

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number
WA 158/07
File Number 5074122

BETWEEN Bonnie Johnstone
(Applicant)

AND The Chief Executive in respect
of the Inland Revenue
Department
(Respondent)

Member of Authority: P R Stapp

Representatives: Bonnie Johnstone in Person
Susan Hornsby-Geluk for Respondent

Investigation Meeting: New Plymouth, 16 and 17 October 2007

Determination: 30 November 2007

DETERMINATION OF THE AUTHORITY-The New Plymouth Matter

Employment Relationship Problem

[1] Bonnie Johnstone has applied to the Employment Relations Authority with an employment relationship problem and is seeking to be reinstated to her job at New Plymouth. Her application involved a number of matters relating to her employment with the Inland Revenue Department (IRD or the Department) during the period of her employment at the New Plymouth office of the Department. The Department denied that she has any personal grievance and has contended that it acted fairly and reasonably at all times. The Department has opposed reinstatement. It has denied all Mrs Johnstone's other claims and remedies in her employment relationship problem.

[2] This determination is restricted to matters she has complained about in her employment relationship problem during the period of her employment with the IRD in New Plymouth. There is another matter before the Authority that related to her secondment in a position located in

Wellington that she made a complaint on when she returned to New Plymouth. That matter will be dealt with in a separate determination.

Issues

[3] How did the Applicant's employment end? Does she have any personal grievances against the department?

The Facts - the New Plymouth Matter

[4] Mrs Johnstone was employed at the Department as a Maori Community Officer in New Plymouth. She commenced her employment with the Department in October 1996. She was seconded to Wellington for the period July 2003 until March 2004 to work in the Maori Authority Project in the National Office. She took up the secondment in Wellington on 4 August 2003. She returned to New Plymouth in December 2003 but advised the Department that she was unwell and could not return to work. She went on paid leave for 6 months. She recommenced work in the New Plymouth office upon the Department deciding that she was fit and well to resume work. She resumed work in August 2004.

[5] Upon returning to New Plymouth Mrs Johnstone laid a complaint about matters associated with her secondment in Wellington. That will be dealt with in a separate Determination.

[6] On 11 March 2005 Mrs Johnstone laid a comprehensive complaint of harassment against Murray Rickerby, an area manager, in regard to his behaviour towards her at a meeting held on 8 March 2005. She also complained about other matters involving Mr Rickerby concerning Tax Returns, an investigation in 2003, Marcia Paurini, team leader, on her performance management, and support persons. She also requested a formal review of her remuneration under the IRD/PSA collective employment agreement.

[7] The Department provided a response through the Hamilton Service Centre Manager, Mr Kevin Moody, who was responsible for New Plymouth. He acknowledged the request for the review and outlined the process. On the other matters Mr Moody expressed the Department's opinion, action and rejection of the complaints. The action included safeguarding Mrs Johnstone's right to have a support person and noting its understanding that performance management plans were to be developed.

[8] On 13 April Mrs Johnstone acknowledged Mr Moody's action and raised a number of matters to do with the proposal on the formal review of her remuneration. She was accommodated with a suggested nominee and her approval sought on a third person on the panel. The process was delayed by agreement until Mrs Johnstone's nominee was available.

[9] The review panel, chaired by Darren Ryder, Acting Service Centre Manager Hamilton, met Mrs Johnstone on 8 June 2005, and interviewed other people on the same day. It made its findings and recommendations in a report dated 5 July 2005.

[10] The recommendations included the following:

Recommendations

After evaluating the process in the evidence provided we recommend:

- A. *Bonny's existing remuneration rating remains at 102% and the periods ended October 2003, October 2004 and June 2005 are not revisited.*
- B. *Bonny's performance management and remuneration assessment date be aligned with the standard 1 July to 30 June and a development plan and personal objectives are agreed upon for the period 2005 to 30 June 2006, by 31 July 2005.*
- C. *Jenni Murphy-Scanlon assist Bonny's Team Leader in defining appropriate objectives and evidence, so that they clearly set out the expectations for Bonny over the next 12 months to reach the outcome of 105% of the job expectation as she is seeking.*
- D. *Interim reviews throughout the 2006 period to be conducted at the end of October 2005 and February 2006 with the final review at the end of June 2006 with both Bonny's and her Team Leader's agreement, Jenni Murphy-Scanlon to facilitate these reviews.*
- E. *Given the breakdown in process for the 2003 and 2004 years, plus considering absences, if Bonny achieves and adequately evidences all the expectations of the position and objectives set out, and a percentage increase at the end of June 2006 is warranted, this is to be backdated to 1 November 2004.*
- F. *Performance reviews are conducted on a timely basis, and participated in jointly from now on.*
- G. *A coaching/relationship development programme is made available to enable a co-operative working relationship to be developed and maintained between Bonny and her Team Leader. This will require the participation of both parties (SOP appendix 5 – Remuneration Formal Review dated 5 July 2005).*

[11] Mrs Johnstone largely accepted the recommendations and they were approved.

[12] In July and August Mrs Johnstone approached Marcia Paurini, her team leader, and reminded her that the performance agreement-personal objectives and development plan-had to be in place by 31 July. Ms Paurini went on a secondment and an acting team leader was appointed causing a delay to the completion of the personal objectives and development plan. Discussion on the plan finally occurred at the end of August 2005.

[13] Mrs Johnstone held an opinion that Ms Paurini was challenging recommendations C and G of the panels' report. Mrs Johnstone set out her concerns in writing and in an exchange of emails took issue on the technical competencies Mrs Paurini was applying. Mrs Johnstone was informed that Mr Robin Tutt, another team leader, from Hamilton, would observe her in what are called: "advisories" (or "shadowing", a form of peer review). Mrs Johnstone has alleged Ms Paurini became difficult to deal with during this time because of her mood and confrontational behaviour.

[14] The parties continued to exchange correspondence on the review, the conducting of the advisories and Mr Tutt's report and the completion of the development plan. Mrs Johnstone and her support person had a series of meetings with Ms Paurini and Ms Jennifer Murphy-Scanlon, HR manager responsible for New Plymouth, to discuss Mrs Johnstone's interim performance review. In essence Mrs Johnstone had concerns about Mr Tutt's assessment of her not reaching 105% and that he had rated her performance at 95.5%, criticisms of her work and the failure to provide a development plan and that Ms Paurini was asserting her leadership over her. The discussions and outcomes culminated in a letter dated 30 May 2006 from the Department that there were some serious concerns regarding her performance.

[15] Mrs Johnstone wanted to ensure all matters were finalised before commencing with the next part of the performance review process and would not initial the interim performance discussion until all her comments and ratings had been considered and included in the document. She decided not sign it.

[16] Mrs Johnstone's and Ms Paurini's relationship became strained and Mrs Johnstone raised her concerns about the performance management with Mr Ryder, who in turn referred it to Mr Moody. Mrs Johnstone took issue with Mr Moody's reply. New issues had been raised by Ms Paurini about Mrs Johnstone taking time off for sick leave and wanting to know Mrs Johnstone's whereabouts during work hours: Mrs Johnstone took issue with these.

[17] On 24 March 2006 there was an interview held with Mrs Johnstone, her support person and Ms Paurini and Felicity Lister, team leader from another office, to clarify expectations and the areas of performance that Ms Paurini sought improvement on. Mrs Johnstone was accompanied on more advisories by Mr Tutt on 30 and 31 March 2006 to assess if she had improved.

[18] After 4 advisories Mr Tutt prepared a report critical of Mrs Johnstone's performance. She was given a copy and the concerns further discussed.

[19] Mrs Johnstone's performance was reviewed in April at a meeting with Ms Murphy-Scanlon that involved a discussion on the performance indicators that were recorded in writing dated 10 April 2006.

[20] During April and May Ms Paurini and Mrs Johnstone had a difficulty over alleged anomalies Ms Paurini raised about Mrs Johnstone's time recording for various dates and Mrs Johnstone was asked to explain. Mrs Johnstone took offence at this. They met and it was found that the wrong dates had been referred to by Ms Paurini who accepted she had made an error-
Investigation 1.

[21] On 6 June 2006 Mrs Johnstone raised a personal grievance alleging that the Department had failed to meet its obligations under clause 8.2.5 of the Collective Employment Agreement to resolve her complaint regarding remuneration. That letter reads as follows:

Kia Ora Kevin,

I acknowledge your letter of 20 March 2006 acknowledging issues raised in my letters to you of 18 February and 6 March 2006.

As you are aware, a formal request to review my remuneration for years ending October 2003 and October 2004 were raised, under provision 8.2.5 of the IR/PSA Collective Agreement 022. The issues in relation to the remuneration review, for those years were identified as, Team Leader Marcia Paurini failing to follow the performance management processes.

To resolve the situation, a review panel was agreed upon whereby, after evaluating the process and the evidence provided, the following recommendations were made ...

I accepted these recommendations in good faith as a means to resolve previous failed performance management processes. These recommendations allowed Marcia and myself to move forward with agreed objectives.

On 18 February and 6 March 2006 I wrote to you highlighting my concerns about failure to follow the recommendations as set out by the review panel, in particular recommendations E, F and G. I also highlighted to you the inappropriate behaviour by Marcia towards me.

This letter encloses further evidence of the deterioration to the recommendations made by the review panel as follows:

1. *Letter of 11 May 2006 – 2006 mid point review – Murray Rigby.*

As can be seen this letter reduces my overall performance percentage rating from 102% to 95.5% in support of a letter received from Marcia Paurini of 14 December 2005. Copies of letter attached.

Considering the review process is still in process 01 July 2005-30 June 2006 this rating is not only in breach of my Collective Contract Agreement it is also in breach of recommendation A set by the review panel, as advising existing remuneration rating remains at 102%.

2. *Letter of 30 May 2006 – Marcia Paurini*

This letter was as a result of an urgent meeting held 25 May 2006 between Marcia, myself, Jenni Murphy-Scanlon and the Virginia to discuss my development plan. The meeting resulted in a half hour provided to Virginia and myself to agree upon a pre-determined development plan provided by Marcia.

Although I was invited to add my comments and suggested development, the focus was more on my acceptance of the pre-determined development plan. As there were a number of elements identified in this development plan, I raised with Jenni the need for more time to consider the applications and impact of this plan on me. This however was not supported by Jenni.

There was an element of coercion whereby I felt pressured to accept the development plan before the meeting was to end. This was also evident in the timeframe given (half hour) to not only consider the details of the development plan, but also make changes to it.

As per recommendations B and C of the review panel the delivery of this development plan is in breach of the recommended timeframe of 31 July 2005.

To clarify my position, numerous requests and recommendations towards my development plan have been made to Marcia throughout the year. The last discussion regarding my development plan was in February 2006, whereby I was advised that Berys Smith, the acting team leader would now be taking over this role.

Finally parts of the development plan included Mr Robin Tutt completing observation/shadowing on a weekly basis, of my advisories. I had had two previous observations carried out by Mr Tutt, both resulting in undue and unreasonable pressure placed on me to perform in my role as Maori community officer. This was largely due to the lack of their guidelines and expectations by Mr Tutt, resulting in me trying to complete advisories to unknown measurements. The outcome in his report has placed me in an unhealthy demeaned position.

I believe Mr Tutt has limited experience and knowledge of the delivery techniques my role entails or the spontaneous client assessment processes required to make the advisory effective. Further to this Mr Tutt's interjection disrupted one advisory to the extent that the client's monitory feedback was one of confusion and concern for me.

To continue with weekly shadowing/observations by Mr Tutt adds to the deterioration of my health and wellbeing. This process adds undue and

unreasonable pressure and expectations on my health, safety and well-being and forces me into considering action to secure my overall well-being if it is to continue.

The pressures I have faced to date from Mr Tutt's visits have been:

- *Humiliating – staff asking me what he is doing, and why he keeps coming. Speculation by staff that I have done something wrong.*
- *Embarrassing – to my customers and myself when the pressure of responding to their queries is not spontaneous but met at time with a number of tongue twisted comments, moments of silence, loss of concentration and one instance a moment of blankness.*
- *Undermining – feedback from Mr Tutt has been negative in comments of “you are wrong”. On occasions he has corrected me in front of customers.*
- *Harassment – being placed in the situation. The unreasonable timeframe in which to perform.*

I have undertaken to meet all commitments and recommendations towards my Performance Management process (as set out by the review panel) without prejudice. I have met and agreed on processes as set out by Marcia and Jenny Murphy-Scanlon. This letter is to advise you that I am now raising this matter as a personal grievance against Inland Revenue. It has failed under provision 8.2.5 of the IR/ PSA Collective Agreement 022 to resolve my complaint. The process has instead placed undue pressure and unreasonable demands on my health and well-being and ability to perform my duties as a Maori community officer in a professional manner.

[22] Clause 8.2.5 of the collective reads as follows:

Review of individual remuneration decisions

If an employee does not agree with the outcome of their remuneration review, the following process will be followed:

Informal review

- *The employee will indicate verbally to their manager that they do not agree with the manager's decision regarding their salary level and state the reason why;*
- *The manager and employee will meet again to see if an agreement can be reached.*

If agreement cannot be reached, the employee will, within one month of the formal advice of the outcome of the remuneration review, notify the manager's manager in writing that they wish to seek a formal review and state the reasons why.

Formal review

A panel comprised of a nominee of the employee, a nominee of the manager's manager and an agreed independent person will carry out a review taking into account the reason for the review and make a recommendation to the manager's manager. The agreed guidelines for the review process are contained in the HR manual.

[23] Further advisories were carried out by Mr Tutt who says he witnessed further errors and had concerns that he says he discussed with Mrs Johnstone, and he reported on his findings. On 15 June 2006 Mrs Johnstone decided that she would not participate in further advisories and she advised the Department:

“The intensity and duration of the shadowing coupled with your reports has had a negative affect on my health and well being and the ability to perform my duties in a professional manner.”

[24] The Department responded to Mrs Johnstone’s letter of 6 June 2006 with a letter dated 23 June 2006. It rejected her personal grievance, explained its position on the performance management process, outlined the situation on the 2006 midpoint review, detailed the justification for the meeting held on 25 May 2006 and supported Mr Tutt’s involvement in conducting the advisories as he was an experienced officer. Unless more details were provide by Mrs Johnstone in regard to how she had been disadvantaged and what she was complaining about in regard to Mr Tutt’s alleged behaviour the Department required her to continue to be involved in advisories.

[25] On 7 July 2006 Mrs Johnstone’s representative, Ms Raukawa Simon, advised the Department that a medical opinion was being sought regarding the impact of the shadowing on Mrs Johnstone’s health. The Department was advised that Mrs Johnstone had taped an advisory that would support her opinion that Mr Tutt had interjected, passed comment and undermined her during the advisory.

[26] The Department replied explaining to Ms Simon the reason for the advisories. It also outlined its concern over the existence of a tape that could be subject to section 81 of the Tax Administration Act 1994 ie a breach of confidentiality of the administration of tax.

[27] On 11 July 2006 it requested Mrs Johnstone’s representative to give it the tapes of the advisory made by Mrs Johnstone because of its concern regarding section 81 of the Tax Administration Act. Mr Tutt knew at the time the advisory was being taped, but thought it was for training purposes. The Department gave until 13 July for Mrs Johnstone and her representative to hand in the tapes and transcripts. While that deadline was not met, the tapes were subsequently handed in.

[28] On 12 July 2006 a medical certificate was received that the Department considered had no diagnosis and no explanation as to why the shadowing may be the cause of alleged health issues for Mrs Johnstone. The Department was concerned and therefore on 14 July 2006 decided that Mrs Johnstone should refrain from completing any further advisories until the health issues were clarified.

[29] On 17 July 2006 Mrs Johnstone requested that she be allowed to start work at 6.00 am to make up lost time. Ms Paurini declined the request for various reasons such as health and safety issues, the availability of appropriate work at the time, operational requirements and that the Department was on notice that Mrs Johnstone had complained about being under stress. Mrs Johnstone was instructed to work her contracted hours: 7 hours and 35 minutes.

[30] On 24 July 2006 Mrs Johnstone was put on notice to attend a meeting and provide an explanation for taping the advisories, transcribing the tapes and failing to return them as requested. She was put on notice that the failure to adequately explain could mean disciplinary action, including dismissal.

[31] A meeting was held on 31 July to investigate Mrs Johnstone's possession of the tapes- Investigation 2. Mrs Johnstone was given an opportunity for further responses after the meeting, and her representative did respond. A decision was made by Mr Ryder that there had been breaches of the Tax Administration Act, a breach of the code of conduct and Mrs Johnstone had failed to follow a reasonable and lawful instruction. A warning was issued for 12 months, and Mrs Johnstone was requested to hand in the tapes. Although Mrs Johnstone is now complaining about the warning I find that she never raised a grievance in the 90 days required under the Employment Relations Act to pursue it. Therefore the Authority can not pursue it as a separate personal grievance.

[32] There was then some concern from Mrs Johnstone about what work she would be able to undertake, but agreed she would complete other administrative duties, undertake advisories with a new person to accompany her: Ms Ihipera Bethell. Also the parties agreed to go to mediation.

[33] On 3 August 2006 Ms Paurini requested Mrs Johnstone to amend her timesheets in accordance with her contractual hours of work because Mrs Johnstone's timesheets indicated that she had worked outside the standard hours on 21, 24, 25 and 26 July 2006.

[34] No response was received from Mrs Johnstone until 11 August 2006 when she provided a written explanation that the Department considered was insufficient. Ms Paurini wrote to her on 9 August 2006 requiring she attend a meeting to investigate her failure to amend and explain.

[35] On 15 August 2006 the Department held a meeting with Mrs Johnstone and her representatives and a decision was reserved. Before a decision was made Ms Paurini requested Mrs Johnstone to comply with the standard hours of work and amend her time records and that if she did not follow instructions her action could result in further action being taken.

[36] More timesheets exceeding the standard hours were handed in and Mrs Johnstone was again requested by Ms Paurini to amend them.

[37] Before any further advisories could take place Mrs Johnstone alleged that it was not Mr Tutt's shadowing that was distressing her but rather shadowing in general and that Mr Tutt's behaviour was a concern: The Department decided not to pursue any shadowing in the meantime.

[38] The parties attended mediation on 17 August 2006 out of which it was agreed that there would be further accompanied advisories, however Mrs Johnstone was unable to complete them on the first scheduled date due to a specialist appointment. Other planned advisories were affected by scheduling difficulties but it was agreed that upon the completion of 2 advisories there would be a meeting to discuss training and support. That meeting occurred on 4 September 2006 with Ms Paurini, Ms Murphy-Scanlon, Ms Johnstone and her support person. The Department's opinion that Mrs Johnstone was not performing to a sufficient level was conveyed and that further advisories would be needed. Subsequently the Department informed Mrs Johnstone that the advisories could only take place if she was well enough to attend to them. Mrs Johnstone terminated the meeting. She followed it up with a complaint that she found the meeting extremely stressful and objectionable. Mr Moody replied with his opinion of the situation that Mrs Johnstone says shocked her further.

[39] Mrs Johnstone complained that the situation was impacting on her health. The Department acted to safeguard her position and that of its own. Mr Moody raised and suggested medical retirement given the difficulties being experienced to resolve the problem with Mrs Johnstone. She declined. The Department moved away from that option.

[40] In the mean time not much progress was being made by the parties on Mrs Johnstone's performance reviews. Although the Department tried to arrange a date to hold a meeting for Mrs Johnstone's end of year performance review, she delayed because she wanted more time for legal advice, to respond to Mr Tutt's reports, to transcribe the taped advisory and respond to the Department and complete her part in the final performance discussion in completing the form. She asked to do this during work time. She was granted 2 hours to prepare a response to Mr Tutt's report during work time, but told the other matters would have to be done in her own time.

[41] On 29 August 2006 she was asked to meet a deadline of 31 August but she replied that the process was subject to a personal grievance.

[42] On 6 September 2006 Felicity Lister made a decision that Mrs Johnstone had provided a satisfactory explanation and that no action would be taken but instructed her on how to communicate with her team leader-Investigation 3.

[43] On 14 September 2006 Ms Lister initiated another investigation into time records that Mrs Johnstone had not amended when requested to do so by Ms Paurini. No meeting occurred-Investigation 4.

[44] On 26 September 2006 Mrs Johnstone complained/appealed to Mr Moody alleging that Ms Paurini had harassed her by altering the timesheets in order to ensure they were inside the standard hours. She also requested clarification on her role as a Māori Community Officer and expressed her opinion that since her role had been "semi-suspended" because of the Department's "serious concerns" that she opposed the action being taken. An exchange of correspondence between Mrs Johnstone and the Department's Solicitor then occurred. The investigation was not completed.

[45] On 21 September 2006 Mr Rickerby wrote to Mrs Johnstone enclosing a completed assessment of her performance and advised her that her performance was rated at 95% of fully competent. She declined to attend an appointment set to discuss her 2006/2007 performance objectives because she said she was waiting a response regarding the other "serious concerns" from the Department and her employment status. Until then she was not ready to move on.

[46] The Department provided clarification on the concerns which led to its decision for Mrs Johnstone not to undertake further advisories, but Mrs Johnstone proceeded to claim she had

responded. No further advisories were undertaken. Instead when she was at work she was required to carry out other administrative duties.

The Request to Open the Team Leader's Email and Use of the Photocopier

[47] Because Mrs Johnstone was not undertaking advisories other administrative duties were allocated to her by Ms Paurini, including replying to correspondence. However Mrs Johnstone requested support and training and approvals to access customer details before doing it. Another employee was organised to sit with Mrs Johnstone and act as a coach.

[48] On 9 October 2006 Ms Paurini emailed Mrs Johnston with a request to complete correspondence that had been allocated and requested an explanation for Mrs Johnstone allegedly photocopying a large number of documents. Mrs Paurini says she checked her email properties and found that Mrs Johnstone had not opened her email. Ms Murphy-Scanlon telephoned Mrs Johnstone and requested her to open the email. Although Mrs Johnstone was at her desk at the time, she accepts that she did not open the email.

[49] A meeting was arranged and Mrs Johnstone was put on notice to attend. She was told what the issues were that the Department was investigating; ie her failure to open the email, follow instruction and failing to respond to a reasonable request for an explanation about photocopying. Mrs Johnstone provided her explanation by letter but did not attend the meeting. Mr Ryder considered her response was insufficient and required her to attend a meeting, which Mrs Johnstone declined to do twice.

[50] At this point Mrs Johnstone started to communicate directly with the Commissioner of IRD. In the meantime Mr Ryder issued a tentative decision for Mrs Johnstone to comment on regarding her failure to follow a fair and reasonable instruction, that she was in breach of the code of conduct and had breached her employment agreement. He did not know of the developments involving Mrs Johnstone's reaction to his tentative decision in her work place. It was decided dismissal would be an appropriate outcome and he enabled Mrs Johnstone to comment before making a final decision. She had until 16 October 2006 to reply and comment. She was offered special leave to prepare for this.

[51] On 16 October 2006 Mrs Johnstone announced at work she had a constructive dismissal and informed other staff she had had enough, and was leaving. On 16 October Mrs Johnstone gave

notice in writing of a constructive dismissal with the Department. Also, on the same date, following the expiry of the opportunity for Mrs Johnstone to comment and reply, Mr Ryder, without any knowledge of Mrs Johnstone's action at work, decided to dismiss her for failing to follow a reasonable and lawful instruction: primarily for not opening the email and not responding on the photocopying. He told the Authority that in his opinion her conduct *was deliberate, defiant and undermined the trust and confidence* IRD was entitled to have in her. Mrs Johnstone denied it.

[52] Mrs Johnstone says that the IRD wanted to get rid of her and that she was entitled to get certainty about what was required of her and her employment sorted out on the other on-going matters and her grievances.

[53] She has also complained that the Department unreasonably did not consent to her attending training or pay the costs when she attended after her resignation.

Determination

[54] Mrs Johnstone has approached her employment relationship problem by detailing, it seems each and every event between her and the respondent and relying on every letter and email existing between the parties. Her statement of problem set out details and the letters and emails in 135 pages from 166 documents supplemented by documents produced by IRD. It is not necessary for me to go into such detail and specifics. I have drawn from the information the following to determine the matters that are relevant.

[55] Her employment relationship problem relates to the claims that:

- (A) She was constructively dismissed;
- (B) Her employer unjustifiably disadvantaged her;
- (C) Her employer breached her contract-collective employment agreement;
- (D) Her employer breached health and safety requirements.

[56] I will deal with each of these: first the last claim (D), secondly (C), thirdly (B) and the claim (A) last.

(1) Alleged Breaches of Health and Safety Requirements

[57] During her employment Mrs Johnstone referred to the stress she believed her employer was putting her under in regard to investigations, disciplinary processes, the requirements to undertake advisories and her belief that her job had been changed and her role “semi-suspended”. She alleged that the individual actions of different people amounted to harassment, and stressed her, in respect of responses, meetings and correspondence.

[58] In each instance it is my finding that it was open to a fair and reasonable employer to engage with Mrs Johnstone over her work performance. Indeed when the going started to get difficult and Mrs Johnstone claimed she was stressed by the advisories her employer acted prudently. It protected its own position and Mrs Johnstone’s safety by stopping the advisories until she could say she was well enough to do them. I agree with the Department that Mrs Johnstone has not sufficiently substantiated her claim. There is only one medical certificate in the evidence and that falls short of establishing any causal link to her employment and any harm. There is no diagnosis and no clarification of any specified health problems where objectively her employment was the cause. Furthermore the Department:

- Listened and responded to any health concerns.
- Reduced the intensity of shadowing and ceased it on occasions.
- Changed the person involved in the shadowing.
- Required Mrs Johnstone to confirm that her health permitted her to continue with the advisories.

[59] These are examples of reasonable and practicable steps taken by the Department to protect the health and wellbeing of the applicant, although I accept she does not feel that that was the case.

(2) Alleged Breaches of the Collective Employment Agreement

[60] Mrs Johnstone has alleged that the Department failed to meet its obligations under clause 8.2.5 of the Collective Employment Agreement to resolve her complaint regarding her remuneration. Her claim related to her letter dated 6 June 2006.

[61] Mrs Johnstone raised a grievance in that letter that the Department failed under clause 8.2.5 of the collective agreement to resolve her complaint regarding her remuneration. I find that the Department did not fail to comply with the provision. I need to say that the other complaints in the

letter were new matters that Mrs Johnstone raised. The Department was entitled to ask Mrs Johnstone to provide more details about how she was disadvantaged. The reference to it in her letter that- *“The process has instead placed undue pressure and unreasonable demands on my health and well-being and ability to perform my duties as a Maori Community Officer in a professional manner”*-was not sufficient detail or able to be corroborated independently, other than being her own opinion.

[62] Moreover it was fairly and reasonably open to the Department:

- To acknowledge it had made an error on the calculation of the pay level and correct it, which it did do.
- To set expectations as part of an on-going employment relationship and that entitled Ms Paurini and Ms Murphy-Scanlon to facilitate at the meeting of 25 May 2006.
- To decide to use Mr Tutt to continue to attend advisories to advise and observe.
- To request more details on Mrs Johnstone’s health.

[63] Mrs Johnstone set out to get a medical certificate, which upon being provided was not adequate for the Department. She then conceded that her complaint was about the shadowing in general and that she had a concern about Mr Tutt. Other than the remuneration the additional matters were not pursued at the time as a grievance. The Department’s position is supported by Mrs Johnstone’s decision to attend a further 3 advisories with Mr Tutt. The Department decided to act cautiously to put another officer in. It subsequently decided that the advisories would cease until Mrs Johnstone could confirm she was well enough to continue. These matters were then lost sight of as other matters took on more importance for Mrs Johnstone until filing her employment relationship problem in the Authority.

[64] The Department took all practicable steps to complete Mrs Johnstone’s Performance Management for 2005-2006 in accordance with the recommendations of the review panel. A formal review was carried out. From the evidence and the following examples it can be seen that:

- Mrs Johnstone’s remuneration remained at 102%. Her assessment was below that level.
- Mrs Johnstone’s performance and remuneration assessment date was aligned. A personal development plan was completed.

- Appropriate objectives and measurements for achieving 105% rating that Mrs Johnstone desired to meet were developed, albeit that Mrs Johnstone might not have agreed. It was open to a fair and reasonable employer to pursue them.
- Interim review were carried out involving Ms Paurini and Ms Murphy-Scanlon in October 2005, February 2006 and a final review at the end of June that Mrs Johnstone refused to complete when she did not provide her comments. The opportunity was given to her.
- Although there were delays there were reasons advanced. Ms Paurini was seconded. Ms Murphy-Scanlon located elsewhere and needed to travel to New Plymouth. Suitable dates had to be agreed. There was no disadvantage.

[65] Finally the recommendations I accept were not contractually binding but a fair and reasonable employer would have considered them and implemented them where practicable. IRD has met that test, in my opinion.

[66] Mrs Johnstone has now pursued Mr Tutt's behaviour in her advisories as part of her employment relationship problem filed in the Authority. She was concerned enough to tape the advisories at the time with Mr Tutt's knowledge. He understood that it was for training purposes. It was reasonable for the Department to engage in shadowing for the assessment of its employees' work. Mrs Johnstone's concerns about the behaviour of Mr Tutt have become blurred by the Department pursuing her in respect of section 81 of the Tax Administration Act, to take possession of the tapes. However, it was never with the purpose of obscuring or covering up evidence of any inappropriate behaviour on Mr Tutt's part. Indeed Mrs Johnstone has never laid that charge against her employer. I accept that its concerns were over possible disclosure of information that related to the administration of tax. It is common ground that the tapes were very difficult to transcribe and were barely audible in places; they have not been produced for the Authority. Furthermore the Department did subsequently agree to change the officer involved in the advisories and suggested another name and put all further advisories on hold. In such circumstances there could be no disadvantage to Mrs Johnstone.

(3) Disadvantage

[67] I conclude that Mrs Johnstone has not established that she has been disadvantaged by an unjustifiable action by her employer. The key here is the relationship between unjustified actions and a disadvantage: both have to be established. That has not been achieved here. There has only been one medical certificate produced that did not provide any diagnosis. I accept that Mrs Johnstone says she felt stressed and various interactions with managers caused her to feel stressed embarrassed and harassed. However, I am not satisfied that those feelings have been caused by any unjustifiable actions of the Department and /or any unjustified disadvantage arising out of those actions, whereas the Department has produced sufficient evidence of a performance management process and followed procedures and requested further details where necessary from Mrs Johnstone that it is permitted to do as an employer.

(4) How did the Applicant's employment end?

[68] Mrs Johnstone left her employment claiming she had been constructively dismissed. She conveyed that information to the Commissioner directly and by-passed Mr Ryder, who she knew was waiting on her input and comments in regard to allegations on failing to carry out a reasonable and lawful instruction because of the notice given to her. I accept his evidence that he provided Mrs Johnstone with the opportunity to comment and respond and he put her on notice of a decision being made on the information he had if she did not respond and reply. Also, I accept that his decision happened on the same day (16 October) that Mrs Johnstone made her claim with the Commissioner directly and told employees she was leaving, and that Mr Ryder did not know of these events when he made his decision to dismiss her. I accept that the resignation coincided with Mrs Johnston leaving on the same day. Mrs Johnstone also did not know of her dismissal before she decided to leave, although she might have known of the possibility of that occurring. Therefore his decision could have had no part in her decision to leave, and even if it did, it would not be a basis to lay a claim for constructive dismissal.

[69] From the forgoing evidence it is clear that there has been no unjustifiable action disadvantaging Mrs Johnstone in her employment. The claims she had in respect of alleged grievances were not sufficient to make it foreseeable she would resign.

[70] The background that Mrs Johnstone has relied upon has involved claims of a breach of her employment agreement and breaches of health and safety in the workplace. These have not been established by her to be a cause to resign over, I hold although she clearly was not well.

[71] Mrs Johnstone has relied on the 5 investigations including her time keeping and the request that she open an email and explain the use of photocopying and the failure of the Department to consent to her attending a course run by the New Zealand Chartered Accountants leading to her resignation.

[72] The employer was entitled to raise with Mrs Johnstone its concerns. The time span does not assist her claim and each of the matters was taken up separately. They do not support her claim that her employer wanted to get rid of her because it was open to a fair and reasonable employer to raise them. Mrs Johnstone in each of the matters was given the right to be represented, respond and reply and provide any comments on legitimate concerns. The Department was entitled to require Mrs Johnstone to work her contracted hours and as such to arrange her own representation. That can not therefore be linked to denying her access to representation as she claimed. The Department was entitled to raise a concern over confidentiality in the administration of tax under section 81 of the Tax and Administration Act over the tapes. Also, Mrs Johnstone was able to have a support person present during meetings and the process. I find that there was no prohibition placed on this by the Department and if Mrs Johnstone did not like Mr Moody's, Ms Murphy-Scanlon's and the Department's lawyer's and Mr Ryder's conclusions she had the opportunity to have input by way of comment, reply or other forms of response. She did do that, but her representative replied. Mr Moody did not pursue medical retirement. Any grievances and alleged breach actions could still be pursued. In those circumstances it would not be foreseeable that she would resign.

[73] The Department explained its decision on training and I accept its explanation, which is also underpinned by its discretion, which is not open to me to substitute my opinion for. Indeed Mrs Johnstone cannot reasonably expect the Department to pay fees on a course she attended of her own choice and after she had left her employment. The Department's decision at least on declining her attendance at the course would not have been a reason to resign over, if it indeed ever was relied upon.

[74] This determination will probably be difficult for Mrs Johnston to accept because she really wanted her job restored. That simply is not possible because of the outcome and it also begs the question, even if I got to the point of considering remedies, as to whether or not it would be

practicable to reinstate her given that she resigned. I can only hope that Mrs Johnstone is able to pursue her career aspirations in directions that she will add some value to and receive the appropriate support and appropriate recognition of her qualities and abilities.

Orders of the Authority

[75] Mrs Johnstone's claims are dismissed.

[76] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority