INTERIM ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES

IN THE EMPLOYMENT COURT
WELLINGTON

[2018] NZEmpC 60
EMPC 259/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	FGH Plaintiff
AND	RST Defendant

Hearing:	27 – 29 March 2018 (Heard at Wellington)
Appearances:	S Henderson, counsel for plaintiff S Dyhrberg and A Clarke, counsel for defendant
Judgment:	1 June 2018

JUDGMENT OF JUDGE B A CORKILL

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Introduction

[1] FGH (Ms H) is an employee of a government organisation, RST, which has as one of its responsibilities the obligation to issue certain formal documents to the public; Ms H worked in a team which processed applications for these documents.[1]

[2] Over seven months in 2015 and 2016, Ms H was required to participate in informal, then formal, performance management processes. She had an anxiety disorder which affected her whilst doing so, to the point that she became so ill she could not attend work for some weeks. She had asserted, from time to time, that she had been bullied and that there were health and safety issues.

[3] When she was certified to return to work following her illness, it was agreed that a report from an occupational physician should be obtained; however, there was a dispute as to the basis on which the medical consultation would be conducted so that it did not occur. Although she remains an employee of RST, the parties have been unable to agree the basis on which she might return to work.

[4] Ms H raised a disadvantage grievance asserting that RST had failed to provide a safe work environment when dealing with her performance issues. She said this has subjected her to unwarranted stress. RST denied her claims, contending it had treated her appropriately.

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[1] For reasons outlined in my interlocutory judgment of 2 February 2018, an order of non-publication of names of the parties to the proceeding, or any version of the determinations of the Authority to which the proceeding relates which may contain the names of, or otherwise identify, the parties: *FGH v RST* [2018] NZEmpC 1 at [35].

[5] Following a five-day investigation meeting in late 2016, the Employment Relations Authority (the Authority) issued its determination in August 2017, dismissing the claims made by Ms H.[2] It concluded that RST had justifiably addressed performance concerns. The Authority found that Ms H had failed to understand the gravity of those concerns or the extent of her perceived deficiencies. As a result, she failed to react positively to a concerted attempt to assist her to perform in the desired way; she thought those attempts were improper. Accordingly, her claim was dismissed.

[6] Ms H then instituted a de novo challenge to the Authority's determination, which means that the Court must consider the matter afresh.

[7] In this judgment, I first analyse the pleadings for the purposes of identifying the issues which the Court must resolve. I then describe the history of events in some detail, based on a significant volume of documentation and the evidence of eight witnesses. Finally, I analyse each cause of action.

[8] In the result, I am satisfied that Ms H has established a disadvantage grievance on three grounds. Because insufficient evidence and submissions have been placed before the Court as to remedies, I have concluded that it will be necessary to resume the hearing to consider those matters.

Issues

[9] Ms H's statement of claim sets out the various legislative and contractual provisions which are said to be relevant, to which I shall return later, and summarises the relevant chronology.

[10] Then it is asserted there are eight causes of action giving rise to personal grievances for unjustified disadvantage. These, paraphrased, are as follows:

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[2] *[FGH] v [RST]* [2017] NZERA Wellington 78.

a) First cause of action: RST did not meet its statutory and contractual obligations to provide Ms H with a safe and healthy work environment since July 2015, thereby giving rise to a disadvantage grievance.

b) Second cause of action: RST's temporary team leader, Ms Phillipa Julian, affected Ms H's conditions of employment to her disadvantage in respect of her status as an approver on 30 July 2015, and by disallowing access to over-time opportunities to improve her income on 14 August 2015, both such steps being taken without notice and without providing her with an opportunity to respond before the relevant decisions were made.

c) Third cause of action: RST managers, Ms Louise Sinclair and Mr David Philp, received a complaint on 18 August 2015 that Ms Julian was bullying Ms H, but failed to arrange an impartial investigation of that complaint which affected her conditions of employment to her disadvantage.

d) Fourth cause of action: Ms Sinclair, who received notice of a complaint of bullying by Ms Julian from a health and safety representative on 28 September 2015 on behalf of Ms H, failed to arrange an impartial investigation which affected Ms H's conditions of employment to her disadvantage.

e) Fifth cause of action: on 30 September 2015, Ms Tiffany Scott, senior Human Resources (HR) manager, failed to arrange an impartial investigation on receiving a complaint from Ms H about bullying by Ms Julian, which affected her conditions of employment to her disadvantage.

f) Sixth cause of action: Ms Julian wrongly instituted a disciplinary process on 21 January 2016, and wrongly decided it on 22 February 2016, affecting Ms H's conditions of employment to her disadvantage.

g) Seventh cause of action: upon receiving notice of Ms H's complaint of bullying by Ms Julian on 26 February 2016, Ms Sinclair wrongly instituted disciplinary proceedings against Ms H, affecting her conditions of employment to her disadvantage.

h) Eighth cause of action: on 13 May 2016 and thereafter, the defendant's management engaged in "adverse conduct" as defined by the Health and Safety at Work Act 2015 (HSW Act), maintaining the disciplinary/dismissal processes commenced by Ms Sinclair on 26 February 2016, which affected the conditions of her employment to her disadvantage.

[11] The statement of claim goes on to allege that as a consequence, Ms H's illness continued for two and a half months from late February 2016, which after the expiration of three weeks' paid sickness leave on 21 March 2016, left her without an income. Subsequently, she obtained support from Work and Income, which continued until she secured temporary employment as a sales commission agent in April 2017.

[12] Ms H claims that on the basis of the foregoing unjustified disadvantage claims, the Court should make an order for compensation of $75,000 for humiliation, loss of dignity and injury to feelings; and order reimbursement of lost earnings and benefits in a sum to be quantified together with interest thereon.

[13] Apart from the first cause of action which overarches the entire chronology, each subsequent cause of action asserts a disadvantage grievance with regard to the key steps that were taken in a lengthy performance improvement process, and after Ms H was absent from the workplace due to illness. There is significant overlap between the first cause of action on the one hand, and the second to seventh causes of action on the other; the eighth is related to the seventh cause of action. Because the circumstances are connected and the causes of action overlap, it is appropriate in my view to regard Ms H's claim as being a single claim for a disadvantage grievance under s 103(1)(b) of the Employment Relations Act 2000 (the Act). It would be artificial to do otherwise.

[14] However, in his opening submissions, Mr Henderson, counsel for Ms H, analysed the issues rather differently, doing likewise in his closing submissions. That analysis raised issues that were in some respects more broadly expressed than those raised in the statement of claim. In some instances, it appeared to be suggested that specific findings of unjustifiable action should be made, although not specifically pleaded. An example relates to the detailed submissions which Mr Henderson made as to "covert surveillance" and the "stockpiling of information" without disclosing it in breach of s 4 of the Act. Another example relates to bullying: Mr Henderson argued that Mrs Shona Garwood, a health and safety representative, had a legal duty to assess whether Ms H was at risk when she said she had been bullied in late September/early October 2015 which she failed to discharge. Yet, there were no specific causes of action about those allegations. Nor was there a relevant application for leave to amend the statement of claim, as would have been necessary if specific findings to this effect were sought.

[15] Understandably, Ms Dyhrberg, counsel for RST followed the format of Mr Henderson's analysis when presenting her submissions, so as to be able to answer the assertions that were raised.

[16] However, the Court is obliged to determine the case according to the pleadings. This was emphasised by the Court of Appeal in *Price Waterhouse v Fortex Group Ltd,* in dicta which is no less important now than it was then:[3]

> It has become fashionable in some quarters to regard the pleadings as being of little importance. There was an echo of that approach in the implicit suggestion floated in this case that exchange of briefs of evidence before trial might be seen as curing any lack of particularity in the pleadings. Any such view is misguided. Pleadings which are properly drawn and particularised are, in a case of any complexity, if not in all cases, an essential road map for the Court and the parties. They are the documents against which the briefs of evidence are or should be prepared. They are the documents which establish parameters of the case, not the briefs of evidence.
>
> We are not casting aspersions on the pleadings in this case which, leaving aside issues about necessary particularity, are well drawn on each side. Nor are we advocating a pedantic approach to the topic. Pleadings should be read as conveying what they would reasonably convey, in the context of the case, to a sensible legal mind. Even less are we advocating prolixity of pleadings, or the raising of every conceivable cause of action irrespective of its potential

[3] *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 17-18.

> success; this type of pleading often contains the additional flaw of overlooking r 114 which requires each cause of action to be separately pleaded. *What we are saying is that both the Court and opposite parties are entitled to be advised of the essential basis of a claim or defence, and all necessary ingredients of it, so that subsequent processes and the trial itself can be conducted against recognisable boundaries. Neither the Court nor opposite parties should be placed in the position of having to deal with a proposition of whose substance adequate notice has not been given in the pleadings.*
>
> (emphasis added)

[17] The one caveat which arises under the Act is found in s 122, which provides that the Court has the power to make a finding that a personal grievance is of a type other than that alleged.[4] While the Court possesses that power, I do not consider that it is necessary in the interests of justice to utilise it here. I am satisfied that although some of the assertions which are now made are outside the scope of the causes of action which relate to specific events on particular dates, the first cause of action is widely expressed and is the principal vehicle for considering the primary claim raised for Ms H; and I am satisfied that RST has been able to comprehensively address all the relevant issues.

[18] I conclude that the issues in the case are best analysed with reference to the eight causes of action. I will consider the evidence and counsel's detailed submissions within that framework, referring to them as is appropriate.

[19] The final preliminary point is that because each cause of action pleads a disadvantage grievance, the ultimate issue for the Court is whether Ms H's employment, or one or more conditions of her employment, were affected to her disadvantage by unjustifiable action on the part of RST. These assertions are to be assessed according to the test of justification set out in s 103A of the Act: were RST's actions, and how it acted, what a fair and reasonable employer could have done in all the circumstances?[5] The health and safety, and bullying, assertions must be considered within this statutory context.

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4 As, for example, in *Nathan v C3 Ltd* [2015] NZCA 350, [2015] ERNZ 61 at [35]; and *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 171, [2015] ERNZ 1124 at [236].

5 The section was comprehensively discussed by the full Court in *Ports of Auckland v Angus* [2011] NZEmpC 160, [2011] ERNZ 466.

Chronology

[20] The chronology is somewhat long and complex. I now summarise the relevant events, although it will be necessary to return to specific elements of the history when considering particular causes of action.

Mid 2013 – mid 2015

[21] After working for RST on a temporary basis for some months in 2010 and 2011, Ms H commenced working for the organisation in a permanent role in early February 2012. Her job required her to work in one of several teams of about eight members, each of whom was responsible for the processing of applications made by members of the public, and once assessed and if appropriate, issuing a formal document to an applicant.

[22] According to Ms Rachael Badham, who was Ms H's team leader until mid-2015, Ms H's performance fluctuated between poor and satisfactory. Two formal performance improvement plans (PIPs) were undertaken.

[23] I interpolate that the documentation relating to the PIPs which is before the Court shows that the process consisted of establishing specific expectations for improvement, where relevant the provision of coaching and support, and the undertaking of reviews on predetermined dates to assess whether recorded targets had been achieved.[6]

[24] The first PIP was implemented in June 2013. Its preamble stated there had been a number of changes in the relevant work processes, which resulted in concerns as to Ms H's throughput and her ability to adapt quickly to the changes which had been introduced. The PIP stated that Ms H had not reached the expected minimum daily processing level set at an average of 40 applications for resolution; and that there were issues as to punctuality of attendance.

[6] A Performance Improvement Policy approved in January 2016, is before the Court, but not one pertaining to the period which precedes that date when the applicable PIPs were entered into. The summary in this paragraph is accordingly based on the actual PIPs which were in evidence, for the period 2013 – 2015.

[25] According to later documentation, Ms H managed to meet the expected targets for the first half of the review period, but she did not do so in the second half. A disciplinary meeting was held, which resulted in a written warning for inadequate performance being given on 3 October 2013.

[26] Then, on 11 November 2013, a further PIP was implemented. It recorded that system changes had been introduced following the previous plan, and that the processing requirement was now 50 applications per day. The PIP focused on this expectation.

[27] On 7 March 2014, Ms Badham wrote to Ms H recording progress made during the second PIP. She was pleased to note that there had been "a marked improvement in your performance over the last three months". Overall, Ms H's achievements against expectations were described as being "at a good level". Ms Badham said the challenge would be to maintain this performance; she would continue to work with Ms H on this issue.

[28] Further performance concerns arose in early 2015. Ms H implied that these were catalysed by issues which were affecting her personal life. She acknowledged that as a result of these her work "slipped a bit".

[29] Ms Badham said she began to closely monitor Ms H's work on a daily basis over May and June 2015.

[30] On 30 June 2015, she met Ms H to reiterate her concerns and discuss what was expected of her. The notes relating to the meeting record an "inconsistency in taking timely action on applications and recording in file notes what the problem was, and what action had been taken". An action plan was agreed, which set up a structured work programme for each day.

[31] The same day, Ms Badham sent an email to Ms Julian, who was about to take over as temporary team leader, attaching the action list and stating that she envisaged there would be weekly meetings and monitoring, together with random checks on her work over a period of four to six weeks. She told the Court she had also informed

Ms Julian that Ms H needed to lift her performance otherwise there would have to be more formal action.

July 2015

[32] Initially, Ms H and Ms Julian got on well, communicating with each other informally but constructively.

[33] However, Ms Julian then became concerned as to whether the action plan was being complied with. She felt that not only was there a low throughput of work, but there was inconsistency in Ms H's method of working.

[34] As a result of these concerns, she started maintaining a very detailed log of all her interactions with and about Ms H, who did not learn of the existence of this record until she issued her proceeding in the Authority. That said, it is a largely contemporaneous and accurate record of relevant events.

[35] On 13 July 2015, Ms Julian, and a business coach who was familiar with the technical requirements of Ms H's work and who knew her, Ms LeNora Sila, met with Ms H. This was an informal meeting, with the intention of supporting Ms H to improve her performance.

[36] Ms Julian then decided to conduct what were described as "regular touch-base meetings" with Ms H to discuss her performance and to give feedback; she also set up regular coaching sessions between Ms H, Ms Sila and another business coach, Mr Mike Sidaway.

[37] On 28 July 2015, a particular problem arose. Ms Julian emailed Ms H regarding three particular applications that had not been processed in a timely way. The email exchange resulted in a conversation in which Ms Julian told Ms H she wanted her to focus on resolving particular applications, to deal with them as they occurred, and not to undertake "approving" work. This was a task which involved double checking the processing of applications by other members of her team. Ms H regarded the undertaking of this task as an indication of competence, and wished to continue this work.

[38] Later, she said she did not realise that a decision had been made that day to revoke her authority to do this work. Ms Julian in her log specifically recorded that she told Ms H she wanted her to concentrate on her work list, and not to do any approving work even although she was rostered to do it. Ms Julian recorded that Ms H was not happy about this.

[39] The next day, in the presence of Ms Sila, Ms Julian told Ms H she would "not be approving applications until she [could] consistently show she is able to manage her work list".

[40] In an email sent by Ms H to Ms Julian, on 30 July 2015, she described herself as suffering attention-deficit disorder (ADD), a well-recognised condition.

August 2015

[41] On 4 August 2015, Ms Julian recorded that she had met with the business coaches to "look at the evidence they had been collecting about [Ms H's] work list". She then spoke to Ms Nicola Wairau, a senior HR advisor. She asked whether there was enough evidence to proceed to a PIP; she was told that there was not. Rather, there should be a discussion with Ms H as to what was getting in the way of completing work on the action list, and to deal with issues as they came up. A question arose as to how Ms H's performance could be supported.

[42] This led to a discussion between Ms Julian and the business coaches as to a more focused approach for Ms H, with one application at a time being processed before moving on to the next one. Ms Julian then sent an email to Ms H asking her to attend a catch-up meeting with her and the business coaches a few minutes later.

[43] At the meeting, which Ms H said took her by surprise so that she felt she was being "ganged up on", there was a general discussion as to progress over the previous two weeks. According to Ms Julian's log, Ms H felt she was improving although she also recognised that there was an issue as to staying focused.

[44] Ms Julian told Ms H that a new approach would be taken, and that Mr Sidaway would sit with her to support her in undertaking one application at a time. This would

take place over six weeks. She said that if she did not achieve consistency in her work processing, a PIP would be commenced and weekly meetings would take place to review progress. Ms Julian recorded that Ms H was unhappy with this development. Ms Julian told her that she would need to try and remain positive.

[45] The next day, Ms H spoke to Ms Julian, stating she had felt uncomfortable at the meeting on the previous day. It had been unnecessary for the business coaches to be present. It should have been a meeting, she said, between herself and Ms Julian only; and there should have been more warning. She said, "I don't want to call it bullying". Ms Julian apologised and told her that this was not her intention, and confirmed the reason for the meeting. Ms H said she understood what was intended.

[46] Then, Ms Julian initiated a request for advice on assisting a person with ADD. On 6 August 2015, she spoke with an Employment Assistance Programme (EAP) counsellor as to appropriate strategies and techniques; that person made the comment that Ms Julian needed to recognise appropriate boundaries, and suggested that it may be necessary to seek an assessment as to the employee's physiological health. Encouraging her to attend the gym would be a good idea.

[47] Ms Julian continued to hold concerns as to Ms H's work performance. She met with Ms Sila on 13 August 2015, who provided her with a minute by minute breakdown as to what Ms H had been doing over the previous four days. There were concerns that Ms H had been taking excessive breaks even though this was to attend the gym, and that she was distracted in the afternoons. She was improving at the task of finishing applications, but still had issues in not resolving them before moving on.

[48] Ms H was not informed at the time that the business coaches were taking detailed notes of her activities; she told the Court that had she been able to comment on the detailed notes that were being taken by the business coaches; for example, she could have corrected misunderstandings that she said had arisen.

[49] On 14 August 2015, Ms H asked Ms Julian whether overtime would be available during the upcoming weekend. Ms Julian said that this was available, but it was not being offered to Ms H as she felt her performance was currently not at the

stage where she could be trusted to make the right decisions, and that she would not have the necessary support. Ms H became angry stating that this decision was unfair. She repeated a request she had made previously that she wanted to move teams. It was necessary for the two to move to a quiet room, as they were starting to raise their voices. Ms H said she could not understand why she was not being offered overtime, and that she needed the extra wages.

[50] In the course of this conversation, Ms Julian said she was trying to understand Ms H's condition, and that she would like to refer her to EAP for them to assess her capability, so that she could understand how her work performance was impacted by her ADD. She said that tiredness which Ms H had reported concerned her, although she did not necessarily think this was related to the ADD. Ms Julian then said that she felt Ms H had shown she could stay focused and work consistently when someone was sitting next to her, but when this did not happen, progress slipped.

[51] For her part, Ms H said that there was a constant focus on what she was doing wrong, and she was never given positive feedback. Ms Julian contested this. Then she said that there was a focus on "breaking a habit" with Ms H so that she dealt with issues when they arose straight away.

[52] Ms Julian acknowledged she could have approached the issue of overtime differently, and apologised. She said she would reflect further on the issue and might reconsider the possibility of overtime in the future.

[53] On 18 August 2015, Ms Julian discussed with Ms H the length of her lunchtime break. This resulted in Ms H stating that she would not have any more one-on-one meetings with her, which was followed by an email stating that she would meet Ms Julian the next day when someone could attend with her.

[54] This encounter was followed by Ms H meeting with Ms Sinclair, manager of the section within which Ms H worked. First, she requested that she be moved immediately from the team in which she was working. Ms Sinclair responded by explaining she was not comfortable with moving her into an alternate role, because of the steps that were being taken to effect an improvement in her performance in a

consistent manner; she said that six weeks was not enough time to evidence consistency.

[55] Ms H went on to say that she felt bullied by a number of people, although she did not want to discuss this matter with Ms Sinclair any further. Ms Sinclair explained that the involvement Ms Julian had in monitoring Ms H's work, and in providing coaching and feedback, was not bullying: it was a process to achieve consistent work performance. Then Ms H stated that she wished to meet Mr Philp, general manager of the section in which she worked. Such a meeting was promptly arranged.

[56] Mr Philp said he was given a very quick briefing. Then, he said, a very informal and casual conversation took place with Ms H. No file note was made.

[57] Ms H said that when she met Mr Philp, she described recent events and that she was being bullied. She said Mr Philp repeated what Ms Sinclair had just said to her, to the effect that what she was describing was not bullying. Ms H told Mr Philp it was not up to him to say this because she was the person being bullied. She said Mr Philp told her that if she felt strongly she was free to make a complaint. She said she thought she had done just that. She commented that Mr Philp was not unfriendly, but she thought he did not believe her, politely ending the meeting.

[58] For his part, Mr Philp stated that Ms H did not use the term bullying at this meeting. He said his recollection was that she was complaining about being treated unfairly by Ms Julian. He asked her specifically what Ms H considered was unfair; her main concern was that Ms Julian was constantly checking and reviewing her work more than others, and that her throughput numbers were not acceptable. He said he told Ms H the actions which she described were fair and reasonable for a team leader to take when somebody was not performing as expected. Ms H said she was doing as much work as anyone else; Mr Philp said he would check the numbers and get back to her.

[59] Soon after, Ms Sinclair sent an email to Ms Wairau and Ms Julian referring to the meeting which had occurred with Mr Philp. She said that the meeting had not been structured. It had been an "ad hoc situation". Then she said that Mr Philp had met

with her and "just let her vent and get her side of things and has agreed to meet with her tomorrow to give her our expectations around performance".

[60] Ms H was adamant that she had said she was being bullied; Mr Philp was equally adamant that she had not. I will consider this issue later.

[61] A second meeting with Mr Philp then occurred after Ms Julian had provided him with figures which he said indicated she was not performing to the expected level, that is, an average of 17 applications per day. He also said that she was not meeting the employer's expectations, and reiterated that he considered she was being treated fairly.

[62] Ms H did not believe that the figure was correct and pointed this out in an email to Ms Julian, who amended the figure to an average throughput of 24 applications per day, advising Mr Philp accordingly. Although he could not recall exactly what he subsequently told Ms H, he said he would have reverted to her stating that the number had been wrong, but that he did not consider this altered his view that expectations were not being met, since it was considered a team member would process 35 to 50 applications per day.

[63] On 19 August 2015, Ms Julian and Ms Sinclair agreed in light of these events that Ms H would not be given any more feedback that week, unless there was a "blatant disregard for the rules". Ms Julian explained that this was to allow Ms H an opportunity to work without feeling that she was constantly looking over Ms H's shoulder and criticising her performance. The evidence is that Ms Julian's desk was close to but behind Ms H's, so that she could have felt she was being closely watched.

[64] On 27 August 2015, Ms Julian met with Ms H to provide her with a letter inviting her to a meeting regarding her work performance, time management and personal wellbeing, which would take place the next day. She said this would be an informal meeting, and encouraged her to attend with a support person. She said that Ms Wairau would also attend the meeting to provide additional support and guidance.

[65] Ms H reacted adversely to this letter. She opposed having Ms Wairau present, and said she did not understand the necessity for the meeting as she was doing a good job. Ms Julian stated that Ms Wairau would be there to support both parties; furthermore, as she had mentioned bullying, an HR representative needed to attend. Ms Julian followed up the meeting in an email with Ms H, telling her not to be stressed about the proposed meeting. She said she had written the letter so that Ms H could provide it to a support person. She emphasised that the meeting would be informal, and that she had intended it would be more helpful for advice of it to be given in writing.

[66] The next day, Ms H arrived late and told Ms Julian she had had trouble sleeping; she responded by telling her to text her next time if she was running late.

[67] It is evident that these events caused Ms H anxiety and frustration. Ms H did not find the continual focus on performance easy to deal with; and as far as she was concerned, there was no end in sight. She described her concerns in an email to her father (Mr H), a lawyer, on 30 August 2015. She referred to recent events that concerned her, including the short notice for a meeting that it transpired involved Ms Julian and two business mentors, being removed from the tasks of approving and overtime without being advised of this properly, the bare acknowledgment of a mistake as to her throughput, and the process of reviewing old applications when she was attempting to concentrate on current applications. She said that the situation was one of "borderline bullying" in that she felt she was undertaking the same tasks as others, but that she was being picked on. She felt she was being micromanaged. Then she said that along with constructive criticism she needed encouragement and positivity; with this, she would flourish.

September 2015

[68] The informal meeting was duly convened on 1 September 2015, attended by Ms H and her father as well as Ms Julian and Ms Wairau. Ms Julian's log recorded that the meeting had in fact been set up at the request of Mr Philp.

[69] Ms Julian summarised the performance issues which had been under review. Ms H stated that she thought her performance was going well. She described areas of

work in respect of which she thought she had improved. However, she said she was unhappy in her role and with the way she was being managed, with particular reference to the withdrawal of approval and overtime work. Ms Julian said that this had been discussed previously and she had apologised; but she apologised again for her handling of these matters. She said that on a future occasion, such issues would be approached differently.

[70] Ms H said she felt like she was "moving backwards". She was not sleeping. She felt she would crack or fall ill. She was frustrated and wanted a way forward. She said she felt drained as a result of the micromanagement of the last few weeks.

[71] Mr H said his daughter was not being dealt with in a proportionate way relative to other team members. He also referred to the fact that she had ADD, but that she would respond to encouragement. He added that the role at RST meant everything to Ms H.

[72] It was agreed that there would be a weekly catch-up, on a one-on-one basis. Ms H was to work on "continuing to change her habits". In her log, Ms Julian recorded that a plan was needed to assist Ms H, and that if everything went well in four weeks' time, they could look at reintroducing overtime and approving, as well as buddying with a colleague. She also recorded that the possibility of a PIP was not specifically mentioned, but the idea could be introduced in a few weeks if things were not going to plan.

[73] Over the weekend of 29 – 31 August 2015, Ms H sent an inappropriate email to a work colleague. This resulted in a meeting with Ms Julian on 2 September 2015, in which she admitted she should not have sent the email and that she "felt sick about it". There was a discussion on this issue which resulted in a copy of the Code of Conduct being provided to her. Ms Julian recorded that during the conversation Ms H told Ms Julian she was depressed about what had occurred over the last couple of months, and began to cry. But she also made some positive comments about the conduct of the meeting which had occurred the previous day.

[74] Weekly meetings occurred through September with Ms Julian, at which performance was discussed in detail. Often these involved discussion of issues arising from the extensive recording of her activities which had been undertaken by the business managers on random days in August and September; Ms H was not told of this surveillance at the time.

[75] It is evident that Ms H felt she was being picked on, but was attempting to meet the objectives which had been established. It is apparent that she reluctantly participated in the process.

Late September – December 2015

[76] A significant meeting occurred between Ms H and Ms Julian on 24 September 2015. It was informal, and involved only the two of them. Again, performance issues were discussed, as well as objectives for the following week. It emerged that Ms H thought the four-weeks of monitoring had ended, but Ms Julian said this was not the case. She said she would now need to meet Ms Wairau to discuss the position, which would be followed by another meeting to review her work over the previous month. Ms H reacted badly to this response, speaking loudly and aggressively. She emphasised that she thought the process was at an end so that she could now recommence approval work. She became very distressed. She stated she had improved her performance; she should now be permitted to transfer to another team. Ms Julian again stated that they were trying to "break habits" which needed the intensive feedback which had been provided. Ms H then calmed down and apologised for overreacting. Amongst other things she said she was sorry for previously saying Ms Julian had bullied her, as that was not the case at all.

[77] Late that night, Ms H sent Ms Julian an email stating that she was not fit for work the next day. She said she had been extremely worried, which caused her chest pains and anxiety. Ms Julian responded the next day initially by email, and then by telephone, suggesting she consider seeing her doctor. Ms H stated she could not afford to do so, and that such a reaction was normal with her anxiety. However, Ms H said she attended her doctor soon after to discuss these symptoms.

[78] Whilst at home, Ms H followed up on a suggestion a friend had made that she tell a health and safety representative that she was being bullied by Ms Julian. In the late afternoon of 25 September 2015, a Friday, she sent a message by Facebook to such a representative, Mrs Garwood. She sent Ms H a questionnaire on bullying, advising her to seek the services of a PSA representative, Mr James Devine, and to contact a senior member of HR, Ms Scott.

[79] Ms H said that the questionnaire, when completed, demonstrated that she was being bullied. She also contacted Mr Devine, who commenced supporting her.

[80] On Monday, 28 September 2015, Mrs Garwood spoke to Ms Sinclair. Ms Sinclair recorded their conversation in an email. She said that she had been told by Mrs Garwood that, as a health and safety representative, she had been requested by Ms H via Facebook to lodge a complaint about bullying within the workplace, not only about her team leader but the whole team within which she was working. Ms Sinclair said that she asked Mrs Garwood to confirm with Ms H what actions she was wanting the employer to take, and then to send that in to her.

[81] On the same day, Ms H contacted Ms Scott, as had been recommended by Mrs Garwood. She told Ms Scott she was having issues at work and wanted to meet with her. Ms Scott responded by saying she was happy to do so, and proposed a time two days later.

[82] On 29 September 2015, Ms H met Ms Julian, wishing to follow up on their previous discussion during which Ms Julian had said she would be speaking to Ms Wairau to discuss the possibility of a review meeting. She reiterated what she had said on that occasion that a month of the agreed arrangements had passed, although 29 September 2015 actually marked the end of the four weeks of oversight. She told Ms Julian that she felt isolated by the removal of approval and overtime work which was Ms Julian’s fault, that she was hating attending work, was having trouble sleeping, and was experiencing anxiety and chest pains.

[83] For her part, Ms Julian said that she had never guaranteed that after four weeks these tasks would be reinstated, only that they could be discussed. Ms H said that

Ms Julian had made the wrong decisions about her, and should have just left her for the month. In further discussion, Ms H implied she was being singled out, and that if other members of the team were subjected to the scrutiny which she was facing they would all be failing. Ms Julian terminated the conversation, saying it was going around in circles. She recorded that she felt personally attacked by what had been said, and walked out. She then told Ms Wairau that she had a confrontation with Ms H, providing her with log notes of the incident.

[84] It appears that a telephone conversation then occurred between Ms Julian and Ms Wairau. The latter recorded that members of the team in which Ms H worked were feeling physically unsafe due to the way Ms H was reacting. Ms Wairau also recorded Ms Julian as stating that Ms H's volume of processing had improved, but her behaviour was deteriorating as a consequence; moreover, consistency of work was still not up to expectations. It was recorded that Ms H's reactions were "up and down", and that she would apologise when she had calmed down.

[85] On the same day, Ms H emailed Ms Scott asking if the meeting could be earlier than the time which had been scheduled for the next day. In the result, the time was left as scheduled, but Ms H asked to speak by phone to Ms Scott that day.

[86] This occurred. Ms H referred to the performance issues and her concern that she was being micromanaged. She said the process had continued for two to three months, and that this was affecting her sleep, and causing chest pains. She said that she wanted to move teams, and that there had been a "fight" earlier that day. She said she was dreading coming to work, and reiterated she was having trouble sleeping, and was feeling anxious. She was attending counselling. The issue had become a health and safety concern. She said there was a complete breakdown of the relationship with Ms Julian, and that she did not trust her. Arrangements for the meeting the next day were then discussed.

[87] Although the witnesses were vague as to precisely when the meeting occurred, it is evident that at about this time Ms Wairau met Ms Scott to discuss Ms H's circumstances. Ms Wairau made notes, which include reference to Ms Scott asking if Ms H was aware of the detailed summary made by Ms Julian as to the discussion of

28 September 2015. There is no record of the response, but it is clear from other evidence that she did not. Nor is there any evidence that Ms Scott told Ms Wairau the notes should be disclosed. It is unclear whether Ms Scott was aware of the level of detail which was being recorded on a day-to-day basis, or that there were other detailed records being made of Ms H's work by the business coaches.

[88] The thrust of the discussion between Ms Wairau and Ms Scott was on health and safety issues. This included how Ms H's ADD condition should be "accommodated" and whether she was being treated reasonably given that condition.

[89] It was recorded that the employer's preference would be to obtain advice from her doctor; and that because it was a substantial employer, case law confirmed that they had to do everything they could. The EAP advice which had been given to Ms Julian was noted as being appropriate – that is, that she should recognise Ms H's boundaries, but also that there may be a need to seek advice. Ms Wairau recorded that the organisation needed to follow its processes, but it needed to be mindful of Ms H's disability. It was noted that they were not medical professionals, but that they needed to support the employee, and to recognise relevant boundaries. They would need to be flexible to some extent; any agreement with the employee should demonstrate that. Ms Wairau's notes recorded an issue as to whether the employer was being clear in its expectations, and whether the employee had been adequately supported to achieve these. Was the employer acting reasonably given Ms H's limitations, mindful that she needed to perform the work she was required to undertake? It was queried whether they were being too prescriptive in undertaking the PIP.

[90] On 30 September 2015, Ms H and her father met Ms Scott and Ms Wairau.

[91] It is evident from Ms Wairau and Ms Scott's notes of the meeting that the emphasis continued to be on health and safety issues – which included the impact of the performance management processes on Ms H. There is no record of either Ms H or her father asserting that she was being bullied.

[92] Mr H explained that Ms Julian's management style was not working for Ms H. He recounted the events which had occurred. He said that she had moved on since receiving a warning letter as part of a previous PIP, and was now working hard.

[93] Ms H referred to the anxiety and pressure which the process was creating, and said that the situation had become a health and safety issue which was impacting on her sleep and increasing her anxiety. She was due to see a doctor the next day. Ms H said that she believed she could return to approving duties immediately, but acknowledged that she probably could not resume overtime duties until her anxiety reduced and she was sleeping properly.

[94] Ms Scott stated that information from her doctor should be provided, in line with the employer's normal processes. She recorded that Ms H was amenable to this.

[95] She emphasised that Ms Julian needed to be able to give Ms H reasonable instructions. Ms H asked whether she could be moved out of Ms Julian's team – the response was that this was not an HR decision.

[96] Ms Scott provided Ms H and her father with a copy of the organisation's Problem Resolution Procedure, and of the Harassment Policy that was in place at the time. The options of self-help, informal intervention such as mediation, and formal complaint were discussed.

[97] Matters were left on the basis that Ms H and her father would consider the available options.

[98] On 1 October 2015, Ms Julian met Ms H, as she put it, to debrief following the altercation which had occurred two days previously. The discussion, as recorded in her log, focused on behavioural issues. As well as inappropriate interaction with Ms Julian herself, reference was made to the fact that, she said, there had been inappropriate communication with Mrs Garwood on Facebook over a weekend. I interpolate that the Facebook record shows that Ms H initiated her health and safety concerns with Mrs Garwood via Facebook late on the previous Friday when she was at work, and that the subsequent exchanges which occurred between the two indicate

Mrs Garwood was a willing participant in them. No indication was given to Ms H that it would be inappropriate to maintain the dialogue out of work hours. Naturally, Ms H made the point to Ms Julian when speaking with her that she had not been told it was inappropriate for these communications to have occurred, and that she frequently spoke with Mrs Garwood on Facebook.

[99] On 1 October 2015, Ms H saw, and obtained a medical certificate from, her GP who recorded that Ms H had made "significant progress over the last three and a half years largely related to her work and living environments". The GP stated that she had recently experienced anxiety-related changes in the workplace which was impacting on her sleep, which in turn impacted her work performance. That said, she was regarded as being medically fit to undertake her previous role as an approver, and was fit to work overtime.

[100] However, she was away from work over the next few days, and the GP certified her as medically unfit for work from 2 to 5 October 2015.

[101] On 2 October 2015, Mr H wrote to Ms Scott. Due to email problems, the email was not received on that day, and had to be resent on 5 October 2015.

[102] In it, Mr H recorded the matters that had been alluded to at the meeting with Ms Scott. He said that rather than her receiving encouragement, Ms H had felt under continual siege which was affecting her sleep and health. He referred to the debriefing meeting of 1 October 2015, which he said placed Ms H under further scrutiny; it had included questioning Ms H over her contact with the health and safety representative – this at a time when it was known that she had an appointment with her GP that evening.

[103] Mr H repeated that Ms H was suffering from lack of sleep, and that the anguish was affecting her health. Then he stated that Ms H wished to invoke the Informal Intervention procedure, under the RST policy. He requested the appointment of an external mediator knowledgeable on understanding the difference between legitimate workplace stress and unhealthy stress which would lead to lowered performance rather than improved performance.

[104] He noted that Ms H could be aggressive and unfortunate events could occur. He emphasised that she along with all other employees was entitled to a safe workplace. He raised the question of a change of team as an aspect of an informal intervention to fix the problem, which he said was getting worse.

[105] A private mediation was arranged for 14 October 2015. Two days prior to it Ms H and her father met with Mr Devine from the PSA, explaining the circumstances. Mr Devine recorded that there was an "H and S issue". No reference was made to bullying.

[106] Mediation was convened by an agreed mediator, attended by Ms Sinclair, Ms Julian, Ms Wairau and an RST lawyer on the one hand, and Mr Devine, Ms H, and Ms H's father on the other. The Court was informed that it was agreed that Ms H would be placed on a three-month PIP, and that she would recommence approval work at that time. It was also agreed that a return to her being placed on the overtime roster would be considered on successful completion of the first month of the PIP.

[107] Unfortunately, there were delays in preparing the relevant documentation for the PIP, so that it was not until 30 October 2015 that she was given a letter inviting her to what was described as a PIP meeting. When doing so, Ms Julian was asked by Ms H how long the PIP would be for; she said three months. Ms H reacted adversely, pointing out that this was unfair given the lapse of time taken to prepare the relevant document. Ms H said that it was Ms Julian's fault that she was "broken" – this apparently being a reference to the previous indications that habits needed to be broken. Ms H was clearly disappointed that the PIP was still not finalised, and that it would be another two weeks before she would be able to recommence the task of approving, since this could not occur until the PIP was formalised.

[108] The formal PIP documentation was not signed until 10 November 2015. It summarised the background, stating there had been regular meetings to discuss Ms Julian's concerns regarding Ms H's performance; and that there had been improvements in some areas, but there were still others where performance did not consistently meet the required level. It was for this reason Ms H had been removed from approving and overtime.

[109] It went on to state that the plan focused on particular areas of concern specifically:

a) processing of applications;

b) personal time management; and

c) behaviour.

[110] It recorded that as a result of the mediation, Ms Sinclair agreed Ms H would be reinstated as an approver for the duration of the PIP, and overtime would be reviewed one month into the PIP process. At Ms H's request, it was recorded in the plan that she had advised she had a "medical condition with anxiety and that she is currently receiving counselling for this".

[111] Later in the document, Ms H acknowledged that she needed to:

> [W]ork on myself and I am working closely with the counsellor on these issues. I really hope that this performance plan is to encourage and help me to improve my work. I can flourish if I am managed correctly.

[112] The various PIP meetings which then followed focused on aspects of Ms H's work performance. Ms H was supported by Mr Devine at these meetings.

[113] Ms Julian recorded that the first meeting went well, and that Ms H made an effort to keep on track and not react to feedback. Ms H had said, however, that the whole situation was making her anxious and that she was not sleeping. She apologised to Ms Julian for her behaviour which she acknowledged was not acceptable. For her part, Ms Julian stated that she wanted to move the situation to a stage where Ms H did not have to apologise, and was able to address adverse behaviour before it occurred.

[114] The evidence is not specific as to when it commenced, but it appears that during the course of September 2015 Ms H attended EAP counselling. In her log notes of 24 September 2015, Ms Julian recorded that Ms H's counsellor had endorsed the suggestion that she should move teams or fulfil another role elsewhere in the organisation.

[115] On 23 November 2015, Ms Wairau requested approval for a further three counselling sessions, because Ms H had obtained benefit from this process in managing her elevated stress levels.

[116] The weekly PIP meetings held in the remainder of November recorded, on the whole, positive progress, although Ms H recorded that the period was stressful. She now expected that overtime would be reinstated.

[117] Notwithstanding this phase of apparent progress, a series of events then occurred which had the reverse effect.

[118] The first of these were two meetings which occurred on 8 December 2015. In the morning of that day, Ms H said that Ms Julian took her into a side room to say there was something very serious for which there would be consequences. The issue involved a follow-up step which she had omitted to take with a member of the public. She said the raising of this issue made her feel "sick in the stomach".

[119] Later that day, the first monthly PIP review meeting was held, attended by Ms H and Mr Devine as well as Ms Julian, Ms Wairau and Ms Sinclair. The issue concerning the task which had been discussed between Ms Julian and Ms H earlier in the day was referred once again. Ms H said that the member of the public to whom it related had been pleased with the work that had been carried out. Ms Sinclair stated that it was not always about the public. However, she acknowledged that the feedback on Ms H's performance over the previous month had been "really good"; but she now wished to see another month of similar performance before Ms H could undertake overtime work. Ms H said she felt scrutinised, intimidated, over-questioned and pressured by the process. She was clearly disappointed that she did not receive the encouragement of being restored to overtime, given the progress she thought she had made.

[120] Then several events occurred which were to become the focus of some attention at formal meetings in early 2016.

[121] The first of these took place on 9 December 2015. It appears Ms Julian told Ms H she wanted to discuss a particular matter with her. Ms H responded by stating that she would be able to do so soon; but she left for her lunchbreak without talking to Ms Julian. Ms H told the Court that she had suffered a panic attack and left the building in distress, which she said was observed by Ms Sinclair who was standing outside. She said that Ms Sinclair later contacted her and spoke to her sympathetically about this situation.

[122] On 10 December 2015, Mr Devine met with Ms Sinclair who told him that Ms H needed to work on her resilience and needed to relax. Ms Sinclair said that she would have a word with Ms Julian about "body space, backing off"; he recorded that Ms H felt "extremely bullied and trapped".

[123] The second event which later became the subject of attention occurred on 11 December 2015. Ms Julian recorded that Ms H had responded with an aggressive tone to colleagues, when she thought they were making too much noise. Ms Julian spoke to her about this. Ms H's position was that she felt under pressure to perform, and this had given rise to her response.

[124] It appears she informed Mr Devine of this event because he then telephoned Ms Sinclair about it. In his notes of the telephone call, he described three questions, which I infer he discussed with Ms Sinclair. The first of these was that the incident with Ms Julian had to be understood in the context of her anxiety disorder. Secondly, he referred to what he described as a relationship breakdown so that Ms H no longer wished to meet alone with Ms Julian. Thirdly, he stated that this was not healthy for either of them, and that a team swap should be arranged.

[125] The conversation between Mr Devine and Ms Sinclair resulted in an exchange of emails on the same day, which built on their discussion. It is apparent that Ms Sinclair was not prepared to consider the team swap. However, communication processes would be refined. It was proposed Ms Julian would leave any issues that needed to be discussed with Ms H for regular weekly catch-up meetings on a Tuesday. If anything urgent were to arise, Ms Julian was to contact Ms Sinclair in the first instance. Ms Sinclair would attend any additional meeting. Mr Devine recorded in

his email that Ms Sinclair said she was unwilling to place Ms H in another team, as she needed to focus on being resilient, and open to feedback. She had said that Ms H had made significant improvements; if she maintained good performance, she would be further encouraged by having her overtime reinstated. Ms Sinclair responded noting that Mr Devine's email captured the essence of their conversation, but stating that in addition, an email would be sent to him prior to weekly meetings recording issues that would be discussed. A procedure for dealing with urgent issues was also recorded.

[126] That evening, events occurred which gave rise to the third event. An email was sent to Ms H by a member of the public which contained inappropriate language. Ms Julian saw it, and early on 16 December 2015 emailed Ms H telling her she would talk to the customer because the email was totally inappropriate; but she sought clarification as to whether she had spoken to the customer already. A chance meeting then occurred between the two; Ms H became upset, stating she had too many things to worry about in order to meet expectations. She again asked for a shift of desk. Ms H became more and more agitated, and then said she wished to speak to Ms Sinclair, and did not want to talk to Ms Julian about it anymore. Mr Devine then became involved, telephoning Ms Julian. He queried whether it was appropriate for her to be speaking directly to Ms H, in light of his earlier discussion with Ms Sinclair, stating that all interactions should be through a third person.

[127] On 17 December 2015, Mr Devine met with Ms Julian, with the intention of discussing a "new way of doing things". The possibility of Ms H moving her desk was discussed; a proposal which obviously arose from the fact that Ms Julian's desk was near Ms H's. Also discussed was the provision of necessary support for Ms H during January when he would be away.

[128] These events resulted in Mr Devine preparing a document which summarised Ms Sinclair's expectations. It emphasised that anything to do with the PIP process was to be undertaken at weekly meetings, or passed through Ms Sinclair in the first instance. However, there would have to be communications with Ms Julian on a daily basis regarding ordinary business requirements. He went on to suggest ways of dealing with Ms Julian if Ms H became stressed, such as taking time out, reducing any

necessary questions to writing, limiting face-to-face conversation and attending meetings with a support person. He also emphasised that she should look forward to the light at the end of the tunnel; that is, the PIP would be concluded in February 2016, and Ms Badham would return as team leader in March. Mr Devine also discussed support for Ms H during January when he would be away; this would be available from Mr H and from another PSA representative, Mr Shaun McGuire.

[129] The final step taken on behalf of Ms H in 2015 was an email from Mr Devine formally requesting a move from Ms H's current desk to a new one; he said this was because the three staff with whom she was sitting could be noisy and distracting at times. This could not help her when she was trying to stay focused on her work, with the added stress of a PIP and her medical condition.

January 2016

[130] On 5 and 6 January 2016, Mr Devine and Ms Julian exchanged emails as to the possible desk change for Ms H.

[131] Ms H returned to work on 12 January 2016, and Ms Julian promptly sent her emails regarding an intended weekly meeting to be held that day, with regard to PIP matters from 15 December 2015. There was an issue as to who would support her. Eventually, Ms H said there was no PSA representative available for a meeting, but there would be in the following week. She then said that for health and safety reasons she would not attend any meetings without a support person from the PSA. Ms Julian reported that she was frustrated by this, as the meeting had been set down for the last couple of months; she thought Ms H should have communicated the problem earlier.

[132] On 15 January 2016, Ms H was stressed at work, and sought time out. Ms Julian recorded Ms H as saying that she probably should not have come in that day, as it was a one-year anniversary of the death of someone she knew. Ms Julian was concerned that she had left the work area without informing her. Later, these events were to become the subject of a concern which Ms Julian described as "leaving her desk multiple times without communicating clearly".

[133] On 18 January 2016, Ms H was noted as sitting in a kitchen area stating that she felt nauseous; she was placed in a sickbay. Later she went home, unwell.

[134] A series of three meetings followed on 19 January 2016. The first was a weekly catch-up relating to work performance of late December/early January that had originally been scheduled for the previous week; there was also a second such meeting relating to work performance for the period 12 – 18 January 2016; the third was a monthly review meeting under the PIP process. All were attended by Ms Julian, Ms Wairau and Ms Sinclair on the one hand, and Ms H and Mr McGuire on the other. Although specific details as to the length of these meetings are not available, it is apparent they took some time. Themes which emerged related to the time taken to undertake particular tasks; that Ms H was feeling very stressed; and that a move of desks could improve Ms H's focus. In her log, Ms Julian recorded that the "health concerns" justified a consideration of the request to shift desks.

[135] It was recorded that overall there was some improvement, but there were also aspects of the PIP which had not been met. Ms H was told that she would accordingly be invited to a disciplinary meeting, about which she would receive a letter by 21 January 2016.

[136] Ms Julian then drafted a disciplinary letter to Ms H inviting her to attend a formal review meeting to discuss her progress under the PIP. She acknowledged good progress, but said there were still a number of areas requiring significant improvement, particularly with regard to the processing of applications, and with regard to her "behaviours". Reference was made to the several incidents to which I referred earlier. She said Ms H needed to take personal responsibility for her behaviour and actions, appropriate and professional interactions with colleagues and team leader, and self-monitoring the appropriate use of her time throughout the day. The letter outlined the meeting requirements, and then stated that the employer regarded the current matter as potential misconduct so that disciplinary action up to and including a first formal warning would be a potential outcome.

[137] When Ms Julian gave Ms H this letter on 21 January 2016, she reacted adversely stating "I'm on to you, I'm not stupid, I know you have bad intentions" and

“you should have been an actress”. Ms Julian attempted to respond to this, but Ms H walked away.

[138] Ms Julian sent an email to Ms Sinclair and Ms Wairau about this incident stating that she was incredibly frustrated with Ms H’s personal verbal attacks on her; she acknowledged that Ms H might be lashing out at the circumstances, but that did not make the conduct appropriate.

[139] Ms Sinclair advised her HR colleagues of this incident, stating that she was mindful of Ms H’s current emotional state, and the impact that meeting Ms Julian had on fuelling such behaviours, but in her view, they were not excusable. She would schedule time to discuss this with Ms H and Mr McGuire.

[140] She did so on 28 January 2016, reiterating the need for Ms H to work with her team leader on a day-to-day basis. In a follow-up email, she stated that should such behaviour reoccur, it would be addressed in a more formal process.

[141] A further weekly PIP meeting was scheduled for 27 January 2016.

[142] Beforehand, Ms H spoke to Ms Julian, apologising for her reactions at the meeting of 21 January 2016, stating she had not wanted to upset Ms Julian. Ms H said everything had just built up and she had “exploded”.

[143] Later that day at the meeting, the importance of working on one task at a time was stressed, as was the taking of unnecessarily long breaks. An example related to a break she had taken that morning, which Ms H commented was probably when she attended the toilet.

[144] The conversation then turned to the incident which had occurred on 21 January 2016. Ms H again acknowledged that her behaviour had been inappropriate, but she had felt provoked into reacting.

[145] On 2 February 2016, a further weekly meeting was held, attended by Ms Julian, Ms Wairau, and Ms H and Mr Devine. Again, there was discussion regarding consistency of approach in work tasks. Asked why some matters had been left for

days, Ms H said that "something else must have come up" or/and "I can't remember, I'm not sleeping well". Ms Julian also produced statistics from the previous week and questioned Ms H as to why they were so low. There was discussion as to whether these were accurate, so Ms Julian said she would have to check them. With regard to her comment as to sleep deprivation, Ms Julian asked her if she was attending the gym; Ms H said she had not had time. According to notes which Mr Devine made, there was a long discussion as to the length of toilet breaks. Then, Ms Julian found she had incorrectly calculated the number of tasks processed from the previous week, apologised, and showed Ms H the amended figures. It was acknowledged that the disciplinary meeting would take place the next day.

[146] However, on 3 February 2016, Ms H felt nauseous and unwell, as she had a few days prior. After speaking to a member of the HR staff, she went home. As a result, the disciplinary meeting was rescheduled. Subsequently, Ms H emailed Ms Julian confirming she was unwell. Ms Julian discussed this with the HR staff member, who told her not to mention the fact that calling in (by phone) was an expectation of the PIP. She should "pick her battles", as it was reasonable for Ms H to have emailed. Ms Julian recorded that she did not fully agree with that; she considered it was an example of Ms H not wanting to deal with her.

[147] On 9 February 2016, Mr H sent an email to Ms Sinclair stating that Ms H's flatmate, who was a trained nurse, had spoken to him regarding his daughter's condition when she left work prematurely on 3 February 2016. He recorded that his wife and Ms H had attended her doctor the next day, learning of a condition Ms H was suffering which related to her work. He said he had medical information he would like to provide to Ms Sinclair in confidence. He wished to meet.

[148] As a result, he and Mr Devine met Ms Sinclair informally on 11 February 2016. Mr H said it was important for Ms Sinclair to understand Ms H's health issue, which was a result of work-related stress. She had been diagnosed with stress-related incontinence. Mr H said that the employer was not providing a safe environment for his daughter, as the stress she was currently experiencing was directly related to the scrutiny under which she was being placed. He produced emails that had been received from Ms Julian questioning Ms H's whereabouts. He said this was over-the-

top and uncalled for. Ms Sinclair responded by stating that she was entirely comfortable with such questioning because Ms H had previously left the building for lengthy periods of time, and the employer had a responsibility to ensure she was safe. Ms H's father disagreed.

[149] He stated that the relationship between Ms H and Ms Julian was beyond repair, and that once Ms Julian's temporary role ceased, Ms H would be in a much better position. Ms Sinclair said the relationship was certainly strained, but the expectations of the employer remained. The breakdown related to performance expectations, not the person. She said that Ms H was more than capable of performing her role, but her inability to be consistent in her outputs and her behaviours were of continued concern.

[150] There was then discussion as to the interactions between Ms Julian and Ms H on 21 January 2016. He said in summary that the various performance-related initiatives were not allowing Ms H an opportunity to get on with her work. Again, Ms Sinclair disagreed, stating that the aim was to assist her in lifting her performance to a level that was expected from all staff.

[151] Mr H asked where this was going. He anticipated an extension to the PIP process, which would ultimately end in the termination of her employment. Ms Sinclair responded by saying that any decisions would not be pre-judged; the disciplinary meeting that had been scheduled needed to take place.

February – August 2016

[152] On 15 February 2016, Ms Julian wrote to Ms H stating that she wished to get the process for the disciplinary meeting underway; she said that if she had not met with Ms H by 19 February 2016, then she would confirm her preliminary decision in writing. On the same day, she emailed Ms H stating she would hold a six-monthly performance review on 17 February 2017. It was also intended that the weekly PIP meetings and monthly PIP review meeting would take place in the following days. On 16 February 2016, Ms Julian proposed that the disciplinary meeting be held before other meetings were convened. Ms H assumed this meant that the six-monthly review meeting for the next day would not now occur. Ms Julian thought otherwise and was surprised that Ms H did not attend.

[153] The disciplinary meeting on 19 February 2016 was attended by Ms Julian, Ms Sinclair and Ms Wairau as well as Ms H and Mr Devine. There was discussion as to whether the expectations of the PIP had been met. Eventually Ms H said she had been unable to perform over the previous seven months, and had been bullied. Ms Sinclair said she did not agree; she said Ms H needed to control her behaviour which was not acceptable. After a break, Ms H apologised for reacting, and that she should not have made accusations about bullying. There was then a protracted discussion regarding behaviours. Mr Devine referred to the fact that Ms H had a medical condition requiring short breaks, as Ms Sinclair knew. Ms H also said her anxiety had led to her performance issues. Ms H handed over a prepared statement about the four events which had been referred to in the letter calling for the meeting, as already described.

[154] Mr Devine stated that a formal warning was serious. He said the view of the employer was "three strikes and you are out". It was necessary to separate the trivial from the serious when considering breaches of the Code of Conduct. He said that management knew Ms H suffered from anxiety and panic attacks. Each event had an explanation, and did not meet the organisation's threshold for a formal warning.

[155] It was acknowledged that the PIP process had originally been scheduled to end on 15 February 2016, but it now needed to continue until a final review could be carried out, because of the delays which had occurred in undertaking the various meetings. Then, Ms Sinclair proposed an extension for another month.

[156] On 23 February 2016, Ms H initially attended work, but then suffered a migraine and went home without notifying Ms Julian. The latter then phoned Ms H and queried why she had not spoken to her before she left.

[157] On 24 February 2016, Ms H arrived at work late. Ms Julian spoke to her about this, and about her unnotified absence on the previous day. Ms H became upset and accused Ms Julian of bullying her, stating she had been doing it for seven months, and said "you have enjoyed every second of it". Ms Julian told her this language was inappropriate.

[158] On 25 February 2016, a weekly meeting took place, attended by Ms Julian and Ms Sinclair on the one hand, and Ms H and Mr Devine on the other. In the course of the meeting, Ms H said she was overwhelmed, not concentrating and was missing things, all of which were impacting on her performance. She said this was "beyond resilience", and that she was struggling with work, was confused, and finding it hard to cope. There was discussion as to toilet breaks. It was decided that if Ms H needed to take a "stress break" she would first see Ms Julian to tell her. She said she would not question toilet breaks, unless these were "multiple in a short period of time/or long breaks".

[159] Ms Julian handed to Ms H a letter which she had written several days earlier, on 22 February 2016, which was headed "Preliminary Decision". It summarised the PIP history, and referred to the letter of 21 January 2016 in which Ms Julian outlined particular areas which she said required performance improvement, especially consistency of the processing of work, and behavioural issues. She then briefly summarised what had happened at the subsequent disciplinary meeting of 19 February 2016. She said that she did not consider the matters raised by Ms H at that meeting could be said to impact on her ability to meet the PIP requirements, as she had demonstrated in the first month of the PIP that she could achieve these expectations. It was accordingly her preliminary decision to issue Ms H with a formal written warning, and to extend the PIP until 31 March 2016. She proposed a meeting on 29 February 2016 when Ms H could respond.

[160] Ms Sinclair then met privately with Ms H, stating that a further disciplinary process would now be instituted relating to the events of 24 February 2016, when she had accused Ms Julian of bullying her which had adverse consequences for her health. Ms H said she thought Ms Julian had been vindictive but she then apologised. She said she was scared for her job, and was at her wits end, feeling "utterly trapped".

[161] On 26 February 2016, Mr H sent an email to Ms Sinclair and Ms Julian stating that Ms H was ill; he said he had seen her the previous evening, and had observed her condition. Medical evidence would be provided in the following week.

[162] Subsequently, it was confirmed that she would be seeing her GP on 29 February 2016. On the same day, Ms Sinclair wrote a comprehensive letter to Ms H. With regard to Ms Julian's letter advising of a proposed warning, she stated that after a thorough process of specifying performance issues outlining the employer's requirements, supporting Ms H and allowing a reasonable time for improvement, she was now being warned that her performance was still not up to an acceptable standard, and that her employment was therefore at risk of termination. Because she had been unwell, the time for responding to the preliminary decision letter was extended to 1 March 2016.

[163] The remainder of the PIP process was then discussed. Ms H would be given until 31 March 2016 to improve her performance. She would continue to be managed and monitored by Ms Julian. There would be one meeting in mid-March to assess progress and give feedback. If, at the end of that period, the performance was satisfactory the process would end and she would return to regular management supervision. If the performance was not up to an acceptable standard, a final written warning could be given. That would indicate a further two weeks to try to meet the required standard before a final review meeting; if improvement was not thereby achieved, termination would be considered for poor performance.

[164] Then, Ms Sinclair enclosed a separate letter, dated 26 February 2016, concerning an allegation of misconduct regarding events which had occurred on 24 February 2016. She was invited to a disciplinary meeting to discuss the concerns which thereby arose. A date for this would be set once she returned to work.

[165] Finally, a request for medical information was made, in light of recent absences. A letter from Ms H's GP was sought for health and safety purposes. The information which was required was:

- the nature of the medical condition(s) currently preventing her from attending work;
- the likely impact of her condition(s) and/or any medication on her ability to work as usual on her return;

- any recommended steps the employer could take to support her on her return to work; and
- the date she was expected to be fit to return to work.

[166] In a subsequent medical report of 9 March 2016, Ms H's GP confirmed that she had seen her on 29 February 2016. She said that Ms H's symptoms were sufficiently severe on that date for her to be certified unfit to work for two weeks, and a medical certificate had been provided for this. The GP recorded that a further review was conducted on 7 March 2016, and her medical certificate was extended until 4 April 2016. Then she said:

> Her current anxiety is affecting her work performance, productivity and ability to concentrate. The trigger for this appears to be related to some difficulties she is having with her current manager. While those current issues are ongoing it is likely to continue to be very difficult for [Ms H] to return to work in her full capacity. I believe her work performance is currently being assessed by her employer. It would appear that the work environment has caused her some difficulty since at least 1/10/15.
>
> I am unable to indicate precisely when [Ms H] will be fit to return to work but I would imagine her return to work could be expedited by the issues that have contributed to her anxiety being addressed.

[167] Ms H said that in the period from 26 February 2016 to 16 May 2016, she was ill, suffering from continuous nausea. She stayed at home for about five weeks, sleeping most of the time. Initially she said she was in shock with memories as to how she had been treated in the previous months. She attempted to attend counselling, but then felt she could not talk about it and decided to delay this. She said the letters from her employer's lawyers made her feel even more ill, as they commented adversely on her work performance.

[168] On 1 March 2016, Mr Devine forwarded to Ms Sinclair confidential medical notes relating to Ms H. She sought approval for HR colleagues and the organisation's external employment lawyer to see these notes. It appears this was given, because in an email from Ms H to the RST lawyer of 1 March 2016, he recorded that Ms H had waived her medical privilege on 1 March 2016.

[169] On 7 March 2016, Mr H wrote to lawyers acting for RST. He referred to the medical records just provided, and said that recent consultations with two doctors had confirmed a deteriorating condition, which had resulted in the GP certifying a two-week suspension from work from 29 February 2016.

[170] He said that medical evidence was the key to understanding the interrelationship between Ms Julian and Ms H, and its impact on her capacity to perform consistently. He suggested that the extent of her medical condition had not been known when Ms Sinclair signed off her comprehensive letter of 29 February 2016, and the attached letter of 26 February 2016.

[171] Then he went on to state that Ms H was known to be ill, and she was being subjected to tight deadlines which threatened her job while she was sick; he said this was wrong. He went on to outline the history of events, suggesting that there had been, in effect, substantive unfairness. He suggested that the administration of the health and safety policies of the organisation were in question.

[172] RST's lawyers responded on 9 March 2016, stating that it had been concerned to learn for the first time on 2 March 2016 that Ms H suffered from "serious medical conditions". It was denied that the employer had acted inappropriately on the information it had. The thrust of the response is contained in this paragraph:

> [RST] has taken time to consider whether the health issues being raised at this stage in the process, as set out in the medical information [Ms H] has recently provided, require it to take a different approach. From the information provided, [Ms H's] medical condition(s) were pre-existing. She did not consider her health condition(s) would affect her employment, and so did not disclose them. [RST] does not, therefore, accept the suggestion that any action it has taken caused [Ms H] to develop the medical condition she has now disclosed, or that there is a causal link between Ms Julian's management of [Ms H] and her illness.
>
> It may be that the stress of the performance improvement process has exacerbated [Ms H's] (undisclosed) medical condition(s), which in turn may have made it more difficult for her to perform to the required standard. However, an employer is not able to or in law expected to make allowances for medical conditions which have not been disclosed, and is entitled to expect all employees to perform the work to the required standard. The process has, as outlined above, been fair and lawful.

[173] Correspondence between lawyers for both parties then took place. Initially there was an issue as to whether Ms H was being accused of dishonesty for not disclosing a medical condition at the time of her appointment. However, it was confirmed by the employer's lawyer that no such accusation had been made or was to be implied.

[174] On 26 April 2016, Ms H's GP advised her that she could return to work on 16 May 2016 on receipt of this information. RST's lawyers said that any return to work would have to be informed by medical advice. They proposed that Ms H first attend an occupational physician; Ms H agreed to do so.

[175] Although an appointment was arranged for her to do so in early June 2016, the parties were unable to agree on the content of the letter of instructions to that doctor. On 29 April 2016, Ms H had filed a statement of problem with the Authority, asserting a disadvantage personal grievance. Thereafter the parties could not agree whether it was appropriate for the occupational physician to be told about the legal issues which had been placed before the Authority. In the end, the medical consultation did not proceed.

[176] Finally, in this history of events, I refer to the medical report provided by Ms H's GP on 11 August 2016. Materially, it stated:

> I have consulted with [Ms H] six times since October 2015 regarding work-related stress. She was initially unfit to work due to the impact of stress and has been fit to return to work since May 2016 (on a graded return to fulltime work over three weeks) but has been unable to do so due to ongoing administrative issues so I believe.
>
> Her medical record shows a past diagnosis of bipolar disorder, which was reviewed by a specialist in 2014 and was felt to not be consistent with her symptoms. She was subsequently diagnosed with ADHD. She has been on ADHD medication since that time (and the medication most commonly used for bipolar disorder was stopped at that time) and she has remained stable.

[177] Attention-deficit hyperactivity disorder, ADHD, may encompass ADD. But the focus of the former is on hyperactive or impulsive symptoms, while the latter is on inattentive symptoms.[7]

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[7] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, American Psychiatric Publishing, Arlington, VA, 2013) at 61.

First cause of action: RST failed to meet statutory and contractual obligations to provide Ms H with a safe and healthy work environment from July 2015

[178] It is appropriate to deal with this cause of action first, since it requires a consideration of health and safety – and bullying – allegations that span the main period of review, that is, from July 2015 to February 2016. Because of the overlap of this cause of action with most of the remaining causes of action, findings of the former will impact on the latter.

Submissions for Ms H

[179] Mr Henderson submitted that the first cause of action raised a question as to whether workplace stress was increased by significant managerial conduct which impacted on Ms H's health and safety. Relying on dicta in *Attorney-General v Gilbert*, he submitted that such conduct should be measured against a fundamental implied terms of Ms H's employment agreement that:[8]

- The employer would not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust, confidence and fair dealing.

- It would take all reasonable care to avoid exposing an employee to unnecessary risk of injury or further injury to her physical or psychological health, and in particular would maintain a safe system of work.

- The employer would be a good and considerate employer and in particular would deal with any concerns relating to workplace health and safety.

- It would provide a working environment and management processes which would not cause unreasonable stress to the employee.

[8] *Attorney-General v Gilbert* [2002] 2 NZLR 342, [2002] 1 ERNZ 31 (CA).

[180] In summary, Mr Henderson argued that all relevant RST managers breached these terms. First, he said that the catalogue of actions which amounted to micromanagement and relentless fault-finding by Ms Julian had a harmful effect, which led to "butting heads" and bullying.

[181] Then he argued that other managers exacerbated this issue. In particular, he argued that Ms Sinclair, Mr Philp, Ms Scott, Ms Wairau and Mrs Garwood should all have appreciated there was a risk of serious harm eventuating, given what they knew about Ms H's medical condition; they ought to have taken whatever steps were necessary to mitigate that risk.

[182] Mr Henderson acknowledged that a process of performance management may be proper, but submitted that in this case it was carried out so that it caused confusion, resentment, a feeling of injustice, oppression, and harm.

Submissions for RST

[183] Ms Dyhrberg said that RST acknowledged it had a legal responsibility as an employer to take all reasonable practicable steps to prevent harm to an employee which it foresaw or ought reasonably to have foreseen at the time, as explained in *Attorney-General v Gilbert*.[9] However, it was submitted it had met its legal obligations having regard to the knowledge it held at the time. Ms Dyhrberg summarised the position by stating that once RST was made aware of medical issues apparently impacting on Ms H, it put in place additional measures to assist and accommodate her. These began prior to the formal performance improvement process, and continued throughout it. She was offered EAP; assistance with putting good routines in place; was given time to attend the gym; had the support of RST business coaches; was given the benefit of fewer meetings, as well as summaries of performance concerns in writing before those meetings; meetings were postponed; she had the ability to attend a quiet space; and she was given a desk move. These steps were all taken in an effort to assist Ms H and minimise the stress she was reporting. She argued that senior managers and HR staff had made themselves available, often at short notice, to meet Ms H and/or her father and PSA representatives, to hear their

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[9] At [92].

issues and offer solutions. She said this much was clear and not in dispute. The real question was whether it was good enough in the circumstances.

[184] Ms Dyhrberg then reviewed the chronology relating to the provision of medical information, which she said was brief and contained no real analysis. There was no confirmation from a medical practitioner as to the diagnosis of ADD. However, Ms H's assertions about her condition had been taken at face value. RST could not have been expected to do more. In fact, the extent of her illness was not actually apparent until after she was certified unfit to work in late February 2016.

[185] Next, Ms Dyhrberg presented detailed submissions which she said confirmed Ms H had been provided with a safe and healthy workplace. In summary, she submitted that RST's actions were neither a breach of health and safety obligations, or bullying, but were justified steps in the circumstances.

[186] Turning to the formal PIP process, Ms Dyhrberg said that the basic principles of such a process were set out in *Trotter v Telecom Corp of New Zealand Ltd*.[10] On a detailed analysis of Ms H's work performance, the steps which RST took concerning its PIP process were justified when assessed against that guidance. It was also argued that the disciplinary steps that were taken in early 2016 were justified, and Ms H was not unreasonably disadvantaged.

[187] Ms Dyhrberg submitted that what Ms H described as bullying were in fact appropriate steps taken under a performance management process.

[188] She said Ms H exhibited extreme emotional reactions at times; it was not reasonable to expect the employer simply to stop a lawful process because the employee was having an emotional reaction, when that reaction seemed angry and impulsive rather than a symptom of deteriorating health.

[189] She emphasised that prior to the provision of medical information on 1 March 2016, Ms H had not provided any evidence she was suffering from a serious illness; the medical certificates that were provided were brief and provided little

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[10] *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) at 681.

information. Genuine efforts were made to alleviate the pressure and anxiety felt by Ms H. She was well supported by her father and by Mr Devine.

[190] In summary, for the purposes of the first cause of action, it was submitted that RST had properly addressed all complaints made by Ms H, whether as to an unsafe workplace or as to bullying whether under RST policies, or according to contractual or common law obligations.

Legal framework as to health and safety

[191] An employer's failure to provide a workplace which meets health and safety requirements may be a ground for an unjustified disadvantage claim.

[192] As already noted, Ms Dyhrberg acknowledged for RST that it had a legal responsibility as an employer to take all reasonable practical steps to prevent harm to an employee which it foresaw or could reasonably have foreseen at the time.

[193] She said this important duty is derived from a number of sources. Section 56 of the State Sector Act 1988 requires the Chief Executive of a Government department to act as a good employer, which amongst other things requires the operating of a personnel policy containing provisions requiring good and safe working conditions.

[194] I note that this obligation receives expression in the applicable collective employment agreement, which at cl 7.1 stated that the employer was committed to being responsible for a healthy and safe workplace environment.

[195] But, as the Court of Appeal explained fully in *Attorney-General v Gilbert*, the relevant obligations are actually spelt out in some detail in the health and safety legislation – the Health and Safety in Employment Act 1992. This statute of course applied until 3 April 2016; the Health and Safety at Work Act 2015 (HSW Act) governed the position thereafter. The Court of Appeal went on to acknowledge that the duty to take reasonable steps to maintain a safe workplace is also a term now

implied by common law into employment contracts, in recognition of their special nature.[11]

[196] The following passage summarises the conclusions of the Court:[12]

> ... The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of "all practicable steps". What is "reasonably practicable" requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s 19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[197] Although these findings were expressed as long ago as 2002, they remain in my view an accurate and useful summary of the relevant obligations in this case, for the period up to 3 April 2016. These principles apply to the first seven causes of action. The eighth cause of action focuses on the more recently enacted provisions of the HSW Act, to which I shall return later.

[198] Health and safety cases in the Employment Court often involve dismissals,[13] but there are also instances where it has been determined that an employer's failure to provide a safe workplace constitutes an unjustified disadvantage.[14] That proposition is not controversial.

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11 *Attorney-General v Gilbert,* above n 8, at [75].
12 At [83].
13 For example, *McGowan v Nutype Accessories Ltd* [2003] 1 ERNZ 120 (EmpC).
14 For example, *Northern Distribution Union v Sheril dee Holdings Ltd (t/a New World Titirangi)* [1991] 2 ERNZ 675 (EmpC). See also *Jennings v University of Otago* [1995] 1 ERNZ 229 (EmpC).

[199] In the extract from *Attorney-General v Gilbert*, the Court of Appeal made two important points, which were also touched on by Ms Dyhrberg in her submissions to the Court.[15] The first is that foreseeability of harm and its risk is a factor which it is necessary to consider when reviewing circumstances of the kind which arise here. As the Court of Appeal emphasised, such an assessment must take account of the current state of knowledge, and it must not be made with the benefit of hindsight. So, when considering the fact that Ms H became very unwell in late February 2016 necessitating her absence from the workplace for many weeks thereafter, a key question is whether such a possibility was foreseeable; and the Court must be careful to avoid hindsight bias when analysing this issue.[16]

Legal framework as to bullying

[200] Aspects of the chronology also require consideration of the obligations which RST had in respect of bullying complaints.

[201] An employer's failure to address bullying in the workplace may give rise to an unjustifiable disadvantage claim. This can be seen as an aspect of the duty to provide a safe workplace. As discussed earlier, either or both of these concepts may be relevant to an assessment of justification under s 103A of the Act where a personal grievance is alleged.

[202] Workplace bullying is a very serious and widespread problem.[17] Allegations of bullying are frequently raised in the Authority; they have been raised in the Court on a number of recent occasions, but the particular circumstances of those cases did not require the Court to consider the topic in detail. It is appropriate to do so now.

[203] Where bullying occurs, the consequences can be far reaching, resulting in a hostile work environment, decreased worker health and wellbeing, motivation,

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15 *Attorney-General v Gilbert,* above n 8, at [83].

16 As to the difficulties of avoiding hindsight, the following is of assistance: Jeffrey J. Rachlinski "A Positive Psychological Theory of Judging in Hindsight" (1998) 65 U Chi L Rev 571.

17 For a discussion of this, see, for example, Michael O'Driscoll and others "Workplace Bullying in New Zealand: A survey of employee perceptions and attitudes" (2011) 49 Asia Pac J Hum Resour 390 at 397; Kate Blackwood and others "Out of Step? The Efficacy of Trans-Tasman Law to Combat Workplace Bullying" (2003) 38(1) NZJER 27.

performance and commitment, workers having to attend the workplace while sick, or having to take more sick leave, and even increased worker turnover.[18]

[204] People often use the word "bullying", but not always with a clear understanding of the concept. An important resource to which the Court was referred is "Preventing and Responding to Workplace Bullying: The Guidelines".[19] In workplace circumstances where there is no other binding definition of the term or provisions as to how it should be dealt with, this document may well provide appropriate guidance; and a yardstick for assessing whether appropriate steps were taken. I will return to these guidelines shortly.

[205] In the present case, however, RST maintained relevant policies.

[206] The first of these is an "Harassment Policy" introduced in October 2010. As I explained earlier, a copy of this document, and another as to process which will be described shortly, were provided to Ms H and Mr H in early October 2015, and relied on by them.[20] There was some evidence that the Harassment Policy was replaced very soon after by a "Managing Unacceptable Behaviour Policy". There is no evidence that the relevant managers who dealt with the circumstances of Ms H ever referred to the policy, or even knew about it. Accordingly, I place it to one side, since it was not relied on by RST at the material times.

[207] The policy referred to several types of harassment, including sexual and racial harassment, victimisation, and bullying. It is the last of these examples of harassment which is relevant here, and should be reproduced in full:

> ***Bullying***
>
> Workplace bullying is a form of harassment, most often used for one person to have power or unwarranted control over another.

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18 WorkSafe New Zealand "Preventing and Responding to Workplace Bullying: The Guidelines, February 2014 The Guidelines)", (February 2014) (The Guidelines): first published in February 2014 and updated in March 2017. <https://worksafe.govt.nz/dmsdocument/782-preventing-and-responding-to-bullying-at-work>.

19 Preventing and Responding to Workplace Bullying: The Guidelines, above n 18.

20 Compliance with a properly promulgated policy is of course relevant to an inquiry into an employee's conduct under s 103A, see for example *Butcher v OCS Ltd* [2008] ERNZ 367 (EmpC).

Bullying is unwanted and unwarranted behaviour that a person finds offensive, intimidating or humiliating, and which is repeated, so as to have a significant detrimental effect upon a person's dignity, safety and wellbeing. Behaviours that amount to bullying may be both overt and covert.

Note: An isolated incident of the behaviour described as bullying may be inappropriate conduct (and may require a managerial discussion with the perpetrator or disciplinary action under the Code of Conduct), but a one-off incident is not generally considered to be bullying.

Covert bullying behaviours

May include:

- Undermining a person's work or reputation.
- Regularly setting impossible deadlines – over pressuring.
- Regularly inflicting menial tasks, under-work, or unwarranted removal of responsibility.
- Constantly changing targets and expectations without reasonable justification.
- Spreading malicious/false rumours.
- Ignoring and isolating a person from needed support, communication or resources.
- Unreasonable administrative sanctions, interference, setting people up to fail.
- Taking credit for others' ideas, refusing to give credit where due.

Overt bullying behaviours

May include:

- Open hostility and acts of intimidation.
- Public humiliation and ridicule/teasing.
- Abusive or degrading gestures or language (including via email or texting).
- Constant unsubstantiated criticism or accusations.
- Unjustified threats of dismissal or unfair treatment, coercion.

The above lists are not exhaustive. If an individual is exhibiting negative behaviour toward another individual in the workplace that impacts on that person's wellbeing, the Department may still choose to manage that behaviour with EAP, facilitated sessions and/or training.

Malicious, Vexatious or Frivolous Complaints

If it appears that the complaint is malicious, vexatious or frivolous, this will be investigated and as a result there may be grounds for disciplinary action against the complainant.

Examples of behaviour which is not harassment

The following are examples of what is **not** considered harassment:

- *legitimate criticisms about your work performance (unless they are expressed in an unprofessional or hostile manner);*

- minor incidents of miscommunication or misunderstanding;
- *free and frank discussion about legitimate issues or concerns in the workplace, without personal insults;*
- preference shown to other employees on legitimate grounds (e.g. targeted affirmative action policies, parental leave provisions, or reasonable accommodation and provision of work aids for staff with disabilities etc);
- exchange of mutually acceptable jokes, compliments, flirting, hugs etc (although be careful: third parties within hearing/sight may find your behaviour offensive).

(emphasis added)

[208] It is appropriate to make some observations about this policy. The first sentence stated in effect that most often a prerequisite for concluding whether bullying behaviour has occurred is whether it was used to maintain power or control over another.

[209] The issue of whether there must be an intention to bully is a vexed one, where a range of possibilities may potentially arise. Ms Dyhrberg referred to an Authority determination, *Isaac v Chief Executive of the Ministry of Social Development*, where it was stated that bullying is about behaviours that are repeated and carried out "with a desire to exert dominance and an intention to cause fear and distress".[21] There are several examples of Authority determinations where such an approach has been adopted.[22]

[210] But intent is not always an essential prerequisite. This element, for example, is not referred to in the definition contained in the WorkSafe Guidelines which states:[23]

> Workplace bullying is repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety.[24]

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21 *Isaac v Chief Executive of the Ministry of Social Development* NZERA Auckland AA200/08, 5 June 2008 at [55].

22 *Evans v Gen-i Ltd* NZERA Auckland AA333/05, 29 August 2005 at [2]-[3]; *Kneebone v Schizophrenia Fellowship Waikato Inc* NZERA Auckland AA31/07, 13 February 2007.

23 Preventing and Responding to Workplace Bullying: The Guidelines, above n 18, at 7.

24 And see Australian Legislation such as the Fair Work Act 2009, s 789FD, and UK cases on bullying, which do not refer to intentional conduct on the part of the bullying person: *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224; *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 (QB).

[211] Where there is an applicable policy or provisions of an employment agreement pertaining to the particular workplace, the requirement for intention depends on the language used.

[212] As already mentioned, the definition in the RST policy suggested, in its first sentence, that bullying conduct would "most often" be intentional. The examples given later in the document as to covert bullying behaviours and overt bullying behaviours appeared to reinforce that requirement. That said, the definition did not state that a desire to exploit power and in balance must *always* exist.

[213] The second paragraph of the policy made it clear that the behaviour must be unwanted, unwarranted and repeated, causing detriment. Focusing on the first two of these adjectives, the policy recognised that unreasonable work demands – such as is asserted here – could constitute covert bullying. However, that statement was followed by a statement that legitimate criticisms about work performance were not considered harassment unless they were expressed in an unprofessional or hostile manner; and that free and frank discussion about legitimate issues or concerns in the workplace, without personal insults, was not harassment. These statements recognised the tension that could arise where the employer's prerogative to guide the work performance of an employee was undertaken in a structured, and perhaps unwanted fashion; under the policy, such a prerogative could be exercised providing it did not cross the line to covert or overt bullying behaviours as defined. In my view, these provisions were fair and reasonable.

[214] The policy went on to describe appropriate processes for dealing with these problems. It explained that when employees believed they had been subjected to harassment, they had the options of self-help, informal intervention and formal complaint. These were outlined more fully in a related policy, "Problem Resolution Procedure". It suffices for present purposes to mention that informal intervention included mediation using either an internal or external mediator; and that if prior options did not work, and if a complainant believed an allegation was serious enough to warrant a formal complaint, he or she could submit a written complaint to their manager, or a more senior manager or HR if the complaint was directed against their manager; and the person also had the right to request a formal investigation which

would involve the appointment of a manager from another business group, from HR, or an external investigator.

[215] Returning to the Harassment Policy itself, it was explained that managers needed to be familiar with the guidelines, and be prepared to explain options to any staff who complain of harassment. Then it stated:

> ... Managers must:
>
> - *act quickly and effectively where a complaint is bought to their attention*
> - treat any complaint with confidentiality and sensitivity
> - *not trivialise any complaint*
> - make it clear to staff that [the organisation] will not tolerate any form of harassment
> - set standards of behaviour
> - ensure that the work environment does not condone language, behaviour or visual material that is unwanted by, or offensive to any staff member
> - have a role within the [organisation] promoting and explaining the [organisation's] policies in these areas
>
> (emphasis added)

[216] In my view, this statement made it clear that relevant managers could not sit back and wait for an employee to act; if aware of a complaint, they were required to act quickly and effectively.

[217] Such an interpretation is consistent with the good faith provisions of the Act, found in s 4, requiring the parties to an employment relationship to be active and communicative in establishing and maintaining a productive employment relationship.

[218] As a general observation, the existence of bullying may have health and safety implications. Where an appropriate policy as to bullying or harassment is in effect or is applied, any allegations will usually fall to be considered under that policy or those provisions. However, where bullying is not made out on the evidence, that is not necessarily the end of an appropriate health and safety enquiry.

Understanding of Ms H's medical condition when performance management was commenced

[219] Ms Badham said that Ms H had advised her that she was on medication, although she did not recall specifically what that was for. She said that Ms H had not

made a big issue about it, and had not wanted to talk about it. Her evidence suggested that from time to time Ms H had difficulty focusing, or trouble sleeping. She said that she was also aware that from about May 2015, personal events had occurred that had affected Ms H. Ms H had found that EAP counselling sessions were of assistance.

[220] Ms Julian said that she was unaware of these issues at the time of the handover to her, but Ms H talked about them when she started conversing with her about her work. Soon after, in an email exchange on 30 July 2015 relating to the importance of being focused for work purposes, Ms H mentioned she had ADD.

[221] Ms Julian quickly recognised that Ms H's ADD condition could be relevant to her work performance. To her credit, she obtained specialist input from two individuals. However, the EAP counsellor whom she consulted stressed that she needed to stay within her role and boundaries, and not become too involved in Ms H's situation. Ms Julian recorded that she was to "do less" than might otherwise have been her inclination. She was also told that there were varying levels of ADD, that the organisation was proceeding only on the basis of what they had been told by Ms H, and not on the basis of any confirmation from a medical professional. This advice did not lead to a request for medical information from Ms H, at least at this stage.

[222] Ms Julian continued to be aware of Ms H's medical condition. However, she tended to focus more on her expectations of Ms H.

[223] As I shall outline shortly, Ms H's underlying medical condition became an even more significant factor as time went on.

Removal of approval and overtime work

[224] Much was made in the evidence as to the removal of approval work and overtime work. But as Ms Dyhrberg submitted, the decisions to do so were steps which were open to the employer to take, given legitimate performance concerns. It was within managerial discretion. The process for making the relevant decisions and informing Ms H of them was not ideal, but Ms Julian apologised promptly when it became apparent there was a concern.

[225] On the information held by Ms Julian and RST at the time these steps were taken, it could not have been foreseen there could be an impact on Ms H's health. These matters are therefore legally irrelevant to the first cause of action. That said, it became clear subsequently that Ms H felt she was being punished by the removal of privileges, and this affected her self-esteem. As time went on, this factor required reconsideration. This apparently occurred at mediation: approval work was reinstated, but not overtime work even although it was indicated reinstatement would be considered favourably in December 2015. The decision not to do so led directly to the deterioration in Ms H's behaviour which I shall review shortly.

Surveillance?

[226] Next, I refer to the concerns which were raised as to what Mr Henderson described as the "secret gathering of information" by Ms Julian in her log, and the business mentors, Ms Sila and Mr Sidaway in the observation notes which they prepared. Ms H was unaware of this documentation, and was thus unable to correct errors. Mr Henderson said the lack of opportunity to know and if necessary immediately correct the information obtained was a matter which went to the safety of the workplace.

[227] Ms Dyhrberg said these assertions were unfair. She argued it was good practice to act on the basis of accurate information; Ms H was kept up-to-date with the concerns as they arose, and she would have been given copies of the documents if they were requested.

[228] It is clear this information was relevant to conclusions which were being reached regarding Ms H's performance. It was not for her to seek documents she did not know about. She was not given the opportunity to check this material, and examples were given of a number of wrong assumptions and conclusions.[25] This was a natural justice failure, which could have founded a cause of action alleging procedural breach, if such had been pleaded. However, for present purposes I am not persuaded that these factors, at the time they occurred, could be regarded as health and safety or bullying issues.

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[25] As derived from notes taken on 7, 10, 28, 25 and 31 August 2015.

[229] Nor am I persuaded, at least for the purposes of the early stages of the chronology, that assertions of micromanagement, seating location, or reference to the possibility of a PIP being implemented, were health and safety issues.

Bullying?

[230] It is next necessary to consider several meetings which took place on or after 18 August 2015.

[231] Mr Henderson submitted that these constituted the first example of "three major complaints of bullying". They were made to Ms Sinclair and Mr Philp. Counsel also said Ms H made it "crystal clear to these managers that she believed her health was in danger". It is necessary to examine the evidence in some detail to assess this submission.

[232] It is evident from her conversation with Ms Sinclair, as recorded in an email which she sent soon after, that Ms H wanted to shift teams. This would have had the effect of her no longer being directly managed by Ms Julian. Ms Sinclair told her she was not comfortable with this possibility, because more time was needed for her to demonstrate consistency in her work.

[233] It was in the face of this response that Ms H said she felt bullied by a number of people. She also said she wanted her father to assist her because she knew she was not being rational and needed his help. Ms Sinclair understood that what was at the heart of Ms H's concerns were the facts that she was being "micromanaged" and that Ms Julian was "asking me questions". On the basis of these assertions, Ms Sinclair told Ms H that she did not think this was bullying.

[234] Then, Mr Philp saw Ms H at short notice at her request. He was given a quick briefing, apparently by Ms Sinclair. He understood there were issues with the way Ms H processed her work, not volume, although a focus on this developed. As mentioned earlier, the meeting was "informal and casual", although it ran for 20 minutes; it was not documented.

[235] Mr Philp said that Ms H complained about being treated unfairly by Ms Julian. Particular reference was made to the constant checking of her work by Ms Julian – more so than that of her fellow team members; she also said her throughput was not regarded as acceptable. Mr Philp told Ms H he considered Ms Julian's actions were fair and reasonable, given the performance issues. Because Ms H said she was doing as much work as anyone else, he would have the records of volume checked.

[236] He obtained figures which suggested to him that Ms H was not performing to an expected level. He met her for a second time the following day, to provide this information and his view as to expectations. He repeated that Ms Julian was treating Ms H fairly. It transpired the numbers given to him were incorrect, but once corrected, his view did not change.

[237] Ms H was adamant that she also told Mr Philp she was being bullied. Mr Philp said that this language was not used. I find that Ms H may have used the term "bullying" because her evidence that Mr Philp then said if she felt that strongly she should make a complaint was not contested by Mr Philp. However, as in the conversation with Ms Sinclair, the focus was on what it was that amounted to bullying. And like Ms Sinclair, Mr Philp considered the matters being complained of were legitimate steps in an informal performance management process.

[238] There is no evidence that Ms H referred to her anxiety condition in either of these conversations. It is unclear on the evidence whether Ms Sinclair knew of this already, but I am satisfied that Mr Philp did not. In both meetings, the focus was on the way Ms H was being managed. The focus of this discussion is to be contrasted with later meetings when Ms H made express reference to her medical condition, and/or to the effect the PIP process was having on her health.

[239] A question which then falls for consideration is whether the references made by Ms H to bullying should have caused RST to institute an independent investigation under its Harassment Policy. Mr Timothy McMahon, who gave expert evidence on behalf of Ms H, suggested that when assertions of this sort were made by Ms H, RST should have followed its own policy and appointed an independent investigator; he said managers should not have responded by telling Ms H she was not being bullied.

[240] The responses given to Ms H by Ms Sinclair and Mr Philp as to whether she was being bullied were given intuitively rather than by reference to the Harassment Policy. However, I consider their responses were in fact correct when assessed under that policy, for two reasons. First, Ms Julian had not demonstrated intent; she was not harassing Ms H so as "to have power or unwarranted control over another". Second, the performance management steps which had been taken fell within the statement in the policy that harassment did not include "legitimate criticisms about your work performance (unless they are expressed in an unprofessional or hostile manner)"; and "free and frank discussion about legitimate issues or concerns in the workplace, without personal insults".

[241] In hindsight, it can be seen that Ms H's underlying medical condition meant that her ability to cope with more intense performance management was more limited than would have been the case for others. However, I find that given the way in which the issues were presented to Ms Sinclair and Mr Philp at this stage, and in particular, Mr Philp's evidence to the Court that he was unaware of these underlying factors, it is unsurprising that he did not focus on them at the time.

[242] I find that the response given by Ms Sinclair and Mr Philp to Ms H were reactions which were open to a fair and reasonable employer in the particular circumstances which pertained at the time.

[243] These events, however, are not without significance for later purposes. Mr Philp said that at some reasonably proximate point after these meetings, he spoke to Ms Julian and Ms Sinclair to discuss whether the performance management process was unfair, or whether Ms H was being targeted. He said they both held the view that the process had been fair, but they saw Ms H's behaviour as "irrational" and that Ms H had been "venting". Ms H herself had acknowledged at the time to Ms Sinclair that she was not being "rational". This factor was a yet further pointer to an underlying issue which could not be ignored.

The raising of health and safety concerns

[244] Against that background, it is next necessary to consider the sequence of events that occurred in late September/early October 2015.

[245] Although this particular sequence of events was initiated by a communication from a health and safety representative to the effect that Ms H wanted to lodge a bullying complaint, the real focus in the meetings that took place was on health and safety.

[246] At the meeting with Ms Scott where Ms H was supported by her father, on 30 September 2015, reference was made to the anxiety and pressure which the performance management process was creating. Ms H stated that the situation had become a health and safety matter impacting on her sleep and increasing her anxiety. As a result, Ms Scott requested the provision of information from Ms H's GP.

[247] In their contemporaneous conversation, Ms Scott and Ms Wairau discussed the health issues in detail. By this time, they were aware of the significant concerns Ms H was expressing about the health impacts of performance management, and how this gave rise to adverse reactions as evidenced by the notes Ms Julian had forwarded about the altercation on 29 September 2015. They recognised that these events were related to Ms H's condition because they discussed the EAP advice which had been provided on that topic. Thus, they noted that in undertaking performance management, RST would need to be mindful of Ms H's disability. Although they were not medical professionals, they would need to support Ms H, albeit recognising appropriate boundaries. The question as to whether RST was being too prescriptive in undertaking the PIP was acknowledged. The need to seek medical advice, if necessary, was again recognised. They obviously understood there was a health and safety issue.

[248] Following these various meetings, two medical certificates were provided. The first of these, which followed an examination by Ms H's GP on 1 October 2015, referred to the fact that Ms H was suffering increased anxiety, which was impacting on her sleep, which in turn impacted on work performance. The GP went on to say that she was medically fit to undertake her previous work as an approver, and work overtime as required. However, a second medical certificate which followed a review on 5 October 2015 said Ms H had been "medically unfit for work" from 2 to 5 October 2015. No further explanation was given.

[249] The first which suggested Ms H was medically fit gave scant detail. In addition, the reference to undertaking approval and overtime work, on its face, was not obviously a topic on which the GP was able to express a reliable opinion; this statement was likely to be a reflection of what the patient had said. The second medical certificate was even more brief, and on the face of it conflicted with the first, because Ms H was in fact unable to work for three days on medical grounds.

[250] Ms Scott and Ms Wairau had realised they needed medical confirmation as to Ms H's disability. When it was not given, it is most surprising that the possibility of obtaining a proper medical explanation was not considered. This was a missed opportunity.

[251] Mr Henderson submitted that these events constituted the second major occasion when a reference to bullying was made, this time with express reference to impact on health, which should have triggered an independent investigation under the Harassment Policy. Mr McMahon's evidence supported this submission.

[252] The records that were taken of the meeting on 30 September 2015 show no express reference to the subject of bullying; that said, it appears Ms Scott was aware of the concerns raised by Mrs Garwood because she provided Ms H and her father with a copy of the Harassment Policy, as well as the policy relating to the Problem Resolution Procedure.

[253] In the detailed letter sent by Mr H to Ms Scott on 5 October 2015, there was again no express reference to bullying. What was stressed was the effect of the performance management process on Ms H's health: I cited earlier Mr H's statement that his daughter felt "under continual siege which is affecting her sleep and her health", and later that "the anguish is affecting her health".

[254] In my view, RST was entitled to conclude, as the managers did, that the real issue was a health and safety matter, as had been discussed at the meeting and then in Mr H's letter, caused by intense performance management; and that Ms H did not in fact wish to advance a formal bullying complaint despite such a possibility having been alluded to several days earlier by the health and safety representative.

[255] The submission that a formal investigation under the Harassment Policy should have been instituted at this stage has to be assessed in that context.

[256] Since health and safety was the real problem, I return to the lack of specific detail regarding Ms H's condition. I have indicated that it is surprising there was no follow-up request for such information. It is apparent that relevant managers, and particularly the HR staff, Ms Scott and Ms Wairau, were lulled into a false sense of security by the involvement of Mr H who had met with them. They appear to have taken the position that with her father's support, Ms H would supply the relevant information; and then the focus turned to the requested mediation.

[257] For the purposes of health and safety considerations, I can move fairly quickly through the period to mid-December 2015. Mediation resulted in an agreement being reached as to a formal PIP. It is regrettable that it took as long as it did to set it up, but it is not asserted that this necessarily had implications for Ms H's health and safety.

[258] Initially positive progress was made under the PIP. However, the situation went seriously off the rails from mid-December onwards, essentially because of what was perceived as misbehaviour by Ms H. In fact, she had been working hard, although she found this was stressful. She reacted adversely when the reintroduction of overtime did not occur, because she had believed it would; this possibility had provided an incentive for hard work. It is evident she saw the provision of overtime as contributing to her status and self-esteem, which was obviously important for someone with her condition. As a result, several unfortunate events occurred, as documented earlier.

[259] By this time, it was well known that Ms H was suffering ADD. Her medical condition was specifically referred to in the PIP. She was known to be prone to anxiety, and that this had given rise to significant sleep deprivation over many months. She had also clearly been identified, at times, as being irrational (as discussed with Mr Philp). A significant lack of focus had often been observed. Confirmation of the role of workplace activities on health had been confirmed albeit in brief form by her GP. However, this fact had been corroborated by Mr H, and there was no suggestion his opinion was unreliable.

[260] In summary, by the end of December 2015, Ms H was manifesting an obvious attention-deficit condition. RST managers had been observing this in her work practices for nearly six months. The question arises as to why, in light of that knowledge and the clear identification of potential problems by HR staff, no steps to explore the medical issues further were taken.

[261] By this time, Ms H was being fully supported on a day-to-day basis by Mr Devine, and by Mr H. As before, RST managers appear to have assumed that if any further information should be provided regarding Ms H's condition, it was for those assisting Ms H to ensure this would occur.

[262] The situation in early 2016 was no better. By then there was an increased focus on managing Ms H's behaviours. Ms Sinclair, Ms Wairau and Ms Julian all believed that Ms H's outbursts when she reacted aggressively, rudely or dismissively stemmed from the simple fact that she did not like being performance managed. They told the Court there had been a clear pattern throughout the seven months of the process, and that close oversight should be continued so as to address those behaviours.

[263] Ms Dyhrberg submitted that it was not reasonable to expect an employer to stop a lawful process, simply because the employee was having an emotional reaction, when that reaction seemed angry and impulsive rather than a system of deteriorating health. She submitted that efforts were made to alleviate the apparent pressures and anxiety experienced by Ms H, such as:

- extending timeframes to allow her more time to respond;
- offering her EAP counselling;
- allowing her time to attend the gym;
- support provided by business coaches;
- providing a summary of discussion points prior to meetings;
- postponement and reprioritising meetings;

- allowing her to move desks;

- allowing her to spend time on another floor when she became overwhelmed;

- involving Ms Sinclair, as a more objective participant in meetings as required; and

- other temporary measures as discussed with Mr Devine in late December 2015.

[264] I have no doubt that the managers involved genuinely believed that these were all fair steps in the circumstances, as they were. But they were not sufficient, because even when those steps were taken Ms H continued to be distraught, displaying obvious signs of heightened anxiety.

[265] Her behaviour became even more difficult in late January/early February 2016, when RST moved to formal disciplinary action.

[266] Thus, Ms Julian in her letter of 21 January 2016, advised Ms H that an alleged failure to improve work performance, or to behave appropriately on four occasions in December and January, was "potential misconduct". When the letter was provided to Ms H there was an inevitable response where she lashed out at Ms Julian, to her frustration. Ms H apologised subsequently. I find that the performance management process had become oppressive in the circumstances.

[267] In the meetings which followed it was clear that Ms H continued not to sleep adequately, and that she felt nauseous and unwell. Ms Julian's reaction on being told this was to raise an issue as to how this information was communicated to her; whilst she was attempting to regulate Ms H's behaviour, was regrettable.

[268] The meeting instituted by Mr H on 11 February 2016 with Ms Sinclair was significant. In that meeting, he accurately identified and summarised the issues. He made it clear Ms H was suffering significant work-related stress, to the point of

incontinence. These representations constituted a yet further red flag: it was a significant one.

[269] However, the process of numerous meetings reviewing Ms H's work and behaviours continued. At the subsequent disciplinary meeting, Mr Devine, who was recognised as an experienced and reliable PSA official, justifiably emphasised that the imposition of a warning in the circumstances was a serious step given management's awareness of Ms H's anxiety issues and susceptibility to panic attacks. I observe that the prospect of extending the protracted PIP process by another month was also a serious step in these circumstances, given the length of the process to that point.

[270] Ms H continued to react adversely, accusing Ms Julian on 24 February 2016 of having bullied her for several months, and stating that she had enjoyed every second of it. It was this behaviour which resulted in Ms Sinclair telling Ms H the next day that she would be commencing another disciplinary process. This appears to have been the final straw for Ms H, because she then became so ill she was unable to attend work for several weeks.

[271] The difficulty which arose here was that a routine performance management process, and then disciplinary processes, were being used in an attempt to control adverse behaviour arising from what managers had been told on many occasions was an ADD condition.

[272] They did not apparently link the deteriorating behaviour to Ms H's disability but, as Mr H made crystal clear to Ms Sinclair on 11 February 2016, the various processes were plainly affecting Ms H's health.

[273] HR staff had some four months previously recognised medical advice was needed. The need for that advice became more acute as time progressed, particularly if RST was to continue to manage a rigorous performance management process that was plainly affecting Ms H's health. It was not enough to respond by stating, as Ms Sinclair told Mr Devine in late December 2015, that Ms H needed to show "more resilience". Nor were the other steps taken by RST sufficient to ameliorate the effects of performance management.

[274] RST was driving a very structured performance process which, by February 2016, had been maintained for seven months. This was to break habits of an employee who not long before the process commenced had been regarded as performing well. It was known she had an underlying medical condition which meant she had considerable difficulty handling the stress of the process, and that there had been significant sleep deprivation.

[275] It was entirely foreseeable she would continue to react adversely if the formal processes were maintained, because of her anxiety disorder.

[276] All of this meant the organisation needed to take responsibility for requesting proper medical advice. In the particular circumstances, the onus was on the employer to work with the employee to obtain advice which was adequate in the circumstances.

Conclusion on first cause of action

[277] In my view, to commence and maintain the two disciplinary processes, in the absence of steps to obtain adequate medical advice, is not what a fair and reasonable employer could have done in all the circumstances. The same view applies to the decision to extend the PIP process to 31 March 2016. In both instances, RST failed to comply with the applicable obligations to maintain a safe and healthy work environment.

[278] This aspect of Ms H's disadvantage grievance is accordingly established.

Second cause of action: removal of approval work, and overtime work

[279] I have already referred to the circumstances relating to the removal of approving work and overtime work. I have found that the process for making the relevant decisions and informing Ms H of them was not ideal. But Ms Julian apologised soon after, when it became apparent Ms H was upset at this development.[26]

[280] I also found earlier that these steps were not relevant to the cause of action relating to health and safety obligations.

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[26] Above at para [224].

[281] For present purposes, the Court must consider whether a fair and reasonable employer could have taken these steps in all the circumstances which existed at the time the decisions were made on 30 July and 14 August 2015.

[282] In my view, the issue is one of procedural fairness. There is no evidence that had these decisions been made after consultation with Ms H, performance management would have been any different.

[283] This cause of action falls for consideration under s 103A(5). There was a procedural flaw but it was minor when considered in the overall context; nor am I persuaded that it resulted in Ms H being treated unfairly at the time the decisions were made. The long-term effects of these steps could not necessarily have been foreseen by Ms Julian when she made these decisions.

[284] This aspect of the disadvantage grievance is not established.

Third cause of action: failure by Ms Sinclair and Mr Philp to arrange an impartial investigation following a complaint of bullying

[285] This allegation relates to the events which occurred on or about 18 August 2015. I have already considered these.[27]

[286] I have found that the focus of the discussion with both Ms Sinclair and Mr Philp was on the various steps Ms Julian was taking to improve Ms H's work performance. The essence of Ms H's concern was the rigour of the process, including the detailed questioning of work methodology, neither of which she found easy to cope with.

[287] In terms of the definition of bullying in the policy, there is no doubt that Ms H found the intense supervision to be "unwanted", "intimidating" and "humiliating", to use the language of the policy. However, unless legitimate criticisms were expressed in an unprofessional or hostile manner, they could not be described as "unwarranted".

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[27] Above at paras [230]-[242].

[288] Although Ms Julian's approach to performance management was tenacious, it had not been unprofessional or hostile. I am accordingly satisfied that "bullying" was not the correct description of the problem. I also conclude, for the purposes of these circumstances, that the mere use of the term did not require an automatic response that an independent investigation under the Harassment Policy should be commenced.

[289] This aspect of the disadvantage grievance is not established.

Fourth cause of action: failure by Ms Sinclair to arrange an impartial investigation following a further complaint of bullying

[290] This allegation relates to the events which occurred on or about 28 September 2015.

[291] Again, these events were analysed for the purposes of the first cause of action.

[292] A reference to a possible complaint of bullying was contained in an email sent by Mrs Garwood to Ms Sinclair. Ms Sinclair asked Mrs Garwood to confirm with Ms H what action she wanted to take on her behalf, and then to forward it.

[293] This step was overtaken by the contact which Ms H established with Ms Scott, and then the meetings which followed. As I found earlier, the focus at that point was on health and safety issues, rather than the assertion of bullying.

[294] This aspect of the disadvantage grievance is not established.

Fifth cause of action: failure by Ms Scott on receiving complaint of bullying, to arrange an impartial investigation

[295] It is asserted that on 30 September 2015, Ms Scott received a complaint of bullying by Ms Julian, and then failed to institute an independent investigation.

[296] As already indicated, in her conversations with Ms Scott in the period 28 to 30 September 2015, Ms H primarily referred to health and safety issues. She did provide relevant policies which included provisions for making a complaint. On

considering those Ms H, assisted by her father, requested mediation which subsequently took place.

[297] This aspect of the disadvantage grievance is not established.

Sixth and seventh causes of action: initiating disciplinary proceedings

[298] The two causes of action which assert disadvantage grievances because disciplinary actions were commenced by Ms Julian and Ms Sinclair in January/February 2016 can conveniently be dealt with together.

[299] I have already found that these processes establish a disadvantage grievance on health and safety grounds.[28] In these circumstances, it is not strictly speaking necessary to consider these steps further, however, for the sake of completeness I do so.

[300] In addition to the health and safety allegations, Mr Henderson asserted that the letters relating to the disciplinary process, as authored by Ms Julian on 21 January 2016 and 22 February 2016, and as authored by Ms Sinclair on 26 February 2016, were not "legally valid". The thrust of this allegation was that given their prior involvement in the performance management processes relating to Ms H, neither had sufficient partiality to deal with these issues.

[301] For RST, Ms Dyhrberg submitted that such an allegation was unmerited; she said there was no evidence of bias, and nor was there any impediment to a manager who had been involved in the history of a matter resolving issues then arising from it.

[302] She placed emphasis on the dicta of this Court in *New Zealand Tramways IUOW v Auckland Regional Council*, where it was emphasised that the fact that "the person making the decision is an officer of the employer empowered to deal with the issue does not of itself automatically make the decision biased and thereby deny the employee of the opportunity of a fair hearing."[29]

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[28] Above at paras [277]-[278].

[29] *New Zealand Tramways IUOW v Auckland Regional Council* [1992] 2 ERNZ 883 (EmpC) at 891.

[303] She submitted that RST had clearly proceeded in accordance with relevant policies, and in accordance with principles of good faith; nor could it be said their processes were predetermined, as they had yet to be the subject of decisions. Indeed, if the Court were to determine there had been "minor defects" in the processes, they could be remedied.

[304] Dealing first with the process instituted by Ms Julian, it is evident that by this time she was "incredibly frustrated", with aspects of Ms H's behaviour, including what were regarded as emotional outbursts, as she told her manager Ms Sinclair at the time. Mr Devine had earlier referred to what he described as a "relationship breakdown" between Ms Julian and Ms H. Ms Sinclair did acknowledge their relationship was "strained". Then, it was decided that a disciplinary process should be commenced, with insufficient acknowledgment of the health and safety issues as previously discussed. I do not attribute blame to Ms Julian for this, as it is clear she was consulting closely with both Ms Sinclair and Ms Wairau, taking guidance from them.

[305] However, I consider that the advancing of a disciplinary process by a manager who had been closely involved in a process which had become increasingly fraught, was not a step that a fair and reasonable employer could have taken. It caused Ms H disadvantage in the form of yet further significant anxiety, which was a health issue. This is a further procedural defect, which supports the disadvantage grievance.

[306] Turning to the disciplinary process commenced by Ms Sinclair, the disciplinary issue she raised did not relate to circumstances in which she had been directly involved, but to the manner in which Ms H had spoken to Ms Julian.

[307] I am not persuaded that an independent cause of action is established by the fact that it was Ms Sinclair who had commenced the second disciplinary process.

[308] The sixth cause of action is made out, and this aspect of the disadvantage grievance to which it relates is established. The seventh cause of action is not made out.

Eighth cause of action: maintaining "disciplinary/dismissal process" on and after 13 May 2016

[309] This cause of action may be dealt with briefly. Essentially it is asserted that to continue the disciplinary process commenced by Ms Sinclair after Ms H's GP had confirmed she was fit to return to work, amounted to "adverse conduct".

[310] It must follow that if this disciplinary process could not be justified as discussed earlier, then maintaining it after 13 May 2016 when Ms H was certified fit to return to work was also not justified; to do so caused disadvantage to Ms H as an employee.

[311] This was not a step which a fair and reasonable employer could have taken in all the circumstances. This aspect of the disadvantage grievance is thereby established.

[312] Although not pleaded, logically the same conclusion must apply to the disciplinary process initiated by Ms Julian.

Conclusions

[313] Ms H's disadvantage grievance is established with regard to the proved allegations pleaded in the first, sixth and eighth causes of action.

[314] The next issue which the Court must consider is remedies. Some evidence was presented on this matter, but neither counsel presented relevant submissions. This topic should be the subject of both evidence and submissions in light of the conclusions reached by the Court. It would be potentially unfair to both parties to proceed on the basis of the limited information which has been provided to this point. In the very unusual circumstances of this case, I consider that the only fair way forward is for the Court to reconvene to receive evidence indicating more precisely what financial remedies are being sought in light of this Court's findings; and addressing issues such as mitigation and contribution. I also note that Mr Henderson in his opening submissions submitted that the Court should make a recommendation as to

health and safety practices. This submission was not developed in closing. It is unclear whether the point is still pursued.

[315] I will convene a telephone directions conference with counsel to discuss the way forward on a date which is to be fixed by the Registrar within two weeks of the issuing of this judgment.

B A Corkill
Judge

Judgment signed at 3.15 pm on 1 June 2018