

[2] Since turning my attention to this matter, I have reviewed the administrative file and reread the statement of problem, statement in reply, statements of evidence, all the exhibits, my full notes of the evidence and the parties' considered submissions. The determination has required careful thought and consideration of factual and legal issues involved, tasks which are difficult in the Authority's current working circumstances.

[3] I acknowledge the parties' patience and understanding and sincerely regret any difficulties caused by the delay.

Introduction

[4] Mondiale Freight Services Limited (Mondiale) provides a freight forwarding service with offices in Christchurch and several other New Zealand and overseas centres. Briony Carpenter worked for Mondiale as Operations Manager based in Christchurch from February 2008 until she gave notice of resignation in March 2010. Ms Carpenter says that she was constructively dismissed and has a personal grievance because of the circumstances in which she resigned. She also says that her employer breached express and implied terms in her employment agreement by not providing her with a safe and healthy workplace, and that this failure caused her harm. Ms Carpenter further says that she was unjustifiably disadvantaged in her employment and her employer failed to treat her in good faith.

[5] To remedy these problems Ms Carpenter is seeking compensation for humiliation, injured feelings and loss of dignity, general damages for the breaches of contract and reimbursement of lost wages and benefits.

[6] Mondiale says that Ms Carpenter does not have a valid personal grievance and that there was no breach of any contractual term or of the duty of good faith.

[7] There are a number of factual disputes that need to be resolved. First it will be useful to set out relevant terms of the employment before turning to the events that led to Ms Carpenter's resignation. I will then determine whether there was any breach of contract before considering the personal grievance claims.

The employment

[8] Mark Irwin is Mondiale's South Island Manager. He heard that Ms Carpenter had ceased working for another freight company so he contacted her to discuss the possibility of her taking up a newly created role with Mondiale as Operations Manager to work out of the Christchurch office. The role was intended to relieve Mr Irwin of some responsibilities. Before Ms Carpenter joined there were five staff and Mr Irwin.

[9] Mr Irwin and Ms Carpenter met to discuss this in January 2008. Neither of them have any notes of their discussion. Ms Carpenter's evidence is that Mr Irwin knew of the excessive hours worked by her at her previous employment and told her that it would never happen at Mondiale, a point which she affirmed in their discussion. Mr Irwin's evidence is that Ms Carpenter made it clear that she was a hard worker who had worked after hours and at weekends in her previous position. He explained that Mondiale's Christchurch setup meant that it was not generally necessary for staff to work weekends. Mr Irwin denies making any commitment that there would never be a need for Ms Carpenter to work after hours and he does not recall Ms Carpenter saying that she was opposed to working additional hours from time to time.

[10] To the extent there is a dispute between Ms Carpenter and Mr Irwin on this issue it is answered by the written employment agreement. As requested by the 21 January 2008 letter of offer, Ms Carpenter signed and returned the proposed written employment agreement. There are several relevant clauses of the agreement which read:

5. Hours of work.

The normal hours of work are 8.30 am to 5.30 pm, Monday to Friday, with a one hour break for lunch. The normal hours of work may be modified from time to time, after consultation with you, to take account of changes in business requirements. These "standard" hours are used to calculate your employment entitlements.

Your salary is however set at a level that recognises that you may be required to undertake work outside these hours, and/or at weekends, from time to time, as necessary to complete the requirements of the work in your position. Salaried staff are not paid overtime when it is necessary to work additional hours.

26. General conditions

- *This agreement constitutes the entire agreement between the parties and will supersede all previous contracts, agreements or terms and conditions either written or oral between the parties.*
- *No modification, variation or waiver of this agreement or any of its terms will be effective or binding on either of the parties unless made in writing and signed by both parties.*
- *Mondiale is putting in place a number of policies and rules in relation to its activities and the conduct expected of its employees. As well as the provisions of this agreement you are bound by these policies and rules and must adhere to them. Mondiale may at its discretion, change these policies and rules from time to time and you will be notified of these changes.*

....

[11] What Mr Irwin says he told Ms Carpenter is consistent with clause 5 of the employment agreement. Clause 26 excludes the possibility that there was a different oral term of the agreement concerning hours of work.

[12] There are some other terms that should be mentioned. Clause 6 of the agreement sets out the salary and also states *Your remuneration will be reviewed annually*. Clause 9 of the agreement dealing with public holidays includes *You may be required to work on any of the public holidays (only with the prior approval of the Manager)* ... Clauses 1, 15 and 25 bear setting out more fully:

1. Position

The position to which you are appointed is Operations Manager reporting to the Branch Manager.

Your role may be varied in line with career development or changes to the structure of Mondiale. Your duties, which have been discussed, are as outlined in the attached position description. These duties may be modified by Mondiale from time to time.

15. Health and safety

It is Mondiale's policy that its operation be managed to protect the health and safety of our employees in accordance with health and safety legislation.

The success of any accident prevention effort depends on the co-operation and active support of all employees. Mondiale, therefore, expects employees to follow safe work practices in the interests of their own safety as well as that of fellow employees.

...

You are required to comply with all safety and health legislation, Company policies and procedures and, further, be accountable for your actions in this regard.

...

25. Employment relationship problems/grievances & disputes

If you have any problems then please talk to your manager. If we cannot resolve the matter, you may use the procedures in the Employment Relations

Act (see Attachment A). You have ninety days from the date that the incident occurs or comes to your attention, to raise any personal grievance with us.

[13] Ms Carpenter's evidence is that her position was partly a replacement for one of Mondiale's sales representatives who was going on parental leave and partly a new position. Mr Irwin's evidence is that he decided to create a new role to relieve himself of some of the trouble shooting, sales management, communications and staff back up he had been performing. I think the intentions at the time are best captured by an email dated 1 February 2008 that Mr Irwin sent to staff before Ms Carpenter started work. Ms Carpenter received a copy of this email from another staff member on 28 February 2009. The original email reads:

Dana will be finishing up for 12 months maternity leave on Thursday 24-April.

...

Briony Carpenter will be starting with Mondiale 18-Feb-2008 as Operations Manger. This is a newly created role of which Briony will be responsible for the CHC operations along with a list of existing clients to look after.

Briony has experience in the majority of freight forwarding areas (Air/sea/import/export) and holds customs pin for export entries.

Once she is up to speed with our systems, Briony will become the first point of back up for both Jodie & Blair. (I will then be the 2nd back up)

This is a positive move for our office and will give us additional support/coverage for our exports (along with imports.) It will also give everyone here another point of contact for operational queries.

This will give Briony just over 2 months to spend with Dana before she heads off.

My focus for Feb/March will be assisting customer services team to help get up to speed with all the areas.

Once this is all in place the plan for staff holidays/sick coverage will be as follows.

Blair away (Briony to cover)

Jodie away (Briony to cover)

Mark away (Briony to cover)

In regards to customer services the aim is that coverage will be handled within the team.

Ie: Gail away – Allison/Lesley to cover etc...(with Briony & myself as back up – Will discuss this more with those concerned.)

[14] To return to the formation of the employment relationship. The letter of offer and the proposed agreement refer to a number of annexures. I have been provided with an unsigned copy of *Attachment A Procedure for resolving employment relationship problems*. Ms Carpenter's evidence is that she had never seen *Attachment A* before. Joanna Rolfe commenced as Mondiale's HR manager in November 2009. Her evidence is that Ms Carpenter's HR files includes several of the forms mentioned in the offer letter. If some of the annexures were sent (and returned signed by Ms Carpenter) then the suggestion is that probably all the annexures were

sent. I accept that probably occurred. It means that Ms Carpenter's recollection on this point is not correct.

[15] However, Ms Carpenter's proposed agreement did not include a position description despite the wording in clause 1 of the proposed agreement. On 7 May 2008 Mr Irwin sent an email to Ms Carpenter and others pointing out HR's aim to get updated job descriptions especially because of recent role changes, giving as the reason the need for staff to be aware of roles and responsibilities and it being a health and safety requirement and asking staff to draw up their own job descriptions and responsibilities as a starting point by 23 May 2008. Ms Carpenter complied with this request by 20 May 2008. However there was no response from Mr Irwin or HR so on 7 November 2008 Ms Carpenter in a further email to Mr Irwin said *and how about our job descriptions? in our policy we should have them ...(aren't i a nag!?!)*. Ms Carpenter's evidence is that her request for a job description was never finalised. However, I note in an email dated 6 July 2009 Ms Carpenter mentions being presented with a job description from HR some months earlier. The same email includes mention of a need to redo job descriptions because of the *great change in workload in the past year*. Given Ms Carpenter's undisputed evidence, it must be that this suggestion was not followed up and the completed job description related to her original (pre-March 2009) position.

Change in role

[16] In February 2009 Mondiale's export operator (Jodie) went on parental leave. She was not replaced. Instead, Mr Irwin looked to cover her duties from his existing staff resource. His evidence, no doubt correct, is that he looked for ways to absorb her functions for the 12 months that she intended to be on parental leave without increasing head count. That reflected the recessionary economy. Mr Irwin spoke to Ms Carpenter about her taking over responsibility for the export functions and she agreed to do so. Ms Carpenter commenced this work from early March 2009.

[17] Ms Carpenter's evidence is that she took on the export operator role in addition to her existing operations manager role. That is not accepted by Mondiale. Mr Irwin's evidence is that other staff tended to continue to bring their operational issues to him rather than Ms Carpenter. With Jodie's departure he decided to continue

to front the majority of those issues and take on more of the quoting function. He also decided to take on some more sales/relationship management duties which Ms Carpenter had previously been working on. That left Ms Carpenter with the export functions from Jodie and some limited communications and quoting work from her previous role. Mr Irwin's evidence is that when he discussed this with Ms Carpenter she said she was happy to take on a different focus and that she preferred the export work. Curiously, there was no written communication about these arrangements either between Mr Irwin and Ms Carpenter or from Mr Irwin to the other Christchurch staff.

[18] Ms Carpenter had remote computer access to Mondiale's network and sometimes worked at home. One evening in May 2009 Ms Carpenter sent an email to a relation saying:

*Right now, I'm entering B/Ls (at home).
Work, it's still retarded tho better cos I'm now doing exports, which I like better that sales/quoting (booooooring!), but now I've gone to the other extreme and doing mega hours again. Hoooo. Can't win. Still don't like the people tho. OR the company. They've laid off a few people in AKL lately and haven't even officially told us. We just hear thru the grapevine.*

[19] There is another email dated 2 July 2009 that throws some light on the arrangement over the export work. It is an email from Ms Carpenter to Mr Irwin. Relevantly for present purposes it reads:

...
I am enjoying the change by doing exports and feeling as though I am making changes to the way things are done, and somewhat prefer it to what I was doing, however it is now just too much.

[20] From this I find that it was not just a case of Ms Carpenter taking on the export work in addition to her existing role. There was some transfer of responsibilities around March 2009 from Ms Carpenter to Mr Irwin to give her some time to perform the export work. However, Mr Irwin knew that the arrangement would require Ms Carpenter to work more than fulltime to cover exporting and her residual responsibilities.

Ms Carpenter's workload issues

[21] Ms Carpenter's evidence is that she expected the first month to be tough while she found her feet. However she found the workload manageable although it required

more than 40 hours per week. She decided to continue for several months to see if things would settle down but they did not. Ms Carpenter's evidence, which I accept, is that after the first six weeks she was feeling stressed and unwell and she went to see her doctor for help. I have been provided with Ms Carpenter's doctor's notes which for 17 April 2009 include:

Still complaining of headache ...Says that she thinks it could be stress-related and that she might have depression. Personal and work life discussed; did not become tearful but eyes were clearly watering because of topic. Does not enjoy her work and her workload has increased. ...To try citalopram and review in 1 month.

[22] Ms Carpenter was not keen on counselling (the doctor's first suggestion) and was prescribed an antidepressant. Ms Carpenter had been prescribed an antidepressant in October 2007 which she took for several months late in 2007.

[23] Ms Carpenter next visited her doctor on 11 May 2009 for review. The notes include *Headaches not daily with citalopram, has noticed slight improvement, keen to continue ...*

[24] I note Ms Carpenter's email to her relative mentioned above was sent on 13 May 2009.

[25] About or before this time Mr Irwin arranged and had performance appraisal meetings with all his staff except Ms Carpenter. Ms Carpenter's evidence, no doubt correct, is that Mr Irwin raised it with her but she said she just did not have time. Mr Irwin's evidence is that Ms Carpenter was very reluctant to commit to a time for a meeting. Equally, Mr Irwin did not insist on meeting her for a performance appraisal, nor did he do anything to investigate Ms Carpenter's alleged reluctance.

[26] On 2 July 2009 Ms Carpenter sent Mr Irwin an email, also referred to above, with the subject line *Work and Workload...* The email reads:

Given our emails this morning, thought perhaps now appropriate to send the below. I've been working on it for a while ...this week has been an oddity to the last few months and has been about the right sort of workload, though I know that comes down to a combination of things.

I had hoped to complete my portion of the performance review to discuss that and my current situation at the same time; but apart from not knowing how/where to start and finish it, I just have not had time...

Our volumes (across all export areas; EAF/LCL/FCL) are significantly higher than when Jodie was here. I expected the first month to be tough,

while learning what was required (my 'training' was minimal at best), but I didn't expect the workload to be as much as it has been.

I am enjoying the change by doing exports and feeling as though I am making changes to the way things are done, and somewhat prefer it to what I was doing, however it is now just too much.

I have worked every Sunday for the past four months, plus the odd Saturday. My hours of work are between 55-62 each week. (I have recorded all of this.) None of which seems to be recognised and certainly not compensated for.

I think you have raised with me my hours once – though you suggested I come up with a solution – a) I don't feel it is my responsibility (although my responsibilities and job role(s) are something which I have never felt has been clear since I've been with Mondiale) and b) don't have the time to think about it.

So much has changed since Jodie was doing Exports and I need to document many things; however again, lack of time prevents this. I worry about how much is in now my head and feel I am in a position of not being able to take time off, as the thought of having to 'catch-up' on my return makes it not worth it.

The communication within Mondiale is extremely poor and I am often fighting the battle of having learnt things after the fact, when it is far too late. I have found the Auckland staff to be unapproachable and the way some of them have spoken to/treated me is pretty appalling. I am often made to feel like the idiot newbie yet I have over 13 years under my belt. I am questioned over things I don't feel they should be questioning me about.

As for the Christchurch staff, their work ethic is poor, their mistakes are high and they simply have no idea of the big picture of what we do.

They are seemingly unaware of what I personally have been doing over the past few months (even though most of our clients are and often comment on it). One time I asked for help, I was laughed at for asking. Sure, it was filing, but it needed to be done. When I said I'd come in in the weekend to do it, the laughing continued.

I have raised many times the issue of the constant droan of drivel going on all day every day. On top of the droan, we have three radios and two people whistling/singing. It is too much, especially when one doesn't have a much idle time as they do. I know I am not the only one to have complained about this and that you have attempted to do something, however your attempts are ignored. You are the manager, they should not ignore you.

And not even mentioning the computer systems...

I'd appreciate if you could think about the above and if you want to discuss further, please let me know.

Thanks.

Briony.

[27] Both Ms Carpenter and Mr Irwin say that they met shortly after the email to discuss those matters. Ms Carpenter's evidence is that they discussed dividing up some of her duties, including handing over quoting for Mr Irwin to do. Mr Irwin's evidence, which I accept, is that they discussed handing some of Ms Carpenter's work over to another staff member but Ms Carpenter thought that the person did not have the necessary skills. Mr Irwin says that Ms Carpenter was reluctant to hand over quoting to him but he made it clear that he wanted her to do this.

[28] Ms Carpenter followed up this meeting with a further email on 6 July 2009. In that email she advised Mr Irwin that she had not been able to come up with a solution to divvying up her work but said she would endeavour to hand over more quotes while wanting to retain some to keep up with that area of work. Ms Carpenter suggested that Mr Irwin should look at the overall running of the office by streamlining some processes and considering a restructuring. Ms Carpenter conveyed her view that there were four staff members with a reduced workload. In response Mr Irwin confirmed that there was *excess capacity in imports/customer service but unfortunately [they] lack the skills to redeploy into exports to assist*. He mentioned that he was looking at a redundancy which would result in some restructuring. As events unfolded the employment of one employee was terminated some time after these exchanges and the person was not replaced. However, there was no restructuring as such.

[29] There is no evidence of any further exchanges until 20 July 2009 when Ms Carpenter sent Mr Irwin a further email. Ms Carpenter mentioned several current work issues which are not relevant for present purposes then said:

-Labour Weekend. Too far away, I don't know if/what I'll do for this, however suspect it won't be practical for me to have time off, so suggest you disregard the leave application and have Lesley do the course.

-Further to above and our chat of a couple of weeks back, Mondiale need to look at my remuneration while I'm covering two jobs and doing additional hours. They are saving a whole person's salary by having someone else cover, so there has to be money there somewhere – despite them saying there are no pay reviews, there are for 'exceptions for special

[30] Mr Irwin responded later the same day. With respect to the extract above Mr Irwin advised Ms Carpenter that she was entitled to have time off and told her they would cover if she wanted leave and that he would discuss the issue about extra hours and remuneration with the powers that be and revert.

[31] Nothing further of relevance happened between Ms Carpenter and Mr Irwin until November 2009. In the meantime there had been some exchanges with Jodie about her intentions following her parental leave. She indicated that she would be interested in a part-time position but, in response to advice from Mr Irwin that she would have to return to her full-time export position, said she doubted she would return full-time as *it would be very difficult as we both know the position is never really 8.30-5* but would let them know her decision over the next few months.

Mr Irwin copied Ms Carpenter in on this exchange on 23 September 2009. Ms Carpenter replied expressing some frustration about Jodie's stance and saying *Tx for the heads up. Will keep hanging in there.*

[32] On 25 September 2009 Ms Carpenter saw her doctor again who provided a repeat prescription for citalopram and noted:

Ran out of citalopram and mood and anxiety are worse as are her headaches; keen to resume it. Only ran out a short while ago; found some others at home. Work still stressful; no end in sight for it.

[33] On 3 November 2009 Ms Carpenter sent Mr Irwin an email following up on the unresolved matters mentioned in her 20 July email. It is useful to set out the email:

G'day

Regarding the highlighted points below, what has happened about this? It has been four months since I raised it and I've only had a brief comment in passing that 'it was not forgotten but there were other things going on' ...which I took to be the Allison situation.

I am giving up my time, my home computer and internet and gaining nothing – except for stress, weight gain and exhaustion.

I feel Mondiale has not even recognised what I have been doing this year.

I find the dealings with our non-cooperative Auckland colleagues (across all departments) to be extremely frustrating and making things even more difficult than they need to be.

I appreciate that we have discussed but not been able to come up with any solutions and it is somewhat frustrating too, that we are at Jodie's mercy that she can hold out on confirming her decision even though she has effectively put in writing that she will be resigning.

I am not suggesting I can't continue, but some acknowledgement and showing of appreciation would certainly help.

Regards,

Briony

[34] Mr Irwin responded promptly saying that he had raised matters with Auckland but had not followed up; that they should discuss matters in person upon his return from Auckland; and noting his personal, sincere but not often enough expressed appreciation for Ms Carpenter's efforts. Several days later, on Friday 6 November 2009, Mr Irwin advised Ms Carpenter that the issue about extra hours and remuneration would be discussed in a directors meeting which he thought would take place during the next week. Having not heard further, Ms Carpenter followed up on 26 November 2009 and was told by Mr Irwin that he expected to be able to give her an answer *early next week.*

[35] On 1 December 2009 Mr Irwin advised Ms Carpenter that she would receive a bonus of \$2,500.00 by the end of that week and a salary review in February 2010; that she should start thinking about her plans for next year and where she saw her role; that he thought she was well suited to exports and did a great job; and that Jodie had made a formal request for a flexible working arrangement regarding which he sought Ms Carpenter's input. In response Ms Carpenter expressed her disappointment in light of the delay, the level of the bonus in light of her efforts over the year and the lack of a salary review since her commencement.

[36] Mr Irwin responded to Ms Carpenter's comment several weeks later after being prompted. In his email he referred to economic circumstances over the previous year or so, a serious decrease in business at the end of 2008 and the beginning of 2009, the directors' salary cuts, Christchurch staffing changes and the forthcoming salary reviews.

[37] The timing of Mr Irwin's response meant that Ms Carpenter did not respond until the new year. Ms Carpenter sent Mr Irwin an email on 24 January 2010 as follows:

I have to again express my extreme disappointment (nicest way I can put it) with Mondiale's position and actions here.

I am aware that there were staffing cuts last year, however I have also notice a number of hirings since the layoffs – particularly within Customer Services, where I've seen perhaps 6-7 new people since the initial four people departed. I believe there have been changes in other departments too; I would be surprised if the staffing numbers have remained at the number since the redundancies (ie, I expect it would be higher again).

I can understand, and expect, to do some hours a week overtime but to have to do 60-65 hours a week (including at least one weekend day) for the last year with no recognition from the company, or assistance from within my own team, makes me question my current position within Mondiale.

Grant Ryder sent an email in April last year, stating there would be no salary reviews or bonuses, however there would be a limited number of exceptions to this. I consider myself to be an exception, given that I have been doing two roles for the past year. To say, after seven months since this began, to wait a further three months for a review (without a guarantee of outcome) is rather insulting.

I am well aware that in our branch, numbers have dwindled by way of staff leaving and not being replaced – hence the situation I am currently in. I expect that had Jodie not become pregnant, we would

have remained as we were (given that Dana resigned and Allison “left” soon after).

I am an extremely hard worker and have put in considerable time, effort and cost into covering the Exports role within CHC office. I go to all lengths to get the job done and keep customers satisfied – to the detriment of my own health, both mental and physical. I feel I have been taken advantage of by the company and without any recognition (until I prompted for it).

I feel I have done a very good job in Exports – which can be reflected in new business, working relationships and record months in airfreight and LCL.

I acknowledge that I agreed to take on the additional role, expecting only the first month to be full on – certainly not the whole year. In hindsight, I should not have done this without proper discussion as to what would be involved and expected, and what I could get from it (other than health decline).

For Mondiale to cite a difficult year, staff cuts and directors’ salary cuts (tho I am sure they are still benefiting greatly from it being their company), and then to spend tens of thousands of dollars on a staff Christmas party and small group to China tour, I find it quite remarkable they cannot do anything here.

Regards,

Briony

BTW, I recently had some days off over Christmas – I spent three days working; half very sick and the other half I spent stressing about coming back to work. Wasn’t exactly the time off I needed.

[38] The only action taken by Mr Irwin with respect to this communication was to forward it his manager in Auckland. The manager’s response (*She will be getting a pay increase next month. Can’t she wait?*) was not copied to Ms Carpenter.

[39] In the meantime, just before Christmas, Mondiale received Jodie’s resignation. Mr Irwin advised staff and advertised for a replacement export operator. By mid February 2010 he had arranged a short list and shared that with Ms Carpenter. However there was a brief pause in progressing that because an Auckland employee expressed interest in a transfer to Christchurch. Within a short time Mr Irwin clarified that he could still progress with recruiting a replacement export operator and advised Ms Carpenter about that. On 25 February 2010 Ms Carpenter responded to that news as follows:

Ah ok, cool. Must admit I like the idea of having our own customs person – reckons it shows something positive to the CHC market too.

Tx,

B.

Resignation

[40] On Thursday 11 March 2010 at 10.31 pm Ms Carpenter emailed Mr Irwin as follows:

*Dear Mark,
While with some mixed emotion, I wish to resign from my position at Mondiale Freight Services – at a date to be agreed upon by both parties.
My plan is to take some time out, get my health sorted out and look to change career path.
Thank you for the opportunities and experiences over the last two years.
Kind Regards,
Briony Carpenter.*

[41] Having received this email Mr Irwin spoke to Ms Carpenter. He asked if anything could be done for her to change her mind but Ms Carpenter did not make any suggestions. He told Ms Carpenter that he was close to making a decision on employing someone in the export area who he hoped would be able to start shortly. Mr Irwin asked if Ms Carpenter wanted more time to consider her resignation. Mr Irwin also suggested that Ms Carpenter take the forthcoming weekend to reconsider. However Ms Carpenter did not change her mind. On Sunday 14 March 2010 Mr Irwin sent Ms Carpenter an email saying that they reluctantly accepted her resignation and confirming that two months' notice would apply.

[42] Ms Carpenter's doctor's notes for 23 March 2010 record *Discussion about her work; still finds it stressful and difficult to cope with.* Ms Carpenter returned to her doctor on 26 March. The notes say *Feels she needs to take time of work because of the stress caused by her job.* On this second visit Ms Carpenter received a medical certificate saying that she was *medically unfit for work for stress related issues.* Ms Carpenter gave Mondiale the certificate. Her paid sick leave entitlement extended to only part of the time covered by the certificate. Ms Carpenter did not return to Mondiale.

Raising a personal grievance

[43] Ms Carpenter saw a solicitor on 29 March 2010 who that day wrote to Mondiale raising her employment relationship problem. The letter says that Ms Carpenter made it clear in 2009 and 2010 that her workload was excessive and that her health was suffering but Mondiale failed to take any action to support

Ms Carpenter, reduce her workload or provide her with a safe work environment. That caused her resignation giving rise to personal grievances of unjustified dismissal and unjustifiable disadvantage as well as a breach of the employment agreement.

[44] Mondiale acknowledged this correspondence the same day and agreed to attend mediation (as requested). Mediation did not resolve the employment relationship problem.

Breach of agreement?

[45] Under the Health and Safety in Employment Act 1992 *harm* is defined as including physical or mental harm caused by work related stress: see s.2 of that Act. S.6 requires employers to take all practicable steps to ensure the safety of employees while at work. *All practicable steps* is limited to require the employer to take those steps only in respect of circumstances that they know or ought reasonably to know about: see s.2A(2).

[46] These statutory obligations were also contractually binding on Mondiale because of clause 15 of the employment agreement (set out above).

[47] I am also referred to *Gilbert v Attorney-General* [2000] 1 ERNZ 332 (EC), *Attorney-General v Gilbert* [2002] 2 ERNZ 31 (CA) and *Whelan v Attorney-General* [2004] 2 ERNZ 554 as to the nature of the implied term in Ms Carpenter's employment agreement. I accept that these cases express the principles that are presently relevant. I also agree with counsel's submission that Ms Carpenter must establish that she has suffered harm, that the harm was caused by the workplace, that the risk of harm was reasonably foreseeable and that Mondiale failed to take all reasonably practicable steps to prevent the harm.

[48] I find that Ms Carpenter has suffered harm. Ms Carpenter's doctor (Dr Mick Ozimek) gave evidence. His view is that Ms Carpenter *has suffered from stress, which would seem to be work related, with depression*. Having considered but excluded other causes, he also thinks that Ms Carpenter's persistent headache was a manifestation of the stress and depression. Dr Ozimek's evidence is that a review of the notes of a counselling session on 26 July 2010 *would suggest that [Ms Carpenter]*

is, or shortly will be, able to return to work. From that I find that the harm suffered by Ms Carpenter was sufficiently severe so as to cause her to be unfit for work from late March 2010 until about the end of July 2010.

[49] What caused this harm? The only evidence indicating that the cause of the harm suffered by Ms Carpenter was something other than her work at Mondiale are the following references in her doctor's notes for 26 October 2007 and 28 November 2007 respectively which resulted in the prescription of citalopram:

Has been feeling very stressed at work; has lost interest in it and feels she is not performing very well. Does get tearful and feels tired. Discussed. Not overtly depressed but obviously stressed. Interested in trying citalopram. Discussed referral for brief intervention counselling; she does not want to pursue that at this point.

Has resigned from work; feeling better because of it would like to carry on with citalopram for at least another month.

[50] This earlier illness appears to have been resolved some months before Ms Carpenter started work at Mondiale. When asked about the relevance of this illness to Ms Carpenter's later illness while employed at Mondiale, Dr Ozimek told me that it could be that the issues from October/November 2007 were not fully resolved. He also noted the difference in that the earlier episode did not involve depression while the later illness did.

[51] It is clear that Ms Carpenter began working long hours from March 2009 when she took over the export responsibilities even though some of her previous responsibilities were assumed by Mr Irwin. Following the investigation meeting I was provided with a summary of Ms Carpenter's working hours based on her 2009 diary in which she generally recorded her hours and days of work. I was also provided with the diary itself. With reference to the diary it shows that, from March 2009, Ms Carpenter usually worked Monday to Friday starting at or before ordinary office hours and finishing often at 6.30pm or later. Ms Carpenter often worked at night at home. In addition Ms Carpenter usually worked on statutory holidays and Sundays for a part day and infrequently worked on a Saturday for a part day. Ms Carpenter worked at Mondiale's office and also worked from home.

[52] The diary is supported by other evidence. For example on 13 May 2009 Ms Carpenter in an email to a relation said *...now I've gone to the other extreme and*

doing mega hours again. Hoooo. In an email on 2 July 2009 to Mr Irwin Ms Carpenter said *I have worked every Sunday for the past four months, plus the odd Saturday. My hours of work are between 55-62 each week. (I have recorded all of this.)* Ms Carpenter referred again to her doing *additional hours* in an email on 20 July 2009 to Mr Irwin. On 3 November 2009 Ms Carpenter in another email to Mr Irwin mentioned *giving up my time, my home computer and internet and gaining nothing.* On 24 January 2010 in a further email to Mr Irwin Ms Carpenter said *I can understand, and expect, to do some hours a week overtime but to have to do 60-65 hours a week (including at least one weekend day) for the last year with no recognition ...*

[53] In its defence Mondiale says that Jodie had performed the export duties within an 8.30am – 5.00pm working day for approximately four years without needing to work significant additional hours to perform her duties. Mondiale also says that 2009 export volumes, while generally higher than in 2008, were often lower than in previous years. I have been given a table of export volumes by seafreight and airfreight between 2002 and March 2010. Despite Mr Irwin's evidence I note the email from Jodie to him dated 23 September 2009 about her intentions at the end of her parental leave saying *we both know the position is never really 8.30-5 ...* The export table also shows that in 2009 export seafreight LCL volumes were higher than every year except 2005, export seafreight FCL volumes were higher than every year and export airfreight volumes were higher than 2008 but lower than every other year. On review the export table demonstrates that 2009 volumes were higher, with limited exceptions, than previous years. I should also say that Ms Carpenter was obviously regarded as very able and efficient in her work.

[54] From all this I conclude that Ms Carpenter did work the long hours reported by her and that she needed to do so in order to meet Mondiale's requirements of her. The volume and pressure of work was a significant cause of the illness suffered by Ms Carpenter from about April 2009. There may have been other causes such as the pre-employment illness not having been fully resolved.

[55] Was the risk of harm reasonably foreseeable? I note that the Minimum Wage Act 1983 provides at s.11B that, subject to the Act, every employment agreement must fix at not more than 40 the maximum number of hours (exclusive of overtime) to

be worked in any week. The Act permits parties to an employment agreement to fix the maximum at more than 40 hours by agreement. If they fix the maximum hours at more than 40 hours per week, the parties to the agreement *must endeavour to fix the daily working hours so that those hours are worked on not more than 5 days of the week*. Pursuant to s.65 of the Employment Relations Act 2000 an individual employment agreement must be in writing and must include *an indication of the arrangements relating to the time the employee is to work*: see s.65. Consistent with these statutory provisions Mondiale's employment agreement with Ms Carpenter made provision for 40 hours per week Monday to Friday as her normal hours of work, subject to the need to undertake work outside these hours or at weekends *from time to time, as necessary to complete the requirements of the work in your position*. Consistent with this provision Mr Irwin told Ms Carpenter before she was offered employment that Mondiale's Christchurch setup meant that it was not generally necessary for staff to work weekends. No doubt one of the reasons for the statutory provisions concerning hours and days of work and the contractual provision covering Ms Carpenter's employment is the possibility of harm being caused by excessive working hours.

[56] Ms Carpenter did alert Mondiale to health problems arising from her long working hours. The long hours were mentioned in her 2 July 2009 email. On 3 November Ms Carpenter went further and complained about *stress, weight gain and exhaustion*. In her 24 January 2010 email Ms Carpenter again said that her long working hours had been *to the detriment of my own health, both mental and physical*. There were other emails where Ms Carpenter referred to her workload as involving her doing two jobs. By these communications Ms Carpenter took *unequivocal steps to make [her] concerns or stressors or medical conditions known to Mondiale*: see *Healey v The Mercury Bay Area School Board of Trustees* EmpC Auckland, AC21/05, 11 May 2005. From this I conclude that the risk of harm to Ms Carpenter from working long hours was reasonably foreseeable.

[57] Did Mondiale fail to take all reasonably practicable steps to prevent harm? The work expected of Ms Carpenter which resulted in routinely long hours of work including evenings and weekends over a period from about March 2009 until March 2010 was a breach of clause 5 of the employment agreement. That finding necessarily leads to the conclusion that Mondiale failed to take all reasonably practicable steps to

prevent harm as it must always be reasonably practicable not to persistently breach such an important contractual term.

[58] There were other reasonably practicable steps that Mondiale could have taken.

[59] Because Ms Carpenter had been asked to cover the exporting duties in Jodie's absence while retaining some of her original responsibilities, it would have been reasonable for Mondiale to systematically monitor her working hours. That would have been apposite especially given the recovery during 2009 in export volumes. However, there was no mechanism in place to do this. Ms Carpenter was left to work whatever hours were required to meet the business demands.

[60] Mr Irwin met promptly with Ms Carpenter following her 2 July 2009 email and they discussed the issues and concerns mentioned in her email. Mr Irwin suggested handing over quotes to him and they discussed handing over some work to other staff members. However, as Mr Irwin observed a few days later *There is an excess capacity in imports/customer service but unfortunately lack the skills required to redeploy into exports to assist*. Despite that being a fundamental difficulty with keeping Ms Carpenter's hours of work within those envisaged by the employment agreement, Mondiale took no steps to upskill other staff or recruit competent temporary assistance during the currency of Jodie's parental leave.

[61] Mondiale failed to provide a job description for Ms Carpenter's post March 2009 position, despite job descriptions apparently being company policy and a health and safety requirement according to Mr Irwin. The exercise of describing Ms Carpenter's job requirements would likely have caused some focus on whether the role could be performed within reasonable working hours.

[62] I agree with counsel that Mondiale's response to Ms Carpenter's concerns, except immediately following the 2 July 2009 email and as mentioned below, was characterised by delay and inaction. By way of illustration of delay, Ms Carpenter asked for a salary review as a special case in her email of 20 July 2009. Her employment agreement entitled her to an annual review (ie by February 2009) but there appears to have been a company wide pay freeze in response to the global financial crisis, subject to special circumstances. In the absence of a substantive

response she raised the matter again on 3 November 2009 and was told (in effect) that it was a work in progress with an indication of a substantive answer by mid November. Ms Carpenter asked about progress by email on 26 November 2009 at 7.32pm. There was eventually a substantive response on 1 December 2009. Ms Carpenter was obviously extremely disappointed with the outcome but also with the inordinate delay. I find that the frustration experienced by Ms Carpenter as a result of delay and inaction generally contributed to her ill health and her subsequent decision to resign. Overall, it would have been reasonably practicable for Mondiale to have responded to Ms Carpenter's requests and expressions of concern in a timely manner with a view to developing a plan to resolve those concerns.

[63] Mr Irwin did on at least two occasions (5 February and 17 February 2010) specifically offer to help Ms Carpenter with any outstanding work. While well intended, these occasional offers were largely immaterial to the systemic failure to monitor and control Ms Carpenter's working hours.

[64] From all this I conclude that Mondiale did breach its obligation to maintain a safe workplace.

Personal Grievance

[65] I should say that there is some overlap between the breach of contract and the personal grievance claims. The foregoing analysis is relevant to the following analysis and vice versa.

[66] In *Auckland etc Shop Employees' etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. The third category is in issue here. Not every breach of duty is sufficiently serious to give rise to a personal grievance of constructive dismissal. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168 the Court of Appeal said:

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

[67] Ms Carpenter's evidence is that the combination of her dealings with Mr Irwin (by which is meant Mondiale's inadequate or non-existent responses) and her rapidly declining health led her to see no other option but to resign. The text of her written resignation is set out above. It refers to Ms Carpenter's health issues. There is little evidence to indicate that there was any reason for Ms Carpenter's resignation apart from her illness which was caused by Mondiale's breach of obligation.

[68] It is argued for Mondiale that events proximate to Ms Carpenter's resignation indicate that her resignation was not caused by any breach of duty on its part. I am referred to emails Ms Carpenter sent to Mr Irwin on 17 February and 25 February 2010, the recruitment process and then imminent appointment of a new employee to perform the export role and several phrases from Ms Carpenter's resignation email.

[69] As to the last point, Ms Carpenter started her resignation email by saying it was with *some mixed emotion* that she was resigning. The phrases referenced by counsel reflect Ms Carpenter's reluctance to resign. Ms Carpenter clearly had a good working relationship with Mr Irwin and sought to resign without rancour. Hence Ms Carpenter referred to the positive aspects of her time at Mondiale and foreshadowed a possible career change. However, I do not consider that the phrases mentioned by counsel mean that Ms Carpenter was resigning for a reason other than her state of health.

[70] Ms Carpenter's communications on 17 February and 25 February 2010 also reflect her *mixed emotions* and do not indicate that her resignation was caused by something other than Mondiale's breach of obligation. The 17 February 2010 email also is an example, albeit trivial, of Mondiale's delay. Ms Carpenter initiated the exchange on 11 February 2010 about a new vehicle or an allowance and received an

acknowledgment rather than a substantive response to her email on 17 February 2010. The recruitment process can be viewed in a similar light. The previous incumbent (Jodie) resigned on or before 18 December 2009. By 17 February 2010 Mr Irwin was able to share a shortlist of candidates with Ms Carpenter. On 24 February 2010 Mr Irwin advised Ms Carpenter that an intra-company transfer might affect the recruitment process and the next day he updated her that it would not prevent recruitment with at least one interview to proceed on 2 March 2010 and possibly others to follow.

[71] There is a submission for Mondiale that a substantial risk of resignation was not reasonably foreseeable because Ms Carpenter had not disclosed her recent depressive condition when her employment commenced, did not disclose her depressive condition for which she again needed medication from April 2009 and did not sufficiently clearly raise her concerns with Mondiale. I am referred to excerpts from Ms Carpenter's emails to support this last point. As to the first point, Dr Ozimek's evidence, noted above, is that the first illness did not involve depression as a clinical diagnosis while the second illness did. There was no obligation on Ms Carpenter when employed to disclose any medical condition, much less one that she did not suffer from. Ms Carpenter was under no legal obligation to reveal details of her later medical condition while employed by Mondiale. Ms Carpenter's emails need to be read as a whole to gather an accurate impression of what they conveyed. Mondiale says that Ms Carpenter's emails were understood as a complaint by her about her remuneration. I agree that this was part of the message being conveyed but Mondiale must have misunderstood what was being communicated if they genuinely thought that was the only message.

[72] I find that a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. In particular, in her email dated Sunday 24 January 2010 at 10.01pm, Ms Carpenter specifically said that her long hours of work without recognition from Mondiale made her question her current position. It might not have been too late at that stage to remedy the developing problem. Ms Carpenter's various emails before that date also should have alerted Mondiale to her increasing concerns about the long hours required of her.

[73] An argument for Mondiale is that Ms Carpenter did not utilise the procedures in the employment agreement for resolving employment relationship problems such as accessing EAP services or contacting her manager (or that person's manager) and HR staff. EAP is a confidential counselling service. Ms Carpenter's choice was to seek advice from her doctor and I do not accept that she had any obligation to seek assistance elsewhere instead of or before taking that step. Ms Carpenter's experience of presenting her concerns to her manager and the inordinate delay and lack of response that followed, ostensibly due to Mondiale's head office, would hardly have given her any confidence that her concerns would be properly addressed. In addition, the procedures for resolving employment relationship problems include internal company contacts as an option rather than as a mandatory first step. Ms Carpenter elected to seek external assistance, as was her right, in the face of Mondiale's significant breach of duty. For these reasons there is no merit in this submission.

[74] For the foregoing reasons I conclude that Ms Carpenter was unjustifiably dismissed and she has a personal grievance.

[75] It is unnecessary to canvass the alleged unjustified disadvantage grievance as it is subsumed by the foregoing findings. The same applies to the alleged breach of good faith.

Remedies

[76] There is a claim for compensation for distress arising from the personal grievance (\$10,000.00) and a further claim for damages for the non-pecuniary loss arising from the breach of contract (\$30,000.00). In essence the proven harm from one employment relationship problem cannot be distinguished from that resulting from the other employment relationship problem and I agree with the submission for Mondiale that there can only be one award.

[77] The evidence is that Ms Carpenter suffered harm to the extent of being unable to work for about four months. Given that, Ms Carpenter must have suffered humiliation, injured feelings and lost dignity. Ms Carpenter's evidence is that her career has ended, she feels that Mr Irwin took advantage of her, that (as at November 2010) she still felt stressed and saddened, and that she was frustrated by the loss of her

career and ambition. There is no reason to doubt this evidence. In addition, there is the evidence of what Ms Carpenter told her doctor and the counsellor's notes as her illness developed. From this I consider that an award of \$15,000.00 is an appropriate sum to compensate Ms Carpenter for her proven non-pecuniary losses.

[78] Ms Carpenter obtained alternative employment from 16 August 2010, after actively seeking employment from about May 2010. There is a claim for reimbursement of wages and other monies lost from the termination of the employment until that date.

[79] Ms Carpenter was entitled to private use of a company vehicle as part of her employment agreement. Ms Carpenter returned the vehicle in early May 2010 following the expiry of her notice period. I am asked to award compensation for the loss of the use of the vehicle thereafter at the rate of \$10,000.00 per annum. However I have no evidence of the value of private use of the company vehicle. It is incumbent on a claimant to prove their losses. In the absence of proof I can take the matter no further. There will be no award in relation to the vehicle.

[80] As for wages during this period Ms Carpenter's base salary was \$60,000.00 per annum. She was paid only for a few days of her notice period because she apparently had only a small amount of paid sick leave. Ms Carpenter then received no income from employment until commencing alternative employment on 16 August 2010. I am satisfied that Ms Carpenter has lost remuneration as a result of her personal grievance and/or suffered pecuniary loss as a result of Mondiale's breach of duty. There is a submission for Mondiale that recovery should be limited to the three months following the termination of the employment by reference to s.128(2) of the Employment Relations Act 2000. The first difficulty with this submission is that it does not address the principles of assessing losses under a breach of contract claim. The ordinary application of those principles would entitle Ms Carpenter to full recovery for the period of the proven loss. The second difficulty is that under s.128(3) of the Act the Authority may order compensation for more than the initial three months. Mondiale's submission is Ms Carpenter's pre-employment illness and other factors not amounting to any breach of its legal obligations are likely to have materially attributed to Ms Carpenter's condition. However, there is no evidence that these other factors actually contributed to the duration of Ms Carpenter's illness. In

light of these factors I find that Ms Carpenter should be fully compensated for her lost remuneration from when she gave notice until 15 August 2010. I will reserve leave in case the parties cannot agree on quantum.

[81] In her new position Ms Carpenter received a salary \$15,000.00 per annum less than her salary at Mondiale. I am asked to make an award of compensation to cover that ongoing loss to the date of the Authority's investigation meeting and beyond. I accept that the loss can be attributed to the grievance and Mondiale's breach of duty, at least for a period of time. I see no reason to impose on Mondiale the cost of delay arising from the Authority's inability to determine this matter in a timely way. Accordingly I will order Mondiale to reimburse Ms Carpenter for her lost remuneration up to 10 November 2010.

Contribution

[82] To the extent that any of these awards are compensation for a personal grievance the Authority must consider the extent to which Ms Carpenter has contributed towards the circumstances giving rise to the grievance and, if those actions so require reduce the remedies accordingly: see s.124 of the Employment Relations Act 2000.

[83] For Mondiale it is submitted that Ms Carpenter contributed to the circumstances of her grievance by not disclosing her prior illness, not disclosing the recurrence of her illness, refusing counselling and not availing herself of the assistance and solutions offered by or available from Mondiale. The submission is that remedies should be reduced by between 50–75% to account for these contributions. For a mixture of reasons I do not accept these submissions. First, s.124 only has application when the Authority is assessing compensation for an established personal grievance. Subject to s.113 of the Act, at least some of the foregoing awards could also have been made as awards of damages for the proven breach of contract so as to avoid the potential impact of s.124. More significantly, there must be a blameworthy element to any contribution for it to result in a reduction in grievance remedies. There was nothing blameworthy about Ms Carpenter not disclosing her previous illness. The evidence is not that the later illness was a recurrence of the earlier illness; and the evidence is that Ms Carpenter did alert Mondiale to her being

unwell but without giving details of that illness. There was nothing blameworthy about her level of disclosure. I also observe that Mondiale could have asked for more details but neglected to do so. I do not accept that there was anything blameworthy about Ms Carpenter's preference, with medical advice, for medication rather than counselling. Nor do I accept that there was anything blameworthy in Ms Carpenter's preference to complete work herself rather than hand it over to Mr Irwin in response to his occasional offers; or in Ms Carpenter not taking her concerns beyond her own manager. There being no blameworthy contribution on Ms Carpenter's part, there can be no reduction in remedies.

Summary and orders

[84] Ms Carpenter has suffered harm as a result of Mondiale's breach of its duty to provide her with a safe workplace. Ms Carpenter also has a personal grievance of unjustified dismissal. These problems overlap. Because Ms Carpenter cannot receive both damages and compensation for the same loss I have assessed remedies under the statutory regime for an established personal grievance.

[85] Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, Mondiale Freight Services Limited is to pay Ms Carpenter compensation of \$15,000.00.

[86] Pursuant to s.123(1)(b) and s.128(3) of the Employment Relations Act 2000, Mondiale Freight Services Limited is to pay Ms Carpenter compensation for all her lost remuneration (base salary) from the date she gave notice of resignation until 10 November 2010. Leave is reserved in case of any disagreement about quantum.

[87] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days. The other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority