

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 51  
5418068

BETWEEN

ELISE DILLON  
Applicant

A N D

IMPACT            MARKETING  
SOLUTIONS LIMITED trading  
as Club Premier Pacific  
Respondent

Member of Authority:     Christine Hickey

Representatives:         Anna Oberndorfer, Advocate for the Applicant  
                                 Adam Gallagher, Counsel for the Respondent

Investigation meeting:    8 November 2013 at Christchurch

Submissions Received     18 November 2013 from the Applicant  
                                 18 November 2013 from the Respondent

Date of Determination:    02 April 2014

---

**DETERMINATION OF THE AUTHORITY**

---

- A.     Elise Dillon was unjustifiably disadvantaged by a delay in Impact Marketing Solutions Limited approving her parental leave.**
- B.     Elise Dillon did not breach her duty of good faith to Impact Marketing Solutions Limited.**
- C.     Impact Marketing Solutions Limited must pay Elise Dillon \$2,500 in compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.**

**Employment relationship problem**

[1]     Elise Dillon was employed as a telephone sales consultant by Impact Marketing Solutions Limited. She claims that:

- (a) She was unjustifiably constructively dismissed;
- (b) She was unjustifiably disadvantaged when her employer removed her sales appointments from her diary;
- (c) She was unjustifiably disadvantaged because Impact deliberately delayed signing her paid parental leave forms; and
- (d) Impact breached its duty of good faith to her by failing to communicate honestly and openly with her about her role and about changes in the business location while she was on parental leave.

[2] By way of remedy Ms Dillon seeks:

- (a) Compensation of \$1,742.08 for loss of earnings from the time of her intended return to work after her parental leave until she started her new employment;
- (b) Compensation of \$8,000 for humiliation, loss of dignity and injury to her feelings;
- (c) A penalty against Impact pursuant to s.4A Employment Relations Act 2000; and
- (d) Legal costs.

[3] Impact denies that it breached its duty of good faith or unjustifiably disadvantaged Ms Dillon in any way. Impact says it did not constructively dismiss Ms Dillon.

[4] Impact also says that Ms Dillon failed to communicate with it about her state of health, misrepresenting her employment status online and failed to communicate about her return to work from parental leave in breach of her duty of good faith. Impact seeks a penalty against Ms Dillon for the claimed breaches of good faith.

### **Issues**

[5] The issues the Authority needs to address are:

- (a) Whether Impact unjustifiably disadvantaged Ms Dillon when it gave her sales leads to a colleague;
- (b) Whether Impact unjustifiably delayed signing Ms Dillon's parental leave forms and caused her disadvantage by doing so;
- (c) Whether Impact constructively dismissed Ms Dillon;
- (d) Whether Impact breached its duty of good faith to Ms Dillon;
- (e) Whether Ms Dillon failed or refused to communicate with Impact in breach of her duty of good faith; and
- (f) Whether Ms Dillon suffered any loss for which she should be compensated.

### **Background facts**

[6] Ms Dillon's second child was due on 23 October 2012 and she initially intended to work until as close to her due date as possible. Impact was happy to accommodate her working until early October 2012.

[7] Ms Dillon worked thirty hours a week, from Tuesday to Friday. She had been working for Impact for about 15 months when the first event she claims caused her an unjustified disadvantage happened.

#### *The removal of sales leads*

[8] On Tuesday, 17 July 2012 Ms Dillon arrived at work late after the morning briefing that the other sales consultants had attended and found that her renewal and non-renewal sales leads had been taken from her diary and transferred to a colleague, Mark Symon. When she confronted Mr Symon he told her she would have to speak to their manager, Allison Smith, about it. Ms Smith was out of town that day.

[9] Ms Dillon was upset at her sales leads having been removed from her diary. She left work immediately for a brief period before coming back and asking her colleagues to text Ms Smith to say she was going home because her two-year-old daughter was sick.

[10] Ms Smith telephoned Ms Dillon later that day and asked to meet with her the following morning. Ms Smith says she wished to talk to Ms Dillon about her arriving late and about deterioration in her general attitude to work. Ms Smith says she was concerned Ms Dillon's attitude was having a negative impact on the rest of the sales team. However, the events of the next day meant those issues were not raised.

**Was Ms Dillon unjustifiably disadvantaged in her employment by Impact's actions?**

[11] Section 103(1)(b) of the Employment Relations Act 2000 defines a claim of personal grievance of unjustified disadvantage as:

*... the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[12] Therefore, in order for a personal grievance of unjustified disadvantage to be proved, Ms Dillon must have suffered some disadvantage in her employment and that disadvantage had to have been caused by an unjustifiable action by Impact.

*By removing Ms Dillon's sales leads did Impact unjustifiably disadvantage her?*

[13] Ms Dillon says the removal of her leads was significant because it took away all the new leads she had personally generated as well as appointments she had made to call and get credit card details for already agreed sales. She was concerned that Mr Symon would get commission on all the sales she had already set up.

[14] Adrienne Friesen was acting under Ms Smith's instructions on 16 July 2012 when she transferred the renewals and non-renewals from Ms Dillon's diary and gave them to Mr Symon. Ms Friesen said that in the previous week the number of sales had been very low. Mr Symon's return rate for renewals was high and Impact hoped that by having him working on the renewals on Monday, a day Ms Dillon did not work, it could get a good start to the week.

[15] Ms Dillon says that because her diary had been *stripped* of all her leads she had nothing to do on 17 July 2012 and so could not have sold anything and would have had no income for the day, or the week. She says that she had set up other sales leads in her diary for months in advance and they were also gone.

[16] Ms Friesen says that some leads could have been given back to Ms Dillon and that as a senior consultant she would have been able to *new sell* using leads from a folder kept in the office that consultants could use to generate leads or she could have used the NZ telephone directories that Impact keeps in its office to cold call. She says she did not get an opportunity to tell Ms Dillon any of that because:

*Elise showed up late went straight to her diary, ripped a couple of pages out, threw things in the bin then stormed over to Mark asking if he had her renewals (which is [sic] company property) and he said yes then she stormed out of the room, hopped into her car and drove away. After a while she came back and asked if we could txt [sic] Alli to tell her she's going home because Violet was sick.*

[17] Taking away all sales leads from Ms Dillon, and not returning them to her could be seen as a condition of her employment being affected to her disadvantage by an action of her employer. It would be particularly disadvantageous if there was no possibility of retaining sales that she had almost completed. Any disadvantage would be to her earning capacity. However, I consider that if Ms Dillon had remained at work some of the renewals and non-renewals would have been returned to her and that other leads would have been provided to her.

[18] Ms Dillon did not suffer any disadvantage because she left work on 17 July 2012 to look after her sick daughter and did not return to work at all after that, initially because of the necessity to start her parental leave early.

[19] Even IF Ms Dillon did suffer a disadvantage in her employment in order for that to amount to a personal grievance I need to be satisfied that Impact's action was unjustified.

[20] Section 103A(2) of the Employment Relations Act 2000 sets out the test to be applied in considering whether an employer's action was justifiable. I need to look at whether the way that Impact acted in relation to the leads in Ms Dillon's diary was what a fair and reasonable employer could have done in all the circumstances at the time.

[21] At the investigation meeting Ms Dillon agreed that:

- Her diary was a work diary supplied by Impact;
- Renewals and non-renewals did not 'belong' to an individual sales consultant but to Impact. The leads remained Impact's

property even if they were kept in or entered into the consultant's diary;

- From time to time if, for example, a sales consultant was away sick or on holiday their leads would be redistributed amongst the other consultants.

[22] Viewed objectively Impact's action in redistributing Ms Dillon's sales leads to Mr Symon on Monday 16 July 2012 and letting them remain with him on 17 July was what a fair and reasonable employer could have done in all the circumstances at the time. I consider that to be so because:

- Renewals did not belong to Ms Dillon but to Impact;
- Ms Dillon was not at work on Monday when the renewals were given to Mr Symon. They were given to Mr Symon because Impact wished as many sales as possible to happen on the Monday due to low sales figures for the previous week;
- Ms Dillon was not at the team briefing and so the redistributed renewals remained with Mr Symon because it was not clear whether Ms Dillon would be at work on 17 July; and
- Impact had no opportunity to supply any leads, renewals or non-renewals to Ms Dillon because she left work almost immediately when she discovered Mr Symon had some leads from her diary. She did not communicate her unhappiness to anyone other than Mr Symon, who was not in a position to make any decisions about Ms Dillon's work. Therefore Impact had no opportunity at the relevant time to rectify the situation by providing work back to Ms Dillon.

[23] Ms Dillon does not have a personal grievance of unjustified disadvantage based on Impact redistributing renewals and sales leads to Mr Symon because Impact acted as a fair and reasonable employer could have acted when it gave renewals and non-renewals to Mr Symon.

*Did Impact cause any unjustified disadvantage to Ms Dillon by its delay in signing Ms Dillon's parental leave form?*

[24] Ms Dillon saw her mid-wife, Holly Mayberry, who was her lead maternity carer, on the afternoon of 17 July 2012. Ms Mayberry told Ms Dillon that she should give serious consideration to when she would finish work, with the implication that it should be sooner rather than later.

[25] Ms Dillon attended the meeting with Ms Smith on 18 July 2012 with her daughter, who was still sick. Ms Dillon believed Ms Smith was angry with her, although she did not know why. Ms Smith says she was not angry at Ms Dillon but was concerned about some negative feedback about Ms Dillon she had received recently. Before Ms Smith could raise the issues she wished to discuss Ms Dillon told her that she needed to go on parental leave early for health reasons and would do so immediately. She handed Ms Smith a medical certificate from Ms Mayberry dated 2 July 2012 confirming Ms Dillon's pregnancy and stating the baby's due date.

[26] Ms Smith agreed that Ms Dillon could go on parental leave immediately<sup>1</sup>. She says that in the circumstances she did not think it worthwhile or necessary to bring up her concerns about Ms Dillon's work.

[27] Ms Dillon gave Ms Smith the Inland Revenue Department application form (IR880) that Impact needed to complete for Ms Dillon to receive paid parental leave. She asked Ms Smith to complete the form then and there but Ms Smith told her that she would have to take advice from Impact's accountant, Robert Wong.

[28] After Ms Dillon left Ms Smith contacted Mr Wong and Anton Kritzinger, Impact's Managing Director, who told her that they would deal with Ms Dillon's application for paid parental leave.

[29] Later on 17 July 2011 Ms Dillon sent Ms Smith an email informing her in writing that she would be away on maternity leave from 18 July 2012 and would return on approximately 18 December 2012. She also requested a copy of her employment agreement and that her last payslip be emailed to her.

[30] Ms Smith replied that she would arrange for her payslip to be posted to her. She also told Ms Dillon that Mr Wong:

---

<sup>1</sup> Allison Smith's evidence at paragraph 28: *I said that she could finish immediately if that is what she needed to do; even though she had just dropped this on us without any notice.*

*...has advised under the Department of Labour law that you have not followed the correct process to take leave especially with finishing so suddenly.*

*Until such time that you have followed the correct procedure Robert nor myself will be signing any documentation.  
I would advise you to look at the Department of Labour Website to follow the legal procedure.*

[31] Ms Smith did not specify what part of the correct procedure Ms Dillon had failed to follow. Ms Dillon was not sure what Ms Smith was referring to and contacted a labour inspector to discuss her concerns.

[32] On Friday 20 July 2012 Mr Kritzinger emailed Ms Dillon that she needed to make an application for parental leave in writing. He included a copy of the draft letter the Department of Labour website recommended and suggested she use that format.

[33] Ms Dillon responded:

*I am already well aware of the information you have included in your email, as I have been speaking with the DOL since Tuesday<sup>2</sup>. A labor [sic] inspector will be in contact with you shortly.*

*Here is my application again for you.*

*I wish to inform you that I want to take parental leave. I have given Allison a copy of my medical certificate signed by my midwife, saying when my baby is due.*

*I want to take my parental leave between 18/7/12 and 18/12/12. The leave I am applying for is no more than 52 weeks.*

[34] Mr Kritzinger replied on the same day telling Ms Dillon that Impact could not:

*accept an email application. It needs to be written out and signed by you.*

[35] Ms Dillon replied that she had written it out and signed it and would post it that day.

[36] Mr Kritzinger responded:

*Please read through all the information I sent you. If it is not followed 100% correctly it can lead to us not being able to sign off and the government not paying. Please take your time in doing it to make sure everything is clear.*

---

<sup>2</sup> Which was 17 July 2012, the day before Ms Dillon started her maternity leave.

[37] Ms Dillon sent a signed letter which read:

*Dear Allison,*

*I wish to inform you that I want to take parental leave. I have given you a copy of my medical certificate signed by my midwife, saying when my baby is due.*

*I want to take my parental leave between 18/7/12 and 18/12/12. The leave I am applying for is for no more than 52 weeks.*

[38] Despite the letter of application being completed as Mr Kritzinger asked no-one from Impact completed the employer portion of the IR880 application form. On 3 August 2012 Kim Baldwin, a labour inspector, wrote to Mr Kritzinger advising him that Ms Dillon was concerned about her application for parental leave. Ms Baldwin asked if she could discuss the matter with a company representative in New Zealand.

[39] On 5 August 2012 Ms Smith responded and offered to meet with Ms Baldwin as soon as possible and to:

*...supply you with all documentation we have in regards to Elise's request. Our company is committed to ensuring all matters concerned with New Zealand employment are complied with under the correct guidelines.*

*Please feel free to ring me at any time convenient so that we can have this sorted quickly and effectively for both parties concerned.*

[40] On 6 August 2012 Ms Baldwin sent another email in which she acknowledged speaking to Ms Smith and confirmed a meeting time they had made. She wrote:

*I confirm that the Parental Leave and Employment Protection Act 1987 provides that any employer must not refuse to allow an employee to exercise any rights and benefits in respect of parental leave or a parental leave payment due to any irregularity in the formal requirements under the Act (section 68). The Act also provides that an employer must fill in its portion of the form relating to paid Parental Leave (IR880) irrespective of whether it believes an employee is eligible.*

[41] Ms Smith and Ms Baldwin met at Ms Baldwin's office on 9 August 2012. However, Impact did not complete the form at or after this meeting.

[42] On 23 August Ms Baldwin sent a letter to Ms Smith, enclosing a letter from Ms Mayberry, dated 22 August:

*I am currently the Lead Maternity Carer for Elise Dillon (Neame). This will be Elise's second child.*

*Elise's due date is 22<sup>nd</sup> October 2012. Elise is currently 31 weeks pregnant.*

*Elise has had health issues this pregnancy. So I told Elise that due to her health concerns it would be advised [sic] to finish work earlier than what Elise expected.*

*On the 18<sup>th</sup> of July it was decided that Elise would finish work, for the health of her and the baby.*

[43] The letter also drew Ms Smith's attention to section 13 of the Parental Leave and Employment Protection Act which provides that if a midwife determines that a pregnant employee should begin her parental leave earlier than anticipated the midwife may give the employee a certificate specifying the date on which the employee should begin her maternity leave.

[44] Ms Baldwin's letter again reminded Ms Smith that an employer:

*...must not refuse to allow an employee to exercise any rights and benefits in respect of parental leave or a parental leave payment due to any irregularity in the formal requirements under the Act. In addition, the Act provides that an employer **must** fill in its portion of the form relating to Paid Parental Leave (IR880).*

*To resolve this matter, please complete the Employer's section of the application for Paid Parental Leave. Once the form has been completed please let me know so I can arrange a date and time to uplift the form from you.*

*The company should also write to Elise to confirm the arrangements relating to her parental leave.*

*I would appreciate hearing from you by **Friday, 31 August 2013**.*  
[Emphasis in the original letter]

[45] Ms Smith completed the IR880 on 3 September 2012 and delivered it to Ms Baldwin's office. She apologised to Ms Baldwin for the delay which was because she had worked in Auckland for most of the previous week and the week before that and had limited access to emails.

[46] Ms Dillon was notified by the IRD on 19 September 2012 that her paid parental leave had been approved and that she would be paid for the period from 18 July 2012.

[47] Ms Smith and Mr Wong say that Ms Dillon failed to give Impact all the information it needed to complete the IRD880 form any earlier. Mr Wong says:

*There was never any intention to refuse to sign the appropriate forms for parental leave and we did not refuse to sign the forms. Our primary concern was that we ensure that the process was followed as set out in the guidelines and that we complied with New Zealand law.*

[48] Impact's reason for not signing the IR 880 any earlier than it did appears to be that it considered Ms Dillon's application for parental leave did not strictly comply with the requirements under *New Zealand law*. However, when I asked Ms Smith and Mr Wong what aspect of the law Impact alleged Ms Dillon failed to comply with they were unable to tell me.

[49] Once Impact had received Ms Dillon's written application and Ms Mayberry's certificate of 2 July 2012, it did not ask Ms Dillon for any further information. Impact completed the IR880 on 3 September. Ms Dillon was notified by IRD on 19 September 2012 that her parental leave payments would be made.

[50] I consider that Impact unjustifiably delayed signing the IR880 form, for the following reasons.

[51] Ms Dillon complied with the requirement to make her application for parental leave in writing and signed by her by posting the letter to Impact on 20 July 2012. The relevant parts of s.10 of the Parental Leave and Employment Protection Act 1987 (PLEP Act) provide that:

*Maternity leave shall begin –*

*(a) on the date of confinement; or ...*

*(c) on such earlier date –*

*(i) as is determined in accordance with section 11 or section 12 or section 13...*

[52] Section 12 of the PLEP Act provides that maternity leave may begin on any date before *the date of confinement by agreement between the female employee and her employer*.

[53] Section 31 of the PLEP Act provides:

*(1) An employee who wishes to take parental leave under this Act shall give written notice to the employee's employer of the employee's wish to take that leave.*

*(2) The notice under subsection (1) shall state the proposed date on which the employee wishes to commence leave, and the duration of the leave.*

*(3) Except where the employee is proposing to adopt a child, the notice under subsection (1)—*

*(a) shall be given at least 3 months before the expected date of delivery; and*

*(b) if given by a pregnant employee, shall be accompanied by a certificate from a medical practitioner or a midwife—*

*(i) certifying that the female employee is pregnant; and*

*(ii) stating the expected date of delivery; ...*

[54] The evidence establishes that on 18 July 2012 Ms Dillon and Ms Smith agreed that Ms Dillon should end work immediately and go on her maternity leave early. Also on 18 July 2012 Ms Dillon provided Ms Mayberry's certificate which complied with s.31(3)(b) of the PLEP Act.

[55] On 6 August 2012 Ms Baldwin advised Ms Smith that Impact was unable to unreasonably refuse to allow Ms Dillon to exercise any of her rights to parental leave or parental leave payments due to any irregularity under the Parental Leave and Employment Protection Act. But Impact did not complete the form until 3 September 2012, almost a full month later.

[56] An intention to refuse to allow Ms Dillon to exercise any right or benefit is not necessary. Neither Ms Smith nor Mr Wong set out to refuse Ms Dillon's receipt of paid parental leave. However, in failing to complete the form at least by 7 August 2012, the day after being advised by Ms Baldwin that it was not entitled to delay doing so because of any (perceived) irregularity in Ms Dillon's application, Impact unreasonably failed to allow Ms Dillon to exercise her right to be receiving parental leave payments before 19 September 2012.

[57] I consider that this action disadvantaged a statutorily granted condition of Ms Dillon's employment during a period when Ms Dillon's pregnancy and associated health meant she should have been secure in the knowledge that her parental leave payments would be made. Therefore Ms Dillon suffered a personal grievance of unjustified disadvantage which gives rise to a consideration of remedies.

### **Was Ms Dillon constructively dismissed?**

[58] A constructive dismissal arises where an employee has no choice but to resign, but the impetus for the resignation comes from the employer.

[59] Ms Oberndorfer submits that the following actions by Impact left Ms Dillon in *no doubt that she was not wanted in the workplace*, leading her to resign:

- removing Ms Dillon's sales leads;
- delaying signing the paid parental leave application;
- lack of earlier notification about the move to Amberley; and
- lack of communication about Ms Dillon's concerns as notified by Ms Oberndorfer.

[60] In *Auckland etc. Shop Employees etc. IUOW v Woolworths (NZ) Ltd*<sup>3</sup> the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- (i) An employer gives an employee a choice between resigning or being dismissed;
- (ii) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (iii) A breach of duty by the employer causes an employee to resign.

[61] Ms Dillon's claim falls within the third category.

[62] In examining whether a constructive dismissal in the third category has occurred there are two relevant questions<sup>4</sup>. First, has there been a breach of duty on the part of the employer which has caused the resignation? To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation.

[63] Secondly, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation; that is, would there be a substantial risk of resignation?

---

<sup>3</sup> [1985] ACJ 963

<sup>4</sup> *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc.* [1994] 1 ERNZ 168 (Court of Appeal) at 172

[64] I will examine the alleged breaches one by one. Two of the alleged breaches are also claimed to have caused unjustified disadvantage to Ms Dillon in her employment and I have already considered those claims.

*Did the removal of sales leads amount to constructive dismissal?*

[65] Impact's action in passing on work to Mr Symon was not a breach of any of its duties to Ms Dillon. Therefore, it could not amount to or contribute to constructive dismissal.

*Could the delay in signing the parental leave form amount to constructive dismissal?*

[66] I have already found that Impact breached a condition of Ms Dillon's employment amounting to a disadvantage to her in her employment. However, I need to consider whether the failure to complete the IR880:

*crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship<sup>5</sup>*

[67] Ms Dillon does not contend that the delay in completing the IR880 alone meant that she was constructively dismissed. I do not consider that it did either. Impact did eventually comply with its obligation. The failure to comply earlier was not a deliberate failure by Ms Smith but a problem with her understanding about whether and when she had adequate authority, from Mr Wong, to sign the IR880. I do not consider that this alone was sufficiently dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[68] However, I need to consider Ms Dillon's other allegations because Ms Dillon claims that these, combined with the delay in signing the IR880, mean Impact demonstrated dismissive or repudiatory conduct and it was foreseeable she was likely to resign.

*Premises moving to Amberley - dismissive or repudiatory or in breach of good faith?*

[69] Ms Dillon first found out that the work premises had shifted when Ms Smith sent her an email on 12 December 2012 reminding her that her parental leave was due to end on 18 December and told her that work was now based in Amberley.

---

<sup>5</sup> *Wellington Clerical Workers Union v Greenwich* [1983] ACJ 965 at 975.

[70] Ms Oberndorfer submits that Impact breached its s.4(1A) duty of good faith to Ms Dillon. In particular, she submits that the decision to move the workplace to Amberley was a decision *that will, or is likely to, have an adverse effect on the continuation of employment* of Ms Dillon, under s.4(1A)(3), because it was much further for Ms Dillon to go to work. Therefore, she submits that Impact had a duty to provide access to relevant information and provide an opportunity for Ms Dillon to comment on that before it made its decision to relocate to Amberley.

[71] Ms Smith's evidence was that the lease of the previous premises expired and Impact was not able to find any other suitable premises within time. Ms Smith reluctantly made the decision to temporarily locate the work from her own home, as had been done in the immediate aftermath of the Canterbury earthquakes in 2011.

[72] Impact did not breach s.4(1A)(3) of the Act. Impact's decision about the location of the work premises was not the kind of decision that s.4(1A)(3) contemplates. It was not a decision made by Impact that would or was likely to have an adverse effect on the continuation of Ms Dillon's employment. The decision about the continuation of Ms Dillon's employment was a decision made by her alone and not by Impact. Impact's relocation of the work premises was not a decision that was dismissive of Ms Dillon or repudiatory but was a necessary commercial decision.

[73] In addition, I do not consider that Impact breached its duty of good faith under s.4(1A)(2) to be active and constructive in maintaining a productive employment relationship by failing to tell Ms Dillon about the relocation of the work premises at the time it happened. Communicating the relocation earlier is unlikely to have assisted Ms Dillon to decide that she could remain employed by Impact. Impact did communicate the fact of the relocation to Ms Dillon before she was due to return from parental leave and that was sufficient in all the circumstances.

*Lack of engagement by Impact with Ms Dillon's claim of unjustified disadvantage*

[74] On 2 October 2012 Ms Oberndorfer sent Impact a letter complaining of its breach of good faith towards Ms Dillon and raising a personal grievance of unjustified disadvantage. Mr Gallagher responded stating that there were not enough details provided to allow Impact to adequately respond.

[75] On 28 November 2012 Ms Oberndorfer wrote to Impact stating that Ms Dillon raised a personal grievance of unjustified disadvantage because Impact removed her

sales leads from her diary without consultation and that after she left on parental leave Ms Smith threw Ms Dillon's diaries, files, stationery and personal photos in the rubbish bin and that another employee returned Ms Dillon's photographs to her<sup>6</sup>.

[76] Ms Oberndorfer said that Ms Dillon had requested a copy of her employment agreement and her payslips *approximately four times and did not receive anything*. The letter also alleged that Impact's actions amounted to breaches of good faith and that Ms Dillon's pay rates were unilaterally changed and not based on a reliable system. It asked that her pay be reassessed and corrected.

[77] On 12 December 2012 Ms Smith wrote an email to Ms Dillon and forwarded it to Ms Oberndorfer through Mr Gallagher. Ms Smith reminded Ms Dillon that her parental leave ended on 18 December and that meant, unless she had changed her mind, she was due to return to work on 19 December 2012. Ms Smith asked Ms Dillon to let Impact know as soon as possible when she intended to return to work.

[78] Ms Smith also informed Ms Dillon that the business had moved from Christchurch and was currently located at Ms Smith's home in Amberley. Ms Dillon was told the business would close for the Christmas break at the end of the day on 20 December 2012 and reopen on 8 January 2013.

[79] On 14 December 2012 Ms Dillon wrote to Ms Smith stating that new work location was too far away from her home and from her daughters' day care. She also considered that being expected to return to work for:

*... one day before Christmas break is another example of the unreasonable approach you have taken towards me in the latter stages of my employment. You have made no attempt to discuss my returning after the Christmas break (which would be logical) and you didn't bother telling me about the move to Amberley. ...*

*I think you have pushed me to leave by not communicating properly and refusing to help resolve the problems I have raised. Because of the treatment and the lack of communication I will not be able to return to work.*

[80] I note that it was Ms Dillon, not Impact, who had nominated her last day of parental leave to be 18 December 2012. If she wished to delay her return to work until after the Christmas break that was something she could have brought up with Impact, as part of her ongoing duty of good faith communication.

---

<sup>6</sup> Evidence established that Ms Smith did not throw items belonging to Ms Dillon away. Ms Smith also suggested that Katelin Rogers return Ms Dillon's photos to her.

[81] On 17 December 2012 Mr Gallagher responded to the 28 November 2012 letter denying the allegations and asking for them to be withdrawn. He also raised the issue of Ms Smith's concerns in July 2012 about Ms Dillon's absenteeism and attitude.

[82] On 20 December Mr Gallagher sent Ms Oberndorfer a response to Ms Dillon's resignation letter and notified her that in the circumstances Impact did not see any useful purpose being served by mediation. In response to Ms Dillon's resignation Ms Smith explained the reasons for the move to Amberley and expressed surprise that Ms Dillon believed she had been forced to resign. She asked Ms Dillon to reconsider her resignation and suggested she may instead wish to extend her parental leave, which is what Ms Dillon had suggested was *logical*. Ms Dillon was asked to let Impact know by 4 pm Friday, 21 December 2012 whether she wanted to reconsider her decision to resign.

[83] Also on 20 December 2012 Ms Oberndorfer sent a further letter requesting Ms Dillon's pay slips and a copy of information about the bonus structure. She wrote that:

*The combined actions of Ms Smith have unjustifiably disadvantaged my client and now amount essentially to a constructive dismissal.*

[84] Ms Oberndorfer also suggested ways to progress resolution of the unjustified disadvantage claims including asking for reconsideration of Impact's earlier refusal to attend mediation. The matters were not resolved and on 30 April 2013 Ms Dillon's statement of problem was filed with the Authority. The parties were directed to mediation but no agreement was reached.

[85] If there was any breach of Impact's duty of good faith to communicate adequately and to be responsive to Ms Dillon it could only be between 28 November 2012, when Ms Oberndorfer provided details of Ms Dillon's disadvantage claim, and 17 December 2012, when Mr Gallagher's response to the 28 November letter was sent. Ms Smith's 12 December letter was silent on Ms Dillon's personal grievance claim but did convey an expectation that she would be returning to work. That is evidence that Impact wanted Ms Dillon to return after her maternity leave.

[86] Mr Gallagher's 17 December letter was received after Ms Dillon tendered her resignation and gave as a part of her reasons the lack of communication about the

problem she had raised. Therefore, it is unfortunate that Mr Gallagher was silent on her resignation. Ms Smith and Mr Gallagher failed to consider the issues related to Ms Dillon together as a whole and I consider this contributed to Ms Dillon not accepting Ms Smith's later request to reconsider her resignation in the spirit it was, I have no doubt, intended. Impact did not want Ms Dillon to resign and asked her to reconsider over the holiday break and offered her the possibility of extending her leave instead of her resigning at that stage.

[87] In evidence given at the investigation meeting Ms Dillon said that even before she heard from Ms Smith about her return to work she was:

*... still discussing with Anna whether I would go back...*

*when my baby was born I didn't hear anything from her [Ms Smith]. I've known her since I was 18 and I felt really crushed. I was unsure about going back but when I found out it was in Amberley I knew it was impossible. The petrol and travelling time meant I couldn't work in Amberley. I couldn't have afforded to reduce hours and keep working at Impact while in Amberley.*

[88] Despite Impact's refusal to attend mediation to deal with the disadvantage claim I do not consider its actions in any way amounted to a destruction of the trust and confidence that Ms Dillon needed to have to remain employed. Ms Dillon's resignation was as much a result of the fact that with two young children she wanted to work fewer hours than the hours she had worked prior to her maternity leave. That combined with the distance she would have to travel to Amberley meant continuing to be employed by Impact would not be financially viable for her. Even if Ms Smith had agreed to Impact contributing to Ms Dillon's cost of petrol it is not clear that she would have decided to return to work because of the travelling time.

[89] Impact did not breach its duty of good faith.

### **Did Ms Dillon breach her duty of good faith to Impact?**

[90] Mr Gallagher submitted that Ms Dillon breached her duty of good faith to her employer by failing to be honest and open about her health during her pregnancy.

[91] Apart from not telling Impact about the fact that she had vomited blood about a week before she went on maternity leave there is simply no evidence that Ms Dillon failed to be communicative with Impact about her pregnancy and her health. Ms Smith knew that Ms Dillon had extremely bad morning sickness and had worked to

assist Ms Dillon by moving the position of her desk. The discussion with Ms Mayberry about ending work as soon as possible was the day before she went on maternity leave. Ms Dillon did not breach her duty of good faith in failing to be open and honest about her health during her pregnancy before she went on leave.

[92] Mr Gallagher also submitted that Ms Dillon was not responsive and communicative, or honest about the fact that she was working for her grandmother's business, The Iris Garden. He is referring to the following.

[93] On Linked In Ms Dillon (under her maiden name of Neame) lists herself as being the Advertiser for The Iris Garden from August 2012 to the *present*.

[94] On her Facebook page Ms Dillon wrote that in June 2012 she *left job at The Iris Garden*. The job she claimed to have had was as the personal assistant to the manager.

[95] At the investigation meeting Ms Dillon said she had never held either position with The Iris Garden. In other words, she posted false information online. She said that to feel better about herself she elevated the help she had given her grandmother with marketing beyond what it really was. That impacted negatively on my assessment of Ms Dillon's credibility in relation to her evidence. However, I do not consider that it had any negative effect on her employment relationship with Impact before she resigned. Therefore, Ms Dillon did not breach her duty of good faith to her employer.

[96] Mr Gallagher also submits that Ms Dillon was insufficiently communicative about her intention to return to work from her maternity leave. In fact, both parties failed to adequately communicate with each other in the way the PLEP Act required. Under s.38 of the Act Impact should have given Ms Dillon written notice within 21 days of the beginning of her parental leave of the date on which her parental leave would end and whether it was able to keep her position open for her until the end of her parental leave.

[97] And under s.39 of the Act Ms Dillon should have, not later than 21 days before the date on which the her parental leave ended, given Impact written notice stating whether or not she would be returning to work at the end of her parental leave. That notice should have been given no later than 27 November 2012 but was not. However, that is not a breach of Ms Dillon's duty of good faith so much as a lack of

understanding of the necessary process combined with her own indecision about whether she wanted to, or could realistically, return to work.

[98] Impact has claimed a penalty for what it says were Ms Dillon's breaches of good faith. Given that I have found no such breaches, no penalty is necessary.

### **Remedies**

[99] Ms Dillon was not unjustifiably dismissed and is not entitled to lost wages.

[100] Neither party has breached their duty of good faith and no penalties are awarded.

### *Compensation*

[101] Ms Dillon claims \$8,000 compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to her feelings. However, that amount was claimed for the combined effect of the two disadvantage claims and the dismissal claim. Given that I have found only one of the disadvantage claims proved, my consideration of compensation cannot include any negative effect on Ms Dillon of feeling that Impact wanted to get rid of her and had effectively dismissed her, or from what she considered to have been the unjustified taking of her work from her on 17 July 2012.

[102] I can only consider what, if any, compensation is due to Ms Dillon solely from the delay in signing the IR880 form. Ms Oberndorfer submits that Ms Dillon:

*was very stressed over the difficulties she faced trying to get her maternity leave [I am satisfied she is referring to parental leave payments]. She felt powerless and distraught at struggling to provide the basic necessities for her toddler.*

[103] Ms Dillon's evidence was that the main strain on her was a financial one which necessitated her having to borrow money and seek other assistance from her grandmothers. She felt embarrassed and humiliated having to do so.

[104] It is relevant to weigh Ms Dillon's evidence prepared for the Authority's investigation against with her Facebook entry posted on 19 September 2012:

*Got a letter from the IRD saying im owed A LOT of money ...Gonna frame that one*

*Applied for maternity leave and it took about 12 weeks to process but that's COOL WITH ME! cos now its in a huge lump sum! I think I prefer it this way!!<sup>7</sup>*

[105] Ms Dillon received her lump sum payment about 10 days later.

[106] Impact submits that there:

*is little if any credible evidence ... to support the humiliation and distress the applicant alleges she suffered as a result of the actions of the respondent.*

[107] I consider that Ms Dillon's Facebook entry may have been her genuine feeling at the time she posted it. In the end she was paid all the money she was entitled to by IRD and so suffered no financial loss. I consider her Facebook entry reflects her relief at that. However, for the time from at least early August until she heard from Ms Baldwin that Impact had signed the IR880 I consider there was actual humiliation, loss of dignity and injury to Ms Dillon's feelings for which she should be compensated. She was entitled to remain free from the unnecessary stress of wondering when her parental leave payments might begin and the stress of finding enough money to pay for her family's day to day needs over that time. A reasonable amount of compensation in all the circumstances is \$2,500.

[108] Section 124 of the Act requires me to consider whether Ms Dillon contributed to the situation which gave rise to her unjustified disadvantage and, if so, reduce remedies accordingly. However, Ms Dillon did not engage in any blameworthy conduct leading to the situation in which approval of her parental leave application was delayed, so compensation will not be reduced on the grounds of contribution.

---

<sup>7</sup> The spelling and grammar is exactly as posted on Facebook.

**Costs**

[109] Costs are reserved. The Authority is likely to consider costs on the basis of the daily tariff of \$3,500 per day. The investigation meeting took one day. The parties are invited to agree on the matter. If they are unable to do so, any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

Christine Hickey  
Member of the Employment Relations Authority