took reasonable steps to protect Ms Fraser's health and welfare which was proportionate to known and avoidable risks (*Attorney-General v. Gilbert* [2002] 2 NZLR 342 CA). I do not find that Dr Cragg knew that Ms Fraser suffered from stress or was unwell as a result of that stress prior to her resignation.

[100] In conclusion, I find that there was only one breach of duty on the part of the University during the time leading to Ms Fraser giving notice of her resignation.

Did Ms Fraser affirm her contract with the University and/or were there other actions inconsistent with the end of the contractual relationship and the claim for constructive dismissal?

[101] If there has been repudiatory conduct on the part of the employer, an employee may either elect to treat the contract as at an end because of the conduct or to affirm the contract in knowledge of the breach.

[102] A reasonable notice period is not fatal to a claim for constructive dismissal particularly when it is a contractual notice period – *ParaFranchising Ltd v. Whyte* [2002] 2 ERNZ 120. A notice period of four months when Ms Fraser's contractual notice period was only one month may well support an affirmation of the contract.

[103] I do not conclude in this case that the notice period, although lengthy, on its own constitutes affirmation of the contract between Ms Fraser and the University. In my view, it is the notice period together with the actions of Ms Fraser during the notice period when viewed together which are inconsistent with a claim for constructive dismissal and more consistent with the continuation of the employment relationship.

[104] These actions are Ms Fraser asking for continuity of service, medical retirement, applying for another position within the University during her notice period, asking for a sick leave payment for a period of recuperation at the end of the notice period and advising that she hoped to return to the University. I find these acts, when viewed together with the notice period, show affirmation of the contract by Ms Fraser.

[105] If I am incorrect that Ms Fraser affirmed her contract with the University, then I do not find that there were breaches of sufficient seriousness to make it reasonably foreseeable that Ms Fraser would not be prepared to continue working.

[106] Ms Fraser's claim that she was constructively dismissed fails.

Was Ms Fraser's employment or a condition of that employment affected to her disadvantage by an action or actions of the University?

[107] I find that Dr Cragg not following up with Ms Fraser after the 2005 PDR about her clear concerns with respect to S caused Ms Fraser disadvantage in that she became unhappy, disillusioned and did not believe anything would be done about the situation.

[108] I have also considered the actions during the notice period. The University knew shortly after Ms Fraser resigned that both her doctor and physiotherapist had advised her to take a break before considering working again. That is recorded in Ms McNichol's letter to Dr Heydon.

[109] Ms McNichol may not have specifically turned her mind to the reason for the break. It is probably not unreasonable for Ms McNichol to have considered that Dr Heydon may well discuss with Ms Fraser whether she was well enough to continue on at work. It would have been clear, however, from Dr Heydon's letter of 2 May 2006 that he had not had a discussion of this nature. Further, the University was aware of Ms Fraser's email of the same date that she had been diagnosed with an anxiety disorder and that she wanted a sick leave payment for a period of recuperating.

[110] The University, once it became aware that Ms Fraser was suffering from stress, had an obligation, not to expose her to unnecessary risk or further risk of injury to her physical or psychological health.

[111] It was clear in my view that as the notice period progressed, Ms Fraser did become more unwell. She also became angry and upset about what she perceived were Dr Cragg's failings to deal appropriately with the conflict. She formed the view that she would need a longer period of recuperation at the end of the notice period and advised Ms McNichol at the meeting on 20 June 2006 that she would need six months break. Ms Fraser was also required to take all practical steps to ensure her safety at work. It may have been that her personality was such that she pushed herself to continue on at work rather than taking leave.

[112] I find that the University had sufficient knowledge to put it on notice that Ms Fraser may not have been well enough to have continued to work during her notice period. This was a matter that should have been specifically put to her, if not at the meeting on 16 March 2006, then very definitely by way of follow up after her 2 May 2006 email. Continuing to work did not benefit Ms Fraser in terms of her physical or psychological health. It probably extended the period required for her eventual recuperation. Importantly too there was no real ability for her to consider her options. It was clear from her email correspondence and various requests that she was quite confused about what she wanted and how that would be achieved. Ms Fraser

was also interviewed for another position at the University during her notice period. She said she broke down during the interview.

[113] I find that during Ms Fraser's notice period there were some good initiatives taken by Human Resources at the University with respect to her referral to Dr Heydon, discussion of workplace intervention and counselling options provided under the EAP scheme. The University failed though as part of its duty to provide a good and safe workplace when it did not take steps to clarify whether Ms Fraser was well enough to continue at work during her notice period, did not offer/suggest leave, did not follow up with her after her email of 2 May 2006 and also did not speak to Dr Cragg at an early time after notice was given as to whether the workplace was safe in circumstances when Ms Fraser continued to work with S. It was important that the University be communicative and responsive with Ms Fraser during her notice.

[114] Ms McNichol did not follow up in late June 2006 with the EAP counsellor and ask for a report. I do not find that this disadvantaged Ms Fraser in terms of health and safety because it was so late in the notice period that it was unlikely to have helped. It could well have influenced any potential payment by the University although in my view Ms McNichol had already made a decision by that time. I am not satisfied, although that matter was regrettable, that it disadvantaged Ms Fraser.

[115] An employer's failure to provide a safe workplace can amount to a disadvantage. I find that Ms Fraser was disadvantaged by the failures in this case as set out above. I am satisfied, and accept Ms Fraser's evidence, that her stress levels increased during the notice period, that she became quite unwell and could not properly assess her options with the University.

If Ms Fraser was disadvantaged then were the actions unjustified?

[116] I find that the actions of Dr Cragg in failing in terms of her obligations of trust, confidence and good faith to follow up with Ms Fraser after the 2005 PDR was unjustified because it was not what a fair and reasonable employer would have done at the time.

[117] The University says that its actions during the notice period to provide a safe workplace were justified because it was entitled to believe that Ms Fraser was well enough to continue working and that the four months notice period did not suggest there was any difficulty in her doing so. Further, it says that Ms Fraser never told

anyone during her notice period that she was sick and she did not take extended sick leave apart from a short period in late May 2006.

[118] I find that the actions of the University in not investigating whether Ms Fraser was well enough to work through her notice period in the circumstances of this case and failing to investigate with Dr Cragg whether the workplace was a safe one for Ms Fraser to work out her notice, were unjustified. Ms Fraser had 90 days available as sick leave. The actions were not what a fair and reasonable employer would have done in all the circumstances.

[119] Ms Fraser has a personal grievance that her employment was affected to her disadvantage by unjustified actions of her employer and she is entitled to remedies.

Remedies

[120] Ms Fraser is entitled to compensation for the failure by Dr Cragg to follow up with her after the 2005 PDR. Ms Fraser was clearly distressed at the time of the PDR and afterwards felt that nothing would be done. There were other solutions available to the interpersonal difficulties and these should have been explored.

[121] I do not find that Ms Fraser contributed to the personal grievance in terms of this breach. I am of the view that an appropriate award in terms of this matter is a sum of \$3,000 under s.123C(1) of the Employment Relations Act 2000.

[122] I order The Vice Chancellor of the University of Otago to pay to Carol Fraser the sum of \$3,000 being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[123] Ms Fraser is also entitled to compensation for the failures by the University to provide a good and safe workplace and take reasonable steps not to expose her unnecessarily to further risk to her physical or psychological health. I accept that Ms Fraser found the notice period difficult and that her stress levels increased during that time and she became unwell. In terms of these breaches, I find Ms Fraser did contribute because she did not advise the University that she was unwell or take all practical steps to ensure her own safety at work. She did not appear to have followed her own Doctor's advice.

[124] In the circumstances of this case, I am of the view that proper communication and discussion with Ms Fraser about health would in all probability have resulted in Ms Fraser taking leave for at least part of her notice. Accordingly I am of the view that there is a real likelihood her recuperation period could have been reduced. In these circumstances I find it is appropriate for Ms Fraser to be reimbursed for part of her lost wages. Ms Fraser seeks 13 weeks lost wages.

[125] Taking contribution into account, I make an award for lost wages for 6 and a half weeks. I also consider compensation in the sum of \$6,000.00 would be appropriate taking contribution into account.

[126] I order The Vice Chancellor of the University of Otago to pay to Carol Fraser a sum equal to 6 and a half weeks lost wages under s.123 (1) (b) of the Employment Relations Act 2000. If there are difficulties in calculating this sum by the parties, leave is reserved for either party to return to the Authority.

[127] I order the Vice Chancellor of the University of Otago to pay to Carol Fraser the sum of \$6,000.00 without deduction being compensation under s.123 (c)(ii) of the Employment Relations Act 2000.

Costs

[128] I reserve the issue of costs.

Summary of finding and orders made

- I have not found that Ms Fraser was unjustifiably constructively dismissed.
- I have found that there were unjustified actions of the University that disadvantaged Ms Fraser in her employment. One action was prior to Ms Fraser giving notice and another action was during her notice period.
- I have ordered with respect to the first unjustified action that The Vice Chancellor of the University of Otago pay to Carol Fraser the sum of \$3000.00. I have not found that Ms Fraser contributed to that personal grievance.
- I have ordered with respect to the second unjustified action that The Vice Chancellor of the University of Otago pay to Carol Fraser a sum equal to six and a half weeks lost wages and \$6000.00 compensation. I have

found that Ms Fraser contributed to this personal grievance and that is reflected in the awards.

- I have reserved the issue of costs.

Helen Doyle
Member of the Employment Relations Authority