



## **The Investigation**

[3] In her statement of problem filed in the Authority on 13 July 2009 Ms Lambert said she had returned to work after a period of work related stress leave, but resigned some weeks later because of not being given the support she believed she should have received . The applicant claims three months lost wages, \$10,000 for loss of dignity, humiliation and injury to feelings and costs.

[4] In its statement in reply received on 29 July the company said Ms Lambert's unfortunate break down in late 2008 was not caused by any breach of duty or unjustified action on its part and Ms Lambert does not allege this, that she was supported on her return to work and, just over a month after he return to work, Ms Lambert resigned on her own accord. She was not constructively dismissed or otherwise unjustifiably disadvantaged.

[5] This problem was not resolved at mediation.

[6] In a telephone conference on 17 August the parties agreed to a one-day investigation in Napier on 19 November and timelines for providing witness statements and an agreed bundle of documents (note: all references to documents in this determination are to the parties' agreed bundle).

[7] Efforts by the parties during the investigation to resolve this problem on their own terms were not successful.

## **Summary of Facts**

[8] I adopt (and adapt) the summary of facts provided by counsel for the company and dated 19 November 2009:

[9] Ms Lambert was an employee of the company for 23 years. During that time she held several supervisory roles and management positions.

[10] On 16 December 2008 Ms Lambert informed the company that she had been diagnosed with depression.

[11] In a letter dated 19 December 2008 (doc 8), but which appears to have been provided to the company following the applicant's resignation, Ms Lambert's psychologist described her patient as presenting "*with anxiety and low mood in the context of multiple stressors in the workplace over the last year. It appears that a series of events at work have compounded, and Tania now finds that she is having difficulty managing ...*"

[12] Between 16 December and 18 February 2009 Ms Lambert remained off work on paid sick leave. Ms Lambert provided her employer with copies of medical certificates (docs 4).

[13] On 29 January Ms Lambert and her manager met to plan for the applicant's return to work. It was agreed Ms Lambert would be gradually reintegrated into the workforce. The company would

- a. reduce Ms Lambert's working hours to two days per week to start with;
- b. relieve Ms Lambert from staff management duties; and
- c. meet with her so as to monitor her progress.

[14] Ms Lambert returned to work on 19 February.

[15] Monitoring meetings were held by Ms Lambert and her manager on 19 & 25 February, 2 or 3 March and 10, 17 & 24 March.

[16] An amended employment agreement reflecting Ms Lambert's reduced hours and changed responsibilities was communicated to her (dated 17 March, doc 28).

[17] Ms Lambert and her manager met on 24 March during which the latter outlined the tasks the applicant was expected to perform. Ms Lambert was advised that if she was unable to perform these tasks the company might review its options. These could include performance management.

[18] By letter dated 25 March Ms Lambert gave notice of her resignation; she identified 20 May as her last day.

### **Applicant's Position**

[19] Amongst other allegations Ms Lambert said that, and after discussions with her counsellor about a return to work plan and how it might best be implemented, she met with her manager on 29 January 2009. As a result, Ms Lambert said it was agreed they would hold progress meetings at 4.00 p.m. on Wednesday on a weekly basis. Ms Lambert said she spelt out to her supervisor "*what help I needed, my requests were simple and I was not asking for anything more than what I was entitled to*" (par 10 of the applicant's witness statement).

[20] Ms Lambert said she was disappointed when she did not receive the notes or record of the meeting held on 29 January that she had requested her supervisor to provide. She was even more disappointed when none of the progress meetings were held and no excuse was given: "*It was a slap in the face to turn up to these to find (the supervisor's) office locked and she had gone for the day*" (par 13, above).

[21] Ms Lambert provided her employer with a copy of a 12 February letter from her psychologist (doc 16), which the applicant said set out steps the company "*could take to help me integrate back into the workforce*" (par 15).

[22] Ms Lambert said that, from her return to work date, "*I felt my situation started to decline. I don't believe I failed in my efforts to return back into the workforce, I believe HB Today failed me*" (par 16, above).

[23] Specifically, and amongst other things, the applicant said she received no human resources support and her supervisor was hostile in the first meeting when she was informed of the applicant's medical condition.

[24] Ms Lambert alleged the telephone number for employee assistance was given to her only two months after her return and her request for EAP with a valid reason to be reimbursed was declined. She said no progress meetings were held and there was no work recovery plan put in place.

[25] The applicant also alleged her vehicle was taken from her, she had inadequate support and she was threatened with performance management and pressured to sign a new employment agreement.

### **Company's Position**

[26] Because of my findings there is no need for me to summarise the company's position further.

### **Findings**

[27] I understand from Ms Williams' submissions that, at the heart of her client's grievance, is the claim the company failed to take all reasonably practical steps to provide her with a safe workplace per *Attorney-General v Gilbert* [2002] 1 ERNZ 31, i.e. it breached its obligations to Ms Lambert as set out in the Health and Safety in Employment Act 1992 (and her return to work plan) and thereby constructively dismissed her.

[28] In determining these allegations I am obliged to make credibility findings in respect of matters disputed by Ms Lambert and her manager. A balance of probabilities application is required, based on – where it exists and amongst other things – relevant documentary evidence. This is always a difficult task, not least because of the nature of Ms Lambert's medical condition and her genuine conviction as to the truth of her recollection. However, and for the following reasons, I am satisfied the applicant has not made out her case.

[29] All evidence points to the company's willingness to address Ms Lambert's concerns when they arose, including its early and ready agreement to her returning to work on a part time basis with lessened responsibilities.

### **Return to Work Plan**

[30] Ms Lambert's return to work plan was never set out in writing. The evidence is clear that, following their first meeting on 29 January, Ms Lambert and her manager had different understandings as to what the plan consisted of and its detail.

[31] As the manager makes clear at par 47 of her statement, she first saw Ms Lambert's psychologist report of 12 February 2009 (doc 16) on 19 February. The report is commendably plain and straightforward: it describes the applicant's condition, and said (amongst other things and verbatim), that

*Tania is currently experiencing depression and anxiety, appears to have resulted from chronic stress over the past 12-18 months.*

*Tania is keen but understandably apprehensive about returning to work... . In order for Tania to be able to make a successful and sustainable return to work it is important that she increases her hours gradually ... . It will be important to review Tania's situation at the end of the first month to determine how she is coping.*

*I understand that Tania has spoken with management about ... how she would like to be supported when she returns. Regular (bi-weekly) meetings with Tania to check how she is coping, and whether necessary changes have occurred, would be valuable ... .*

[32] I am satisfied that, to the extent the psychologist's report of 12 February amounted to a return to work plan, the company adhered to it. That is because, and as Ms Lambert's own evidence confirmed, the applicant returned on reduced hours, there were frequent and regular, albeit not every Wednesday at 4.00 p.m., meetings to check how she was coping and some discussion occurred about increasing those hours.

[33] The manager does not agree she undertook to provide Ms Lambert with notes of those meetings and, unlike the applicant, did not keep a record of their discussions. However, I note also that, during the five-week period of her return to work, Ms Lambert did not raise – orally or in writing – her concerns about her manager not adhering to an agreed return to work plan (oral evidence of applicant in the Authority's investigation), or indeed any other concerns she now says she was experiencing at the time.

[34] An earlier report from the same psychologist, dated 19 December 2008, said that the applicant "... presents with anxiety and low mood in the context of multiple

*stressors in the workplace over the last year. It appears that a series of events at work have compounded, and Tania now finds that she is having difficulty managing her emotions”* (doc 8).

[35] The report goes on to comment that Ms Lambert was a “*driven, successful woman who has high expectations for herself and those she works with. She reports that she works best in a supportive environment in which she feels in control of her work ...*”. Ms Lambert was not sure if that report was provided to the company before her resignation: her manager recalled seeing it only as part of the bundle, i.e. after the applicant’s resignation. The report is addressed to a doctor. Its diagnosis is no different from that set out in doc 16; it does not include any return to work suggestions.

[36] It establishes no causal link between a breach of duty by the company and Ms Lambert’s medical condition.

### **Company Vehicle**

[37] Ms Lambert said the company vehicle was part of her salary package, that it was taken from her while she was off work and not returned on her return, and she wanted to be compensated for the loss of a term and condition of employment. The company agrees the vehicle was reallocated while Ms Lambert was off work. At the time the applicant resumed work her manager assumed it had been returned to her. Again, there is no record of Ms Lambert seeking its return or protesting the loss of a term and condition of her employment. At Item 8 of Ms Lambert’s employment Agreement (page 17 in the bundle) a company car is listed under “*Other benefits (if applicable)*” with the proviso “*use of company vehicle as per the employer’s vehicle policy*”; the policy was not produced by the parties. Ms Lambert accepted it was appropriate the vehicle was used by others while she was on sick leave.

[38] In light of the above, I do not accept there is evidence of the company deliberately depriving the applicant of what appears to be a discretionary benefit: Ms Lambert did not protest the car issue at the time and it did not feature in her letter of resignation as a reason for her departure (see doc 34).

**EAP**

[39] Ms Lambert's manager said that, as the applicant had made clear she was already undertaking counselling, it did not occur to her to offer Ms Lambert EAP; consistent with the provisions of the EAP scheme, as Ms Lambert was undertaking counselling other than through the scheme, the Company was not obliged to compensate her for past counselling sessions, i.e. she had the option of taking up counselling with another counsellor, under the EAP scheme, which the company would reimburse. Ms Lambert's evidence to the Authority was that she declined that offer as she wished to stay with her present counsellor.

[40] I do not accept that the above amounts to a breach by the company of its EAP obligations to Ms Lambert, or that she was unjustifiably disadvantaged by the delay of its offer or application of its discretion. Ms Lambert's evidence was that, prior to her return to work, she was already aware of the EAP available to her, but did not claim it in her discussions with the company before returning to work.

**Other Matters**

[41] The serious allegations made by Ms Lambert, that the company was hostile to her return, failed to put in place an agreed recovery plan, was not proactive in offering EAP and failed to meet its responsibilities to the applicant under that scheme, are not sustained by similarly weighted evidence, particularly as - other than raising the grievance - Ms Lambert accepts she did not contest her employer's conduct any time after her return to work and before her resignation.

[42] There is no evidence of undue pressure on Ms Lambert to sign off a new employment agreement: the applicant's manager presented credible evidence that she gave the applicant a reasonable time to respond to a document that regularised her lessened hours and responsibilities.

[43] Finally, I do not accept that Ms Lambert's manager's reference to the option of performance management amounted to an attack on the applicant and/or that it was foreseeable she would resign in light of the articulation of that option.

[44] The applicant was troubled by a key element of her reduced responsibilities, i.e. cold sales calling. Ms Lambert and her manager discussed the implications of the applicant not undertaking that work. No decision was reached.

[45] Their conversation took place the day before Ms Lambert submitted her resignation. That notice said, "*This was a hard decision for me to take and made with a lot of sadness, but it is the best decision for me to recover*" (doc 34).

[46] It makes no mention of the threat of performance management or any dissatisfaction in respect of the company's handling of Ms Lambert's return to work plan. It ends with the words, "*Finally I have enjoyed being a part of the company and have worked with many talented people. I truly wish the staff and the company well for the future*" (above).

[47] There is no evidence to interpret this advice, at the time, as other than a genuine, unforced decision to voluntarily leave her employment.

[48] I record here my sincere wish that this determination in no way impedes Ms Lambert's recovery or slows the realisation of her evident strengths and abilities.

### **Determination**

[49] Ms Lambert's application is dismissed.

[50] Costs are reserved. As indicated to the parties during the investigation, costs typically follow the event. This investigation ran to a half day, including time spent by the parties unsuccessfully attempting to settle matters on their own terms. Subject to parties' submissions, I can see no reason not to set costs at \$1,500 per half day.

**Denis Asher**

**Member of the Employment Relations Authority**