

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2026] NZERA 116
3303060

BETWEEN

NICHOLAS FRY
Applicant

AND

FIRE AND EMERGENCY NEW
ZEALAND
Respondent

Member of Authority: Peter van Keulen

Representatives: Luke Acland, counsel for the Applicant
Tanya Kennedy, counsel for the Respondent

Investigation Meeting: 29 May 2025 and 27 November 2025 in Nelson

Submissions received: 27 November 2025 from the Applicant
27 and 28 November 2025 from the Respondent

Date of Determination: 2 March 2026

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nicholas Fry was first employed by Fire and Emergency New Zealand (FENZ) from 24 January 1986 until 17 November 2014. Mr Fry returned to FENZ in March 2022 as an Advisor Community Readiness and Recovery.

[2] In January 2024 Mr Fry discovered he had not been enrolled into the New Zealand Fire Service Superannuation Scheme (FireSuper). This was despite him applying to join FireSuper in June 2022 and being told by FENZ in July 2022 that he had been accepted into FireSuper.

[3] Mr Fry believed he was eligible to join FireSuper given the eligibility requirements, because TEP¹ (who was a close friend and colleague) had been accepted into FireSuper and because FENZ had told him it had accepted him into FireSuper back in July 2022.

[4] What followed was an exchange between Mr Fry and FENZ resulting in FENZ confirming that Mr Fry was not eligible to join FireSuper – he had been erroneously advised otherwise in July 2022. Also, and critically in terms of this employment relationship problem, FENZ removed TEP from FireSuper as FENZ discovered he was also not eligible and had been incorrectly allowed to join FireSuper previously.

[5] TEP held Mr Fry responsible for their removal from FireSuper. This was because Mr Fry had told FENZ that TEP had been deemed eligible to join FireSuper and as his own circumstances were almost identical to TEP's he should also be eligible to join. The subsequent fall out between the two caused considerable distress for Mr Fry.

[6] Mr Fry held FENZ responsible for TEP's removal from FireSuper as he believed FENZ had promised him directly that if he told them about TEP's eligibility TEP would not be removed from FireSuper.

[7] Despite ongoing dialogue with FENZ, Mr Fry was unable to resolve his and TEP's eligibility for FireSuper, and Mr Fry felt that FENZ had broken its promise to him regarding TEP's eligibility for FireSuper; so, Mr Fry raised personal grievances for these two sets of actions.

¹ This employee and their circumstances are an integral part of this employment relationship problem. However, they did not give evidence in my investigation meeting. Given that I could not test evidence relating to them and because some of the facts I have established may reflect badly on them I have decided not to name the employee and will refer to him as TEP.

[8] Following this because FENZ failed to remedy its alleged failings and because Mr Fry believed it had failed to support him at work in connection with the events arising out of the alleged breaches, Mr Fry resigned. Based on this resignation Mr Fry raised a personal grievance for unjustified dismissal.

[9] These three personal grievances form the employment relationship problem that I have investigated and this determination resolves.

The Authority's investigation

[10] I investigated this employment relationship problem by receiving written evidence and documents, holding an investigation meeting on 29 May 2025 and 27 November 2025 and assessing the written and oral submissions of the parties.

[11] In my investigation meeting, under oath or affirmation, witnesses confirmed their written statements and gave oral evidence in answer to questions from myself and the parties' representatives.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

The matters investigated

[13] This employment relationship problem encompasses three personal grievances:

- (a) A personal grievance for unjustified action by FENZ in not enrolling Mr Fry into FireSuper in July 2022 when it told him he was eligible to join, with this action causing disadvantage to Mr Fry's employment.
- (b) A personal grievance for unjustified action by FENZ when it failed to meet its promise to Mr Fry - that by naming TEP as being the colleague eligible to join

FireSuper FENZ would not cause TEP to be removed from FireSuper – with this action causing disadvantage to Mr Fry’s employment.

(c) A personal grievance for unjustified dismissal where Mr Fry resigned because of a series of breaches by FENZ’s; these breaches including the actions comprising the two personal grievances, FENZ’s failure to remedy the actions giving rise to the two grievances and then FENZ failing to support Mr Fry at work with the difficulties arising out of his ongoing work relationship with TEP.

[14] In respect of the first personal grievance, FENZ has raised the issue of whether it was raised within the 90-day time frame.² I will deal with this issue first.

[15] Then once I have determined if the first personal grievance has been raised in time, I will consider each personal grievance in turn – only dealing with the first personal grievance if I determine that it has been raised in time.

Was a personal grievance raised in respect of Mr Fry not being enrolled in FireSuper?

The legal position

[16] Section 114(1) of the Act sets out that any employee wishing to raise a personal grievance must do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[17] Section 114(2) of the Act sets out what constitutes the raising of a personal grievance:

For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

² Employment Relations Act 2000, s 114.

[18] So, there are two parts to raising a personal grievance:

- (a) Whatever communication being relied on as raising the personal grievance must be made within 90 days of the action giving rise to the grievance occurring or coming to the employee's notice.
- (b) The communication must make the employer aware that the employee is alleging a personal grievance.

What happened?

[19] Mr Fry was employed by FENZ as an Advisor Community Readiness and Recovery from 21 March 2022. Mr Fry's terms of employment included a right to participate in KiwiSaver and to obtain employer contributions consequently.

[20] Mr Fry advised FENZ of his participation in KiwiSaver on 7 March 2022 and from the commencement of his employment FENZ made contributions to Mr Fry's KiwiSaver fund.

[21] After a discussion with TEP around June 2022, in which TEP told Mr Fry he was a member of FireSuper, Mr Fry decided to apply to enrol into FireSuper. Mr Fry made his application to enrol in FireSuper on 30 June 2022. FireSuper provided eligible employees with greater employer contributions than KiwiSaver so being accepted into FireSuper would have given Mr Fry an increased benefit.

[22] On 21 July 2022 Mr Fry followed up on his application with FENZ payroll. In response to the follow up, a payroll advisor informed Mr Fry that his application had been actioned and he would see FireSuper contributions coming out of his next pay.

[23] Despite this advice Mr Fry was not enrolled into FireSuper in July 2022 and FENZ continued to deduct and pay employee contributions, and make employer contributions, to Mr Fry's KiwiSaver fund.

[24] In addition, Mr Fry did not receive any communications regarding FireSuper and he

continued to receive communications from his KiwiSaver fund provider.

[25] On 18 January 2024 Mr Fry and TEP discussed superannuation and TEP showed Mr Fry the FireSuper website, which Mr Fry had not seen before. As a result, Mr Fry checked his superannuation status and saw that he was not enrolled in FireSuper.

[26] Mr Fry then emailed FENZ payroll asking about which superannuation scheme he was enrolled in. FENZ payroll replied to this email on 23 January 2024 confirming that Mr Fry was not enrolled in FireSuper and FENZ and Mr Fry had been contributing to Mr Fry's KiwiSaver fund.

When did the action Mr Fry complains of (not being enrolled in FireSuper) happen or when did this come to Mr Fry's notice?

[27] FENZ did not enrol Mr Fry into FireSuper in July 2022.

[28] Mr Fry says he was not aware of this at the time, rather he only became aware of it in January 2024.

[29] Counsel for FENZ submits that Mr Fry must have been aware of the fact he was not enrolled in FireSuper in 2022 as contributions were not being made to FireSuper but rather Mr Fry's KiwiSaver contributions continued. Further Mr Fry did not receive any communications from FireSuper but continued to receive communication from his KiwiSaver fund provider.

[30] I find this submission compelling and accept at the very least that Mr Fry should have known he was not enrolled in FireSuper in July 2022. However, there are two factors which inform my view that Mr Fry did not know this at the time. First, he denies knowing this and remained firm in this view when giving evidence. Second, Mr Fry's actions in July 2022 were not consistent with him knowing as he did nothing about it – contrast this with the steps he took immediately on 18 January 2024 when he says he first realised he was not enrolled in FireSuper.

[31] I am satisfied that FENZ not enrolling Mr Fry into FireSuper came to Mr Fry's notice on 18 January 2024.

What communication does Mr Fry rely on as raising his personal grievance?

[32] Although there were various communications that Mr Fry had with FENZ regarding his eligibility to join FireSuper and the treatment of TEP's enrolment in FireSuper (outlined further below) none of these were sufficient to make FENZ aware he was raising a personal grievance in respect of the failure to enrol him in FireSuper in July 2022.

[33] Mr Fry raised a personal grievance on 9 May 2024 in correspondence sent to FENZ by Mr Fry's lawyer. In this correspondence Mr Fry sufficiently identified that the grievance related (in part) to FENZ not enrolling him into FireSuper in July 2022 when he was told he was eligible.

Was the communication raising the personal grievance made within 90 days of 18 January 2024?

[34] 9 May 2024 is 112 days after 18 January 2024. On this basis Mr Fry did not raise his personal grievance regarding the failure of FENZ to enrol him into FireSuper in time and I do not have jurisdiction to consider this grievance.

Does Mr Fry have a personal grievance relating to the FENZ assurance regarding TEP not being removed from FireSuper?

The legal position

[35] A personal grievance for unjustifiable action causing disadvantage to an employee's employment is set out in s 103(1)(b) of the Act. An employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[36] Mr Fry says FENZ promised him that if he gave it TEP's name, as TEP was the

colleague in a similar role to him who had been enrolled into FireSuper as a returning employee, then it would not use that information to have TEP removed from FireSuper. FENZ failed to keep that promise after he gave them TEP's name as TEP was removed from FireSuper. FENZ failing to keep its promise was an unjustified action and this caused a disadvantage to his employment as it caused a breakdown in his working relationship with TEP and damaged his reputation with other staff.

What happened?

[37] After Mr Fry received the email of 23 January 2024 advising him that he was not enrolled in FireSuper he sent a reply email in which he stated, amongst other things, that other returning employees had been accepted back into FireSuper, so he assumed he had been enrolled. After a further exchange of emails Mr Fry sent an email on 13 February 2024 stating that one of his colleagues in a senior advisor role returned to FENZ and was accepted back into FireSuper and this had set a precedent.

[38] What followed from this email is the key exchange between Mr Fry and FENZ. FENZ, through a Senior People Advisor, emailed Mr Fry on 13 February 2024 stating:

Apologies, as it stands the eligibility does not include advisors in community risk and recovery space.

Are you able to provide the name of that person and I can go and check why this has happened and even use it as a case for you if that is the case and this person has been given an allowance.

Just to note I do not choose who is eligible or not we just go by the trust deed and what FENZ and the FireSuper Directors have negotiated at this stage.

[39] FENZ then followed that email with a further one, just a few minutes later, stating:

... I just wanted to mention that I will not use that person's name as a way to get him or her removed from NZ FireSuper. If you are worried that revealing their name may put that at risk, I can say it won't.

[40] Mr Fry had been reluctant to provide TEP's name to FENZ in connection with their

entitlement to FireSuper. And, TEP had told Mr Fry not to disclose his name as he did not want to risk losing his entitlement to FireSuper.

[41] In this context Mr Fry read the second FENZ email of 13 February 2024 as an assurance that if he provided TEP's name, as the returning employee who was eligible for FireSuper, that would not put TEP's eligibility for FireSuper at risk. So, based on this assurance, Mr Fry then provided TEP's name to FENZ on 13 February.

[42] Having received TEP's name as the employee who was in the same circumstances as Mr Fry and was eligible for FireSuper, the FENZ Senior People Advisor emailed FENZ payroll on 14 February 2024, stating:

It seems we have another issue with Nick Fry in regard to him not being eligible for the NZ FireSuper. His colleague [TEP] who is in exactly the same role has been accepted into NZ FireSuper scheme.

Are you able to look into who approved this at all? I have screen shot [TEP's] details below:

....

[43] On 20 February 2024, after receiving some further information from FENZ employment relations team, the FENZ Senior People Advisor emailed Mr Fry advising him:

So, I have done some investigation and checked in with our employment relations team who are experts in the NZ FireSuper Scheme and payroll. Unfortunately, I don't have the answer you probably want to hear but the original email still stands as per the deed you are not eligible for NZ FireSuper at this stage.

I understand this may seem unfair as you believe there are other people that have been allowed into the scheme however I cannot disclose any information in regard to them or why or why not they were accepted.

[44] On 22 February 2024, TEP received an email from FENZ payroll that advised him:

It has been discovered that you have joined NZ FireSuper Scheme when you are not entitled to do so in your role of Senior Advisor Community Readiness & Recovery. The Payroll Advisor at the time should not have processed this.

I have been advised to stop payments going into [FireSuper Fund] and set you up to receive Employer Contributions in KiwiSaver.

[45] TEP was upset at being removed from FireSuper and was angry at both Mr Fry and the Senior People Advisor; TEP blamed them for his removal from FireSuper.

[46] Mr Fry says the fallout from the FENZ action of removing TEP from FireSuper was immensely stressful and devastating. TEP had been a friend and colleague of his for many years and their working relationship and friendship became very strained; TEP's animosity and lack of trust in him caused enormous stress at work. Mr Fry reached out to TEP to try and resolve things between them but was not successful. In the end Mr Fry took a secondment position from 2 April 2024 so that he did not have to work with TEP.

Did FENZ promise Mr Fry that it would not use TEP's identity to have him removed from FireSuper and, if so, did it then breach that promise?

[47] Mr Fry says the second email from FENZ Senior People Advisor on 13 February 2024 was a promise by FENZ that it would not use TEP's name in a way that would have him removed from FireSuper.

[48] FENZ says the second email of 13 February 2024 was not a promise that TEP would not be removed from FireSuper. Rather, it says the email was a reassurance that HR would not use TEP's name to get him removed from FireSuper.

[49] I do not accept the narrow construction FENZ adopts for the 13 February 2024. Objectively assessed in the context of the communications between Mr Fry and FENZ the 13 February email is a promise that if Mr Fry provides TEP's name to HR then that will not be used have TEP removed from FireSuper.

[50] It follows that FENZ breached this promise as TEP's name was passed to payroll and its subsequent investigations revealed that TEP was not eligible to participate in FireSuper, so he was removed.

Analysis – were FENZ’s actions justified?

[51] FENZ’s failure to keep its promise to Mr Fry was not justified. Arguably it was out of FENZ’s control as eligibility to participate in FireSuper is dictated by the FireSuper trust deed and FENZ has no ability to approve or remove participants in FireSuper. The answer to this is FENZ should not have made the promise it did. The result is FENZ’s actions were not justified.

Did FENZ’s actions cause a disadvantage to the applicants’ employment?

[52] Mr Fry’s employment was disadvantaged because of FENZ’s failure to keep its promise; his working relationship with a senior colleague, TEP, was damaged to an extent that made day to day work difficult for him.

Conclusion on unjustified action causing disadvantage grievance

[53] Mr Fry has a personal grievance for unjustified action by FENZ that caused a disadvantage to his employment.

Was Mr Fry constructively dismissed by FENZ?

[54] A constructive dismissal is where an employee’s resignation is treated as a dismissal – that dismissal can then be considered unjustified if the test for justification is not met.³

[55] A constructive dismissal can arise where an employee resigns in response to a breach, or breaches, of duty by the employer.⁴ The relevant case law shows that for a constructive dismissal to arise out of a breach of duty I need to be satisfied that:

- (a) There was a breach, or breaches, of duty by the employer.

³ The Employment Relations Act 2000, s 103A.

⁴ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

- (b) The breach of duty or the culmination of the series of breaches was sufficiently serious, i.e., repudiatory or dismissive, to warrant the employee resigning.
- (c) It was reasonably foreseeable that the employee might resign in response to the breach or series of breaches.
- (d) The employee did resign in response to the breach of duty or the breaches of duty.

[56] Mr Fry says he resigned because of a series of breaches by FENZ:

- (a) A failure to enrol him in FireSuper in July 2022 when it advised him that he would be enrolled.
- (b) Not remedying the failure to enrol him in FireSuper.
- (c) A failure to keep its promise regarding TEP not being removed from FireSuper in February 2024 when Mr Fry provided TEP's name to FENZ HR.
- (d) Not remedying the breach of promise in February 2024 by re-enrolling TEP into FireSuper.
- (e) An ongoing failure to support Mr Fry at work during 2024 with the difficulties arising out of his damaged work relationship with TEP.

[57] I will consider whether these breaches occurred. If any of the breaches did occur then I will assess if the breaches that occurred were sufficiently serious to warrant Mr Fry's resignation, whether it was foreseeable that Mr Fry would resign in response to any breaches that occurred and whether Mr Fry did, in fact, resign in response to those breaches.

What happened?

[58] After TEP had been advised that he had been removed from FireSuper the Senior

People Advisor emailed Mr Fry. In this email of 27 February 2024, the Senior People Advisor told Mr Fry that TEP's removal from FireSuper was not supposed to happen, and she apologised. She then told Mr Fry that she was working on getting what had happened, fixed. I note here that ultimately the FENZ HR team was unable to do anything about Mr Fry or TEP's enrolment in FireSuper as eligibility was set by the FireSuper trust deed and enrolment was not within FENZ's ability to decide.

[59] At this time, Grant Haywood, District Manager/Commander in Nelson, became involved. Mr Haywood spoke to Mr Fry about the issue with his enrolment in FireSuper. Mr Haywood encouraged Mr Fry to speak to the union and then arranged for Mr Fry to speak to the Chair of FireSuper.

[60] Mr Haywood also met Mr Fry in March 2024 to discuss his wellbeing and any support that he needed from FENZ, which included meeting with a Welfare Officer and intervention with the FENZ restorative team. Mr Haywood arranged for Mr Fry to access the Welfare team and referred the relationship problem between Mr Fry and TEP to the restorative team in FENZ.

[61] In March 2024 Mr Fry advised the restorative team that he did not want to proceed with the restorative process with TEP until their enrolment in FireSuper was resolved.

[62] On 2 April 2024 Mr Fry went on secondment in a Risk Reduction role; this was in a different team to Mr Fry's role in Community Readiness and Recovery. This meant Mr Fry did not have to work or interact with TEP on a regular basis. The secondment role had been offered to Mr Fry before the issues arose over his eligibility for FireSuper and with TEP.

[63] Mr Fry's secondment was in place until 2 September 2024. During this time and up until 25 September 2024 TEP was on an extended period of sick leave and working from home – this was unrelated to the issues with Mr Fry.

[64] By May 2024 FENZ had managed to agree changes to the FireSuper eligibility and

from 1 May 2024 Mr Fry and TEP became eligible to enrol in FireSuper.

[65] The restorative team then contacted Mr Fry again in a further attempt to commence a restorative process between Mr Fry and TEP. After initial contact with Mr Fry the process was put on hold due to TEP's absence. An attempt was made to recommence the restorative process in July 2024 but by August 2024 Mr Fry had decided he did not want to participate in the process, and he advised the restorative team of this.

[66] At the end of August 2024 arrangements were made for Mr Fry's return to his role in the Community Readiness and Recovery Team. Mr Haywood and Steve Trigg, Community Risk Manager – Mr Fry's reporting manager – met with Mr Fry to discuss his return to work.

[67] On 2 September 2024 when Mr Fry returned to work TEP, who was working from home at that time, sent Mr Fry an email welcoming him back to the team and directing him in terms of the work to focus on.

[68] Mr Fry says that on his return to his usual role on 2 September 2024 he immediately felt overwhelmed by the uncertainty over his working relationship with TEP. Mr Fry went to his doctor and was signed off work for four weeks. In the end Fry's sick leave was extended by his doctor until 11 November 2024.

[69] On 27 September 2024 Mr Fry emailed Mr Trigg to advise of the extension to his sick leave and in this email Mr Fry asked if there was an alternative position he could return to; Mr Fry also asked about counselling that FENZ could offer.

[70] What followed from this was an exchange of emails between Mr Trigg and Mr Fry in which Mr Trigg provided information about the FENZ welfare support and offered to arrange for a Welfare Officer to contact Mr Fry. Mr Fry advised that he was feeling better and looking forward to returning to work and asked again about an alternative position – ultimately Mr Fry expressed a view that FENZ should create a position for him so that he would not have to work with TEP. In response Mr Trigg advised that he was not aware that TEP had said he

could not work with Mr Fry and he understood that the two could work together professionally; he offered Mr Fry the opportunity to re-engage with the restorative process. Mr Trigg also asked Mr Fry if there were any adjustments that FENZ could make to support him in his work, noting at that time that there were no alternative positions available for Mr Fry to transfer to.

[71] Mr Fry returned to work on 11 November 2024, and Mr Trigg called him to discuss his work.

[72] Mr Fry says that on his return to work he felt so overwhelmed by the situation that he felt he had no choice but to resign.

[73] Mr Trigg and Mr Fry arranged to meet in person on 19 November 2024. In this meeting Mr Fry resigned.

Did FENZ breach any duties it owed to Mr Fry?

[74] I have already determined that FENZ breached a duty it owed to Mr Fry when it failed to keep its promise to him that TEP's identity would not be used to have TEP removed from FireSuper. However, I am not satisfied that FENZ breached any other duties that it owed to Mr Fry. Specifically:

- (a) There was no breach in relation to the failure to enrol Mr Fry into FireSuper in July 2022 – Mr Fry was not eligible to be enrolled and FENZ could not change that at the time as eligibility was determined by the FireSuper trust deed.
- (b) There was no breach by FENZ for alleged failures to remedy any breach by enrolling Mr Fry into Fire Super in 2024 – again FENZ could not do this.
- (c) There was no breach by FENZ for not re-enrolling TEP into FireSuper when he was removed from it in 2024 – again, FENZ had not ability to do this.
- (d) There was no breach by FENZ from February 2024 in terms of supporting Mr

Fry in his work at FENZ particularly as that related to his working relationship with TEP. I am satisfied that FENZ did enough in terms of supporting Mr Fry through the attempts to engage the restorative process, providing welfare support and counselling, supporting his secondment, and supporting his return-to-work from secondment and sick leave – including asking Mr Fry directly what support or adjustments he wanted to assist him in his return to work. This is particularly so in context of Mr Fry’s actual work conditions and the amount of interaction he would have had with TEP and what FENZ knew about the state of his working relationship with TEP.

Was the FENZ failure to keep its promise sufficient to support constructive dismissal?

[75] The breach of promise by FENZ does not support constructive dismissal for two straight forward reasons; Mr Fry did not resign at the time of the breach and Mr Fry did not resign just because of the broken promise. In the circumstances the breach of duty was not sufficiently serious to warrant resignation, it was not foreseeable that Mr Fry would resign in response to the broken promise and Mr Fry did not resign in response to the broken promise.

Conclusion on constructive dismissal

[76] Mr Fry’s resignation is not a constructive dismissal.

Conclusion on personal grievances and resolution of this employment relationship problem

[77] Mr Fry has a personal grievance for the unjustified action of FENZ – failing to keep its promise that TEP’s identity would not be used to remove him from FireSuper – that caused a disadvantage to his employment.

[78] Mr Fry does not have personal grievances for the other alleged actions of FENZ including constructive dismissal.

Remedies

[79] As Mr Fry has been successful with one personal grievance for unjustified action causing disadvantage, I must turn to consider what remedies he may be entitled to in terms of those provided for under s 123 of the Act.

Compensation

[80] Compensation is awarded pursuant to s 123(1)(c)(i) of the Act; it is for the humiliation, loss of dignity and injury to feelings that an applicant suffers because of the unjustified actions of the employer.

[81] When assessing compensation, I need to quantify the harm and loss caused by any humiliation, loss of dignity and injury to feelings arising out of FENZ's unjustified actions.⁵ I must consider the effect of the unjustified actions on Mr Fry and establish what that shows in terms of the harm caused to him and the loss he suffered as a result. I must then quantify the harm and loss; this is done by assessing Mr Fry's harm and loss against others who have been treated unjustifiably and establishing where that sits compared to the range of compensation awarded.⁶

[82] A key issue arises for the assessment of Mr Fry's harm and loss is that I must look at the effect of FENZ not keeping its promise to Mr Fry. Clearly FENZ's refusal to enrol Mr Fry into FireSuper after telling him he would be in July 2022 caused a great deal of upset, frustration and anger for Mr Fry. I need to separate out the humiliation, loss of dignity and injury to feelings arising for Mr Fry from not being enrolled into FireSuper from the assessment of the effect of FENZ not keeping its promise to him and the subsequent impact on his working relationships, especially with TEP.

[83] I assess the harm and loss suffered by Mr Fry that was caused by FENZ failing to keep

⁵ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; and *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁶ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

its promise to him as:

- (a) Humiliation and loss of dignity - Mr Fry described embarrassment at what occurred and for letting down a colleague, feeling isolated and vulnerable, and being seen as untrustworthy at work; Mr Fry says he felt like an “out-cast” and even now still doubts his own judgement and does not trust himself with decisions.
- (b) Injury to feelings through the guilt, stress and anxiety arising out of the harm to his relationship with TEP.

[84] Assessing where this harm and loss sits against other harm and loss suffered by those who are subjected to unjustifiable actions by their employer I quantify the compensation level to be \$13,000.

Reimbursement

[85] Pursuant to sections 123 and 128 of the Act if an employee has a personal grievance and they have lost remuneration because of that grievance then they are entitled to their actual lost remuneration or three months ordinary time remuneration. The key issue at the outset being whether the employee has lost remuneration because of the grievance.

[86] In this case Mr Fry has not lost any remuneration because of his personal grievance as he continued to be employed and continued to be paid.

[87] Mr Fry is not entitled to any lost remuneration.

Contribution

[88] As I have awarded a remedy to Mr Fry, I must now consider whether he contributed to the situation that gave rise to his grievances.⁷ This assessment requires me to determine if Mr

⁷ Employment Relations Act 2000, s 124.

Fry behaved in a manner that was culpable or blameworthy, and this behaviour contributed to his grievances.⁸

[89] Mr Fry did contribute to his personal grievance as he made the decision to give FENZ TEP's name and he did so without TEP's permission. However, in the circumstances he was entitled to rely on the promise he was given. So, my view is whilst he contributed, Mr Fry's actions were not culpable or blameworthy and therefore there is no basis for Mr Fry's compensation to be reduced.

Summary and orders

[90] Mr Fry did not raise a personal grievance in connection with not being enrolled into FireSuper within the requisite 90-day period and I do not have jurisdiction to consider it.

[91] FENZ acted unjustifiably toward Mr Fry when it failed to keep its promise that if he provided TEP's name to it then TEP's name would not be used to have him removed from FireSuper. This unjustified action caused a disadvantage to Mr Fry's employment, and he has a personal grievance for this.

[92] FENZ did not constructively dismiss Mr Fry.

[93] In settlement of Mr Fry's personal grievance for unjustified action, FENZ must pay Mr Fry \$13,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

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

[95] If the parties are unable to resolve costs, and an Authority determination on costs is

⁸ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

needed, FENZ 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 Mr Fry 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.

[96] 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.⁹

Peter van Keulen
Member of the Employment Relations Authority

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