

Attention is drawn to the order in paragraph [15] prohibiting publication of certain information in this matter

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 97
3151961

BETWEEN

VXO
Applicant

AND

NORTHLAND DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Arunjeev Singh and Jeremy Sparrow, counsel for the Applicant
David Grindle and Kezia Purdie, counsel for the Respondent

Investigation Meeting: 15 to 17 November 2022 in Whangarei

Submissions and/or further evidence 17 January and 3 February 2023 from the Applicant
24 November 2022 and 1 February 2023 from the Respondent

Determination: 1 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, VXO, claims that he was unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, Northland District Health Board (NDHB) (now known as Te Whatu Ora).

[2] VXO further claims that NDHB breached the duty of good faith it owed to him, and clause 27 of the parties' collective agreement.

[3] NDHB denies that VXO was unjustifiably dismissed or unjustifiably disadvantaged, or that it has acted in breach of the duty of good faith, or in breach of any clauses of the parties' collective agreement.

The Authority's investigation

[4] The Authority received written and, under oath or affirmation, oral evidence from the Applicant VXO, and his wife. The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Ms Pip Zammit, Director - Scientific, Technical of Allied Health at NDHB; Ms Emma Carman, Human Resources (HR) Service Partner; Ms Vicki Cunningham, paediatrician and Director of training for Royal College of Physicians – paediatric branch; and, Ms Jeanette Wedding, General Manager, Rural, Family and Community Health Services.

[5] The commencement of the Investigation Meeting was delayed due to an application by the Respondent to remove confidential 'Without Prejudice' material from the common bundle of documents. This was discussed, and agreed by the Applicant.

[6] A further delay occurred because two of the witnesses for the Applicant, his wife and an expert witness, were not present as expected at the start of the Investigation Meeting. This expectation was set out in clause [4] of the Authority's Directions Minute dated 12 April 2022. The wife of VXO arrived later on the first day and an application for the evidence of the other witness for the Applicant to be taken by AVL was only made at the start of the Investigation Meeting. This was not possible since the facilities for doing so were not available at the venue where the investigation Meeting was being held.

[7] After discussion, I agreed for the third witness' attendance to be taken on the second day of the Investigation Meeting. However the third witness was not present until later on the second day when cross-examination by counsel for the Applicant of a Respondent witness, Ms Zammit, was in progress and needed to be concluded, therefore his evidence was deferred until the start of the third day.

[8] There was also a late application by the Applicant that the Respondent witnesses be excluded from the Investigation Meeting during the taking of the evidence of each. This was strongly opposed by the Respondent and I observed that it would be very unusual in an Authority investigation for witnesses to be excluded.

[9] However the Respondent agreed to the Applicant's application on pragmatic grounds to avoid further and inevitable delay when counsel for the Applicant, Mr Singh, advised that his instructions were to challenge any decision made by the Authority that did not grant the witness exclusion request.

[10] On the commencement of the third day of the Investigation Meeting, Mr Singh advised that his client's instructions had been withdrawn, and requested permission from the Member to be excused from further attendance at the Investigation Meeting, which was granted. The Applicant, via Mr Singh, advised that he and his remaining witness would not be attending on the third day of the Investigation Meeting.

[11] I decided that the meeting should proceed pursuant to clause 12 Schedule 2 of the Employment Relations Act 2000 (the Act) with the conclusion of the final Respondent witness evidence. The meeting concluded at 11.00 a.m. on the third day.

[12] The parties were directed to file closing submissions by 25 November 2022. The Applicant having instructed new counsel, requested an extension to file later. This was agreed, and the closing submissions for the Applicant from his new counsel, Mr Sparrow, were received by the Authority on 17 January 2023.

[13] The counsel for the Respondent requested leave to file brief submissions in reply on 1 February 2023 and in the circumstances of this case, in which counsel for the Applicant was not present at the conclusion of the Investigation Meeting when submissions were expected to be spoken to, I accepted submissions in reply to be filed by both counsel for the Applicant and the Respondent.

[14] As permitted by s 174E of the Employment Relations Act 2000 (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 of the submissions received.

Non Publication Order

[15] **Pursuant to clause 10 (1) of Schedule 2 of the Act, the names of the Applicant and the complainant junior doctor are prohibited from publication until this order is revoked or varied by further orders of the Authority. They will be identified only by randomised initials which have no correlation to their actual names.**

Issues

[16] The issues requiring determination are whether or not:

- VXO was unjustifiably dismissed by NDHB?
- VXO was unjustifiably disadvantaged by NDHB?
- NDHB breached the duty of good faith it owed to VXO?
- NDHB breached clause 27 of the collective agreement between the parties?

Background

[17] VXO was employed as a Senior Medical Officer and worked as part of the Paediatric medical team which in 2020 consisted of eleven senior medical officers (SMOs), two fellows (advanced paediatric trainees), two registrars (junior paediatric trainees) and eight house officers (junior hospital doctors).

[18] The Paediatric team were covered by the collective agreement between Senior Medical and Dental Officers and New Zealand District Health Boards which came into effect on 1 April 2020 and expired on 31 March 2021 (the MECA).

[19] Ms Cunningham explained that Paediatric registrars are doctors who undertake a six year training programme to become Paediatric specialists/SMOs. This training apprentice model encompasses learning through direct clinical supervision and teaching from SMOs. In 2020 she said NDHB had two registrar training positions targeted at trainees commencing their six years of training.

[20] Ms Cunningham said there is a hierarchy of experience, expertise and responsibility within the Paediatric medical team with SMOs as the most senior, providing clinical and professional supervision to the more junior Paediatric doctors (fellows, registrars and house officers). SMOs have clinical decision making power in that their clinical decisions will override a trainee doctor's opinion or decision. They also influence a trainee's progression through training by providing assessment and feedback to the college about the trainees' performance.

[21] Although an SMO will be assigned to provide supervision to a specific trainee, Ms Cunningham said all SMOs provide feedback for consideration on each trainee.

Events in 2020

April 2020: The Complaint from BUW

[22] BUW was a Registrar in the Paediatric department at NDHB. Ms Cunningham said that she worked closely with BUW in her capacity as a supervising SMO and in her position as Director of Physician Training.

[23] On 29 April 2020 Ms Cunningham said BUW approached her and raised concerns regarding the actions of VXO, a SMO who provided her with direct supervision. Ms Cunningham explained that whilst another SMO was responsible for the actual supervision of BUW, she would be required to work with VXO and under his supervision when they were rostered together, and he would provide feedback on her progression at review meetings.

[24] On 30 April 2020 BUW provided a written complaint with details of the alleged behaviour by VXO which made her feel uncomfortable, and provided details of text messages between her and VXO. She stated in the complaint:

It has taken me some time to gather the courage to come forward with my experiences. ... I made the decision to share my experiences with Dr Vicki Cunningham now as I am currently on a ward week with [VXO], during which I am unable to avoid working closely with him. In the time leading up to this ward week, I became increasingly anxious and worried about having to work with him. It affected my sleep and took away my usual enjoyment of work. I was particularly worried that I may be unwilling or unable to seek his help in a clinical situation due to my apprehension about interacting with him.

[25] Ms Cunningham said that given the serious nature of the issue, she immediately sought advice in how to proceed from her Child Health Manager who directed her to the Chief Medical Officer.

[26] Ms Wedding said in her role as General Manager of Rural, Family and Community Health Services, she had responsibility for the operation of Paediatrics. In late April or early May 2020 she had been briefed by the HR department that a complaint had been made by BUW against one of her supervising SMOs, VXO.

[27] Initial advice provided to her was that the complaint should be investigated. She agreed as the decision to investigate was in keeping with NDHB policy: 'Managing Unacceptable Behaviour in the Workplace' which stated:

Complaints made by or about another employee in regard to unacceptable behaviour will be taken seriously, treated with sensitivity and investigated as soon as practicable.

[28] Ms Wedding said that on 4 May 2020 she asked Ms Zammit, as a senior manager within NDHB but unconnected to the Paediatric department, to conduct the investigation.

[29] Ms Zammit confirmed that she had been contacted by Ms Wedding on 4 May 2020 ascertaining her ability to undertake an employment investigation into a complaint which had been received from a Registrar working in Paediatrics against a SMO.

[30] Ms Zammit said she did not have any contact with either the complainant or the SMO, and confirmed that she was independent and unaware of any reason which would preclude her from undertaking the investigation, and she agreed to undertake it.

[31] Ms Zammit said that later that same day, 4 May 2020, she received a letter from Ms Wedding confirming the terms of the investigation and providing some related material. The letter detailed that Ms Zammit should:

- a. Meet with the complainant in the first instance to review the complaint with her in order that you have a document that can be supplied to the consultant concerned to respond to;
- b. Meet with the consultant to discuss the complaint and his response;
- c. Determine as a result of the investigation whether there is evidence or otherwise of unacceptable behaviour in the workplace; and
- d. Provide a report to me as regards your investigation and findings.

[32] It also advised that Ms Carman would support Ms Zammit with HR advice during the investigation process.

[33] Ms Zammit said she had experience of undertaking similar investigations both for NDHB, and also for the Dental Service with which she was also involved. She had been provided with a copy of the NDHB policy 'Managing Unacceptable Behaviour in the Workplace', and was conversant with the NDHB Code of Conduct and Disciplinary policy.

13 May 2020: Ms Wedding's Meeting with VXO

[34] Ms Wedding said she met with VXO on 13 May 2020 to advise him that a complaint had been made concerning him.

[35] Prior to doing so, she met with Ms Carman to discuss the need to advise VXO of the investigation and the potential impact it would have on him, and to take the HR department's advice on how to conduct matters. It was also agreed that VXO would be offered paid special leave while the investigation was ongoing.

[36] VXO said in the meeting Ms Wedding informed him of the written complaint made about him by BUW. He was handed an envelope containing a copy of the complaint and a letter which he was not given time to read, and told that he was invited to attend an investigation meeting with Ms Zammit on 18 May 2020.

[37] VXO said he was told that he was being placed on special leave until the investigation was completed, which was estimated to be in a couple of weeks. He had asked if he could do a handover before he left the hospital and Ms Wedding agreed he could do so.

[38] The letter contained the following information:

- Ms Zammit would be the investigator, her title and an explanation of her position as: “a neutral manager for Northland DHB who is not responsible for the service in which you or [BUW] work”;
- Ms Zammit would meet with him and his support person, which he was strongly advised to have;
- Notes would be taken during the interview: he would be provided with a copy and given the opportunity to amend them;
- He would be given a copy of the preliminary investigation report;
- The investigation would be confidential;
- He was offered a period of special leave until the investigation was completed;
- He was offered EAP counselling; and
- The assistance of an independent HR Service Partner to assist him with understanding procedural advice.

[39] Ms Wedding said VXO appeared shocked when he was told about the complaint and the investigation. She informed him she would not be involved in the investigation which would be conducted by Ms Zammit, assisted by Ms Carman.

The Investigation Meeting: (i) with BUW

[40] Ms Zammit said that she met with BUW, and Ms Cunningham who was acting as her support person, on 5 May 2020. Ms Carman attended because her role in the process was to assist Ms Zammit with the documentation, and in particular to take notes at the meetings held with BUW and VXO.

[41] Ms Zammit said the meeting had been opened by an acknowledgment of how difficult the discussion would be and a short explanation of Ms Cunningham’s role as a support person.

[42] In both that meeting and the one with VXO Ms Carman was responsible for preparing notes during the meeting. These were not verbatim, but were provided to the Authority and are detailed. They were subsequently typed up and provided to the interviewee to check and if appropriate, amend.

[43] BUW answered a number of questions which had been prepared prior to the interviews with her and VXO, and explained the text messages, the various interactions and exchanges, and how they had impacted on her.

[44] BUW explained that her delay in making the complaint was because she was ashamed about what had occurred and her contributions in the texting exchange. However she had discussed that and the other incidents, and how they had made her feel, with her family and friends who had expressed an opinion that what had occurred was not acceptable conduct by her senior, and encouraged her to proceed with a formal complaint.

[45] BUW concluded by stating that she was very anxious about being rostered to work with VXO and that the overall situation was: “compromising my learning and judgment, and that is scary”

[46] Following the meeting with BUW, Ms Carman prepared a transcript of the text message conversations between BUW and VXO. She explained that she had done so by examining BUW’s older model mobile phone, to ascertain the time and dates of the text messages in the received and sent folders, to correlate the sequence of messages.

Investigation Meeting: (ii) with VXO

[47] The proposed meeting between VXO and Ms Zammit did not take place on 18 May 2020 because neither VXO, or his representative from the Association of Salaried Medical Specialists (ASMS) were available. However on 28 May 2020 VXO provided a written statement response to BUW’s complaint in which he made the following comments:

- a) ... it was obvious in retrospect that at some stage I had crossed a line and what I saw as banter was totally inappropriate and unwelcome;
- b) ... I now have a much better understanding of the feelings of discomfort which BUW has explained in her complaint. I am embarrassed to see that I have been the cause of the confusion and anxiety that she was going through. That wasn’t my intention;
- c) I also now feel ashamed that what I thought of as sardonic attempts at witticisms were so hurtful;
- d) ...I have never previously thought about myself in terms of power but now have more insight into the shadow cast by the presence of a senior member of the team in a group of people about the power imbalances between senior doctors, especially male. This also means that it is very difficult for junior doctors and others to challenge inappropriate behaviour; and
- e) I take full responsibility for my actions and I feel embarrassed and ashamed that my behaviour has caused distress to her for several months.

[48] On 29 May 2020 the investigation interview with VXO took place with his ASMS representative attending by Zoom. Ms Carman took notes while Ms Zammit asked the prepared questions.

[49] During the meeting VXO was shown the transcript of the text message conversations Ms Carman had prepared from BUW's phone and VXO accepted he had sent them.

[50] VXO asserted that during the investigation interview he had not been treated in the same manner as BUW because there had been no introductory remarks to him about the process being challenging and difficult for him.

[51] Ms Carman said that the same introductory comment about the process had been made to both BUW and VXO, but had no explanation of why she had not recorded such in the notes she made of the meeting. She had not commented on the role of a support person in the introduction for VXO however because she contended that was not required in the presence of the ASMS representative.

[52] Following the meeting, notes had been prepared and sent to the ASMS representative and separately to VXO for his feedback on their accuracy. On 12 June 2020 the ASMS representative returned the notes, they had been annotated and were unsigned. On 15 June 2020 VXO returned the annotated version of the notes signed by him.

[53] In the amended, annotated signed notes VXO confirmed:

- a) "we did have that conversation" (in relation to text messages);
- b) "I do recall sending them" (referring to text messages);
- c) "At sometime the boundary became blurred and as we sent responses and read the replies the repartee became more risqué. I said something close to cheeky and got a cheeky response back. It was quite entertaining. At the time, I thought this was something, perhaps flirty, that you would say in social interactions."
- d) "I am embarrassed. In retrospect, the conversation went too far."
- e) "it was inappropriate and unprofessional"

[54] VXO also confirmed in the signed notes that he recalled:

- saying to BUW that she was more fun to text than she is in real life;
- making a comment about 'her latest conquest' when he had observed her hugging her father; and
- making the comment "if you look at me with that cheeky smile, you could get whatever you want".

[55] In relation to the last comment, VXO explained it was a phrase he often used when asked for, and granting, a favour.

[56] VXO said he had made the statements during his interview under duress because he was concerned he would lose his job, and because the ASMS representative had told him NDHB would be looking for a restorative process, and he believed that if he accepted responsibility, that would be the best way to achieve a conciliatory outcome with no blame being attached to him.

[57] It was on that basis that he signed the notes recording the meeting and his admission that his communication was inappropriate and unprofessional.

[58] Ms Zammit said she was not aware of any agreement or undertaking being made by NDHB that the investigation was to be a restorative or a no-blame process.

[59] VXO confirmed that it was the ASMS representative who had given him that impression.

25 June 2020: the investigation report

[60] Ms Zammit said when questioned that she had considered whether or not to interview the possible witnesses named by BUW as present during some of the alleged incidents, but on the basis that VXO in the signed, annotated notes of the investigation meeting had acknowledged fault on his part, she considered this was unnecessary. This decision was described as being due to the sensitive and confidential nature of the proceedings.

[61] Ms Zammit said she completed her report and sent a copy of it to VXO and Ms Wedding on the same day, 25 June 2020. In the 'Overview' of the report, Ms Zammit assessed the behaviour of VXO within the context of the Worksafe NZ sexual harassment definition and commented:

In defining Sexual Harassment, Worksafe describe behaviours that are unwelcome or offensive sexual behaviours that are repeated or serious enough to have a harmful effect. I am of the view that the behaviours detailed in the statements of both the complainant and the respondent, have had a serious harmful effect on [BUW].

This emotional harm to [BUW] has also impacted upon her training.

[62] In the conclusion to the report Ms Zammit stated:

I am confident that [VXO] has made a conscious effort to educate himself in these matters over recent weeks. However, references made as part of this process such as "roasting humour" and 'conquests', along with his comments that his actions

amounted to outdated sexism or social faux pas, indicates to me that there continues to be a significant lack of insight.

[63] Ms Zammit provided it as her view that VXO's conduct had breached NDHB's Policies, Code of Conduct and Values, and that "he has displayed unprofessional conduct in his capacity as a senior doctor." Her recommendation was that the complaint by BUW had been upheld and was serious enough to warrant consideration of disciplinary action.

[64] Ms Zammit said that VXO responded that same day, 25 June 2020, thanking her for the report and stating: "I do not agree with your findings."

Disciplinary Process: June 2020

[65] Ms Wedding said that having received and read the investigation report from Ms Zammit she believed that she needed to follow up the finding that some of NDHB's policies and Code of Conduct may have been breached, and she sent a letter to VXO asking him to meet and discuss the concerns highlighted in the investigation report.

[66] The letter to VXO dated 29 June 2020 set out Ms Wedding's concerns:

- ... potentially, your behaviours and the resulting impact on the complainant, meet the definition threshold for Sexual Harassment in accordance with Worksafe NZ's guidance. ...
- Your behaviours and actions did not meet the standards or the expectations of Northland DHB in terms of our Values. Specifically the findings were that you have not:
 - o Treated [BUW] in a respectful manner.
 - o Communicated appropriately or in a safe manner.
 - o Treated [BUW] with care
 - o Excellence could not occur as the basis of the relationship was unable to inspire confidence.
- As part of the investigation, you acknowledged that your behaviours had been inappropriate and unprofessional. ...

[67] The letter continued to set out in detail areas of concern contrasting the requirements of the NDHB Code of Conduct.

[68] It also advised VXO of his right to have a support person or representative with him and assured him that he would be provided at the meeting with a full opportunity to discuss his view of the findings in the investigation report. Ms Wedding assured him in the letter: "I undertake that full consideration to any and all matters that you submit and wish us to consider will occur before any final decision on this matter is reached."

[69] On 30 June 2020 Thomson Wilson Law, the legal firm who were at that time representing VXO, wrote to NDHB with a copy to Ms Wedding. The letter stated that VXO and his lawyer, Mr Magee, expected to be involved in any disciplinary process, and that it was VXO's wish to return to work from the leave he had been placed upon during the investigation.

[70] Ms Wedding said she, the Director of HR, and Mr Grindle, NDHB's lawyer, attended a meeting with Mr Magee, VXO, and his wife, on 17 July 2020. Ms Wedding said she recalled that in the meeting there was agreement that VXO's behaviour towards BUW was inappropriate conduct and that it breached the rules, but that there was a difference of opinion on how to categorise the behaviour and its seriousness.

[71] After the meeting she forwarded notes she had prepared to VXO and received in return an expanded copy of the notes.

[72] Ms Wedding's notes state: "In finishing VXO's lawyer stated that they were in agreement that this was inappropriate conduct and has breached the rules – never a denial".

[73] The expanded notes provided by VXO, which were prepared following the meeting by him and his wife from their recollections of the discussion, contain the following comments:

- PM [Mr Magee] has said that [VXO] has admitted that some of his behaviours in initiating the sending of the text messages were inappropriate and some changes were necessary ... there was a complete denial of any bullying or harassment behaviour;
- [VXO] didn't intend any harm but accepts that it was wrong and has been willing to apologise for it;
- [VXO] realises that he made a mistake after he was told by [BUW] that it was her father but the conclusion has been taken out of context .."

[74] On 4 August 2020 Mr Grindle received a letter from Mr Magee raising a personal grievance on behalf of VXO. The letter stated that VXO had been disadvantaged by the way in which the complaint had been investigated and setting out the perceived flaws in the process adopted, and claiming a breach of good faith.

[75] It stated:

Our primary submission at this stage is if the DHB are serious about complying with their legal obligations and are acting in good faith then this matter should be the subject of an independent investigation.

[76] The letter concluded: "If this submission is not accepted and the DHB continues to proceed with dismissing [VXO] we see no point in there being any further meetings."

[77] Ms Wedding said that although the investigation had taken longer to conclude than had been expected, this was because it had been a thorough process and she did not accept there had been a breach of good faith.

Preliminary Outcome: 7 August 2020

[78] Mr Grindle responded on behalf of NDHB by letter dated on 7 August 2020 stating that there would be a response to the personal grievance and attaching a letter from Ms Wedding dated 7 August 2020.

[79] In the letter Ms Wedding addressed the findings contained in the investigation report and noted that VXO: “had accepted that your texting in this vein was inappropriate, unprofessional and unwelcome.” Further that:

The writer has contemplated deeply about how to define your conduct and whether it constitutes sexual harassment. We believe that any singular part of your conduct viewed in isolation may struggle to meet the accepted definition of sexual harassment, but that taken collectively, your conduct is likely to meet the threshold required, especially where there is reference to [BUW’s] latest conquest, cheeky smile and the possibility of being naughty or bad. In the circumstances, it is not necessary for us to make a determination of that kind because the writer has determined that your conduct meets the definition of bullying and harassment as outlined in the NDHB’s Managing Unacceptable Behaviour in the Workplace Policy.

...

As outlined above, we believe that your conduct meets the definition of bullying and harassment as contained within the Behaviour Policy. We have also considered the NDHB overarching values with which you are well aware. We believe that your conduct falls below the standard required and is in breach of the NDHB values regarding respect, caring and communication.

Having determined that your conduct is in breach of the NDHB values and constitutes bullying and harassment, I have considered whether it constitutes serious misconduct. In that regard, we have taken into account a range of factors, including that [BUW] is someone over whom you exercise power and control and that you also had a teaching responsibility for her. Further, the bullying and harassment visited upon [BUW] has had a profound and adverse effect upon her. She describes being emotionally and psychologically impacted by the behaviour that has made her apprehensive, anxious, worried, uncomfortable and ashamed. We are of the view that collectively the seriousness of your behaviour is elevated by these factors and that it does constitute serious misconduct.

[80] The letter concluded by stating that NDHB’s preliminary view was that no alternative outcomes other than dismissal could be adopted, and it asked VXO to meet with Ms Wedding on 11 August 2020 to provide his views on the preliminary outcome.

Medical Incapacity August 2020

[81] On 10 August 2020 a letter was received by NDHB advising that VXO had been taken ill and admitted to Tauranga hospital with chest pain: “caused by stress induced cardiomyopathy”.

[82] The NDHB lawyers wrote to VXO's lawyer on 13 August 2020 advising that VXO would be regarded as being on sick leave and the employment investigation would be adjourned until VXO had clearance from the cardiologist.

[83] VXO provided medical certificates covering his continued absence. On 28 September 2020 Ms Wedding instructed the NDHB lawyers to enquire if VXO was available to discuss NDHB's preliminary findings in person or via Zoom, but if he did not feel well enough to do so, it could be adjourned until VXO's expected return to work date of 17 October 2020.

[84] There was no response to the enquiry and on 14 October 2020 the NDHB lawyers wrote again asking if a meeting with VXO could be held during the week of 19 October 2020 when he was anticipated to return to work after the expiry of his last medical certificate. That request was declined by VXO's lawyer on the basis that: "under no circumstances in [VXO's] current health state is he to be involved in any matters that could adversely impact his health.

[85] Ms Wedding said that by November 2020 VXO had been absent from work for more than three months, and she started to consider NDHB's options in regard to his continued absence.

[86] The medical certificates which had been provided did not contain significant detail about either VXO's condition or his expected date of return to work. During the period of VXO's absence, NDHB engaged a locum paediatrician in addition to paying VXO his full salary and Ms Wedding said the costs to NDHB were becoming significant and ongoing.

[87] In these circumstances, Ms Wedding said she instructed NDHB's lawyers to write to VXO and confirm NDHB's intention to invoke clause 27 of the MECA which stated:

27.5 When a period of leave on account of accident or illness exceeds three months the employer is entitled to seek a review of the employee's condition and likely fitness to return to work. The review will be done by a representative of the employer, a representative of the employee and a mutually agreed medical practitioner, or such other group as the employer and employee may agree.

27.6 The reviewers shall advise the employer on the prospects and timing of the employee being fit to return to normal or other duties.

27.2 On receipt of that advice, the employer after consulting with the employee and taking into account any other relevant information, shall decide whether to extend the period of sick leave (with or without pay) or to terminate the employment. Termination in these circumstances shall be on notice.

[88] The letter from the NDHB lawyers dated 2 November 2020 also advised of NDHB's intention to undertake a medical examination and suggested that one of the cardiology specialists at Bay Cardiology or Auckland Heart Group undertake the examination.

[89] The response provided on behalf of VXO was that he agreed to either of the nominated cardiologists to undertake a review and added that a mental health assessment would also be appropriate.

[90] NDHB's lawyers wrote to the Auckland Heart Group on 23 November 2020 requesting a medical review of VXO, which it agreed to undertake.

[91] On 4 December 2020 NDHB received a further letter on behalf of VXO inviting: "the DHB to also appoint an independent assessor in relation to [VXO]'s mental health."

Events in 2021

[92] On 21 January 2021 Ms Wedding said NDHB were advised by the Auckland Heart Group that it was no longer available to undertake the medical review of VXO. As a result NDHB contacted VXO's lawyers to enquire if VXO's own cardiologist could provide the information required pursuant to clause 27 of the MECA.

[93] The letter dated 21 January 2021 from NDHB also acknowledged the request for a mental health assessment and proposed an Auckland psychiatrist as the person to undertake this.

[94] VXO's lawyers wrote to NDHB on 15 February 2021 confirming that the information from VXO's cardiologist would be available to NDHB and that he agreed to the appointment with the Auckland psychiatrist.

[95] By a further letter dated 1 March 2021 VXO's lawyers wrote to NDHB criticising a delay in the time taken to engage the Auckland psychiatrist. The letter contained an allegation that VXO's health issues were a direct consequence of: "the incompetent and high-handed manner in which the NDHB conducted its investigation".

[96] On 18 March 2021 NDHB received a copy of the report from VXO's cardiologist which referenced a medical event VXO had six years earlier and raised the possibility of his suffering from a type of cardiomyopathy.

[97] The medical report from the Auckland psychiatrist dated 1 April 2021 diagnosed that VXO had developed symptoms which supported a diagnosis of a Major Depressive Episode

and stated that: “as a result of his depressive illness, [VXO] is currently unfit to attend to any of his working duties as a Paediatrician.” The report from the Auckland psychiatrist also stated that the key limitation to VXO’s recovery was the ongoing uncertainty and distress caused by the complaint process which remained unresolved, in particular the report commented:

[VXO] expressed significant reservations about his ability to return to working duties if his name is not cleared through the process of resolving the complaints`.

[98] Ms Wedding said that she took some time to carefully consider what decision was appropriate and consistent with clause 27 of the MECA. She took into account a number of factors and interests including:

- a) The length of time VXO had been absent from work due to illness;
- b) The estimated time he would remain absent from work before he could reasonably be expected to return;
- c) The state of his likely fitness to return to work;
- d) The medical certificate from VXO’s GP received 3 March 2021;
- e) The medical report from VXO’s cardiologist dated 3 March 2021;
- f) The medical report from the Auckland psychiatrist dated 1 April 2021;
- g) The various interactions between NDHB and its lawyer, and VXO and his lawyer, including submissions made by him in response to NDHB’s preliminary outcome letter including the letter from VXO’s lawyer dated 30 April 2021;
- h) The interests of NDHB including the ongoing cost to paediatrics in employing a locum to fill VXO’s position;
- i) the interests of the patients NDHB served; and
- j) other factors including the impact of her decision on VXO; and what a return to work might look like in the circumstances.

[99] At this date, Ms Wedding said VXO had been absent from work due to medical incapacity since 10 August 2020. By April 2021 it had been 8 months since VXO had gone on sick leave and more than 11 months since he had been at work. It was not clear from the most recent medical certificate whether or not VXO could return to work upon its expiry, or if a further medical certificate would be provided.

[100] Neither the report from the Cardiologist or the Auckland psychiatrist provided any indication of when VXO would be able to return to work. Rather Ms Wedding said the report from the cardiologist suggested that VXO had underlying heart abnormalities and potential

cardiomyopathy which required further investigation with no indication how long that would take.

[101] The report from the Auckland psychiatrist was also unclear as to when VXO could return to work, but it noted that any ability for VXO to be able to return to work was primarily inhibited by the ongoing disciplinary investigation into his conduct which was not resolved.

[102] Ms Wedding said that she considered it necessary to complete the disciplinary process relating to VXO's conduct with his participation, however this could only occur upon his return to health and to work. While a primary concern was VXO's well-being, Ms Wedding said she also had to bear in mind the interests of NDHB, the patients, and other staff, because VXO's extended absence was beginning to have a detrimental effect on service delivery in the Paediatrics department. A further consideration was financial in that NDHB was paying the higher locum costs and VXO's sick leave.

[103] On 22 March 2021 NDHB's lawyers wrote to VXO's lawyers on Ms Wedding's authorisation proposing that discretionary paid sick leave would cease and inviting VXO's feedback on that proposal. There was no response to that letter and so the proposal to discontinue the discretionary paid sick leave was not enacted which Ms Wedding said represented an additional financial burden for NDHB.

Preliminary decision to dismiss on medical grounds

[104] On 22 April 2021 after further consideration, Ms Wedding formed the preliminary view that termination of VXO's employment was appropriate. Accordingly on the same day, NDHB's lawyers wrote to VXO's lawyers outlining the information provided in the medical reports and conveying the preliminary decision to terminate VXO's employment.

[105] The medical information referred to was (i) a medical certificate; (ii) a report from the cardiologist dated 3 March 2021 (the Cardiac Report); and (iii) a psychiatric assessment report dated 1 April 2021 (the Psychiatric Report). The letter summarised the following information which was provided in the reports:

- The Cardiac Report did not confirm when VXO would be able to return to work but did confirm that a further cardiac MRI scan was to occur and that ongoing stress and anxiety were exacerbating his symptoms;
- The Psychiatric Report indicated that although VXO was currently unfit to work due to the effect of a Major Depressive Episode, the depression was likely to

resolve into the medium term although no time frame for that was provided and it noted that VXO's recovery was impeded by the disciplinary investigation; and

- The most recent medical certificate confirmed that VXO would be unfit to work until 16 June 2021 by which date he would have been absent from work for 10 months.

[106] It was requested that VXO consider the proposal and provide any feedback by 30 April 2021.

Response from VXO

[107] There was a response to the proposal from VXO's lawyer on 30 April 2021. The letter alluded to another psychiatrist completing a report on VXO on 21 April 2021. However Ms Wedding said this was not provided with the letter and NDHB only became aware of it when the Statement of Problem was lodged with the Authority on 19 August 2021. The letter stated:

[VXO] desperately wants to return to his chosen profession but he needs to return to a safe environment which the NDHB is statutorily obliged to deliver.

Given the actions of the NDHB it is difficult to see how that can occur given the situation which has been created by this employer. These actions give rise to a constructive dismissal claim in and of themselves.

[108] Ms Wedding said that having considered the comments in the letter dated 30 April 2021, she felt there was nothing in the letter which caused her to question the interpretation of the medical evidence upon which she had based her preliminary decision. The letter also failed to provide any further information on when VXO could return to work. Although the letter claimed Ms Wedding was responsible for harassment, bullying, discrimination and incompetence, it did not give any reasoning to support these generalised claims.

[109] On 9 August 2021 VXO's new lawyer sent a letter raising a personal grievance on the basis that VXO had been unjustifiably dismissed, and unjustifiably disadvantaged by the investigation and outcome process, and a claim that NDHB had breached the duty of good faith.

[110] The letter submitted that there should be an independent investigation and concluded: "If this submission is not accepted and the DHB continues to proceed with dismissing [VXO] we see no point in there being any further meetings.

[111] Ms Wedding said she then re-considered all of the evidence, including the feedback letter, however the medical evidence before her was unclear as to when a return to work by VXO could be expected. The last medical certificate provided was due to expire on 15 June

2021, at which point VXO would have been on paid sick leave for 10 months. She said she considered it necessary to conclude the disciplinary investigation as this appeared to be what was impeding VXOs return to health.

The Dismissal 7 May 2021

[112] Ms Wedding concluded her earlier decision to terminate VXO's employment was an appropriate outcome in all the circumstances. She instructed NDHB's lawyers to communicate her decision to VXO's lawyers, but instructed that there should be a long lead time before the termination occurred, because she was hopeful that there could be some discussion between the parties which might prevent the termination occurring.

[113] The letter to VXO's lawyers dated 7 May 2021 stated

In terms of clause 27.6, there is nothing in your most recent correspondence that causes our client to believe that [VXO] will be fit to return to work any earlier than previously proposed.

...

Accordingly, our client confirms its proposal contained in our 22 April 2021 letter that [VXO's] employment shall be terminated effective from Friday, 14 May 2021.

[114] The date of termination was subsequently enlarged to 19 May 2021 and in a letter dated that same date, 19 May 2021, it clarified that the reason for dismissal was VXO's medical incapacity:

... You have been absent from work due to illness for more than 9 months and there is no clear date upon which you are likely to be able to return. Therefore, after considering matters further, the NDHB now confirm that, pursuant to clause 27.7 of the NZ Health Boards – Collective Employment Agreement, your employment will end at 5 pm today.

[115] On 9 August 2021 VXO's previous counsel raised further personal grievances on behalf of VXO to include unjustifiable dismissal and a breach of the MECA.

Was VXO unjustifiably dismissed by NDHB?

[116] VXO was dismissed for medical incapacity. The essential rule governing this category of dismissal as stated by Judge Castle in *Canterbury Clerical Union v Andrew and Bevan* is:

... it is well established that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period. This is particularly so when the business of the employer requires the presence of permanent staff.¹

¹ *Canterbury Clerical Union v Andrew and Bevan* [1983] ACJ 875

[117] It was stated succinctly by the former Chief Judge of the Arbitration Court in *Hoskin v Coastal Fish Supplies Ltd*: “There can come a point at which an employer ... can fairly cry halt.”²

[118] All dismissals are assessed in accordance with the test of justification as set out in s 103A of the Act which requires a determination to be made of whether an employer’s actions and how the employer acted, were what a fair and reasonable employer would have done in all of the circumstances at the relevant time.

[119] Dismissals for medical incapacity are similar to a termination on the basis of redundancy, it is a ‘no-fault-based’ situation on the part of the employee and as observed by the Chief Judge in *Lal v The Warehouse Group Ltd*, some of the factors to be considered under s 103A (3) of the Act do not sit comfortably with this category of dismissal.³ That judgement helpfully sets out the following framework to be adopted when approaching this type of dismissal:

[33] The employer must give the employee a reasonable opportunity to recover. The terms of the employment agreement, any relevant policy, the nature of the position held by the employee and the length of time they have been employed with the employer are factors which are likely to inform an assessment of what is reasonable in the particular circumstances.

[34] The employer must undertake a fair and reasonable inquiry into the prognosis for a return to work, engaging appropriately with the employee. This will likely involve seeking and considering relevant medical information. It will also involve explaining the reasons for the inquiry, the possible outcome of it, and providing the employee with an opportunity for input and comment.

[35] The employer must fairly consider what the employee has to say before terminating their employment. An employer is entitled to have regard to its business needs in deciding an appropriate response to the situation and any applicable time-frames. An employer is not obliged to keep a job open indefinitely, no matter how long an employee has been employed or how large the organisation is. For their part, an employee is obliged to be responsive and communicative.

[36] In cases of medical incapacity, and a reduced ability to undertake certain tasks, a level of engagement with attempts to facilitate a return to work may reasonably be expected. Fairness cuts both ways, consistently with the mutual obligations which exist in employment relationships.⁴

² *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124 at p 127

³ *Lal v The Warehouse Group Ltd* [2017] NZEmpC 66

⁴ Above n 3 at [33] – [36]

Reasonable Opportunity to Recover

[120] The MECA at clause 27 addressed leave for illness and in clause 27.5 specifically addressed a long term absenteeism on the basis of ill health, stating that the employer is entitled to conduct a review after three months of absence:

27.5 When a period of leave on account of accident or illness exceeds three months the employer is entitled to seek a review of the employee's condition and likely fitness to return to work. The review will be done by a representative of the employer, a representative of the employee and a mutually agreed medical practitioner, or such other group as the employer and employee may agree.

[121] VXO commenced his absence from work on 10 August 2020 when NDHB was advised by letter that he had been admitted to Tauranga Hospital. It was not until November 2020, three months after he commenced sick leave, that NDHB commenced a review of the situation.

[122] I find that NDHB gave VXO a reasonable opportunity to recover before commencing a review of his medical capacity and it complied with the MECA provisions contained in clause 27.5.

A fair and reasonable inquiry into the prognosis for a return to work

[123] It is incumbent upon the fair and reasonable employer to obtain medical information and a medical prognosis before proceeding to a decision on whether or not to continue the employment.

[124] NDHB having commenced its review in November 2020 took the following steps to obtain medical information:

- In the letter dated 2 November 2020 advised that it intended to undertake a medical examination and suggested a cardiologist from the Auckland Heart Group;
- On 21 January 2021, after advising VXO that the Auckland Heart Group could no longer undertake the examination, asked if VXO's own cardiologist could do that;
- On 21 January 2021 acknowledged VXO's request for a mental examination and proposed a psychiatrist to undertake that;
- On 18 March 2021 received the report from VXO's cardiologist; and
- On 1 April 2021 received the report from the psychiatrist.

[125] In addition NDHB had been provided throughout by medical certificates, the most recent at the time the decision was made to terminate VXO's employment was dated 15 March 2021 and certified VXO as unfit to work until 15 June 2021.

[126] VXO via his lawyers had been communicated with throughout the process of obtaining medical information which took approximately six months from November 2020 to 1 April 2021. VXO was asked for input which was provided, and he facilitated the process of gathering information.

[127] The medical report from the cardiologist in March 2021 was that further investigation was in progress with an MRI scan and it opined that VXO would need to avoid high levels of stress and anxiety.

[128] It was submitted by counsel for VXO that NDHB should have carried out further enquiries as to VXO's expected date of return to work, and that it should have waited for the outcome of the further cardiologist report before making a decision to terminate on the basis of medical incapacity.

[129] In considering the reasonableness of this decision by NDHB, I observe that it was made clear in the medical reports received that only a resolution of the disciplinary process which involved VXO's 'name being cleared' would result in a return to health sufficiently for him to be able to return to work i.e. that the preliminary decision was withdrawn.⁵ I find it to be a reasonable assumption in all of the circumstances, that a further report would have been accompanied by this same stipulation, as throughout the disciplinary process VXO did not accept the seriousness of his actions and the expectation of his name and impliedly his reputation, being 'cleared' was objectively an unrealistic view.

[130] By the beginning of May 2021 there was no indication from the medical information received by NDHB of when VXO would be well enough to return to work, and it was also clear the return was dependent upon the disciplinary process ceasing.

[131] In these circumstances I consider that NDHB had sufficient information on which to base a view that, unless the disciplinary process was abandoned, VXO would not be returning to the workplace within a reasonable timeframe.

⁵ The Auckland psychiatrist Report dated 1 April 2021.

[132] NDHB reasonably did not consider it was appropriate to abandon the disciplinary process and resile from its preliminary decision without a meeting being held with VXO. Due to VXO's subsequent medical situation that meeting had not occurred, and due to VXO's continued ill health, could not occur. If this did not occur however, VXO's state of health would not allow him to recover and return to work.

[133] In these circumstances I find that NDHB had made sufficient enquiry into the prognosis for VXO's return and that its decision to not seek further medical information was reasonable.

The Employee's comments and business needs

[134] I find that NDHB was active in seeking VXO's engagement in the process. It was unfortunate that the Auckland Heart Group was unable to follow through to an appointment after confirming it would do so, but I do not consider that NDHB was at fault in regard to that delay in the process.

[135] The observations of the medical specialists and the prognosis for VXO's return to work together with VXO's comments were considered prior to any decision being made by Ms Wedding.

[136] Regarding business needs, NDHB's evidence was that VXO's continued absence was having a detrimental effect on the wellbeing of staff and patients in the Paediatric department, and there was a significant cost to NDHB in light of the higher locum costs in addition to the cost of keeping VXO on full sick leave payment.

[137] I find that in the circumstances which involved:

- NDHB providing VXO with reasonable time to recover, being some 10 months at the date of termination;
- no imminent prospect of VXO returning to work;
- having consulted VXO throughout its process; and
- having obtained medical information from medical specialists;

NDHB followed a process as a fair and reasonable employer.

Redeployment

[138] A fair and reasonable employer will consider the possibility of redeployment prior to termination of an employee's employment. It is submitted for VXO that NDHB failed to consider redeployment.

[139] In the case of termination for medical incapacity the duty to consider redeployment is made more complex by the medical condition of the employee and the prevailing circumstances. Objectively the complaint was of a serious nature and it was well documented

[140] As observed VXO's return to health was dependent upon the removal of the preliminary disciplinary decision and his name 'being cleared' in respect of the complaint. It was more likely than not, that dismissal would have been the outcome. Thus, redeployment as an alternative would not have been an appropriate response and I find was not feasible in all the circumstances. VXO, I find was given ample opportunity to participate in the disciplinary process and his communicated response was he could only return to work if he was cleared of the allegations made against him.

[141] As NDHB had not concluded the disciplinary process, and could not do so without VXO's input on the preliminary decision, the preliminary decision remained and as such, was stated to be preventing VXO's return to health and consequently the workplace. Therefore, the reason for dismissal was medical incapacity. By the nature of VXO's submission returning him to work in an alternative position, it still came with an unreasonable stipulation that he be cleared of the allegations his employer had found to be made out.

[142] In those circumstances, redeployment was not feasible.

[143] I determine that VXO was justifiably terminated on the grounds of medical incapacity.

Was VXO unjustifiably disadvantaged by NDHB?

[144] The investigation and disciplinary process, which resulted in the preliminary decision of termination, are claimed to have unjustifiably disadvantaged VXO and to be responsible for causing his physical and mental illness.

[145] To qualify as a disadvantage grievance, VXO must establish that there was some unjustifiable action by NDHB which affected his terms and conditions of employment to his disadvantage.

[146] A disciplinary process carried out in accordance with the principles of justification as set out in s 103A of the Act is not an unjustifiable act by the employer.

[147] The Court of Appeal in *Cowan v IDEA Services Ltd* stated that it is not for the Authority to substitute its decision for that of the employer, rather its role is to determine if what occurred

was a response open to a fair and reasonable employer in all the circumstances at the appropriate time:

It is not for the court to substitute its decision for what a fair and reasonable employer could have done in the circumstances and how such an employer could have done it. In *Angus v Ports of Auckland Ltd*, it was emphasised there may be a range of responses open to a fair and reasonable employer, and that the Court's task is to examine objectively 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.⁶

[148] Accordingly, NDHB's decision-making process and the actions it took, need to be assessed by the standard of a fair and reasonable employer in the circumstances.

[149] In s 103A(3) of the Act a range of factors are set out for consideration by the Authority when assessing the employer's procedural actions at the time of dismissal or action occurred, these include:

- a) Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- b) Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- c) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[150] Genuine consideration means that an employer should approach an investigation into alleged wrong-doing by an employee with an open mind rather than having a pre-formed view from the outset. Accordingly the fair and reasonable employer should assess all the evidence before arriving at a decision based on a balance of probabilities.

[151] The duty of good faith as set out in s 4 of the Act is also relevant. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to have an adverse effect on the continuation of the employment of an employee, he or she is required to provide to the employee access to information relevant to that proposal and an opportunity to comment on it prior to a decision being made.

⁶ *Cowan v IDEA Services Ltd* [2019] NZEmpC 172 at [81]

A fair investigation and disciplinary process?

[152] The allegations made against VXO were taken seriously by NDHB in accordance with its own policy: 'Managing Unacceptable Behaviour in the Workplace' which stated:

Complaints made by or about another employee in regard to unacceptable behaviour will be taken seriously, treated with sensitivity and investigated as soon as practicable.

[153] Initially BUW raised a verbal complaint that the way a senior member of staff treated her made her feel "uncomfortable". She followed this up with a formal written complaint. I consider that acting in accordance with its policy, NDHB was required to treat it seriously and investigate it.

(i) Initial meeting held on held on 13 May 2020

[154] Ms Wedding as the manager tasked with addressing the complaint, prior to the start of the process, approached Ms Zammit and asked her to undertake an investigation into the merits of the complaint.

[155] Before the investigation commenced, Ms Wedding met with VXO on 13 May 2020. During that meeting she informed VXO of the complaint and gave him an envelope with a letter explaining the process steps, the potential outcome, offering EAP and a period of special paid leave during the duration of the investigation, advising him to seek support; and a copy of the complaint by BUW.

[156] VXO did not have a support person at that initial meeting. I do not consider that was detrimental to procedural fairness because VXO was not being asked to comment on the complaint. His opportunity to do so would be during the investigation process when he was strongly advised to have a support person with him,

[157] VXO was offered the opportunity to take special leave. However his evidence was that he was not asked for his view on that as a proposal but that he was told to leave the hospital. There was no evidence that VXO was presented with a proposal that he could take special leave, but rather it was a predetermined decision referred to in the letter with which he was presented.

[158] Special leave is addressed in the NDHB Disciplinary policy which states:

Consideration may be given to placing an employee on special paid leave (where there are genuine concerns for the employee's health and/or welfare) while an investigation of alleged misconduct is being investigated. This will occur only after a formal documented meeting has been held with the employee to consider whether special paid leave is appropriate and to consider any views that the employee may have regarding a proposal to place them on special paid leave.

[159] I find that VXO should have been provided with an opportunity to comment on the proposal that he take special leave in accordance with the NDHB policy. The fact that he was not asked his views on a proposal that he take special leave I find was a flaw in the procedure adopted by NDHB.

The investigation with Ms Zammit

[160] Ms Zammit was not an independent investigator from outside NDHB which I understand it is now NDHB's usual policy to appoint. However it is not necessarily at odds with procedural fairness that there be an independent investigator. In *New Zealand Tramways IUOW v Auckland Regional Council* Judge Travis stated:

As representatives of the respondent they could not be described as independent, but there was no evidence which suggested they were anything but impartial. There was no evidence that they had made their minds up in advance and therefore did not give the grievant a proper opportunity to be heard and have his defence considered. The mere fact that the person making the decision is an officer of the employer empowered to deal with the issue does not of itself automatically make the decision biased and thereby deny the employee of the opportunity of a fair hearing. To hold otherwise would effectively prevent employers themselves deciding whether there are grounds for a dismissal.⁷

[161] Ms Zammit had no previous contact with either BUW or VXO, and worked outside of the Paediatrics department. Although she was not the decision-maker, it was incumbent not only on Ms Wedding, but on her as the investigator, that she should not make up her mind in advance before giving VXO a proper and unbiased opportunity to be heard on the allegations made against him.

[162] In respect of the process conducted by Ms Zammit, both BUW and VXO were interviewed separately. Both had support people, in VXO's case this was an ASMS representative, and both were asked prepared questions.

[163] Following the meeting with VXO and his representative, they were sent copies of the notes of the meeting. VXO had the opportunity to check the notes and amend them. He did so and signed the annotated version of the notes.

[164] It was only after conducting the interviews and receiving VXO's annotated notes that Ms Zammit wrote her report.

[165] I find no evidence that Ms Zammit acted with partiality or with bias during the investigation. It is submitted by counsel for VXO that Ms Zammit did not sufficiently

⁷ *New Zealand Tramways IUOW v Auckland Regional Council* [1992] 2 ERNZ 883

investigate BUW's motivation for making the complaint or the delay in so doing. However these matters were traversed during the interview with BUW.

[166] Regarding the investigator allegedly acting with bias towards VXO, he was provided with a full opportunity to provide his explanations in relation to the allegations made by BUW in an interview in which he had professional representation.

[167] In addition Ms Zammit's report was written after VXO had been provided with, and had availed himself of, the opportunity to correct any errors in the notes of that interview.

[168] Ms Zammit did not interview the individuals named by BUW as potential witnesses to the incidents which culminated in her complaint about VXO. However I find she did turn her mind to VXO's suggestions and her evidence was that she did not believe expanding her investigation would add anything further to the documented and self-evident communications and interactions between VXO and the complainant.

[169] Moreover that Ms Zammit said she did not consider it necessary to interview anyone further after receiving VXO's response to the allegations, as confirmed by the signed and annotated copy of the notes, in which he accepted responsibility, and which she reasonably understood as indicating he had accepted them as a true and accurate record.

[170] In accordance with the procedural steps set out in s 103A(3) of the Act, I find that Ms Zammit carried out sufficient investigation during a process in which VXO had representation during his detailed interview, opportunity to review and correct any notes, and I find Ms Zammit genuinely considered VXO's responses as outlined in her report.

[171] I find that the investigation process was one a fair and reasonable employer could have endorsed in the circumstances at the relevant time.

The Disciplinary Process

[172] After receiving the investigation report from Ms Zammit, Ms Wedding was required to genuinely consider it and to provide VXO with a reasonable opportunity to respond to it before reaching a decision.

[173] It is submitted for VXO that during the Authority's Investigation Meeting Ms Zammit found a finding of sexual harassment after discussing it with Ms Wedding. That was not the evidence provided, on the contrary it was that the two processes were separate and independent of each other.

[174] Ms Wedding's evidence was that she carefully considered the investigation report from Ms Zammit against NDHB policy to decide whether the behaviour established breached either NDHB policies or its Code of Conduct.

[175] Following that, she sent a letter dated 29 June 2020 setting out in detail her concerns about VXO's behaviour towards BUW in accordance with that required by NDHB policies and the Code of Conduct.

[176] During the meeting with VXO held on 17 July 2020 at which VXO was accompanied by his wife and his lawyer, both Ms Wedding's notes and those compiled by VXO and his wife, indicate a meeting in which VXO had a full opportunity to discuss his position regarding the findings in the report.

[177] Ms Weddings' evidence was that she gave full consideration to the explanations and responses provided by VXO during the meeting on 17 July 2020 before reaching her preliminary decision that dismissal was the appropriate outcome.

[178] The preliminary response was conveyed in the letter dated 7 August 2020 in which Ms Wedding set out clearly her reasoning for reaching her preliminary dismissal decision.

[179] VXO was invited to meet with Ms Wedding on 11 August 2020 to provide his views on the appropriate outcome, however he did not attend because of ill health. As a result the process was not concluded with a final decision on the disciplinary issue.

[180] It has been submitted on behalf of VXO that Ms Wedding acted outside of her role by finding VXO guilty of bullying which was not a finding as set out in the investigation report.

[181] That is correct, however the investigation report did uphold BUW's complaint in that it found that VXO had behaved: "in an offensive and unacceptable manner in his interactions" with BUW and that these had "had a serious harmful effect on [BUW]".

[182] The NDHB policy 'Managing Unacceptable Behaviour in the Workplace' defines bullying in the workplace as:

.. repeated, unwanted, unwarranted behaviour that a person finds offensive, intimidation and/or humiliating so as to have a detrimental affect(sic) upon a person's dignity, safety, wellbeing and functionality.

[183] I find that NDHB had substantive justification on the basis that its preliminary decision (that VXO's conduct had breached its policies and procedures and this constituted serious misconduct) was one a fair and reasonable employer could have reached in all the circumstances at the relevant time.

[184] In relation to the placing of VXO on special leave I observe that it is expected that an employer will adhere to its own policies. Accordingly I have found that the failure to adhere to its own policy and not ask VXO for his views before placing him on special leave was a flaw by NDHB in an otherwise fair investigation procedure.

[185] However, I take into consideration the fact that VXO could have objected to being placed on special leave in early May 2020 either via his ASMS representative, or with the HR Service Partner he was informed had been appointed to assist him with procedural advice, or with Ms Wedding, or with Ms Carman, but at no time did he do so prior to the issue being raised in the letter raising a personal grievance on 4 August 2020.

[186] In addition the duty of good faith is one both parties are expected to adhere to by being communicative and responsive.

[187] Having given the matter full consideration, I consider NDHB failing to ask VXO for his views before activating special leave constitutes a minor procedural flaw pursuant to s 103A(5)(a) and (b) of the Act, and this did not result in VXO being treated unfairly.

[188] I determine that VXO was not unjustifiably disadvantaged by NDHB.

Did NDHB breach the duty of good faith it owed to VXO?

[189] Other than the minor procedural flaw, I find no breach of the duty of good faith towards VXO by NDHB. Throughout the investigation and disciplinary processes, and the medical incapacity period, it was communicative and responsive with VXO.

[190] I determine that NDHB did not breach the duty of good faith owed to VXO.

Did NDHB breach clause 27 of the MECA?

[191] I determine that NDHB did not breach clause 27 of the MECA.

Costs

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

[193] If they are not able to do so and an Authority determination on costs is needed the Respondent 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 Applicant 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.

[194] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[195] 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.⁸

Eleanor Robinson
Member of the Employment Relations Authority

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].