

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 311
3060712

BETWEEN

ANNE SCOTT
Applicant

AND

THE VICE-CHANCELLOR OF THE
UNIVERSITY OF CANTERBURY
Respondent

Member of Authority: Helen Doyle

Representatives: Graeme Riach and Mikayla Hughes, counsel for the
Applicant
Scott Wilson and Julia Hurren, counsel for the Respondent

Investigation Meeting: 7, 8, 9, 10 and 11 December 2020 at Christchurch
Further affidavit evidence: Affidavit of Dr Anne Scott sworn on 28 January 2021
Affidavit of Professor Jonathan Le Cocq affirmed on
22 February 2021

Submissions Received: 10 March and 13 April 2021 from the Applicant
31 March 2021 from the Respondent

Further Information
received: 1 and 8 July 2021

Date of Determination: 21 July 2021

DETERMINATION OF THE AUTHORITY

A Dr Anne Scott was unjustifiably disadvantaged in and unjustifiably dismissed from her employment with the Vice-Chancellor of the University of Canterbury.

B The Vice-Chancellor of the University of Canterbury is ordered to pay to Dr Anne Scott:

(a) The sum of \$141,921.27 gross being reimbursement of lost wages.

- (b) The sum of \$45,000 without deduction for compensation for the unjustified actions of placement on involuntary sick leave, removal and then only partial reinstatement of IT, unlawful suspension and unjustified dismissal.**
- (c) The sum of \$5,400 without deduction for compensation for the first written warning taking contribution into account.**
- (d) The sum of \$4,250 without deduction for compensation for the final written warning taking contribution into account.**

C Costs are reserved and failing agreement a timetable set.

Employment Relationship Problem

[1] Dr Anne Scott was employed by The Vice-Chancellor of the University of Canterbury (UC or the University) as a Lecturer/Senior Lecturer in Sociology from 8 January 2001 to 15 May 2019.

[2] She asks the Authority to resolve employment relationship problems of unjustified disadvantage, discrimination and unjustified dismissal.

Non-Publication

[3] Counsel confirmed to the Authority before the investigation meeting that no non-publication orders were sought. At the end of the evidence the Authority raised the issue of non-publication again and that position was confirmed.

[4] Medical reports are an important feature of this case. It was not necessary to hear evidence from the authors of those reports. The Authority has referred to the various psychiatrists, a specialist clinical nurse and a general practitioner in this determination by initials or role. It has also done this with other individuals where appropriate.

[5] I want to record that beyond setting out the facts as presented no view or judgement has been reached about the actions and any intentions that could be attributed to them of Dr Scott's ex-husband in particular but also any family members. This is a determination about employment matters.

Raising of grievances

[6] Grievances were first raised in a letter dated 2 May 2018 from a senior solicitor at Mr Riach's firm, Emily Park.¹ They were that Dr Scott was unjustifiably suspended when she was placed on involuntary sick leave on 26 February 2018 and unjustifiably disadvantaged when she had her IT access removed on 27 February 2018 and then restricted. Further she says that she was not allowed to resume work duties despite several medical assessments confirming that she was mentally well and able to return to work. She says that the failure to accept the medical advice that she was fit to return to work was a breach of the duty of good faith and that she was the subject of discrimination on the grounds of disability under ss 103(1)(c), 104(1)(b) and 105(1)(h) of the Employment Relations Act 2000 (the Act).

[7] Mr Wilson raises an issue that will require resolution as to whether this was sufficient to cover the raising of a personal grievance that Dr Scott continued to be unlawfully suspended for the period after 2 May 2018 until it was agreed Dr Scott could return to her role at the University.

[8] There were grievances raised with the University in a letter from Mr Riach dated 6 December 2018.² They were that a formal letter of warning on 12 September 2018 was unjustified and caused disadvantage. There is also a grievance raised about the "intransigence of the University" regarding restoration of Dr Scott's IT access. There was reference in that letter to a comprehensive letter that Dr Scott had written to the University with a number of annexures also dated 6 December 2018 that Mr Riach said demonstrated amongst other matters that the continuation of involuntary sick leave had been unwarranted and unnecessary.³

[9] In a grievance raised on 6 May 2019 in a letter to the University from Mr Riach Dr Scott alleges that a final written warning given to her on 18 February 2019 was an unjustified action and disadvantaged her.⁴

¹ Applicant's bundle of documents AS52 pg.125.

² Applicant's bundle of documents AS65 pg.257.

³ Applicant's bundle of document AS 66 pg. 264.

⁴ Applicant's bundle of documents AS79 pg.433.

[10] Dr Scott was dismissed from her employment on 15 May 2019. She says that her dismissal, which was summary in nature, was unjustified. An unjustified dismissal grievance was raised on 18 June 2019.⁵

[11] Dr Scott seeks reimbursement of lost wages from 15 May 2019 to the date of the investigation meeting on 7 December 2020 in the sum of \$175,750.00 with earnings between 30 June 2019 and 30 November 2020 to be taken into account. Dr Scott also seeks compensation, costs and recommendations under s 123(1)(ca) of the Act. Dr Scott sought to amend the amount claimed for compensation from that in the amended statement of problem of \$35,000 to total of \$70,000 in her statement of evidence lodged 18 September 2020. She has broken her claim down in this way in her statement. Dr Scott claims \$20,000 for the first grievance and \$10,000 each for the second and third disadvantage grievances and then \$30,000 for the unjustified dismissal grievance.

[12] Mr Wilson in final submissions recorded the different amounts claimed for compensation in the amended statement of problem and statement of evidence. He submitted that if Dr Scott was successful in more than one personal grievance and there are separate compensatory awards then any awards should be restricted to the amended amounts.

[13] The amendment to the compensatory award was made well before the investigation meeting commencing on 7 December 2020 and before the University lodged its evidence on 30 October 2020. I grant leave to amend the compensatory amount in circumstances where the timing presents no natural justice issues.

[14] In an initial statement of problem lodged in May 2019 before dismissal Dr Scott wanted reinstatement to full duties following a second period of placement on involuntary sick leave. The amended statement of problem was lodged on 25 June 2019 to include the unjustified dismissal claim. Reinstatement was also sought at that time. On 8 October 2019 following a conference with the Authority and counsel Mr Riach confirmed that reinstatement was no longer sought.

[15] The University says that its ongoing concerns about Dr Scott's mental wellness were those of a fair and reasonable employer and that it followed a fair and full process when addressing concerns about Dr Scott's conduct and behaviour in the course of her

⁵ Applicant's bundle of documents AS 84 pg.481.

employment. Further that it justifiably imposed a written warning in September 2018, a final written warning in February 2019 and justifiably terminated Dr Scott's employment in May 2019.

Issues

[16] The Authority needs to determine the following issues in this matter:

- (a) Was it justifiable to place Dr Scott on involuntary sick leave on 26 February 2018?
- (b) Was the removal and then restriction of IT access for Dr Scott a justifiable action and/or discriminatory?
- (c) Was there a grievance raised about unlawful suspension after 2 May 2018?
- (d) Was the University justified in continuing involuntary sick leave in light of the available medical reports/information or was that an unlawful suspension?
- (e) Was the warning issued to Dr Scott on 12 September 2018 justified?
- (f) Was the final written warning issued to Dr Scott on 18 February 2019 justified?
- (g) Was UC justified in dismissing Dr Scott on 15 May 2019?

The Authority investigation process

[17] The Authority heard significant evidence over five days of investigation. There are many relevant documents and the submissions are lengthy. In accordance with s 174E of the Act whilst the Authority has carefully considered all the evidence, submissions and relevant documents it is not required to and does not set out a full record.

Justification test in s 103A of the Act

[18] The Authority is asked to determine the justification of actions of the University and whether its decision to dismiss was justified. In doing so it must apply the test in s 103A of the Act. The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of the University, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the action or dismissal.

[19] Under s 103A of the Act the Authority needs to assess whether there was justification for the actions and dismissal. The reasons for the dismissal in this case were findings of serious misconduct and medical incapacity. Justification is usually assessed with issues about medical incapacity in a manner to recognise there is no issue of fault.

[20] The Authority must also have regard to the procedural fairness factors set out in s 103A (3) of the Act. These are whether allegations against Dr Scott were sufficiently investigated, concerns raised with her so that she had a reasonable opportunity to respond and whether such response was taken into account and considered genuinely before the taking of action or dismissing. The Authority may take into account other factors as appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[21] A fair and reasonable employer could be expected to comply with the good faith obligations set out in s 4 of the Act.

Decision maker and human resource support

[22] Professor Le Cocq is the Pro Vice Chancellor of Arts at UC. He was the decision maker with respect to the disciplinary outcomes received by Dr Scott. Human resource advice was received at the material times from senior human resource adviser Nicole Coles after November 2018 when she returned from parental leave and Rachel Dillon, who was seconded as a senior human resource advisor to cover Ms Coles' leave from January 2018 until her return in November 2018.

Was it justifiable to place Dr Scott on involuntary sick leave on 26 February 2018

Reporting lines

[23] Dr Scott was a member of the Sociology and Anthropology Department at the University from the time she commenced employment with the University in 2001. She was a Senior Lecturer at the material time.

[24] The University delivers through five colleges. The Sociology and Anthropology Department sits within the broader School of Language, Social and Political Science which is one of three schools in the College of Arts. Dr Scott's speciality is sociology of health and illness with a particular focus on the sociology of mental health and wellbeing.

[25] Dr Scott reported to Professor Jonathan Le Cocq through the Head of School. The Head of School at the material time and currently is Professor Linda Jean Kenix.

[26] At the material time Dr Scott's Head of Department was Associate Professor LF. He also had a reporting line to Professor Le Cocq through Professor Kenix. The Authority did not hear evidence from the Head of Department at the material time Associate Professor LF (LF). Heads of Department are responsible for coordinating teaching and related matter in their areas, day to day management of subjects and for leading course subject development.

Collective Employment Agreements

[27] Dr Scott's work was covered at material times by the Academic and Associated Staff Collective Agreements – 1 July 2015–30 June 2018 and 1 July 2018–30 June 2021. The collective agreements were between the University and The New Zealand Tertiary Education Union Te Hautū Kahurangi o Aotearoa Incorporated (TEU).

[28] Both collective agreements provide for sick leave in G.5. There is no reference to involuntary sick leave.

Historical sick leave taken by Dr Scott

[29] It is necessary to put the placement on involuntary sick leave on 26 February 2018 in the context of some historical sick leave and a work plan.

2004-2006

[30] Dr Scott was hospitalised from 2004 to 2006 six times. She was eventually diagnosed as suffering from Bipolar Mood Disorder.

2006-2013

[31] After 2006 Dr Scott had about seven years of good functioning and stable work performance.

[32] In 2013 her spiritual experiences returned although she described them as less destabilising than previously. Her then husband who I shall refer to as DG was concerned and arranged for her hospitalisation in 2013. After assessment Dr Scott was discharged from hospital and returned to work at UC.

Further hospitalisation in 2014

[33] In 2014 Professor Le Cocq said that there were concerns raised about Dr Scott's health and her fitness to work. She was placed on sick leave.

[34] The Authority heard evidence about the background to the placement of Dr Scott on sick leave in 2014. As Mr Wilson submits there was no grievance raised about what occurred in 2014. I want to set out two matters that touch on the more recent events.

[35] The evidence supports it is less likely that Dr Scott had the opportunity to properly and fully respond to the concerns reduced to writing before she went on sick leave in 2014. The concerns were overtaken in the preparing to and return to work and were not revisited.

[36] The second is that after a period of hospitalisation in 2014 described by Dr Scott as lengthy and traumatic she did not return to UC for some months. Before she returned a rehabilitation plan and review (work plan) was entered into and signed by Dr Scott and the Head of Department on 25 August 2014. The University relies on the work plan for placement on involuntary sick leave in 2018 and as background to other matters.

The 2014 return to work plan

[37] The signed work plan was provided during the Authority investigation.⁶ There was evidence from Dr Scott that she was unhappy at the time in 2014 when the plan was negotiated and considered aspects unlawful. I acknowledge that Dr Scott was unhappy at being required to sign the plan and that she felt under some pressure to do so if she wished to return to work at the University. The work plan was however signed and there was continued adherence to aspects of it until 2018.

[38] Part A of the work plan is about medical reports. Part B contained an agreement if Dr Scott became unwell the University was to be informed immediately and they would make immediate contact with Dr Scott's then husband, DG. At the sole discretion of the University Dr Scott would then be placed on immediate sick leave until medical advice is sought and/or an agreed return to work plan is in place. Before the work plan was signed on 25 August 2014 the University received an email from Dr Scott on 20 August 2014 that gave permission

⁶ Respondent's bundle of documents UC46.

for DG to liaise with the University and its various representatives should she become seriously unwell again.

[39] The work plan also included monthly consultation with a clinical nurse specialist and three monthly reviews with a psychiatrist. There was a change to the plan in September 2014 when it was agreed that Dr Scott would visit the psychiatrist every six months. The plan was to be reviewed in 2015 however aspects such as the monthly visit to a clinical nurse and six monthly visits with a psychiatrist continued until 2018.

[40] In semester 2 of 2014 Dr Scott took a sabbatical and was not teaching. In November 2014 she unexpectedly sent the University an advance directive dated 11 November 2014. The advance directive set out Dr Scott's key support people in the event she was unwell and referred amongst a number of other matters to her willingness if unwell to placement on sick leave "without explicit request." It referred to the involvement of her husband if she became unwell. The advance directive was sent with a statement from the clinical psychiatric nurse that Dr Scott was well when she prepared it.

[41] The University held a further meeting to discuss the advance directive as it differed somewhat from the work plan. Updates to the work plan following a meeting on 8 December 2014 with Dr Scott, her support person, LF and Ms Coles are recorded.⁷ One of the updates was that it was agreed that Dr Scott's doctor should if possible provide more specific details to the University about what duties she can and cannot undertake while on sick leave or returning to work. An example was set out as to whether she should have library/IT access.

[42] Dr Scott resumed teaching duties in 2015. The University received regular email updates on Dr Scott from a psychiatric nurse who I shall refer to as KG. KG is a clinical nurse specialist at the North Sector Adult Community Psychiatric Service (NACPS). Between 2015 and February 2018 the only matter arising was an email from KG in 2015 that Dr Scott had symptoms of depression. There was a meeting and support provided about that by the University at the time.

Placement on involuntary sick leave 26 February 2018

[43] On 26 February 2018 DG contacted the University by telephone and spoke to Ms Dillon about concerns with Dr Scott's health. He told her that Dr Scott had voluntarily

⁷ Respondent's bundle of documents UC4 pg. 42.

reduced her medication and was experiencing psychotic episodes. DG advised that Dr Scott had just left for work and was scheduled to lecture later that day and that it would be appropriate to place Dr Scott on sick leave referencing the 2014 work plan.

[44] DG then came into the University and met with Ms Dillon and Professor Kenix. He advised that Dr Scott's behaviour had changed and that she was acting on spiritual guidance, not coming home until late, had reduced medication and had disposed of some of his property. During the meeting it was agreed that they would go and see Dr Scott and Professor Kenix would explain that DG had raised serious concerns about her health. She would then be asked in line with the work plan to go on paid sick leave and obtain medical help.

[45] They then went and spoke to Dr Scott in her office. Professor Kenix referred to the 2014 plan that if DG had reported she was unwell UC was to put her on involuntary sick leave until a medical opinion that she was fit to work had been received and/or a return to work plan was agreed. Dr Scott advised Professor Kenix that it was not mental illness but rather "a domestic." She pointed out that she had had no complaints or problems at work and asked Professor Kenix to view copies of what she was working on to judge if her work was irrational or "putting the University at risk." The evidence did not support the offer was taken up by Professor Kenix.

[46] Ms Dillon recalled when the reduction in medication was raised Dr Scott responded that she had stopped taking medication altogether since January 2018. Dr Scott considered Professor Kenix was unrelenting about the placement on sick leave and said she would leave but asked for some 15 minutes to collect some papers and tidy her office, which was agreed to.

Conclusion on the justification of the placement of Dr Scott on 26 February 2018 involuntary sick leave

[47] Mr Riach submits that the 2014 work plan had lapsed and could not be relied on. Weighed with that aspects of the plan such as monthly reports were still being provided to the University by KG. There was no variation or rescinding of the part of the plan that DG was to be involved if there were concerns and/or the part of the plan where the University may place Dr Scott on involuntary sick leave.

[48] Ms Dillon and Professor Kenix formed the view that whilst unusual it was appropriate to act in the way they did in placing Dr Scott on involuntary sick leave in reliance on the 2014 work plan. I accept that when DG spoke to Ms Dillon and Professor Kenix they would have been concerned about what he was saying and were faced with a challenging situation. I do not conclude that it was unreasonable for the University to have regard to the work plan.

[49] Dr Scott believed she had been functioning very well at work over the previous year before the placement on involuntary sick leave. She did not consider that she was unwell. There is some objective evidence available to support Dr Scott's good functioning at work over that time. There was no dispute that in January 2018 Dr Scott had a positive professional development and review meeting with Professor Kenix who encouraged her to apply for a promotion to Associate Professor. Dr Scott had also gained approval for a new third year course, had carried a heavy teaching load, engaged in post graduate supervision, established a new student support project, managed a research team and budget and contributed to four oral presentations and workshops. She had also published articles in international journals.

[50] There was a letter dated 15 March 2018 provided in support of Dr Scott's regaining IT access from LF to a psychiatrist who was assessing Dr Scott. It was subsequently provided to the University with a letter to Professor Le Cocq dated 6 December 2018.⁸ The letter from LF stated that compared to other occasions there had been no concerns this time about Dr Scott and that staff "were shocked" that she was placed on leave. There was reference to Dr Scott "travelling really well and even leading a new Honours initiative." It was noticed that numbers for the new 300-level course on mental health in semester 2 were "huge". LF referred to that body of work as impressive. His main concern, and this will be explored more when the removal of IT is considered, was that Dr Scott get her IT back so she could finish revision to her accepted article for the "British Journal of Social Work" and complete the preparation for her new course. He stated that this was important because Dr Scott had a large workload in the next semester and a desire to avoid a situation where she is preparing material for one new course while teaching another.

[51] It is a significant matter to remove a person from their place of work on the basis that they are unwell when they maintain they are not. It is a decision that will have an adverse effect in those circumstances.

⁸ Applicant's bundle of document AS17 pg.49.

[52] Whilst acknowledging the work plan on its face supported agreement to this approach the Authority must have regard to the procedural fairness factors in s 103A (3) of the Act in any assessment of justification. Fairness should be considered with respect to the circumstances but the procedural fairness required in the justification test cannot be contracted out of.⁹ The decision to remove Dr Scott from her work place on involuntary sick leave was determined before Ms Dillon and Professor Kenix entered Dr Scott's office.¹⁰ What was said by Professor Kenix and Ms Dillon was limited to an explanation as to what was happening and why. There was no intention to hear from Dr Scott as part of that process or that anything she said would have any bearing on the decision.

[53] The evidence did not support that Dr Scott's presentation when Professor Kenix and Ms Dillon entered her office supported urgent action without process. To the extent that it is suggested Dr Scott agreed to placement on involuntary sick leave the evidence supports rather that she accepted the inevitability of such.

[54] A fair and reasonable employer could be expected to have listened to Dr Scott's responses, taken those into account and investigated further if necessary before placing her on sick leave. A number of other options were available. A conversation for example with LF could have taken place. The overarching object of the Act is to build productive employment relationships through the promotion of good faith. The duty of good faith in s 4 requires the parties to be active and constructive in maintaining a productive employment relationship by being responsive and communicative. There was a possibility that a way forward may have been able to have been agreed rather than imposed which would have better maintained a productive employment relationship.

[55] The fairness factors in s 103A of the Act were not complied with and the defects in the process were not minor and of a nature where they resulted in Dr Scott being treated unfairly.

[56] In terms of any disadvantage some statements Dr Scott made at a later meeting with the University on 4 September 2018 reflect how she felt at that time. The meeting was recorded and the recording transcribed.¹¹ Professor Le Cocq asked Dr Scott to explain from her perspective what it was like when she was experiencing responding to spiritual

⁹ Section 238 Employment Relations Act 2000.

¹⁰ Oral evidence of Ms Dillon.

¹¹ Applicant's bundle of documents AS59 pg. 200.

instruction. Professor Kenix was also present at the meeting. Dr Scott said amongst other matters:¹²

I am grateful because I feel like if this conversation had happened in February, which in fact I tried to have it in February, the whole last year could have been avoided. Actually, I think at the time, you came to see me in my office with DG, I said to you, "This isn't mental illness, it's a domestic." Do you remember?

...

In fact, that is what it was. I do understand the issue psychosis raises people's fear. I understand that but I actually feel we need to get past a fearful response and actually have a conversation. This has been the first opportunity to do that, so I appreciate that, and I would hope if it was ever to happen again, that the conversation would happen at the beginning and not at the end.

[57] The actions of the University in placing Dr Scott on involuntary sick leave whilst consistent with an agreed 2014 work plan was unjustified because the procedural fairness factors in s 103A(3) of the Act were not complied with and that overlapped with the substantive justification as Dr Scott was not heard on the matter. It disadvantaged Dr Scott because she felt unheard and powerless and did not have an opportunity to persuade the University not to take the action it did. She remained outside of the workplace for many months. Dr Scott has made out her personal grievance in that respect. Remedies will be assessed once the other claims have been considered.

Removal and restriction to IT

[58] When Dr Scott was placed on involuntary sick leave her access to IT was removed and she challenges the justification of this and alleges discrimination. There was reinstatement of the part of IT that was not student facing later in April 2018.¹³ That meant Dr Scott was unable to access her University email and any student facing IT throughout 2018. Concerns continued to be raised about the fact that full IT access was not restored until 20 December 2018 when there was agreement about a return to work and return to work instructions.

[59] There is an email on 28 November 2018 from the University's employment solicitor Summer Pringle. In her email to Ms Park she confirmed that there was discussion about

¹² Applicant's bundle of documents AS59 pg. 235.

¹³ This followed a meeting with Dr Scott and the University on 4 April 2018.

restoring full IT access to Dr Scott at a meeting in September 2018. She wrote that it was made clear that the University was not prepared to restore Dr Scott's access to UC email or full Learn access until a suitable return to work plan was agreed and at that time the circumstances remained unchanged.¹⁴

[60] I accept Mr Wilson's submission that a grievance was not clearly raised that IT access was rescinded while the work support plan was being negotiated. A grievance was raised about the removal and then restriction to partial IT access.

[61] Dr Scott said that losing her IT access was one of her most significant concerns.

The University decision-making about removal of Dr Scott's access to IT and partial reinstatement

[62] DG raised concerns with the University at or about the same time when Dr Scott was placed on involuntary sick leave that she was sending emails and that he was of the view that her access to IT should be removed. Ms Dillon said that she reviewed Dr Scott's file and could see that removing access to IT was a step that had been undertaken in 2014. Ms Dillon said that there was concern about what Dr Scott may be communicating by email through her University IT account and that it could be a reputational risk to the University and Dr Scott.

[63] Ms Dillon said that the University understood from DG after Dr Scott was placed on involuntary sick leave that she had met with a psychiatrist Dr W on 27 February 2018. Dr W's view was that Dr Scott was unwell with a mental health disorder and that it may be weeks or months until she would be well enough to return to work. Dr W was Dr Scott's consultant psychiatrist for about 15 years.

[64] It was decided that Dr Scott's IT access and after-hours building access would be removed. Ms Dillon confirmed in evidence that Dr Scott was not spoken to as part of this process. There was nothing in the work plan about discontinuing IT in the event Dr Scott was placed on sick leave. Mr Wilson submits that it was a decision that the University could have made as a fair and reasonable employer.

¹⁴ Respondent's bundle of documents UC42 pg.116.

Dr W's subsequent medical advice about IT access

[65] On 8 March 2018 Ms Dillon spoke to Dr W. He advised that Dr Scott was well enough to do some things but not well enough to return to work. Dr W agreed that Dr Scott should have access to her IT. On 9 March 2018 Dr W sent an email to Ms Dillon in which he said he had met with Dr Scott, DG and a support person from Mental Health Advocacy and Peer Support (MHAPS). Part of that discussion involved Dr Scott's need to prepare lessons for the following terms. Dr W wrote that neither he nor DG had concerns about this request and he supported Dr Scott's access to IT.

Partial access considered and then approved

[66] At a meeting on 4 April 2018 with Dr Scott the University agreed to explore whether partial access for Dr Scott to IT was possible. Once ascertained it was possible, access to the P-drive and Library was approved so that Dr Scott could undertake research. It took from 9 to 13 April 2018 to manually configure Dr Scott's IT account and Ms Dillon said that the P Drive was accessible from 16 April 2018. There were some issues with the library access which were resolved from 20 April 2018.

[67] In a meeting with the University on 4 September 2018 Dr Scott advised that she still did not have email access but did recently discover by accident that her library access had been restored. Further that whilst she had access to Learn her courses had been taken off Learn including the ones that were not student facing and not being taught that year. That resulted in her not being able to work on them.¹⁵

*Justification of removal of IT access and only partial reinstatement**Very unusual to remove IT for employees on sick leave*

[68] Mr Wilson accepted in submission that removal of IT access for employees on sick leave is very unusual. The evidence supported that Ms Dillon and Professor Le Cocq were only aware of one other occasion where an employee on sick leave had IT access removed.

¹⁵ Applicant's bundle of documents AS59 pg. 221.

Adequate consultation with DG and Dr W

[69] Mr Wilson submits that there was appropriate consultation about the IT suspension with Dr W and DG before it was removed. Further that the University acted appropriately when concerns were raised by Dr Scott about her wanting IT reinstated by holding a meeting on 4 April and partially reinstating non-student facing IT access. Mr Wilson submits that as at 2 May 2018 Dr Scott was on sick leave and not expected or required to undertake her employment duties. He submits that there was no expectation she would be preparing for a course, supervising students or carrying out research whilst on sick leave.

[70] Reliance was placed for restricting IT access in the first place on the concerns of DG and Dr W's first medical assessment. The same degree of reliance was not placed on Dr W's views to the University on 8 and 9 March 2018 as supported by DG that IT access should be reinstated for Dr Scott even though such medical advice was consistent with the update to the work plan about what duties Dr Scott could carry out.

Professor Kenix does not agree to IT access

[71] Professor Kenix in a letter dated 14 March 2018 noted Dr W had offered support for Dr Scott to gain IT access but she was not prepared to grant this.¹⁶ The reasons were that Dr Scott had no teaching scheduled for semester 2, she was on sick leave and there was concern about Dr Scott's health and the potential risk to her reputation and that of the University. Professor Kenix wrote that before the suitability of IT access can be established the University needed to ascertain there are no health and safety concerns. It was noted that Dr Scott was not medically cleared and the University was not satisfied that she was ready to return to work. The letter also advised that she would remain on sick leave until further medical information was received.

[72] The provision of this letter to Dr Scott is illustrative of some of the difficulties that arose for Dr Scott by removing IT. It was sent by Professor Kenix in the first instance to Dr Scott's University email which she did not have access to. It was not until a representative from TEU emailed Dr Scott and asked if she had received it that she was aware of it. Professor Kenix had sent the letter to the TEU representative and DG before Dr Scott received a copy.

¹⁶ Applicant's bundle of documents AS29 pg.79.

Dr Scott cleared medically for gradual return to work by Dr D in report dated 23 March 2018

[73] A medical report dated 23 March 2018 was provided to the University from Dr D. Dr D assessed Dr Scott on 21 March 2018.¹⁷ DG was present at that assessment. Dr D recommended in a report dated 23 March 2018 that Dr Scott return to partial or gradual duties with completion of those duties to a satisfactory or above satisfactory level seen as a precursor to a fuller return to work. A copy of a proposal for such a return was attached to the report from MHAPS. The plan referred to broader work than preparing lectures and required Dr Scott to have IT access. Reviews were to be undertaken of Dr Scott's work including discussions with postgraduate students about how the supervision is going.

Professor Kenix advises the University will not be considering a return to work

[74] Professor Kenix in a letter to Dr Scott dated 26 March 2018 noted amongst other matters that the University had received the medical report from Dr D and the suggestion of a partial return to duties. She wrote that the University would not be considering a return to duties until it was satisfied that Dr Scott was well enough to return and there was a suitable return to work plan that she would adhere to. Dr Scott was asked to attend another psychiatrist who I shall refer to as Professor M.¹⁸ Dr Scott had also been asked to see Professor M in 2014.

KG supports IT access

[75] KG met with Dr Scott on 27 March 2018 as part of the routine reviews under the 2014 work plan. KG recorded in an email to the University that she had no information to suggest Dr Scott's ability to function at the University was compromised and supported the letters from Dr W and DG recommending that Dr Scott be given access to the library and computer to attend to work related matters. This was consistent with the update to the work plan and advice about duties Dr Scott could perform.

Professor M clears Dr Scott for a gradual return to work in a report dated 16 April 2018

[76] Dr Scott attended with Professor M as requested by Professor Kenix on 10 April 2018. Professor M provided a report to the University dated 16 April 2018 that it received on

¹⁷ Applicant's bundle of document AS29 pg.79.

¹⁸ Applicant's bundle of documents AS30 pg.80.

or about 18 April 2018. In his report Professor M concluded that Dr Scott could begin a graduated return to work.¹⁹

[77] Mr Wilson submits that because of the highly autonomous role Dr Scott held and the need to have a high degree of trust and confidence in her the University was justified to restrict her IT. He submits that it was open to the University to form a view that unrestricted IT access may create a risk of reputational harm to Dr Scott or the University. He also submits that there was an expectation that Dr Scott would not be working whilst on sick leave. Further he submits that the information provided at the time in or about March was misleading because Dr Scott had stopped her medication in January 2018 and did not take the medication prescribed by Dr W in February 2018. Mr Wilson refers to this being a period of time when Dr Scott was being “actively dishonest”.

[78] Justification for restricting IT access even if could be established for a period immediately after the placement on involuntary sick leave is weakened by Dr W’s subsequent advice to the University verbally and in writing on 8 and 9 March 2018 that IT access could be reinstated. After Dr D’s report was received that cleared Dr Scott to return to work on a gradual basis as did subsequent reports I do not find that a fair and reasonable employer could continue to restrict IT access. There was no evidence of earlier concerns with inappropriate email/IT use by Dr Scott and the medical reports supported a gradual return to work.

[79] The issue with medication was not known about by the University until medical reports were received from Professor M and from Dr Scott’s own doctor in April 2018. It was not therefore part of the decision making at the time IT was removed and then restricted. In terms of any impact not taking medication may have had Professor M specifically in answering a question from the University about medication in his 16 April report stated:²⁰

...from her perspective, and there is no obvious evidence to contradict this, she has been just as well on or off the medication.”

[80] Dr Scott was disadvantaged by the complete restriction of IT access initially with no procedural fairness and then the partial restriction against a background where IT access was supported by Dr W and she was cleared to return to work on a graduated basis from March 2018. The requirements for IT access also changed from initially a requirement to be

¹⁹ Applicant’s bundle of documents AS44 pg 111.

²⁰ Above n 19.

medically cleared for work to agreeing to a suitable return to work plan when Dr Scott was cleared.

[81] I do not find disadvantage is answered by Mr Wilson's submission that there was no expectation that Dr Scott work whilst on sick leave. This submission does not take into account Dr Scott's role, the medical reports that cleared her for a gradual return to work and the fact that IT is not, with the exception of one other case, restricted for others on sick leave. The medical reports from 23 March 2018 do not conclude that Dr Scott was unwell.

[82] Dr Scott set out some of the disadvantage she suffered. She set out in her written evidence that she lost contact details for professional and personal networks compiled over a period of 18 years which could not be restored even when she returned to work in 2019. Further she was unable to maintain contact with her research group and she felt that she had let the other members of the group down. She was also concerned at losing new professional opportunities by being unable to access emails. A former MA student with whom she was writing a journal article was unable to get in touch with her by email and had become distraught and although Dr Scott was eventually able to contact the student by other means they almost missed the publication date because emails were not accessed about the article deadline.

[83] Dr Scott has made out her grievance that she was unjustifiably disadvantaged by removal of IT access and then restriction of the same. I will address remedies once other claims have been assessed as there is an element of overlap.

[84] Mr Riach confirmed that the discrimination claim is particular focussed on the restriction of IT access. Having found such IT restriction was an unjustified disadvantage I do not additionally need to consider the claim as one of discrimination. The employment relationship problem about IT has been resolved without the need to do so consistent with the role of the Authority.²¹

Unlawful suspension

Was there a grievance raised about unlawful suspension beyond 2 May 2018?

²¹ Section 157 of the Employment Relations Act 2000.

[85] Mr Wilson submits that a personal grievance about unlawful suspension for the period from 3 May 2018 to January 2019 was not raised under s 114 (1) of the Act. Mr Wilson distinguishes the situation from that in the Employment Court judgment of *Premier Events Group Limited v Beattie* where one raising of a personal grievance was sufficient to cover a related and continued course of action to the extent that it related to events outside of the 90 day period.²² Mr Wilson submits that Dr Scott is asking that her 2 May grievance cover further events that had not occurred at that date and could not be reasonably known.

[86] The grievance raised on 2 May 2018 was that Dr Scott had since February “effectively been suspended from work, without any contractual justification for this action.” There was also reference under a heading of breach of the duty of good faith that the University had refused to accept the overwhelming medical evidence that Dr Scott was fit to return to work.

[87] After 2 May 2018 Dr Scott remained concerned about not being permitted to return to work. Ms Park at a meeting on 3 July 2018 with the University stated that there were “four medical reports” that Dr Scott was fit to work. She stated an issue as to fitness to work where there were no performance concerns before 26 February 2018 was a “bit astounding that you can even be having an issue about whether there is a fitness to work.”²³ Later in the same meeting Ms Park refers to the various medical reports received at that time and it feeling like “we’re hitting our head against a wall.” This meeting was held after Professor M’s medical report of 16 April 2018 but before requested updates to the report were received.

[88] There were comments in Ms Park’s letter of 31 July 2018 to Professor Le Cocq that it was not disputed Dr Scott had been disappointed by the recent and continuing action of the University with reference to the 2 May letter.²⁴ Dr Scott voiced her concern about the length of her sick leave at a disciplinary meeting with the University on 4 September 2018. Mr Riach also referred to the continuation of the involuntary sick leave in his letter of 6 December 2018.²⁵

[89] I find that the 2 May 2018 letter that raised the grievance and the ongoing concerns raised with the University as set out above sufficed to cover the raising of this grievance for a period beyond 2 May 2018.

²² *Premier Events Group Limited v Beattie* (No 3) [2012] NZEmpC 79.

²³ Applicant’s bundle of documents AS55 pg. 150.

²⁴ Applicant’s bundle of document AS58 pg. 194.

²⁵ Above n 2.

No return to work permitted

[90] Professor Le Cocq referred to the requirement to obtain further information because of the highly autonomous nature of Dr Scott's role and the need for a high degree of trust and confidence. He referred to the age and vulnerability of students in his evidence.

[91] I accept that the University has obligations towards the students but the medical reports provide an independent assessment of Dr Scott's mental wellness from those experienced and knowledgeable in the area. Those who undertook the medical assessments knew what Dr Scott's role was. A fair and reasonable employer could unless there is good reason be expected to accept medical reports that follow an assessment of an employee by a psychiatrist.

[92] The Authority heard evidence about Dr Scott's functioning whilst she worked at the University. Some of this evidence came from two lecturers in the Sociology department at the material time. One described Dr Scott as an excellent lecturer who was skilled at pitching her lectures in ways that were accessible by students. She had not witnessed during the period they worked together any behaviour that would have put students or work colleagues at risk.

[93] The other referred to Dr Scott being very busy in early 2018 producing and writing lectures for the new 300 level course. Although she observed some level of stress with Dr Scott with the high workload before a planned trip to the United States and because of her ill mother she did not see any symptoms of mental health problems. She was surprised when she heard Dr Scott had been put on sick leave in February 2018.

[94] I also heard from a researcher and former student of Dr Scott who had known Dr Scott since 2015. Dr Scott had been her supervisor. She said that she had never observed any behaviours of Dr Scott that were unusual or concerning or that would pose a risk to students. She said that Dr Scott did not tell her about her spiritual beliefs during the time she supervised her PhD. She described Dr Scott as an excellent supervisor who from what she heard was very well regarded by the students she lectured. The student said that Dr Scott's exit from her supervisory team when Dr Scott was placed on involuntary sick leave resulted in stress, uncertainty and delayed the completion of her thesis.

[95] The Authority heard from Dame Susan Bagshaw who is a Primary Care Doctor. In her roles in working with young people in primary care she has a lot of experience with emerging mental illness and she explained in her evidence that distinguishing between mental illness and spiritual experiences has always been difficult.

[96] Dame Susan met Dr Scott about 6 or 7 years ago at a research group. She had not observed anything in the way that Dr Scott carried out her work or conducted herself that could have posed a risk to the University, its staff or students. She said that Dr Scott had always impressed her as having a wealth of knowledge and the ability to take a concept and explore the details in both a theoretical and practical way. She was aware that Dr Scott was placed on involuntary sick leave in 2018 but said that she was always rational and able to communicate well during 2018. Although aware that Dr Scott had been diagnosed with Bipolar disorder Dame Susan did not observe symptoms of Bipolar with Dr Scott. She recalled that Dr Scott talked more about her spiritual experiences in 2018 and 2019 than previously but in a rational way and they were more relevant in a project they were working on.

[97] Mr Wilson submits that there was justification in seeking a further report from Professor M given the inconsistencies between Dr W's assessment and Dr D's. The evidence supports both Dr W and Dr D are experienced psychiatrists who interviewed/assessed Dr Scott at different points of time. DG was present at each time.

[98] If the University could be said to have been justified in not accepting Dr D's medical report it was only a few weeks later when Professor M assessed Dr Scott. He concluded that Dr Scott's mental state is normal with no specific psychiatric symptoms and it was reasonable for her to return to work on a gradual basis.

[99] The University is required to justify the continued placement on involuntary sick leave of Dr Scott once she was medically cleared to commence a gradual return to work from March 2018. The Authority has considered the medical reports from March 2018. They are consistent that Dr Scott was not presenting as mentally unwell and should be permitted to return to work initially on a gradual basis. Not only were there reports from psychiatrists but reports from KG and Dr Scott's own doctor.

[100] I have additionally considered in assessing justification aspects of the letter dated 26 April 2018 Professor Le Cocq wrote to Dr Scott. This letter attached a copy of the report

from Professor M dated 16 April 2018.²⁶ Professor Le Cocq noted in his letter that he had ongoing concerns about Dr Scott's fitness for work and that she had blocked Professor M from talking in particular to DG. I visit this matter in more depth when I consider the justification of the formal written warning issued on 12 September 2018 but I do not conclude this concern justified further delay. Ms Park in her letter of 2 May 2018 stated correctly that in his original report Professor M did not "caveat or qualify" his opinion as a result of not being able to talk to DG.

[101] In his updated report dated 28 June 2018 Professor M confirmed he had spoken to several people that the University had wanted him to. He briefly set out what information each had provided. His summary at the end of his report provided:

This has clearly been a difficult year for Dr Scott, her family, friends and Mental Health Services. However, they all agree that while Dr Scott has some unusual beliefs, these have not led to any significant alteration in her mental state. She is now calm, interactive, pleasant and easy to get on with. She still holds her views, but these do not appear to be interfering with her functioning in any measurable way.

I have not seen Dr Scott since my review on the 10th of April 2018. At that stage I felt she had no significant mental state abnormalities and given the opinions of her family, friends and mental health staff, I have no reason to change that opinion. Therefore, I still believe that Dr Scott is able to begin a graduated return to work.

[102] After that updated report Professor Le Cocq met with Professor M and asked him some further questions.

[103] A decision was made in September 2018 that Dr Scott could return to work with a satisfactory return to work plan.

[104] The University has been unable to justify its decision to kept Dr Scott on involuntary sick leave once medically cleared from March and April 2018 on the basis of the 2014 work plan or otherwise.

[105] Continued placement on sick leave once cleared to return amounts to an unlawful suspension that could not be supported by the 2014 work plan or otherwise.

[106] There was corresponding disadvantage in requiring Dr Scott to remain away when she was assessed as presenting without current mental unwellness. I weigh that she remained on

²⁶ Applicant's bundle of documents AS35 pg. 93.

full pay. Even taking this into account Dr Scott was not able to be part of the workplace and the department. This included being unable to supervise her postgraduate students and an inability to prepare for a new Sociology and Anthropology health course at third year level which had high enrolment and was to be taught in semester two. That course ended up being cancelled. The disadvantage of the continued unlawful suspension could have been reduced somewhat if Dr Scott had full IT access and access to her office and library. This overlaps in some respects with the grievance found made out about IT.

[107] Ms Park proposed an approach by way of a staggered return by way of reinstatement of full IT and office access immediately and student face to face contact and supervision from 6 June 2018. There was no agreement to that.²⁷

[108] Having found the grievance made out I will deal with remedies after considering the other claims.

First written warning

[109] By letter dated 12 September 2018 Dr Scott was issued with a written warning for conduct and behaviour that was found to amount to serious misconduct and breaches of good faith.²⁸ In making a decision on serious misconduct and breaches of good faith Professor Le Cocq said that he had taken all matters into consideration and had reached a decision to issue a written warning in respect of the “following type of conduct.” The wording was broad.

[110] The findings in respect of the three concerns that formed the basis of the warning were as follows.

- (a) That Dr Scott was dishonest on at least two occasions to the University as to whether she was taking her prescribed medication.
- (b) That Dr Scott blocked access to relevant information and people and breached good faith and that hindered Professor M in his ability to provide a fully informed report to the University and for the University to be fully informed of Dr Scott’s mental health.
- (c) That Dr Scott unilaterally disregarded (and breached) her work plan without notice to the University by not advising that she had discharged herself from

²⁷ Above n 1.

²⁸ Applicant’s bundle of documents AS60 pg. 236.

psychiatric services, revoking the University's contact with DG and refusing to allow Professor M to contact certain people and refusing to allow him to reopen his assessment to provide a more comprehensive report.

[111] The original allegations that led to the formal written warning were contained in a letter to Dr Scott from Professor Le Cocq dated 29 May 2018. The letter also raised an issue about medical incapacity however this was effectively "parked" pending an updated report from Professor M.²⁹ Not all allegations were found to be made out.

[112] I do record that the matters that gave rise to concern arose in March and April 2018. The 29 May 2018 letter containing the allegations provided that "if one or all of these allegations are substantiated and/or your explanation is not considered satisfactory, your employment may be terminated."³⁰ There was no outcome for Dr Scott until September 2018. That is a considerable period of time to be waiting for an outcome that could be as serious as termination of employment with comparatively straightforward allegations. Some of the delay was caused by the University waiting for an updated report and then continuing discussions with Professor M.

Dishonesty on at least two occasions to the University in relation to whether Dr Scott was taking prescribed medication - serious misconduct

[113] In a letter from Ms Park to the University dated 28 March 2018 Ms Park advised that Dr Scott was taking her medication as directed by Dr W. Further in the 4 April meeting when Ms Park confirmed Dr Scott was taking her medication Dr Scott made no attempt to correct her.

[114] The explanation given in correspondence and meetings held with the University was that Dr Scott had not told the truth to her lawyer and indeed other health professionals about the prescribed medication because Dr W had threatened to involuntarily hospitalise her on 27 February 2018 unless she took the antipsychotic medications. She said that when she was confident she would be discharged from the NACPS shortly before her assessment with Professor M she was no longer under Dr W's authority. She said that she felt able to be open with Professor M on 10 April 2018 and her own doctor that she had not taken medication for some months. It was not concluded by either that she was unwell without it. Her doctor in

²⁹ Applicant's bundle of documents AS53 at pg.132.

³⁰ Above n 29.

an email to Ms Dillon dated 19 April 2018 noted that Dr Scott had admitted that she had not taken medication for three months. She considered that could be seen as a positive sign because if she had been developing a psychosis then she would have deteriorated by that point off medication.³¹

[115] Dr Scott contrasted her openness that she had stopped taking medication at all with Ms Dillon and Professor Kenix on 26 February 2018 with knowledge that this could have consequences for her as an employee when she was placed on involuntary sick leave. This was indeed a concern raised in Professor Kenix's 14 March letter to Dr Scott.

[116] Ms Dillon had a telephone conversation with Dr W on 21 August 2018 and asked him whether he "was explicit" that unless Dr Scott took the high dose of anti-psychotic medication he prescribed she would be immediately and involuntarily hospitalised under the Mental Health Act. Dr W's statement as recorded in the file note was that he was less explicit and had a lengthy conversation including that DG was saying she was unwell and that he [DG] wanted her hospitalised. Dr W is recorded as saying he explained that stopping medication was likely to make her unwell and getting back on it will prevent her going to hospital.³²

[117] DG attended a meeting on 3 July 2018 with Dr Scott and the University to discuss the allegations and had a different recollection.³³ He was present at the time of the assessment by Dr W and stated:

At that session, Anne was given a very clear threat of either taking medication or being hospitalised. When people think of hospital, they think hospital as a nice supportive, caring, getting better environment and Anne's experience of hospital is dramatically different from that. It usually involves being forcibly medicated which can be literally being held on the ground while you're being injected with medication over a long period of time.

[118] The University asked Dr Scott to explain why she would mislead the University through her representative when it had made no threat about her medication and Dr Scott had asked that it make no further contact with Dr W.³⁴ Dr Scott in response accepted that the University was not involved in threatening her with involuntary hospitalisation and forced medication however said her fear was so great that she was not prepared to take any risk and

³¹ Applicant's bundle of documents AS46 pg. 117.

³² Respondent's bundle of document UC11 pg. 57.

³³ Applicant's bundle of document AS55 pg.154.

³⁴ Memorandum to Dr Scott from Professor Le Cocq dated 9 July 2018.

the safest course of action was to maintain the fiction that she was taking anti-psychotics. She said that she was concerned the University may inadvertently advise DG or tell KG.

[119] In the warning letter Professor Le Cocq accepted that Dr Scott may have been fearful of possible involuntary hospitalisation but he did not accept this excused her “lying” and misleading the University. He stated by the time the “second lie” was told Dr Scott had instructed the University not to contact the psychiatric service or Dr W. The letter about that is dated 5 April which was after the 4 April meeting but there is some suggestion it was emailed a little earlier. I do not consider I need to resolve that matter although both parties have different views about it. Professor Le Cocq reached the conclusion that Dr Scott’s actions were inconsistent with good faith and she was not honest and she misled the University. He concluded this amounted to serious misconduct.³⁵

[120] Mr Wilson directed the Authority to a statement in the Employment Court judgment in *Emmanuel v Waikato District Health Board* that:

It is essential to the maintenance of the necessary trust and confidence in the employment relationship that employees are honest and open with their employers...Where an employee provides misleading information to his or her employer on a matter the employee knows is important to the employer that usually will deeply impair or be destructive of the basic confidence or trust that is an essential of the employment relationship. It will almost inevitably amount to serious misconduct.³⁶

[121] Dr Scott was at the time of the misleading statements on involuntary sick leave. Her own views that she was mentally well, that it was a domestic situation and that she was performing well were not taken into account. She was prescribed a high dose of antipsychotic medication the day after she was placed on involuntary sick leave on 27 February 2018. There was a possibility that could not be completely discounted if Dr W or DG had understood she was not taking the prescribed medication she could have been hospitalised as an involuntary patient.

[122] Dr Scott’s explanation was that the fear of that based on her previous experiences of involuntary hospitalisation was such that she misled the University and indeed others about the fact she was not taking her medication. She apologised for doing so to the University. There was also a detailed description given about what involuntary hospitalisation involves in

³⁵ Above n 28.

³⁶ *Emmanuel v Waikato District Health Board* [2019] NZEmpC 81 at [60].

a letter from Ms Park dated 31 July 2018.³⁷ Consistent with that explanation there was openness on the part of Dr Scott about not taking medication with the University on 26 February 2018 which was the day before the 27 February assessment with Dr W. There was openness again after Dr Scott believed she would be discharged from NACPS with Professor M on 10 April 2018 and then openness with her own doctor³⁸.

[123] DG and others who had informed Dr W's views as at February and March 2018 also advised Professor M for the purposes of his updated report on 28 June 2018 that whilst Dr Scott had her beliefs there was no signs they were affecting her behaviour. Dr W is recorded in that report when spoken to by Professor M as saying that when he saw Dr Scott [February and March] he was concerned her psychotic symptoms would "herald a further manic episode" but that they appear not to have done so.³⁹

[124] I acknowledge the concerns of the University. Dr Scott did not dispute the conduct that she was dishonest about her medication for a short period. Her explanation of fear of involuntary hospitalisation was accepted to a degree by Professor Le Cocq. That was what a fair and reasonable employer could be expected to conclude because there was evidence that was consistent with that explanation. It was particularly important for Dr Scott to be honest with Professor M because the University were going to rely on that report whereas they had not done so with Dr D's report. She was honest with Professor M. The period within which the University was led to believe incorrectly that medication was being taken as prescribed was short, between 28 March 2018 and 10 April 2018. Importantly in terms of any findings about misconduct the statements that she was compliant with her prescribed medication were not relied on by the University either for a return to work or full reinstatement of IT.

[125] Dr Scott had not received any earlier warning or any other disciplinary action about this type or any other type of behaviour.

[126] When all those matters are weighed and considered objectively assessed I do not find a fair and reasonable employer could have concluded that there was serious misconduct on

³⁷ Letter from Ms Park to Professor Le Cocq dated 31 July 2018.

³⁸ Applicant's bundle of documents AS46 pg.117.

³⁹ Applicant's bundle of documents AS56 pg.186.

the part of Dr Scott about the fact that she was not taking her medication as prescribed and was not honest about it. It is distinguishable from the situation in *Emmanuel*.⁴⁰

Blocking access to relevant information and people and breached good faith and that hindered Professor M in his ability to provide a fully informed report to the University and for the University to be fully informed of Dr Scott's mental health.

Not allowing Professor M to contact certain people and re-open his assessment.

[127] Dr Scott asked Professor M not to talk to DG at the time of his first report. Dr Scott stated to Professor M in an email of 12 April 2018 that her marriage is “on the rocks” because DG is getting put in the “middle of things” and she did not want the relationship damaged further. She explained that she had put him on a non-disclosure list and taken him off the return to work plan at the University.⁴¹ The only restriction for Professor M was to DG.

[128] Professor M confirmed to Ms Dillon that he had access to Dr Scott's medical reports when he undertook this first report. These records as confirmed by a number of documents in the bundles contain views of DG and others about Dr Scott's behaviour. Professor M did not identify in his report that not being able to contact DG prevented completion of a full report on 16 April 2018.

[129] One of the concerns for the University was that Dr Scott had also advised that it was no longer to have contact with DG on 23 March 2018 and it considered that was contrary to the work plan. It makes sense to address that issue here as it overlaps with what information Professor M had at the time of his first report.

[130] Until 26 April 2018 Dr Scott was unaware that DG and one of her four adult children provided the University with unsolicited emails and a letter after she had asked that the University no longer contact him in respect of her employment. The first of these unsolicited emails was sent on 27 March, another on 30 March, one on 3 April together with a long letter undated with knowledge that Dr Scott and Ms Park were to have a meeting with the University on 4 April 2018 about IT access.⁴²

⁴⁰ Above n 18.

⁴¹ Applicant's bundle of documents AS45 pg. 116.

⁴² Applicant's bundle of documents AS35 pg.89.

[131] DG in the email on 27 March to the University stated that the instruction to not talk with him about Dr Scott's mental health was explicitly breaking the work support plan terms and that no changes should be made to the work plan. Specifically he stated the University should not accept a new proposed support person as that would undermine the whole purpose of the plan and he "strongly suggested" and urged the University to hold Dr Scott to the support plan. It was also clear from the communications he sent at that time that it was likely DG and Dr Scott would separate.

[132] The University denies maintaining contact with DG after it was told not to except to the extent that DG was advised copies of the documents would be given to Dr Scott later in April 2018. The evidence supports these emails concerned Professor Le Cocq and were part of the reason notwithstanding medical reports that there were still questions as to Dr Scott's mental state.⁴³

[133] Professor Le Cocq in his oral evidence said that the emails from DG and Dr Scott's son were not provided to Professor M until after his first report. That was also said at a disciplinary meeting on 3 July 2018. Professor Le Cocq was mistaken about that because Ms Dillon had emailed Professor M's personal assistant on 9 April 2018 with the correspondence from DG and Dr Scott's son before he met with Dr Scott on 10 April and completed his first report.⁴⁴ I did not hear from Professor M and I am unclear about what weight was placed by him on the emails but he did have that information at the time of the first report.

[134] Dr Scott said in her written evidence that in reading the emails/letter from her husband and son on 26 April 2018 she was so distressed "she could hardly breathe."⁴⁵ She felt her husband had "betrayed her." These emails and the letter were not disclosed to Dr Scott or her representative by the University before or at the 4 April meeting when important discussions were being had about a return to work and IT.

[135] I do not find in the circumstances a fair and reasonable employer could conclude misconduct on the part of Dr Scott for restricting Professor M's access to DG.

⁴³ Applicant's bundle of documents AS 55 pg.179.

⁴⁴ Email of 9 April from Ms Dillon to Professor M's PA supplied July 2021.

⁴⁵ Statement of evidence of Dr Scott at [192].

[136] This leads onto another allegation that Dr Scott had refused permission for a second assessment by Professor M on 26 April 2018.

[137] On 26 April 2018 Dr Scott sent a fairly strongly worded letter to the University. In the letter she set out amongst other matters her view of another assessment:

You are using information garnered illegally from DG to try to construct medical evidence that will work in favour of your pre-determined decision to extend my involuntary sick leave in contravention to several medical assessments. This is clearly against the law. I do not give my permission for Dr. M to re-open his assessment of me, and I do not give my permission for Dr. M to approach the people DG had pre-identified as agreeing with his opinion.

DG is indeed acting in contravention to my best interests; it was precisely for this reasons that I had him removed as key support person from my return to work plan, and put the privacy restrictions relating to him in place.

[138] There then followed an email from Professor Le Cocq dated 1 May 2018 that if Dr Scott did not agree to a further assessment a return to work was unlikely and if unresolved it is likely to result in the termination of employment. Dr Scott took legal advice and reluctantly agreed to provide permission for a second assessment and for Professor M to talk to all of those individuals the University wanted him to.

[139] The letter from Ms Park containing Dr Scott's agreement to a second assessment and for Professor M to contact the individuals referred to was dated 2 May 2018. It was sent to Professor Le Cocq from Ms Park but he said he did not receive it as it went into spam mail. Until this was explained Dr Scott faced an allegation of failure to follow a reasonable instruction. This initial refusal was still relied on in the first written warning.

[140] I do not conclude this initial refusal to have a second assessment with Professor M could be seen as misconduct or a failure to be constructive seen in the context of what had occurred. It was a letter written the same day Dr Scott received the emails sent to the University by DG and her son that caused her shock and distress. That is evident from what she wrote at that time. After legal advice Dr Scott agreed to attend a second assessment a few days later.

[141] I do not find that a fair and reasonable employer could conclude in the circumstances these matters amounted to misconduct or serious misconduct.

Unilaterally disregarding and breaching the work plan by not telling the University about certain actions and revoking contact with DG

[142] There were a number of changes made by Dr Scott over a short period of time to people on the 2014 work plan. That was I accept challenging for the University with respect to a plan going forward. Ms Park in the letter of 2 May 2018 stated that the return to work plan was no longer operative. However in the event that was disputed then she referred to Section B and the agreement for a process if Dr Scott became unwell again. That was that she would be placed on immediate sick leave until medical advice is sought and/or an agreed return to work plan is in place.⁴⁶ She noted that Dr Scott would consider all reasonable proposals in respect of a return to work plan.

[143] The University continued to approach changes as the basis for misconduct and breaches of good faith rather than seeing them as needing discussion and negotiation for paving the way forward for a return to work.

[144] Dr Scott applied to change her psychiatrist Dr W and asked the Canterbury District Health Board (CDHB) to transfer her to a new psychiatrist. She had made a complaint about him. She advised Ms Dillon, Professor Kenix and LF of this in a letter dated 5 April 2018. She confirmed that she would continue to obtain monthly assessments with KG and she referred the University in the event it had concerns to her GP.

[145] There was dishonesty alleged in the 29 May 2018 letter and touched on in the letter of warning about what Dr Scott had told the University about monthly meetings with KG on 5 April 2018 when in fact she never intended to continue such assessments.⁴⁷ That was on the basis there was advice received a few days later on 11 April from KG regarding Dr Scott's discharge from Psychiatric Services. Dr Scott denied that allegation and explained that she never understood that she could be discharged until 9 April when she was told by KG at a meeting with her that this was open to her.

[146] After this explanation was given Ms Dillon contacted KG and asked her some questions. From that it was accepted that KG did talk about what Dr Scott wanted from the service and if she was wanting a change at the meeting on 9 April. The possibility of a discharge came up in conversation and this was in fact consistent with Dr Scott's explanation.

⁴⁶ Applicant's bundle of documents AS52 pg. 127.

⁴⁷ Above n 28.

When the letter of warning is considered as a whole there was a view of the University that Dr Scott had not been forthcoming about that matter. In light of what KG had said no finding of dishonesty could have been reached by a fair and reasonable employer about this matter to conclude misconduct.

[147] Focus was then on the discharge from NACPS without prior notification. The evidence supported that the discharge is required to be authorised by the team at psychiatric services which includes clinical psychiatrists. It was not something Dr Scott could do without authorisation from the team. Whilst it would have been preferable for Dr Scott to have told the University that she was seeking discharge the University knew from KG that she was discharged two days after Dr Scott indicated that she would seek a discharge. Dr Scott said that it was not until after 11 April she aware her discharge had been approved and KG therefore got in first with the advice to the University. A fair and reasonable employer could not conclude that was misconduct.

[148] Some focus was placed on an email to the University from KG dated 11 April 2018 that suggested discharge may be an unwise decision given the timing. It was stated by KG however that Dr Scott did not meet the criteria for compulsory treatment and had informal status.⁴⁸ KG also confirmed to the University that Dr Scott was not compromised in making the decision by a mood or psychotic disorder.⁴⁹ There was a concern for the University on the face of KG's email that Dr Scott had explained that KG was supportive of her decision but used the words that it may be seen as an unwise decision. Whether someone is supportive or not is often a subjective evaluation. Further investigation with KG about this would have been required beyond reliance on the words in an email if this could have been viewed as misconduct. On the information before it the University could not conclude misconduct in that regard.

[149] The basis for removing DG as a contact person under the work plan by Dr Scott was because of the marital difficulties and that his involvement caused difficulties and potential damage in and to the relationship. The removal was resisted by the University and seen as a breach of the work plan.

⁴⁸ Applicants bundle of document AS 41 pg.107.

⁴⁹ Applicant's bundle of documents AS 42 pg.108.

[150] The relationship between DG and Dr Scott was strained and this is supported by medical reports. Dr Scott said she no longer had confidence that DG had her best interests at heart and the state of the relationship could impact on the reliability of DG's statements. The University was sent and relied on communications from DG after the instruction from Dr Scott removing him as a support person. An alternative person to DG was suggested by Dr Scott although not seemingly seen as suitable to the University. I do not conclude there was misconduct in removing DG as a contact person. The work plan was in place from 2014 and circumstances can change as they did with the relationship of some 33 years between DG and Dr Scott. It was not unreasonable for Dr Scott to advise the University in those circumstances that it was no longer appropriate for DG to be the support or contact person and that could not amount to misconduct of any description.

[151] The warning was issued to Dr Scott on 12 September 2018 for three types of conduct. I have not found that a fair and reasonable employer could have concluded serious misconduct for the dishonesty about the medication in all the circumstances or misconduct or serious misconduct for the other two matters.

[152] Some weight was placed by Mr Wilson on the fact that Ms Park suggested an oral warning at most. An oral warning is followed by a first written warning, final warning and then dismissal in the University disciplinary process.⁵⁰ As Mr Wilson submits there is provision in the disciplinary policy that the type of warning given will reflect the seriousness of the situation. An example is given of a final warning being given in the absence of either an oral or first warning.

[153] In this matter findings of serious misconduct were reached by Professor Le Cocq for the conduct of concern and the disciplinary outcome of first final warning would have reflected that view of the seriousness of the situation. As earlier set out there had been no other disciplinary matters.

[154] In light of my findings about misconduct and serious misconduct for all three matters relied on as the basis for the first written warning the University has not been able to justify its action of issuing a formal written warning on the basis of serious misconduct. The warning is unjustified and I will deal with remedies after considering the other grievances.

⁵⁰ Respondent's bundle of documents UC33 pg.108.

Dr Scott is permitted to return to work

[155] Between 12 September 2018 and December 2018 there was communication about a return to work plan.

[156] Following a meeting between Dr Scott and the University on 17 December 2018 Dr Scott was to have a full return to her duties in 2019 subject to a memorandum that contained arrangements and instructions for a return to work.⁵¹ Professor Le Cocq also took steps to have full IT reinstated.

[157] The return to work conditions were accepted and Dr Scott agreed to operate in accordance with them with rights reserved about the lawfulness and reasonableness of the instructions in an email from Mr Riach dated 21 December 2018.⁵²

[158] Dr Scott and Mr Riach expressed appreciation at that time for the thoughtful way that Professor Le Cocq had dealt with the impasse of the return to work plan and had taken into account some of Dr Scott's concerns.

Final written warning 18 February 2019

[159] On 18 February 2019 Dr Scott was issued with a final written warning.⁵³ Professor Le Cocq confirmed when questioned that the communication with colleagues was limited to an email to a colleague R. When the final warning letter is read it refers to communication with "other colleagues in a tone which is aggressive and uncooperative" and the email to R is used as an example. It could suggest a broader concern. I accept for current purposes the evidence of Professor Le Cocq that it is the content of an email to a colleague R and an email to the Head of Department LF dated 30 and 31 January 2019 that resulted in the warning.

Email to R

[160] The email to R was sent by Dr Scott after she considered that R's email had been disrespectful. The last sentence in the email from Dr Scott supports that this was her view of R's email when she states "Don't ever imply that I am lazy or irresponsible again, R, I simply will not tolerate it".

⁵¹ Applicant's bundle of documents AS68 pg. 364.

⁵² Applicant's bundle of document AS69 pg.69.

⁵³ Applicant's bundle of documents AS75 pg. 419.

[161] She accepted at the disciplinary meeting that her email was “sharp.” R escalated the matter to LF and Dr Scott was disappointed that R did not talk to her directly before she did so. R did however send a short email in response although that may not have appeased Dr Scott. The issue in dispute was about who should do the uploading of reading for a course. Dr Scott set out her views for her absence in 2018 and the lack of fault about that. She referred to the University’s “illegal actions”.

[162] Dr Scott took exception to LF’s decision to remove her from level 1 teaching on a course on receipt of R’s email. She considered that LF should have talked to her first. R had also inadvertently sent Dr Scott an email LF had sent to her when she forwarded him the email from Dr Scott. In that email LF said “he was keeping a log of all these incidences at “M’s” suggestion. – just in case.” Dr Scott also had some concerns about how she was treated when she raised some proposals in relation to courses.

[163] Dr Scott wrote a 14 page email to LF in which she was also critical of a number of matters including the University’s actions the previous year, the keeping of a log and removal from teaching. This included reference to the University taking illegal action against Dr Scott such as suspension, discriminating against and bullying her. She wrote that she had 10 positive medical reports in 2018 but the University did not allow her to return to work.

[164] The allegations to answer in a letter dated 4 February 2019 from Professor Le Cocq were that she had breached trust and confidence and good faith obligations and that there was an alleged failure to follow lawful and reasonable instruction.⁵⁴ The 20 December 2018 instructions were referred to and the staff code of conduct. Further there was a concern that that Dr Scott was not willing to engage with the Department or College strategic plans or with reasonable course administration.

Conclusions and final warning dated 18 February 2019

[165] After a meeting on 15 February 2018 there was the warning letter from Professor Le Cocq dated 18 February 2019 that the language and sentiments in emails and verbal communication from Dr Scott to LF and others in the Department and possibly beyond was unacceptable and not consistent with trust and confidence and good faith. Further that the

⁵⁴ Applicant’s bundle of documents AS73 pg.388.

tone of the communication had fallen short of the expectations with the instructions of 20 December and the staff code of conduct.

[166] It was not concluded that Dr Scott would not comply with the strategic plans of College and University but rather that she had made statements that could be construed that way.

[167] There was also reference to a similar pattern of behaviour the previous year and that she had adopted a tone and approach disproportionate to the disagreement she found herself in. There was reference to the 2018 warning. It was recognised that Dr Scott had very strong feelings about the circumstances in 2018 and that they had had a considerable personal cost to her financially and in her personal life.

[168] Professor Le Cocq in the letter considered it appropriate that LF keep a record of concerns. He stated that there would be consultation about them as had occurred on this occasion.

Justification of the final written warning

[169] Dr Scott by way of explanation at the meeting at which she was accompanied by Mr Riach accepted that she should not have been sharing her views as to what occurred in 2018 with others and that some of the language was not acceptable. She accepted that she was angry and that there is “a bit of crusading.” Dr Scott accepted that she should not be making comments publically about the way she considered the University had treated her even though she strongly held those views. She said she would not say it publically again. These were appropriate concessions to make.

[170] A fair and reasonable employer could be expected to weigh concerns about the unilateral removal of Dr Scott from teaching level 1 courses and concerns about the log being kept on her and that these could be raised with LF. The unilateral removal of the teaching as she explained at the disciplinary meeting had caused her to mistrust the intentions behind that and she explained she considered that to be a punishment.

[171] LF explained at the disciplinary meeting that the intention was to reduce stress on Dr Scott however that was not immediately obvious from the email. Dr Scott only inadvertently found out about the log. R was told however of the fact it was being kept and

the email raised concerns about that. Objectively keeping a secret log on an employee when they have returned from a difficult year away is not an action likely to be conducive to a productive working relationship.

[172] Dr Scott expressed at the disciplinary meeting that it made her feel unsafe and that colleagues were talking behind her back. She did make in the email a threat of legal action and Professor Le Cocq expressed concern at the disciplinary meeting that “That’s an absolute extraordinary thing in a university context.”⁵⁵ An employee is entitled to raise concerns with a manager and state that she/he may take legal action. The concern about that must be limited to how that was said and the tone.

[173] The University could fairly and reasonably reach a view that the tone and content of the emails were disproportionate and Dr Scott should not have set out her views about 2018 and the University actions. There were some appropriate emails before the one that was focussed on between Dr Scott and R that could be weighed. Dr Scott explained what she referred to as the “sharp email” to R in the context of a stigma about mental illness where you are treated as if you are not particularly competent and can’t be trusted. Dr Scott explained that she considered R treated her in a condescending way as if she was not competent and “as if she was very junior.” Further that with mental illness “you only need an allegation against you and everyone assumes it’s true and treats you differently.”⁵⁶ Dr Scott explained that she had always had a “temper” at one point in the disciplinary meeting.

[174] When the emails were sent Dr Scott had been back at work for a few weeks only. It was known there were IT issues that continued to cause difficulties because of the change to partial IT in that she had lost all of her contacts and sent/received emails prior to January 2019 and her email was unreliable.⁵⁷ Ms Coles assisted in attempting to resolve this.⁵⁸ Dr Scott referred to this at the disciplinary meeting.⁵⁹ She also as explained had a sensitivity to being treated as if she was not competent because of the mental illness stigma. The email to LF was also in part a reaction to the knowledge to the secret log being kept on her and the unilateral removal of her from teaching without consent.

⁵⁵ Applicant’s bundle of documents AS74 pg.394.

⁵⁶ Applicant’s bundle of documents AS74 pg.402.

⁵⁷ Respondent’s bundles of documents UC32 pg.98.

⁵⁸ Respondent’s bundle of documents UC33 pg.99.

⁵⁹ Applicant’s bundle of documents AS74 pg.408.

[175] Mr Riach put forward that there should be no disciplinary action as a result of her behaviour and her explanations. Further that the University should simply take the opportunity to “set the scene” for expectations going forward. Professor Le Cocq said that he thought about that but concluded a final written warning was the appropriate disciplinary outcome.

[176] I conclude that a fair and reasonable employer could not weighing the explanations conclude that the two emails were such to justify a final written warning. That decision was based on the earlier first written warning that I have found to be unjustified. The final written warning was an unjustified action and it disadvantaged Dr Scott because it was a disciplinary outcome that brought her closer to dismissal.

[177] The grievance in respect of the final written warning is made out and remedies will be assessed at a later point.

Justification of dismissal

[178] By letter dated 15 May 2019 from Professor Le Cocq to Mr Riach Dr Scott was dismissed by way of summary dismissal. The first reason was that she had made a misleading or untruthful statement to the University and that was found to be serious misconduct. The second reason was that Dr Scott had refused to provide all relevant information about her mental health including giving consent to the University to talk to DG and laid down conditions with its employed psychiatrist Dr E. This was found to be a breach of good faith, the collective agreement and was serious misconduct. The third reason was the likelihood of relapse and the impact of this on the University. The fourth was general trust and confidence. This letter of termination followed a disciplinary meeting on 9 May 2019.

Misleading or untruthful statements

[179] On 21 February 2019 Ms Coles received a call from Dr Scott’s daughter who advised that Dr Scott had been involuntarily admitted to Hillmorton Hospital the night before. Dr Scott was in hospital from 20 – 25 February 2019. Following her discharge from hospital Dr Scott emailed Ms Coles and advised she was proposing to return to work the next day. Dr Scott was advised until the University could understand the circumstances surrounding the hospitalisation she was to remain on sick leave. It was agreed that Ms Coles would meet with Dr Scott to discuss the recent hospitalisation on 27 February 2019.

27 February 2019

[180] The serious misconduct was about what was said at the meeting on 27 February 2019 by Dr Scott to Ms Coles. There is a file note from the meeting.⁶⁰

[181] On 27 February 2019 Dr Scott told Ms Coles as recorded in the notes that she and DG had decided to separate and sell their house and that a formal separation agreement was required. It is recorded that Dr Scott advised that on the evening of 20 February 2019 DG came over to get details for the separation agreement and he wanted to stay for a coffee. Dr Scott told Ms Coles that within ten minutes of that the Crisis team arrived and told Dr Scott she had to go with them otherwise the police would be called. It is also recorded that Dr Scott said that she was afraid of DG and that he was unaware at that point that she had been released from hospital. Ms Coles ascertained that Dr Scott had friends to turn to.

[182] The file note records that Dr Scott told Ms Coles that after the five day assessment she was released as an outpatient but was still under the Mental Health Act. She said that Dr D said that she was not unwell enough to be in hospital but not sure if well. Dr Scott said that she had her formal assessment on 25 February and the next assessment is at 14 days. She would therefore require an assessment as an outpatient with Dr M (a different psychiatrist to Professor M) and that she had been referred to Dr RP for a second opinion for medication but this appointment had not been set up.

[183] The next statement was found to be misleading. I will therefore set it out in full as it appears in the file note:

Anne was not prescribed any medical (sic) while in Hillmorton, and she believes this is a sign that they (mental health services) do not believe she is unwell.

[184] The University then received a letter from Dr M dated 27 March 2019 who had undertaken the section 14 assessment of Dr Scott under the Mental Health Act. He wrote a long letter in response to the University but the relevant aspect for present purposes is that he wrote that Dr Scott does not agree to take psychotropic medications which in his opinion will help her because she had an established Bi-Polar Mood Disorder and without it the chances

⁶⁰ Respondent's bundle of documents UC34 pgs100 and 101.

of relapse are very high. He wrote that as an informal patient Dr Scott could not be forced to take treatment.⁶¹

[185] That statement said to be misleading needs to be considered and investigated with the allegation of serious misconduct in a letter to Dr Scott from Professor Le Cocq dated 11 April. It was that Dr Scott was untruthful to Ms Coles about the psychiatrist views “on your need to take medication.” There was reference to the first written warning.

[186] At the Authority’s investigation meeting questioning of Dr Scott confirmed that Dr M had not spoken or met her during her period of hospitalisation. Dr M met with her for an assessment on 8 May 2019 after she had been discharged because Dr D did not feel she needed an inpatient assessment or treatment.

[187] The explanation was not given at the time of the disciplinary meeting that Dr Scott did not see Dr M until after her admission to hospital. The University is required to establish justification for findings and disciplinary outcomes. Proper questioning and investigation by the University in line with the allegation would have quickly unearthed the true position.

[188] Dr M’s letter was referring to a different period of time with respect to any suggestion of prescribing medication. A fair and reasonable employer could not have concluded on the information it had before it that Dr Scott’s statement to Ms Coles on 27 February that she was not prescribed any medication in Hillmorton was untruthful at the time it was said. Dr Scott had some understanding of the forcible administration of medication. When she was in Hillmorton for the five days there was no evidence to support prescription of medication even though she was an involuntary patient. Dr D as recorded in Dr M’s letter to the University discharged Dr Scott without treatment. Dr Scott’s view of that as a sign that mental health services did not believe she was unwell could not be seen by a fair and reasonable employer as misleading or deceptive.

[189] What appeared to have occurred is that the University wrongly concluded that Dr M was involved at the time of the admission.

[190] I accept Mr Riach’s submission that a finding of serious misconduct about this was not available to a fair and reasonable employer on the information it had and cannot be a basis for the dismissal.

⁶¹ Applicant’s bundle of documents AS76 pg.422.

Refusal to provide all relevant information about your mental health - serious misconduct

Findings under this allegation

[191] It was found in the letter of dismissal dated 15 May 2019 that Dr Scott had not disputed that she would not permit release of all medical information in that she would not sign a consent form, refused to provide discharge summaries and would not permit the University to talk to DG. It was set out that Dr Scott maintained that this is information the University does not need and it impinges on her personal life. The University noted that Dr Scott had received a previous warning in relation to this.

[192] There was reference to the “sensitive and highly autonomous nature” of Dr Scott’s role and the high level of trust and confidence required in her role. It was stated that the University could not be expected to rely exclusively on Dr Scott’s own account of her admission or on psychiatric assessments that take place at a later time. Further that the assessment by Professor M, Dr M and others have indicated an established diagnosis of Bi-Polar mood disorder and that patients can function normally “in between manic and depressive illness” but without medication in someone with a history of 9 admissions the chances of relapse are high.

[193] Another concern found established was that Dr Scott wanted a fuller assessment before Dr E reported to the University. It was found this was unhelpful and unconstructive behaviour and that it was “not appropriate” for her to dictate conditions to Dr E or to any psychiatrist engaged by the University to monitor her mental health. In doing so she had undermined the process of the University regardless whether she felt she had good reason to do so or not.

[194] It was found that all of this breached good faith and the actions were in breach of clause G.5.4 of the collective agreement which states:

...during any period of sick leave, the University and the Employee will be active, constructive, responsive and communicative in maintaining a productive employment relationship. To this end, all Employees should engage constructively when asked by the University to provide information relevant and necessary for a safe return to work.

[195] This was found to have amounted to serious misconduct.

Not agreeing to the University talking to DG

[196] Professor Le Cocq wanted to be able to talk to DG to get another account of what occurred at the time of Dr Scott's admission to hospital. The explanation given by Dr Scott to that at the disciplinary meeting was that he would not have been an unbiased source of information, they were separated and it was not reasonable. Dr Scott referred to the three support people that she had provided the University with in line with the 20 December instructions. One had spoken to Ms Coles. There was also a question asked of Professor Le Cocq by Mr Riach that in the event of a dispute between the account of DG and Dr Scott how would that be resolved and was that for Professor Le Cocq to do given the subsequent medical assessments.

[197] DG and Dr Scott were separated, there was discord in the relationship to the extent that Dr Scott had earlier told Ms Coles on 27 February that she felt unsafe and matters had moved on to medical assessments after admission and discharge. In the circumstances a fair and reasonable employer could have been expected to have been alive to the potential unreasonableness of any request to talk to DG. This included the concerns raised by Mr Riach about potential reliability and how to resolve any issues of credibility of any account.

[198] I am not satisfied that it was unreasonable for Dr Scott to not consent to the University talking to DG and a fair and reasonable employer could not conclude misconduct for that.

Discharge summaries

[199] Dr Scott explained at the disciplinary meeting about the discharge summaries that Dr D would not release them to her unless she assured him they would not go to a third party. Initially she was happy to provide them to the University. When she had Dr D's view she was not.

[200] Ms Coles asked KG in a letter dated 25 March 2019 a number of quite lengthy questions about Dr Scott's admission and discharge and whether what Dr Scott had told them was correct.⁶² One of the questions was whether it was correct what Dr Scott had told them about the discharge summaries. I asked for further information about any response to that

⁶² Respondent's bundle of documents UC37 pg.105.

letter from KG. A brief file note of a telephone call between Ms Cole and KG was provided. The file note did not appear to cover this question. In any event that University was in a position to investigate this further with KG.

[201] I do not find that a fair and reasonable employer could have concluded misconduct because the discharge information was not released. There was other information available.

Not consenting to release and collection of medical information

[202] Dr Scott was not prepared to sign a consent form provided by the University to release of information from medical professionals at Hillmorton relating to her mental health. She explained the reasons why and was asked to sign the consent form a second time and declined to do so.

[203] The University said it was only wanting information relating to the latest admission. If Dr Scott had signed the consent form she would have authorised “the collection and release of information including but not limited to assessments and opinions, from medical professionals at Hillmorton.” That would have authorised potential release and collection of a considerable amount of confidential medical information extending back possibly to 2004 even if that was not the intention.

[204] Ms Coles in her email of 4 March to Dr Scott advised that the form was drafted in the way it was because the University wanted “reasonable transparency” into events, issues and concerns which lead to her involuntary admission and mental state before, during and after admission as these were directly relevant to her ability to do her job. There was reference to the autonomous high trust role that Dr Scott holds at the University.⁶³

[205] Mr Riach in a letter to Professor Le Cocq dated 6 May 2019 stated that Dr Scott was not under a duty to disclose all of her personal medical information to third parties including the University. At that point Dr E had withdrawn his services but Dr M was in the process of preparing a report about Dr Scott to be available for the disciplinary meeting.⁶⁴

[206] Mr Wilson in his submission refers to a number of cases that he says support that the University was entitled to insist that medical information is provided. *Radio New Zealand*

⁶³ Respondent’s bundle of documents UC15 pg. 63.

⁶⁴ Applicant’s bundle of documents AS79 pg.433.

Ltd v Snowden and Dunn v Waitemata District Health Board.⁶⁵ I accept there could be some impact on the employment relationship if the medical information before the employer is inadequate and there are good faith obligations to be responsive and communicative. With that there are protections for an individual about collection and release of medical information that have to be seen alongside any obligations in the employment agreement and generally. Dr Scott was entitled to decline to sign the consent form and to do so is not misconduct. I will shortly set out the information that the University actually had.

Dr E

[207] A psychiatrist, Dr E, had been engaged by the University in line with the instructions issued to Dr Scott in December 2018 to undergo bi-monthly appointments with a qualified psychiatrist. Subsequently on 1 May 2019 after being asked if he could provide a report in time for the disciplinary meeting he emailed Ms Cole and stated that he did not think he was going to be any help. He said that Dr Scott had:

...

put provisos regarding the quality of any report I could make based on the quality of interview she had, essentially determining, on her own expertise, what constitutes an adequate psychiatric assessment.

I see that I am going to get caught between the University requirements and Dr Scott's requirements despite my attempts to head this off and, therefore, I will bow out. I will inform Dr Scott.

...⁶⁶

[208] It was put to Dr Scott that it was not appropriate for her to lay down conditions and place constraints on Dr E. Professor Le Cocq advised at the disciplinary meeting that verbally Dr E had advised that Dr Scott wanted to "place restrictions on him and direct how his reports were to be written and what they contain."

[209] Mr Riach and Dr Scott provided the University before the disciplinary meeting with a copy of an email dated 1 May that Dr Scott had sent to Dr E's personal assistant. In that email she wrote that when she saw Dr E he said a second appointment may well be needed. She expressed that sounded sensible and she set out some difficulties over the past 17 months

⁶⁵ *Radio New Zealand Ltd v Snowdon* [2003] 1 ERNZ 12 at [83] and [87]. *Dunn v Waitemata District Health Board* [2014] NZEmpC 201.

⁶⁶ Respondent's bundle of document UC16 pg. 71-72.

about “uninformed assessments” without collecting information about her functioning. She wrote that she wanted a “full psychiatric evaluation.” She also wrote that “her ability to continue to pursue her profession” depended on a “full and accurate psychiatric evaluation.”⁶⁷

[210] Dr Scott said by way of explanation that she did not want to obstruct Dr E but wanted a full assessment that she felt had not occurred from the first meeting with Dr E where she said there was mainly discussion about the purpose of the appointment. Dr Scott explained that she never thought that Dr E would withdraw on that basis. She said that she did not think that it was unreasonable for a person who is facing the possible loss of her job for incapacity to ask for an assessment. Mr Riach noted at the disciplinary meeting that even though the appointment had been set back the letter of 11 April had arrived that stated the University was looking at dismissing her for medical incapacity. Therefore it was very important for Dr Scott and “went past the bi monthly thing in a way.”

[211] Dr E was entitled to decide to withdraw. It was disappointing for both Dr Scott and the University because his report was not available and it was difficult to secure a psychiatrist at the time in Christchurch. It may have been necessary to look further afield to Wellington and Dunedin for a psychiatrist. I do not find however objectively that a fair and reasonable employer could conclude Dr Scott wanted to or intended to put restraints on Dr E’s assessment in the sense of what information he could or could not write. The email from Dr Scott to Dr E’s personal assistant did not support that on its face.

[212] Dr E could have felt put upon to do something which was not in keeping with how he saw his role or the contract that he had with the University. He did not go back to Dr Scott before he withdrew from the process. He did not have to but had he done so it could have provided an opportunity for further discussion and perhaps another way forward. It may well have been advantageous for the University to have a fuller report from him at that stage because it was considering ending the relationship at least in part because of incapacity. The University had in 2018 as Dr Scott explained in her explanation to this concern returned back to Professor M twice for more information after his first full assessment. At the disciplinary meeting Dr Scott confirmed that she was willing to try to obtain another psychiatrist to have the bi-monthly assessments.

[213] I do not conclude the interactions with Dr E amounted to serious misconduct.

⁶⁷ Applicant’s bundle of document AS81 pg.440.

What information did the University have about the admission in 2019?

[214] Dr Scott had consented to the University talking to KG and Dr M and there were other support people who could be contacted. Dr Scott had provided a fairly full account of what led to her admission which she said was preceded by a domestic dispute to Ms Coles on 27 February 2019.

Dr M's letter of 27 March 2019

[215] Dr M provided a letter of a little over five pages to Ms Coles dated 27 March 2019 and responded to her questions about who could make an application for assessment under the Mental Health Act and the steps that that entailed.⁶⁸

[216] He then went on to refer to Dr Scott specifically in his letter. He referred to “collateral history” provided by her husband and children that she was becoming increasingly volatile especially when her situation at work is brought up as she believe there is bullying and discrimination. Dr M wrote that the following day she was reviewed by Dr D. Collateral information was gathered from three colleagues and two others who reported Dr Scott was not mentally unwell and is performing tasks properly.

[217] Dr M wrote that Dr D assessed Dr Scott on 25 February 2019. He found she was able to talk and undertake activities of daily living without difficulty and was not evidently manic. When she was assessed by an occupational therapist she reached the highest score in the “Allen” cognitive level and there were no issues with concentration or distractibility. Dr Scott was then discharged back to the community as Dr D did not feel she needed an inpatient assessment or treatment.

[218] Dr M referred to Dr Scott being diagnosed with Bi-Polar Mood Disorder with at least nine prior admissions although with no presentation currently with prominent mood symptoms. The main issue noted was her spirituality. He noted as set out earlier that in his opinion psychotropic medications would help her because of the established diagnosis of Bi-Polar Mood Disorder.

[219] Without treatment he stated the chance or relapse is quite high but Dr Scott could not be forced to take medication. In answer to the University’s question he stated that it was

⁶⁸ Above n 61.

difficult to predict the duration between relapses. It could happen over weeks or months. He noted that she agreed to continue seeing KG and her psychiatrist.

Second report of Dr M dated 6 May 2019

[220] In a report of 6 May 2019 to Dr Scott's doctor Dr M stated that he had met Dr Scott with KG that day for her follow up appointment.⁶⁹

[221] This report was available for the disciplinary meeting on 9 May 2019.

[222] Under the heading mental state examination Dr M wrote:

I could not find any remarkable thing except her spiritual beliefs which are consistent with Spiritualist Church and cannot be labelled as delusions. Her mood was euthymic. There was no subjective evidence of objective reporting of perceptual distortion. Cognitive function was grossly intact. Her judgment was not impaired.

She has not been on any antipsychotic medication for more than a year and despite that she is not showing any signs of manic or depressive episodes.

[223] He stated that in his opinion currently Dr Scott does not "manifest any abnormal mood or psychotic symptoms". The plan as set out was that as she has been stable without being on psychotropic medications for more than a year there is no need for her to be under Specialist Mental Health Service care and she was discharged back to GP care.

[224] There was medical information provided to the University and further information could have been requested from Dr M or KG. I do not find that it could be considered inadequate. I do not find in the circumstances that a fair and reasonable employer could conclude there was serious misconduct on the part of Dr Scott about medical information release. This could not be a ground for dismissal.

The likelihood of relapse and the impact on the University - incapacity

Medical incapacity tests

[225] This situation does not fit easily in the tests applied in other employment cases for medical incapacity.⁷⁰

⁶⁹ Applicant's bundle of documents AS80 pg.435.

⁷⁰ *Lal v The Warehouse Limited* [2017] NZEmpC 66 at [48].

[226] Dr Scott had been diagnosed in or about 2004 with Bipolar Disorder. Before the involuntary hospitalisation in February 2019 for five days the evidence supported previous admissions of Dr Scott to hospital occurred on six occasions in 2003 to 2004 and two occasions between 2013 and 2014.

[227] In 2014 when Professor M reviewed Dr Scott he considered that she had Bipolar Disorder which was at that time in remission. When he assessed Dr Scott in April 2018 he diagnosed her on the DSM 5 with Bipolar Disorder (in remission) and concluded that she presented with a normal mental state notwithstanding some unusual beliefs. Professor M's view remained unchanged in a subsequent report and there were further discussion between him and the University. The University was satisfied from discussions with Professor M and an agreement to abide by instructions that Dr Scott could return on a full time basis to her position rather than on a gradual basis. Although Dr Scott remained off for much of 2018 there was no hospital admission that year.

[228] Of more recent times Dr M concluded in his 6 May 2019 report that Dr Scott did not manifest any abnormal mood or psychotic symptoms and the only remarkable thing was her spiritual beliefs which are consistent with Spiritualist Church and could not be labelled as delusions. This report was not inconsistent with Dr D's and Professor M's reports and those from KG and Dr Scott's own doctor.

[229] The reports from March 2018 were fairly consistent that Dr Scott did not require further time to recover before returning to work albeit in the early stages on a gradual basis. There was then the 2019 hospitalisation. At the time of dismissal the University had Dr M's second report and the views of KG.

[230] There was the issue with Dr E however the effect of that was one of delay in obtaining a new psychiatrist as opposed to Dr Scott refusing to comply with the instruction.

[231] On the face of it the medical information supported that Dr Scott was not presenting as mentally unwell despite not being on anti-psychotic medications for over a year. The risk of a relapse could not be ruled out however in light of Dr M's second report there was no further investigation as to whether it was such that a fair and reasonable employer could have fairly and reasonably dismissed Dr Scott. Before reaching any view on justification of dismissal on the basis of incapacity I will consider the specific findings made in the letter of dismissal about incapacity.

[232] Professor Le Cocq stated in the letter of dismissal that he had reiterated the point that previous assessments have confirmed the diagnosis which Dr Scott disagreed with of Bi-Polar Disorder with a high likelihood of relapse. Further that Dr Scott continued to insist that the only relevant information is psychiatric assessments such as those of Professor M and Dr M which indicate that Dr Scott was well at the time of assessment. He stated that weight was not placed on the likelihood of relapse or a pattern of wellness in between episodes of manic and depressive illness.

[233] Professor Le Cocq in his evidence said that Professor M had indicated that a relapse was likely and could happen within the next ten years. He therefore supported a return to work because that timeframe was considered as acceptable. There was then Dr M's first report.

[234] There is inconsistency between Dr M's first and second reports. The first report referred to a relapse without medication within weeks or months. The second report recorded that Dr Scott has not been on any antipsychotic medication for more than a year and despite that she is not showing any signs of manic or depressive episodes. It was recorded that as Dr Scott has been stable without being on psychotropic medications for more than a year there was no need for her to be under Specialist Mental Health Service care. She was discharged back to GP care.

[235] There was no attempt to return to Dr M, after his second report to resolve a possibility of relapse or patterns of wellness where that information was quite different to the earlier report, before dismissal. The University before the second report was received had asked Dr M to clarify a number of matters including the grounds for admission in April 2019 and he did not respond at that stage.⁷¹ There was no further attempt after his second report.

[236] Over the 18 years or so that Dr Scott had been employed by the University there had been periods without unwellness or relapse. There was a seven year period from 2006 to 2013/2014. The next instance, aside from an episode of depression in 2015, was when DG approached the University in February 2018. Dr Scott was not admitted to hospital in 2018 and she had been performing well before her placement on involuntary sick leave. Dr W initially considered she was unwell in February and early March 2018. That was not the view of the authors of subsequent medical reports and assessments received by the University.

⁷¹ Statement of evidence of Nicole Coles [70].

[237] Dr Scott agreed that her extended periods of required sick leave or reduced duties including not teaching of almost a year at that stage had been disruptive to the Department and the University and financially costly. Dr Scott explained that she viewed this as resulting from unjustified actions on the part of the University. Professor Le Cocq reiterated in the dismissal letter the responsible nature of Dr Scott's role and that Dr Scott had not demonstrated that she would behave constructively in response to any relapse. Dr M's second report does not support on its face that she had had a relapse in 2019. When Professor M spoke to Dr W for the purpose of his second report in June 2018 Dr W noted that his concern was that psychotic symptoms would herald a further manic attack but noted that they appear not to have done so.⁷²

[238] There was reference to Dr Scott refusing to see a psychiatrist the previous year exacerbating the length of time away. I do not accept that a fair and reasonable employer could attribute any significant delay in that matter to Dr Scott. Any delay in agreement to see Professor M for a second time and consenting to him talking to individuals was between 26 April and 2 May 2018 which is a period of five days. Dr Scott cannot be responsible for the fact the letter went to Professor Le Cocq's spam mail.

[239] The situation with Dr E was referred to as a matter of concern. An email was provided before the disciplinary meeting between Dr Scott and Dr E's personal assistant that did not on its face support an intention to undermine Dr E. At the disciplinary meeting Dr Scott said that she would attempt to obtain the names of other psychiatrists and that would enable the requirements of the 20 December instructions from Professor Le Cocq to be fulfilled. Whilst there could have been some delay it was not known what that delay would be before Dr Scott's employment was then terminated.

[240] There was reference to Dr Scott explaining that she had her spiritual awakening from 2016 however Professor Le Cocq said at their first meeting in 2014 Dr Scott asked him to arrange a meeting of the College for her to explain the apparent illness was in fact a spiritual event. Dr Scott had disagreed with that saying that what she had said was that she wanted a "welcome back party." Professor Le Cocq wrote in the dismissal letter that he was confident about his recollection. It is unclear the relevance of this somewhat historical event in light of the medical information which should be the focus of the University.

⁷² Applicant's bundle of documents AS56 pg. 186.

[241] In a catch all paragraph Professor Le Cocq wrote that the impact on the University and Department has been significant and that Dr Scott's prognosis for the future is uncertain and the medical advice is that there is a high chance of relapse without medicine. He wrote that he did not consider it reasonable to keep accommodating Dr Scott and he did not have confidence that any such accommodation would help the University because Dr Scott could not be trusted to disclose relevant information or enable an understanding as to what is happening.

[242] I conclude that a fair and reasonable employer approaching the issue of relapse with an open mind could have been expected to rely not only on Dr M's first report but also his second report and question further the inconsistency between them as to relapse and medication.

[243] I accept that there was impact on the University with the long period of Dr Scott's sick leave in 2018 and again from February 2019. That has to be weighed with the fact that there were medical assessments that cleared Dr Scott to return to work from 23 March 2018 and Dr Scott wanted to return to work as soon as possible. It was the University that was not prepared to agree to that or reinstate full IT access.

[244] Ms Park and then Mr Riach advised at various stages that Dr Scott would consider reasonable proposals for a return to work plan. Her primary goal in 2018 was always to return to work as soon as possible and this was repeated in written correspondence from her representatives and in face to face meetings. Dr Scott had agreed to abide by return to work instructions of 20 December 2018.

[245] The decision to dismiss Dr Scott on the basis of medical incapacity and a likelihood of relapse was unusual because there was medical information available to the University at the time that Dr Scott was not mentally unwell removing the basis for any continued sick leave. The view about relapse within the shortened timeframe of weeks or months without medication was either premature or overtaken by the second medical report by Dr M. With knowledge that Dr Scott had not been on antipsychotic medication for over a year Dr M did not suggest that had caused harm or that such medication needed to be prescribed. It was unknown what the delay would be in securing a further psychiatrist under the return to work instructions. It may not have been significant.

[246] Dismissal was not the action a fair and reasonable employer could have taken in all the circumstances on the basis of incapacity and likelihood of the impact of any relapse.

[247] The final ground for dismissal was a very broad trust and confidence matter. This was expressed as a combination of the above matters. There was reference to Dr Scott's episodes of volatility, problematic behaviour and their possible link to the longstanding diagnose of Bi-Polar disorder, behaviour with colleagues and an ongoing refusal to provide access to information about mental health and engage constructively despite the earlier warning demonstrating a lack of perception and judgement.

[248] All these things and more were found to have eroded trust and confidence. There was also reference to the concerns in the letter of 11 April 2019 continuing to be highly significant and not ameliorated by responses at the meeting. There was reference to very similar concerns which led to Dr Scott being relieved of teaching duties during 2018 and the warning provided that year.

[249] The letter of termination said that the decision to dismiss would have been made even if Professor Le Cocq did not have regard to any employment issues which arose prior to Dr Scott's admission to Hillmorton in 2019 but is compounded by them.

[250] I have considered what could be the basis for this loss of trust and confidence. Placement on involuntary sick leave in 2018 could not form the basis for a loss of trust and confidence. There was no evidence to support work performance issues before that period. I accept that the University would have been concerned to hear on 26 February that Dr Scott had gone off medication without them knowing about it. That concern that it meant Dr Scott was unsafe was short-lived because their own expert Professor M said in his April medical report there was nothing to suggest that she was not as well on or off medication.

[251] The University declined to accept Dr D's medical report in March 2018. Dr Scott was advised the University was considering whether the employment relationship could continue or whether termination of employment for incapacity was appropriate.⁷³ She was asked in that same letter to attend Professor M and to provide him with access to medical records.

⁷³ Applicant's bundle of documents AS30 pg.80.

[252] She did both these things quite willingly notwithstanding that she considered Dr D's report was sufficient. The only restriction was that she advised Professor M she would "rather that he didn't talk to DG" as their marriage was in difficulty because he was in the middle of things and she did not want to damage the relationship further.

[253] Dr Scott did agree reluctantly that Professor M could have access to all individuals named in the information from DG for an updated report. Dr Scott through Ms Park also gave consent to the University to ask Professor M about an allegation of dishonesty that arose from considering the unsolicited information by DG and Professor M's first report. Ms Park wrote Dr Scott was prepared to accept his recollection about the matter which is a constructive response.⁷⁴ That matter was not ultimately pursued as a disciplinary matter.

[254] The Authority has concluded it was not unreasonable for Dr Scott to withdraw consent and not give further consent in 2019 to the University to talk to DG in all the circumstances. That matter cannot in the circumstances give rise to fundamental trust and confidence concerns either in 2018 or 2019.

[255] Dr Scott was not honest with the University for a short period about the fact that she was not taking prescribed medication between 28 March and 10 April 2018. She was honest when this was put to her as an allegation of dishonesty. There was no evidence to support continued dishonesty about medication after 10 April 2018 and I have not concluded a fair and reasonable employer could find she mislead Ms Coles about medication whilst in Hillmorton hospital in 2019.

[256] There were some concerns about Dr Scott removing access by the University to Dr W, DG and the NACPS in breach of the plan in March and April 2018 without agreement and consultation. I accept that this could have been approached better. With that Dr Scott was legally able to make decisions about her medical care and it was not unreasonable for her to remove DG from the plan.

[257] Dr Scott of her own volition had a full mental health assessment with her own doctor in or about April 2018 and gave permission to the University to ask her doctor questions about her reports. She paid for these and sent them to the University during 2018. Dr Scott also provided the name of a support person and her background and qualifications to the

⁷⁴ Applicant's bundle of documents AS58 pg.195.

University on 3 April 2018.⁷⁵ Under the return to work plan instructions in 2019 she provided the names of three support people.

[258] The communication from Dr Scott's representatives throughout this lengthy period at meetings and in correspondence was constructive and focussed in preserving the employment relationship notwithstanding grievances were raised from time to time. It was always Dr Scott's wish to return to work.

[259] Some of Dr Scott's behaviour that caused concern likely arose because of frustration with the actions of the University.

[260] An example of that is that Professor M's first report dated 16 April 2018 was sent to the University on 18 April 2018. Dr Scott became concerned when she did not have a copy of it by 20 April. Her calls to several University employees about the report on 24 April were described in the 29 May 2018 from Professor Le Cocq as "strangely excessive and unnecessary." This seemed to suggest the possibility of unwellness. Objectively her telephone calls to see where things were at with it could be explained by a desire to see the medical report. She was entitled to a copy and had been advised that the University was considering termination on the basis of incapacity so it was important. Dr Scott was about to take pre-arranged leave on 5 May to America to see family and if the report was positive she wanted to arrange a return to leave plan before that trip to remove that stress.

[261] I accept that the University was concerned about the two emails in 2019. Some of what was written at that time in one of the emails related to knowledge that a secret log was being kept on her and she had been removed from some teaching without consultation. This was also a time where there was stress in returning from a long period of absence with heightened concerns about being treated in a certain way because of a mental health stigma.

[262] I have been asked to consider by virtue of some additional evidence in affidavits after the investigation meeting whether Dr Scott putting forward new courses in department meetings after she returned in 2019 formed part of the decision making at the time of the final warning and dismissal. This was denied by Professor Le Cocq. He described this in his oral evidence as unusual and strange. I could not be satisfied to the appropriate degree that it formed part of the decision making for the final warning or the dismissal.

⁷⁵ Applicant's bundle of documents AS34 pg.87.

[263] I do not find when objectively assessing all the events from February 2018 that a fair and reasonable employer could conclude that they “continually eroded and undermined trust and confidence.” I do not find that a fair and reasonable employer could have reached a justifiable decision to dismiss Dr Scott on this ground or any of the other ground of misconduct or incapacity viewed separately or cumulatively in the circumstances.

[264] Dr Scott was unjustifiably dismissed from her employment with the University. She has made out her personal grievance of unjustified dismissal and is entitled to consideration of remedies.

Remedies

Lost wages

[265] Dr Scott seeks reimbursement of lost wages from the date of dismissal in 15 May 2019 to the date of the Authority investigation meeting on 7 December 2020 less earnings received. She asks that the Authority exercise its discretion under s 128(3) of the Act and order the University to pay to her a sum for remuneration lost as a result of her dismissal greater than that set out in subsection (2).

[266] As Mr Wilson correctly submits there can be no issue of lost wages for the period before the dismissal as Dr Scott was on full pay.

[267] Mr Wilson submits that Dr Scott provided no evidence of her earning since 15 May 2019 however this information was attached to submissions in reply. Mr Wilson submits that there is only limited evidence of attempt to mitigate loss.

[268] Dr Scott in her evidence explained the difficult financial situation she was in following her dismissal. The proceeds from the sale of the family home were still in trust and at the date of the Authority investigation meeting Dr Scott was unable to access those funds. After some initial advice from her family lawyer as a result of the separation that she could not draw on her retirement fund from the University she was given leave to do so. She used that money to live on and pay rent and establish a business offering education, consultancy and training in mental health, physical health, public health and disability. She also learned website development so she could offer that service to small health related business and NGO's.

[269] Ms Coles confirmed that Dr Scott had obtained a certificate of service. I accept notwithstanding that in applying for a professional or other role Dr Scott would have to explain how her 18 year role as lecturer/senior lecturer with the University ended. That would have necessitated somewhat unusually advising of a dismissal for both medical incapacity and serious misconduct. I do not find that her decisions to establish a business and retrain as a health practitioner could be seen as unwise in the circumstances or not the taking of suitable mitigation steps.

[270] Dr Scott said that whilst the business started well with six contracts in negotiation there was an attempt to evict her from where she was living. She said that the trauma and distress of the previous year came flooding back and she became physically and mentally unwell. She lost all six contracts and became largely unable to function.

[271] She said that things deteriorated to the stage where she rung the Mental Health Services and asked to be hospitalised. Her doctors then concluded she was not mentally unwell but exhausted and stressed and she was transferred to a respite service where she spent a week. On discharge she was told that she was still exhausted and must rest.

[272] Dame Susan said her view was that Dr Scott had suffered trauma in 2019 with the loss of her job, her husband and family and her brain was not functioning well with the stress and the spiritual experiences became more intense. Dr Scott was told by her doctor that she would need several months of rest. Once she found a place to live Dr Scott found she needed up to 14 hours of sleep for about eight months however at the time of the Authority investigation meeting she had recovered and was working in her business and training.

[273] Mr Wilson submits that the eviction and need for rest and recuperation that followed broke the chain of causation and from that point on any lost wages are not attributable to the University's actions. He submits that it was not foreseeable that Dr Scott would isolate herself from family and friends in remote accommodation and that the eviction would cause a further onset of stress preventing her from obtaining alternative work or earning an income.

[274] The evidence supports that the loss of Dr Scott's role in May 2019 that she had held for 18 years and the events that preceded it from February 2018 that I have already set out in some detail caused Dr Scott significant stress and an overwhelming sense of unfairness and grievance. This was over a significant period and was with the exception of a few months

fairly relentless stress. Dr Scott started out well enough after dismissal in setting up a new business and deciding on some training for a new direction.

[275] I find it more likely than not that the stress of the loss of her role and what led to that when triggered by the lesser event of eviction contributed in a significant way to Dr Scott becoming very unwell. I do weigh that the end of the marriage and the damage to family relationships was also a stressor. I cannot conclude from the evidence that the end of the marriage was the dominant cause of the stress. There was a unique aspect in this matter that blurs a clear line between the stressors at that time with the previous involvement of Dr Scott's ex-husband in employment actions in 2018 when she was placed on involuntary sick leave and at other points. The period of involuntary hospitalisation was also significant in the dismissal.

[276] The loss of the job and earlier events that led to that triggered by an eviction did not break the chain of causation so that the loss of wages could no longer be attributable to the unjustified dismissal. Dr Scott needed to take time to rest and recover so that she could work productively again. Where she lived whilst she recuperated and who she saw is not I conclude particularly relevant considered in the round.

[277] In taking all matters into account I consider this is an appropriate case to exercise my discretion under s 128(3) of the Act and order payment for lost remuneration for a greater sum than that in subsection (2). I do weigh with the health concerns very limited evidence of mitigation.

[278] I have paused and considered whether an adjournment of an earlier investigation meeting set for a fortnight commencing on 23 March 2020 should be taken into account in an assessment of lost wages. Dr Scott had become exhausted physically and mentally in preparing her statement of evidence and there was a medical certificate to support an adjournment request. She did not want to be compromised in the preparation of a statement of evidence. An adjournment was not opposed.

[279] I am not minded to limit reimbursement to that date. There was medical information to support an adjournment, and one would in all likelihood have been required in any event given the Covid lockdown.

[280] I am required as Mr Wilson submits to make allowances that the relationship may have ended before December 2020 in any event – *Sam’s Fukuyama Food Services Ltd v Zhang*.⁷⁶

[281] Before the placement on involuntary sick leave in late February 2018 the evidence supported Dr Scott was performing well.

[282] Mr Wilson places reliance on the warnings. Both have been found to be unjustified. The first warning related to events in March and April 2018 although it was imposed in September 2018.

[283] The second warning related to two separate emails between Dr Scott and a colleague and Head of School in 2019 which said different things but were sent at a similar time. Dr Scott had said she would not be critical of the University again in the way that she had been. I could not be satisfied that the employment relationship was at risk of significantly deteriorating from an assessment of those emails and Dr Scott’s reassurance going forward. The University environment is likely one where most differences between colleagues can be worked through.

[284] I could not be satisfied that the relationship would not have lasted because of any concerns about Dr Scott’s mental wellness for at least a further 15 months. The latest medical report from Dr M confirmed that Dr Scott did not need to be under Specialist Mental Health care and was not manifesting abnormal mood or psychotic symptoms. This was in line with the earlier reports.

[285] In considering all of the above matters and weighing both the causal link with the University’s actions and Dr Scott’s subsequent unwellness and the very limited mitigation I conclude it appropriate to exercise my discretion in s 128(3) of the Act and make an award, subject to any issue of contribution, of lost remuneration from 16 May 2019 to 16 August 2020.

[286] That is a period of 65 weeks and three days. Dr Scott at the material time received a salary of \$114,000 which is a weekly amount of \$2,192.31. My calculation of the lost wages for that period based on the 65 weeks is \$142,500.15 gross.

⁷⁶ *Sam’s Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [37].

[287] I take from that amount earnings received from the Canterbury Workers Educational Association before 16 August 2020 in the sum of \$578.88 as reflected in the statement from Inland Revenue. Mr Riach has also deducted benefits paid to Dr Scott from 31 January 2020. The usual way of dealing with benefits is to have that amount paid to Dr Scott rather than deducted. It is then between her and the Ministry of Social Development that paid the benefit money to discuss any repayments that may then follow. I do not therefore deduct the money received for benefits.

[288] Subject to any issue of contribution Dr Scott is entitled to reimbursement of lost wages the sum of \$141,921.27 gross under s 123(1)(b)(i) of the Act

Compensation

[289] In assessing compensation I am conscious of the fact that there is overlap between the grievances found made out. The Authority also needs to make an assessment about any contributory conduct and a separate rather than global assessment is appropriate therefore for some of the grievances.

[290] I have therefore assessed compensation for the first and fourth grievances together. I have assessed compensation for the second and third grievances separately.

Compensation for the placement on involuntary sick leave, removal of IT, unlawful suspension and dismissal.

[291] The global sum sought for these grievances is \$50,000.

[292] There was extensive evidence about the harm caused by these actions and I do not accept Mr Wilson's submission that there is no evidence of the hurt and humiliation caused by the first to third grievance and only limited for the fourth.

[293] The impact was set out over many pages in Dr Scott's statement of evidence and specifically in paragraphs [260] to [309]. I accept that the consequences of the University's actions have been devastating professionally and socially. Dr Scott has lost her career with its opportunity to publish. Her professional reputation has been damaged and she has lost professional connections. The financial impact has also been significant and she has lost a steady income with the financial security that came with that. Dr Scott has used up her retirement fund for living expenses.

[294] I do not conclude from the evidence that the responsibility for the breakup of Dr Scott's marriage and the harm to her relationship with her family and wider family is solely due to the actions of the University.

[295] I do accept that the University's actions at various stages when DG was involved with her employment contributed to her distress and humiliation. Dr Scott was not heard before her placement on involuntary sick leave when she considered she was mentally well. She was not heard at the time of the removal of her IT. The University relied on what DG said about that to remove IT access but not when he supported that it be restored. Dr Scott's IT was not fully restored until 2019 but had been so significantly damaged due to effectively being cut in half she lost all email contacts and email exchanges before that time.

[296] The University continued to retain and rely on information from DG after Dr Scott's instruction not to. That was relied on as a reason not to accept the medical reports that she could return to work on a gradual basis but was not provided to Dr Scott until 26 April 2018 and then to support concerns that became allegations. At the time that information was provided there appeared little thought was given as to any impact on Dr Scott. The University had however called DG to advise that it was being sent to her. That caused loss of dignity and humiliation. Dr Scott despite medical reports clearing her to work was not permitted to return and faced the possibility of termination for incapacity. That caused injury to her feelings.

[297] At the time of the investigation into the matters that resulted in dismissal the University insisted that it should be able to contact DG to verify Dr Scott's account of her admission to hospital in 2019. It did not accept that it would be unreasonable to do so and found the failure to agree to that an aspect of serious misconduct. That was humiliating for Dr Scott.

[298] Dr Scott's son in America said in his written evidence that before she was dismissed Dr Scott had held out hope she would regain her position. After her dismissal he said that she became extremely sad about losing her career and part of her identity. His written evidence referred to an anger about DG and the loss of her role. He said that she became tearful at times when talking about the loss of her role and family relationships and did not think that other possible business opportunities would fill the void left by her career.

[299] If Dr Scott had been heard at the time of her placement on involuntary sick leave then that would have reduced the loss of dignity and humiliation she suffered at that time. If her IT access had not been removed entirely and then only restored partially the impact would have been reduced including when she returned to work in 2019. Had she been allowed to return to work from her placement on involuntary sick leave at a much earlier time then re-entry into the workplace could have been less stressful and more gradual. Dr Scott's third year course that she had gained approval to teach in the second semester in 2018 would not have needed to be cancelled. The approval of this course was described by Dr Scott in her statement of evidence as an "unusual" and "lovely surprise". She could have continued the work with her research team and her supervision of postgraduate students. The stigma that comes with a mental health diagnosis could have been significantly reduced if she had not been required to remain outside of the workplace for an extended period.

[300] Dr Scott lost her 18 year career with all of its opportunities. She had been the primary income earner for the family during her years at the University and her work was a significant part of her life.

[301] I consider any award of compensation for these grievances should reflect the duration of humiliation and loss of dignity Dr Scott suffered as a result of these grievances and the significant impact on her from the effect of the summary dismissal.

[302] I do weigh that Dr Scott was on full pay for the period of her suspension. Part of that period from September 2018 was spent discussing a return to work plan. Subject to any issue of contribution an appropriate award consistent with other cases under this head is \$45,000 without deduction.

Contribution

[303] I am not satisfied that Dr Scott contributed in a blameworthy way to these grievances. The above awards are not reduced for reason of contribution.

First written warning

[304] This warning caused Dr Scott humiliation and loss of dignity. She had not received a previous disciplinary action in her 18 years at the University. Her feelings about that are

reflected by the fact that she wrote a 55 page letter with annexures to Professor Le Cocq about this on 6 December 2018.

[305] An appropriate award under this head subject to any issues about compensation is \$6000.

Contribution

[306] The main concern for which the warning was given was the dishonesty about medication. The Authority has found there was no basis for a finding of misconduct or serious misconduct for the other matters relied on.

[307] It was clear from the evidence that Professor Le Cocq felt particularly strongly about the dishonesty about medication. Mr Wilson in his submission refers to some of the medical information coming at a time when Dr Scott was being “actively dishonest” although it was a limited period. I have then considered whether Dr Scott misleading the University between 28 March and 10 April was an action that was culpable or blameworthy. I have weighed that during that time limited if any weight was being given to what Dr Scott had to say. More weight had been placed on DG’s statements and the psychiatrists.

[308] I do accept that as a result of a short period of dishonesty the University lost some confidence in Dr Scott that seemed to remain. I have already noted that there was a considerable period that elapsed between any dishonesty that ended on 10 April and the warning on 12 September 2018.

[309] The circumstances around the dishonesty and Dr Scott’s explanation for it need to be weighed together with the fact that she was not prescribed medication after 10 April 2018. I further weigh that her explanation as to why she was dishonest was accepted but not concluded to excuse the dishonesty. With that Dr Scott was a senior lecturer and the University needed to have confidence in her that she would be honest with them. At the time of being dishonest she had been cleared to return to work on a gradual basis and the reports at that time concluded she was mentally well.

[310] I conclude that any culpable or blameworthy conduct in all the circumstances was modest and limited to the medication issue. There is to be a reduction of 10% to reflect this.

Final warning

[311] The main humiliation and loss of dignity about this warning was that Dr Scott maintained her actions were not such that she should have been issued a final written warning, that she was stressed at the time of the issue of the warning and it was unfair. The actual impact of the warning was very limited because it was quickly followed by hospitalisation, sick leave and dismissal.

[312] An appropriate award under this head is the sum of \$5000.

Contribution

[313] There was stress at that time for Dr Scott and understandable concerns about the log being kept on her and the removal of teaching being a punishment. Some of what was said in the emails was not appropriate. There could have been an oral or first warning issued. There was some blameworthy behaviour and the above award is to be reduced by 15%

Recommendations

[314] This matter was not advanced in Mr Riach's submissions. I do not make any recommendations as the determination speaks for itself.

Costs

[315] I reserve the issue of costs. Failing agreement Mr Riach has until 4 August 2021 to lodge and serve submissions as to costs. Mr Wilson has until 18 August 2021 to lodge and serve submissions in reply.

Orders made

[316] The Vice-Chancellor of the University of Canterbury is ordered to pay to Dr Anne Scott the sum of \$141,921.27 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.

[317] The Vice-Chancellor of the University of Canterbury is ordered to pay compensation in the following amounts without deduction:

- (a) The sum of \$45,000 for the unjustified actions of placement on involuntary sick leave, removal and then only partial reinstatement of IT, unlawful suspension and unjustified dismissal.
- (b) Taking contribution into account the sum of \$5,400 for the first written warning.
- (c) Taking contribution into account the sum of \$4,250 for the final written warning.

Helen Doyle
Member of the Employment Relations Authority