

NOTE: This determination contains an order prohibiting publication of certain information at [1] – [2].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 190
3139761

BETWEEN

SMV
Applicant

AND

MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Barbara Buckett and Matt Belesky, counsel for the Applicant
Peter Chemis and Jessica Taylor, counsel for the Respondent

Investigation Meeting: 15 and 16 February 2022 and on the papers September 2022

Submissions received: 17 February, 27 September and 19 December 2022 from Applicant
17 February, 23 September and 20 December 2022 from Respondent

Determination: 18 April 2023

DETERMINATION OF THE AUTHORITY

Non-publication

[1] The Authority has issued a non-publication order under clause 10 (1) of Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting publication

of the name of the applicant and the other employees of the respondent involved in the matter, but who did not give evidence. The applicant is referred to as SMV.

Employment Relationship Problem

[2] SMV was employed at the Ministry of Business, Innovation and Employment (the Ministry) as a team leader and was dismissed after a finding of serious misconduct. SMV had been employed for 19 years starting with employment at the Department of Labour which later became the Ministry until her dismissal in October 2020. Her total length of employment in the public service amounts to approximately 32 years. SMV says her dismissal was unjustified and she seeks reinstatement, compensation, lost wages and loss of monetary benefit she would otherwise have received from continuous service.

[3] The Ministry says the dismissal was justified as it occurred after an investigation into conduct concerns about management style and sending sensitive information to an unauthorised email address. The Ministry accepts there were some flaws in the process, but says on the whole it followed a fair and reasonable process and in all the circumstances, it says, any flaws were not sufficiently serious to make the dismissal unjustified. It also says SMV's conduct meant the dismissal was substantively justifiable.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from SMV, SMV's husband, sister and a friend. Deborah Te Awhe, National Manager and Stephen Dunstan, General Manager gave evidence for the Ministry. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions. Further evidence and submissions were received on the issue of reinstatement. This was agreed to at the conclusion of the investigation meeting because the Authority required relevant information from the team who reported to SMV about reinstatement. Those employees had not participated in the investigation meeting.

[5] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[6] As permitted by 174C(4) of the Act, the Chief of the Authority has decided exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Issues

[7] The issues for determination by the Authority are as follows:

- (a) Whether the decision of the Ministry to dismiss SMV, and how it reached the decision, was what a fair and reasonable employer could have done in all the circumstances, at the time?
- (b) If the Ministry is found to have acted unjustifiably (in dismissing SMV), what remedies should be awarded to her considering:
 - (i) Reinstatement;
 - (ii) Lost wages and lost benefit under ss 123(1)(b) and (c) of the Act;
 - (iii) Interest on any lost wages; and
 - (iv) Compensation under s 123(1)(c)(i) of the Act.
- (c) If remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by SMV that contributed to the situation giving rise to her grievance?
- (d) Should either party contribute to the costs of representation of the other party?

Background

[8] SMV was responsible for managing a team with six direct reports. Ms Te Awhe, was appointed as a National Manager approximately 10 months before the issues about SMV surfaced. Ms Te Awhe said she had no direct knowledge of SMV or the individuals involved until she received a complaint from SMV about SMV's manager, followed closely in time with issues being raised about SMV by SMV's team.

SMV's complaint about her manager

[9] On 14 July 2020, SMV emailed her manager and Ms Te Awhe requesting a meeting with them both to discuss concerns about how she was being managed. In the subject line of the email SMV recorded "Meeting to discuss potential harassment incidents". She set out concerns under two headings with bullet point examples under each. The headings were "I have repeatedly asked that" and "Examples of overtly critical opinions towards me since being back in the office".

[10] Some of the matters SMV said she had repeatedly asked her manager to address included issues with another employee. SMV had asked that she not attend meetings between SMV and her manager, and that the opinions of that employee should not be prioritised. She also stated she should not be made to look like a "useless nobody" in front of the other employee.

[11] Included in the examples of overly critical opinions of SMV were her manager's comments about SMV's teams' backlog, questioning the lack of work completed during lockdown, no understanding as to the plan her team put in place during the first month of lockdown, negative feedback about the plan for clearing work accumulated during lock down, criticism that SMV's team were involved in creating that plan (to clear the backlog), and the proposal to audit the teams' work.

[12] SMV added that she felt tired, underappreciated and inadequate, she hated being at work and indicated that her performance would likely suffer as a result. At the end of the email SMV included a definition of harassment.

[13] SMV said in evidence she had been struggling for some time because she felt underappreciated by her manager and that her team were not appreciated. Her manager had told her if she wanted her team to have extra resources they would have to improve the quality and quantity of work. SMV says she was determined to secure better resources for the team and realises now she put more pressure on both the team and herself because of that. SMV also set out how tired she was after the Covid-19 Lockdown and said all of this was affecting her general health and wellbeing.

[14] SMV's husband gave evidence of sending more than one text message to SMV's managers providing information on how SMV's work stress was impacting on her health before lockdown. Then, on 6 August, SMV's husband advised Ms Te Awhe by text that SMV was physically sick from anxiety about work such that she was unable to come to work that day. SMV was notified of an investigation into her conduct the following day.

[15] Ms Te Awhe said initial conversations and meetings took place with human resources to determine next steps for SMV's complaint. Over the course of several discussions with Ms Te Awhe SMV explained she and her manager had worked together for many years and this was a pattern in their relationship. They had blow ups from time to time but on the whole managed to work together professionally and by the time of their final meeting SMV was confident they would work through this.

[16] Because of the reporting lines, Ms Te Awhe spoke to SMV's manager about the complaint at their weekly catch up the day SMV sent her email and before she had spoken to SMV. Ms Te Awhe noted SMV's manager was visibly upset about the complaint, had felt sick ever since receiving it, and was unsure whether she wanted to continue managing people. Ms Te Awhe's file note also records SMV's manager provided her with a notebook and emails to show from her perspective there had been issues with SMV. She was given an opportunity to discuss these and her view of SMV's complaint (about her) with Ms Te Awhe at that early stage.

[17] Ms Te Awhe placed SMV's manager on sick leave. SMV's manager had also discussed the impact SMV was having on her, including that coming into work was making her feel ill and that she could not speak to SMV and stayed away from her. When she returned from sick leave, Ms Te Awhe noted SMV's manager still appeared fragile and shaken by the matter. She revisited whether SMV's manager was still considering moving to a different role. SMV's manager confirmed she was open to a facilitated discussion with SMV, however in her later email to Ms Te Awhe she resiled from that position saying there was no point in reconciliation and referred to a number of things indicating the relationship between SMV and her manager were significantly impaired and in her view the relationship was broken.

[18] An informal process was recommended to Ms Te Awhe in relation to SMV's complaint about her manager. Ms Te Awhe sought SMV's views on how she wanted the complaint to proceed. SMV conveyed, after giving it some thought, that she did not want to take the matter any further. It was SMV's position she had an indication by 28 July that unless she made a formal complaint, nothing was going to happen. SMV on the whole preferred "kanohi ki te kanohi" or face to face communication between the parties because she did not want to escalate matters between them and thought it was resolvable through communication.

[19] Ms Te Awhe denied she gave an indication that unless a formal complaint was made that nothing would happen. Instead, said she was unable to progress a facilitated discussion between the two after intervening but that she left it open for SMV to revisit the matter. She did, however, agree that once she was given advice to keep the complaints separate, she did not revisit that decision, even when SMV asked that her complaint about her manager be taken into account during the later investigation into SMV's conduct.

Complaints about SMV

[20] Two days after Ms Te Awhe's final meeting with SMV about SMV's complaint, SMV's manager told Ms Te Awhe she had been made aware SMV's team members had been heard speaking negatively about SMV and their work environment. This was reported to SMV's manager by another employee who worked closely with SMV's team, and who had overheard the conversations at a social function.

[21] On receiving that information Ms Te Awhe decided to meet with SMV's team as a group and hear what they had to say. Ms Te Awhe took notes during the meeting but later disposed of the notebook so no record of what was actually said and by who remains in existence. She summarised what she heard into six bullet points and circulated those to the group by email to check their concerns were recorded accurately. The group included SMV's manager and the other employee.

[22] Each bullet point represented a theme. The team felt micromanaged, under the gun to perform but with no clear direction and experienced constant change, individual performance was called out in front of the team, they had to report in

during Covid-19 Lockdown and felt harassed by SMV checking on them. If daily reporting was not completed during Covid-19 Lockdown, annual leave was to be taken and SMV's emails bordered on being abusive.

[23] Those six bullet points formed the basis for the allegations of misconduct against SMV. Ultimately it was these matters together with an email containing personal information she sent to her personal email, discovered while investigating the group concerns, that resulted in SMV's dismissal.

[24] A decision was made to commence an investigation into SMV's conduct. Ms Te Awhe also recorded in the letter informing SMV of the decision to formally investigate, that overall the team dread coming to work, are considering leaving, and that Ms Te Awhe was concerned some individuals were experiencing mental health issues because of the work environment. SMV was placed on leave while the matter was investigated.

[25] When she was notified by Ms Te Awhe of the investigation, SMV immediately responded both verbally and in an email. She said many of the issues were caused by the same stressors that SMV had raised in her email complaint about her manager, such as under-resourcing, pressure to perform and lack of support and asked that her complaint about her manager be progressed.

[26] Individuals were interviewed by Ms Te Awhe and an investigation report completed that concluded it was not appropriate and would be detrimental to the wellbeing and safety of the team if SMV were to return to her role. It was stated that because of this the employment relationship with SMV was no longer tenable because of significant loss of trust and confidence. The last sentence acknowledged there were issues that needed to be addressed in a separate process regarding SMV's manager.

[27] SMV was invited to a meeting to discuss the preliminary view reached by Mr Dunstan, the final decision maker and then to a final meeting to discuss the proposal to dismiss her. SMV was dismissed by way of letter from Mr Dunstan on 9 October 2020.

Inappropriate use of technology

[28] As part of the investigation into SMV, SMV's emails were obtained. As a result, Ms Te Awhe identified SMV had sent and received sensitive and confidential client information to her personal email address on one occasion.

[29] SMV gave evidence about this allegation. She acknowledged she sent it but explained this was due to the need to continue working on an information request within the statutory timeframe, the unprecedented Covid-19 Lockdown situation and the fact that there were no suitable IT solutions available at that time. She apologised that sensitive client information had passed through her personal email. She had never previously sent work information to her email and only did so because of her perceived need to carry on working during the Covid-19 Lockdown and the pressure she felt she was under to have her team perform better.

[30] Ms Te Awhe gave evidence there was no need to continue working during Lockdown especially for that particular workgroup. SMV gave evidence she was not at the meeting referred to by Ms Te Awhe, over audio visual technology, where that was conveyed to people managers. For the reasons set out below to do with the difficulties in the relationship between SMV and her manager that existed well before lockdown, I accept SMV's evidence that she was unaware of the instruction from Ms Te Awhe. By this stage SMV was already isolated because of the relationship breakdown with her manager, was reliant on the technology working to be connected with work and it appears no other communication was had with SMV about the work she and her team were doing. Otherwise, this would have been identified.

[31] Whether or not it was a privacy breach or not is a matter for the Privacy Commissioner. In the context of this matter, it was an example of inappropriate use of technology that SMV accepts was inconsistent with the relevant policies. No evidence was provided on where this example of inappropriate use of information sits in terms of seriousness. In any event I find that it is unlikely this conduct on its own would reach the threshold of serious misconduct. It was deliberate but for a work purpose, a one off, in the context of the first Covid-19 lockdown and it was contained in that there was no publication or wider dissemination of the information.

On a sliding scale of seriousness of inappropriate use of technology, this conduct was at the lower end of the scale.

[32] Combining that with SMV's explanations together with her apology and reassurance it could not happen again, a fair and reasonable employer would not reach the conclusion that this was serious misconduct.

[33] I also note an email was provided to the Authority showing that on at least one occasion Ms Te Awhe emailed SMV on her personal email address during lockdown. Although the email did not contain the type of information SMV emailed to herself, it serves to underscore the difficulties experienced with the operating environment during the first Covid-19 lockdown.

Relevant legal principles

[34] The Authority is asked to determine whether the Ministry were justified in the decision it made and the actions it took to dismiss SMV. It is required to apply the justification test which is set out in s 103A of the Act. In applying the test, 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 Ministry, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[35] This includes whether the allegations against SMV were sufficiently investigated, concerns raised with her, whether she had a reasonable opportunity to respond to the concerns and whether such explanations were genuinely considered by the Ministry before dismissal. The Authority may take into account other factors as appropriate and must not determine the dismissal to be unjustified solely because of defects in the process if they were minor and did not result in SMV being treated unfairly.¹

¹ Employment Relations Act 2000, s 103A(5).

[36] The following principles, from a summary described by the Court of Appeal as uncontroversial, guide the application of the statutory test for justification to the Ministry's actions in this case:²

- (a) The Authority's task is to objectively examine the employer's decision making process and determine whether what the employer did and how it was done were what a fair and reasonable employer could have done.
- (b) There may be a range of responses open to a fair and reasonable employer and the Authority is not to substitute its decision for what a fair and reasonable employer could have done in the circumstances.
- (c) The requirement is for an assessment of substantive fairness and reasonableness, not minute and pedantic scrutiny to identify failings.
- (d) In considering the standard of proof, a distinction is drawn between what is required for the Authority's investigation and the employer's earlier disciplinary inquiry. The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to the Authority that the dismissal was justified. The employer's inquiry does not involve a legal standard of proof. The Authority's investigation does.
- (e) In ascertaining the facts, the employer may be presented with conflicting accounts. Acting reasonably, the employer will be entitled to accept some accounts in preference to others. That does not call for the application of any standard of proof.
- (f) When required to prove that dismissal was justified, the employer's evidence to the Authority's investigation will need to show that both the course taken to ascertain the facts and the employer's conclusion that those facts warranted dismissal were reasonable. That must be shown on the balance of probabilities flexibly applied according to the gravity of the matter in the circumstances.

² *Cowan v Idea Services Limited* [2020] NZCA 239 at [18] and [40].

[37] In considering whether the Ministry met that standard of reasonableness, the Authority is empowered to make a factual inquiry about whether the Ministry had a sufficient and reliable evidential basis for concluding Ms SMV had committed serious misconduct. I have already found it was not reasonable to conclude the allegation of sending work information to an unauthorised email address was serious misconduct.

Did the Ministry act fairly and reasonably in relation to SMV?

[38] With regard to the allegations about SMV's management style, SMV says there are three main flaws with the Ministry's decision making and its process that have unfairly prejudiced her. Firstly, SMV's concerns about her manager were not considered relevant to the investigation into SMV's conduct and therefore not taken into account. Secondly, the way in which the complaints about SMV were gathered and progressed was unfair to SMV in several ways, including anonymising the complainants and grouping the complaints into themes. Thirdly, SMV's manager's email to Ms Te Awhe jeopardised the investigator's impartiality and lastly SMV was not provided with two pieces of information – her manager's email to Ms Te Awhe about SMV and the information on which Mr Dunstan received.

[39] The Ministry has accepted not providing SMV with the information Mr Dunstan relied on to reach his preliminary decision was an error in the process. In not providing it to SMV, she missed an opportunity to correct errors or to comment on any of the material that was being relied on to make decisions about the continuation of her employment. This was particularly important because of the gravity of the matter, in that dismissal was being considered.

Gathering the complaint from a group

[40] As noted, Ms Te Awhe's first step on hearing about SMV's team's concerns was to meet with the employee who had overheard the conversation at the after-work function to confirm what was overheard. Then, to further understand what was overheard Ms Te Awhe met with SMV's direct reports in a group. SMV was on sick leave that day. Included with the group was the other employee (who reported what was said at the after-work function and who SMV had earlier referred to in her complaint about her manager) and SMV's manager. Ms Te Awhe explained to the group she had heard things about the work environment and

reassured them it was safe for them to raise anything they thought she needed to know. She recorded written notes of what was said but later disposed of the notebook.

[41] Individual interviews were conducted with each team member including the other employee using the six summarised bullet points of issues as a starting point. A script was provided to the Authority containing the questions that were asked. From there the allegations against SMV were formulated. The allegations provided to SMV were anonymised and summarised to protect the identity of the complainants, who the investigator believed were traumatised and affected by SMV's conduct. For the same reason, none of SMV's team gave evidence at the Authority's investigation meeting.

[42] Ms Te Awhe gave evidence that the matters and themes raised were consistent across the team, and she was concerned by what the team had reported. For example, she was concerned they were required to complete daily reports, that during lock down they were required to take leave if they were not working at home, they felt targeted, that staff performance was inappropriately called out in front of others, and they felt bombarded by SMV's frequent messaging during lockdown.

[43] While those may have been valid concerns, speaking to complainants in a group likely resulted in unfairness to SMV. While a script was provided for the interviews, no record of what else was said was kept and previously the same investigator met with the group, including SMV's manager, who was not able to be impartial about SMV because of the history between the two, to understand the complaint. Then grouping the allegations into themes meant SMV was not given an opportunity to respond to specific allegations.

[44] The opportunity for SMV to respond is important because when an employer receives complaints from one employee about another, it owes equivalent obligations to the employee about whom the complaint is made. The thrust of the complaint should not be automatically accepted. It must be tested in a fair way and a conclusion drawn reasonably before any action is taken. A failure to do these things is, equally a breach of duty as much as failing to protect the interest of the employee making the complaint.

[45] Anonymising the allegations was also unfair to SMV for the same reasons and meant that SMV could not have had a full opportunity to respond when it was likely she had relevant information about interactions to do with individual team members, as their manager over a period of time. The rationale for anonymisation was Ms Te Awhe's subjective view of the impact on the team by SMV. No objective information such as medical evidence was available to the Authority's investigation.

[46] Prior to the investigation Ms Te Awhe's view was stated clearly in the letter to SMV informing SMV of the investigation, "that some individuals are experiencing mental health issue because of their current environment."

[47] It was established at the investigation meeting, when questions were asked about reinstatement that some of the team had experienced mental health issues, and of that small group, their mental health conditions were pre-existing. The Authority was also informed there was no suggestion that SMV's conduct had caused these issues.

[48] The impact of the first Covid-19 lock down was another relevant factor when considering the complaints about SMV because that time period was inherently stressful, and the team told the investigation that SMV's conduct escalated over the lockdown. With no evidence provided to the Authority to establish a causal link between SMV and any individual's health, the connection between a manager's conduct and any health issues in the team was problematic.

SMV's complaint about her manager not investigated

[49] When Ms Te Awhe spoke with SMV to advise her about the investigation into SMV's conduct, SMV immediately raised her complaint about her manager because she said many of the things her team complained about were a result of pressure her manager was putting on her. SMV also emailed Ms Te Awhe:

"I understand you will be undertaking an investigation into both the current allegations as well as my previously requested issues with [my manager] so with those thoughts in mind and without access to the correct forms I would like to take my informal complaint regarding [my manager] initiated nearly a month ago and formerly lodge a harassment and bullying complaint."

[50] Ms Te Awhe did not take any action to formalise SMV's complaint as requested until after SMV had been dismissed. She said they were "essentially the same matters raised in her email of 14 July 2020" and based on earlier advice from People and Culture, she advised SMV those matters would be treated as separate matters.

[51] SMV asked several more times that her complaint and or relationship with her manager be taken into consideration. The investigation report records:

"when discussing the allegations [SMV]'s responses leaned toward the breakdown in the working relationship with her manager ... which she has now raised a formal complaint against. While it's acknowledged there is a link, this does not excuse or justify SMV's behaviour toward her team and the impact it had."

[52] Then in the preliminary view it was recorded that SMV had raised her concern that the pressure from her manager had an impact on the way she conducted herself with her team. That matter was disposed by way of a sentence saying that the decision maker did not consider that justified her behaviour towards her team with no analysis or rationale.

[53] That meant the matters raised by SMV about her manager were not considered as part of the investigation into SMV's conduct despite her raising those issues on more than one occasion.

[54] While an email from SMV's representatives at the time shows they did agree to hold SMV's complaint for a week or two until the other matter was finalised, this was at a time when dismissal was not in contemplation and there appeared to be agreement that SMV's complaint would be progressed after her team concerns about her had been addressed.

[55] The basis for separating the two was that what was now being advanced by SMV was essentially the same matters raised in her email of 14 July 2020 and a decision had been made not to progress that complaint. That rationale did not address relevance of one complaint to the other.

[56] However, the relevance of one to the other was stark. Both complaints were about management style. Some of the matters SMV's team complained about SMV

said were driven by requirements on her set by her manager, plus the impact of the Covid-19 Lockdown on the operating environment in 2020. Specifically, SMV's email complaint to Ms Te Awhe raised concerns about how SMV's managers' management style was impacting on SMV. SMV found her manager to be "overly critical" of her and she provided examples. Part of SMV's email complaint was about the other employee being involved in her team and management discussions impacting on her ability to manage her team. Issues with case management and pressure to perform were also raised.

[57] At the point in time when SMV raised her concerns about her manager as part of her response to the concerns about her, the Act required the employer to give it genuine consideration.³ There was no evidence this occurred other than the fact a decision had been made previously to deal with them separately.

[58] The result was that SMV had no opportunity to have the issues she had raised about her manager's style that she said had impacted on her interactions with her team, considered by the investigator or Mr Dunstan. The result of that decision was that relevant information from SMV was not taken into account prior to a final view being formed by the decision maker.

[59] A fair and reasonable employer could have been expected to be open minded about whether the difficulties SMV described in her email complaint about her own manager, had impacted on the work group as a whole and take that into account when making decisions about SMV's conduct in the workplace. This is especially so when there is evidence that SMV did in fact raise this all the way through the investigation into her conduct. Particularly because she was never provided with the investigation report or material Mr Dunstan relied on to reach his preliminary view.

SMV's email to the investigator

[60] Ms Te Awhe said SMV's team made it clear when she spoke to them that SMV's behaviour was a "long standing issue" but it had escalated during lockdown.

³ Employment Relations Act 2000, s 103A(3)(d).

She asked SMV's manager to provide her with background information and any previous issues with SMV.

[61] I note at this point it is evident from Ms Te Awhe's file note, that SMV's manager had already provided a detailed account of her views of SMV to Ms Te Awhe, including her notebook, before the complaint about SMV had surfaced, when Ms Te Awhe was considering SMV's earlier complaint about her manager.

[62] In any event SMV's manager provided information a second time in the form of a two page email setting out the background to the extensive difficulties she had managing SMV. The prior matter alluded to by SMV's team appeared to have been dealt with informally by SMV's manager and closed and that is confirmed by the fact it was not referred to in the final letter recording the reasons for SMV's dismissal.

[63] The key concern in terms of whether the process followed was one that a fair and reasonable employer could have followed in all the circumstances is the fact that information provided to Ms Te Awhe by SMV's manager was never given to SMV. In the context of an employment investigation it did not paint SMV in a favourable light, it was clearly prejudicial to SMV and she was given no opportunity to respond because it was never disclosed to her.

[64] Ms Te Awhe gave evidence that despite having received that email she still considered she was sufficiently independent as an investigator because she could put it aside and had only been in her role for approximately 10 months. She did not know SMV or her direct reports and worked in a different building with no day to day contact with any of them. Mr Dunstan said they discussed her independence and for those reasons he was also confident Ms Te Awhe would be an appropriate investigator.

[65] However, I am satisfied that the investigator's independence and therefore her impartiality, required in an employment investigation, was particularly undermined by several things that happened. The inclusion of SMV's manager at the initial meeting with SMV's team to hear the concerns, the conversations with SMV's manager about the impact SMV's complaint had had on her, the provision of information from SMV's manager directly to Ms Te Awhe both before the

investigation and during it that was not disclosed, are all matters that go toward whether Ms Te Awhe was sufficiently independent.

[66] Freedom from bias is a natural justice obligation on employers when they are undertaking workplace investigations, whether actual or perceived. In this case there was both the perception because of the direct reporting lines and likely actual bias because of the communications about SMV that happened due to that, and the handling of the previous complaint close in time from SMV. The decision to involve the other employee and SMV's manager in the interviews with the complainants is also of concern. SMV's manager could not by any measure be considered to be an impartial participant in any aspect of an investigation into SMV because of the unresolved complaint about her.

[67] SMV had no knowledge the email existed or that it was the second time SMV's manager had had an opportunity to provide her views to Ms Te Awhe directly. It follows SMV had no opportunity to respond or have genuine consideration given to her response to the content of the email or indeed, her managers views about her.

The information relied on by Mr Dunstan

[68] SMV had an opportunity to respond to Mr Dunstan's preliminary view, but the Ministry accepts a step in the process was missed in that SMV was not given an opportunity to respond to the investigation report and related documentation prior to receiving the preliminary decision. This was especially important in this case, not only because dismissal was proposed but also because of the way in which the concerns had surfaced and how they were investigated. The fact they arose against a backdrop of SMV's concerns about her own manager was also relevant and there was evidence also available to the Ministry about the impact on SMV of that relationship.

Conclusion

[69] The onus is on the employer to show it has a reasonable belief of misconduct warranting dismissal. The employer must be able to show that it carried out a proper inquiry to enable it to form such a belief.

[70] While a range of responses is open to a fair and reasonable employer when investigating and making decisions about conflict within a work group, the evidence in this case showed the Ministry failed to reasonably consider whether one complaint was relevant to the other. It adopted a process that was unfair to SMV in that the complaint was elicited from a group, including her manager (who SMV had made a complaint about) and then as things progressed information was relied on by the investigator and then the decision maker to make decisions that led to SMV's dismissal that was not available to SMV. The allegations that were investigated were anonymised and represented general themes, and the investigator received information that was never disclosed to SMV and the nature of that information jeopardised the investigator's impartiality.

[71] Accordingly for the reasons given, the Ministry's inquiries resulted in conclusions that did not meet the necessary standard of reasonableness because there was a failure to conduct a full and fair inquiry into the concerns raised. It was not open for the Ministry to conclude there had been misconduct. The failings were significant and resulted in unfairness to SMV. As a result, SMV has established a personal grievance of unjustified dismissal and an assessment of remedies was required.

Remedies

[72] As SMV has been successful in her personal grievance, I need to determine what remedies are appropriate under all of the circumstances. SMV seeks:

- a. Reinstatement;
- b. Lost wages and loss of a benefit; and
- c. Compensation for humiliation and distress.

[73] The Authority heard significant evidence from the parties both for and against the remedy of reinstatement. Section 123(1)(a) of the Act provides for the remedy of reinstatement of an employee to his or her former position, or placement to a position no less advantageous to that employee. Section 125 of the Act provides that reinstatement is to be the primary remedy and the Authority must provide for

reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy as specified in s 123 of the Act.

Practicable and reasonable

[74] The submissions on SMV's behalf were that reinstatement was both practicable and reasonable. She acknowledged her communication style had impacted in a way she was unaware of and noted this was never raised formally with her. While the submissions of the Ministry expressed concern about SMV's return to her team or indeed to any team with direct reports, SMV stated she is prepared to address and work through any issues caused by her management style. This was the first time in a 32-year career in the public service that SMV has been the subject of a disciplinary investigation. No performance issues had been raised with her and her performance reviews had been good.

[75] The submissions on behalf of the Ministry were that on the whole reinstatement was opposed and reinstatement to the same team would not be practicable or reasonable. I agree with that simply on the basis that there is an unresolved complaint from SMV about her manager and given the course of events that followed, it would not be appropriate for SMV to return to a team with the original reporting lines.

[76] In relation to any alternative positions in the Ministry, SMV's lack of insight into her own behaviour, the impact it had and her treatment of highly sensitive documents were submitted as factors that weigh against reinstatement. It was also suggested SMV lacked the technical expertise for other people leader positions at the level of her previous position, and in any event there were few vacancies and some were off shore.

[77] The availability of a vacancy is not a requirement of reinstatement⁴ and this Ministry is of a significant size meaning I do not find those arguments persuasive. This determination has not been able to make findings in relation to whether the conduct of concern reached the threshold of serious misconduct, but rather that course taken to ascertain the facts and the employer's conclusion that those facts

⁴ *Walker v Firth Industries a division of Fletcher Concrete & Infrastructure Limited* [2014] NZEmpC 60 at [83].

warranted dismissal, did not reach the standard of what a fair and reasonable employer could have done in the circumstances.

[78] This means that while I accept it would be impracticable to place SMV back in a team reporting to her old manager, because of the unresolved complaint, those same arguments do not satisfy me SMV could not return to a similar position elsewhere in the organisation. SMV has had a long career in the public sector and an unblemished work history at the Ministry with positive annual reviews. The Authority is satisfied the employment relationship can be successfully re-established and that it would be reasonable to do so given the finding of unjustified dismissal.

Lost wages

[79] SMV seeks reimbursement of lost wages. She asks that the Authority exercise its discretion under s 128(3) of the Act and order the Ministry to pay to her a sum for remuneration lost as a result of her dismissal greater than that set out in subsection (2). It was submitted on her behalf she was under no duty to mitigate her loss with reference to *Maddigan v Director General of Conservation*⁵ because in the context of this case it was unreasonable to have expected SMV to be active in seeking alternative employment.

[80] SMV required medication and support to manage anxiety, stress and depression and could not seek new employment due to her health and the futility of seeking work in the public sector because of the dismissal. Consistent evidence was provided by SMV and her family and friends of the impact on her. It was far-reaching and affected all aspects of her health including her physical and mental health such that she was at times unable to leave the house without significant support. Not only was her health impacted she feared running into former colleagues and having to explain what happened to her.

[81] The evidence supports that the loss of SMV's role in October 2020 that she had held for 19 years against the backdrop of a 32 year career in the public service has caused SMV significant stress and an overwhelming sense of unfairness and

⁵ *Maddigan v Director General of Conservation* [2019] NZEmpC 190.

grievance. There was a period of high stress connected with work and it was evident the relationship between SMV and her manager was of concern and the cause of significant stress for both of them for some time before SMV's dismissal.

[82] I am required to make allowances for the fact that but for the unjustifiable dismissal, SMV's employment may still have ended. No evidence was provided to suggest that SMV's work history with the Ministry had been anything other than unblemished, however, the background to the dismissal, was an increasingly impaired relationship between SMV and her manager. The concerns they had with each other were about management style with a history of them both exhibiting a fair degree of tolerance towards each other over time until the Covid-19 lockdown when things escalated.

[83] There was no evidence of any assistance or support provided to SMV or her manager and nothing to suggest that they would not have been amendable to such an approach particularly given the degree they had managed the relationship as best they could over the 12 years they had worked together, despite their differences. SMV accepts there were issues with her communication style but said they were not properly considered and the context was not taken into account. They had not been raised with SMV formally before.

[84] On this basis it follows that I consider the issues that existed were not insurmountable and the employment relationship between SMV and the Ministry would have continued into the future.

[85] I accept SMV needed to take some time to rest and recover so that she could work productively again and regain the ability to function fully in all areas of her life. I do 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) but I am cognisant of the limited evidence as to the length of time the health concerns existed and the duty to mitigate loss subject to the context in each case.

[86] While I accept SMV's evidence of the impact on her health and that significant financial loss flowed from the decision to dismiss SMV, I also have to be satisfied the causal link remained for the period for which lost wages are awarded.

The final termination letter made it clear that resignation would not be accepted in this case and the decision maker's responsibility extended to the public sector as a whole to prevent any future incidences of inappropriate behaviour. It was clear that the Ministry knew SMV would not be able to work in the public sector again placing an even greater responsibility on it to ensure the process it followed and the decisions it made met the statutory tests in the Act of what a fair and reasonable employer could do in all the circumstances.

[87] I accept that it was reasonable for SMV in the circumstances not to seek further employment for a period of time because of the impact of the dismissal on her and her health. However, I do consider it would have been reasonable in the absence of medical evidence, for an employee in SMV's circumstances to have taken steps towards employment no later than 10 to 12 months after dismissal.

[88] In weighing all these factors including the guidance in *Telecom New Zealand v Nutter*⁶ that moderation is appropriate in setting awards for lost remuneration, I conclude it is appropriate to make an award of lost remuneration from the date of SMV's dismissal being 20 October 2020 for a period of 12 months.

Loss of benefit

[89] Loss of benefit was also claimed due to loss of contractual entitlements SMV would otherwise have been entitled to. However, it was not clear exactly what was sought other than loss of unspecified benefits from a period of continuous service. In the circumstances of this case I consider it appropriate to reserve leave for SMV to come back to the Authority specifying what is sought, if required.

Compensation for humiliation, loss of dignity and injury to feelings

[90] The final issue is whether there should be an order to pay compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c) of the Act. It was submitted on SMV's behalf an award in the range of \$10,000 to \$40,000 would be appropriate.⁷ The evidence established SMV suffered humiliation, loss of dignity

⁶ *Telecom New Zealand v Nutter* [2004] 1ERNZ 315 (CA) at [70] – [79].

⁷ *Waikato District Health Board v Archibald* [2017] NZEmpC 132 and *Richora Group Ltd v Cheng* [2018] NZEmpC 113 at [67].

and injury to her feelings from her dismissal. She took pride in her role as a team leader, said she was faced with sorrow and grieved the loss of her work whanau and her longstanding work and contribution to the public service. Her mana she said, once strong had been trampled on. She had felt anxious and unwell since before the complaints about her surfaced and there was evidence to support this from SMV's husband and SMV.

[91] Since her dismissal she has required medication to manage anxiety, stress and depression and described losing all her self-confidence, staying largely at home, feeling humiliated and embarrassed by her sudden disappearance from her work and anxious not to see any colleagues in case she had to explain what had happened. I accept the evidence of SMV's friends and family who were consistent in their accounts of the impact on her which was severe, particularly because she was also losing the ability to work again in the public sector.

[92] Given my findings above, considering the distress experienced, the impact on SMV's health and the general range of awards in similar cases, an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$25,000.00 for the unjustified dismissal.

Contributory conduct

[93] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance. In this case, in the context of a dismissal for serious misconduct, where the process followed was so flawed it resulted in unfairness to SMV, I do not find that SMV's conduct contributed to the situation or was sufficiently blameworthy to warrant a reduction.

Interest

[94] SMV seeks interest on lost earnings caused by the dismissal and the impact on SMV's entitlements connected with continuous service in the public sector. The Authority has the power to award interest in any matter involving the recovery of

money⁸ however, I am not satisfied that a good case has been made out for an interest payment.

Outcome

[95] SMV's claim that her dismissal was unjustified has been successful and remedies are appropriate.

[96] I order that:

- a. SMV is to be reinstated to a position other than her previous position but one that is no less advantageous to her than the position she held at the date of dismissal, within 28 days of the date of this determination.
- b. The Ministry of Business, Innovation and Employment is to pay SMV lost remuneration for a period of 12 months following her dismissal, including contributions to Kiwisaver and payment of holiday pay for the same period.
- c. The Ministry of Business and Innovation and Employment is to pay SMV compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act of \$25,000.00.

[97] The parties are directed to attend mediation to assist in facilitating the successful reintegration of SMV back to work.

[98] Leave is reserved for SMV to return to the Authority with regard to the claim for loss of benefit under s 123(1)(c)(ii) of the Act.

Non-publication

[99] While the starting point is open justice and a non-publication order is a departure from that fundamental principle, based on the evidence, I am of the view that publication of the names of the specified individuals in this case would likely have a detrimental impact on the health of some of those who did not give evidence

⁸ Employment Relations Act 2000, schedule 2, clause 11.

but were nonetheless involved. It would also impact on the SMV's successful reinstatement into the workplace. I am satisfied these are adverse consequences of publication that justify a departure from the fundamental rule of open justice, but only to the extent necessary to prevent those adverse consequences.

[100] For those reasons the order for non-publication set out above was made in relation to information that would identify SMV and the other employees involved in this matter, but who did not give evidence.

Costs

[101] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed SMV may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Ministry would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[102] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1