

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 567
3050332

BETWEEN ELIZABETH WILSON
 Applicant

AND ORANGA TAMARIKI –
 MINISTRY OF CHILDREN
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Elizabeth Wilson, in person
 June Hardcare, Counsel for the Respondent

Investigation Meeting: 09-10 September 2019

Submissions and further 11 September 2019 from the Applicant
Information Received: 11 September 2019 from the Respondent

Date of Determination: 04 October 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Wilson has been employed by The Chief Executive, Oranga Tamariki – Ministry for Children (Ministry), and its predecessor, Child, Youth and Family, since 3 March 2014. Ms Wilson’s current position is a Senior Practitioner at the National Contact Centre (NCC).

[2] The parties’ relationship has been fraught with issues over the last couple of years. The majority of these matters have been resolved. However, Ms Wilson maintains a claim that she has been unjustifiably disadvantaged in her employment. This is denied by the Ministry.

[3] As permitted by s 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

[4] The issues identified for investigation and determination are:

- a. Did Ms Wilson suffer an unjustified disadvantage to her employment arising from:
 - i. Ms Wilson's return to work in July 2018 on the basis of 20 hours' per week as opposed to full-time duties;
 - ii. The Ministry's decision to decline her request to work over the 2018/2019 Christmas period;
 - iii. The first written warning issued to Ms Wilson on 15 January 2019;
 - iv. The decision to place Ms Wilson on a Performance Improvement Plan which commenced on 15 April 2019;
 - v. The second and final written warning issued to Ms Wilson on 29 April 2019;
 - vi. The Ministry's decision to remove Ms Wilson from phone duties on 30 April 2019 pending a meeting.
- b. If so, what remedies should be ordered?
- c. If any remedies are awarded, should they be reduced under s124 of the Act for blameworthy conduct by Ms Wilson that contributed to the situation giving rise to her grievance?

[5] For completeness, I record that these issues were narrowed from that raised by Ms Wilson in two earlier statements of problem. The narrowing of her claims followed her taking legal advice and the Authority seeking confirmation from her Representative. Confirmation that her claim was limited to those matters set out in her third amended statement of problem dated 3 July 2019 was provided to the Authority and the Ministry on 12 July 2019.

Background

The record of settlement

[6] On 20 July 2018, the Ministry and Ms Wilson entered into a record of settlement under section 149 of the Act (the ROS) to resolve an employment relationship problem raised by Ms Wilson. The ROS represented a full and final settlement of all matters that had arisen between the Ministry and Ms Wilson at that time. Of relevance to this investigation was the following clause:

Liz and the Ministry have agreed upon a return to work plan including that Liz will return to work at the National Contact Centre on Monday 23 July 2018.

[7] At the time of signing the ROS, Ms Wilson had been away from work for a period of around 8 months.

The return to work plan

[8] On 23 July 2018 Ms Wilson returned to work. The role that she returned to was different than she had previously undertaken. She had previously worked in the call centre taking general calls from members of the public. Her new role involved her taking calls on a dedicated Caregiver phone line. This was a 24 hour support service offered to caregivers and was also the contact point for those wishing to apply to be caregivers. The parties agree Ms Wilson required some training on the processes involved with this new role and that this, combined with her on-going health issues, meant that it was appropriate that there be a delay in her returning to full-time duties.

[9] That same day Ms Wilson attended a meeting to discuss her return to work. In that meeting, and others that followed that week, it was agreed:

- a. Ms Wilson would work 20 hours per week and 4 hours per day;
- b. Ms Wilson's hours of work would be reviewed after 4 weeks;
- c. Prithika Maharaj was to be Ms Wilson's Social Work Supervisor and Jackie Allen was to be Ms Wilson's Practice Manager;
- d. The parties recognised Ms Wilson needed training and a training plan would be put into place by Ms Maharaj; and

- e. As Ms Wilson had taken above the limit of sick leave she was entitled to since her anniversary date, any future paid sick leave would be at the discretion of her manager.

[10] Thereafter Ms Maharaj had regular daily supervision meetings with Ms Wilson where they reflected on the work Ms Wilson had completed and Ms Maharaj provided feedback. During this period a number of informal performance issues were raised and discussed with Ms Wilson regarding her behaviour, non-compliance with tasks, appearing uninterested in her work and use of her personal cell phone. Ms Wilson “signed off” each record of the meetings with Ms Maharaj.

The four week review

[11] On 17 August 2018 a review meeting was held with Ms Wilson to discuss her work during the four weeks since her return to work. I have viewed the notes of this meeting that were signed by Ms Wilson. Ms Wilson accepted they were accurate. At this meeting Ms Maharaj identified what she considered to be Ms Wilson’s strengths, as well as areas for development.

[12] Ms Maharaj recommended that Ms Wilson continue to work 20 hours per week, 4 hours per day, while she worked on her telephone manner and building confidence in retaining information. She advised she would audit one call each day to check for improvement and Jamie Prasad, a Practice Leader, would randomly audit Ms Wilson’s calls and provide feedback by the end of the following week. At that stage Ms Wilson’s hours of work would be reviewed again.

Performance concerns arise

[13] On 22 August Ms Maharaj and Ms Allen met with Ms Wilson to discuss a telephone call taken by Ms Wilson the previous day. Ms Maharaj and Ms Allen had concerns Ms Wilson had overstepped her boundaries by advising the caller she would be popping over to their home, as well as discussing personal family connections.

[14] During the meeting Ms Allen shared these concerns including that she considered that the comments that were made were unprofessional. She advised that she wanted Ms Wilson to listen to the call and then provide feedback on what she considered she did well, what she could have done better and if there was anything she shouldn’t have done.

[15] As the parties were listening to the call, Ms Wilson asked for the call to stop and advised she wanted a Practice Leader or the PSA present before it went any further. Ms Allen's attempts to locate a Practice Leader were unsuccessful. Ms Wilson then left work without authorisation, and contrary to Ms Allen's express instruction that she must remain at work, and did not return to work until Monday 27 August.

The meeting on 27 August 2018

[16] On 27 August a practice meeting was held with Ms Wilson. The purpose of this meeting was to review the telephone call discussed at the meeting on 22 August and to provide Ms Wilson with feedback on areas of improvement. Ms Wilson accepted the feedback that Mr Prasad provided and it was agreed that a development plan would be put in place to review the support and learning Ms Wilson required.

[17] After the meeting Mr Prasad prepared notes that incorporated the areas of practice improvement discussed at the meeting on 27 August, set out training and coaching that had been provided to Ms Wilson, and identified the development areas discussed at the review meeting on 17 August. The notes concluded by setting out a summary of the training, support and monitoring that was required including a recommendation that Ms Wilson be returned to full time duties on 19 October. This was three weeks after Ms Wilson's return from planned annual leave and was considered to be sufficient time to ascertain if she had improved in the areas identified.

The meeting on 28 August 2018

[18] On 28 August a meeting took place to discuss the areas of practice improvement that had been discussed with Mr Prasad the day before and the notes he had prepared. When it came to the conclusion, and particularly Mr Prasad's recommendations around when Ms Wilson would return to full-time duties, Ms Wilson stated that she wanted to end the meeting. She then said "I feel like a PG is coming on" indicating that she had never had any practice issues whilst working at NCC. She declined an offer to talk to Mr Prasad about his recommendation.

[19] Ms Wilson then left the meeting and returned to her desk. She then informed Ms Maharaj that she was leaving for the day. When Ms Maharaj asked her why, she

responded “because I want to”. She said she was going to the pub to write up a PG letter that Ms Maharaj would receive in the morning.

[20] Later that day Ms Wilson sent Ms Allan an email from her Doctor that said she was unwell and was “unable to work at present”.

[21] On 3 September, while on pre-approved annual leave, Ms Wilson raised a personal grievance. This grievance included a complaint about not being returned to full-time employment.

Ms Wilson returns to full time work

[22] On 1 October Ms Wilson returned to work. She then met with Ms Maharaj and Mr Prasad to discuss the practice issues that she disputed in the unfinished meeting on 28 August. During this meeting Mr Prasad talked about his role and the importance of ensuring that they were adhering to the Ministry’s priorities and ensuring Tamariki were safe. He advised that his main concern from the call audit was around Ms Wilson over stepping boundaries and some lapses in professional manner. Ms Wilson was perceived to have “taken on board” the feedback and comments and she acknowledged there were areas for improvement.

[23] At the end of the conversation it was recommended that Ms Wilson continue to work 4 hours per day that week during which time her calls would be randomly audited and, at the end of the week (5 October), they would review whether Ms Wilson was in a position to commence fulltime hours from the following week. An email to this effect was sent to Ms Wilson. I am satisfied she agreed to the recommendation.

[24] The parties met again on 5 and 8 October. The outcome of those meetings was that Ms Wilson resumed working fulltime duties on 9 October.

[25] On 11 October Ms Wilson withdrew a claim she had made in the Authority relating to the personal grievance raised on 3 September. When withdrawing this claim she advised the Authority that she was “back on full time hours and feeling well supported by our real manager”.

Further behavioural and performance concerns arise

[26] That same day, Ms Wilson took two days' sick leave for a pre-planned medical appointment. On this day she sent a text message to Ms Maharaj that said:

Can you put sick leave on the agenda. If this illness leads to surgery I am covered through HR policy. FYI – minutes for supervision will now be done by myself! It's starting to become a ass covering exercise for you! Will talk to this more next week Monday.”

[27] On 15 October, Ms Wilson sent Ms Maharaj an email saying that she had changed her position since meeting the previous week with Mr Prasad around supervision. Among other things, the email said:

Randomly taking me off the floor - will only be if I have placed a child at risk, any complaints etc otherwise email me notice to keep with my no surprises kaupapa

...

Any escalations to any management about me I would like this written on letterhead A4 before that happens

When you exemplify Maori principles of wellbeing to me - we might develop a better partnership

...

I liked you better as a trainer...When you start treating me with some respect - I will reciprocate. Reflection – when you say to me the old Liz is gone – think about my history and the country your standing in. Will leave this with yourself to take along to Noho Marae so you can gain some new learning.

[28] Ms Maharaj escalated this email, and the earlier text message, to Ms Allen because she considered the content disrespectful and inappropriate. Ms Allen escalated this to Gregory Versalko, the General Manager of NCC, suggesting they meet with Ms Wilson to address her concerns and set some ground rules moving forward.

[29] Later that day Ms Maharaj received feedback from the acting Practice Leader on two recent calls taken by Ms Wilson. Ms Maharaj was concerned by the comments that were made by the Acting Practice Leader that included:

My overall impression from these two calls is that Liz needs to learn to maintain a professional manner on the telephone with all callers. She also needs to be clear about what her role in the Caregiver Team is so that she gives correct information, in an appropriate manner... The calls I listened to both have the potential to damage caregiver/Oranga Tamariki relationships, and I understand this has been a pattern.

[30] Following receipt of this feedback Ms Maharaj contacted Ms Wilson to arrange a time to meet with her and the Acting Practice Leader to provide feedback on the calls. Ms Wilson declined to attend the meeting, demanding that Mr Prasad be the person who provided the feedback to her despite him being away.

[31] On 16 October, Ms Wilson sent another email Ms Maharaj:

You did not consult me first Prithika – Jamie has not been here in the past and we have waited until he returned for cohesive learning and practice. I said this to you yesterday Prithika – now you're making me repeat myself intentionally and causing me stress. I have repeatedly told you I have serious health issues going on – do I really need to say I nearly died this year will I continue to be dismissed by you. Have some respect and compassion. Just stop with your behaviours.

Behavioural concerns are addressed

[32] On 16 October, Ms Allan, Ms Maharaj and Mr Versalko met with Ms Wilson to discuss the messages she had sent to Ms Maharaj and her refusal to follow her instructions to meet and discuss feedback on her calls. A summary of the discussion was emailed to Ms Wilson later that day and I have viewed that. In response to this email Ms Wilson apologised for her behaviour and advised that “you will certainly see a change in my attitude going forward.”

Unauthorised breaks

[33] On 6 December, Ms Wilson was seen to leave the workplace at an unscheduled time. When Ms Maharaj queried where she was going, Ms Wilson replied “up to the moon” and then left the workplace.

[34] Later, when Ms Wilson came back into the office, she emailed Ms Maharaj and Ms Allen advising that she was supporting a colleague of Maori descent in a crisis. In that email, among other things, she said:

You both enjoy your day as you continue to find faults and I am a bit over you both treating me like some sort of a child.

FYI – Pri I told you I had an emergency and would take 10 minutes and you said NO – regardless. As I walked to this person you call out Liz where are you going – this could have waited until I returned. But NO you yell across the floor where am I going. How unprofessional – next time do me a small favour and wait so we could talk about this in supervision the proper process – my comment I was going to the moon was because of your behaviour.

FYI – Running to a PM to do your job – if you cannot do your job let me know and I will find someone who can.

Again thanks for always finding faults and treating me like a child this makes me feel all warm and fuzzy inside.

All this with everything else you have both put me through. Just thanks heaps for causing me ongoing unnecessary stress.

[35] Ms Maharaj said she was shocked by Ms Wilson's email and considered it very disrespectful and unprofessional. I have viewed an email that she sent to Ms Allen that day expressing her concerns about Ms Wilson's behaviour and the impact it was having on the team. She was concerned that Ms Wilson was continuing to refuse to follow her instructions, and making things difficult, despite her doing her best to support and manage her. She asked Ms Allen to follow this up.

[36] Upon receipt of Ms Maharaj's email Ms Allen contacted the Manager of the staff member who Ms Wilson said was in crisis. This Manager spoke to this person who informed her that she just went on a break and there was no crisis or concern.

[37] On 7 December, Ms Wilson emailed Ms Maharaj again. That email said:

Please be advised as the supervisor of this team you may want to do some self-reflection on your behaviours.

Hope your happy with your performance in the time I have been in this team.

FYI – I will be approaching Jamie for real supervision something you know nothing about.

Its people like you that make our workplace toxic – I feel really sad for you.

Remember supporting you in a formal meeting with your supervisor and did nothing but have your back as your support person.

How disappointing you can't reciprocate that support perhaps due to the lack of experience skills knowledge a bit unsure.

You say yesterday you didn't even read my merit three even after requesting I present my merit to new employees in the NCC. I sent you that merit the following day from being asked by you – please know if you want respect you must earn it. This will take some time if you want this from me.

I asked you about merit two – your response you need to stay out of that its nothing to do with you. Please know a part of your role is to support your team members with genuine care and follow through. Something you also know nothing about.

... FYI – Will ask the PL if next year going forward can I do supervision with him – your unsafe and the worst supervisor I have met.

[38] Ms Maharaj was again concerned and escalated this to Ms Allen, advising that she did not deserve to be treated in this manner and found the content of the email to be “very disrespectful and unprofessional”.

Request to work over the 2018/2019 Christmas break

[39] That same week Ms Wilson made a request to work at the NCC over the 2018/2019 Christmas Break. The Ministry generally operates a skeleton staff at the NCC over this period. Ms Allen responded advising her that she would not support her working over the holiday period:

Last week you informed Prithika that you would like to work throughout Christmas and New Year. Given your most recent emails to Prithika, your attitude toward her and not following instructions, I would not support you working over the holiday period. There will be no Practice Managers on the floor during these times and I do not want Prithka to feel in anyway at risk or unsupported.

[40] Ms Wilson responded advising that Ms Allen was placing her at a serious disadvantage and wanted to meet with her and HR. She advised:

If you have practice issues there is a process it's called Performance Improvement Plan and I am unaware if this korero applies to me as no one has told me I am on a PIP.

Perhaps we call the SWRB to raise these practice issues you both have with my performance.

... HR can you write me a formal invite and the purpose for standing me down over Christmas period and not allowing me to work.

Ms Wilson refuses to attend a meeting to discuss her conduct

[41] On 11 December Ms Wilson was invited to a formal meeting by Ms Allen to discuss her concerns about Ms Wilson's professional conduct and behaviour. Ms Wilson stated that she would not attend.

[42] On 13 December, Joanne Patmore, an HR Business Partner, emailed Ms Wilson rescheduling the meeting for 17 or 19 December. Ms Wilson replied on 14 December stating that she would provide a medical certificate for her absence and that she would not be attending any HR meeting on the basis that she was addressing her employment dispute with the Authority. Due to Ms Wilson taking sick leave, the disciplinary meeting was postponed until the New Year.

Ms Wilson takes another unscheduled break

[43] Ms Wilson returned to work on 7 January 2019.

[44] On 8 January Ms Maharaj emailed Ms Allen advising her that Ms Wilson had not adhered to her scheduled break time. Ms Wilson replied stating that Ms Maharaj was harassing her. Mr Versalko intervened and reminded Ms Wilson of the agreement she made in October 2018 that she would adhere to instructions given to her. Mr Versalko expressed to Ms Wilson that her behaviour could not continue and asked for a face-to-face meeting.

The final written warning

[45] On 9 January Mr Versalko invited Ms Wilson to a formal disciplinary meeting to take place on 14 January. This was to discuss the concerns about her professional conduct and behaviour that had arisen prior to Christmas and on 8 January 2019.

[46] On 14 January, Mr Versalko met with Ms Wilson. Ms Patmore attended that meeting via teleconference. I have reviewed the notes of that meeting and Ms Wilson accepted they are correct.

[47] These notes record that Mr Versalko raised the issue of Ms Wilson's disrespect towards Ms Maharaj and Ms Allen and Ms Wilson acknowledged that her behaviour had been bordering on insubordination, and that she had been rude. Ms Wilson promised that her behaviour would improve and there would be no need for any further meetings about her conduct.

[48] The meeting was then adjourned to enable Mr Versalko an opportunity to consider Ms Wilson's feedback. Thereafter the meeting was reconvened and Mr Versalko advised Ms Wilson that he was issuing her with a written warning. Ms Wilson nodded in agreement. A written warning was issued the following day.

Practice Development Plan

[49] On 30 January Mr Prasad and Ms Wilson met to discuss an informal practice development plan that he and Ms Allen had prepared. He also prepared a supervision agreement. The informal development plan, and the supervision agreement, was provided to the Authority and I have reviewed these.

[50] The development plan set out that Mr Prasad would work with Ms Wilson in the following three practice areas:

- a. Acting in a professional manner
- b. Demonstrating role clarity
- c. General practice

[51] In addition, Mr Prasad and Ms Wilson were to complete cultural supervision for an hour and a half on a fortnightly basis for three months and Mr Prasad would also randomly audit Ms Wilson's calls with his findings to be discussed in the supervision session. Ms Wilson said she was happy with the development plan and the proposed supervision.

Supervision commences but no improvement

[52] During February Mr Prasad met with Ms Wilson 3 times. On the second of these occasions he discussed another call with her where she used inappropriate language. This call had been overheard by a number of staff. Ms Maharaj said that during this period she too overheard a number of conversations that she believed were inappropriate and referred these to Ms Allen. Ms Allen said she listened to these calls and was concerned that Ms Wilson was not improving despite being provided with supervision.

The parties attend mediation and discuss a Performance Improvement Plan

[53] On 26 February the parties attended mediation. By agreement they disclosed what occurred during that mediation in terms of discussions regarding a Performance Improvement Plan (PIP).

[54] Ms Wilson and Ms Patmore provided consistent evidence in terms of what was discussed. They agreed that the Ministry advised it wanted to place Ms Wilson on a PIP and set out the reasons why. Ms Wilson's lawyer was not in a position to discuss the PIP, or its terms, during the mediation. It was agreed that, before the PIP was finalised, the Ministry would email him a draft PIP for him to review and discuss with Ms Wilson. It also agreed to set out its expectations of Ms Wilson moving forward.

[55] The next day Ms Allan approached Ms Wilson and asked her if she would like to have input into the PIP. She responded advising that she was happy with the development plan presented to her by Mr Prasad.

[56] On 6 March, the Ministry wrote to Ms Wilson's representative as agreed. This letter:

- a. Attached the proposed PIP together with the Ministry's "Managing Poor Performance Policy". The PIP identified three areas of concern that were similar to those identified in the practice development plan. In addition, amongst other things, it set out the improvement/standard required, actions to be taken, the measurement of performance, the plan period, and review meeting dates.
- b. Addressed its concerns about Ms Wilson's behaviour over the previous seven months and set out the Ministry's expectations that she would conduct herself in a professional manner, be polite and professional to her supervisor and manager and not refuse reasonable requests by her employer.
- c. Concluded by advising:

I trust the information outlined above covers what we discussed and I would appreciate you reviewing these points with Liz. We are hopeful that we will be able to come to agreement around how Liz and the team can move forward.

[57] No response to this letter was received from Ms Wilson's lawyer despite reminders being sent by the Ministry.

Further issues arise – unscheduled leave and breaks

[58] On 5 March, Ms Wilson emailed the NCC leave address to say that she would be leaving at 12 pm that day. No explanation was provided and she declined Ms Allen's request to meet with her.

[59] On 6 March, Ms Maharaj emailed Ms Wilson regarding an unscheduled break that day. Ms Wilson responded that she took the unscheduled break "for my health and wellbeing". The next day Ms Allen emailed Ms Wilson to remind her of the Ministry's expectations around Ms Wilson taking breaks. She advised she would like

to book some time with her and Ms Maharaj to clarify expectations. Correspondence followed where Ms Wilson stated that she would not meet with Ms Allen.

The meeting on 11 March 2019

[60] On 11 March a meeting was held with Ms Wilson to discuss the Ministry's expectations in relation to her leave and taking unscheduled breaks. This meeting was recorded and I have listened to this. The parties also spoke about the need for Ms Wilson to follow instructions and to stop making sarcastic comments to Ms Maharaj. Ms Wilson refused to discuss this later issue, advising that this was a matter that should be discussed with Mr Prasad during their cultural supervision sessions. Ms Allen disagreed. She clarified Ms Wilson's reporting lines with her, stipulating that Ms Maharaj managed her day to day, Ms Allen oversaw the whole team and Mr Prasad provided her with cultural supervision.

The implementation of the PIP

[61] On 25 March, having received no response to the draft PIP that had been sent to Ms Wilson's representative on 6 March, Ms Allen wrote to Ms Wilson. Her letter invited her to a meeting to discuss the implementation of the PIP. Another copy of the draft PIP, and the Ministry's Managing Poor Performance Policy, was attached.

[62] On 2 April a meeting was convened to discuss the implementation of the PIP. I have reviewed a recording of that meeting. During this meeting Ms Wilson did not provide any feedback on the PIP, nor did she engage in any discussion to clarify any questions she may have had. She denied there were any issues with her performance.

[63] On 11 April Ms Allen wrote to Ms Wilson advising that, in the absence of any feedback on the PIP, the plan had been finalised and would commence on 15 April.

[64] On 15 April Ms Wilson advised that she would not enter into the PIP and that she would not meet with anyone regarding the PIP. The next day Ms Allen wrote to Ms Wilson advising her that she was required to engage with the Ministry and that the PIP would be implemented.

[65] On 29 April, Ms Wilson was contacted to arrange the first feedback meeting for the PIP. Ms Wilson replied stating that she was not on a PIP and alleged that the process was fraudulent. She refused to attend scheduled meetings regarding the PIP.

Second and final warning

[66] On 26 March Ms Allen wrote to Ms Wilson inviting her to a disciplinary meeting to discuss her unauthorised breaks on 5 and 6 March and another that had taken place the day before. This letter set out the specific allegations and provided copies of the State Services Commission Standards of Integrity and Conduct, the Code of Conduct, and the Ministry's Disciplinary Process Guidelines.

[67] Ms Wilson attended this meeting on 2 April with her representative where she acknowledged that she had taken unauthorised breaks.

[68] On 8 April Ms Allen wrote to Ms Wilson setting out her preliminary view that a second and final written warning was the appropriate disciplinary outcome in the circumstances. Ms Wilson was invited to a meeting on 11 April to provide feedback on the preliminary view. She did not attend that meeting as she was sick. The meeting was rescheduled to 16 April and again Ms Wilson did not attend. This time as she was on unplanned leave.

[69] On 16 April Ms Allen wrote to Ms Wilson offering her a further opportunity to contact Ms Allen to arrange a meeting to provide her response, or to provide any submissions in writing if she preferred, by 29 April. Ms Wilson did not take up the opportunity to meet with Ms Allen and did not provide any written submissions regarding the preliminary view.

[70] On 29 April Ms Wilson was advised of the decision to issue her with a final written warning and the reasons for that.

Ms Wilson is removed from phone duties

[71] On 8 April Ms Maharaj attempted to schedule a meeting to provide Ms Wilson with some feedback on a call she had reviewed. Ms Wilson was reluctant to attend, advising Ms Maharaj to put the call on the agenda for her to discuss with Mr Prasad at their next supervision meeting. Ms Maharaj responded advising her that as she was "your reporting line manager I monitor the teams' day to day operations and this

includes practice. I need to be able to give you the same feedback. I am happy for Jamie to attend the meeting.” Ms Wilson disregarded this instruction and emailed Mr Prasad, noting in her email “Pri – any concerns about my practice please forward them to Jamie so we can discuss these further in my supervision.”

[72] Ms Allen intervened and told Ms Wilson that she must meet with Ms Maharaj to hear feedback on her calls. Mr Prasad was able to attend.

[73] The meeting with Ms Maharaj, Mr Prasad and Ms Wilson was recorded and I have listened to this. As indicated to the parties during the investigation meeting I found the way in which Ms Wilson spoke to Ms Maharaj to be very inappropriate. She was sarcastic and disrespectful. She refused to engage in a discussion about the call Ms Maharaj had listened to and the meeting was ended.

[74] On 30 April Ms Allen called Ms Wilson and requested an opportunity to meet with her to discuss feedback on her calls and concerns that she had regarding her behaviour. Ms Wilson refused to meet with Ms Allen. Ms Allen advised Ms Wilson by email that until Ms Wilson was prepared to meet to discuss feedback on her calls, Ms Wilson was not to take any further calls.

[75] Ms Wilson has been on sick leave since 30 April 2019.

Issue One: Unjustified disadvantage

[76] 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 employee’s conditions of the employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[77] 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.

[78] 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.

Disadvantage one: Return to work hours

The claim

[79] The Statement of Problem pleads:

The respondents have breached a settlement agreement reached in respect of personal grievances, reached on 20 July 2018, by continuing to disadvantage the applicant.

[80] Ms Wilson advised during the investigation meeting that her claim was for unjustified disadvantage and not breach of the settlement agreement. She said she had suffered a disadvantage to her employment when the Ministry did not return her to full-time duties after one month of returning to her role in July 2018. She said after one month she was medically well enough to resume her full-time duties and therefore she should have been returned to full-time duties.

[81] The Ministry denies Ms Wilson was unjustifiably disadvantaged. It maintains that the agreement was that Ms Wilson would return to work for 20 hours per week. There was no commitment that Ms Wilson would return to a 40-hour week within a specific timeframe thereafter. It submits that it was clear to all parties that Ms Wilson's hours of work were subject to ongoing review. A staged return to work was necessary due to Ms Wilson having a lengthy period of sick leave and the need for her to be retrained.

Analysis

[82] I find, on balance, that Ms Wilson did not suffer a disadvantage to her employment arising from her reduced hours of work following her return to work in July 2018. At material times Ms Wilson agreed to her staged return to full-time duties.

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

- a. There is no dispute that the parties agreed to Ms Wilson working 20 hours per week, 4 hours per day, for a period of at least one month following her return to work i.e. Friday 24 August.
- b. On Tuesday 28 August the parties met. At that time it would have become clear to the Ministry that Ms Wilson was unhappy with continuing to work reduced hours. However, before the Ministry had an opportunity to address this, Ms Wilson went on sick and then pre-planned annual leave.
- c. Ms Wilson returned to work on 1 October. On that day the parties met to discuss, amongst other things, the date she would return to full-time duties. I find, on balance, that Ms Wilson agreed during that meeting that she would remain on part-time duties until the end of that week (i.e. Friday 5 October).
- d. Notes of a meeting conducted on 5 October, which Ms Wilson signed; show she was happy to postpone the review meeting until 13 October at which time the parties would discuss a return to full-time duties.
- e. On 8 October Ms Maharaj emailed Ms Wilson to advise that, following their discussions that day regarding her progress, she recommended that she start working full-time from the following day. Ms Wilson replied expressing her gratitude for “all the awhi and maanaki getting my practice up to standard this is obviously very important to me and the business we do here...thank you for your patience”.
- f. On 11 October 2018 Ms Wilson withdrew a claim she had made in the Authority relating to her hours, advising the Authority that she was “back on full time hours and feeling well supported by our real manager.”

[83] In the foregoing circumstances, Ms Wilson has failed to discharge the onus of proving that she suffered a disadvantage to her employment in terms of her return to work hours.

Disadvantage two: Not working over the 2018/2019 Christmas break

The claim

[84] Ms Wilson made a request to work over the 2018/2019 Christmas period during which time the Ministry operated with a skeleton staff. That request was declined. Ms Wilson claims this decision disadvantaged her. I disagree.

[85] The Collective Agreement, that Ms Wilson was a party to, provides that:²

The timing of taking annual leave will be decided by mutual agreement between the employee and their manager, taking into account work requirements and personal preferences. In the absence of agreement, the Ministry may direct when leave is to be taken. Notwithstanding the foregoing, and as a result of the incorporation of what were previously known as Departmental Days into the annual leave entitlement, the Ministry may require staff to take annual leave between Christmas and New Year even if such leave is in advance.

[86] In the present case, the Ministry exercised its discretion to require Ms Wilson to taken annual leave. I find that decision did not disadvantage Ms Wilson because:

- a. During the investigation I was provided with a medical certificate that showed Ms Wilson was unfit to work from 17 December to 31 December 2018. As she was unwell during this period, she could not have worked even if the Ministry had agreed to her request. It is noteworthy that despite being sick, and having used her sick leave entitlements, the Ministry exercised its discretion to pay her.
- b. Ms Wilson was paid her full wages for the period 1 January 2019 to 6 January 2019. She provided no evidence of any humiliation, loss of dignity or injury to her feelings caused as a result of the Ministry's decision not to permit her to work during this period.

[87] For completeness, even if I had found Ms Wilson was disadvantaged by the Ministry's decision, I would have found that decision justified. I agree with the Ministry that a fair and reasonable employer could have made the decision that it did in the circumstances. The circumstances included that it was operating a skeleton staff, Ms Maharaj was the only supervisor rostered to work the 2018/2019 Christmas period, the relationship issues between Ms Maharaj and Ms Wilson, Ms Wilson's

² Collective Agreement, Clause 6.2.1

refusal to take instructions from Ms Maharaj, and Ms Wilson's refusal to meet to discuss those issues.

Disadvantage three: The written warnings

[88] Ms Wilson alleges that she suffered unjustified disadvantages to her employment as a result of the processes that were followed by the Ministry when issuing her with the written warnings on 15 January 2019 and 29 April 2019. She pleads that the written warnings were issued "without giving me an opportunity to respond to the allegations".

The process

[89] There is no substance to the allegation that the Ministry did not provide Ms Wilson with an opportunity to respond to the allegations relating to either the first or second final warning. The evidence establishes, on balance, that the Ministry met the statutory obligations set out in s 103A (3)(a)-(d) of the Act.

[90] In reaching this view I considered the Ministry's Disciplinary Process Guidelines. These Guidelines provide:

Verbal warning

A verbal warning is generally issued for relatively minor breaches of standards, or for a first minor incident of misconduct. A record of verbal warnings should be kept on the employee's personnel file. The verbal warning should be signed by the employee to record both their receipt and understanding. If the employee refuses to sign the record this should be noted by the manager on the record, dated, and filed.

Written warning

A written warning may be issued:

when the manager considers the conduct to be serious enough to warrant action greater than a verbal warning
where a verbal warning has previously been issued and there is a further incident of the same or similar.

Final written warning

A final written warning may be issued:

following a previous warning in cases where any further incident of misconduct of the same or similar nature will result in the employee's dismissal
without any previous warning (verbal or written) in cases of serious misconduct but where the circumstances do not warrant dismissal.

[91] I am satisfied, in terms of the written warning issued on 15 January 2019, that a fair and reasonable employer could have concluded that the conduct was serious enough to warrant action greater than a verbal warning:

- a. Ms Wilson's failure to follow lawful instructions to remain at work on 6 December 2018, and her failure to adhere to her scheduled break time on 8 January 2019, was conduct falling within the definition of misconduct in the Ministry's Disciplinary Process Guidelines.
- b. The emails that Ms Wilson sent to Ms Maharaj and Ms Allen on 6 and 10 December 2018 were, on balance, breaches of the Ministry's Code of Conduct and the State Services Commission Standards of Conduct and Integrity.
- c. Ms Wilson's conduct was similar to that discussed with her on 16 October 2018.

[92] In terms of the second and final warning issued on 29 April 2019, I am also satisfied the decision made by the Ministry was within the range of responses that a fair and reasonable employer could have made. The conduct that led to this warning (taking unauthorised breaks and failure to follow instructions) was similar to that which Ms Wilson had been spoken to about on 16 October 2018 and that which had led to the first written warning being issued on 15 January 2019.

Disadvantage four: Performance improvement plan

[93] The Statement of Problem pleads that Ms Wilson suffered an unjustified disadvantage due to:

The respondent's actions by its staff in taking disciplinary action against me without following the correct procedure for doing so.

Particulars

On 29 April 2019, the respondent by its employees told me that I had been placed on a performance improvement plan ("PIP") without informing me prior that this was to happen, or to give me an opportunity to respond to alleged performance deficiencies.

[94] The allegations made by Ms Wilson are not upheld.

[95] As a review of the background facts will show, there can be no doubt that the introduction of a PIP was an action that a fair and reasonable employer could have taken in the circumstances. I accept the Ministry had genuine concerns with respect to Ms Wilson's performance in terms of the quality of the calls that she was taking that needed to be addressed formally following the failure of informal processes and her refusal to engage with her supervisor, Ms Maharaj.

[96] The Ministry's policy for managing poor performance provides for both informal and formal processes. The Policy is clear that where performance concerns cannot be resolved informally then a more formal approach can be taken. This is clearly what was done here.

[97] The Ministry took a number of steps to try and informally resolve the performance issues it was having with Ms Wilson. This included meeting with Ms Wilson throughout the last quarter of 2018 and providing her with supervision and feedback to try and improve her performance. When this was unsuccessful it met with her on 30 January 2019 to formulate an informal development plan and supervision agreement. Mr Prasad then met with her three times under the supervision agreement before the parties attended mediation. Mr Prasad said that during this period he continued to have issues with her performance.

[98] It was not until 26 February that the Ministry decided that it needed to take formal steps to manage Ms Wilson's performance. Before drafting the PIP it tried to consult with Ms Wilson at mediation and then in person. When Ms Wilson would not engage the Ministry then prepared a draft PIP that it provided to her lawyer on 6 March 2019 for her feedback. Again she did not engage. The Ministry then provided Ms Wilson with another opportunity to provide feedback on the PIP at the meeting on 2 April 2019. She chose not to do so.

[99] I am satisfied that the Ministry was justified in its decision to implement a Performance Improvement Plan. Ms Wilson has not suffered an unjustified disadvantage to her employment arising from the implementation of the PIP.

[100] As indicated to the parties during the Investigation meeting, I recommend to Ms Wilson that when she returns to work she complies with the PIP. There are clearly issues with her performance that need addressing and a PIP is the appropriate way of addressing these concerns.

Disadvantage five: The Ministry's decision to remove Ms Wilson from phone duties

The claim

[101] Ms Wilson alleges that her phone duties were removed on 30 April 2019 and this has unjustifiably disadvantaged her. The Ministry denies Ms Wilson has suffered an unjustified disadvantage. It maintains that its instruction was lawful and reasonable in light of Ms Wilson's refusal to meet to discuss concerns regarding her phone manner. I agree.

[102] Before removing Ms Wilson from her phone duties the Ministry sought to address its concerns regarding her level of professionalism when on the phone in a number of ways. This included meeting with her and on-going supervision.

[103] On or about 27 April 2019 Ms Allen and Ms Maharaj were made aware of further issues with calls. The Ministry considered that during these calls Ms Wilson had made a number of inappropriate comments about children in care and was disrespectful about other Ministry staff.

[104] Thereafter Ms Allen attempted to meet with Ms Wilson to discuss the calls but she refused to meet. She had also advised by this time that she would not enter into a PIP and would not meet with anyone regarding the PIP. A fair and reasonable employer in those circumstances, faced with an employee who refused to engage with it to address its concerns, could have made the decision to remove her from her phone duties until its concerns had been addressed.

Costs

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

[106] If they are not able to do so, and an Authority determination on costs is needed, the Ministry 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 Ms Wilson 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.

[107] 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.³

Outcome

[108] The overall outcome that I have reached is:

- a. Ms Wilson did not suffer an unjustified disadvantage to her employment.
- b. Costs are reserved

Jenni-Maree Trotman
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].