

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 200/08
5086872

BETWEEN	DENISE ISAAC Applicant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Member of Authority:	Vicki Campbell
Representatives:	Mark Ryan for Applicant Samantha Turner for Respondent
Investigation Meeting:	13 and 25 February 2008
Submissions Received:	7 March 2008 from Applicant 17 March 2008 from Respondent
Determination:	5 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Denise Isaac claims one or more terms of her employment have been affected to her disadvantage by the failure of the Ministry of Social Development ("MOSD") to provide her with a healthy and safe work environment. Ms Isaac also claims to have been discriminated against as a result of a disability and that MOSD is in breach of its obligations to act in good faith toward her.

[2] MOSD denies the claims and says it took all practicable steps to facilitate a safe and healthy workplace for Ms Isaac.

[3] In relation to Ms Isaac's personal grievance for unjustified disadvantage section 103A of the Employment Relations Act 2000 requires the Authority to scrutinise MOSD's actions and ascertain whether its actions and how it acted were what a fair and reasonable employer would have done.

[4] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations

between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

Medical disability

[5] Ms Isaac commenced her employment with MOSD in 1991. In 1996 she suffered from a repetitive strain injury and was subject to a formal return to work program while she remained under the supervision of ACC. Ms Isaac returned to full time work in 2002.

[6] Ms Isaac's condition has become a long term disability which requires her to be careful about her work environment. Her condition is called fibromyalgia. Fibromyalgia is a chronic pain condition caused by a number of factors which result in pain, fatigue and over sensitivity to light and noise.

[7] Ms Isaac's treatment for her condition included taking daily painkillers, walking, exercising, self hypnosis, the use of a tenz machine and working with an Osteopath. When her symptoms were chronic Ms Isaac would require time off work. For Ms Isaac workplace factors affecting her were her work station set up, light and glare exposure, and background noise levels. Ms Isaac's condition also means that she is unable to drive distances or for long periods of time as her concentration wanes.

[8] Due to the issues relating to glare and noise, radios have been banned from use in the workplace shared by Ms Isaac, and blinds remain closed during the day to prevent glare. The prohibition on radios and the closing of the blinds have been the cause of some frustration for Ms Isaac's team members.

[9] While the specifics of Ms Isaac's medical condition were not disclosed to all her team members it was discussed in some general terms during team meetings when Ms Isaac would explain to her team members why she was unable to do some things, and why she would do things differently to others.

[10] On 21 January 2003 Ms Kathy Higgins, an organiser with the PSA, wrote to the then Regional Operations Manager regarding issues Ms Isaac was experiencing in the workplace. Ms Higgins advised MOSD that Ms Isaac felt isolated and did not feel she was receiving adequate management support. Ms Higgins requested a meeting to discuss and agree some protocols to allow issues in the workplace between MOSD and Ms Isaac to be resolved at the earliest possible point.

[11] On 4 February 2003 Ms Isaac's doctor, Ms Michelle Baker, wrote to Ms Higgins, outlining Ms Isaac's condition and identifying factors to be managed to assist Ms Isaac to continue to be a productive fulltime staff member. Those factors are:

- Maintaining an ergonomic workstation
- Controlling environmental factors such as light, noise, temperature and drafts
- Rest breaks
- Variation of tasks
- Exercises
- Managing work load
- Disabled car park
- Seek crisis intervention when appropriate

[12] The parties met, discussed and agreed on the process to be followed when dealing with issues in the workplace with Ms Isaac. The process was to be informal but also provided for Ms Isaac to seek assistance from the PSA as and when she needed. It was agreed:

- Ms Isaac's immediate manager would be her first point of contact for any issues arising from Ms Isaac or from MOSD.
- There was no requirement to put the issues in writing, except when Ms Isaac considered the issue to be sensitive or large.
- Depending on the specific issue Ms Isaac may have to provide information or verification, but that would be determined on a case by case basis.
- Ideally agreement would be reached as to how long an issue would take to resolve.
- It was open for either MOSD or Ms Isaac to approach the other to check that things were on target and, if necessary to renegotiate timeframes.
- It was open for either MOSD or Ms Isaac to approach each other to confirm that things were going well or not.
- Both Ms Isaac and her manager were able to seek advice and assistance if matters were unable to be resolved or progressed.
- Ms Isaac's workstation would be reassessed by her OT.
- A second meeting would take place to discuss Ms Isaac's feelings of being isolated from the rest of her team and to look for resolution.

[13] In May 2003 a further meeting was held with Ms Isaac to discuss issues regarding training venues, team meetings, increasing Ms Isaac's workload and approachability and support from Ms Isaac's manager. The minutes of this meeting record Ms Isaac raising the issue of feeling isolated from others as no one sat next to her. Ms Brooks, Ms Isaac's manager at that time, advised Ms Isaac that it wasn't intended that she feel isolated, but that things would resolve once the whole team were all located together.

[14] Not long after this, in June 2003 Ms Joanne O'Connor was appointed as the Service Centre Manager of the Domestic Purposes Benefit team which included Ms Isaac. Ms O'Connor told me she put a lot of time and effort building a good relationship with Ms O'Connor and spent a lot of time assisting Ms Isaac to manage her relationships with her colleagues. Ms O'Connor told me that managing Ms Isaac was not always easy as her needs had to be balanced against those of other staff members.

[15] In July 2005 Ms O'Connor was promoted to the position of Branch Manager. In her new role Ms O'Connor became responsible for up to 70 staff and was unable to provide Ms Isaac with the same level of support as had been previously given.

[16] At the investigation meeting Ms Isaac accepted that Ms O'Connor's promotion meant that she could no longer spend large amounts of time helping to sort out her issues. However, Ms Isaac also told me that after her promotion Ms O'Connor did not seem to want to speak with her about her problems and that she had to refer them to her manager, Ms Nicola Tolich. Ms Isaac seemed to think there was a problem with this turn of events, however, it seems logical to me that an employee whose manager is promoted, must in turn, report to the newly appointed manager. This is also in accordance with the agreement reached in 2003 whereby, Ms Isaac's manager is to be her first point of contact for any issues.

[17] Following Ms O'Connor's promotion in 2005 and through to 2007 a number of issues arose in the workplace which has led to Ms Isaac's application before the Authority. These events include:

- Issues with Ms Strid and Ms Rogers
- 2005/2006 Christmas/New Year break
- Being advised she would be fired by Ms O'Connor
- Shirley Tane incident
- Change of workplace from East to West wing

[18] In addition to those issues, Ms Isaac lodged a formal complaint against Ms Denise Bayne, who was Ms Isaac's manager in September 2006, and Ms O'Connor, with regard to allegations of bullying by both managers. Ms Isaac's complaint was investigated by MOSD. The investigation concluded there was no substance to Ms Isaac's complaint. Ms Isaac is not happy with the conclusions reached by MOSD and has now lodged her problem for resolution in the Authority.

[19] In working through all the issues raised by Ms Isaac in her evidence and the documents provided to the Authority, I have found it useful to set out the issues relied on by Ms Isaac and which she says support her claims that Ms O'Connor and Ms Bayne have subjected her to bullying in the workplace. I have, where possible, reached my own conclusions with regard to a number of the issues raised.

Ms Strid and Ms Rogers

[20] In November 2005, Ms Isaac experienced difficulties with two work colleagues. Ms Strid and Ms Roger's workstations had been moved to beside the windows following a refurbishment of the office space. The blinds on the windows were also changed from vertical to venetian blinds. As a result of the change to venetian blinds, when the blinds were closed the office was a lot darker and colder.

[21] Ms Isaac complains that Ms Strid and Ms Rogers would open the blinds during the day which created a problem for her because when the day was sunny, the reflection of the sun caused glare which impacted on her.

[22] I am satisfied that members of the staff of MOSD working in the same area as Ms Isaac did forget from time to time about making sure the blinds were down when the glare was at its worst. I am satisfied also that managers failed to ensure that that blinds were always closed. Ms Isaac's manager arranged for the windows to be treated with anti-glare film. This resolved that problem; however, in the meantime, the relationship between Ms Isaac and Ms Strid had deteriorated.

[23] In November an incident occurred between Ms Strid and Ms Isaac, where both ladies raised their voices to each other. Ms O'Connor suggested mediation in an effort resolve the workplace difficulties between the two. However, Ms

Isaac declined the invitation for mediation as she wished to speak with the PSA first.

[24] At a further meeting on 7 December 2005 Ms Isaac requested mediation with the use of an independent mediator. Ms Strid then declined to attend mediation as she felt the issues with her and Ms Isaac had been resolved as the windows were now tinted and she [Ms Strid] had moved on.

[25] On 12 December 2005 Ms O'Connor sent an email to both employees regarding the yelling incident between the two in November. In her email Ms O'Connor set out her conclusions that neither employee had any good reason for their behaviour. Ms O'Connor referred Ms Strid and Ms Isaac to MOSD's Code of Conduct and confirmed that their behaviour had been unacceptable and would not be tolerated. Ms O'Connor advised both Ms Strid and Ms Isaac that any future breaches of the code of conduct would be treated in a more formal manner.

[26] Ms Isaac told me at the investigation meeting that she felt she wasn't to blame for this incident, but that Ms Strid was as she had acted in an inappropriate way.

[27] It was common ground that at the time Ms Isaac received the email from Ms O'Connor she never raised any issues about it. However, in a disciplinary meeting in February 2006 Ms Isaac raised the email as constituting a breach of her privacy. At that time, Ms Isaac was advised that the disciplinary meeting was not the appropriate place to raise this issue and that she should work through the formal process to enable any complaint about breaches of privacy to be addressed appropriately.

[28] This issue was next raised in September 2006 as part of Ms Isaac's allegations that she had been subject to bullying in the workplace.

[29] I would not regard it as a breach of any of the privacy principles for an employer to send an email to two employees setting out expected standards of behaviour after both of these employees had been involved in an incident. There is no blame attributed to either of the employees involved and the email did not constitute a warning.

2005/2006 Christmas/New Year break

[30] Following on from the deterioration in the relationship between Ms Strid and Ms Isaac, an issue arose as to the amount of annual leave Ms Isaac would be required to take during the 2005/2006 Christmas/New Year break.

[31] Ms Isaac had previously applied for leave to take her through to 6 January 2006 which was approved. Due to her medical condition, Ms Isaac preferred to return from leave to work a shorter week than usual.

[32] On her last day of work before commencing her Christmas/New Year break, on 22 December, Ms Tolich, Ms Isaac's manager at that time, advised Ms Isaac that the East Wing (which is where Ms Isaac's workstation was located) would be closed to the public during the Christmas/New Year break. This meant that no client interviewing could be undertaken in the East Wing during that period.

[33] This was not a common practice and Ms Isaac asked if she could come back on the agreed date, and for her to undertake non-client contact work. This was declined by Ms Tolich. Instead, Ms Isaac was given two options: either MOSD would arrange for Ms Ann Molloy (Ms Isaac's Occupational Therapist) to attend and help set up a work station in the West Wing; or she would be given special paid leave for the one extra day, Friday 6 January 2006. On that basis Ms Isaac would return to work the following Monday, 9 January 2006.

[34] Still seeking to return to a short week, and after explaining her reasons, Ms Isaac requested special paid leave on Monday 9 January 2006 as well. No answer to this request was forthcoming, until about 30 minutes before Ms Isaac was due to leave for her Christmas/New Year break. Ms Isaac was advised that she would have to take annual leave for the Monday.

[35] On receiving this news Ms Isaac became extremely distraught and contacted her PSA organiser who in turn contacted the HR Manager, Mr Clive Kilgour. Mr Kilgour's advice was that Ms Isaac obtains a medical certificate and makes an application for special leave for the Monday, 9 January 2006.

[36] During the MOSD investigation into Ms Isaac's complaint against Ms O'Conner in 2006, Ms Tolich admitted that she handled the situation with Ms Isaac badly and that she could have been more thoughtful in her handling of it.

[37] As events transpired Ms Isaac did obtain a medical certificate and was paid special paid leave for the Monday.

Shirley Tane incident

[38] On 23 December 2005 Ms Shirley Tane made a formal complaint regarding Ms Isaac's conduct on 22 December 2005. Ms Tane alleged Ms Isaac had yelled at her in front of her clients, for no apparent reason. In her letter of complaint Ms Tane states that this was not the first time Ms Isaac had behaved in such a way toward her and asked for her behaviour to be addressed.

[39] A second employee, Ms R'phael Gavitt, the Service Centre Training manager, also sent an email to Ms O'Connor on 23 December, outlining what she had witnessed the previous day between Ms Isaac and Ms Tane. Ms Gavitt advised that she had a client with her at the time who also witnessed the incident.

[40] The incident with Ms Tane occurred concurrently with Ms Isaac's telephone conversation with the PSA organiser who she rang on 22 December to discuss her leave situation over the Christmas/New Year break.

[41] By the time Ms Tane's letter of complaint was received by Ms O'Conner Ms Isaac had already commenced her Christmas/New Year leave.

[42] On her return to work in the New Year, Ms Isaac was subject to a disciplinary process to deal with the complaint by Ms Tane. The disciplinary process resulted in a verbal warning being issued to Ms Isaac.

[43] Ms Isaac's complaint about this incident is that she requested a copy of the complaint and related documents before the disciplinary meeting and was only provided a copy of the complaint and not the email from Ms R'phael Gavitt which was only provided to Ms Isaac at the disciplinary meeting on 1 February 2006.

[44] The notes of the disciplinary meeting show that a number of other issues were raised by Ms Isaac during the meeting, including the breach of privacy issue relating to the email sent by Ms O'Connor on 12 December 2005. Ms O'Conner pointed out that the disciplinary meeting wasn't the appropriate forum for raising a breach of privacy issue. It was agreed that Ms Isaac and her PSA representative, Ms Higgins, would discuss where they would take the issues

raised during the meeting, including the breach of privacy and would advise Ms O'Connor. The meeting ended with an undertaking that a follow up meeting would be arranged.

[45] Following the conclusion of the meeting Ms O'Connor made contact with Mr Ian Gordon, the PSA Organiser Ms Isaac had contacted after her discussion with Ms Tolich on 22 December. Notes of that discussion dated 1 February 2006, show that Mr Gordon confirms there was "...a ruckus going on..." and that Ms Isaac "...was probably shouting..." Mr Gordon is also recorded as saying Ms Isaac took a good ten minutes to calm down.

[46] As events transpired the follow-up meeting did not take place until 10 March 2006. On 10 March, Ms Isaac was advised that she would receive a verbal warning for the 22 December 2005 incident between herself and Ms Tane. Ms Isaac disagreed with the warning and denied yelling at Ms Tane.

[47] Ms Isaac's views were then confirmed in writing by her on 17 March 2006 when she set out in her explanation as to why Ms Tane may have thought she was yelling and again disputed that she had yelled at Ms Tane.

[48] The verbal warning has not been challenged by Ms Isaac. What Ms Isaac says is that the warning was an example of the bullying she was being subject to in the workplace.

Ms O'Connor tells Ms Isaac she would be fired

[49] Ms Isaac was due to have surgery during May 2006 which required a six to eight week recovery period. As a result of interventions by Ms O'Connor, Ms Isaac received special paid sick leave for the duration of her absence (eight weeks).

[50] A planned refurbishment of the offices was due to be completed while Ms Isaac was absent on leave for her operation. A meeting took place on 11 April to discuss Ms Isaac's move from the East Wing to the West Wing. During the meeting Ms Isaac says Ms O'Connor told her that if she couldn't be accommodated then she [Ms O'Connor] would have to fire her.

[51] Ms O'Connor told me:

During the meeting I assured Denise that we would be able to accommodate her special needs during, and following, the office rearrangement, as we had always done in the past. Denise raised a number of concerns she had about the rearrangement and how it may affect her. My response was, again, that I was sure we would be able to accommodate her needs but I did not have specific details of how each and every need would be accommodated at that stage. Denise was not happy with this, and she itemised certain needs that she wanted met. Denise asked what would happen if those specific needs could not be accommodated. I responded that nothing was finalised yet, so I could not provide exact details, but we would definitely be able to work out a plan for Denise.

Despite my assurances, I felt Denise was unnecessarily “badgering” me ... she kept repeating what her specific needs were and she would not accept, or acknowledge, my assurances that she would be looked after. Eventually, out of frustration, I said: *“What do you want me to say? That I will fire you?”* This was *only* after I had assured her over and over again that we would be able to accommodate her disability yet Denise would not accept it.

[52] During the meeting Ms Isaac was supported by Ms Stephanie McMillan, a work colleague and a PSA delegate. Ms McMillan was interviewed about this meeting during MOSD’s investigation into Ms Isaac’s complaint that she had been subjected to bullying in the work place. Ms McMillan is recorded as telling the investigators that Ms O’Connor had assured Ms Isaac that her special needs would be accommodated. Ms McMillan told the investigators that Ms Isaac was asking for specific information on how her needs would be met, and that Ms O’Connor was unable to give her those specifics. Ms McMillan is reported as having told the investigators that Ms Isaac continued to push the issues about how her needs would be specifically met for about an hour, but Ms O’Connor provided only the general response that all her needs would be accommodated. Ms McMillan told the investigators:

I do not think she meant that they would fire Denise, but if all else fails what else could Jo Anne say. We have certain requirements under OSH and good business practice. If there was no other option it would need to be considered. But I do not feel Jo Anne had any intention of hinting that it was an option. She probably was feeling badgered and wanted to end the “ping pong” ball conversation about how Denise’s disability needs to be accommodated. With the changes with the new service centre model, as the changes were still in the planning stage and no desk moves or reallocation of tasks, redistribution of tasks had been finalised, they were just in the stage of noting important things that required noting so they were not overlooked.

[53] Ms O’Connor’s statement about firing Ms Isaac was extremely ill conceived. However, I am satisfied it is more likely than not, that the statement was made as a question and out of frustration of the “ping pong” (to use Ms

McMillan's words) way the discussion had been going for about an hour. Ms McMillan advised the investigators:

I would say that she [Ms Isaac] pushed the issue and she would know Jo Anne well enough to know how to push her buttons. ... Regarding the comment Denise did bait/push Jo Anne into giving an answer to a question that she was earlier informed was in the planning stages, so they could not answer; Jo Anne did not have the answers at this stage. So that's possibly why Jo Anne would have snapped that's why I believe both parties were equally responsible.

Bullying

[54] Ms Isaac says she was bullied in her employment from 2003 to 2006 when she made a formal complaint to MOSD. Ms Isaac went on leave in December 2006 and has not returned to work. Up to and including April 2007 Ms Isaac was on unpaid leave. However, following a decision by the Regional Commissioner in April 2007 Ms Isaac was paid for the periods 18 January to 2 March 2007, 16 March to 30 March 2007 and has been on full pay since 2 April 2007.

[55] The concept of bullying has not been defined in a legal sense because it is a difficult concept. Bullying is about behaviours that are repeated and carried out with a desire to exert dominance and an intention to cause fear and distress. The behaviours usually include elements of personal denigration and disdain of the person subject to it. It is intended to control the behaviour or actions of its target in particular ways.

[56] Bullying usually refers to behaviour of an employer to an employee, between two or more employee's and occasionally even by an employee towards a supervisor or manager. Criticism or feedback from an employer is not bullying although it might become so because of the manner or purpose of its delivery or a particular vulnerability of the recipient.

[57] During the investigation meeting it became apparent that Ms Isaac had considered that she was being bullied by at least June 2006. Set out below are examples of conduct (over and above the main issues as set out earlier in this determination) or reports, Ms Isaac says support her contention that she was bullied in the workplace.

EAP Counselling

[58] After issuing Ms Isaac the verbal warning in March, Mr Kilgour met with Ms Higgins and they agreed that Ms Isaac would benefit from some professional, psychological assistance. As a result, Ms Isaac was offered professional counselling through MOSD's EAP services which were fully funded by MOSD.

[59] Ms Isaac says that after the April meeting and given what she had taken from the statement by Ms O'Connor, she began to push for the EAP sessions to commence. Ms Isaac says she was feeling extremely threatened and insecure about her job.

[60] Ms Isaac attended counselling before she returned to work following her operation and continued with the counselling sessions during her initial return to work phase.

[61] On 30 June 2006 Ms Tracey Gee, Registered Health Psychologist forwarded a written report to MOSD with regard to Ms Isaac's counselling sessions. The report indicates that Ms Isaac has reported continued distress relating to workplace harassment and bullying.

Return to work

[62] Ms Isaac returned to work following her operation, on 14 June 2006. That same day Ms Isaac met with Ms O'Connor. The purpose of the meeting was to discuss how MOSD could assist Ms Isaac back to full time work following her operation.

[63] A progressive return to work schedule was agreed.

Change of workplace from East to West wing

[64] In Ms Isaac's absence at the beginning of June 2006, the team Ms Isaac worked with were moved from the East Wing to the West Wing. On her return, and before Ms Isaac's workstation was relocated, an assessment of potential locations was carried out by Ms Isaac and her occupational therapist Ms Ann Molloy. Ms Isaac was given the opportunity to choose her new location. The staff member occupying the location identified by Ms Isaac and Ms Molloy as being the most suitable for Ms Isaac was moved to allow Ms Isaac to relocate to that position.

[65] A report was then compiled by Ms Molloy identifying the specific needs for Ms Isaac's new workstation to ensure she was able to work safely. At the

investigation meeting Ms Molloy told me she sensed impatience with Ms Isaac by members of her team and in particular, Ms O'Conner when she was undertaking the assessment and then when she returned to ensure all recommendations had been adhered to.

[66] In her report Ms Molloy refers to Ms Isaac's reported fear of losing her job and independence and referred also to Ms Isaac's reporting of the incident from the April meeting. Ms Molloy also makes reference to Ms Isaac's EAP counselling sessions, which Ms Molloy understood from Ms Isaac, were to help Ms Isaac to cope with workplace bullying.

[67] Ms Isaac refers to one incident in relation to her move to the West Wing which she says is further demonstration of the bullying tactics of Ms O'Connor. It was common ground that when Ms Molloy, Ms Isaac and Ms O'Connor agreed on the new location for Ms Isaac's workstation, the current occupant had a screen behind her desk. However, when Ms Isaac came to move into the area the screen had disappeared. The screen was necessary to prevent drafts in Ms Isaac's work area.

[68] Unbeknown to Ms O'Connor, who could not recall seeing a screen at that location, the screen had been taken by the previous occupier. However, a replacement screen was taken from the Reception area and installed that same day by Ms O'Connor.

[69] On 26 June 2006 following the relocation of Ms Isaac's works station Ms Molloy, Ms Isaac and Ms O'Connor met to discuss the best set up for Ms Isaac's desk taking into account health and safety issues.

[70] Ms O'Connor set out a summary of the discussions which she emailed to Ms Denise Bayne (Ms Isaac's new manager who replaced Ms Tolich when she was appointed to another position within MOSD) and Mr Kilgour in which she states:

- Denise and Anne have chosen Alison's desk in Super as being suitable for Denise's requirements.
- This includes the room divider being in place behind Denise as a foil for the air conditioning.
- Denise is left handed and works to the left of her desk with clients.
- The desk has been moved out from the wall to facilitate client access on that side.
- Denise has a credenza which sits to the right of her desk and a filing cabinet which sits to the left.

- I have requested that Denise remove the additional folders and telephone books from her desk top to facilitate as much as possible the clear desk policy. She has complied with this.
- Dermot has adjusted the wiring for Denise's telephone and keyboard to meet her needs.
- She still has concerns re the wire for her mouse crossing the desk towards the corner in which clients will sit. We will monitor this to see if it becomes an issue.
- The initial angle of Denise's desk was such that there was the possibility that sun could affect her in the afternoon. The OT has repositioned her desk so this will not be a factor.
- Reference was made to the hours of work for Denise. This will be discussed with Denise and her PSA rep Kathy Higgins before the end of her 5 weeks re-entry programme. During this programme Denise will continue to work between the hours of 7am and 3:30pm.

Change in work hours

[71] Ms Isaac says that at the meeting on 14 June 2006 where Ms O'Connor and Ms Bayne discussed Ms Isaac's return to work programme, Ms O'Connor wanted Ms Isaac to change her hours and how she was managing her work.

[72] I have read a summary of the meeting held on 14 June 2006 and have concluded it is more likely than not that Ms O'Connor raised the fact that Ms Isaac's hours of work would need to be discussed, but that the discussion would take place on a later date when Ms Isaac was able to have PSA representation.

[73] On 26 June 2006 Ms Higgins emailed Mr Kilgour advising (verbatim):

Denise has just phoned me in tears; she is feeling really vulnerable at the moment and describes the treatment of her as bullying. Apparently she has been advised that she has to change her hours of work to accommodate the new service model and management are putting pressure on her to accommodate this. Quite clearly Denise can not be forced to change her working pattern without agreement as per the collective. I have advised Denise to get Jo to ring me as she can not deal with her and I will clarify this for her. Apparently Jo will not ring me. Can you please talk to Jo in this regard as this is not the appropriate way to handle this situation?

[74] A meeting took place on 4 July 2006 the purpose of which was to discuss and obtain some agreement around changes to Ms Isaac's working hours. I am satisfied MOSD were not trying to change the hours during which Ms Isaac worked, but rather were attempting to reach some agreement around when Ms Isaac would take her breaks.

[75] The MOSD Service Centre is open to the public for client contact from 8.30am to 5.00pm Monday to Friday inclusive. Ms Isaac, whose role included direct client contact, worked between the hours of 7.00am and 4.00pm. Ms O'Connor was aware that the arrangement with Ms Isaac's hours of work put additional pressure on the other team members and she wished to see if it was possible to reach an agreement on adjusting her hours. Ms O'Connor says Ms Isaac became very upset at the thought of having to adjust her hours.

[76] Ms Isaac took OOS breaks each day, together with the usual tea and lunch breaks. As a result of the timing of these breaks it was difficult to make appointments for Ms Isaac to meet with clients, for longer than 30 minutes duration. Some appointments required longer than 30 minutes however, these longer appointments could not be scheduled into Ms Isaac's diary.

[77] The meeting was recorded on a sound tape which has been provided to the Authority. I have listened to that tape and have come to my conclusions based upon what I have heard and from the transcript also provided to the Authority.

[78] Ms Isaac was clear that she would not change her break times to accommodate MOSD's requests. Ultimately, however, Ms Higgins did persuade Ms Isaac consider reducing the two OOS breaks she was taking each day.

[79] During the meeting Ms Isaac raised issues about how she had been treated by Ms Bayne and Ms O'Connor. Ms Isaac was of the opinion that she had not been treated with respect and that the way Ms Bayne and Ms O'Connor treated her was demeaning and she asked for it to stop. For her part, Ms O'Connor advised Ms Isaac that she felt she had always treated Ms Isaac with respect and had done her best to facilitate her working in the MOSD environment. Ms O'Connor reminded Ms Isaac that she had gone out of her way to apply for payment for the period she was away undergoing surgery and that she had done that because of the respect she had for Ms Isaac.

[80] Ms Isaac then gave by way of example a situation that had occurred the previous day when she says Ms O'Connor blocked her at her desk. Ms Isaac described Ms O'Connor as using stand over tactics and was intimidating, hostile and angry. Ms Isaac also says this incident was observed by others.

[81] Ms O'Connor asked for the names of those who observed this encounter, but Ms Isaac told her she was not prepared to give her names. Ms O'Connor then

went on to tell Ms Isaac that she felt she had bent over backwards to accommodate her needs and to understand about the fibromyalgia and OOS problems. Ms O'Connor expressed her frustration at the lack of progress and asked Ms Isaac to show her, Ms Bayne and the other case managers the level of respect Ms Isaac was demanding for herself.

[82] The meeting derailed and ended with the participants agreeing to take a five minute break, however the meeting never reconvened. Ms Isaac says Ms Bayne was yelling at her during the meeting. Having listened to the tape from that meeting, I have concluded that Ms Bayne was certainly firm in her responses to Ms Isaac; however, I differ in my opinion as to the tone Ms Bayne used, which could not be described as yelling. There seemed to me to be a level of frustration being exhibited by both Ms O'Connor and Ms Bayne throughout the meeting at Ms Isaac's continued lack of desire to compromise or accept points being raised by Ms O'Connor and Ms Bayne.

Incident with Ms Barratt

[83] During August 2006 the Invalid Team was moved into the same area as Ms Isaac. Ms Donna Barratt's workstation was moved to a location just in front of Ms Isaac. Ms Barratt had medical needs which required her to use natural light and therefore she preferred to have the blinds open while working. This upset Ms Isaac who complained to Ms Bayne.

[84] Ms Isaac says the situation became very bad. She said Ms Barratt started to treat her like a pariah; she would move if Ms Isaac sat at the same table during their breaks and would make derogatory comments. While the issues with the blinds were raised with Ms Bayne, these other matters were not.

[85] Ms Bayne says she discussed the blind situation with Ms Barratt but Ms Barratt felt that Ms Isaac's needs were being favoured over Ms Barratt's own medical needs.

[86] Ms Bayne resolved the problem by moving the entire Invalid Team out of the area and relocating members of the DPB team into the area. Before the members of the DPB team were relocated, Ms Bayne checked with each one to ensure they did not have any issues with regard to working with the blinds closed.

[87] Ms Isaac has used this example to support her contention that she was being bullied in the workplace.

Nadine Chapel-Toi Incident

[88] On 22 August 2006 Ms Isaac was involved in an incident with another case manager. Ms Isaac was running late with one of her clients due to the client presenting with an issue additional to the main purpose of her client meeting. Ms Isaac interrupted another employee, Ms Strickland, who was interviewing a client, and sought agreement as to how the issue should be progressed. While involved with another client, Ms Isaac was herself interrupted by Ms Chapel-Toi in relation to the earlier client. Ms Isaac took offence at being interrupted as she felt it was inappropriate.

[89] Mr Kilgour told me that he received a complaint from Ms Chapel-Toi that Ms Isaac had been rude to her when she had interrupted Ms Isaac's appointment to seek more information on the first client, who was waiting for emergency relief.

[90] On Wednesday, 23 August 2006 Ms Bayne attempted to discuss the situation with Ms Isaac, but Ms Isaac became upset and very emotional and informed Ms Bayne that she needed to go home. Recognising Ms Isaac's distress, Ms Bayne asked for the assistance of the Assistant Service Centre Manager, who helped Ms Isaac out of the office. Ms Bayne offered to drive Ms Isaac home, an offer Ms Isaac refused.

[91] Ms Isaac returned to work on Friday, 25 August 2006. Later the following month, Ms Isaac requested that the sick leave be treated as special paid leave as she had been reacting to a stressful situation at work. In a letter outlining her account of the events in August, Ms Isaac says:

I felt that the implication was that I have to always modify my behaviour was ridiculous as this meant that I was being found at fault. This was unfair.

[92] By this time, Ms O'Connor had been seconded to the Regional Office; however, she retained an oversight of Ms Isaac as she was familiar with her history and medical condition. Ms Bayne spoke with Ms O'Connor expressing how difficult she was finding the day to day management of Ms Isaac and that she was struggling to communicate with her.

[93] Ms O'Connor wrote to Ms Isaac on 25 August 2006 requesting a meeting to discuss Ms Isaac's management needs. The meeting was to take place on 1 September; however, it seems that meeting never occurred.

Requested move from Waitakere to Westgate

[94] One of the recommendations contained in the June 2006 report from EAP Services was to move Ms Isaac to a smaller single level office located in Westgate and which was closer to Ms Isaac's home than Waitakere.

[95] On 9 August 2006 Ms Isaac made a request to the Westgate office manager, to be considered for any vacancies at the Westgate office of MOSD. Ms Isaac was advised that there was a vacancy for a team member who had resigned and that the usual recruitment process would be worked through to replace that person. I understand that Ms Isaac did not apply for that or any other vacancies at the Westgate office.

[96] On 19 September 2006 Ms Isaac forwarded the email communication she had had with the Westgate Manager to Ms Bayne and formally applied for a transfer to Westgate. Ms Isaac sought the transfer so she would no longer have to drive in heavy traffic to get to and from work, and therefore problems with her hours of work would be minimised, she recognised that parking would be easier so she would no longer require an allocated car park, and the office was on one level so would allow easy access to all areas including the filing area.

[97] At the time this email was received by Ms Bayne, Ms Isaac had lodged a formal complaint of bullying against Ms Bayne and Ms O'Connor. Given that, it was decided, that Ms Isaac would report to Ms Meredith Watkins-Foy, the acting Branch Manager, and Mr Jay Basnayake, Service Centre Manager Employment. As a result, Ms Bayne forwarded the application for transfer to Ms Watkins-Foy. On 29 September 2006 Ms Isaac also emailed Ms Watkins-Foy forwarding the message she had previously sent to Ms Bayne. Ms Isaac asked for an opportunity to explain her reasons for the transfer in person.

[98] It is not apparent that any response has been made to this request.

Bullying Complaint

[99] By July 2006 MOSD was on notice that Ms Isaac considered that she was the victim of workplace bullying.

[100] In June it had received a report from Ms Isaac's occupational therapist who identified psycho-social factors as problems for Ms Isaac in the workplace and also identifies Ms Molloy's understanding that Ms Isaac was attending EAP sessions to help her cope with workplace bullying.

[101] MOSD had also received a report from EAP Services which states:

Denise states she has been and continues to experience a significant amount of distress related to her reported workplace harassment and bullying from a select number of staff. Her distress impacts on her emotional, cognitive, behavioural and physiological profile. For example, fear, thoughts of being threatened, withdrawal and stress reactivity. Ongoing patterns of this nature are detrimental to her wellbeing.

[102] At the same time (26 June) Ms Higgins through her email to Mr Kilgour, also pointed to Ms Isaac having described the treatment of her as bullying. The fact that Ms Isaac felt that way was then reiterated in the meeting on 4 July, when she expressed to Ms O'Connor and Ms Bayne that she felt she was being treated in a derogatory and demeaning way.

[103] On 28 August 2006 Ms Isaac emailed Mr Kilgour and referred to the EAP Services Report specifically with regard to the statements on bullying. Mr Kilgour responded pointing out that no specific complaints of bullying had been received from either Ms Isaac or the PSA. He asked Ms Isaac to forward the specifics of any complaints she had, so that an investigation could be undertaken.

[104] Subsequent email discussion went like this (verbatim):

Ms Isaac to Mr Kilgour

Thank you for replying.

There have been a series of bullying incidents that I have brought to the attention of the Branch Manager Jo Anne O'Connor, managers and to the PSA. I have records from various meetings and bullying has been discussed and noted.

I was under the impression that the report from the EAP psychologist to you that identified I was being bullied and the effects of this was notification to you of the situation and I did expect some contact regarding this.

Tracey Gee from EAP had advised me that she contacted you after she sent the report to find out what process you intended to follow and that you had advised you will still considering your options.

I would not want a meeting with Jo Anne O'Connor until I have had a meeting with you and the PSA to agree a way forward.

I understand that Jo Anne O'Connor is seconded out of the role of Branch Manager for the Waitakere Service Centre and am questioning why is she involved in this.

Mr Kilgour to Ms Isaac

Morning Denise – My understanding is that any suggestion of 'bullying' has, as you note, been dealt with appropriately at the time they have been raised. You are correct in confirming that I spoke with Tracey Gee and advised that the Ministry was reviewing options in light of our desire to ensure you are working in a safe environment. We are aware that "change" for you can create anxiety and so we are

working to ensure continuity for you. Jo Anne will continue to work with you as will Kathy Higgins/Krishna.

[105] On 3 September 2006 Ms Isaac wrote to Peter Anderson, Area Manager, and advised him:

It is with regret that I am contacting you regarding the bullying I have been experiencing at the Waitakere Service Centre as I had hoped that we did not need to get to this position.

I wish to make a formal complaint of bullying and harassment by my previous branch manager Jo Anne O'Connor with recent involvement of my current service manager Denise Bayne. This began with bullying by a colleague Gillian Strid which as a staff member with a disability my health and safety was compromised and was not adequately addressed by my manager at the time and the branch manager.

[106] Ms Isaac attached a copy of the report from EAP Services. In response Mr Anderson requested specific details so that Ms Isaac's complaint could be investigated.

[107] On 5 September 2006 Ms Isaac repeated her concerns about workplace bullying in a further letter to Mr Anderson. She advised him she had kept records and evidence of the incidents which supported her complaint. Ms Isaac requested a meeting with Mr Anderson and her PSA organiser to discuss how her complaint would be progressed. Mr Anderson requested copies of the records and evidence supporting her complaint.

[108] Ms Isaac then requested an opportunity to meet so that she could provide verbal descriptions of the situations rather than go through the stressful task of writing it all down. Ms Isaac requested Mr Anderson to treat the situation as a sensitive one.

[109] At the same time Ms Isaac was referred, by her doctor, to see Dr John McEwan. In Dr Baker's referral note she mentions that Ms Isaac had been subjected to bullying by her manager and co-workers for almost 10 years. Dr Baker states:

There have been several what would seem minor disputes ... that have generally been initiated by some workmates, these have not been dealt with at all well by her manager. Generally her employer and managers have found it very hard to accept that she has an ongoing disability and Denise has been subjected to ongoing bullying and harassment tactics over several years.

[110] Ms Isaac wrote to Dr McEwan on 25 September 2006 regarding her situation at work and seeking his help with strategies to help her cope with her work environment, ongoing employment and getting her evidence together for her complaint.

[111] In her email Ms Isaac told Dr McEwan that just before she left for her surgery in May she had been told by Ms O'Connor that the MOSD was changing the way the office works and that she [Ms Isaac] was not likely to be able to fit into this and they were going to fire her.

[112] Ms Isaac told Dr McEwan that she had had no contact from the Department (but doesn't specify the timeframe) and that no action had been taken by MOSD and that even though she had contacted the HR Consultant and Regional Manager, and had made a formal complaint she had received no support from senior management and no intervention. Ms Isaac does not tell Dr McEwan that she had been communicating with Mr Anderson in early September, nor that she had not yet sent the documents he had asked for.

[113] Dr McEwan consulted with Ms Isaac on 26 September 2006. Dr McEwan concluded that Ms Isaac was the victim of one of the worst cases of harassment in the workplace he had dealt with and that all the standing orders of the department had been broken. Dr McEwan recommended a move to another office as soon as possible, preferably Westgate. Before reaching his conclusions Dr McEwan had not made contact with any members of staff or management at MOSD.

[114] On 27 September 2006 Mr Anderson wrote to Ms Isaac reminding her that he was awaiting copies of the records and evidence she had compiled with regard to her complaint, so that he could progress the matter quickly.

[115] On 19 October Ms Higgins forwarded to Mr Anderson a copy of the agreed terms of reference to be followed in the investigation of Ms Isaac's complaints. An independent investigation followed, undertaken by Mr Alan Hodgson, Regional Integrity Services Manager (Waikato/Coromandel), and Ms Sarah Best, Investigation Manager (Bay of Plenty).

[116] The allegations contained in Ms Isaac's complaint are recorded as:

- Harassment and bullying by Ms O'Connor – "harsh, angry, distant, hostile and thuggish".

- Other staff witnessed the “harsh, angry, distant, hostile and thuggish” behaviour.
- Ms O’Connor’s behaviour encouraged other staff to act inappropriately towards Ms Isaac;
- Breach of privacy by Ms O’Connor – an email sent to Ms Strid; and the delivery of a written verbal warning letter without an envelope. These two incidents made Ms Isaac feel “mortified, humiliated and unsafe”.
- Glare problem between July and November 2005 that was not managed by Ms O’Connor.
- Late response by Ms Isaac’s manager to Ms Isaac’s request to take special leave at Christmas 2005. The manager was taking instructions from Ms O’Connor.
- Problems with the placement of a screen to prevent a draft from the air-conditioning caused by Ms O’Connor.
- Ms Isaac was told by Ms O’Connor on 11 April 2006 that she would be fired on the grounds that the office would not be able to accommodate her disability.

[117] Mr Hodgson and Ms Best in their report concluded that Ms Isaac:

Had an unequivocal view of the part that she played herself. She could not accept that her behaviour and approach to colleagues and managers could have a bearing on her situation. She appeared to us to be self-righteous and beyond reproach and this reduced her credibility.

[118] Mr Hodgson and Ms Best found the allegations of bullying against Ms O’Connor and Ms Bayne to lack substance. On 22 December the draft report was provided to Ms Isaac and Ms Higgins for their comments. Ms Higgins wrote a substantial response to the report findings. In conclusion Ms Higgins advised MOSD that the PSA did not agree with the outcome of the investigation and maintained that workplace bullying/harassment had occurred.

Disadvantage Claim

[119] As set out earlier in this determination there are two aspects to Ms Isaac’s claim that she has been disadvantaged in her employment, bullying and breaches of health and safety.

Bullying

[120] I find the facts do not support a finding the Ms Isaac has been disadvantaged in her employment. The evidence shows that Ms O’Connor, both while she was Ms Isaac’s direct manager and after she had been promoted and

had no further direct responsibility for Ms Isaac, did everything she reasonably could to ensure Ms Isaac was safe while she was at work.

[121] In coming to my conclusions in this matter I am mindful of the need not to trivialise Ms Isaac's complaints. What I have set out in this determination does not mean I do not believe Ms Isaac, but rather, I disagree with her. Ms Isaac lacked insight into the dynamics of the relationship between herself and her managers. She put all the responsibility for the deterioration in their relationship on Ms O'Connor and Ms Bayne. I find Ms Isaac's perception of Ms O'Connor's behaviour and the seriousness of the behaviour is overstated and exaggerated.

[122] I am satisfied Ms Isaac has construed events and conversations to show she was a victim. I am supported in my findings by two quite distinct and separate examples.

[123] Ms O'Connor made a formal complaint that when she attended the office on 20 December 2006 in her role as Regional Manager, Ms Isaac deliberately took a photo of her, on her [Ms Isaac's] cell phone. Ms Isaac denied taking a photo and told me that she had been advised by Dr McEwan to hold something up between herself and Ms O'Connor to act as a shield against Ms O'Connor and that she had used the cell phone for that purpose.

[124] MOSD provided the Authority with copies of the CCTV footage from that day. There were two camera angles provided. The footage shows Ms Isaac, who is holding some documents, walking towards the end of the room, where Ms O'Connor is seated with another employee. As Ms Isaac sees Ms O'Connor she turns and walks back to her desk.

[125] While Ms Isaac is at her desk she retrieves what looks like her cell phone from her handbag. She then makes her way to the end of the room (walking directly past Ms O'Connor) and proceeds to work with the documents she had in her hand. While standing at the workstation Ms Isaac holds her cell phone up in Ms O'Connor's direction as if taking a photograph.

[126] After working with the documents (it looks like photocopying but I can't be sure about that) Ms Isaac begins to make her way back to her desk. Just as she goes past the area in which Ms O'Connor is seated Ms Isaac stops, takes her cell phone, turns around and looks to be taking a photo of Ms O'Connor. Ms Isaac then puts her cell phone in her pocket and returns to her desk.

[127] Ms Isaac's actions do not support her contention that she was simply following instructions and holding up the cell phone as a barrier between herself and Ms O'Connor. Ms Isaac did not need to return to her desk and retrieve her cell phone, she had papers in her hand which would have been a far more effective barrier.

[128] At the meeting at which Ms Isaac received a copy of the Investigation Report, on 22 December 2006 it was agreed that Ms Isaac would provide a response by 12 January 2007. It was also agreed that Ms Isaac would be paid special paid leave for the two days, 9 and 10 January 2007 to enable her to spend those days with the PSA, compiling her response to the investigation report.

[129] On 12 January 2007 Ms Isaac wrote to the Minister, Ruth Dyson seeking assistance. Ms Isaac writes:

The result of the investigation was given to me on Friday 22/12/06 with the proviso that I had to have a reply to MSD by 08/01/07. This left me in a terrible state over the Christmas period with no access to my medical, counselling, PSA or legal advisors. It was only with the support and help from a friend that I was able to complete a response.

[130] Ms Isaac has failed to mention the two days special paid leave she received for 9 and 10 January, or that the response to the report was completed on 11 January 2007 by Ms Higgins, a PSA organiser.

Health and safety

[131] Ms Isaac claims one or more terms of her employment have been affected to her disadvantage by the failure of MOSD to provide her with a healthy and safe work environment.

[132] I am satisfied MOSD took all steps which were reasonably practicable to ensure Ms Isaac's safety at work. MOSD has made extensive efforts to facilitate Ms Isaac's requirements to ensure she can be actively employed. These steps include:

- In 2003, to accommodate Ms Isaac's disability with regard to sensitivity to noise, Ms O'Connor instructed staff working in the same area as Ms Isaac to keep their radios turned off. Further, no radios and music is allowed at work social events when Ms Isaac is in attendance.

- Ms Isaac was allocated her own car park as she is unable to walk from the usual staff car parking area to the office. The car park was only allocated after extensive consultation with Ms Isaac as some areas of the car park were unsuitable because of the distance from the door and steps. The fact that Ms Isaac was the only case manager with her own car park was a cause of some consternation from Ms Isaac's work colleagues.
- In April 2006 Ms Isaac's computer monitor was changed. MOSD contacted Ms Molloy and asked her to assess Ms Isaac's work station as a result of that change at a cost to MOSD. Further, Ms Isaac has had access to ergonomic furniture as required.
- Significant expenditure was incurred in tinting the windows to assist with the glare problem faced by Ms Isaac. All staff were also instructed to keep the blinds adjusted or closed. This impacted on staff members who liked to work in natural light.
- Staff with conflicting needs have been moved to other areas of the office. This has caused upset for those staff being moved which has had to be managed.
- When the relocation to the West Wing occurred in 2006 Ms Molloy was engaged by MOSD to assist in determining which location would be best for Ms Isaac. Ms Isaac had free reign to decide where to sit, and her decision resulted in another staff member being moved.
- Air conditioning units were adjusted and screens were installed to accommodate Ms Isaac's needs as and when necessary.
- Ms Isaac's hours of work have been changed to reflect her desire not to drive in peak hour traffic. There is a resulting difference between Ms Isaac and her colleagues in the amount of time Ms Isaac is available to undertake client contact by about three hours. In order to address this issue MOSD offered to pay for a taxi to and from work for Ms Isaac so that she could work normal hours. Ms Isaac refused this offer and became very upset at the proposal.
- Ms Isaac is not required to be part of the usual Case Manager rosters for reception or the floating Case Manager unlike her colleagues.

[133] The managers responsible for Ms Isaac's safety and welfare at MOSD were fully aware of Ms Isaac's medical condition and its affects on her. Those managers not only took all practicable steps to assist Ms Isaac in her daily functions, but went the extra distance. The evidence does not establish any failures by MOSD in providing a safe working environment for Ms Isaac.

Discrimination claim

[134] Ms Isaac also claims to have been discriminated against in her employment. I am not satisfied Ms Isaac has substantiated this claim. Certainly, I have found no evidence of discrimination.

Breach of good faith

[135] This claim concerns an alleged failure by MOSD to provide Ms Isaac with information, and/or the opportunity to comment on information, relevant to the decision not to transfer Ms Isaac to a position based at the Westgate office.

[136] Ms O'Connor and Mr Kilgour discussed the possibility of transferring Ms Isaac but determined that it would not be feasible. A number of the reasons put forward by Ms O'Connor relate specifically to the hours between which Ms Isaac works at Waitakere. However, as Ms Isaac has been at pains to point out, if she was working at Westgate, she would be working normal office hours, as her route to work would not necessitate the travelling outside peak travelling times.

[137] Other reasons relate directly to how Ms Isaac would cope given her medical condition, in particular dealing with stressed clients, which in the past has impacted on Ms Isaac's ability to remain at work and the lack of tinting on the windows at the Westgate office and therefore the potential for the glare to cause problems given Ms Isaac's sensitivity to light.

[138] At the investigation meeting Ms Isaac told me there would be many advantages to her working at Westgate, firstly, and as already stated she would be able to work within the normal hours of work of 8.30am to 5.00pm which means she could do the same amount of contact hours as other client managers; she would no longer require a special car park as the staff car parks, which are on a first in first served basis, are much closer to the office and she could cope with that; all the filing is on one level and so she would be able to undertake her own filing.

[139] It should have been clear to MOSD by at least June 2006 that Ms Isaac was seeking a move to Westgate, as the EAP report recommended such a move. In coming to its conclusions not to transfer Ms Isaac, MOSD had an obligation in good faith, to fully discuss the reasons why a transfer was not seen as practicable.

[140] To find a breach of good faith, the breach by MOSD must be serious and sustained. I find that while MOSD should have explained its reasons for the non-transfer, this breach does not meet the standard which would give rise to finding of a breach of good faith.

Conclusion

[141] Ms Isaac's employment has not been affected to her disadvantage by an unjustifiable action of MOSD and her concerns do not give rise to a personal grievance.

[142] Ms Isaac has failed to establish her claim that she was discriminated against.

[143] MOSD is not in breach of its duty to act toward Ms Isaac in good faith.

Direction to mediation

[144] Ms Isaac and MOSD are in an ongoing employment relationship. As set out earlier in this determination, Ms Isaac was initially on unpaid sick leave from January 2007. This situation was rectified by MOSD when Ms Isaac was paid retrospectively for the period 18 January to 30 March 2007. Since 2 April Ms Isaac has been in receipt of her full pay.

[145] On 30 March 2007 Ms Isaac was cleared by her doctor to return to work on a graduated basis, subject to any proposal being submitted to Dr Baker for consideration. On 4 May MOSD wrote to Ms Isaac explaining that the Regional Commissioner was to oversee a responsive return to work plan for Ms Isaac and that Mr Anderson would work with Ms Isaac and Ms Higgins to expedite that as quickly as possible.

[146] On 11 May 2007 Mr Anderson wrote to Ms Higgins advising of the steps needed to ensure that her workplace was safe on her return to work. Mr

Anderson undertook to make contact with Ms Higgins within 2-3 days to commence dialogue.

[147] On 1 June 2007 a further medical certificate was issued by Dr Baker reinforcing her opinion that Ms Isaac could make a graduated return to work. However, Dr Baker added the condition that Ms Isaac's work location had to change.

[148] Due to the reluctance of MOSD to change Ms Isaac's work location, and Ms Isaac's reluctance to return to the Waitakere office, Ms Isaac has remained on paid special leave.

[149] On 4 December 2007 a further medical certificate was provided by Dr Baker, reiterating once again that Ms Isaac was fit to return to work on a graduated program. This medical certificate, however, does not mention a requirement that Ms Isaac's work location be changed.

[150] It has now been 18 months since Ms Isaac has attended full time work. Ms Isaac is clearly able to return to work on a graduated basis and this should occur as soon as possible.

[151] The parties are directed to attend mediation within 28 days of the date of this determination in order to agree on a graduated return to work program for Ms Isaac.

[152] The parties have never discussed with Ms Isaac, why a move to Westgate could not be accommodated. While I have found the failure of MOSD to discuss its reasons with Ms Isaac was not sufficient to found a breach of the duty of good faith, this is an issue that the parties are able to canvass at mediation.

Costs

[153] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority