

**Attention is drawn to the order prohibiting publication of certain information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2020] NZERA 469  
3066513

BETWEEN	LILLIAN WAITERE Applicant
AND	CCS DISABILITY ACTION WAIKATO INCORPORATED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Allan Halse, advocate for the Applicant Ruvín Pattiaratchi, counsel for the Respondent
Investigation Meeting:	18 & 19 February 2020 at Hamilton
Submissions [and further information] Received:	21 February 2020 from the Applicant 21 February 2020 from the Respondent
Date of Determination:	13 November 2020

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Lillian Waitere was a Community Support Worker with CCS Disability Action Waikato Incorporated (CCS). She brings claims of constructive dismissal and unjustifiable disadvantage, relating to allegations that CCS failed to follow process and properly investigate her allegations of bullying in the workplace.

[2] Ms Waitere also claims CCS breached its obligations to treat her in good faith and act as a fair and reasonable employer by failing to protect her after she had raised her concerns.

[3] CCS denies Ms Waitere's claims. It says her casual employment came to an end after the two clients she was looking after left its service. It acknowledges Ms Waitere informally raised her feeling of being bullied, but says she did not make a formal complaint or seek an investigation. CCS says it managed Ms Waitere's concerns in line with its policy.

[4] CCS asks the Authority to dismiss Ms Waitere's claims in their entirety.

### **The Authority's investigation**

[5] In the course of the investigation meeting, confidential matters were referred to concerning two named former clients of CCS. I granted a permanent non-publication order sought by CCS, and unopposed by Ms Waitere, in relation to those former clients. The order covers their names and any identifying details. Where it is necessary to refer to them, they will be known respectively as X and Y.

[6] I heard evidence from two witnesses for Ms Waitere: herself and her partner, Glenn Murray. I heard evidence from four witnesses for CCS, all of whom were employees of that organisation. They are Kathryn Harward, a Service Manager; Carolyn Hopa, a Coordinator; Dempsey Puru, a Senior Service Coordinator/Team Leader; and Colene Herbert, the General Manager of CCS for the Midland region.

[7] A former employee of CCS was frequently referred to in the evidence presented to the Authority. That person was not called to give evidence and did not participate in the Authority's investigation. As many of the references to the person contained allegations as to her conduct towards Ms Waitere, to which she had no opportunity to respond, I have chosen not to name her. I refer to her as "the Coordinator" or, after her departure from CCS, "the former Coordinator", in this determination.

[8] I have not set out a record of all evidence heard or received but, in determining this matter, I have carefully considered all the material placed before the Authority, including all evidence from the parties and submissions made by their representatives.

[9] This determination has been issued outside the timeframe set out at s 174C (3) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

### **Issues**

[10] The issues for determination are:

- (a) Whether Ms Waitere was unjustifiably disadvantaged during her employment;
- (b) Whether she was constructively dismissed;
- (c) Whether CCS breached its obligations of good faith in relation to protecting Ms Waitere after she made her concerns known.

[11] Depending on the answers to the above questions, issues of remedies and contribution may also arise.

### **General background**

[12] CCS is part of a nationwide organisation that provides support, advocacy and information for disabled people. Its funding comes partly from Enabling Good Lives (EGL), which is a partnership between the disability sector and government agencies. EGL is a separate organisation from CCS.

[13] Ms Waitere commenced employment with CCS on 20 December 2016 on a casual employment agreement (the IEA). Her role as a Community Support Worker (CSW) entailed providing individualised supports to specific disabled clients of CCS, in accordance with the clients' individual support plans.

[14] At the time of the events leading to the current claims, Ms Waitere was supporting two CCS clients, those whom I have identified as X and Y. Ms Waitere reported directly to Willie Marsters, Senior Service Coordinator - Youth and Adult. Mr Marsters went on extended leave in June or July 2018.

[15] A CCS Coordinator (the Coordinator) organised and supervised supports that were provided to clients. The Coordinator left CCS in April 2018 to take up a role in EGL. Ms

Hopa assumed responsibility for coordinating the supports provided to client Y from approximately July 2018.

### **Events and evidence of the parties**

[16] It will be useful to set out the parties' perspectives of what occurred in the months leading up to the ending of Ms Waitere's employment with CCS before turning to a consideration of the merits of each of her claims.

[17] In March 2018 Ms Waitere sold a laptop computer to the father of client Y for a small sum. She believed she was helping the client's family in doing so but it was in breach of CCS policy. The Coordinator reported this to CCS management. Ms Waitere accepted she had breached policy and agreed to complete an 'integrity and conduct' course. The incident was noted in CCS's Concerns Register and Ms Waitere was reminded of the need to maintain appropriate boundaries between herself and the client. No further action was taken.

[18] From that time, however, Ms Waitere believed she was a target of rumour and gossip within CCS, resulting in her feeling isolated and embarrassed. She believed the former Coordinator had shared information about the laptop incident with EGL staff and discredited her reputation within that organisation.

[19] On 23 August 2018 Ms Waitere received a telephone call from Ms Hopa in which Ms Hopa had taken her to task over the supports she was providing to client Y. Ms Hopa had said she was claiming time for supporting Y in her attendance at a particular programme, when it was not part of her role as a CCS employee to provide that support.

[20] Ms Waitere had responded that Y, who attended the programme in a wheelchair, required her support and had explained the reason her support was needed. Ms Hopa informed Ms Waitere the EGL funding did not provide for her to support Y at the programme and EGL would not pay for any support that fell outside that funding. During the phone call Ms Hopa had also referred to a complaint she had received about Y consistently arriving late at the programme. It was part of Ms Waitere's duties to transport Y to the programme. The complaint had been conveyed to Ms Hopa by the former Coordinator.

[21] In her evidence to the Authority Ms Waitere said she had a sleepless night after the phone call from Ms Hopa and felt her job was under threat. For that reason she sought a meeting with Mr Puru on 24 August 2018. Her partner, Mr Murray, attended the meeting with

Ms Waitere, in the course of which she made her concerns about the former Coordinator known to Mr Puru. She also disclosed her discomfort about the friendship between Ms Hopa and the former Coordinator and her belief that they were discussing her behind her back.

[22] The meeting ended with Mr Puru proposing to get everyone around a table to talk and with Ms Waitere agreeing to that process. It is Mr Puru's evidence that this approach was in line with CCS's Concerns and Complaints process (C & C process). Both parties agreed Mr Puru offered Ms Waitere Employee Assistance Programme (EAP) support which she declined.

[23] Ms Waitere claimed in her statement of problem to have made a formal complaint in the 24 August meeting about the conduct and behaviour of the former Coordinator towards her. Mr Puru said Ms Waitere raised, informally, that she felt bullied by the former Coordinator.

[24] During the Authority's investigation Ms Waitere acknowledged she had not made a formal complaint at that time: she said she gave CCS a chance to sort the matter out and agreed to an informal hui process for that purpose. Ms Waitere also acknowledged she had not complained about the former Coordinator while that person was employed by CCS. By the time of the 24 August 2018 meeting it was approximately four months since the former Coordinator had left her employment with CCS to take up a role in EGL.

[25] Mr Puru had hoped to organise the hui to address Ms Waitere's concerns within two weeks but the arrangements took longer than he anticipated. It eventually took place on 19 September 2018. Before the hui commenced, Ms Waitere requested that a senior manager be present and Mr Puru asked Ms Harward to attend, which she did.

[26] In the period between the 24 August 2018 meeting and the hui, Ms Hopa had raised an issue over apparent discrepancies in Ms Waitere's timesheets. She had emailed Mr Marsters about this, and copied in Mr Puru and Ms Harward. This matter, which concerned the supports Ms Waitere provided to X and Y in relation to a programme they attended, was also discussed in the 19 September 2018 hui.

[27] Ms Waitere attended the hui with Mr Murray. She also brought clients X and Y with her. Mr Puru and Ms Harward were uncomfortable with clients being present at a hui that had been arranged to discuss employment matters. They proceeded with the hui, however, because, as Mr Puru said in evidence, it would have been too awkward and confrontational to ask the clients to leave.

[28] Ms Hopa attended the hui but the former Coordinator did not. She had accepted Mr Puru's invitation to attend, but could not attend on the day for reasons that were not made clear. Notes of the meeting, taken by Mr Puru, were included in the bundle of documents provided to the Authority.

[29] In the course of the hui Ms Waitere raised her concerns about the former Coordinator making allegations about her that undermined and belittled her to EGL employees. Ms Waitere said this led to two EGL employees and the former Coordinator advising X and Y to "*sack her*" as their support worker. Ms Waitere also raised her feeling of being bullied in the telephone call with Ms Hopa about the supports she provided to Y.

[30] Ms Hopa responded that she took any allegation of bullying very seriously and did not think her communication with Ms Waitere had been bullying. She apologised if Ms Waitere had felt bullied. Ms Hopa's evidence is that she believed Ms Waitere had accepted her apology as she said nothing to indicate she wanted the matter taken further.

[31] In evidence to the Authority Ms Hopa clarified that she did not accept she had bullied Ms Waitere in the phone call and that, in apologising, she was acknowledging Ms Waitere's feelings. EAP assistance was again offered and again declined by Ms Waitere. The meeting ended with Ms Harward undertaking to get back to Ms Waitere the following week to discuss the process going forward.

[32] Ms Hopa and Ms Harward both gave evidence that Ms Harward met informally with Ms Hopa on 21 September 2018 to discuss the bullying allegation Ms Waitere had made. Ms Harward emphasised to Ms Hopa that she needed to be conscious about how she spoke on the phone and the language she used. The evidence of both was that, as Ms Waitere had not made a formal complaint, they believed the matter had been dealt with appropriately by Ms Harward taking this action. Ms Waitere acknowledged in the Authority's investigation that she was aware this discussion had taken place between Ms Harward and Ms Hopa.

[33] CCS says the process it would have followed after the hui was overtaken by other events, the first of which was an urgent request from EGL on 20 September 2018 to remove Ms Waitere as the support worker for client X. The request was made by email to Ms Harward, stating X had requested the change based on feeling unsafe and issues of control and fit. Ms Harward texted Ms Waitere giving her 24 hours' notice to cease all supports for client X. Ms

Harward's evidence is that she was following standard practice in doing this and Ms Waitere was paid for the shift because of the short notice she had received.

[34] The next event occurred on 26 September 2018 when an EGL Connector provided further information to CCS about an incident X had told her occurred two or three weeks' earlier. The incident involved Ms Waitere and allegedly included physical abuse.

[35] A further intervening event occurred on 27 September 2018 when the former Coordinator emailed Mr Marsters conveying information she had received from client Y about the lack of support Y was receiving from Ms Waitere. The former Coordinator's email listed a number of concerns she said had been expressed to her by Y the previous day, including that Y had been very uncomfortable attending the 19 September hui. The former Coordinator's email also noted she had spoken to Y's father the previous evening and he had confirmed the issues raised by Y and had indicated his belief that Ms Waitere should have no further part in supporting his daughter.

[36] Mr Marsters passed that information on to Ms Harward who spoke by telephone with the General Manager, Ms Herbert, and apprised her of the allegations. Ms Herbert rang Ms Waitere on 27 September 2018. The parties dispute whether Ms Harward went through the allegations with Ms Waitere in detail or not. Ms Harward and Ms Waitere agree that Ms Waitere queried whether the suspension would be paid.

[37] Ms Herbert clarified that suspension would be paid and advised her decision to suspend Ms Waitere with immediate effect until such time as an investigation had been completed. She confirmed the decision in writing the same day, noting that the suspension was a precautionary matter and did not mean CCS had determined the allegations were substantiated. Ms Herbert advised Ms Waitere she would shortly receive a letter outlining the process to be followed in the investigation.

[38] That letter was duly emailed to Ms Waitere on 2 October 2018 and resulted in a meeting with Ms Harward and Mr Puru on 5 November 2018 to discuss the allegations. CCS says the delay was caused by Ms Waitere's representative's unavailability earlier. Her representative, Mr Halse, and her partner, Mr Murray, attended with her. Both parties recorded the meeting and a transcript was included in the bundle of documents provided to the Authority.

[39] On 3 December 2018, Ms Harward wrote to Ms Waitere summarising Ms Waitere's explanations and comments in the 5 November meeting in relation to the allegations that had been made against her. Ms Harward advised Ms Waitere CCS would not be taking any further action on those allegations. Ms Harward confirmed the indication she had given Ms Waitere during the 5 November meeting that both X and Y had exited CCS's service. She advised that, in line with the organisation's standard practice, it would pay Ms Waitere two weeks' notice regarding the cessation of her supports to X and Y.

[40] Ms Harward also advised Ms Waitere that her suspension had been lifted and that she would now be able to undertake support shifts if these became available.

[41] Mr Halse emailed Ms Harward on 19 December 2018 notifying that Ms Waitere did not believe it was safe for her to return to work given that her complaints had never been investigated and "*instead there was retaliation.*" He expressed appreciation for the lifting of Ms Waitere's suspension but noted she had lost trust and confidence in her employer. He ended by suggesting a meeting to discuss where to from there.

[42] There was further communication between the parties on 20 and 21 December 2018 over pay issues and a meeting Mr Halse requested for 24 December. Ms Harward advised she was not available to meet 24 December as the office had a two week close down period from 21 December 2018 and she was on leave until mid-January 2019.

[43] On 10 January 2019 Mr Halse emailed Ms Harward, raising a personal grievance on Ms Waitere's behalf for:

- failure to investigate (Ms Waitere's) complaint;
- the resultant allegation against her that resulted in her suspension; and
- CCS's failure to provide additional work.

Mr Halse ended his email by advising they wished to take the matter to mediation as soon as possible to seek a resolution for Ms Waitere.

[44] CCS's Human Resource Manager responded by letter dated 23 January 2019, in which, amongst other matters, she acknowledged receipt of the personal grievance; denied the validity of the grievance; and indicated CCS's willingness to attend mediation.

[45] The parties attended mediation in February 2019 but were unable to resolve the matter.

## **Submissions and discussion**

### ***Unjustifiable disadvantage***

[46] A personal grievance for unjustifiable disadvantage is a grievance relating to a claim an employee may have against the employee's employer/former employer:

that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;<sup>1</sup>

### **Suspension**

[47] Although Ms Waitere did not specifically raise a personal grievance in relation to her suspension, the allegation was made in the "*Background*" section of her statement of problem and in submissions on her behalf that CCS failed to act as a fair and reasonable employer. The allegation was that Ms Herbert informed Ms Waitere of serious allegations against her in an unexpected and unannounced phone call on 27 September 2018 and that Ms Herbert made the decision to suspend Ms Waitere some hours later without proper consultation. Details of the serious allegations were not given but Ms Herbert informed her they included allegations of abuse and threatening and intimidating behaviour.

[48] Ms Colbert's evidence was that, ideally, she would have given Ms Waitere advance notice of her proposal to suspend her and then met in person to discuss the matter. However, that was not possible at the time because she was based in Tauranga, and the serious nature of the allegations required prompt action. It was Ms Herbert's evidence, and CCS's submission, that the manner in which she effected the suspension was reasonable in the circumstances.

[49] As I have noted above, the parties dispute whether Ms Herbert went through the allegations with Ms Waitere in the 27 September 2018 phone call. Ms Colbert's evidence was that she had received the allegations in a telephone call from Ms Harward, including an allegation of physical abuse of a client by Ms Waitere. Ms Herbert said she went through those allegations when she phoned Ms Waitere; informed her of the serious nature of them; advised that she was proposing to suspend her; and gave Ms Waitere the opportunity to comment before she made a decision on suspension.

---

<sup>1</sup> S 103(1)(b) of the Act.

[50] Ms Herbert said Ms Waitere commented to the effect that there were two sides to the story and denied the allegation that she had physically abused a client. As noted earlier, Ms Waitere asked if the suspension would be paid.

[51] The letter conveying Ms Herbert's decision to suspend, sent after the telephone call, did not contain details of the serious allegations CCS had received against Ms Waitere but stated "*...the allegations relate to unsafe acts which may have resulted in harm of others and allegations of abuse, threatening and intimidating behaviour.*" The allegations were itemised in more detail in Ms Harward's letter of 2 October 2018 to Ms Waitere. In that letter Ms Harward notified her wish to meet Ms Waitere in a non-disciplinary meeting for the purpose of hearing her explanation regarding the allegations.

[52] I find it likely Ms Herbert went through the allegations with Ms Waitere on 27 September 2018 in as much detail as she had gleaned from Ms Harward in their telephone conversation that day. The allegations were conveyed sufficiently for Ms Waitere to appreciate the serious nature of them, without knowing all the detail. I accept Ms Herbert's account of Ms Waitere's response. In doing so, I make no adverse finding as to Ms Waitere's evidence, as she was clearly surprised at receiving a telephone call from the General Manager and no doubt shocked to hear the allegations conveyed to her. Those factors could easily explain Ms Waitere's inability to recall all but the outline of what was said on the call.

[53] I accept CCS's submission that, in the circumstances of serious allegations being made against an employee who was, at that time, supporting a client, prompt action was required. I find the manner in which Ms Waitere's suspension was effected was fair and reasonable in all the circumstances at the time. Ms Waitere had sufficient knowledge of the allegations, and of the proposal to suspend her, to comment to her employer before Ms Herbert made her decision that suspension was the appropriate course of action.

### **Failure to investigate**

[54] Ms Waitere submits she asked her employer to address and prevent the bullying she perceived she was experiencing, although she acknowledged she may not have initially used the word "*bullying*". She submits she made it very clear in her meeting with Mr Puru on 24 August 2018 that she was laying a complaint when she set out her concerns about the conduct and behaviour of staff, particularly that of the former Coordinator.

[55] In Ms Waitere's submission CCS "*ramped up*" allegations against her after the 19 September hui instead of investigating and acting upon the complaint she had made. Her representative described CCS's actions as retaliatory.

[56] CCS denies those allegations and submits it followed an informal procedure in dealing with Ms Waitere's concerns in line with the informal manner in which she raised the concerns. CCS referred to its C & C process which, in its submission, Ms Waitere had agreed to, and engaged in.

[57] The policy CCS referred to provides four different options for dealing with concerns and complaints that have been raised formally or informally by employees. In summary the options are:

- No further action – the complaint/concern will be registered in case of further occurrence;
- Casual – involving direct discussion between the complainant and the person complained about;
- Informal – the manager will gather information and speak with witnesses and the person concerned. If not resolved the matter could be escalated;
- Formal – including a full investigation, formal meetings, and possible disciplinary action resulting.

[58] I accept CCS's submission that Ms Waitere had agreed to an informal process being followed, when she approved Mr Puru's proposal to hold a hui. However, only one of the two people Ms Waitere identified as having concerns about attended the hui. Ms Waitere had the opportunity during the hui to voice her concerns about the telephone call from Ms Hopa in which she felt bullied and Ms Hopa had the opportunity to respond. An apology ensued and follow up action was taken by Ms Harward with Ms Hopa.

[59] Worksafe New Zealand defines bullying as "*repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.*"<sup>2</sup> It specifically excludes "*a single instance of unreasonable behaviour*" from its definition and I am satisfied that one telephone call, such as that from Ms Hopa to Ms Waitere in August 2018, did not constitute bullying.

---

<sup>2</sup> From Worksafe New Zealand's Guidelines for PCBUs: *Preventing and responding to bullying at work*. March 2017.

[60] I do not accept CCS discharged its obligation to Ms Waitere under its C & C process in respect of the former Coordinator. That person did not attend the hui and Ms Waitere's concerns over her conduct remained unaddressed. Ms Harward's evidence to the Authority was that CCS was not required to do anything further after the 19 September 2018 hui. She said it had listened to Ms Waitere's concerns at the hui; Ms Waitere had not made a formal complaint about the former Coordinator; she had provided no evidence; and did not request a follow-up investigation.

[61] That is an unsatisfactory response in the circumstances. Mr Puru recorded in his notes of the 19 September hui that, when Ms Waitere presented information to him on 24 August 2018, she said this was a complaint against the former Coordinator. Having agreed to Mr Puru's suggestion of a hui, at which everyone would sit around the table to talk face to face, Ms Waitere was entitled to expect her employer would follow through on the informal approach as outlined in paragraph [57] above. Clearly CCS was not responsible for the former Coordinator's decision not to attend the hui but it was responsible for its failure to take any further action in relation to that person.

[62] There is no evidence that Mr Puru or Ms Harward spoke with the former Coordinator, after the hui she did not attend, to get her views regarding Ms Waitere's complaint. Ms Harward's evidence, and CCS's submission, was that events, in the form of the allegations made against Ms Waitere by EGL staff, overtook any further action. Ms Harward said that CCS intended to query Ms Waitere's complaint about the former Coordinator with EGL but that this could not happen as Ms Waitere's complaint was superseded by serious complaints made against her in the days following the hui.

[63] There is no question that CCS needed to have regard to the complaints made by EGL and to investigate them appropriately. Those complaints did not relieve it, however, of its duty to investigate Ms Waitere's complaint. Mr Puru's notes of the 19 September hui record that Ms Waitere had named three EGL staff, including the former Coordinator, as having told one of her clients to dismiss her as their support worker. The timing of EGL's notification of an urgent request to remove Ms Waitere as her other client's support worker, one day after the hui, may have been entirely coincidental. It would have been reasonable, however, for CSS to consider if there was any relationship between the two events and, whether there was validity to Ms Waitere's claim about the three named EGL employees.

[64] I find it was unreasonable for CCS not to investigate Ms Waitere's complaint. Its failure to follow up on it disadvantaged Ms Waitere as it led to a lack of trust on her part that she could expect fair treatment from her employer in relation to the complaints made against her by EGL. That in turn gave rise to Ms Waitere's belief that she would be unsafe returning to the workplace which made it problematic for her to accept any future support work that CCS may have offered her. I find Ms Waitere has established a personal grievance for unjustifiable disadvantage.

### ***Constructive dismissal***

[65] I do not find Ms Waitere was constructively dismissed. Her IEA with CCS was clear as to each assignment being a stand-alone employment arrangement with the employment ending at the completion of each period of work. Ms Waitere acknowledged in the Authority's investigation meeting that she did not resign from CCS. I find her employment ended with the withdrawal of her two clients from CCS.

[66] Ms Waitere may have had suspicions about the reasons for the clients withdrawing but ultimately it was a choice open to the clients and/or their families. Her IEA made clear there was "*no entitlement to, or expectation of, continuous or regular employment.*"<sup>3</sup> Once the election to leave CSS was made by the clients, Ms Waitere's continued employment was dependent on new assignments/clients being made available.

[67] It was Ms Harward's evidence, which was not challenged, that there was no work available up to 22 December 2018 when CCS entered a closedown period until 6 January 2019. As Ms Waitere's representative had notified CCS on 19 December 2018 of his client's feeling that it was unsafe for her to return to the workplace, CCS was unlikely to offer her further assignments after that date. I note that appears to have been the first time Ms Waitere's safety was raised as an issue with CCS.

[68] Ms Waitere's claim to have been constructively dismissed has not been established.

### ***Breach of good faith in failing to protect Ms Waitere***

[69] Ms Waitere claims CCS breached its obligations under the Act and under the Health and Safety at Work Act 2015 (the HSW Act), by failing to protect her after she had raised

---

<sup>3</sup> Clause 3.4 of Ms Waitere's IEA.

concerns. Her statement of problem links s 110A(1)(c) of the Act to the provisions of s 85 of the HSW Act.

[70] Section 110A concerns “Adverse conduct for prohibited health and safety reason”. The relevant parts of the provision are:

- (1) For the purposes of this Part, an employer engages in **adverse conduct for a prohibited health and safety reason** if the employer or a representative of the employer, for a prohibited health and safety reason, -
  - a. ...
  - b. ...
  - c. subjects the employee to any detriment in circumstances in which other employees employed by the employer in work of that description are not or would not be subjected to such detriment; or ...

[71] Section 85 of the HSW Act concerns “training requirements relating to giving direction to cease work” and bears no relevance to the Ms Waitere’s situation. In oral submissions Ms Waitere’s representative referred the Authority to his email of 19 December 2018 to Ms Harward conveying Ms Waitere’s belief that it was unsafe for her to return to work as her complaints had not been investigated and instead there had been “*retaliation*”.

[72] It was clear Ms Waitere regarded the allegations made about her by EGL staff in the days following the 19 September hui as retaliation for her complaints against the former Coordinator and Ms Hopa. While I have found it would have been reasonable for CCS to consider if there was any relationship between those events, there was no evidence presented to establish the existence of such any relationship.

[73] The nature of the allegations made against Ms Waitere was serious and CCS understandably treated them as such. The notes of the 5 November 2018 investigatory meeting between CCS and Ms Waitere, at which she provided her responses to the allegations, reveal Ms Waitere made certain acknowledgements in relation to some of the allegations which undermines her claim they were retaliatory.

[74] A prohibited health and safety reason includes where the adverse conduct is engaged in because the employee has raised a health and safety issue or concern with the PCBU<sup>4</sup> (person

---

<sup>4</sup> Section 89(h) HSW.

conducting a business or undertaking),<sup>5</sup> which in this instance is CSS. I find Ms Waitere has not made out this claim against CCS. It would have been remiss of the organisation to ignore serious allegations against her. Its investigation into the allegations did not constitute engaging in adverse conduct for a prohibited health and safety reason. I dismiss this claim.

### **Remedies and contribution**

[75] Having found Ms Waitere to have a personal grievance for unjustifiable disadvantage, I turn to the question of the appropriate remedy and, as I am obliged by s 124 of the Act, to the question of whether Ms Waitere contributed to the situation that led to her personal grievance.

[76] I do not consider Ms Waitere to be entitled to an award of wages as her employment ceased as a result of the two clients she was supporting leaving CCS. She was paid wages while suspended from her employment, during which time her employer was investigating the serious allegations that had been made against her.

[77] Ms Waitere was advised on 3 December 2018 that the outcome of the investigation was that CCS would take no further action in the matter; that her suspension was lifted; and that she was available for any new support shifts that arose. Ms Waitere was paid two weeks' wages as notice in respect of the clients she had been supporting who had both exited from CCS. As noted, above, her casual employment agreement provided no guarantee of, or entitlement to, ongoing work.

[78] That leaves the matter of compensation for the hurt, humiliation and distress caused to Ms Waitere by her employer's failure to follow up on her complaint regarding the former Coordinator's conduct and behaviour towards her. To be clear, I make no finding as to whether Ms Waitere's concerns about the former Coordinator were valid: there was insufficient evidence for me to draw any such conclusions, particularly as that person played no part in the Authority's investigation.

[79] What I do find is that Ms Waitere genuinely held concerns about that person's behaviour and conveyed them to her employer sufficiently clearly that it commenced, with Ms Waitere's agreement, on the informal option of its Concerns and Complaints process by arranging a hui. It failed to follow through on the process, however, when the former Coordinator did not attend the hui and it took no further steps to investigate or resolve Ms

---

<sup>5</sup> Section 17 HSW.

Waitere's complaint, claiming it was overtaken by events. Those events were the allegations made against Ms Waitere by EGL, including by the former Coordinator, in the days following the hui. I do not find Ms Waitere contributed to the situation that led to her personal grievance.

[80] I accept Ms Waitere's evidence, and that of Mr Murray, about the distress this caused her and the lack of trust she suffered in her employer as a result which, as I have noted, led to her belief that it was unsafe for her to return to the workplace even if further support work had been available for her, which it was not.

[81] I find an appropriate award of compensation to be \$7,500. In doing so, I note part of Ms Waitere's distress came from matters for which I cannot compensate her. I refer to the distress she felt over what she perceived as her reputation being sullied in EGL by the former Coordinator. That is a matter on which I can make no findings: as already stated, my findings relate to CCS's failure to investigate Ms Waitere's concerns, and not to whether her concerns were valid.

### **Orders**

[82] CCS Disability Action Waikato Incorporated is ordered to pay Ms Waitere the sum of \$7,500, pursuant to s 123(1)(c)(i) of the Act, as compensation for her personal grievance.

### **Costs**

[83] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority