

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION (REFER PARAGRAPH 5)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 253
5390540

BETWEEN	DEBORAH OWEN Applicant
A N D	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Brian Henry, Counsel for Applicant Juliette Dobson and Tara Sewell, Counsel for Respondent
Investigation Meeting:	25 February 2014 at Whangarei 16-18 May 2016 at Auckland
Submissions Received:	26 May 2016 from Applicant 30 May 2016 from Respondent
Date of Determination:	26 July 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Ms Deborah Owen, claims that she has been unjustifiably disadvantaged and unjustifiably dismissed from her employment with the Respondent, the Chief Executive of the Department of Corrections (the Department).

[2] In particular, Ms Owen claims she was unjustifiably disadvantaged by the Department's handling of her complaint of sexual harassment and by the Department creating and fostering an unsafe work environment. Ms Owen claims that the actions of the Department resulted in her feeling unable to continue in her employment.

[3] The Department denies that it unjustifiably disadvantaged or unjustifiably dismissed Ms Owen, claiming that it acted fairly and reasonably and in good faith to support Ms Owen throughout her employment, dealing with her concerns in a timely and appropriate manner.

The issues

[4] The issues for determination by the Authority are whether or not Ms Owen:

- (a) Was unjustifiably disadvantaged by the Department as a result of its handling of her claim of sexual harassment;
- (b) Was unjustifiably disadvantaged by the Department failing to provide her with a safe working environment and ;
- (c) Was constructively dismissed by the Department.

Prohibition on publication

Prohibition on publication

[5] **I order that the name of the former Department employee and any information which may lead to his identification, which is subject to a permanent non-publication order is not to be published. The former employee is to be referred to as Mr A, a letter bearing no relationship to his actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Note

[6] During the course of the half day and three day hearings, the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties’ representatives. The parties have also submitted closing submissions on the facts and law.

[7] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on each of the issues necessary to dispose of the matter and specified orders made as a result.

[8] One of the primary witnesses for the respondent, Ms Barbara Bailey, who was a Service Manager for the Department, was unable to attend the Investigation Meeting and give her evidence in person due to a severe health problem. Her evidence was filed by way

of a sworn affidavit and is therefore untested. Whilst I take due cognizance of that fact, the witnesses were questioned in relation to the evidence filed in Ms Bailey's affidavit during the Investigation Meeting.

Background facts

[9] Ms Owen's employment was covered by the Collective Agreement 2010 – 2012 between the Community Probation Services and the Public Service Association (PSA).

[10] The Collective Agreement stated at clauses:

1.1 Scope of Agreement

Management has the right to plan, manage, organise and finally decide on the operations and policies of Community Probation Services (CPS) of the Department of Corrections (the Department), subject to the provisions of this agreement.

4.3 Medical Examinations

Staff may be required to undergo medical examinations during their employment, as directed by CPS, to assess whether they continue to meet the requirements of their role.

[11] Ms Owen was employed as a Senior Community Work Supervisor by the Department on 8 December 2008. Community Work Supervisors are appointed to manage offenders who are sentenced to community work and/or community detention. A sentence of community work provides reparation to the community and an opportunity for offenders to acquire or improve work skills. A sentence of community detention is a punitive measure that restricts an offender's movements.

[12] The Community Work service team was split into two sections, the Agency caseload in which team Ms Owen had worked, and the Centre caseload. The Centre caseload was always substantially larger than the Agency caseload.

[13] During the period 21 August 2009 to 2 October 2009 Ms Owen was on a period of leave and confirmed during a meeting held with the Department on 28 May 2010 that the reason for her absence was: "*I got sick in August 2009 I was diagnosed at this point as being in stage 1 of Bi-Polar (very low level and under control)*". Upon her return to work, Ms Owen was on reduced hours gradually returning to full-time hours.

[14] Initially, there were no issues with the work undertaken by Ms Owen.

[15] In November 2009, Ms Bailey was assigned to the role of Service Manager of the Community Work service team in which Ms Owen worked. Ms Bailey stated that she had been tasked to change the operational day-to-day systems and processes of the Community Work Service team to ensure any unmanaged offenders were followed up for either engagement in their sentence or enforcement to be undertaken.

[16] Ms Owen said that she had worked with Mr Jared McQueen; however, he had responsibility to manage the community detention electronic monitoring which involved him in visiting offenders' home and attaching the monitors to the offenders' ankle to measure at the perimeter where the offender was allowed to go. As a result, he was frequently out of the office and unable to assist her with her workload.

Sexual harassment Complaint 2010

[17] A temporary employee, Mr A, was engaged by the Department in March 2010 and assigned to assist the Community Work team. Ms Owen said that on 29 March 2010, Mr A brushed his right hand against her buttocks while she was standing by a filing cabinet.

[18] Ms Owen said that on 9 April 2010, while she was seated at a desk, Mr A crawled underneath the desk stating that he was looking for something and then deliberately placed his hand on her knee and slid the hand from her knee to her thigh. He said he had done so in order to assist him to get out from underneath her desk.

[19] Following this further incident, Ms Owen had spoken to the Acting Area Manager, Mr Gregg Anderson. Mr Anderson said he had not seen the incident or the behaviour about which Ms Owen complained in relation to Mr A, however, as Ms Bailey was due back to work very shortly after the date that Ms Owen had spoken to him, he had said he would pass the issue on to Ms Bailey for her attention.

[20] When Ms Bailey returned from leave, Ms Owen emailed her on 16 April 2010 and set a time to speak to her about Mr A, stating that she wished to speak about: "*an issue that had become quite serious*" for her.

[21] When Ms Owen met with Ms Bailey, they had discussed the situation and Ms Owen said Ms Bailey's response had been that Mr A was probably unaware he was being offensive, but that she would speak to him, and she would also ask Mr Anderson to speak to Mr A about personal boundaries. Ms Owen had believed that as a result of her discussion with Ms Bailey, Mr A would be moved out of the building in which she worked

[22] Ms Bailey stated in her untested affidavit evidence that during the discussion with Ms Owen about the incident, she had enquired what she (Ms Owen) would like to happen.

Ms Owen had made it clear to her that she did not want any formal action taken; she just wanted her complaint noted.

[23] Mr McQueen said that he had noticed Mr A touching Ms Owen's leg. He had subsequently been called in to Ms Bailey's office, and asked about what he had seen. There were no minutes taken of that meeting.

[24] Ms Bailey said she had discussed the matter with Mr Anderson who confirmed that Ms Bailey had asked him to speak to Mr A about office etiquette in general, and being mindful of personal behaviours and boundaries in particular.

[25] Mr Anderson confirmed he had done so, and that he had not had any reason to think that Ms Owen had been concerned about Mr A after that.

[26] Ms Owen said that Mr A had continued to approach her and this had resulted in an incident where he had invaded her space inappropriately by leaning across her from behind when she was sitting at the chair at her desk.

[27] Ms Bailey stated that Ms Owen had advised her about this incident, and asked her to discuss it privately with Mr A whilst she (Ms Owen) was away from the workplace.

[28] Mr Ross Bonthron, a Probation Officer, said Ms Baily had spoken to him about the incident which he had witnessed.

[29] Ms Bailey had spoken to Mr A and asked him to keep his distance from Ms Owen. He had agreed to do so.

[30] She had also relocated Ms Owen to sit away from Mr A, next to Mr Bonthron, and near to her own office.

[31] Ms Bailey stated in her affidavit evidence that she had advised Ms Owen that it had been made clear to Mr A that he was to keep his distance from her, and she had also spoken to Ms Owen on a number of occasions subsequently in relation to the matter. Ms Owen had told her that she was happy to relocate to the desk next to Mr Bonthron, and felt safe sitting next to him.

[32] Ms Owen said that despite being moved to sit next to Mr Bonthron, Mr A had continued to approach her, he had asked her for money, told her: "*you look like shit*", appeared to have looked at her mobile phone and made an inappropriate comment to another employee to the effect that: "*Deb is on fire, don't touch her or you'll put her phone out*".

[33] Ms Bailey stated in her untested affidavit evidence that she was unaware until she read Ms Owen's witness statement that issues had arisen after she had been moved to sit next to Mr Bonthron. These issues including the incidents of Mr A accessing her mobile phone and making sexually inappropriate comments about her to another employee, had not been raised with her at the time they were alleged to have occurred.

[34] Ms Owen said that during a period of sick leave in the latter part of May 2010, Ms Bailey had telephoned her and proposed that she work alongside Mr A to: *reduce my workload*".

[35] Ms Bailey stated that on 24 May 2010 Ms Owen had advised her by telephone that she would be off work for another week and that working with Mr A would be a problem. Ms Bailey stated that she had asked Ms Owen for information and her expectations as she believed the matter had been resolved, however Ms Owen had changed the subject.

[36] On or about that date Ms Owen said she had contacted the PSA to seek assistance in making a formal complaint about Ms Bailey concerning her workload and sexual harassment.

[37] Ms Bailey had emailed Ms Lesley Wears, at that time Senior Human Resources Adviser for the Department and the Assistant Area Manager, Mr Tony Hodgson, advising that she had been contacted by Ms Nora Cook, PSA Organiser, about Ms Owen's: "*unreasonable workload*" and a complaint of sexual harassment.

Workload issue

[38] On 10 May 2010, Ms Owen had a meeting with Ms Bailey at which she discussed the fact that she felt under pressure from her work caseload, following which she went on sick leave.

[39] During a meeting held on 18 May 2010, Ms Owen said that Ms Bailey had insisted that she go to see a psychiatrist. Ms Bailey stated in her affidavit that she had not instructed Ms Owen to see a psychiatrist, but Ms Owen had told her that she had regular appointments with a psychiatrist.

[40] Ms Owen had subsequently been medically certified as unfit for work from 17 May 2010 until 4 June 2010. The medical certificate dated 18 May 2010 stated that in the doctor's professional opinion: "*her current symptoms have been caused by pressure in the workplace*".

[41] Ms Owen said that during her period of certified leave, Ms Bailey had phoned her repeatedly to talk about work for extended periods of time. On one such call on 25 May 2010, Ms Owen said she had become aware that Ms Bailey had spoken on the speaker phone with Mr Anderson listening in, although she had not been advised of this.

[42] Ms Bailey stated in her untested affidavit that she had contacted Ms Owen while she was on leave, however, she did not discuss work and she had checked on her wellbeing and with the purpose of ensuring that she was being supported. She said that during such conversations which were conducted using a speaker telephone, Mr Anderson was present and she had advised Ms Owen of this fact.

[43] Mr Anderson said that he had attended telephone meetings with Ms Bailey and Ms Owen who had been made aware of him being in attendance, however he did not recall work being discussed during any of those calls.

[44] Ms Bailey stated that when she and Ms Owen met on 18 May 2010, they completed a Department Stress Management Record form which was signed by herself and Ms Bailey. Ms Owen said that although she had signed the Stress Management record, she had not read it properly.

[45] The Stress Management Record recorded that Ms Owen believed that her workload was too high and the various sections of the form recorded:

- ***Actions taken to eliminate, isolate or minimise stressor:***

Debbie and Barb both agree that Debbie is not fit to be at work

- ***Actions taken by employer to alleviate employee stress:***

Advised Debbie to make a doctor's appointment, to have more time off – get certificate. Recommended that Debbie attend EAP = Deb agrees.

- ***Actions to be taken by the employee to alleviate future stress:***

Debbie will attend doctor's appointment today and whilst on leave will rest, not think about work, identify any stresses and start working on how to manage personal stress. Bring back when returns to work some ideas for stress management to discuss with Barbara.

- ***Date set for follow-up meeting:***

Will be set when known that Doctor has given Debbie clearance to return to work.

[46] Ms Bailey stated in her untested affidavit evidence that she had suggested that Ms Owen obtain assistance through EAP, which Ms Owen confirmed.

[47] Ms Owen said that during the meeting on 18 May 2010, Ms Bailey had presented her with a letter addressed to her and written by Ms Marganit Carmon, Psychiatrist, and dated 13 May 2010. The letter stated:

Debbie has been quite stable for the last couple of months

She noticed for quite a while that her workload is too heavy to manage and told me she has tried to address you twice regarding this matter.

....

I recommended that she will rest for a few days and that she will check with you how she can reduce the immediate workload to a manageable one. She obviously needs your help and support to find the way to reduce the unnecessary (extra) stress that is caused by being over loaded.

[48] Ms Bailey stated that Ms Owen initially refused to provide her with a copy of the Psychiatrist's letter as she believed it had errors in it. The letter dated 13 May 2010 states on it in Ms Bailey's handwriting: "*Debbie reports that this letter has not accurately reflect the discussions with Dr Carmon. Debbie states clearly that the underlined statement is not valid or true and had pointed out this inaccuracy out to her nurse Jackie.*" It had been signed after this statement by Ms Owen and dated 18 May 2010.

[49] Ms Owen said that she had been upset when she realised what she had signed and had asked her then District Health Nurse Jacqui Metcalfe, who had been present at the meeting with the Psychiatrist Dr Carmen to write a letter to Ms Bailey on her behalf. In the latter dated 18 May 2010 Ms Metcalfe had addressed the letter: "*TO WHOM IT MAY CONCERN*" and stated "*I am writing at Debbie's request to rectify the untrue statement her manager Barbara Bailey asked her to sign on the medical certificate Margeret Carmen had issue her with on the 13/5/2010*".

[50] The workload issue which Ms Owen had also raised with the PSA was discussed at the meeting held on 28 May 2010 with Mr Hodgson and Ms Wears.

Meeting on 28 May 2010

[51] The purpose of the meeting held on 28 May 2010 was to address the concerns raised by Ms Owen in relation to her complaints that Ms Bailey had mismanaged the sexual harassment issue involving Mr A, and the unsafe workplace due to high workloads.

[52] Ms Wears said that Ms Owen had been open with the Department in relation to health issues she had experienced and had mentioned depression and bipolar disorder. It was her understanding that Ms Owen had discussed these health issues with Ms Bailey.

[53] Ms Wears said that at the meeting on 28 May 2010 Ms Owen's concerns with her workload had been discussed. In relation to her workload Ms Owen stated: "*I cannot do all the assessments, my caseload plus another caseload, part of somebody's else's caseload and other queries from staff during the day*".

[54] In response to Ms Wears question as to what she wanted to happen, Ms Owen had stated: "*I don't want to work under Barbara*" although she also stated that: "*I don't dislike Barb – I have trusted her –*".

[55] It was agreed during the meeting that the Service Manager to whom Ms Owen reported would be changed, however, it was pointed out that Ms Bailey would remain the Service Manager at the Department Poto Street site and that therefore there would be some contact with her.

[56] Ms Wears said that the Department changed the Service Manager to whom Ms Owen reported following the meeting and that the Department had believed that Ms Owen and Ms Cook were satisfied with the approach.

[57] Ms Owen said that the change in the Service Manager took place on 12 July 2010. During the Investigation Meeting Ms Owen confirmed that Ms Bailey ceased to manage her after the end of May 2010 and after that date Ms Victoria Ashby and Mr Anderson were appointed as her Service Managers. She said that she enjoyed a good relationship with Ms Ashby and Mr Anderson, and worked well with them.

[58] The complaint about sexual harassment was also discussed at the meeting. Ms Owen discussed her complaint as relayed to Mr Anderson and Ms Bailey that Mr A had crawled under her desk and touched her leg, she also said that Ms Bailey had wanted her to continue working with him after that incident but she did not want to do so.

[59] Ms Owen told Mr Hodgson and Ms Wears that she wanted to discuss her options in relation to Mr A, and was advised that he was leaving the Department whereupon she stated: *“If (Mr A) is leaving in 3 weeks then that will no longer be an issue for me”*.

[60] Mr Hodgson asked her if she felt the Mr A matter had been dealt with, or if she required further action to be taken, and she responded: *“I am happy with this – as he is leaving.”* Mr Hodgson further enquired if she would like to lodge a formal complaint in respect of Mr A, but Ms Owen replied that she did not want to do so.

[61] Mr Fury asked where Mr A would be working during the three week period until he left the Department, and Mr Hodgson advised that Mr A would not be working on the agency workload but he would be present at Poto Street office, and Ms Wears asked Ms Owen if that would be a problem for her, to which she responded: *“No – he won’t come near me – Barb has told him already to keep his distance”*.

[62] Ms Wears then advised that Ms Owen could report any issues regarding Mr A to another Service Manager at Poto Street.

Events 24 December 2010

[63] On the evening of 24 December 2010, Ms Owen said her ex-husband broke into her home while heavily intoxicated and proceeded to harass her for some period of time. The incident had culminated with her ex-husband taking her to hospital and informing staff that she had taken a drug overdose as a result of which she had been admitted to hospital under section 11 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 where she remained in the mental health unit until released on 29 December 2010.

[64] On 30 December 2010, Ms Owen met with Mr Anderson and Ms Janine Wain, who was ‘acting up’ at that time in the role of Assistant Area Manager Taitokerau. During the meeting, Ms Wain said that Ms Owen had informed her and Mr Anderson that she had been sectioned under the Mental Health Act by her ex-husband over the Christmas period. She recalled that Ms Owen did not appear to be well during the meeting.

[65] Ms Owen confirmed that she had done her best to explain during the meeting that she had been taking extremely heavy drugs with sedative properties and had been in recovery mode.

[66] Following the meeting Ms Wain had sent an email to Ms Wears, copied to Mr Hodgson, Mr Anderson and another Service Manager, Mr Kevin Watene. In the email which was dated 31 December 2010 Ms Wain stated in relation to the meeting with Ms Owen:

Both Gregg and I feel she is not okay to be at work – she was adamant that she wanted to be back at work next Wednesday but we discussed that she needs to make sure that she is medically cleared to come back to work and that it would be negligent of us to allow her to come back as she admitted she is still not 100% with her medication. We made it very clear that she would need a full clearance to return to work and that it may not be the 5th of Jan.

[67] A medical certificate was subsequently provided to the Department stating that Ms Owen would be off work from 5 January to 13 January 2011.

[68] Due to the Department having concerns about Ms Owen's health, it had decided to obtain an independent medical assessment in accordance with Ms Owen's Employment Agreement and its policies.

[69] Mr Hodgson compiled a letter to Dr Jim McLeod, company medic for the Department, dated 18 January 2011 requesting that he meet with Ms Owen and provide a report to the Department on her suitability to return to work. A draft was provided to Ms Owen. In the letter, Mr Hodgson stated:

I am becoming concerned by the length of time Debbie has been absent from the workplace and her ongoing instability.

[70] Ms Owen said that when she found out about the letter and the comment that Mr Hodgson had made, she informed him that she was submitting an official complaint to the Whangarei District Health Board and provided a certificate from her GP dated 5 January 2011 stating that Ms Owen:

... has been subjected to a serious incident of psychological domestic violence. Debbie and I believe it is best if she remains off work, as she is worried about her work performance may be compromised

[71] Ms Owen had asked that she meet with her own GP, Dr Andrew Miller rather than Dr McLeod and on 15 February 2011 Mr Hodgson supplied a letter to Dr Miller in which he stated:

Since Debbie commenced employment she has on a number of occasions needed to take leave due to ongoing issues with her mental health (bipolar). On at least two occasions she has needed to take significant leave namely 25 days from 31 August to 2 October 2009 and 17 May to 4 June 2010. On a number of other occasions managers have sent her home due to her illness.

I am becoming concerned by the length of time Debbie has been absent from the workplace and her ongoing instability. I am writing to request your assistance to help me to determine how the Department can best work with Debbie to manage this situation while ensuring the ongoing effectiveness of our business. ...

When I receive your report I will discuss it with Debbie so we can determine the next steps. I have provided Debbie with a copy of this letter.

[72] Dr Miller responded on 17 February 2011 confirming that Ms Owen, who had been diagnosed with bipolar affective disorder was being treated with antidepressants and mood stabilisers, and stated that the 2010 absences were due to: “*stresses in her workload and safety at her workplace*”.

[73] On or about this date, Ms Owen said the lawyer whom she had instructed to represent her at that time had requested additional information. She and Mr McQueen had gained access to Ms Bailey’s old office which was empty at that time and had uplifted and photocopied medical certificates and private notes written by Ms Bailey which recorded Ms Owen’s concerns and health issues and the Department’s actions in relation to them. They were private notes and not otherwise available for general inspection.

Return to work 2011

[74] Following her return to work in early 2011, Ms Owen reported to the Service Manager Mr Watene.

[75] Ms Owen said that on 24 February 2011, Mr Watene had called her into his office and said that he and another Service Manager had been looking for her the night before as he thought she had “*necked herself*”. Ms Owen said she had asked Mr Watene what he meant and he made a joking gesture with one hand implying hanging by the neck and said “*I thought you had hung yourself*”. Ms Owen said she was completely shocked by both his statement and the way in which he had expressed it.

[76] Mr Watene proposed placing Ms Owen on a Coaching Plan. Ms Jeana Jurisich, National CPS/PSA Delegate had assumed responsibility for representing Ms Owen. On 28 February 2011 she wrote to Mr Watene on behalf of Ms Owen stating that Ms Owen felt coerced into agreeing the Coaching Plan, and seeking a meeting to discuss it.

[77] Mr Hodgson replied to Ms Jurisich on 2 March 2011 responded stating: “*I think it is important for staff to be supported when ever they feel they require this. I do need t clarify that the coaching plan is not disciplinary. It is being put in place to support Debbie to undertake her work to the required standard*”.

[78] Ms Owen said she attended a Family Court hearing in Whangarei on 7 March 2011 and that Mr Watene was aware of the leave she was taking for that day. As the Court process took longer than she had anticipated, she said she had remained in touch with Mr Watene, however, during the course of the day he had telephoned her when she was in

the presence of other people and had spoken to her in what she felt was a very aggressive and unpleasant way.

[79] On 7 March 2011, Ms Owen emailed a formal complaint about Mr Watene to Ms Wain, who was again acting up as the Assistant Area Manager Taitokerau. Ms Wain said she notified the Area Manager, Ms Ana Cullen, and invited Ms Owen to meet with her to discuss her complaints. Due to delays with finding a date suitable to Ms Owen and her PSA representative, the meeting with Ms Wain did not take place until 24 March 2011.

Meeting on 24 March 2011

[80] At the meeting held on 24 March 2011, Ms Owen presented her complaints about Mr Watene and Ms Bailey; specifically she stated that she was not able to work with Mr Watene, or at the Poto Street site where Ms Bailey was located as she did not consider it a safe environment for her.

[81] It was agreed that Ms Owen would take the following day as sick leave and Ms Owen would provide further details to be discussed at the next meeting which took place on 30 March 2011. Ms Wain said that she and Ms Owen had also spoken briefly about some alternative working scenarios and about the coaching plan initiated by Mr Watene.

Meeting on 30 March 2011

[82] The meeting held on 30 March 2011 was attended by Ms Owen, Mr Mark Fury, PSA representative, Ms Wain and Mr Alfred Bloom, Human Resources Assistant.

[83] Ms Wain said that during the meeting she had listened to Ms Owen's concerns in relation to her safety.

[84] Ms Wain was aware that Ms Owen had raised the complaints about her current and previous Service Managers at the Area Manager level, but she had not addressed these during the meeting, because rather it had been her intention to support and carefully manage Ms Owen's return to work so that she felt safe.

[85] It was agreed during the meeting that Ms Owen would in future work at the Department's Vinery Lane site which was a 5 minute walk from the Poto Street site, and report to Ms Wain.

[86] Ms Owen's work at the Vinery Lane site would be different from that which she had undertaken at the Poto Street site because Vinery Lane was a satellite office with no direct offender contact. Accordingly she was not able to continue with her Agency work but would carry out Enforcement action with files sent to her from Poto Street.

[87] It was further agreed that there would be regular meetings to discuss with Ms Owen how things were progressing and moving forward. Ms Wain's impression had been that Ms Owen seemed satisfied with the outcome of the meeting.

[88] The notes of the meeting record Mr Mark Fury as stating:

Very happy with option put on the table – start tomorrow.

[89] Ms Owen wrote to Ms Wain the following day, 31 March 2011 commenting on the discussion at the meeting the previous day and stating:

At Wednesday's meeting, a well thought out option was presented to me and I have gratefully accept the opportunity to continue doing productive work in a safe and supportive environment"

Thank you for the manner in which you have dealt with this matter. It has been of great assistance in rebuilding my confidence and trust in the Department

[90] Ms Wain said that on the following day she set up systems where work would be requested by and delivered to Ms Owen. She confirmed this by email to Ms Owen and advised her that if she required additional work at Vinery Lane she could email the Administration Officer for further files.

[91] Ms Cullen, at that time Acting Area Manager for Taitokerau, wrote to Ms Owen on 5 April 2011 explaining that she would be dealing with the formal complaints against Mr Watene and Ms Bailey. In the letter, Ms Cullen advised Ms Owen that her:

... allegations are being taken seriously and that appropriate steps are being taken. Until these matters have been looked into and resolved I confirm that you will continue to work as a SCWS at Vinery Lane Service Centre and report to Service Manager J Wain, as agreed on Wednesday 30 March 2011 with Acting Assistant Area Manager J Wain. ...

In the first instance I think it would be useful for us to meet so I can clarify the specifics of each of your concerns before proceeding with the appropriate action ...

I would also like to take this opportunity to remind you of the EAP service that is available to all staff.

Meeting on 12 April 2011

[92] Ms Cullen met with Ms Owen on 12 April 2011. Also present at that meeting were Ms Wears, Mr Fury, PSA Organiser, and Ms Hinemoa Hopa, in the capacity of Ms Owen's support person.

[93] Ms Cullen said it was her intention during the meeting to discuss Ms Owen's complaints about Ms Bailey and Mr Watene and in particular her allegations of bullying and the action that could be taken in relation to those complaints. She had also wanted to reach a resolution in relation to Ms Owen returning to work from sick leave which she was on at that time.

[94] Ms Cullen said it was agreed during the meeting that they would work together to resolve Ms Owen's concerns and that Ms Owen would only undertake community enforcement work in relation to her previous caseload with another employee managing the new workload allocations.

[95] It was also agreed that Ms Owen would work at the Vinery Lane site whilst Ms Cullen addressed her concerns; however this was not to be a permanent measure.

[96] The meeting notes record:

AC: What I'd like to do is focus on moving ahead. Your placement at Vinery Lane processing breaches can't be sustained long term, and I expect you will return to CW given your role as SCWS.

DO: No issues with this, but I want security controls in place as to what to do when I'm threatened or feel unsafe.

AC: Yes we will work through this with you. In the meantime while we're working through these issues you can remain at Vinery/Poto St and the coaching plan will proceed and be revisited to reflect expectations of your current work, ie processing breaches etc

DC/MF: Both agree

[97] Ms Cullen had agreed she would be speaking to Mr Watene following the meeting; however she had been unable to do so as he was on long term sick leave. Mr Watene did not return to work and has since retired from the Department.

[98] Given that Mr Watene was on long term sick leave, Ms Cullen organised with the current Service Manager, Ms Wain, to ensure that Ms Owen's workload allocation would be specific to community enforcement action from the remote site at Vinery Lane.

[99] Ms Cullen said she and a representative from the HR department had met with Ms Bailey and discussed Ms Owen's complaints in some detail. Ms Bailey had shown her the notes she had made for her own reference at the time and she had been pleased to see the level of support Ms Bailey had provided to Ms Owen. She found no evidence that Ms Bailey had been bullying Ms Owen, but on the contrary she identified several examples of Ms Bailey attempting to support Ms Owen.

[100] Ms Cullen said that she had not commenced a formal employment investigation because she had wanted to try to resolve Ms Owen's complaints via a facilitated meeting with all parties present. However Ms Owen did not want this to occur, preferring instead to have Ms Bailey present her response in writing.

[101] Ms Wain said she had been in contact with Ms Owen regularly following the meeting held on 12 April 2011.

[102] During the 5 week period Ms Owen was at the Vinery Lane site, Mr Anderson would deliver and collect the enforcement files she was working upon, and discuss enforcement actions with her.

[103] During April 2011, the Department sent a number of emails to all staff in Whangarei, including Ms Owen, to update them about upcoming changes to community work.

[104] Ms Owen said that on 21 April 2011, Ms Bailey had sent out a generic email to a large number of Department employees copied to Mr Anderson and Ms Wain. Ms Owen said she understood from the email that only the staff member who was allocated to each offender's file was allowed to access the file and that if a staff member's name was not attached to an offender and the staff member opened the file, it became a breach of confidentiality.

[105] Ms Wain said that the email from Ms Bailey was sent to all Department employees, including herself, as a reminder about the Department's IT systems in relation to staff and offender information, and in particular that once an offender was transferred from one staff member to another staff member for them to manage, the original staff member did not have authority to access that information.

[106] Ms Wain said it was a reminder to all employees that information could only be accessed for a genuine business purpose, but because Ms Owen did have a genuine reason to access files that were not allocated to her by undertaking enforcement action, therefore she could access the information.

[107] As Ms Wain had not been present in the office she sent her an email querying the matter. Also included in the email had been her concern that she had not been receiving the files she needed to complete the enforcement actions.

[108] Ms Owen sent an email to Ms Wain, copied to Mr Fury, on 26 April 2011 complaining about: "*the lack of colleague communication and refusal to send enforcement files through the mailrun with justifiable cause*". Ms Owen also complained about Ms Wain's lack of response to her emails, and the fact that she had run out of work.

[109] Ms Wain emailed Ms Wears the following day, 27 April 2011, commenting upon a telephone conversation she had had with Mr Fury, and stated that she had explained to him that:

...I have been regularly checking up on Debbie's work load and she only ran out of work on Thursday and had not signalled any issues to me prior to this email (I talked to her on Wednesday). I also said that this shows a real disregard to our processes of raising issues – that Debbie should have gone to ASM Gregg Anderson for more work once she ran out, or could have spoken to me on Thursday to highlight her concerns.

... I will be reminding her of what she needs to do when there are issues or concerns with her work. I have arranged for more work to go to her today ...

[110] Ms Wain said she met with Ms Owen on 27 April 2011 to find out exactly what her concerns were and to clarify with her with whom she was working, i.e. the community work team with Acting Service Manager, Ms Claire Jones. She had also wanted to clarify with Ms Owen how and when to raise issues with her.

[111] During their meeting, she had reiterated the upcoming changes which were occurring to the Community Work team structure and advised that these changes applied to all staff.

[112] She had confirmed the situation in an email dated 28 April 2011. Also on that day she sent an email to all staff at Whangarei, including Ms Owen, stating:

Early next week there will be a meeting of all Community Work staff as the teams have been reshaped and reformed, working towards the move to Walton Street.

[113] Ms Owen said that on 28 April 2011, her entire caseload was transferred to Ms Bailey with the exception of a few which went to another employee. She had refreshed her computer page and discovered her entire caseload had been removed. She said there had been no discussion about this with her and she had not been warned or informed by anyone about what was happening or why she was no longer responsible for the caseload.

[114] During the Investigation Meeting Ms Owen confirmed that she had not read any of the emails about the impending changes to the Department IT systems.

[115] On 29 April 2011, Ms Wain received an email from Ms Owen at 8.40am asking if she could meet with her that day to discuss her caseload. Ms Owen commented in the email: *“As I have not been advised or contacted to discuss this issue, I now request some time with you to discuss this matter.”*

[116] Ms Wain responded one minute later, at 8.41am, advising that: *“I was planning to meet with both you and Claire today to discuss just that. I’ll send you a calendar appointment.”*

[117] Ms Owen said she had contacted a lawyer who had advised that she should leave the office and visit her doctor to obtain a certificate for stress leave. As a result she advised two employees that she was leaving and left the building without responding to either the email from Ms Wain nor the calendar invitation.

[118] Ms Wain said Ms Owen had left the office without advising her, or any other manager, that she was doing so. She had not been able to contact Ms Owen later that day or for a period of time thereafter.

Meeting on 17 May 2011

[119] Ms Wears said that the Department met with Ms Owen on 17 May 2011. Present at the meeting were Ms Wears, Ms Cullen and Ms Linda Biddle, Regional Manager. Ms Owen was accompanied by Mr Larry Alexander, the lawyer acting for Ms Owen at that time.

[120] At this meeting, Ms Owen advised that she wanted her issues investigated further and that she was unwilling to return to the workplace until this occurred.

[121] Ms Cullen said that Ms Owen raised a number of new issues during the meeting, including the disappearance of her workload without any communication from the department. She had explained that that was incorrect; rather Ms Owen's work load had been reallocated and would be re-distributed across the team. At no point had Ms Owen been blocked from her work.

[122] Ms Cullen said she had found it difficult to believe that Ms Owen had been unaware of the reallocation of workloads due to Department changes required to improve efficiencies, stating in the meeting: "*I am aware of at least 3 emails from Barb Bailey sent to your team regarding the upcoming changes – the messages were very clear.*"

[123] Ms Wears said that at 17 May 2011 the Department had already considered all of Ms Owen's issues to that date and believed that some had been addressed to her satisfaction.

[124] The Department requested that Ms Owen return to work at another location until the remaining issues could be sorted out, however, Ms Owen had refused to do so and had handed in her resignation. The resignation letter dated 17 May 2011 stated:

In light of the round table meeting today I am left with no option but to resign for the following reasons:

- 1. The issues I have raised have not been resolved.*
- 2. Return to the workplace as demanded will continue to place me under duress as a result of the issues not being resolved.*
- 3. This meeting has tended to "gloss over" and ignored the concerns I have raised.*
- 4. My resignation takes effect forthwith.*

[125] The Department had requested that Ms Owen reconsider her resignation.

[126] Ms Owen subsequently raised a personal grievance. The parties attended mediation on several occasions; however these did not resolve the issues between them.

[127] The Department processed Ms Owen's resignation on 8 September 2011 as the parties had failed to resolve her issues and she had not returned to work. Ms Owen filed her first statement of problem with the Employment Relations Authority on 27 July 2012.

Determination

Unjustifiable disadvantage

[128] Ms Owen is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[129] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[130] Ms Owen must therefore establish that there was some unjustifiable action or actions by the Department which affected her terms and conditions of employment to her disadvantage.

Was Ms Owen unjustifiably disadvantaged by the Department as a result of its handling of her claim of sexual harassment?

[131] Ms Owen claims that she was sexually harassed by Mr A. Specifically Ms Owen claims that she considered Mr A's behaviour in:

- (i) *Brushing his right hand against her buttocks while she was standing at a filing cabinet. (29 March 2010).*
- (ii) *Placing his hand on her knee and sliding it to her thigh. (9 April 2010).*
- (iii) *Leaning across her and placing his left hand on her shoulder.(on or about May 2010)*

to be of a sexual nature, and unwelcome and offensive to her.

[132] The relevant statutory and procedural requirements are set out in s.103, s.108 and s.117 of the Act and the Department's policy and procedures document: 'Managing Misconduct and Poor Performance'.

[133] Sexual Harassment is specifically addressed in the Act being referred to as a personal grievance in s.103(1)(d) of the Act on the basis that: “*that the employee has been sexually harassed in the employee’s employment*”.

[134] Sexual harassment is defined in s.108 of the Act as:

*(1) For the purposes of sections 103(1)(d) and 123(1)(d) an employee is **sexually harassed in that employee’s employment** if that employee’s employer or a representative of that employer—*

(a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains—

(i) an implied or overt promise of preferential treatment in that employee’s employment; or

(ii) an implied or overt threat of detrimental treatment in that employee’s employment; or

(iii) an implied or overt threat about the present or future employment status of that employee; or

(b) by—

(i) the use of language (whether written or spoken) of a sexual nature; or

(ii) the use of visual material of a sexual nature; or

(iii) physical behaviour of a sexual nature,—

directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee’s employment, job performance, or job satisfaction.

[135] Pursuant to s.108(1)(a) of the Act sexual harassment primarily occurs where there has been a direct or an indirect request by the employee’s employer or a representative of the employer for: “*sexual intercourse, sexual contact, or other sexual activity*” that contains an implied or overt promise of preferential or detrimental treatment in regard to the employee’s employment or future employment status.

[136] Sexual harassment may also occur pursuant to s. 108(b) where the employee’s employer or a representative of the employer has used language of: “*a sexual nature*”, or

used: “*visual material of a sexual nature*” or: subjected the employee to: “*physical behaviour of a sexual nature*”.

[137] I find there is no evidence that there was a request pursuant to s.108(1)(a) made to Ms Owen, nor was there conduct of the type set out in s.108(1)(b) of the Act. Moreover significantly, Mr A was not the employer or a representative of the employer; he was a fellow employee, namely a co-worker.

[138] Sexual harassment by a person other than the employer is addressed in s.117 of the Act which in s.117(1)(b) refers to a various acts of a co-employee in a similar manner to those referred to in s.108(1)(b), where the employee is subjected to behaviour by the co-employee of a type that has:¹ “*either by its nature or through repetition, a detrimental effect on the employee’s employment, job performance or job satisfaction.*”

[139] In accordance with s.117(3) of the Act, once an employee has made a complaint the employer: “*must inquire into the facts*”. If the employer then is satisfied that the behaviour took place, s.117(4) states that the employer: “*must take whatever steps are practicable to prevent any repetition of ... such behaviour*”

[140] Managing Misconduct and Poor Performance states:² “*The Department recognises the right of all employees to enjoy good and safe working conditions and will work to promote a work place free of sexual and racial harassment*”.

[141] It also states that sexual harassment is an example of serious misconduct, and that it expects employees to complain if sexual harassment occurs and that managers are responsible for dealing with complaints promptly and fairly.

[142] Ms Owen complained about Mr A’s behaviour to Mr Anderson, and subsequently to Ms Bailey. Whilst she did not formalise her complaint I note Managing Misconduct and Poor Performance] (page 8) states: “*The Department expects employees to complain if sexual harassment occurs,*” Moreover s. 117((2) of the Act does not specify that the complaint must be in writing, it states: “*If this section applies, the employee may make a complaint about that request or behaviour to the employee’s employer or to a representative of the employer.*”

[143] Sexual harassment is defined as being behaviour of a sexual nature and must be:³

¹ S.108(1) (b) of the Act

² Managing Misconduct and Poor Performance page 8

³ Managing Misconduct and Poor Performance page 9

- *Unwanted by or offensive to the recipient*
- *Repeated or of such a significant nature that it has a detrimental effect on the recipient's work performance or environment.*

It also states that: “*the motive of the respondent employee is irrelevant,*”

[144] Managing Misconduct and Poor Performance sets out: “*four important obligations*” of the Manager as being to:⁴

- *Protect and support the complainant employee*
- *Act fairly to the respondent employee*
- *Investigate the complainant fairly and competently*
- *Manage all other relationships within the workplace*

[145] As regards the complainant employee the manager's obligations include:

- Providing information on the options for making a complaint;
- Ensuring the sexual harassment stops (if necessary by separating the parties);
- Keeping the employee informed of progress and the result of the employment investigation; and
- Informing the complainant of his or her right to pursue a personal grievance or to take the case to the Human Rights Commission

[146] Options for resolving complaints include:⁵ “*either employment investigation or conciliated resolution*”. Conciliated resolution is discussed at page 7 of Managing Misconduct and Poor Performance and requires the agreement of both parties.

[147] Ms Owen initially took her complaint to Mr Anderson who passed it on to Ms Bailey when she returned to work. I find that following Ms Owen's complaints in April and early May 2010:

- Ms Bailey met with Ms Owen in early April 2010 who said she did not want any formal action taken, but her complaint noted;

⁴ Managing Misconduct and Poor Performance page 10

⁵ Managing Misconduct and Poor Performance page 11

- At Ms Bailey's request Mr Anderson spoke to Mr A; and reminded him of office etiquette and to be mindful of personal behaviours. There is no evidence that Mr A was questioned as to the complaint or that the complaint was even referred to during that conversation, nor did Ms Bailey speak to Mr A;
- Ms Bailey met with Ms Owen in May 2010 to discuss the third incident involving Mr A. Ms Owen said she wanted Ms Bailey to discuss it privately with Mr A whilst she was away from the workplace;
- Ms Bailey spoke to Mr A and asked him to keep his distance from Ms Owen, there was no record of the meeting and no evidence that Ms Bailey reminded Mr A that this was the third occasion on which Ms Owen had complained about his behaviour; and
- Ms Bailey also moved Ms Owen to sit at a desk adjacent to her own office, away from Mr A and next to Mr Bonthron.

[148] Following the last incident, Ms Bailey stated in her untested affidavit evidence that she was not informed or made aware of any further incidents between Ms Owen and Mr A.

[149] Ms Owen having made a complaint to the Department that she had considered herself to be sexually harassed by Mr A, I find that a fair and reasonable employer would have dealt with Ms Owen's complaint in accordance with s.117 of the Act and its own procedures for addressing sexual harassment complaints.

[150] In terms of s.117(3) and (4) of the Act which mandates that the employer inquire into the facts and take steps to prevent a repetition, I find that Ms Bailey made inquiries of Ms Owen herself and also spoke to Mr McQueen and Mr Bonthron. However it was not until after the complaint relating to the third incident that she spoke to Mr A herself and relocated Ms Owen's working space.

[151] The second incident which gave rise to the first complaint, that Mr A touched her leg, was a repeated incident and serious in nature. Ms Bailey's response was to ask Mr Anderson to speak to Mr A about office etiquette.

[152] I find that the fair and reasonable employer would have taken more effective steps to address the situation at this stage; however Ms Bailey did not speak to Mr A herself or move Ms Owen to another desk until there had been a repetition after the third incident.

[153] Managing Misconduct and Poor Performance obligated Ms Bailey to investigate the complaint fairly and competently. It also refers to the obligation of the employer to: “*take all possible steps to protect the complainant’s privacy*”.

[154] Whilst I acknowledge that Ms Baily was in a difficult situation in trying to manage the complaints in accordance with Ms Owen’s stated preference, which was to address the complaints informally and in a low-key manner, I find there is insufficient evidence that she took adequate steps to investigate and deal with the matter other than her having spoken to Mr McQueen and Mr Bonthron in relation to the complaints, until after the third incident, despite the serious nature of the second incident. I do however note that the steps taken following the third incident appeared to be adequate in resolving the situation in light of the information available to the Department at that stage.

[155] Managing Misconduct and Poor Performance also sets out the Manager’s obligations as including providing information to Ms Owen on how to make a complaint, keeping her informed of progress and the result of the employment investigation, and informing her of her right to take the case to the Human Rights Commission.

[156] I accept that Ms Bailey did speak to Ms Owen following the complaints; however, there is no evidence that Ms Bailey informed Ms Owen of her right to pursue a personal grievance or to take a case to the Human Rights Commission.

[157] Ms Owen’s complaints were also discussed with Mr Hodgson and Ms Wears at the meeting held on 28 May 2010.

[158] Ms Owen confirmed during the meeting held on 28 May 2010 that the matter involving her complaints about Mr A had been dealt with by Ms Bailey effectively and to her satisfaction (*he won’t come near me – Barb has told him already to keep his distance*), and that she did not require further action to be taken.

[159] I find that this information, conveyed at a meeting in which Ms Owen had PSA representation by an experienced PSA Organiser, Ms Cook, indicates that Ms Bailey had dealt with the third sexual harassment complaint to Ms Owen’s satisfaction.

[160] However whilst that may have confirmed to the Department that further investigation was not required, that did not absolve it from examining whether or not there had been an adequate inquiry made by Ms Bailey, or advising Ms Owen of her right to pursue further action by raising a personal grievance or making a complaint to the Human Rights Commission.

[161] I find that the Department did not follow the mandatory requirements of the Act by taking practicable steps to prevent a repetition of Mr A's behaviour until after the third incident, or by taking steps in accordance with its own policy Managing Misconduct and Poor Performance.

[162] I determine that Ms Owen was unjustifiably disadvantaged by the Department as a result of its handling of her claim of sexual harassment

Was Ms Owen unjustifiably disadvantaged by the Department failing to provide her with a safe working environment?

(i) *Unsafe workplace due to failure to discipline Mr A.*

[163] I have already addressed the sexual harassment disadvantage complaint.

[164] During the period after the first incident until Ms Bailey took adequate steps by speaking to Mr A and moving Ms Owen to another desk, I find that Ms Owen was not provided with a safe working environment.

[165] I determine that Ms Owen was unjustifiably disadvantaged by the Department failing to provide her with a safe working environment during the period between the first incident in March 2010 and the steps taken to adequately address the situation.

(ii) *Bullying by Ms Bailey and Mr Watene*

[166] Workplace bullying is difficult to define, or to prove. Workplace bullying is defined in the Worksafe 2014 'Guidelines on Preventing and Responding to Workplace Bullying':.

[142] The Guidelines define bullying as being:

...repeated and unreasonable behaviour directed towards a worker that creates a risk to health and safety.

Repeated behaviour is persistent and can involve a range of actions over time.

Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.

A single incident of unreasonable behaviour is not considered workplace bullying, but it could escalate and should not be ignored.

[167] The behaviour alleged to constitute bullying must usually be threefold: repeated, unreasonable and a risk to health and safety⁶.

[168] Ms Owen raised a formal complaint alleging that Ms Bailey created an unsafe work environment for her by a number of actions including not addressing her high workload.

[169] I note that Ms Bailey's untested affidavit evidence is that Ms Owen did not have a workload which was any higher or unreasonable than any other employee. Her evidence on this point was supported by Mr Anderson's oral evidence during the Investigation Meeting that Ms Owen had a reasonable workload.

[170] Ms Hopa also stated during the Investigation Meeting that Ms Owen's workload was no different to that of any other member of staff.

[171] After Ms Owen raised a formal complaint regarding Ms Bailey, this was addressed in the meeting held on 28 May 2010. Ms Owen did not specifically state that she had been bullied, but stated that she did not want to work: "*under Barbara*". During that meeting Ms Cook stated: "*Also want to note that Debbie's written statement is not a complaint about Barbara it is her raising concerns about working with her.*"

[172] In response, the Department moved Ms Owen to work with alternative Service Managers, and she did not report to Ms Bailey again during the period of her employment at the Department.

[173] The notes which Ms Owen discovered when accessing Ms Bailey's disused office were private notes which Ms Bailey had made recording her interactions in response to concerns raised by Ms Owen, they were not notes intended to be accessed by others. She stated in her untested affidavit evidence that her purpose in making the notes was to: "*ensure Ms Owen was supported, her workload under control and that we were both doing what we said we would do*".

[174] Ms Owen stated in the meeting held on 12 April 2011 that she had been particularly upset by Ms Bailey categorising her in the notes as mentally unwell as opposed to being overworked.

[175] A fair and reasonable employer is under an obligation to respond appropriately to concerns raised by an employee.

[176] In response to Ms Owen's complaint of bullying behaviour on the part of Ms Bailey, Ms Cullen said that she had reviewed the notes made by Ms Bailey in 2010. Her

⁶ Pg 6 of the Worksafe Guidelines

view had been that they indicated no evidence of bullying, but rather pointed to Ms Bailey trying to support Ms Owen.

[177] I find that the notes indicate that Ms Bailey was trying to support Ms Owen, referring to her enquiring how Ms Owen was feeling when she was on sick leave, agreeing with Ms Owen that she should see her GP and utilise EAP, and asking if Ms Owen was getting sufficient support.

[178] Moreover, whilst the notes record Ms Owen raising her workload, they also note that Ms Owen did have mental health issues, and that her workload was one of a number of factors creating stress for her, the others being non-work related.: “... *She volunteered that she had discussed existing stressors being caseload, move to new home, Jo (ex-partner)*”

[179] I find that a fair and reasonable employer, knowing an employee was suffering from health issues would be expected to enquire if the employee was receiving medical assistance, ensure he or she only returned to the workplace when certified as fit to do so, and advise him or her about EAP.

[180] Ms Bailey did so. She also investigated Ms Owen’s workload and concluded it was not unreasonable. That does not constitute bullying behaviour.

[181] The Department had considered the complaint about Ms Bailey in May 2010. It reasonably believed that matter had been resolved following the meeting held on 28 May 2010.

[182] It re-emerged in March 2011 some 10 months after Ms Owen had ceased to report to Ms Bailey.

[183] At that time, the Department again considered the complaint made by Ms Owen about Ms Bailey. Ms Cullen examined the concern regarding Ms Bailey and proposed that a facilitated meeting might assist resolve Ms Owen’s concerns about the notes made by Ms Bailey. I find that this was a reasonable proposal on the part of the Department⁷ and one with which Ms Bailey was prepared to cooperate, however Ms Owen preferred to have Ms Bailey respond in writing.

[184] Further, having raised her concern at continuing to work from the Poto Street site where Ms Bailey was based, it was proposed that Ms Owen be moved, albeit temporarily to the Vinery Lane site to address that situation. I find that this was a reasonable proposal on the part of the Department, and one with which Ms Owen was pleased.

⁷ *Adams t/a Untouchable Hair & Skin v Brown* [2015] NZEmpC 77 at [85]

[185] I find that the Department, having found no evidence that Ms Bailey had bullied Ms Owen, nonetheless acted as a fair and reasonable employer by (i) ensuring in 2010 that Ms Owen reported to another Service Manager rather than to Ms Bailey, (ii) relocating Ms Owen in 2011 after she raised her issues again from the workplace where Ms Bailey was located; and (iii) offering to arrange, and engaging Ms Bailey's co-operation to, a facilitated meeting to address Ms Owen's concerns about Ms Bailey's private notes.

[186] Mr Watene's proposal to place Ms Owen on a coaching plan is a normal part of a management process, the purpose of which is to manage expectations and provide support in areas of an employee's performance. Whilst Ms Owen disagreed with being placed on such a plan, I find that it is not a disciplinary step and does not constitute bullying.

[187] Mr Watene's behaviour towards Ms Owen did demonstrate two areas of unreasonable behaviour, the first being the inappropriate comment made to Ms Owen about her having "*necked*" herself, and the telephone conversation on 7 March 2011.

[188] Ms Owen raised a formal complaint about Mr Watene's behaviour. It was incumbent upon the Department as a fair and reasonable employer to meet with Ms Owen to discuss her concern and to take appropriate steps.

[189] Ms Cullen responded to Ms Owen's concern about Mr Watene by moving her place of work to the Vinery Lane site, and by agreeing to speak to Mr Watene about his behaviour, however she was unable to do so due to his being on sick leave and subsequently leaving the employment of the Department.

[190] I find that once Ms Owen raised her concern about Mr Watene's behaviour with the Department, it acted swiftly to address the situation by removing Ms Owen away from the workplace in which she felt unsafe to another. This was an appropriate action to be expected of a fair and reasonable employer.

[191] The fact that the Department could not investigate Ms Owen's complaints with Mr Watene due to circumstances beyond its control does not mean that it acted other than as a fair and reasonable employer would do.

[192] In summary, Ms Owen raised a concern about reporting to Ms Bailey and the Department changed her reporting line. Ms Owen complained about Ms Bailey's notes and the Department reviewed them and tried to arrange a facilitated meeting to which Ms Owen was not prepared to agree. Ms Owen complained about reporting to Mr Watene, and being in the same building as him and Ms Bailey and the Department changed her reporting line and place of work whilst it addressed her concerns.

[193] I find these actions to be an appropriate response of a fair and reasonable employee to Ms Owen's complaints of bullying by Ms Bailey and Mr Watene.

[194] I determine that Ms Owen was not unjustifiably disadvantaged by the Department failing to provide her with a safe working environment as a result of her being bullied by Ms Bailey and Mr Watene.

(iii) *Breach of health and safety obligations*

[195] Examining overall whether or not the Department breached its health and safety obligations to Ms Owen I observe that an employer is under an obligation to provide an emotionally and physically safe working environment as observed in the Court of Appeal case *Attorney-General v Gilbert*⁸

[196] In that case *The Court of Appeal* stated:

... that is made clear by the definition of "all practicable steps". What is "reasonably practicable" requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[197] Ms Owen made a complaint that her workload was too high. Ms Bailey reviewed it and observed it was reasonable, as did Mr Anderson and Ms Hopa confirmed it was no higher than that of other employees.

[198] At the time she was employed by the Department, Ms Owen was under stress from significant personal stressors, even prior to the distressing incident in December 2010. The Department was not responsible for causing these personal stresses but nonetheless I find it acted as a fair and reasonable employer: responding appropriately to her health concerns, ensuring that she knew about EAP and had accessed it, had the opportunity to obtain

⁸ [2002] 1 ERNZ 31

professional medical assistance and ensuring her return to work occurred only after medical clearance was obtained.

[199] In relation to her work concerns about reporting to Ms Bailey and Mr Watene, I find the Department acted quickly and appropriately, changing the reporting lines and moving Ms Owen to another location whilst her concerns were properly investigated.

[200] The Department also communicated appropriately about the changes to Ms Owen's work in light of the IT restructuring, communicating the reasons in a timely manner. Had Ms Owen read the emails, her concerns may have been allayed. In addition once she raised concerns about her level of workload, Ms Wain addressed these in a timely manner.

[201] I determine that the Department did not breach its health and safety obligations to Ms Owen.

Was Ms Owen constructively dismissed by the Department?

[202] An employee is usually entitled to resign from their employment on a unilateral basis. The agreement of the employer to such unilateral notice is not required, the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:⁹

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.

[203] There is no obligation on the employer to dissuade the employee from leaving, although he or she may choose to do so in some cases. An employee who has resigned has not been dismissed.

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

[205] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.¹⁰

⁹ 5/12/00 AC 94/100, AEC 106/00 at para 21

¹⁰ *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

[206] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹¹ there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- iii. There had been a breach of duty by the employer which causes an employee to resign.

[207] Ms Owen resigned from her employment during the meeting held on 17 May 2011. She had not been presented with the choice of being dismissed or resigning by the Department.

[208] Ms Owen is claiming a breach of duty on the part of the Department. The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*¹². The Court of Appeal in examining the question of constructive dismissal observed:

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

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

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and

¹¹ (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372

¹² [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[210] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*¹³ observed in describing this type of constructive dismissal:¹⁴

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[211] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option

[212] I have already found no breach of duty towards Ms Owen by the Department such as to justify her considering that she had no other option but to resign from her employment.

[213] I observe that after Ms Owen had resigned, the Department asked her to reconsider her decision. Whilst Ms Owen did not resign after an emotional scene or confrontation, I note that she was nonetheless emotional due to her health situation.

[214] In *Boobyer v Good Health Wanganui Ltd* the Employment Court said that the employer cannot safely insist on what the employee may have said:

... where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this issue or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties".

[215] Ms Owen, despite having had legal representation at the meeting held on 17 May 2011 was nonetheless given the opportunity to reconsider her decision to resign by the Department.

¹³ [1983] ACJ 965

¹⁴ at [975]

[216] I find that the Department acted reasonably in allowing Ms Owen a ‘cooling down’ period, and in fact did not process her resignation until some months later as a result of her choosing not to rescind her resignation.

[217] I determine that Ms Owen was not unjustifiably constructively dismissed by the Department but that she resigned voluntarily.

Remedies

[218] I have determined that Ms Owen was unjustifiably disadvantaged as a result of the Department’s handling of her sexual harassment complaint and by not thereby being provided with a safe working environment until that situation was resolved.

[219] That situation resulted in Ms Owen being distressed and suffering from anxiety.

[220] I order that the Department pay to Ms Owen the sum of \$7,000.00, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[221] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[222] Ms Owen did not contribute to the situation in which she found herself and there will be no reduction in the remedy awarded.

Costs

[223] Costs are reserved. I consider that this is an appropriate case for letting costs lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve the matter between them. If they are unable to do so, the Applicant may file and serve memorandum to costs within 28 days with reply submissions from the Respondent to be lodged within 14 days of the days of receipt. I will not consider any costs submissions outside that time frame.

[224] Should costs be sought, the parties are advised that all submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority