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IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 191
3021117

BETWEEN VICKI HIGGS
Applicant

AND CANTERBURY RELOCATIONS LIMITED
First Respondent

TRU GROUP LIMITED
Second Respondent

Member of Authority: Andrew Dallas

Representatives: Linda Ryder and Jeff Goldstein, counsel for Applicant
Hugh Matthews and Andrew Mitchell, counsel for
Respondent

Investigation Meeting: 31 July, 1 August and 22 August 2018 in Christchurch

Determination: 2 April 2019

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] Under cl 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I prohibit from publication any medical evidence lodged in these proceedings relating to Ms Higgs other than that set out in this determination.

Employment relationship problem

[2] Vicki Higgs says that during her employment with Canterbury Relocations Limited (Canterbury) between September 2015 and August 2016 it failed to provide her with a safe working environment and breached express and/or implied terms of her employment agreement as a result.

[3] Ms Higgs also says her subsequent employer Tru Group Limited (Tru), which is part of the same group of companies as Canterbury, unjustifiably constructively dismissed her, disadvantaged her during the employment through unjustified actions, breached express and/or implied provisions of her employment agreement and breached its obligations of good faith towards her.

[4] In settlement of her claims, Ms Higgs sought various compensatory remedies and the imposition of penalties under the Act. Both Canterbury and Tru denied any wrongdoing in respect of Ms Higgs and resisted all her claims.

Issues

[5] The issues for investigation and determination are:

- (i) Did Canterbury breach Ms Higgs' employment agreement by failing to provide her with a safe working environment?; If so, should a penalty be imposed and in what amount?;
- (ii) Is Canterbury liable for general and/or special damages by breaching express and/or implied terms of contract to provide Ms Higgs with a safe work environment?;
- (iii) Has there been a constructive dismissal of Ms Higgs by Tru as a result of a breach of duty by Tru?
- (iv) If (iii) is answered in the affirmative, was the dismissal justifiable in terms of the statutory test of justification under s 103A of the Act?
- (v) Was Ms Higgs unjustifiably disadvantaged by Tru?;

- (vi) If Tru's actions were not justified, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s 123(1)(c)(i) of the Act.
- (vii) If Ms Higgs' personal grievance(s) are made out, did she contribute to the situations giving rise to these?;
- (viii) Did Tru breach its obligations of good faith to Ms Higgs?; If so, should a penalty be imposed and in what amount?;
- (ix) Did Tru breach Ms Higgs' employment agreement, such that penalties should be imposed?;
- (x) Should the Authority exercise its discretion and award part or all of any penalties to Ms Higgs?;
- (xi) Should interest be awarded on any remedies?; and
- (xii) Should costs be awarded to successful party?

The Authority's investigation

[6] During the Authority's investigation meeting, I heard evidence from a number of current and former employees of Canterbury and Tru. These witnesses gave evidence on behalf of Ms Higgs and Canterbury and Tru. In addition I received and heard medical evidence from both parties.

[7] This determination was issued outside the three month timeframe after receiving the last information from the parties. I record the Chief of the Authority has decided s 174C(4) of the Act has been met. Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation of Ms Higgs employment relationship problems. Although I have not referred to all the submissions advanced by the representatives in this determination, I record I have fully read and considered them.

Who was Ms Higgs' employer for the purposes of the second claim?

[8] During the investigation meeting an issue emerged as to which legal entity employed Ms Higgs during the second phase of her employment. It was submitted on behalf of Mr Higgs she was employed by the four legal entities comprising Tru: AC Auto Mechanical and Electrical, Canterbury Relocations Limited, Traffic R Us Limited and Traffic R Hire Limited. Tru said Ms Higgs was employed by itself, being a company in its own right, and said she was allocated to the various entities to perform certain tasks. After consideration of the evidence which included Ms Higgs' witness statement where she said she was employed by Tru and her employment agreement, which identified Tru as her employer, I find, on the balance of probabilities, Tru employed Ms Higgs.

What happened?

Canterbury

[9] Canterbury carries on business as a storage and removal company. Ms Higgs commenced working for Canterbury in October 2014. The director of the company is William Robertson, who also owns a number other companies which make up the Tru Group. Mr Robertson acquired the business during Ms Higgs' employment, however she continued to work for the company afterwards. Subsequent to the acquisition, Ms Higgs reported to business manager, Robert Gillam. Initially Ms Higgs continued to work at her existing location but she eventually moved to another site and commenced work in a large open-plan "Porta-com" with a number of other people employed by the Tru Group of companies.

[10] Ms Higgs received a promotion to Operations Supervisor in September 2015 and signed a new employment agreement. As part of that process she was required to complete a medical questionnaire. One of the questions posed was: "[h]ave you ever had, or do have the following: ... frequent or marked depression, mental illness or nervous trouble".

[11] Ms Higgs said while she had suffered from depression, a plan had been made with her doctor to take her off the medication used to treat it. She said she advised Mr Gillam of this and asked him for advice about how to complete the form. Ms Higgs said Mr Gillam told her tick "no" because she had been performing the job without any problems and was coming off

her medication. Mr Gillam denied he said this. He said he did not recall her mentioning any mental health issues, however he did recall her saying she was helping her daughter with some issues she was having.

[12] Ms Higgs said she and Mr Gillam had different expectations about what the job required. Ms Higgs said Mr Gillam had unrealistic expectations and her workload was excessive. She said she was expected to work overtime without payment and perform tasks on public holidays. Ms Higgs said she would be called up to ten times a day during some weekends. She said she often worked between 45 and 47 hours per week but was not paid for more than 40 hours. Ms Higgs' sister and daughter gave evidence in support of this.

[13] Ms Higgs said Mr Gillam expected her to be always available on the phone including at night, weekends and while on periods of annual leave. Ms Higgs said if she did not answer the phone, as on occasion she could not, he would leave abusive messages or call back and "rant" at her about not answering the phone.

[14] Ms Higgs said she spoke to Mr Gillam on two occasions about her workload, both in 2016. However, Ms Higgs said Mr Gillam advised her that was what was expected and it was not up for negotiation. He would also say things to the effect of: "I don't know what is wrong with you, I'm running five companies". Ms Higgs said she was not paid for the extra hours she worked including on 29 December 2016.

[15] Ms Higgs said Mr Gillam, in addition to her view that he was demanding, had an aggressive and bully manner in the workplace and this was very stressful to her. Ms Higgs said Mr Gillam would often be very angry, would throw or kick things and would yell and swear at her (and other staff). She said there was a climate of fear in the office and it was Mr Gillam's "way or the highway".

[16] Ms Higgs said she initially stood up to Mr Gillam but realised that raising issues only made matters worse. Ms Higgs said she tried to engage with Mr Robertson about Mr Gillam's behaviour but he simply said words to the effect of: "that is what he is like". Mr Robertson denied that Ms Higgs ever raised issues regarding Mr Gillam's behaviour with him. He said he did not recall witnessing Mr Gillam yelling or being abusive to Ms Higgs. Mr Robertson

claimed that there was a perception among some other employees that Ms Higgs was Mr Gillam's "pet".

[17] In January or February 2016, Ms Higgs sought a pay rise due to her workload and long hours; her pay was increased moderately and again in June 2016. Ms Higgs said these pay increases did not address the fact she dreaded going to work. She said she was getting overwhelmed, became anxious every Sunday night at the prospect of the week ahead, was not sleeping or over-sleeping at weekends and always thinking about work. She said no matter how hard she tried Mr Gillam would find fault with her work. Ms Higgs said she felt trapped as she could not obtain alternative employment or afford to give up a well-paying job.

[18] On Monday 19 July 2016, following an incident over the weekend involving a removal job that has not gone to plan and for which Mr Gillam had abused her over the phone – something he would deny – Mr Higgs submitted her resignation. She said she made clear the reason she was resigning was due to workload and that her last day of employment would be 16 August 2016. Ms Higgs said Mr Gillam avoided engaging with her for the next couple days.

[19] Ms Higgs and Mr Gillam met on 20 July 2016. Ms Higgs said Mr Gillam told her everything was her fault and she was not living up to his expectations. Ms Higgs claimed he also told her that he was unable to charge the customers at the centre of the previous weekend's drama and there might be further repercussions as they were a major client. Ms Higgs told Mr Gillam it was not her fault. However, Mr Gillam insisted it was. Ms Higgs said she felt Mr Gillam was enjoying the stress he was putting her under during the meeting. She said she went home afterwards.

[20] Mr Gillam recalled the events slightly differently. He said the meeting to discuss Ms Higgs' resignation occurred on the day she resigned. Mr Gillam said Ms Higgs never advised him she was resigning due to excessive workload or his abusive outbursts. Rather, he said Ms Higgs advised him she was leaving because she was looking after her grandchildren and this made it difficult to meet the obligations for the role. Mr Gillam said he would have preferred Ms Higgs not resign because she was a good employee.

[21] Ms Higgs said she went back to work the next day. However, she heard nothing further about her resignation until 27 July 2016 when she was given 30 minutes notification of a meeting with Mr Gillam and Mr Robertson. Ms Higgs said she was not told what the meeting was about or whether she could bring a support person.

[22] At the meeting, Mr Gillam advised Ms Higgs that her resignation stood. However, he advised her that Tru was intending to “get rid” of its accounts person through redundancy and she could apply for the job but as an external candidate due to her resignation. Ms Higgs thought Mr Gillam’s actions in respect of her resignation were designed to ensure she left the role and she believed, and it had been previously indicated, that Mr Gillam wanted to employ a friend of his (and Mr Robertson’s) in her role. Ms Higgs said she advised she would consider the accounts role because it had set hours, Monday to Friday and because it played to one of her strengths in credit control.

[23] Ms Higgs was told that Tru could not do anything about the accounts role until the incumbent had left. She said that she was asked to align her resignation with that person’s last expected day. Ms Higgs said she was also asked to train Mr Gillam’s and Mr Robertson’s friend in her role as operations manager at Canterbury.

[24] Mr Gillam said Ms Higgs approached him a few days after tendering her resignation and asked to withdraw her resignation but he advised her that her role had been filled. He said he did indicate to her that an accounts role was coming up and this “may suit her more”. Mr Gillam also said this was a “new” role focused on debt collection and accounts generally. Mr Gillam also denied that Ms Higgs was asked to extend her notice period.

[25] Ms Higgs said she left Canterbury on 19 February 2016 and she was paid out her holiday pay. Despite an understanding she would get an employment agreement from Tru for the accounts position, this was not forthcoming. Ms Higgs said she was very uncertain about her future and was not sure she would even be offered the accounts role. She said she applied for other jobs during this period.

[26] Ms Higgs said she was not provided with the timesheets she completed each week during her employment with Canterbury. She said these demonstrated how many hours she

had been working. Ms Higgs said there no explanation as to what happened to these. She said they were scanned to a computer each week.

Employment with Tru Group

[27] Approximately two weeks after finishing with Canterbury, Ms Higgs, having not heard anything from Tru regarding the new position, contacted Mr Gillam. Ms Higgs said she subsequently met with Mr Gillam and Mr Robertson in early September 2016 and was told they were not looking for anyone else to fill the job and she could have it.

[28] Ms Higgs began her new accounts/administration role with Tru on 5 September 2018. She signed an employment agreement on 6 September 2016. Her annual salary was \$55,000 and Mr Gillam said he would review that in six months. Under the agreement, Ms Higgs was required to work 40 hours per week, Monday to Friday between 8.30am and 5.00pm. Mr Gillam was again to be her manager. The agreement contained the exact same medical questionnaire wording as the Canterbury agreement and Ms Higgs again wrote “no” in response to the mental health question.

[29] Ms Higgs was not given a job description by Tru. Evidently the provision of this was to be determined by an assessment of her skills and that of another employee working in the same area, with whom she shared an email address. Ms Higgs said she asked Mr Gillam several times for a job description but this was not forthcoming.

[30] Upon commencement of her new job, Ms Higgs discovered it was much broader than she had expected and Mr Gillam gave her more and more work to do. Ms Higgs said if a task was to be undertaken, Mr Gillam would say words to the effect of “Vicki can do that”. Ms Higgs provided examples of this extra work which included taking notes at a disciplinary meeting, attending a dispute tribunal hearing on behalf of Tru, assisting her replacement at Canterbury, correcting his mistakes and relieving for him when he was away and undertaking the work of other absent staff. Ms Higgs said two new business ventures bought or established by Mr Robertson during this period also increased her workload. Ms Higgs said she believed Mr Gillam was taking advantage of the fact she did not have a job description when asking her to undertake such tasks. Mr Gillam, in contrast, said Ms Higgs: “was keen to help outside her accounts role”.

[31] Ms Higgs said she was determined not to get into the same position she was in at Canterbury and therefore sought to stick to her contracted hours of work despite the work piling up. In addition, Ms Higgs said Mr Gillam's patterns of behaviour continued during her employment at Tru including describing employees, including her, as "fucking useless" and making declarations to the effect that no-one was leaving for the day until all the work was done and if that involved weekend work, then so be it.

[32] As part of her job, Ms Higgs was required to deal with timesheets and pay. She said she received minimal training of the pay system used. Mr Gillam was ultimately responsible for signing off and authorising in the system and Ms Higgs said he regularly demonstrated his anger and annoyance towards her if something was wrong. Ms Higgs also said she was required to create a position in the system for a "dummy staff member" against whose name work was to be charged and invoiced. Ms Higgs said she viewed this as "illegal" and said it created stress and extra work. Ms Higgs said some customers became concerned about Tru's labour invoicing practices. Mr Gillam said there was nothing untoward about this, said in effect it was an accounting practice, and that, in any event, Tru was able to charge clients whatever they saw fit for the service provided.

[33] In March 2017, Mr Gillam held a meeting with several office staff including Ms Higgs. He said, on Ms Higgs' account, he expected staff to work over their contracted hours and if they did not want to do that, then they could "fuck off". Ms Higgs said she continued to work her contracted hours because she knew she was never going to be paid for any additional hours worked. Mr Gillam agreed a meeting took place but denied he advised attendees they were required to work over their contract hours. He said the purpose of the meeting was to get staff to reflect about the importance of "the extra mile" to support other staff in the chain.

[34] Ms Higgs said during her time working with Tru she fought against the feelings of stress and anxiety arising out of Mr Gillam's behaviour and unrealistic expectations. She said the simpler job she envisaged at Tru never eventuated. Rather than working long hours, she found herself in a "pressure cooker" to get an excessive amount of work done in an impossible amount of time. Ms Higgs said she felt herself becoming unwell, was teary at

work and was having difficulty sleeping. She said she felt trapped again but needed the income from her job to live.

[35] Mr Gillam said he became aware about a week prior to Ms Higgs' resignation that some cash from Canterbury's operation that was due for banking had gone missing. After making inquiries with another staff member, Mr Gillam said he asked Ms Higgs if she could shed any light on what happened. He said he received no response to this request.

Resignation from Tru

[36] On 21 April 2017, when Ms Higgs arrived at work she was told by Mr Gillam that she would need to fill in as operations manager for Canterbury for four days. She was told that this would be in addition to her own job. As it was a Friday, Ms Higgs said she already expected it to be busy as she needed to process the timesheets in advance of the next payday. Ms Higgs said she did not complain as Mr Gillam was the only one whom she could complain to.

[37] Ms Higgs said this pushed her over the edge. She said when she started thinking about the work required to be undertaken, she began to feel physically unwell. She said she knew she was going to have a panic attack, so she left the office and went to her sister's house. Ms Higgs said when she left the office, she felt a big weight lift from her shoulders and she decided never to go back.

[38] Ms Higgs said she subsequently had a "complete meltdown". She said she was very upset, shaking and crying. Ms Higgs said her sister was so concerned about her that she encouraged her to ring the crisis mental health team, who subsequently visited her at home. Ms Higgs ended up in respite care and was diagnosed with a major depressive disorder. She was subsequently given medication by her doctor with whom she made an appointment prior to going into respite.

[39] On 26 April 2017, Ms Higgs emailed Mr Gillam and resigned with retrospective effect from 24 April. Mr Gillam responded and said he would not backdate her resignation and that her resignation was 26 April. Ms Higgs said he also refused to pay her sick leave because she did not provide a medical certificate.

[40] A series of further emails were exchanged between Ms Higgs and Mr Gillam in the aftermath of her resignation about sick leave. Ms Higgs said Mr Gillam's emails appeared to insinuate that she was not actually unwell. In one of his emails to Ms Higgs about her sick leave, Mr Gillam also accused her of theft of the money he had previously made inquiries with her about. However, despite an apparent referral to the police, nothing came of this.

[41] Eventually, Ms Higgs obtained medical certificates from her doctor covering her entire notice period. However, these appear to have been disputed by Tru and it was only on 28 July 2018, after the intervention of her lawyer, that she was paid her sick leave.

[42] Some of Ms Higgs' evidence about Mr Gillam's behaviour towards her and more generally in the workplace was corroborated by other witnesses include some giving evidence for Tru. For his part, Mr Gillam denied that he was abusive or swore at Ms Higgs in either of the positions she held. He said he did not throw or kick objects in anger in the workplace. Mr Gillam conceded he did get annoyed with Ms Higgs when she had not completed work she was asked to do or that was her responsibility. Mr Gillam said there was never any expectation she work extra hours and if she did this she did so on a "voluntary" basis. He could also not recall Ms Higgs working weekends.

Evaluation

Ms Higgs claims against Canterbury

Breach of contract: failure to provide a healthy and safe working environment

[43] Clause 10 of Ms Higgs' employment agreement set out the health and safety obligations to take all practicable steps to provide Ms Higgs with a healthy and safe work environment. In the absence of such an express term, such a term would be otherwise implied into Ms Higgs' employment agreement. I find Canterbury breached this term of Ms Higgs' employment. On the evidence, Canterbury had sufficient knowledge of Mr Gillam's bullying and harassing behaviour towards Ms Higgs and her excessive workload and long hours and failed to take any real steps, let alone all practicable steps, to deal with these issues. I am satisfied that Ms Higgs has established in a practical, common-sense way a causal link between this failure by Canterbury and the emotional effects on her. Further, that Ms Higgs

would be adversely affected in such a way by this failure would have been foreseeable to Canterbury, as it likely would by any employer prosecuting or condoning such conduct.

[44] In an attempt to play down the impact of the work environment on Ms Higgs much was made by Canterbury about Ms Higgs' pre-existing depressive illness, the failure to disclose it despite the supposed requirement to do so and other "private" stressors, particularly concerns about family members, including her sister. Even if Ms Higgs did have a pre-existing mental health issue this cannot shield Canterbury from liability in and of itself. Such a condition could be latent and come to the fore, or manifest and be exacerbated, through the failure to provide a healthy and safe work environment. In any event, when Mr Gillam was asked during the investigation meeting if he would have treated Ms Higgs differently if she had disclosed her depression in the pre-employment medical questionnaire, he said "no". Moreover, even if Mr Gillam's evidence is accepted that he did not advise Ms Higgs how to complete the questionnaire, Ms Higgs did not have, on the evidence, "frequent or marked depression". Further, given the term "mental illness" is far too broad to be in anyway meaningful and that of "nervous trouble" is equally without discernible meaning, it is difficult to criticise Ms Higgs for the approach she took.

[45] Ms Higgs sought \$15,000 as general damages from Canterbury. She said these damages would place her back in the position she was in were her employment agreement not breached by Canterbury. I accept Ms Higgs lost life enjoyment and suffered emotionally as result of the failure by Canterbury to provide a healthy and safe work environment and that this also affected her psychologically. It is important in awarding Ms Higgs her claim for general damages, that parties to employment agreements understand that failure to adhere to or meet express contractual obligations has legal consequences, which are real and not illusory. Canterbury must pay Ms Higgs \$15,000 as general damages for breach of contract.

[46] For completeness, while not explicitly pleaded, the evidence also supports a further breach of contract by Canterbury in respect of Ms Higgs' employment agreement, that of the implied term of trust and confidence. However, a common sense approach to concurrent liability would likely have seen Ms Higgs awarded a similar global amount of damages for both breaches or a similar total amount for two distinct breaches.

Excessive hours

[47] Ms Higgs had two employment agreements with Canterbury. Both agreements specified that her hours of work “shall be” 42.5 hours per week to be worked between 8am and 5pm, Monday to Friday. I accept Ms Higgs’ evidence she worked hours in excess of 42.5 hours per week and that she also worked outside the span for which those hours were to be undertaken (for example, during weekends). Ms Higgs calculated such hours as 8 hours a week at a rate of \$27.15 an hour, giving \$149.33 a week, and then multiplied this figure by 10 months giving a total of \$6471.00.

[48] While expressed as a breach of contract claim for which “special damages” were an available remedy, the Authority is not bound to treat the claim as pleaded by Ms Higgs.¹ It is clear that Ms Higgs was hampered in gaining a complete understanding of how many extra hours she worked for Canterbury due to its failure to produce wage and time records. A failure that was never properly explained. The default by Canterbury here is, however, a double-edged sword because the company is not in a position to convincingly rebut Ms Higgs’ underpayment claim either.

[49] Absent wage and time records to contradict Ms Higgs’ evidence about the hours she worked in excess of her contractual hours, and in reliance on s 132(2) of the Act, I accept Ms Higgs has a claim for underpayment of \$6471.00 in wages against Canterbury. In addition, holiday pay, Kiwisaver contributions and interest are also to be paid on this amount.

Ms Higgs’ claims against Tru

Was Ms Higgs constructively dismissed by Tru?

[50] The short answer is “yes”. In essence, Tru breached express terms of Ms Higgs’ employment agreement and, I find, these breaches were significantly serious, and foreseeable by her employer, to support an allegation of constructive dismissal against Tru.

[51] Section 4 of Ms Higgs’ employment agreement required Tru to (i) act as a “good employer” in all dealings with her; (ii) to deal with her in good faith in all aspects of the

¹ Employment Relations Act, s 160(3)

employment relationship and (iii) take all practical steps to provide her with a safe and healthy work environment. I find Tru did none of those things for Ms Higgs during the course of her employment or, at the very least, for a significant time during that employment including in the period immediately prior to its ending.

[52] I find Tru also breached the implied term of trust and confidence, its' good faith obligations and, most likely, the Holidays Act 2003 by refusing to pay Ms Higgs' sick leave, which, as we have seen, was only resolved months after her employment ended and following the intervention of her lawyers. Similarly, Tru's apparent accusation of theft, which Ms Higgs vigorously denied and which was referred to the police without result, also served to further undermine the employment relationship.

[53] During the investigation meeting, a number of current employees of the Tru group of companies gave evidence. As a general observation, there was a strong element of a collective narrative about it; although not of the romanticised variety. Almost without exception each witness gave forthright evidence and in doing so conceded just enough about the internal dynamics of the workplace to remain credible without straying too far into territory which might give credence to Ms Higgs' claims.

[54] However, despite this, the concessions made by these witnesses provided more than a hint of a workplace with the following characteristics: significant, often excessive, workloads and unremunerated overtime and unacceptable managerial behaviour by Mr Gillam including bullying and harassment of Ms Higgs (and other employees). The cumulative weight of this evidence, together with that of Ms Higgs and of her witnesses, discloses concerning workplace dynamics and practices at Tru and acceptance of, or acquiescence to, Mr Gillam's conduct. Consequently, Ms Higgs' claim for unjustified constructive dismissal against Tru succeeds.

Remedies for Ms Higgs' personal grievance

Lost wages

[55] Having found Ms Higgs was unjustifiably constructively dismissed by Tru, the Authority is required to award her, even if it provides no other remedies, the lesser of a sum equal to her actual lost wages or three months ordinary time wages.

[56] After providing reasons for the same, Ms Higgs sought 40 weeks lost wages. In order for this to occur the Authority would need to exercise its discretion under s 128(3) of the Act. However, standing back and considering the matter overall, I have decided that awarding Ms Higgs three months ordinary time wages is the most appropriate outcome.

[57] Subject to any contribution, Tru must calculate and pay Ms Higgs three months' pay including any applicable holiday pay and KiwiSaver contributions within 28 days of the date of this determination.

Compensation for hurt, humiliation and injury to feelings

[58] Ms Higgs sought \$30,000 compensation for hurt, humiliation and injury to feelings arising out of the termination of her employment by Tru.

[59] Ms Higgs said she was very distressed by the termination of her employment. Her evidence in this regard was supported by that of her sister, daughter and mental health caseworker. As with the general damages claim against Canterbury, I do not accept that a pre-existing mental illness immunises an employer from having to take responsibility for its own contributions to an employee's ordeal arising out of unjustified behaviour; in this case constructive dismissal.

[60] Taking into account all relevant matters including the surrounding circumstances, it is appropriate for Tru to pay Ms Higgs \$25,000 under s 123(1)(c)(i) of the Act. This award has

been made mindful of recent guidance from the Court about granting this remedy and the discernible upward trend in awards made in this jurisdiction.²

Contributory conduct by Ms Higgs?

[61] Having found that Ms Higgs was unjustifiably constructively dismissed and that she is entitled to remedies for a personal grievance, I am required by s 124 of the Act to consider whether she contributed to the situation giving rise to her grievance.

[62] There was no evidence before the Authority of any conduct by Ms Higgs which contributed to the termination of her employment by Tru. For completeness, when arriving at this conclusion, I accept Ms Higgs' evidence that she needed the job at Tru, she did not take the job for the "cynical" reasons suggested by Tru and that she genuinely believed working for a different employer within the Tru Group, including with restrictions on her hours of work, would make a significant difference to her working life. While optimistic about the future, I find this was not blameworthy conduct causally linked to Ms Higgs' personal grievance.

[63] There is to be no deduction for contribution by Ms Higgs under s 124 of the Act.

Breach of contract claim

[64] An alternative claim was brought by Ms Higgs for breach of contract by Tru. For the reasons given above this is effectively made out. However, the constructive dismissal claim is the most appropriate way of assessing the situation, and having found that claim established, remedies flow elegantly from it under the Act. Ms Higgs also accepted that a successful grievance claim would preclude discreet awards for breach of contract.

Other claims

[65] Ms Higgs also advanced several other claims including breach of her employment agreement and breach of good faith, for which penalties were sought, and one or more

² See, *Waikato District Health Board v Archibald* [2017] NZEmpC 132

personal grievances for disadvantage arising out of unjustified actions by Tru. Ultimately these arose out of, or were related to, the same facts that have given rise to her successful grievance claim for constructive dismissal. Consequently, these claims will effectively be remedied on the basis of the outcome below. Even if these were assessed by the Authority as discreet claims, a common sense approach needs to be applied to concurrent liability as has been applied to the multiple breach of contract findings in respect of Canterbury.

Summary

[66] The remedial orders made are for Canterbury to pay Ms Higgs within 28 days of the date of this determination:

- (i) \$15,000 as general damages for emotional distress for failing to provide her with a healthy and safe working environment; and
- (ii) \$6,471.00 as underpayment of wages including any applicable holiday pay and KiwiSaver contributions and interest, which is to be calculated with reference to the Interest on Money Claims Act 2016.³

[67] The remedial orders are made for Tru to settle Mr Higg's personal grievance for unjustified dismissal by paying her the following amounts within 28 days of the date of this determination:

- (i) Three months lost wages including any applicable holiday pay and KiwiSaver contributions; and
- (ii) \$25,000 for hurt, humiliation and injury to feelings.

Costs

[68] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Ms Higgs has 28 days from the date of this determination in which to file and serve a memorandum on costs. Canterbury Relocations and Tru have a further 14 days in which to file and serve a memorandum in reply.

³ See: www.justice.govt.nz/fines/civil-debt-interest-calculator/

[69] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.⁴

Andrew Dallas
Member of the Employment Relations Authority

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.