IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 403/07
5086003

	BETWEEN	SHELLEY MENELDA Applicant
	AND	PUBLICIS MOJO LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Sandra Callanan for Applicant Howard Thompson for Respondent
Investigation Meeting:	9 and 10 October 2007 at Auckland
Submissions received:	24 and 31 October 2007 from Applicant 24 and 31 October 2007 from Respondent
Determination:	19 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant says the Respondent breached its duties to keep her safe from harm at work by failing to properly deal with bullying by a client and this resulted in her suffering a nervous breakdown due to chronic stress.

[2] She seeks compensation for loss of both past and future earnings following termination of her employment by the Respondent after five months of absence due to illness. Her claims for remedies include lost salary for ten months, $30,000 compensation for hurt and humiliation, and a 20 year loss of opportunity claim totalling $1.2 million and based on an expected $60,000 salary differential between 2007 and her expected year of retirement in 2027.

[3] The Respondent, an advertising agency, accepts that the Applicant raised

issues with her managers about a particular client account and the demanding work expectations of that client's representative. However it says those issues were dealt with appropriately by the Respondent as a reasonable employer and that the Applicant's breakdown was not foreseeable. Once the Applicant advised she was on stress leave in late September 2006, the Respondent paid her salary through to 31 January 2007, a period longer than her sick or other leave entitlements. It terminated her employment on the grounds of ill-health in early March 2007 after the Applicant's doctor advised that the Applicant was "*permanently unable to return to work at her previous employers*".

The investigation

[4] The parties were not able to resolve this matter in mediation.

[5] For the investigation written witness statements were provided by the Applicant; her husband, Rick Menalda; her GP, Dr Shelagh James; her psychologist, Pauline Griffiths; Kay Boyle and Susan Perry, both managing partners of the Respondent; and a senior account director, Anna Murray.

[6] The Applicant, Mr Menalda, Ms Griffiths, Ms Boyle and Ms Murray attended the investigation meeting and answered questions from the Authority and counsel.

[7] Jane Freeman, formerly on the Respondent's board of directors, also attended the meeting and answered questions under a witness summons issued at the Applicant's request.

[8] Frances Stead, managing director of L'Oreal New Zealand Limited attended the meeting under a witness summons issued by the Authority. She answered questions from the Authority and counsel. Ms Stead is the person who the Applicant says bullied her.

[9] Ms Perry was interviewed during the meeting by telephone from Melbourne.

[10] Dr James did not attend the investigation meeting. She was absent overseas but her affidavit, including reports on her assessment of the Applicant, forms part of

the evidence.

[11] Other documentary evidence included reports of the Applicant's psychiatrist Dr Jan Reeves (the most recent being dated 17 September 2007), many emails between the Applicant and her various managers, and background correspondence and documents.

Background

[12] The Applicant, now 45, was employed as an account director by the Respondent on 24 March 2003. Her career in the advertising industry spans more than 25 years. Initially employed by the Respondent on a salary of $100,000 a year, this increased to $120,000 from August 2004.

[13] Although the Applicant did do some work on other client accounts, she was specifically employed for the role of day to day management of the Respondent's account for the international cosmetics corporation, L'Oreal. This was a substantial account for one of the country's "top ten" advertisers. L'Oreal's New Zealand subsidiary spends many millions each year advertising its L'Oreal and Garnier branded products in the print and broadcast media and through event sponsorship.

[14] Prior to her appointment the Applicant was told that Ms Stead could be difficult and exacting in her demands of the agency but that Ms Stead's expectations were not unrealistic.

[15] The Applicant's evidence was that she was a person of "*unrelenting standards*" and was confident that she could meet Ms Stead's expectations.

[16] In advising the Applicant of her pay rise in August 2004, Ms Boyle said the increase was "*in recognition of the fabulous job*" the Applicant was doing and commented: "*It is great to know that you are always onto everything with the clients and won't let us down*".

[17] The Applicant relies on up to 35 emails sent between March 2005 and September 2006 as supporting her case that she identified ongoing problems with her

treatment by Ms Stead but received neither sufficient support from the Respondent's managers nor protection from criticism by the client.

[18] The first of these emails from the Applicant, dated 7 March 2005 and addressed to Ms Perry and Ms Freeman, includes this note in a report on a meeting where Ms Stead queried the wording used in some advertising:

> *This is soul destroying quite frankly – I work my tits off with no thanks from this Client. I don't mind working hard but give me someone who appreciates the work I do. I have never let L'Oreal down and yet feel I am always on the back foot.*

[19] Later that month the Applicant complained to both Ms Perry and Ms Freeman about a query made by Ms Stead about the content of notes of a meeting with her – referred to as a "contact report". The Applicant's email dated 30 March 2005 included this comment:

> *If this is what I am reduced to then I am over it. I have no job satisfaction what so ever. The Client is grinding me into the ground. After 25 years in Advertising and references from previous employers and clients that are outstanding, I can't believe that this Client is suggesting that I can't even write a contact report.*
>
> *Sue, I have been working on this account for two years now and as you know this is not an easy Client to deal with. I am not sure what the solution is for me moving forward but another two years of this is not appealing to say the least. I am doing a good job and should not be stressed to the max – something needs to be done.*

[20] In what witnesses referred to as "the first resignation", the Applicant told Ms Perry and Ms Freeman on 15 June 2005 that she wanted to resign because of her frustrations with the L'Oreal Account. She was asked to set out her concerns in writing, and did so on 16 June 2005.

[21] The Applicant suggested she take a leave break at a Queensland health resort. The Respondent, through Ms Freeman, agreed and offered to pay the return airfare to Brisbane and half the cost of the resort stay.

[22] On her return from a five-day stay at the resort in early August 2005 the Applicant told Ms Freeman that the break, which included 'facials', acupuncture, massage and attending a stress management seminar, was "*a real circuit breaker and*

really did get me back on track".

[23] Six months later the Applicant advised Ms Perry by email of what she described in her evidence as her "second resignation".

[24] In this email, dated 23 February 2006, the Applicant asks to "*talk asap*" to Ms Perry and continues:

> *This week takes the cake.*
>
> *I get in on Monday, by lunchtime I have had 3 complaints from L'Oreal – nothing major at all and I won't go into detail but I am sick of their negativity.*
>
> *As of the 23 March I will no longer work on behalf of this Client. I have well and truly done my time. If Publicis can use my services elsewhere, then I am happy to consider options otherwise, Thursday 23 March is my last day.*
>
> *The last straw came from this email from Jens [Hohenspein, of L'Oreal]. The brochure he refers to is printed to the highest of standards in (sic) yet he still finds reason for complaint.*
>
> *Can you please call me when you are free.*

[25] Discussions with Ms Boyle and Ms Perry followed. By 21 March Ms Perry reported to other managing partners that the Applicant had agreed to continue working of the L'Oreal account for a further six weeks with the agency agreeing to look at roles for her on other accounts after that. The Applicant was described by Ms Boyle as being "*up*" for a proposal whereby she would manage a group of accounts including L'Oreal but not have direct contact with Ms Stead.

[26] Around this time the Applicant was also involved in organising her wedding – a second marriage – to Mr Menalda.

[27] By early May Ms Boyle – in an email dated 3 May 2006 and addressed to the Applicant with the subject line 'Your role' – apologised for not having "*got final lift off yet*" and stated:

> *I will note also to any parties involved in this structure, that you have requested that in the long term you would like to get off the L'Oreal business completely and ensure that the Account Manager we employ has the ability to be trained up to take over your role and you can work on other pieces of business.*

Stand by – we are working on this!

[28] Later that month Ms Murray, a senior account director, was also assigned to work on the L'Oreal account and to attend regular client meetings along with the Applicant. The Applicant also took up some work on another client's account.

[29] On 1 August a new account manager was appointed to work half of her time on the L'Oreal account and half of her time on another account. On 11 August the Applicant complained to Ms Murray that the new account manager employed to help her on L'Oreal was being given too much work on other accounts.

[30] Ms Murray responded by proposing that a meeting be held with Ms Boyle to resolve the role and commitments of the new account manager and that the Applicant and Ms Murray meet with the Applicant to "*look at scope of work you have*" and "*discuss what role you would like to have*". Ms Murray and the Applicant did meet in the week following 11 August. They discussed the Applicant's future role and Ms Murray referred to the prospect of the Applicant remaining on the L'Oreal account until Christmas.

[31] By the end of August the Respondent had also appointed another account manager to work with the Applicant on the L'Oreal account.

[32] On 27 September Ms Murray and the Applicant attended a regular monthly meeting with Ms Stead and other L'Oreal representatives. A representative of the Respondent's associated media company, Optimedia, also attended.

[33] During the meeting the Applicant sought approval of arrangements for a helicopter banner to be used at an upcoming sports events. Ms Stead had previously expressed concern at delays in having those arrangements finalised. However prior to this meeting Ms Stead had also advised she would be attending the meeting shortly after returning on a long flight from Europe. She wanted the meeting to deal only with key issues and not the level of detail discussed at 'work in progress' meetings.

[34] Ms Stead became annoyed at why the details of the helicopter banner were being discussed when a final proposed cost had not been provided. In what another

participant at the meeting described as "*not with a raised voice, but direct*", Ms Stead said that this was "*not good enough*".

[35] Following the meeting the Applicant began crying in the L'Oreal carpark. She says she "*exploded in rage and tears*". Ms Murray, who described this as a "*meltdown*", told the Applicant to go home for the rest of the day.

[36] The Applicant saw her GP Dr James on 27 and 28 September 2006 and was given a medical certificate stating she was "*unfit to resume work and was suffering acute stress and anxiety triggered by work related issues*".

[37] On 20 November Dr James described the Applicant as presenting in a "*critical state*" with acute stress symptoms, acute anxiety and possibly early depressive symptoms. She said this state was, in lay terms, "*a nervous breakdown*". The Applicant was referred to a clinical psychologist, Ms Reeves and, later on her income protection insurer's request, to a psychiatrist, Dr Reeves. Ms Griffiths considered the Applicant exhibited symptoms of post traumatic stress disorder ("PTSD") and Dr Reeves came to a similar view.

[38] The Applicant has since received cognitive behaviour therapy and anti-depressant medication. The latest medical report available in the evidence – an assessment by Dr Reeves on 17 September 2007 – considered that "*there has been a substantial resolution of the PTSD symptoms*" but that the Applicant continued to have mild to moderate anxiety "*somewhat aggravated*" by her impending case in the Authority.

[39] Dr Reeves opinion was that the Applicant was not then currently able to return to performing the role of an advertising account director because of the ongoing presence of anxiety and depressive symptoms. However Dr Reeves expected that with further improvement of her symptoms over the next eight weeks, the Applicant would be well enough to undergo career counselling and, using her wide skill base, would be able to return to employment in a different environment.

The law

[40] The Applicant's written employment agreement contains no express health and safety clause but the duty to take reasonable steps to maintain a safe workplace is an implied term of all employment agreements: *Attorney General v Gilbert* [2002] 1 ERNZ 31, 49 (CA). An employer must take reasonable care to avoid exposing an employee to unnecessary risk of injury or further injury to her physical or psychological health.

[41] The Court of Appeal in *Gilbert* at 52 stated:

> *The standard of protection provided to employees by the Health and Safety in Employment Act [1992] 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 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 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 risks.*
>
> …
>
> *If a plaintiff is able to show that the employer failed to do what was reasonable at the time and was in breach of the contractual obligations, no reason of policy inhibits contractual liability for psychological injury.*
>
> …
>
> *In some cases, a risk may not be apparent without specific information about the vulnerability of a particular employee.*
>
> …
>
> *After Mr Gilbert returned to work in October 1995 after extended sick leave, there can have been no doubt about his vulnerability to stress. But it does not follow that in all cases the risk will need to be matched to the particular employee. If the risk is one which applies generally, then knowledge of specific vulnerability may be irrelevant. If the employer unreasonably fails to take all steps practicable to remove or*

> *manage the risk and it is reasonably foreseeable that any employee may suffer harm as a result, then the employer will be in breach of the term of the contract to maintain safe working conditions. It was not necessary in the circumstances for there to be "direct warning of imminent breakdown on the part of the respondent", as suggested on behalf of the appellant.*

[42] The issue of foreseeability was discussed in *Edmonds v Attorney-General* [1998] 1 ERNZ 1. There the Court held it was unable to conclude on the evidence that a supervisor's conduct has exposed the plaintiff to a reasonably foreseeable risk to his mental health and, at 25, Judge Finnigan stated that:

> *I have held there was excessive verbal abuse which became a feature of his job and which led to his mental ill-health and to his resignation. I do not think it reasonable however, to hold, for the purposes which I am required to serve, that his depressive condition was a reasonably foreseeable risk. The conduct was in the doctor's opinion the medical cause, and I accept that. For it to be the legal cause, however, it must be objectively reasonable and foreseeable. To me, that means it must have been foreseeable that any normal employee would have developed symptoms of mental illness if treated in the way that the plaintiff was here. I am unable to go that far.*

Issues

[43] The issues for resolution of this problem include:

(i) Whether the conduct of Ms Stead towards the Applicant amounted to workplace bullying; and

(ii) Whether the Respondent responded in a timely and effective manner to difficulties identified by the Applicant in servicing the L'Oreal account or whether it breached its duties of taking reasonable steps to protect the Applicant's well-being in carrying out her work; and

(iii) If the Respondent did breach its duties to the Applicant, was it reasonably foreseeable that the Applicant could suffer psychological harm as a result; and

(iv) If the harm arose from breaches of duty by the Respondent and was reasonably foreseeable, what remedies are due to the Applicant?

Was Ms Stead's conduct towards the Applicant bullying?

[44] The Applicant's case is that she suffered a nervous breakdown because the

Respondent failed to protect her from what she describes as "*chronic workplace bullying*" by Frances Stead.

[45] The Respondent did not put forward Ms Stead as a witness. Instead she gave evidence under a summons issued by the Authority. This was issued to both better investigate the Applicant's claim and to give Ms Stead an opportunity to respond directly to the strong accusations made against her by the Applicant through the public forum of an Authority investigation.

[46] The Applicant described Ms Stead of having "*very little respect for anyone*", "*nit picking*", "*never g[iving] credit for any work or effort*" and breeding a "*culture of fear*". Examples of bullying given by the Applicant include:

(i) Being "*belittled*" by being asked to present a 180 page presentation in an order different to previous years.

(ii) Being kept waiting, along with other employees of the Respondent, beyond the time of appointment for regular scheduled meetings, sometimes by as much as an hour-and-a-half.

(iii) Never thanking her for her work in three-and-a-half years.

(iv) Suggesting the Applicant type minutes of meeting which the Applicant describes as "*something a secretary would normally do*".

[47] Other witnesses did accept Ms Stead could be a demanding client. Ms Boyle said Ms Stead paid attention to detail and had high but not impossible expectations. Ms Perry described Ms Stead as having exacting expectations and liking things done her way. Ms Murray described her as a "*tough taskmaster*". Ms Freeman said she had never met anyone so demanding.

[48] Ms Stead, in her own oral evidence, described L'Oreal as having "*high expectations, externally and internally*". However her comment on that approach was that being "*demanding does not translate into bullying*". While she may have been demanding of the Applicant and others from the Respondent's agency, she said she was "*not unprofessional*" and had not sworn or raised her voice in more than 25 years of company meetings.

[49] While the concept of workplace bullying still lacks satisfactory legal

definition, it refers to behaviour that is repeated and carried out with a desire to gain power or exert dominance and an intention to cause fear and distress.[1] This behaviour usually includes elements of personal denigration and disdain of the person subject to it. It is intended to control the behaviour or actions of its target in particular ways.

[50] Bullying usually refers to behaviour of an employer to a worker, between two or more workers, and occasionally even by a worker or workers towards a supervisor or manager. However, as recognised in cases of sexual harassment where power in relationships is similarly misused, workplace bullying may include actions of clients, customers or contractors outside the legal employment relationship but within the working environment. Criticism or feedback from an employer (or a client) is not bullying, although it might become so because of the manner or purpose of its delivery or a particular vulnerability of the recipient.

[51] While the Applicant perceived, or has come to perceive, the actions of Ms Stead as bullying, I do not accept that the weight of the evidence supports that conclusion.

[52] This is best illustrated by examining the Applicant's allegation that Ms Stead "*never*" gave her credit for her work or thanked her for her efforts. That is plainly at odds with the content of the Applicant's own evidence.

[53] In her email of 7 March 2005 the Applicant complained about negative feedback from L'Oreal and said "*give me someone who appreciates the work I do*". Only three days before sending that email the Applicant reported to Ms Perry on a L'Oreal meeting on 2 March: *"My side of the meeting went well. Frances [Stead] said thank you very much to me …"*

[54] In an email from Ms Stead to Ms Freeman, copied to the Applicant and dated 26 May 2005, Ms Stead says:

> *We really appreciate all Shelleys efforts on these. I believe she has been working very hard on this … Shelley has been absolutely fabulous to try and cover for Opti's total lack of interest in honouring*

[1] See *Kneebone v Schizophrenia Fellowship Waikato Inc* (ERA, AA 31/07, 13 February 2007, Member Campbell) and *Evans v Gen-I* (ERA, AA333/05, 29 August 2005, Member King)

> *their obligations on our business. Her commitment and efforts are totally exemplary …*

[55] And in February 2006, Ms Stead in an email to Ms Perry (later forwarded by her to the Applicant) about the Applicant's 'second resignation' says it is "*a real pity*". Ms Stead refers to the Applicant's "*commitment and passion*" which "*leaves a big hole to fill fast*".

[56] Earlier, at the time of her 'first resignation', the Applicant also made this comment about her work for L'Oreal and with Ms Stead, in an email to Ms Perry and Ms Freeman dated 16 June 2005:

> *To be honest, I could cope with L'Oreal if I had some decent media support – I only have to meet with Frances Stead once a month and besides the anxiety leading up to this meeting, I can usually leave it behind until the next meeting with her.*
>
> *Frances is tough (and quite often well out of line with her approach) however I have got to say that I have learnt such a lot from her so all is not bad.*

[57] In fact, as the email continues, it is clear that the Applicant and Ms Stead share the same analysis of problems with the L'Oreal account. Throughout this period – as acknowledged by the Respondent's witnesses – the agency was let down by its associated media company (Optimedia) in the material and information it provided for the client. The Applicant was often left covering for those inadequacies and this was the real cause of frustration and anxiety because Ms Stead was a stickler for detail and knew that her company was not being well served. The point is clear from this comment in the Applicant's email:

> *Regardless of whether Frances [Stead] is right or wrong, Optimedia has not been squeaky clean with their recommendations as I have found them to be full of errors – that is another long list in itself and I feel extremely let down that I personally have had to get down to the nitty gritty of media to try and work out how we can improve this situation for the client. Surely this is an Optimedia issue and just further shows the lack of care for this client (and ultimately for me).*

[58] Overall I do not accept that when Ms Stead writing directly to the Applicant's managers refers to her as "*totally exemplary*" and showing "*commitment and passion*" to the L'Oreal account, she can be said to have "*never*" thanked the Applicant for her work or efforts.

[59] Similarly the Applicant's concern about being kept waiting for a meeting with Ms Stead or being asked to provide minutes of meetings reflect concerns about her own sense of status rather than bullying behaviour by Ms Stead. Ms Freeman's evidence about being kept waiting for meetings was that it was "*unprofessional*" but arose because Ms Stead's earlier meetings with other agencies ran over schedule. It was not behaviour calculated by Ms Stead to demean or diminish the Applicant or other employees of the Respondent.

[60] I also consider the evidence does not support the Applicant's implication that her problems with the L'Oreal account resulted solely from personally targeted bullying by Ms Stead. Rather the Applicant was, at the time, critical of others within L'Oreal too. That is clear from the wording of her 'second resignation'.

[61] In an email to Ms Boyle on 23 February 2006 she says: "*In a nutshell, I've had enough of this Client. We all know <u>they</u> are extremely difficult and I personally am unwilling to put up with it any longer*" (my underlining). The client is referred to in the plural "they" and not just singularly as it would be if it were intended to refer to Ms Stead alone. This is consistent with the Applicant's email to Ms Perry on the same day – referred to earlier in this determination – which describes "*the last straw*" as being a critical comment from Jens Hohenspein of L'Oreal rather than Frances Stead.

[62] Accordingly I find that the Applicant was not subject to workplace bullying by Ms Stead. Rather Ms Stead's expectations and dealings with the Applicant – even at the level of detail and direction she exhibited – were part of the course of the commercial relationship and requirements between client and agency in the advertising industry.

Did company do enough to respond to A's concerns?

[63] However, while I have found that Ms Stead's conduct was not of the nature alleged by the Applicant, it is clear that throughout the period from March 2005 to September 2006 the Applicant felt under considerable strain in meeting the expectations of her employer and its client, L'Oreal.

[64] As Ms Freeman noted in her evidence, she and the Applicant often left L'Oreal meetings unhappy:

> *They were often right in their criticisms and concerns and that was uncomfortable for [the Applicant] and me. It was not their personalities but the circumstances. I did not feel professional, and nor did [the Applicant]*.

[65] The question turns now to whether the Respondent responded in a timely and effective manner to difficulties identified by the Applicant in servicing the L'Oreal account or whether it breached its duty to take reasonable steps to enable her to do her job without undue pressure.

[66] In her witness statement the Applicant says she was "*pretty much left to deal with this difficult Client on my own*". She says that the Respondent:

> *… neglected my needs over at least two years basically ignoring my pleas for help which are well documented. I think they felt that as Frances Stead seemed to be happy with me and my performance that they would try to ensure I stayed in my role at all costs.*
>
> *In hindsight I believe I was the sacrificial lamb given to Frances Stead. I took the burden for my employer of this difficult client.*

[67] The allegation of a lack of responsiveness by the Respondent to identified needs of the Applicant can conveniently be assessed by considering how it dealt with the so-called "first resignation" on 16 June 2005 and the "second resignation" of 23 February 2006.

[68] The Applicant reported to Ms Perry who worked from the Respondent's Melbourne office. However Ms Freeman, while not working full-time, was based in the Auckland office and was responsible up until around July 2005 for attending monthly meetings with L'Oreal along with the Applicant.

[69] When the Applicant 'resigned' in June 2005 Ms Perry responded by asking the Applicant for a "*warts and all*" overview of what had caused the situation and also told her: "*[W]e will fix this*". The Applicant responded with a lengthy email setting out a number of concerns, but identified the "*main reason for my frustrations and*

exhaustion is the level of work I need to do to carry out for Optimedia."

[70] In that email she noted that she had talked with Ms Freeman and while needing a break had "*not closed the door completely*".

[71] Ms Perry responded by confirming arrangements for the Applicant to take a leave break at the Queensland health resort referred to earlier. There were also discussions between Ms Freeman, Ms Perry and other senior managers about providing more support for the Applicant. Arrangements were also made to relieve the Applicant of media work she had become involved in because of inadequacies in the work done by Optimedia staff. This initially included appointing an additional staff member to work on the account and later the media function was moved to another agency.

[72] As noted in the Respondent's closing submissions, there are then no significant complaints by the Applicant document between August 2005 and her 'second resignation' in February 2006.

[73] The Applicant's email of 23 February 2006 to Ms Perry asked to "*talk asap*". This resulted in the Applicant meeting with Ms Boyle and Paul McElwain, both Auckland-based managing partners of the Respondent, to talk about her work prospects in the agency. By 21 March the Applicant has agreed to work on the L'Oreal account for a further six weeks and had been told about a proposal that she might manage a group of accounts including L'Oreal.

[74] Ms Murray, an Auckland-based senior account director, was also assigned to the account with the Applicant reporting directly to her. They sat at neighbouring desks in the Respondent's offices. Ms Murray's role included attending monthly meetings with L'Oreal as Ms Freeman had previously done.

[75] On 16 May Ms Boyle checked with the Applicant whether she was "*happy with the latest events on L'Oreal*". This referred to the proposal for involvement of Ms Murray and also for an additional person to be employed to work on the account with the Applicant. The Applicant's reply to the query was: "*Yes. I think it will be great and I am really looking forward to it*".

[76] By August an additional person had been appointed to assist the Applicant with day to day management of the account but had responsibilities for work on other accounts too. When the Applicant complained about this by email on 11 August 2006, Ms Murray's reply began with the comment: "*Okey dokey. Lets get this sorted out, you are too important to us to have you feeling this way.*" She then arranged meetings with Ms Boyle and the Applicant to discuss how work on the account would be done. This resulted in the appointment of another assistant from late August to work solely on the L'Oreal account.

[77] The Applicant's evidence refers to her direct report manager being remote in Melbourne and lacking support in Auckland. She relies on a comment by Ms Stead that the Applicant had operated as a "one man band".

[78] However heard two days of oral evidence and reviewed all the detail of the witness statements and many hundreds of pages of emails and other documents, I do not accept that the Applicant's allegation that she lacked a reasonable level of support and responsiveness to her needs within the Respondent's business. On three occasions the Respondent took steps to arrange additional staff to work on the account. Throughout the Applicant usually attended major meetings with L'Oreal accompanied by a senior representative of the Respondent, earlier Ms Freeman and later Ms Murray. She also had frequent and ready email and telephone contact with Ms Perry in Melbourne. Working in the Auckland office, the Applicant also had direct physical access to Ms Murray from May 2006 to discuss work problems.

[79] Both 'resignations' were promptly responded to by senior managers and followed up with discussions about the detail of the concerns.

[80] In neither case did they result in an unequivocal request by the Applicant to be immediately removed from the L'Oreal account. As extracts of emails detailed above show, the Applicant was satisfied with arrangements made at the time.

[81] For the reasons given I conclude that the Respondent did respond in a timely and effective manner to difficulties identified by the Applicant in servicing the L'Oreal account and did not breach its duty to take reasonable steps to enable her to

do her job without undue pressure.

Foreseeability of harm

[82] Because of the finding made regarding an absence of breach, I need not address the question of foreseeability of harm. However if I were wrong in my conclusion regarding breach and the employer did not meet its duty to protect the Applicant from the risk of harm from the pressures of her work, I turn to the question of whether it was foreseeable that such a breach would cause psychological harm to the Applicant.

[83] Ms Boyle described the Applicant as "*highly strung*" and "*dramatic*" over daily events in the office environment, but accepted that the Applicant was no more "*flamboyant*" than others in the advertising industry. The Applicant accepted that she was "*demonstrative*" at work but said that this was "*not unusual in our environment*". Ms Murray observed that the Applicant exhibited a "*tendency to overreact to situations*" so that Ms Murray found it difficult to distinguish between a "*genuine crisis*" and merely "*sounding off*".

[84] Viewed in the circumstances at the time, I do not accept that what the Applicant called "cries for help" did unequivocally put the Respondent on notice of her concerns in such a way that it must reasonably have foreseen that harm could result to her if those concerns were not adequately addressed. Rather the Applicant's resignations were a device to gain prompt action from her managers and resulted on both occasions with the Applicant expressing satisfaction with the outcomes.

[85] The Applicant does point to two instances of her telling Ms Perry by emails on 31 May and 7 June 2005 that she was suffering from a bladder infection. The inference is that the Respondent should have been aware that these infections arose from stress at work. I do not accept that the Respondent should have drawn that conclusion or that, in the absence of anything more, it should not have concluded this was resolved by the time of the Applicant's return from the health resort in August 2005.

[86] While the Applicant did complain about working late and being under

deadline pressures, this communication were not sufficiently distinctive that the Respondent might have been alerted to dangers to her mental health arising from it.

[87] The Applicant has been described by her psychologist and then her psychiatrist as suffering symptoms consistent with PTSD. Although the opinions of respective health professionals refer to the circumstances of the Applicant's work, it is the Applicant herself who has attributed the cause of her present health difficulties to the Respondent. Conclusions reached from the Applicant's self-reporting are not sufficient for me to determine that the Respondent's actions have caused her ill-health and that it must be liable for a full range of remedies on that basis. What may be accepted in a health professional's opinion as a medical cause of a psychiatric illness is not necessarily enough to establish the cause for legal purposes, as noted in the extract from the *Edmonds* case cited earlier. Put another way, the processes appropriate for health professionals dealing with their patients' perceptions of what has happened are different from the evidential analysis required for legal purposes.

[88] I do note however that the psychological assessment and psychiatrist's opinion refer to other events during this period which also increased pressures in the Applicant's life during this period – these included preparation for her wedding in 2006 and serious illnesses of a nephew and a close friend. However because of the conclusions reached earlier I need take this issue no further.

[89] For similar reasons the decision of the Applicant's insurer to make loss of income payments to her while she has been ill is not relevant for the Authority's investigation and determination of her claim. Put simply, the questions for her insurer, arising out of the terms of her policy, are different from the questions for the Authority in determining whether the Applicant's terms of employment, including over safety, trust and confidence and good faith, were breached.

Termination of employment

[90] In early 2007 the Respondent took steps to formally end its employment relationship with the Applicant. In light of the medical evidence available to it, it was, I find, an action that which was fair and reasonable in the circumstances at the time. Accordingly I accept the Respondent's submission that the termination of the

Applicant's employment was not unjustified.

Determination

[91] For the reasons given I find that the Respondent has not breached its duty to the Applicant. Her claim is dismissed.

Costs

[92] The parties are encouraged to agree any question of costs. If they are not able to do so, either party may request a timetable be set for the lodging of memoranda on costs before they are determined by the Authority.

Robin Arthur
Member of the Employment Relations Authority