

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA164/08  
5085705

BETWEEN MAURICE ROBERTSON  
Applicant

AND CHIEF EXECUTIVE OF THE  
NEW ZEALAND FIRE  
SERVICE COMMISSION  
Respondent

Member of Authority: Helen Doyle

Representatives: Mary-Jane Thomas and Miriam Sinclair, Counsel for  
Applicant  
Paul McBride and Steven Fraser, Counsel for Respondent

Investigation Meeting: 6 and 7 August 2008 at Invercargill

Submissions received: 18 August 2008 from Applicant  
25 August 2008 from Respondent

Determination: 28 October 2008

---

**DETERMINATION OF THE AUTHORITY**

---

## **Employment relationship problem**

[1] Maurice Robertson was employed by the Chief Executive on behalf of the New Zealand Fire Service Commission (the fire service) for approximately 38 years until his resignation on 3 September 2007. He was at the time of his resignation the chief fire officer for Invercargill and party to an individual employment agreement with the fire service.

[2] Mr Robertson said in his statement of problem lodged with the Authority on 7 August 2007 that he was subjected to unjustified action that caused him disadvantage when the fire service failed to remove his line manager, the fire region commander of the southern region, Stuart Rooney, from being the decision maker

regarding his employment issues and personal grievances. The request for Mr Rooney's removal as decision maker was because of the procedure adopted by the fire service to deal with concerns about financial management of the Invercargill Fire Station, a telephone call between Mr Rooney and Stephen Warner who is the national president of the New Zealand Professional Firefighters Union (the NZFPU) and the way complaints by or about Mr Robertson were handled by the fire service.

[3] Mr Robertson said in his statement of problem lodged with the Authority on 3 October 2007 that his resignation on 3 September 2007 was in the nature of an unjustified constructive dismissal. He said that the factors for his inability to work were his depressive illness caused by how he was dealt with by Mr Rooney and another of the management team; his lack of confidence that he would be treated differently on return to work; what had been said about the telephone call in the statement in reply lodged by the fire service; the response he had received to a complaint he had made; issues about obtaining administrative support and a statement that he refused to engage in discussion with the management team of the southern region on routine matters.

[4] The fire service does not accept that Mr Robertson was unjustifiably constructively dismissed or has any other grievance and maintains that its dealings with Mr Robertson were fair and reasonable.

### **Fire service Hierarchy**

[5] It is helpful to briefly refer to the relevant parts of the fire service hierarchy to place within it the various main participants whose interactions I am required to analyse.

[6] The national commander of the fire service is Mike Hall. He is also the chief executive under s.17A of the Fire Service Act 1975 of the fire service. Within the fire service there are national office staff who provide advice to the regions, including financial and human resource advice.

[7] Stuart Rooney is the fire region manager for the southern fire region from the Waitaki river in the north to and including Stewart Island in the south. He has the chief fire officer of each of the 68 fire districts in the region reporting to him through two assistant fire region commanders. The two assistant fire region commanders reporting to Mr Rooney at the material time in the southern region were Shane Howe

and Brent Mortensen. Mr Howe at material time was based in Dunedin with responsibility primarily for the Otago area. Mr Mortensen at the material time was based in Queenstown with responsibility for all of Southland.

[8] Carolyn West was employed as the southern fire region business and administration manager and is based in Dunedin. Ms West's role is to provide administrative, financial, business and other support to the region and the various districts.

[9] Mr Robertson reported to Mr Mortensen and through him to Mr Rooney. For part of the material time there was a deputy fire officer at Invercargill, Steve Larkin. Mr Rooney viewed management for the purpose of the Invercargill fire district as Mr Robertson, Mr Larkin, Mr Mortensen and Ms West. Ms West and Mr Robertson were on the same management level.

[10] Below the management group are two layers of supervisory staff. The first layer is the Senior Station Officer. Gordon Rodgers is the senior station officer at the Invercargill Fire Brigade. The second layer of supervisory staff is the station officer. Stephen Warner as well as holding the position of President of the NZPFU is the station officer in Christchurch and Graeme Gilroy in Invercargill.

## Issues

[11] The issues for the Authority to determine are:

- (a) Was the failure by the fire service to remove Mr Rooney from being the decision maker with respect to disciplinary, performance and personal grievances, as they concerned Mr Robertson unjustified?
- (b) Was Mr Robertson unjustifiably constructively dismissed?

**Was the failure by the fire service to remove Mr Rooney from being the decision maker with respect to disciplinary, performance and personal grievances as they concerned Mr Robertson unjustified?**

*A call in September 2006 and an awareness of some vulnerability*

[12] Mr Rooney telephoned Mr Robertson on or about 27 September 2006 to raise a concern he had about Mr Robertson's memory. Mr Robertson described Mr Rooney

as aggravated during the call and that he said he had people to back it up [the memory loss]. Mr Robertson did accept that Mr Rooney offered specialist help at the time at fire service cost. Mr Robertson went to see Ms Thomas at that time, although the matter was taken no further.

[13] Mr Robertson was clearly upset by the call, and understandably, given what was being discussed and his view of the matter, defensive.

I conclude it likely, having heard the evidence, that Mr Rooney was simply concerned about Mr Robertson and wanted in a low key and informal way, to raise those concerns. Raising such a matter would not have been easy. Mr Rooney understood that Mr Robertson wanted confidentiality and time to see if things improved. Mr Rooney produced a letter he had drafted by human resources following his call to Mr Robertson. In the end he did not send the letter because he said matters with Mr Robertson were not so noticeable after that time. I found it to be an appropriate letter and it supports Mr Rooney had concerns and appreciated the sensitivity required in raising and then, if necessary, dealing with them.

[14] Mr Rooney was also aware in previous dealings with Mr Robertson, and dealings reported to him by Mr Mortensen that Mr Robertson could become *fragile when dealing with staff conflict or when facing questions about his actions*. I accept from the evidence that it was reasonable for Mr Rooney to have that view.

#### *Financial management*

[15] Mr Robertson said that a staff costs analysis which included payments made to staff in terms of call-outs in the Invercargill fire station was carried out without his knowledge by Ms West. I find that in February 2007 at a district management meeting involving Mr Robertson, Mr Larkin, Mr Mortensen and Ms West it was agreed that Ms West would analyse staff cost issues for the Invercargill fire district following a variance between actual Invercargill costs and costs that may have been expected. Such a finding is consistent, not only with Ms West and Mr Rooney's evidence, but also with the background set out in the report about call-outs in the Invercargill fire district prepared by Ms West following her analysis.

[16] Ms West sent her memorandum in the first instance to Mr Rooney. It is recorded in the memorandum that in Ms West's opinion in relation to one fire fighter fraud is being conducted. There was no suggestion from Ms West's report that there

was any suspected fraud or dishonesty on the part of Mr Robertson. The fire service fraud policy requires Ms West to report suspected fraud if there is an issue of potential or suspected impropriety.

[17] Upon receiving the report from Ms West, Mr Rooney asked Mr Howe who was familiar with call-outs in the rest of New Zealand, to have a look at it. Mr Howe also prepared a memorandum about the matters raised and forwarded that to Mr Rooney. Within his memorandum he referred to the fact that there may be some training issues to be addressed with respect to entitlements under the contract, allocation of pay codes and understanding of the need to explain reasons for call-out. Those issues identified by Mr Howe were matters that Mr Robertson was ultimately responsible for as chief fire officer of the Invercargill fire district.

[18] Mr Robertson was responsible for the day to day management of the Invercargill fire district and had a significant operating budget of about \$3.8m, of which approximately 80% was expended on payroll costs. As part of his management, Mr Robertson was expected to comply with fire service policy and procedural requirements to meet statutory accountabilities and satisfy audit requirements. It was reasonable and appropriate for Mr Rooney to talk to Mr Robertson about the issues the memorandum raised as it concerned the Invercargill fire district. Quite properly in those circumstances, Ms Thomas accepts that the fire service was entitled to talk to Mr Robertson and/or investigate any concerns it had about financial matters or expenditure.

*23 March 2007*

*Events leading up to and the meeting itself*

[19] A meeting date and time was arranged with Mr Robertson to discuss the matters that were the subject of the memorandum prepared by Ms West and Mr Howe. There are a number of matters leading up to and including the meeting itself on 23 March Mr Robertson considered unsatisfactory.

[20] I find that the purpose of the meeting was to get some response from Mr Robertson about the matters in Ms West and Mr Howe's memorandum. There was a possibility that there could be disciplinary action arising as a result of the investigation. In a memorandum dated 22 March 2007 provided to Mr Robertson before the meeting Mr Rooney advised that he wished to approach the matter in a

constructive and friendly problem-solving manner, but given the potential seriousness of the apparent findings, Mr Robertson should be aware that the process of which the meeting forms part, may result in formal action being taken against staff found to have breached the standards of conduct of the fire service. Mr Rooney said in his memorandum that it was unlikely to include Mr Robertson, but that Mr Robertson should be aware that he has a right to have a representative present at the meeting.

[21] Mr Robertson said that he was not provided with all the material prior to the meeting and that this was unfair. Mr Rooney did not provide all the material to Mr Robertson because there was a large volume of it and he preferred to bring it to the meeting so that it could be gone through and considered. Mr Robertson did accept at the Authority investigation meeting that the documents were quite thick and that he was provided with all the material at the meeting itself. Given that he made no comment or response to the material at the time of the meeting and not until after he had talked to Ms Thomas, I do not see any unfairness arising out of a failure to provide all the material prior to the meeting on 23 March. To the extent that there is a suggestion that this failure to provide all the material indicated bias and pre-determination on the part of Mr Rooney, then I do not find that is made out.

[22] Mr Rooney attended the meeting with Ms West and Mr Howe. Mr Robertson attended with Mr Larkin as his support person. Mr Robertson wanted the meeting held in his office but Mr Rooney was of the view that the table in Mr Robertson's office was too small to properly spread the papers out and look at them. The meeting was held in the smoko room and the duration of the meeting was approximately 20 minutes. Ms West and Mr Howe spoke to their respective memoranda. Mr Robertson made no response and was given until 6 April 2007 to consider the documentation and then provide a response. This date was subsequently extended at Ms Thomas' request.

[23] Ms West and Mr Howe offered Mr Robertson some assistance in working through the various documents, but that offer was not taken up by him. When one or two people walked into the smoko room the evidence supported that the talking between the managers stopped. I accept Mr Rooney's evidence that he did not consider the matters confidential, which is supported by the fact he was comfortable with Mr Robertson consulting with anyone to obtain assistance about the issues. Mr Robertson accepted that whilst he asked for the meeting to be held in his office, he did

not object to the smoko room and I do not find the venue issue can be taken any further.

[24] The evidence does not support that there were allegations about Mr Robertson's conduct in the nature of dishonesty and/or fraud. I accept the evidence of Mr Rooney that the matter was about payroll accountability and policy compliance. As matters progressed, Mr Rooney continued to reassure Mr Robertson, through Ms Thomas, about the nature of the concerns and that they were not about dishonesty and fraud. That was not accepted but the fire service cannot be accountable for that. I do not find that the meeting on 23 March 2007 was a disciplinary meeting.

*Who came to know about the matter and how*

[25] Mr Robertson had telephoned Gordon Rodgers at home on 22 March 2007, the day prior to the meeting on 23 March, to advise him that Mr Rooney had made some accusations.

[26] Mr Rodgers said in his written evidence in two separate places that the nature of the accusations, as advised by Mr Robertson, was fraud and dishonesty against members of the brigade with respect to claims for payment. Mr Rodgers said in his evidence at the investigation meeting that fraud and dishonesty were his words and the Mr Robertson had used the expression *false and multiple claims in the Station management system*. Regardless of the exact words used, Mr Rodgers took from the discussion that Mr Rooney had made accusations of fraud and dishonesty against members of the Invercargill brigade.

[27] Mr Rodgers agreed with Mr Robertson that he would look at the information provided at the meeting with the management team the next day and it is clear from Mr Rodgers' evidence that he was alarmed by his conversation with Mr Robertson because he said he had lost a few hours sleep.

[28] On arrival at the station on 23 March to look at the papers Mr Rodgers said that he found Mr Robertson to be in a very stressed state and recalled he was greeted with *you guys have shafted me*. Mr Rodgers assured Mr Robertson that was not the case and he was provided with the papers that Mr Robertson had been given and he photocopied them. Mr Rogers formed the view that the matter was very serious and he telephoned the local secretary of the NZPFU and station Officer, Graeme Gilroy.

[29] Mr Gilroy contacted Mr Warner because he viewed the allegations against the union members as being very serious. Whilst not strictly relevant for the purposes of this determination, it is obvious, from documents provided to me as part of my investigation, that the matters which formed the basis of the concerns and discussion with Mr Robertson on 23 March, became a significant issue for the union and its members for some time after this date.

[30] Mr Gilroy was advised by Mr Warner when he telephoned him on 23 March that Mr Warner knew of the issue, because he had been telephoned that same day by Mr Rooney. It is necessary for me to make some findings in terms of the telephone call that took place between Mr Warner and Mr Rooney on 23 March because a personal grievance was raised in terms of that telephone call.

#### *The telephone call*

##### *Why was there a telephone call?*

[31] Mr Rooney recognised on 23 March 2007 that he has raised issues with Mr Robertson that potentially impacted on NZPFU members in Invercargill and he had not told Mr Robertson that the issues were confidential. Mr Rooney spoke to Mr Hall about having an “off the record” discussion with Mr Warner. Mr Rooney said he was asked by Mr Hall in terms of the financial management issues, whether there was any suggestion of dishonesty or impropriety by Mr Robertson or whether the issues were of the mistake variety. Mr Rooney said that he told Mr Hall that in his opinion the matter fell into the latter category. Mr Hall was happy for Mr Rooney to contact Mr Warner which he duly did.

##### *Was the call off the record?*

[32] Mr Warner said in his evidence at the Authority investigation meeting that it was not an “off the record” discussion and Mr Rooney said that it was “off the record”.

[33] No notes were taken by either Mr Warner or Mr Rooney about the telephone conversation. Mr Gilroy made a file note on Monday 26 March 2007 about the discussion he had had with Mr Warner on Friday 23 March. I find this file note was sent to Mr Warner by Ms Thompson on 3 April 2007 so that Mr Warner could comment on whether or not he agreed with its content. Mr Warner responded to Ms



Thompson by email dated 4 April 2007 and made specific reference to two paragraphs in Mr Gilroy's file note which he felt did not accurately reflect what was said but he did not comment on the reference within the file note to *Steve detailed that Rooney had "off the record" outlined the allegations, he had indicated that these were directed at Robertson and apparently his failure to have a procedure in place to insure the alleged fraud was checked earlier.* I find that the telephone call was intended to be an "off the record" discussion, otherwise it is most unlikely that Mr Gilroy would have made a note to that effect and most unlikely that Mr Warner would not have advised Ms Thomas that the file note made was incorrect in that regard. I am strengthened in my view by Mr Robertson's evidence that he was advised by Mr Gilroy that the telephone call between Mr Warner and Mr Rooney was "off the record".

*What was said during the discussion?*

[34] Neither Mr Warner nor Mr Rooney could recall word for word what was discussed and given the passage of time and absence of notes taken at the time, and that is not surprising. It is therefore somewhat difficult for the Authority to place different parts of the call which it is agreed took place at 1.47pm on 23 March in context.

[35] Having heard the evidence, I find that the following was most likely discussed.

- Mr Rooney advised that he wanted Mr Warner to know what had occurred in Invercargill because it potentially may affect members. Mr Rooney advised that Mr Robertson had been provided with a memorandum about financial management issues.
- There was a discussion about the nature of the claims that arose from the memorandum.
- Mr Rooney made it clear that he was not seeking recompense from members of the Union and that it was probably a management problem and the concerns were at management level.
- There was mention of problems/concerns about how the station was being managed and even if Mr Robertson was not mentioned by name, it would have been clear that the concerns were in respect of his actions. I am less clear that the words *management being off beam* was

said by Mr Rooney but I accept that Mr Warner may well have taken that from the discussion.

- There was a general reference made to Mr Robertson's health. There was no evidence to support that any specific details were referred to or that the reference was made for any reason other than concern. In all likelihood there was a reference by Mr Rooney to a link between Mr Robertson's health and his management. Mr Rooney said by way of explanation that he was referring more to Mr Robertson tending to overreact than anything specific.
- There was reference to the concerns in the memorandum being all over the Station and that Mr Robertson would only give one side of the story. I find that the discussion in that regard was less about the memorandum itself being disclosed or plastered over the Station than the contents of the memorandum. The likely context of this part of the discussion was that union members would all come to know about it.
- I do not find that there was any discussion as set out in Mr Gilroy's file note that if union members continued to support Mr Robertson and he tumbled then they would too. Mr Warner said in his email to Ms Thomas that the emphasis was that by listening to Mr Robertson the members would only be getting one side of the story and not necessarily that members would tumble if things went badly.

[36] Mr Warner said that he took from the conversation with Mr Rooney that Mr Rooney did not have confidence in Mr Robertson about the matters that form the basis of the concerns in the memorandum. Mr Rooney said he did not think he had given that impression to Mr Warner.

[37] When Mr Warner talked to Mr Gilroy he advised him to keep a lid on things and Mr Gilroy agreed at the investigation meeting that Mr Warner had asked him to treat the matter confidentially. I do not find that Mr Warner expected that the conversation would go further and/or be relayed to Mr Robertson. That was not however the case. On that same day, 23 March, Mr Gilroy told Mr Robertson about his discussion with Mr Warner and Mr Warner's discussion with Mr Rooney. I am

not satisfied that the discussion between them would have been an absolutely accurate account of what was said during the telephone call from Mr Rooney.

[38] Mr Robertson confirmed in his evidence that he did not speak to Mr Warner directly about the telephone call with Mr Rooney until the Authority investigation meeting. Mr Robertson knew on 23 March that there had been a discussion between Mr Rooney and Mr Warner about concerns with his management of the station and that the allegations in the memorandum were directed at him. Mr Robertson said in his evidence at the Authority investigation meeting that he was also aware there had been a discussion about his health.

[39] Mr Robertson said that after hearing about the conversation from Mr Gilroy he decided that all further communications with Mr Rooney should be through Ms Thomas because his trust and confidence in Mr Rooney was destroyed at that point. Communication after 23 March 2007 with Mr Robertson on any matters from Mr Rooney was only permitted through Ms Thomas.

[40] Mr Rooney did not know that Mr Robertson knew of his telephone call with Mr Warner until 12 April 2007 when Ms Thomas raised the personal grievance about the telephone call in a letter of the same date. He was rather surprised at Mr Robertson's request to communicate in those circumstances through Ms Thomas, but did as he was asked. The delay in advising Mr Rooney about the telephone call was because Ms Thomas was wanting to confirm the advice Mr Gilroy had given her about the nature of the call with Mr Warner.

*Further matters after the telephone call*

[41] Two complaints about Mr Robertson were put through Ms Thomas. One was from Ms West that Mr Robertson ignored her during a planned visit to Invercargill in late March 2007. Ms West labelled that allegation *bullying*. The other complaint was from the district fire officer at Invercargill, Mr Larkin.

[42] Ms West said in her evidence at the Authority meeting that in making the complaint she wanted Mr Rooney to know what had occurred, but she did understand, because she had attended at the Invercargill station shortly after the meeting on 23 March that Mr Robertson could have been feeling stressed. Ms West said that from her perspective she did not consider the incident impacted on her future dealings with Mr Robertson and she did not expect an outcome.

[43] In light of that I do not accept as suggested by Ms Thomas that restrictions on contact between Ms West and Mr Robertson were necessary. Ms West's complaint was about one isolated incident. Ms West was required to contact Mr Robertson from time to time to ask about various financial matters but she was told by Mr Rooney in early May 2007, after the parties had attended a mediation, that there was an objection by Mr Robertson to any communication with Ms West being other than by email. After that time Ms West only communicated with Mr Robertson by email.

[44] An internal audit was undertaken of the financial management issues that had been the subject of the memorandum discussed at the meeting on 23 March 2007. There was agreement between the parties about the undertaking of such an audit and their respective contributions to it but I accept that such an audit is a requirement of fire service policy. There was a finding in the 15 June 2007 audit report that there were some practices and procedures that could have been better managed, but there was no evidence to suggest serious and deliberate financial wrongdoing or anything dishonest or fraudulent. There was a conclusion that all the management and financial areas that are continuing to cause concern to regional management must be addressed one by one with training and assistance given to bring these up to the operating standard expected. That finding, in my view, makes it clear that the audit was not considered to be an end to matters between the parties.

[45] There was an agreement between Mr Rooney and Ms Thomas to attempt to deal with the substance of both the West and Larkin complaints at the second mediation following the receipt by the parties of the financial audit report.

[46] The second mediation did not take place until mid July 2007 and as it transpired, matters were not resolved at mediation and there was no outcome to either complaint at the time that Mr Robertson resigned.

[47] On 25 June 2007 Ms Thomas emailed Mr Rooney and said that she did not believe that it was appropriate for Mr Robertson to attend a business planning meeting scheduled for the following week, which would involve Ms West, Mr Rooney and Mr Howe. Ms Thomas said that this was because Mr Robertson's personal grievance remained unresolved and that Ms West remained someone who Mr Robertson believed had made serious false allegations against him.

[48] There was agreement that Mr Robertson attend another meeting on 12 July 2007 on the basis that he was allowed to use a tape recorder and was not left alone with Ms West and Mr Rooney. Ms Thomas in a letter dated 5 July 2007 had sought an apology from Mr Rooney before Mr Robertson would attend another meeting in Wellington. The apology was in respect of allegations of theft. Mr Rooney in a letter dated 10 July 2007 denied ever having made such allegations and I do not find the evidence supports that any such allegation was made.

[49] On 19 July 2007 after the second mediation, Mr Rooney wrote to Ms Thomas and formally invited Mr Robertson's response to the allegations made by Mr Larkin and any further comment to that already made to the denial in terms of Ms West's complaint. Mr Rooney also proposed a performance management process and set out elements of the plan in terms of the financial management issues. Feedback was requested. In his letter Mr Rooney suggested mediation to facilitate relationships between the southern region senior management team and Mr Robertson.

[50] On 25 July 2007 by letter, Ms Thomas raised on Mr Robertson's behalf a complaint of workplace bullying against Ms West on the basis that since the second mediation the tone of emails sent by her were intimidatory and part of a continuing campaign of alleged wrongdoings. Ms Thomas said in her letter raising the complaint that Ms West's continued harassment of Mr Robertson will form part of a personal grievance which would be lodged that same week. The emails that Ms Thomas relied on were set out in her letter.

[51] On 25 July 2007 by letter, Mr Rooney sought clarification from Ms Thomas as to whether she wanted the fire service to investigate the allegation or whether legal action was to be pursued. Mr Rooney's letter accepted that the emails from Ms West appeared terse but noted that any communication with Mr Robertson by Ms West had to be by email which tends to come across that way.

[52] Ms Thomas confirmed to Mr Rooney subsequently that the alleged bullying behaviour of Ms West would not be included in a statement of problem to be lodged with the Authority. Mr Rooney then advised that he intended to appoint the fire service principal human resource consultant, Michelle Richards, and the financial controller, Graham Paterson, to independently assess the emails from Ms West.

[53] From 26 July 2007 Mr Robertson was away on sick leave and he did not return to work after that date.

[54] On 2 August 2007 Mr Robertson, through Ms Thomas, provided a response to Mr Larkin's allegation, and on 7 August 2007 Ms Thomas lodged a statement of problem claiming unjustified action causing disadvantage in the Employment Relations Authority. Mr Rooney left any further action in relation to that to internal and external lawyers.

[55] On 16 August 2007 Mr Rooney provided Ms Thomas with a report into the complaint of bullying by Mr Robertson against Ms West. The report, which was headed *Independent Assessment of email Interaction* provided comment on four areas, as below:

- Are the requests legitimate based on roles they hold.
- Are the requests legitimate in terms of processing of fire region accounts.
- Do the requests reflect good prudent management of accounts.
- Please comment on tone of email.

[56] It was found that the requests by Ms West were legitimate, showed good process and controls that would be expected of a financial process and reflected good business practice and an understanding of audit requirements. The emails themselves were described as direct but offering constructive feedback on issues and offers of help if required. It was noted that tone is often difficult to determine in emails and that there may be a level of frustration in terms of email correspondence.

[57] In the same letter providing the report to Ms Thomas Mr Rooney requested information about Mr Robertson's medical condition. The medical certificate provided stated that Mr Robertson had an acute stress disorder and that workplace factors contributed to that condition. Mr Rooney also said in his letter of 16 August that there was a need to assess the nature of Mr Robertson's condition in regard to the likelihood of him returning to full duties within the foreseeable future. It was noted in the letter that, aside from the responsibility of providing a safe workplace, if the nature of an employee's condition means that they are unable to return to work within

the foreseeable future, then the question of medical retirement arises. Mr Rooney asked for some specific information about Mr Robertson's situation and advised that the fire service was willing to meet the cost of further medical consultation which may be required before or in order to answer the questions.

[58] On 20 August 2007 a statement in reply was lodged with the Authority in relation to the allegation of unjustified action causing disadvantage.

*Events leading to Mr Robertson's resignation*

[59] On 22 August 2007 Ms Thomas emailed Mr Rooney in response to his letter of 16 August and advised, amongst other matters, that *Maurice is committed to returning to work as soon as possible and has been seeing a counsellor and his GP. His GP has suggested that Maurice attend a psychiatrist in Christchurch.* Ms Thomas also advised in her email - *Support would assist him on his return being some administration assistance and the urgent appointment of a Deputy.* On that same day Ms Thomas sent a letter to Mr Rooney to confirm whether the 3 August report into the investigation of bullying by Ms West was the full extent of any investigation. Mr Rooney subsequently confirmed it was.

[60] On 22 August 2007 Mr Rooney wrote to Ms Thomas confirming that the fire service would meet the cost of Mr Robertson's consultation and reasonable travel associated with that with a psychiatrist in Christchurch. Mr Rooney expressed in his letter that he welcomed the suggestion of appointment of a deputy and some administration assistance. He said that they were matters that could be addressed in order to facilitate Mr Robertson's return. Mr Rooney specifically noted that raising such matters indicates not only a desire by Mr Robertson to return to his duties, but a willingness to solve this matter by reasonable discussion of practical matters.

[61] On 27 August 2007 Dr Harvey Williams, Specialist Psychiatrist, prepared a report that, amongst other matters, Mr Robertson had a full house of depression symptoms.

[62] Ms Thomas then raised a personal grievance on the basis that Mr Robertson had been unjustifiably disadvantaged by a wholly inadequate investigation into the concerns about bullying behaviour by Ms West in her emails.

[63] On 3 September 2007 by letter Ms Thomas, on Mr Robertson's behalf, tendered his resignation immediately and enclosed with her letter the report from Dr Williams. In the letter Ms Thomas asked that Mr Robertson be paid all monies owed to him including outstanding wages, holiday pay and his gratuity. It was indicated in that letter that Mr Robertson would apply to have his superannuation paid out forthwith. A grievance of unjustified constructive dismissal was raised and the factors that had finally led to Mr Robertson's inability to return to work were set out and, in particular, his inability to work on a day-to day basis with Mr Rooney and to a lesser extent, Ms West.

[64] On 4 September 2007 by letter Mr Hall replied to Ms Thomas and responded to the facts set out in Ms Thomas's letter. Mr Hall said in his letter that he did not consider that Mr Robertson had no choice but to resign and that he was confident differences could be resolved. He advised in his letter that he would not accept Mr Robertson's resignation for a period of 24 hours from Ms Thomas' receipt of his letter and suggested further mediation to achieve functional working relationships between Mr Robertson, Mr Rooney and Ms West.

[65] Ms Thomas sought an extension to the time to consider the resignation which was granted. Mr Robertson did not withdraw his resignation and was duly paid out the money that was owing to him.

**Conclusions with respect to failure to remove Mr Rooney from decisions about Mr Robertson's employment, performance and personal grievances.**

[66] The Authority asked for clarification about what decisions it was claimed Mr Rooney should have been removed from in terms of Mr Robertson's employment and whether such removal was of a permanent nature. Ms Thomas said in response the requested removal of Mr Rooney was in relation to the inappropriateness of his attending mediation as decision maker at the two meditations held before Mr Robertson resigned.

[67] That is not the claim as set out in the statement of problem or in the letters that Ms Thomas sent at the time so I have not narrowed my investigation to the appropriateness of Mr Rooney's attendance at mediation. In respect of mediation it is for an employer to choose its representatives at mediation and the employee cannot insist on another representative. Mr Rooney did offer to attend mediation with the



director of human resources at the fire service but that attendance was declined by Ms Thomas because it still meant Mr Rooney was the decision maker.

[68] Mr Rooney in a letter to Ms Thomas dated 25 May 2007 in which he responded to amongst other matters the objection to his attending mediation reassured Ms Thomas and Mr Robertson that the chief executive and the director of human resources were fully aware of the situation. Mr Rooney reiterated his own accountability to superiors and noted the legal adviser that he would have at mediation would be there to represent the fire service and not Mr Rooney himself. The appropriateness of Mr Rooney attending at mediation can be taken no further and his attendance as a representative cannot form the basis of an unjustified action claim.

[69] Ms Thomas alleged in her correspondence with Mr Rooney during the process after 23 March pre-determination and bias on his part in dealing with the Mr Robertson's employment issues. There were no relevant decisions made that the Authority could assess as unfair on the basis of bias and predetermination. There was no disciplinary action from the financial matters discussed at the 23 March meeting, although a performance plan was proposed. If the issue is that there was a potential risk of predetermination or bias as a result of the telephone call to Mr Warner, then I am not satisfied from the evidence that Mr Rooney had closed his mind and was not open to persuasion about any of the issues with respect to financial management, complaints or those about general employment.

[70] It may have been a different situation if Mr Rooney had not appreciated and acknowledged that Mr Robertson had concerns about the relationship he had with Mr Rooney. Mr Rooney acknowledged in his correspondence to Ms Thomas on a regular basis the requirement for an effective working relationship between him and Mr Robertson and the need for that to be restored. In his letter of 23 April 2007 he said, amongst other matters, that he and Mr Robertson were part of a very small senior management team which he leads and it is vital that he have a functional working relationship with Mr Robertson. Mr Rooney acknowledged the reference in Ms Thomas' earlier letter to Mr Robertson's poor view of his working relationship with Mr Rooney and emphasised the need to address that.

[71] I do not find in conclusion that it was unreasonable for Mr Rooney to continue to deal with Mr Robertson's employment issues rather than the matters being dealt with by Mr Hall. Mr Rooney appreciated that from Mr Robertson's perspective there

were issues that required resolution about the relationship and he took steps in that regard by acknowledging that and attending/suggesting mediation.

[72] The claim of unjustified causing disadvantage because Mr Rooney was not removed from decisions about Mr Robertson's employment or personal grievances is not made out. I have considered other matters that were raised in final submissions

*The telephone call*

[73] I do not find that the action of Mr Rooney telephoning Mr Warner to advise that the concerns were at management rather than member level unjustified. Mr Gilroy accepted in his evidence that given the concerns both he and Mr Rodgers had about the memorandum, it was inevitable that Mr Rooney would have been questioned about the matter from the union members' perspective.

[74] I am not satisfied in the context of the discussion that any matters raised about concerns with Mr Robertson's management were done so in a way that was unjustified or unnecessary. I have reached this view because the context of the discussion is limited to the particular financial issues in the memorandum and that adherence to policy and procedures could have prevented the concerns that arose. I do not conclude from the evidence that concerns wider than those in the memorandum were discussed.

[75] There were matters discussed with Mr Warner that I do not find justified. They are the reference to health and the link in that regard to management together with the statement by Mr Rooney to the effect that Mr Robertson would have told all those in the station about the memorandum.

[76] In relation to the first matter, I accept that Mr Rooney only made a general and not a specific reference to Mr Robertson's health. Mr Warner was left with the understanding that there were health issues with Mr Robertson which impacted on his management. There were no medical reports at that time to support that and the only health issues that Mr Rooney had ever spoken to Mr Rooney about had been issues with memory. Mr Rooney understood that Mr Robertson wanted confidentiality about that issue.

[77] In relation to the second matter Mr Rooney had not, in fact, told everyone in the station about the memorandum and/or its contents. In any event, Mr Rooney had

not restricted Mr Robertson as to who he could ask for assistance or talk to about the memorandum. I find that the discussion about these matters with Mr Warner went beyond what was necessary and justified, particularly when assessed against the background where Mr Rooney knew that Mr Robertson was extremely sensitive and fragile when issues were raised with him about his actions.

[78] In reaching this finding, I would not wish to discourage “off the record” discussions between employers and union officials. An employer, however, does have obligations to take care not to conduct itself in a manner which is likely to damage the relationship of trust and confidence and there is always a risk in such “off the record” discussions that some matters may be disclosed. I accept that Mr Robertson was extremely hurt and distressed to be advised of the call by Mr Gilroy and in that way I find that he was disadvantaged.

[79] Mr Robertson has a personal grievance he was disadvantaged by the unjustified action of Mr Rooney talking to Mr Warner about a link between his health and management and the suggestion that Mr Robertson would have talked widely about the memorandum around the Station because it was not what a reasonable employer would have done in all the circumstances.

[80] In considering remedies, I have taken into account that the evidence does not support knowledge of the telephone call impacted on Mr Robertson’s standing or support from the union members of the fire station. They continued to be very supportive of him throughout the process. I also take into account that Mr Rooney intended the call with Mr Warner to be “off the record” and in that way go no further. I have also taken into account that Mr Robertson did not talk directly to Mr Warner about the call or the context of the various comments that were made at the time that Mr Robertson came to hear of the call. Had he done so then that may have reduced his concerns and distress about the call.

[81] I do not find that Mr Robertson can be said to have contributed to the contents of the telephone call. No criticism can be directed at him for talking to Mr Rodgers and Mr Gilroy about the meeting on 23 March because he was not restricted in who he could talk to. For completeness, Mr Robertson was not responsible for the material that was put up on a notice board at a later date.

[82] In all the circumstances, although I am of the view that there should be an award for compensation, for the above reasons it should be an award that reflects and takes into account these matters. A suitable award of compensation in all the circumstances is \$3,000.

[83] I order the New Zealand Fire Service Commission to pay to Maurice Robertson the sum of \$3,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

*Performance plan*

[84] I find the proposed performance plan that followed the receipt by the parties of the audit report into the matters of financial concern was reasonable. Mr Robertson had an opportunity for input into it. Mr Rooney proposed quite appropriately that the performance plan was delayed until Mr Robertson was medically cleared and returned to work.

*Relationship with Ms West and the emails*

[85] I find that the response by the fire service to have two independent investigators who knew of the human resource and financial aspects have a look at the emails, was a reasonable response.

[86] The reality of the situation was that there was a border relationship issue that required addressing between Ms West and Mr Robertson. Mr Rooney recognised this and proposed mediation assistance with specific regard to Ms West's role in terms of the proposed performance plan.

[87] I do not find the process with respect to investigating the complaint of bullying in relation to the emails was unjustified. I do not find that Ms West impliedly or expressly in any of her exchanges with Mr Robertson alleged he was dishonest Ms West needed to ask certain questions to obtain information in order that she could perform her role as required in relation to statutory requirement and for audit purposes.

*Steve Larkin complaint and Ms West complaint*

[88] There was a resumption of an investigation into both of these matters after the second mediation. There was no outcome in terms of these matters before Mr Robertson resigned.

[89] Some of the matters that were the subject of the Steve Larkin complaint may well have already been dealt with in the audit report, but there were some other matters outside of the audit as supported by the fact that Ms Thomas asked for feedback from the union on Mr Larkin's complaint. I do not find that it was unreasonable of the fire service to proceed to reach a conclusion about these two complaints.

[90] I do not find that other than as set out in relation to the telephone call between Mr Rooney and Mr Warner, there were other unjustified actions that disadvantaged Mr Robertson.

**Was Mr Robertson unjustifiably constructively dismissed?**

[91] The claim for constructive dismissal falls more into the category of an alleged breach of the terms of Mr Robertson's employment rather than that the fire service followed a course of conduct with the dominant purpose of coercing Mr Robertson to resign.

[92] As such the claim requires consideration as to whether there was a breach of the terms of the employment agreement between Mr Robertson and the fire service of sufficient seriousness that Mr Robertson's response in resigning on 3 September 2007 would be reasonably foreseeable to the fire service.

[93] If there has been repudiatory conduct on the part of an employer then an employee may either elect to treat the employment agreement as at an end because of the conduct, or affirm the employment agreement in knowledge of the breach. Mr Robertson's subsequent actions after knowledge of the telephone call between Mr Rooney and Mr Warner support affirmation of the employment agreement in relation to that matter as does Ms Thomas' email of 22 August 2007.

[94] The reasons for the resignation I find were set out in Ms Thomas' letter tendering Mr Robertson's resignation of 3 November 2007 and I will set these out below.

*Depressive illness cause by the actions of Mr Rooney and Ms West*

[95] This is an allegation of a breach by the fire service to provide a safe and healthy workplace for Mr Robertson and take reasonable and practical steps to avoid him suffering psychological harm. In determining whether or not there has been a breach of any duties in this regard by the fire service, the degree of knowledge that it held about Mr Robertson's condition or vulnerability is important. The fire service was aware that Mr Robertson was fragile and/or sensitive when confronted about his actions, and I find that it took reasonable steps on 23 March to have a comparatively low level informal meeting during which it raised issues of financial management. No immediate response from Mr Robertson to the matters was forthcoming or required.

[96] After that date all communication from Mr Rooney went through Ms Thomas and although there were unpleasant matters in the nature of complaints and issues about financial matters to deal with there was no suggestion until Mr Robertson went on sick leave that he was at risk of psychological harm. The fire service was entitled to assume in those circumstances that Mr Robertson could cope with normal pressure of his role which included being asked about matters from time to time.

[97] After Mr Robertson went on sick leave Mr Rooney attempted to obtain some understanding of the medical condition and workplace factors/stresses that may have contributed. The understanding in terms of these issues was expected to come as a result of the psychiatric report paid for by the fire service but that was provided to the fire service at the same time as Ms Thomas tendered Mr Robertson's resignation.

[98] I am not satisfied from the evidence that there has been a breach of the fire service's obligations to provide a safe working environment for Mr Robertson. Given that finding, I do not need to determine the issue of causation, but, for completeness, the evidence of causation in the form of medical certificates and the report from Dr Williams comes from Mr Robertson's own self reporting.

[99] It is important that there was no evidence that Mr Robertson was placed under pressure to return to work. The evidence supported that he had remaining sick leave and there had also been reference to the option of medical retirement in an earlier letter from Mr Rooney dated 16 August 2007.

*No confidence of different treatment*

[100] I am not satisfied that there have been breaches of duties owed to Mr Robertson that would enable a conclusion to be drawn that such conduct would continue. The suggestion of a further mediation to repair the relationships was a sensible one.

*The removal of Mr Rooney*

[101] I have not found that there was a breach when Mr Rooney was not removed from issues to do with Mr Robertson's employment or his personal grievances. There is no breach in that regard that would support a constructive dismissal claim.

*The statement in the statement in reply that Mr Warner called Mr Rooney*

[102] Mr Rooney gave evidence that he was not involved in the drafting of the statement of reply and that what Mr Robertson objected to was clearly in error. Mr Hall in his letter of 4 November 2007 asked Mr Robertson to reconsider his resignation and specifically noted in his letter that the paragraph in the statement in reply was incorrect and he apologised on behalf of the fire service. Mr Hall agreed with Mr Robertson that it had never been denied by Mr Rooney that he had called Mr Warner rather than the other way round. Mr Hall offered in his letter to amend and resubmit the statement in reply.

[103] I do not find that this error in the statement in reply amounted to a breach but was simply a mistake which Mr Hall offered to remedy.

*Bullying complaint*

[104] I do not consider the investigation was unreasonable and there is no breach in that regard.

*Additional support*

[105] Mr Robertson was required to undertake most of the administrative work together with his deputy. There was considerable email correspondence from Ms West that required a response from Mr Robertson and a few months when Mr Robertson did not have a deputy to assist him, after Mr Larkin left. A request for

support in the administration area from Ms Thomas on Mr Robertson's behalf was reasonable one.

[106] Although Ms Thomas asked for assistance which would, in the ordinary course of events in the fire service, come from or be arranged through Ms West, Mr Robertson actually wanted an assistant for a few hours per week. The distinction is important. For the latter a business case is required because it would mean the employment of additional staff resource. For additional staff resource the fire service required the submission of a business case, a letter setting out the reasons for someone to be employed to undertake a particular task. I accept that the evidence supports Mr Robertson had asked previously for an assistant and had been told that a business case would be required to be submitted but that had not be taken further. I would have thought that once it was clarified that Mr Robertson wanted an assistant, Ms Thomas's letter and the knowledge of Mr Robertson's medical situation from Dr Williams' report may well have sufficed as a business case.

[107] I had considered whether it was unreasonable for Mr Rooney to advise that any administrative support would come from regional headquarters and involve consultation with Ms West. I do not find that that was unreasonable against the background of communication with Ms Thomas where it had already been recognised that the relationship between Ms West and Mr Robertson would have to be functional and mediation had been suggested for that to be achieved.

[108] I am not of the view that Ms West's complaint about Mr Robertson which involved one interaction could be seen as an impediment to addressing assistance for Mr Robertson. Ms West said in her evidence that she wanted Mr Robertson to achieve in this area and there was also no suggestion that Mr Rooney would not facilitate such assistance.

[109] I do not find that there to be a breach with respect to the provision of administration assistance. Some assistance was offered and in terms of an assistant, it would be premature to reach a conclusion that that was not a possibility because Mr Rooney had written his response to Ms Thomas on assistance arranged through Ms West rather than the engagement of an assistant. The letter was also written before the psychiatrist's report with full details of Mr Robertson's medical condition was to hand.



*Statement in Mr Rooney's letter with respect to refuse to enter into discussions*

[110] Mr Robertson said that he had never refused to enter into discussions with Ms West and other members of the southern region senior management team on routine matters, as alleged by Mr Rooney in his letter of 22 August 2007. From March 2007, however, until his resignation Mr Robertson insisted that any communication with Mr Rooney be through a solicitor and from early May 2007 that any communication with Ms West be undertaken by way of email. Many issues that could have been resolved simply by a telephone call or a visit were, in my view, elevated as a result to a more serious level.

[111] The evidence supports that Mr Robertson was reluctant to attend regional meetings and there was reluctance, for example, by him to attend the business planning meeting. I accept that business planning is a routine matter for someone in Mr Robertson's position.

[112] Whilst accepting that *refuse to engage* may not necessarily be the right terminology he used in all the circumstances, I do not find its use unjustified. Normal engagement objectively assessed was no longer possible between the members of the southern regional management team and Mr Robertson.

[113] I do not find that there is a breach of contract in this respect that would support an unjustified constructive dismissal.

**Conclusions with respect to the constructive dismissal claim**

[114] Mr Robertson was unwell when he made his decision to resign and I accept he was unhappy in his employment. In those circumstances a fair and reasonable employer would have done as Mr Hall did and asked him to reconsider his resignation and suggest further mediation. Mr Robertson took some time to consider his resignation before confirming his decision. There were alternatives to resignation. Mr Robertson could have remained on sick leave and further discussions could have taken place about his needs in light of the psychiatric report. I find that the evidence falls short of establishing a serious breach of contract that would make it reasonably foreseeable Mr Robertson would not be prepared to continue his employment.

[115] The claim for unjustified constructive dismissal is not made out.

**Costs**

[116] I reserve the issue of costs. Mr Robertson has not had success with all his claims and the parties should attempt to reach agreement on costs. Failing which Ms Thomas has until 18 November 2008 to lodge and serve submissions as to costs and Mr McBride until 16 December 2008 to lodge and serve submissions in reply.

**Summary of findings and orders made**

- I have found that there was an unjustified action that caused Mr Robertson disadvantage in terms of the telephone call between Mr Rooney and Mr Warner. I have ordered the fire service to pay to Mr Robertson the sum of \$3,000 compensation under s.123(1)(c)(i) of the Employment Act 2000.
- I have not found any other unjustified actions that caused Mr Robertson disadvantage.
- I have not found that Mr Robertson was unjustifiably constructively dismissed.
- I have reserved the issue of costs, encouraged agreement failing which there is a timetable for an exchange of submissions.

Helen Doyle  
Member of the Employment Relations Authority