IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC48
ARC 37/07

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WENDY ANNE CLEAR Plaintiff
AND	WAIKATO DISTRICT HEALTH BOARD Defendant

Hearing: 10 and 11 March 2011
(Heard at Hamilton)

Counsel: Mr Mark Hammond, Counsel for the Plaintiff
Mr Geoff Bevan, Counsel for the Defendant

Judgment: 23 May 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The hearing before me was confined to one aspect of the plaintiff's prayer for relief, namely her claim for loss of earnings and certain medical and related expenses. Issues of liability had been dealt with in this Court by Judge Shaw back in 2008 when Her Honour heard Ms Clear's challenge to a determination[1] of the Employment Relations Authority (the Authority). The hearing before Judge Shaw was confined to liability only. Counsel had requested the opportunity to present further evidence and submissions on the issue of remedies. In her judgment on liability,[2] Judge Shaw upheld the plaintiff's claim of unjustifiable dismissal and disadvantage.

[1] AA 33/07, 13 February 2007.
[2] [2008] ERNZ 646.

[2] The defendant (the Board) then sought leave to appeal Judge Shaw's decision on liability. The Court of Appeal granted leave[3] and in its substantive judgment[4] it dismissed the appeal but made some important observations in relation to the nature and extent of the defendant's liability. Subsequently the parties were able to settle the plaintiff's claim for non-economic loss and the issue of costs in connection with both the Authority and Court of Appeal hearings. The issue of costs in relation to the hearing in this Court before Judge Shaw is yet to be resolved.

[3] Before turning to consider the issues involved in relation to Ms Clear's economic loss claim, it is necessary to refer briefly to the relevant factual background and the findings made by Judge Shaw as clarified and confirmed in the Court of Appeal judgment.

Background

[4] Ms Clear is 64 years of age. She was employed by the defendant from 1969 until her dismissal in January 2005. She was based at Tokoroa Hospital. Initially, she worked as a registered nurse in the accident and emergency department and general ward but from September 1987 she was employed as a midwife in the maternity ward. The following passage from the Court of Appeal judgment summarises the basis of Ms Clear's claim:

> [2] Ms Clear brought proceedings in the Employment Relations Authority (the Authority) for unjustified dismissal and disadvantage. The proceedings raised issues about the way in which the Board had dealt with complaints made by Ms Clear over a three-year period from 2000. A common thread running through those complaints was Ms Clear's claim she had been bullied by her Unit Manager, Margaret Parata, and that as a result her workplace was unsafe. Ms Clear's proceedings also focused on the effect of the Board's actions on her health, which deteriorated to the point that from early September 2003 she stopped work.
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> [3] The Authority upheld Ms Clear's disadvantage grievance in relation to a complaint Ms Clear made to the Board in late August 2003 but otherwise found for the Board. Ms Clear's challenge in the Employment Court was largely successful. The Employment Court found that the Board had affected her conditions of employment to her disadvantage and breached its duty to provide her with safe working

[3] *Waikato District Health Board v Clear* [2009] NZCA 112, (2009) 7 NZELR 1.
[4] *Waikato District Health Board v Clear* [2010] NZCA 305.

conditions. The Employment Court also found that Ms Clear's dismissal was unjustifiable.

[5] During the three-year period between 2000 and 2003, Ms Clear made four formal written complaints to her employer about Ms Parata's conduct. The Court of Appeal described the first three complaints in these terms:

> [9] The first complaint [October 2000] focused on the stress Ms Clear said had been caused her by Ms Parata's management style. The hospital manager, Peter Campbell, investigated. He told Ms Clear that there would be changes in the way cases were allocated amongst the midwives and that other improvements would follow.
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> [10] In the second (April 2001) complaint Ms Clear said that the position had not improved. She referred to what she described as Ms Parata's belittling conduct. Ms Clear discussed the matters with Mr Campbell. She said he was supportive. Mr Campbell spoke to Ms Parata again. After this, Ms Clear noticed an initial improvement but she said that this was short lived.
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> [11] The third (May 2002) complaint was dealt with by Janice Osborn, who was by then the area manager. The essence of the complaint was that the work environment was unchanged. Numerous matters were raised by Ms Clear all of which, bar one, Ms Osborn saw as historical. Ms Osborn had been advised by the Board's human relations personnel to address complaints as they arose rather than try to fix historical matters. She therefore dealt only with the one new matter, which related to the shredding of a document.
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> [12] Ms Clear accepted that her relationship with Ms Parata was in an "irreparable" state by June 2003.

[6] The Court of Appeal dealt with the fourth complaint under a separate heading:

> *The fourth complaint*
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> [17] The Board received Ms Clear's fourth formal complaint on 25 August 2003. This complaint was dealt with by Ms Priestley. Ms Priestley and Ms Cotterall began investigating. The Employment Court noted that it was "apparent that they had very sketchy if any knowledge of the extent of the history of dysfunction when they began''.
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> [18] Ms Clear returned to work on 30 August 2003. Her manager had organised that she and Ms Parata would work different shifts although occasionally they were there at the same time.
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> [19] Ms Clear was told on 8 September 2003 that the 32 points in her complaint would be investigated, that Ms Parata and other staff would be interviewed and that the information coming from the investigation would be made available to her. On 9 September 2003 Ms Clear left

> on indefinite sick leave. Her personal grievance was raised on 12 September 2003. Ms Cotterall in acknowledging the personal grievance said that a full investigation into her complaint was being undertaken.

[7] The Court of Appeal at [29] noted the substance of the Employment Court's findings in relation to Ms Clear's disadvantage grievance:[5]

> By failing properly to address Ms Clear's complaints and by failing to reach conclusions on the complaints that were properly communicated by her the [Board] seriously affected her conditions of employment to her disadvantage. It also breached its duty to provide her with safe working conditions. On any account the conditions of work in the Tokoroa Maternity Ward were not safe either for Ms Clear or Mrs Parata.

[8] In reference to the limitation period prescribed in s 114 of the Employment Relations Act 2000 (the Act) for the raising of personal grievances, the Court of Appeal recorded that there was no dispute that the limitation cut-off date was 19 September 2002 and that the Board could not be liable for breaches occurring prior to that date.[6] In her statement of claim, Ms Clear had recognised that, given the limitation cut-off date, the Board could not be held liable for any disadvantage claim based on the handling of any of her formal complaints apart from the fourth complaint in August 2003.

[9] Before the Court of Appeal, the Board had argued that effectively it had been held liable by the Employment Court for all the effects of Ms Clear's illness even though she was ill before 19 September 2002, that is, before any actionable breach arose. The Court of Appeal agreed with a submission from counsel for the Board that if the Employment Court had purported to impose liability on the Board for Ms Clear's illness per se, that would be an error of law.[7] On this aspect of the appeal, however, the Court concluded that Judge Shaw had recognised the limitation cut-off date and Her Honour's finding was that "...Ms Clear's problems in the workplace had led to the position where she was so ill that additional steps were

[5] At [128] of Judge Shaw's judgment.
[6] At [31].
[7] At [51].

required by her employer given the Board's knowledge of her fragile state."[8] On that analysis there had been no error of law. The Court of Appeal went on to observe:[9]

> Obviously, this means that when questions of quantum are determined, the Board's liability in terms of Ms Clear's return to work in August 2003 is limited to the failure of the Board to take the two identified steps on her return.

[10] The phrase "the two identified steps" is a reference to the finding of the Employment Court that the Board had breached its duty to Ms Clear to take all reasonable and practical steps to provide her with safe working conditions in requiring Ms Clear to return to work in late August 2003 when Ms Parata, (1) had not been required to "review her management style" and (2) "no attempt at conciliation had been made."[10] Commenting on that finding, the Court of Appeal said:

> [49] The latter finding is a factual finding. It may seem a somewhat surprising finding given Ms Clear's acceptance that her relationship with Ms Parata was by then "irreparable" and the absence of any finding upholding the complaint of bullying. But those are matters of fact, not an error of law over which we have any jurisdiction.
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> [50] There was a basis, albeit fairly slim, on which the Employment Court could conclude that the situation was such that a fair and reasonable employer would take the steps of attempting conciliation and of requiring Ms Parata to review her management style. ...

Subsequent developments

[11] After leaving her workplace on indefinite sick leave on 11 September 2003, Ms Clear never returned to work with the Board. The Court of Appeal judgment summed up the subsequent developments under the heading *"The Board's investigation"*:

> [20] Ms Priestly duly interviewed Ms Parata and two other staff members. Other staff members, particularly those who had left, were not interviewed because Ms Priestly considered their views were not relevant as they could only discuss previous complaints which had already been investigated. One other midwife who was still employed in 2003 was away and was not interviewed. As a result of the interviews undertaken, Ms Priestly came to the view that, although

[8] At [53].
[9] At [53].
[10] At [124].

genuinely believed, Ms Clear's allegations against Ms Parata were not correct. The investigators concluded that the 32 individual complaints were not made out but the enquiry into the allegations of bullying was not completed.

[21] There was evidence that shortly after leaving work, by 14 September, Ms Clear had reached the lowest point of her illness. She was described as acutely distressed. She was seeing a councillor under the Board's scheme for employees, was prescribed anti-depressants and was extremely unwell. A second opinion was obtained from a psychiatrist in October 2003. Her medication was changed in October 2003 and from then on her symptoms abated.

[22] At a meeting on 6 November, the Board representatives suggested that Ms Clear see a Board-nominated psychiatrist. There was ongoing debate about that issue but no resolution was reached as Ms Clear wanted an independent consultant. At a meeting on ... 27 November, Board representatives considered that Ms Clear's behaviour and health had deteriorated.

[23] Over the Christmas period, Ms Clear wrote a letter complaining to the Chief Executive Officer of the Board. This letter repeated the allegations already made to Ms Priestly and referred to the delays that had occurred. The Board's employment relations consultant, Greg Peploe, became involved. He took over the matter in February 2004.

[24] Essentially, Mr Peploe indicated that there would be an investigation and he took some steps in this regard. He ultimately reached the view that no further investigation was warranted or likely to be of benefit. Mr Peploe concluded that although the major issues related to the conflict with Ms Parata there were some patient and staff concerns as well and the level of complaints about Ms Clear was almost "unheard of".

[25] However, Mr Peploe did not communicate any of this to Ms Clear despite her regular emails to him. Mr Peploe in his evidence said that he did not respond to any of Ms Clear's requests for information because by then her solicitor was dealing with Ms Cotterall over a mediation. Mr Peploe accepted that he should have responded to Ms Clear directly rather than relying on Ms Clear's lawyer to pass on information.

[26] Mr Peploe's inquiries led to the Board's decision that Ms Clear's allegations of bullying were not justified. The Board then turned its focus to trying to find an acceptable solution so that Ms Clear could return to work. Ms Clear was not told of Mr Peploe's adverse findings about her performance, based on the number of complaints about her, nor that her claims of bullying were not accepted.

[27] An unsuccessful mediation was held in October 2004. What then followed was an inquiry into the possibility of other positions for Ms Clear.

[28] On 21 December 2004 Ms Clear's employment was terminated effective from 22 January 2005. The reason for the termination was

> her "continued absence from work with little hope that the situation will be resolved in the near future".

[12] There was no challenge in the Court of Appeal to Judge Shaw's finding that Ms Clear's dismissal was unjustified. The evidence was that after her dismissal, she remained medically unfit for work and in receipt of the sickness benefit until March 2008. After then being issued with a medical clearance, she carried out intermittent part-time work, initially driving taxis and more recently as a caterer. She also looks after her elderly father.

The contentions

[13] Mr Hammond framed Ms Clear's claim for lost remuneration under two heads. First, for the period 5 October 2003 to 21 January 2005 (less one month's notice) when she was unpaid but still an employee of the defendant. Secondly, for the period 22 January 2005 to March 2008 following her unjustified dismissal when, because of her disability, she was physically unable to return to work. Ms Clear's principal medical adviser throughout has been Dr Bernard Gadsden, a medical practitioner from Tokoroa with some 36 years' experience in general practice.

[14] Expanding on the basis of the plaintiff's claim for the first period, Mr Hammond submitted:

> 15. In summary therefore the defendant breached its duties to the plaintiff first by allowing the plaintiff to return on 29 August 2003 to an environment which was clearly dysfunctional and which was unsafe to her. The result of that was that in September 2003 the plaintiff became severely ill and in Dr Gadsden's words 'hit the wall'. That problem was greatly exacerbated by the defendant failing or refusing to undertake a full and fair investigation into the complaint and in failing to communicate with the plaintiff (the second breach).
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> 16. It is the plaintiff's position that there can be no basis for the plaintiff not receiving full recompense for lost income in the period from October 2003 to January 2005. No new argument has been advanced by the defendant opposing remedies for that period, especially given that the promised investigation had not been undertaken, communicated or concluded by the defendant during that period and the first and third breaches directly relate to the reason for the plaintiff not being able to work during that period.

[15] In reference to the plaintiff's claim for the second period, after reviewing a number of relevant authorities, Mr Hammond submitted in his closing submissions:

> 34. The exercise involves a consideration of what is a reasonable period of compensation in the circumstances and what is an adequate allowance for the contingencies of life. It is submitted that where this loss is aggravated by an individual's limited employment opportunities as they near retirement age, this is a factor that should be taken into account. Here the critical circumstances are first that the plaintiff was medically unfit, secondly that unfitness to work is casually directly linked to the defendant's breaches and finally the unsafe work environment was never addressed.
>
> 35. Also the plaintiff had worked in the specialised area of midwifery in a town where the defendant was the primary health employer. Her skills were not readily transferable and there were no realistic alternative employment options even if she was well enough.

[16] In his submissions in reply, Mr Hammond referred to a passage from the liability judgment in this case upon which he placed significant emphasis:

> 2. Compensation to the plaintiff for lost remuneration was clearly contemplated by Judge Shaw by the binding finding in [143] of the Employment Court decision: 'In light of the finding that Ms Clear's illness was significantly if not totally caused by the DHB's breach of duty to her in respect of the complaints which she made to it awards under sections 123(1)(b) and (c) are justified.'

[17] The case for the defendant was advanced by Mr Bevan under two limbs. First, counsel submitted that the Court "is required to separate out the loss flowing from the plaintiff's pre-existing illness (i.e. her condition as at 29 August 2003) from loss caused by defendant's breaches." The defendant's position in relation to this submission was that Ms Clear's breakdown was caused by a long build-up of stress rather than by her return to work on 30 August 2003. Secondly, the defendant contended, citing authorities in support, that any award for loss of earnings must be reduced to take into account contingencies which it claims would have affected Ms Clear's ability to achieve the income she alleges she would have earned. The defendant's contention under this head was: "even if she can show some lost income, the amount awarded should be substantially reduced, reflecting the reality that Ms Clear was extremely unlikely to make a successful return to work unless Ms Parata was dismissed."

[18] The defendant's medical expert was Dr David Prestage who has qualifications from both South Africa and New Zealand. Dr Prestage worked as a general practitioner between 1984 and 2003 and since 1999 he has practised in the field of occupational medicine.

[19] Before attempting to assess the merits of the parties' respective contentions, it is necessary to take a closer look at the circumstances surrounding Ms Clear's return to work at the end of August 2003.

Ms Clear's return to work

[20] Piecing together the evidence given at the liability hearing before Judge Shaw and the evidence given before me, it appears that Ms Clear was proposing to take a period of annual leave between Monday, 11 August and the end of August 2003. On Wednesday, 6 August she was unwell and was off work but she was not able to see Dr Gadsden until Friday, 8 August. She then returned to work over the weekend prior to starting her annual leave. However, part way through her first week on annual leave she again began to feel unwell and so on Friday, 15 August she consulted Dr Gadsden to obtain a medical certificate so that she could convert the annual leave she was supposed to be taking into sick leave. Dr Gadsden agreed. He prescribed medication and issued a medical certificate backdated to 11 August 2003 confirming that Ms Clear was medically unfit for work "until further notice".

[21] When asked in examination-in-chief how unwell Ms Clear was in early and middle August 2003, Dr Gadsden replied:

> I have obviously gone through my notes recently prior to presenting today. She certainly was unwell, she was obviously depressed, anxious, tense, she was I believe difficult to live with, she was irritable as I have mentioned.

[22] One of the symptoms Ms Clear suffered from at that stage was a medical condition known as polyarthralgia which was described to the Court as "multiple joint pains". Ms Clear referred to that condition in describing her return to work on 30 August 2003:

> After about 10 days I started to feel better but I didn't think about getting a clearance and my polyarthralgia had persisted until the day before. I was having dinner with him [Dr Gadsden] on the Friday night and I suddenly

realised I didn't have a clearance and I asked him if he wouldn't mind giving me one so he gave me a clearance to return to work on the following day on the Saturday.

[23] Ms Clear explained to the Court what happened when she returned to work on Saturday, 30 August 2003:

> I came back to work and I discovered that my roster had been changed yet again without any notification. And I took the report, I went up and saw the woman who was in the ward and there was only one and she was asleep. I got a cup of coffee, came back down, sat down and I reached up for the mail and I saw a letter it was marked Private and Confidential and I just knew it was going to be another complaint. I opened it and I just didn't feel I was going to ever get up. I felt rooted to the spot.

[24] The following passage from the transcript of Ms Clear's examination-in-chief explains the subsequent developments:

> Q. So in the ensuing days what were things like for you? Before you went off?
> A. Well I had the weekend to sort of try and come to terms with that, but I was getting quite stressed then after that incident and then I saw Thia and Kate on the Monday and I can remember my hand shaking while they were talking to me and I'm thinking, they've still not done anything, they're just going to let me, just going to hang me out to dry.
>
> Q. So you're facing the situation of working with Mrs Parata?
> A. Yes.
>
> Q. And nothing had happened?
> A. Nothing had happened that I was aware of.
>
> Q. On those days were you actually able to work?
> A. It was very difficult. I did some things that I had to but I was just shaking inside.
>
> Q. And then the evidence is that in the, after some time about nine days or so of working, you then [in] Dr Gadsden's words hit the wall.
> A. Yes.
>
> Q. Can you tell His Honour about that?
> A. I was, I worked the Monday/Tuesday afternoon and on the Wednesday morning, my flatmate called me into her bedroom to listen to a radio interview with Andrea Needham, and she had written the book of Workplace Bullying – A Costly Business Secret and it was due to be published the following week and I just listened to what she was saying and the responses, and thinking, that's her, that's me. That's her, that's me, and I just realised the penny finally dropped and I could no longer deny what was happening, and I just couldn't work after that.

[25] Ms Clear was asked further questions by the Court about the letter of complaint referred to in paragraph [23]. She made it clear that she believed that Ms Parata had orchestrated that patient complaint along with other complaints from patients over a long period of time. She said she felt "... it's just like I am back and here we go again and I can't deal with any more of this."

[26] Ms Clear was off work on 10 and 11 September. She told the Court that on 11 September a friend, who was a trained psychiatric nurse, recognised that she was at her wit's end and made another appointment for her to see Dr Gadsden. She was attended by Dr Gadsden on 14 September 2003. In cross-examination at the liability trial, Dr Gadsden described her condition on that occasion:

> ... an acutely ill lady, a quivering jelly, hysterical, completely anorexic, nauseous, probably vomiting, sweating, perspiring, sleepless. We introduced medication at that stage which brought those very unpleasant symptoms to at least improve them. Control them. But the issue of faulty cerebral functions, her memory, forgetfulness, all those aspects of the illness remained, but the acute phase of illness if you like, we had under control, under medication. Withdraw the medication and I believe her symptoms would have re-emerged.

[27] Before me, Dr Gadsden was asked how Ms Clear appeared when he saw her on 14 September 2003 compared to when he had previously seen her in August. He replied:

> It was a very dramatic difference; she was intensely distressed, inconsolable, almost incoherent, illogical, entirely dysfunctional I believe, she was in bed, restless, a very sick and distressed lady.

The relevant principles

[28] There was substantial agreement between counsel as to the relevant principles applicable to the assessment of remedies under s 123(1)(b) of the Act. They follow the general principles applicable to the assessment of damages in tortious cases. It is the application of those principles to the facts of the instant case that have given rise to the problems. The starting point is that a plaintiff seeking compensation must be able to show on the balance of probabilities that his or her

loss was caused by the breach claimed. The breach does not have to be the sole cause of the loss but it must be a material factor.[11]

[29] In reference to cases like the present involving a plaintiff with a pre-existing vulnerability, the Court of Appeal in *Gilbert*, citing with approval *Sutherland v Hatton*[12] stated:[13]

> Where the consequence of breach has been to accelerate or exacerbate a pre-existing and progressive condition, the employer is responsible for that effect and not the underlying condition.

[30] In relation to the assessment of compensation for future economic loss, the Court of Appeal in *Gilbert* stated:[14]

> Compensation for loss of future earnings is for a prospective loss. Assessment of the loss turns upon the hypothesis that the opportunity removed by the breach of contract or constructive dismissal would have produced benefits for which the plaintiff ought to be compensated. The Court must evaluate the opportunity lost, as best it can, taking into account contingencies which affect achievement of the benefit.

[31] The principle was restated by the Court of Appeal in *Telecom New Zealand Ltd v Nutter*:[15]

> We also emphasise that full compensation must be assessed in light of all contingencies and in no circumstances should an award be made which exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment.

[32] Certain additional principles have been established covering the situation where the Court, as in this case, is primarily concerned with what would probably have happened in the past rather than with events that may happen in the future. In *Mallet v McMonagle*, Lord Diplock said:[16]

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what

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[11] *Attorney General v Gilbert* [2002] 2 NZLR 342, [2002] 1 ERNZ 31 (CA) at [96].
[12] [2002] EWCA Civ 76, [2002] ICR 613 at [42].
[13] At [108].
[14] At [107].
[15] [2004] 1 ERNZ 315 at [81].
[16] [1970] AC 166 at 176.

> was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[33] Mr Bevan referred to the relatively recent Australian authority of *Seltsam Pty Ltd v Ghaleb*,[17] where Ipp JA, summarising the decision of the High Court of Australia in *Malec v J C Hutton Pty Ltd*, stated:[18]

> (a) In the assessment of damages, the law takes account of hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring.
>
> (b) The court must form an estimate of the likelihood that the alleged hypothetical past situation would have occurred.
>
> (c) The court must form an estimate of the likelihood of the possibility of alleged future events occurring.
>
> (d) These matters require an evaluation of possibilities and are to be distinguished from events that are alleged to have actually occurred in the past, which must be proved on a balance of probabilities.

Plaintiff's pre-existing condition

[34] Mr Hammond accepted that the plaintiff "had some level of unwellness in August 2003" although he submitted that, "the general picture of her health prior to this was not that of a seriously unwell person". He stressed that she had a clearance from her doctor before she returned to work on 30 August 2003 and he submitted that, "she was able to function effectively as a midwife on her return". Counsel placed reliance on the finding of Judge Shaw at [143] that, "Ms Clear's illness was significantly if not totally caused by the DHB's breach of duty to her in respect of the complaints which she made to it". Mr Hammond suggested that a possible fair alternative was to allow a "modest diminution in the percentage of the awards... in the area of 10 percent" for pre-existing illness.

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[17] [2005] NSWCA 208 at [103].
[18] (1990) 169 CLR 638.

[35] Mr Hammond submitted that there was no criticism of Ms Clear's clinical capabilities on her return to work and he stressed that she had had "very few sick leave days since the bullying some years earlier". Counsel also submitted that her third complaint was almost a year before her breakdown yet she had been able to function as a midwife in a clinically satisfactory way in the meantime.

[36] Mr Bevan, on the other hand, stressed that the Board could not be held liable for the effects of Ms Clear's pre-existing illness. He submitted that the Court of Appeal anticipated that, "there would be either no award, or a very limited award, for lost remuneration on the basis that, prior to any actionable breach, Ms Clear was already very sick and her relationship with Ms Parata was in an 'irreparable' state."

[37] In this part of his submissions, Mr Bevan relied significantly upon the claim made in evidence by Dr Prestage, that nothing that "happened between 30 August and 11 September 2003 in the workplace, gave significant additional impetus to or caused her [Ms Clear's] breakdown". Counsel stressed Dr Prestage's conclusion:

> 47. Although this involves an element of speculation, based on my review I believe Ms Clear's breakdown was highly likely (if not a near certainty) sometime around the September 2003 period, even if she had not returned to work.

Discussion on plaintiff's pre-existing condition

[38] In reference to the quotation from Judge Shaw at [143] of her judgment, relied upon by Mr Hammond at paragraphs [16] and [34] above, it is significant that Her Honour refers to "complaints" in the plural rather than to Ms Clear's fourth complaint which gave rise to the only actionable breach. Although the Court of Appeal did not refer specifically to paragraph [143] of the Employment Court judgment, it was made very clear that in determining questions of quantum, this Court will not be concerned with Ms Clear's out-of-time complaints but only with the failure of the Board to take the two identified steps on her return to work. Although, Mr Hammond submitted, there may not have been any recorded criticism of Ms Clear's clinical abilities after her return to work on 30 August 2003, it is apparent from her own admissions at paragraph [24] above, that she was finding it "very difficult" to cope.

[39] In relation to the defendant's submissions and counsel's reliance upon Dr Prestage's conclusions, it is necessary to examine in more detail the basis of the doctor's claim. It is not clear from the evidence exactly when Dr Prestage was first instructed in the case but it may have been as recently as 2010. One of the unusual features of Dr Prestage's involvement is that, although he had been given the opportunity, he declined to examine or meet with Ms Clear. In other words, he did not meet Ms Clear until the Court hearing. He told the Court that his evidence was based upon information he had assembled from a perusal of medical records and medical reports, together with relevant documents and evidence from the liability hearing including the resulting Employment Court judgment. He explained his reason for not having examined Ms Clear in these terms:

> Because we are concerned about a period that is significantly in the past, I do not believe an examination would be useful or necessary. There would also be real danger of Ms Clear presenting me with her assessment of the past, based on what she believes the past was like (or should have been like) now.

[40] Dr Prestage was cross-examined at some length about the assertion he had made in his examination-in-chief that Ms Clear would have suffered her breakdown even if she had not returned to work. The transcript from his cross-examination by Mr Hammond records the following exchange:

> Q. But what this is about is what the Board could have and should have done to create a safe working environment. I'm putting to you that had the Board done any one or a combination of those various things that had been put up by the Court of Appeal Judges and by Judge Shaw then potentially Ms Clear could have safely carried on working.
> A. That's correct.

[41] At another point in his cross-examination, it was put to Dr Prestage that he was being "...speculative and indeed highly speculative". The doctor responded:

> I'm being speculative, but I think there's no doubt, something altered Ms Clear's state of health quite acutely and it appeared on the evidence I've seen to be directly related to the incident when she heard the interview on the radio. She'd been at work for I think two weeks, with no evidence anywhere of deterioration [in] health during that time. And my interpretation of events is that the, it wasn't so much the return to work but suddenly the validation of what had been happening to her over a longer period of time that led to the acute breakdown. The return to work would certainly be a factor in all of that, because the way people present is the end result of everything that's affecting them, but the final straw that broke the camel's back as it were, was

> that specific incident at home. When she became acutely distressed and inconsolable, I think that was the word used.

[42] Although both Dr Gadsden and Dr Prestage presented as impressive witnesses, I am afraid that Dr Prestage lost some credibility because of his decision not to examine or interview Ms Clear. It was up to the defendant to establish its assertion that Ms Clear would have suffered the breakdown in September 2003 even had she not returned to work. Dr Prestage said that he thought that Ms Clear had been back at work for two weeks with no evidence of any deterioration in health before she suffered her breakdown and the only incident that could have brought on the breakdown was the radio programme on bullying. That, however, was not the whole of the evidence before the Court. Ms Clear had told the Court about the impact of learning how her roster had been changed (without any notification) and about the letter of complaint that had caused her to feel "rooted to the spot". Those incidents had occurred only about five minutes after she had returned to work at 6.45 am on the morning of Saturday, 30 August 2003. In other words, within a very short time of her return to work, Ms Clear had become aware that nothing had changed and, it was apparent from her evidence, that this sudden realisation that nothing had changed caused her considerable distress.

[43] Dr Prestage was unaware of the incident involving the letter of complaint until he was asked about it during the hearing. He told the Court, "No there was no information anywhere from the past records of any incident at that time." This is the type of factual matter, however, which the doctor could easily have ascertained directly from Ms Clear had he chosen to interview her.

[44] Mr Bevan was critical of Ms Clear's evidence relating to the incident involving the letter of complaint. In his closing submissions he said:

> 55.6 That contention is remarkable, given that she has never referred to the 30 August 2003 incident in the previous two Authority hearings or in the previous Employment Court liability hearing.

[45] It would appear, however, that counsel's submission may not be completely accurate. The agreed bundle of documents from the liability hearing, which was made available by consent at the quantum hearing, disclosed a medical report dated

29 March 2004 from Gil Newburn, a neuropsychiatrist, who had interviewed Ms Clear. He recorded:

> When she returned to work she discovered that her duties had been changed without any negotiation. She also found that a further complaint had been made against her.

In other words, Ms Clear had disclosed both those matters at an early stage and I have no reason to doubt that she would have also disclosed them to Dr Prestage had he chosen to interview her.

[46] For his part, Dr Gadsden accepted in cross-examination that Ms Clear's breakdown on 11 September 2003 was a result of a long build-up over a period of time but he said that he was "stunned" by the observation by Dr Prestage that she would have suffered a breakdown in mid-September in any event. In reference to Ms Clear's condition as at the end of August, Dr Gadsden said:

> I had no premonition of literally the catastrophic event that I think she – that befell her subsequently. Whether that was a matter of sustained stress or whether there was some particular incident that week of which I'm not aware, but certainly there was a huge change in her function and capacity.

[47] Although it is not an easy exercise, after considering all of the relevant evidence and counsel's submissions, I reject the defendant's theory that Ms Clear would have suffered her breakdown in mid-September 2003 even had she not returned to work. At the same time, however, I am satisfied that immediately prior to her return to work on 30 August 2003, Ms Clear was in a fragile state suffering from a significant underlying illness for which, because of the limitation cut-off period, the Board cannot be held liable. Doing the best that I can, I would assess her pre-existing disability at 60 percent which means that 40 percent only of Ms Clear's proven economic loss can, as a matter of law, be attributable to the Board.

Future economic loss

[48] Mr Hammond, in reliance upon *Nutter*, emphasised that the actual loss suffered by the employee sets the upper ceiling on any award and is the logical starting point for an assessment of future economic loss. He submitted that where the loss is aggravated by an individual's limited employment opportunities as they

near retirement age, that is a factor that needs to be taken into account. He went on to further submit:

> Here the critical circumstances are first that the plaintiff was medically unfit, secondly that unfitness to work is casually directly linked to the defendant's breaches and finally the unsafe work environment was never addressed.

[49] I accept Mr Hammond's submission that Ms Clear has established to the required standard of proof that she is entitled to compensation for lost remuneration during the period she was unpaid and not at work but still an employee of the Board between 5 October 2003 and 21 January 2005 (less one month's notice) as well as for the period following her unjustified dismissal until she was finally given a medical clearance to return to work in March 2008. Both periods are affected by any calculation of contingencies which relate to what would have occurred if Ms Clear had been in the workplace. Mr Hammond has filed a memorandum showing calculations, which I understand are accepted by Mr Bevan, recording the total loss (less actual received) as being $252,773.63.

[50] For his part, Mr Bevan submitted that any award for economic loss needed to be reduced to take into account three principal contingencies. He described them as follows:

> 61 1) The high likelihood (or near certainty) that Ms Clear would have suffered a breakdown due to a long build up of stress and her perceptions about the relationship with Ms Parata, even if she had not returned to work at the end of August 2003.
>
> ...
>
> 62 2) The likelihood that Ms Clear's health would have continued to suffer if the Board (acting in all respects fairly) had not concluded that Ms Parata was not a bully.
>
> ...
>
> 63 3) The high likelihood that, given the situation as at 29 August 2003, Ms Clear could almost certainly never have returned to work with Ms Parata, even if Ms Parata had been found to be a bully and had been required to change.

Discussion on future economic loss

[51] Mr Hammond stressed that Ms Clear's disadvantage actions were "about the defendant's failure to properly investigate the plaintiff's claims of bullying and not whether in fact the plaintiff had been bullied." The Court of Appeal confirmed that the Board's liability in terms of Ms Clear's return to work in August 2003 was limited to its failure to take the two steps identified by the Employment Court, namely, its failure to review Ms Parata's management style and its failure to attempt conciliation.[19] Both those failures added up to a breach of the Board's duty to take all reasonable and practical steps to provide Ms Clear with safe working conditions.

[52] Ms Clear impressed me as a strong but sensible person. The frustration she would have experienced when she returned to work at the end of August 2003 and realised that the Board had not acted on her fourth complaint, in other words that nothing had changed, was only too evident from her demeanour when she gave her evidence before me.

[53] How the Board might have dealt with the two steps identified in the judgment on liability is open to a certain amount of speculation. I formed the impression, however, that had the Board consulted Dr Prestage at that stage (which was an option because the doctor did give advice to the Board in a locum capacity during 2003 on health and safety matters) and sought his advice as an expert in the field, then he, through the conciliation process, may well have been able to come up with a solution to the problem which would have avoided recourse to litigation. That is speculation, of course, but I am quite satisfied that the outcome would have been considerably different had Ms Clear, upon her return to work in August 2003, been able to see that the Board was taking some proactive measures to deal with her perceived problems in one or both of the respects identified by Judge Shaw and confirmed by the Court of Appeal. I am equally satisfied that she would have been patient about the matter so long as she could see that some action was being taken by the Board. This is evident, not only from her evidence before me, but also from the patience she subsequently exhibited in her communications with the Board's employment

[19] At [53].

relations consultant, Mr Peploe, who, as the Court of Appeal recorded, failed to communicate any of his findings to Ms Clear.[20]

[54] At the same time I accept that, even had the Board fully met its obligations in relation to Ms Clear's return to work, there was still a real likelihood, in all the circumstances, that she would not have carried on working for the Board until March 2008 as claimed and for that reason there needs to be a significant reduction in her award for economic loss to cover such contingency. That contingency could have manifested itself through any one or more of the factors identified by Mr Bevan at [50] above or it may simply have arisen through Ms Clear's eventual realisation that, in colloquial terms, she had "reached the end of the road".

[55] In other words, there would come a point in time when Ms Clear would have had no option but to accept that the Board had met all its obligations to her in response to her one in-time complaint but things were not going to get any better. Ms Parata was not going to be found to be a bully nor was she going to be required to change her ways. I consider that faced with that situation, the option available to Ms Clear of carrying on working in such an environment would have been unpalatable and, rather than persevere, she would have elected simply to resign. Although not a certainty, I find this scenario a definite possibility. On account of such contingency, I would make a deduction from Ms Clear's proven economic loss of 60 percent. I reject the suggestion tentatively raised by defence counsel that Ms Clear had failed to mitigate her loss by taking up other employment opportunities in Tokoroa. The evidence satisfied me that she was unable to carry on any other employment prior to March 2008 because of her medical condition.

[56] On the foregoing basis, after allowing for the appropriate percentage reductions on account of her pre-existing condition and the identified contingencies, Ms Clear is awarded the sum of $40,443.78 pursuant to s 123(1)(b) of the Act. No issue of contribution under s 124 of the Act has been raised and, in any event, I do not find any contribution on the part of the plaintiff. Accordingly, no reduction in the award is ordered under s 124.

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[20] At [25].

Medical and dental expenses

[57] Ms Clear has claimed a total of $12,997.60 on account of her medical expenses and she also claims a sum for dental expenses resulting from bruxism. Mr Bevan submits that her claim for medical expenses will need to be adjusted to take into account the extent of the Board's liability as determined by this Court. I agree with Mr Bevan and am confident, now apportionment has been determined, that counsel will be able to reach agreement on the issue of medical expenses. I would, however, allow Dr Gadsden's fees and expenses in full. In relation to the claim for dental expenses, Mr Bevan submitted: "Ms Clear completely fails to show causation in respect of her dental expenses, which relate to pre-existing bruxism (teeth grinding)." I agree with that submission. As the claim for dental expenses was in contention, it should have been the subject of expert evidence. I disallow the claim for dental expenses.

Loss of superannuation benefits

[58] Ms Clear claimed "Loss of superannuation benefits [as] a natural consequence of the defendant's breaches and the unjustified dismissal." Mr Hammond submitted that the evidence in relation to superannuation could be ascertained by a simple matter of calculation from the defendant's records. Mr Bevan correctly submitted that any award on account of such benefit must allow for Ms Clear's pre-existing condition and the contingencies I have identified. Again, I am confident that counsel will now be able to reach agreement on this issue.

Costs

[59] The plaintiff is entitled to an award of costs and expenses in relation to the two hearings in the Employment Court. In November 2010, memoranda were filed by both counsel in relation to the plaintiff's entitlement to costs in respect of the liability hearing before Judge Shaw. I convened a telephone conference on 13 December 2010 to deal with the matter. Mr Bevan submitted that, as a *Calderbank* offer had been made, all issues in relation to costs should be left until after delivery of the judgment on remedies. Mr Hammond submitted that, as the plaintiff had virtually no income and had been required to "mortgage her house to

the hilt to fund this litigation", it would be difficult for justice to be done in the preparation of her case for the remedies hearing unless costs in respect of the liability hearing were assessed and paid by the defendant. I gave the defendant the option of making an immediate contribution of $10,000 towards the plaintiff's costs which would need to be taken into account in the final determination, failing which I would determine the issue of costs. The defendant agreed to make the advance payment.

[60] In respect of the liability hearing, Mr Hammond advised the Court that Ms Clear's actual costs amounted to $61,755.22 along with disbursements totalling $1,123.95. In accordance with *Binnie v Pacific Health Ltd*,[21] counsel sought a contribution towards Ms Clear's costs in the sum of $40,758.45, being two thirds of her actual costs, plus disbursements. Having had access to all the documentation involved in the liability hearing, I accept that in terms of preparation, evidence and submissions, the costs incurred would have been considerable. The hearing ran for four days. The plaintiff was substantially successful, apart from a minor aspect of her claim relating to a claim for "days in lieu". Although I am conscious that I have not perhaps heard all of the submissions that could be made on the subject, my preliminary view based on the evidence and submissions received to date, is that the plaintiff should be awarded the full amount of her costs claim, after allowing for the advance referred to in [59].

[61] I have deliberately refrained from making any inquiry into details of the *Calderbank* offer referred to. Obviously, that could have a bearing on the tentative conclusions I have just expressed.

[62] In relation to the hearing on remedies, the plaintiff is entitled to a modest award of costs taking into account the extent of her recovery, along with disbursements. As counsel were able, without intervention by the Court, to reach agreement on costs both in the Authority and in the Court of Appeal, along with the potentially more complicated issue of compensation for non-economic loss, I am hopeful and optimistic that they will be able to reach agreement on costs in relation to this hearing as well as the issue of medical expenses and the claim for superannuation benefits. It is time this litigation ended. If, however, agreement does

[21] [2002] 1 ERNZ 438.

not prove possible then leave is granted for either party to come back to the Court within 28 days on any of the matters referred to in the last three paragraphs of this judgment.

A D Ford
Judge

Judgment signed at 4.15 pm on 23 May 2011