

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 20
EMPC 301/2021**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

BETWEEN VIRGINIA HENRY
Plaintiff

AND SOUTH WAIKATO ACHIEVEMENT
TRUST
Defendant

Hearing: 10–12 and 18 August 2022
(Heard at Hamilton and Christchurch via Audio Visual Link)

Appearances: E B Burke, counsel for plaintiff
J Laphorne and M Hutcheson, counsel for defendant

Judgment: 22 February 2023

JUDGMENT OF JUDGE K G SMITH

[1] Virginia Henry began working for South Waikato Achievement Trust (the Trust) in 2000. The Trust is a community residential service for people with disabilities. By August 2017, Ms Henry had been promoted to a managerial position as “2IC Residential Co-ordinator”, one of two positions reporting directly to the Chief Executive Officer, Russell Ensor.

[2] Ms Henry was summarily dismissed by the Trust on 2 August 2018 at the conclusion of an inquiry that began with allegations that one of the Trust’s employees may have assaulted a person in its care.

[3] The Trust's inquiry into Ms Henry's conduct began after it dismissed the assault allegation. Its concern about her were that she:

- (a) had failed to adhere to its complaints procedure by delaying reporting the alleged assault;
- (b) reported the alleged assault for an improper purpose; to have the employee about whom she complained disciplined when she had failed to achieve that outcome in relation to another recent complaint she made about that employee; and
- (c) inappropriately questioned the person in care as part of reporting the alleged incident.

[4] On 12 April 2018, Ms Henry was suspended from work on full pay and did not resume her duties before being dismissed approximately four months later.

[5] Ms Henry raised personal grievances with the Trust. The Employment Relations Authority dismissed those grievances¹ and ordered that she pay costs to the Trust associated with the investigation.² She challenged both determinations and sought reinstatement to her position, compensation for lost remuneration, and compensation of \$40,000 for alleged humiliation, loss of dignity and injury to her feelings. A claim was also made for special damages for legal fees incurred during the Trust's investigation of her.

[6] The Trust does not accept that its actions in suspending and dismissing Ms Henry were unjustified.

The legal test

[7] Ms Henry pursued two personal grievances under s 103 of the Employment Relations Act 2000 (the Act); that she had been unjustifiably disadvantaged by being suspended and unjustifiably dismissed.³

¹ *Henry v South Waikato Achievement Trust* [2021] NZERA 340 (Member Arthur).

² *Henry v South Waikato Achievement Trust* [2021] NZERA 387 (Member Arthur).

³ Employment Relations Act 2000, s 103(1)(a)–(b).

[8] Under s 103A the question of whether the dismissal or an action was justified must be determined, on an objective basis, by applying the test in s 103A(2).

[9] The test in s 103A(2) is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[10] Section 103A enables the Court to consider the sufficiency of the investigation, whether the employer raised concerns with the employee before dismissing or taking action against the employee, whether there was a reasonable opportunity for the employee to respond, and whether the employer genuinely considered the employee's explanation (if any).⁴ The Court may also consider any other factors it thinks appropriate.

[11] In applying the test in s 103A of the Act, the Court is not to substitute the decision it would reach for the employer's decision. The Court is entitled, however, to review the facts on which the decision was made to decide whether the employer was entitled to say the dismissal or action taken against the employee was justified.⁵

[12] Significantly, a dismissal or action is not to be held to be unjustifiable solely because of defects in the process followed if they were minor and did not result in the employee being treated unfairly.⁶ The requirement is for an assessment of substantive fairness and reasonableness rather than minute and pedantic scrutiny to identify any failings.⁷

Non-publication orders

[13] The underlying complaint which led to Ms Henry's difficulties with the Trust involved an alleged assault by a Trust employee on an autistic person in care.

⁴ See s 103A(3)(a–d).

⁵ *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295 at [46]; and *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [26].

⁶ Section 103A(5).

⁷ *A Ltd v H*, above n 5; and *Angus v Ports of Auckland Ltd (No 2)*, above n 5.

[14] The Trust requested that an order be made that there be no publication of the names or information identifying the person in care, her support worker, or the employee alleged to have committed the assault. The person in care is now deceased. None of those persons gave evidence at the hearing.

[15] I agree that it would not be in the interests of justice to publish the names of those persons. At the hearing interim orders for non-publication were made. Those orders are now made permanent.⁸ In this decision the person in care will be known as “A”, that person’s support worker will be known as “B” and the employee alleged to have assaulted A will be known as “C”.⁹

What happened?

[16] On 30 March 2018, Ms Henry reported a complaint to Mr Ensor that alleged an incident had occurred in which A was injured. Ms Henry did not purport to witness that incident. She completed an incident form, but the details of the allegation were in an accompanying statement from A’s support worker, B. While B’s statement was also dated 30 March 2018, it detailed an incident that came to her attention about six months earlier, in late September or early October 2017. B’s statement noted seeing bruising to A’s toe and arm which she reported were attributed by A to the Trust’s employee C. B took photographs of the bruises which were included in the material she supplied to Ms Henry and, in turn, included in the report to Mr Ensor.

[17] Towards the end of B’s statement she mentioned what had prompted her to raise it with Ms Henry. The reason was A’s unwillingness to stay at a Trust hostel because of C’s presence there.

[18] Ms Henry’s complaint to Mr Ensor stated that she asked B why the incident was not reported when it occurred. The response attributed to B was that there was no point in reporting because nothing would get done and previously she had been instructed not to go on a “witch hunt” relating to C.

⁸ Employment Relations Act 2000, sch 3 cl 12.

⁹ A similar order was made by the Authority.

[19] Ms Henry's complaint recorded her action after receiving B's statement. She spoke to A and showed her the photographs of the bruises taken by B and noted the response. She also searched the hostel for any incident report that might have been prepared but found none.

[20] Ms Henry was aware of the alleged abuse of A before receiving B's statement. Her attention was drawn to the alleged incident by another employee, Wanda Lunam. Precisely when Ms Lunam informed Ms Henry was unclear but it was well before March 2018 and possibly as early as October 2017. Ms Lunam knew about the bruising A sustained because B had spoken to her about it, probably during October 2017.

[21] Mr Ensor reacted promptly to the complaint. It was delivered to him on 3 April 2018. He saw C that day and subsequently spoke with B and Ms Lunam. The investigation ended quickly. On 9 April 2018, Mr Ensor wrote to C confirming that the investigation was closed, and in so doing confirmed what he had told her the previous week. Mr Ensor's letter noted that he was unable to find "sufficient evidence to support the claim" but he had established that A had a history of making potentially false claims.

[22] Mr Ensor's letter to C suggested the investigation ended because the effluxion of time compromised it. However, his evidence was that he was satisfied at the time of his inquiry that no assault occurred.

[23] Two issues emerged immediately about Ms Henry's report to Mr Ensor. The first was its timeliness because the alleged incident occurred about six months before. The second was whether Ms Henry was motivated for an improper reason, retaliating because she was dissatisfied with the Trust's decision over another complaint she made about C on 26 March 2018. Her earlier complaint was about being sworn at by C during a phone call. Mr Ensor had resolved that complaint by reprimanding C but had declined to take any other action.

[24] Throughout the subsequent investigation Ms Henry explained that her delay in informing Mr Ensor about the alleged incident involving A was because she knew he would not act on a complaint unless it was in writing. She said that when the matter

came to her attention she asked B to provide information about what happened, including the photographs that were taken, but it was not until March 2018 that it was supplied. She could not, therefore, report the incident before then.

The inquiry turns to Ms Henry

[25] After Mr Ensor completed the investigation into the alleged assault on A, his attention turned to investigating Ms Henry's conduct in bringing the matter to his attention when she did. On 11 April 2018, he wrote to her to begin an investigation into six matters arising from the complaint. In summary, they were that:

- (a) she was aware of the incident around the time it had allegedly taken place;
- (b) she did not report the incident at the time;
- (c) in relation to her report of 30 March 2018, there was an issue as to whether B had approached her to lodge a complaint or that she had asked B to complain;
- (d) the incident was reported shortly after an earlier unsuccessful complaint Ms Henry made about C (the swearing incident mentioned earlier);
- (e) Ms Henry spoke to A which, given the delay, was not appropriate; and
- (f) there was a separate issue relating to her involvement in a van door slamming incident on a Trust vehicle referred to in complaints from two other staff members.

[26] Ms Henry was invited to a meeting to consider these matters to establish if there was sufficient evidence to warrant a disciplinary investigation. Additionally, Mr Ensor's letter proposed that Ms Henry be suspended because of "the nature of these concerns". She was asked to respond to her proposed suspension by 8.30 am the following day.

[27] Ms Henry attempted to address Mr Ensor's letter but was not successful in staving off the proposed suspension. She was suspended on full pay.

The investigation diverges into two

[28] Ms Henry and her union representative met Mr Ensor and Tarrin Terry, the Trust's adviser, on 16 April 2018. A few days later, on 19 April 2018, she received notice of a disciplinary meeting alleging serious misconduct. Four allegations were made and it is appropriate to set them out in full:

- 1 That on (sic) in late September / early October 2017 you were verbally advised by Wanda Lunam of an allegation that [C] had physical (sic) abused a resident of the Trust. You advised Wanda that you would follow this up with [B] who had made the allegation ([B] advised Wanda of this alleged incident). [B] states that you did not speak with her at this time. You did not report this allegation to me and this allegation was not investigated in a timely manner.
- 2 In relation to the above incident it is alleged that on or about 30 March 2018 you approached [B] and told her she needed to report the allegation as detailed above. It is alleged you did this with the intention of this ultimately resulting in disciplinary action being taken against [C].

It is noted that on 29 March 2018 you were advised that [C] would not be subject to a disciplinary meeting in relation to a separate complaint you had made against her.
- 3 It is alleged that you conducted an inappropriate investigation through the questioning of the resident who had allegedly been physically abused by [C]. The time delay was significant and this resident is also on the autistic spectrum.
- 4 It is alleged that in March 2018 you displayed inappropriate conduct and behaviour in front of your colleagues and Trust Clients. This was (sic) incident was just prior to a client outing and it is alleged that at this time you got angry and slammed the Choices Van door.

[29] Mr Ensor's letter briefly described the responses given at the meeting on 16 April 2018. The fourth allegation, about slamming a van door, was new because it was not in any way connected to the alleged assault on A or the complaint about that incident. Nor did it have any connection with the allegations that began to emerge to the effect that Ms Henry had some animosity towards C. The fourth allegation was eventually put aside as having already been dealt with.

[30] Shortly after being suspended Ms Henry instructed counsel who raised with Mr Ensor a claim that it was inappropriate for him to conduct the disciplinary investigation because he was alleged to have a very close relationship with C. Ms Henry claimed that because of that relationship Mr Ensor would not entertain complaints about C and that other support workers felt they were unable to raise issues about her for “fear of reprisals”. An independent investigator was requested. Mr Ensor denied the allegation.

[31] The parties agreed that the disciplinary investigation temporarily halted on 9 May 2018. A further investigation began about Ms Henry’s claim. As a result, Mr Ensor ceased to be involved in investigating the concerns he raised with Ms Henry following the suspension.

[32] Two investigations followed. In the first investigation Peter Treanor, who was a member of the Trust’s board, investigated the allegation about Mr Ensor and C. He was also appointed to investigate a personal grievance raised by Ms Henry claiming an unjustified disadvantage arising from the disciplinary process she was engaged in.

[33] The second investigation was conducted by another Trust board member, Neil Sinclair, into the concerns Mr Ensor raised. Mr Treanor and Mr Sinclair were both assisted by Ms Terry.

[34] A significant amount of hearing time was taken up with exploring the appropriateness and robustness of these inquiries.

[35] Mr Treanor’s investigation addressed six matters. In summary, they were that:

- (a) there was an inappropriate relationship between Mr Ensor and C and that therefore he refused to accept there was any basis for any complaint against C;
- (b) the Trust’s employees were prevented from raising complaints about C because of the inappropriate relationship;
- (c) there was a history of C’s misconduct going undisciplined;

- (d) Mr Ensor had told Ms Henry that he would “turn this around” on her when she submitted the incident report about C;
- (e) Mr Ensor threatened to have A removed from B’s care when the incident report was submitted; and
- (f) suspending Ms Henry for failing to progress a complaint in a timely manner but not suspending Mr Ensor for failing to progress a complaint in a timely manner constituted disparity of treatment.

[36] Mr Treanor and Ms Terry interviewed 19 Trust staff members and received two written statements. They also considered the records of complaints held by the Trust about C, a diary entry made by a support worker who was one of those interviewed, correspondence from Ms Henry’s lawyer, and a letter written by Ms Terry in which she stated the grounds of Ms Henry’s suspension were safety-related.

[37] Mr Treanor reported to the Trust on 19 June 2018. His conclusion was that there was no evidence to support any of the claims and he recommended that they not be accepted. He also recommended that disciplinary proceedings be “recommended” against Ms Henry and expanded to include claims that she potentially made a vexatious and/or malicious complaint about Mr Ensor and C and to investigate whether there was a breach of good faith by her in making those allegations.

[38] The Trust accepted Mr Treanor’s recommendations. The specific further allegations it developed were that the claims made by Ms Henry in her lawyer’s letter of 3 May 2018, and a subsequent email of 6 June 2018, were potentially vexatious and/or malicious in nature and may represent a breach by her of good faith obligations. For the avoidance of doubt, Ms Henry was advised that all other allegations remained as described in Mr Ensor’s letter of 19 April 2018.

[39] The Trust provided to Ms Henry a copy of Mr Treanor’s report and associated documents which included the typed notes of interviews he and Ms Terry conducted. Those notes were referred to as transcripts although they were not verbatim records of what was said.

[40] Ms Henry complained about Mr Treanor's report disputing its conclusions and claiming that, in reality, Ms Terry was the investigator because of the role she had taken throughout this part of the investigation. She drew attention to some of the interviews that were said to be capable of supporting her claim and, therefore, to contradict Mr Treanor's conclusions.

Mr Sinclair's investigation

[41] Mr Sinclair concluded the investigation started by Mr Ensor and as expanded following Mr Treanor's recommendations.

[42] Thirty-three questions were prepared in anticipation of a disciplinary meeting with Ms Henry on 27 June 2018. No advance notice of these questions was given to her, so the meeting did not proceed beyond its early stages. Instead it was rescheduled so she could provide written answers. She did that and her answers were discussed at a meeting on 13 July 2018.

[43] By the time Mr Sinclair and Ms Terry met Ms Henry and her lawyer in mid-July 2018, Mr Sinclair had not read the transcripts of staff interviews conducted by Mr Treanor. At the request of Ms Henry's lawyer he agreed to read them before concluding his investigation.

[44] Mr Sinclair's preliminary view was communicated to Ms Henry on 23 July 2018. He concluded that the first, second and third allegations were substantiated.

[45] Mr Sinclair's conclusions included findings that:

- (a) Ms Henry provided inconsistent information about when she became aware of the alleged abuse of A;
- (b) two members of staff had raised with her the alleged abuse of A, and that should have been fully addressed or "escalate[d]" at the time, which was not done;

- (c) contrary to Ms Henry's assertion, serious verbal complaints are always listened to and investigated;
- (d) there was a breakdown in the working relationship between Ms Henry and C;
- (e) on 6 March 2018, Ms Henry submitted a complaint about C on behalf of five staff members made verbally, contradicting her previous statement that only written complaints would be dealt with;
- (f) the 6 March 2018 complaint was made for an improper purpose because the five staff members did not complain about C at that meeting; and
- (g) the timing of the complaints made by Ms Henry about C, statements from staff members in relation to the working relationship she had with C, and statements from B and three other employees pointed to her raising an historic allegation with a view to having some form of action taken against C.

[46] Mr Sinclair did not change his view despite further representations on Ms Henry's behalf and she was summarily dismissed for serious misconduct.

The issues

[47] The issues are:

- (a) Was there a basis for Ms Henry's suspension in April 2018, and did the Trust follow an appropriate procedure before acting?
- (b) Was it open to Mr Sinclair to conclude that the allegations made about Ms Henry were serious misconduct?
- (c) If the answer to (b) is no, was Ms Henry unjustifiably dismissed and entitled to remedies?

Suspension

[48] Ms Burke, counsel for Ms Henry, criticised the Trust's decision to suspend because the reason given for it was vague and little time was provided to respond to the allegations used to justify it.

[49] Ms Laphorne, counsel for the Trust, submitted that the suspension was justified because the Trust had serious concerns about Ms Henry's conduct and she drew on the allegations it considered were substantiated.

[50] Ms Laphorne submitted that the suspension was fair in a procedural sense because an opportunity was provided to comment before it was implemented. Responding to the submission that Ms Henry could not address the proposal without more information being supplied, the argument was that she would have understood that the purpose of her suspension was to protect the integrity of the investigation and staff who may have been involved.

[51] Counsel concentrated on the appropriateness of Ms Henry's suspension and did not make submissions as to whether the Trust had the power to suspend. I proceed on the basis that the Trust enjoyed that power and the issue is whether it was entitled to exercise it in this case.

[52] Initially, all Ms Henry knew of the reasons for her suspension were the six concerns Mr Ensor listed in his 11 April 2018 letter. In relation to them he simply wrote that "given the nature of these concerns" he was proposing to suspend her from work on full pay. Why those concerns might have given rise to the need to remove Ms Henry from the workplace was not stated in his letter. The letter reads as if the existence of Mr Ensor's concerns was enough to justify the proposed action.

[53] When Mr Ensor gave evidence it was apparent that another reason existed for his decision that he did not disclose to Ms Henry. He attributed to her a bad temper, which presumably was intended to support the enigmatic description provided by Ms Terry when she was asked for an explanation for the suspension after it was imposed. Ms Terry informed Ms Henry that it was due to concerns "around client and staff safety" without elaboration.

[54] Mr Ensor did not explain why it was necessary to remove Ms Henry from the workplace to investigate the concerns he listed or how the undisclosed concern about her alleged temper was relevant. It could not have been to preserve his ability to investigate because he already possessed most of the information relevant to the concerns he identified. He had interviewed B and Ms Lunam as part of investigating the alleged assault on A and knew when they said that the incident was reported. He had written statements from B and any inconsistency in them was a matter for either interpretation or further inquiry from her not from Ms Henry. The door-slamming incident was the subject of written complaints already provided to Mr Ensor.

[55] There was a possibility of the investigation touching on Ms Henry's earlier complaint that had been made about C, about being sworn at, but Mr Ensor had already investigated that matter and dealt with it.

[56] Ms Henry acknowledged having spoken to A. She interviewed A in an attempt to establish that the alleged assault happened and that C was responsible for it which information she included in her report to Mr Ensor. The issue identified by Mr Ensor was that an attempt was made to interview A at all, given the reasons for her being in care, not the integrity of the answers that were given.

[57] Given the information Mr Ensor already possessed it is difficult to contemplate an appropriate reason justifying excluding Ms Henry from the workplace while the investigation was concluded. Compounding that difficulty is the fact that Ms Henry was deprived of an opportunity to address what appears to have been the real basis for her suspension, Mr Ensor's concern about her alleged temper.

[58] Ms Terry's explanation about client and staff safety does not assist the Trust. Ms Henry did not pose a risk to any client. She was not accused of assaulting A. Aside from Mr Ensor's belated statement about her alleged temper, which lack any specifics, there was no evidence that she posed a risk to staff. The highest these concerns reach is that one of the matters being investigated was that the complaint about C was mischievous, but that does not obviously fall within the broad scope of the words "client and staff safety" conveyed by Ms Terry.

[59] The decision to suspend Ms Henry was not justified. The Trust did not adequately disclose to her the reasons for it and there was no proper basis for reaching that decision. She has established her personal grievance under s 103(1)(b) of the Act.

Could the allegations be treated as serious misconduct?

[60] The test for serious misconduct was described in *Chief Executive of the Department of Inland Revenue v Buchanan*.¹⁰ It is not possible to define serious misconduct because it is always a matter of degree but what is needed is conduct that deeply impairs or is destructive of the basic confidence or trust essential to the employment relationship.¹¹

[61] Ms Burke's submissions can be summarised as:

- (a) Mr Ensor required complaints to be in writing before he would investigate them so that the criticism of Ms Henry for not acting sooner than she did was misplaced.
- (b) An independent investigator ought to have been appointed; the investigations by Mr Treanor and Mr Sinclair were not independent because they were actually conducted by Ms Terry who also assisted Mr Ensor.
- (c) Ms Terry ought not to have been involved in the investigation because she had expressed clear views about the allegations and in response to the complaint that Mr Ensor and C had an inappropriate relationship had threatened defamation proceedings.
- (d) Mr Treanor's investigation was flawed because:
 - (i) of the way the interviewees were selected;

¹⁰ *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [36]; *Minhinnick v New Zealand Steel Ltd* [2010] NZ EmpC 30, [2010] ERNZ 73; and *Hines v Eastland Port Ltd* [2018] NZEmpC 79, [2018] ERNZ 224.

¹¹ *Buchanan*, above n 10, at [36]; and *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA).

- (ii) it lacked a clear set of references;
 - (iii) the inquiry was misdirected so that it became about Ms Henry and her working relationships; and
 - (iv) he put aside statements made by some interviewees that could have supported Ms Henry's allegations about Mr Ensor and C;
- (e) Mr Sinclair's investigation was flawed because of the way in which it was conducted particularly in that:
- (i) Mr Treanor's flawed report was relied on; and
 - (ii) Mr Sinclair defaulted his role to Ms Terry;
- (f) At the time he made his decision Mr Sinclair did not know the allegation of assault was resolved and a conclusion reached that one had not occurred.
- (g) There was disparity of treatment of Ms Henry because others knew about the alleged abuse of A in September or October 2017 and they were not subjected to any disciplinary action.

[62] Ms Laphorne submitted that the Trust had not unjustifiably dismissed Ms Henry. It had sufficiently investigated the allegations, raised concerns with her, provided a reasonable opportunity to respond and genuinely considered the explanations offered. Fundamental to these submissions was that Ms Henry did not report the alleged assault when she should have and it was not credible for her to say that she was waiting for B (or anyone else) to put it into writing. The complaints procedure was clear; all complaints were required to be reported to the chief executive.

[63] A supplementary submission was that the only plausible explanation for Ms Henry not reporting the allegation when it came to her attention was that she did not genuinely believe an assault had taken place. Instead, she used the information for a mischievous purpose. Part of the Trust's case was that Ms Henry approached B

to solicit the information supporting her complaint, intending to cause trouble for C. The proximity between the outcome of one complaint and making the next one was not a coincidence.

[64] The Trust maintained that Ms Henry's interview with A was inappropriate.

[65] For the reasons that follow, I am not satisfied that the Trust has shown that its decision to dismiss for serious misconduct, viewed objectively, was one that was open to a fair and reasonable employer in all the circumstances.

[66] The first allegation was that Ms Henry knew of the alleged assault on A well before reporting it and her delay contravened the Trust's policy in its complaints procedure. Under that procedure, all complaints must be directed to the Chief Executive immediately. The procedure does not state that a complaint must be in writing, although after Ms Henry was suspended it was changed to make clear that all complaints, in writing or not, must be referred to the Chief Executive.

[67] Mr Sinclair's conclusion was that serious verbal complaints were always listened to and investigated but he accepted that the complainant is encouraged to record the complaint in writing. Implicit in these findings was that Ms Henry knew about the complaints procedure and did not comply with it.

[68] The difficulty for the Trust is that Mr Ensor did not always comply with the procedure and his expectations about complying with it were potentially confusing. While Mr Ensor said that all complaints were investigated and that he would consider a verbal complaint he also said that there was more weight behind a written one.

[69] It was apparent to Mr Sinclair that Mr Ensor clearly preferred complaints to be in writing. In an email to Ms Terry prior to the preliminary decision being written he acknowledged that was what Mr Ensor seemed to require. That observation assisted Ms Henry's response to the allegation but did not find its way into the conclusions rejecting her explanations.

[70] Mr Ensor did not always adhere to the complaints procedure, which opened up the possibility that Ms Henry's comprehension of how complaints were to be dealt

with may have been understandable. For example, he was criticised in an auditor's report for not applying the procedure in relation to one complaint. Further, when he investigated the alleged assault on A he did not take the steps required by it, such as acknowledging the complaint in writing or completing a written investigation report.

[71] Mr Sinclair relied on Ms Henry's senior position and her role in providing tuition about the Trust's policies to support his conclusion that she knew what the complaints procedure required but had not complied with it. That conclusion does not assist. While Ms Henry provided tuition to new employees that was only in a limited way, by supplying them with copies of the policies or access to them and nothing more. The conclusion does not address how Mr Ensor may have applied the procedure in practice.

[72] Mr Sinclair also drew on a further incident, on 6 March 2018, from which he deduced that Ms Henry understood what was required by the complaints procedure. At a staff meeting that day Ms Henry collated complaints from other staff about C, who did not attend the meeting, which she recorded in her diary and subsequently reported to Mr Ensor. This was an annual services review meeting although the significance of it being described in that way was not explained.

[73] The point was that the staff complaints made at the meeting were provided by Ms Henry to Mr Ensor even though they were not in writing. When asked if this action indicated she understood that all complaints must be reported, she distinguished between what was required by the complaints procedure and the status of this meeting. She described the service review meeting as a formal meeting in which staff had drawn issues to her attention about client care.

[74] Mr Sinclair also concluded that statements from staff present at the 6 March meeting made in Mr Treanor's investigation contradicted what she said because they had not, in fact, complained about C. That conclusion assisted him in deciding that the second allegation was established.

[75] The information Mr Sinclair relied on did not support his conclusions. In the absence of further information about what an annual service review meeting is, it is difficult to take this concern by the Trust very far. However, Ms Henry distinguished

between what was raised at this meeting and complaints such as the one in relation to A. It would not be appropriate to assume that at such a meeting client or staff-related issues were not intended to be brought to the attention of management or, if that happened, they needed to be treated as complaints under the Trust's procedures.

[76] More importantly, however, Mr Sinclair's rejection of what Ms Henry said happened in the 6 March meeting was based in part on his review of the interview notes taken by Mr Treanor from those staff members who attended that meeting. The conclusion Mr Sinclair reached was not open to him from the interview notes he read. In those notes the staff members were not asked directly if they intended to make complaints at the meeting on 6 March 2018. The question they were asked was a general one; if they had made a formal complaint about C or Ms Henry. Whether the interviewees would have connected complaints under the procedure and the discussion at the review meeting was entirely unclear.

[77] Finally, Mr Sinclair gave no weight to the fact that Ms Henry had only recently been appointed as 2IC and had no job description delineating her responsibilities and functions. Instead, in his email to Ms Terry before writing the preliminary decision he commented that Ms Henry's promotion may have been beyond her.

[78] The next difficulty confronting the Trust is the reliance it placed on actions attributed to B. Mr Sinclair's preliminary decision was critical of Ms Henry over how the alleged assault came to her attention. B made three separate written statements about the incident. They are inconsistent in describing when B reported the incident to Ms Henry. They are capable of supporting conclusions either that Ms Henry was eventually provided with information by B who did so voluntarily but well after the event, or that Ms Henry solicited information from B in late March 2018, just after Mr Ensor had dealt with the complaint that she was sworn at by C.

[79] Mr Sinclair elected to accept the subsequent explanation, to the effect that Ms Henry had solicited B's statement, to support the conclusion that the complaint was mischievous and designed to cause trouble for C. He did not make inquiries to justify such a conclusion in the face of B's inconsistent statements.

[80] There are other problems as well. Mr Ensor knew before beginning the investigation into Ms Henry's behaviour that there was no substance to the complaint that A was assaulted. The fact that he had concluded no abuse took place was relevant but was not taken into account by Mr Sinclair who viewed allegations of potential abuse of persons in care as very serious. Mr Sinclair ought to have known about the outcome of Mr Ensor's investigation. If he had known of it, it is likely that this incident would not have been characterised as a potential act of serious misconduct to begin with.

[81] The decision to dismiss raises a significant issue about the disparity between Ms Henry's treatment and the treatment of other staff members who knew about A being bruised and suspected she was abused. B was the first person to become aware of the bruising and it was her comment to Ms Lunam in about October 2017 that eventually led to Ms Henry being informed.

[82] The test for disparity of treatment was dealt with in *Buchanan*.¹² In that case the Court of Appeal posed three questions. Is there disparity of treatment? If so, is there an adequate explanation for the disparity? If not, is the dismissal justified, notwithstanding the disparity for which there is no explanation?¹³

[83] B did not report the matter to Mr Ensor in October 2017 or for that matter report to Ms Henry at that time as part of attempting to comply with the procedure. B was excused of responsibility because Ms Henry was eventually informed but that is an inadequate explanation for not following the complaints procedure. If the procedure was being applied B should also have faced some consequences given that she did not report the incident in October 2017.

[84] An attempt was made to differentiate between the circumstances confronting B and Ms Henry based on their relative seniority but the difficulty with that argument is that it is inconsistent with the complaints procedure. There is an obvious and unexplained disparity of treatment.

¹² *Buchanan*, above n 10.

¹³ At [45]–[49].

[85] The next problem is over the conclusion that Ms Henry was attempting to get C into trouble. On 26 March 2018, Ms Henry complained that she was sworn at by C during a telephone call which had the innocuous purpose of asking C if she had the Trust's van keys because they could not be located. The complaint was that C responded with offensive language; she was alleged to have said "Fuck off, hold I'll check my bag". According to the Trust's policies this statement could be regarded as using abusive or offensive language towards a manager giving rise to potential disciplinary action.

[86] Mr Ensor dealt with the complaint by issuing a reprimand to C by letter. In his letter he said it stopped short of a "formal disciplinary sanction" because he could not establish whether the language was directed at Ms Henry, or was an expression of C's disappointment with herself for having retained the keys. However, C was reminded that swearing and speaking inappropriately to any member of staff was not acceptable. Ms Henry was informed of the outcome of her complaint on 29 March 2018, one day before making the further complaint about C.

[87] The claim that Ms Henry was retaliating for the lack of success in causing trouble for C draws a very long bow and relies on the coincidence of timing. C was reprimanded for the language she used, which is a sanction, indicating that the complaint had some substance.

[88] In Mr Sinclair's preliminary decision he also linked the 26 March and 30 March complaints to the one Ms Henry made on 6 March 2018 following the annual service review meeting. An adverse conclusion was drawn to support the second allegation from the existence of three complaints by Ms Henry about C within the space of one month.

[89] If there was no substance to some or all of Ms Henry's complaints about C then the fact that they were made might support the Trust's second allegation, but that is not the case. Ms Henry's description of the matters raised with her at the meeting of 6 March 2018 remained uncontradicted. She described concerns being raised about the quality of C's care for, in particular, a male client and other matters such as completion of her work. There was no evidence that the Trust investigated these

allegations or that they were in some other way dismissed. The other allegations have been referred to already. There was substance to the complaint about being sworn at and sufficient information to prompt the investigation of the alleged assault into A.

[90] The next and most important difficulty for the Trust was the use of Mr Treanor's report and associated interviews to establish the complaints Mr Sinclair investigated. Mr Treanor and Ms Terry interviewed several Trust staff members but significantly fewer than the full complement of employees engaged in care. Nineteen people were interviewed but at the time the staff complement was somewhere between 50 and 60 personnel. They could not explain how the persons interviewed were selected. It was not clear whether they were thought to have knowledge of the events under investigation, were volunteers, or were chosen by some other method.

[91] What is troubling about Mr Treanor's interviews is that they appeared to be engaged in an assessment of Ms Henry as a manager. Many of the questions were very general ones about Ms Henry's working relationships with staff and her demeanour but both the questions and answers were without adequate context, or in some cases any context, to explain them. Some of the comments in the interviews were not flattering but many of the answers were vague so that they could not assist Mr Sinclair. For example, one question asked of the interviewees was whether they had ever submitted a formal incident report regarding either C or Ms Henry. One interviewee mentioned an incident eight years beforehand, in 2010. The relationship between this very general question and the investigations was not contained in either the statement or Mr Treanor's report.

[92] A significant issue arises about whether for those employees who commented that they had complained any analysis was undertaken to assess whether the complaint was investigated and, if it was, the outcome. The relationship between the existence of a previous complaint and the investigations Mr Treanor or Mr Sinclair were undertaking was not discussed by Mr Sinclair.

[93] Ms Henry was interviewed by Mr Treanor but, not surprisingly, could not adequately respond to the information he obtained given its general nature.

[94] Mr Sinclair did not separately interview the statement makers, but he interpreted adverse comments about Ms Henry in the transcripts as supporting allegations against her, particularly the second one. The transcripts invited broad and general answers lacking specific information but were turned into support for a specific allegation of retribution in the face of a consistent denial by Ms Henry. He seems to have given little weight to the positive comments made about Ms Henry in the interview notes or, for that matter, to at least three statements which raised questions about C's behaviour.

[95] Ms Henry insisted Mr Sinclair read the interviews as part of his inquiry and cannot complain that he did, but that does not justify the way that information was applied.

[96] The conclusion reached was not objectively something that could be derived from the interviews and was not fair to Ms Henry.

[97] Mr Sinclair did appear to have had at least one eye on the shortcomings of the performance-related matters he read about, because of the views he expressed to Ms Terry before writing the preliminary decision. In an email to her he made a telling observation that ought to have played a greater role in the decision making. Mr Sinclair's email ended with this statement:

Unfortunately that promotion as I see it was beyond her and with hindsight maybe needed training on how to be in charge of staff who previously had been [her] equals.

[98] These remarks ought to have led to some reflection about whether the circumstances identified required training rather than dismissal.

[99] For completeness, I do not accept the submission that either Mr Treanor or Mr Sinclair were not the investigators because they defaulted that task to Ms Terry. Her role was to assist both investigations and there was no evidence capable of supporting the claim that she was doing more than that.

[100] The third allegation was that Ms Henry had conducted an inappropriate investigation by questioning A about the alleged assault by C. An aspect of the

allegation was that the time delay between the alleged assault and the interview was significant and that A was on the autistic spectrum.

[101] The Trust did not explain what aspect of this complaint might give rise to a finding of serious misconduct. Nevertheless, in Mr Sinclair's preliminary decision he considered that this allegation, along with the first and second ones, when substantiated was serious misconduct. It was described as conduct that had irreparably undermined the trust and confidence in the employment relationship.

[102] Ms Henry's explanation was that she attempted to contact Mr Ensor for advice as to how to manage the process and, in the absence of a response from him, decided to proceed by interviewing A. She also apologised if the investigation process had not been conducted properly and said that in future she would bring issues immediately to Mr Ensor's attention.

[103] As it transpired what Ms Henry recorded as the outcome of her interview with A was essentially the same as the report provided by B, that the bruising was caused by C. The passage of time, it seems, did not affect what A said about the incident so it is difficult to see how that consideration could be determinative.

[104] The Trust did not explain why it was inappropriate for Ms Henry to talk to A given her autism. In the absence of an explanation as to why this step was inappropriate the Trust cannot satisfy s 103A in relation to it.

[105] The Trust's decision to dismiss does not satisfy s 103A. Ms Henry was unjustifiably dismissed.

Remedies

[106] Ms Henry sought reinstatement to her former position, lost remuneration, \$40,000 as compensation under s 123(1)(c)(i) of the Act, and special damages for legal fees incurred of \$8,060.48.

[107] Where a personal grievance for unjustified dismissal succeeds reinstatement is the primary remedy.¹⁴ It must be provided wherever practicable and reasonable no matter what other remedies are awarded.

[108] Ms Laphorne submitted that reinstatement was not practicable or reasonable because:

- (a) the former position of 2IC no longer exists;
- (b) Ms Henry's conduct irreparably destroyed the trust and confidence necessary in the employment relationship; and
- (c) her conduct caused disharmony in the workplace and reinstatement would result in further destructive conflict with other employees.

[109] Central to those submissions was that being practicable was not the same as being possible.¹⁵

[110] There was no dispute that the position of 2IC was disestablished about three years ago and was not replaced with any similar position. There was no suggestion that the reorganisation was undertaken as a means to frustrate Ms Henry's claim.

[111] I accept Ms Laphorne's submission that if reinstatement was ordered Ms Henry's claim of an inappropriate relationship between Mr Ensor and C, who are still employed by the Trust, would create a significant and probably insurmountable difficulty to an ongoing employment relationship. Any senior position Ms Henry might take up would inevitably require her to deal with Mr Ensor and C in circumstances where she has previously accused them of a significant professional and personal lapse. I agree that reinstatement is not practicable or reasonable.

[112] The remaining claims are for lost remuneration, compensation under s 123(1)(c)(i) of the Act and special damages. Ms Burke approached compensation

¹⁴ Employment Relations Act 2000, ss 123(1)(a) and 125; see the discussion in *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153.

¹⁵ *Campbell v Commissioner of Salford School* [2015] NZEmpC 122, [2015] ERNZ 844 at [305].

for both personal grievances globally, not differentiating between the disadvantage and dismissal claims. I will take the same approach.

[113] When Ms Henry was dismissed by the Trust, she was earning \$96,702 (gross) per annum. She was without work for two weeks before obtaining casual employment. She calculated her losses from the date of dismissal until the date of the Authority hearing as \$52,636.72, after making allowances for lost and reduced remuneration. No explanation was given for the assessment or evidence of loss ending at that point. She claimed reimbursement for travel-related expenses to reimburse petrol costs of \$5,400 and accommodation to the value of \$9,360. Both of those amounts appear to be estimates.

[114] Under s 123(1)(b) of the Act the Court may order reimbursement of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. Where reimbursement for that loss is to be ordered, s 128(2) provides for it to be the lesser of a sum equal to the lost remuneration or three months' ordinary time remuneration, but there is a discretion to award a greater amount.

[115] The claim invites the Court to exercise the discretion under s 128(3) to extend the time over which compensation for lost remuneration is payable. Ms Burke contended that those losses were sustained because of the Trust's actions and ought to form part of an order.

[116] In contrast, Ms Lapthorne submitted that there was no basis for an award of lost remuneration given Ms Henry's conduct. She did not dispute Ms Henry's calculation of her lost income but submitted an award should not be made. As a fallback she submitted that any award for lost wages should be modest and capped at several weeks' pay. She did not say how much that ought to be but, presumably, it was lost income for the time just after the dismissal when Ms Henry was searching for work and before she began her casual employment. Her point was that the assessment must allow for all contingencies and that the prospects for Ms Henry's ongoing employment were low because of the problems identified with her conduct.¹⁶

¹⁶ Relying on *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [26].

[117] I do not accept that Ms Henry's ongoing employment prospects with the Trust were tenuous. Prior to March 2018 she had 18 years' service and there was no evidence that, during that time she had any history of poor behaviour or otherwise that her job was at risk. Her promotion to 2IC suggests she was regarded as having reasonable prospects of ongoing employment.

[118] Ms Lapthorne submitted that Ms Henry was obliged to mitigate her losses and that she had to provide a satisfactory account of efforts made to obtain employment, including dates, places, names, copies of correspondence and details of alternative employment and the reasons for ceasing that employment.¹⁷ I prefer the approach taken in *Xtreme Dining Ltd (t/a Think Steel) v Dewar*.¹⁸ I am satisfied that Ms Henry did take reasonable steps to mitigate her losses by accepting casual employment as a stop-gap measure before finding full-time employment.

[119] Ms Lapthorne is on stronger ground criticising other aspects of the financial claim where supporting information was lacking. Ms Henry has not established that the amounts sought for petrol and accommodation follow from the Trust's unjustified dismissal and they need to be deducted from the amount claimed.

[120] The next issue is the claim for special damages. The amount claimed is what Ms Henry spent on retaining a lawyer to act for her from shortly after the suspension interview in April 2018 until her dismissal. Ms Lapthorne did not query the amount but placed in issue whether it was appropriate to award special damages or, instead, whether those costs ought to be treated as costs of the litigation and dealt with at the conclusion of the hearing on that basis.

[121] There is a difference between the attendances by Ms Henry's lawyer in dealings with the Trust during its inquiries and later attendances to distinguish them from the subsequent costs incurred to be represented in the Authority and Court. Ms Henry was entitled to be represented in dealing with her employer and those costs are not subsumed into the costs of litigation.

¹⁷ Relying on *Allen v Transpacific Industries Group Ltd (t/a Medismart Ltd)* (2009) 6 NZELR 530 (EmpC) at [78].

¹⁸ *Xtreme Dining Ltd, (t/a Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628.

[122] The next claim is for compensation for humiliation, loss of dignity and injury to Ms Henry's feelings. Ms Henry said her years of work for the Trust were meaningful and rewarding professionally and personally. She described feeling crushed and devastated when she lost her job that she had hoped to continue until retirement. She could not understand why everything turned around and why what she described as false allegations were "drummed up" against her.

[123] Ms Henry referred to the indignity of being suspended from her job for almost four months, being subjected to testimony which she considered vilified her without there being complaints raised against her by those staff members who criticised her during the investigation process, and emotional anguish at being suspended. She recounted sleepless nights, inconsolable crying and self-doubts. She said she was too ashamed to show herself in public in her small community because of the indignity of being suspended from her job, which news spread quickly.

[124] Ms Henry said she went through a great deal of mental and emotional stress as a result of the suspension and while waiting for four months to discover her fate. She said, and I accept, that these events led to her questioning her self-worth and having suicidal thoughts.

[125] Ms Burke submitted that the impact on Ms Henry was consistent with the situation in *Rayner v Director-General of Health*.¹⁹

[126] Ms Lapthorne submitted that the case did not warrant an award exceeding Band 2 as described in *Richora Group Ltd v Cheng*.²⁰

[127] Ms Henry was deeply impacted by the decisions to suspend and then dismiss her. The emotional rollercoaster began from the moment she was suspended. The discussion of her emotional feelings has some similarity with the circumstances in *Rayner*. I agree that this case falls into band 2 and consider that \$35,000 is an appropriate amount to order.

¹⁹ *Rayner v Director-General of Health* [2019] NZEmpC 65, [2019] ERNZ 142.

²⁰ *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

Did Ms Henry contribute to her dismissal?

[128] Under s 124 of the Act, the Court is required to consider whether Ms Henry contributed to the circumstances giving rise to the grievance. If she did, remedies must be reduced. Ms Laphorne argued that there was a contribution and recommended that the steps referred to in *Maddigan v Director-General of Conservation* be followed.²¹ After those steps were taken, and in reliance on *Xtreme Dining Ltd*, it was submitted that a significant reduction would be appropriate in this case, somewhere between 25 and 50 per cent was recommended.

[129] The contributing conduct was said to be the delay in raising concerns regarding the alleged abuse of A, that her misconduct was egregious given the vulnerable members of the community the Trust serves, and that her actions fatally damaged the employment relationship.

[130] I do not agree. It is difficult to see that Ms Henry contributed towards the Trust's decision. She implemented the policy as she considered it was applied. What followed was a direct consequence of the Trust viewing Ms Henry's conduct as being contrary to the policy and retaliatory.

[131] It might be argued that some part of Ms Henry's action was contributory in the sense that she raised the subject of the relationship between Mr Ensor and C that lead to the Treanor investigation. However, while Ms Henry's allegation may now be seen as ill-judged, it was made as a reaction to the allegations about her conduct and needs to be seen in that light.

[132] I am not satisfied that any ground has been made out for a reduction in remedies.

Outcome

[133] The challenge to the Authority's determinations is successful and they are set aside. Ms Henry was unjustifiably disadvantaged and dismissed.

²¹ *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550.

[134] The Trust is ordered to pay Ms Henry:

- (a) lost remuneration of \$52,636.72;
- (b) special damages of \$8,060.48; and
- (c) compensation pursuant to s 123(1)(c) of the Act of \$35,000.

[135] Costs are reserved. Counsel are encouraged to agree about them but if that is not possible memoranda may be filed.

K G Smith
Judge

Judgment signed at 9.40 am on 22 February 2023