

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 101
5521613

BETWEEN DANIELLE LOUISE GREEN
Applicant

AND MITECH LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Lee-Lon Wong for Applicant
Michael Smyth for Respondent

Investigation Meeting: 29 and 30 July and 3 September 2015

Submissions Received: 5 and 27 October 2015 from Applicant
22 October 2015 from Respondent

Determination: 4 April 2016

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Ms Green's employment were not affected to her disadvantage during her employment.**
- B. Ms Green does not have a personal grievance for unlawful discrimination.**
- C. Ms Green was unjustifiably dismissed from her employment on 2 December 2014.**
- D. Mitech is ordered to pay to Ms Green the sum of \$15,375.00 gross plus 8% being holiday pay, within 28 days of the date of this determination.**

- E. Mitech is ordered to pay to Ms Green the sum of \$10.000 being compensation within 28 days of the date of this determination**
- F. Mitech has not breached the employment agreement between the parties.**
- G. Mitech has not breached its statutory obligations of good faith.**
- H. Costs are reserved.**

Employment relationship problem

[1] Ms Danielle Green claims one or more conditions of her employment were affected to her disadvantage by Mitech's unjustified actions and that she was either unjustifiably actually dismissed or constructively dismissed from her employment as a Services Co-ordinator with Mitech Limited ("Mitech"). Ms Green also claims she was unlawfully discriminated against on the grounds of sex, which includes pregnancy and childbirth, and family status.

[2] Ms Green claims remedies for her personal grievances and penalties against Mitech for breaches of the employment agreement and its statutory duty of good faith.

[3] Mitech denies the claims and says a number of Ms Green's claims are outside the Authority's jurisdiction as they were not raised within the statutory 90 day period.

[4] A number of the issues I investigated as a result of Ms Green's claims overlap each of her claims for unjustified disadvantage and discrimination, and the claims for breaches of the employment agreement and good faith. After setting out the background to the employment relationship I have set out the facts relating to each of the complaints Ms Green had about her employment with Mitech before going on to considering each of Ms Green's claims.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Green and Mitech but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[6] Ms Green commenced employment with Mitech as a Service Planner in November 2012. Ms Green's terms and conditions of employment were set out in a written employment agreement dated 5 December 2012.

[7] Mitech Limited is a licensed distributor of labelling and barcoding equipment. It sells hardware and services the hardware it sells. Mitech's customers tend to be large manufacturing companies which produce and package consumables. Customers need to ensure machinery does not break down and if it does, that the machinery is back up and running as soon as possible. Production stoppages can cost Mitech's customers significantly and therefore customers will often make purchasing decisions based on the level of support provided including response times to breakdowns.

[8] Mr James Cato, Managing Director, told the Authority that most customer calls tend to occur at either end of the working day. That was for two reasons. First, customers often find out that machinery doesn't work first thing in the morning when it is switched on and second, customers who experience problems during the day will often call close to the end of the day as they will want to have the machinery fixed before the night shift commences.

[9] Ms Green's role was part of the Service Department and required her to liaise with clients, receive service requests and organise technicians to attend to the requests. The role was a demanding role and Mitech says it was a critical role in the company which is a small business. The Service Planner role was the main administration function within the Service Department.

[10] Mr Cato described the Service Planner role as requiring Ms Green to take customer calls, identify the problem, and then despatch a technician to site to fix the problem. Mr Cato says the Service Co-ordinator must undertake a number of tasks, including opening a job, ordering parts, liaising with technicians for their availability, organising any travel for the technicians, responding to customer queries regarding the job, invoicing the job and closing the job down. It is a very process driven role and when Ms Green first started in the role processes were still being developed. The role also required Ms Green to arrange for regular servicing of customers' machinery.

[11] Prior to Ms Green being employed in the role, the previous incumbent and Mitech had experimented with the concept of the employee undertaking the role remotely by working from home. That experiment did not work and it became apparent to Mitech that working remotely was not feasible for the business.

[12] During the initial stages of her employment in November and December 2012 Ms Green went through a steep learning curve learning the range of machinery available to, and being used by, customers so that she was able to inform the technicians when despatching them to resolve problems.

[13] Ms Green and her immediate Manager, Mr Andrew Bebb, enjoyed a strong professional working relationship from November 2012 until May 2013. Ms Green says the relationship deteriorated after she announced her pregnancy.

[14] In 2013 Ms Green became pregnant with her first child, with an expected date of delivery of 17 January 2014. Ms Green intended to take a period of leave and return to work following the birth of her child. Ms Green would be the sole care giver for her child.

[15] Ms Green commenced a period of 12 months combined Maternity and Extended Leave (“parental leave”) pursuant to the Parental Leave and Employment Protection Act 1987 (“PLEPA”) on 20 January 2014 and returned to work on 2 September 2014. Ms Green’s last day of work prior to commencing her parental leave was 24 December 2013 because she was on a period of annual leave between 25 December 2013 and 19 January 2014.

[16] On 10 April 2014 Ms Green requested to return to work earlier than 2 September 2014. This request was declined. On 22 April 2014 Ms Green raised a personal grievance claiming one or more conditions of her employment had been affected to her disadvantage by the unjustified actions of Mitech and that she had been subject to discrimination.

[17] Ms Green returned to work on 2 September 2014 but her return to work did not go smoothly. On 1 October 2014 Ms Green raised a personal grievance claiming one or more conditions of her employment had been affected to her disadvantage by the unjustified actions of Mitech which Ms Green says amounted to bullying.

[18] Ms Green commenced a period of sick leave on 6 October 2014 and has not returned to work and her employment has ended.

90 Day issues

[19] Ms Green raised two personal grievances. The first was on 22 April 2014 in which Ms Green claimed she had been disadvantaged in her employment and had been discriminated against on the basis of her pregnancy and family status. The factors giving rise to her grievance include:

- a) refusal to provide light duties and flexibility;
- b) Mr Bebb's change in attitude toward her after she advised of her pregnancy;
- c) refusal to accommodate an early return to work from Parental Leave;
- d) 29 August 2013 meeting;
- e) refusal to provide a larger uniform;
- f) change of manager;
- g) comments made to Ms Green in relation to her pregnancy;
- h) desk being cleared prior to leaving on parental leave;
- i) lack of communication from Mitech during Parental Leave.

[20] The second personal grievance was raised on 1 October 2014. Ms Green claimed that since returning to work she had been subject to bullying and in particular claims she had been subject to:

- a) excessive monitoring;
- b) constant nit picking;
- c) hostile letters instead of conversation;

- d) being belittled in front of others; and
- e) disciplinary proceedings.

[21] Mitech says the majority of claims raised on 22 April 2014 were raised outside the requisite 90 day period and therefore the Authority has no jurisdiction to investigate those claims.

[22] The relevant provisions of the Act relating to the raising of a personal grievance are as follows:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[23] Section 114(2) of the Act makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[24] Section 114(2) of the Act requires there be sufficient specification of the employee's concerns as to enable the employer to be able to address the grievance. To do so, the employer must know what to do.¹

Ms Green's complaints

Refusal to provide light duties and flexibility

[25] Ms Green experienced difficulties in her pregnancy and on 17 September 2013 Ms Green's midwife advised Mitech (through Ms Green) that Ms Green would greatly benefit from working lighter duties if possible as she advanced in her pregnancy.

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

[26] In response, by letter dated 19 September 2013 Mitech's Operations Manager, Mr Ayson, acknowledged receipt of the midwife's letter and advised Ms Green that Mitech would ensure:

- a) a resource was available to access any DG storage areas to limit Ms Green's exposure to chemical vapours;
- b) a resource was available for any lifting/carrying tasks so that Ms Green was not at any risk;
- c) Ms Green was assisted up or down stairs on request.

[27] Mr Ayson requested Ms Green to advise him if she felt unable to discharge her duties effectively or if she was concerned about the impact of her work on her health or that of her baby as soon as possible.

[28] Ms Green was not satisfied with Mr Ayson's response and she wrote to Mr Cato on 4 October 2013 requesting the option of working 2-3 days from home each week. Ms Green was keen to reduce the amount of time she spent travelling to and from work and felt the suggested working from home option would allow her to rest when necessary and concentrate on tasks without constant disturbances. As an alternative, Ms Green suggested her workload be reduced by either receiving assistance with her workload or undertaking an alternative position until her parental leave commenced.

[29] As a final suggestion, if the other two options she had put forward were not possible, Ms Green requested flexible working hours or reduced working hours. This was put forward on the basis that Ms Green was unable to rest in a suitable environment while completing a stressful and demanding role.

[30] Mitech says it responded on 9 October 2013, but this is disputed by Ms Green who says she did not receive a response until the first week in November 2013 when she was advised by Mr Ayson that her request to work from home had been declined. Mr Ayson advised Ms Green that Mitech could not accommodate her working from

home but that he was happy for her to have half a day off each Friday or alternatively she could take two hours off on both Thursday and Friday each week.

[31] For the sake of completeness I have noted that Ms Green has not asserted that her request for flexibility was made pursuant to section Part 6AA of the Act. The letter written by Ms Green does not reference Part 6AA² and the process set out in the Act to resolve disputes under Part 6AA has not been followed.³

Mr Bebb's changed attitude

[32] Ms Green says that after advising Mr Bebb of her pregnancy in or about May 2013 his attitude toward her changed. Ms Green points to a number of factors to illustrate how Mr Bebb's behaviour changed:

- a) Mr Bebb said little during the May 2013 meeting at which her pregnancy was discussed;
- b) Mr Bebb began asking her to leave their shared office when he wanted to meet with other employees;
- c) Ms Green was subject to inappropriate comments at Friday night drinks which resulted in her leaving in tears;
- d) She was denied a larger uniform;
- e) In response to a request by Ms Green that she have a bucket beside her desk so that she did not have to rush to the toilet when she was sick (Ms Green suffered from morning sickness during part of her pregnancy) she says Mr Bebb told her to "...vomit in the car park".

[33] Ms Green raised her concerns with Mr Cato in August 2013 about the treatment she was receiving from Mr Bebb and was advised to raise the issues directly with Mr Bebb.

[34] I am satisfied that when Ms Green raised her concerns in August 2013 she did not do so with a view to raising a personal grievance. She told the Authority that she

² As required by the Employment Relations Act 2000 (the Act) section 69AAC(a)(iii).

³ The Act, section 69AAH.

had decided not to raise matters formally. Ms Green did not raise matters formally until 22 April 2014. All of the complaints Ms Green has raised regarding Mr Bebb's attitude arose prior to her commencing her leave on 24 December 2013.

29 August 2013 meeting

[35] After Ms Green had raised her concerns in August 2013 about Mr Bebb's attitude toward her with Mr Cato, Mr Cato advised Mr Bebb about his conversation with Ms Green. Mr Cato told Mr Bebb that Ms Green wished to discuss her concerns with him.

[36] Mr Bebb had previously discussed with Mr Cato some performance concerns he had about Ms Green and Mr Cato suggested that he should raise the performance concerns at the same time. Mr Cato suggested Mr Bebb make a list of the issues he wished to address with Ms Green so that he did not miss anything during his discussion with her.

[37] On 29 August 2013 Mr Bebb invited Ms Green to meet with him over lunch. There is a dispute about how this invitation was extended but it is common ground that Mr Bebb intended discussing performance concerns with Ms Green but did not give her any advance knowledge of this intention. Mr Bebb's evidence is that he told Ms Green that Mr Cato had indicated she had some issues and invited Ms Green to catch up over lunch.

[38] It was Ms Green's evidence that during the lunch discussion she told Mr Bebb that she felt his attitude toward her had changed and in response Mr Bebb was critical of her performance. Ms Green says she raised concerns about stress levels and how she perceived other employees were reacting to her pregnancy.

[39] Mr Bebb's evidence is that he raised the concerns he had about Ms Green's performance but that Ms Green was very defensive and would not take any responsibility for what he perceived to be her deficiencies in her way of working.

[40] On his return to work Mr Bebb met again with Mr Cato who suggested he confirm the discussions he had with Ms Green in writing. This was done and in a letter to Ms Green dated 29 August 2013 Mr Bebb outlined his perspective of the conversation he and Ms Green had had that day. Mr Bebb set out his understanding

that the meeting had been mutually agreed to address issues expressed by Ms Green and performance concerns raised by Mr Bebb.

[41] It is correct to say that the meeting had been mutually agreed. Ms Green and Mr Bebb both wanted to meet. However, there was no agreement as to what was to be discussed. Ms Green and Mr Bebb both went into the meeting understanding that Ms Green wanted to discuss her concerns about Mr Bebb's attitude toward her but Ms Green was unaware that Mr Bebb wished to discuss performance concerns.

[42] I have accepted Ms Green's evidence that the performance issues raised by Mr Bebb came as a complete surprise to her and that the concerns lacked specificity. Both Mr Bebb and Ms Green gave evidence that Ms Green became tearful during the meeting.

[43] Mr Bebb records in his letter that he told Ms Green that her demeanour and lack of focus in her work was having an impact on the business. He also records that he told Ms Green that he had received a number of complaints from colleagues and customers about the quality of Ms Green's work. No examples of these complaints are set out in the letter and Ms Green told me that when she asked for examples during the meeting Mr Bebb was unable to provide these to her. Mr Bebb also records that he advised Ms Green that he felt there were times when she may as well not have been at work, such was her ineffectiveness.

[44] Ms Green says the meeting ended unresolved. However, the letter from Mr Bebb sets out five action points which Ms Green was asked to address. Mr Bebb records in the letter that he told Ms Green that if she addressed each of the action points it would assist in reducing her stress levels.

[45] Ms Green was asked to sign the 29 August 2013 letter acknowledging that she had received it. Ms Green refused to sign the letter and on 30 August 2013 met with Mr Cato where she disputed aspects of the letter.

[46] In her evidence Ms Green acknowledges that she did not raise the issues regarding 29 August 2013 meeting formally. Ms Green raised her personal grievance regarding the meeting when she set out her concerns in the 22 April 2014 letter.

Refusal to provide a larger uniform

[47] Ms Green was critical of Mitech for not providing her with a larger uniform. I am satisfied that Ms Green was not required to wear a uniform and was not issued with a uniform. During my investigation into this matter, it became clear to me that Ms Green had been given a tee shirt originally purchased for use by Mitech employees working outside the office environment. The evidence indicates that spare “uniform” items were then offered to office based staff.

[48] Ms Green was not required to wear the tee shirt and once she could no longer fit it comfortably, there was no obligation on Mitech to issue her another shirt to accommodate her pregnancy. This issue occurred prior to 24 December 2013.

Change of manager

[49] Ms Green says that in September 2013 a restructuring took place which changed her supervisor from Mr Bebb to Mr Ayson. Ms Green was unhappy with the change in supervisor as she did not believe Mr Ayson had the requisite skills to supervise her work.

[50] Mr Ayson gave evidence that by August 2013 he was becoming concerned that the Service Department was not meeting expectations. He told me that mistakes were being made and jobs were not being invoiced correctly, causing cash-flow issues for the company.

[51] Mr Ayson acknowledged that part of this was due to a growing customer base and a growing number of products which the technicians were required to service. The solution was for Mr Bebb to work harder and longer hours. When this had happened previously Mr Bebb had experienced serious health issues.

[52] By August 2013 Mr Bebb’s health was once again a cause for concern. Mr Ayson removed the Customer Services aspect of Mr Bebb’s role and took these on himself on a temporary basis until the end of the year. Apart from addressing serious concerns about Mr Bebb’s health, this would also provide Mr Ayson the opportunity to assess the service department first hand and gain a better understanding of what was going wrong and to implement changes to make the department more efficient.

[53] Ms Green raised this issue in her letter dated 22 April 2014. The change of manager took place in September 2013. Ms Green also refers to the removal of these

duties as a “restructuring”. This was not so much a restructuring as the removal of some duties from Ms Green’s current manager to another manager for a temporary period.

Comments made to Ms Green in relation to her pregnancy

[54] Ms Green says that Mr Bebb and one other employee had made inappropriate and offensive comments to her about her pregnancy. Ms Green gave me examples of the types of comments that were made to her, most of them about the fact of her being pregnant and how that may have occurred. Ms Green raised her concerns with the employee directly. This worked to prevent further comments and Ms Green told the Authority that the employee became more supportive of her.

[55] This complaint relates to comments made prior to 24 December 2013.

Desk being cleared prior to leaving on parental leave

[56] Ms Green claims that her desk was cleared three days before she was due to commence her period of leave.

[57] Mr Ayson acknowledged that he had cleared Ms Green’s desk on the Friday before Christmas 2013 in the genuine but mistaken belief that Ms Green had already commenced her annual leave and would not be returning until the end of her parental leave in September 2014.

Refusal to accommodate an early return to work from Parental Leave

[58] Ms Green made a written application for parental leave on 12 September 2013 in accordance with the requirements of the PLEPA. In her application Ms Green stated that her leave would commence on 20 January 2014 and she would return to work on 2 September 2014.

[59] On 24 February 2014 Ms Leslie Paurini commenced work with Mitech on the understanding that the role was a fixed term role until 15 September 2014 to cover a parental leave situation. Ms Paurini was undertaking the tasks previously undertaken by Ms Green.

[60] Ms Green met with Mr Cato on 10 April 2014 and requested that she be allowed to return to work early from June 2014. It was common ground that Ms Green was experiencing financial difficulties and she was keen to have a graduated return to work commencing on 25 hours each week and building to 35 hours then full time by September 2014. At the meeting Mr Cato advised Ms Green that as Ms Paurini was on a fixed term contract he would need to discuss the proposal with her.

[61] Mr Cato approached Ms Paurini to discuss the possibility of ending of her fixed term agreement early but Ms Paurini did not agree to ending her employment early and wished to work out the period of the agreement.

[62] I have viewed a copy of Ms Paurini's fixed term agreement and note that Mitech has not complied with its obligation under section 48 of PLEPA to inform Ms Paurini in writing that Ms Green may return to work, in accordance with section 45 of PLEPA before the date on which the employee is required to return to work at the end of the parental leave. I have concluded that this failure led, in part, to Ms Paurini's insistence that she work out the full period of the fixed term agreement.

[63] After discussing Ms Green's request with Mr Bebb, Mr Cato advised Ms Green by letter dated 17 April 2014 that Mitech did not consent to Ms Green returning to work early, that Ms Paurini had not agreed to end her fixed term agreement early and due to a recent increase in staff numbers and an overcapacity in administrative functions, there were no alternative roles available for her to return to.

[64] Responding to Ms Green's request for part-time hours, Mr Cato explained that the role undertaken by Ms Green was a pivotal role upon which the entire service department was centred and that due to the demands of the role it was important that the role be undertaken on a full time basis. Ms Green was requested to plan to make herself available for the full business day upon her return to work in September.

[65] For the sake of completeness there is no dispute that Ms Green was not seeking to return to work under flexible working arrangements under Part 6AA of the Act.

Lack of communication during Parental Leave

[66] In her letter dated 22 April 2014 Ms Green cited the lack of communication during her parental leave as forming part of her grievance. Ms Green claims she was aware of leaving functions and BBQ's that she had not been invited to, that she had received no annual review. Ms Green says that during a meeting with Mr Cato on 10 April 2014 she was told that Mr Bebb would once again be her Manager on her return to work. Ms Green's complaint is that there was no prior communication to her before this decision was made.

[67] During her parental leave and until June 2014 Ms Green was in constant contact with another employee from Mitech, Ms Maria Graham. The two colleagues text each other regularly. The conversation focussed on Ms Paurini, Mr Bebb and Mr Cato. Ms Graham, in particular, passed on information to Ms Green about her perceptions of the environment at work in very negative terms. It is my considered view that these comments from Ms Graham has contributed to Ms Green's sense of grievance. I have read all of the text messages which passed between Ms Green and Ms Graham. I have found some of these messages to be disparaging of both Mr Cato and Ms Paurini.

[68] While Ms Green was on parental leave her employment was essentially suspended and she was no longer an active part of the business. This may have increased her vulnerability⁴ but there was no obligation on Mitech to communicate on day to day matters. Ms Green was aware at the time the responsibilities for customer service were removed from Mr Bebb's duties that it was for a limited period. It should have come as no surprise that Mr Bebb was undertaking those duties while she was on parental leave and that on her return she would continue to report to Mr Bebb.

[69] Ms Green emailed Mitech on 2 August 2013 that she would be returning to work on the scheduled date of 2 September 2014. Ms Green received a written response from Mitech in which Mitech set out its expectations of Ms Green for her return to work including her hours of work and that she was expected to apply herself diligently to her work and communicate in an open and honest manner.

[70] Ms Green took exception to the letter. It was Ms Green's view that the letter questioned both her work ethic and her honesty and was hostile.

⁴ *Lewis v Greene* [2004] 2 ERNZ 55.

[71] Mr Ayson explained that by the time this letter was written Ms Green had raised a personal grievance claiming unjustified disadvantage and claimed that she had been unlawfully discriminated against. While they had attended mediation, the matters had not been resolved and he wished to be clear about expectations when Ms Green returned to work. Mr Ayson told me he did have some concerns about Ms Green being diligent in her work but did not have any concerns about her honesty.

[72] Ms Green responded to the letter setting out her intentions on her return to work, her childcare arrangements including the need for her to pick up her son by 5.30pm and also set out her own expectations for her return to work.

[73] Ms Green raised further concerns about lack of communication when she raised her second personal grievance on 1 October 2014.

Allegations of bullying

[74] Ms Green claims she was bullied in her employment following her return to work on 2 September 2014. Ms Green points to five factors which she claims constitutes bullying she experienced in the workplace. All five factors arose between 2 September and 1 October 2014.

[75] Ms Green says Mr Bebb and Ms Paurini made unreasonable requests of her to complete tasks at the end of the day, making it difficult for her to meet her child care obligations. The evidence shows that the requests to complete tasks were generally about having tasks completed before Ms Green left work at 5.00pm.

[76] Ms Paurini's evidence, which I have accepted, is that the work was for parts allocation and transfers, and invoicing. Ms Paurini told me she was aware that Ms Green would sometimes leave the task of parts allocation and transfers until the following day but this created problems with workflows.

[77] Requests that particular tasks be completed before leaving work should not have prevented Ms Green from leaving work at the appointed hour of 5.00pm, although Ms Green gave evidence of one occasion when she was asked by Mr Bebb to complete a task before leaving and the time of the request was 4.55pm. When Ms Green advised Mr Bebb she could not complete the task because she had to leave, Mr Bebb advised Ms Green that he would get someone else to complete the task instead.

[78] Ms Green also claimed her emails were constantly being monitored and Ms Paurini was dictating to her when and how emails should be responded to. Ms Paurini's evidence, which I have accepted, is that she advised Ms Green that she needed to respond to customer emails promptly as part of good customer service. Ms Paurini also suggested that Ms Green speak with the technicians and other colleagues directly rather than communicating via email if they were in the office as it would save time.

[79] During Ms Green's absence the processes she had previously used to record calls from clients had been digitalised. Whereas previously Ms Green had made notes manually, when she returned to work, she was required to input information into a spreadsheet which had been developed by Ms Paurini. Ms Green seemed resistant to this change.

[80] Ms Green says that she was subject to constant "*nitpicking*" by Ms Paurini. I have been provided with a number of emails sent from Ms Paurini to Ms Green during the period from 4 September to 18 September 2014. The emails focus on work tasks that need to be completed.

[81] I have concluded that Ms Paurini's interactions and dealings with Ms Green were professional and most comments were in the nature of suggestions to achieve improvements in Ms Green's processes or specific requests for work tasks to be completed.

[82] On 10 September 2014 Ms Green complained to Mr Bebb about feeling harassed by Ms Paurini and that she had spoken down to her in front of other employees. Ms Green gave Mr Bebb specific examples of her concerns.

[83] Mr Bebb's evidence is that after her return to work serious concerns about Ms Green's performance began to arise. Mr Bebb told me that Ms Green would not attend to tasks immediately which had flow on affects for others. Ms Green was frequently not present at work due to sick leave. Ms Green was present for work on 8 full days out of a possible 21 days from 2 September to 1 October 2014. This meant that Ms Paurini continued to complete Ms Green's tasks in her absence.

[84] It has become clear to me through this investigation process that Ms Green had formed adverse views about Ms Paurini prior to returning to work. I find it is more likely than not that Ms Green's view of anything to do with Ms Paurini had been seriously coloured by the comments exchanged between herself and Ms Graham during Ms Green's parental leave. As a consequence any interactions between Ms Green and Ms Paurini were highly likely to be seen as negative by Ms Green.

Disciplinary process

[85] On Friday, 19 September 2014 Ms Green was invited to attend a disciplinary meeting the following week on Tuesday, 23 September 2014. The allegation set out in the letter claims Ms Green had deleted all of the sent emails from the Help-desk email account and from the trash/bin folder.

[86] Ms Green was advised that if the allegations were upheld she could be subject to disciplinary action including summary dismissal and that she was entitled to bring a representative with her to the meeting.

[87] Attached to the letter was a screen shot of the email account showing the Sent Items folder prior to 16 September 2014 and the folder post 16 September 2014.

[88] Ms Green says she received the letter at 1.45pm on the Friday but that this was just 15 minutes before she was to leave for a counselling session from which she would not return for the weekend.

[89] On Monday, 22 September 2014 Ms Green advised Mitech that she would be away sick until Wednesday and that she was not well enough to attend a meeting the following day. She requested the meeting be deferred. On Wednesday 24 September 2014 Mr Ayson contacted Ms Green advising that the meeting planned for that day would have to be postponed due to his own illness.

[90] Ms Green claims her email accounts were being accessed by others and that someone other than herself had changed her password, and the snapshots of the Sent Items showed it was done through an access Ms Paurini had to Ms Green's email folders.

[91] Ms Green was also concerned that her payslip information was sent to her through her email and that others would have access to this personal information and the use by others of her passwords was a breach of Mitech's own IT policy.

[92] In late September 2014 Ms Green's son became extremely unwell and was briefly hospitalised which required her to take time off work. On 3 October 2014 Ms Green attended work and says she was greeted by Mr Bebb and subjected to a list of complaints about work that was incomplete and/or incorrect. Ms Green was advised that her login password had been changed once more.

[93] On 6 October 2014 Ms Green notified Mitech that she had been declared unfit for work until 4 November 2014. Ms Green attached a copy of a psychologist report and advised Mr Ayson the report was private and confidential.

[94] In response Mr Ayson confirmed with Ms Green that Mitech, in respect of a request by Ms Green that the parties attend mediation, was prepared to attend mediation and had put steps in place to progress this. Mr Ayson sets out what he considers to be the outstanding matters between them as being:

- a. The disciplinary issue has not yet been discussed;
- b. Mitech were still awaiting a response from Dr Grobler in respect of the workplace stress issues; and
- c. Performance concerns and KPI's needed to be addressed.

[95] None to the outstanding matters were addressed as Ms Green did not return to work after 6 October 2014. The disciplinary process did not proceed.

Issues

[96] The issues for determination are whether:

- a) one or more conditions of Ms Green's employment was subject to her disadvantage by unjustifiable actions of Mitech and if so what, if any, remedies should be awarded;

- b) Ms Green was unlawfully discriminated against on the grounds of sex, including pregnancy and childbirth, and/or family status and if so what, if any, remedies should be awarded;
- c) Ms Green was actually or constructively unjustifiably dismissed and if so what, if any, remedies should be awarded;
- d) Mitech breached the terms and conditions of Ms Green's employment and if so what, if any, remedies should be awarded; and
- e) Mitech breached its statutory obligations of good faith and if so what, if any, remedies should be awarded?

Disadvantage grievances for unjustified actions

[97] Ms Green has set out a number of matters which have given rise to her claims that one or more conditions of her employment were affected to her disadvantage by unjustifiable actions on the part of Mitech.

[98] The statutory test of justification is contained in section 103A of the Act. That section provides that the question of whether an action was justifiable must be determined on an objective basis, having regard to whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[99] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[100] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.⁵

[101] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[102] As a full Court observed in *Angus v Ports of Auckland Ltd*⁶

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[103] As set out in paragraphs [22] to [24] of this determination, the statutory time limit on raising a personal grievance is 90 days. I have concluded that a number of the matters raised by Ms Green which she says led to her being disadvantaged were raised outside the statutory 90 day time period.

[104] Mitech argues that all of those matters which fall outside the 90 day period (events prior to 24 January for those matters raised in the 22 April 2014 letter) should not be considered in determining whether Ms Green can succeed in her claim for disadvantage.

[105] The statutory time limitation can only be circumvented either by the employer waiving the breach of the statute by the grievant, or by the Employment Relations Authority allowing the grievant leave to do so.

[106] In this case there is no consent from Mitech and no application has been made for such leave if a grievance or grievances were not raised by Ms Green in time. An employer's consent or waiver may, in some circumstances, be implied by

⁵ Employment Relations Act 2000, section 103A(5).

⁶ [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

acquiescence. Mitech did not raise any issues with respect to the 90 day time limit until it responded to Ms Green's statement of problem lodged in the Authority on 17 February 2015. Mitech attended two mediations with Ms Green, the first in May 2014 the second in November 2014. I have concluded that in attending mediation without objecting to the 90 day time frame, Mitech has given its implied consent to the raising of Ms Green's personal grievances outside the 90 day limit.

[107] Even if I had not found Mitech had implied its consent, I would have taken into account the concerns raised by Ms Green which were asserted to be outside the 90 day period to assist me in determining whether Ms Green had suffered an unjustified disadvantage in respect to what happened to her within what the respondent says was the applicable 90 day period.

[108] This is the approach taken by the Court in *Davis v Commissioner of Police*⁷ where the Court noted that disadvantageous acts or omissions in employment frequently do not occur in isolation. Such acts often occur as part of a continuum of conduct:

... which needs to be understood to determine whether the employee has suffered an unjustified disadvantage in respect of what has happened to that employee within the 90 day period.⁸

22 April 2014 grievances

[109] Ms Green raised her grievances immediately after receiving notification from Mitech that it would not consent to Ms Green ending her parental leave early. I have concluded that the major source of Ms Green's unhappiness was the declination of her early return to work request. My conclusion is supported by the text messages Ms Green sent to Ms Graham during her parental leave. Until Ms Green had decided she wished to return to work early, the tenor of the text messages is light and focusses on Ms Green's activities and her new baby. That changed on or about 4 April 2014 when Ms Green decided she wanted to return to work early.

[110] The evidence of the events between May and August 2013 show that Ms Green was concerned about her relationship with Mr Bebb and comments being made by at least one other employee. These matters were raised appropriately by Ms Green when she spoke to Mr Cato and then Mr Bebb on 29 August 2013.

⁷ [2013] NZEmpC 226.

⁸ Ibid at [47].

[111] That Mr Bebb had concerns about Ms Green's performance was not known to her until she met with him on 29 August 2013. In her evidence Ms Green describes her view that this meeting was a meeting between two staff members to iron out problems. Ms Green's view is misconceived. Ms Green had raised serious concerns about her manager's attitude with the Managing Director. While the meeting with Mr Bebb was not a formal meeting, it was a meeting with her manager, not just another member of staff.

[112] Following the meeting Mr Bebb set out in writing five areas that Ms Green could implement to improve her effectiveness in her role. The letter ended with Mr Bebb reiterating that he wanted nothing more than for him and Ms Green to have a strong and productive relationship and asked that Ms Green take the comments as positively as they were intended.

[113] Ms Green did not implement the suggestions made by Mr Bebb and as a result further discussion about Ms Green's performance took place with Mr Ayson in October 2013.

[114] Ms Green says she was disadvantaged when she was not provided with light duties or flexibility on where she could carry out her duties during her pregnancy. Ms Green was in an office bound role. Such roles, by their very nature, do not require heavy duties. In response to the midwife's concerns about Ms Green's health, Mitch put steps in place to ensure Ms Green and her baby were not put in harm's way. Ms Green was advised to alert Mr Ayson if she felt her duties were impacting on her or her baby's health as soon as possible.

[115] Ms Green was seeking flexibility on where she undertook her duties and in October requested to work from home 2-3 days each week. Mitech was not prepared to accommodate Ms Green working from home because of the nature of the role and because a previous attempt to have the role undertaken remotely had not been successful. Instead Mitech offered Ms Green shorter hours by either leaving two hours early on a Thursday and Friday each week, or taking a half day off every Friday.

[116] During her pregnancy Ms Green was provided with assistance to get to and from her medical appointments. Mitech arranged for another employee to drive Ms

Green to her appointments in a Mitech vehicle during normal working hours. This was a significant benefit to Ms Green.

[117] With respect to the comments made by Mr Bebb and one other employee relating to Ms Green's pregnancy, once these were raised with Mr Cato, Mr Bebb and the employee they did not continue.

[118] The failure to provide a larger tee shirt to accommodate Ms Green's growing size did not cause Ms Green a disadvantage. There was no contractual obligation on Mitech to provide a "uniform" or items of clothing. Ms Green was under no obligation to wear the tee shirt, and it did not form part of any official Mitech uniform. The tee shirt was part of a promotional activity for field staff. Office bound employees were offered a tee shirt which they were free to wear or not as the case may be.

[119] I am satisfied that when Mr Ayson cleared Ms Green's desk before she commenced her period of leave in December 2013 he did so under a genuine mistaken belief that Ms Green had already commenced her leave.

[120] In relation to the claims that Mitech failed to communicate with her during her parental leave, Ms Green was in constant contact with Ms Graham throughout her leave. Ms Green attended the office in March 2014 when she took her new baby in to introduce him to Mitech employees. Ms Green then attended the office a second time a couple of weeks later to discuss her proposal to return to work early. The parties then met in mediation in May 2014.

[121] While it is always a good practice to stay in regular contact with employees who are away from work on extended leave such as parental leave to keep them up to date with the important happenings of a business, there is not statutory obligation to do so.

[122] Ms Green claims that she was disadvantaged in her employment when Mitech did not consent to her returning early from parental leave. Section 45 of the PLEPA allows an employee who is on parental leave may choose to end parental leave by returning to work before the date on which the employee is required to return to work where specific conditions are met.

[123] The conditions include situations where:

- a) the employee suffers a miscarriage, or the child is stillborn or dies;
- b) the employee has consented to the adoption of the child;
- c) the employee ceases to have care of the child; or
- d) the employer consents.

[124] Mitech did not consent to Ms Green ending her parental leave early.

28 July 2014 to 1 October 2014

[125] Ms Green says she was subject to bullying behaviour by Mr Bebb and Ms Paurini after she returned from parental leave on 2 September 2014 and was subject to an unjustified disciplinary process.

[126] Bullying is a serious allegation to make. There is no legal definition of the term but the Ministry of Business Innovation and Employment (“MBIE”) has adopted the following definition:⁹

Workplace bullying is repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety:

Repeated behaviour is persistent and can involve a range of actions over a period of time.

Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.

A single incident of unreasonable behaviour is not considered workplace bullying, but it could escalate and should not be ignored.

[127] The guidelines provide examples of conduct that does not constitute bullying:

One off or occasional instances of forgetfulness, rudeness or tactlessness

Setting high performance standards because of quality or safety

Constructive feedback and legitimate advice or peer review

A manager requiring reasonable verbal or written work instructions to be carried out

Warning or disciplining employees in line with the workplace’s code of conduct

A single incident of unreasonable behaviour

⁹ Found at <http://www.business.govt.nz/worksafe/information-guidance-items/bullying-guidelines/workplace-bullying>.

[128] After returning to work on 2 September 2014 Ms Green attended work on 12 full days and two half days before she left the workplace permanently. In that time Ms Paurini was attempting to train Ms Green in new processes which had been implemented during her absence. Ms Green has acknowledged the changes were not significant. Mitech says the changes were important to ensure the flow of work continued as it had while Ms Green had been away.

[129] When Ms Green was unable to work Ms Paurini was required to cover during her absences. Because of that it was important for Ms Paurini to be fully aware of Ms Green's activities by having regular handovers to ensure continuity of service was maintained to Mitech's customers. Further, Ms Green's frequent absences resulted in Mitech having to access Ms Green's email account in order to manage customer queries. This in turn necessitated a number of changes to Ms Green's login password.

[130] I am satisfied Ms Paurini's interactions and dealings with Ms Green were professional and the content of the emails were in the nature of suggestions to achieve improvements in Ms Green's processes or specific requests for work tasks to be completed.

[131] Likewise, I am satisfied that Mr Bebb's conduct toward Ms Green was not bullying in nature. Mr Bebb was Ms Green's manager and was entitled to check that she was working to the correct standard and adhering to the changes in processes implemented while she was on parental leave.

[132] Ms Green also claims the disciplinary process initiated on 19 September 2014 was an unjustified action leading to her disadvantage. Employers are entitled to address concerns in a disciplinary setting. Ms Green was on notice as to what the allegations were, was provided with full information from Mitech and was on notice that the matter was being taken seriously, however the disciplinary process did not proceed.

Conclusion

[133] Ms Green has failed to establish to my satisfaction that one or more conditions of her employment were affected to her disadvantage during her employment. Mitech took steps to address each of Ms Green's concerns as they arose. While it is best practice to communicate regularly with employees who are on parental leave the

failure to communicate formally does not form the basis of a personal grievance and Ms Green has failed to show how the failure has resulted in a disadvantage. Mitech was entitled to exercise its discretion not to consent to Ms Green ending her parental leave early by returning to work under a graduated return to work process.

Personal grievance for discrimination

[134] Ms Green claims she suffered a personal grievance when she was discriminated against on the basis of sex (which includes pregnancy and childbirth) and family status.¹⁰ Ms Green says Mitech failed to:

- a) accommodate her pregnancy;
- b) communicate with her during her parental leave;
- c) consider an early return to work;
- d) accommodate her return to work; and
- e) treat her the same as others (disparate treatment).

[135] During the course of the Authority's investigation into her claims Ms Green produced a document published by the Human Rights Commission ("HRC") which sets out guidelines for employers on how to treat employees with family responsibilities. These guidelines are to assist employers meet their responsibilities but do not contain legal rights and obligations.

Accommodation of Ms Green's pregnancy

[136] Ms Green says Mitech failed to accommodate her pregnancy in the workplace by not considering all reasonable options to ensure her performance was maintained or adjusted to make her feel supported and safe.

[137] Based on the HRC guidelines Ms Green submits that such accommodations include:

- provision of seating for work;

¹⁰ The Act sections 103(1)(c), 104 and 105(1)(a) and (b).

- flexible working hours and flexibility in the location of the work;
- provision of larger uniform;
- transfer to another department where physical duties may be lighter/safer;
- assistance from other staff on potentially unsafe duties;
- sick bay or private area to rest during lunch or tea breaks or other times as necessary;
- clean and accessible toilet facilities.

[138] I am satisfied Mitech attempted to accommodate Ms Green's pregnancy when it did the following things:

- removed any lifting from Ms Green's role.
- offered to provide any assistance necessary for accessing the stairs.
- limited Ms Green's exposure to the workshop area which contained solvents and other chemicals.
- permitted employees to drive her to and from doctor and other personal appointments during working hours and using company vehicles.
- offered flexibility on her hours of work by either reducing the number of hours to be worked on a Thursday and Friday or working for only ½ a day each Friday.

[139] Ms Green did not take up the option of finishing early on a Thursday and/or a Friday. Ms Green wanted to work from home. I am satisfied Mitech considered this option but a previous attempt at having the role working remotely had proven to be unsatisfactory given the nature of the role.

Communication during parental leave

[140] The PLEPA guidelines advise employers to agree about a process and frequency for communication during their parental leave. Ms Green says Mitech made no active attempts to communicate with her during her leave.

[141] I am satisfied Ms Green was not ignored during her parental leave. Ms Green herself bought her new baby into the workplace on 21 March 2014 and then met with Mr Cato on 10 April 2014 to discuss her proposal to end her parental leave early by returning to work.

[142] I am satisfied that during Ms Green's parental leave no decisions were made that impacted adversely on Ms Green's continued employment. While processes were changed and new systems put in place during her parental leave, Ms Green acknowledged that the changes were not significant. There is no evidence that the changes had a detrimental effect on Ms Green's ability to undertake her duties on her return.

Consideration of an early return to work

[143] Ms Green claims Mitech failed to consider her request to return to work early. The PLEPA allows an employee on parental leave to return to work earlier than the date specified in her notice where, amount other things, the employer consents.¹¹

[144] Mitech was not under a legal obligation to consent to Ms Green ending her parental leave early although it was bound by its obligations to act in good faith. I am satisfied Mitch considered Ms Green's request before it was declined. Mr Cato met with Ms Green on 10 April 2014 to discuss her request with her and then discussed the possibility with Mr Ayson. Following all these discussions Mr Cato advised Ms Green that Mitech would not consent to an early return to work on the basis that she had requested which included a graduated number of hours to be work each week.

Accommodation on return to work

[145] Ms Green claims that on her return to work Mitech failed to accommodate any flexibility with respect to her hours of work. Ms Green's hours of work were not disputed. There was no application requesting flexible working hours and no

¹¹ PLEPA section 45.

evidence that Ms Green was expected to work outside the agreed hours. On the one occasion Ms Green was asked at 4.55pm to complete a task before leaving, after hearing from Ms Green about why she could not do that, Mr Bebb told her he would get someone else to do the task instead.

[146] Indeed the evidence shows that Ms Green had to leave work early on occasion and this was accommodated by Mitech.

Disparate treatment

[147] Ms Green claims that she suffered from work related stress and when she raised her concerns she was dealt with differently to others who had raised concerns about work related stress including her Manager, Mr Bebb.

[148] Ms Green says she was told to work harder, while Mr Bebb was taken out of his role and redeployed to allow him time to recover. Ms Green also says Ms Graham was treated differently in that she was fully supported when she was having personal difficulties.

[149] The evidence shows a different view of what happened to the view held by Ms Green. Mr Bebb was not redeployed rather one aspect of his role was removed and taken on by Mr Ayson for a short period of time. Serious concerns were held about Mr Bebb's health and this was addressed by Mitech in having Mr Ayson undertake the customer services role for a short period. This also allowed Mr Ayson the opportunity to assess the service department first hand in order to make changes to make the department more efficient.

[150] Ms Green raised her concerns about workplace stress in an email in September 2014 following her return to work. Mr Ayson was absent overseas at the time and addressed the issues on his return. Mr Ayson concluded that Ms Green's role was not inherently stressful and there was nothing untoward about the manner in which Ms Paurini had gone about her task of retraining Ms Green on her return.

[151] However, matters did not end there. Mr Ayson sought further information from Ms Green about her stress and requested her consent to seek further medical information to assist in gaining a greater understanding of her condition and any suggested changes that could be made to her role.

[152] Mitech received a report from Mr Malcolm Fraser a clinical psychologist dated 20 September 2014. The report indicated that Ms Green had sought assistance in July 2014 while she was on parental leave.

[153] Due to Ms Green's frequent absences during September Mitech found it difficult to arrange a meeting to discuss with her what changes should be made to assist her. In light of the report and to address matters in the interim Mr Ayson removed Ms Paurini from any training of Ms Green and Mr Bebb was given that function.

[154] A full report dated 13 November 2014 was then produced by Dr Grobler who advised Mitech that once the workplace issues had been resolved Ms Green would function well in her role. By the time this letter was received by Mitech Ms Green's employment had ended.

Conclusion

[155] In *Air New Zealand Ltd v McAlister*¹² the Supreme Court held that the question to be answered is whether a relevant ground of discrimination was "a material factor" in the decisions made.

[156] I find that Mitech's responses to Ms Green's various requests both prior to her departure on parental leave and following her return in September 2014 were dealt with in the same way it would have dealt with an employee who did not have the care of a child.

[157] Mitech's decisions and responses were not discriminatory in nature based on Ms Green's pregnancy and childbirth or her family status.

Dismissal

[158] Ms Green claims she was unjustifiably actually or constructively dismissed by Mitech.

[159] On 24 November 2014 Ms Green wrote to Mitech expressing her view that matters had not adequately been addressed by Mitech and that she still required a fair response to her concerns. Ms Green advised Mitech that if that response was not

¹² [2009] NZSC 78; [2010] 1 NZLR 153.

received she would have no option but to stand down from her position and seek unjustified constructive dismissal.

[160] In response Mitech advised Ms Green on 2 December 2014 that any response would probably not be considered a “...*fair response*...” and proceeded to accept Ms Green’s resignation. Mitech confirmed that Ms Green’s final pay would be calculated and paid on 14 December 2014.

[161] The acceptance of Ms Green’s resignation was premature. Ms Green had not resigned. Her email makes it clear that she would stand down only in the event that she considers any response to be unfair. That was to be Ms Green’s decision, not Mitech’s.

[162] Further, the next day, on 3 December 2014 Ms Green disabused Mitech of its understanding by clearly notifying Mitech that she had not resigned.

[163] I find Mitech dismissed Ms Green on 2 December 2014 when it inappropriately accepted a resignation that had not been tendered. The dismissal occurred in the absence of any notion of procedural fairness and is therefore unjustified. Ms Green is entitled to a consideration of remedies for her personal grievance.

Remedies

[164] Ms Green seeks remedies of lost wages including future lost earnings and compensation.

Lost wages

[165] At the time of the investigation Ms Green had not secured further employment. Ms Green seeks lost wages for the period 3 October 2014 until she is fit to return to work.

[166] Ms Green was absent on sick leave from 3 October 2014 until at least 24 November 2014. As Ms Green had used her statutory entitlement to paid sick leave she was effectively on leave without pay for that period. As Ms Green was still employed during this period I have used the date of the dismissal which I have

concluded was 2 December 2014 as the date from which the lost wages should commence.

[167] Section 128 of the Act provides for the Authority to order an employer to pay the lesser of a sum equal to the lost remuneration or 3 months ordinary time remuneration. Ms Green's claim is from 2 December 2014 until the date of hearing which was 3 September 2015.

[168] Ms Green submits that it was the actions of Mitech that have caused her to be so unwell that she cannot return to work and therefore I should exercise my discretion to increase the award from three months.

[169] Ms Green's position that her medical incapacity is as a result of Mitech's actions is not supported by the evidence. In particular:

- a) Ms Green was prescribed medication to assist in her recovery but refused to take it and did not then seek out alternative remedies to assist her;
- b) Ms Green discontinued her treatments with both her general practitioner and her psychologist; and
- c) Failed to take up alternative treatment options which were recommended by Mr Falcolner.

[170] There is no recent medical evidence to support Ms Green's contention that she has been too medically incapacitated since 2 December 2014 to seek alternative employment. Ms Green's last visit to Mr Falcolner was on 19 November 2014.

[171] Taking into account all of the circumstances of this case an appropriate award for lost wages is three months. Mitech is ordered to pay to Ms Green the sum of \$15,375.00 (\$5,125 x 3) gross plus 8% being holiday pay, within 28 days of the date of this determination.

Compensation

[172] Ms Green seeks the payment of \$30,000 in compensation for humiliation and distress. The evidence from Ms Green as to the impact the dismissal had on her was

compelling although a significant portion of it related to her claim that she was suffering work related stress and did not pertain to the dismissal.

[173] In all the circumstances of this case I am satisfied that an appropriate award of compensation is \$10,000 which is to be paid by Mitech within 28 days of the date of this determination.

Contribution

[174] Section 124 of the Act obliges me to consider the extent to which Ms Green's actions contributed towards the situation that gave rise to her personal grievance. If I consider Ms Green's actions so require I must reduce the remedies accordingly.

[175] Viewed objectively I do not consider Ms Green contributed to the decision to dismiss her on 2 December 2014 in a blameworthy way and no reduction will be made to the remedies awarded.

Breach of employment agreement

[176] Ms Green claims Mitech breached the express and implied terms of her employment agreement when her safety and security at work was compromised.

[177] Ms Green first alerted Mitech to concerns that she was suffering work related stress during her meeting with Mr Bebb on 29 August 2013. Following that meeting Ms Green continued to work normally.

[178] Ms Green first approached her general practitioner complaining of work related stress in June 2014. At that time she was referred to Mr Falconer who saw her for the first time on 8 July 2014. Mr Falconer assessed Ms Green and concluded that Ms Green's employment dispute was the primary cause for her symptoms.

[179] Ms Green attended six therapy sessions with Mr Falconer prior to her return to work in September 2014.

[180] During this period of time Ms Green was on parental leave and was not present at work. Although Ms Green raised issues relating to stress in her 22 April 2014 letter it was raised in light of having everything resolved and moving forward.

[181] Ms Green attended her general practitioner again in September 2014 following her return to work. Ms Green raised her concerns about work related stress with Mr Ayson on 9 September 2014 when she emailed Mr Ayson explaining that she had had to leave work early the previous Friday due to stress related symptoms.

[182] Mr Ayson was out of the country at the time and on his return addressed the concerns by seeking further information about Ms Green's concerns and took steps to remove Ms Paurini from the equation while awaiting further medical advice.

[183] On 16 September 2014 Mr Ayson wrote to Ms Green and advised her (verbatim):

In order to ensure that we are acting in your best interests and that we are fulfilling our obligations under the Health and Safety Legislation we would therefore like to request consent for the release of your medical information. We will then write to your doctor to obtain greater understanding about your current condition and what (if any) changes they suggest that we could make to your role. We will then take that information on board and look at what we can reasonably achieve and discuss with you.

[184] This step was reasonable and appropriate given the concerns raised by Ms Green's general practitioner. Mitech's investigation into the stress concerns raised by Ms Green was not completed. This was due to Ms Green being absent for a significant amount of time during September and the pre-emptive termination of her employment on 2 December 2014.

[185] I am satisfied Mitech has not breached the employment agreement between it and Ms Green. Ms Green was away on parental leave when the issues of stress first manifested itself. Once Ms Green raised this with Mitech, after she returned from parental leave, Mitech took steps to investigate and address Ms Green's concerns.

Breach of good faith

[186] Ms Green claims Mitech has breached its statutory obligations of good faith. It is unclear on the papers currently before the Authority what the actions Ms Green says constitute breaches of good faith and the submissions lodged on Ms Green's behalf does not address this issue.

[187] The only remedy available for a breach of good faith is the recovery of a penalty which must be commenced within 12 months of the date when the cause of action first became known to the person bringing the action.

[188] Ms Green commenced her action for recovery of a penalty on 17 February 2015 which means the breaches must pertain to the period between 18 February 2014 and 17 February 2015.

[189] Ms Green was on parental leave in the relevant period until 2 September 2014. I am satisfied there are no actions after 2 September 2014 that could give rise to a valid claim for breach of good faith that would warrant the imposition of a penalty.

Interest

[190] A new claim for interest has been included in the submissions for Ms Green. This claim was not included in the claims lodged in the Authority. It is not appropriate for new claims to be raised through submissions.

Costs

[191] Costs are reserved. Because there has been a mixed result for both parties I am of a mind to let costs lie where they fall. However, the parties are invited to resolve the matter between them and if they are unable to do so Ms Green shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mitech shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority