

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 365
3151102

BETWEEN RACHAL WILSON
Applicant

AND PRESBYTERIAN SUPPORT
NORTHERN
Respondent

Member of Authority: Claire English

Representatives: Gillian Warren, counsel for the Applicant
Tim Clarke, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 27 January, 10 February, and 11 April 2023 from
Applicant
27 January, 10 February, and 6 April 2023 from
Respondent

Determination: 11 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Rachal Wilson, raises claims of unjustified disadvantage occurring during her employment and unjustified constructive dismissal.

[2] Ms Wilson had worked for the respondent, Presbyterian Support (Northern) (PSN) for some 15 years. She says that problems began to arise following a supposedly confidential staff survey, where she gave feedback that was critical of her manager. After the survey results were shared with staff and managers, Ms Wilson

was subject to disciplinary procedures. Ms Wilson says the disciplinary process was not carried out in a proper way, and she was disadvantaged by the way it was resolved.

[3] Ms Wilson also raised claims of bullying against her manager. After some months, the manager raised a bullying complaint against Ms Wilson, and PSN began an external investigation. Ms Wilson resigned her employment.

[4] She claims the following remedies: that the Authority make recommendations about PSN's workplace conduct and practices; an award of compensation for hurt and humiliation of \$50,000; reimbursement for the loss of her work car in the value of \$1,057.00 for a period of 5 weeks calculated with reference to the amount of annual leave Ms Wilson says was outstanding as at the ending of her employment; reimbursement of unquantified costs for therapy and medical appointments; and a contribution to costs.

[5] PSN resists Ms Wilson's claims. It says that at all times, it maintained appropriate confidentiality in relation to the staff survey. It further says that it was entitled to inquire into Ms Wilson's actions when it undertook a disciplinary investigation about Ms Wilson's handling of a particular matter, but in the end, it agreed with her that no disciplinary action should result. In regards to Ms Wilson's claims of bullying by her manager, PSN says that Ms Wilson repeatedly refused to engage with it about these concerns. Overall, PSN says that Ms Wilson resigned, and was not constructively dismissed, and no remedies should be awarded.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Ms Wilson, supported by Ms Ali Coles, and Mr Frank Jackson, and on behalf of PSN, by Ms Mel Scott, Ms Lynne Fairs, Ms Andrea McLeod, and Mr Paul de Beer. The representatives also provided written submissions and relevant documents.

[7] This matter was allocated to me in accordance with clause 16 of Schedule 2 of the Employment Relations Act 2000 (the Act). By consent of both parties, I investigated this matter "on the papers". As part of that agreed process, the parties provided further documents and commentary on them.

[8] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[9] The issues requiring investigation and determination are:

- (a) Was Ms Wilson unjustifiably disadvantaged in her employment?
- (b) Was Ms Wilson unjustifiably constructively dismissed?
- (c) If PSN's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - Compensation under s123(1)(c)(i) of the Act; and
 - Reimbursements claimed; and
 - If any recommendations under s123(ca) of the Act should be made?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Wilson that contributed to the situation giving rise to her grievance/s?
- (e) Should either party contribute to the costs of representation of the other party.

Background

[10] Ms Wilson is an experienced social services worker, and worked for PSN from 2007 to 2021 in Taupo. In addition to working as a social worker, she held the role of Team Leader. Ms Wilson's manager was Ms Fairs, who was based in Hamilton.

Survey

[11] In October 2020, PSN staff were asked to complete a staff survey, called the Peakon Staff Survey. Among other things, the survey solicited feedback about managers. It was described as confidential.

[12] Ms Wilson filled in the survey. She made comments which she describes as including concerns about Ms Fairs' competence¹.

[13] When the survey results were released, Ms Wilson and another team leader reached out to Ms Fairs' manager, Ms McLeod, asking for confirmation that the

¹ Paragraph 46 of Ms Wilson's Statement of Evidence dated 17 June 2022.

survey content would be kept confidential, and Ms McLeod assured them that comments would be anonymous.

[14] In November 2020, the survey results were conveyed to all team leaders, showing their team's overall scores. Ms Wilson was told by PSN that Ms Fairs was provided with a copy of these results, as well as a second set of results which included the scores of the team leaders². Ms Wilson's concern is that by merely comparing these two sets of results, one including the team leader's scores, and one excluding the team leader's scores, it would be immediately obvious whether the team leader's comments had caused each rating to go up or down, and therefore whether team leaders had given positive or negative feedback about their manager. In other words, the team leader feedback was effectively not anonymous.

[15] In addition, Ms Wilson raises a more general concern that, because Ms McLeod and Ms Fairs are friendly, Ms McLeod may have inappropriately shared comments made as part of the survey with Ms Fairs. This is rejected by PSN witnesses, and I make no findings about this.

[16] PSN takes the position that no individual responses were shared with Ms Fairs, and that this was sufficient³. Ms Fairs says that Ms Wilson "was obsessed with the idea that managers could read the Peakon survey responses and attribute the responses to individuals."⁴

Report of Concern

[17] In October 2020, an issue arose with Ms Wilson making a Report of Concern. Ms Wilson advises she is familiar with this process, which is a process under the Oranga Tamariki Act 1989, and both she and her staff would occasionally need to make such reports.

[18] In short, a child disclosed to Ms Wilson that she was experiencing abuse and suicidal thoughts. Ms Wilson contacted the regional Attendance Officer, who was able to put her in touch with the relevant Ministry of Education (MOE) official to begin offering assistance, and Ms Wilson prepared a report of concern to be sent to Oranga Tamariki.

² See the emails from Ms Nicole Davies dated 23 November 2020 at 3.41pm and 2.18 pm.

³ Paragraphs 44 to 47 of Ms Scott's Statement of Evidence dated 15 July 2022.

⁴ Paragraph 39 of Ms Fair's Statement of Evidence dated 15 July 2022.

[19] Ms Wilson phoned Ms Fairs, and spoke with her about the report of concern prior to filing. Ms Fairs was supportive of the report being filed, so Ms Wilson did so the following day.

[20] Ms Fairs requested Ms Wilson send her a copy of the report of concern. Ms Wilson provided it.

[21] The child's parent subsequently made an Official Information Request, and a complaint, which was handled by Ms Fairs and Ms McLeod.

Disciplinary Process

[22] On 22 December 2020, Ms Wilson was sent an email from Ms Fairs, about a disciplinary investigation into potential misconduct. The concern was that Ms Wilson had inappropriately shared information with the MOE Attendance Officer prior to filing the report of concern.

[23] Ms Wilson was invited to attend a disciplinary meeting on 24 December. She wrote back, asking if this meeting could be held in January as there was not enough time for her to arrange a support person. It was agreed that the meeting would be held sometime in January.

[24] Ms Wilson then raised a personal grievance claim, explaining that she believed the misconduct allegations were in error, taking into account the protective provisions of section 66 of the Oranga Tamariki Act allowing for reports of concern to be made across agencies. Ms Wilson also suggested that Ms Fairs was bullying her.

[25] The references to bullying in Ms Wilson's letter dated 23 December 2020 are as follows:

If Lynne Fairs is not involved in bullying me, she will be happy to come forward and admit that all aspects of this case were discussed with her. If not, I will be happy to provide the relevant documentation. ...

I personally have extensive documentary and photographic evidence, (including other instances of Lynne attempting to bully me, and complaints I made about these,) to support the comments that we all made in the Peakon Survey, which were less than favourable to Lynne Fairs, and will be happy to supply this to HR, or if we are unable to resolve it at this level, in Employment Court. ...

I would like to express my personal sadness to find myself being bullied within an organisation which prides itself on preventing bullying...

It is my expectation that PSN/Family Works will immediately put a stop to such bullying happening, not just to me, but to others.

[26] On 26 January 2021, Ms McLeod responded to Ms Wilson's grievance, and asked for more information about the bullying claims. Ms Wilson took the position that "If that information wasn't enough to concern her, I didn't think providing any more detail would help."⁵ Ms Wilson's view is further that "I am reluctant to further share details of [Ms Fairs] bullying at that point, as the disciplinary process that involves HR seems hostile...⁶".

[27] The following day, 27 January 2021, she wrote in substantive reply to Ms McLeod, and explained her position in respect of the report of concern.

[28] On 4 February 2021, Ms McLeod wrote again to Ms Wilson. Further concerns were raised around PSN's code of conduct, specifically that Ms Wilson had not filed the report of concern on PSN's information system. Ms Wilson wrote in reply on 12 February 2021.

[29] On 8 March 2021, Ms Wilson received a further letter inviting her to a Disciplinary Hearing. It also provided further detail around PSN's concerns about the report of concern, specifically that Ms Wilson had disclosed information inappropriately to the Attendance Officer, and that this amounted to a sharing of confidential information with external parties prior to discussing this with Ms Fairs⁷, and instead, Ms Wilson should have contacted Ms Fairs earlier⁸.

[30] Ms Wilson replied to this letter on 12 March, asking that it and her previous responses (including that her discussions with the Attendance Officer were protected by the relevant statute) be taken into account.

[31] On 24 March 2021, PSN sent a disciplinary outcome letter to Ms Wilson. The outcome was that PSN accepted Ms Wilson's explanation that she had followed long-established practices in relation to the ROC in place at her site, and as a result, no further action would be taken. However, the letter went on to set out 6 expectations for the future in relation to the way PSN expected Ms Wilson to work. In addition,

⁵ Paragraph 76 of Ms Wilson's Statement of Evidence dated 17 June 2022.

⁶ Page 7 of Ms Wilson's timeline document.

⁷ Paragraph 32 of Ms Scott's Statement of Evidence dated 15 July 2022.

⁸ Paragraphs 18 and 19 of Ms Fairs' Statement of Evidence dated 15 July 2022.

Ms Wilson was removed from participating on PSN's Advisory Group, and the letter ended by stating: "Our expectation is that, moving forwards, you will engage with me [that is, Ms Fairs] as your manager in a positive, proactive, and respectful manner."

[32] Ms Wilson says that she found the expectations imposed on her humiliating, and she believed that Ms Fairs had taken these actions to bully her in retaliation for the comments Ms Wilson made in the staff survey. Ms Wilson's view is also that her removal from the Advisory Group was in retaliation for raising practice issues that were not well received by PSN.

[33] Ms Wilson was particularly concerned that, in addition to these actions being taken, she was subject to a disciplinary process over doing nothing more than, in her view, what was agreed best practice of informing other agencies of concern and exploring all options before making a formal report of concern.

[34] PSN says that "the outcome letter set out a number of expectations [of Ms Wilson] for the future, which included her removal from the Advisory Group. This was because [Ms McLeod, Ms Fairs] and Ian considered this would free her up from other responsibilities and allow her to focus on her role"⁹. Ms Wilson's union representative, Mr Jackson states he was concerned by this as "it was not fair to impose penalties and other measures when the investigation had not found [Ms Wilson] guilty of any misconduct."¹⁰

Laptop Issues

[35] In February 2021, Ms Wilson asked for a new laptop as hers had stopped working. She was told by PSN's information technology worker that her request had been approved, and a new laptop would be sent to her when Ms Fairs next came to Taupo. The ticket was later closed.

[36] After learning that the ticket had been closed, Ms Wilson emailed Ms Fairs asking for the replacement laptop she had been told Ms Fairs would be bringing her. Ms Fairs emailed back, saying Ms Wilson could use the laptop previously used by another employee, even though Ms Fairs had previously taken that laptop away and not returned it.

⁹ Paragraph 33 of Ms Scott's Statement of Evidence dated 15 July 2022.

¹⁰ Paragraph 12 of Mr Jackson's Statement of Evidence dated 17 June 2022.

[37] When Ms Wilson pointed this out, Ms Fairs said that Ms Wilson would not be provided with a new laptop. Ms Wilson confirmed with IT that IT had already given Ms Fairs a new laptop allocated to her, and IT confirmed this had occurred.

[38] Ms Fairs then told Ms Wilson this had been a “misunderstanding” and the laptops were needed for other workers.

[39] Ms Wilson advised she needed a laptop to complete electronic files training booked with her team, and to complete other online training booked with her team about the staff survey. Ms Fairs then said a laptop would be loaned to Ms Wilson.

[40] In April 2021, Ms Wilson was unable to attend planned survey training because she had still not been provided with a laptop. Ms Wilson was then provided with a loaned laptop for 1 day, to enable her to complete the electronic file training.

[41] PSN’s view is that Ms Wilson could continue to access PSN’s network and server to perform duties remotely, so they are “not sure why this has become such a big issue for her.¹¹” and this “was just another example of [Ms Wilson] being difficult.¹²” It is unclear when or if this was resolved, as Ms Fairs cannot recall¹³.

Mediation

[42] PSN declined to attend voluntary mediation with Ms Wilson in early March 2021, on the grounds that Ms Wilson had not followed PSN’s internal processes regarding bullying claims, and because PSN had asked Ms Wilson to provide details of her bullying claims, but Ms Wilson had not yet done so¹⁴. Mr Jackson states that Ms Wilson “did not trust the internal processes”¹⁵.

[43] Although a request for mediation was raised subsequently, PSN did not agree to attend voluntary mediation with Ms Wilson at a later date either.

On-going Employment Relationship Difficulties

[44] In March 2021, Ms Wilson began requesting that her PSA representative attend management line meetings with her, initially out of a concern that an on-line meeting she had been invited to attend might in fact have been a disciplinary meeting.

¹¹ Paragraphs 50 and 51 of Ms Scott’s Statement of Evidence dated 15 July 2022.

¹² Paragraph 47 of Ms Fairs’ Statement of Evidence dated 15 July 2022.

¹³ Paragraph 45 of Ms Fairs’ Statement of Evidence dated 15 July 2022.

¹⁴ Paragraph 27 of Ms Scott’s Statement of Evidence dated 15 July 2022.

¹⁵ Paragraph 6 of Mr Jackson’s Statement of Evidence dated 17 June 2022.

Later, she continued to ask her PSA representative to attend line management meetings with her, as she did not trust Ms Fairs. Ms Fairs said this made her “very uncomfortable” and she was worried “they would scrutinise everything I said and try and set me up for a claim.”¹⁶

[45] In July 2021, Ms Wilson was invited to attend team leader training. She declined to attend because she felt “concerned” and “nervous”¹⁷.

[46] Several disagreements arose between Ms Fairs and Ms Wilson at their line management meetings, coming to a head in August. These included Ms Wilson disagreeing with a decision made by Ms McLeod that the term “kaimahi a whanua” could no longer be used for social workers working in schools. Ms Wilson was upset by the decision, and believes it was to upset her, as “they know I am part Maori”. Ms Wilson emailed other staff about this decision, stating her view that “systemic racism” “should always be challenged”¹⁸. Ms Fairs felt this undermined her.

[47] Ms Wilson and Ms Fairs disagreed about the minutes of these line management meetings, with Ms Wilson wanting considerably more detail included in the minutes.

[48] Finally, Ms Wilson did not want to complete her yearly professional development review with Ms Fairs, even though she had previously agreed to do this, on the grounds she did not feel “safe”.

[49] Ms Fairs also states that “I feel that my relationship with [Ms Wilson] worsened after the investigation concluded. She made work very difficult for me.”¹⁹ Mr de Beer attended a line management meeting between Ms Wilson and Ms Fairs in August 2021, and recalls that “there was no mutual respect for one another” and “it was not a friendly conversation, and it was as if they both had their “back up” prior to going into that meeting.”²⁰

[50] In late August 2021, Ms Wilson again requested mediation. PSN declined to attend mediation, on the grounds that there was no personal grievance to mediate. Ms

¹⁶ Paragraph 34 of Ms Fairs’ Statement of Evidence dated 15 July 2022.

¹⁷ Paragraph 154 of Ms Wilson’s Statement of Evidence dated 17 June 2022.

¹⁸ Paragraph 159 of Ms Wilson’s Statement of Evidence dated 17 June 2022.

¹⁹ Paragraph 28 of Ms Fairs’ Statement of Evidence dated 15 July 2022.

²⁰ Paragraph 11(d) of Mr de Beer’s Statement of Evidence dated 15 July 2022.

Wilson was concerned by this, on the grounds that her bullying complaint of 23 December 2020 was still outstanding. Ms McLeod's view on the other hand was that PSN had asked Ms Wilson to provide further information so the matter could be progressed, and Ms Wilson had never done so, despite engaging actively with the parallel disciplinary process. Ms Scott says on behalf of PSN that "At the time, I did not make the connection between the request for mediation and [Ms Wilson's] personal grievance claim that she had raised in December 2020, as that claim had gone quiet and [Ms Wilson] had not provided details of her personal grievance claim of bullying allegations, despite our request.²¹"

[51] Ms Wilson was asked twice more by email to complete her performance review by 13 September. She did not reply to those emails or complete her performance review.

[52] On 14 September 2021, Ms Wilson closed her open client files, took sick leave, and filed a claim with the Authority.

[53] Ms McLeod then wrote to Ms Wilson, querying her sick leave, as the time Ms Wilson had taken was the same as the number of paid sick days Ms Wilson had available to her. Ms McLeod also advised Ms Wilson that Ms Fairs had laid a complaint of bullying against her, and an independent investigation would occur.

Investigation & Ms Wilson's Resignation

[54] On 28 September 2021, Ms Wilson raised another personal grievance claim, making it clear that she considered her bullying claim had not been resolved.

[55] Ms Wilson was sent a copy of the terms of reference for the investigation, and a copy of the bullying complaint made by Ms Fairs. Ms Wilson was given the opportunity to comment on the terms of reference, and was offered the opportunity to speak with the investigator once she had returned from sick leave.

[56] Ms Wilson remained on sick leave, and PSN requested further details. PSN then stated that Ms Wilson would need to be examined by PSN's own doctor.

²¹ Paragraph 58 of Ms Scott's Statement of Evidence dated 15 July 2022.

[57] In December 2021, the parties attended mediation with the assistance of mediation services. It was not successful. Ms Wilson resigned the following day, on 3 December 2021.

[58] On 20 February 2022, Ms Wilson raised a personal grievance claim of unjustified dismissal.

[59] Ms Wilson feels that PSN chose to support Ms Fairs over her, and that her bullying claims were never taken seriously. She says that this is demonstrated by PSN's refusal to attend mediation. As a result, she subsequently felt constantly on high alert and afraid. She said she continued to feel stressed, anxious, and afraid, because her complaint had effectively been ignored and put back on her.

[60] Ms Wilson says that she believed she could no longer trust Ms Fairs. To this day, she does not understand why PSN could not just have taken part in mediation when she first asked this of them.

Analysis

[61] In the present case, it is submitted for Ms Wilson that:

- a. PSN unlawfully and unjustifiably pursued disciplinary action against her in relation to the ROC;
- b. PSN did not follow due process, including imposing consequences adverse to Ms Wilson as a result, despite stating that there was no disciplinary outcome;
- c. PSN did not keep Ms Wilson safe from a manager she raised bullying concerns about, including eventually commencing an investigation into that manager's bullying complaint against Ms Wilson;
- d. PSN did not act properly or consistent with its duties of good faith when it refused to mediate with Ms Wilson²².

[62] Together, it is submitted that these actions constitute unjustified disadvantage during Ms Wilson's employment²³, and that "in isolation and together" "they clearly gave rise to a substantial risk of resignation²⁴.

²² Paragraph 4 of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

²³ Paragraph 77 of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

²⁴ Paragraph 82 of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

[63] PSN reiterates that Ms Wilson's resignation was voluntary, and not reasonably foreseeable. It states that PSN acted at all times as a fair and reasonable employer and Ms Wilson has not established that any breach occurred, including any breach that was significant enough to have caused her to resign²⁵.

[64] In considering the various concerns raised by Ms Wilson, I must consider whether PSN's actions, and how PSN acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the action²⁶.

[65] It is helpful to consider each of the key topics in turn.

Survey

[66] Ms Wilson raised a reasonable concern about the way the survey results were presented to managers. Her concern was that managers would see/be given 2 sets of survey data relating to their team, first, the aggregated team feedback excluding the team leader feedback, and second the aggregated team feedback including the team leader feedback. Ms Wilson's concern was that by merely comparing and contrasting these two sets of results, it would be immediately obvious whether the team leader had provided positive or negative feedback on any given metric.

[67] PSN persistently stated in response to Ms Wilson's concerns that an individual's responses "could not be attributed to their author", and that Ms Wilson's responses had not been shared with her manager, Ms Fairs²⁷.

[68] This does not address Ms Wilson's concern. Her concern was that, by sharing data in this way, any manager would immediately be able to see if a team's feedback score was higher when the team leader's feedback was included (indicating that the team leader had given positive or "supporting" feedback,) or was lower when the team leader's feedback was included (indicating that the team leader had given negative or "detracting" feedback). PSN confirmed to Ms Wilson that this was how the data was presented to managers, including Ms Fairs. I can find no evidence that PSN ever engaged with or responded to Ms Wilson's actual concern, which was a clear and present concern based on the information PSN had provided about how it presented the feedback to managers.

²⁵ Paragraphs 9 and 12 of the Respondent's Closing Submissions dated 27 January 2023.

²⁶ Section 103A of the Employment Relations Act 2000.

²⁷ Paragraph 22 of the Respondent's Closing Submissions dated 27 January 2023.

[69] PSN's failure to engage or respond to Ms Wilson's concerns about confidentiality and privacy, caused Ms Wilson disadvantage in her employment²⁸. MS Wilson should have been able to rely on her employer to communicate accurately and meaningfully about an issue that she had raised. Instead, PSN mis-characterised the nature of Ms Wilson's concerns, and then Ms Fairs described her as being "obsessed". This is an unfortunate turn of phrase to describe a situation where an employee repeatedly asks a question about the security of their personal information that the employer does not answer. I accept that this failure reduced Ms Wilson's sense of security in her employment, and amounts to an unjustified disadvantage.

Disciplinary Process

[70] Ms Wilson's concern is that PSN should not have continued disciplinary actions against her once her responses setting out the protections in the Oranga Tamariki Act²⁹ were considered³⁰, and that in any event, adverse outcomes were imposed on her despite PSN stating that no disciplinary outcome occurred³¹. She raises related concerns about a lack of impartiality during this decision-making process³².

[71] It is not clear on the evidence that PSN fully engaged with Ms Wilson's position during this process, that is that Ms Wilson was entitled to make the disclosures she made to the people and agencies she made them to, and was statutorily protected from disciplinary proceedings resulting from such disclosures. The letter recording the outcome merely states that PSN "continued to be concerned" Ms Wilson had breached PSN's internal policies, and that PSN agrees "with you that you may have been following long established practice". The matter is complicated as PSN's concerns changed as the process continued, as indicated in the letter to Ms Wilson dated 8 March 2021, where PSN mentions Ms Wilson's reliance on the Oranga Tamariki Act and states that "We understand you believe you have acted in accordance with the Oranga Tamariki Act. However, we are concerned that this is not

²⁸ As this was put at paragraph 5 of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

²⁹ Namely the permissive provisions of section 66C of the Oranga Tamariki Act 1989 allowing such information to be shared, and the protection provisions of section 16 of that Act stating that no civil, criminal or disciplinary proceedings shall lie against a person who properly discloses such information.

³⁰ Paragraph 6 of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

³¹ Paragraph 19 of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

³² Ibid.

correct.” PSN never explained to Ms Wilson why it believed she was not correct on this point.

[72] The letter of 24 March 2021 setting out the outcome does not canvas the result of this concern that PSN supposedly held. Instead, it focuses on PSN’s policies, while containing a caveated statement that Ms Wilson “may have been following long established practice”.

[73] PSN’s position remains that there is nothing for it to answer, as there was no disciplinary outcome³³, and in addition, PSN was justified in setting out its future expectations of Ms Wilson and she accepted at hearing these expectations were not sanctions or punishments³⁴.

[74] This is not the correct test. An unjustified disadvantage is defined as a situation where 1 or more conditions of an employee’s employment is affected to the employee’s disadvantage by some unjustifiable action by the employer. The expectations PSN imposed on Ms Wilson must be assessed in light of this statutory test³⁵, and the test of justification set out in section 103A of the Act.

[75] In the letter of 24 March 2021, PSN set out 6 “expectations for the future”³⁶. All of these were specific requirements of Ms Wilson, as to what she would do in her work. These 6 expectations were essentially unilateral variations to Ms Wilson’s terms of employment.

[76] These unilateral variations were disadvantageous to Ms Wilson. They imposed additional obligations and duties on her, and required her to work or act in certain circumscribed ways. This constitutes a disadvantage in Ms Wilson’s ongoing employment (or the conditions thereof)³⁷.

[77] PSN must therefore demonstrate that its actions, in imposing these 6 expectations on Ms Wilson, were justified. At the outset, PSN does not have substantive justification for imposing these 6 expectations. This is because, as PSN

³³ Paragraph 32 of the Respondent’s Closing Submissions dated 27 January 2023.

³⁴ Paragraph 34 of the Respondent’s Closing Submissions dated 27 January 2023.

³⁵ Set out at section 103(1)(b) of the Employment Relations Act 2000.

³⁶ Arguably, there were in fact 7 expectations, as Ms Wilson was also required to give up her position on PSN’s internal “Advisory Group”.

³⁷ See for example, *Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192.

has repeatedly said, “no further action will be taken³⁸” in respect of the disciplinary allegations. If this statement is taken at face value, it is hard to see how the 6 expectations could have been imposed at all. The reality of the situation is that further action was taken – ie the 6 expectations were imposed – but PSN for its own reasons (which are not expressed), attempted to distance the rationale for this from the disciplinary action.

[78] In any event, PSN’s actions in imposing the 6 expectations on Ms Wilson fall short of the statutory test of justification. There is no evidence that PSN raised its proposal to impose any of the 6 expectations on Ms Wilson with her before actually doing so. There is no evidence that PSN consulted with Ms Wilson by giving her an opportunity to consider any proposed expectations and put forward her responses to them before the final decision was made. Finally, there is no evidence that PSN genuinely considered any responses by Ms Wilson before finalising its decision. In one sense, it could not logically do this given that there is no evidence it put a proposal to her in the first place. I note this also applies to the evidence that PSN did not in fact properly consider Ms Wilson’s explanation on the impact of the Oranga Tamariki Act, and never responded to her about this.

[79] Overall, I find that Ms Wilson suffered an unjustified disadvantage arising from the disciplinary process, and its outcome. In light of this, I have not found it necessary to make further findings relating to these matters.

Laptop Issues

[80] The submissions for Ms Wilson characterise the on-going failure of PSN to provide Ms Wilson with a laptop as a negative behaviour targeted at Ms Wilson, and an undermining behaviour³⁹. PSN accepts there was a delay in providing a laptop to Ms Wilson, but say that this was not an unjustifiable action, it was merely a case of juggling resources⁴⁰, and that there was no disadvantage to Ms Wilson resulting, as there were other options available to her to complete her work⁴¹.

[81] I find that Ms Wilson’s concerns arise from two overlapping factors. The first is Ms Wilson’s reliance on what were effectively promises or assurances made to her

³⁸ Page 3 of the 24 March 2021 letter.

³⁹ Paragraph 52(a) and (b) of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

⁴⁰ Paragraph 39 of the Respondent’s Closing Submissions dated 27 January 2023.

⁴¹ Paragraphs 40 and 41 of the Respondent’s Closing Submissions dated 27 January 2023.

by an IT person working for PSN, that a laptop had been purchased and allocated to her, but then later Ms Fairs intervened to prevent this laptop from being given to Ms Wilson even though Ms Wilson needed it. The evidence on this is inconclusive, given the lack of email correspondence and any direct evidence from the IT person. The second is that there is no doubt that PSN never viewed the provision of a laptop to Ms Wilson with the same seriousness or sense of urgency that Ms Wilson did. This arises, at least in part, because it is not clear from the documents how important Ms Wilson having access to a laptop actually was, given the availability of other in-office computer access.

[82] There is no doubt that Ms Wilson believes that Ms Fairs deliberately prevented her from having access to a laptop, and that this was a decision of Ms Fairs' designed to hamper Ms Wilson. However, the actual evidence to support this conclusion is lacking. My view is that this is insufficient to amount to bullying or a form of unjustified action, especially given the timing of key events. By the time Ms Wilson was issued with the outcome letter of 24 March 2021, her relationship with Ms Fairs had already deteriorated to the point where Ms Wilson was refusing to attend management meetings without a union support person present, and interactions around the request for a laptop have been coloured by this. Accordingly, no orders are made.

Mediation

[83] It is submitted for Ms Wilson that "PSN did not follow its own policies or engage with [Ms Wilson] in good faith when it twice refused [Ms Wilson's] request for external mediation.⁴²" Specifically, this dispute stems from PSN's refusal to attend mediation in February/March 2021, and again in August 2021, where Ms Wilson sought to attend mediation to have her bullying allegations addressed. PSN refused to attend mediation, as they did not understand Ms Wilson perceived her bullying grievance to be outstanding.

[84] Ms Wilson's personal grievance letter of 23 December 2020 raised a claim that Ms Fairs was bullying her. All references to bullying in that letter have been quoted above, but it is important to make two points about what Ms Wilson actually said in that letter. Firstly, Ms Wilson stated twice that she had "the relevant

⁴² Paragraph 4(d) of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

documentation” and “I personally have extensive documentary and photographic evidence”. Both times she mentioned documentation, she said that she would give this to PSN, eg “I will be happy to provide the relevant documentation”, and “I personally have extensive documentary and photographic evidence... and will be happy to supply this to HR”.

[85] On 22 January 2021, PSN replied. That letter recorded that one of the concerns Ms Wilson had raised was “You believe you have been bullied by Lynne Fairs”. The letter went on to say:

Bullying and Harassment Allegation

In your letter you have advised us that you believe you have been bullied by Lynne Farris [sic] and that you have significant evidence to support your allegation. You are correct that PSN seeks to create and maintain a work environment where everyone feels welcome and valued and takes allegations of Bullying and Harassment very seriously. We have read through the details of your letter and noticed that it does not provide enough detail or the evidence you have advised that you have for the organisation to act upon your allegations at this time. We ask that should you wish to progress these allegations that you read through the PSN Bullying and Harassment Policy. We have attached a copy for you to review.

[86] Ms Wilson’s response to this is summed up in the comments she makes in her timeline document, under the date “26/01/21”.

She [Ms McLeod] doesn’t agree to investigate my bullying complaint by clearly acknowledges I am complaining about being bullied.

I tell Andrea [McLeod] that I have applied for external mediation. She doesn’t reply. Mel Glensor does. She says “we will wait to hear from them then.” The implication is that we will work through the bullying issues in that process.

I am reluctant to further share details of Lynne’s bullying at that point, as the disciplinary process that involves HR seems hostile, and I am scared that anything I share will be twisted and used against me.”

[87] Ms Wilson also says in her written evidence⁴³:

She asked for more information, as if I hadn’t already provided enough. If that information wasn’t enough to concern her, I didn’t think providing any more details would help.

After receiving this response from Andrea, I did not feel confident about disclosing further details of [Ms Fairs’] bullying to [Ms McLeod]. I felt like she was not taking my concerns seriously...⁴⁴

⁴³ Paragraph 76 of Ms Wilson’s Statement of Evidence dated 17 June 2022.

⁴⁴ Paragraph 80 of Ms Wilson’s Statement of Evidence dated 17 June 2022.

I assumed she meant we would work through the bullying complaint via external mediation⁴⁵.

[88] Ms Wilson never responded to PSN's request for further information about the bullying claims, and never provided any of the documents or information she stated she had on this topic. This is in stark contrast to the detailed, substantive, and clear responses she provided to PSN about the ROC issue. Ms Wilson's evidence makes it clear that she considered the matter, and chose not to provide further detail, rather than simply overlooking this.

[89] In addition, Ms Wilson states that she made an assumption that her bullying complaint would be addressed at some future mediation. Ms Wilson never mentioned her assumption to PSN. There is nothing in the correspondence from PSN that would support such an assumption, particularly given that PSN had invited Ms Wilson to provide further information.

[90] In the end, Ms Wilson took no further action to progress her bullying claim until 27 August 2021 when she submitted a further request to Mediation Services for mediation assistance⁴⁶. PSN declined to mediate, on the grounds that there was no personal grievance⁴⁷. Ms Wilson says "PSN had of course received a personal grievance from me...but they had failed to address the issued I had raised..."⁴⁸ However, Ms Wilson did not tell PSN that she considered the matter to be still unresolved, despite her failure to mention it again since 23 December 2020. Ms Wilson did not make this clear to PSN until she filed her statement of problem with the Authority (stamped 17 September 2021), and wrote to PSN stating this on 28 September 2021.

[91] I do not accept PSN has been guilty of a breach of good faith in regards to its failure to attend mediation with Ms Wilson on these two occasions. PSN fulfilled its obligations by asking Ms Wilson for the information she said she had, and Ms Wilson chose not to provide it. In contrast, Ms Wilson did provide a considerable amount of information about the other issues that were "live" between the parties, and PSN responded to that. When PSN understood (albeit not until late September 2021) that

⁴⁵ Paragraph 81 of Ms Wilson's Statement of Evidence dated 17 June 2022.

⁴⁶ Paragraph 165 of Ms Wilson's Statement of Evidence dated 17 June 2022.

⁴⁷ Paragraph 166 of Ms Wilson's Statement of Evidence dated 17 June 2022.

⁴⁸ Paragraph 167 of Ms Wilson's Statement of Evidence dated 17 June 2022.

Ms Wilson considered the bullying issue was still outstanding, PSN did engage in mediation. It was Ms Wilson's choice not to provide the further information she said she had (in her letter of 23 December) that lead to PSN not being able to consider or action this matter sooner.

[92] Under these circumstances, I decline to find that there was a breach of good faith by PSN and no orders are made.

Complaints re Sick Leave

[93] Ms Wilson's second amended statement of problem claims that PSN failed to respond properly to her application/s for sick leave.

[94] I do not accept that this is an accurate interpretation of events. On 1 December 2021, PSN wrote to Ms Wilson asking her to visit its own medical practitioner (at PSN's cost), in support of Ms Wilson's further application for on-going sick leave. Ms Wilson had been off work on sick leave (mostly on a paid basis) since 14 September 2021, some two-and-a-half months, with no diagnosis and an earlier date proposed for her return to work of 8 November, having passed.

[95] Under these circumstances, PSN was entitled to make further inquiries of Ms Wilson. However, the matter was never resolved, as on 2 December 2021, the parties attended mediation, and on 3 December 2021, Ms Wilson resigned.

[96] I am not prepared to find that there was any unjustified disadvantage (or other breach) resulting for Ms Wilson from being asked to attend a medical practitioner of PSN's choice, especially after she had already been off work on sick leave for such a considerable period of time, and had not proposed any return to work date. The issue of constructive dismissal will be considered below.

Investigation

[97] Ms Wilson raises a complaint that PSN "agreed to conduct a further investigation against [her] while she was on stress leave⁴⁹". I infer from the following paragraph that this is a claim that this is either an action that caused Ms Wilson unjustified disadvantage, and/or contributed to her being constructively dismissed.

⁴⁹ Paragraph 5(c) of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

[98] On 27 September 2021, PSN advised Ms Wilson that a complaint had been received about her, and that it would be conducting an investigation, but that she would not need to participate until after she has returned from leave. PSN asked Ms Wilson to make contact prior to her expected return to work date on 8 November, “to discuss the most appropriate action for your return to work while the investigation is underway”. This was described as “the nail in the coffin of [Ms Wilson’s] employment...⁵⁰”.

[99] Ms Wilson gave feedback on the proposed terms of engagement for the investigation, and attended mediation with PSN. The investigation was never fully completed once Ms Wilson resigned, as she was the subject of the investigation.

[100] Accordingly, I need to consider if Ms Wilson’s employment came to an end as a result of constructive dismissal. This case is one where (in Ms Wilson’s view) there has been a breach of duty by PSN, causing her to resign. In circumstances where the initiative for the so-called resignation came from the employer⁵¹, rather than from the employee, there will be an (unjustified) constructive dismissal.

[101] There must be a breach of the terms of employment by the employer sufficiently serious to warrant the employee resigning⁵². The Court has commented that:

I draw attention to the emphasis of both the common law and the statute on whether a reasonable person would conclude from the behaviour that the other party did not intend to perform the obligations undertaken⁵³.

[102] Not all blameworthy actions by an employer will be sufficient to amount to constructive dismissal. The conduct complained of must be sufficiently serious and repudiating⁵⁴.

[103] Ms Wilson resigned on 3 December 2021, immediately following mediation where the parties were not able to reach an agreed outcome. Her resignation came

⁵⁰ Paragraph 70 of the the Closing Submissions on Behalf of Applicant dated 27 January 2023.

⁵¹ *NID Distribution Workers etc IUOW v Foodtown Supermarkets Ltd* [1988] NZILR 588 (LC), where a constructive dismissal is described as a situation where the initiative for the dismissal comes from the employer.

⁵² See *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372,

⁵³ *Ibid*, at [47].

⁵⁴ *NZ Woollen Workers Union v Distinctive Knitwear NZ Ltd*, [1990] 2 NZILR 7991 at 448 and 449.

more than 2 months after she had been advised that PSN was investigating a bullying claim against her.

[104] While it is clear that Ms Wilson's working relationship with Ms Fairs had broken down, as shown by Ms Wilson's refusal to attend line management meetings without her PSA support person from mid-March 2021, this does not amount to a breach of duty by PSN that is sufficient amount to an unjustified constructive dismissal. While it may be said that PSN was obliged to take action once Ms Wilson's concerns about being bullied had been brought to its attention, it did take action.

[105] I have already found that Ms Wilson's letter of 23 December 2020 was not sufficient to properly outline her concerns around bullying, and in any case, PSN did respond appropriately to this claim at the time. It asked Ms Wilson for more information, and asked her to follow the internal process for progressing her concerns. Ms Wilson did not provide PSN with more correspondence on this issue until she filed her statement of problem (which she signed on 14 September, and which was received by the Authority on 17 September), received by PSN (at the latest) via its counsel on 5 October, and/or her further letter of 28 September.

[106] By this time, Ms Wilson had already left the workplace, and had closed all her client files without telling her manager she had done this. Shortly thereafter, she returned her work vehicle, despite not being asked to do so, and never provided PSN with a firm date for her return to work.

[107] Once PSN understood that Ms Wilson considered her bullying concerns to still be unresolved, it attended mediation with her. Ms Wilson resigned the next day, citing the failure of mediation to resolve the issues. The question then becomes did PSN fulfil its duties as at the end of September/the beginning of October 2021 when it became clear that Ms Wilson considered her bullying concerns remained "live"?

[108] My view is that there was no improper action by PSN at this time. Ms Wilson is critical of PSN for not recognising that she considered her bullying concerns to be outstanding and an on-going matter, but she did not notify PSN of this in the intervening period.

[109] At best, Ms Wilson was indicating, via her inviting her union representative to line management meetings, that she did not get on with her manager. But Ms Wilson did not convey to PSN that there remained underlying issues that Ms Wilson considered still needed investigating, until some time between 14 September 2021 (when she left work and filed her statement of problem) and her formal letter to PSN dated 28 September. It was only after this that PSN was fully on notice that Ms Wilson considered more needed to be done.

[110] Ms Wilson is also critical of PSN for asking for further medical details when she applied to take a significant amount (more than 7 weeks) paid sick leave, on the basis of a “bare” medical certificate dated 14 September 2021 that stated (in full):

To whom it may concern:

This is to certify that I have examined the patient described above
I find them to be unfit to resume work for a period of 7 weeks and 3 days i.e.
to 7th November.
from 15/09/2021 inclusive⁵⁵

[111] PSN wrote to Ms Wilson dated 27 September (which presumably then triggered Ms Wilson’s letter of 28 September), where PSN said:

We would like to understand why you are on sick leave, your diagnosis and prognosis and likely return to work.

In particular, we note that in your email you refer to being on sick leave due to stress. You had not raised any concerns about stress before going on sick leave. We are therefore surprised by this claim and would like to understand this better...

[112] While Ms Wilson states that she was surprised that PSN did not connect her taking substantial sick leave with what she considered to be her outstanding employment concerns, there is nothing in the above medical certificate that would have alerted PSN to the underlying reason/s why Ms Wilson wanted to take such a significant period off work, and nothing improper about PSN asking Ms Wilson to provide further detail. Once that was provided, PSN granted the leave sought, while the parties worked to clarify potential mis-understandings and arrange mediation.

[113] I have also considered whether PSN’s actions in commencing an investigation into an allegation by Ms Fairs that Ms Wilson had bullied Ms Fairs, while Ms Wilson was on sick leave, was a course of action so improper that Ms Wilson had no option

⁵⁵ Emphasis and punctuation as per the original.

but to resign⁵⁶. Ms Wilson was told that there were allegations of bullying against her, and that PSN would be conducting an investigation. PSN also told Ms Wilson she would not be asked to participate in that investigation until she had returned to work.

[114] The documents show that terms of reference were prepared dated 28 September 2021, and the investigator interviewed Ms Fairs on 6 October 2021⁵⁷. No further actions were taken until Ms Wilson was asked to comment on the terms of reference on 15 October, to which she provided two pages of substantive feedback on 21 October⁵⁸. After this, no further action was taken as Ms Wilson remained on sick leave until her resignation on 3 December 2021.

[115] I am not persuaded that PSN acted improperly in telling Ms Wilson about the compliant, and consulting with her on the terms of reference. Arguably, they were required to do so in accordance with the mutual duties of good faith to be active and communicative. In addition Ms Wilson was able to provide lengthy and substantive feedback despite being on sick leave, and PSN respected this by not asking Ms Wilson to participate further. The terms of reference explicitly state that Ms Wilson is on leave, and will not be asked to participate until she has returned to work. Ms Wilson was not asked for further participation as her sick leave continued, and in the end, this process was “overtaken” by Ms Wilson’s resignation without returning to work.

[116] I am not persuaded that there was anything improper in the limited participation requested of Ms Wilson, especially in the context of her substantive engagement with the terms of reference when she was consulted about these. No orders are made.

[117] Finally, I consider Ms Wilson’s case as a whole. In addition to the separate claims already discussed, Ms Wilson claims that she was bullied by Ms Fairs as her manager, and that it was clearly foreseeable that PSN’s failure to protect Ms Wilson

⁵⁶ As per paragraph 4(c) of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

⁵⁷ Paragraph 25 of the Memorandum of Counsel for Respondent in response to Applicant’s request for information dated 6 October 2022.

⁵⁸ The terms of reference as prepared on 28 September contain an indicative timeline suggesting interviews in the month of October and indicating that Ms Wilson would be interviewed in November on her return from sick leave. This was effectively overtaken by events.

from this bullying, coupled with PSN's refusal to engage in mediation, and PSN's continued support of Ms Fairs, "clearly gave rise to a substantial risk of resignation".

[118] The court has referred to the definition of bullying adopted by Worksafe, as meaning: "repeated and unreasonable behaviour directed towards a worker or a group that creates a risk to health and safety"⁵⁹. In my view, Ms Wilson has not been able to demonstrate that PSN engaged in repeated and unreasonable behaviour directed at her. I have found that PSN did not communicate adequately with Ms Wilson in regards to how the results of the Peakon survey would be shared with managers (occurring around November 2020), and that the outcomes of the disciplinary process (occurring in March 2021) amounted to an unjustified disadvantage. However, I do not agree with Ms Wilson's view that these two instances amount to repeated unreasonable behaviour.

[119] I also note that there is no evidence suggesting that Ms Fairs was able to view negative or detracting comments Ms Wilson had apparently made about Ms Fairs during that survey, and there is no evidence to support Ms Wilson's view that this was the reason PSN and/or Ms Fairs commenced disciplinary action against Ms Wilson.

[120] After the conclusion of the disciplinary process, and the provision of a laptop to Ms Wilson, Ms Wilson's employment continued for some four to five months without incident, until Ms Wilson raised her bullying concerns again, in September 2021. This does not suggest a pattern of repeated or unreasonable behaviour against Ms Wilson by PSN, but rather supports PSN's position that it thought matters between it and Ms Wilson had been resolved.

[121] There is no evidence that PSN committed a breach of duty so sufficiently serious that it was reasonably foreseeable that Ms Wilson would resign. The breaches that I have upheld (relating to the communication regarding the Peakon survey results, and the outcomes of the disciplinary process) occurred between 9 and 13 months prior to Ms Wilson's resignation. I do not accept that PSN beginning an investigation process into allegations raised against Ms Wilson is in and of itself a breach of duty, nor was the inquiry PSN made into why Ms Wilson was taking significant sick leave. Ms Wilson cannot reasonably expect to rely on a letter dated 23 December 2020 to

⁵⁹ *FGH v RST* [2018] NZEmpC 60, at [204].

explain why she was taking sick leave in September 2021, especially when she had never told PSN of her view the two were connected.

[122] Overall, Ms Wilson’s claim of constructive dismissal is not made out. No orders are made.

Remedies

[123] Ms Wilson is entitled to remedies for the two unjustified disadvantage grievances that I have found were made out. Ms Wilson has asked for compensation for hurt and humiliation of \$50,000 resulting from her constructive dismissal and/or unjustified disadvantage.

[124] I accept that Ms Wilson has suffered distress as a result of PSN’s unjustified actions. She gives evidence that she felt “constantly fearful of what would happen next”⁶⁰, and that she told her doctor that she felt “sick to my stomach every time I thought about going into work”⁶¹. There is no doubt that these feelings of uncertainty were caused by PSN’s lack of genuine engagement with Ms Wilson, starting with the failure to respond to her concerns about privacy relating to the Peakon survey, and continuing in the lack of engagement leading up to the issuing of the 24 March 2021 outcome letter. I accept her evidence that she found the expectations imposed on her by way of the outcome letter of 24 March 2021 to be humiliating, and to have a public aspect to that humiliation in that as an experienced practitioner and team leader, she was asked to undergo relatively introductory training sessions in a group environment, and was removed from leadership and advisory positions where she had previously represented others and shared her knowledge and experience. Ms Wilson also gives evidence that she felt unable to take on new clients in her role as a social worker as her stress levels were “through the roof”⁶².

[125] In assessing the appropriate amount of compensation to be awarded, I note that “it is the effect of the employer's conduct on the grievant and not the wisdom or otherwise of its actions that must be reflected in the compensation level⁶³”.

⁶⁰ Paragraph 173 of Ms Wilson’s Statement of Evidence dated 17 June 2022.

⁶¹ Paragraph 66 of Ms Wilson’s Statement of Evidence in Reply dated 25 July 2022.

⁶² Paragraph 173 of Ms Wilson’s Statement of Evidence dated 17 June 2022.

⁶³ *Lawless v Comvita New Zealand Ltd*, [2005] ERNZ 861, at [90].

[126] This is helpfully summarised in the case of *Waikato District Health Board v Archibald*, where the court found that the plaintiff,:

experienced a deep sense of hurt that she had not been listened to and that her concerns had been unceremoniously brushed to one side. She felt cornered by the actions of the WDHB and became very upset and anxious⁶⁴.

[127] The plaintiff in that case (decided some years ago) was awarded the sum of \$20,000 in compensation for hurt and humiliation. Likewise, the court awarded compensation of \$20,000 where an employee had similarly been issued with what was described as “an outcome letter” where the contents of that letter were found to amount to a disadvantage⁶⁵.

[128] Taking into account recent awards and the court’s comments as to the need for such awards to remain current⁶⁶, it is my view that an appropriate award of compensation for hurt and humiliation in respect of Ms Wilson’s unjustified disadvantage grievances is \$25,000. In reaching this figure, I have borne in mind the public aspects of the expectations imposed upon Ms Wilson, as well as PSN’s failures to properly explain why they did not communicate with her properly and fairly when she raised issues with them.

[129] PSN submits that the Authority should assess Ms Wilson’s contribution at 50%⁶⁷. It describes her as a “difficult” and “disrespectful” employee⁶⁸, and makes reference to the deterioration of her working relationship with her manager Ms Fairs⁶⁹. The difficulty with PSN’s submissions is that none of the criticisms PSN levels at Ms Wilson suggest that Ms Wilson’s actions contributed to the actions of PSN that gave rise to Ms Wilson’s personal grievances of unjustified disadvantage. Ms Wilson communicated with PSN about a range of concerns in a substantive and effective manner. PSN itself acknowledged as much at the time, when it said in the outcome letter of 24 March 2021 “we have appreciated you providing a comprehensive response...”.

⁶⁴ [2017] ERNZ 791, at [58].

⁶⁵ *Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192, at [129] and [159].

⁶⁶ For example, *GF v Comptroller of the New Zealand Customs Service*, [2023] NZEmpC 101 at [162] where the court comments on the need for awards to remain current.

⁶⁷ Paragraph 96 of the Respondent’s Closing Submissions dated 27 January 2023.

⁶⁸ Paragraph 94(a) of the Respondent’s Closing Submissions dated 27 January 2023.

⁶⁹ Paragraph 94(b) of the Respondent’s Closing Submissions dated 27 January 2023.

[130] I decline to find that any actions of Ms Wilson contributed towards the situation that gave rise to her personal grievances, and no reduction in the compensation ordered is made.

[131] Ms Wilson has not asked for compensation for lost wages⁷⁰. However, she has asked for compensation for “loss of her entitlement to use of a work car (for 5 weeks to the value of \$1057 being the same period as annual leave owed at the end of Ms Wilson’s employment)⁷¹. It is not clear how this figure was arrived at, or what the relevance of any annual leave owed has to this claim (and for avoidance of doubt, there is no claim for any unpaid annual leave before me). It is simply submitted that this is a “reimbursement of 5 weeks’ use of the work vehicle which was part of her package”⁷².

[132] Even if there was adequate evidence to support this claim, which there is not, this claim would only be available to Ms Wilson if her constructive dismissal claim was made out, which I have found it was not. This claim is not made out. No orders are made.

[133] Ms Wilson has asked for “the respondent to reimburse costs incurred by her as a result of the respondent’s actions including therapy and medical appointments⁷³”. This claim is not quantified. Although Ms Wilson states generally in her evidence that she visited her general practitioner to obtain medical certificates, there is no evidence as to what costs Ms Wilson incurred or what those costs were for. On this basis, I must find that the claim is not made out. No orders are made.

[134] Ms Wilson has asked that recommendations are made under section 123(1)(ca) of the Act to improve PSN’s workplace conduct and practices in respect of the following matters:

- a. The breach of confidence in respect of staff surveys.
- b. Ensuring investigatory and disciplinary processes are only initiated once impartial and reasonable inquiries have been made to establish

⁷⁰ I understand that Ms Wilson obtained alternative employment, as advised at paragraph 81 of the Respondent’s Closing Submissions dated 27 January 2023, and confirmed by the absence of such pleadings from the Second Amended Statement of Problem and Third Amended Statement of Problem.

⁷¹ Paragraph 29(b)(ii) of the Second Amended Statement of Problem.

⁷² Paragraph 11 on page 20 of the Closing Submissions on Behalf of Applicant dated 27 January 2023.

⁷³ Paragraph 29(c) of the Amended Statement of Problem and Second Amended Statement of Problem.

whether the use of such processes is justified (given the inevitable harm they cause including the loss of trust and confidence in the employment relationship);

- c. Ensuring investigatory and disciplinary processes are conducted in good faith and according to due process;
- d. The failure to investigate employees' complaints about their manager in a fair and impartial way, particularly where multiple employees have complained about bullying by the same manager;
- e. The failure to address systemic bullying;
- f. The failure to provide a workplace safe from bullying⁷⁴.

[135] This remedy is only to be applied in circumstances where I am satisfied that “any workplace conduct or practices are a significant factor in the personal grievance”⁷⁵. I am not satisfied that it would be appropriate to make the recommendations sought by Ms Wilson as set out above. There are several reasons for this, first being that some of them are merely re-expressions of duties that employers may already be said to owe to employees in a general sense. Second, I am not satisfied that there is sufficient evidential support for the issuing of the suggested recommendations. Thirdly, I note the relatively high threshold implied by the wording of the Act which states that that I need to be satisfied that particular aspects of the workplace conduct or practice are “a significant factor” in the personal grievance.

[136] I am not satisfied on the facts before me that particular aspects of PSN's workplace conduct or practice have been specifically or concretely identified separate from Ms Wilson's own personal grievance claims, and certainly this has not been done to the extent that I can be confident such items are “a significant factor” in Ms Wilson's grievances. For these reasons, I decline to make any recommendations. No orders are made.

Orders

[137] I find that Ms Wilson has suffered two unjustified disadvantages. Ms Wilson's other claims, including that of constructive dismissal, are not made out.

⁷⁴ Paragraph 29(a) of the Second and Third Amended Statement of Problem.

⁷⁵ Section 123(ca) of the Employment Relations Act 2000.

[138] Presbyterian Support Northern Inc. is ordered to pay to Rachal Wilson the sum of \$25,000 without deduction as compensation for compensation for humiliation, loss of dignity, and injury to feelings in accordance with section 123(1)(c)(i) of the Act.

Costs

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

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

[141] 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.⁷⁶

Claire English
Member of the Employment Relations Authority

⁷⁶ Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>