

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 106/10
5118607

BETWEEN HARRY HILDITCH
 Applicant

AND MINISTRY OF FISHERIES
 Respondent

Member of Authority: Dzintra King

Representatives: Stephen Tee, Counsel for Applicant
 Rachael Schmidt, Counsel for Respondent

Hearing: 15,16, 17 June 2009

Submissions Received: 14 and 27 August 2009 from Applicant
 21 August 2009 from Respondent

Determination: 8 March 2010

DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Harry Hilditch, says he was unjustifiably constructively dismissed by the respondent, the Ministry of Fisheries (“the Ministry” or “MFish”). He says the constructive dismissal arises as a result of a breach of duty on the part of the employer to provide a safe workplace, which caused injury, making it impossible for Mr Hilditch to return to work.

[2] The respondent denies that Mr Hilditch was constructively dismissed. It says he chose to take medical retirement.

Background

[3] Mr Hilditch was employed as a Senior Investigator by the Ministry after a long career in the NZ Police.

[4] Mr Ian Bright was the District Compliance Manager for the Auckland office. He was Mr Hilditch's manager from the time of his appointment in 1996 until the MFish Compliance Unit was restructured in 2005.

[5] Mr Bright said that as a manager he looked out for unusual amounts of sick leave, consistently long hours, failure to progress files, unhappiness and other attitudinal issues such as anger or negativity. He had also arranged for Mr Geoff Ruthe, a clinical psychologist, to visit the office and discuss workplace stress with staff and he had instituted EAP.

[6] Mr Bright said that during the time he was Mr Hilditch's manager he did not detect any signs that he was suffering from work related stress. Mr Hilditch had not been directed to undertake much of the work about which he was now complaining; he had a high degree of control regarding his tasks and workload.

[7] Mr Bright denied that Mr Hilditch had told him that he was overloaded and could not cope, had an extreme workload and was under pressure and that he had "*hit the wall*" and needed assistance.

[8] Mr Hilditch had been a very productive employee but was difficult to manage as he had a tendency to control every aspect of his files and a reluctance to let other people near them. He did not work collaboratively with others or respond well to external input on how his files were being progressed

[9] Mr Hilditch undertook much of the work he did because it gave him a high profile and underscored his value to the organisation.

[10] I accept Mr Bright's evidence that Mr Hilditch did not tell him he was suffering from stress and I also accept that had he done so Mr Bright, who had very humane, compassionate and understanding views regarding workplace stress, would have acted promptly to alleviate matters.

Restructuring

[11] In 2005 MFish's Compliance Unit was restructured. There was a shift from a regional enforcement model to a national model co-ordinated from Wellington. Prior to the restructuring the command structure of each office was relatively flat with the team leader responsible for most of the day to day operational decisions. The practical effect of the restructuring was that investigators, and especially senior investigators like Mr Hilditch, lost some of their status and autonomy, with important operational decisions being made further up the hierarchy.

[12] A further effect was that investigators were expected to become generalists and that was reflected in the competencies required for the position. Mr Hilditch, an expert in Asian crime and black market paua, had to develop further competencies relating to the commercial fisheries aspects of his role.

[13] Mr Hilditch was unhappy about the changes and upset that he needed to undergo the competency process.

[14] Mr Nicolson, although appointed as the new Investigations Manager to the Auckland Hub position in June 2005, did not actually start in Auckland until April 2006. Mr Nicolson said he had worked with Mr Hilditch prior to being appointed as his manager. He had observed that Mr Hilditch had operated with complete autonomy for a lengthy period and so did not impose a closer style of supervision upon him.

[15] Mr Nicolson felt Mr Hilditch was disgruntled with the new direction of MFish and very critical of some initiatives, which included the new manner in which informants were managed and the management of information and intelligence generally.

[16] Mr Nicolson said that due to Mr Hilditch's knowledge of the paua black market he left him to generate his own work.

Illness in 2005

[17] Mr Hilditch went on leave in July 2005 returning in October 2005. This leave period was made up of 6 days time off in lieu (“TOIL”), 20 days annual leave and 40 days leave without pay (“LWOP”). On 7 November Mr Nicolson received an email saying that Mr Hilditch had been ill with bronchial problems while on leave and requesting that 10 days annual leave be transferred to sick leave. Mr Nicolson agreed to this and sometime in November discussed Mr. Hilditch's health problems. Mr Hilditch told him he had been experiencing serious, ongoing nasal and sinus congestion problems.

[18] Mr Hilditch suffered dizziness and disassociation on 3 December 2005 and saw his doctor. He went to work the following week and spoke to Human Resources who told him to arrange to see Mr Ruthe.

[19] Mr Hilditch said he had told Mr Nicolson that he had “*hit the wall*” and that he believed he had told him it was stress. Mr Nicolson denies this was said to him. Mr Hilditch remained on sick leave from 5 December 2005 until 3 April 2006. Mr Nicolson said he spoke to Mr Hilditch on a number of occasions during his illness. He told Mr Hilditch to take all the time he needed to get well again and not to return until he was ready. He also told him if he needed any support to let Mr Nicolson know.

[20] Mr Hilditch did not identify the nature of his illness, other than what he had previously said about the sinus problem. He did say he was going to seek counselling about his health problem. Mr Nicolson understood that undue pressure or stress at work could exacerbate that condition.

[21] On Friday 7 April he met Mr Nicolson and they discussed his workload, how the office was to be run and how best to manage his work. Mr Hilditch said he was sure they had discussed his stress condition and agreed that he could take time off as he felt necessary. Mr Nicolson said he understood that stress could aggravate Mr Hilditch's physical illness, not that work stress was causative of the illness. He was not aware that the doctor had recommended that he return to work on a part time basis. Mr Hilditch did not tell him or anyone else of this requirement.

[22] Mr Nicolson monitored Mr Hilditch's workload. He held regular office meetings and had periodic day to day contact. Other than an intense period during which evidence for Operation Monopoly and Operation Bond 2 was required to be briefed there was no unusual workload. He spoke to Mr Hilditch about getting help to do the briefing but Mr Hilditch said it was easier to do it himself and getting someone else in would only create extra work. He told Mr Hilditch that if there was any work he could be helped with to let Mr Nicolson know and resources would be provided.

[23] In the period 7 April 2006 to the end of the year hours in excess of 88 per fortnight were worked on 5 occasions, one of which was significant, 20.3 hours in the week ending 2 July 2006.

[24] It was agreed that if Mr Hilditch needed to take days off or to leave early that could be – and was – accommodated. He asked Mr Hilditch to tell him if he was becoming unwell again as it might be difficult for Mr Nicolson to know otherwise.

[25] Mr Nicolson said that within MFish staff were able to pick and choose, within reason, based on intelligence and priorities which targets they wished to focus on.

[26] On 10 May 2006 Mr Hilditch had 10 days' sick leave for sinus surgery.

[27] Between April 2006 and January 2007 Mr Nicolson said he had regular discussions with Mr Hilditch about his health issues. Mr Hilditch complains that these were not formal meetings but it is clear that Mr Nicolson did follow up in Mr Hilditch's state of health and that Mr Hilditch had the opportunity to tell him of any difficulties.

[28] On 31 May Mr Nicolson received an application to accumulate annual leave for travel in March 2007. He approved the request. In September 2006 he received an application for 12 weeks LWOP for Mr Hilditch and his partner.

[29] In July 2006 Mr Nicolson discussed Mr Hilditch's performance agreement for the year 2006/2007. They also discussed his health and Mr Nicolson said he emphasised that Mr Hilditch had his full support to take days off as required and to manage his time and day to day activities in order to accommodate his health

problems. Mr Hilditch does not dispute this and he accepts that M Nicolson was genuine.

Performance Agreement

[30] In setting the Key Results Areas Mr Nicolson included two areas, one of which required Mr Hilditch to manage the Auckland equipment TSU store and complete the outfitting of a third covert vehicle by October 2006; the other to take a high level leadership role in the development and implementation of three poaching black market investigations. Both of these were intended, in part, to assist with the management of the workload given the health problems. Mr Hilditch was encouraged to take a more hands off leadership role allowing him to make better use of support and resources.

[31] On Wednesday 30 August 2006 Mr Hilditch got up to carry out a search warrant operation. He felt very unwell and fell over. A bit later he felt better and carried out the operation. He then had a very busy day and about 2.45pm felt dizzy and fell over again. Despite this, he continued to work till 5pm. The following day he saw his doctor who put him off work for two days. Mr Hilditch took 1.5 hours sick leave on 31 August and a day's sick leave on 1 September.

[32] When he returned to work he met with Mr Nicolson but did not know whether he had discussed his episode of illness with him.

Operation Voyager and Leave without Pay

[33] Mr Nicolson had discussed with Mr Dave Turner, now the Manager of the Special Operations Unit in Wellington, who was at the time the Acting Manager Investigations Services. Mr Turner told him that in 2007 a major focus would be on combating the illegal bulk export of black market paua and rock lobster. Mr Nicolson was told to prepare a concept plan.

[34] He produced this in early September. He asked Mr Hilditch whether he would lead the operation. Mr Nicolson raised the issue of Mr Hilditch's health. Mr Hilditch said he needed to think it over.

[35] Mr Hilditch said when he and Mr Nicolson discussed the Voyager role Mr Nicolson had told him he would not be required to take the role. After discussing it with Mrs Hilditch they decided he would take the role and dedicate two years to it.

[36] A couple of days later Mr Hilditch said he would be able to manage the role but wanted a higher duties allowance, a car and greater autonomy. Mr Nicolson said he needed to consult Mr Turner.

[37] Mr Nicolson also discussed the LWOP application with Mr Turner who said he did not have an objection in principle but would need the specific dates and then would assess how it would impact on the compliance business.

[38] Mr Turner and Mr Nicolson then discussed the difficulty that would be created by two out five investigators being out of the office for an extended period. Operation Voyager was going to take a significant amount of time and they agreed Mr Hilditch was the logical choice to take a lead role. Mr Turner said he would not make a final decision about the leave until there had been an opportunity to develop Operation Voyager and determine who would be doing which roles.

[39] Mr Hilditch says that Mr Nicolson told him the leave would be approved. Mr Nicolson denies this; he had no authority to approve it and Mr Turner had not made a final decision.

[40] In October Mr Turner met with Mr Nicolson to discuss the LWOP application and Operation Voyager. Mr Turner asked whether Mr Hilditch was able to take on a leading role given his health problems. Mr Nicolson said he had been assured that the health problems were not a kind that would prevent that, but that Mr Hilditch wanted a car and a higher duties allowance.

[41] Mr Nicolson said he has assumed that Mr Hilditch would be the Officer in Charge of the Operation but that Mr Turner wanted him to take on that role and that Mr Hilditch was to be the Officer in Charge of the investigation phase of the operation. Mr Turner did not feel that that position would require anything above what a Senior Investigator was already receiving.

[42] Mr Hilditch was then asked into the meeting. They were going to explain what the operation was about and the details of the role he was expected to undertake.

Mr Hilditch indicated that his health problems would not prevent him from taking on the role and asked about the car and higher duties allowance. Mr Turner said they were not warranted. At that stage Mr Hilditch said that in that case he would go away and think about whether or not he would do the role. Mr Hilditch left.

[43] Mr Turner was very dissatisfied with Mr Hilditch's stance. Given his health was not a problem he was of the view that Mr Hilditch did not have an option about taking on the role as it was within his job description. Mr Turner told Mr Nicolson he felt Mr Hilditch was demonstrating a poor attitude and a lack of commitment to the role. Mr Turner became disgruntled when Mr Hilditch said he had not decided whether or not to take the role. Mr Nicolson said Mr Turner had "*spat the dummy*". It was not reasonable of Mr Turner to question Mr Hilditch's commitment. All of Mr Hilditch's performance reviews had demonstrated a very high level of commitment.

[44] Mr Turner decided to explore alternatives to having Mr Hilditch in the lead role and decided to place another person on the role.

[45] Mr Hilditch was most unhappy when told this.

[46] Mr Turner declined the LWOP application on 24 October 2006. Mr Hilditch felt this was a personal attack on him as a result of his stance on Operation Voyager position.

[47] On Sunday 26 October he "*hit the wall*". He had major mood swings. The next day he saw Ms Watson and asked about his leave balances.

[48] On 10 November Mr Hilditch made a revised request for LWOP, which was also declined.

[49] Mr Hilditch said he took the declining of the leave, which appeared to take place in conjunction with the removal of the position which he had anticipated having, as a personal attack upon him. He said the whole matter caused him a great deal of stress and frustration on top of his already busy workload.

[50] In his notebooks Mr Hilditch set out at length his dissatisfaction and concern. These included historic problems with senior management, purportedly having been told by Mr Nicolson that the LWOP had been approved, the discussions with Mr Nicolson to the effect that he would be in charge of Operation Voyager and that after

the meeting with Mr Turner and Mr Nicolson everything had changed. LWOP was declined. He believed Mr Turner had a personal grudge against him and was treating him in an arrogant, unfair and dictatorial manner.

[51] At that point he made a note in his diary that he considered he had no choice but to leave. The focus of Mr Hilditch's concerns is on the Operation Voyager position, the LWOP issue and the historical criticisms.

[52] Mr Hilditch said he was very confused about instructions being given to him. He said on 7 November Mr Nicolson told him that if an enquiry was to be made by any of the staff Mr Hilditch was to send a message to him so he could send it to the District Compliance Managers and the Investigation Managers so as to get a Fisheries Officer ("FO") or an Investigator to carry out the task. Mr Hilditch said that was ridiculous as previously anyone could go straight to the FO or Investigator. This would be totally impracticable and it made his frustration and stress level even higher.

[53] It is evident that Mr Hilditch was upset and frustrated by the way in which work and reporting had been reorganised.

[54] On 23 November he had a day's sick leave and the following day a "day off."

[55] On 28 November 2006 Mr Hilditch's doctor advised him that he needed to reduce his workload but he did not communicate this to his employer and worked a long week. On 28 November he saw his doctor who told him to reduce his workload and stress. He said this was difficult to do as he was running the office, a number of operations, trials and informants. Most of these were not jobs anyone else could do and there would be real problems if they were not done. He was not sure if he had told this to Mr Nicolson.

[56] On 5 December he had dizzy spells and a day's sick leave. On 11 December he was again sick with dizzy spells which continued the next day.

[57] On Monday 13 December he was back at work and noted a number of urgent tasks in his notebook. They were all urgent tasks and he was of the view that no-one else could do them. During the day he spoke again to Ms Deborah Watson, Administration Team Leader Human Resources, who advised him he needed to bring

matters to the attention of senior management. This was when he wrote a memorandum to Mr Stuart regarding his dissatisfaction with the Operation Voyager matter and the refusal to grant LWOP.

[58] On 11 and 12 December Mr Hilditch took sick leave and saw Ms Watson and wrote a memorandum to Mr Steven Stuart

[59] In late 2006 Mr Hilditch felt that Operation Voyager and the Auckland Hub were going nowhere. He experienced huge frustration at seeing the whole project, which he had worked towards for five years, just falling away due to its not being run properly.

[60] He returned to work on 8 January 2007. He noted in his notebook that he had gone back to work in March 2006 which was supposed to be part time but it was “full on”. In December 2006 his doctor had told him to go on leave but he declined as he needed to complete a number of court matters. This was not work anyone else could do or help with. His doctor told him to take leave in January.

[61] On 9 January he received a call from Mr Stuart regarding his letter. He was asked about his health. He said he had been unwell for a considerable period. They discussed the LWOP application. Mr Stuart said he would support the application to retire on medical grounds.

[62] It is apparent that Mr Hilditch wanted something further from Mr Stuart. He said Mr Stuart did not give him any options and did not address his concerns in the letters. Mr Hilditch felt this call was the last straw. Mr Stuart said he thought the matter was a fait accompli and he had been asked to keep the matter in confidence. Mr Stuart did address the matters in the memo; he endorsed what had occurred.

[63] In January 2007 Mr Hilditch took sick leave on 12 and 17 January and then was on sick leave from 22 January until he retired on medical grounds on 22 June 2007. He submitted a memorandum to Mr Stuart on 10 May seeking approval to retire on medical grounds.

Knowledge regarding Mr Hilditch's illness

[64] Mr and Mrs Hilditch say they alerted the employer to the fact that Mr Hilditch was ill and that the illness was stress related and caused by work. Unfortunately, Mr Hilditch's medical certificates were non specific so could not have alerted the employer to a concern regarding the illness being work related stress.

[65] Mr Nicolson said he believed that the illness in 2005 was due to ongoing sinus problems. Mr Nicolson said he understood from Mr Hilditch that that the condition was serious and could cause pressure on the brain resulting in irritability, headaches and difficulty concentrating.

[66] Chronic sinusitis can also cause balance problems and dizziness due to inner ear problems. In his evidence Mr Hilditch recounted several occasions when he had felt dizzy and an occasion when he had actually fallen over but had continued to work. Sinusitis can also result in increased fatigue due to difficulty breathing and sleeping.

[67] In *Allergy and Asthma Proceedings*, 2007, Jan-Feb, 28 (1): 3-9, Dr R Nathan stated that nasal congestion was associated with sleep-disordered breathing, a condition which can have a profound effect on mental health, including increased psychiatric disorders, depression and anxiety.

[68] Mr Hilditch's diaries show that he continued to suffer from sinus related symptoms for a considerable period, not just for the time in China in 2005 and upon his return to work until he had surgery in May 2006. On 19 March 2007 he had a CT scan and an audiology test regarding his dizzy spells. On 8 May 2007 he noted that the scan had shown potential problems. On 24 August 2007 he had an appointment with Mr Richard Douglas, an otolaryngology and rhinology specialist. On 27 September 2007 he had an operation at Gillies Hospital.

[69] Mr Hilditch had four appointments with Mr Ruthe: 22 December 2005, 25 Jan 2006, 27 Feb 2006 and 23 March 2006. Mr Nicolson said Mr Hilditch did not tell him why he had been seeing Mr Ruthe. Mr Hilditch did not deny this. Mr Hilditch may have been seeing a clinical psychologist for personal reasons rather than work related

ones. Without his expressly telling Mr Nicolson that he had been seeing Mr Ruthe for work related stress, Mr Nicolson had no way of knowing.

[70] Given what Mr Hilditch had told Mr Nicolson about the possible effects of sinusitis, and given the absence of other information, it was not unreasonable for Mr Nicolson to conclude that the problems were sinus related. He understood they could be aggravated by stress and therefore made efforts to accommodate Mr Hilditch.

[71] Ms Deborah Watson was employed as Administration Team Leader/HR from May 2006 until April 2007. Mrs Hilditch told her on several occasions that her husband was stressed due to work. She asked Ms Watson to keep this confidential.

[72] In November or December 2006 Mr Hilditch told Ms Watson that he was ill and needed time off. He mentioned the leave without pay application and the Operation Voyager position. She told him he was to provide regular medical certificates and his doctor should be specific about the nature of the illness. Despite this advice, the subsequent medical certificates did not provide particularised information.

[73] Mr Hilditch gave Ms Watson a memo to pass on to Mr Stuart. The memo refers to the Operation Voyager position and the LWOP matter. Mr Hilditch says:

I have been under some medical attention for the past while. This was discussed early in the development of running of Op Voyager with dave and nico and allowances were agreed on to accommodate this. The events since September as set out in the accompanying memo however have certainly contributed to a significant deterioration in my well being and increased frustration to the point of me seriously questioning my ability and wish to remain with the Ministry.

...

In the event that my health still does not come right it will be that i will give notice to retire on medical grounds. This will be determined by the doctor. I anticipate that this decision will be made within 6 weeks which will be mid February.

...

It is our intention and request that the above matter be treated in confidence by you until the determination is made by the doctor.

[74] Ms Watson said she discussed this with Mr Nicolson and told him the illness was stress related. She spoke to Mr Patrick Donnelly, National Human Resources Manager. They talked about the possibility of medical retirement. She also spoke

briefly to Mr Stuart and said it was her view that he was unlikely to return from sick leave. She passed on Mr Hilditch's letter.

[75] Mr Hilditch's letter of 10 May 2007 tendering his resignation would not have alerted the employer to the fact that Mr Hilditch believed there was a stress issue regarding work. His letter says:

As you are aware I have been suffering some serious health problems since December 2005. I had several months off and received both medical and psychological assistance. I returned to work supposedly on a reduced workload but became ill again and have been on sick leave for the past 16 weeks. During this time I have received assistance from my doctor, Dr Hillebrand, a psychologist, Mr Geoff Ruthe, and 2 specialists. I have had one lot of surgery, a CAT scan, and it would seem that some further surgery may be required.

[76] This refers to a physiological condition as well as a possible emotional condition.

[77] What the employer did know was that Mr Hilditch had been ill over a prolonged period. There was knowledge of the sinus condition and Mr Nicolson believed that it was important for Mr Hilditch to avoid stress as it could exacerbate his physical condition.

[78] While Mr Hilditch is now of the view that he told Mr Nicolson that his condition was caused by work stress, even if I accept that he made statements to the effect that he had "hit the wall" to Mr Nicolson the fact remains that Mr Nicolson did act upon what he says Mr Hilditch conveyed to him and put in place mechanisms to reduce stress.

[79] Mr Hilditch's assertions that he was very straightforward regarding his medical condition are inconsistent with the fact that on more than one occasion he failed to convey what his medical practitioner had told him regarding the need not to return to work or to work part time. They are also inconsistent with his telling Mr Nicolson that his health would not be an impediment to taking on the Operation Voyager position.

[80] Furthermore, an employee's assertion that he or she is suffering from work related stress is just that. It needs to be supported by medical evidence and some indication of the actual work matters that are causing the stress.

Causation

[81] A significant part of the enquiry must be what caused the problem. Causation must relate to the breach by the employer of the obligation to provide a safe and healthy workplace. It is not simply a matter of determining that the work caused the harm.

[82] In considering causation I have looked at the chronology of events and also taken into consideration the views of various medical practitioners. Dr Shieff was the only person who gave evidence. The remaining views I have extrapolated from notes and letters. I have also borne in mind that none of the medical practitioners had access to contrary views or evidence regarding Mr Hilditch's workplace and workload.

[83] There is no question that the work carried out by Mr Hilditch was inherently stressful. Mr Bright gave evidence that the stress primarily arose from the tight deadlines surrounding the preparation of investigations for prosecution within the two year limitation period which could entail the evaluation of thousands of documents. Mr Bright said that in such circumstances investigators would expect to work an 8 or 9 hour day with spikes of more intense activity as the investigation moved towards the court phase where disclosure and such matters had to be attended to.

[84] Mr Bright said that in recognition of such spikes the Ministry provided 1.5 hours of time off in lieu ("TOIL") for every hour worked in excess of 88 per fortnight.

[85] There was a pattern of Mr Hilditch returning to work contrary to medical advice. This was the case in 2004 after shoulder surgery and later when he had been told to work part time but he had returned full time against medical advice. In November 2006 he ignored medical advice. He failed to tell Mr Nicolson and worked contrary to the medical advice. He set this out in his letter to Mr Stuart dated 15 December 2006 he wrote:

Two weeks ago the doctor determined that I was not to be at work however due to a personal commitment to complete an involved trial preparation, Op Bond 2, I chose to continue and complete this matter.

[86] These are instances of an employee not being prepared to take all practicable steps to ensure his own safety while at work.

[87] Dr Robert Shieff, a psychiatrist, saw Mr Hilditch once towards the end of his employment on 17 May 2007 and then again on 8 August 2007, 2 September 2008 and 10 March 2009 after his employment had terminated. He based his evidence on Mr Hilditch's statements, the report of a clinical psychologist, Ms Emma Holmes, dated 30 Nov 2007, a report by an occupational medicine specialist, Dr David Ruttenberg, on 9 Sept 2008 and a vocational assessment by Ms Sylvia Keets on 7 Nov 2008.

[88] Dr Shieff deposed that he thought the episode of depression in 2007 was very unlikely to be related to a pre-existing mood disorder and more likely to have been provoked by an experience of stress. Dr Shieff said Mr Hilditch referred to a heavy and complex workload. He was required to work in covert manner with criminals who displayed who displayed intimidating and threatening behaviour. He noted that this was similar to Mr Hilditch's experience with the police and said that he had coped with that well. Dr Shieff said that the factors that led to Mr Hilditch's experience of stress "*must, therefore, encompass a set of experiences in addition to the multitude of demands generated by his employment position*".

[89] Dr Shieff went on to say that Mr Hilditch had identified a cluster of factors which, in Dr Shieff's view, were highly instrumental in that regard. Mr Hilditch had reported numerous interactions with regard to management personnel, through which he communicated his circumstances and the stress caused by those. His pleas for assistance were ignored. Dr Shieff was relying on Mr Hilditch's recollections, which I find to have been incorrect. Dr Shieff said this would have caused significant demoralization.

[90] Mr Hilditch had identified negative commentary over a period of time by high level management which he believed would have been perceived as intimidating and bullying. He had also referred to the Shane Hay episode which had been a source of sustained frustration and aggravation. He had been questioned on a number of occasions about his disinclination to use Mr Hay's research.

[91] The final aspect of the stress was the offer of leading Operation Voyager, which had been withdrawn, which caused resentment and disappointment. Mr Hilditch had also referred to the leave issue which had been approved and then withdrawn. While Mr Hilditch believed this is what had happened, and therefore conveyed this to Dr Shieff, I find Mr Hilditch was mistaken in his view that approval had been given.

[92] Dr Shieff noted that Mr Hilditch's accumulating depressive symptoms lay in close temporal connection to the above events so he believed those stressors were chiefly responsible for the provocation of the depression. Even on the self reporting of Mr Hilditch Dr Shieff did not find that matters such as work overload or untoward hours contributed to what he diagnosed as depression.

[93] It is of note that the assessment by Ms Adkins on 9 September 2008 identified similar stressors. He told her he had found his work ethic being questioned by regional managers, the whole environment had changed and he didn't want to be there. He described an increase in work load and an increasing sense of frustration. He referred to the leave issue. Mr Hilditch spoke of a change in political environment and things not being good the last 3 to 5 years. He had huge frustration working in his role and commented on bullying that he thought had contributed to his symptom. He noted lack of support and resources and said that if the political environment was different he could return to the work role in a full time capacity. This is indicative of the dissatisfaction with the changed direction of the Compliance Unit referred to by Mr Nicolson.

[94] Ms Holmes noted that Mr Hilditch "*alluded to a tendency towards perfectionism.*"

[95] I have examined the records regarding the hours worked by Mr Hilditch. While on some weeks more than 40 or 44 hours were worked this was not the case on a permanent basis. I have taken into account that Mr Hilditch was often able to control the work he did and that there was a time in lieu provision, which Mr Hilditch used. Considered objectively, I do not think it can be concluded that the workload was excessive. This is not to say that Mr Hilditch may not have experienced it as excessive.

[96] It would appear, therefore, that the factors causing Mr Hilditch's ill health were a combination of frustration caused by his feeling he had been unjustly criticised, dissatisfaction with the reorganisation, the offer and later withdrawal of the Operation Voyager position and the fact that the sought for LWOP was not granted, which he saw as a personal attack on him by Mr Turner. All this was, since 2005, coupled with chronic severe sinus problems which can have the concomitant effects referred to earlier.

Breach of duty

[97] Was there a breach of the duty to provide a safe and healthy environment that was of sufficient seriousness to warrant the termination action taken by Mr Hilditch? In *Wellington, Taranaki and Marlborough Clerical Workers IUOW v Greenwich* (1983) ERNZ Sel Cas 95 at 104 the Court held:

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.

[98] In *Attorney-General v Gilbert* [2002] 1 ERNZ 31 the Court of Appeal said at para [69]:

The obligation to maintain a safe workplace is derived from the express incorporation of the statutory requirements under the State Sector Act 1988 and the Health and Safety in Employment Act 1992 and from implied duties, recognised by the common law, which are themselves informed by the statutory obligations.

[99] Section 6 Health and Safety in Employment Act 1992 requires employers to “take all practicable steps to ensure the safety of employees while at work.” Section 2(1) defines “all practicable steps.” Referring to what was reasonably practicable the Court of Appeal said a balance was required:

The standard of protection provided to employees by the Health and safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. This is made clear by the definition of “all practicable steps”. What is “reasonably practicable” requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s 19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of an employee. Whether workplace stress is unreasonable is a matter of judgement on the facts. It may turn upon the nature of the work being performed as well as the workplace conditions. The employer’s obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[100] In order to establish that an employer operated an unsafe workplace because an employee worked excessive hours the employee must show those hours were required by the employer: *Nelson v Air NZ International Ltd*, 22/3/06, M Ulrich, AA 81/06. In that case, the hours worked resulted from an employee’s assessment of what was necessary not a direction from the employer. Mr Hilditch was not told to work excessive hours; and if hours above 88 per fortnight were worked he was entitled to TOIL. Mr Hilditch declined offers of assistance with preparation as he was of the view that would make it more difficult.

[101] The employee must raise the issue with the employer: *Whitehead v Metallic Sweeping* (1988) Ltd 9/1/09, Y Oldfield, AA6/09 and *Buis v Silverdene Farm* (2001) Ltd 2/9/04, P Stapp, WA118/04. In *Buis* stress was not raised and although the

applicant was stressed this may have been due to his own sensitivity or inability to cope with work demands.

[102] In *Nilson-Reid v Attorney-General* [2005] ERNZ 951 Travis J held at para 117 that to succeed in the claim that the defendant had failed in its duty to provide the plaintiff with a safe system of work which avoided reasonably foreseeable harm the plaintiff had to establish that the defendant knew or ought to have known of the risks and failed to act to avoid them.

[103] The Ministry did take reasonable care to avoid unnecessary risk. This was not a situation like that in *Gilbert* where the workload was excessive, the management grossly deficient and there was a failure to provide support and resources. Mr Hilditch's work was inherently stressful and there were spikes in the workload. Mr Hilditch was offered assistance and refused it and was told if he needed other assistance to ask.

[104] There was no evidence that the employer placed undue work pressure on Mr Hilditch. The evidence was that, in the main, he controlled his workload and self-generated new work.

[105] Mr Hilditch was upset by the criticism he perceived he was receiving from Mr Driscoll regarding Mr Hilditch's use of Mr Shane Hays' work. There is nothing to indicate that any actions by Mr Driscoll were a breach of duty.

[106] Mr Hilditch was unhappy with the reorganisation. He resented the time he had to spend doing the competencies. Mr Hilditch said that the new performance system created a great deal of work, uncertainty, change and stress. The employer was entitled to reorganise the business and the fact that Mr Hilditch disliked it does not constitute a breach of duty.

[107] I understand that Mr Hilditch was disappointed and dissatisfied when his leave without pay application was declined. I am not satisfied that either Mr Nicolson or Mr Turner had promised the leave would be granted and then reneged on the promise. Mr Hilditch did not notify his employer that he felt the granting of the leave was necessary to his continued emotional and mental well-being. Leave without pay is

discretionary. Mr Hilditch had previously been granted a lengthy period of leave, including leave without pay. There were operational reasons – the setting up of Operation Voyager – that precluded the granting of extended leave at that time.

[108] I understand Mr Hilditch's disappointment regarding the change in the Operation Voyager position, and then the withdrawal of the position he was offered. Mr Turner could have handled the withdrawal of the offer in a better manner. However, as stated in *Greenwich* inconsiderate conduct which causes resentment does not per se constitute dismissive or repudiatory conduct.

[109] There was no breach of duty on the part of the employer.

[110] Mr Hilditch was not constructively dismissed and does not have a personal grievance.

Costs

[111] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority