

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Leonie Maunder (Applicant)

AND Restaurant Brands Limited (Respondent)

REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Matthew Maling, Counsel for Respondent

MEMBER OF AUTHORITY Helen Doyle

INVESTIGATION MEETING Ashburton 12 September 2006
Ashburton & Christchurch 13 September 2006
Christchurch 14 September 2006
Christchurch 19 October 2006

DATE OF DETERMINATION 15 December 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Leonie Maunder, was employed by the respondent as manager of the Ashburton Pizza Hut from 4 June 2001. Ms Maunder was party to an individual employment agreement with the respondent dated 24 May 2001.

[2] Ms Maunder was in the manager's role at Pizza Hut until 3 August 2004. She did not physically attend at work after that date and was on stress leave. In or about late November 2004 Ms Maunder agreed, following a request by the respondent, to be examined by an independent psychiatrist, Dr Anne Young. Dr Young's report was issued on 25 February 2005. In her report Dr Young gave her diagnosis of Ms Maunder's mental health and said:

Ms Maunder initially presented with symptom of stress from approximately 2003. From approximately mid 2004 she described clear symptom of a major depressive episode with associated anxiety, which worsened significantly following her leaving work on 3 August 2004. She continues with symptom still consistent with the diagnosis of a Major Depressive Episode, although she had made significant improvements in her symptom, but this is not yet in full remission.

Dr Young said with respect to the likelihood of Ms Maunder being able to perform her role that:

In my opinion Ms Maunder is unlikely to be able to perform the full time role as manager of Pizza Hut, Ashburton, and to sustain that performance for the foreseeable future. It is now six months since Ms Maunder left work and, although she has made some improvement she still continues with mild to moderate symptom of depression and is extremely fearful and distressed when describing her experience with Pizza Hut management in general but particularly with Ms Bell.

In my view Ms Maunder has no capacity at the present, or in the foreseeable future, to work with Ms Bell as Area Manager, and to do so is highly likely to lead to a full recurrence of her Major Depressive Disorder.

As regards working for Pizza Hut generally she reluctantly expressed that she feels a marked sense of betrayal by those at Head Office, and feels there has been extremely little support for her, either prior to her going on stress leave, or subsequently. Given her ongoing distress when thinking about the Pizza Hut organisation in general, in my view, Ms Maunder has no capacity to be employed by Pizza Hut at any point in the future.

[3] Following Dr Young's report there was correspondence between Ms Maunder's solicitor at that time, Mr Timings, and Mr Maling. Ms Maunder was given one month's notice of termination of her employment on 1 April 2005.

[4] Ms Maunder says that she has three employment relationship problems that arise from her employment as manager of the Ashburton Pizza Hut which she wishes the Authority to resolve. The three employment relationship problems are:

- That the respondent has breached the terms of her employment agreement.
- That she was unjustifiably dismissed.
- That she was unjustifiably disadvantaged in her employment by the failure by Restaurant Brands to provide her with a safe workplace before August 2004 and that Restaurant Brands adopted an unfair procedure at its meeting with Ms Maunder on 3 August 2004 which put Ms Maunder's continuing employment in jeopardy.

[5] Ms Maunder seeks the following remedies: reimbursement of lost wages from August 2004 until the date of the Authority investigation meeting on 19 October 2006, future lost wages, damages in the sum of \$50,000 for breach of her employment agreement, compensation for humiliation, loss of dignity and injury to feelings as a result of the unjustified dismissal in the sum of \$50,000, compensation for humiliation, loss of dignity and injury to feeling as a result of the unjustified disadvantage and costs.

[6] There was discussion with counsel at the commencement of the investigation meeting that in the event liability is established a further meeting would be required to determine remedies. If liability is established then I am of the view that a further meeting is required to deal with the issues of remedies. This determination therefore will be about the question of liability only.

[7] The respondent, Restaurant Brands Limited (Restaurant Brands), is a duly incorporated company which operates Pizza Hut stores as part of its business.

[8] Restaurant Brands deny that it breached the terms of Ms Maunder's employment agreement and that it failed to provide Ms Maunder with a safe work place. It says that the first it knew of Ms Maunder's stress was on or about 4 August 2004 after which time she was written to and offered counselling through the Employee Assistance Programme. Restaurant Brands also denies that it unjustifiably disadvantaged Ms Maunder by its actions on 3 August 2004 or unjustifiably dismissed her from her employment.

The issues

[9] Restaurant Brands accept that Ms Maunder suffered a depressive illness in or about August 2004 but deny that it was caused by breaches of duty that it had towards Ms Maunder. Ms Maunder says that her depressive illness was caused by breaches of duty owed to her by Restaurant Brands and as a result of the harm suffered she has been unable to work from August 2004.

[10] Both Mr Goldstein and Mr Maling in their respective submissions referred to principles in the Court of Appeal judgment of *Attorney-General v. Gilbert* [2002] 1 ERNZ p.31 which are applicable in this case. The Employment Court judgment in *Gilbert v Attorney-General* is reported in [2000] 1 ERNZ 332.

[11] The issues that the Employment Court summarised in *Gilbert* are essentially the same issues required to be determined in this matter. The claim in *Gilbert* was also a breach of duty and personal grievance claim. The statement of problem lodged by Ms Maunder alleges both breaches of her employment agreement and personal grievances and some of the employment relationship problems overlap. The issues for determination are:

- What were the contractual duties Restaurant Brands owed Ms Maunder?
- Did Restaurant Brands breach these duties?
- What injuries/losses did Ms Maunder suffer?
- Were the injuries or losses caused or contributed to by the breaches?
- Were Ms Maunder's injuries/losses reasonably foreseeable for Restaurant Brands?
- Was Ms Maunder's dismissal justified?
- Was Ms Maunder's employment or one or more of her conditions of her employment affected to her disadvantage by an unjustified action of Restaurant Brands on 3 August 2004?

What were the contractual duties Restaurant Brands owed Ms Maunder

[12] Restaurant Brands accepted that it had an implied duty to take reasonable steps to maintain a safe and healthy workplace and that this encompassed an obligation to take reasonable and practicable steps to avoid psychological harm

[13] The Court of Appeal in *Gilbert* in para.[75] of the decision said: *...The content of the duty implied by common law to maintain a safe workplace is informed and given content by modern legislation, including in New Zealand the provisions of the Health and Safety in Employment Act.*

[14] There were amendments to the Health and Safety Act 1992 by virtue of the Health and Safety in Employment Amendment Act 2002. The amendments came into force on 5 May 2003 after *Gilbert* was decided. The definition of harm in s.2(1) of the 1992 Act was amended by s.4(8) of the Amendment Act to include physical or mental harm caused by work related stress. Section 2A of the principle Act sets out the factors to have regard to in terms of all practicable steps. S.2A(2) provides that *to avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.*

[15] I do not accept, as seems to be suggested by Mr Goldstein in his submissions, that the amendments to the Health and Safety in Employment Act 1992 changed the test to be applied to determining this matter.

[16] Both counsel referred in their respective submissions to para.[83] of the judgment of the Court of Appeal in *Gilbert*.

The appellant raises the spectre of unreasonable burden on employers. 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. That 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 obligations. 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 the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job 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 risk.

[17] Mr Goldstein submitted that the Court of Appeal confirmed five distinct implied contractual obligations in *Gilbert* which he sets out and relies on. Restaurant Brands accepts that it has implied contractual duties in its relationship with Ms Maunder as set out below;

- That it not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust, confidence and fair dealing between the parties.
- To avoid exposing Ms Maunder to unnecessary risk of injury or further injury to her physical and psychological health and, in particular, provide and maintain a safe system of work.
- That it takes all reasonable care not to cause the employee physical or psychological injury or further injury by reason of the volume, character, nature, or circumstances of the work required to be performed.

It denies a breach of those duties to Ms Maunder.

[18] Although Mr Maling in his submissions accepts that two additional implied duties were pleaded in *Gilbert*, he does not accept that they were all explicitly held as being implied terms by the Court of Appeal. He submits that they are not necessary to provide for employees' safety, and the other terms relied on effectively encapsulate and provide for the protections required and recognised by the law. The remaining two duties pleaded in *Gilbert* and referred to in Mr Goldstein's submissions are:

- That the employer would be a good and considerate employer and in particular in dealing in matters of workplace health and safety.
- That the employer would provide a working environment and management processes so that undue stress would not be caused to the employee.

[19] I am of the view that there is strength in Mr Maling's submission. The Employment Court in *Gilbert* said in paras.[15] and [35] of its judgment with respect to the duties above, that the obligations were also the operation and practice of those implied terms already admitted by the defendant.

[20] I accept Mr Maling's submission that the last two duties relied on by Ms Maunder are not required to be considered as separate implied duties, but are rather obligations that stem from the duties Restaurant Brands has accepted it has in its relationship with Ms Maunder.

[21] I find in conclusion that the contractual duties set out in paragraph 17 which Restaurant Brands accepts it owes Ms Maunder together with the statutory obligations in the Health and Safety in Employment Act 1992 are the duties it had toward her.

Was there a breach of the duties Restaurant Brands owed to Ms Maunder?

[22] In determining whether there was a breach of the duties Restaurant Brands owed Ms Maunder, the degree of knowledge Restaurant Brands had or ought reasonably to have had about Ms Maunder as an employee and any vulnerability she may have had is important in determining the scope of a particular duty and whether it has been breached.

Ms Maunder's position

[23] Ms Maunder was store manager of a take home and delivery pizza business in Ashburton. The maximum opening hours for the store was 62 hours per week. The store was staffed by way of a roster which Ms Maunder or someone she delegated to would prepare. The staff who worked in the store were often young. Ms Maunder was expected to be accountable for, and to manage the store. She was responsible for recruiting and training staff, and ensuring there was enough stock for pizza making. She was expected to manage costs by ensuring they were kept under control. There were times when the store would get busy and these times were commonly known as peak times. They occurred at times when the majority of pizza orders were made.

Pizza Hut structure

[24] The Pizza Hut structure is as follows. There are team members and delivery drivers within stores. Above them there is a shift supervisor. The next level is assistant manager and then store leader (Ms Maunder's role). The direct reporting line for a store is the area manager. The area manager is responsible for all stores in his or her area. Ms Maunder's store fell within area nine, along with eight other stores from Ashburton south. The area manager reports to the operations manager and general manager.

Did Ms Maunder directly report to her managers about her difficulties with work pressure and stress?

[25] Ms Maunder's claim proceeded on the basis that Restaurant Brands was aware that Ms Maunder was suffering from work-related stress. Restaurant Brands denied it had this knowledge.

[26] Mr Goldstein in response to a request for further particulars wrote to Mr Maling on 24 July 2006. In that letter he wrote that Ms Maunder told her three area managers and the general manager that she was stressed as a result of the work she was doing. He said further that Ms Maunder raised the issue of work stress as far back as July 2001 and continued to raise the issue with the above managers on a fairly regular basis during her employment (applicant's document 38).

[27] Barry Cox was Ms Maunder's area manager from the time of commencement of her employment until October 2002. Jacqui de la Croix was Ms Maunder's area manager from October 2002 until about mid August 2003. There was then a period of about 6 to 8 weeks where there was an acting area manager before Joanna Bell became area manager from October 2003. Ms Bell was still area manager in August 2004 after which time Ms Maunder did not return to work.

[28] Mr Cox, Ms de la Croix and Ms Bell were the three area managers referred to in Mr Goldstein's letter as having knowledge of work stress. The general manager was Rod de Vries. During the investigation meeting Ms Maunder clarified that she had discussed her workplace with Mr de Vries as in operational issues but not her stress. Mr de Vries was telephoned during the investigation meeting about the meeting he had in Ms Maunder's store in Ashburton in May 2002. He recalled that Ms Maunder was talkative, positive and cared about her staff. Ms Maunder raised issues with Mr de Vries about a security door and perimeter fence. He said he thought Ms Maunder was passionate and doing a good job.

[29] Mr Cox now works for a competitor to Pizza Hut. He therefore has no vested interest in the outcome of this matter. Mr Cox said in his evidence that he was surprised when he heard about Ms Maunder's complaint and came forth because he was concerned about the truthfulness of Ms Maunder's statement [of evidence]. I found Mr Cox to be a reliable and sincere witness. He said that he could not recall the word "stress" from Ms Maunder or her exhibiting any outward signs of stress or fatigue when he was her area manager. He explained that he had some understanding about mental illness and outward signs that may indicate all is not well. He said that the issues Ms Maunder raised with him were operational about her store rather than stress issues. He said that Ms Maunder became overly concerned about little issues, but never said that she could not cope, or was over worked. I accept Mr Cox's evidence that he was never told by Ms Maunder that she could not cope, or was over worked, or stressed, and that he was therefore unaware that she was.

[30] Ms de la Croix was telephoned during the investigation meeting. Ms de la Croix said she thought a lot of Ms Maunder and described her as a friend. She could not recall Ms Maunder telling her that she was tired, and said that she did not tell her that she was not coping. Ms de la Croix said that she had no concerns about Ms Maunder's mental health. She recalled that security at the back of the store was a major concern of Ms Maunder, and that Ms Maunder was concerned about the safety and security of her staff. Ms de la Croix said a pizza promotion at the store where a customer would buy a pizza and get one free would have made the store busier, but that she was an available support for Ms Maunder. She did not accept Ms Maunder was under stress and said that Ms Maunder was not required to do more than 40 to 45 hours work each week.

[31] Ms de la Croix took Ms Bell in or about late July or early August 2003 to meet the store managers in area nine before Ms Bell formally commenced as area manager. Ms Maunder said that during that meeting with Ms Bell and Ms de la Croix in late July or early August 2003 she talked about her stress and the pressure that she had been under since the pizza promotion. Ms Maunder said that there was a discussion about raising the profile of the store, but that Ms Bell would not approve of the store having more opening hours until Ms Maunder got her stress under control. Ms Bell's evidence was quite different. She said that Ms Maunder appeared *bubbly and outgoing* at the café meeting. Ms Bell said she felt that Ms Maunder was trying hard to impress and that Ms Maunder did not look nor sound drained. Ms Bell said that there was discussion about the assistant manager at the Ashburton store, Rebecca, who was off work ill. Ms Maunder then said that she wanted to open the store for additional lunches. Ms Bell said that was something that was not to be considered until Rebecca was better and back on board and until she [Ms Bell] had been down there long enough to assess the situation and whether the sales generated would justify the additional labour spending. Ms Bell said that at no stage during the meeting did she recall Ms Maunder mentioning she was stressed, and that Ms Maunder did not present as such.

[32] I have considered the two quite different accounts of the meeting. I prefer Ms Bell's evidence that there was no mention by Ms Maunder at that meeting of the stress she was under. I consider it less likely had Ms Maunder reported her stress to Ms Bell that she would in the same conversation have suggested longer opening hours for the store. I also find it more likely that the reason the longer hours were put on hold was because of Rebecca's illness and, so that Ms Bell could do her own assessment of the viability of additional opening hours.

[33] Ms Bell said the first time she was aware that Ms Maunder was suffering from stress was on 4 August 2004 when she spoke to Mr Maling. Mr Maling had been advised by Lynda Hartley, a friend and support person for Ms Maunder, that Ms Maunder was on stress leave. Ms Bell wrote to Ms Maunder on 6 August 2004 and offered confidential employee assistance programme counselling sessions with someone independent of the Restaurant Brands.

[34] Dr Paul Edgar is a consultant psychiatrist. Dr Edgar completed a report following a consultation with Ms Maunder on 7 August 2006. He attended and gave evidence at the Authority investigation meeting. Dr Edgar described in para.2.6 of his report some of the difficulties that Ms Maunder reported. Ms Maunder said that she no longer had any time for friends and would obsess over problems at work and felt increasingly tired. Her sleep deteriorated due to ruminating about problems at work. She reported her problems started to occur approximately April 2003 when she said she had her first panic attack which included heart racing, sweating palms and a feeling of doom. Dr Edgar records in his report that Ms Maunder did not discuss with her GP or her area manager how the pressure of work was affecting her.

[35] Dr Edgar further says in his report that *it is my opinion, on balance, that the work pressure that Ms Maunder was under during her time at Pizza Hut was an important cause of her developing a depressive disorder. In addition, that had action been taken by her employer, to relieve some of these work pressures, in terms of staff numbers, opportunities to take time away from work and enforcement of reasonable work hours, Ms Maunder would have avoided a depressive episode.* In the last paragraph of his report Dr Edgar states that he believes, and sets out the reason why, that Ms Maunder's personality was a contributing factor to the development of her depressive disorder but to a lesser degree than workplace stress. He states in that paragraph, with respect to his opinion that Ms Maunder has a perfectionistic personality and a belief that she has always been able to meet or surpass workload challenges in the past that; *I believe that this view of herself led Ms Maunder to focus her contact with the management of Pizza Hut solely on the workplace problems, but not on the personal effects that these problems were having on her, such as her sleep disturbance, lack of enjoyment of life and appetite.*

[36] I am not satisfied that the evidence establishes on the balance of probabilities that Ms Maunder directly notified her employer that she was not coping, or gave any clear indication that she was suffering stress as a result of work pressures. I accept that Ms Maunder raised operational issues with her area managers on a regular basis concerning the Ashburton store.

Was the work intrinsically stressful?

[37] Mr Goldstein submitted that the work undertaken by Pizza Hut store managers was intrinsically stressful and therefore there was no need for knowledge of specific vulnerability of Ms Maunder to detrimental harm. He referred to the Court of Appeal decision in *Gilbert* where it seems to be accepted that certain types of work may be intrinsically stressful. That is not the view of the English Court of Appeal in *Hatton v Sutherland* [2002] 2 ERNZ. In para.[12] of the Court of Appeal judgment in *Hatton*, under background considerations, there is a statement that:

...Psychological pressures are inevitable in all jobs, although greater in some than in others. But it is, as the documents quoted show, rather more difficult to identify which jobs are intrinsically so stressful that physical or psychological harm is to be expected more often than in other jobs. Some people thrive on pressure and are so confident of their abilities to cope that they rarely, if ever, experience stress even in jobs which many

would find extremely stressful. Others experience harmful levels of stress in jobs which many would not regard as stressful at all.

[38] I find that a Pizza Hut store manager oversees a store that on the whole provides a positive experience for customers. Behind the scenes there are pressures in meeting those needs and at times the pressures become quite intense. That of itself does not mean that it is a job where one would expect psychological harm to occur more than in other jobs.

[39] I do not accept Mr Goldstein's submission that Restaurant Brands' policy on stress and fatigue accepts stress is an inevitable part of the store manager's role. Rather, it provides an acknowledgement that stress of work can be a contributing factor to many health-related conditions.

[40] It would seem the sort of occupations which might be regarded as intrinsically stressful are those that involve employees dealing with violent and sexual offenders, abused children, and those who attend the scenes of terrible accidents. I accept that there are human resource issues peculiar to the fast food industry about which Restaurant Brands know. I shall come to those in considering the system of work adopted by Restaurant Brands. In conclusion though, I do not consider that Ms Maunder's job is intrinsically stressful. Having reached that conclusion the indications of harm to Ms Maunder's health arising from stress then had to be clear enough for Restaurant Brands to do something about it in order to trigger a breach of its contractual obligations for it failing to take steps.

Should Pizza Hut management have known about Ms Maunder's stress before 4 August 2004?

[41] Mr Goldstein in his submission said that if I did not accept that Ms Maunder's role was intrinsically stressful then the evidence, including documentary evidence, supports that Restaurant Brands did know, or, at least ought to have known that Ms Maunder was suffering from workplace stress. Mr Goldstein specifically refers to a 360 degree survey undertaken in 2003, a letter and note of an interview from an employee Karen in December 2003, notes of an interview with an employee Alyce dated 17 December 2003, Ms Maunder's self preparation document for her performance review, and the stress and fatigue policy. Mr Goldstein also refers to evidence from Alyce that Ms Bell told her she knew of Ms Maunder's stress.

[42] Both the 360 degree surveys for 2002 and 2003 refer to Ms Maunder being stressed at peak times. There is a comment which has been attributed to Ms Maunder about her being more effective if *not hands on sometimes, so I can spend more time doing the important paper chase in a time effective way. To care less so the small things don't get me down. I should take less ownership, may be it would help with the overall stress and frustrations of operating the store.*

[43] Dr Edgar has said in terms of that comment from Ms Maunder that he, as a psychiatrist, would pick that up as an indicator of depression and stress, but it would perhaps not be evident to an area manager. In relation to the various references to stress by staff members in the feedback report about Ms Maunder at peak time he said: *Stress is a catch-all term for pressure and irritability and used in that sense it was Ms Maunder reacting in a non-helpful way.*

[44] I took from Dr Edgar's evidence that only an employer with very good knowledge of mental illness would make the connection between the feedback reports and a mental health issue.

[45] I now turn to the 12 December 2003 letter and notes from an interview with the employee Karen. Ms Bell became aware in December 2003 following telephone calls from staff in the Ashburton store that they were concerned about the way they were treated by Ms Maunder. Ms Bell asked the staff to put their concerns in writing. Mr Goldstein specifically refers to Karen's letter. I do not intend to set out the contents of the letter. The part Mr Goldstein refers to in his submissions is on the second page of the letter which contains a number of complaints about the actions of Ms Maunder. Karen writes: *I get a feeling this comes from not handling the stress or something very well. But I don't see this job as a*

stressful one (compared to having been a manager myself in McDonald's for 3½ years). She goes on to say that Ms Maunder is always back-stabbing the crew.

[46] Ms Bell also got a telephone call from another employee, Alyce, about a potential intruder at Pizza Hut at or about this time. Ms Bell was concerned that Ms Maunder had not discussed the incident with her, and telephoned Ms Maunder. Ms Bell said that she took a file note of the conversation and that Ms Maunder was belligerent and swearing and suggested Alyce was prone to fantasy. I have no reason not to accept that that file note (respondent's bundle 3) accurately reflects what was said.

[47] Ms Bell realised that she needed to do something about the staff issues and talked with a senior area manager, Sam Tuhuru, who worked in Christchurch. Mr Tuhuru suggested to Ms Bell that they set up a meeting with the staff members who had made the complaints and listen to their concerns and then meet with Ms Maunder. On 17 December 2003 Ms Bell met with the three staff members Alyce, Sara and Karen individually at a local motel. Ms Bell took notes.

[48] The notes record a number of concerns about Ms Maunder's management of the staff members. Mr Goldstein relies on some of the notes. He relies on the part of the notes which record Alyce saying that she knew Ms Maunder before starting at Pizza Hut and that she was lovely out of work but completely different at work. Mr Goldstein also relies on part of the interview where Alyce is recorded as having said that Ms Maunder gives *good long hours to favourites, if in bad books – forgot to use cups and she's psycho*. Apparently cups are used to measure the ingredients for the pizzas.

[49] The notes taken from Karen record, amongst a number of other matters, that Karen told Ms Bell and Mr Tuhuru that *Leonie is in the store, stressed all the time, makes us on edge, disorganising everything as a drama*. Knowing what is known now about Ms Maunder's health the word *stressed* takes on some significance. I will come to whether it would have appeared significant at that time. I note what the third employee Sara is recorded at her meeting that day as saying about Ms Maunder – *yells at everybody – standing doing nothing, stressing staff out, complains about what staff do or don't do*. Sara is also recorded as saying that she [Sara] is *crying after work and angry when she gets home*. This really illustrates the difficulty in determining that the words about stress should have indicated specific vulnerability to a reasonable employer. It is important, therefore as said by the Court of Appeal in *Gilbert* that these words are not considered with the benefit of hindsight but against the actual knowledge that Restaurant Brands had at that time about Ms Maunder.

[50] A meeting took place with Ms Maunder on 19 December 2003 to discuss some issues. Ms Bell picked up on the staff concerns but said that a lot of things the employees had told her were not things she herself had observed with Ms Maunder. She said that sometimes young people *slag* off a store manager and she decided to raise four core issues with Ms Maunder.

[51] Ms Bell attended the meeting with Mr Tuhuru. Ms Maunder attended with Janice Maher. Ms Maher was, at that time, a store manager and had been store manager of the New Brighton Pizza Hut where she had trained Ms Maunder when she commenced employment. Ms Bell raised issues with Ms Maunder at the meeting about the rosters, payment of staff, code 4 and a phrase that staff said Ms Maunder used to refer to Ms Bell. Objectively considered, the issues appear to have been satisfactorily talked through.

[52] Mr Tuhuru asked both Ms Maunder and Ms Bell whether they could continue to work with each other. This was because of the phrase used by Ms Maunder when referring to Ms Bell. I prefer Ms Bell's evidence, confirmed by Mr Tuhuru, that they both indicated that they could, rather than Ms Maunder's evidence that Ms Bell indicated that she could not. If Ms Bell had said that, then I am quite satisfied Ms Maunder would have been assigned to another area manager. I do not find that Ms Maunder said anything at the meeting about not coping or finding the work difficult, or that she asked for additional assistance. Both Ms Bell and Ms Maunder exchanged Christmas gifts.

[53] Mr Goldstein also relies on a comment in Ms Maunder's self review preparation document for a performance review in April 2004. Ms Maunder wrote under the heading, *What goals were not achieved and why? – Did not pass enough audits. There's no time for my own personal growth – 100+ hours per week in training, running store etc – too much to do, not ever enough time.*

[54] Ms Bell said she could not recall reading that document, but that she would have thought 100 hours per week was impossible given the store opening hours. She said that there was no discussion between her and Ms Maunder about the comments. Ms Bell had also had complaints from staff about Ms Maunder turning up late for shift, not working when at the store but talking to customers, and leaving during her rostered times to do chores. At that time it seemed to me that Ms Bell's concerns about hours were more focused on those issues than Ms Maunder working excessive hours. I found Ms Maunder's evidence about her hours unclear and imprecise. Dr Edgar also confirmed in his evidence that Ms Maunder was not precise about these matters. Only some rosters were able to be located for the latter part of her employment which did not support that Ms Maunder was at least rostered on for excessive hours. Ms Maunder's own evidence is that she was not working 100 hours per week in 2004.

[55] I have considered the 360 degree surveys, performance appraisal and letters and comments from Alyce and Karen with the state of Restaurant Brands' knowledge at that time rather than with the benefit of hindsight. They also have to be considered in light of the fact that Ms Bell maintained fairly regular contact with Ms Maunder both at the store and by telephone discussing operational issues from December 2003 until August 2004. These documents were therefore only a small part of the ongoing relationship between Ms Bell as area manager and Ms Maunder as store manager.

[56] The knowledge that Restaurant Brands had was that Ms Maunder was managing an average store with average turnover. There was no evidence her targets were unreasonable and that undue pressure had been brought to bear about them. There was no evidence of abnormal levels of absence through sickness for Ms Maunder.

[57] The Pizza Hut manager for Timaru, Sheryl Symes, appointed about four months prior to Ms Maunder, gave evidence that she worked considerably less hours than Ms Maunder said she was working. Timaru is a store with a higher turnover than Ashburton. Alyce complained in early January 2004 about being sent home first by Ms Maunder and that Ms Maunder was never at work. As a result of this Ms Bell checked with the alarm company about Ms Maunder's rostered hours. The records show that from 13 January 2004 to 26 January 2004 (14 days) Ms Maunder was not rostered for six days and was on bereavement leave for one day. Those records would not demonstrate to Ms Bell the need for concern about whether Ms Maunder was having adequate days off or working excessive hours. Mr Goldstein referred to an email sent at 2.26 am from Ms Maunder to Ms Bell on 1 March 2004 as an indication that Ms Maunder was working excessive hours. Ms Bell said it was more likely to be an indication of a particular shift rather than an employee working more than 40 hours per week. She said it did not cause her alarm because she knew what Ms Maunder's way of working was.

[58] When Ms Maunder asked Ms Bell to organise cover it appeared to have been done. When the assistant manager of the Ashburton store resigned in early February 2004 Ms Bell advised Ms Maunder that she would place an advertisement for a shift supervisor and talked to Ms Maunder about her ideas. Ms Bell arranged cover from Timaru for the assistant manager in the Ashburton store when she resigned. She advised Ms Maunder that she would do the interviewing and testing for a replacement shift manager. In mid February 2004 Ms Bell worked the close shift in Ashburton store and in consultation with Ms Maunder organised some cover from Timaru for a further close and an open of the store. Ms Bell also arranged other cover when required or asked by Ms Maunder in 2004.

[59] There was no evidence that Ms Maunder was ever asked to assist in another store, or supply staff from her own store to assist elsewhere. Although Ms Maunder's evidence was that her workload had increased from the time Ms Bell was appointed, there was no satisfactory evidence for me to conclude that this was significant. Ms Bell did establish that training had not been done in accordance with set procedure and certain elements therefore had to be

completed. That was an issue in every store in area 9 and it appeared from the audit carried out on training that Ms Maunder was able to deal with that promptly.

[60] There was no satisfactory evidence in my view that Ms Bell undermined Ms Maunder. When staff at the Ashburton store raised issues she did ask them to put them in writing but I am not satisfied at all that Ms Bell encouraged complaint. If anything Ms Bell downplayed staff complaints. One example is that Ms Bell said she decided not to take another issue raised by Alyce further with Ms Maunder because she thought it may be speculation and rumour. I prefer Ms Bell's evidence as documented by a diary entry about the conversation to Alyce's evidence that the conversation did not take place.

[61] Ms Maunder was on sick leave from 14 April 2004 until 28 April 2004 with suspected deep vein thrombosis. Ms Maunder was then on annual leave from 6 July until 12 July 2004. It was after that date that two employee complaints were the subject of a further meeting with Ms Maunder on 3 August 2004 after which date she did not return to work.

[62] The documents Mr Goldstein referred to in his submission, when viewed against the knowledge that Restaurant Brands had, do not in my view provide sufficient warning or put Restaurant Brands on notice that Ms Maunder was vulnerable to injury or harm to her health. This is, notice of warning in a sense of being plain enough for Ms Bell to have thought that she should do something about it.

[63] Restaurant Brands has a stress and fatigue policy. This policy encourages managers to have a basic idea of how to recognise and deal with the early signs that one of the people in their care is beginning to be exposed to health and safety problems related to fatigue – from whatever source. The policy goes on to say that in the course of managing its business, Restaurant Brands will regularly ask itself basic questions concerning the performance of the tasks. For example: Are there enough people to do the work? Do they have the right equipment? Are they clear about their functions? Is the person fit to be at work? The policy recognises that the responsibility for preventing and resolving issues arising from workplace stress and fatigue lie with both the employee and the employer. Ms Bell accepted that she had not had training with a professional to recognise stress or identify stress, but she confirmed that she had had training in the way work was organised, such as store set-up, rostering and labour resources and lay-out. In my view the policy anticipates Restaurant Brands having some notice from the employee of their stress or fatigue. I do not accept that the policy in some way changes or alters the requirement of notice or specific warning of vulnerability to health.

[64] There was also a reference to Alyce's evidence about Ms Bell's knowledge of Ms Maunder's stress. Alyce gave evidence in support of Ms Maunder. I found her to be a pleasant and well intentioned witness who knew that Ms Maunder was unwell and wanted to support her. Alyce said that she told Ms Bell that Ms Maunder was getting stressed and that Ms Bell said Ms Maunder was *not handling the job at the moment*, and that Ms Maunder was *doing things the hard way*.

[65] Ms Bell expressed surprise at Alyce's evidence. I prefer Ms Bell's evidence, which appears to be supported by notes taken of telephone calls from Alyce at the time of her employment that Alyce never expressed any concern for Ms Maunder. I accept that Ms Bell was not impressed with Alyce's comments about Ms Maunder when she was an employee. Alyce was just describing events as a young person would. I find though that it would be quite unlikely that Ms Bell would have discussed any of her views about Ms Maunder with Alyce. I find Alyce's evidence unreliable about any discussion she may have had with Ms Bell.

[66] In conclusion I do not find that Restaurant Brands knew, or ought to have known of any particular problem or vulnerability about Ms Maunder as an employee before August 2004.

[67] Given that there was no specific knowledge about the vulnerability of Ms Maunder, I need to consider what steps Restaurant Brands took to maintain a safe workplace and whether they were reasonable.

Was the system of work safe?

Training and support

[68] After Ms Maunder commenced her employment with Restaurant Brands on 4 June 2001 she received about 8 weeks' training for the position she was to take up as store manager, Ashburton. Ms Maunder shadowed Ms Maher in her store and worked each different station to get an understanding about the operation of the store. Ms Maunder accepted that she was shown everything about how the store operated. Ms Maunder found there was a lot of information to absorb and she found it a little daunting.

[69] There was a further week for orientation for Ms Maunder in Auckland in or about October 2004. This included a health and safety training session with the health and safety officer for Restaurant Brands, Heather Carnegie. After Ms Maunder started in the Ashburton store on 1 August 2001 it was essential in my view that there be some support available to her particularly in the somewhat isolated store like Ashburton. The evidence suggested that it was during the first year that some trained store managers found the job too challenging and resigned.

[70] The support available to Ms Maunder in my view came from several sources. There were written procedures and policies for all aspects of the day to day operation of Pizza Hut stores. Each Pizza Hut operated on the same basis. There was a set procedure/policy for the hire of staff. An assessment or evaluation was carried out for new staff members who could be put through the system.

[71] Ms Maunder could telephone her area manager for assistance. The area manager had a vested interest in the success of the stores in his or her area. When Ms Maunder first started as store manager she experienced difficulties with rostering and labour forecasts. Mr Cox organised for the store manager from Timaru to go to Ashburton to help Ms Maunder. The area manager visited the store about twice a month and completed audits of training and staff. Ms Maunder telephoned other store managers and Ms Maher to talk through issues or ask for assistance. The evidence was that she would speak to other managers by telephone for extended periods of up to 3 hours. Ms Maher gave evidence that during this early period of employment she drove halfway to Ashburton to drop off some stock for Ms Maunder. Ms Maher also assisted in training some of Ms Maunder's staff and helped Ms Maunder sort out her emails in folders. I find that reasonable steps were taken by Restaurant Brands in terms of initial training of and then support for Ms Maunder after she started as store manager. Ms Maunder was not simply left to her own devices and there were people for her to go to for assistance during her time with Pizza Hut.

Retention and Recruitment

[72] One of the significant issues for Ms Maunder was recruitment of the right staff for the store from the available labour force in Ashburton.

[73] Restaurant Brands accept that difficulty in recruitment and retention is one of the main human resource issues it faces. There is an emphasis on training for all employees from the time they first start employment as a key retention strategy. Each new team member is provided with an induction programme and there are surveys about the quality of induction carried out from time to time. Employees are also asked why they joined Restaurant Brands and it would seem that training is a significant part of why they seek employment with the company. A people power audit is also carried out every month by the area manager on the store, usually in consultation with the store manager. That audit identifies the needs of the store and whether there are additional staffing requirements. If staffing levels have fallen below the minimum numbers required then there is an action plan discussed and recorded for recruitment and employment. Training is also audited as part of that process every month. Ms Maunder's store was audited every month in terms of people power.

[74] Employee turn reports are also prepared which shows a turnover of team members and drivers for each store. These statements indicate what would be considered in other industries as a very high turnover of staff. Compared with other staff turnover levels in other Pizza Hut stores in New Zealand Ms Maunder's turnover was consistent and lower in some instances.

[75] Mr Cox accepted that recruitment of staff is more difficult in a small town, but said that during the time he was area manager he never thought Ms Maunder's store had got to the point of two few staff. Mr Cox said that if a store manager asks for relief he/she would get it. Ms Bell obtained cover from other stores for Ms Maunder's store in 2004.

[76] Recruiting and retaining staff is an issue for Pizza Hut but I find the steps that Restaurant Brands took in terms of training, people power audits and providing relief to stores was reasonable. The recruiting and retention of staff leads onto the next issue which is that Ms Maunder said she was working excessively long hours.

Demands of the role

[77] In the early days of her employment and during the pizza promotion campaign Ms Maunder said she worked up to 100 hours per week. Ms Maunder's employment agreement provided the following with respect to hours required to be worked:

3. *Hours of work*

- 3.1 *As we are a seven day a week operation, your hours of work will be based on a rostered shift system. This will require you to work evenings, weekends and public holidays.*
- 3.2 *Given the operation of the business your workload and shift duration will alter according to trade requirements and/or other unforeseen circumstances. The emphasis is on completing the responsibilities of the position and achieving company objectives – this may require varying amounts of time according to the circumstances of the individual restaurant.*
- 3.3 *You may also need to work additional time to attend staff meetings, training sessions and complete other management and administrative duties – your gross compensation has been calculated to recognise these requirements.*
- 3.4 *Having said that, the normal expectation is that you will be rostered to work in the vicinity of 40 hours each financial week usually covering the busiest trading periods and that typically includes Friday and Saturday evenings.*
- 3.5 *You may request a day in lieu this, due to circumstances outside your control, you are required to work a full shift of at least 8 hours duration, in excess of the 40 work hours described above. Days in lieu may be taken as paid holidays at a time convenient to the company or may be paid for at the current daily rate, as mutually agreed.*

[78] The area managers were not required to review Ms Maunder's rosters in any routine way and they all said that they did not require Ms Maunder to work in excess of the contractual hours. I accept that there were occasions when Ms Maunder worked long hours. It seemed to me from the evidence this was more likely during the earlier part of her employment and possibly when there was a pizza promotion in 2002/2003. I listened carefully to the evidence from previous staff and drivers who said Ms Maunder worked long hours, although these staff properly accepted that they were not present for the whole period that Ms Maunder worked. It did not seem to me from the evidence that she continued to work excessive hours in 2004.

[79] In assessing this matter I consider it is not so much the hours Ms Maunder was working, but whether the demands for the job were reasonable or unreasonable. There is some evidence to suggest that Ms Maunder liked to *potter around* and that she would telephone other managers at times when they would have expected her to be well finished. The

additional work required outside a store manager's rostered hours (which I accept should be in the vicinity of 40 hours per week) is essentially completion of rosters, banking, reporting, ordering goods and employing and training staff. Cleaning and dough preparation is also required but there was a view that with delegation and organisation these tasks should usually be able to be performed during the store opening hours. Of those matters training is probably the most significant commitment in terms of time, but on my assessment of the training documents that I was provided with staff do complete much of it on their own. The current manager of the Ashburton store, Teresa, said that she normally works about 40 hours per week but does do 50 hours a week every two or three months. It seemed to me from the evidence that the first year was the period when it was more likely than not that more than the contractual hours were worked as a store manager gets to understand the role.

[80] I am not satisfied that the demands for the Pizza Hut store manager role were unreasonable. I am not satisfied that Ms Maunder was expected to consistently work long hours in excess of contract hours, or long hours outside of those that she was rostered for. Having said that, I accept additional hours are required on occasion and that this was recognised in the employment agreement with the ability to request a day in lieu. There was no evidence that days in lieu were requested for this reason by Ms Maunder.

[81] I find that it was a surprise to the company when Ms Maunder advised at a disciplinary meeting on 31 August 2004 that she was working between 55 to 85 hours per week. I am not satisfied that there was an expectation that Ms Maunder should be working these hours and that if indeed she was working these hours Restaurant Brands was unaware of this.

Security

[82] Ms Maunder felt that security issues at the Pizza Hut store were unsatisfactorily dealt with. She referred in particular to a vent and a security door (see document 45 applicant's bundle). I did not hear expert evidence to make an assessment whether what was provided was reasonable. Even if I was to find a breach with respect to these security aspects Ms Maunder would not have been able to establish that these failures caused or made a material contribution to her ill health as there was no evidence of physical or psychological harm as a result of these security issues.

Leave

[82] There did not in my view appear to be significant obstacles to taking leave for store managers although advance notice was required so that alternative arrangements to cover the store could be made. This did I accept require some organisation in advance but there was no evidence that Ms Maunder had requested leave and had been turned down. I note that this wasn't a work environment where an employee would return to a significant build up of work.

Stress and fatigue policy

[83] There was a policy with respect to stress and fatigue and a laminated poster was sent to all staff on 20 May 2003. The laminated poster, which I am satisfied was sent to Ms Maunder's store, provided that: *the definition of "harm" or "hazard" now explicitly includes stress and fatigue. Restaurant Brands have developed a Stress and Fatigue Policy and set up an Employee Assistance Programme with information provided on the intranet.* This laminated poster was sent out to the stores in May 2003.

[84] Ms Maunder was trained in health and safety aspects of her role and her employment agreement required her to learn and observe the Company policies and procedures. Restaurant Brands has a health and safety officer, Ms Carnegie. I am satisfied Ms Carnegie would have been able to guide the managers in terms of risk management strategies if one of them had contacted her about an employee suffering from stress or fatigue. Ms Carnegie knew Ms Maunder and felt she had struck a real rapport with her. Ms Maunder did not feel that way about her relationship with Ms Carnegie, but nevertheless it was another person to whom she could have gone to about her issues. Importantly, too, there was reference to an employee

assistance programme which Ms Maunder could have used to discuss matters that she may well have felt, as many employees do, uncomfortable talking to her area manager about.

[85] I am of the view that Restaurant Brands Limited took reasonable steps in terms of development of a stress and fatigue policy and importantly, setting up an employee assistance programme to deal with those matters.

Knowledge on 4 August 2004

[86] When Restaurant Brands became aware that Ms Maunder was suffering from stress she was immediately advised about the employee assistance programme. Ms Maunder did not return to work after that date except to attend a disciplinary meeting on 31 August 2004.

Determination on breach of Employment Agreement

[87] I find in conclusion that Restaurant Brands took reasonable care and all practicable steps to provide a safe workplace for Ms Maunder who, in the absence of clear evidence to the contrary, they were entitled to assume could cope with the normal pressures of the job.

[88] I do not find that there was a breach of the duties and obligations that Restaurant Brands had to Ms Maunder to ensure that she had a safe working environment.

[89] I do not need to determine the issue of causation. For completeness I do note that the evidence of the cause of the depressive disorder from Dr Young, and in Dr Edgar's report, comes from Ms Maunder's own self reporting. Whilst Dr Edgar also saw Ms Maunder's perfectionist personality as a contributing factor, he thought that contributed to a lesser degree than workplace pressures. He accepted that if the evidence was that there was support in terms of the workplace and the pressures were not as he understood them, then Ms Maunder's personality could have contributed in a greater way.

[90] It may have been that the Pizza Hut job was not the right sort of job for Ms Maunder. Ms Maunder described to Dr Edgar that she would give *over 100%* and *quitting was not an option*. This was an important belief that she had had from her childhood. One of Ms Maunder's friends, Lynda Hartley, offered her a position in or about late 2002 or 2003. Ms Maunder turned it down because she did not want to let Pizza Hut down. Ms Hartley said that Ms Maunder did not believe that anyone else could step in and manage the store to her standard. This was despite Ms Hartley offering Ms Maunder more money than she was getting at Pizza Hut.

[91] It is very sad that Ms Maunder became so unwell. It is obvious from the evidence that I heard that Ms Maunder was well regarded as a store manager, not only by those she employed at Pizza Hut but also by other store managers and customers of Pizza Hut.

[92] However, I have not found that there was a breach of duty and Restaurant Brands took all reasonable and practicable steps to ensure Ms Maunder had a safe working environment. In conclusion, Ms Maunder's claim for breach of her employment agreement is unsuccessful.

Unjustified actions causing disadvantage and unjustified dismissal claims

[93] The first claim of unjustified action was that Restaurant Brands did not provide Ms Maunder with a safe workplace. I have found that Restaurant Brands did not breach its contractual obligations to provide Ms Maunder with a safe workplace. The breach of a contractual obligation pleaded, in the alternative as a personal grievance for unjustified action causing disadvantage, cannot therefore succeed.

[94] The second unjustified action alleged was in relation to a meeting that Ms Maunder attended with a support person Lynda Hartley with Ms Bell and Mr Tuhuru on 3 August 2004.

[95] The meeting was to discuss allegations from two employees at the Ashburton Pizza Hut that Ms Maunder had altered their clocked in hours and then after they complained about this their rostered hours for the following week were reduced.

[96] Ms Bell organised a meeting to discuss the matter and invited Ms Maunder to come with a support person.

[97] The allegations were not disclosed to Ms Maunder until the meeting and that she says is the unjustified action that disadvantaged her because she was not given adequate notice and warning as to what the meeting was about.

[98] There is no dispute that Ms Bell did not tell Ms Maunder what the allegations were prior to the meeting. Ms Maunder was competently supported at the meeting by her friend Lynda Hartley. The allegations were discussed and Ms Maunder did accept that she had deducted hours from the system and appeared to appreciate that it was not the right thing to do. The meeting ended on the basis that there would be some thought given to what had been discussed and a further meeting for the following day was arranged.

[99] I accept that Ms Bell did not reach a decision to take disciplinary action after the meeting but she did conclude that the matter was serious. Ms Bell spoke to Alan Brookbanks who is the General Manager of People and Performance at Restaurant Brands because she had never been involved in a disciplinary process before and needed some advice. Mr Brookbanks referred Ms Bell to Lane Neave solicitors and she spoke to Mr Maling. Ms Bell was advised that there had to be a procedurally fair process which would include Ms Maunder being aware of the specific allegations she was facing. Ms Bell understood that if the process was recommenced then, if there was any unfairness about the first meeting, it could be resolved.

[100] In the afternoon of 3 August 2004 Ms Bell received a telephone call from Dr Penny Holdaway who said that Ms Maunder would be off work for a week but would return on 10 August 2004. She did not advise Ms Bell of the reasons.

[101] Ms Bell was then advised by Mr Maling on 4 August 2004 that Ms Maunder was on stress leave. Mr Maling also advised Ms Bell that Ms Maunder wanted a letter outlining the allegations.

[102] Following that Ms Bell made an offer to Ms Maunder in writing of the employee assistance programme. Ms Maunder took up the offer and attended three sessions. The allegations were also set out in writing as requested by Ms Maunder.

[103] The meeting on 4 August was then postponed. A disciplinary meeting did not take place until 31 August 2004. At that meeting Ms Maunder was represented by a solicitor, Mr Timings. She gave explanations in relation to the allegations and spoke about her stress including the excessive hours she had been working.

[104] Ms Bell said that she needed to follow up on some issues after the meeting about the reason for changing the rosters following the time alteration issue, the hours that Ms Maunder said she had been working and the stress issue.

[105] Mr Maling in a letter dated 7 September 2004 wrote to Mr Timings and asked amongst other matters when Ms Maunder first raised the stress complaint.

[106] Mr Timings responded in writing on 9 September 2004 and provided a copy of a further medical certificate that stated Ms Maunder was unfit for work and should be fit to resume on 28 September 2004. He also confirmed that Ms Maunder had been admitted to hospital and in the circumstances any disciplinary meeting should be deferred.

[107] On 10 September 2004 Mr Brookbanks wrote to Mr Timings and advised that Restaurant Brands would be prepared to pay for a further five EAP counselling sessions for Ms Maunder and would then review the situation again.

[108]Mr Maling wrote to Mr Timings on 10 September 2004 advising that a further disciplinary meeting would be adjourned until Ms Maunder was well enough to attend.

[109]Mr Maling provided Mr Timings when requested with a transcript of the 31 August meeting and details of further allegations. There were further requests for particulars with respect to the stress claim so that it could be investigated.

[110]On 29 October 2004 Mr Maling wrote to Mr Timings raising the issue of Ms Maunder's long term illness and whether her employment could be maintained given her long term illness. A request for Ms Maunder to be examined by a Doctor was made. A further request was made in the letter for the information about when Ms Maunder first raised the stress claims.

[111]On 2 November Mr Timings raised personal grievance claims against Restaurant Brands and Mr Maling requested further particulars of the grievances and the stress claim and suggested mediation assistance.

[112]Ms Maunder was then examined by Dr Young. Dr Young's report was issued on 25 February 2005. Her conclusions were that Ms Maunder had no capacity to be employed by Restaurant Brands at any point in the future and if she was it may lead to a major depressive episode.

[113]Mr Maling wrote to Mr Timings by letter dated 10 March 2005. In that letter he sought input from Ms Maunder following Dr Young's report to Restaurant Brands belief that it had grounds to terminate Ms Maunder's employment for unfitness for work and/or long term illness. 14 days was given for information to be provided which it was noted could include any medical assessment that Ms Maunder wished to present.

[114]An extension of the timeframe for Ms Maunder to reply was requested on 24 March 2004 by Mr Timings. An extension was granted that same day.

[115]By letter dated 31 March 2005 Mr Timings advised Mr Maling that:

Our client accepts that under the current management regime it would not be in her best interest to return to the workplace. Any such return would have a detrimental effect on her health.

[116]On 1 April 2005 Restaurant Brands advised Ms Maunder in writing that having considered Dr Young's report and the paragraph set out above in Mr Timing's letter of 31 March 2005 it had decided to terminate Ms Maunder's employment on the grounds of her unfitness for work due to long term injury/illness. Ms Maunder was given one months notice of termination in accordance with her employment agreement. She was also invited to mediation on an urgent basis to enable implementation of the exit in a way to cause the least disruption and to resolve the other outstanding issues previously raised.

Determination of claim of unjustified action causing disadvantage at meeting on 3 August 2004

[117]The disciplinary process that had commenced in August 2004 was never finalised. I accept that the allegation Ms Maunder was facing at the meeting on 3 August 2004 of altering her employees' time records and then their hours was potentially serious. Depending on Ms Maunder's explanations there was a real possibility of disciplinary action.

[118]I find that it was unfair that Ms Maunder was advised of the nature of the allegations before she attended the 3 August meeting and it was unjustified for Ms Bell not to advise Ms Maunder what the allegations were. That however is not the end of the matter. To succeed in a grievance for unjustified action there has to be a corresponding disadvantage to Ms Maunder in her employment or one or more conditions of her employment.

[119]Ms Maunder was after 3 August 2004 provided with written details of the allegations and a further opportunity to respond to them on 31 August 2004. I accept that effectively this dealt with any unfairness in terms of the first meeting.

[120]Mr Goldstein submits that the disadvantage was that Ms Maunder's continuing employment was placed in jeopardy. I do not accept that it was placed in jeopardy. The disciplinary process was never finalised and there was no outcome to the matter.

[121]I find that there was an unjustified action when Ms Bell invited Ms Maunder to a meeting on 3 August 2004 without advising of the allegations she was facing. I do not consider that Ms Maunder was disadvantaged by that action in her employment or one more conditions of that employment because the allegations were subsequently put to her in writing and she was given another opportunity to give an explanation. Ultimately there was no disciplinary action as a result of the allegations.

[122]For completeness I do not conclude that Ms Maunder's attendance at the meeting on 31 August 2004 was an unjustified action. Ms Maunder was legally represented and if she had not been well enough to attend then I would have expected an adjournment to have been requested by her representative as indeed had been requested and granted before the meeting of 31 August 2004.

Determination of claim of unjustified dismissal

[123]I am of the view that given Dr Young's report and correspondence from Mr Timings on behalf of the applicant, there were substantive grounds on the basis of long term illness to terminate Ms Maunder's employment. I also consider that the dismissal was procedurally fair with input from Ms Maunder before termination.

[124]I conclude that in terms of section 103A of the Employment Relations Act 2000 Restaurant Brands action and how they acted in terms of Ms Maunder's dismissal were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[125]I accept Mr Maling's submission that the correct approach is to deal with the personal grievance of unjustified dismissal by assessing the substance and procedural fairness of the dismissal. Even if the dismissal was justified there can still be a claim for loss of earning arising from the dismissal if I had found a breach of duty that caused the long term illness [Court of Appeal in *Commissioner of Police v Cartwright* [2000] 2 ERNZ 106.

[126]I have not in this case found there to have been a breach of duty so there can be no claim for loss of earnings in this case.

Costs

[127]I reserve the issue of costs. Ms Maunder is legally aided. If the respondent wishes to make submissions with respect to costs then these should be lodged and served by Friday 2 February 2007 and the applicants will have a further two weeks to respond to these submissions.

Summary of findings

- I have found that there was no breach of Restaurant Brands Ltd duties and obligations. The Company took reasonable and practicable steps to ensure Ms Maunder had a safe working environment proportionate to known and avoidable risks.
- I have found the personal grievance with respect to the unsafe workplace claim not to be made out as a result of the finding that there was no breach of the Company's duties and obligations.
- I have found that there was an unjustified action of Restaurant Brands in terms of the meeting on 3 August 2004, but Ms Maunder was not disadvantaged by that action as there was a meeting on 31 August 2004 and no resulting disciplinary action taken.
- I have found that Ms Maunder's dismissal was justified.
- I have reserved the issue of costs.

Helen Doyle
Member of Employment Relations Authority