IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 22
WRC 12/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ANGELA CLAIRE SHAW Plaintiff
AND	SCHERING-PLOUGH ANIMAL HEALTH LIMITED Defendant

Hearing: 21, 22, 23 and 29 November 2012
(Heard at Wellington)

Appearances: Paul McBride and Clare Needham, counsel for the plaintiff
Andrew Scott-Howman, counsel for the defendant

Judgment: 25 February 2013

JUDGMENT OF JUDGE A D FORD

Introduction

[1] Mrs Angela Shaw claims that on 3 December 2010 she was unjustifiably constructively dismissed from her employment with the defendant company. She also claims to have a disadvantage grievance arising out of a formal complaint she had made earlier in time about one of her co-workers. In the alternative, in respect of her disadvantage grievance, Mrs Shaw has made a claim for breach of contract. I will need to expand on these issues later in this judgment. The defendant strongly denies all of the allegations made against it.

[2] The same claims had originally been made in the Employment Relations Authority (the Authority) but in a determination[1] dated 26 April 2012, the Authority

[1] [2012] NZERA Wellington 48.

held that Mrs Shaw had failed to establish grounds for a constructive dismissal and it also concluded that none of the employer's actions relied upon had amounted to an unjustified disadvantage. In this proceeding, Mrs Shaw has challenged by way of de novo hearing the whole of the Authority's determination.

Background

[3] The Court was told that in 2011, the defendant company changed its trading name to MSD Animal Health but throughout this hearing it was referred to by its former name, Schering-Plough Animal Health Limited (Schering-Plough), and for ease of reference I will continue to refer to it as such or simply as the defendant. Schering-Plough is part of a global company which has a presence in over 120 countries and employs over 80,000 people worldwide. The company's operation in New Zealand centres on the production of bacterial vaccines for sheep, cattle, deer and pigs. Production is carried out at a high-tech facility in Upper Hutt which employs about 110 employees.

[4] Mrs Shaw holds a Bachelor of Applied Science with double majors in Natural Resource Management and Forestry (Massey University 2000-2003). Her early work experience was in administration and hospitality roles and in 2004 she was employed as a supervisor for the Foxton Conservation Corps. Mrs Shaw commenced working for Schering-Plough in April 2005 as a temporary purchasing officer and in June 2005 she was appointed to a permanent position as logistics coordinator, a position she held until the cessation of her employment. The terms of her employment were governed by an individual employment agreement dated 26 May 2005.

[5] Mrs Shaw and her husband, Mr Ian Shaw, have four children, the oldest is a 20-year-old son and the youngest a three-year-old daughter. Mr Shaw, who gave evidence in the case, works as an in-house accountant for a local company. In reference to her previous work experience, Mrs Shaw highlighted the position she held as supervisor for the Foxton Conservation Corps because she claimed that its challenging environment involving her working with and supervising unemployed youth was "not in the same league as what I was later forced to put up with at Schering-Plough."

[6] In her position as logistics coordinator, Mrs Shaw's role involved arranging for the dispatch of company products throughout much of the world. In evidence that was not disputed, she told the Court that the position required special qualities including absolute attention to detail and the ability to meet stringent timeframes. Mrs Shaw was required to open and maintain productive interpersonal relationships with employees in all parts of the business. She said that she demonstrated those special qualities and that she was a valued employee, a belief that was supported by her various performance reviews.

[7] One matter which assumed some significance during the course of the hearing related to the interior layout in 2010 of what I shall refer to as the logistics office where Mrs Shaw worked. The logistics manager was Mr Dennis Boyle. He told the Court that there were effectively six members in his team. Five were located in adjacent offices in the logistics office while the sixth was a coordinator who was based in the warehouse. Mrs Shaw was located in a corner office which she shared with the production planner who was the subject of her complaint. In his determination, the Authority Member referred to this person simply as "A" and, as the individual in question did not give evidence before me, to protect his identity, I propose to continue to refer to him as A.

[8] A bird's eye view of the office layout shows the office occupied by Mrs Shaw and A located in the bottom right-hand corner. At the top right-hand corner was Mr Boyle's office. Between those two offices there was a meeting room with a door on either side. In other words, there were two doors separating Mr Boyle's office from the corner office. An internal right-angled passageway gave access to both Mr Boyle's office and the corner office. To the immediate left of the corner office was the office of Mr Mike Rennie, the purchasing officer and then in the room next to Mr Rennie's office was the purchasing manager, Ms Kate Pilkington, to whom Mr Rennie reported. Across the passageway from Mr Rennie and Ms Pilkington's offices were the computer rooms.

[9] By way of background to her complaint, Mrs Shaw referred to her return to work following a period of maternity leave taken between March and November 2009. During her absence she had been replaced by Ms Maritza Acosta. Mrs Shaw said that upon her return it was "made fairly clear" to her that

Schering-Plough preferred Ms Acosta. She said that Mr Boyle told her that Ms Acosta had skills that she did not have, including the fact that she could speak Spanish and communicate with other Spanish-speaking colleagues, which was a real advantage. Mrs Shaw further stated:

> 30. Kate (Pilkington) had established a very friendly out of work friendship with Maritza (even attending her Wedding) and [A] and the Warehouse staff (all males) loved the fact, and often mentioned that, Maritza wore tight pants to work.

These allegations were not specifically disputed by the Schering-Plough witnesses although Mr Boyle said:

> Angela says that no-one appeared to welcome her back, or be pleased that she was back. I just want to say that the company was happy to have her back: she was a long term employee, and did her job well. I don't know why Angela didn't feel welcomed - because we were happy to have her back.

The complaint

[10] The more important relationship was that between Mrs Shaw and A. Mrs Shaw said in evidence that following her return to work from maternity leave her colleague A, "started doing and saying things that caused me real concern, and increasingly led me to feel for my health and safety." She said she had no idea why this was so but she noted that "his position within the company was extremely demanding and stressful. My return had also 'forced' his preferred Maritza to leave the workplace."

[11] Mrs Shaw outlined in evidence the aspects of A's alleged conduct up to the beginning of December 2010 to which she took exception. She said that although she was not a prude, she was disturbed and frightened by his constant bad language and cursing in the office. She gave as an example how A would "routinely swear at and violently bash and curse" the aged printer which was located right next to her desk whenever it jammed, which apparently was quite regularly. She described him as having an outspoken opinion on everything and she told how he regularly made insulting remarks about other people. By way of example, she said that several times A stated that Ms Jane Vennell (Human Resources Associate at Schering-Plough) had got "fat". He discussed his views about the former Prime Minister, Ms Helen Clark, "as a lesbian prime minister" with Ms Pilkington in front

of Mrs Shaw and his views about the new CEO of Schering-Plough who he described as a "black man", making the statement that "all black people run bad countries". Mrs Shaw described A as being "obsessed with breasts, boobs and tits". She said that after returning from his Wednesday lunchtime grocery shopping, he would frequently make comments about "Upper Hutt women and their breasts, bums etc" which Mrs Shaw said she felt was inappropriate behaviour and she told him so.

[12] Mrs Shaw said that A also had outspoken views on beneficiary recipients who he felt "should be sterilised" as well as global population growth. He had a graph on his wall of population growth patterns which he was very vocal in expressing his opinion on. He also had firm views on racial issues and allegedly "frequently put down Maori and Island races". Another issue A had firm views on, which Mrs Shaw said she found it difficult to ignore, was climate change. He would accuse her of having "a large carbon footprint" by using several cars. In addition to these matters, Mrs Shaw referred to other conduct on A's part which was of a more personal nature. She told how he "farted and burped with no regard for me being there. He also adjusted his genitals often in our office, which I ignored and pretended not to see. I found this rather disturbing". She said that he regularly told her that she was "chubby", "old", "useless" and "grumpy" adding that, "he did not see why my husband stayed with me." Mrs Shaw explained that these comments affected her greatly because she had struggled with self-worth and self-confidence after suffering postnatal depression back in the 1990s.

[13] In mid-2010 Mrs Shaw applied for two other positions within Schering-Plough. She said the primary reason for doing so was to allow her to move away from the office she shared with A but those applications were turned down without an interview. Mrs Shaw told the Court that from about the same period of time she became increasingly concerned over A's behaviour. On one occasion he kicked her desk and she ran out of the office to Mr Rennie because she did not know what might happen next. On another occasion A threw a pen in anger so hard that it bounced off the wall close to Mrs Shaw and then could not be found. On another day he violently punched a pile of paperwork on Mrs Shaw's desk only about 40 cm from her face. She said she felt that although his rage was not directed at her, it was increasing and she was clearly in the line of his physical fire. She told him that she

did not like his behaviour and his response was to laugh at her. She said that she did not feel that she could approach that topic again, as it would only inflame the situation.

[14] On Thursday, 2 September 2010, Mrs Shaw made a formal complaint by email to Mr Boyle about A's conduct. The email read:

> ...
>
> **Subject**: Concerns
>
> Dear Dennis
>
> I wish to complain about [A's] behaviour within our office environment. This has been an ongoing problem for quite some time, and I know you are aware of most issues, however to date I have not been aware of any actions to address his behaviour.
>
> I find his constant loud bad language, disruptive attitude, rude behaviour and increasingly violent outbursts towards myself and our office furniture and other items including my desk very distressing and I am worried about my health and safety.
>
> Recently I had to vacate our shared office very quickly as I was afraid of his actions after he threw documents around the room and also after one very heavy kick to my desk, and only yesterday he punched a pile of documents on my desk extremely hard. All these actions have left me distressed and shaken.
>
> I would like these actions addressed to eliminate the risk to myself and my colleagues.
>
> I also wish for my complaint to be dealt with confidentially as this would place me in an extremely difficult working environment if [A] became aware of my personal complaint.
>
> Thank you and I am sure you can understand why I have had to express this concern.
>
> Regards,
>
> Angela

Reaction to the complaint

[15] Mr Boyle said in evidence that Schering-Plough takes health and safety issues very seriously but Mrs Shaw had never told him about the concerns she had over A's conduct or that she had felt unsafe. He said that had he been aware of these matters, "I would have taken immediate action to address those concerns."

Mr Boyle also said that none of the other staff had ever made a complaint regarding A's conduct and if his behaviour had really been as serious as Mrs Shaw made out then, "given the high premium placed by the company on health and safety", he was "amazed that not one of the employees came forward to alert us to it."

[16] Mr Boyle said that his own view was that Mrs Shaw "tended to inflate things in her own mind beyond what others would regard as "unsafe"." He continued:

> For example, she says in paragraph 57 that [A] threw a pen which could have hit her or Mike. That is certainly not behaviour that we would want from our employees, but it certainly isn't something that I think you would say made our workplace "unsafe".

[17] Mr Boyle said that he was surprised when he received Mrs Shaw's email of 2 September 2010 and he denied that he knew about A behaving inappropriately "to the level that Angela says she was unsafe." He continued:

> 26. It would be fair to say that I was very concerned about Angela's email. It described things which, in my view, are serious - and I immediately realised that I would have to take the email seriously as a result.

[18] For her part, Mrs Shaw said that on a number of occasions when A was away or on leave, Mr Boyle would say things to her such as, "it will be quiet without [A] around" or "I am sure it's quiet without [A]". She said that A's conduct "was well-known in the workplace and was the subject of comment and discussion by other staff." She gave the names of 12 other employees she had given to the Authority who had discussed A "and his frustration and his behaviour". None of the 12 individuals were called as witnesses before me but Mrs Shaw made the point that they still worked at Schering-Plough.

[19] Mr Boyle met with Mrs Shaw in his office on Friday, 3 September 2010. In reference to the meeting, Mr Boyle told the Court:

> 27. ... Angela was sending some confused signals in this meeting. On one hand, she told me that she was genuinely concerned about [A's] behaviour - and particularly referred to things like him slamming papers down on his desk.
>
> 28. At the same time, however, she went to some lengths to emphasise that her good working relationship with [A] was important to her and that she didn't want [A] to know about the fact that she had made a complaint about him.

29. Angela didn't make a complaint about any specific incident, nor did she indicate that [A] had directed any violence or verbal abuse at her. It wasn't a situation where she had an immediate fear for her safety. My impression was that Angela had an issue about the way [A] behaved. She didn't want him to behave that way, and wanted him to be told to stop.

30. This put me in a really difficult position. I told Angela that, in ordinary circumstances, I just would have asked her to let me talk to him one on one. I actually thought that if I confronted [A] with Angela's concerns there would be a very high probability that he would stop any unwanted behaviours. But I knew that in order to get him to do anything I would have to be specific - and let him know about Angela's concerns.

31. Angela was adamant that she didn't want me to do that. She said that it would jeopardise her working relationship with [A]. When I asked her what she thought I should do, she couldn't offer any suggestion.

32. One option I suggested was that Angela could move away to a different part of the office - but she definitely didn't want this either. She wanted to stay in the office with [A].

[20] Mrs Shaw's account of the meeting was a little different. She prefaced her evidence with the following observations:

73. I was extremely apprehensive about what [A] would say and do if he found out that I had complained about his behaviour and had written a formal email. That was why I asked Dennis to treat my complaint in confidence.

74. I was very mindful that it was a serious move to put such a complaint in writing, but I was at the end of my tether and I saw this as my last resort.

[21] In reference to the meeting itself, Mrs Shaw confirmed that she told Mr Boyle why she wanted her name to remain confidential. She continued:

> I told him why that was, and I understood he recognised why I had said that. I emphasised that the situation was very serious for me, and something needed to be done. I certainly understood that he was going to follow up on the issues, just that, to the extent possible, he would keep me out of it to try to avoid making the situation worse for me.

[22] Mrs Shaw strongly denied that Mr Boyle had suggested that she could be moved to a different office. In her evidence in response, she said:

71. ... In fact, if that offer had been made to me, I would certainly have taken it. Nor was I told that there was any harassment policy or other

documentation that addressed the structure for such issues. I certainly did not want to stay in the office with [A's] conduct.

72. There was no apparent action from my perspective at all. If indeed the matter was being taken seriously, as I have previously noted I am astonished that there were no notes of the events.

Subsequent developments

[23] Rather surprisingly, Mr Boyle made no notes of his meeting with Mrs Shaw on 3 September 2010 or of any follow-up action. This issue became significant because Mrs Shaw's evidence was:

78. The next I heard from anyone at Schering-Plough about my complaint was 29 September 2010, when I had a PMP (performance management programme) discussion with Dennis Boyle. At that time, I had continued to put up with [A's] behaviour.

79. Over the almost 4 week period until that point I seemed to have been ignored by the Company, despite my cry for help. That was certainly the way I felt.

[24] The evidence for the company was that on Tuesday, 9 September 2010 Mr Boyle met with Ms Linda Bognuda, Schering-Plough's Human Resources Manager. Mr Boyle was criticised in cross-examination by counsel for the plaintiff, Mr McBride, for waiting a week before making contact with human resources. Initially, Mr Boyle denied that he waited a week but then he conceded:

> Um, as the dates suggest there was a time lag. I can't explain that time lag, but it would have been the first opportune time that I could take the issue up with HR.

[25] Mr Boyle was later asked by the Court to expand on that statement. In a rather unsatisfactory answer, the witness replied:

> Um I would have felt that I took the note seriously, I followed up with a meeting promptly with Mrs Shaw and I would have known that, in my experience as a manager, that I would have wanted to forward that to HR at the most expedient moment possible. So due to - and I accept not having some records of that particular time, that I had an urgency about it to follow-up with HR. That would have been the time that people would have been available to discuss the issue.

[26] In reference to this meeting with Ms Bognuda on 9 September 2010, Mr Boyle told the Court that he gave Ms Bognuda a copy of Mrs Shaw's email

complaint of 2 September 2010 and they talked about Mrs Shaw's concerns and the difficulty raised by her desire not to alert A to her complaints. I do not accept, however, that Mr Boyle did give Ms Bognuda a copy of the email in question. Ms Bognuda claimed that she did not see the email until December and there was documentary evidence confirming her recollection in this regard.

[27] In her evidence in relation to the meeting on 9 September 2010, Ms Bognuda said that Mr Boyle had told her about the email he had received from Mrs Shaw the previous week. She said:

> My assessment was that Angela had raised some general concerns about the way in which A's behaviour in the office could be affecting her. I knew the appropriate response was for the company to address her concerns.
>
> The difficulty we had, however, was Angela's express desire for [A] not to know about her concerns - and certainly not to put them to [A] as if they were complaints by her. ...

[28] In cross-examination it was put to Ms Bognuda that Mrs Shaw did, in fact, want her concerns addressed but she did not wish to be identified as the complainant because that was likely to make matters worse for her. Ms Bognuda disputed that interpretation. The following exchange then took place:

> **Q.** And so Angela didn't have an expressed desire for [A] not to know about her concerns she had an expressed desire to have her concerns addressed but in a way that didn't paint her as a whistleblower to borrow a phrase.
> **A.** I disagree with that.
>
> **Q.** Why do you think she wrote the email if it wasn't to have the concerns addressed?
> **A.** I am not going to speculate.
>
> **Q.** Are you saying you believe that this email was written about these issues on the basis that Mrs Shaw didn't want any action taken?
> **A.** I don't know why she wrote this email.

[29] No notes were taken of the meeting between Mr Boyle and Ms Bognuda on 9 September 2010. Ms Bognuda told the Court that she referred Mr Boyle to the company's harassment policy and told him, "that the best option, and the one I believed to be most effective was the "self help" option (which is clause 4.1 on page 3)." Ms Bognuda then said:

30. The document also contained the procedure to follow if the "self help" was not used (clause 4.2 on page 3). The policy refers to the need to make a "formal" complaint if the person wants action to be taken against the person they are accusing (the last bullet point on page 4). The point says:

> "Confidentiality will be respected but the complainant must be prepared to stand by their statements if they want action to be taken against the person they are accusing"

[30] Ms Bognuda said that she suggested to Mr Boyle that he do three further things:

32. The first was to have a general chat with [A] about how he was feeling and his behaviour in the office. I suggested that a chat might cause him to be more self-aware of the way he behaved - and the way it might be perceived by others. ...

...

34. The second thing I suggested was that Dennis should, over the next couple of months, check in with Angela at regular intervals to see whether her concerns were ongoing. ...

35. The third thing I suggested was that Dennis should keep an eye on things in the wider team. ...

[31] The following day Ms Bognuda sent Mr Boyle an email attaching a copy of Schering-Plough's harassment policy and a "behavioural competencies document." The email read:

From: Bognuda, Linda
Sent: Friday, 10 September 2010 4:34 p.m.
To: Boyle, Dennis
Subject: Behaviours

Hi Dennis

Further to our discussion yesterday about behaviours within the Planning team, I'm sending you in the internal mail a set of the Global Behavioural Competency - which defines "Underskilled", "Skilled" and "Overused".

Of course we are aiming for "Skilled"

For [A] I recommend that you take a good look at Composure.

For AS I recommend that you look at Interpersonal Savvy, and maybe some of Standing Alone.

In both cases it would be good for them to be able to self assess and see their opportunities.

> I'd also ask AS to look at the policy "Harassment - BP HR 02" which is on our HR Site. This directs the colleague to look at self help options in the first instance. But also goes on to next steps if this is not possible.
>
> Please let me know if you need any further assistance.
>
> Linda

[32] The first document referred to in the email, was a one-page extract from a company resource document about behavioural competencies. Ms Bognuda said in evidence, "I sent appropriate parts of this to Dennis because I thought they might provide a helpful basis for the discussion around behaviours for both [A] and Angela." The second document Ms Bognuda referred Mr Boyle to was the company's harassment policy which was on the HR website. Mr Boyle was invited to show Mrs Shaw the "self help" options referred to in the harassment policy. It is not clear from the evidence why Ms Bognuda wanted Mrs Shaw's attention drawn to the self-help options (clause 4.1) in the harassment policy because the document makes it clear that the self-help options have no application once an employee makes a formal complaint which, of course, Mrs Shaw had already made. The obvious question that arises, therefore, is whether Ms Bognuda, the HR manager, was aware at that stage that Mrs Shaw had made a complaint about A's conduct. As already noted, Mr Boyle never showed Ms Bognuda the email of 2 September 2010. Perhaps significantly, the subject of her email to Mr Boyle was "Behaviours" rather than "Mrs Shaw's complaint" or similar terminology. There is the added factor that in her evidence referred to in [29] above, Ms Bognuda refers to the need under the harassment policy to make a "formal complaint". My conclusion on this issue is that, whatever Mr Boyle discussed with Ms Bognuda at their meeting on 9 September 2010, he did not disclose the important fact that Mrs Shaw had already made a formal complaint in writing about A's conduct.

Follow-up action with Mrs Shaw

[33] Ms Bognuda accepted in cross-examination that a written complaint making allegations of the type made by Mrs Shaw needed to be treated "extremely seriously" and addressed as soon as possible. She acknowledged, however, that at no stage did she approach Mrs Shaw to talk about the issues that had been raised and, as she was not present, she did not know whether Mr Boyle had spoken to A about the matter.

In her examination-in-chief, Ms Bognuda said that after she sent Mr Boyle a copy of the company harassment policy on 10 September 2010, "the next time I had involvement in this matter was in December 2010, after Angela had resigned." In cross-examination the witness endeavoured to qualify that statement by saying that she had informal discussions with Mr Boyle, "from time to time about how things were going in his team, just the way I would for anyone with an issue." That statement appeared to be something of an afterthought, however, and I did not find it particularly convincing.

[34] In the meantime, Mrs Shaw had no knowledge, of course, of the meeting between Mr Boyle and Ms Bognuda. As noted in [23] above, Mrs Shaw claimed that after lodging her complaint and meeting with Mr Boyle on 3 September 2010, she had no other communication regarding her complaint until she had her PMP discussion with Mr Boyle on 29 September 2010. In reference to the PMP discussion on 29 September, Mrs Shaw told the Court in evidence which I accept:

> 80. When, on 29 September, Dennis asked me about [A's] conduct I told Dennis that the position was just as bad if not worse as it had been previously. Dennis then said then (sic) that he could not do much, as I had asked that [A] was not told that it was me raising the complaint - as it was termed "confidential". Again I told Dennis that something needed to be done as I could not put up with it much longer.
>
> 81. There was certainly no advice from Dennis that nothing could be done unless I made a formal complaint that could be shown to [A]. If he had told me that, because of how serious the situation was for me, I would have needed to seriously consider doing that.
>
> 82. Again from that time on there was no sign of anything being done by Dennis or the company. [A's] offensive actions continued.

[35] Mrs Shaw then told the Court about her next discussion with Mr Boyle which she said took place on 25 November 2010:

> 83. On 25 November 2010 a similar discussion occurred when Dennis came to see me while [A] was on leave (I referred to that above). Again I told him that something needed to be done, as I could not put up with [A's] conduct for much longer.
>
> 84. Still there was no sign of anything being done.
>
> 85. I was absolutely at the end of my tether with [A], and my manager, Dennis, seemingly would not or could not do anything about it. Dennis had also told me in September that he would raise the issue

with HR. Seemingly, HR would not or could not do anything about [A's] conduct either.

The resignation

[36] Mrs Shaw told the Court that by December 2010 she had reached the view that she simply could not put up with the situation any further. She said, "There was not even a hint of any light at the end of the tunnel." She continued:

> 88. By 3 December 2010 it had become obvious to me that nothing was going to be done about the situation. I was scared, worried, and feeling anxious about being at work with [A]. I felt that I simply could not go on in the employment; my health was suffering due to the environment that I was required to work in. As a result I wrote a letter advising the company that I felt I had no option but to leave.

[37] The resignation letter stated:

> 03 December 2010
>
> To HR
>
> Due to the Office Environment and Stress of my Logistics Coordinator position here at Intervet/Schering-Plough I wish to tender my resignation, effective end of business 04 January 2010.
>
> Kind regards
> Angela Shaw

[38] In a lengthy passage of cross-examination counsel for Schering-Plough, Mr Scott-Howman put it to Mrs Shaw that her manager, Mr Boyle, had met with her three or four times in September, October and November 2010 but Mrs Shaw rejected that proposition and claimed that after her initial meeting on 3 September 2010, she had only two further meetings with Mr Boyle, on 29 September and 25 November 2010, and those meetings were noted in her diary. Mr Scott-Howman also put it to Mrs Shaw that Mr Boyle's evidence would be that the meeting she said took place on Thursday, 25 November 2010 had actually taken place on Thursday, 2 December. The significance of the date of this last meeting was that Mr Boyle accepted in his evidence that Mrs Shaw had told him at that final meeting that "things had got worse." He said that he then made a promise to her that he would follow up the matter with HR and get some advice about how to proceed. Mr Boyle's evidence was that he knew that he was going to be out of the office the

following day, Friday, 3 December 2010, and so he told Mrs Shaw that he would have the conversation with HR on the following Monday.

[39] If Mr Boyle's evidence was correct and the meeting had taken place on 2 December 2010, he would not have had time to follow the matter up with HR before Mrs Shaw handed in her resignation the following morning. If, however, the meeting had taken place the previous week on 25 November 2010, as Mrs Shaw claimed in her evidence, then Mr Boyle's failure to meet with HR could be seen as a breach of his "promise" to Mrs Shaw and further evidence of inaction on his part. For the record, I confirm that I accept Mrs Shaw's evidence regarding her meetings with Mr Boyle and in particular the date of their final meeting. Not only did I find Mrs Shaw's evidence entirely credible on these matters but the date of the final meeting was recorded in her diary as 25 November 2010. Mr Boyle had made no notes of the meeting and I simply did not find credible his assertion, both to the Court and to one of the HR officers, that the meeting had taken place on 2 December 2010.

[40] As Mr Boyle was away from the office on Friday, 3 December 2010, Mrs Shaw handed her resignation letter to Ms Vennell, the Human Resources Associate. Mrs Shaw said that she tendered her resignation on the Friday morning and the company Christmas lunch function was held on site that same day. She told the Court, in evidence which I accept, that at one level she felt "a huge sense of relief to finally be free of the situation" but she was also, "extremely sad at the fact I felt I was forced into making this decision by lack of action by the company". At the Christmas lunch Mrs Shaw sat at a table with Mr Rennie and A and she said in evidence that, "completely unsolicited, [A] apologised for his behaviour in 2010, and said he hoped 2011 would be a better year." Mrs Shaw explained that A's apology was not specifically directed at her. He simply raised his glass at one point. In the witness' words:

> And it was just like a - it was like one of those and he just said "Oh here's to a better year next year and I'm sorry for" - and he listed, you know, his bad language and his bad behaviour - yeah. It was like a "Cheers" thing.

[41] In their evidence both Ms Bognuda and Ms Vennell expressed surprise, in virtually identical language, that Mrs Shaw and A were seen after the Christmas

lunch "chatting and laughing" and seemingly enjoying each other's company. Ms Bognuda said:

> It didn't make sense to me on two counts; that Angela wanted to come to the Christmas lunch when she had just resigned because she was so dissatisfied with the company, and that she chose to accompany [A] back to their empty office, when she claimed he was violent and she did not feel safe with him.

[42] Mrs Shaw's evidence on this point was:

> I do remember walking back to my office with a group of people, including [A]. I did speak to [A] about the nice lunch we had just had, and I went home as we were allowed to go home early after our Christmas lunch.

[43] Ms Vennell told the Court that she was immediately concerned about Mrs Shaw's letter of resignation which had been handed to her on Friday, 3 December 2010 because she had no background to the matter and, as the witness put it, "it seemingly had come out of the blue." She said that she rang Mrs Shaw and told her she wanted to have a chat with her to understand why she had decided to resign. They arranged to meet on Monday, 6 December 2010. On the Monday, however, Ms Vennell met instead with Ms Bognuda and Mr Boyle. Her meeting with Mrs Shaw did not take place until Tuesday, 7 December 2010. Ms Vennell made some notes of the meeting. She suggested arranging a meeting with Mr Boyle, herself and Mrs Shaw "to talk through the reasons for her resignation". Mrs Shaw asked if she could think about that proposal.

[44] The following morning Mrs Shaw emailed Ms Vennell with her response:

> **Subject:** Resignation meeting - CONFIDENTIAL
>
> Hi Jane
>
> Thank you for the opportunity to meet with yourself and Dennis to discuss some points of my resignation, however at this time I will decline your meeting offer.
>
> I am extremely concerned by the response you relayed to me yesterday after our meeting and your follow up discussion with Dennis, "that he was aware of the situation but was not aware that it was serious enough to resign over".
>
> It would appear from his comments that my concerns from 02 September 2010 (email attached) and subsequent meetings/discussions were not taken as seriously as I would have expected and that comment from a Senior Manager it would appear Intervet/Schering-Plough condones this behaviour from its employees, which I find terribly disturbing.

> After 5 & half years in my current position and although I do not have employment to move onto, I am happy with my resignation as I am unable to work under the stress involved and in an unhealthy and unsafe environment obviously acceptable to ISPAH management.
>
> Regards,
>
> Angela

[45] Ms Vennell then decided to refer the matter to Schering-Plough's General Manager, Mr Ian Pawson. She met with Mr Pawson and updated him on the position. Mr Pawson told the Court that the company had to be, "very concerned about anything in our workplace that could endanger our employees' wellbeing. This includes behavioural issues in the workplace." He continued, "... if the problem had got to the point where she (Mrs Shaw) felt she had to resign, I thought that the company had to investigate it". In his submissions, Mr McBride referred to the company's investigation as being "woefully inadequate and belated".

The investigation

[46] Mr Pawson and Ms Vennell began their investigation by requiring Mrs Shaw to attend a meeting with them on 9 December 2010. She was not invited to bring a support person. They informed her of their proposed investigation and they advised her that irrespective of her previous wishes they were going to put her concerns directly to A. Ms Vennell acknowledged in cross-examination that Mrs Shaw was distressed and "certainly anxious" that A was going to find out about the things that she had been saying.

[47] In reference to this meeting, Mrs Shaw told the Court:

> 99. I was told that as I had made a complaint, and it seemed I could not work with [A], I could either move from my office into the Warehouse (in an upstairs mezzanine floor room with no heating/cooling, no computer and no phone), or I could use my annual leave until my resignation date.
>
> 100. I found that itself to be very distressing and upsetting - confirming that I was seen as the problem, and not [A].
>
> 101. After this meeting Mr Pawson and Jane Vennell suggested I leave the Schering-Plough premises, as they were going to talk to my colleagues in the Logistics team. I could not understand why I was effectively stood down from work. I could not, for instance,

understand why was [A] not stood down pending an investigation or some other safeguards put in place.

102. I immediately hysterically contacted my husband Ian, who subsequently made a Doctor's appointment for me. I saw the Doctor and was issued a Doctor's certificate as I was unfit for work.

[48] Ms Vennell and Mr Pawson claimed that they had given Mrs Shaw the option of moving into the warehouse or to an upstairs office in Logistics. They also claimed that it was Mrs Shaw who made the suggestion of going on leave. However, both Mr Pawson and Ms Vennell made what appear to be reasonably comprehensive notes of the meeting recording what Mrs Shaw had told them and there is nothing in those notes to suggest that Mrs Shaw's version of events is not completely accurate. As it turns out, the issues were not significant. I accept, however, that Mrs Shaw was left in what she described as a "hysterical" state. Her husband confirmed that she phoned him at work after the meeting "crying" and "very distressed". He said that he had never made a medical appointment for his wife before but on that occasion he took the initiative and arranged an appointment for her to attend a doctor because, "something needed to be done."

[49] The joint investigation by Mr Pawson and Ms Vennell involved them meeting, over the course of 9 and 10 December 2010, with Mr Boyle, Mr Rennie, Ms Pilkington, Ms Bognuda and A. They did not meet again with Mrs Shaw nor did they give Mrs Shaw the opportunity to comment on any of the information they had received from the people they had interviewed. Instead, they concluded that the workplace environment was safe; that the behaviours Mrs Shaw had complained about "could be addressed" and that A "was capable of changing any behaviours which were of concern to Angela". On the afternoon of Friday, 10 December 2010, Ms Vennell telephoned Mrs Shaw advising her of the conclusions she and Mr Pawson had reached and invited her to reconsider her resignation. Mrs Shaw said she wanted to think about things and Ms Vennell suggested they should touch base again on Monday, 13 December 2010.

[50] Mrs Shaw told the Court that on Monday, 13 December 2010 she returned to Schering-Plough at 8.15 am and was totally ignored by her Logistics colleagues. In the witness' words, "the atmosphere was so thick you could have cut it with a knife." Mrs Shaw said that she went looking for Ms Vennell to discuss the situation but as

Ms Vennell was not present she left her a note and a certificate from her doctor confirming that she was medically unfit for work until 24 December 2010. That was the last working day before the company closed down for the Christmas vacation. Mrs Shaw had leave through until her last day on 4 January 2011.

[51] Mr Pawson said in evidence that he thought it was important for the company, "to round off the investigation by writing a letter with our formal conclusions." In his letter to Mrs Shaw dated 23 December 2010, he recorded that he and Ms Vennell had reached the overall conclusion that the work environment was safe and that while there may have been behaviour which was unacceptable to Mrs Shaw, the level and frequency she had identified was not substantiated by others. The letter went on to note, "... Jane and I will be available the week commencing 10 January 2011 if you would like us to discuss our conclusions with you personally." Mrs Shaw did not return to work and did not meet with Mr Pawson and Ms Vennell to discuss the outcome of their investigation.

The disadvantage grievance

[52] One of the principal legal issues raised by Mr Scott-Howman was that the defendant could not be held liable for actions outside the 90-day limitation period prescribed in s 114(1) of the Employment Relations Act 2000 (the Act) which meant that the Court was "only permitted to consider events occurring after 14 November 2010." Counsel submitted, in reliance on *Coy v Commissioner of Police*,[2] that as the plaintiff had first raised her employment problem with Schering-Plough by way of a letter through her solicitor on 14 February 2011, the Court could only consider events that had occurred in the period since 14 November 2010 which left "the plaintiff to argue that she was disadvantaged in the two-week period prior to her resignation."

[53] In response, Mr McBride submitted:

> The submission is that, regardless of all else, in her communications of 2 September 2010 and the meetings of December 2010 (and certainly when considered in combination), the Plaintiff had raised a personal grievance in relation to actions/inactions while the employment was on foot.

[2] CC23/07, 19 November 2007.

[54] Mr McBride sought to rely upon the recent judgments of this Court in *Idea Services Ltd (in Stat Man) v Barker*[3] and *Maynard v Bay of Plenty District Health Board.*[4] In the former case, Judge Inglis stated, relevantly:

> [39] ... the focus of the provision s 114(2) is squarely on the alleged grievance, and the extent to which the employee has drawn (or reasonably attempted to draw) that grievance to the employer's attention.
>
> [40] The underlying purpose of the personal grievance procedures is to identify and address employment relationship issues expeditiously and by direct communication between the parties to it. It is evident too that the grievance process is designed to be informal and accessible. ...
>
> [41] Ultimately, the issue of whether an employee has done enough to inform his/her employer of the nature of the alleged grievance that he/she wants addressed will be objectively determined having regard to the facts of each case. This may be reflected in a number of communications, and there is no requirement that it be reduced to writing. Nor is there a requirement for the level of detail that might be expected in, for example, a statement of problem.

[55] In *Maynard* the issue was whether Ms Maynard's resignation letter and two letters from her solicitors couched in conditional language had been sufficient to raise a personal grievance. Judge Travis concluded that, although it might not have been the solicitor's intention to raise a personal grievance, in fact that was its effect. Of particular relevance to the present case, Judge Travis stated:

> [36] While on their own each of these solicitor's letters were not sufficient to satisfy the statutory test, if looked at in combination with Ms Maynard's resignation letter and her solicitor's earlier letter to the defendant of 7 April, these three documents contain everything necessary to raise a personal grievance according to the guidance in *Creedy*.[5] The details of Ms Maynard's complaints (bullying and bias in the investigation), along with her desire to resolve these issues at an early stage by payment of a gratuity, are conveyed sufficiently to the defendant to alert it to the fact that the plaintiff is raising the grievance, which it needed to address.

[56] I agree with Mr McBride's submissions on this issue. Mrs Shaw clearly raised a personal grievance in her email complaint of 2 September 2010. The defendant through that communication was informed of the nature of Mrs Shaw's alleged grievance which it needed to address. The test for determining the justification of the defendant's response to the grievance raised is that prescribed by

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[3] [2012] NZEmpC 112.
[4] [2011] NZEmpC 175.
[5] *Creedy v Commissioner of Police* [2006] ERNZ 517.

s 103A of the Act, as it then stood. So long as it could be said that the employer's actions, and how the employer acted, were not what a fair and reasonable employer would have done in all the circumstances to address the grievance, the grievance remained extant. Its subsistence did not depend upon the employment relationship problem having to be confirmed by way of a more formal legal communication.

[57] In my view, the evidence in the present case disclosed that the defendant failed abysmally to address in any meaningful way the grievance raised by Mrs Shaw. From the outset her manager, Mr Boyle, downplayed and misrepresented her concerns. Although he denied any prior knowledge of the matters Mrs Shaw complained about regarding A's behaviour in the office, I do not accept that he was unaware of the situation. I accept what Mrs Shaw said in the first paragraph of her complaint, namely:

> ... This has been an ongoing problem for quite some time, and I know you are aware of most issues, however to date I have not been aware of any actions to address his behaviour.

[58] Mr Boyle accepted in cross-examination that Mrs Shaw's complaint was of a "serious nature" and yet, as already noted in [24] above, he did not approach the HR Manager, Ms Bognuda, about the matter until a week later and when he did speak to Ms Bognuda, he did not show her a copy of Mrs Shaw's written complaint or even disclose that she had made a formal written complaint. That led in turn to Ms Bognuda giving him inappropriate advice by recommending that Mrs Shaw consider the "self-help" options in the company's harassment policy which had no application in a situation where a written complaint of harassment had already been made. I must say that I had reservations about much of Mr Boyle's evidence and even some of the evidence given by Ms Bognuda. Ms Bognuda told the Court that when Mr Boyle came to see her on 9 September 2010 about Mrs Shaw's concerns over A's behaviour, the difficulty she had, "was Angela's express desire for [A] not to know about her concerns ..." but Mrs Shaw had never expressed any such desire. On the contrary, she clearly wanted her concerns addressed. She just did not want to be identified as the complainant.

[59] Ms Bognuda referred Mr Boyle to the company's harassment policy and in her evidence she drew attention to one of the clauses which stated:

> ... Confidentiality will be respected but the complainant must be prepared to stand by their statements if they want action to be taken against the person they are accusing.

There is no evidence, however, that the harassment policy was ever shown to Mrs Shaw by either Mr Boyle or Ms Bognuda. When asked about the matter in cross-examination, Mrs Shaw said:

> ... If he [had of] brought this to me and said "Look Angela, read this. Go through this and then come back to me", it would have been completely different. He never showed me this document Mr Scott-Howman. He didn't show me it at all. I was unaware of any harassment policies.

[60] It is difficult to avoid the conclusion that had Mr Boyle or one of the HR officers sat down with Mrs Shaw and taken her through the confidentiality provision in the harassment policy, the outcome may well have been quite different. Mrs Shaw may have agreed to allow her name to go forward but, even if she still insisted on not being identified as the complainant, she would at least have had an inkling as to why the company claimed it was having difficulty in progressing her complaint. As it was, in the absence of any feedback on the matter, Mrs Shaw was entitled, as time went on, to assume, as she did, that the company was not taking her complaint seriously.

[61] When, after Mrs Shaw's resignation, Mr Pawson and Ms Vennell proceeded to carry out their investigation, they met with A and it is clear from the notes they each made of that interview that A disclosed he had not received any feedback from Mr Boyle "at all" in relation to either the issues raised by Mrs Shaw or his general behaviour. In other words, by December 2010, Mr Boyle had taken no action to address the problems Mrs Shaw had identified in her complaint of 2 September 2010. It is difficult to understand precisely why Mr Boyle reacted as he did. One possible explanation arising from an unchallenged statement in Mrs Shaw's evidence-in-chief was that Mr Boyle (with input from A) had been supplying the company USA Head Office with "fictional and misleading information about back-orders & order status". It also emerged from the evidence that A and Mr Boyle were old boys of the same college. Mr Boyle left Schering-Plough in early 2011 and went to work for another company. About the same time A followed him to the new company.

[62] For the reasons I have outlined, I am satisfied that the plaintiff has established her disadvantage grievance. In terms of the test of justification in s 103A of the Act, a fair and reasonable employer would not have failed to take any meaningful action in respect of Mrs Shaw's complaints for some three months but that effectively is what happened in this case. Having reached that conclusion, there is no need for me to consider the plaintiff's alternative pleading of breach of contract. I turn now to consider the claim of constructive dismissal.

Constructive dismissal

[63] Not surprisingly, counsel were in agreement as to the principles relevant to claims of constructive dismissal. They were expressed by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*[6] and have subsequently been applied in numerous decisions of this Court. The basis of the plaintiff's claim is that her resignation was caused by breach of duty on the part of her employer and, as was the position in the *Auckland Electric Power Board* case, it fell within the third of the three non-exhaustive categories of constructive dismissal referred to by the Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd.*[7] As was stated in the *Auckland Electric Power Board* case:

> 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 the notice or other communication whereby the employee had 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.

[64] In the present case counsel for the plaintiff submitted that the defendant had breached the duty to take all reasonable and practicable steps to provide the plaintiff with safe working conditions; the duty of good faith in s 4 of the Act, including the duty to be active, constructive and communicative as well as the duty not to breach

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[6] [1994] 1 ERNZ 168.
[7] [1985] 2 NZLR 372 at 374-375.

the trust and confidence inherent in the employment relationship. Relevant authorities were cited in respect of each submission. As the Court of Appeal made clear in *Attorney-General v Gilbert*,[8] an employer is under statutory and contractual duties to provide a physically and emotionally safe working environment. In that case the Court of Appeal said:[9]

> 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.

[65] In this case, the cause of the plaintiff's alleged workplace stress had been identified and was known to the company but in breach of its contractual obligations, the defendant failed for three months to address the issue in any meaningful way. In the meantime, the stress on the plaintiff became so unbearable that she considered she had no option but to resign. In all the circumstances, I accept that her resignation was reasonably foreseeable and that it was caused by the defendant's breach of duty.

[66] The defendant's subsequent belated "investigation" into Mrs Shaw's complaint was fatally flawed in a number of procedural aspects identified by Mr McBride. It was also subject to the valid criticism that it was based on interviews with other employees who had their own offices. It was only Mrs Shaw who had to share an office with A (the subject of her complaint) and endure his ongoing unreasonable conduct. Nevertheless, even though the outcome of the investigation was based on interviews with these other staff members, in a significant passage of cross-examination, Ms Vennell accepted that the interviews disclosed that these other employees were able to confirm the substance of virtually all of A's unreasonable conduct which Mrs Shaw had identified and complained about.

[67] For the foregoing reasons I conclude that Mrs Shaw's resignation following the defendant's breach in failing to address or adequately address her complaints, was reasonably foreseeable, if not inevitable and in the circumstances this amounted

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[8] [2002] 1 ERNZ 31 (CA).
[9] At [83].

to an unjustified constructive dismissal. In terms of the s 103A test of justification, I have no doubt that the defendant's conduct around the time of Mrs Shaw's dismissal is not how a fair and reasonable employer would have acted in all the circumstances.

Remedies

[68] Having concluded that the plaintiff has succeeded in establishing both her disadvantage grievance and constructive dismissal claims, it is unnecessary to consider the separate remedies sought in the statement of claim under each head. There can be no double recovery, of course, but the plaintiff can be fully compensated in respect of her disadvantage grievance through the remedies awarded in respect of her unjustified constructive dismissal. The defendant does not allege any contributing behaviour by the plaintiff in terms of s 124 of the Act and, in any event, I do not find that any actions of the plaintiff contributed towards the situation that gave rise to her personal grievance.

[69] The evidence was that in about mid November 2010, Mrs Shaw consulted her obstetrician and gynaecologist and she was booked to undergo major surgery on 20 January 2011. A medical report confirmed that she was unfit for work following the surgery until 2 March 2011. The defendant's witnesses made some play of the fact that Mrs Shaw had not sought leave to have the time off from work for the operation but I reject any suggestion that the surgery was a reason for her resignation. I accept Mrs Shaw's explanation that she had sufficient sick leave and annual leave available to see her through the recovery period before returning to her job. She had intended raising the matter with Mr Boyle but that was overtaken by the events resulting in her resignation.

[70] In terms of mitigation, there was evidence that Mrs Shaw actively sought other employment both before and after she was medically fit to return to work. She listed a number of examples of positions she had applied for and confirmed that she actively searched on the Internet and in the newspapers for any suitable work as well as registering with the employment agencies. In the meantime, "to keep herself busy", Mrs Shaw helped out on a voluntary basis in the housekeeping department at the Te Omanga Hospice. In August 2011, she obtained some short-term employment but it was not until May 2012 that she obtained part-time permanent employment at

a boys' school. Her income in that employment is less than what she was earning at Schering-Plough. I am satisfied that the plaintiff has taken all reasonable steps to mitigate her loss.

[71] One of the submissions made by Mr Scott-Howman was that Mrs Shaw had been applying for other jobs before she left Schering-Plough, "without even informing her employer of this." No dates were identified in this regard but in cross-examination Mrs Shaw explained her reasoning in these terms: "... I was desperate to get away from A and his bullying of me." I accept that explanation.

[72] Mr Scott-Howman obtained from Mrs Shaw in cross-examination a concession that there had been workplace stresses in the job, affecting her and others, resulting from such things as shipment delays and late packaging. I accept Mrs Shaw's evidence, however, that she loved her job and the stresses in question were not a factor in her resignation.

[73] In *Sam's Fukuyama Food Services Ltd v Zhang*[10] the Court of Appeal made it clear that "full" assessment of the financial loss suffered by an employee as a result of an unjustifiable dismissal merely sets the upper limit on an award of compensation and there is no automatic entitlement to full compensation. The Court of Appeal also confirmed:

> ... moderation is required in setting awards for lost remuneration. Any award of compensation in a particular case must have regard to the individual circumstances of the particular case. Having said that, as with any awards of compensation which involve a discretionary element, precision is difficult and the award will inevitably involve a broad brush approach.

[74] In the present case, one of the significant contingency factors that needs to be taken into account in the assessment of the plaintiff's claim for future economic loss involves the issue of how long Mrs Shaw would have remained with Schering-Plough had it not been for the defendant's breaches which led to her resignation. As noted, she acknowledged that there were certain stresses in the job which were unrelated to A's conduct but I accept that they were ordinary workplace stresses that would not have led to her resignation. Of more significance, was the evidence that her family were financially dependent upon Mrs Shaw's income and I

[10] [2011] NZCA 608.

accept that the financial situation would have been a compelling factor for her to continue working. In one part of her evidence, in reference to her resignation, Mrs Shaw told the Court:

> 129. Financially it left my family and me in an extremely difficult situation. We have only just managed to keep our home, as it was a very hard time.

[75] Although as the Court of Appeal has recognised, assessing the appropriate level of compensation is not an easy task, after weighing up all the factors touched upon in evidence, I accept that the plaintiff has established a claim for one year's loss of income from the date her resignation took effect, namely 4 January 2011. The payment she received on termination needs to be offset against that amount.

[76] Having made those observations, I record that both counsel indicated that it was likely that they would be able to reach agreement on the issue of loss of wages and economic loss, subject to leave being granted for either party to revert to the Court if necessary. The Court is happy to accommodate that request.

[77] Turning finally to Mrs Shaw's claim in the sum of $30,000 as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act, Mr McBride submitted that "substantial compensation" is warranted. The effects on the plaintiff of her disadvantage grievance and unjustified constructive dismissal claim, both of which I have upheld, were serious and the evidence fully supports a claim for significant non-economic loss. Mrs Shaw's evidence on these matters was appropriately supported by medical evidence from her doctor, which I need not detail, and the evidence of her husband.

[78] I award the plaintiff the sum of $20,000 on account of her non-economic loss.

Summary

[79] For the reasons stated, the plaintiff succeeds in her challenge and this judgment now stands in place of the Authority's determination.

[80] The plaintiff is awarded the sum of $20,000 pursuant to s 123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity and injury to feelings.

[81] As requested by counsel, leave is reserved for either party to seek further directions or orders from the Court, should it be necessary, in relation to the quantification of the plaintiff's economic loss claim.

[82] The plaintiff is entitled to costs but it is premature to make any timetabling orders for submissions on costs until the plaintiff's economic loss claim has been fully quantified, either by agreement or upon reference back to the Court. The plaintiff also seeks interest under all heads of claim. I am prepared to award interest in respect of her economic loss claim at five per cent. Interest is not recoverable, however, on a compensation award for non-economic loss.[11]

A D Ford
Judge

Judgment signed at 12.15 pm on 25 February 2013

[11] *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2006] ERNZ 449 at [133].