IN THE EMPLOYMENT COURT
AUCKLAND

AC 31/09
ARC 60/08

IN THE MATTER OF	a non-de novo challenge to a determination of the Employment Relations Authority
BETWEEN	ORA LIMITED Plaintiff
AND	SONJA KIRKLEY Defendant

Hearing: 18, 19 and 20 May 2009
(Heard at Auckland)

Appearances: Giles Brant, counsel for plaintiff
Lawrence Ponniah and Bethany Harper, counsel for defendant

Judgment: 4 September 2009

JUDGMENT OF JUDGE B S TRAVIS

Introduction

[1] The plaintiff's challenge to a determination of the Employment Relations Authority finding that it had unjustifiably dismissed the defendant, Mrs Kirkley, has taken an unusual course. In response to the challenge, Mrs Kirkley had lodged her own challenge to those parts of the determination which dismissed her claim that she had suffered stress injuries as a result of the plaintiff's breaches of duty, the findings of contributory conduct, and the quantum of the remedies. Mrs Kirkley later abandoned her cross-challenge. This was on the basis that her health was so precarious that it was unlikely that she was going to be able to give evidence in support of her cross-challenge and financial considerations.

[2] Although the withdrawal of the cross-challenge meant that the hearing would be shorter, it was still set down for a week commencing on 18 May 2009 on the basis that the plaintiff's medical evidence would be called when it was first available, on 18 June 2009. The final day for submissions was to be on Friday 19 June 2009.

The course of the hearing

[3] When Mr Brant opened the case for the plaintiff he advised that counsel were in agreement that three witnesses would not need to be called on behalf of the plaintiff, although those witnesses would be available. Their evidence was to be taken as read without cross-examination. This was on a reciprocal basis that five witnesses for the defendant would not be called for cross-examination and their evidence could be taken as read.

[4] After hearing submissions I advised counsel that if they elected to present briefs without cross-examination, I would take those briefs into account. If a conflict developed between those briefs and oral testimony subjected to cross-examination, I advised counsel that they were at risk that the briefs admitted by consent would trump the oral evidence because of their agreement not to cross-examine those witnesses. I advised them that their agreement not to cross-examine meant that they were not testing the evidence of those witnesses and they were to be taken as accepting what those witnesses stated in their briefs. Counsel agreed to that course.

[5] Three witness were called for the plaintiff: Brett Cullen was the former manager of the plaintiff and the financial director of the group of companies of which the plaintiff was a part; his wife, Susan Cullen, was the sole shareholder and director of the plaintiff, and a director of other companies in the group; Jacqui Donaghy, was the head administrator of the group of companies, which included the plaintiff. All the companies in the group were owned and controlled by Mr and Mrs Cullen.

[6] On the third day of the hearing, during the cross-examination of Mrs Cullen, I raised with the parties where the case was leading in light of admissions that had been made by Mr Cullen as to both the procedural and substantive justification of the dismissal. I then gave the parties the opportunity to discuss the position. When we

resumed the hearing after an adjournment Mr Brant advised that his instructions were that he was not to lead any further evidence and was not to cross-examine Mrs Kirkley or any other defence witnesses. In particular he was not to lead any evidence from the doctors. His instructions were that his client would prefer to have an oral judgment delivered immediately and would pay what was required. He said that the completion of cross-examination was a matter for Mr Ponniah as he would not be re-examining. Mr Brant accepted that Mrs Kirkley's evidence could be taken as read, as could Mr Kirkley's, and the evidence of Ms Chase for the plaintiff would be withdrawn.

[7] Counsel undertook to have further discussions with their clients during the luncheon adjournment. When the Court resumed Mr Ponniah completed his cross-examination of Mrs Kirkley. A timetable was then agreed to allow for further evidence, the filing of closing submissions, and the date when the hearing would resume. No further evidence was presented. Mr Ponniah filed his closing submissions on 2 June. On 8 June Mr Brant advised the Court that the plaintiff would not be filing any closing submissions and the following day he advised the Court that the matter could be dealt with on the papers without a further hearing. I now proceed to deal with the matter as counsel requested, having derived much of the factual background from Mrs Kirkley's briefs of evidence.

Factual background

[8] Mrs Kirkley joined the plaintiff in November 2002 with a background of working as a practice manager in a medical practice. The plaintiff was a private institution funded by the Te Wananga O Aotearoa and its business was educating immigrants through settlement programmes it ran. Mrs Kirkley's responsibilities included internal administration, finance, information technology, and human resources. She was part of the management team. In the first 18 months the plaintiff enrolled some 1,000 students. The student role started to drop off early in 2005. Towards the end of that year the managing director, Rob Pickstock, resigned to work on behalf of the group to investigate the Australian market. He took with him Nigel Lacey, then the plaintiff's policy research and development manager, to assist him,

but left behind a person he had appointed to the management team, Wayne Wild, who became the acting chief executive officer.

[9] In October 2005, Mrs Cullen called an emergency meeting with all staff and advised that because of lack of funding the plaintiff was no longer going to enrol students, it would take a year to finish off the current students and then redundancies would take place as the student numbers declined. This caused the staff anxiety. Approximately 2 weeks later a further meeting was called by Mrs Cullen, who advised that the situation had changed and the plaintiff had gained funding for another 2 years. The management team, at that stage, consisted of three people, Barend de Klerk, the head of education, Mr Wild and Mrs Kirkley.

[10] Mrs Kirkley understood that she was then employed as internal administrator and her responsibilities included all finance activities up to balance sheet, internal PAYE returns, debtors, creditors, the monthly finance report, the fortnightly payroll and the full human resources functions for 83 staff. She was concerned that Mr Wild had started passing his workload on to her after Mr Pickstock left and she was finding it difficult to cope. To that point she had had no personal contact with Mrs Cullen and had never had a meeting alone with her. Mr and Mrs Cullen worked through a base in Te Awamutu. The plaintiff's head office, where Mrs Kirkley was employed, was in Auckland. She continued to get her instructions from Mr Wild. She began to experience difficulty with tiredness and sleeping and expressed some of her concerns to Mr Wild. She was offered assistance by Mr Wild. She had also advised Jacqui Donaghy, the Group Administrator, of her concerns.

[11] In order to deal with her feeling of tiredness and burnout she planned to take a three-week holiday in January 2006 with her family. This was the period when the plaintiff closed for two weeks.

[12] At about this time the plaintiff decided to change banks. Mrs Kirkley tried to talk Mr Wild into reconsidering this change but was told to get on with what was necessary to facilitate it. This added to her difficulties. There were technical problems with new software and training was scheduled during an extremely busy period, immediately prior to Christmas 2005.

[13] In the course of organising mobile phone accounts she observed that Mr Wild was still communicating on a regular basis with Mr Pickstock. She informed Mr Lacey, who had returned to the plaintiff and was then the quality control manager, and he informed Mrs Cullen.

[14] Mrs Kirkley had returned to work on 9 January 2006 preparing to complete all her tasks before taking her three weeks' leave. She was working extended hours. On Wednesday night, 11 January, Mrs Cullen phoned Mrs Kirkley at home and spoke to her for three hours, questioning her about Messrs Pickstock, Wild and De Klerk. Mrs Kirkley answered all the questions and also told Mrs Cullen of the difficulties that she had been encountering.

[15] The next day Mr and Mrs Cullen walked into the office in Auckland, which was very unusual, and went straight into Mr Wild's office. Later that day Mr Cullen told Mrs Kirkley that Mr Wild was being given the option of resigning or being fired. Mr Cullen said he was grateful to Mr Lacey and Mrs Kirkley for bringing these matters to their attention and "*for saving the company for them*".

[16] Mrs Kirkley and Mr Lacey's positions were then disestablished and reorganised as part of a new management structure. Mrs Kirkley was given a new position described as "*Head of Corporate Services*". She did not receive a job description or any training for this role. Mrs Kirkley understood that her role involved additional responsibilities such as staff management, IT management, call-centre management, administration management, filing management, in addition to her prior responsibilities.

[17] Mrs Kirkley considered that with all the redundancies and the new role with its demands that she should cancel her three weeks' annual leave to cope with the work. She said these extra demands caused her to work up to 16 hours a day and on weekends. Mrs Kirkley felt that she was not getting support and she and her family were upset when she did not take the three weeks' leave.

[18] Further restructuring of the job functions went on under the direction of Mrs Cullen. Mrs Kirkley understood that Mr de Klerk had been requested to leave on

short notice and was made redundant when he arrived back from leave on 16 January 2006. As Messrs Wild and de Klerk had been requested to leave on short notice, Mrs Kirkley and the other staff had been required to pack up their personal belongings, as they were no longer allowed on the premises. Mrs Kirkley was also required to deal with the implementation of security measures, such as changing locks and keys as the consequence of the sudden departure of key staff.

[19] Mrs Cullen accepted Mrs Kirkley's suggestion that the payroll function could be contracted out to an organisation described as COMACC and Mrs Kirkley was directed to make the necessary arrangements. She ascertained that they were one of the largest payroll providers in New Zealand, had a high security rating, were well known and trusted to perform the payroll functions. She met with the managing director of COMACC and was advised that the payroll person who would be allocated to the plaintiff would be properly trained, trustworthy and security cleared. She was told that they performed similar functions for many other much larger organisations who chose to contract out their payroll functions. Their personnel were to be provided with the appropriate access codes so that they could perform the payroll functions. Mrs Kirkley arranged the contract between the plaintiff and COMACC.

[20] The COMACC payroll person, Terri de Groot, started around 14 February 2006 and Mrs Kirkley instructed her on the one computer that was used for payroll purposes to input the payroll and prepare the audit trail. Mrs Kirkley would then work with her to ensure that the payroll entries were accurate and would then sign off the audit. At the time she instructed Ms de Groot, Mrs Kirkley was the only person employed by the plaintiff who knew how the system operated to transfer the payroll file into the banking system so that the staff were then paid.

[21] There was a disagreement between Mrs Cullen and Mrs Kirkley concerning the setting up of communications with the students. On 20 February 2006, she had a meeting with Mrs Cullen during which Mrs Cullen lost her temper, shouted at Mrs Kirkley and told her that if she did not start thinking Mrs Cullen's way her services would be terminated.

[22] The following day, 21 February, Mr and Mrs Cullen met with Mrs Kirkley and told her that they were going to send her on a 6 month sabbatical so that she could "*de-stress, energise and develop to take over*" her new role. They wanted her to start thinking their way and to rid herself of her previous management style. They had realised that she could not do that unless she had the opportunity to get away from her current tasks. She was told that she would go on sabbatical that day and would not come back to work for six months. Mrs Cullen sent an email to all staff that day announcing Mrs Kirkley was to go on six month's study leave**.**

[23] That same day Mrs Kirkley prepared the payroll for the coming week and set out the dates when important payments had to be made and informed Mr Cullen that the payroll was ready for the COMACC person to manage.

[24] For the next two days Mrs Kirkley worked from home and also did research work into courses which would help her develop her management skills the way Mrs Cullen required.

[25] On Friday 24 February she received an email from Mrs Cullen informing her that Mrs Cullen was holding a meeting on the following Monday at 11am to discuss the team changes and that Mrs Kirkley was welcome to come if she wanted to keep in touch, but that she did not have to.

[26] There had been no discussion about the handover of Mrs Kirkley's duties, but Mrs Cullen had sent out an email advising the staff who was going to handle the various roles.

[27] Mrs Kirkley attended the meeting at 11am on Monday 27 February. Just before the meeting finished she was called downstairs to help Ms de Groot who had not been able to log into the payroll because of computer problems. It was discovered that the server access cable was not plugged in to the computer. When Mrs Kirkley checked the file given to Ms de Groot she found that someone had dismantled her payroll instructions and the supporting paperwork that she had prepared and that her written instructions were also missing. When she started searching for that material she also discovered that all her personal belongings in her

office were missing. She discovered that they had been put into boxes. This was the same thing that had been done to the two senior staff members of the management team when they were dismissed. She believed that because she was out of the office on leave she was being investigated and would be dismissed. She described herself as being deeply shocked, hurt and confused. She was unwell at that stage.

[28] At the same time Ms Donaghy was requesting information from her. Mrs Kirkley became extremely upset and told Ms Donaghy that they should discuss this at a later time. Mrs Kirkley returned to Ms de Groot and gave her Mrs Kirkley's own password to the plaintiff's banking system which enabled Ms de Groot to import the batch for the completion of the payroll. Mrs Kirkley informed Ms Donaghy that she had had to give her password to Ms de Groot. Ms Donaghy was going to be in charge of finance and HR. Mrs Kirkley told Ms Donaghy that this was not ideal but she needed to do it to enable Ms de Groot to complete the payroll and that Ms Donaghy needed to be aware of this and to do something about it, for example, changing the password if she so desired.

[29] These discussions with Ms Donaghy took place at the same time as Mrs Kirkley was giving Ms Donaghy access to her MYOB programme on her computer.

[30] Mrs Kirkley became extremely upset during the course of all this. She accepted that she went out of control. It appears to be common ground that she "*lost it*". Ms Donaghy, who was present throughout the incident and whose evidence was not seriously in conflict with that of Mrs Kirkley, said that when Mrs Kirkley realised that her personal belongings had been moved from her cupboards and put in a box she lost her cool even more and started to shout that she had been violated and felt raped and pillaged. Mrs Kirkley was out of control, throwing her arms in the air, demanding to know who had done this to her, went storming around the offices looking for her things, and bawling in a loud voice, so that no one could avoid hearing her. When Ms Donaghy tried to talk to Mrs Kirkley she responded angrily that she was not under investigation and did not understand what was happening. Although Ms Donaghy did not see Mrs Kirkley leave it seems to be common ground that she did leave at about 3 pm and never returned to work.

[31] I find Ms Donaghy would have had the opportunity before Mrs Kirkley left at 3 pm and after she was told at about 2 pm that the password had been given to Ms de Groot, to have changed the password and withdrawn Ms de Groot's access to the bank. Ms Donaghy also conceded that she did not see the matter at the time to be a disciplinary matter but it was a serious issue that needed to be addressed because it could be a breach of security. That does not explain why she did not take appropriate steps at the time if it was so serious.

[32] Ms Donaghy prepared a report that day at the request of Mr Cullen who was enquiring into Mrs Kirkley's behaviour. The report describes Ms Donaghy's interchanges with Mrs Kirkley and Mrs Kirkley's behaviour. It does not, however, mention at all that the access codes had been given to Ms de Groot or that Mrs Kirkley had told Ms Donaghy that this is what she had done. It does not at any point refer to any risk of a security breach. I do accept, however, even though it is not contained in Ms Donaghy's report, that she was the one who told Mr Cullen about Mrs Kirkley's actions over her password.

[33] Mr Cullen also prepared a written report about Mrs Kirkley general behaviour as being angry, confrontational, accusatory and offensive. He also recorded that unknown to either of the company directors and without their permission, Mrs Kirkley had decided that it was appropriate to give out her company banking details, including the site number, user name and password, to the temporary payroll clerk. He describes this in his report as a "*huge breach of security and of her confidentiality clause in her employment contract*". On 28 February 2006 Mr Cullen sent Mrs Kirkley an email informing her that she was suspended as an employee of the plaintiff, on full pay, but was required to return her vehicle. Her suspension was to continue:

> *…until such a time as we have had the opportunity to review your employment in relation to the verbally and emotionally unacceptable behaviour that was directed at various Ora staff members while you were here on the 27th of February and has been documented.*

[34] The email said Mrs Kirkley's six-month sabbatical to undergo training was also suspended. She was invited to seek advice relating to her employment agreement and was to be contacted shortly so a hearing could be arranged to consider

the company's position, that she could be charged with serious misconduct for her actions on 27 February and there could be consequences *"as per your employment contract"*. The suspension letter was issued without any prior consultation with Mrs Kirkley and made no mention of the alleged breach of security giving her password to Ms De Groot. The reports of Ms Donaghy and Mr Cullen were not provided to Mrs Kirkley at this stage.

[35] Mrs Kirkley sought help from her personal doctor and a personal and corporate physician. She also instructed solicitors. Despite requests by Mr and Mrs Kirkley in email communications, Mr Cullen refused to provide details of the allegations or supporting documentation, stating that these would only be provided at the investigative meeting. This added to Mrs Kirkley's stress.

[36] Following the involvement of Mrs Kirkley's solicitors, the plaintiff's then solicitors provided the details by letter dated 7 March 2006. This letter alleged that Mrs Kirkley had refused or neglected to obey a reasonable and lawful instruction from the plaintiff by failing on 27 February to facilitate the handover of her employment duties, and by failing to complete the inputting of the company's financial data for February 2006. The second allegation, and the first time it appeared on any documentation addressed to Mrs Kirkley, was an allegation that she had failed to maintain the confidentiality of her employer's business by providing the plaintiff's banking details, including the site number, user name and password, together with other confidential passwords, to a temporary payroll clerk, without authorisation. The third allegation was that she had failed to comply with lawful and reasonable instructions because she had made deductions from the fortnightly pay of two employees without authority. The first and third allegations were unproven and abandoned by the plaintiff in the course of its investigation.

[37] On 14 March 2006 Mrs Kirkley and her solicitor met with Mr Cullen and the plaintiff's lawyers and provided them with a full written response. On that same day an acquaintance of Mrs Kirkley had rung the plaintiff and was advised that Mrs Kirkley no longer worked there. Subsequently, by email from the plaintiff's solicitors dated 16 March 2006, the suspension was lifted, but rather than being placed back on sabbatical leave, Mrs Kirkley was unilaterally placed on sick leave

by the plaintiff. The plaintiff's solicitors stated that there were outstanding matters relating to the investigation that would be the subject of further discussion when Mrs Kirkley was well enough to resume work.

[38] On 17 April 2006, in spite of her solicitors' request that all communications were to go through them because of the stress illness Mrs Kirkley was suffering, Mr Cullen sent directly to the plaintiff a letter he addressed to Mrs Kirkley's solicitors. This went over again the matters she had explained at the investigation meeting. It stated:

> *I regard the provision of the banking information as a serious breach of confidentiality and completely reject the explanation given on the day of the investigatory meeting. This has not been resolved and cannot be dismissed by claiming mental illness on the day as the cause of such a breach.*

[39] Mrs Kirkley's solicitors replied on 20 April 2006 expressing their concern that the letter, although addressed to them, had been sent directly to their client by Mr Cullen rather than to her solicitors. Although the letter did not state it, I note that Mrs Kirkley had never offered her mental illness as an explanation for handing over her passwords, either at the investigation meeting or in her written response, which explains in some detail why she had done this and sets out the risk factors she had considered namely:

a) The payroll clerk was employed by a reputable company and dealt with confidential issues every day;

b) the password would only have allowed the clerk to see an account balance, if she chose to go into those screens on the bank website, and that no withdrawals, transfers or deposits could be made without further authorisations;

c) the password could easily have been changed after she had informed Ms Donaghy what she had done; and

d) Mrs Kirkley had complete authority to run the payroll and had done so in the past and believed she had acted within the limits of her authority.

[40] On 30 April 2006 she was sent a letter directly from Mr Cullen stating that the plaintiff had decided to terminate her employment as of 1 May 2006 on the basis of serious misconduct in that she had passed on her password and other details to the payroll clerk in breach of the confidentiality clause in *"chapter 17.3"* of her employment agreement. The letter briefly refers to the explanatory note she gave supporting why she had done this but went on to state:

> *Unfortunately, after further investigation, we consider the reasons you gave to be insufficient to explain the serious breach of company confidentiality.*

[41] At no stage was Mrs Kirkley given any information relating to any further investigation which led to the rejection of her explanation for her actions.

[42] On 4 May 2006 her personal belongings were delivered to her home, together with a demand for the return of the company vehicle. Her solicitors raised a personal grievance on 5 May 2006. On her instructions they sought mediation, but they were advised on 16 May 2006 that the plaintiff would not attend mediation on a voluntary basis.

The Authority's determination

[43] In the Authority Mrs Kirkley alleged that she was unjustifiably dismissed and that the plaintiff had failed to provide a safe workplace. She sought compensation for the consequences of her dismissal and damages for workplace stress. The Authority found that the plaintiff had not breached any duty to her and had not exposed her to undue work related stress.

[44] At para 117 the Authority stated:

> *[117] At the investigation meeting I asked Mr Cullen what further investigation he had conducted, as referred to in the dismissal letter. He said the sole further investigation he had undertaken was into whether Mrs Kirkley was "mentally ill" as a result of workplace stress. He said his attempts to investigate this were unsuccessful because Mrs Kirkley hampered that investigation. Mr Cullen pointed to the Beattie Rickman letters to support his evidence that he had requested further medical information. He said this inability to investigate her claims formed part of his decision that Mrs Kirkley's stressed behaviour was part of her history of intimidating and unacceptable behaviour.*

[45] The Authority found that a medical assessment could have been sought under the terms of Mrs Kirkley's employment agreement and that the conclusions reached by Mr Cullen had not been as a result of a fair investigation. It observed that there was some force in Mrs Kirkley's evidence that the password could not have been taken too seriously by Ms Donaghy or Mr Cullen. It found that giving the password to the clerk was not "*ideal*" and that her ill health must have contributed to this conduct. It found the error was blameworthy and contributed to the circumstances giving rise to the personal grievance and reduced remedies by 10 percent.

[46] The Authority awarded her the balance of the sabbatical of four months as lost wages but found there was no causal link between Mrs Kirkley's ill health and her employment which entitled her to claim for lost remuneration beyond the end of the sabbatical period. It observed that she was claiming compensation for hurt and humiliation in the sum of $27,000. It referred to the medical treatment she had been receiving and the impact of the situation and found that there had been a profound reaction to her dismissal which had a significant impact on her and awarded her $15,000.

In the Court

[47] In the course of the Court hearing Mr Cullen accepted that, although he was not a director of the company, he was the decision maker in Mrs Kirkley's dismissal. He also accepted in evidence the following reasons given by Mrs Kirkley for providing the passwords: there had been no concealment of the handing over of the passwords because Mrs Kirkley told Ms Donaghy of her actions shortly afterwards; Mrs Kirkley had done it to complete her involvement with the payroll; she had authority for setting up the payroll process; COMMAC was a reputable company and the plaintiff had some business dealings with that company; the password could have been changed easily once Ms Donaghy was informed of the matter; Mrs Kirkley genuinely believed that she was acting within her authority and that she could delegate part of it to the COMMAC clerk; there was still real safeguards present on the day because two passwords were needed to authorise the system and Ms Donaghy had the other password. He accepted that nowhere had Mrs Kirkley, in giving her explanation, said that it was because she was in mental distress. He had

simply assumed this and it had concentrated his mind. He accepted that everything Mrs Kirkley had said had been confirmed with Ms de Groot and that supported the honesty of Mrs Kirkley's actions.

[48] As all these matters confirmed the explanation that Mrs Kirkley had given in her written response, Mr Cullen was in some difficulties in explaining how he had reached the conclusion, in both his 17 April letter and in the dismissal letter, that he completely rejected the explanations she had given. It was also clear that Mr Cullen was most concerned about the claim for substantial compensation for workplace stress and it was this issue that was concentrating his mind.

[49] Mr Cullen accepted that Mrs Kirkley could have been troubled by being put on sabbatical shortly after having received a promotion and was then being taken out of any further involvement with the plaintiff. He also accepted that boxing up the personal effects of the other two employees who were dismissed could have led her to conclude that the same thing was being done to her on 27 February. He also accepted that suspending her without any prior notification or consultation, and without giving her the specifics of what she had done, was incorrect and could have added to her stress.

[50] As Mr Ponniah submitted, the plaintiff faced a further difficulty in that it appeared to have completely disregarded the procedure for dealing with serious misconduct contained in the employment agreement the plaintiff had prepared and required Mrs Kirkley to sign. The agreement, when dealing with a summary dismissal, which is what happened to Mrs Kirkley, sets out a procedure which includes the following:

> *7.4.2* …
>
> *(c)* *When the employer is satisfied that the matter has been fully investigated, the employer will arrange a meeting with the employee and make the findings of the investigation known. The employee will be allowed a reasonable and adequate opportunity to make further representations to the employer.*

[51] As the dismissal letter stated, Mr Cullen apparently conducted a further investigation after the 14 March meeting with no involvement of Mrs Kirkley and

did not provide her any opportunity to make further presentations after he had made the findings of his investigation known.

[52] I accept Mr Ponniah's submission that Mrs Kirkley provided an adequate and reasonable explanation for her actions on 27 February. Ms Donaghy did not see it as a disciplinary matter. In the circumstances handing over the passwords did not amount to misconduct and certainly not serious misconduct which could justify summary dismissal. Both the suspension, which was done without consultation, and the subsequent investigation were unfairly carried out and the investigation breached the express terms of Mrs Kirkley's employment agreement. The plaintiff has therefore failed, in terms of s103A of the Employment Relations Act 2000, to discharge the burden of showing that its actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal. Accordingly the plaintiff's challenge is dismissed.

Remedies

The law on remedies relevant to this case

[53] If the plaintiff had discontinued its challenge during the course of the hearing that would have been the end of the matter and there would have been no case before the Court which would have allowed for the increase Mrs Kirkley sought of the remedies awarded by the Authority: *IHC New Zealand Incorporated v Scott*[1]. To the plaintiff's credit, it did not withdraw its challenge but indicated it would not be contesting the defendant's evidence and would not be calling any more evidence in support of its challenge. The plaintiff advised the Court, through its counsel, that it was prepared to abide the decision of the Court and that, if it was required to pay, it would do so.

[54] The role of the Court in increasing remedies where there is no cross-challenge was dealt with by the Court of Appeal in *Andrew Yong t/a Yong and Co Chartered Accountants v Chin*[2]. The Court of Appeal declined an application for

[1] AC 45A/06, 18 October 2006
[2] [2008] ERNZ 339 (CA)

leave to appeal against a decision of Judge Perkins in the Employment Court[3]. At first instance Judge Perkins had dismissed the plaintiff employer's challenge, noted that no cross-challenge had been filed, but stated at paragraph [2]:

> *However, as the challenge is seeking a hearing de novo against the whole of the determination, it is open to the Court to increase the awards if the plaintiff is unsuccessful.*

[55] While confirming all of the other remedies awarded by the Authority, Judge Perkins considered it was probable that he had heard evidence which was not before the Authority and that the level of compensation awarded there appeared to be inadequate. He therefore increased the amount that had been awarded by the Authority.

[56] In the grounds for the application for leave in the Court of Appeal, under the heading "*Breaches of natural justice and predetermination*", the applicant stated at para [9]:

> *6 The Judge increased the award against the applicant without the respondent asking for it. As such, the applicant was denied the opportunity to be heard on the matter.*

[57] The Court of Appeal addressed this matter as follows at para [16]:

> *[16] Point six is more troublesome. The Judge increased the level of compensation, even though, according to Mr Orlov, Ms Chin did not seek an increase and he was not put on notice that this was in contemplation. If that is so, we consider that the Judge should have given express notice in advance that he was contemplating increasing the compensation award so that Mr Orlov had the opportunity to make submissions on the point on Mr Yong's behalf. However, given the small amount at issue ($3,000) we do not consider that this is a basis on which we can properly give leave.*

[58] As to the level of compensation awards, the Court of Appeal in *Commissioner of Police v Hawkins*[4] accepted the statement of Chief Judge Colgan in *Simpsons Farms Ltd v Aberhart*[5] concluding that the earlier decision of the Court of

[3] [2007] ERNZ 322
[4] [2009] NZCA 209
[5] [2006] ERNZ 825

Appeal in *NCR (NZ) Corp Ltd v Blowes*[6] was intended to signal that most awards will fall within a range up to about $27,000 but that exceptional cases might attract higher awards. The Court of Appeal in *Hawkins* said that there are difficulties in trying to "*cap awards*" in the developing dignity context, but there has to be a sound basis for such awards and there are very real conceptual and practical difficulties in establishing a spectrum as to where lines are to be drawn. Mr Hawkins was awarded $35,000 by the Employment Court which was seen by the Court of Appeal to be a "*high*" award, although noting that there had been higher awards for similar types of claims, citing *Ogilvy and Mather (NZ) Limited v Turner*[7]. There the Court of Appeal considered $50,000 in damages for humiliation and distress to be within the proper range in the circumstances of that case.

The claims

[59] In her cross-challenge Mrs Kirkley had set out the relief she sought as follows:

> *12. The relief sought is:*
>
> *(a) A finding that Mrs Kirkley has made out her claim for workplace stress for the period October 2005 to December 2005.*
>
> *(b) A finding that Mrs Kirkley has made out that Ora Ltd breached a duty to her and exposed her to undue work-related stress.*
>
> *(c) A finding that Mrs Kirkley did not contribute to the situation giving rise to her personal grievance.*
>
> *(d) Remedies which are commensurate with Mrs Kirkley's workplace stress, Ora Ltd's breach of duty, and Ora Ltd's unjustifiable dismissal of Mrs Kirkley.*

[6] [2005] ERNZ 932
[7] [1996] 1 NZLR 641; [1995] 2 ERNZ 398

(e) Costs.

[60] From her withdrawal of the cross-challenge it appeared that these remedies were no longer being sought. However, in the course of the proceedings it appeared that Mrs Kirkley was seeking an increase in the remedies awarded by the Authority. I referred to this in my exchanges with counsel. I observed that the remedies being sought were more extensive than those granted by the Authority and asked Mr Ponniah whether the defendant was still pursuing the full extent of those remedies. He answered in the affirmative. I then asked Mr Brant whether that was understood. He responded in the affirmative and said that he might make submissions.

[61] I then addressed with counsel the issues whether there would have been ongoing work at the plaintiff for Mrs Kirkley if she had been able to return after her sabbatical, whether there was an inevitable redundancy and whether she would have received redundancy compensation. Mr Brant invited me to put that to Mrs Cullen who was still on the witness box. Mr Ponniah then completed cross-examination of Mrs Cullen but she was later recalled to ascertain what arrangements for redundancy compensation had been made for the staff. She confirmed that all staff were paid 10 weeks and that the redundancies had occurred in October and were implemented in November. Mr Lacey finished on 15 December and Ms Donaghy left about the same time.

[62] In support of her claim for a higher award in the range of $50,000 as distress damages, Mr Ponniah cited *Gilbert v Attorney General*[8], an award of $75,000 in general damages in a common law case, and two others of a similar nature in the High Court: *Brickell v Attorney-General*[9] and *Benge and Hallinan v Attorney-General (Police)*[10]. I did not find those to be particularly helpful when dealing with a claim under s123(1)(c)(i) of the Act.

[63] Mr Ponniah sought to have what he described as an aggravated award because of what he submitted was high handed conduct on the part of the plaintiff.

---

[8] [2000] 1 ERNZ 332
[9] [2000] 2 ERNZ 529 (HC)
[10] [2000] 2 ERNZ 234 (HC)

The difficulty with that submission is that it sought to penalise the plaintiff rather than compensating Mrs Kirkley for the distress and humiliation she suffered as a result of the dismissal see *Air New Zealand Ltd (No 3) v Johnston*[11].

[64] There was also some difficulty in making an award for distress and humiliation where the Court has not had the benefit of seeing and hearing the grievant. However, in *Matheson v Transmissions and Diesels Ltd*[12], a case cited by Mr Ponniah, the grievant had committed suicide after his dismissal and the Employment Court was able, on the evidence before it, to award his estate $50,000 either as general damages or as compensation under the Employment Contracts Act 1991. The sum was awarded after taking into account a gratuity of $10,000 paid following Mr Matheson's death. The Court of Appeal[13] lowered the compensation award to $25,0000 but also awarded the gratuity of $10,000.

Stress damages

[65] Mr Ponniah in his extensive closing submissions, based on the unchallenged medical evidence, claimed Mrs Kirkley's illness prevented her from obtaining employment and still prevents her from obtaining employment. He submitted that based on the uncontested briefs of evidence, that the plaintiff ought reasonably to have known of Mrs Kirkley's overwork and stress. Mr Ponniah stated:

> *It is submitted that Mrs Kirkley was placed under circumstances of employment similar to the* Gilbert *case in that she was exposed to stress and harm, arriving not only from work overload but also from management failure, inadequate, and lack of proper direction or instruction from her employer, office dysfunction and resource deficiency. The risk of injury was within the reasonable contemplation of her employer.*

[66] Mr Ponniah accepted that Mrs Kirkley had abandoned her cross-challenge but still contended that the plaintiff had a continuing duty whether implied or

[11] [1989] 3 NZILR 338
[12] [2001] ERNZ 1
[13] [2002] 1 ERNZ 22 (CA)

otherwise to take reasonable care to avoid exposing Mrs Kirkley to the risks of injury. In these circumstances, he submitted, that a high level of damages of $50,000 minimum was warranted.

[67] In light of Mr Ponniah's proper concession that the claim for workplace stress was abandoned, and there being no challenge to the Authority's finding dismissing this aspect of Mrs Kirkley's claims, I can see no basis for awarding her damages on the basis asserted in Mr Ponniah's submissions. That was not the case that the plaintiff faced at the hearing. This aspect of the claim having been abandoned cannot result in any remedies for Mrs Kirkley.

Distress compensation

[68] Under the heading "***Aggravated distress damages***" Mr Ponniah sought a substantial award under s123(1)(c)(i) of the Act in the range of $50,000.

[69] Limiting myself as best as possible to the issues of compensation and not penalty and based on the extensive evidence given by Mrs Kirkley and her husband as to the effect of the dismissal, I consider the $15,000 award made by the Authority was inadequate. I observe that Mrs Kirkley sought $27,000 in the Authority. I consider that would be an appropriate sum and award $27,000 under s123(1)(c)(i) of the Act.

Lost remuneration and other benefits

[70] Lost earnings for a minimum of 18 months were sought because of Mrs Kirkley's ill-health. I reject that claim on the basis that, had Mrs Kirkley completed her sabbatical and returned to work, she would have continued in employment until all the staff of the plaintiff were made redundant and then would have received the same compensation which was given to all the redundant employees. There was an issue as to precisely when all the plaintiff's staff were made redundant. However, the closure of the plaintiff's business in December 2006 meant that a claim for remuneration beyond that date, other than in the nature of redundancy compensation, cannot be sustained. On the evidence, I consider it is more likely than not that, had

Mrs Kirkley returned from her sabbatical, during which she was being paid her full pay and was entitled to the use of a motor vehicle, she would have been made redundant on or about 15 December 2006 and would then have received the equivalent of ten weeks' remuneration as redundancy compensation.

[71] Mr Ponniah has calculated that for the balance of the sabbatical period, namely from 1 May 2006 until 21 August 2006, $24,273.64 would have been earned. I consider the appropriate award for lost remuneration, and benefits which would otherwise have been received, should be for the period from 1 May 2006 to 15 December 2006 plus ten weeks' remuneration for redundancy compensation. That approximates to 10 months lost remuneration. That is the amount I award Mrs Kirkley for both lost remuneration and lost redundancy compensation she would have received but for the dismissal. I invite the parties to calculate the appropriate figure and reserve leave to refer the matter back to the Court if agreement cannot be reached.

[72] In addition I find that Mrs Kirkley is entitled to compensation for the loss of use of the motor vehicle from the date of her dismissal on 1 May to 15 December 2006 at the rate of $10,000 per annum. Again, I invite the parties to calculate the appropriate sum, reserving leave to refer the matter back to Court for determination.

[73] I am not persuaded to allow compensation for petrol or the loss of a mobile phone.

[74] Mrs Kirkley also sought reimbursement of medical expenses totalling $7,427. I will allow reimbursement of medical expenses incurred in the period 27 February to 1 May 2006 and for expenses incurred in obtaining medical evidence for the Authority and the Court. If there is any issue as to the quantum of those expenses they may be the subject of further memoranda.

Contribution

[75] Finally, I turn to the issue of contribution which the Court is required to consider under s124 of the Act. The 10 per cent deduction made by the Authority

was based on what it found to be Mrs Kirkley's fundamental error in passing over the passwords to the payroll clerk. On the basis of the findings I have made, I do not consider that constituted an error. It was pointed out to Ms Donaghy at the time and, if there was a problem, it could have been easily resolved. The evidence suggests that the plaintiff took no steps to alter the arrangements Mrs Kirkley had put in place for at least a day or more after her departure on 27 February. For these reasons I do not consider that her conduct in relation to the passwords amounts to blameworthy conduct.

[76] I have considered whether her irrational conduct that day could amount to blameworthy conduct which contributed to the dismissal. I am satisfied however, that the medical evidence does explain why she reacted in such a way to the actions of the plaintiff in removing her personal effects and boxing them up and other stresses on the day. I therefore do not consider her actions in all those circumstances were blameworthy and find there is no contributory conduct.

Summary of awards

[77] The summary of awards is as follows:

(a) ten months remuneration to be calculated with leave to refer the matter back to Court;

(b) compensation for loss of use of a motor vehicle to be calculated from 1 May to 15 December 2006 with leave to refer the matter back to Court;

(c) medical expenses to be calculated with leave to refer the matter back to Court;

(d) compensation under s123(1)(c)(i) of $27,000.

Costs

[78] Mr Ponniah addressed the costs in the Employment Relations Authority and in the Court. He sought indemnity costs because of the conduct of the plaintiff. Indemnity costs cannot be justified on the basis asserted by Mr Ponniah. Where, as in the *IHC* case cited earlier in this judgment, one side has abandoned a challenge because it was without merit, a substantial costs order can be made to ensure that the successful defendant "*should not have to suffer reduction in the quantum of remedies awarded by the Authority… by having to pay legal costs on the challenge*".

[79] Mr Ponniah's submissions did not address the quantum of the costs he was seeking in either jurisdiction. From the exchange I had with counsel, Mr Brant sought to have costs reserved so there would be a final opportunity for the plaintiff to respond to Mrs Kirkley's claims in that regard. There was a further complication in that costs were awarded against Mrs Kirkley in the High Court, a matter with which I cannot deal, but that may be addressed in the submissions. These submissions should also deal with the monies held in trust which should be released to Mrs Kirkley, subject to any deduction for the High Court costs.

[80] If the parties cannot agree on the question of costs, then I invite Mr Ponniah to file submissions as to the quantum and reasonableness of the costs actually incurred, the disposition of monies in trust, and the way in which the High Court costs should be dealt with, within 30 days of this judgment. Mr Brant will have 30 days in which to respond on behalf of the plaintiff.

BS Travis
Judge

Judgment signed at 4.15pm on 4 September 2009