ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION (REFER PARAGRAPH 4)

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 81
5428029

	BETWEEN	CAROLYN FILBRY Applicant
	AND	DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Greg Bennett, Advocate for Applicant Phillipa Muir & Rebecca Rendle, Counsel for Respondent
Investigation Meeting:	18 & 19 February 2014 at Auckland
Submissions received:	18 & 24 February 2014 from Applicant 18 February 2014 from Respondent
Determination:	07 March 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Carolyn Filbry, was employed by the Respondent, the Department of Corrections (the Department), as a Corrections Officer from October 2007 until her employment was terminated on 9 August 2013.

[2] Ms Filbry claims that she has been unjustifiably constructively dismissed as a result of breaches by the Department of the duties which it owed to her.

[3] The Department denies that it constructively dismissed Ms Filbry, and claims that she voluntarily terminated her employment following her resignation on 12 July 2013.

Prohibition on publication

[4] **I order that the name of the prisoner involved is not to be published. The prisoner is to be referred to as Prisoner A, a letter bearing no relationship to the prisoner's actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Issues

[5] The issues for determination are:

a. Whether Ms Filbry was unjustifiably dismissed as a result of breaches of duty owed to her by the Department, specifically a breach of the duty of care:

- to ensure Ms Filbry's safety;
- in respect of the Fact Finding Review process; and
- of the implied duty to maintain and build the employment relationship by having suggested the option of a medical retirement at a meeting held on 7 May 2013

b. Whether the Department acted unreasonably by accepting Ms Filbry's resignation

c. Whether the Department was estopped from accepting Ms Filbry's resignation letter.

d. If Ms Filbry was unjustifiably dismissed, or if she resigned and the Department unreasonably accepted such resignation, to what extent Ms Filbry contributed to the termination of her employment.

Background Facts

[6] Ms Filbry commenced employment with the Department on 23 October 2007 as a Corrections Officer at the Spring Hill Correctional Facility (Spring Hill). Ms Filbry was a member of the Corrections Association of New Zealand (CANZ).

[7] Spring Hill is a correctional facility accommodating approximately 1100 prisoners and 400 staff members. The prisoners progress through various stages of imprisonment from Assessment (formerly High Security), and graduate to handcuff units to Internal Self-Care to External Self-Care.

[8] Prisoners who have reached a stage when they are moving towards rehabilitation and reintegration into society are housed initially in the Internal Self-Care (ISC) unit, then the External Self-Care(ESC) unit, and finally in Whare Oranga Ake, a separate unit to the ESC unit operated by a private provider.

[9] The ESC unit is minimum security and mainly houses prisoners who are at the end of their sentences. It is an unlocked residential facility outside of the prison wall and operates on a high level of trust.

[10] Mr Dennis Taylor, Residential Manager, said that there are robust assessments and processes that take place to ensure that a prisoner is of low risk to themselves, staff and the community before they are placed in the ESC unit. This involves a prisoner successfully completing specific re-integration and rehabilitation programmes, demonstrating good behaviour and working with community workers and psychologists.

30 January 2013 Incident

[11] On 30 January 2013 Ms Filbry entered the room of Prisoner A who was housed in the ESC unit, and removed a copy of the NZ Road Code which she found there and which was marked as belonging to ISC. Shortly afterwards, Prisoner A had approached her and attempted to snatch the Road Code from her, claiming that he had been given it by Corrections Officer Storr from the ISC unit.

[12] Later that day Ms Filbry completed an Offender Note making a complaint of "*Threatening Behaviour"* on the part of Prisoner A in which she reported that Prisoner A had:

> "*… lunged at me and attempted to forcibly snatch the book from my hand. I refused to give it to him and he walked off in the opposite direction yelling back at me, telling me to get a real job and that I am in trouble".*

[13] The following day, 31 January 2013. Ms Filbry interacted with Prisoner A regarding his parole date, and she continued to work in ESC until 21 February 2013.

[14] Ms Filbry said that during this period of time she had raised no concerns about her safety when working with Prisoner A either to her Manager, Mr Taylor, or to CANZ

[15] On 21 February 2012 Prisoner A pleaded guilty to the complaint which Ms Filbry had made against him and had been sentenced to 28 days loss of privileges. Ms Filbry who had given evidence at the complaints hearing said that as Prisoner A had left he had grinned at her and said words to the effect of "*I told you I would get away with this".*

[16] Ms Filbry said that she had regarded the 28 days loss of privileges sentence as a "*non-event",* however Mr Taylor said that the loss of privileges penalty meant that Prisoner A had been unable to have a planned home visit which had greatly upset him.

[17] On 22 February 2013 Ms Filbry was absent on sick leave, and subsequently annual leave, returning to work on 4 March 2013.

Security Classification and Adjudicator Issue

[18] On 24 February 2013 Mr Taylor requested a Security Classification Review be completed on Prisoner A in accordance with the standard practice following a finding of guilt or a guilty plea on a misconduct charge. This had been undertaken on 4 March 2013 by Senior Correctional Officer (SCO) Riddles.

[19] The Security Classification involved a five page assessment of Prisoner A with page 4 of the assessment making provision for "*Override Reasons and Recommendations".*

[20] Although the initial assessment under taken by SCO Riddles had assessed Prisoner A as '*High*' risk, this had been overridden by Principle Corrections Officer (PCO) Beavan to '*Minimum*' and the override had been subsequently checked and approved by the Custodial Support Manager, Ms Faaea Aufai-Leone, on 5 March 2013.

[21] On 13 March 2013 Mr Zan Southon, a PCO at Spring Hill and National General Secretary of CANZ, emailed Mr Kanawa, then Prison Manager, raising a complaint about the adjudicator in the complaint process undertaken in respect of the complaint made on 30 January 2013 made by Ms Filbry about Prisoner A.

[22] Mr Southon, also raised a concern about the Security Classification Review to which Mr John Kanawa responded by email on 27 March 2013. In the email Mr Kanawa confirmed to Mr Southon that he was: "*supportive of the override and process".*

[23] As a result of the concerns raised by Mr Southon, a Fact Finding Review (FFR) was subsequently undertaken by Mr Paul Gregg, a Residential Manager from Waikeria Prison. The FFR was completed on 30 May 2013.

Stress concern

[24] Following her return to work on 4 March 2013 in the ESC unit, Ms Filbry worked two days but did not attend for work on 6 March 2013 as expected. As he had expected her to attend for training that day, Mr Taylor said he had telephoned her to enquiry why she was not at work. Ms Filbry had responded that she had to visit the doctor that afternoon with a family member and that she would be taking stress leave.

[25] Following his telephone conversation with Ms Filbry, Mr Taylor emailed Mr Dean Hyde, Senior Human Resources Advisor, who had advised that in light of Ms Filbry's comment about taking stress leave, there should be a meeting held with her.

[26] Ms Filbry was absent from work from 6 March 2013 until 24 March 2013, supplying medical certificates in respect of her absence at this time which stated only that she was unfit for work providing no further details..

[27] On 26 March 2013 Mr Dustow, Site Prosecutor and CANZ representative, sent an email to Mr Taylor and Mr Beavan in which he referred to the sentencing of Prisoner A to 28 days loss of privileges as having no effect on the prisoner, and to Ms Filbry expressing concerns about her being in the same unit as Prisoner A due to: "*constant taunting*" by him. This email did not mention any safety concerns on the part of Ms Filbry at working with Prisoner A.

[28] Ms Filbry said she had received a copy of the email Mr Southon had sent to Mr Kanawa on 13 March 2013 and that same day she had also received an email dated 26 March 2013 from Mr John Dustow.

[29] In that email Mr Dustow advised her that he had had discussions with Mr Taylor and Mr Beavan who were keen to have her back, and that they would place her somewhere other than the ESC unit to assist her with her concerns about working with Prisoner A.

[30] Ms Filbry said she had replied to Mr Dustow and said that this was not acceptable as it should be Prisoner A who was moved and not her.

[31] Ms Filbry said that she had received a call from Mr Taylor on 25 March 2013 prior to her attending for work, advising her that she would be working in the ISC unit that day. She said she had also advised him that she considered that Prisoner A should be moved and not her.

[32] Mr Taylor explained that the placement of Ms Filbry in the ISC unit was a temporary measure designed to deal with her opposition to working with Prisoner A, who had been

correctly placed in the ESC unit in accordance with his security classification. Mr Taylor stated that during the telephone conversation with Ms Filbry prior to her attending for work, she had not mentioned any safety concerns related to working with Prisoner A.

Meeting on 25 March 2013

[33] On 25 March 2013 Mr Taylor met with Ms Filbry, Mr Beavan and Mr Dustow, to discuss the temporary placement of Ms Filbry in the ISC unit.

[34] During the meeting Mr Taylor said it had been explained to Ms Filbry that there was no basis for moving Prisoner A from the ESC unit as he had been through the adjudication process, penalised and his security rating re-assessed, thus that his location in the ESC unit was appropriate, and as Ms Filbry raised an issue with being placed in the ISC unit, they could look at another temporary placement to another unit, such as Reception and Movements. Accordingly they would meet with her later that day.

[35] Ms Filbry having advised that she wanted her union representative present at the follow-up meeting, Mr Taylor said it had been agreed to hold this the following day, 26 March 2013.

Sick Leave 26 March – 20 May 2013

[36] On 26 March 2013 Ms Filbry was absent from work as a result of sick leave, and remained on unpaid sick leave until 20 May 2013.

[37] During that period of her absence, Mr Taylor said he made several attempts to call Ms Filbry, but on each occasion the telephone was not answered. However on 29 March 2013 Mr Taylor said the telephone had been answered by Mr Noel Thornton, Ms Filbry's husband, who had handed the telephone to Ms Filbry.

[38] Mr Taylor said that during the telephone call with Ms Filbry on 29 March 2013 he had offered her assistance and asked if there was anything the Department could do for her. He also said that Ms Filbry had referred to a serious personal family issue and her own health issues, however she had not specified what these were.

[39] Mr Taylor said he had asked when she was going to return to work, however Ms Filbry had not been prepared to engage with him on this issue. During the telephone call Ms Taylor said that Ms Filbry had not made any reference to Prisoner A.

[40] Ms Filbry said she had not been contacted during the period and denied receiving the telephone call from Mr Taylor on 29 March 2013. However on the basis that Mr Thornton confirmed at the Investigation Meeting that he remembered speaking to Mr Taylor that day and passing the telephone to Ms Filbry who had then conversed with him, I accept Mr

Taylor's evidence that he had made that call, and the previous calls referred to above, to be correct.

[41] Mr Taylor said he had further spoken to Ms Filbry on 19 April 2013 and offered her EAP assistance at that time, and had asked about her return to work, however she had not wished to discuss this.

[42] Given Ms Filbry's lengthy absence on unpaid sick leave, Mr Taylor said that he had wanted to meet with Ms Filbry to discuss her return to work. He had therefore written to her on 1 May 2013 and asked her to attend a meeting to be held on 7 May 2013 to: "*proactively start working towards your return to work at Spring Hill".* Mr Taylor explained that Mr Hyde would be present at the meeting, and invited Ms Filbry to bring a support person.

[43] Mr Taylor ended the letter:

> *Finally, Employee Assistance Programme (EAP) services are available at all times and can be contacted directly on 0800 327 669. This is an independent, confidential support and counselling service available at no cost to you".*

Meeting on 7 May 2013

[44] Ms Filbry attended the meeting held on 7 May 2013 with Mr Taylor and Mr Hyde accompanied by Mr Thornton and Mr Southon.

[45] During the meeting Ms Filbry said she had been "*aghast"* when Mr Taylor had said he could make her see a doctor and had mentioned the possibility of medically retiring her.

[46] Mr Hyde described the meeting as being a cordial one, and said he had asked if Ms Filbry and Mr Southon were amenable to having a candid discussion, and Mr Southon had indicated that they were interested in this suggestion.

[47] Mr Taylor said that as Ms Filbry had had long periods of sickness absence he had raised the possibility of Ms Filbry having a medical assessment in accordance with clause 6.3.1 of the Collective Agreement (Collective Agreement) between the Department and CANZ which stated:

> *Employees may be required to undergo medical examinations during their employment, as directed by the department, to assess whether they continue to meet the requirements of their role.*

[48] Mr Taylor confirmed that he had also suggested that Ms Filbry could consider medical retirement as an option, although he had not pursued this when Ms Filbry said that she wished to return to work.

[49] Mr Southon confirmed at the Investigation Meeting that there had been no objections made by Ms Filbry or himself to the suggestion of a medical examination or to the option of medical retirement being mentioned during the meeting. He further confirmed that after Ms Filbry said she wished to return to work, the medical retirement option had not been further discussed.

[50] Mr Taylor said that he had gained the impression from the meeting that Ms Filbry's continued absences were centred on her personal family concerns.

[51] Mr Taylor said that Ms Filbry was offered EAP during the meeting and also asked what other support could be provided to her, however she had replied that no assistance was required. Mr Southon confirmed at the Investigation Meeting that Ms Filbry had been offered further assistance and she had replied that she was fine.

[52] Mr Southon said he had also raised the issue of moving Prisoner A out of the ESC unit, however Mr Taylor had told him to raise this matter with Mr Kanawa.

Events 7 May to 12 July 2013

[53] Ms Filbry said that Mr Taylor had made no contact with her following the meeting on 7 May and her return to work on 20 May 2013 following full medical clearance, however Mr Taylor said that he made several attempts to contact her during that time, which evidence I find convincing based on Ms Filbry's denial of the confirmed telephone contact on 29 March 2013.

[54] On 14 May 2013 Ms Filbry had a telephone conversation with Mr Kanawa during which he had informed her that Prisoner A would be moved to the ISC unit for the duration of the FFR.

[55] Following medical clearance, Ms Filbry returned to work on 20 May 2013, and worked in the ESC unit.

[56] On 26 May 2013 Ms Filbry provided a written statement for the FFR. In the statement Ms Filbry had written that she had asked SCO Riddles on 21 February 2013 if Prisoner A was to be moved from the ESC unit but had been informed that he had not. Ms Filbry recorded that the following day she had: " *Called in sick, ... I was feeling physically drained as I had been up most of the night with asthma, exasperated by all the recent stress"*

[57] Under the date of 26 March 2013 Ms Filbry had recorded in her written statement that: "*The humiliation had become too great for me and had again taken its toll on my physical wellbeing and I could no longer face the prospect of going to work".*

[58] Mr Gregg completed the FFR on 30 May 2013. In the FFR Mr Gregg concluded that the penalty awarded to Prisoner A of 28 days loss of privilege was appropriate and that: "*because the prisoner was on LOP's he could not undertake Home Leave, this aspect had a significant punitive effect on the prisoner behaviour"* .

[59] The FFR also concluded that the challenge to Prisoner A's security classification of "*minimum*' was not substantiated.

[60] In the FFR Mr Gregg had recommended that: "*CO C Filbry is interviewed to ascertain her well-being status and support needs, and that the security classification and misconduct process are explained to her."* This recommendation was followed up by Mr Roger Mita, and by Mr Taylor.

[61] Following the completion of the FFR on 30 May 2013, Prisoner A was returned to the ESC unit and remained there until 11 July 2013 when he was transferred to Whare Oranga Ake.

[62] Mr Taylor said that at the beginning of July 2013 he had been become aware of rumours that Ms Filbry was thinking of resigning. Accordingly he had telephoned her on 4 July 2013 and asked her if there was any reason for the rumours, to which Ms Filbry had responded that a family member was ill and she was having difficulty coping. Mr Taylor said he had again asked if there was anything the Department could do to assist her, however she had said no.

[63] Apart from one day of sickness absence Ms Filbry continued to work in the ESC unit until Monday 9 July 2013. Ms Filbry said that she had had to deal with a pressing and very serious family issue on 10 July 2013.

[64] On 11 July 2013 Ms Filbry said that she had been required to lock/unlock the Whare Oranga Ake in which Prisoner A was housed. Mr Taylor said that he had not been aware of any requirement for Ms Filbry to lock/unlock Whare Oranga Ake, and was not aware that she had done so on that date.

Resignation

[65] On 12 July 2013 Mr Chris Lightbown, then Acting Prison Manager, said that he had received an email from Ms Filbry tendering her resignation. In the email Ms Filbry had written:

> *After much thought it is with deepest regret that I am giving notice of my forced resignation from employment with the Department of Corrections.*
>
> *My resignation will take effect from 9th of August 2013.*

[66] Mr Lightbown said that while he noted Ms Filbry was saying that she had given the issue "*much thought*", he was concerned at her claim that her resignation was *"forced"*.

[67] As this was his first dealing with Ms Filbry since he had arrived at Spring Hill four weeks earlier, Mr Lightbown said he had wanted to ensure that this was the decision Ms Filbry wanted to make, and that she had discussed any concerns with her Manager, Mr Taylor.

[68] Accordingly Mr Lightbown had discussed his intention to allow Ms Filbry a 'cooling down' period with Mr Hyde, who said he had been fully supportive of this decision.

[69] Mr Lightbown responded to Ms Filbry's email that same day, stating:

> *Dear Carolyn,*
>
> *Thank you for your email. I acknowledge that you have given four weeks' notice and I would honour the date you have suggested. However, I would ask that you re-consider your decision over the weekend and I'd be grateful if you could re-affirm Monday.*
>
> *I also note that the tone of your letter suggests that this isn't a decision you wish to make and I wouldn't expect anyone to feel they have been forced to resign. Therefore could you discuss your concerns with your Manager who I believe is Dennis who I have copied in.*
>
> *Finally, EAP is available to you if you wish 0800 327 669.*

[70] On Monday 15 July 2013 Mr Lightbown said that as he had not heard from Ms Filbry, he had emailed Mr Taylor asking that he make contact with her.

[71] Ms Filbry said that she had been dealing with a distressing and urgent family matter on 15 July 2013 which was why she had not responded to Mr Lightbown on that date, however she had not informed him of this, nor requested more time to respond, nor had she taken up the offer of EAP assistance.

[72] Mr Taylor spoke to Ms Filbry on Wednesday 17 July 2013 by speaker phone with Mr Hyde present. Mr Taylor reported by email to Mr Lightbown that Ms Filbry had confirmed that she had received his email of 12 July 2013, had acknowledged that she was on sick leave, and that, when offered EAP assistance, she had said that this would not help.

[73] Mr Taylor said, and Mr Hyde confirmed, that Ms Filbry did not rescind her resignation during this call.

[74] Mr Lightbown said that as he had been satisfied that Ms Filbry had had five days to reconsider matters, access EAP and to discuss any issues with himself or Mr Taylor, he felt comfortable to process her resignation given that her decision had been made after "*much thought"* and she had been allowed additional time for further reflection. He had therefore asked Mr Hyde to action Ms Filbry's resignation.

[75] On 18 July 2013 Ms Filbry emailed Mr Lightbown and requested additional time to re-consider her decision to resign. Ms Filbry requested time to be granted: "*until Monday, 22nd July to respond*".

[76] Mr Lightbown responded by email dated the same day advising that he would need to take advice from the HR personnel, but if she wished to re-consider he would discuss any correspondence the following week. The email concluded: "*In the meantime I just want to reiterate that EAP is available to you".*

[77] Mr Lightbown said that Ms Filbry had contacted him on 22 July 2013, however it was not to rescind her resignation. Instead by way of an email from Mr Southon attaching a letter from her dated 22 July 2013, Ms Filbry had raised a personal grievance against the Department in relation to the incident with Prisoner A on 30 January 2013. In the letter Ms Filbry had claimed that the Department had not shown good faith in dealing with her complaint against Prisoner A.

[78] In the personal grievance letter, Ms Filbry had set out a number of areas in which she felt the complaint had not been properly dealt with, and concluded these at stated at point (k)

by stating that she had: "*been left with no option other than to resign because of the discrimination and humiliation I have been subjected to."*

[79] On 23 July 2013 Mr Lightbown said he had received an email from Ms Filbry asking to withdraw her resignation because she had had a: "*change of heart".* As he had already allowed Ms Filbry a 'cooling down' period and had accepted her resignation in good faith, Mr Lightbown said he was not prepared to agree to her withdrawing it at this stage.

[80] On 24 July 2013 Mr Lightbown provided a response to Ms Filbry's email in which he explained that the Department did not accept that she had grounds for a personal grievance, nor did the Department accept that she had any grounds for a claim of discrimination.

[81] On 25 July 2013 Mr Lightbown sent Ms Filbry a formal letter acknowledging her resignation and that her last day would be 9 August 2013. Ms Filbry said that she had not received this letter.

[82] On 30 and 31 July 2013 there had been email exchanges between Mr Southon and Mr Lightbown in which Mr Southon asked if Mr Lightbown would consider allowing Ms Filbry to transfer to the Auckland Regional Women's Correctional Facility (ARWCF).

[83] Mr Lightbown said he had responded by pointing out that he had allowed Ms Filbry a 'cooling off' period and that while he acknowledged that Ms Filbry might be experiencing some disappointment due to her decision to resign, he believed her decision had been made with clear and thoughtful intent. Mr Lightbown said he had also suggested that Ms Filbry submit an application to ARWCF.

[84] Although a meeting was proposed for early August 2013 to discuss Ms Filbry's personal circumstances, this was supplanted by mediation. Mediation did not resolve matters, and Ms Filbry filed a personal grievance with the Authority on 6 August 2013.

Determination

Constructive Dismissal

[85] An employee is usually entitled to resign from their employment on a unilateral basis. In this case, the Collective Agreement made provision for this situation at clause 9.1.1. which required the employee to provide four weeks' notice of termination.

[86] The agreement of the employer to such unilateral notice is not required, the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton:*[1]

> *Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.*

[87] There is no obligation on the employer to dissuade the employee from leaving, although they may choose to do so in some cases. An employee who has resigned has not been dismissed.

[88] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[89] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.[2]

[90] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*[3] there are three fundamental situations in which a constructive dismissal claim may arise:

i. An employee is given a choice between resigning and being dismissed;

ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;

iii. There had been a breach of duty by the employer which causes an employee to resign.

[91] Ms Filbry is claiming a breach of duty on the part of the Department. The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*[4]. The Court of Appeal in examining the question of constructive dismissal observed:

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[1] 5/12/00 AC 94/100, AEC 106/00 at para 21
[2] *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etxc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+
[3] (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372
[4] [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

> *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 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.*

[92] Therefore in examining whether a constructive dismissal has occurred two questions arise:

i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and

ii. Second, 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.

[93] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*[5] observed in describing this type of constructive dismissal:[6]

> *It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have 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.*

[94] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option.

[95] In the case of *Harrod v DMG World Media (NZ) Ltd*[7] *(Harrod)* the then Chief Judge observed that the unsuccessful plaintiff failed in her claim of constructive dismissal in

[5] [1983] ACJ 965
[6] at [975]

circumstances in which: *"... she knew or ought to have known that it could have been discussed further if it was troubling her*."[8]

[96] Further in the case of a claim of repudiatory breach of an employment agreement, an employee may either accept the repudiation of the agreement and resign, or refuse to accept the repudiation and continue to work. In *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd*[9] it was held that a delay in making such an election may be fatal to the employee's claim of constructive dismissal[10]

Was Ms Filbry was unjustifiably dismissed by the Department as a result of a breach of duty of care in respect of her safety?

[97] Ms Filbry claims that being made to work with Prisoner A placed her in a position in which her safety was at risk. I observe that on 30 January 2013 Ms Filbry had no qualms about entering the room of Prisoner A and removing the Road Code which she said she knew would upset him, an unusual action if she had fears for her personal safety in relation to this prisoner.

[98] Further following the incident on 30 January 2013 Ms Filbry had remained at work and finished her shift in the ESC unit that day.

[99] The following day Ms Filbry had interacted with Prisoner A on his parole date, and she remained working in the ESC unit until taking sick leave on 22 February 2013.

[100] Ms Filbry confirmed at the Investigation Meeting that throughout the whole of this period from 30 January to 22 February 2013 she had not informed either the Spring Hill management team, or a representative of CANZ, of any concerns that she had regarding her personal safety working with Prisoner A.

[101] When questioned at the Investigation Meeting as to why she had not done so, Ms Filbry stated that she had felt she: "*would not be listened to",* but was unable to provide any basis or evidence for this belief.

[102] On 21 February 2013 Prisoner A had been sentenced in respect of the complaint made by Ms Filbry about the incident on 30 January 2013. It is very clear from her evidence that

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[7] [2002] 2 ERNZ 410
[8] *Harrod* at [54]
[9] (1990) ERNZ Sel Cas 791 (LC)
[10]

Ms Filbry believed this sentence to have been inappropriately lenient, and that she had difficulty accepting it.

[103] From 22 February 2013 until 4 March 2013 when she was on sick leave and annual leave and following her return to work in the ESC unit on 4 March 2013, Ms Filbry raised no personal safety concerns with the Department about having to work with Prisoner A.

[104] When Mr Taylor telephoned Ms Filbry on 6 March 2013 when she had failed to attend for work as expected, she explained that she was visiting the doctor with a family member, and because she was suffering from stress, although she gave no details as to the cause of her stress, nor did she mention any concerns for her personal safety when working with Prisoner A.

[105] Ms Filbry remianed on sick leave until 25 March 2013 on which date she had been assigned to work in the ISC unit due to her opposition to working with Prisoner A, an issue which had been raised with Mr Taylor and Mr Beavan by Mr Dustow.

[106] This opposition appears from Mr Dustow's email to have been based upon Ms Filbry experiencing: "*constant taunting"* from Prisoner A, However Ms Filbry stated at the Investigation Meeting that she could not explain why that statement had been made by Mr Dustow, and stated that these were: "*not my words*". Other than this reference to "*constant taunting"* which Ms Filbry denied emanated from her, there was no reference in the email to Ms Filbry having concerns for her safety.

[107] There was no mention by Ms Filbry of any safety concerns during the telephone conversation between her and Mr Taylor on 29 March 2013, nor at the meeting held on 7 May 2013 at which Mr Southon had been present.

[108] Following Ms Filbry's return to work on 20 May 2013, she continued to work with Prisoner A from 30 May 2013 until her resignation on 12 July 2013 without raising any issues about her safety with Mr Taylor or any other member of the management team.

[109] The assignment of Ms Filbry to work in the ISC unit I find to have been a temporary operational transfer in response to CANZ notification that Ms Filbry insisted on not working in the same unit as Prisoner A. Such a move was not disciplinary in nature, had no adverse impact on her terms and conditions of employment, and as acknowledged by Mr Dustow in his 26 March 2013 email, such a move was within the operational prerogative of the Department.

[110] At the Investigation Meeting, Ms Filbry agreed that Mr Taylor probably would not have realised at the time that the issue for her was her own personal safety, indeed Mr Taylor

stated that on 25 March 2013 when Ms Filbry returned to work, her attitude was focussed on having Prisoner A moved in order to: "*punish him*".

[111] In circumstances in which Ms Filbry, who had the full support of CANZ representatives, failed to raise any issues about her personal safety, and moreover confirmed at the Investigation Meeting that when she had to deal with Prisoner A: "*that was fine";* I find that the Department was not aware that a breach of duty to Ms Filbry in regards to her personal safety had occurred, let alone foreseen that it was of sufficient seriousness as to cause her to resign.

[112] I further find that in respect of her well-being, the Department made every effort to engage with Ms Filbry in respect of the stress she said she was experiencing and which Mr Taylor believed on reasonable grounds to be caused by the difficult personal family issue with which she was dealing at that time, and which had reached its peak at the time of her resignation.

[113] Ms Filbry was offered access to EAP and other assistance on at least 6 occasions, however she choose not to accept the offers made.

[114] In these circumstances I find that the Department acted as a fair and reasonable employer would act towards an employee on long-term sickness.

Was Ms Filbry was unjustifiably dismissed by the Department as a result of a breach of the duty of care in respect of the Fact Finding Review?

[115] Following concerns raised on Ms Filbry's behalf by CANZ in respect of the handling of the misconduct complaint against Prisoner A, and the subsequent security classification, the Department had engaged Mr Gregg to undertake the FFR.

[116] I find this to have been an appropriate response. Mr Gregg was an experienced member of the Department, and he was impartial and independent thus that his appointment was appropriate.

[117] There is no evidence that the thorough investigation into the misconduct process and outcome and the security classification was undertaken other than in good faith by Mr Gregg. Further it included, and took into account the written statement by Ms Filbry.

[118] The outcome of that FFR included that the 28 days loss of privileges penalty metered out to Prisoner A was appropriate and that the challenge to Prisoner A's security classification process was not substantiated.

[119] The FFR was completed on 30 May 2013. Ms Filbry remained working after that date until her resignation on 12 July 2013, some weeks later. There is no indication in her resignation letter that she was resigning because of the outcome of the FFR, or because she had not been provided with the copy of the report she had requested.

[120] I find no breach of duty on the part of the Department in respect of the FFR.

Was Ms Filbry unjustifiably dismissed by the Department as a result of a breach of the implied duty of maintaining and building the employment relationship by making a suggestion of a medical retirement option at the meeting held on 7 May 2013?

[121] At the time of the meeting with Ms Filbry on 7 May 2013, she had been on sick leave for a significant period of time. During that meeting various options relating to her return to work were discussed with Ms Filbry who had the support of both Mr Southon and Mr Thornton at that meeting.

[122] The Collective Agreement provided at clause 9.2.2. for medical retirement. Mr Taylor said he had raised it as an option for Ms Filbry to consider, but had not pursued it as soon as she said that she wished to return to work.

[123] Mr Southon confirmed that the suggestion of medical retirement had presented as an option only, and that it had been not pursued once Ms Filbry had made clear her intention to return to work.

[124] I find no breach of the implied duty in maintaining and building the employment relationship in the Department having made Ms Filbry aware that medical retirement was an option in circumstance in which she had been on a prolonged period of sick leave given that the suggestion was not pursued once Ms Filbry made her intention to return to work clear.

[125] Further I also find no breach of such implied duty by the Department seeking that Ms Filbry undertake a medical examination in accordance with clause 6.3.1 of the Collective Agreement.

[126] It was not only set out in the Collective Agreement that the employer could require this: " *... to assess whether they continue to meet the requirements of their role"* but I consider it to be the action of a responsible employer in circumstances in which an employee who had had a prolonged period of sick leave was intending to return to the workplace..

[127] The position of a Corrections Officer is acknowledged by all the parties as a difficult one. I consider that the fair and reasonable employer, provided as in this case with medical

certificates which provided little helpful information, would try to ascertain that the employee was fully medically fit to resume the stresses of such a position. However such a course was not necessary as Ms Filbry returned to work on 20 May 2013 having been provided with full medical clearance by her doctor.

[128] I find no breach of the implied duty of maintaining and building the employment relationship by the Department requesting either a medical assessment, or making the option of medical retirement known to Ms Filbry.

[129] I determine that there had been no breaches of the various duties owed to Ms Filbry as outlined above by the Department.

Did the Department acted unreasonably by accepting Ms Filbry's resignation?

[130] As previously stated, an employee has a right to resign, and there is no onus on the employer to dissuade the employee from so doing. Also once a resignation has been submitted it is not open to either party to withdraw or vary that notice without the consent of the other.

[131] There is also no obligation on the employer to allow the employee a 'cooling period' although in some cases it may be prudent for the employer to do so. A particular circumstance in which this might be appropriate is where the employee had resigned 'in the heat of the moment'. In *Boobyer v Good Health Wanganui Ltd* the Employment Court said of that in this type of case that the employer cannot safely insist on what the employee may have said:

> *This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this issue or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties".*

[132] There is no indication that Ms Filbry resigned 'in the heat of the moment', in fact in her resignation dated 12 July 2013 Ms Filbry states that the decision had been made: " *after much thought",* however Mr Lightbown did in effect allow her a 'cooling period' and requested in his email dated 12 July 2013 that she discuss her concerns with Mr Taylor, and also that she contact him again on Monday 15 July 2013.

[133] Ms Filbry failed to contact him as requested on 15 July 2013 and as a result Mr Lightbown requested that Mr Taylor contact Ms Filbry in connection with her resignation.

Mr Taylor did so, and Ms Filbry confirmed having received Mr Lightbown's email, however she did not rescind or discuss her resignation during that telephone call.

[134] On 18 July 2013 Ms Filbry requested by email to Mr Lightbown a further period of time to reconsider her decision until 22 July 2013, however on that date Mr Southon forwarded her letter dated 22 July 2013 which raised a personal grievance and which stated at point (k) that she had " *been left with no option other than to resign because of the discrimination and humiliation I have been subjected to."*

[135] In an email dated 23 July 2013, the day after giving notice of a personal grievance, Ms Filbry asked the Department if she could withdraw her resignation. That was the first indication given to the Department that she wished to rescind her earlier resignation.

[136] In these circumstances I find that Mr Lightbown, not having been advised by Ms Filbry of any reason for her not having responded as requested on 15 July 2013, and having received the personal grievance letter dated 22 July 2013, had reasonable grounds for believing that Ms Filbry intended to resign.

[137] I determine that the Department did not act unreasonably in accepting Ms Filbry's resignation.

Was the Department was estopped from accepting Ms Filbry's resignation letter?

[138] The Applicant claimed in closing submissions that Ms Filbry understood from the use by Mr Lightbown of the word: "*re-affirm*" in his email of 12 July 2013 that it meant that her resignation would not be effective until she reaffirmed it on Monday 15 July 2013.

[139] As she had not re-affirmed her decision to resign on 15 July 2013, and did not do so thereafter, Ms Filbry claims that the Department is estopped from relying on her decision to resign.

[140] I find no evidence to substantiate the proposition that Mr Lightbown asking Ms Filbry to re-affirm her decision to resign meant that he had made a promise to her that until she did so, that decision would not be accepted by the Department.

[141] Further there is no evidence to indicate that Ms Filbry held a belief that her resignation had been put in a 'hold' position, on the contrary the statement in the personal grievance letter dated 22 July 2013 at point (k) that she had: "*been left with no option other than to resign because of the discrimination and humiliation I have been subjected to."* indicates that she believed her resignation was effective.

[142] Moreover I observe that closing submissions is not the appropriate place to enter new pleadings. If estoppel was to be pleaded as a defence, it should have been pleaded in the Statement of Problem rather than in closing submissions thereby allowing the Respondent to mount an appropriate response.

[143] I determine that the Department was not estopped from relying on Ms Filbry's resignation.

Conclusion

[144] In conclusion, a constructive dismissal applies in circumstances in which the employee is left with no option but to resign. In this case I find that Ms Filbry had various alternatives open to her other than resigning, specifically Ms Filbry:

- could have availed herself of the many offers of EAP or other assistance made by the Department, all of which were open to her to accept, however she declined to do so;

- irrespective of the fact that there appears that there was no requirement for Ms Filbry to lock/unlock Whare Oranga Ake on 11 July 2013, she could have raised any concerns she had about Prisoner A moving to Whare Oranga Ake with either management or CANZ, however she did not do so;

- could have followed the procedure for raising a personal grievance set out at clause 12.3 of the Collective Agreement, including notifying the Regional Manager at clause 12.3.3 of her concerns, however she did not do so;

- could have discussed her concerns with Mr Lightbown who had asked her to respond to him on 15 July 2013, or with Mr Taylor as requested by Mr Lightbown on 12 July 2013, however she did not do so;

- accepted the outcome of the adjudication, security classification and FFR and proceeded to '*move on'*.

[145] I determine that Ms Filbry was not unjustifiably constructively dismissed by the Department.

Costs

[146] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs

within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority