

**NOTE: This determination  
contains an order prohibiting  
publication of certain  
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2025] NZERA 828  
3331400

BETWEEN	GYN Applicant
AND	Oranga Tamariki Respondent

Member of Authority:	Davinnia Tan
Representatives:	Alan Knowsley, counsel for the Applicant Hamish Kynaston, Louise Robertson and Gianna Menzies, counsel for the Respondent
Investigation Meeting:	5,6,7, 28 August 2025 in Wellington
Submissions received:	Submissions up to 18 September 2025 from the Applicant Submissions up to 11 September 2025 from the Respondent
Determination:	18 December 2025

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication**

[1] On 30 May 2025, the Authority made an interim order pursuant to clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting publication of

the names and identifying details of GYN<sup>1</sup>, all witnesses, and the site at which they worked.<sup>2</sup>

[2] Following the investigation meeting, the parties jointly applied for permanent non-publication orders. I acknowledge the parties' agreement on this point.

[3] The starting position in the Authority is open justice, including the publication of names. Non-publication can be granted only in exceptional circumstances. In *MW v Spiga Ltd (Spiga)*<sup>3</sup>, the majority set out a two-part test:

- (1) There must be reason to believe that the specific adverse consequences could reasonably be expected to occur; and
- (2) The Authority must be satisfied that those consequences justify a departure from open justice, weighing all relevant factors, including equity and good conscience.

[4] I am satisfied that the test is met here. Identifying the individuals involved, including the worksite, carries a real risk of harm. The sensitive nature of their work, together with the evidence about the mental health of those involved, reinforces that publication would likely cause more harm than good. There is no public interest in identifying the individuals, and non-publication will not impede the Authority's ability to provide a fair and accurate account of this dispute.

[5] Accordingly, permanent non-publication orders are granted under clause 10 of Schedule 2 of the Act. All individuals are anonymised using randomly generated three-letter pseudonym.

## **Employment Relationship Problem**

### *Summary*

[6] GYN was employed by Oranga Tamariki as a site manager, with a 29-year history with Oranga Tamariki which included previous roles as a social worker.

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<sup>1</sup> GYN is a randomly generated name and does not resemble the name of the applicant.

<sup>2</sup> *GYN v Oranga Tamariki* [2025] NZERA 305 at para [8].

<sup>3</sup> *MW v Spiga Ltd* [2024] NZEmpC 147.

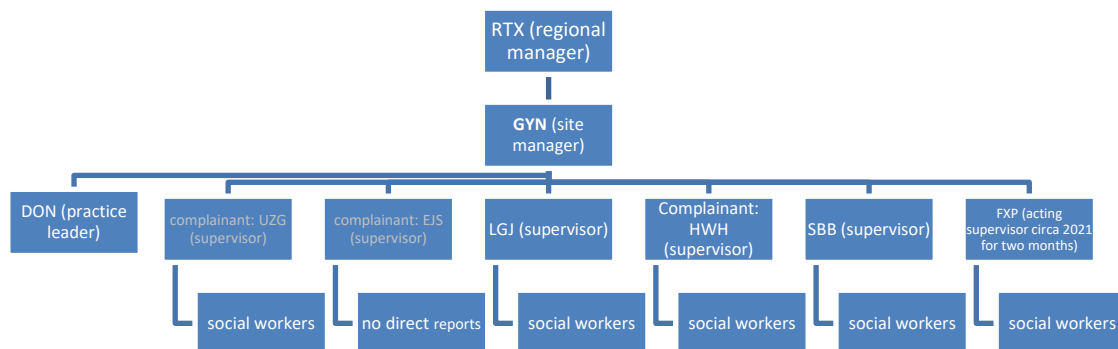
[7] On 21 June 2024, Oranga Tamariki found that GYN had engaged in bullying, undermining, and harassing behaviour, in breach of its ‘workplace bullying, harassment and discrimination policy’ (bullying policy), code of conduct, and organisational values, constituting serious misconduct. It issued a final written warning and required GYN to step down from the site manager role into a social worker position. Salary protection for 12 months was provided.

[8] On 12 August 2024, GYN lodged a personal grievance alleging unjustifiable disadvantage, claiming the finding of serious misconduct, the demotion, and the process leading to those decisions were unfair and unreasonable and a breach of contract.

*Chronological background*

[9] As site manager, GYN managed a team of supervisors and a practice leader. This team was known as and is referred to as “the leadership team”. Each supervisor managed approximately four or five social workers at the site, and the practice leader, DON, provided supervision to the supervisors. DON did not have any people management duties for the supervisors. GYN was the supervisors’ and practice leader’s direct line manager. GYN reported to the regional manager, RTX.

[10] The line management of the site, can be illustrated as follows<sup>4</sup>:



[11] As site manager, GYN’s position description included:

**Leadership**

<sup>4</sup> Except for UZG and EJS, all supervisors in this organisational chart were witnesses. The placement of DON is to reflect that the practice leader role had subject matter leadership responsibilities, but not as a people manager of the supervisors.

Create an inspiring team environment with an open communication culture to enhance practice excellence

... Promote and role model the values of Oranga Tamariki including good employer principles and practices and expected high standards of responsiveness and behaviour in site operations.

[...]

### *Staff complaints about GYN*

[12] In March 2023, when GYN was away on annual leave for a month, three supervisors, UZG, EJS, and HWH, (the complainants) raised concerns with the acting site manager, QZT, about GYN's behaviour. Each of the complainants then lodged a formal complaint against GYN with Oranga Tamariki's human resource department (HR). After receiving those concerns, GYN's manager and regional manager, RTX, initiated a preliminary assessment, which later escalated into a disciplinary process.

[13] QZT stated that three supervisors (HWH, UZG, and EJS) approached QZT separately in confidence for a one-on-one meeting. During these discussions, complaints were made against GYN and DON.

[14] QZT's recollection of these separate one-on-one meetings were that the complaints were substantially similar in nature and included the following:

- GYN expected staff to “get on with it” when staff asked about additional resourcing or support;
- GYN gave the leadership team the impression they would all be “blamed” for how the site operated and “they were shit”;
- All three complainants stated there was bullying behaviour by GYN, DON (practice leader) and LGJ (a supervisor) against UZG such as being told to stop crying and to “suck it up”;
- HWH also stated that GYN would comment on UZG's weight directly to UZG from their desk where staff could overhear the comments;
- UZG was often the centre point of harassment;
- GYN and DON used inappropriate language, including referring to social workers whom the supervisors managed, as “fuckers”;

- There was yelling frequently by the leadership team in meetings and lack of support and direction by GYN;
- GYN had favourites;
- GYN is dismissive to staff's feelings;
- There is a "us and them" within the leadership team created by GYN;
- GYN told the supervisors that QZT was put in the acting site manager role to "spy" for GYN's manager and instructed the supervisors not to talk to QZY;
- GYN would yell from their desk in front of staff.

[15] QZT was concerned by the allegations raised by all three complaints about GYN and DON and considered the allegations indicated "a pattern of behaviour". Each of the complainants also expressed concern about "backlash" or being the focus of "bullying" by speaking out. EJS stated they felt vulnerable in their supervisor role as they "no longer had a team to manage" and was concerned that GYN would be upset by them speaking out and would "try and end [their] employment".

[16] QZT stated that UZG, was particularly afraid during the discussion, and would stop speaking every time a person walked past the meeting room, requiring reassurance that no one could hear the discussion, UZG stated that they were "no longer willing to protect" GYN and DON but was worried about "being punished" if either of them found out UZG was talking to QZT. UZG and HWH discussed resigning as "they were not willing to continue working under [GYN's] leadership."

[17] QZT stated that during their time as acting manager, they also received three other separate complaints about GYN by Oranga Tamariki's contracted Iwi and Māori providers and by a social worker, FXP (who had also acted as a supervisor previously). QZT also noted there were four others who had made similar comments in passing or in other hui to them. QZT stated that another supervisor, SBB, also made "comments" about GYN similar in nature to the above.

*Regional manager, RTX, informed of complaints against GYN*

[18] Shortly after receiving the complaints, QZT advised GYN's manager, RTX, of the complaints by telephone.

[19] RTX advised QZT to discuss the matter with Human Resources (HR). HR then advised QZT that there was enough information for Oranga Tamariki to investigate further. HR advised QZT to speak to each complainant to enquire if they wished to make a formal complaint.

*Follow-up meetings between QZT and each complainant*

[20] Following RTX's advice, QZT met with the complainants separately. QZT stated that at this stage, none of them had any knowledge that anyone else had made complaints against GYN, and two of them expressed fear it would only be their word against GYN. QZT stated that UZG and HWH then shared a story GYN told the leadership team during a leadership meeting about a former staff member "who had tried to lay a complaint" against GYN and GYN "made fun that nothing had been done about it." To allay their concerns about being the sole complainant and fear of retaliation by GYN and DON, QZT then shared with each of them that there were other complaints made against GYN and DON of similar nature. QZT stated that when this was shared with UZG, UZG cried and expressed surprise that there would be others willing to "stand up for her and speak out". QZT stated that it did not appear that any of the complainants had spoken to each other about the concerns they had. As context, it was also undisputed that UZG and HWH had a tense relationship as colleagues and did not get along.

*Formal complaints made*

[21] As part of putting the formal complaints together, QZT stated that they prepared a draft based on the meetings, which was then sent individually to each complainant separately, for their review, changes and comments. QZT stated that all changes were tracked to ensure clarity and accuracy of the content. Once the complainants reviewed their individual draft complaints, made their changes, and confirmed its content, the formal complaints were then provided to HR and the regional manager, RTX. QZT said that once this process was completed, QZT was no longer involved in the process nor had any visibility on the matter.

*Regional manager, RTX informs GYN of complaints*

[22] Shortly after GYN returned from annual leave, on 10 March 2023 GYN's manager, RTX, called GYN to inform them that concerns had been raised. GYN says

they were shocked by the complaints as they believed they had a good relationship with the complainants. During the call RTX advised they would like to meet with GYN the following week together with Oranga Tamariki's senior HR advisor and GYN was welcome to bring a support person. RTX stated the purpose of the meeting was to discuss the concerns and offered GYN support in the form of flexible working until the meeting, and reminded GYN of Oranga Tamariki's contracted employee assistance programme (EAP) for confidential support. GYN was provided a copy of the complaints.

[23] On 16 March 2023, RTX met with GYN, a PSA representative, and an HR advisor, after GYN sought advice from PSA. The meeting was an initial discussion following GYN's reflections on the complaints and discussion about alternative working arrangements while the complaint was being worked through. In the HR advisor's meeting notes, GYN was described as "surprised" by the complaints. GYN noted this was "a rude awakening" and acknowledged they had not "always got things right" and was "developing ground rules for team meetings" and that they "will pay attention, not call out in office publicly" and that they were "wiling to grow/ develop".

[24] On 24 March 2023, RTX advised GYN that they were still in discussions with HR on next steps, but indicated that a formal investigation with a terms of reference was likely.

*Next step: preliminary assessment*

[25] On 24 April 2023, RTX met with GYN again, along with GYN's PSA representative and a senior HR advisor.

[26] The PSA representative then asked if there was going to be a terms of reference and the senior HR advisor stated, "not in the preliminary assessment". It was agreed that DBE, a senior HR advisor in a different region, would make contact following the meeting.

[27] RTX followed the meeting with a letter, dated 24 April 2023, which reiterated the discussions of the meeting. This letter also stated that RTX decided that "it is an appropriate step to undertake a preliminary assessment with the aim of seeking further understanding of the concerns. The purpose...is to obtain further clarity and understanding into relevant incident and to assist me in deciding what the appropriate

next steps might be... to this end I have asked [DBE], Senior HR Advisor... to undertake a preliminary assessment... To be clear, this is not an investigation or formal disciplinary process.”

*DBE’s interviews with complainants – May 2023*

[28] DBE conducted the interviews respectively on 11 May 2023 with EJS, 12 May 2023 with HWH, and 16 May 2023 with UZG.

*Preliminary assessment report 5 June 2023*

[29] Based on the interviews and following confirmation by each interviewee that DBE’s interview notes were accurate, DBE completed a preliminary assessment report dated 5 June 2023.

[30] In the preliminary assessment report, DBE stated that “three main issues appeared to be more significant than others”. These were:

- Alleged inappropriate behaviour of the Site Manager and Practice Lead, apparently evidenced by mocking language, inattention during meetings and discussions, and that the two were allegedly not sympathetic to the stresses experienced by the supervisors.
- Division in the Leadership Team, apparently evidenced by ‘separate’ meetings being held with some members and not others.
- An unsustainable workload, causing physical and mental stress for supervisors.

[31] DBE included the transcripts of the interview to their preliminary assessment report and stated that:

It is my opinion that the behaviours described by [the complainants] of GYN and DON fall below those required for any staff working for Oranga Tamariki, but particularly for staff in positions of leadership.

...If you [decision maker] decided the next steps were to conduct a process to establish if there is any culpability it is my preliminary assessment that would require interviews of some of the employees that were referred to by the parties and are named below...

[...]

The definition of bullying and harassment is specific... it is my preliminary assessment that the information supplied by the three complainants is likely to reach the definition of both bullying and harassment for both GYN and DON.

Clearly there is a relationship problem between the supervisors... and GYN and DON. If you were to proceed with a full investigation, potential witnesses are:

[LGJ]

[...]

[SBB]

[...]

I recommend that you have a discussion with each of the interviewees at the time you provide the report to gauge their reflections on the issues. It is advisable to let them know when they will receive the information so they are kept well-informed...

#### *New decision maker XKU following consultation with GYN*

[32] On 6 June 2023 DBE provided the preliminary assessment report to Oranga Tamariki's senior HR advisor and later shared with GYN's regional manager RTX.

[33] Following discussions with HR, RTX was then removed as the decision-maker as the complainants stated GYN made disparaging comments about RTX.

[34] The senior HR advisor had recommended the new decision maker be RTX's manager. However, during consultation with the interviewees and GYN, GYN opposed the appointment of RTX's manager as the decision maker. Consequently, Oranga Tamariki recommended XKU as the new decision maker, as XKU was a regional manager of a different area and would remove any risks of a potential conflict of interest.

[35] Following another round of consultations with the interviewees, in which GYN did not oppose the appointment of XKU as the new decision maker, XKU was appointed the new decision maker on 28 June 2023.

#### *Senior HR advisor's recommendations to XKU regarding next steps*

[36] On 28 June 2023, the senior HR advisor emailed XKU and provided a screenshot of DBE's recommendations from the preliminary assessment report which included the following:

I also recommend that you have a discussion with each of the interviewees at the time you provide the report to gauge their reflections on the issues. It is advisable to let them know when they will receive information, so they are well-informed.

I recommend that a decision on what further action you need to take, if any, is made, as soon as possible.

[37] The senior HR advisor also stated:

It is important that we continue building the mana with the complainants during the process. I suggest you regularly check in with them during the process... check in on their wellbeing...

### *Invitation to disciplinary meeting*

[38] On 28 June 2023, XKU provided the interview notes and the preliminary assessment report to the complainants and GYN's lawyer and advised they would be in touch again with next steps.

[39] On 6 July 2023, following consultation with HR, XKU emailed a letter inviting GYN to a disciplinary meeting and attached the following documents:

- Oranga Tamariki's workplace bullying, harassment and discrimination policy
- Oranga Tamariki's Code of Conduct and values
- Oranga Tamariki's disciplinary policy
- Oranga Tamariki's disciplinary guidelines
- GYN's interview notes from the preliminary assessment
- Interview notes from the preliminary assessment from the complainants
- Preliminary assessment

[40] The letter stated that XKU wanted to hear from GYN:

...regarding the information in the preliminary assessment and interviews, which indicates you may have:

- (1) Referred to kaimahi in a derogatory or disrespectful manner in front of other kaimahi (e.g. calling staff "fuckers"; "sookie baby" comments; saying "less words"; talking critically about [UZG] during 'separate meetings' with a portion of the leadership team).

- (2) Belittled staff by mocking them when distressed or concerned, rather than supporting them. For example, calling [UZG] “sookie baby” saying to “put her big girl pants on”, “suck it up”, “just stop it”, and asking [HWH] “do you want me to throw the tissue box at you like I do at [UZG].”
- (3) Undermined staff by publicly raising your concerns with them...for example calling out to [UZG] in the open office about [their] late work or overdue KPIs.
- (4) Acted in a manner that would have been reasonably foreseeable as undermining of kaimahi confidence in their ability to do their role...
- (5) Disrespected kaimahi by not paying attention...
- (6) Spoken disrespectfully to [UZG] about [their] weight and diet in front of [their] colleagues, as well as saying things such as “less words”, “stop talking” or rolling your eyes at [their] input to discussions.
- (7) Breached the privacy of [UZG], by telling some members of the team you intended to take [them] through an HR process...
- (8) Placed unrealistic and unachievable work expectations upon kaimahi, without taking reasonable steps to support them to achieve these.
- (9) Acted in a way that indicates disrespect for Māori culture and undermines managers authority...saying...got the role because [they] were Māori...

[...]

#### **Potential Breaches**

If these allegations are substantiated, your actions could be in breach of the following:

Workplace Bullying, Harassment and Discrimination Policy [...]

Code of Conduct [...]

Oranga Tamariki Values [...]

Employment Agreement [...]

[41] The letter sought any additional and clarifying information from GYN that GYN believed was relevant, and noted that the matter was serious and if the concerns were substantiated, this “may amount to serious misconduct that could lead to a disciplinary outcome including a final warning or your dismissal.” The letter also advised GYN of their right to a support person or representative, and reminded GYN about support and counselling available.

#### *Disciplinary meeting 20 July 2023*

[42] The disciplinary meeting took place on 20 July 2023. The attendees were GYN, GYN’s former lawyer, the decision maker XKU and the senior HR advisor. During the

meeting, XKU went through with GYN and their lawyer, each of the allegations as set out in the letter.

[43] In the meeting, GYN accepted that they had used the words “fuckers” and acknowledged feeling frustrated at staff at the time it was used, and that they “deeply regret that” and was “sorry”. GYN stated “I realised it was inappropriate but I shouldn’t have said it...”

[44] GYN denied using the words “sookie baby”, but stated they would have been more likely to say “oh come on pull yourself together here, have a tissue, dry your tears, but not in a nasty kind of way” and that they used humour a lot, but stated that in relation to UZG it was “how I’ve kind of jollied [them] along...” In response, XKU noted that all three complainants had been clear and consistent that GYN had used the words “sookie baby or sookie bubba”, and sought clarification from GYN as to whether it is “not language that you use or are you saying that you do not recall using that language”, GYN then stated that they were “not 100% certain...” XKU asked if GYN recalled saying “something that could be similar to that” and GYN replied “I’m not sure to be honest. I, honestly, I’m not sure....it could be, it could be possible, but what I would say categorically is if I said it or whatever I’ve said, I’ve not intentionally said it to be hurtful, nasty...”

[45] GYN acknowledged saying to UZG “less words”, but stated there “is a context behind that.” In GYN’s explanation, they said that UZG had described themselves as talking too much or using too many words, and had asked GYN to “remind” them when that happened. GYN accepted that at a particular meeting, they got frustrated at UZG and had told UZG to “stop” or “just stop”.

[46] XKU asked if GYN would do anything differently in light of what the complainants said and GYN stated that they would do “everything” differently. GYN reflected on the separate meetings in which UZG would be brought up by HWH or LGJ, and explained that they believed it was a “safe” space for them to talk about the frustrations, but accepted that they themselves “would have acknowledged” about being frustrated by UZG. GYN acknowledged that those meetings had been “misconstrued” as gossip sessions or “laughing about [UZG]” and that upon reflection GYN would not undertake meetings in that form if they had concerns about UZG. GYN then accepted

that it was valid for UZG and others to view the separate meetings as gossip meetings because they were excluded. However GYN reiterated that it was not their intention.

[47] GYN stated that they did not use term “big girls pants” in relation to UZG. GYN then clarified the allegation that they threw a box of tissues at UZG by explaining that they had simply pushed the tissues over to UZG at a meeting which later became a “a bit of a joke” about GYN throwing tissues. GYN could not recall if they joked about throwing a box of tissues at HWH too but stated that their “intention would have been as a joke”.

[48] GYN denied discussing KPIs openly in the office and stated that they would go into a room for such discussions. GYN noted there was one occasion when they stood up and said “hey [UZG], has that visit been done?” but stated that was the extent of it and it was “not a telling off”.

[49] GYN accepted that they “multitasked” during meetings using their laptops and phones and had not thought about how they came across to other people, but that they were open to feedback and change, and wanted to do things differently. GYN explained that them rolling their eyes was “not intentional” and that they were not conscious of doing it.

[50] GYN stated that they were previously in a well being group together with UZG, HWH and EJS, where they would meet and talk about what their health goals were. GYN stated that as such, they were frank with each other. GYN acknowledged that these conversations were held in the open and other kaimahi may have seen what GYN said to UZG and interpreted the comments, such as, “should you be eating that?” as disrespectful.

[51] GYN denied breaching UZG’s privacy by stating they were taking UZG through an HR process” as GYN did not consider taking such action, but accepted they “talked in the leadership team around HR and needing to manage performance and things”.

[52] GYN stated they held a different view to the allegation that they had set unachievable work expectations for the team. GYN set out a lengthy explanation which attributed much of the team’s stress and pressure on the lack of resourcing for the caseloads.

[53] GYN denied the allegation that they acted in a way that was disrespectful to Māori. GYN explained that they had good working relationships with Māori partners and Iwi, detailing some examples in their work history, including in their role as site manager. As such, GYN stated they were surprised by the allegation.

[54] GYN noted that when their previous manager left and expressions of interest for the regional manager role was advertised, GYN did share their view that the manager would likely be Māori because of the practice shift Oranga Tamariki was taking, but the allegations as described by the complainants against them were “just unbelievable”.

[55] XKU invited GYN to provide any additional comments before the interview ended. GYN then explained that while they did not want to make any excuses, they had some stressful events happen in their personal life which was not shared with anyone at work.

[56] XKU then explained that following the interview, they would reflect on the information and determine next steps, which may include gathering additional information or a preliminary view, which would be put to GYN. XKU noted that they were impressed with GYN’s openness and that they felt they had got an “unadulterated perspective” from GYN. GYN’s lawyer responded that they felt the way XKU “approached this too is appreciated from this side too.”

[57] On or around 3 August 2023, GYN enquired whether they were able to assist the region by undertaking some social work activities. Following internal consultation and agreement, Oranga Tamariki agreed for this to occur pending XKU’s preliminary decision on the disciplinary process.

*Preliminary decision 21 August 2023*

[58] On 21 August 2023, XKU issued their preliminary decision. The preliminary decision found that GYN behaved in an undermining, bullying and harassing manner towards kaimahi, but did not find that GYN had been culturally disrespectful, derogatory, and inappropriate.

[59] The preliminary decision included GYN’s responses to each of the nine allegations and set out XKU’s “findings of fact” in relation to each allegation. For ease of reference, I have set these out as a summary in the table below.

<p><b>Whether GYN “behaved in an undermining, bullying and harassing manner towards kaimahi”:</b></p>
<p><b>Allegation 1:</b> Referred to kaimahi in a derogatory or disrespectful manner in front of other kaimahi (e.g. calling staff “fuckers”; “sookie baby” comments; saying “less words”; talking critically about [UZG] during ‘separate meetings’ with a portion of the leadership team).</p>
<p><b>XKU’s Findings of fact</b></p>
<p><i>Use of “fuckers”:</i></p> <p>In our meeting, you acknowledged to me that you have used the terms ‘fuckers’ at leadership meetings. I propose to find this allegation substantiated.</p>
<p><i>Use of “sookie baby”:</i></p> <p>In our meeting, you first stated it wasn’t a term you would use, then later stated you don’t recall using the term. You stated you have used terms such as ‘pull yourself together’ and ‘dry your tears,’ but not in a nasty or derogatory way. On the balance of probabilities, I am upholding this allegation, as all three complainants corroborate this allegation, the corroboration was consistent, and you were not certain whether you made this comment or not, and actually acknowledged you may have said it. I am therefore upholding this allegation.</p>
<p><i>Use of “less words”:</i></p> <p>In our meeting you justified saying ‘less words’ to [UZG] as she asked you to let her know when she was talking too much. I do not feel your justification is valid as I find this term and the context in which you used it to be passive aggressive, and I do not believe those words have a positive wairua in this context. I am therefore upholding this allegation.</p>
<p><i>Separate meetings:</i></p> <p>You acknowledged these meetings did occur, and conversations about [UZG] took place. However, you do not feel that you deliberately excluded people, but in hindsight can understand how it was perceived this way as you were meeting so often. You felt the meetings offered a safe space for your team to vent their frustrations regarding [UZG], and you admitted that on occasion you would ‘agree with their frustrations.’ The evidence from</p>

the complainants is consistent and clearly points to separate meetings being held which excluded at least [UZG] and [EJS] Further, [HWH], who was in these meetings corroborates that these meetings deliberately excluded [UZG] and [EJS] and that these sessions turned into gossip sessions. I am therefore upholding this allegation and find that these meetings excluded certain staff deliberately and that at least some of these meetings were used to gossip about another colleague.

**Allegation 2:** Belittled staff by mocking them when distressed or concerned, rather than supporting them. For example, calling [UZG] “sookie baby” saying to “put her big girl pants on”, “suck it up”, “Just stop it”, and asking [HWH] “do you want me to throw the tissue box at you....?”

**XKU’s Findings of fact**

*Use of “put her big girl pants on”:*

You refuted using this term and said you are more likely to say, ‘come on [UZG] pull yourself together’, or ‘what are those tears about, how come you are crying.’ [UZG] is clear you used these words. When I interviewed you, you were adamant that you didn’t use the term then you said that you did not think you used the term. I find this is very similar to the allegations above where you do not recall using certain words. On balance, I am upholding this allegation. In any case, I find that even using the term ‘pull yourself together’ is demeaning, and inappropriate, in light of our values of tika, pono, and aroha and especially from a Site Manager.

*Tissue box comments:*

You stated you do not know whether you said this to [HWH], you don’t recall, but it would have been in a joking manner as there was a joke on site about you throwing tissues. You stated you do recall saying to [HWH] ‘you’re not crying as well’ as everyone was stressed. On the balance of probabilities, I am upholding this allegation as you were unsure as to whether you said this or not, and both [HWH] and [UZG] have raised separate allegations around throwing tissues. Further, you saying to [HWH], ‘you’re not crying as well’ is demeaning, inappropriate, in light of our values and your role as a senior leader.

**Allegation 3:** Undermined staff by publicly raising your concerns with them or their work, for example calling out to [UZG] in the open office about [their] late work or overdue KPI’s.

**XKU’s Findings of fact**

You stated you might have called out to [UZG] as you work in an open planned office, however it would have been in relation to gathering data, rather than performance. Further, you recalled a situation at your desk where you did stand up and ask [UZG] if a visit had been completed, and you admitted that you have a loud voice. I am therefore upholding this allegation.

**Allegation 4:** Acted in a manner that would have been reasonably foreseeable as undermining of kaimahi confidence in their ability to do their role. Such as indicating you thought [UZG] wouldn’t cope with a support plan, would end up on a PIP which wouldn’t be successful. Suggesting that [UZG] write 123 reports instead of Supervising.

**XKU’s Findings of fact**

You refuted this allegation and stated that your concerns were always around [UZG’s] wellness or stress levels, never in relation to [their] performance. I am not upholding this allegation as there is not enough evidence to verify whether it occurred or not.

**Allegation 5:** Disrespected kaimahi by not paying attention. For example, by focussing on your laptop or phone during hui, asking them to repeat what they had said, sometimes saying you had not been listening, and interrupting them speaking. Saying to [UZG] you didn’t read [their] email because it was too long.

**XKU’s Findings of fact**

You did not refute these allegations and admitted to bringing your phone and laptop into meetings, and saying to [HWH] that you were not listening. Further, both [UZG] and [HWH] corroborate this allegation. I am therefore upholding this allegation.

**Allegation 6:** Spoken disrespectfully to [UZG] about [their] weight and diet in front of her colleagues, as well as saying things such as “less words”, “stop talking” or rolling your eyes at [their] input to discussions.

**XKU’s Findings of fact**

*Comments about [UZG]s] weight:*

You stated that [UZG] first approached you regarding your weight loss and since then you have had regular conversations around health and wellbeing. You do not feel you have been disrespectful about [their] weight. You later admitted having frank conversations with [them], and when I asked you whether you stated, ‘should you be eating that’ you replied ‘yes possibly.’ I am upholding this allegation as all three complainants corroborate that you have made disrespectful comments, are consistent in their corroboration, and you admitted having frank, direct conversations with [UZG] about [their] weight. You may have not

intended to be disrespectful, but I find that is the way you came across in your comments about weight.

*Rolling eyes:*

You stated that you roll your eyes, but it is not intentional, and you do not do it to be disrespectful. You acknowledged that you aren't conscious of it at times, and have asked others to tell you when it occurs. Further, both [UZG] and [HWH] corroborate it. I am therefore upholding this allegation.

**Allegation 7:** Breached the privacy of [UZG] , by telling some members of the team you intended to take [them] through an HR process.

**XKU's Findings of fact**

As per allegation 4, I am not upholding this allegation as I cannot verify whether it occurred or not.

**Allegation 8:** Placed unrealistic and unachievable work expectations upon kaimahi, without taking reasonable steps to support them to achieve these.

**XKU's Findings of fact**

I am not upholding this allegation as it appears you were short staffed, and, in my many years as a senior leader, the concept of what is too much work is often a matter of perspective, and it appears as though you sought help and attempted to put things in place to address and alleviate the demanding workload.

**Whether GYN has "been culturally disrespectful, derogatory, and inappropriate":**

**Allegation 9:** Acted in a way that indicates disrespect for Māori culture and undermines your managers authority. Saying [RTX] got [their] role because [they] was Māori and that the team needed to attend wananga with Matawaewae and Kohi to get [RTX] off the team's back. Saying [they] had a brown face, so it looked good for the organisation. Speaking openly to the leadership team about your dislike of [them] and saying Oranga Tamariki was losing its professionalism and becoming an iwi service. Speaking of voting for the National Party so the Ministry could go back to not being an iwi service, returning to being a professional service and that the team might get a decent Regional Manager. Joking about (a staff member) ... having 1% Māori DNA and being kaumatua. Talking about not believing the practice shift was good, was a waste of time, and was moving the Ministry away from professionalism toward being a marae or iwi based service.

**XKU's Findings of fact**

I have considered the information provided to me including your response and have determined that I am not upholding this allegation as you have refuted all claims, provided justifiable context and explanations, and the information was not corroborated. [This] is therefore not substantiated.

*Finding that GYN behaved in an undermining, bullying and harassing manner*

[60] XKU found that GYN had breached Oranga Tamariki's Workplace Bullying, Harassment & Discrimination policy as their actions were:

...repetitive, unwelcome, unacceptable and inconsistent with our Values and Code of Conduct. It is in my view that you did behave in a way that was undermining, and the behaviour you displayed publicly, whether intentional or not, is inappropriate and has caused significant distress across your team. I find the evidence of the complainants compelling, because it was consistently corroborative, particularly in relation to the allegations surrounding:

- The highly insensitive language used.
- Having 'separate meetings.'
- What was said in the 'separate meetings.'

I did not find your evidence credible regarding the above matters mainly, because, the evidence was corroborated by more than one party, it happened multiple times and formed a pattern of behaviour. In particular, in relation to the insensitive language used, you were often vague, and could not recall whether you used the language alleged, or whether you even use the type of language alleged. In totality, your behaviour forms a cumulative pattern of treatment which has undermined and belittled staff, causing psychological harm to [UZG]. I propose to find this allegation substantiated.

[61] XKU did not however find that GYN was "culturally disrespectful, derogatory and inappropriate" on the basis that GYN had "clearly refuted all claims, provided justifiable context and explanations, and the information was not corroborated."

[62] XKU also considered that there were mitigating factors at play, noting that:

**Mitigating Factors:**

You stated you do not want to make excuses, however last year your mum was diagnosed with COPB, which is a breathing issue that will get progressively worse. Two years before this, your mother-in-law died. Further, your youngest son had a

serious car accident, and you were concerned that he had a seizure that caused the accident. You were afraid he was going to be charged. You did not share this personal information with anyone at work and wonder if that's why you missed what was happening with your supervisors.

[63] XKU further considered GYN's responses during the disciplinary meeting and acknowledged GYN's "commitment to work on" their behaviour and noted that GYN was "genuinely sorry", was "not aware that some of [their] behaviours were seen as bullying" and noted GYN's perspective that their actions was a joke. XKU however noted that the "tone, manner, body language, and words were not appropriate", and while XKU also acknowledged GYN's behaviour was not motivated by ill-intent, the behaviour was troubling for a senior manager and that GYN's "interpersonal and communications interactions with the complainants have been at times highly unprofessional and display a serious lack of self-awareness."

[64] XKU stated:

As a Senior Leader, the apparent lack of insight regarding the impact your actions have had on at least three people, on multiple occasions, seriously concern me. There are three critical Ministry values which you have fallen well below the line in. These are the values of tika and pono, respecting mana and aroha.

[...]

Further, I note that you have been employed with Oranga Tamariki for 29 years, are a registered social worker, and your substantive position is a Site Manager. While I acknowledge your loyal service of 29 years, it is also relevant that this period of time as a social worker, and latterly in the substantive role of Site Manager, is also an aggravating factor given you are a Senior Leader of Oranga Tamariki and should have known better. The Ministry expects more of you because you have been employed by this organisation for a long period of time. The Ministry expects more of you because you are a senior leader. The Ministry expects more of you because you have been a senior leader for a considerable time. It is therefore my view that the allegations of serious misconduct made against you have been substantiated [...]

*Proposed sanction following preliminary decision – dismissal*

[65] XKU stated that in light of their finding that the bullying allegations should be upheld, this conduct constituted serious misconduct and the proposed sanction was dismissal with one month pay in lieu of notice.

[66] XKU stated that they considered reasonable alternatives to dismissal, such as a final written warning and further training, but considered that a lesser sanction was not appropriate or proportionate to the seriousness of GYN's actions. GYN was then offered an opportunity to respond before a final decision would be made.

*GYN provided further information for consideration*

[67] On 1 November 2023, GYN emailed the senior HR advisor and attached a substantial number of documents which GYN said related to the allegations made by the complainants. The attached documents were largely emails dating back to July 2022 in relation to various matters, such as UZG's request for annual leave due to personal issues and their emotional state; and comments made previously by UZG that they "still want to work for [GYN] and that "together", they made a good leadership team. GYN also included an email where they told UZG that they need not worry about a work issue while they are on annual leave. Other documents showed GYN providing support for Māori representation at leadership hui, and photos that demonstrated their attendance at other events which HWH stated GYN did not attend. GYN also included other emails between the complainants and themselves which suggested there was a good relationship between them. GYN also included emails from external parties as support for GYN being a good and supportive manager.

*GYN's response of 7 December 2023 to preliminary decision*

[68] On 7 December 2023, GYN's new legal representative, Alan Knowsley, provided a response to XKU's preliminary decision and raised a personal grievance for an unjustified disadvantage. The response included the following:

- In relation to the use of "fuckers", GYN did not direct those words to staff referred to, and that it was a use of a swear word that would at worst be misconduct, in the context of an expression of frustration at staff.

- GYN continued to deny using the term “sookie bubba”, and stated that they did not mean to undermine, bully, or harass UZG by saying “less words” to UZG.
- The holding of separate meetings was not to undermine, bully, or harass staff and were not “gossip” sessions.
- The “tissue box” comment was taken out of context and was not used to mock or belittle staff.
- The complaint that concerns were raised in an open office was “just a normal conversation about work data” and was not to undermine staff.
- The allegation that they disrespected staff by not paying attention and not listening to HWH was taken out of context as GYN had been busy and in the middle of another task at the time.
- GYN disputed that they were disrespectful to UZG about their weight, and that as context, GYN, too, had suffered from being overweight and the discussions were intended to be supportive and not disrespectful. GYN suggested that staff who overheard the comments took the comments out of context.
- GYN also stated that their rolling of eyes is an “unconscious and unintentional body movement” not done to be disrespectful.
- The process was unfair because it did not include any “terms of reference” and included matters “that are clear[ly] stale due to the age of the matter and lack of sufficient detail as to when the alleged event occurred to be fairly responded by [GYN]” and that if the proposed dismissal was not withdrawn, GYN would seek an urgent hearing with the Authority.

[69] The letter concluded by stating that “no findings of misconduct should be made” and that the “proposed findings are not supported by the evidence. They do not reach the level of serious misconduct or misconduct.”

[70] On 18 December 2023, Oranga Tamarik’s senior solicitor responded to Mr Knowsley acknowledging the personal grievance for an unjustified disadvantage but disagreed that its process was unfair or unreasonable.

*Further comments provided by GYN*

[71] On 19 December 2023, Mr Knowsley responded to Oranga Tamariki’s senior solicitor and stated that LGJ and SBB, should have also been interviewed, as DBE had recommended they too be interviewed. Mr Knowsley also noted that as mediation had been agreed to, this would occur in the new year due to the Christmas holidays.

*Further interviews conducted by DBE – February 2024*

[72] On 31 January 2024, XKU wrote to supervisors LGJ and SBB separately to advise that they had asked DBE to interview them regarding concerns about GYN and DON.

[73] In their evidence, XKU stated they did not feel it was necessary to conduct further interviews, but did so following comments by GYN. XKU further stated that the interviews did not add anything, instead reinforced views for OT.

[74] The interviews with LGJ and SBB took place on 9 and 12 February 2024 respectively.

[75] On 22 February 2024, SBB’s and LGJ’s interview notes were provided to GYN.

*GYN’s comments of 28 March 2024 to SBB and LGJ’s interview notes*

[76] On 28 March 2024, GYN provided further their comments to the interview notes.

[77] GYN’s comments in relation to both interview notes were similar; including that DBE had “leading” questions when asked whether LGJ had information about any “bullying” behaviour by GYN or DON.

[78] GYN also considered that LGJ was “parroting what the others have said” and that there was “no exploration of my intent in what I was saying or how I said it” but that LGJ confirmed “my comments were supportive of [UZG’s] health goals.”

[79] GYN complained that DBE did not ask LGJ for examples for the comments GYN was alleged to have made to UZG about the food UZG ate, or other health related comments.

[80] GYN also commented that there was a lack of specificity as to what GYN was alleged to have said to UZG when asked if GYN made comments such as “sookie bubba” or “put your big girls pants on” to UZG.

[81] GYN also noted that “each complainant was told that the process was not an investigation. That same statement was repeated to [LGJ] and [SBB] even after the ‘non investigation’ had resulted in a preliminary finding of serious misconduct against me. This has misled [LGJ] and [SBB] and the complainants as to the process being followed in the same way I was misled by being told that the process was not an investigation.”

*Changes in subsequent preliminary decision 7 May 2024*

[82] On 7 May 2024, XKU issued Oranga Tamariki’s “subsequent preliminary decision following additional interviews” to GYN. In it, XKU observed that SBB and LGJ had provided corroboration of several allegations, including the use of the term “sookie baby” or similar, the use of “put her big girl pants on”. XKY noted that LGJ confirmed comments about UZG’s weight were made that UZG found distressing.

[83] Allegations 4, 7, 8, and 9 remained unsubstantiated as per the preliminary decision of 21 August 2023. However there were some changes to the preliminary decision. These changes were:

- Allegation 3 that GYN undermine staff by publicly raising concerns with them or their work, (for example calling out to UZG in the open office about their late work or overdue KPIs) was not substantiated. XKU stated that this was because there was not enough evidence to uphold the allegation.
- XKU proposed an alternative sanction to recognise the tenure of GYN’s employment with Oranga Tamariki, whilst noting they had been working as a social worker throughout the disciplinary process and that there were no further allegations or concerns raised regarding their behaviour or communication. The alternative sanction was that GYN “relinquish [their] management role and continue as a social worker for the next 12 months” but that GYN would be paid at the same salary that they were currently on for the next 12 months. GYN would not seek to be employed in any management roles while they had direct reports during this 12 months, but that they were free to do so following that period.

[84] XKU noted that before a final decision would be made, they wished to provide GYN an opportunity to provide any views about the new preliminary decision and invited GYN to a meeting to discuss their responses in person.

*Meeting to discuss new preliminary decision - 23 May 2024*

[85] XKU and Oranga Tamariki's solicitors and senior HR advisor met with GYN and Mr Knowsley on 23 May 2024.

[86] During that meeting, GYN provided a history of their longstanding employment with Oranga Tamariki and explained that they had been asked to be site manager at the site as it was known to be dysfunctional.

[87] Mr Knowsley expressed his view that GYN had received a harsher outcome than DON whose conduct was found to be misconduct as opposed to serious misconduct. Mr Knowsley stated that DBE's recommendation for others to be interviewed were ignored until GYN pushed for additional staff to be interviewed. Mr Knowsley stated that those interviews took place a year after the complaint and should have taken place at the time when the witnesses' memory would have been better. Mr Knowsley stated the outcome was predetermined and that witnesses were misled at the interview when they were told "this was not an investigation".

[88] During the meeting, GYN agreed that should a finding of serious misconduct be found, they would step down as site manager and undertake a social worker role while maintaining their site manager salary for another year, to avoid a dismissal.

*Final decision of 21 June 2024*

[89] On 21 June 2024 Oranga Tamariki issued its final decision. In the interest of brevity, a summary is set out as follows.

[90] XKU concluded that GYN engaged in undermining, bullying, and harassing behaviour toward staff, particularly UZG. This conduct included referring to kaimahi in a derogatory or disrespectful manner in front of other kaimahi, such as use of "fuckers" in the context of other staff members, belittling comments such as "sookie baby", "put your big girl pants on", remarks about using fewer words, eye-rolling, and joking about throwing a tissue box at staff. XKU also found that GYN also held

meetings which excluded other supervisors which had turned into gossip sessions about staff. GYN also repeatedly made personal comments about UZG's weight and diet in front of others.

[91] XKU concluded that the behaviour caused psychological harm and created distress in the workplace. XKU concluded that witness testimony was consistent and corroborated by additional staff. On the basis of the evidence, XKU found that the allegation (behaving in an undermining, bullying and harassment manner) substantiated on the balance of probabilities, but that the allegation that GYN had been culturally disrespectful, derogatory or inappropriate was not substantiated.

[92] The conduct was found to constitute serious misconduct and breached organisational policies, duty of care, and Oranga Tamariki values, particularly expectations of senior leaders.

[93] A final written warning was issued.

[94] XKU noted that during the meeting of 23 May 2024, GYN accepted the sanction proposed, agreed to step down from the management role, and will transition to a social worker position while their salary will be maintained for 12 months before moving to the top step of the Social Worker band. XKU also noted that the matter will be reported to the Social Worker Registration Board in line with obligations.

[95] XKU noted that a restorative process was explored but was not viable due to complainant's concerns and unwillingness to participate as they expressed feeling unsafe. As such XKU believed that forcing a restorative process would be detrimental to the health and wellbeing of all individuals. Consequently, GYN's role as social worker would also be based at a different site.

#### *Mitigating and aggravating factors*

[96] In reaching this final decision, XKU noted the following mitigating and aggravating factors:

[97] As to the mitigating factors, XKU acknowledged that:

- GYN expressed genuine remorse and a commitment to change;

- GYN was unaware some behaviour was perceived as bullying and believed it was humour;
- No further incidents have occurred over the past 12 months;
- GYN had continued working safely as a social worker during the investigation;
- GYN has 29 years of service, including over 10 as a senior leader;
- GYN has independently completed significant leadership training in the past 12 months.

[98] As to aggravating factors, XKU considered that:

- Conduct was carried out by a senior leader with high responsibility and influence;
- The behaviour demonstrated a lack of professional self-awareness;
- The actions breached core organisational values of integrity (tika and pono), respect for mana, and aroha;
- The behaviour occurred repeatedly and caused distress;
- Senior leaders are expected to model values and behaviours; these standards were not met despite extensive tenure and experience;
- The employee's long service and leadership experience heighten expectations of appropriate conduct.

[99] Finally, XKU set out the future expectation that any further substantiated concerns may result in further disciplinary action, up to and including dismissal.

[100] On 12 August 2024, GYN raised a personal grievance with Oranga Tamariki for an unjustifiable disadvantage for the finding of serious misconduct, the demotion to the position of social worker, and alleged that the process undertaken was unfair and unreasonable.

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

[101] For the Authority's investigation written witness statements were lodged by the witnesses set out in the 'glossary' below as having done so. Except for GYN's former manager, TUY (who provided a witness statement and was taken as read), all witnesses answered questions under oath or affirmation from me and the parties' representatives.

All witnesses who were supervisors also gave evidence opposing GYN's reinstatement. The representatives also gave oral summary closing submissions.

[102] All material from the parties was fully considered. However as permitted by s 174E the Act, this determination has not recorded all evidence<sup>5</sup> and submissions received.

### **The issues**

[103] The issues requiring investigation and determination were:

- (a) Whether GYN has been unjustifiably disadvantaged;
- (b) Whether Oranga Tamariki have breached its contractual obligations to GYN;
- (c) If Oranga Tamariki's actions were not justified or if it has breached its contractual obligations, what remedies (if any) should be awarded.
- (d) If any remedies are awarded, whether they should be reduced under s124 of the Act for any blameworthy conduct by GYN.
- (e) Whether either party contribute to the other party's costs of representation.

### **Unjustified disadvantage**

[104] Section 103(1)(b) of the Act defines an unjustified disadvantage as an employer's unjustified action that adversely affects an employee's employment or a condition of that employment.

[105] To succeed, GYN needed to show that they were disadvantaged in their employment, and this disadvantage was caused by an unjustifiable action by Oranga Tamariki. I must assess Oranga Tamariki's actions using the test in s 103A of the Act and consider whether its actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time.

[106] This assessment requires examining both substantive justification (the reasons for the employer's decision), and procedural fairness (the process followed). The Authority is not to substitute its own view for that of the employer but rather determine

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<sup>5</sup> The parties lodged in excess of 1,000 pages of documents in their common bundle of documents, which excluded witness statements and submissions.

whether the employer's actions fell within the range of reasonable responses available in the circumstances.

### *Summary of submissions*

[107] Counsel for GYN submitted that Oranga Tamariki erred in finding serious misconduct. They argued the concerns should at most have been addressed as a performance matter, and that the outcome was disproportionate particularly given that DON's conduct attracted only a misconduct finding. Counsel also alleged procedural defects, including:

- failure to conduct a formal investigation with a terms of reference,
- not providing the preliminary assessment report to complainants for comment,
- leading questions during interviews,
- and an alleged demotion "three levels" below the site manager role.

[108] GYN also asserted that their behaviour was misunderstood as bullying when it was intended as humour, and that the disciplinary outcome failed to adequately consider their lengthy service, remorse, and commitment to change.

[109] Oranga Tamariki submitted that its actions were fair and reasonable and fell within the range of acceptable responses under s 103A of the Act. It rejected the contention that the social worker role was "three levels" below the site manager role, noting the practice leader role has no direct reports. It also emphasised that the conduct substantiated was serious, repeated, and inconsistent with organisational values expected of a senior leader.

[110] I address these submissions below.

### **Could a fair and reasonable employer have concluded that allegations 1, 2, 5, and 6 had been substantiated?**

[111] GYN's job description requires that they:

... Promote and role model the values of Oranga Tamariki including good employer principles and practices and expected high standards of responsiveness and behaviour in site operations.

[112] Additionally, under clause 3.1 of the Collective Employment Agreement (CEA), site managers are expected to demonstrate strong leadership, uphold organisational values, promote a safe and respectful culture, and lead in a manner that maintains trust and confidence. These obligations shape the expectations against which GYN's conduct must be assessed.

[113] Oranga Tamariki's values stipulate that:

Oranga Tamariki is founded on and guided by an agreed set of values. These are designed to influence the work, approach, and attitude of both the employer and the employee. Both parties share a commitment to these values and have a mutual responsibility for ensuring they are upheld...

- We put **Tamariki** first...
- We believe **Aroha** is vital: It keeps us focussed on what is right.
- We respect the **Mana** of people: we listen, we don't assume, and we create solutions with others.
- We are **Tika** and **Pono**: we do what we say we'll do.
- We value **Whakapapa**...
- We recognise that **Oranga** is a journey: we understand the long-term impacts of our actions today.

Oranga Tamariki is committed to recognise and provide a practical commitment to the Te Tiriti o Waitangi.

Oranga Tamariki Tiriti obligations to Māori employees will mean that... Oranga Tamariki will provide a culturally safe working environment that supports cultural beliefs, aspirations, and practices of its employees, particularly Māori...

[114] During the investigation meeting, I asked GYN if there was any substantiated allegation (either allegations 1, 2, 5 or 6) made by Oranga Tamariki in its final decision that GYN could unequivocally state was factually untrue. In response, GYN did not deny any of the substantiated allegations.

[115] I have reviewed GYN's responses to the allegations, including their responses during the disciplinary meeting of 20 July 2023, 7 December 2023, 28 March 2024 and 23 May 2024. In these responses, I note GYN's explanation that there was 'context' to the events that were the subject of the allegations and that there was no ill intent behind the allegations. For example, the 'tissue box' comment was in the context of previous jokes intended to be a jovial response, or that the use of 'fuckers' was driven out of

frustration at the time and not directed personally to the supervisors, or that comments to UZG relating to weight were in the context of their shared health goals and intended to be supportive rather than to ridicule UZG. GYN's other responses included acknowledgement they had used the word 'fuckers' in a leadership meeting in relation to the social workers being discussed, acknowledgement that UZG had often been the subject of other supervisors' and DON's frustrations in meetings where UZG was not present or invited to, and that GYN's eye rolling in staff meetings was "involuntary".

[116] Having reviewed GYN's responses, I am cognisant that although GYN's contextual explanation may provide insight into the circumstances in which an event occurred, it does not displace the fact that the event(s) themselves occurred, nor does it render the factual allegation false. I also observed an absence of genuine recognition or response to how their behaviour had compounded UZG's emotional and psychological state.

[117] Counsel for GYN asserted that XKU failed to consider "contrary evidence" and preferred the three complainants' account without interviewing them themselves. However, I saw no evidence of a conflicting account by GYN of the allegations found to be substantiated that Oranga Tamariki did not consider. For example, GYN provided emails and documents demonstrating positive interactions with staff, but that was the extent of its purpose. The purpose was to demonstrate that GYN had a good relationship with some of the complainants prior to the complaints; the emails showed that they often attended team dinners GYN organised, and some emails expressed gratitude to GYN on certain matters. Counsel considered that these emails were contrary evidence to the matters complained about and should have given XKU the impetus to probe or question the complainants further beyond what DBE had asked during the interviews. GYN also denied or was unable to recall the use of the words 'sookie baby' or 'put your big girl pants on', but accepted they may have used other words and made those comments jokingly, albeit with no ill-intent, in response to witnessing UZG and others in emotional distress.

[118] During the investigation meeting, under cross examination by GYN's counsel, XKU demonstrated that they had reviewed and considered the information GYN provided. XKU articulated why that information was not considered relevant to the issues before them for decision-making and why XKU did not feel it necessary to re-interview the complainants. XKU agreed that the information GYN provided indicated

a prior positive relationship and that at times GYN was commended, but it did not add or change the findings of the allegations. I was satisfied XKU considered the information provided by GYN and their responses but reasonably concluded that none of it outweighed the evidence derived from the complainants' accounts to DBE. A fair and reasonable employer is not required to refute every piece of evidence, and XKU demonstrated a balanced evaluation.

[119] In response to the "consistent" nature of the accounts by the three complainants to the interviewer DBE, counsel for GYN advanced arguments that there was collusion. However, there was no evidence supporting collusion between complainants. Witnesses had made complaints independently, and two of them had strained working relationships, which undermines the suggestion they collaborated. XKU was aware of the possibility and rejected it after detailed consideration.

[120] I find that counsel's assertion of 'collusion' ignored the following factors:

- The complaints were brought to QZT separately, in confidence. It was QZT who identified that there was a "pattern" of behaviour based on information the complainants shared with them. Significantly, two of those complainants did not share a collegial relationship at the relevant time and none had any knowledge that the other had complained to QZT;
- I was satisfied by XKU set out in some detail their assessment of the complaints and the complainants when considering the possibility of collusion, which they had categorically ruled out. As a neutral and experienced decision maker from a different site, I have no reason, in the absence of any evidence, to doubt XKU's competence to identify collusion where it exists;
- additional evidence provided by the witnesses who were not complainants corroborated prior statements that were subject to the substantiated allegations.

[121] In the face of three corroborated accounts, and having ruled out collusion as plausible, I find XKU acted reasonably in preferring the complainants' accounts. In XKU's preliminary decision and subsequent preliminary decision, XKU explained why they preferred the complainants' accounts over GYN's, in respect of allegations 1, 2, 5

and 6. XKU's explanation included the fact that GYN admitted the behaviour alleged in terms of the use of 'fuckers' and 'pull yourself together', as well as the allegations relating to allegations 2, 5, and 6. XKU took into account GYN's responses as to whether they used the term 'sookie baby', noting also that GYN's responses were vague, and did not categorically rule out the possibility they used those words. XKU noted that on the other hand, the three complainants' corroboration on the use of 'sookie baby' or similar was consistent and it was on that basis XKU preferred their version of events. The complainants' accounts were further corroborated by the additional two supervisors. As the Court of Appeal<sup>6</sup> noted, when ascertaining facts, an employer, acting reasonably, is entitled to accept some preference of accounts to others.

[122] I was also cognisant of the fact that the complaints were not made lightly, and that they were made in spite of the complainant's fear of retaliation by GYN. The additional testimony from SBB and LGJ also reinforced the findings made from their separate observations that GYN failed to address others' behaviour that was rude and aggressive to UZG. Those behaviours were observed regularly by supervisors and raised with GYN directly on occasion (one by HWH<sup>7</sup> and the other by SBB<sup>8</sup>) and included their observations of the harm GYN's conduct had particularly on UZG, who had, modified their behaviour over time at the site<sup>9</sup>, as a result of being shut down by GYN and some other staff whom GYN managed. Although some of the behaviours towards UZG was not directly intended by GYN, GYN was responsible for how the site operated and its culture, yet had enabled and normalised some of the behaviours, such as using the 'tissue box' joke when UZG or other staff would be tearful, or use of 'less words' to UZG, or commenting on their weight in front of other staff; all of which perpetuated behaviours towards UZG on a regular basis and leading to UZG experiencing psychological harm.

[123] I find that in these circumstances XKU was reasonably entitled to prefer the complainants' account. I find that re-interviewing the complainants in addition to the interviews undertaken by DBE who was independent from the site and the individuals involved and who was a senior HR advisor, was not required of an employer acting

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<sup>6</sup> *Cowan v Idea Services Ltd* [2020] ERNZ 252 (CA).

<sup>7</sup> Refer to HWH's interview notes noting they were laughed at by GYN and DON for bringing up LGJ's behaviour towards UZG.

<sup>8</sup> Refer to SBB's interview notes noting they stated that what was happening to UZG was bullying.

<sup>9</sup> See for example SBB's interview notes stating UZG would come to meetings and not talk which was different to their nature.

fairly and reasonably. I also find that XKU fairly and reasonably concluded that allegation 1, 2, 5, and 6, were substantiated given GYN's acknowledgement and 'contextual' explanation of some of their behaviour in the allegations. GYN's explanation did not render the allegations false nor excuse the conduct in question. Counsel for GYN asserted that it was not evident XKU had considered the emails GYN provided (which demonstrated a prior positive working relationship with the complainants), but for reasons discussed above, the value of these emails was negligible as far as the substantiated allegations were concerned. In any case, a fair and reasonable employer is not required to refute every piece of evidence, and XKU's decision making demonstrated a balanced evaluation.

[124] Consequently, I find that a fair and reasonable employer could have concluded that allegation 1, 2, 5, and 6, were substantiated.

**Could a fair and reasonable employer have concluded that GYN acted in serious misconduct?**

[125] As set out in the CEA above, how a site manager conducts themselves (i.e. serious misconduct) is informed by the contractual leadership responsibilities, including their job description, the policies, and values of Oranga Tamariki. Consequently, they also inform the nature of the obligations imposed on GYN and the issue of whether Oranga Tamariki could have fairly and reasonably found GYN acted in serious misconduct. Under Oranga Tamariki's policy documents<sup>10</sup>, "misconduct" is defined as unacceptable conduct that fails to meet expectations but does not destroy trust and confidence whereas "serious misconduct" is conduct that undermines or destroys the trust and confidence required for employment to continue. Bullying and harassment are expressly listed as examples of serious misconduct.

[126] Oranga Tamariki defines bullying as repeated and unreasonable behaviour directed towards a worker or group of workers that may lead to physical or psychological harm. A single incident is not considered bullying, but persistent behaviour can escalate if not addressed. Harassment is defined as repeated inappropriate behaviour, whether verbal, physical, or otherwise, that intimidates, ridicules, or expresses hostility.

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<sup>10</sup> Oranga Tamariki's Disciplinary Policy and Guidelines; Workplace Bullying and Harassment Policy and Guidelines.

[127] It was undisputed, from both parties' evidence, that the role of site manager is critical to establish and lead the culture of the site, and ensuring stable, safe systems across the site. From the evidence given by all witnesses, including GYN, the site was, and had been for some time, operating under sustained pressure. Prior to and during the time that GYN was site manager, issues at the site included culture, recruitment, and attrition. I acknowledge from GYN's evidence that it was for this reason that they had been placed as site manager to assist with these issues, as GYN had prior experience doing so at a previous site. This operational landscape is relevant. GYN's conduct and Oranga Tamariki's finding of serious misconduct, must also be considered, against this background, rather than looked at in isolation.

[128] In Oranga Tamariki's preliminary decision, subsequent preliminary decision, and final decision, XKU described GYN's behaviour as "repetitive and damaging" and explained why GYN's behaviour towards UZG in particular was demeaning and not appropriate in light of Oranga Tamariki's values of tika, pono, and aroha, as a site manager. XKU also explained why GYN's evidence was not credible and why their explanation about using alternative wording (i.e. "pull yourself together", "you don't want to go out looking like you have cried") was also, substantially, below Oranga Tamariki's expectations of a site manager.

[129] In reaching its finding of serious misconduct, Oranga Tamariki considered both mitigating and aggravating factors. Mitigating factors included GYN's remorse, absence of further incidents during the disciplinary process, long service, safe work during the investigation, and their completion of leadership training.

[130] In its discussion of aggravating factors, Oranga Tamariki set out in some detail, that GYN being in a senior role was an aggravating factor in its decision. Its rationale included how GYN failed, as a site manager, to act in line with Oranga Tamariki's values of tika, pono, mana and aroha, failing to act with integrity, honour and accountability to the complainants which it said was "critical to leadership". Oranga Tamariki reiterated that GYN's actions were repetitive and damaging, and that as a manager of managers, who had a 29-year employment history with Oranga Tamariki, it expected more of GYN as a site manager.

[131] The aggravating factors identified are important for many reasons. These aggravating factors were the driver behind the disciplinary outcome for GYN. Additionally, as emphasised in their witness statement and evidence, GYN was already on notice of the site's existing issues such as culture of the team, and had been hired as site manager with the objective of turning those issues around. These aggravating factors also dispose of GYN's submission that there was disparity between the disciplinary outcomes for them and DON.

[132] In response to submissions of disparity, I note that DON, as practice leader, was not a people manager, with no line or people management duties of the supervisors. GYN was the site manager, a leader of several leaders. As such, DON and GYN were in substantially different positions. On that basis, there is no disparity.<sup>11</sup> DON, being a provider of technical expertise as a 'practice leader' (providing supervisors with practice advice) did not assume any of GYN's people leadership responsibilities. GYN, by contrast, occupied the most senior leadership position at the site. Their responsibilities under the CEA, Code of Conduct, and values were significantly broader.

[133] Although it may have been open to Oranga Tamariki to arrive at the same outcome for GYN as it did for DON, I find that Oranga Tamariki was, acting fairly and reasonably, entitled to view GYN's conduct as more serious because GYN was the site manager, and therefore an aggravating factor.

[134] I also observed that GYN's responses throughout the disciplinary process failed to directly and substantively address the aggravating factors that informed Oranga Tamariki's finding of serious misconduct. I did not see any evidence where GYN explained why, as a senior manager with a 29-year employment history with Oranga Tamariki, Oranga Tamariki was not entitled to expect more of them, or how their conduct did not meet the definition of bullying.

[135] Bullying is a serious issue, and while it may not always amount to serious misconduct in every case, I find that when the substantiated allegations are weighed against GYN's responsibilities as a site manager, coupled with the strong values of the organisation directly applicable to GYN's leadership role, and Oranga Tamariki's bullying policy expressly stipulating that bullying constitutes serious misconduct, the

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<sup>11</sup> *Chief Executive Office v Buchanan* (No 2) [2005] ERNZ 767 (CA).

finding of serious misconduct is undeniably within the range of findings a fair and reasonable employer could make.

**Was GYN's relegation to a social worker role with site manager salary protection and a final written warning within the range of responses available to a fair and reasonable employer?**

[136] In considering this issue, it must also be borne in mind that it is not for the Authority to substitute its decision for what a fair and reasonable employer could have done in the circumstances, as it has been expressly recognised that s103A clearly contemplates “a range of responses” available to a fair and reasonable employer.<sup>12</sup>

[137] There was disagreement between the parties as to whether the role of social worker was two or three levels below the role of site manager, or whether the ‘practice leader’ role was a role above the level or equal to that of the ‘supervisor’ role. Counsel for GYN submitted that Oranga Tamariki demoted GYN three levels below the site manager role, and Oranga Tamariki say the social worker role is two levels below, not three.

[138] On this point, I note that whether a fair and reasonable employer could have relegated GYN to a social worker role in these circumstances is not a quantitative exercise, but a qualitative one.

[139] Simply asserting that GYN should have been demoted only one level down or to ‘practice leader’ misses the point that the conduct in question was directed at supervisors and social workers managed by the supervisors. It also fails to acknowledge the aggravating factors in GYN’s individual circumstances. Crucially, when the aggravating factors were presented to GYN as part of Oranga Tamariki’s preliminary decision, GYN’s feedback did not directly address these particular points that formed the basis of finding of serious misconduct. Although GYN did not expressly concede that the aggravating factors warranted a finding of serious misconduct for a site manager (having regard to their seniority and experience, GYN being a manager of managers, the significance of the organisational values to their role), and emphasised their previously untarnished 29-year employment record with Oranga Tamariki, the lack of a direct response to those aggravating matters consequently meant the

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<sup>12</sup> *Cowan v Idea Services Ltd* [2020] ERNZ 252 (CA), at para [39].

aggravating factors considered by Oranga Tamariki were essentially left unchallenged or were not outweighed by the mitigating factors it took into account.

[140] In finding that GYN engaged in serious misconduct, Oranga Tamariki had lost trust and confidence in GYN to be in any role that entailed leadership responsibilities, particularly one with an interface with supervisors managing social workers.

[141] The disciplinary policy also outlines that a finding of serious misconduct could lead to a dismissal and hence it could have been open to Oranga Tamariki to dismiss GYN. However, it did not do so. I also note that it was GYN who requested to undertake the social worker role during the disciplinary process. In any case, I disagree with counsel's view that because the supervisors obtained supervision advice from DON that this necessarily means the practice leader role was a "level" above that of a supervisor. I consider the practice leader role is simply different to that of a supervisor; the former includes technical leadership; the latter includes people leadership of approximately a handful of social workers. Asserting that the practice leader role is substantively a level above that of a supervisor is an assumption, on counsel's part, that technical leadership is a "level above" people management. On the evidence before me, the two roles are at best on an equal footing.

[142] For these reasons, I conclude that the sanction ultimately imposed, relegation to a social worker role with salary protection for 12 months and a final written warning, was unquestionably within the range of fair and reasonable disciplinary outcomes available in the circumstances.

### **Was Oranga Tamariki's decision procedurally justified?**

[143] The Authority must assess not only the employer's substantive decision but also the fairness of the process used to reach it. A fair and reasonable employer is expected to investigate concerns, put them to the employee clearly, give them a real opportunity to respond, and genuinely consider that response before making a decision. These principles apply even where the employer determines that a matter can be addressed without a full formal investigation.

[144] A fair process does not require perfection. The question is whether the employer's actions, viewed in context and overall, were what a fair and reasonable employer could have done at the time.

[145] Submissions included the fact that despite DBE's recommendation, additional witnesses had not been interviewed at the time following DBE's preliminary assessment report, and that XKU did not themselves interview the complainants, and did not provide DBE's preliminary assessment report to them to "gauge" their responses as recommended. It was also submitted that XKU ignored emails and photographic evidence that GYN provided and that the fact the additional complainants were interviewed almost a year later led to GYN being treated unfairly in the process as their recollection would have been better had the interviews take place earlier in time.

[146] Oranga Tamariki stands by their process and rejects the submission that it ignored GYN's feedback and documents provided. It says it took the documents into account, but it did not lead to any substantive change in its decision because the documents simply showed that GYN had good relationship prior to complaints. Oranga Tamariki considered that the inherent power imbalance between a manager and a subordinate would have likely also contributed to the appearance of a "good relationship" but was not otherwise evidence that would lead to a change in its findings. However, it did amend its decision on one of the allegations from 'substantiated' to 'unsubstantiated' following the subsequent interview response from SBB.

[147] The question is whether Oranga Tamariki acted unfairly or unreasonably how it reached its decision. S103A(5) makes explicit that an action must not be determined to be unjustifiable solely because of defects in the process if those defects were minor and did not result in the employee being treated unfairly.

*Whether Oranga Tamariki sufficiently investigated the allegations*

[148] Although Oranga Tamariki's policies permit a range of approaches to be undertaken which do not always require a terms of reference, GYN argued the employer should have conducted a full formal investigation which included a terms of reference as initially considered by GYN's manager.

[149] During the investigation meeting, I asked DBE what difference a formal investigation would have made. Their evidence was that a formal investigation would have included a more expansive fact-finding exercise where there were further enquiries to be made or established. However, the decision to undertake a formal investigation was for the decision maker. XKU stated in evidence that after reviewing

the information from the interview responses, they did not consider a further fact finding exercises necessary as there was enough information for them to decide what the next step in the process would be, which was an invitation to GYN to a disciplinary meeting to discuss the interview responses, DBE's preliminary assessment report, and give GYN an opportunity to comment and respond to them (including GYN's own responses to DBE).

[150] The disciplinary policy and the CEA provides a discretion to the decision maker, to decide on the form of investigation that should take place; and what is clear is that the 'investigation' regardless of type, must be conducted "thoroughly, objectively and fairly in the circumstances, and will include gathering the necessary information, considering the facts of the matter, and determining next steps as appropriate." A 'term of reference', contrary to what counsel for GYN asserted, is not a requirement. The disciplinary policy also sets out clearly that not all circumstances will warrant a formal investigation and that "less formal background enquiries might be undertaken before formal allegations are made". This is precisely what has occurred here when RTX first received the complaints and gave instructions to DBE to conduct the interviews to clarify the background facts. RTX undertook an initial assessment after receiving concerns from three supervisors. This step was exploratory, designed to decide whether a formal investigation was needed. At this initial point the decision not to proceed formally was entirely within scope of the disciplinary policy when RTX decided not to proceed with a formal investigation and informed GYN that this first step was "not an investigation or formal disciplinary process".

[151] Where it did become a disciplinary process followed the outcome of the interviews. Based on these interviews where additional enquiries were made, DBE provided their preliminary assessment report to the new decision maker, XKU. The report concluded that the conduct in question fell below the standard of any Oranga Tamariki employee, let alone those in leadership positions. This prompted XKU to initiate the disciplinary process, which began with the disciplinary meeting with GYN.

[152] Following GYN's comments during the disciplinary meeting (set out in paragraphs [43] to [57] above), XKU advised that they would advise on next steps, which may include gathering additional information or a preliminary view.

[153] I find that XKU acted entirely fairly and reasonably in presenting these two likely routes following the disciplinary meeting. The disciplinary policy also contemplates situations where the conduct has been “admitted” or “where it otherwise appears on the face of the information received that the conduct has occurred, it may be that no preliminary investigation is needed before raising the concern in a disciplinary context...” I find that this was the situation before XKU when they proceeded with a preliminary decision as the next step.

[154] As already traversed above, XKU considered that GYN’s acknowledgement of some of the behaviour alleged and the complainants’ corroborated facts meant that there was no cause to consider a wider investigation into what had occurred. Consequently, this meant that a formal investigation (with or without a terms of reference) and additional interviews with the four additional witnesses DBE recommended for interview, were not necessary.

[155] During the investigation meeting in which I heard evidence from DBE, RTX, QZT, and XKU about the differences between a preliminary assessment and a formal investigation, I am satisfied that the only real material difference would have been a terms of reference drafted to set out the purview of the investigation. I was also satisfied that Oranga Tamariki were not obliged, in these circumstances, to have taken that route. Firstly, under the policy documents and CEA, there was no mandatory obligation to do so. Secondly, the complaints in these circumstances were limited to issues within the site in question; and in relation to the site manager and DON. Thirdly, the nature of the complaints was isolated to one subject matter; namely, bullying and there was a pattern or similar theme to the complaints with a common individual, UZG. As such, a formal investigation with a terms of reference would have been superfluous to the process that was already in traction at that point when XKU became decision maker, other than to layer on unnecessary complexity and bureaucracy to the process. This would have also been contrary to what counsel for GYN alleged Oranga Tamariki did not do, which was to “resolve the issue at the lowest possible level”, when in fact, this is what it strived to do from the outset by taking this route of investigation. More importantly, there was no evidence to support that GYN was prejudiced or that GYN was treated unfairly as a result of Oranga Tamariki’s choice as to the form of investigation.

[156] There was a lot of criticism by GYN that XKU did not follow DBE’s recommendations to interview. However, I consider that its decision not to interview

all four additional witnesses was within the range of responses of a fair and reasonable employer in these circumstances. A decision maker is not bound to follow all the recommendations provided by DBE. However more importantly is the point that XKU identified, which was that there was already enough information to form a preliminary view on the alleged breach of its bullying policy. There were nine allegations identified out of the complaints made that GYN was being asked to account for. When one scrutinises the complaints, it appears that some of the additional witnesses identified by DBE related to other complaints made, which Oranga Tamariki did not consider required further action following acceptance GYN's responses at the disciplinary meeting. For example, two of the four witnesses were only mentioned specifically in relation to allegations that GYN "had been culturally disrespectful, derogatory, and inappropriate". As XKU stated in their preliminary decision, "I have considered the information provided to me including your response and have determined that I am not upholding this allegation as you have refuted all claims, provided justifiable context and explanations, and the information was not corroborated. [This] is therefore not substantiated." The decision not to interview the additional witnesses was therefore appropriate in these circumstances, nor did the omission result in any prejudice or unfairness to GYN.

[157] As to the other two witnesses, SBB and LGJ, I agree with XKU's view that there was sufficient information already obtained at this point to reach a preliminary view. While I accept that it would have been more comprehensive to have interviewed SBB and LGJ then, I also accept there was nothing unfair or prejudicial in not doing so. In any case, following GYN's feedback, XKU did instruct for DBE to interview them. While this occurred almost a year later, I did not find that the interviews added any new material not already within contemplation. There was also no evidence of any prejudice to GYN from interviewing SBB and LGJ later in the process.

[158] In making my assessment, I am mindful that procedural justification does not require a "text-book perfect" process<sup>13</sup>. As the Chief Judge Inglis stated in *Wilson Grange Investments v Guerra*<sup>14</sup>:

An employer's actions are to be measured against those that a notional fair and reasonable employer could have taken. That may usefully be conceived of as a target.

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<sup>13</sup> *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 40 at [178].

<sup>14</sup> *Wilson Grange Investments v Guerra* [2-23] NZEmpC 39.

The bullseye of the target is “employer best practice” and the outer circles of the target comprise “acceptable action”. Towards the outer edges of the target lie the danger zones. Anything off the target is not what a fair and reasonable employer could have done. The size of the target will depend on ‘all of the circumstances at the time’, as s103A(2) expressly states.

[159] I am satisfied that Oranga Tamariki sufficiently investigated the issue within the meaning of s103A(3)(a).

*Whether Oranga Tamariki raised its concerns prior to taking action*

[160] I am satisfied that Oranga Tamariki raised its concerns prior to taking action. At no point before obtaining GYN’s responses to the concerns were any proposals made.

[161] The preliminary assessment report summarised the concerns resulting from the interview with the complainants, identified possible breaches of the Code of Conduct and values, and recommended that the allegations proceed to a disciplinary process. The purpose of the assessment was to inform the employer as to what next steps were required, if any.

[162] The letter inviting GYN to a disciplinary meeting clearly set out the concerns raised. GYN was told:

- the nature of the comments and behaviour alleged,
- the dates or approximate dates of relevant incidents,
- the policy standards said to be breached, and
- the potential consequences, including the possibility of serious misconduct.

[163] The consequences of a substantiated allegation of serious misconduct were made clear from the outset as these are stipulated in Oranga Tamariki’s policy documents and were reiterated in the letter inviting GYN to a disciplinary meeting.

[164] The allegations were sufficiently detailed and included the interview notes and preliminary assessment report, which enabled GYN to understand the concerns and prepare a response.

*Whether GYN had a reasonable opportunity to respond to Oranga Tamariki's concerns?*

[165] The evidence shows GYN had a reasonable opportunity to respond and that GYN engaged fully throughout the investigation and disciplinary process.

[166] GYN was provided with the complaint material, the notes of witness interviews, questions in advance of their interview DBE, and the preliminary assessment. These materials were adequate to understand the case to meet.

[167] GYN attended two disciplinary meetings, on 15 May and 5 June 2023, accompanied by representation. At each meeting, GYN had the opportunity to respond to the allegations and to the evidence. Further written submissions were later provided and considered.

[168] The record shows XKU paused the process when appropriate, sought additional information from witnesses when new points arose, and provided GYN with these materials to comment on. I am satisfied GYN had a meaningful chance to be heard.

*Whether Oranga Tamariki genuinely considered GYN's responses to the allegations before taking action?*

[169] XKU's final decision letter demonstrates careful consideration of the explanations offered. XKU accepted several points in GYN's favour, including:

- their positive performance history;
- the absence of any further incidents after concerns were raised;
- their engagement in leadership training; and
- evidence that some comments were meant jokingly.

[170] I was satisfied that XKU considered all the evidence that was put before them in reaching their decision. In relation to the large volume of emails GYN provided in November 2023 which were not material to the allegations in question, I note that the fair and reasonable test does not require an employer to refute every piece of 'evidence' that has been brought to its attention in the investigative process when it communicates its decision to the employee. It was evident in XKU's decision making process that they had reviewed and assessed all material.

[171] There is no evidence that the employer pre-determined the outcome. XKU interviewed additional witnesses upon GYN's feedback, sought corroboration, and revised findings in their subsequent preliminary decision. This was a detailed process, with each finding rationalised comprehensively which took into account GYN's responses. The feedback provided was considered, and GYN was given further opportunities at subsequent stages of the process to make additional comment, which they exercised with representation. I was satisfied, upon reviewing XKU's final decision letter that all relevant considerations were taken into account in their rationale for reaching their conclusion. I accept XKU's evidence that they considered evidence and agreed extra evidence did not change overall findings, but did inform the specific allegations and led to a change in overall outcome. Some of the additional information obtained as a result of GYN's feedback led to a reversal of a previously substantiated allegation; and a change in the proposed dismissal to a relegation of the site manager role.

#### *Other factors*

[172] Section 103A(4) of the Act provides that the Authority may consider other factors in considering what a fair and reasonable employer could have done in the circumstances in its assessment under s103A(3).

[173] While I was cognisant of the time it took for the disciplinary process to conclude, there was little dispute that the reasons for the lengthy process were multi-factorial and cannot be definitively attributed to the fault of either party. There was also no evidence that the time the process took to conclude had any prejudice on GYN.

[174] I have also considered GYN's views of DBE's interview and whether there were leading questions. I reviewed the questions and do not accept the line of questioning was incorrect or led to any pre-determined views; as it was clear that the issue in question concerned allegations of bullying. There was no need on the part of the interviewer to conceal this. As an experienced senior human resource advisor who was independent of the site, I find DBE's interview methodology, line of questioning and notes entirely appropriate.

[175] I have also considered GYN's view that they, SBB and LGJ, were "misled" by being told at the start of the interview that "this was not an investigation". I note that

GYN only provided that feedback after they had received SBB and LGJ's interview notes. I find this response slightly disingenuous for two reasons. Firstly, it was made only after SBB and LGJ's interviews which were undertaken at GYN's request (notwithstanding that XKU decided additional interviews were not necessary following the preliminary assessment report). I found no evidence that they were "misled" in any way. Secondly, GYN's engagement and well-informed feedback throughout the process made it clear GYN understood they were engaging in a disciplinary process regardless of whether it was termed an 'investigation' or not. GYN had been represented throughout the process from the outset. There was also no explanation or elaboration as to what GYN meant by "being misled", or how there was unfairness or any prejudice.

[176] I have also considered GYN's criticism of XKU not meeting with the complainants to specifically "gauge their reflections" on the issues in the preliminary assessment report as recommended by the senior HR advisor. I was not persuaded there was any procedural unfairness that resulted from XKU not doing so. The preliminary assessment report along with the interview notes had been provided to all interviewees concerned. The recommendation noted that the purpose in doing so was to "keep them well informed" of the process, and recommended that XKU to "check in" with the complainants and to focus on "building the mana". I therefore find that any discussion to "gauge" their reflections may have been a 'nice to have', but was not necessary to meet obligations under procedural fairness because GYN was provided a copy of the preliminary assessment report and all the interview notes. Whether or not XKU then met with the complainants to "gauge their reflections" was irrelevant to GYN on this point.

[177] As identified above, there were aspects of the process that were not perfect, but it was not unfair.

[178] When I step back and assess the process in its entirety, I find that Oranga Tamariki met its obligations under s103A(3). Oranga Tamariki's process fell within the range of what a fair and reasonable employer could do in all the circumstances.

[179] GYN was made aware of the concerns when the complaints were first raised. I find that the manner in which Oranga Tamariki did so was considered, including giving GYN notice of a meeting to discuss this, whilst providing them copies of the

complaints. The complaints were not taken on face value and were subject to interviews undertaken by an independent person from the site. I also find that the manner in which the interview with GYN took place provided GYN the best opportunity to respond by ensuring the questions were provided to them in advance of the interview with DBE. GYN was informed of the concerns, given access to the relevant material, including interview questions in advance. GYN was then invited to a disciplinary meeting where GYN, with counsel, was able to comment and respond to the concerns having received prior notice of the alleged breaches of the relevant policies and their CEA. Following the preliminary decision which initially proposed a dismissal, further feedback and documents were provided for XKU's consideration.

### **Was there a breach of the employment agreement by Oranga Tamariki?**

[180] Counsel for GYN considers that there was a breach of clause 8.1 of the CEA which states that:

[Oranga Tamariki's] preference is to be able to solve problems and conflicts in a strengths based, constructive way. We are also committed to resolving issues at the lowest possible level minimising any negative impact on those involved...

Solution focussed- We are not focussed on a punitive outcome or "winners and losers" but where possible what can be learnt from the situation and what supports can be put in place to prevent a recurrence of the issue...

Timely- we don't want anyone to experience a protracted investigation where possible. Having issues resolved as quickly as possible allows for greater workplace harmony and keeping people integrated in the workplace...

Contextual- When making decisions on a resolution, outcome or support there will be balanced consideration given to the employee's circumstances, both inside and outside of the workplace, and the nature of the issue...

[181] The breach of contract claims was submitted as follows:

[XKU's] decision to not do an investigation and reaching inconsistent decisions are a breach of [GYN's] employment contract and Oranga Tamariki's policies and are an unjustified disadvantage to [GYN].

[...] GYN has been unjustifiably disadvantaged and [their] employment contract broken by Oranga Tamariki's poor process and decisions.

[182] Submissions also included:

An unblemished 29-year career should not be trashed by Oranga Tamariki's shady non-investigation, overreaction to allegations and failure to act fairly towards [GYN] due to the decision maker's desire not to trouble or upset [UZG] (or other complainants and witnesses) by questioning them and testing their evidence.

[183] In response, Oranga Tamariki submitted that it did not breach clause 8.1 of the CEA, as it attempted to resolve issues at the lowest possible level. Oranga Tamariki also noted that the sanction imposed was less punitive than dismissal, and this was a decision that was informed by:

... a balanced consideration of [GYN's] personal circumstances, particularly [their] age, future job prospects and length of service.

[184] Clause 8.1 of the CEA sets out the preference in which Oranga Tamariki engages in conflict resolution, it sets out how it will engage when there is conflict resolution and the rationale for it. I am not persuaded that there has been a breach of contract. Oranga Tamariki met its obligation under clause 8.1 of the CEA.

[185] It "committed" to resolving the issues at the lowest level when it chose not to adopt a formal investigation; including XKU's efforts, albeit unsuccessfully, to get agreement from the complainants at GYN's request, for a 'restorative process'. I also agree the final outcome was also less punitive for GYN than the dismissal for serious misconduct as originally contemplated. The process may not have been "timely" but for reasons already discussed above in paragraph [173], I find the time taken to be inconsequential. This also certainly does not result in a successful breach of contract claim. I am satisfied that Oranga Tamariki recognised that resolving the issues as quickly as possible would have been ideal but simply, not practicable in these circumstances. For reasons already discussed as part of assessing Oranga Tamariki's procedural justification in not undertaking a formal investigation, I also find that Oranga Tamariki's decision not to undertake a formal investigation is not a breach of the CEA. Finally, I am also satisfied that the final outcome reached for GYN resulted from a balanced consideration of their circumstances, both inside and outside of the workplace (as per the mitigating factors noted in Oranga Tamariki's decision letter), and the nature of the issue (including the aggravating factors).

[186] Accordingly, the breach of contract claim is unsuccessful.

### **Orders**

[187] None of the claims have been made out. Accordingly, no orders are made.

### **Costs**

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

[189] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Oranga Tamariki may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum GYN will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[190] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>15</sup>

Davinnia Tan  
Member of the Employment Relations Authority

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<sup>15</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

## GLOSSARY

<b>Pseudonym of person</b>	<b>Role</b>	<b>Witness statement provided (Y/N)</b>
GYN	Applicant	Y
RTX	GYN's manager (regional manager)	Y
QZT	Acting site manager	Y
DON	Practice leader	Y
HWH	Supervisor (complainant)	Y
UZG	Supervisor (complainant)	Not a witness
EJS	Supervisor (complainant)	Not a witness
LGJ	Supervisor	Y
FXP	Social worker	Y
DBE	Interviewer (senior HR advisor)	Y
XKU	Decision maker	Y
TUY	Former manager	Y (taken as read)