

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 514
5452062

BETWEEN

LYNDA MCHUGH
Applicant

AND

CHIEF EXECUTIVE OF THE
NEW ZEALAND FIRE
SERVICE
Respondent

Member of Authority: Vicki Campbell

Representatives: Ronelle Tomkinson for Applicant
Geoff Davenport for Respondent

Investigation Meeting: 18, 19 & 20 August 2014

Determination: 16 December 2014

DETERMINATION OF THE AUTHORITY

- A. Ms McHugh was disadvantaged in her employment by an unjustifiable action of the Chief Executive of the New Zealand Fire Service (NZFS).**
- B. The Authority lacks jurisdiction to investigate and determine claims that Ms McHugh was disadvantaged in her employment by NZFS when it breached the terms of Ms McHugh's employment.**
- C. NZFS is ordered to pay Ms McHugh compensation in the sum of \$5,250 within 28 days of the date of this determination.**
- D. Costs are reserved.**

Employment relationship problem

[1] Ms Lynda McHugh has been an employee of the Chief Executive of the New Zealand Fire Service (“NZFS”) since 2005. In 2009 Ms McHugh was appointed to the position of Fire Risk Management Officer (FRMO) based at Takapuna.

[2] This is a claim by Ms McHugh that her employment was affected to her disadvantage as a result of being issued an oral warning following an investigation into allegations of bullying against her.

[3] Ms McHugh also claims the respondent has breached the implied terms of her employment in that it failed to provide her with a safe workplace.

[4] NZFS denies the claims and says that many of the matters raised by Ms McHugh relating to her second claim have been raised outside the requisite 90 day period and therefore cannot form part of her personal grievance.

Background

[5] The applicable terms and conditions of Ms McHugh’s employment are contained in a collective agreement. Ms McHugh received an oral warning on 28 January 2014 after an investigation into allegations that she had bullied a member of the team. Until receiving the oral warning Ms McHugh had a blemish free record.

[6] From December 2013 until the present day Ms McHugh has been based in Auckland Central. When the matters giving rise to the issue of the oral warning occurred, Ms McHugh was one of a team of three engaged in Fire Investigations based in the Waitemata area.

[7] The other members of the team included Mr Ian Wakeley and Ms Melissa La Roche. Mr Wakeley commenced working with Ms McHugh on 29 August 2012 and Ms La Roche joined the team on a six month secondment on 3 September 2012.

[8] On 28 March 2013 Mr Wakeley raised a formal complaint about Ms McHugh’s conduct alleging that her conduct amounted to bullying.

[9] According to Mr Brian Butt, Fire Regional Manager, the Chief Executive Officer (CEO) of NZFS made it clear in early 2012, that safety was an important issue

and bullying would not be tolerated. The policy dealing with bullying in the workplace was published in 2006.

Relevant Policies

[10] Set out below are extracts from the NZFS Policies relevant to this matter:

(a) Standards of conduct

This policy sets out the responsibilities employees have to the CEO including behaving reasonably and taking practical steps to ensure their own and others safety.

The Policy then sets out expected standards, including maintaining appropriate standards of personal behaviour. This is followed by examples of standards relating to the rights of others including colleagues and the public.

Employees are expected to contribute to the efficiency, effectiveness and smooth running of the workplace. This includes avoiding behaviour which might endanger or cause stress or anxiety to other staff, or otherwise contribute to any disruption of the workplace.

(b) Workplace Bullying Policy

NZFS defines bullying as unwanted and unwarranted behaviour that a person finds offensive, intimidating and humiliating and is repeated so as to have a detrimental effect upon a person's dignity, safety and well being.

Specific examples set out in the policy are:

- Threats
- Intimidation
- Physical violence
- Sarcasm
- Shouting
- Isolation
- Interference with equipment or possessions
- Ganging up
- Defamatory gossip
- Constant criticism
- Unjustified threats of dismissal
- Unfair treatment
- Public humiliation

- Professional ambush
- Setting impossible deadlines, over pressuring
- Under work, creating a feeling of uselessness
- Removing responsibility without justification
- Constantly changing targets or deadlines
- Unreasonable administrative sanctions
- Any other means of undermining a person right to dignity at work

Bullying does not include supervisors making reasonable demands of employees or when there is good natured “ribbing”.

The policy provides for four levels of response to bullying. The level at which an employee initiates complaints is at the discretion of the complainant.

Level 1 – “self help”. The complainant must confront the bully early, naming behaviours and asking for it to stop. This level requires the complainant to tell someone if they are being bullied. Complainants are advised to be aware of their own reactions and not to take actions which could make the complainant seem to be in the wrong.

Complainants are advised to use strong assertiveness and to safeguard themselves.

Level 2 – formal intervention. The complainant must speak to their immediate supervisor and seek guidance from them on how to deal with the situation. Complainants are advised to use existing support for advice or assistance including a Union representative or workplace chaplain and to try informal approaches such as mediations and facilitated meetings to reach agreement for the behaviour to stop.

Level 3 – formal intervention. Complainants must formally complain to their manager/Chief Fire Officer or above in writing. The complaint will be investigated in accordance with the NZFS Managing Misconduct policy.

Level 4 – external complaints. Initiating a complaint at this level requires the use of mediation service or Employment Relations Authority, Human Rights Commission, OSH, or the Police for

resolving an employment relationship problem or more serious allegations of violence.

All NZFS managers are responsible for ensuring that the NZFS is a safe working environment.

(c) Managing Misconduct Policy

The stated Principle of this policy is to demonstrate NZFS's commitment to:

... promoting proper standards of behaviour by its employees through the use of fair processes to address any allegations of misconduct and/or serious misconduct.

The policy requires managers who become aware of allegations of potential misconduct to decide whether that complaint or allegation would, if proven, amount to misconduct or serious misconduct.

Managers are required to inform people making complaints that their identity will almost always have to be revealed to enable the person complained about to respond adequately to the allegation except where the disclosure is protected by the NZFS Protected Disclosures policy.

The test for deciding whether a complaint can be kept anonymous is whether, without knowing the complainant's identity the person complained about will have sufficient detail to enable them to be able to respond to it. The policy is clear that there would be very few situations where anonymous complaints can be acted on.

If there is not enough information in the initial complaint, the person complaining should be interviewed to obtain this information.

Once allegations of misconduct have been investigated the decision maker must decide whether the allegations are found to be correct and must take into account the following:

- The seriousness of the behaviour;
- Whether the employee has any current warnings on their personal file;
- Their career to date;
- Any mitigating factors – i.e. reasons why they did the behaviour that might excuse or explain it;
- The need for consistent treatment of similar types of misconduct;
- Any other relevant information provided by the employee or their representative.

Apart from warnings for misconduct and summary dismissal for serious misconduct the policy identifies six other disciplinary sanctions available to NZFS managers:

- Reprimand
- Transfer to other duties (with agreement)
- Redeployment
- Withdrawal of privileges such as flexitime
- Leave without pay (by agreement)
- Demotion

Issues

[11] The issues to be determined are whether:

- (a) the oral warning was an unjustified action and if so whether Ms McHugh's employment was affected to her disadvantage;
- (b) Ms McHugh's employment was affected to her disadvantage by an unjustified action by NZFS with regards her health and safety;
- (c) If the answer to either of the first two questions is yes, what, if any remedies, should be awarded.

Was the oral warning an unjustified action?

[12] A finding under this heading requires an examination of a number of matters including:

- (a) the events leading up to Mr Wakeley's written complaint;
- (b) the investigation report provided to NZFS; and
- (c) NZFS's conclusions that resulted in the oral warning being issued to Ms McHugh.

Sequence of events

[13] Mr O'Donoghue, Fire Area Manager, Waitemata, was Ms McHugh's one-up manager. Ms McHugh's direct manager from September 2012 to 5 March 2013 was Mr George Stephens. Mr Stephens left his employment on 5 March 2013, at which time Mr O'Donoghue assumed direct management responsibility for the team until Mr Sean Pilgrim's appointment at the end of March 2013.

[14] Mr O'Donoghue was aware of tensions between Mr Wakeley and Ms McHugh within a month after the two commenced working together. Mr O'Donoghue's evidence at the investigation meeting was that he had numerous discussions with Mr Wakeley about a number of issues regarding Ms McHugh's conduct towards Mr Wakeley.

[15] Mr O'Donoghue asked Mr Wakeley for something substantial which would allow him to address his concerns with Ms McHugh. Mr Wakeley would not provide that substance.

[16] It was Mr O'Donoghue's evidence, which I accept, that he continually advised Mr Wakeley that he should discuss his concerns directly with Ms McHugh and if he received no satisfactory result from that, he could escalate matters. Mr O'Donoghue says he followed up and asked Mr Wakeley if he had addressed his concerns directly with Ms McHugh. Mr Wakeley confirmed he had not done so as he believed that raising his concerns would cause matters to escalate.

[17] Mr O'Donoghue was concerned enough about the relationship in September 2012 that he sought advice from Human Resources (HR) and discussed his concerns with his manager, Mr Brian Butt. No action was taken at that time to assist the two employees with their relationship issues, however monthly social gatherings were arranged to encourage the team and other members of the staff to get to know each other.

[18] It was common ground that Mr O'Donoghue never raised any specific concerns with Ms McHugh about her conduct toward Mr Wakeley.

[19] On 17 January 2013 Mr O'Donoghue arranged a meeting with the three team members, the purpose of which was to address the tensions within the team. This meeting failed to resolve any of the issues affecting the working relationship between the three team members.

[20] Ms McHugh was seeking to transfer her employment from Auckland to Tauranga and applied for an FRMO position based in Tauranga. In February 2013 an Officer responsible for the recruitment into the Tauranga job, Mr Murray Binning, sought a brief account of Ms McHugh's work experience from Mr O'Donoghue.

[21] On 8 February 2013 Mr O'Donoghue emailed Mr Binning setting out his view of Ms McHugh's working relationship with various colleagues. Mr O'Donoghue reported that he had received unsubstantiated comments from Mr Wakeley and Ms La Roche about their relationship with Ms McHugh but advised that these were of a minor nature and reiterated that they were not substantiated by a specific complaint.

[22] Mr O'Donoghue commented on Ms McHugh's higher than expected level of delivery and noted that she was very diligent, focussed and professional. Mr O'Donoghue described Ms McHugh as always being courteous and helpful with an above average work ethic.

[23] Overall, the reference provided by Mr O'Donoghue was positive with one or two criticism including that the minor relationship issues could be construed as Ms McHugh not being a team player.

[24] A copy of this email was put into Ms McHugh's intray for her information. Ms McHugh was critical of Mr O'Donoghue for putting a copy of this email in her intray, but at the investigation meeting, she conceded that she had a copy of the email in advance of her interview and was provided with a full opportunity at the interview to address the concerns raised by Mr O'Donoghue.

[25] On 25 March 2013 Mr Wakeley contacted Mr O'Donoghue at home and advised him that he would was taking a day off on sick leave. During the telephone discussion Mr Wakeley advised Mr O'Donoghue that he was unwell because of "...*that woman*". Later that same day when passing Ms McHugh in the corridor Mr O'Donoghue asked if there had been an incident between her and Mr Wakeley. Ms McHugh denied any incident had arisen and advised Mr O'Donoghue that she had not seen Mr Wakeley since the preceding Wednesday.

[26] On his return to work on 26 March 2013 Mr Wakeley met with Mr O'Donoghue and was asked to specify the reasons why he had taken sick leave the day before. Mr Wakeley advised Mr O'Donoghue that he had overheard a telephone discussion Ms McHugh had had in her office on 21 March 2013. Mr Wakeley had become offended at a comment Ms McHugh had made during her discussion. Mr O'Donoghue offered to meet with Ms McHugh and advise her that Mr Wakeley felt she was undermining his professional capability and his confidence in departmental work.

[27] Mr O'Donoghue then met with Ms McHugh. Unbeknown to Mr O'Donoghue, Ms McHugh recorded that discussion. Ms McHugh says she recorded the discussion because she had been advised to by another manager. A copy of the recording and a transcript has been provided to the Authority. It is clear from the recording of the meeting that Ms McHugh is upset. She told Mr O'Donoghue that she was feeling unsafe at work, that it was unfair that Mr Wakeley could continue to make allegations about her conduct without having to provide specifics or examples leaving her unable to address his concerns in any way.

[28] During the meeting, Ms McHugh enquired about Mr Wakeley's concerns, but Mr O'Donoghue would not elaborate, on what the specific concerns were. The meeting ended with an agreement that Ms McHugh would approach Mr Wakeley and invite him to knock on her door to discuss any problems.

[29] Ms McHugh left the meeting and approached Mr Wakeley. Ms McHugh says she attempted to get some engagement with Mr Wakeley to address the concerns he had about her conduct toward him but that he would not engage with her and told her he just wanted to be civil.

[30] At the Authority's investigation meeting Ms McHugh also advised the Authority that she had recorded the conversation between herself and Mr Wakeley, however that recording has not been provided to the Authority, despite Ms McHugh acknowledging that she had been advised not to interfere in any way with the recording.

[31] After her meeting with Mr O'Donoghue and her failed attempt to get engagement with Mr Wakeley, Ms McHugh had a conversation with another work colleague who had walked passed her office. Ms McHugh asked the colleague whether she knew what Mr Wakeley's problem was with her. The colleague advised Ms McHugh that Mr Wakeley did not want her to know. Ms McHugh told the colleague that Mr Wakeley had made allegations about her and she would be taking legal action against him. The work colleague passed this information on to Mr Wakeley.

[32] Ms McHugh then met with Mr O'Donoghue for a second time that day. Mr O'Donoghue was sympathetic and acknowledged Ms McHugh's attempt to wave an olive branch in front of Mr Wakeley and Mr Wakeley's failure to provide more

substantial information or to discuss his concerns. That meeting was also recorded. Mr O'Donoghue was not aware of the recording. A copy of the recording together with a transcript of the recording has been provided to the Authority.

[33] The following day, 27 March 2013, Mr Pilgrim wrote to Ms McHugh and advised her that he had tried to arrange a mediated meeting between herself and Mr Wakeley. Mr Pilgrim had been unsuccessful in locating an appropriate mediator but promised to contact Ms McHugh as soon as he was able to confirm someone. He asked Ms McHugh to confirm that she wished to continue with a mediated meeting.

[34] Ms McHugh responded expressing her dismay that matters had not been sorted informally in the discussion she had attempted to initiate on 26 March 2013, and that matters had escalated to mediation.

[35] Ms McHugh was critical of Mr Wakeley for not providing any examples of her conduct and advised Mr Pilgrim that Mr Wakeley had made "...*slanderous allegations about me...*" Ms McHugh advised that as she was now legally represented all future communications should be made through her lawyer.

[36] On 28 March Ian Wakeley submitted to NZFS a seven page document making allegations of bullying against Ms McHugh. The document contained 20 incidents or examples of bullying behaviour experienced by Mr Wakeley.

[37] On receipt of the formal complaint from Mr Wakeley, Mr John Sutton, an external HR Consultant was engaged by NZFS to undertake an investigation and provide a report on his findings.

[38] The complaint was provided to Ms McHugh on 8 April 2013 and she was advised an investigation would be undertaken. Mr Sutton provided Ms McHugh with a list of written questions. Ms McHugh complained that a number of those questions indicated that Mr Sutton had already formed opinions adverse to her and raised these concerns with him.

[39] An investigation was undertaken and a draft report compiled. Ms McHugh received a copy of the draft report and was provided with an opportunity to respond to it.

[40] After consideration of Ms McHugh's feedback on the draft report the report was finalised and submitted to NZFS. NZFS implemented a disciplinary process which resulted in Ms McHugh's employment being subject to an oral warning for 12 months.

Investigation and report

[41] I have some concerns about the robustness of Mr Sutton's investigation and reporting. I have set out below two significant areas of concern.

Motivation for making the complaints

- (a) In her responses to Mr Wakeley's allegations Ms McHugh told Mr Sutton she often found Mr Wakeley's behaviour intimidating. Ms McHugh gave the example of Mr Wakeley's propensity to remind those around him that he had "*earned his rank*". This was perceived by Ms McHugh as being a put down of the fact that her rank was a brevet rank whereas Mr Wakeley's rank was a substantive rank. That Mr Wakeley would often make this comment was confirmed by others interviewed by Mr Sutton.
- (b) In the course of setting out his conclusions regarding one of the allegations which was not substantiated, Mr Sutton gave little weight to information he received from Mr Mike McEnaney, Senior Fire Risk Manager Officer and Union delegate, because Mr McEnaney's statements conflicted. Mr Sutton arrived at this conclusion because in his first statement to Mr McEnaney, Mr McEnaney confirmed that such comments were made by Mr Wakeley but did not convey any antagonism. In his second statement to Mr Sutton and in answer to a specific question from Mr Sutton, Mr McEnaney confirmed that such comments as "*I earned my rank*" could be intimidating.
- (c) Mr Sutton's dismissal of Mr McEnaney's second statement confirming that the comment could be intimidating ignores statements from other employees interviewed who also confirm Mr Wakeley raised the issue of rank a number of times. I find it surprising that here was no further investigation into the possibility that the perception of Mr Wakeley that

he had earned his rank and that Ms McHugh had not, was an underlying cause or a significant contributor to the difficulties in the employment.

Full reporting of interviews and information

- (a) Mr Sutton advised the Authority that a number of things that were said by some of the witnesses were not included either in their confirmed witness statements or his report, because, in his opinion they were not relevant.
- (b) Mr Sutton said that his approach to the interviews was not to make a verbatim record but summarise after the interview, what he considered to be the key points of relevance.
- (c) Mr Sutton acknowledged at the investigation meeting that he had made handwritten notes and that those notes might be different to the final notes presented to each witness for finalising. The handwritten notes were not offered to Ms McHugh because they had been destroyed once he had had confirmation from each witness that the typewritten notes reflected their interviews.
- (d) Mr Ray Coleman, Senior Fire Investigator, was interviewed as part of Mr Sutton's investigation. After his interview Mr Coleman advised Ms McHugh that he had been asked about how well the department was being managed. This conversation does not appear in the interview notes approved by Mr Coleman. Mr Sutton said it was not included in his interview notes as it was irrelevant. He was more interested to hear from Mr Coleman on his opinion about Ms McHugh and Mr Wakeley's behaviours.
- (e) The fact that interviewees were asked questions and provided answers that were not included in the confirmed interview notes raises concerns that information relevant to the disciplinary process may be inadvertently omitted. The decision NZFS had to make was different to the process Mr Sutton was tasked with. Mr Sutton's role was to fully investigate allegations that Ms McHugh's behaviour in the workplace

was bullying in nature and to provide NZFS with a report of including the evidence and information collated. It cannot be said, that the report was included all information collated given the omissions that were made from key interview notes.

- (f) Ms McHugh was also concerned that Mr Sutton held conversations “*off the record*” during interviews and that this was not recorded. Mr Sutton says he was asked to have “*off the record*” discussions but denies inviting such discussions. If Mr Sutton was asked if he could have an off the record conversation his response should have been no because he exposed himself to hearing information which may have influenced his decision-making.
- (g) The failure to record all discussions in the interview notes means that not only was NZFS not in receipt of full information and therefore not in a position to know if such information would have altered the outcome. Ms McHugh never had access to full information and was therefore prevented from providing a full response. It is particularly concerning that the handwritten notes were destroyed and not made available to Ms McHugh.

The allegations

[42] Of the 20 incidents cited by Mr Wakeley in his complaint five were found by Mr Sutton to be substantiated. Of those five, NZFS held that four of the incidents had substance and amounted to misconduct:

- (a) Discussion regarding impending arrival of new team member;
- (b) Morning greetings;
- (c) Kitchen Fire Display Feedback Meeting; and
- (d) 17 January 2013 Team Meeting

Incident 1 - Discussion regarding impending arrival of new team member (Ms La Roche)

[43] Mr Wakeley’s complaint was that on or about 30 August 2012 (this is the first day Mr Wakeley worked with Ms McHugh) Ms McHugh talked to him in a

disparaging way about Ms La Roche. Ms La Roche was to join the team the following week. Mr Wakeley reports feeling very uneasy about this conversation.

[44] Ms McHugh says Mr Wakeley had initiated the discussion about Ms La Roche when he, himself, advised Ms McHugh of a discussion he had had with Mr McEnaney where they discussed Ms La Roche and the fact that Mr Wakeley had wanted one of his friends to get the position. Mr Wakeley also told Ms McHugh that he does not like civilians (which Ms La Roche had been) and did not think Ms La Roche should wear epaulets. The fact that Mr Wakeley and Mr McEnaney had had the earlier conversation was confirmed by Mr McEnaney when he was interviewed by Mr Sutton.

[45] Ms McHugh acknowledged during the investigation that during the discussion with Mr Wakeley she had passed on comments made by Mr Stephens that she should be mindful of Ms La Roche. Ms McHugh told Mr Sutton during the investigation process that she had been instructed to pass on the information about Ms La Roche by Mr Stephens.

[46] Mr Sutton concluded that Ms McHugh's statement that she had been instructed to pass on information about Ms La Roche was not credible and found that the discussion reported by Ms McHugh between Mr Wakeley and Mr McEnaney was not relevant to his enquiry. Mr Sutton concluded the discussion about Ms La Roche was initiated by Ms McHugh, and that there was no instruction from Mr Stephens to pass on negative information.

[47] Mr Sutton accepted Mr Wakeley's complaint that he felt drawn into an alliance of mistrust and suspicion toward Ms La Roche by the content of the discussion. Mr Sutton concluded that this conduct by Ms McHugh left Mr Wakeley feeling stressed and anxious.

[48] When these findings were put to Ms McHugh for her response by NZFS during the disciplinary process Ms McHugh confirmed, and Mr Terry Castle, a Retired Fire Safety Officer, could provide confirmation, that Mr Stephens had expressed warnings to her about Ms La Roche and advised her to document matters of concern. Ms McHugh explained to NZFS that she had been careful to ensure she was passing on Mr Stephens' point of view and not her own.

[49] Ms McHugh also reiterated that it was Mr Wakeley who initiated the conversation by discussing his view that Ms La Roche should not be in the job or wearing epaulets. Ms McHugh pointed out that Mr Wakeley himself, had engaged in a negative discussion about Ms La Roche when he discussed her appointment with Mr McEnaney.

[50] Ms McHugh denies causing Mr Wakeley stress and anxiety. It was Mr Wakeley who had initiated the conversation, the conversation was about Ms La Roche not Mr Wakeley, and the comments Ms McHugh made about Ms La Roche was not her view but the view of Mr Stephens.

[51] NZFS concluded that the allegation that Ms McHugh had breached the standards of conduct and had engaged in behaviour in breach of the bullying policy was substantiated. NZFS notes that Mr Wakeley found the comments made by Ms McHugh to be negative, disparaging and causative of stress and anxiety on his part.

[52] There is no evidence to support NZFS's conclusion as to the impact of the discussion on Mr Wakeley. Mr Wakeley himself describes the incident left him "...*feeling uneasy*".

[53] NZFS's conclusion that the disparaging and negative conduct by Ms McHugh was unwanted and unwarranted does not take into account that Ms McHugh was engaging with Mr Wakeley, on his first day of working with her, in a conversation where Ms McHugh says Mr Wakeley initiated the discussion about Ms La Roche. Both Mr Wakeley himself, and Mr McEnaney have acknowledged that they had the discussion Ms McHugh reported in her response to the allegations.

[54] Given Mr Wakeley's contribution to the discussion it seems unlikely Ms McHugh's contribution was unwanted.

[55] Mr Castle, confirmed in his written statements to Mr Sutton that he had been present when Mr Stephens had expressed concerns about Ms La Roche and had advised Ms McHugh to be cautious and wary of her. Mr Castle confirmed that he concurred with Mr Stephens views about Ms La Roche. This information is not set out in the conclusions reached by Mr Sutton nor is it the subject of discussion by NZFS in reaching its conclusion about the conduct of Ms McHugh.

[56] At the Authority's investigation meeting Mr Butt acknowledged that he had not picked up from the report that Mr Sutton had not asked Mr Wakeley about who initiated the discussion about Ms La Roche and whether he told Ms McHugh about the discussion he had had with Mr McEnaney. Mr Butt acknowledged that he had simply relied on what was contained in the report and under took no further investigations himself.

[57] Mr Butt accepted, in relation to the comments made by Ms McHugh about Ms La Roche, that Mr Wakeley indicated he was offended and it was relevant to his outcome that Mr Wakeley felt intimidated. Mr Butt acknowledged that if the conversation had taken place in the context where both were contributing in a derogatory fashion together, it would be less likely that Mr Wakeley would feel stressed or anxious.

Incident 2 - Morning greetings

[58] Mr Wakeley alleged Ms McHugh was making life difficult for Ms La Roche by being short and rude to her. In his complaint Mr Wakeley says this was demonstrated in the beginning, by Ms McHugh saying good morning to him but not to Ms La Roche which created an extremely tense atmosphere and he noticed Ms La Roche getting lower and lower which concerned him. In his complaint Mr Wakeley says he was fearful of becoming a target.

[59] Mr Wakeley complains that on or about 3 December 2012 he noticed there was an icy atmosphere in the office, that Ms McHugh did not say good morning to him and that he was feeling stressed and bullied.

[60] Mr Wakeley alleges that on Friday, 18 January 2013 he received no response after calling out a greeting in the hallway but that when Ms La Roche arrived she received a greeting from Ms McHugh. Mr Wakeley says that at this point he began to feel undermined and had become the sole focus of Ms McHugh's bullying and that she was trying to form a relationship with Ms La Roche and was ostracising him. Mr Wakeley says he then deliberately avoided Ms McHugh.

[61] In her response to this allegation Ms McHugh denied ever refusing to say good morning to her colleagues and has never ignored face to face greetings. Ms McHugh

expressed her disappointment that if this was an issue it should have been raised with her sooner rather than later so that it could be rectified.

[62] Mr Sutton reports Mr O'Donoghue's statement to him that by mid-September 2012 he had observed rising tensions between Mr Wakeley and Ms McHugh and that these matters had come to his attention through informal advice from Mr Wakeley.

[63] In his report Mr Sutton concluded that the allegations that Ms McHugh was inconsistent with her responses to morning greetings and that this created an extremely tense atmosphere, which made Mr Wakeley feel stressed, bullied and undermined, were substantiated.

[64] During the disciplinary process Ms McHugh disagreed with Mr Sutton's findings in his report. Ms McHugh maintains she has a hearing disability which means at times she does not hear people say hello. Both Mr Wakeley and Ms McHugh agree that Ms McHugh never failed to acknowledge Mr Wakeley when the morning greetings were made face to face.

[65] Ms McHugh says her hearing has consistently deteriorated since 2006 and this has impacted on her ability to hear people outside her office and gauge whether they are talking to her or someone else. Ms McHugh says this aspect of her response has not been given proper consideration in the conclusions reached by Mr Sutton.

[66] In his report Mr Sutton comments on the hearing issue but dismisses it on the basis that the inconsistency was about who was receiving the morning greeting and not where the person was when greeting Ms McHugh. Mr Sutton relied on a statement made to him by Mr Ted Fuller, an NZFS Officer, that Ms McHugh was moody. Mr Sutton does not report Mr Fuller's statement that Ms McHugh always responded to his greetings, albeit sometimes with enthusiasm but other times with a more reserved approach. Mr Fuller does not provide any examples of what he describes as Ms McHugh's moodiness and it does not appear that Mr Sutton asked him to expand on this. This is surprising given his reliance in his report on this statement from Mr Fuller.

[67] Ms McHugh, in her response during the disciplinary process also raises questions about why the missed morning greetings were not raised with her by at least

December 2012 when this matter had been raised informally by Mr Wakeley and her manager Mr O'Donoghue was fully aware of it. Ms McHugh explains that she and Mr Wakeley have now addressed the matter and that if it had been raised earlier with her or if Mr Wakeley had spoken to her she could have advised him of her hearing disability and agreed that morning greetings should be face to face, which is now their practice, and not down the corridor.

[68] NZFS did not accept Ms McHugh's explanations. The reasons given by NZFS for not accepting Ms McHugh's explanations were:

- (a) Firstly, the assertion of hearing loss lacks credibility when the report is considered, including matters referred to by Mr Sutton in paragraph 199 of his report¹;
- (b) Secondly, the inconsistency of responses to greetings was observed not only by Mr Wakeley, but also by Ms La Roche;
- (c) Thirdly, the lack of responses contributed to rising tensions in the office, which was observed and has been confirmed by other evidence, namely Mr O'Donoghue's observations (as referred to in paragraph 202² of Mr Sutton's report); and
- (d) Fourthly, the distances as between offices were found by Mr Sutton to be considerably less than those expressed by Ms McHugh, and his observations having visited the workplace was that sound travelled easily in that environment. Given the short distances involved, Ms McHugh's assertion that she did not hear the greetings, is not accepted.

[69] NZFS found that the conduct of inconsistent responses created tension in the workplace, created an icy environment and left Mr Wakley feeling undermined, and isolated. NZFS found that this conduct was both a breach of NZFS Standards of Conduct and the bullying policy.

[70] In reaching its conclusions NZFS has relied on Mr Sutton's report and has not undertaken any further enquiries of its own. Had it done so NZFS may have learned that Mr Wakeley had raised concerns about morning greetings on several occasions with Mr O'Donoghue. Mr O'Donoghue, while noticing the rising tensions in the office, sent Mr Wakeley on his way and told him to sort it out with Ms McHugh. Mr

¹ Mr Sutton's report at paragraph 199 states: If that was the case from the inception of [Mr Wakeley's] employment in the offices [Ms McHugh's] hearing deficiency would have led her to consistently respond or fail to respond to others hallway greetings, yet her evidence is that sometimes she didn't hear others' greetings or was not in her office and other times she did respond.

² Mr Sutton's report at paragraph 202 states: When I consider [Ms La Roche's] comment that from the greater distance of her office away from [Ms McHugh's] office she could hear [Ms McHugh's] inconsistent response to the morning greetings with [Mr Wakeley], and [Mr O'Donoghue's] statement that by mid September there were rising tensions in the office between [Mr Wakeley], [Ms McHugh], and other staff that he had been made aware of by [Mr Wakeley], and [Mr Fuller's] statement about [Ms McHugh's] moodiness, I find [Mr Wakeley's] complaints under this heading to be credible.

O'Donoghue clearly did not consider the matter to be of significant concern. Mr Wakeley did not do this. Had he done so this matter may not have escalated as it has.

Incident 3 – Kitchen Fire Display (KDU) Feedback Meeting

[71] Mr Wakeley's allegation under this heading is that on or about Tuesday, 6 November 2012 he conducted a public KDU in the car park of Takapuna Fire Station. During the display he says he became aware of Mr Stephens and Ms McHugh watching him from Mr Stephens' office window. Mr Wakeley says he felt like Ms McHugh was monitoring his performance and he found it unnerving. During the display a fire in a pot of fat had gotten out of control. Mr Wakeley proceeded to extinguish the fire by putting the pot on the ground and standing on its lid. Mr Wakeley's actions did not demonstrate correct procedures for dealing with a fire caused by hot fat.

[72] Following the display Mr Wakeley says he was summoned to Mr Stephens office along with Ms La Roche, who had been observing the display. Mr Wakeley says he was micro-critiqued by Ms McHugh at this meeting. He alleges he was being dressed down and criticised for a similar error which Ms McHugh had admitted to him she, herself, had made before.

[73] During this meeting an issue about attendance at a volunteer display in Silverdale was also raised. It was alleged that Mr Wakeley and Ms La Roche attended the event but did not assist in any way. Mr Wakeley says Ms La Roche responded to this allegation by advising that if it had not been for Mr Wakeley's participation in the event it would not have happened as the volunteers were having difficulty getting the oil being used in the display, to burn. Mr Wakeley had intervened and showed them what to do.

[74] Mr Wakeley says he left the meeting feeling low and worried about who was in charge of the department. He found Ms McHugh's feedback unconstructive.

[75] Ms McHugh's response to this allegation was that she had been working at her desk and Mr Stephens had asked her to attend his office.

[76] Ms McHugh says she was asked to observe the demonstration. She says Mr Stephens was unhappy about the demonstration and wanted to discuss it with Mr

Wakeley and Ms La Roche. Mr Stephens asked Ms McHugh to explain to Mr Wakeley and Ms La Roche about how to carry out the KDU and how to use it. Ms McHugh told Mr Stephens that she had not been trained as a “trainer” and did not know how to critique someone. Mr Stephens brushed Ms McHugh’s concerns aside.

[77] Mr Stephens called Mr Wakeley and Ms La Roche into his office where he told Mr Wakeley he was unhappy with the demonstration. Ms McHugh then proceeded, as requested by Mr Stephens, to provide her feedback which consisted of advice on how to do the KDU and how to use it.

[78] Ms McHugh says Mr Wakeley did not appreciate Mr Stephens’ feedback and denies she gave her feedback in a way that could be construed as bullying. After the meeting Mr Wakeley discussed the feedback with Ms McHugh expressing his dissatisfaction with the feedback he had received from Mr Stephens.

[79] During Mr Sutton’s investigation Mr O’Donoghue advised Mr Sutton that he had met with Mr Stephens sometime after this meeting and confirmed that it was appropriate for Mr Stephens and Ms McHugh, as an experienced colleague, to critique Mr Wakeley’s performance. Mr Sutton gave this statement little weight.

[80] Mr Sutton concluded that Mr Stephens’ leadership of the meeting was poor and below the level of fairness and supportiveness that his team, which includes Ms McHugh, were entitled to expect.

[81] In her feedback to NZFS during the disciplinary process Ms McHugh reiterates that the meeting was called by Mr Stephens and that she had no control over how he went about that. Ms McHugh states that the issue was a health and safety matter and her only input was on how to conduct the KDU correctly.

[82] Ms McHugh points out that Mr Stephens did not raise any concerns about her delivery of the feedback with her and Mr O’Donoghue found it reasonable for Mr Stephens to call the meeting because of the health and safety concerns and it was appropriate for Ms McHugh to provide feedback on the correct use of the KDU.

[83] NZFS upheld Mr Sutton’s conclusions that the behaviour of Ms McHugh in the meeting did not reflect proper standards of conduct and that she was in breach of NZFS Standards of Conduct and the behaviour also breached the bullying policy. Mr

Butt found that while there was an obligation on Mr Stephens to intervene during the meeting and that this contributed to the situation, Ms McHugh had also contributed and therefore the allegation was substantiated.

[84] Mr Butt accepted that if Ms McHugh, in giving her feedback, had gone beyond what was expected of her, that he would expect her manager to say something to her and to work through the issue. Mr Butt did not attempt to make contact with Mr Stephens to seek his explanations about the meeting and to gain his perspective on Ms McHugh's conduct at the meeting.

[85] The conclusion by NZFS that Ms McHugh has breached NZFS standards of behaviour overlooks Ms La Roche's statements made during the investigation process. Ms La Roche does not use words to describe Ms McHugh's delivery of her feedback which would indicate that she delivered her feedback in a "belittling or unconstructive" way. Ms La Roche largely confirms Ms McHugh's statements about what she addressed when giving her feedback. The description by Ms La Roche of how Ms McHugh delivered her feedback to Mr Wakeley is that she "...attacked..." him and was trying to find fault with his performance.

Incident 4 – 17 January 2013 Team Meeting

[86] This meeting was held in Mr O'Donoghue's office. It had been called by Mr O'Donoghue to try and work through the issues and concerns between the three team members. In his complaint to NZFS Mr Wakeley says Ms McHugh told him in front Mr O'Donoghue and Ms La Roche that she did not trust him, that he was causing trouble and that jobs would be lost.

[87] Mr Wakeley says this upset him deeply and he found it abusive. Mr Wakeley says Ms McHugh did not provide any examples of where he was causing trouble or why she did not trust him.

[88] Mr Wakeley says Ms McHugh then went on and gave praise to Ms La Roche on her progress and commented that she was fitting in well. Mr Wakeley says this added to him feeling very low and felt he had been insulted in front of his colleagues and his manager. He says he was feeling stressed and emotionally drained and thinking of leaving the department.

[89] Ms McHugh, in her response to this allegation acknowledged that she told Mr Wakeley she did not trust him. Ms McHugh says she said this in direct response to a question from Mr O'Donoghue about whether she trusted Mr Wakeley. Ms McHugh says she explained in the meeting that she did not trust Mr Wakeley because he had said things about her behind her back and when she had tried to discuss these with Mr Wakeley he denied it and at other times was not prepared to discuss the issues with her.

[90] In his interview with Mr Sutton, Mr O'Donoghue states that he does not recall Ms McHugh demonstrating the behaviour attributed to her in the meeting and also denied making a statement to Mr Wakeley after meeting where Mr Wakeley says Mr O'Donoghue told he had handled himself well.

[91] Mr Sutton has disregarded Mr O'Donoghue's version of events at the meeting because he concluded Mr O'Donoghue had "*tuned out*". The basis for this finding is not made clear in the report.

[92] In her response to NZFS during the disciplinary process Ms McHugh highlighted the concerns expressed in Mr Sutton's report that Mr O'Donoghue failed to set the meeting up in a responsible way or to ensure the door to the meeting room was closed.

[93] Ms McHugh asked whether Mr O'Donoghue had been asked to respond to the finding that Mr O'Donoghue "*tuned out*" in the meeting. Mr Butt confirmed to the Authority that he did not follow this up as he did not speak with Mr O'Donoghue after receiving the report.

[94] Ms McHugh explained to NZFS that Mr O'Donoghue had asked all three of them to be open and honest with any problems and to clear the air. Ms McHugh acknowledged that she had told Mr Wakeley she did not trust him but that she did so in answer to a question from Mr O'Donoghue about whether Ms McHugh and Mr Wakeley trusted each other.

[95] NZFS concluded Ms McHugh stepped over the mark in terms of the statements she made at the meeting but also found that Mr O'Donoghue, being the manager who convened and who was present at the meeting, could and should have intervened when Ms McHugh went beyond what could be considered acceptable

communication. Notwithstanding that, NZFS found that Ms McHugh's conduct breached the Standards of Conduct and was bullying in nature.

[96] Mr O'Donoghue told me at the investigation meeting that just prior to the 17 January 2014 meeting alarm bells were ringing. He said the meeting did not go as well as he expected. He said he does not recall specifically asking if they trusted each other, but he could have said that. He acknowledged that the meeting did not go well in terms of resolving the issues.

Conclusions

[97] In reaching its conclusions NZFS has relied entirely on the investigation and report by Mr Sutton. While some delegation by the decision-maker will not necessarily render a dismissal unfair; it is the extent of the delegation that is relevant.³

[98] As set out in the following paragraphs there were a number of matters which NZFS needed to be satisfied about in order to reach its conclusions that an oral warning was justified. In *Timu* the Court held a dismissal to be unjustified because of the employer's failure to take readily available steps to clarify and resolve conflicting information.

[99] In [*Lavery v Wellington Area Health Board*](#)⁴ the Court held that it is important that the employer carries out its own investigation and does not rely on an inquiry undertaken by a third party.

[100] In *Lavery* the Court held that a report does not absolve the employer from carrying out its own investigation, and it should have done so because the inquiries were essentially different. The report in *Lavery* was aimed at the general standard of medical and nursing care provided to a patient, and this was separate from any conclusion as to the grievant's misconduct within the employment relationship. The employer's failure to mount its own inquiry meant that the employer could not have reached, and therefore did not reach, an honest belief that the grievant had been guilty of any misconduct.

[101] NZFS found that all four of the incidents were breaches of the NZFS Standards of Conduct and a breach of the bullying policy. Mr Butt told the Authority that each incident on its own would justify a warning.

³ *Timu v Waitemata District Health Board* [2007] ERNZ 419.

⁴ [1993] 2 ERNZ 31.

[102] NZFS relied on the Standards of Conduct policy where the policy states that in performing their duties, staff should respect the rights of their colleagues and the public. In particular, employees are expected to:

Avoid behaviour which might endanger or cause stress or anxiety to other staff, or otherwise contribute to any disruption of the workplace.

[103] As set out earlier in this determination bullying is defined in the NZFS policy. The questions for NZFS to answer before concluding Ms McHugh conduct amounted to bullying were whether the conduct:

- (a) was unwanted and unwarranted; and
- (b) was behaviour the complainant found offensive, intimidating and humiliating; and
- (c) was repeated; and
- (d) had a detrimental effect on the complainants dignity, safety and well-being.

Incident 1

[104] I do not accept that the conclusion that Ms McHugh's discussion with Mr Wakeley on 31 August 2012 left Mr Wakeley feeling negative, disparaging and causative of stress and anxiety is one that a fair and reasonable employer could have reached in all the circumstances. At best Mr Wakeley describes feeling uneasy.

[105] NZFS failed to undertake any further enquiries of Mr Wakeley to establish whether he had initiated the discussion by introducing the conversation he had held with Mr McEnaney regarding Ms La Roche and the wearing of epaulets.

[106] The Standards of Conduct policy requires behaviour which causes stress and anxiety to other staff. There is simply no evidence to support a finding that Ms McHugh's behaviour met that threshold.

[107] NZFS has determined that the behaviour met the definition of bullying as it was unwanted and unwarranted. NZFS does not address whether the behaviour had been repeated or whether it had a detrimental effect on Mr Wakeley's dignity, safety

and wellbeing. If it had, it could not have concluded that the incident on its own met the threshold of bullying. It was not repeated and Mr Wakeley does not complain that on its own it had a detrimental effect on his dignity, safety or wellbeing.

Incident 2

[108] NZFS has set out four reasons for not accepting Ms McHugh's explanation regarding her hearing loss as being a contributor to her not returning morning greetings.

[109] NZFS found Ms McHugh's explanation to lack credibility, the inconsistency in approach was witnessed by others, the behaviour contributed to the rising tensions in the office and that sound travelled easily between the offices.

[110] Mr Wakeley's letter of complaint supports Ms McHugh's explanation that she sometimes heard people saying good morning and at other times she did not. Ms McHugh, Mr Fuller and Mr Wakeley all stated that Ms McHugh never failed to respond to a greeting when it was done face to face. It was only when the greeting was made from outside her office that she did not always respond.

[111] Ms McHugh explained that sometimes, when people were saying good morning and she could not see them, she would not know if they were actually talking to her or someone else in the team. This explanation has not been explored by NZFS.

[112] Mr Fuller confirmed in his statement to Mr Sutton, that sometimes Ms McHugh would be enthusiastic in her greetings while at other times she would be more reserved.

[113] Given the lack of further investigation the conclusion that Ms McHugh had breached the required standards of conduct in being inconsistent in who she greeted was not one a fair and reasonable employer could have reached, in all the circumstances. While Mr Wakeley was continually approaching his managers about Ms McHugh's conduct toward him including raising his concerns about the morning greetings, Mr Wakeley took no steps to address this even when instructed to do so by his manager.

[114] The conclusion that Ms McHugh's conduct amounted to bullying is not as straightforward. NZFS has failed to address all limbs of the definition of bullying in

its conclusions. The conclusion that the behaviour left Mr Wakeley feeling isolated and undermined does not address whether the behaviour was offensive, humiliating and intimidating and whether it had a detrimental effect on Mr Wakeley's dignity, safety and wellbeing.

Incident 3

[115] NZFS concluded that Ms McHugh's behaviour in this meeting caused Mr Wakeley stress and anxiety and has preferred the statements of Mr Wakeley and Ms La Roche in doing so.

[116] It is significant that NZFS reached its conclusions based solely on Mr Sutton's report and without taking any steps to locate and interview Mr Stephens. By the time this meeting took place Mr Wakeley had already raised concerns with Mr Stephens about his relationship with Ms McHugh. Given that, it seems to me Mr Stephens, as an experienced manager, would have been extremely mindful of not allowing behaviour in a feedback meeting to cross into unacceptable behaviour and would have taken steps to stop Ms McHugh if her conduct did breach the standards expected of her.

[117] Further, this incident occurred five months before Mr Wakeley made his formal complaint. In his letter the strongest complaint he makes about Ms McHugh is that he "*...felt as if [Ms McHugh] was monitoring my performance and I found this very unnerving, as she is a colleague and not a manager.*" [my emphasis]

[118] In Mr Wakeley's first interview with Mr Sutton (7 months after the meeting), Mr Wakeley says Ms McHugh's comments were "*rude, belittling and quite unconstructive*". In his second interview with Mr Sutton (10 months after the meeting) this escalates to being a "*verbal attack*". Neither Mr Sutton nor NZFS have sought clarification from Mr Wakeley as to what Ms McHugh actually said in the meeting and neither have they questioned Mr Wakeley on the escalation of his description of the way Ms McHugh presented her feedback.

[119] The conclusion that Ms McHugh conducted herself in breach of the standards of behaviour is not a conclusion an employer acting fairly and reasonably could make.

[120] For the reasons given above, the NZFS did not have enough information to safely conclude that Ms McHugh's behaviour in the way she gave Mr Wakeley

feedback on the KDU demonstration met the NZFS definition of bullying. The conclusion that Ms McHugh's behaviour in the KDU meeting was bullying in nature was not a conclusion an employer acting fairly and reasonably could make.

Incident 4

[121] The conclusions reached by NZFS that Ms McHugh's conduct in this meeting were not reached on a reasonable basis. Mr Butt acknowledged at the Authority's investigation meeting that after receiving the report he took no steps to clarify any of Ms McHugh's explanations with anyone including Mr O'Donoghue.

[122] Ms McHugh explained that her comments about being unable to trust Mr Wakeley were fully explained to him and that she did this only after Mr O'Donoghue asked the question. At the Authority's investigation meeting Mr O'Donoghue conceded that he could have asked about whether the employee's trusted each other.

[123] In his interview with Mr Sutton Mr O'Donoghue recalled Ms McHugh making a comment about costing jobs. Mr O'Donoghue's recollection was that Ms McHugh was making that comment in response to something Mr Wakeley had said, he assumed Mr Wakeley had accused Ms McHugh of something. Mr O'Donoghue was clear that he did not recall Mr Wakeley being particularly upset at the meeting. This information was not included in the body of the report from Mr Sutton as he had determined that Mr O'Donoghue had "*tuned out*" of the meeting.

[124] This meeting was called by Mr O'Donoghue with the express purpose of clearing the air due to the "*alarm bells*" that were ringing for him. It would have been a prudent step for NZFS to re-interview Mr O'Donoghue about the meeting, at the very least, to provide him with the opportunity to speak to the claim that he had "*tuned out*" of the meeting.

[125] For the reasons given above, NZFS did not have enough information to safely conclude that Ms McHugh conducted herself in breach of the standards of behaviour and it is not a conclusion an employer acting fairly and reasonably could make in the circumstances.

[126] For the reasons given above, NZFS did not have enough information to safely conclude that Ms McHugh's behaviour in the 17 January 2014 meeting met the NZFS

definition of bullying. That conclusion was not a conclusion an employer acting fairly and reasonably could make.

Determination

[127] I am satisfied NZFS did not conduct a full and fair investigation into the allegations that Ms McHugh was in breach of the Standards of Conduct and was in breach of the Bullying policy. There was more NZFS could have done.

[128] The decision to issue Ms McHugh with an oral warning was an unjustified action on the part of NZFS. The warning and all references to it should be removed from Ms McHugh's file.

Disadvantage

[129] It was common ground at the investigation meeting that having a warning of any sort on an Officers personal file will affect the Officer's career. This was demonstrated to Ms McHugh's disadvantage when she was overlooked for a transfer to Tauranga on the basis that she had an oral warning on her file.

[130] Further the oral warning puts Ms McHugh one step closer to dismissal than if the oral warning was not on her file.

[131] Ms McHugh says that the decision to issue her with an oral warning which lasted for 12 months was inconsistent with other warnings issued to Officers in the past.

[132] Ms McHugh's claim of disparity was supported by the evidence of Mr McEnaney who provided the Authority with following examples where others were treated more leniently than Ms McHugh:

- (a) A Senior FRMO with staff responsibilities was the recipient of three employee complaints of bullying. The allegations included the Senior FRMO shouting at his employees, threatening them with dismissal, intimidation, creating a feeling of uselessness, unfair treatment, sarcasm, humiliation and isolation. As a result of the investigation into the allegations the Officer was sent to mediation and became subject to a performance improvement plan to adjust his management style. The Officer was not subject to any disciplinary action.

- (b) A male NZFS communication centre employee physically assaulted a female staff member. The employee was told not to do it again. Months later the employee assaulted the same female staff member a second time by punching her. The female staff member made a formal complaint to NZFS. The employee received an oral warning which expired after a three month period.

- (c) A Senior Fire Fighter in Auckland was given an oral warning after throwing a helmet at the vehicle owned by a member of the public. The vehicle sustained damage and resulted in a formal complaint being made by the member of the public.

[133] NZFS were on notice about Ms McHugh's concerns regarding disparity but produced no evidence at the Authority's investigation meeting nor did it provide any facts relating to the examples set out above to enable the Authority to make an assessment against Ms McHugh's oral warning. I have therefore accepted the evidence of Mr McEnaney as being an accurate reflection of the actions taken against other Officers.

[134] On balance subjecting Ms McHugh to an oral warning and which was current for more than three months is inconsistent with the approaches taken by NZFS in the past and is disparate treatment to her disadvantage.

[135] Ms McHugh's employment or one or more conditions of her employment was affected to her disadvantage by an unjustifiable action by NZFS. Ms McHugh is entitled to consideration of remedies for her personal grievance.

Was Ms McHugh's employment was affected to her disadvantage by an unjustified action by NZFS with regards her health and safety

[136] Ms McHugh claims NZFS has breached its obligations owed to her to take all practicable steps to protect her health and safety. In support of her claims Ms McHugh says NZFS:

- (a) unreasonably delayed bringing Mr Wakeley's concerns to her attention;

- (b) failed to provide Ms McHugh with an opportunity to resolve Mr Wakeley's concerns at an early stage;
- (c) led Ms McHugh to believe she was not doing anything wrong, despite the respondent being aware that Mr Wakeley had issues with her;
- (d) have allowed Ms McHugh's managers to initiate and be involved in incidents which resulted in Mr Wakeley's complaints and for which she has now been disciplined;
- (e) required Ms McHugh to assist with training and upskilling of Mr Wakeley without the having the proper training or coaching to do so in a safe and effective manner; and
- (f) has failed to follow its fatigue management policy by overloading Ms McHugh with work over the period during which the complaints arose.

[137] NZFS denies all of the allegations and says the Authority lacks jurisdiction to determine this claim. NZFS says the statement of problem set out these claims as a claim for unjustified disadvantage which is a personal grievance and as such it had to be raised within 90 days of the date giving rise to the grievance. NZFS submitted that all matters giving rise to the allegations occurred prior to 28 March 2013 and no personal grievance was raised until 12 February 2014.

[138] I have read and carefully considered the submissions of Counsel with respect to this claim. The statement of problem articulates this claim as a breach of NZFS obligations to protect Ms McHugh's health and safety. This is arguably a breach of implied terms of the employment agreement. The remedies sought in resolution of both this claim and the claim for disadvantage as a result of the oral warning were presented as global remedies pursuant to section 123 of the Act. That is, remedies for a personal grievance.

[139] During the course of the Authority's investigation process Counsel for Ms McHugh has attempted to reframe the claim for a remedy under section 123(1)(b) as a claim for special damages for the costs incurred by Ms McHugh during the investigation and disciplinary process.

[140] The difficulty I have with the reframed claim is that statement of problem seeks reimbursement under section 123(1)(b) for other monies lost as a result of a personal grievance and not special damages. In order to award a sum under section 123(1)(b) I first must find that a personal grievance has been established. The barrier for Ms McHugh is that no personal grievance was raised within 90 days of the date giving rise to the claims under this heading.

[141] During the telephone conference call between the Authority and the parties on 11 April 2014 and in response to a comment by the Authority that Ms McHugh faced a significant barrier to establishing her claim under section 123 (1)(b), Counsel advised the Authority that the alternative strategy was to claim the amount as special damages. No amended Statement of Problem was lodged following this call. I raised the lack of an amended Statement of Problem with Counsel prior to the commencement of the investigation meeting on 18 August 2014.

[142] Counsel has included the alternative claim in submissions. I accept the submission of Counsel for NZFS that such an award is not appropriate because special damages have not been claimed in the proceedings.

[143] In any event, the claim for special damages would not succeed. The claim for special damages amounts to a claim for pre-litigation costs and such claims have been consistently rejected by both the Employment Court and the Authority.

[144] In the most recent case of *George v Auckland Council*⁵ the Court agreed with the approach of the Court in *Harwood v Next Homes Ltd* holding that it was not appropriate to classify costs incurred prior to the filing of a Statement of Problem as special damages.

[145] Both Counsel referred me to *Moxon v Pathways Health Ltd t/a Pathways*⁶ as support for their respective positions on this point. In that case the Member declined to deal with the matter as a breach of contract, instead focussing on resolving the personal grievance claim which was the substance of the employment relationship problem. This approach accords with the approach taken in *George* where the Court held that what Ms George was essentially seeking was the resolution of her employment relationship problem.

⁵ [2013] NZEmpC 179 at [128].

⁶ [2011] NZERA Christchurch 151.

[146] I have preferred to deal with this claim in the same manner. That is, to concentrate on resolving the personal grievance claims.

Determination

[147] Each of the allegations set out in paragraph 131(a) – (f) occurred between 30 August 2012 and 28 March 2013. The 90 day period for raising a personal grievance⁷ ended on 27 June 2013. No personal grievance was raised with respect to any of these matters prior to 12 February 2014.

[148] The Authority lacks jurisdiction to investigate and determine this claim.

Remedies

[149] Ms McHugh seeks the following remedies:

- (a) a declaration that the findings of misconduct, bullying and breach of the Standards of Conduct policy were not justifiable actions by NZFS;
- (b) a declaration that the warning issued to Ms McHugh was not a justifiable action by NZFS;
- (c) compensation under section 123(1)(c)(i) of \$15,000;
- (d) reimbursement under section 123(1)(b) of \$20,000;
- (e) costs.

Declaration that the findings of misconduct, bullying and breach of the Standards of Conduct policy and the issue of an oral warning were not justifiable actions by NZFS

[150] The findings by NZFS and the issue of an oral warning were unjustifiable actions by NZFS which affected one or more conditions of Ms McHugh's employment to her disadvantage.

Compensation

[151] Ms McHugh claims the sum of \$15,000 under section 123(1)(c)(i). I have found that the oral warning issued to Ms McHugh was unjustified. In coming to that conclusion I have been critical of the disciplinary process carried out by NZFS.

[152] The oral warning has affected Ms McHugh by preventing her from being considered for a transfer to Tauranga and her treatment was disparate with actions

⁷ As required by section 114(1) of the Act.

taken against other Officers in situations which seemed to me to be of a more serious nature.

[153] The evidence shows that Ms McHugh was significantly affected by the allegations made by Mr Wakeley including suffering from damage to her self esteem and her reputation.

[154] Before the oral warning was issued to Ms McHugh both she and Mr Wakeley had moved to different teams to work. Also the evidence shows that after that move Ms McHugh was no longer requiring time off work for stress related concerns and her working life improved.

[155] Ms McHugh is entitled to a modest award for compensation and I set that at \$7,000 subject to my findings on contribution.

Reimbursement under section 123(1)(b)

[156] For the reasons set out earlier in this determination no award will be made under this heading.

Contribution

[157] When determining the extent and nature of the remedies to be awarded, the Authority is required to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.⁸

[158] Ms McHugh faced significant allegations that her behaviour and conduct was in breach of NZFS policies on conduct and bullying. A full and thorough investigation was necessary if the breaches were to be established.

[159] I have been critical of the process used by NZFS in its disciplinary investigation which led to the issue of the oral warning. I am also concerned about Ms McHugh's conduct in relation to that process. Ms McHugh secretly taped three conversations prior to the allegations being submitted by Mr Wakeley. At no stage during the investigation or disciplinary process did Ms McHugh disclose the existence of the recordings.

⁸ Employment Relations Act 2000, section 124.

[160] Parties to employment relationships are required to deal with each other in good faith. This is a mutual obligation and means being responsive and communicative. It is incumbent upon an employee when complaining about failures by an employer to ensure they themselves engage openly in the process. Neither Mr Sutton or NZFS had the benefit of the covert recordings during their investigation processes.

[161] On 27 March 2014, before Mr Wakeley submitted his allegations, Ms McHugh was invited to participate in mediation. Ms McHugh, unreasonably in my view, refused to participate in mediation. The offer to attend mediation was repeated during the disciplinary process at the time the proposed disciplinary action was notified to Ms McHugh, but before the final outcome had been confirmed. This offer, also, was rejected by Ms McHugh.

[162] These factors were contributing conduct by Ms McHugh. Whether the knowledge of and access to the recordings would have changed the disciplinary outcome cannot now be known. Also, too, one cannot guess about whether the offers of mediation, if they had been accepted, would have avoided the necessity of a lengthy disciplinary investigation and the issue of an oral warning.

[163] I find that Ms McHugh's actions warrant a reduction in remedies and I assess her contribution to be 25%.

[164] NZFS is ordered to pay Ms McHugh compensation in the sum of \$5,250 within 28 days of the date of this determination.

Costs

[165] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms McHugh shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. NZFS shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority