

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 453
3071393

BETWEEN

LANCE CRUICKSHANK
Applicant

AND

MIYAMOTO INTERNATIONAL
NEW ZEALAND LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: J R Pullar and M P Davis, counsel for the Applicant
D J Kilpatrick, advocate for the Respondent

Investigation Meeting: 4 August 2020

Submissions Received: 18 August and 4 September 2020 from the Applicant
25 August 2020 from the Respondent

Date of Determination: 3 November 2020

DETERMINATION OF THE AUTHORITY

A. The claims are dismissed.

B. Costs are reserved in accordance with the timetable at [82].

Employment relationship problem

[1] Lance Cruickshank worked for Miyamoto International New Zealand Limited from February 2017 until April 2018 as a senior structural drafter. Mr Cruickshank says that Miyamoto constructively dismissed him by committing fundamental breaches of his employment agreement. He says that Miyamoto failed to provide him with a healthy and safe

work environment and it unilaterally varied the terms of his employment by altering his role without consultation. The alleged breaches are said also to give rise to unjustified disadvantage grievances.

[2] Mr Cruickshank seeks reimbursement of lost wages and benefits and compensation of \$30,000.00 for humiliation, loss of dignity and injury to his feelings.

[3] Miyamoto says that Mr Cruickshank was not unjustifiably disadvantaged in his employment and that it sought to address the issues raised by Mr Cruickshank.

[4] Miyamoto also says that Mr Cruickshank did not raise his personal grievance claim of unjustifiable dismissal until 21 August 2019 when it was served with the statement of problem, so that claim is out of time. Alternatively, Miyamoto says that Mr Cruickshank was not unjustifiably dismissed.

[5] Matters were not resolved, despite mediation.

[6] The issues which arise are:

- (a) Did Miyamoto vary Mr Cruickshank's role?
- (b) If so, was Mr Cruickshank unjustifiably disadvantaged?
- (c) Did Miyamoto fail to provide Mr Cruickshank with a healthy and safe work environment?
- (d) If so, was Mr Cruickshank unjustifiably disadvantaged?
- (e) Did Mr Cruickshank raise a personal grievance of unjustifiable dismissal within 90 days?
- (f) If so, was Mr Cruickshank constructively dismissed by Miyamoto?
- (g) If so, was the dismissal justifiable?
- (h) If Mr Cruickshank has personal grievances, what are the appropriate remedies?

[7] I first set out greater detail and make some findings about the circumstances in which the grievance claims arise to give context for determining these issues.

Context in which the claims arise

[8] Miyamoto provides engineering and construction consultancy services. When Mr Cruickshank started work, Miyamoto had been operating in New Zealand for about 5 years with offices in Christchurch and Wellington. The majority of employees were located in Christchurch. There were several other drafters. Mr Cruickshank was employed to lead and develop Miyamoto's drafting team, services and processes, following the resignation of the previous drafting manager. The team had expanded to include seven FTE drafters and scanners by the time Mr Cruickshank's employment ended.

[9] The letter of offer of employment and signed employment agreement refer to the position as "Senior Structural Drafter". The job description attached to the agreement describes the position as "Senior Drafter". Mr Cruickshank was to report to the company's directors and/or Principal Engineers. Mr Cruickshank's evidence is that he was introduced and treated as the drafting manager, although his email signature was "Senior Structural Drafter". Throughout, there was no agreed change to his position or its function, which was to lead and manage the drafting team and develop the business in relation to drafting offerings.

[10] David Weir and Nick Regos are company directors and shareholders. They work directly in the company on operational matters as well as in their senior managerial and governance responsibilities. Erica Dryden was the company human resource advisor, providing these services under contract. Ms Dryden principally provided advice to Mr Weir¹ who mostly handled the company's HR functions. Ms Dryden also sometimes provided advice directly to company managers. Ms Dryden usually did not have direct contact with employees.

[11] Mr Weir resides in Wellington and Mr Regos in Christchurch. They were the senior presence in the offices in Wellington and Christchurch. Mr Weir generally worked in the Christchurch office for two days per week on average and would tend to any Christchurch HR requirements then. An administration manager based in the Christchurch office provided administration support. Matt Harris, a certified professional engineer, provided structural

¹ Ms Dryden and Mr Weir are married. Ms Dryden used her maiden name for work.

engineering expertise and management and was responsible for project resourcing and delivery. Mr Harris' role encompassed responsibility for the drafting team so he was Mr Cruickshank's direct manager.

[12] Mr Cruickshank's evidence is that leadership roles and responsibilities were "fluid", as the company was growing. He says that it was confusing and difficult to know who to report to when he had a complaint. The contemporaneous material does not support Mr Cruickshank's evidence of confusion or show him having any difficulty over who should be sent any of his communications. I do not accept this part of Mr Cruickshank's evidence.

[13] Mr Cruickshank says that he began experiencing problems with some of the engineering staff, particularly Kane Miller. He says he first raised these and complaints about other employees with Mr Harris. Mr Harris was assigned as his mentor to work through the issues Mr Cruickshank had with others. Mr Cruickshank is critical of Mr Harris' approach to providing mentoring assistance. Mr Harris left Miyamoto in about October 2017. It is not necessary at present to make any findings about whether Miyamoto met its obligations to Mr Cruickshank through this mentoring.

[14] In late November 2017, Miyamoto lost a bid for a commercial project in Christchurch. There is an email exchange initiated by Mr Miller at 11.10am on 27 November 2017. Mr Miller expressed the view that both engineering fees and drafting fees would need to come down by about half if Miyamoto was to be competitive with other tenderers. Mr Cruickshank was not included in the original email. Mr Regos noticed the omission. At 5.06pm on 28 November he forwarded the chain to Mr Cruickshank, referred to their discussion, apologised and suggested that he might have been responsible for Mr Cruickshank's exclusion initially when discussing the issue with Mr Miller. The following morning Mr Cruickshank emailed Mr Miller asking why he had not been a recipient initially. Mr Miller apologised saying that he must have accidentally not included Mr Cruickshank in the original email. Mr Cruickshank then replied "Kane – you are not being honest...I would appreciate you demonstrating your honesty with me in the future Kane and not just saying that you are".

[15] Mr Miller forwarded Mr Cruickshank's reply to Mr Regos, saying it was unacceptable and Mr Cruickshank needed to be disciplined for sending such comments to senior staff. Mr Regos met separately with Mr Cruickshank and Mr Miller and jointly with them.

[16] On 6 December 2017, Miyamoto's geotechnical engineering manager (Andreas Giannakogiorgos) transferred a call from a client who had an issue to one of Mr Cruickshank's team members. Learning of this, Mr Cruickshank spoke to Mr Giannakogiorgos and sent him an email setting out that conversation, which he copied to Mr Regos. Mr Cruickshank took issue with Mr Giannakogiorgos transferring the client issue to his team member when that person was fully committed to meeting other work priorities. On reading Mr Cruickshank's email, Mr Giannakogiorgos loudly announced to others in the open plan work area that Mr Cruickshank was not to work with him in the future. That prompted Mr Cruickshank to record in another email to Mr Regos what Mr Giannakogiorgos had just announced, saying he believed it was done to embarrass him. Mr Cruickshank asked Mr Regos to intervene. Mr Giannakogiorgos then sent an email to Mr Cruickshank, Mr Regos and Mr Weir which reads:

And I do repeat that loud and clear !!!
I will deal with Lance only if it is necessary for the job; nothing more.

[17] Mr Cruickshank says that Mr Regos and Mr Weir did not investigate or attempt to address the relationship problem between him and Mr Giannakogiorgos. He says that he did not attend the Miyamoto Christmas function because of embarrassment and not wanting to cause a scene, given the "unresolved aggression" towards him. Miyamoto by not addressing this issue with Mr Giannakogiorgos told other employees that the conduct was acceptable. I will return to these points.

[18] There was a phone discussion between Mr Cruickshank and Ms Dryden on 18 December 2017, which included discussion about Mr Cruickshank using a behaviour assessment tool called "DISC". Following the discussion Mr Cruickshank sent Ms Dryden an email. He says that Ms Dryden stated that "something has to change for [him] to stay with the company (or words to that effect)". He also mentions the complaint by Mr Miller, which he was not pursuing, and the more recent conflict between himself and Mr Giannakogiorgos which had not been "addressed properly". Ms Dryden says she was concerned about the "something has to change" comment attributed to her and "shared this email with David [Weir] for information purposes only". Ms Dryden promptly emailed Mr Cruickshank to clarify that she had not said or intended that "something has to change" for him to stay at Miyamoto. Her conversation had been about "what could be done to support you".

Mr Cruickshank replied the following day with thanks for “taking the time to clear up the misunderstanding”.

[19] Mr Weir, having seen Mr Cruickshank’s first email to Ms Dryden, left messages for him to call back. Mr Cruickshank responded to the first message, but had to leave a message himself. Mr Weir then sent an email seeking confirmation that Mr Cruickshank was claiming that Ms Dryden had threatened the termination of his employment if he did not undertake the DISC analysis. On 19 December there was a conversation between Mr Weir and Mr Cruickshank. Mr Weir says that Mr Cruickshank confirmed that he had misunderstood his conversation with Ms Dryden. Mr Weir then sent Mr Cruickshank an email to that effect.

[20] There is no reason to doubt the evidence of Mr Weir and Ms Dryden to the effect that she is an experienced and reputable HR professional. I find that Ms Dryden would recognise that it would be improper to threaten Mr Cruickshank’s employment. It is improbable that a person in her situation would have done so. Her email promptly after receipt of Mr Cruickshank’s email reads as a genuine attempt to correct what she accepted had been his misunderstanding of her comments. I do not accept Mr Cruickshank’s evidence that Ms Dryden told him that something had to change if he was to stay at Miyamoto. I prefer Ms Dryden’s evidence of the exchange.

[21] In evidence, Mr Cruickshank says that Mr Weir became very upset and aggressive and “bullied” him into saying that he must have misheard what Ms Dryden had said to him. Mr Cruickshank attributes Mr Weir’s alleged reaction in large part to Ms Dryden being his wife. I do not accept Mr Cruickshank’s evidence. I prefer Ms Dryden’s evidence as explained above. That is why Mr Cruickshank acknowledged to Ms Dryden and Mr Weir that his first email resulted from his misunderstanding.

[22] On 18 January 2018 there was an incident involving Mr Cruickshank and an engineer (Joey Cheng). Mr Cruickshank says that he took Mr Cheng aside to tell him privately that his communications with the drafting team members were not acceptable. Mr Cheng then sent an email to a number of staff setting out his account of the exchange. I need not describe the substantive issues, but Mr Cheng’s email characterises Mr Cruickshank’s approach as “very condescending and patronizing”. Mr Weir promptly responded to Mr Cheng and Mr Cruickshank, which he copied to the other recipients of Mr Cheng’s email, asking that any issues be directed to Mr Weir and Mr Regos “in the strictest confidence” rather than by an

ongoing exchange of emails. Mr Weir arranged a meeting with Mr Cruickshank for 24 January 2018. They were both in Christchurch while Ms Dryden attended by phone. Ms Dryden made notes of the meeting. I will return later to what happened in this call.

[23] Mr Cruickshank's evidence is that there was a meeting on 27 January 2018 between himself, Mr Regos and Mr Miller to discuss the problems which still existed between Mr Cruickshank and Mr Miller. 27 January 2018 fell on a Saturday. Mr Cruickshank in his 18 December 2017 email to Ms Dryden said that there had been a meeting between himself, Mr Regos and Mr Miller and that he was not pursuing the Kane Miller matter further. Given that, it is unlikely that there was a meeting on 27 January 2018 to pursue it. Mr Cruickshank is probably mistaken about the date.

[24] Mr Cruickshank sent Mr Weir and Mr Regos an email dated 19 February 2018. The email refers to a conversation on 27 January. In his 26 February response Mr Weir also attributed the conversation to 27 January. Both emails refer to exchanges which Ms Dryden notes as having occurred on 24 January. Although nothing turns on the point, it is likely that both Mr Cruickshank and Mr Weir were referring to their 24 January conversation.

[25] Mr Cruickshank's 19 February email covers several matters, which I summarise as follows. Mr Cruickshank says that issues with Mr Miller remained unresolved creating a negative attitude in the office and isolating him. He says that Mr Miller's recent promotion magnified the negative effects. Mr Cruickshank says that nothing had been done in response to his complaint about Mr Giannakogiorgos. Mr Cruickshank says that Mr Cheng undermined and attacked him, referring to the 18 January email Mr Cheng sent to a number of people. Mr Cruickshank says that staff felt empowered to attack colleagues publicly, causing him stress and humiliation. He says he feared that the lack of response made his employment with Miyamoto "untenable".

[26] Mr Weir acknowledged the email promptly and then responded on 26 February. Mr Weir says that matters had been discussed at the earlier meeting. His view was that:

While... Joey, Kane and Andreas may have some accountability ...I have gathered sufficient information to believe the common factor in these conflicts is your inability to interact effectively with other employees. This is a common pattern and extends beyond just these three incidents.

[27] In the email Mr Weir refers to the exchanges about a DISC analysis. He says Mr Cheng had been spoken to about the complaint but it would be taken no further given his resignation. Mr Weir says that his notes indicated that Mr Cruickshank had agreed to speak with Mr Thelan (another manager) for feedback and advice about his interactions with Mr Miller and Mr Giannakogiorgos. Mr Weir was waiting for Mr Cruickshank to report progress from this and whether he would take up the DISC analysis. The email advises that there would be a meeting the following day to discuss the new organisation structure with Mr Cruickshank. He asked Mr Cruickshank not to continue email communication about the foregoing matters but to discuss them at the meeting if necessary.

[28] Mr Cruickshank says that the meeting on 27 February was for the purpose of persuading him to relocate to Masterton. He says he was pressured for a response immediately without Miyamoto providing specifics about what his role would be. He says that he left the meeting but soon after Mr Regos pressured him to return, where Mr Weir insisted on a response to the relocation offer. Mr Cruickshank says he was so stressed about the situation that he went home ill. There is no independent medical evidence to support this. I return to the events of 27 February below.

[29] Mr Cruickshank says that Miyamoto altered his role without consultation. He refers to the appointment of Mr Landells on about 23 January 2018 and the requirement that he report to him. An “example” of his role being “phased out” is an email exchange in early March about interviewing for a Wellington/Auckland drafting position. He says that an appointment outside of Christchurch would undermine his ability to lead and manage the drafting team based in Christchurch. However, Mr Weir says that Miyamoto intended to recruit to appoint to a Christchurch vacancy. In evidence he explains that the email header “Drafter Wellington/Auckland” originated with a recruitment agency. There is no reason to doubt Mr Weir’s evidence.² I find that Mr Cruickshank wrongly took from the email header that Miyamoto had decided to appoint outside Christchurch. The “example” mentioned by Mr Cruickshank does not support his claim. I deal with the alteration of Mr Cruickshank’s role below.

² The recruitment agency email of 26 February 2018 mentions Christchurch as an option for the potential candidate. A reader of the txt should have seen that.

[30] On 8 March 2018 Mr Cruickshank's lawyer contacted Mr Weir to say that Mr Cruickshank would not be attending work that day and a medical certificate would be provided shortly. Mr Cruickshank saw a doctor on 9 March and was certified as medically unfit for work from then and should be fit to return to work on Monday 26 March. Later on 23 March Mr Cruickshank was certified as medically unfit from 26 March to Monday 16 April 2018.³ Miyamoto instructed counsel. Exchanges between counsel included arrangements for mediation. In an email on 22 March counsel for Mr Cruickshank listed "Issues for Mediation". Included were personal grievance claims arising from unaddressed complaints raised with Miyamoto about the conduct of co-workers and a restructure of Mr Cruickshank's position without consultation. The email refers to an earlier discussion between counsel concerning the issues.

[31] Other correspondence need not be set out but on 13 April 2018 counsel wrote advising that Mr Cruickshank considered the employment had ended due to a fundamental breach of the terms of his employment. The letter refers to counsels' discussion on 8 March concerning Miyamoto's claimed failure to provide a safe and healthy workplace for Mr Cruickshank. It is claimed that Miyamoto did not properly address the issues raised by Mr Cruickshank, as canvassed in his 19 February email. By not addressing the issues in a meaningful way, Miyamoto rendered the working relationship untenable causing Mr Cruickshank to lose all trust and confidence in his employer. Mr Cruickshank claimed lost wages, compensation and costs.

[32] Mr Cruickshank commenced action in the Authority in relation to his personal grievance claims on 16 August 2019. Miyamoto says that Mr Cruickshank's unjustified dismissal grievance was not raised with it before then. It is convenient first to consider Mr Cruickshank's other grievance claims as they were raised within time and predate the termination of the employment.

Did Miyamoto vary Mr Cruickshank's role?

[33] Mr Landells started about 23 January 2018.

[34] There was an email exchange involving Mr Cruickshank, Mr Landells, Mr Weir and Mr Regos under the subject line "Drafting TL Role and Work Location Preference" between

³ The certificate says "March" but in context it must have been "April".

28 February and 5 March 2018. The first email by Mr Landells refers to a revised organisation structure being prepared and discussions about it on 26 February and at earlier meetings. Mr Landells then refers to the attempted discussion with Mr Cruickshank on 27 February as an “informal discussion around your role in relation to the revised organisation structure”. Mr Landells says it was cut short as Mr Cruickshank wanted to consider his options. Mr Landells lists the two options. One option was that Mr Cruickshank relocates to Masterton or the lower North Island. The second option, if Mr Cruickshank did not relocate, would involve a change in reporting lines to Mr Landells as the Executive Manager responsible for drafting. Mr Landells understood from a brief discussion on 28 February that Mr Cruickshank preferred to stay in Christchurch. He asked for Mr Cruickshank’s availability to set up a meeting to discuss the matter.

[35] In his response, Mr Cruickshank explains why he did not continue with the meeting on 27 February. He confirms he would remain in Christchurch as “Drafting Manager” and suggests meeting “early next week”.

[36] Mr Weir was copied into these emails and on 2 March responds to points made by Mr Cruickshank about the 27 February exchange. He says that the purpose of the meeting had been foreshadowed at the 26 February team meeting. Mr Weir defends copying Mr Cruickshank’s 19 February email to the executive manager group. The discussion about Mr Cruickshank relocating to Masterton had been in response to his earlier request to relocate. Mr Weir refers to the email exchange with Mr Cruickshank and says that he will send a meeting invite to discuss those matters which should not be the subject of further emails. He concludes by confirming Mr Cruickshank’s wish to stay as Team Leader for Drafting with his new reporting line to Mr Landells as Executive Manager for the Drafting Team.

[37] The submission is that the suggestion in February 2018 that Mr Cruickshank relocates to Masterton reinforces his view that the hiring of Mr Landells was more significant than just as a replacement for Mr Harris. The argument is that Mr Landells was hired to replace Mr Cruickshank, effecting a unilateral variation of Mr Cruickshank’s employment agreement which was unlawful.

[38] I do not accept these submissions. Mr Landells is a professionally qualified engineer. It would make little sense to recruit a person of his professional qualifications to fill

Mr Cruickshank's position, whether described as "Senior Structural Drafter", "Senior Drafter", "Drafting Manager" or "Drafting & 3D Scanning Team Leader".⁴

[39] Mr Landells was appointed as Executive Manager, covering some of Mr Harris' responsibilities. The position involved direct management of structural engineers and oversight of drafters with Mr Cruickshank continuing as the drafting and scanning Team Leader, as shown in an organisational structure chart. A July 2017 reporting chart shows Mr Cruickshank as "Drafting Manager" of five staff reporting to Mr Harris at an operational level. The later chart shows Mr Cruickshank as Team Leader of 7 staff reporting to Mr Landells at an operational level. Mr Cruickshank's agreed position description and terms of employment did not change because the July 2017 chart showed him as "Drafting Manager". Equally, his agreed position description and terms of employment did not change (or need to change) because a later chart described him as "Drafting & 3D Scanning TL". Mr Cruickshank's managerial responsibilities set by his position description and terms of employment were undisturbed by the appointment of Mr Landells or the MINZ Operation Structure chart.

[40] The evidence does not establish that Mr Cruickshank was slowly excluded from any drafting and strategic planning decisions previously within his position description. Mr Cruickshank was wrong to assert that a drafter was being appointed outside of Christchurch. Mr Weir promptly clarified this in a 2 March 2018 email. Mr Cruickshank lost no control over hiring decisions for the drafting team.

[41] I accept Mr Weir's evidence that operationally Mr Cruickshank would have reported to Mr Landells on a daily basis while still reporting to the directors and/or principal engineers.

[42] The possibility of relocation was raised in February 2018 but was not the result of Mr Landells' appointment. Miyamoto presented it as an option, given issues between Mr Cruickshank and others he worked with in the Christchurch office, referred to as unresolved by Mr Cruickshank in his 19 February email. As he was entitled to do, Mr Cruickshank declined the relocation option.

⁴ The descriptions from Mr Cruickshank's letter of offer and email signature title, job description position, July 2017 reporting structure chart and the 2018 MINZ Operation Structure respectively.

[43] I find that Miyamoto did not vary Mr Cruickshank's employment agreement. Mr Cruickshank was not disadvantaged by Mr Landells' appointment. No personal grievance arises from Mr Landells' appointment.

Did Miyamoto fail to provide Mr Cruickshank with a healthy and safe work environment?

[44] The claimed failure arises from incidents with Mr Miller, Mr Giannakogiorgos and Mr Cheng.

[45] Regarding the November incident with Mr Miller, Mr Cruickshank accused Mr Miller of being dishonest when he explained Mr Cruickshank's omission from the email chain started by Mr Miller was by oversight. Mr Cruickshank justifies his view by reference to a separate exchange between him and Mr Miller with Mr Miller not taking the opportunity of mentioning the email chain. Mr Cruickshank says that Miyamoto failed to take steps to address this and earlier concerns expressed by Mr Cruickshank that Mr Miller had underestimated or underbid drafting costs and time. I am referred to monthly governance meeting reports regarding these earlier issues.

[46] The November incident resulted in Mr Miller's complaint that Mr Cruickshank accused him of dishonesty. I find that Mr Regos spoke with both Mr Cruickshank and Mr Miller about the email exchange and the matter went no further.

[47] While Mr Cruickshank rejected the explanation as untruthful, the circumstances did not support his view. Mr Miller did not attempt to conceal the exchange. It was circulated openly and he expected it to be a topic of discussion amongst Christchurch employees. Mr Miller's email reads as reflective rather than critical about Miyamoto's unsuccessful bid based on price. He did not attribute blame to the drafting costs but mentioned both engineering and drafting costs as unfavourable compared to competitor costs.

[48] Mr Cruickshank's evidence is that before he became aware of the email exchange he spoke to Mr Miller, who attributed the failed bid to high drafting costs but did not mention his email. Mr Miller in his explanation email states "I didn't say drafting was the only area we need to look at optimizing". Mr Miller did not give evidence, but that assertion is consistent with his initial email which started the exchange. I regard the assertion as more probably

correct than Mr Cruickshank's evidence. While there is no reason to doubt Mr Cruickshank's evidence that Mr Miller did not refer to the email chain when they spoke, that does not mean that Mr Miller's explanation was untruthful.

[49] The November incident reduces to Mr Cruickshank's unsupported accusation of dishonesty in response to Mr Miller's apology and explanation. Mr Regos had spoken to them both. By 18 December Mr Cruickshank told Ms Dryden "I am not pursuing the matter further". Mr Cruickshank's later assertion that the matter remained unresolved does not mean that Miyamoto failed to act. I find there was no breach of duty owed by Miyamoto to Mr Cruickshank arising from the November matter between him and Mr Miller.

[50] Mr Cruickshank's allegation of breach of duty also rests on earlier exchanges about underbidding on drafting costs. There are references to issues in Mr Cruickshank's monthly meeting drafting reports and an email exchange regarding a particular project. I do not accept that the references in the reports and the emails were complaints by Mr Cruickshank about Mr Miller's conduct towards him, creating a duty on Miyamoto to intervene. The references concern operational matters, not conduct or attitude complaints. Mr Cruickshank in his evidence refers to Mr Miller (and others) displaying a poor attitude to him and his drafting team. However, there is no independent evidence to support the contentions. I do not accept Mr Cruickshank's evidence that there was some on-going "poor attitude" by Mr Miller towards Mr Cruickshank or the drafting team for which he was responsible, such as to create an obligation on Miyamoto to investigate any concerns.

[51] Miyamoto provided some mentoring support⁵ for Mr Cruickshank. I accept that Mr Cruickshank now regards that support as ineffectual and insufficient to resolve his concerns. It is unnecessary to canvass the details to the extent produced in evidence. Mr Regos in his evidence said that Mr Cruickshank generally disregarded his advice and recommendations, often acting to his and the company's detriment, further distancing himself from others and creating further negativity and resentment. I find this evidence is probably correct as a broad summary of Mr Cruickshank's engagement with the mentoring support provided.

⁵ For example, in his draft response to Mr Cheng's email, Mr Cruickshank refers to using mentoring support to resolve a matter with Mr Cheng.

[52] The second incident relied on by Mr Cruickshank concerns the incident with Mr Giannakogiorgos.

[53] Mr Giannakogiorgos did not give evidence. I accept that Mr Cruickshank conducted himself reasonably when expressing his disagreement with Mr Giannakogiorgos about transferring the call to one of Mr Cruickshank's drafting staff members. Mr Cruickshank says he then documented his conversation in an email because he "did not feel comfortable confronting Andreas in person because he is very loud and has a combative personality". However, Mr Cruickshank "confronted" Mr Giannakogiorgos before the email. I find that the purpose of the email was not because Mr Cruickshank did not feel "comfortable confronting Andreas". Its purpose was to reinforce Mr Cruickshank's views by making them known to Mr Regos and Mr Thelan.

[54] I accept that Mr Giannakogiorgos responded by loudly asserting that Mr Cruickshank was not to work with him in the future, attributing that to Mr Cruickshank. Mr Cruickshank also reported this to Mr Regos by email, asking for his assistance as Mr Giannakogiorgos would not book a meeting room to discuss it. That email prompted an email from Mr Giannakogiorgos to Mr Cruickshank, Mr Regos and Mr Weir. Mr Giannakogiorgos emphatically repeated that he would only deal with Mr Cruickshank if it was necessary for the job, nothing more.

[55] Mr Cruickshank says that he felt very isolated from the rest of the team, given Mr Giannakogiorgos' seniority. He says that the intention was to embarrass him and that it would be "impossible" for him to work as "Drafting Manager" if Mr Giannakogiorgos would not work with him.⁶ Mr Cruickshank says that Mr Regos and Mr Weir did nothing, leaving him in "an impossible situation", in effect affirming Mr Giannakogiorgos' conduct and leaving him wondering where the "next attack" would come from.

[56] Mr Weir's evidence, which I accept, is that Mr Cruickshank was upset and left work for the day. He says he and Mr Regos tried to contact Mr Cruickshank, but he would not communicate effectively to discuss the matter. Mr Regos says that he met with Mr Giannakogiorgos that day or the following day and told Mr Giannakogiorgos that the conduct was unacceptable. I accept Mr Weir's and Mr Regos' evidence.

⁶ Mr Giannakogiorgos said he would only work with Mr Cruickshank as necessary for the job.

[57] Mr Weir's evidence is that Miyamoto could not investigate the matter because Mr Giannakogiorgos went on extended leave shortly after the incident. The submission is that Mr Weir's evidence is not credible because Mr Regos in his meeting with Mr Giannakogiorgos had fully investigated the matter. No email was sent to staff advising that Mr Giannakogiorgos' conduct was unacceptable.

[58] Mr Cruickshank's evidence is that he was in an "impossible situation" and "left wondering" where the next "personal attack" would come from. However, in his 18 December email Mr Cruickshank said to Ms Dryden that Mr Regos had told him that he did not intend to investigate the incident "at this time" as Mr Giannakogiorgos was overseas until late January. Mr Cruickshank knew that Mr Regos was hopeful that a new office manager in the New Year would be able to assist dealing with "future personal conflict". Mr Cruickshank also knew that Miyamoto thought that DISC training would assist him with his workplace relationships, and was waiting for his response to that offer.

[59] I do not accept the submission that Mr Weir's evidence about the reason for not investigating the matter is not credible. The reason was given to and accepted by Mr Cruickshank in December. What had happened was sufficiently apparent but not why it happened, what might be the consequences for Mr Giannakogiorgos and what steps might be taken to prevent its recurrence. Investigation was required and Mr Giannakogiorgos' absence was a genuine reason for the delay.

[60] As explained below, I find that the incident with Mr Giannakogiorgos was discussed during the 24 January meeting between Mr Weir, Mr Cruickshank and Ms Dryden. It was then agreed that Mr Cruickshank would seek guidance and take up the matter directly with Mr Giannakogiorgos. Given that, Mr Cruickshank's evidence that he had been left in an "impossible situation", "left wondering" where the next "personal attack" would come from was not caused by a failure by Miyamoto to provide him with a healthy and safe workplace.

[61] The third incident relied on by Mr Cruickshank is the January 2018 incident with Mr Cheng. Mr Cheng sent the email to Mr Cruickshank detailing his interaction that day with Mr Cruickshank. It is not necessary to canvass the substance but Mr Cheng summarised Mr Cruickshank's approach as "condescending and confrontational". Mr Cheng sent his email to a number of staff, including Mr Weir and Mr Regos. Properly, Mr Weir promptly instructed no further dialogue by email, except with him or Mr Regos "in the strictest

confidence” while they dealt with the matter. Mr Weir gave evidence, which I accept, about speaking to Mr Cheng.

[62] There is a draft email by Mr Cruickshank in evidence but I accept it was never sent to Miyamoto. It makes various criticisms of Mr Cheng, but does not directly answer the complaint about Mr Cruickshank’s conduct. I am told that Mr Cheng formalised a complaint about Mr Cruickshank’s conduct.

[63] Mr Cheng resigned within a day or two of his email and finished work at the end of February to travel to Europe. Given this, I find that Miyamoto had no obligation to Mr Cruickshank to take steps with Mr Cheng arising from the circulation of his email.

[64] However, Mr Weir arranged the meeting with Mr Cruickshank to review support for him with his interactions with other staff. His email refers to the need to avoid further episodes such as Mr Cheng out of “frustration” taking matters into his own hands. The meeting was on 24 January 2018. I now turn to summarising it, based on Ms Dryden’s notes.

[65] There was mention of the incidents with Mr Cheng, Mr Miller and Mr Giannakogiorgos. The Mr Giannakogiorgos matter had been deferred while he was on leave over Christmas. Mr Weir assured Mr Cruickshank that it would be investigated, but he queried why staff communications with Mr Cruickshank resulted in confrontation. Later Mr Weir expressed the view that an investigation would probably not assist to establish a better relationship. He had earlier asked how an investigation and proving others were wrong would help Mr Cruickshank to reconnect. Mr Weir asked Mr Cruickshank about the DISC training and what he would do to change his communications. Mr Weir confirmed the results would only be accessible to him, Mr Regos and Ms Dryden. Mr Weir reinforced a positive approach to communication rather than being defensive, as a way of bridge building. It was agreed that Mr Cruickshank would seek guidance from another manager with whom he had a good relationship about resolving the relationship problem with Mr Giannakogiorgos. If it remained unresolved Mr Cruickshank would revert to Mr Weir, Mr Regos and Ms Dryden. The meeting ended with Mr Cruickshank saying he wanted an investigation into an issue with Mr Miller over a project which dated back to mid-2017. Miyamoto did not undertake to do that.

[66] I prefer Ms Dryden's notes and her evidence, to the extent there is any inconsistency with Mr Cruickshank's evidence about the meeting. I need only touch on several points. Mr Cruickshank says that it felt like the entire meeting was an opportunity for Mr Weir to blame him for the issues. Rather, I find that Mr Weir focussed on what might help Mr Cruickshank achieve a better relationship with other staff. Mr Cruickshank says that Miyamoto was insistent about the DISC analysis. Rather, I find that Mr Weir encouraged its use and answered the confidentiality concerns raised by Mr Cruickshank. Mr Cruickshank says he told Mr Weir he would speak to Mr Giannakogiorgos out of frustration and to bring the meeting to an end. Rather, I accept Ms Dryden's evidence that the meeting seemed to take a positive turn with the agreement that Mr Cruickshank would seek guidance and take up the matter directly with Mr Giannakogiorgos.

[67] Mr Cruickshank says he sent the 19 February 2018 email because it had been 3 months without Miyamoto taking steps to resolve his complaints. I do not accept that accurately portrays matters. Mr Weir in his response on 26 February 2018 stated that the common factor was Mr Cruickshank's inability to interact effectively with other employees. That was why they offered the DISC analysis. Mr Weir said that the matter with Mr Cheng was at an end, given the resignation. The January meeting had ended with Mr Cruickshank to seek advice from another manager with whom there was a good relationship. Reasonably, Mr Weir expressed the view that it was for Mr Cruickshank rather than Miyamoto to take any further steps. Meeting arrangements for a discussion about Miyamoto's organisation structure were advised. Mr Cruickshank was asked to discuss any issues then or directly with Mr Weir, Mr Regos or one of the Executive Managers, rather than by email.

[68] I do not accept the submission that inaction by Miyamoto created a culture where staff felt empowered to publicly attack other staff members. Mr Cruickshank did not agree with Mr Weir's assessment that his inability to interact effectively with others was the common factor. However, I am satisfied that Miyamoto sufficiently met its obligation to investigate the incidents referred to by Mr Cruickshank. Mr Weir offered to meet and discuss matters further, but Mr Cruickshank did not take up the invitation.

[69] An employer is not a guarantor of an employee's health and safety at work. The obligation on Miyamoto was to take reasonable steps to maintain a safe workplace. A breach of this duty can give rise to personal grievances such as unjustified dismissal or unjustified

disadvantage.⁷ In this case I find that Miyamoto did not breach its obligations to Mr Cruickshank in its response to the issues with Mr Miller, Mr Giannakogiorgos and Mr Cheng.

[70] Mr Cruickshank's employment was not disadvantageously affected by actions or omissions by Miyamoto.

Did Mr Cruickshank raise a personal grievance of unjustifiable dismissal within 90 days?

[71] There is a statutory requirement for an employee who wishes to raise a personal grievance, to raise it with their employer within 90 days beginning with the day the action giving rise to the grievance claim occurred or came to their notice.

[72] No formality is required to properly raise a grievance. It is sufficient if the nature of an employee's complaint falls within the statutory definition of a grievance and the employee's communications conveyed the substance of that complaint, allowing the employer to respond to it on its merits.⁸

[73] Even considered on its own, the letter of 13 April 2018 was sufficient to raise a personal grievance concerning the end of the employment relationship due to "a fundamental breach" in relation to a "failure to provide a healthy and safe workplace" due to "Miyamoto's... ongoing failure to properly address complaints". Remedies are sought. The letter was not explicit as to the type of grievance being raised, but that is not necessary to satisfy s 114(2) of the Act.

[74] In the context of other communications by and for Mr Cruickshank beforehand, Miyamoto was well able to address Mr Cruickshank's concerns.

[75] Mr Cruickshank's claims in April 2018 and earlier were in substance claims within the definitions in s 103(1)(a) and s 103(1)(b) respectively. I find that Mr Cruickshank raised his claim of unjustified dismissal within time.

⁷ *FGH v RST* [2018] NZEmpC 60.

⁸ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

Was Mr Cruickshank constructively dismissed by Miyamoto?

[76] The letter of 13 April 2018 conveyed Mr Cruickshank's view that his employment had ended, based on Miyamoto's breach of the terms of his employment.

[77] A dismissal is the termination of the employment at the initiative of the employer. An employer's breach of duty that causes the employee to resign can amount to a constructive dismissal, and give rise to a personal grievance.

[78] I accept that Mr Cruickshank ended his employment because he was dissatisfied with Miyamoto's response to the issues he had with other staff, but there was no breach of duty by Miyamoto.

[79] Miyamoto did not vary Mr Cruickshank's terms of employment.

[80] I find that the termination of Mr Cruickshank's employment was at his, not Miyamoto's, initiative. As there was no dismissal, justification need not be assessed.

Summary

[81] The claims will be dismissed.

[82] My tentative view is that costs could be assessed in accordance with the daily tariff but I am asked to reserve costs. If an order is required, the party seeking costs should lodge and serve a memorandum within 14 days and the other party may lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority