

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 190
3019131

BETWEEN

JAMES HILFORD
Applicant

AND

THE ORDER OF ST JOHN
NORTHERN REGION TRUST
BOARD
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: A Halse, Advocate for the Applicant
M O'Brien and Ellie Domigan, Counsel for the
Respondent

Investigation Meeting: 9, 10 and 11 May 2018

Additional documents received: 16 May 2018 and 28 May 2018 from Applicant
16 May 2018 from Respondent

Determination: 15 June 2018

DETERMINATION OF THE AUTHORITY

- A. The Applicant suffered an unjustified disadvantage to his employment by the Respondent's failure to provide him with a safe workplace.**
- B. The Applicant was unjustifiably dismissed by the Respondent.**
- C. The Respondent is ordered to pay to the Applicant the following amounts within 28 days of the date of this determination:**
- a. A gross sum representing the difference between the amount the Applicant would have received for wages, had he worked between 4 October 2014 and his return to work in April 2015, and the amount the Respondent paid to him as paid sick leave.**
 - b. The sum of \$32,918 gross for lost wages arising from his unjustified dismissal.**

- c. **The sum of \$35,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.**

D. Costs are reserved.

Employment Relationship Problem

[1] The Order of St John is a charitable organisation that operates independently of the Government and services communities throughout New Zealand. It is organised into three geographical regions - Northern, Central and South Island. The respondent (St John) is responsible for the day-to-day provision of services within the Northern region.

[2] Mr Hilford was employed by St John from 2 July 2008, although he had been a volunteer with St John from 2002. He was dismissed from his employment on 12 May 2015 and was paid two weeks' wages in lieu of notice. Mr Hilford claims that his dismissal was unjustified. He further claims he was unjustifiably disadvantaged by St John's failure to investigate his allegations of bullying.

[3] St John denies Mr Hilford's dismissal was unjustified. It says its decision to terminate Mr Hilford's employment for serious misconduct was fair and reasonable in all the circumstances. It further denies Mr Hilford suffered an unjustified disadvantage to his employment.

[4] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

- [5] The issues requiring investigation and determination are:
- a. Did Mr Hilford suffer an unjustified disadvantage to his employment?
 - b. Was Mr Hilford unjustifiably dismissed?
 - c. If Mr Hilford did suffer an unjustifiable disadvantage, or was unjustifiably dismissed, what remedies should be awarded?

- d. If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Hilford that contributed to the situation giving rise to the grievance?
- e. Should either party contribute to the costs of representation of the other party?

[6] Before I turn to these issues, it is necessary to review the facts in more detail and to provide an overview of the legislative scheme behind which these issues must be determined.

Background against which issues are to be determined

[7] From the time of his initial training with St John, Mr Hilford had concerns about the way he was being treated. This started when St John raised concerns about Mr Hilford's attitude during his initial training and continued when they required him to be mentored for the first year of his employment. It was thereafter that Mr Hilford began writing on a regular basis to his superiors describing events and concerns about patient care and working relationships. By April 2011 he had started an anti-harassment campaign to prevent workplace bullying.

The initial complaints

[8] In early 2013, and again in May 2013, Mr Hilford raised concerns that he was being bullied by one of the St John's Communications staff (Comms). As this witness did not give evidence I shall refer to her as Ms A. Mr Hilford was concerned about the way Ms A communicated with him. St John said it investigated Mr Hilford's complaint but found it to be unfounded.

[9] By March 2014 Mr Hilford was still experiencing issues with Ms A. Email correspondence I have viewed shows Mr Hilford emailed Mark Deoki, St John's East Auckland Territory Manager, on 11 March 2014. This concerned the assignment of jobs by Ms A/Comms to Mr Hilford when his ambulance was not ready. Then on 1 July 2014 Mr Hilford raised concerns about Ms A's lack of co-operation with him and particularly, on that occasion, her hanging up on him. Both complaints were met with no response from Mr Deoki.

[10] In August 2014 Mr Hilford did not receive his work roster. He emailed the appropriate roster clerk. This clerk did not provide evidence and therefore I shall

refer to her as Ms B. I have viewed the email exchange. Ms B's response to Mr Hilford's request for a copy of the roster was sarcastic and threatening.

Hmm out of 38 relief staff you were the only one who didn't get the advisory
*sigh

And it seems that you're the only one who doesn't know the shift supervisor's number too...

"I turn polar bears white
And I will make you cry.
I make guys have to pee
And girls comb their hair.
I make celebrities look stupid
And normal people look like celebrities.
I turn pancakes brown
And make your champagne bubble.
If you squeeze me, I'll pop.
If you look at me you'll pop."

Have a good night.

Lots and lots of love

[11] Mr Hilford was unhappy with the response he received. He raised this with Mr Deoki who was also provided with a copy of the email exchange with Ms B. The following week Mr Hilford did not receive his roster again. He again emailed Mr Deoki.

[12] Mr Deoki said it was around this time that he met with Ms B to ask her to ensure Mr Hilford received copies of all communications. He said he also asked her to use "orthodox methodology" when dealing with Mr Hilford. He said he then had a meeting with Mr Hilford and relayed the outcome of his meeting with Ms B. He suggested that Ms B and Mr Hilford attend facilitation. Whilst Mr Hilford agreed, this was not arranged.

[13] Mr Hilford then went on a period of annual leave. Upon his return to the workplace further issues with his roster arose. This time Ms B excluded his name from the roster. He brought this to the attention of his supervisor and was then allocated an ambulance.

[14] Upon being allocated an ambulance it is a requirement that ambulance officers log on to the vehicle. This ensures that Comms knows where the officer is. Mr Hilford did not log-on to the ambulance that he was assigned. A pager was sent to him by Comms at approximately 9.25 am asking him to log on. He said he did not

see this message. Later that morning a second pager message was sent. Mr Hilford was driving at the time but shortly thereafter logged onto the ambulance system.

[15] On 25 September 2014 Robbie Orpin, Mr Hilford's supervisor, was advised by email of a number of performance concerns about various ambulance officers. This email came from a Manager in the Comms centre who I shall refer to as Ms C. Ms C's concerns included concerns that officers were not logging on and off correctly. One of the concerns raised by Ms C related to Mr Hilford's delay in responding to the pager messages sent to him asking him to log-on to his ambulance.

[16] In response to this email Mr Orpin spoke to Mr Hilford. He asked him to ensure that he logged on as soon as he was allocated an ambulance. Mr Orpin said he explained to Mr Hilford that this was an essential requirement. Mr Hilford apologised and explained his side of the story. He said he felt that Mr Orpin ignored his explanation. This made him feel "wildly angry". He said he felt it was appropriate to raise his voice and use colourful language because he felt he was not being respected or listened to.

[17] The following day Mr Hilford emailed Mr Deoki. The timing of this email was 6.56 am on Friday 26 September 2014.

"I've fricken had enough!!!! Why the hell am I getting pressure about not longing (sic) on – and I know its not coming from Robbie and I apologize for getting angry with him but what the heck dies (sic) [Ms C] think she's up to? Yesterday I wasn't even rostered to work at St John and yet I came into work – I sat around and then when I got assigned to a vehicle I FORGOT to log on – so what!!!

I did not see or read the supposed pager message at nine oh something and neither did my crew members or else they would have said something and then the message from [Ms C] at around 12.30 WHILE I WAS DRIVING was extremely rude and I'd like to file an official complaint to the tone of that pager message and the way this message has been relaid to me this morning its bloody unacceptable and so is my language here but I no longer bloody care!!

Thanks for your support in this matter I hope my trust and faith in you is well supported.

[18] Mr Hilford did not receive a response.

[19] The next day, Saturday, Mr Hilford sent another email to Mr Deoki. This email was also copied into Ms Ledezma, one of St John's Human Resource Advisors. Mr Hilford said that as his emails were not triggering a response from Mr Deoki he

felt that a picture may assist to demonstrate how he was feeling. The picture depicted Comms as a Panther attacking St John's frontline team who were depicted as a soldier holding up a shield. Attached was a soundtrack of Gangsters' Paradise to express the situation as Mr Hilford said he saw it.

[20] After receipt of this email, Mr Deoki spoke to Mr Hilford sometime over that weekend. He said he spoke at length about Mr Hilford's concerns and suggested that Mr Hilford attend EAP. He felt that it was a positive conversation. Mr Hilford denies this conversation took place.

[21] On the evening of Sunday 28 September 2014, Mr Hilford met with Mr Orpin again. He explained to Mr Orpin that he felt tired of being treated with disrespect. He said he had made official complaints about Comms in the past that had met with no response. He also expressed concern regarding Mr Orpin's discussion with him about logging on and off that he said was directly related to the Comms situation. He told him about being left off the rosters and how this had made him feel unwanted.

[22] Mr Orpin was extremely concerned by Mr Hilford's behaviour during this meeting. He said Mr Hilford was visibly stressed and agitated. He was gritting and grinding his teeth at him. This made Mr Orpin feel so uncomfortable that he asked Mr Hilford to leave and to come back when he calmed down. He said he was concerned about Mr Hilford's well-being and felt that he needed help. He had not seen Mr Hilford act like this before and felt it was out of character. He relayed his concerns to Mr Deoki in an email. I have viewed this email and this corroborates Mr Orpin's recollection of this meeting.

[23] On Tuesday 29 September 2014 Mr Orpin emailed Mr Deoki again. He attached a copy of an email sent by Mr Hilford asking him to have a drink outside of work. In light of Mr Hilford's earlier behaviour, Mr Deoki found this email unnerving. His email to Mr Deoki stated:

I stand by my previous recommendation of you and possibly HR meeting with James to talk through his issues for his own wellbeing with a firm recommendation of James seeking professional help of some sort.

I have not replied to James yet and will await your advise as to the way forward.

[24] Mr Deoki responded on 1 October 2014. He advised Mr Orpin that he had had a long discussion with Mr Hilford and Mr Hilford was going to send Mr Deoki an

apology. He said he had a plan and thanked Mr Orpin for his advice. When asked during the investigation meeting what his plan was, Mr Deoki said it was for his replacement, Lindsay Sattler, to support Mr Deoki, and for Mr Hilford to be referred for a health and wellness check. Mr Deoki said he had no further contact with Mr Hilford after his weekend conversation as he was seconded to replace Mr Gallagher and then went on holiday.

[25] Following this discussion there was no health and wellness referral. Neither Ms Sattler nor anyone else from St John contacted Mr Hilford to provide him with support. No steps were taken to address Mr Hilford's concerns about Comms.

[26] After sending the picture message Mr Hilford said he felt that the atmosphere at St John changed. He said he felt he was being treated by one of his ambulance colleagues, who I shall refer to as Ms D, as a disobedient child. He believed Management had spoken to her. I have viewed notes Mr Hilford prepared on 3 November 2014 that discuss an incident that took place with Ms D in the week following the picture message being sent. On this occasion Ms D wanted Mr Hilford to carry out a check of their ambulance. He was in the middle of something when Ms D got out of her seat and said "come on – check the truck off". He said she then made shoe shoeing motions with her hands as if he was an animal being led into a pen. When Mr Hilford said he was going to finish what he was doing first, he said Ms D walked towards his seat and flicked her right hand across the upper left side of his head, pretending to hit him. His notes record that he was afraid of her attitude and thought she was reporting back to management about his mental and emotional state.

[27] Mr Hilford's concerns that he was being monitored were correct. An email I have viewed shows that Mr Deoki and Mr Orpin had asked Ms D to monitor Mr Hilford and report back on any concerning behaviour. Mr Hilford was not informed he was being monitored.

[28] A further incident occurred on 3 October 2014 when Mr Hilford again felt unsupported by Comms. Following that incident he phoned Mr Orpin. There were missed calls between the two. When Mr Hilford phoned Mr Orpin back the call was answered by someone else. Mr Hilford felt Mr Orpin was avoiding him as he was aware he was still in the room. Mr Orpin explained that he had already signed off by the time Mr Hilford phoned and only remained in the room to assist his colleague. Mr

Hilford said he was left to re-explain the situation to this person. He felt that he received an abrupt and disapproving response from the person he spoke to.

[29] On 4 October 2014 Mr Hilford went on sick leave.

The personal grievance

[30] On 14 October 2014 Mr Hilford raised a personal grievance. This letter was 5 pages in length and was prepared on his behalf by Ms Gilbert, his solicitor. The letter stated that Mr Hilford believed he had been treated unfairly by management and that he was being covertly bullied and stressed by two Comms staff. It addressed the issues he had experienced in August 2014, when he had not received a roster, and the issues he had experienced in September 2014, when his name was not included in the roster. In addition, it addressed the non-allocation to a vehicle during the week commencing 25 September 2014, the pager message he had received from Comms when he failed to log on, the meeting with Mr Orpin on 26 September 2014 and the incident on 3 October 2014. In addition the letter referred to:

“the “continual poor treatment of James by two staff in Comms.....the Team Leader (Ms C) and one of the dispatchers (Ms A) significantly increase the stress James is under by being very rude, condescending and obstructive whilst he is out on the road. As you will appreciate, the officers already operate in a stressful environment. Having Comms staff that are continually rude and abrasive unnecessarily increases the level of stress and creates a bullying atmosphere”...

These two Comms staff clearly operate in a way that persistently and unreasonably humiliate and intimidate James, so as to cause offence and undue stress and thus amount to bullying behaviour. James has raised his concerns about their treatment towards him on a number of occasions but nothing has been done to address this problem”.

The investigation

[31] On 20 October 2014 Douglas Gallagher, St John’s District Operations Manager, wrote to Ms Gilbert by way of letter dated 14 October 2014. The letter advised that a full investigation would be undertaken by St John and, once that was complete, St John would meet with Mr Hilford to discuss its findings. The letter went on to advise that St John would be investigating three matters and asked Mr Hilford to advise if there were any further allegations by 22 October 2014. The three matters were:

“Allegations of bullying by a dispatcher [Ms A] and a Team Leader [Ms C], both of whom work in the Clinical Control Centre, Auckland;

Incident where James returned from annual leave – did not have his roster and was not assigned to a vehicle;

Allegation he (James) was treated unfairly and was dealt with in a demeaning, embarrassing way when he failed to log-on to the computer which would advise Control he was on an ambulance. Robbie Orpin allegedly treated James unfairly and made unfair assumptions about James failing in his obligations by not logging on by not letting James explain his reasons.”

[32] Ms Gilbert immediately replied. Unfortunately, due to an inadvertent error, this letter was not sent to St John and instead an attachment relating to an unrelated matter was provided. Mr Gallagher responded to Ms Gilbert advising that the contents of the letter were irrelevant. He did not advise her that the wrong letter had been attached. This left Ms Gilbert and Mr Hilford unaware that St John had not received their letter. The letter stated:

I appreciate that your response was written in the belief that James had never raised his issues with the organisation previously, and that the first the organisation was hearing about them, was via a lawyer. This is actually incorrect.

James had raised concerns about these issues directly with St John over the weeks preceding his current absence. He had spoken to his managers and had sent some emails, which actually contained some desperate pleas for help...

Unfortunately nothing was done to acknowledge his complaints or to give him comfort that steps were (at the very least) being taken to look into his concerns. Even his email which was sent as a last resort, depicting an attack on him by Comms was completely ignored.

It is appreciated that St John will need to conduct an investigation prior to reaching any formal findings, and that accordingly there will clearly be some delay before those investigations have been concluded.

However, in the interim you have an employee who has now been absent from work since 4 October. The longer he is away, the more it detrimentally impacts on his health, and the harder it will be to reintegrate him back into the workforce.

Given those circumstances and the parties' respective obligations of good faith, we have suggested mediation (or meeting if St John's prefers), to discuss some interim measures which could be put in place, to enable his return. We do not think this is unreasonable. Indeed we would suggest that this would be a reasonable and practicable step St John could take to provide a safe workplace.

[33] Thereafter St John commenced an investigation. Mr Deoki was tasked with being the investigator. However, he said the role of speaking with witnesses was delegated by him to the various witnesses' line managers. He could not recall what he asked the line managers to raise with the witnesses. He had no notes of what he discussed with the line managers and did not obtain a copy of any notes they took when speaking with the witnesses. What Mr Deoki did receive from the delegated persons was one email and one typed note.

[34] The email was dated 1 November 2015 and was from the Comms Duty Centre Manager. She had been delegated the task of speaking with Ms A by Neil Lilley, the person who Mr Deoki had allocated the role to. The email stated:

... I have spoken with [Ms A] and she advises that she has not actively had any dealings with James since the last episode on 27th May 2013 when James accused her of rudeness and being abrupt.

[Ms A] is quite rightly feeling very harassed and upset that James has again targeted her in such a way that it has effected her sleep the night of our discussion. Clearly this is not only placing a great deal of pressure on [Ms A] it is also undermining her confidence that should James work on Green Watch then she is likely to be targeted again.

....I am concerned that James continuing his targeting of [Ms A] is going to cause her to step down from this role as his "out to get her" mentality continues.

My question is what are we able to do to ensure that [Ms A] is supported from this harassment, and malicious behaviour that James is exhibiting again. I have offered in the past to meet with James however this has not occurred. [Ms A] feels that she is being "hunted" by James.

[35] The typed note was unsigned. It was said to have been written by Mr Lilley on 1 November 2014. Mr Lilley did not provide evidence. The note states:

I talked to [Ms C] about James allegations that she contributes to significantly increasing the stress James Hilford is under by being very rude, condescending and obstructive to him.

[Ms C] said she doesn't know where these comments have come from and there is nothing specific in James' complaint so she can't answer about any particular occurrence.

[Ms C] also said she has been a Team Manager since September this year and has not had much to do with James.

[Ms C] refutes James allegations and says James has a reputation for secretly recording people when he is talking with them and she has also heard rumours that he keeps a log of when he speaks with people and what was said.

[Ms C] said she is happy to answer specific allegations, but as James has not provided any, she can't.

[36] Mr Gallagher said it was around this time that he met with Andrew Christie. Mr Christie had been tasked with the job of speaking with Mr Orpin. Mr Gallagher said that following that meeting Mr Gallagher prepared a lengthy report detailing Mr Orpin's response to the allegations made by Mr Hilford. I shall return to this report later in my determination.

Events following the completion of the investigation

[37] On 29 October 2014, Mr Gallagher emailed Ms Gilbert to advise that St John had "completed an investigation into the matters raised and are in a position to meet to discuss the situation".

[38] Ms Gilbert responded the following day advising that Mr Hilford was now represented by First Union. She asked them to ensure that they provided a copy of all information to Mr Hilford directly as well as to the Union. The contact details of the person representing Mr Hilford at First Union were provided.

[39] On 7 November 2014 St John made its first request to Mr Hilford to attend a meeting to discuss the outcome of its investigation into his personal grievance. This request was made verbally to his Union. Mr Hilford was unaware of the meeting. For this reason, and because St John did not provide the Union with information relating to the investigation, the meeting did not proceed.

[40] On 13 November 2014 St John emailed First Union to invite Mr Hilford to attend two meetings commencing at 11.30 am on 18 November. The first meeting was to hear Mr Hilford's "feedback on the results of [St John's] investigation". The second meeting was an absence management meeting. St John provided a copy of Mr Gallagher's report regarding the incident with Mr Orpin as well as the email and note of 1 November 2014. The letter advised:

The first meeting will be held so we can hear your response to [Ms C] and [Ms A]'s response to your allegations of bullying by them.

At this point in time we are proposing that your complaints are not upheld, however no final decision will be made until we meet with you and hear your feedback.

If you do not attend the meeting, or provide a response via a representative, or a written submission, we will make a final decision based on the facts we have.

[41] The letter then went on to address Mr Hilford's absence over the preceding four weeks and the potential courses of action that may be taken as a result of the meeting.

This is a considerable amount of time to be ill James, which has prompted this issue. I wish to meet with you as soon as possible to discuss how St John can help you to return to work and assist with your ill-health. We also note (as of 23 October 2014), you have had 24 sick days since 1 October 2013.

At the meeting we also wish to discuss some Facebook pages which have been given to us. They show you at a shed near Titahi Bay, where you were contemplating gliding, however the glider was out of service. We also have a shot of your playing the bagpipes on a hill near Wellington commenting "For some rason they're louder up her – weird.". These are attached.

As per the Operational Collection Agreement 1 July 2011 – 30 June 2014, St John operates an Absence Management Process with the aim of ensuring absenteeism is kept to a minimum and all members are provided with appropriate assistance to enable them to attend their workplace.

Potential courses of action that may be taken under this process as a result of this meeting include:

- Confirmation of criteria for future paid sick leave
- Recommendation for an independent medical assessment (St John's cost)

[42] Mr Hilford was not copied into this letter by St John. He said he did not receive the invitation until the day before the meeting. He said this seriously damaged the Applicant's trust in his representative, exacerbating his feelings of frustration and stress. He therefore instructed another person to represent him.

[43] At 7.30 am on 18 November 2014 Mr Hilford's new representative wrote to St John. She advised, inter alia, that Mr Hilford was seeing his doctor for a check up and would therefore be unable to attend the meeting. She indicated that once Mr Hilford had spoken to his doctor they would be able to discuss a suitable date and time to meet. The email went on to remind St John of its obligation of good faith to provide all relevant documents to Mr Hilford before he attended a meeting. It requested a copy of the investigator's report and conclusions as well as "all written records in this matter – emails, diary notes, interview notes – plus all relevant recorded information – both video and audio records." The email concluded with advice that "after we receive all of the documentation, we will be able to respond in a full and frank manner to the issue at hand."

[44] Mr Deoki responded the same day. He advised:

We are incredulous that once again, James has refused to attend a meeting to discuss his issues and to discuss his ongoing absence due to alleged ill-health.

We are well aware that while James claims he is too stressed to attend a meeting with us, he is indeed, meeting with Neil Porteous on Thursday.

We have invited James to discuss future paid sick leave, however he has consistently refused to attend a meeting.

We therefore wish to advise you that from today onwards we will be recording his absence as Annual Leave instead of sick pay. If James does not want to use his Annual Leave, please advise us and we will adjust it to leave without pay.

[45] Other than the request to attend the meeting on 18 November 2014 to discuss Mr Hilford's absence, St John could not tell me any other time they sought to have a meeting with Mr Hilford to address concerns about his absence. No notes of any attempts to arrange meetings with Mr Hilford were able to be located by St John.

[46] On 19 November 2014 Mr Deoki wrote again to Mr Hilford's representative. In that email he said:

The good faith you discuss is important in the context of such an issue such as this. However, St John lost trust and confidence in James during 2013 when he covertly, and in our view, illegally made an audio recording of discussions St John and James had, concerning issues he raised at the time. We became aware of this when James inadvertently sent St John a copy of an email he had addressed to another party.

[47] On 20 November 2014 Mr Hilford met with Neil Porteous. Mr Porteous is Mr Gallagher's manager. He told Mr Porteous that he felt St John was not following a proper process in addressing his concerns. Mr Porteous informed him that a process was already in place to address his concerns and there was nothing he could do. Mr Hilford then contacted Peter Bradley, St John's Chief Executive, to advise he was experiencing severe stress and distress. Mr Bradley was asked to organise an urgent bullying investigation, re-instate Mr Hilford's sick leave and facilitate a safe return to work for Mr Hilford.

[48] On 18 December Mr Hilford attended mediation with St John. This did not resolve his grievance.

[49] On 19 December 2014 St John wrote to Mr Hilford and asked him to provide feedback on its preliminary view by 15 January 2015. Ms Gilbert, who had been re-

engaged by this stage, provided a comprehensive response on Mr Hilford's behalf on 22 December 2014.

[50] Ms Gilbert's letter stated that Mr Hilford had serious concerns about his sick leave status and set out the reasons why. She asked St John to urgently revisit its decision concerning his entitlement to sick leave. In addition, she raised concerns about St John's investigation process. Particularly that an independent investigator had not been appointed and that a preliminary view had been reached without speaking to Mr Hilford. She also pointed to Mr Deoki's email of 19 November 2014 in which he expressed that St John had lost trust and confidence in Mr Hilford.

[51] In addition, Ms Gilbert advised that Mr Hilford's doctor had confirmed his immediate fitness to return to work if the workplace issues were properly addressed. She suggested that a "simple step to minimise the hazard could be for example, for St John to give a clear direction to Comms that they are to be polite and respectful to all paramedics and that they must treat staff equally in relation to allocated call-outs and timing of call-outs". She reiterated that Mr Hilford was "willing to do whatever he can to progress matters and is certainly agreeable to a meeting to discuss any of these issues".

[52] By 13 February 2015 Mr Hilford had not received a response to Ms Gilbert's letter of 22 December 2014. Accordingly he wrote himself to St John's solicitors. He referred to St John not providing him with the opportunity to provide a written statement or be interviewed prior to a preliminary view being reached. He stated that he had always been willing, and continued to be willing, to return to work immediately as soon as St John provided a safe work environment. He asked for the opportunity to meet with St John to discuss this possibility whilst the investigation was underway. He also reiterated that he was willing to participate in an impartial and independent bullying investigation conducted by a third party. He asked that his paid sick leave be reinstated while the situation was resolved.

[53] The letter went on to provide details as to why he considered the process followed by St John was flawed. He pointed out that he was not complaining "about isolated issues and individual events but the cumulative impact of a series of events which demonstrate a "bullying culture"."

[54] St John's solicitors responded that same day. The letter advised that Mr Hilford was required to undergo an independent medical assessment and a Fitness for Work Assessment. Once these steps were completed it advised that St John would invite him to a meeting to discuss the possibility of him returning to work and the status of his leave. He was advised a separate letter would follow responding to the matters raised in Ms Gilbert's letter of 22 December 2014.

[55] On 20 February 2015 St John's solicitors sent a letter to Mr Hilford responding to the matters raised in Mr Hilford's letter of 13 February 2015 and Ms Gilbert's letter of 22 December 2014. St John maintained that it had acted fairly and reasonably in dealing with Mr Hilford's absence and stated it had offered to review its decision once it received independent medical advice and a Fitness to Work Assessment had been completed. In terms of its investigation, it advised that it considered Mr Gallagher and Mr Deoki, as well as the managers who spoke to Ms A and Ms C, to be capable of conducting a fair and impartial process. Lastly, it pointed to a failure by Mr Hilford to respond to its letter of 19 December 2014 stating:

“it appears you are not willing to participate in St John's investigation. Accordingly, St John is willing to extend the deadline for you to provide feedback on its preliminary view, to 23 February 2015...If St John has not received any feedback from you, it will be required to finalise its investigation, the results of which will be communicated to you in writing.”

[56] St John indicated that it would consider Ms Gilbert's suggestion of issuing a direction to Comms to be polite and respectful once its investigations were completed. It advised it would discuss a return to work once Mr Hilford had attended medical assessments and provided any written feedback into St John's investigation

[57] On 10 and 24 February 2015 Mr Hilford met with the clinical Psychologist specified by St John. In a report dated 3 March 2015, St John was advised:

It is the psychologist's impression that James is not suffering any thought disorder but that his mood is clearly compromised by his current situation. He believes he is affected by significant stress as a consequence of feeling a lack of control over his destiny. James conveyed to the psychologist that he loves his job and is anxious about losing it. The psychologist utilised an objective assessment tool which indicated an elevated level of depression. He believes this is a reflection of the work situation and if there is not some sense of work-resolution for him in the near future then he is at risk of becoming more severely depressed... He recommends that the process initiated needs to be resolved as quickly as possible in order for James to maintain psychological health.

[58] On 20 March 2015 Mr Gallagher wrote to Mr Hilford providing the outcome of St John's investigation into his complaints of bullying. It determined that none of his complaints were upheld. This was because St John considered the conduct complained of could not be classified as bullying in terms of the definition of bullying as defined by WorkSafe New Zealand in their WorkSafe Bullying Guidelines. Mr Gallagher also advised that he had considered whether any of the conduct complained of was inappropriate. He concluded it was not.

[59] On 27 March 2015 St John's solicitors wrote to Mr Hilford. They advised that, as his complaints had not been upheld, they considered the matter was now resolved. The letter informed Mr Hilford that St John had decided to uphold their original decision to place him on leave without pay, but informed him he was entitled to 5 days sick leave (which would increase to two weeks from July 2015), that the Applicant could apply for special leave without pay, and that this decision would be reviewed in July 2015.

The raising of a second personal grievance

[60] On 1 April 2015 Mr Hilford raised a second personal grievance. This related to an unjustified disadvantage alleged to have occurred due to St John's refusal to pay Mr Hilford sick leave whilst he was off work and in possession of a medical certificate. The letter concluded, inter alia, with a request for St John to put a return to work process in place that included "an assurance of a safe working environment as required by the Health and Safety in Employment Act 1992" and an independent and impartial investigation into his allegations.

Events following Mr Hilford's return to work and the lead up to his dismissal

[61] On 5 April 2015, Mr Hilford returned to work. No return to work plan was put in place and no steps taken to address the issues between Mr Hilford and Comms.

[62] On 2 May 2015 Mr Hilford's work partner viewed him taking a green copy of a Patient Report Form (PRF). Mr Hilford explained to his partner that he was taking it home to use as an exemplar for his studies. In response to his partner's query whether it would be more appropriate to take a photocopy of the paperwork, Mr Hilford told him that he was going to take the original as he had been told he was allowed to do this.

[63] Thereafter Mr Hilford's partner reported the taking of the green form to the Group Leader, Peter Spackman. Mr Spackman in turn told Mr Deoki. By email dated 4 May 2015 Mr Deoki asked Mr Hilford to return the original PRF to St John. Mr Hilford responded advising that he had been advised by his mentor, Derek Liefing, during training that he could keep the green copy to write up jobs with. He asked Mr Deoki to clarify the policy around this and queried why this was being investigated now when he had been doing this for months/years.

[64] Mr Deoki responded by providing Mr Hilford with a copy of Clause 6.6 of the Operations Manual. This provided that the Green copy of the PRF must accompany the data copy for administration purposes and be forwarded to a central point in accordance with regional systems. Mr Deoki advised that PRFs are confidential documents and asked Mr Hilford to return any other original PRFs that he may have.

[65] Mr Hilford complied with this request.

[66] Several days later, St John became aware, via Peter Davis who was the educator on a course Mr Hilford was taking, that Mr Hilford had additional PRFs in his possession. These PRFs had not been deidentified. Mr Deoki phoned Mr Hilford and asked him to return these forms. Mr Hilford complied with this request.

[67] On 6 May 2015 Mr Hilford was asked to attend a disciplinary meeting to obtain his explanation to the following allegations:

- a. Unauthorised possession and removal of St John property. We believe this was at least 17 original patient report forms
- b. Not having followed St John policy concerning dissemination of patient report forms.
- c. Not preserving patient confidentiality.
- d. Despite me instructing you to return all original copies of patient report forms you have not done this. While you returned 17 original forms you were seen by Peter Davis to be in possession of more.

[68] Mr Hilford was told he did not have to attend work pending the meeting.

[69] The disciplinary meeting took place on 12 May 2015. I shall return to this meeting later in this determination. On that same day Mr Hilford was terminated on two weeks' notice. He was not required to work out his notice period.

Issue One: Unjustified disadvantage

[70] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated. This is if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[71] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[72] Relevant evidence to be considered in an unjustified disadvantage grievance is not necessarily confined to events in the 90 days preceding the raising of the grievance.¹ That is because disadvantageous acts or omissions in employment frequently do not occur in isolation but as part of a continuum of conduct that needs to be understood to determine whether an employee has suffered an unjustified disadvantage within the 90 day period.

The Claim

[73] The Statement of Problem pleads a failure by St John to “follow process and justly and correctly investigate allegations of bullying” against Mr Hilford.

[74] An employer's failure to address bullying in the workplace may give rise to an unjustified disadvantage claim. This can be seen as an aspect of the implied and statutory duty to provide a safe workplace.²

[75] The Court of Appeal in *AG v Gilbert*³ discussed the nature of the duty to provide a safe work place as follows:

The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made

¹ *Davis v Commissioner of Police* [2013] NZEmpC 226 at [47].

² *FGH v RST* [2018] NZEmpC 60 at [201].

³ [2002] 1 ERNZ 1 at [83].

clear by the definition of “all practicable steps”. What is “reasonably practicable” requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer’s obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[76] Although these findings were expressed in 2002, they remain an accurate and useful summary of the relevant obligations in this case for the period up to the incorporation of the Health and Safety at Work Act 2016.⁴

[77] The requirement to take all practicable steps to ensure an employee’s safety only arises where an employer knows, or ought reasonably to know, about the circumstances giving rise to the risk of harm.

While an employer cannot absolve itself of responsibility to take all practicable steps simply because its employees have not raised an issue, the alternative threshold of reasonable foreseeability must nevertheless be negotiated if a claim is to be successfully made out.⁵

Did St John know, or ought it reasonably to have known, about the circumstances giving rise to the risk of harm to Mr Hilford?

Relevant Terms in IEA

[78] Pursuant to Clause 18 of the IEA St John undertook to comply with the Health and Safety in Employment Act 1992 and its amendments concerning safety, health and welfare matters. In addition it agreed to “take all reasonable precautions for your health and safety”.

⁴ *FGH v RST*, above n 2, at [197].

⁵ *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99

Harassment Policy

[79] St John's Harassment Policy refers to several types of harassment, including sexual and racial harassment and bullying. It records that St John has zero tolerance towards harassment or any other behaviour that tramples on the mana of another person. It states St John will take seriously and address any reports of harassment.

[80] In terms of bullying the policy provides:

No single definition applies but some of the elements of workplace bullying include repeated, health-endangering mistreatment of a person (the target) by another person (the alleged bully). It is evidenced through any combination of: the focussed and systematic selection of targets; hostile verbal and/or non-verbal communication; interfering or undermining/humiliating actions, omissions or communications, trivial criticisms, false allegations; psychological game playing; coercion of others into participating in the bullying; or other overt or covert behaviours. It then lists examples of overt and covert behaviour that may constitute bullying.

[81] The policy goes on to describe the responsibilities of Managers. These include:

Managers will:

...

- Monitor the work environment to so that professional standards of conduct are observed at all times, taking prompt action when this is not the case.

...

- Follow a process that reflects the principles of natural justice and procedural fairness, taking into consideration any cultural requirements. The primary aim will be, wherever possible, to provide an opportunity for all parties to be heard, using face to face or facilitated approaches so that allegations can be addressed appropriately and as soon as possible.
- Ensure that support is provided to both parties during any process.

...

[82] The policy makes clear that, once aware of a complaint, a Manager is required to take prompt action. This is consistent with the good faith provisions of the Act. Section 4 requires parties to an employment relationship to be active and communicative in establishing and maintaining a productive employment relationship.

[83] In terms of complaints, the policy records that “all formal complaints will be treated promptly, seriously and sensitively.” At the time of presenting the formal complaint “the complainant will be advised of their right to seek assistance from his/her employer/legal representative”.

Discussion

[84] It is abundantly clear from the evidence that St John was aware there were issues between Mr Hilford and the Comms staff from at least May 2013. From May 2013, through until September 2014, Mr Hilford did all he could to raise his concerns about Ms A, Ms B, Ms C and Comms with Mr Deoki and his supervisor Mr Orpin.

[85] It was reasonably foreseeable in the circumstances that a failure to address Mr Hilford’s concerns may result in him suffering harm. Ms Ledezma said Mr Hilford told her he was suffering from anxiety in August/September 2013 and that he said this had manifested itself whilst he was at St John because of the alleged bullying. Mr Orpin said he knew Mr Hilford was stressed and he had issues with Comms and Management. He said Mr Hilford made it clear to the people around him how he felt about Comms and the way he was being treated. In addition, Mr Hilford made several verbal, and at least four written complaints from 2014 that brought the problems to Mr Deoki’s and St John’s attention.

[86] By late September 2014, Mr Hilford’s mental health had deteriorated significantly. Mr Orpin said he was extremely concerned about Mr Hilford’s well-being and considered he needed help. He said he had not seen Mr Hilford act like this before and felt it was out of character. He relayed his concerns to Mr Deoki in two emails where he recommended that Mr Deoki and HR meet with Mr Hilford to talk through his issues “for his own wellbeing with a firm recommendation of James seeking professional help of some sort.”

Were all reasonably practicable steps taken by St John to avoid harm to Mr Hilford?

[87] For the reasons that shall follow, I am satisfied that St John failed to take all reasonably practicable steps to avoid harm to Mr Hilford either prior to him going on sick leave on 3 October 2014, after he raised his personal grievance on 14 October 2014 or in the period following Mr Hilford return to work in April 2015.

Prior to going on sick leave on 3 October 2014

[88] St John did not take any steps to investigate the complaints made by Mr Hilford from May 2014 until prior to him going on sick leave on 3 October 2014. Nor did it provide him with any support, other than an offer of EAP.

- a. Mr Deoki ignored Mr Hilford's complaints about Ms A and Comms that he emailed in March and July 2014.
- b. Mr Deoki did not address the concerns Mr Hilford had with Ms B. No action was taken to organise facilitation or some other meeting between the parties to resolve their issues.
- c. St John and Mr Deoki's failure to address the issues between Ms B and Mr Hilford led to further issues arising in September 2014 when Mr Hilford was left off the rosters. Again, Mr Deoki took no action to resolve the issues between Mr Hilford and Ms A.
- d. Mr Deoki did not respond to Mr Hilford's email of 26 September 2014. This resulted in Mr Hilford sending the explicit picture message on 27 September 2014 that depicted him being attacked by Comms. Mr Deoki then spoke to Mr Hilford. However, he did not take any steps to address the concerns Mr Hilford was raising. Mr Deoki said this was because he was seconded to take over from Mr Gallagher. He said the plan was for his replacement to support Mr Hilford. However, Mr Hilford's uncontested evidence was that no support was provided. Mr Deoki said Mr Hilford was also to be referred for a health and wellness check. The evidence is that this did not occur until three months' later, just prior to Christmas 2014.

[89] A fair and reasonable employer, having knowledge of the circumstances prevailing at the time, could have taken steps to address the issues that Mr Hilford was experiencing. For example, by organising a meeting or facilitation between Mr Hilford and the persons who he complained about. Even if Mr Hilford was not being bullied, that does not absolve St John from satisfying its health and safety

obligations.⁶ Ignoring an employee's concerns, as St John did, is not what a fair and reasonable employer could have done.

After the raising of a personal grievance on 14 October 2014

[90] For the reasons that shall follow, I find that St John failed to follow a fair and reasonable process when investigating the allegations raised by Mr Hilford in his personal grievance letter of 14 October 2014.

[91] St John's Bullying and Harassment Prevention Policy identifies reasonable and practicable steps that will be taken by Managers when faced with a complaint of bullying. St John did not meet these requirements.

[92] The policy requires that "any investigation will be conducted thoroughly, impartially and confidentially". The first of these two criteria were not met. The investigation that was carried out by St John was not what a fair and reasonable employer could have done in the circumstances to investigate Mr Hilford's concerns and to provide him with a safe workplace.

The Investigation was not through

[93] An employer who receives complaints from employees about the behaviour of other employees such as harassment or bullying has particular obligations. First, it must undertake a full and fair investigation into the complaint.⁷

[94] Mr Deoki said he did not have the time to undertake an investigation. He said at the time of the investigation he was still working as an Ambulance Driver as well as having 145 direct reports. This meant he delegated the investigation to other people. The role of speaking with Mr Orpin was delegated to Andrew Christie, St John's District Operations Support Manager. The role of speaking to Ms A and Ms C was delegated to Mr Lilley, St John's Communications Manager. Mr Lilley in turn delegated the task of speaking with Ms A to the Comms Duty Manager.

[95] Mr Deoki said he could not recall what he told these Managers to ask or say to Mr Orpin, Ms A and Ms C. He said he did not know what information they provided to the people they spoke with. He said no notes were taken by the Managers and he

⁶ *FGH v RST*, above n 2, at [218].

⁷ *Clear v Waikato District Health Board* (2008) 6 NZELR 163 at [12].

did not talk to any of the witnesses directly or ask for them to be re-interviewed. He said he simply relied on the email and note dated 1 November 2015.

[96] These were not the actions of a fair and reasonable employer. A fair and reasonable employer could:

- a. Have engaged one investigator to speak with all witnesses.
- b. Taken notes or a recording of what was said by the witnesses at the time the interviews took place. This information could then have been provided to Mr Hilford.
- c. Have addressed any inconsistencies in the witness statements. In the present case:
 - i. The email correspondence with Ms A records her as saying that she had had no interactions with Mr Hilford since May 2013. This evidence conflicts with the email complaints Mr Hilford raised with Mr Deoki in March and July 2014. Mr Deoki did not ask Ms A to respond to this inconsistency.
 - ii. The notes of the discussion with Ms C state she is not aware of any specific allegations against her and therefore could not respond. Mr Hilford's personal grievance letter set out that one of the allegations against Ms C was the pager message.

[97] In addition, a fair and reasonable employer could and should have spoken to Mr Hilford before completing its investigation. St John's Bullying and Harassment Prevention Policy provides that, wherever possible, St John will provide an opportunity for *all* parties to be heard, using face to face or facilitated approaches so that allegations can be addressed appropriately and as soon as practicable. This did not occur.

[98] St John did not speak with Mr Hilford. Aside from requesting him to meet with it on 7 and 18 November 2014, St John made no other attempt to meet in person with Mr Hilford to discuss its investigation despite his advice to them that he was willing to do so.

[99] Mr Gallagher said Mr Hilford was asked to attend two meetings to discuss the outcome of the investigation. The first, he said, was to take place on 7 November 2014. No invitation letter was able to be provided. Mr Gallagher said he didn't know if Mr Hilford was copied into this letter if one was sent despite Ms Gilbert's request for St John to copy all correspondence to Mr Hilford. Mr Hilford said he was unaware of the meeting and did not attend. There is no dispute that if a meeting was scheduled it could not have proceeded in any case as Mr Hilford had not been provided with the documents supporting the outcome of St John's investigation.

[100] The second meeting was to take place on 18 November 2014. This meeting did not take place because Mr Hilford was not aware of the meeting, and the attachments, until the day of the scheduled meeting. Again St John did not copy him into the correspondence requesting this meeting, and providing the attachments, as requested by Ms Gilbert. Upon becoming aware of the meeting his representative immediately emailed St John to advise that he was not attending due to the late notice, not receiving the information from his Union, and his poor health. She advised "After we receive all of the documentation, we will be able to respond in a full and frank manner to the issue at hand".

[101] I am aware of no attempt to meet with Mr Hilford to discuss his concerns, or receive his oral feedback on the preliminary outcome reached by St John, after 18 November 2014 and before a final decision was made.

Mr Hilford was not provided with all information

[102] St John failed to provide information upon which it relied in reaching its outcome to Mr Hilford for comment.

[103] St John did not provide witness statements from any of the witnesses it interviewed during the investigation. Mr Gallagher and Mr Deoki said this was because no witness statements were taken. When questioned on how, in that case, Mr Gallagher prepared a lengthy report on what Mr Orpin had told Mr Christie, he said he had a good memory. He said he met with Mr Christie who recounted to him what Mr Orpin had said. He then wrote his report based on his memory of this conversation.

[104] Mr Gallagher's evidence conflicted with that provided by Mr Orpin. The Authority summoned Mr Orpin to attend and give evidence. He told the Authority

that Mr Christie took notes during the meeting he had with him. He said Mr Christie subsequently emailed him a statement and asked him to confirm it was correct which he did. A copy of this statement was unable to be located. However, Mr Orpin provided the Authority with a copy of an email that Mr Christie had sent to Mr Gallagher that, inter alia, outlined what Mr Orpin had said. A copy of this email was not provided to Mr Hilford at any time.

[105] In reaching its view that bullying did not occur, St John said it viewed the pager message, and listened to phone calls between Mr Hilford and the witnesses. A copy of this information was not provided to Mr Hilford for comment.

[106] Mr Deoki said someone also spoke to Mr Hilford's partner about the pager message. Once again he had no notes of this meeting and did not know who had met with her. No mention of a meeting with this person was made in St John's outcome letter.

Mr Deoki was not impartial

[107] St John appointed Mr Deoki to carry out an investigation into the concerns raised by Mr Hilford in his personal grievance letter. The fact that "the person making the decision is an officer of the employer empowered to deal with the issue does not of itself automatically make the decision biased and thereby deny the employee of the opportunity of a fair hearing".⁸ However, I find in this case the appointment of Mr Deoki was not what a fair and reasonable employer could have done in the circumstances.

[108] Mr Deoki was not impartial. I find he approached the investigation with a closed mind. I am fortified in this finding by the following evidence:

- a. Mr Deoki said that he did not engage an independent investigator as he did not believe Mr Hilford was being bullied. He said that while Ms A's approach to ambulance drivers was known to be abrupt and short, and sometimes could be viewed as rude, Ms A and other Comms staff did not have time for pleasantries when dealing with life and death situations.
- b. Mr Deoki spoke of the stressful environment that they worked in. He said everyone was in the same situation as Mr Hilford and none of the 145 staff

⁸ *New Zealand Tramways IUOW v Auckland Regional Council* [1992] 2 ERNZ 883 at 891.

he dealt with had a problem with Ms A, Ms C or Comms. I pause here to note that Mr Deoki's perception was not supported by conversations he had had with his staff. Indeed, it was Mr Orpin's evidence that there were staff that perceived Comms as bullying them.

- c. In his email dated 19 November 2014, Mr Deoki expressed the view that St John had lost faith in Mr Hilford.
- d. Mr Hilford's personal grievance letter stated that Mr Hilford felt he was being treated unfairly by management. Mr Deoki was his Manager. This complaint was not investigated by Mr Deoki or St John.

After returning to work in April 2015

[109] Prior to returning to work Mr Hilford was asked by St John to see a psychologist. In a letter from St John's health and wellness advisor dated 3 March 2015 she advised:

It is the psychologist's impression that James is not suffering any thought disorder but that his mood is clearly compromised by his current situation. He believes he is affected by significant stress as a consequence of feeling a lack of control over his destiny. James conveyed to the psychologist that he loves his job and is anxious about losing it. The psychologist utilised an objective assessment tool which indicated an elevated level of depression. He believes this is a reflection of the work situation and if there is not some sense of work-resolution for him in the near future then he is at risk of becoming more severely depressed... He recommends that the process initiated needs to be resolved as quickly as possible in order for James to maintain psychological health.

[110] Notwithstanding this report St John did not take any steps to safe-guard Mr Hilford's health or to address the issues he was having with the staff before he returned to work. There was no return to work plan put in place. There was no meeting or facilitation organised with affected staff. This is particularly concerning as by this stage St John was aware, from its meeting with Ms A, that she had similar issues with Mr Hilford as he had with her. She told St John that she was feeling harassed and upset, her sleep was being affected, her confidence was being undermined, and she felt "hunted" by Mr Hilford.

[111] In addition, St John's Bullying and Harassment Prevention Policy provides that Managers will provide support to both parties during any process. Other than offers of EAP prior to Mr Hilford going on sick leave in October 2014, I am aware of

no other support offered by St John to Mr Hilford either during the 8 months he was away on sick leave or when he returned to work with St John.

[112] In the present case reasonable and practicable steps that St John could have taken to meet its obligations to act as a fair and reasonable employer, and to meet its obligations to provide a safe workplace upon Mr Hilford's return to work could have been to:

- a. Provide Mr Hilford with support when he raised his concerns, during his period of absence, and upon his return to work.
- b. Assist Mr Hilford to reintegrate into the workplace by way of a return to work plan or otherwise.
- c. Organise a meeting between him and those he had issues with to try and address and resolve those issues.

Conclusion on Issue One

[113] I find St John failed to take all reasonable and practicable steps to provide Mr Hilford with safe working conditions. This unjustifiably affected his conditions of employment to his disadvantage.

[114] By failing to address Mr Hilford's initial concerns, and to provide him with support, Mr Hilford's state of mind deteriorated to such an extent that he was required to take sick leave.

[115] In correspondence from Dr Anton Wiles, Mr Hilford's doctor, dated 19 December 2014 it is recorded:

I have been seeing James since 13/10/14 with problems from stress, relating to a work situation.

He has been a patient at this practice since 2004, and apart from minor, resolved medical issues, his main problem has clearly related to a stressful work situation that dates back to mid-2013.

He has been unfit to work since 4/10/14 – this is stress, and I have never considered him fit in the time since then. He has sought certificates from other doctors if not able to get into my practice, but this has always been with communication and advice from me. I have encouraged him to get out of Auckland at times, to help him cope with the stresses and the effect it has been having on him.

He remains affected by the stress, and this causes some sleep issues, lack of ability to concentrate on or enjoy anything outside the situation that he is involved in. I believe he is diagnosable as a stress-depression, but have avoided medication because I believe the resolution of the situation is the best cure.

I believe that resolution of this and return to work depends more on proper dealing with workplace issues, and remain hopeful that this can be achieved. If this is done, he should be fit to return to work almost immediately. I would suggest some control and possibly graduation in this.

[116] Had St John taken steps to address the difficulties between Mr Hilford, Ms A, Ms B and Ms C at an early stage there was a fair chance that a practical working solution could have been reached without Mr Hilford suffering harm or continuing to suffer harm.

[117] St John's failure to carry out a fair investigation of the concerns raised by Mr Hilford in October 2014, or to take any practicable steps to resolve the issues between him and Comms, disadvantaged him further. It resulted in him remaining on sick leave for a period of 8 months. St John's decision to stop Mr Hilford's paid sick leave, without prior notice to him, disadvantaged him further and added to his distress.

[118] Mr Hilford is entitled to an assessment of remedies which I will turn to once I have considered his claim for unjustified dismissal.

Issue Two: Unjustified dismissal

[119] On 12 May 2015 Mr Hilford attended a meeting with St John. The first part of the meeting was to provide Mr Hilford with an opportunity to provide his response to the allegations raised by St John. Mr Deoki and an HR Support Officer attended this part of the meeting on behalf of St John. No notes were taken at this meeting.

[120] The parties agree the following explanations were provided by Mr Hilford:

- a. Mr Hilford said he was told by Derek Liefing in 2008 that he was able to take the green PRF copy home as it was not used by St John.
- b. Glen Hoult told him that the green PRF copies go into storage and that this was a cost to St John to securely store them. He told him there was no problem with him taking them home.

- c. The PRFs were used for the purpose of maintaining his log book and were kept in a safe place when he took them off the station.
- d. When he met with Peter Davis he realised that he had more PRFs. He intended to blank out identifiable patient information on these forms before providing them at the meeting but had not done this.
- e. He did not know that the taking of the green PRF copies was a breach of St John policy until he was sent the policies by Mr Deoki.
- f. Taking the green PRFs home was a common practice for him since 2013. He was aware that others also took the green PRF home.

[121] There is a dispute as to whether or not Mr Hilford admitted that it was wrong for him to take the green PRFs home and not to blank out identifiable information. Mr Hilford said he did not say this.

[122] The meeting was then adjourned. Mr Deoki said that during this adjournment he relayed Mr Hilford's explanations to Mr Gallagher. After considering this feedback Mr Gallagher determined that the allegations were substantiated and Mr Hilford's actions constituted serious misconduct.

[123] The meeting was then reconvened to provide Mr Hilford with St John's decision. Mr Gallagher attended this meeting and provided the outcome to Mr Hilford. St John terminated Mr Hilford's employment giving two weeks' notice but exercised its right to pay Mr Hilford in lieu of notice.

Was the decision to terminate justified?

[124] The onus falls upon St John to prove that its actions in dismissing Mr Hilford were justified.

[125] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of St John, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[126] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[127] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.⁹

[128] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

Flawed Process

[129] The test of justification has not been satisfied. There were a number of serious defects in the process followed by St John that resulted in Mr Hilford being treated unfairly in terms of s 103A(5) of the Act. St John did not provide all the information it had that was relevant to the allegations to Mr Hilford for him to consider and respond to. Nor did it properly consider the explanations given by Mr Hilford before it made its decision that his conduct justified dismissal.

[130] I am fortified in this view by the following:

- a. Mr Gallagher said he spoke with Mr Liefing. However he could not recall when this was and he took no notes of what he said. He thought it may have been at the same time as he was asking Mr Liefing for permission to dismiss James. Mr Liefing's response was not put to Mr Hilford for him to respond to before he was dismissed.
- b. Mr Deoki said he spoke with Glen Holt. He did not take notes of the conversation. Mr Hilford was not provided with an opportunity to respond to what Mr Holt said before he was dismissed.

⁹ Section 103A(5), Employment Relations Act 2000

- c. Mr Gallagher said he spoke with Mr Hilford's peers to check whether it was common practice to take the green copy home. This was the week prior to the meeting. He did not take notes of these discussions and he could not tell me who he spoke to. His discussions were not put to Mr Hilford for response. Had they been then it is likely that Mr Hilford would have provided additional evidence to St John to support his position. Email correspondence I have viewed shows him forwarding a copy of an email to his advocate shortly after his termination. This shows a copy of a patient report form was emailed to Mr Hilford that had not been de-identified.
- d. It is also concerning that Mr Gallagher, as decision maker, was not present when Mr Hilford provided his explanation. Whilst St John submitted that he was, both Mr Gallagher and Mr Deoki said in evidence that Mr Deoki relayed Mr Hilford's explanation to Mr Gallagher as he was not present at the explanatory meeting. Mr Gallagher's decision was based on Mr Deoki's memory of what was said, there being no notes taken.

[131] For completeness, I record that I did consider the resources available to St John when deciding whether they sufficiently investigated the allegations. St John submitted that St John had limited resources compared to other comparable organisations. Unlike the police and fire service, it submitted St John is not fully funded by the government and needs to make up the difference through its charity work and collection of donations. I do not however accept that lack of resources affected the process that was followed. St John employs at least two human resource officers. These persons gave St John advice throughout the process, one of these officers was present during the explanatory and outcome meeting, and they assisted St John to write the termination letter.

Conclusion on Issue Two

[132] I am satisfied that St John's decision to terminate Mr Hilford's employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. St John did not have a sufficient and reliable basis for concluding that Mr Hilford had been guilty of misconduct. Furthermore, I find St John failed to provide Mr Hilford with access to relevant information and an opportunity to comment on this before the decision was made in

breach of its obligations of good faith. These defects were not minor and did result in Mr Hilford being treated unfairly.

[133] Mr Hilford was unjustifiably dismissed from his employment with St John and is entitled to remedies.

Issue Four: Remedies

Lost Wages: Unjustified disadvantage

[134] Mr Hilford claims lost wages for the period he was absent from work on sick leave. I understand this period was from 4 October 2014 until April 2015 (the sick leave period). Mr Hilford provided St John with medical certificates during this period.

[135] Having carefully considered the evidence I am satisfied that Mr Hilford's long absence from work was attributable to his suffering stress and anxiety by St John's failure to properly investigate his claim and to provide a safe workplace.

[136] During the sick leave period Mr Hilford was required to, in part, use his annual leave. For the remainder of the period he was unpaid. I have been provided with Mr Hilford's IRD records that show a reduction in salary of \$7,401.00 in the period up to 31 March 2015. It is unclear what wages Mr Hilford lost during April 2015. This is because the exact date of his return to work was unknown by the witnesses.

[137] St John is ordered to pay Mr Hilford gross wages equalling the difference between the amount Mr Hilford would have received had he worked during the sick leave period and the amount St John paid to him as paid sick leave. This sum is to be paid within 28 days of the date of this determination.

[138] If the parties cannot agree on the amount to be paid to Mr Hilford then they have leave to revert to the Authority for a determination on quantum within 28 days of the date of this determination.

Lost wages: Dismissal

[139] Mr Hilford claims lost wages from the time of his dismissal until the present day.

[140] Section 123(1)(b) of the Act provides for the reimbursement by St John of the whole or any part of wages lost by Mr Hilford as a result of his grievance. Section 128(2) of the Act provides that I must order St John to pay Mr Hilford the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration.

[141] In *Xtreme Dining v Dewar*¹⁰ the full Court confirmed that where an employer puts mitigation in issue, an employee must provide relevant information as to the steps taken to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[100] It has long been the position in this jurisdiction that the common law tests as to onus are applicable to claims for statutory remedies. Given that onus, it is incumbent on the employer as the defaulting party to raise the issue, usually in the relevant pleading. Having raised the issue, the employer continues to carry the ultimate onus, or as it has sometimes been described, the "legal burden".

[101] But there is an "evidential burden" on the employee to provide relevant information. This is what the Court referred to in *Transpacific*. It is necessary for the employee to provide this information, if called on, because it is information of which he or she has knowledge. This obligation is a manifestation of the famous statement made by Lord Mansfield in 1774 in *Blatch v Archer* that "it is certainly a maxim that all evidence is to be weighed according to the proof of which it was in the power of one side to have produced, and in the power of the other to have contradicted."

[102] That does not preclude the employer from leading its own evidence on the topic, for instance as to employment options which were reasonably available but not pursued; or to challenge the accuracy or adequacy of the evidence given by the employee.

[103] But when considering all the evidence, this issue of fact must be assessed on the basis that the employee is the victim of a wrong. The Authority or Court cannot be too stringent in its expectations of a dismissed employee. Further, what has to be proved – by the employer – is that the employee acted unreasonably; the employee does not have to show that what he did was reasonable.

[104] In summary, where the employer puts mitigation in issue, the employee must provide relevant information as to the steps he took to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[142] St John did not put mitigation at issue in its statement in reply nor in the submissions filed. I do not therefore hold a lack of documentary evidence of attempts to find work a factor justifying a reduction in remedies to Mr Hilford.

[143] Mr Hilford said he was unable to look for work for a period of time after he was dismissed. He spoke of the severe psychological impact that his disadvantage

¹⁰ [2016]NZEmpC 136

and dismissal had on him as discussed later in this determination. However, by November 2015 he was able to apply and to accept employment. A letter of offer I have viewed states he commenced employment on 23 November 2015. In February 2016 he commenced study towards a law degree at University. He said he continued working part-time and his income was supplemented by a student or other allowance.

[144] I find in the circumstances that 6 months' lost remuneration is reasonable and can be attributed to the personal grievance. Mr Hilford was paid a salary of \$65,836 gross. 6 months' salary therefore equals a sum of \$32,918.

[145] St John is ordered to pay to Mr Hilford the sum of \$32,918 for lost wages attributable to his unjustified dismissal. Payment must be made within 28 days of the date of this determination.

Compensation for Hurt and Humiliation

[146] I heard extensive and credible evidence from Mr Hilford on the effects that St John's actions had on him. In terms of cases I have heard, it is at the highest end.

[147] Mr Hilford gave a harrowing account of the impact St John's actions had on him. He said his life was destroyed in every way. This was clear from the evidence that I heard. Mr Hilford was estranged from his family, suffered very serious health issues, and incurred significant financial pressure. Having no money to support himself he was forced to move away from his home in Auckland to enable him to be supported by his aging mother.

[148] In addition, Mr Hilford lost his career. He explained how he had volunteered for St John for a number of years before deciding to change his career and take on paid employment with St John. He said he was enthusiastic and loved his job before the issues with Comms arose. Aside from initial mentoring, Mr Hilford was not subject to any disciplinary or performance concerns.

[149] In early 2016 Mr Hilford started studying for a professional degree at university. However, his depression made it difficult for him to undertake fulltime study. He said he would find himself crying in lectures and he was eventually referred to counselling through the University. He said he contemplated inflicting serious harm on a senior member of St John. Thereafter he was incarcerated for several months in the Henry Bennett Centre. It was clear from his compelling

evidence that, even at the time of the investigation meeting, he was still suffering significantly.

[150] I acknowledge that in the period following Mr Hilford's dismissal he suffered the loss of a close family member. However, in assessing quantum, I have put that to one side and have focused on the distress that I consider attributable to his grievances.

[151] I am satisfied in all the circumstances that Mr Hilford has proven, on the balance of probabilities, that he has suffered humiliation, loss of dignity and injury to his feelings. I am also satisfied that St John's unjustified actions, and its unjustifiably dismissing Mr Hilford, were material factors in the loss sustained by Mr Hilford.

[152] I consider the evidence warrants a significant award of compensation under s 123(1)(c)(i) of the Act. As the consequences of the unjustified disadvantage, and unjustifiable dismissal, are so closely linked it is appropriate that a global award of compensation is made.

[153] St John's is ordered to make payment to Mr Hilford of the sum of \$35,000 under s 123(1)(c)(i) of the Act. Payment must be made within 28 days of the date of this determination.

Issue Four: Contribution

[154] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If the Authority is satisfied that there is a causal link between an employee's actions and the situation that gave rise to his disadvantage and/or dismissal then the Authority must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies.¹¹

[155] Mr Hilford's actions in taking the green PRF forms, and not de-identifying them, were the catalyst relied upon by St John to terminate his employment. However, on balance, I am satisfied they were not the real reason why he was dismissed. Following the conclusion of the investigation meeting I was provided with an email that showed a PRF form, with patient details, was emailed by a St John

¹¹ Xtreme Dining Ltd v Dewar [2016] NZEmpC 136

staff member to Mr Hilford just prior to him going on sick leave. I am aware of no disciplinary action that was taken against this employee.

[156] I find St John was looking for any reason to terminate Mr Hilford's employment. I am fortified in this view by the evidence I viewed and heard that showed St John was covertly monitoring Mr Hilford. This monitoring started prior to Mr Hilford going on sick leave when St John asked Mr Hilford's former work partner to monitor him. It is likely that the monitoring continued when Mr Hilford returned to work in April 2015.

[157] Within 2-3 weeks of Mr Hilford returning to work, his partner reported him taking PRF forms. No previous partner, in the many years Mr Hilford had been taking the forms, had raised any issue with him doing so. Mr Hilford did not conceal he was doing this and even attached the original green forms to his logbooks that he returned to St John.

[158] Within a further day or two Mr Hilford's mentor reported he had viewed Mr Hilford with original PRF forms. It is simply not credible that this was a "coincidence" as St John submits. It is more likely that St John was trying to bolster its evidence against Mr Hilford to support a termination.

[159] On the foregoing basis I find there was no causal link between Mr Hilford's actions and the situation that gave rise to his disadvantage and/or dismissal. Accordingly there should be no reduction in remedies for contribution in this regard.

Other incidental claims

[160] The Applicant's statement of problem claims compensation for medical expenses, and moving costs, allegedly incurred by Mr Hilford due to his personal grievances. There is no evidence to support his claim for the amounts claimed and accordingly I make no award.

Issue Five: Costs

[161] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[162] If they are not able to do so and an Authority determination on costs is needed Mr Hilford may lodge, and then should serve, a memorandum on costs within 14 days

of the date of issue of the written determination in this matter. From the date of service of that memorandum St John will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[163] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Jenni-Maree Trotman
Member of the Employment Relations Authority

¹² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].