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

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2019] NZEmpC 192
EMPC 177/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	STANLEY ERIC JOHNSON Plaintiff
AND	CHIEF OF THE NEW ZEALAND DEFENCE FORCE Defendant

Hearing:	20, 21 and 22 November 2019 (Heard at Wellington)
Appearances:	T Cleary, counsel for the plaintiff N Lucie-Smith and C Mao, counsel for the defendant
Judgment:	19 December 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The New Zealand Defence Force (NZDF) believed that an email received in the office of the Deputy Prime Minister had been sent by one its employees, Stanley Johnson.

[2] When Mr Johnson was informed by NZDF that an inquiry would be undertaken because the sending of the email amounted to an apparent security breach, he said his email account must have been spoofed or hacked because he was not the sender. Subsequently, he presented statements from himself and an IT specialist to support his

response. Ultimately NZDF concluded it was very likely he had sent the email, but it would not pursue a disciplinary process.

[3] Mr Johnson raised a disadvantage grievance in light of his contention that the NZDF inquiry had been flawed, as was the conclusion it was very likely he had sent the email; he contended NZDF's unjustified actions had led it to lose trust in him, and to impose a warning.

[4] Following an investigation of Mr Johnson's grievance, the Employment Relations Authority dismissed his personal grievance.[1]

[5] He brought a challenge to the Authority's determination, repeating his claim that he had been unjustifiably disadvantaged by NZDF. It denies that it acted unreasonably in any respect, and says Mr Johnson was not disadvantaged.

[6] Accordingly, the issue for the Court is whether Mr Johnson has a personal grievance, and if so, the remedies to which he is entitled.

Key facts

[7] On 29 November 2017, an email was received in the office of the Deputy Prime Minister, the Right Hon Winston Peters, under the heading "Dysfunctional Leadership in NZDF wasting taxpayer funds".

[8] The author of the email stated he was a new citizen of New Zealand, who had been sworn in at a recent ceremony. He stated he was seriously frustrated with a problem at his place of work, the NZDF; he said there was "institutional disobedience".

[9] The email went on to say that the author had been recruited to NZDF to aid with recovering and delivering a new capability which had been in service in the United States of America (the US) for more than 20 years. Although the project had progressed a great deal, the capability would not deliver any benefits if it was not

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[1] *Johnson v New Zealand Defence Force* [2019] NZERA 267.

staffed. Despite relevant directives, a year and a half later, the capability was less than one quarter staffed and losing personnel faster than it was possible to train them. Requests for staff continued unanswered or were ignored.

[10] The author stated that over 20 million dollars had been spent on the project, and it was well on the way to being declared operational. However, lack of staff would torpedo the capability and waste taxpayer dollars. There had been no authorisation to fill essential positions. Thus, a critical tool for conducting and supporting the command and control of the NZDF sat idle and was barely used. The author stated that the project was one which could deliver dividends, but only if it was fully staffed.

[11] The email was signed by "A concerned new citizen of NZ".

[12] The header stated that it had been sent:

> From: Stanley Johnson [mailto: taka3dive@gmail.com] On Behalf Of Stan Johnson.

[13] The footer stated that it was "Sent from Concerned citizen's iPhone".

[14] The email was forwarded to, and considered by, senior officers within NZDF. Eventually, on 20 December 2017, Air Commodore Andrew Clarke referred the email to Group Captain Leanne Woon and asked her to formerly raise the sending of the email with Mr Johnson, one of her subordinates. Air Commodore Clarke also advised Group Captain Woon that Mr Johnson had raised the project manning issue several times with a governance board, and through formal reports.

[15] Group Captain Woon was a member of the Capability Branch, accountable for the delivery of capability programmes and projects, both minor and major.

[16] Mr Johnson's manager was David Owen, Deputy Director of the Capability Branch. Mr Owen reported to Group Captain Woon.

[17] For the purposes of the events I am about to describe, Group Captain Woon sought and received advice from Eszter Colebrooke, Senior Human Resource (HR) Advisor.

[18] On 12 January 2018, Group Captain Woon hand delivered a letter from herself to Mr Johnson, prepared with the assistance of Mrs Colebrooke. The letter began as follows:

> The NZDF have been forwarded an email from the Minister's office which you sent to Rt Hon Winston Peters on 29 November 2017 with the subject line of "Dysfunctional Leadership in NZDF wasting taxpayer funds". This has now been forwarded to me to discuss with you.
>
> The content of your email is in regards to your concerns over institutional disobedience and the personnel resourcing of the Defence Command and Control System project (refer email attached as Appendix 1). This email is of serious concern to me because it reflects behaviour that may be in breach of the NZDF Code of Conduct and your employment agreement.
>
> The contents of your email could be seen as bringing NZDF into disrepute and breaching the confidentiality clause of your employment agreement. I am also concerned that you have not raised your complaint and concerns via the appropriate channels and procedures (protected disclosure).

[19] The letter went on to propose a meeting to discuss the matter, at which Mr Johnson would be welcome to bring a support person or representative. Group Captain Woon said she would then take some time to consider the information obtained and determine how the matter should be appropriately addressed. Further action could include a formal disciplinary process.

[20] Mr Johnson said that when Group Captain Woon met him to provide the letter, she said he appeared to have been involved in a breach of contract/ethics violation and a breach of security. She was reading from papers she had in her hand. She then handed them over, at which point he saw she had been holding a letter addressed to him with an attached email. He scanned that document quickly, noting header details, and what he described as a disrespectful subject title, which he thought were all red flags. He also saw that the first sentence referred to a new citizen. He said he knew this could not refer to him as he had not become a citizen at the date of the email. He then said that he did not recognise the email, had not sent it, and would not have jeopardised his NZDF security by doing so, as well as his citizenship. Because Group Captain Woon said the email had come from his account, he said that it must have been spoofed or hacked.

[21] Spoofing is where someone fakes an email address, often via an online tool which is available to accomplish this task. Hacking is where a person gains unauthorised access to data in a system or computer.

[22] Later that day, Group Captain Woon made some brief notes of her meeting with Mr Johnson. She recorded that Mr Johnson's immediate response was that his Gmail account had been hacked and the letter had not been sent by him. He had stated he would not jeopardise his security clearance or his newly acquired citizenship. She wrote that she had queried Mr Johnson on where the content of the letter could have come from as the information would only be known by someone inside the relevant project team. Group Captain Woon recorded that Mr Johnson had said that the date of the letter was prior to him gaining New Zealand citizenship, "even though the letter ... refers to him as 'new citizen' and is signed a 'Concerned new citizen'". He had asked if NZDF security could find out who had hacked his account; she had responded that the email was sent from his private phone and was not a NZDF responsibility. She recorded that she had gone on to tell him she would require proof that his account had been hacked.

[23] Mr Johnson then phoned his brother who was involved in the IT industry. He told Mr Johnson that the words "On Behalf Of" were a major red flag for spoofed emails. Mr Johnson then approached Group Captain Woon pointing this out and stating that the email was clearly not sent by him. She told him she still wished to meet the following week.

[24] Her own record of this event recorded she told Mr Johnson he would need to check his Gmail account to see if there was any evidence of misuse.

[25] Other emails were exchanged with Group Captain Woon and Mrs Colebrooke in light of Mr Johnson's statements. In one of them, Group Captain Woon said she was "quite staggered" by what Mr Johnson had said.

[26] On the same day, a private secretary to Hon Ron Mark MP emailed Mr Johnson acknowledging receipt of the email by the office of Rt Hon Winston Peters. The email stated that as Mr Johnson's query fell under the NZDF portfolio, it had been transferred to Mr Mark's office. Mr Johnson replied, stating he was confused by the email, as he had no record of having contacted Mr Peters. He said he also found it very disturbing that someone would use his name and spoof his account in this manner to implicate him in such a negative way with regard to his employment relationship.

[27] Other email exchanges took place between NZDF staff members. Mrs Colebrooke sought technical advice from Matt Condon, a member of NZDF's Information and Assurance Team (NIAT). Initially he said that in the absence of email headers of the original, one could not hold Mr Johnson in any way responsible for what happened, having regard to the possibility of spoofing. He said that if the email had been sent from an NZDF address, there could be a reason to investigate further. Mrs Colebrooke responded by stating that Facebook identified the Gmail address as belonging to Mr Johnson. Mr Condon stated that someone could easily spoof such an account.

[28] Mr Condon then undertook a Facebook check himself, which led him to alter his opinion. He could now say, with "high confidence", that it was Mr Johnson who sent the email. But he qualified that by saying that this was all still speculation and "non-admissible". He said he himself would use the knowledge that it was Mr Johnson, but Mrs Colebrooke would be on very shaky ground from a legal standpoint if she were to adopt such a conclusion in an HR process.

[29] On 17 January 2018, Mr Johnson and a lawyer, Francis Lear, met with Group Captain Woon, Mrs Colebrooke and Mr Owen. Ms Lear presented prepared notes from Mr Johnson, which emphasised that he had not sent the email to Mr Peters. Mr Johnson referred to several inaccuracies in the email. These included that he had not, as at 29 November 2017, been sworn in as a new citizen as this did not take place until 6 December 2017; that the email used language that he would not use; that the email stated he had been working for more than half a century, which was clearly not the case; and that when writing to a Member of Parliament he would not sign off using the word "Cheers" as that would be too informal. He also suggested that the person

sending the email was trying to be anonymous, yet he was identified. Further, that the addition of the words “On Behalf Of Stan Johnson” following the email address was a clear indication the email was sent from another account, using his Gmail account as a return address. He went on to state that it was possible for someone else to send an email without having physical access to his iPhone, computer or an actual email account, and that he had taken advice to this effect. He did not know who sent the email. There were a number of people who were familiar with the project, and his citizenship application, who might have their own reasons for desiring to have the personnel issues addressed by Government, and who would also have the minimal capability needed to send the email. He said he was highly concerned about his reputation internally and within the Minister’s office.

[30] Also provided was a written statement by Simon Howard, an IT specialist. In essence, Mr Howard said that without copies of the original emails, rather than forwarded emails, he could not determine who had sent the original. He also explained briefly that the ability to spoof or fake someone’s email address was easy to accomplish, even for non-technical users.

[31] Mr Johnson said he consented to NZDF examining his work computer and emails. He also offered to cooperate and provide full access to all his personal devices for analysis.

[32] Group Captain Woon said she would schedule another meeting after obtaining further information about the email from Parliamentary Services.

[33] There was some delay in obtaining the header information relating to the email, but it was eventually provided to NZDF on 31 January 2018.

[34] The header detail referred not only to the email address shown on the email itself, but to a second email address: taka3iii@spcglobal.net. Mr Owen, on 2 February 2018, told Group Captain Woon and Mrs Colebrooke that this was an address from which Mr Johnson had conducted his earliest communications with NZDF, whilst still residing in the US, and to which NZDF had sent replies. He noted

that since Mr Johnson had moved to New Zealand, the spcglobal address appeared to have fallen out of use in favour of Mr Johnson's Gmail address.

[35] On the same day, Group Captain Woon advised Ms Lear that the header details were being assessed by NIAT. Once their report was received, an update would be provided.

[36] On 9 February 2018, Group Captain Woon wrote to Mr Johnson describing the process which had been undertaken to that point. She stated that NIAT had examined the email headers and determined that Mr Johnson's taka3dive@gmail.com email address had not been spoofed; and that the email was also linked to the secondary email address of taka3iii@spcglobal.net. Accordingly, she said the evidence from NIAT was inconsistent with the explanation Mr Johnson had provided. A further meeting was proposed to enable him to provide a response. At the same time, internal NZDF emails regarding the matter were provided, in response to a request that had been made on Mr Johnson's behalf under the Privacy Act 1993.

[37] Mr Johnson has a heart condition. He said that this process had become increasingly stressful for him. On 12 February 2018, his general practitioner (GP) noted increased blood pressure. On 15 February 2018, he was admitted to the Accident and Emergency Department of Wellington Hospital for chest pain. It was recorded that he was suffering major stress at work. Advice as to medication was given. His GP then certified him as medically unfit from 16 to 26 February 2018.

[38] During this period, Mr Johnson emailed Mr Owen stating that although he had previous heart issues and diminished function, he had remained stable for some years; his last check-up had been in August 2017, when he was told that all was fine. He said the rapid decline was unexpected and unnerving. He also said that he only exhibited symptoms when under stress.

[39] Following his return to work, a further meeting was scheduled for 15 March 2018 attended by the same persons as had been present at the first meeting.

[40] Again, a prepared statement was provided from Mr Johnson as well as a supplementary statement from Mr Howard.

[41] Mr Johnson said he had no motive to send the email, and indeed had a motive not to send one, whether from a work or personal perspective. He had been honest and open throughout. He had asked Parliament for the original email header and had alerted NZDF to the significance of obtaining that information. He had no reason to send the email. He was prepared to make a complaint to the Police, if that was considered helpful. He was also happy to attempt to contact Google, if NZDF wished, although it was acknowledged that this may not be feasible since Google was likely to require a US court order to release information. In short, he said he had nothing to hide because he had not sent the email.

[42] Mr Johnson went on to name an individual who he said might have had the motivation, insider knowledge, and means to send the email to Mr Peters. These details were provided by way of example only, to highlight that it was plausible that someone other than himself had sent the email.

[43] Again, the content of the email was analysed to suggest that most of the statements contained in it were either incorrect or contained publicly available information. The remainder contained mostly broad generalised statements. That meant that intimate knowledge of the particular project on which Mr Johnson was engaged would not be required to send the email. Staffing was a common issue with NZDF projects.

[44] Ms Lear asked whether NZDF was going to undertake an investigation of Mr Johnson's work computer, and what other steps NZDF had actioned. She also asked whether NZDF had ascertained who had access to, or knowledge of, the information in the email; and whether NZDF had considered the possibility that the sender was an external disgruntled person who had been dismissed from the

organisation, who would know about the staffing issues within the project. There is no evidence that Group Captain Woon committed to any particular steps at that stage.

[45] The supplementary statement from Mr Howard stated that he had reviewed and had made the following assessments:

a) the email was sent from taka3dive@gmail.com;

b) the person sending it had configured their email: From: header to taka3iii@spcglobal.net;

c) the email had been sent from an IP address owned by Vodafone NZ; to determine the owner of the account, a Police warrant would likely be required to obtain that information from Vodafone; and

d) the email was sent from an iPhone mail client application on an iPhone 4S. The exact model and make could be determined from the header.

[46] Mr Howard explained that from this information, Mr Johnson's email address had not been spoofed. However, there were a number of other ways that someone other than Mr Johnson could send an email from his Gmail account; his account could have been hacked, someone may know his login credentials, or someone could have worked out what these were. He then commented on each of these possibilities.

[47] He said there was no evidence for or against hacking of the Gmail account having occurred. Even if information could be obtained from Vodafone, that might not assist, because New Zealanders can purchase a SIM Card without having to provide identification.

[48] With regard to the issue as to login credentials, Mr Howard confirmed Mr Johnson had advised him that the spcglobal email address was an account he used whilst living in the US. It had been referenced online, as well as on his curriculum vitae. The email account was discontinued in 2013, shortly before Mr Johnson moved to New Zealand.

[49] Mr Johnson had confirmed to Mr Howard that the password used for his current Gmail account was a variation of his previous spcglobal account. Mr Howard had searched in password breach databases and had confirmed that the spcglobal account was involved in multiple password breaches including in Adobe, Dropbox and LinkedIn; and in a number of other password dump compilations.

[50] He said that if Mr Johnson used the same or a similar password on his Gmail account for any of those sites, it was likely someone could have gained access to his Gmail account by trying the same, or variations of the passwords, from the data breaches. Mr Johnson had not enabled the two-factor authentication on his Gmail account; that meant that if someone had used his username and password, there would have been no other security control stopping them from obtaining access to the account. Thus, it was certainly possible someone else could work out his password or login credentials.

[51] Following the meeting of 15 March 2018, Mrs Colebrooke sought technical advice from Mr Condon about Mr Howard's views. He responded by saying it spoke volumes that Mr Howard had been retained, as his opinion would not have been cheap. He expressed the view that there was substantial evidence against Mr Johnson, with his defence basically being "my dog ate my homework". He said from NIAT's perspective, it was "likely or even very likely" that he had sent the email himself. He went on to say he would confer with other colleagues to verify the probability assessment. Twenty minutes later he sent a further email to Mrs Colebrooke, having apparently conferred with the Directorate of Defence Security (DDS), confirming that the assessment of Mr Johnson was the author of the email was "very likely".

[52] In light of this advice, Mrs Colebrooke advised Group Captain Woon that there were two options. The first was to undertake no formal disciplinary action, but to send a letter stating a probability assessment showed it was very likely Mr Johnson had sent the email, but that NZDF was willing to give him the benefit of the doubt on this occasion. This approach would be backed up by a referral for a "security refresher", and a statement reiterating that any incident of a similar nature or breach of security in the future would result in a disciplinary process.

[53] The second option was to proceed to a disciplinary process, having regard to the balance of probabilities that Mr Johnson was the sender, which would involve another meeting to advise of proposed disciplinary action and providing an opportunity to respond. Mrs Colebrooke said this would likely result in a disciplinary outcome. She said the basis of such an approach would be serious misconduct, given the potential disrepute to NZDF and potential security issues. She noted that if there was a disciplinary outcome, Mr Johnson may take the matter further and raise a personal grievance. Regardless of the outcome of such a process, significant resource would be required to manage the process for all parties.

[54] Group Captain Woon then summarised the position in communications to her superiors. In doing so, she said Mr Johnson had a defence which was weak at best, although it was difficult to establish who had sent the email beyond reasonable doubt. She also stated that his IT specialist had provided a rather loose explanation as to how Mr Johnson's two email accounts may have been used to send the email.

[55] She recommended the first of the two options Mrs Colebrooke had identified, which she said would send a clear message to Mr Johnson, without the considerable overhead of managing a disciplinary process. She thought that the incident, which he had created, had caused sufficient personal stress for him to realise the error of his ways. Currently, he was performing in his role, and would continue to be closely monitored for any misconduct or security breaches in the future.

[56] Air Commodore Webb agreed that this option was the most effective from a cost benefit perspective, but he also suggested that Chief of Staff, Commodore Smith should be advised as to the proposed outcome.

[57] When Commodore Smith's opinion was sought, he agreed that the first of the two options was appropriate, but stated there was now a risk that Mr Johnson may claim reimbursement for legal and professional fees in defending an "unfounded" allegation. Group Captain Woon responded, stating she would be surprised if Mr Johnson tried to claim such expenses, when he had most likely sent the email. She said that hopefully he would learn from the experience.

[58] She also said that a final letter to Mr Johnson would be reviewed by legal staff, and carefully worded it to minimise any response or further action from him. She also told Commodore Smith that Mr Johnson's action struck at NZDF core values of trust which it would be hard for him to regain. She confirmed to the Court that she had lost trust in Mr Johnson over this matter.

[59] Next, Group Captain Woon asked Mrs Colebrooke to ensure that NZDF legal advisors minimised any potential for Mr Johnson to recover legal fees from NZDF. She said she did not think it should be admitted that the sending of the email was "unfounded" as this might give rise to a claim for reimbursement. She had no doubt that Mrs Colebrooke would be able to "cleverly articulate Defence believes he is guilty of sending the email without actually saying it".

[60] In the course of receiving the letter which would record the conclusions reached by NZDF, Mr Owen referred to his opinion as to the proposed outcome, which was that the allegations were not unfounded, but NZDF was giving Mr Johnson the benefit of the doubt. If he attempted to claim for reimbursement, that issue could be dealt with at the time.

[61] When approving the final draft, Group Captain Woon stated that it provided Mr Johnson with a clear warning on the consequences if a similar incident was to arise.

[62] The final form of the letter was dated 22 March 2018. It was to have been provided to Mr Johnson the next day, but the meeting at which it was to be presented was deferred to 27 March 2018. On 26 March, when new arrangements were being established, Mrs Colebrooke suggested that the letter be sent to Ms Lear, so that she and her client would know what they were coming in for and prepare a response or questions if need be. However, she also observed that the outcome was not negotiable. The letter was accordingly forwarded to Ms Lear on 26 March 2018.

[63] The letter sent from Group Captain Woon to Mr Johnson included this paragraph:

> I have now fully considered your responses and explanations provided, including your written speaking notes and the statement from Simon Howard, IT Specialist. I have had advice from the Network Information Assurance Team in CIS and the Directorate of Defence Security (DDS). Their probability assessment has been confirmed as "very likely" to have been sent by you; however, I am prepared to give you the benefit of the doubt on this occasion. No formal disciplinary process will be pursued in this instance.

[64] Group Captain Woon also said she would like Mr Johnson to attend a security refresher course with a personal security advisor from DDS. She said that should an incident of a similar nature or breach of security occur in the future it may result in a disciplinary process.

[65] Mr Johnson said that although the letter stated he was being given the benefit of the doubt, he did not believe this because it was recorded that NIAT and DDS had both concluded he had very likely sent the email. The letter was in essence a warning not to send such an email again. It referred to Group Captain Woon not taking any formal disciplinary action "in this instance", which he also took as a warning. He concluded she thought he had sent the email and that she did not trust him.

[66] The instruction to attend a security refresher course, and a warning about future incidents, also concerned him. He saw that as a threat to his security clearance. He knew the letter would be placed on his personnel file for future reference.

[67] Mr Johnson was stressed by the receipt of the letter and was admitted to Wellington Hospital for medical reasons. He was off work from 26 March 2018, and in fact, never returned. Ultimately, his employment was terminated on grounds of medical incapacity with effect from 15 March 2019.

[68] Through his lawyer, Mr Johnson made a further request for personal information held by NZDF, under the Privacy Act 1993. It was provided and included the internal emails that had been exchanged in the course of the inquiry. These enhanced his concerns. His disadvantage grievance was raised on 24 May 2018.

Overview of parties' cases

Plaintiff's submissions

[69] For Mr Johnson, Mr Cleary submitted in summary:

a) Mr Johnson's claim focused on s 103(1)(b) of the Employment Relations Act 2000 (the Act). The reference in that subsection to "the employee's employment, or 1 or more conditions of the employee's employment" is not confined to breaches of contract; the scope of possible disadvantages under the subsection is broad.

b) It was accepted for the purposes of the grievance claim that Mr Johnson carried an onus to establish disadvantage; however, if established the onus would then shift to NZDF to prove justification of that disadvantage under s 103A of the Act.

c) Fundamentally, the steps taken by NZDF did not have sufficient regard to the good faith obligations owed by it to Mr Johnson, under s 4 of the Act.

d) Disadvantage was accordingly established by predetermining that Mr Johnson had sent the email of 29 November 2017; putting him to proof he had not sent the email; failing to investigate the issue properly; concluding it was most likely he had sent it, and then losing trust in him; orchestrating the 22 March 2018 decision-letter so as to reduce the chance of being liable for costs; and then issuing a decision-letter in those terms.

e) Alternatively, NZDF had breached its statutory duties of good faith and/or implied duty of fair treatment.

f) On either basis he was entitled to remedies.

[70] For NZDF, Mr Lucie-Smith submitted in summary:

a) NZDF was justified in taking the steps it did. It dealt with Mr Johnson in good faith in the context of what started off as a preliminary inquiry

to obtain his comments in relation to an email understood to have been sent by him.

b) The inquiry was intended as a precursor to enable Group Captain Woon to consider whether, once the initial facts were ascertained, a disciplinary process was warranted.

c) NZDF was entitled to assume Mr Johnson had sent the email, but it did not jump to conclusions. It did not commence a disciplinary process immediately. It had not expected to be told that the email was the result of Mr Johnson's account having been spoofed or hacked.

d) No disadvantage arose, because a decision was made not to proceed with a disciplinary process. There was at least one further step which would need to be undertaken before the employer would have considered whether misconduct or serious misconduct had occurred. A fair process was adopted, and inquiries which were reasonable in the circumstances were undertaken.

e) NZDF was justified in not undertaking a more rigorous approach, because the point of a disciplinary investigation had not been reached. NZDF was justified in considering information which it deemed relevant and proportionate to the level of scrutiny required, based on the resources available to it. There could be no disadvantage where an employer gave the employee the benefit of the doubt and ended the process, despite suspicion that the employee had in fact sent the email.

f) Turning to the asserted breaches of the duty of good faith, it could not be said that Mr Johnson was disadvantaged because of what he learned about the NZDF process leading up to its letter of 22 March 2018; this was because he did not obtain the emails relating to those matters until after he was provided with the outcome letter; and he never returned to work.

g) Group Captain Woon's personal views about trust could not, and did not, disadvantage Mr Johnson; they were not reflected in her decision to take

no further action; she believed that trust could be rebuilt; and any disadvantage could only be implied because Mr Johnson never returned to work.

h) In his reply submissions, Mr Lucie-Smith submitted that there could be no breach of the statutory obligations of good faith in a situation where the preliminary process undertaken by NZDF had resulted in a decision not to instigate a disciplinary procedure; s 4 of the Act should not be applied to such a situation.

[71] I will refer to counsel's submissions in more detail, where appropriate. Before doing so, I refer to relevant legal principles.

Legal framework

The scope of s 103(1)(b)

[72] Mr Johnson's primary claim is brought under s 103(1)(b) of the Act. That section allows an employee to bring a personal grievance if the employee's employment, or one or more conditions thereof, is, or are, affected to the employee's disadvantage by some unjustifiable action by the employer.

[73] In 1989, the Court of Appeal was required to consider in *Alliance Freezing Company (Southland) Ltd v New Zealand Engineering Workers etc Union* whether the action involved had caused some material or financial loss.[2] That court held that such a restriction was not appropriate. Any disadvantage, whether material or otherwise, could form the basis of a personal grievance. In that particular case, it was accordingly determined that the giving of an unjustified warning could constitute disadvantage.

[74] In 1990, in *NZ Storeworkers etc IUOW v South Pacific Tyres (NZ) Ltd*, the Labour Court held that a "condition" was not confined to a contractual condition but, rather, included the total environment of the job and how the employment and practice operated.[3]

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[2] *Alliance Freezing Company (Southland) Ltd v New Zealand Engineering Workers Union* [1990] 1 NZLR 533, (1989) ERNZ Sel Casual 575, (1989) 3 NZILR 785.

[3] *NZ Storeworkers etc IUOW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452 (LC).

[75] Nine years later, in 1999, the Court of Appeal discussed the provisions of the Employment Contracts Act 1991 relating to a personal grievance brought on the grounds of discrimination: *Tranz Rail Ltd v Rail and Maritime Transport Union (Inc)*.[4] The Court said:[5]

> Broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of an employment contract.

[76] This interpretation was supported by references to United Kingdom case law which emphasised that the phrase was one of wide meaning and included customary benefits and reasonable expectations provided as a result of the employment relationship.[6]

[77] In 2005, former Chief Judge Colgan relied on this dicta when discussing the concepts described in s 103(1)(b) of the current Act: *ANZ National Bank Ltd v Doidge*.[7] At issue was whether an employee was entitled to a mileage allowance as a term of her employment agreement. The Court held that a "personal grievance is a broader notion than a breach of contract". Payment of the mileage allowance may have been a "condition of employment" but not a "term of the contract".[8]

[78] Such a broad approach leads to a conclusion that there are many ways in which disadvantage may arise. In my view, such a conclusion is reinforced by the overarching obligations of good faith which may fall for consideration when assessing whether a disadvantage grievance is established.

[79] A failure to comply with good faith obligations could found a disadvantage grievance where a fair and reasonable employer could be expected to comply with the law. It is therefore necessary to elaborate on the meaning of the good faith references in the Act.

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4 *Tranz Rail Ltd v Rail and Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA).
5 At [26].
6 At [27] and [28]: *BBC v Hearne* [1978] 1 All ER 111 at 116; and *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 402, [1982] 2 All ER 67 at 90.
7 *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518.
8 At [45].

Good faith behaviour

[80] The starting point is s 3 of the Act which relevantly states:

> **3 Object of this Act**
>
> The object of this Act is—
>
> (a) to build productive employment relationships through the promotion of good faith in *all aspects of the employment environment and of the employment relationship*—
>
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on *a legislative requirement for good faith behaviour;*
>
> ...
>
> (Emphasis added)

[81] Section 4 is important because it gives direct expression to the objects just described. It spells out how parties to an employment relationship are to deal with each other in good faith.

[82] The primary obligation is contained in s 4(1) which emphasises that parties to a relevant employment relationship *must* deal with each other in good faith; and goes on to state, without limiting that obligation, that parties must not – directly or indirectly – mislead or deceive each other or do anything likely to do so.

[83] Then it is confirmed that the duty is wider in scope than the implied mutual obligations of trust and confidence – a well-known common law obligation – and requires the parties to be active and constructive in establishing and maintaining a productive employment relationship, in which the parties are, among other things, responsive and communicative. Some examples are then given, which it is unnecessary to describe since they do not apply to the present circumstances.

[84] An important early statement of the scope of good faith as described in the Act was given by McGrath J in *Coutts Cars Ltd v Baguley*, when he said:[9]

> In my view, in this context, it is a necessary implication that in providing for a duty of good faith in the employment relationship the 2000 Act goes beyond

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[9] *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533, [2001] ERNZ 660 (CA) at [83] (emphasis added).

> what the Courts recognised at common law or under the Employment Contracts Act as implied contractual terms controlling freedom of contract. It has imposed *a higher standard of conduct*.

[85] Subsequently, after the good faith provisions in s 4 had been amended in 2004, a full Court made the following observations in *National Distribution Union Inc v General Distributors Ltd*, when it said:[10]

> Although not doing so exhaustively, the definitions of good faith dealings given in s 4 address what might be referred to as the honesty or transparency of dealings between parties so that deceiving and misleading, whether intentional or consequential, are prohibited. ...

[86] Chief Judge Inglis recently drew attention to the aspect of good faith which requires parties to an employment relationship "to act consistently with reasonable standards (the level at which those standards are set will depend on the circumstances, having regard to the interests of the parties)".[11]

[87] Drawing these threads together, the statutory duty of good faith involves a broad and flexible concept, but it manifests in a standard which must be complied with. Honesty and transparency in communications between parties to an employment relationship are obligations which may fall for consideration. The scope and content of those obligations will depend on the circumstances.

Analysis

The NZDF preliminary inquiry

[88] Before dealing with the individual matters raised for Mr Johnson, it is appropriate to address Mr Lucie-Smith's primary point that NZDF should not be held to a procedural standard which might be expected if a decision had been made to undertake a disciplinary process. He said a different set of standards should apply to the assessment of a preliminary inquiry which resulted in a decision to take the matter no further; and that s 4 should not be applied in such a case.

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10 *National Distribution Union Inc v General Distributors Ltd* [2007] ERNZ 120 at [60].

11 Christina Inglis "Defining good faith (and Mona Lisa's smile)" (paper presented to Law @ Work Conference, Wellington, 31 July 2019).

[89] The letter sent to Mr Johnson assumed he had sent the relevant email to Mr Peters. It went on to state that the sending of the email was of serious concern because it reflected behaviour that may be in breach of the NZDF Code of Conduct, and of Mr Johnson's employment agreement. It also said that NZDF may have been brought into disrepute, that a confidentiality clause of the employment agreement had been breached, and that the complaint and concerns had not been raised via appropriate channels and procedures, such as by way of a protected disclosure.

[90] Then it was recorded that NZDF wished to obtain further information in response to the concerns raised. Once obtained, further action could include a formal disciplinary process. Mr Johnson was advised that he was welcome to bring a support person or representative. It was acknowledged that the situation might be difficult for him, and that the NZDF Employee Assistance Programme would therefore be available to him if he required confidential support.

[91] From this letter, NZDF clearly intended to convey that it regarded the sending of the email by Mr Johnson as involving a serious concern which could have adverse consequences for him, including the possibility of disciplinary action. After reading it, Mr Johnson concluded that he should obtain legal and IT advice. That was not an unreasonable reaction to the apparent seriousness of his employer's concerns.

[92] I do not agree that the acts and omissions of NZDF may be measured against a diluted set of standards, since it ultimately decided not to proceed to discipline. Very soon after the process commenced, an issue of trust developed. Initially NZDF believed Mr Johnson had sent the email. He denied this. At the heart of the process which then followed was the reliability of his denial, which obviously had implications for NZDF's ongoing trust in Mr Johnson.

[93] On any view, trust of employees is a critical matter for an organisation of this kind, as Group Captain Woon emphasised in her evidence. Unsurprisingly, she said that having trust in all levels of the chain of command is fundamental to the running of the NZDF.

[94] Mr Lucie-Smith submitted that when it became clear Mr Johnson disputed he was the author of the email, NZDF backed off its preliminary view, and ultimately accepted Mr Johnson's denial because it decided not to pursue a disciplinary process.

[95] That is not a correct characterisation as to what occurred. It is not apparent that NZDF did back off. As I shall explain later, by the end of the preliminary inquiry NZDF had not accepted Mr Johnson's denial and it had lost trust in him. This is an important part of the disadvantage claim.

[96] It is accordingly necessary to measure the steps which NZDF took carefully, and in light of its responsibility to act in a fair and reasonable way and according to its obligations of good faith, which I find applied to the process it adopted.

Predetermination: open mind?

[97] Mr Cleary submitted it was incumbent on NZDF to commence its process by indicating an open mind as to whether Mr Johnson had been the sender of the email; he said that this did not occur because it assumed from the outset Mr Johnson was the sender.

[98] Mr Lucie-Smith submitted that NZDF did not jump to conclusions and was justified in taking the email at face value, having regard to its contents.

[99] He argued there were a number of factors which pointed to Mr Johnson being the author, such as, the email dealt with subject matter with which he was intimately involved; only a limited number of people knew the details of the project to which it referred; and that it echoed criticisms Mr Johnson had expressed previously.

[100] However, there were other factors which supported the possibility that a third party may have been responsible for the email, and that Mr Johnson might have been framed. His name was presented in an unusual way in the header; the email was said to have been sent on Mr Johnson's behalf only; and there was no sign off by Mr Johnson.

[101] The assumption made in the first NZDF letter was not one which a fair and reasonable employer could be expected to make, because of the importance of starting the inquiry with an open mind.

[102] Once Mr Johnson gave his denial, NZDF did not back off. It took the position that Mr Johnson needed to prove his assertion. Mr Cleary argued that this was the next flaw in the process.

Putting Mr Johnson to proof he had not sent the email

[103] There is no controversary that Group Captain Woon told Mr Johnson that she would require "proof" that his account had been hacked. Later, after Mr Johnson said he had phoned his brother who had pointed out that the words "On Behalf Of" were a major red flag for spoofed emails, Group Captain Woon said she had told Mr Johnson he would need to check his Gmail account to see if there was any evidence of misuse.

[104] Mr Cleary submitted it was trite law that one who alleges must prove. Mr Lucie-Smith submitted that having regard to the fact NZDF was conducting a preliminary inquiry only, it was not unreasonable for Group Captain Woon to have taken the position she did.

[105] It is well established that the ascertainment of facts by an employer that may lead to a belief the person has engaged in serious misconduct, does not call for the application of any legal standard of proof; rather, the standard is one of reasonableness: *Whanganui College Board of Trustees v Lewis*.[12] The same must apply to a belief that a person has engaged in any breach of his or her employment agreement.

[106] A fair and reasonable employer could in the circumstances have asked for information that would allow it to understand what had happened.

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[12] *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [20].

[107] I will shortly refer to the process of investigation conducted by NZDF. At this stage, it suffices to say that from the outset NZDF proceeded on the basis that following his denial, it was up to Mr Johnson to prove an assertion which was regarded by Group Captain Woon as being quite staggering.

[108] In short, NZDF did not work with Mr Johnson so as to obtain reliable information about what had occurred, even when he offered to cooperate constructively, as will be explained shortly. Rather, it placed an onus on him to show his account had been spoofed or hacked; and that he was telling the truth when denying he was the email's author.

The adequacy of NZDF's inquiry

[109] Two meetings were held, so as to hear what Mr Johnson had to say as to whether his emails had been hacked or spoofed. In the course of those meetings, a number of suggested follow-up steps were proposed by Mr Johnson and Mr Howard.

[110] One issue that arose was whether a named person might have had sufficient knowledge of the project and sufficient motivation to frame Mr Johnson. That person's contract had been terminated; in effect the possibility which Mr Johnson raised was that the third party held a grudge that could have led him to cause the email to be sent. It is common ground that no inquiry as to that possibility was made. Indeed, Mr Owen said he was "highly suspicious" about such a suggestion; he apparently regarded the suggestion as lacking credibility which tended to undermine Mr Johnson's denial. However, Mr Johnson was not told of this reaction, or that the assertion would not be explored.

[111] The technical evidence suggested that an iPhone 4 had been used to send the email; Mr Johnson said he had an iPhone 6. He was not asked if he had access to an iPhone 4.

[112] No inquiries were made with Vodafone. Although this may have required the assistance of the Police, there had been a security breach which was regarded as serious, and for this reason Mr Johnson was prepared to make the necessary complaint. It could have been explored.

[113] Mr Howard suggested the header information should be obtained, and Mr Johnson sought this. Mr Condon agreed with this step, so NZDF made the same request.

[114] Having initially concluded in a brief email to Mrs Colebrooke on 15 January 2018 that a conclusion Mr Johnson wrote the email was "all still speculation and non-admissible", once he received the header information and Mr Howard's report which raised the prospect of a password breach, Mr Condon concluded that the defence which was being raised was "a stretch". Although he went on to acknowledge that it was not possible to prove or disprove anything with regard to the internet and cyber, because "everything can be hacked and spoofed", he nonetheless thought that it spoke volumes Mr Johnson had hired Mr Howard, and that there was "substantial evidence" against Mr Johnson. He did not explain what evidence he was referring to. His assessment was that it was "very likely" Mr Johnson had sent the email.

[115] NZDF called Joshua Christiansen, a Senior Digital Forensic and Incident Response Analyst employed by NZDF. He also considered that the email had been sent from Mr Johnson's Gmail account, but acknowledged that there was no evidence to say Mr Johnson was "behind the keyboard" on the account at the time the email was sent. He accepted that a probability assessment made without regard to a statement from an account owner that he had not sent an email, was based on a blunt generalised conclusion that most emails emanating from a particular account are likely to have been sent by the owner of that account.

[116] Later, Group Captain Woon told one of her superiors that NIAT – that is, Mr Condon – had reviewed the response given by Mr Johnson's IT specialist. She did not say he had evaluated the information in Mr Johnson's prepared statements. No report was prepared by Mr Condon, but it appears that he agreed there had been no spoofing of Mr Johnson's Gmail account, and that hacking could not be ruled in or out. It seems likely Mr Condon then proceeded on the basis that as most emails are authorised by an account holder, it could be assumed this one was too; hence, his conclusion. But this, or any other, reasoning was not explained in the advice Mr Condon gave to Mrs Colebrooke; nor was any rationale provided to Mr Johnson.

[117] Another factor going to the adequacy of the inquiry related to Mr Owen's views. He considered that the email revealed a similar style and content as was evident from two previous communications sent by Mr Johnson which Mr Owen had considered were grossly unprofessional. The first involved the sharing of restricted information in a public forum, LinkedIn, in 2014. The second concerned Mr Johnson not adhering to the correct chain of command when raising issues of concern as to the project in which he was engaged in late 2015.

[118] A yet further issue, which Mr Owen also thought was relevant to Mr Johnson's reliability, concerned what he described as a lack of candour because Mr Johnson had not disclosed his heart condition when he was initially employed. I interpolate that this is disputed by Mr Johnson.

[119] Mr Owen's views on these issues were relevant to an assessment of Mr Johnson's reliability, and were discussed with Group Captain Woon. However, they were not raised or discussed with Mr Johnson.

Conclusions reached by NZDF

[120] Group Captain Woon concluded, relying on the technical advice received, that it was very likely Mr Johnson had sent the email. This amounted to a rejection of his denial. These conclusions led her to lose trust in him. She expressly acknowledged this when discussing with her superiors the preferred option for resolving the matter, stating that Mr Johnson's action "strikes at the NZDF core values of trust which will be hard for him to regain now". Group Captain Woon also confirmed to the Court that she had lost trust in Mr Johnson.

[121] Mrs Colebrooke advised Group Captain Woon that Mr Johnson was calling their bluff, giving rise to the two options described earlier.[13]

[122] Group Captain Woon then accepted and recommended the first option to her superiors. It was decided that this was the preferable option when considered from a "cost/benefit perspective".

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[13] Above at [52] and [53].

[123] As noted, Group Captain Woon then requested that the concluding letter should not expose NZDF to a claim for reimbursement of Mr Johnson's costs. For this reason, she proposed that Mrs Colebrooke use language which would make it clear NZDF believed Mr Johnson had sent the email, but without saying so.

[124] The letter which was sent reflected her preferences. It did not record that the concerns had been "unfounded". Specific reference was made to the probability assessment by IT personnel that it was very likely Mr Johnson had sent the email. However, he was to be given "the benefit of the doubt on this occasion", and no formal disciplinary process would be pursued. He was to attend a security refresher. A general warning as to the possibility of repetition by way of a similar breach of security was given.

[125] Unsurprisingly, Mr Johnson regarded the letter as being a formal record that members of NIAT and DDS had both concluded he had very likely sent the email, and that the letter was in essence warning him not to do this again. He regarded the other statements as being a warning from Group Captain Woon not to undertake a similar action again. Mr Johnson concluded that she believed he had sent the email and that she did not trust him. He said he recognised that officially there would be no formal disciplinary process, but that was significantly outweighed by the real findings in the letter.

[126] Mr Johnson was justified in reacting to the letter as he did. Given the mixed messages, these were obvious implications for trust in Mr Johnson's employment relationship.

[127] This issue cannot be downplayed on the basis that issues as to trust were simply Group Captain Woon's personal views. She was the NZDF decision-maker, and one of Mr Johnson's superior officers. Moreover, her views as to trust were imparted to her superiors, who approved her recommendation in light of those views.

[128] Nor can the issue as to trust be placed to one side because that matter only became apparent when relevant emails were provided after the event. The fact is that trust had been lost.

[129] Plainly, Mr Johnson was disadvantaged by the outcome letter. It did not transparently express the real views held by Group Captain Woon and her superiors, and it was deliberately crafted in a way that was intended to mitigate a possible financial risk. It was misleading. Further, it rendered Mr Johnson's employment less secure by giving warning which was not justified in the circumstances.

[130] It does not matter that Mr Johnson did not return to work; these impacts took effect immediately.

Conclusions as to disadvantage grievance

[131] I am satisfied that the totality of the flawed actions I have discussed were not steps which a fair and reasonable employer could have taken in the circumstances.

[132] It was not asserted at the hearing that the procedural deficits were minor. Nor was it contended that Mr Johnson had in fact sent the email.

[133] NZDF has not discharged the onus on it to satisfy the Court that the steps it took met the statutory test of justification.

[134] Considering the multiple defects cumulatively, I find that Mr Johnson was unjustifiably disadvantaged under s 103(1)(b) of the Act.

[135] I will turn to consider remedies for this breach shortly.

[136] Mr Johnson also sought discreet findings that there had been a breach of good faith and of the implied duty of fair dealing; and that damages should be awarded accordingly.

[137] As explained earlier, I have proceeded on the basis that obligations of good faith are relevant when considering the range of matters that may fall for consideration in assessing a disadvantage grievance.[14] In this case, separate findings on that topic are not necessary.

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[14] Above at [87] and [96].

[138] Nor is it necessary to examine the circumstances by reference to the implied duty of fair dealing given the findings I have already made under s 103(1)(b) of the Act.

[139] Nor did Mr Johnson's submissions as to remedies develop the claim for damages; rather, the focus was on the statutory remedies under s 123 of the Act. I proceed accordingly.

Remedies

Compensation

[140] Mr Cleary submitted that there should be a significant compensatory award for humiliation, loss of dignity and injury to feelings; he said there should be a focus on the mental effect on Mr Johnson.

[141] He referred to the fact that prior to these events, Mr Johnson had recently become a New Zealand citizen, and was on top of his work. His life completely changed after 12 January 2018 as a result of having to prove his innocence, participate in a flawed investigation, and receive a significant unjustified finding.

[142] He argued Mr Johnson had suffered a major stress reaction, details of which were confirmed not only by Mr Johnson himself, but also in contemporaneous diary notes prepared by his wife.

[143] The Court was also referred to a report prepared by a specialist occupational physician, Dr David Hartshorn, which described Mr Johnson's medical history in some detail, concluding that within the context of the "significant work-related stressor" Mr Johnson had experienced a deterioration in his cardiomyopathy.

[144] However, Dr Hartshorn went on to say that there was no definitive objective information to confirm that the variation in the underlying cardiac state was as a result of these events. He concluded that there was a high level of psychosocial stress as a result of the work circumstances, primarily characterised by dysthymia (depression) and potential anxiety.

[145] It appears that an aspect of the circumstances which Dr Hartshorn also reviewed related to the question of when, or whether, Mr Johnson would be able to return to work. As noted earlier, ultimately Mr Johnson's employment was terminated on medical grounds. Those circumstances, however, are not before the Court and must be placed to one side.

[146] Mr Cleary also submitted that there were several aggravating factors, to which reference will be made shortly. Then he stated that non-economic loss fell within Band 3 of the scale outlined in *Waikato District Health Board v Archibald*.[15] He said that compensation above $40,000 was appropriate. He referred to other cases involving serious non-economic loss, which he said were comparable.[16]

[147] Mr Lucie-Smith submitted that the cases referred to by Mr Cleary were distinguishable; I infer that he was in effect arguing that the amount sought was excessive.

[148] There are relatively few recent cases in this Court where compensation has been awarded for a disadvantage grievance. A survey of determinations issued by the Employment Relations Authority in the period August 2016 to May 2018, suggests that compensation for disadvantage grievances has often been held by the Authority to fall within a lower range.[17]

[149] However, as I found in *CBA v ONM*, where a disadvantage grievance involves very serious health issues, it may be appropriate to conclude that the claim justifies a higher award.[18]

[150] There are several factors to take into account in the present case. Having regard to Dr Hartshorn's report, there must be a focus on psychological distress. There is no

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15 *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791.

16 *Ramkissoon v Commissioner of Police* [2007] NZEmpC 85, an unjustified disadvantage case where $30,000 was awarded; *Waugh v Commissioner of Police* [2004] 1 ERNZ 450, a constructive dismissal case where $50,000 was awarded; *Rayner v Director-General of Health* [2019] NZEmpC 65, a case where $42,500 was awarded for a disadvantage and dismissal grievance; *Richora Group Ltd v Cheng* [2018] NZEmpC 113, an unjustified dismissal case, where $20,000 was awarded, but which would have been at least $40,000 if pleaded.

17 Christina Inglis "Compensation for humiliation, loss of dignity and injury to feelings" (paper presented to Law @ Work Conference, Wellington, 27 June 2018) at 21.

18 *CBA v ONM* [2019] NZEmpC 144.

clear evidence that the events contributed to a deterioration of cardiac function; moreover, such an event would not be covered under s 123(1)(c)(i) of the Act. That factor, therefore, is not relevant to the assessment.

[151] Second, there must be a focus on the consequences of the particular events reviewed in this judgment, and not on any other events, such as the process and decision to terminate Mr Johnson's employment on medical grounds.

[152] There is no doubt that the circumstances of the inquiry were very stressful. Mr Johnson attended Wellington Hospital in February 2018 following chest pain, and again on the day in which he received the NZDF outcome letter. He suffered ongoing depression and anxiety. The evidence also suggests sleep disruption, and an impact on family life.

[153] I turn next to the aggravating factors raised by Mr Cleary. The first is that Group Captain Woon knew the situation was causing stress for Mr Johnson. He was known to have a heart condition, and thus to be vulnerable to workplace stress. Group Captain Woon said she was aware of this circumstance, and it was a factor when deciding not to proceed to discipline. In my view, this is not a factor that could lead to a conclusion that a fair and reasonable employer could not have raised its concerns with Mr Johnson at all because of his medical background. I place this issue to one side.

[154] Reference was made to the fact that Mr Johnson raised a personal grievance with Air Vice-Marshal Kevin Short, who gave authority to deal with it to Group Captain Woon; it was submitted that she then issued a self-serving response. There is insufficient evidence before the Court as to the extent to which Air Vice-Marshal Short, as Inspector-General, was at liberty to take such a step. I do not regard this as an aggravating factor.

[155] Next, it was argued that NZDF declined to attend mediation when it was requested, although Mr Johnson's employment agreement cited this as a problem-resolution procedure. I agree this was regrettable in the circumstances but have no direct evidence that it contributed to any s 123(1)(c)(i) factor.

[156] Finally, it was submitted that a Vodafone record which Mr Johnson obtained in May 2018, after the preliminary inquiry had concluded, was partly exculpatory because it showed at the time the email was sent, the cell phone was being used for a call. I do not agree this is an aggravating factor, because as Mr Lucie-Smith submitted, that information related to the use of an iPhone 6, and Mr Howard's evidence was that the email in question had been sent from an iPhone 4.

[157] Turning to comparable cases, all of the decisions to which I was referred involved very different circumstances. Only one of them, *Ramkissoon,*[19] involved a disadvantage grievance; it related to a non-appointment to a particular vacancy where there were significant "long-lasting effects" relating to health, and "unique circumstances". Thirty thousand dollars was awarded.[20]

[158] *CBA*, involving a disadvantage grievance, is also of some relevance; it too arose in unusual circumstances where an employee known to have a significant mental health condition was affected by a serious delay in returning to work.[21] Again, the circumstances were very unusual. Thirty thousand dollars was awarded. Both it, and *Ramkissoon*, involved more serious consequences than arose here.

[159] Standing back, I consider that an appropriate award should be made within Band 2, in the sum of $20,000.

[160] The Court is required to consider contribution under s 124 of the Act. That is, did Mr Johnson contribute towards the situation that gave rise to his grievance, and should the payment under s 123(1)(c)(i) be reduced accordingly?

[161] NZDF did not argue that this was the case, and as noted earlier, it was not contended that the evidence established Mr Johnson had in fact sent the subject email.

[162] In my view, he acted responsibly throughout the inquiry, and offered to cooperate in multiple ways, as already explained. No reduction for contribution is necessary.

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19 *Ramkissoon v Commission of Police*, above n 16.
20 At [343]-[345].
21 *CBA v ONM*, above n 18.

Remedy under s 123(1)(b)

[163] Mr Johnson also sought recompense for the amount he spent on IT advice from Mr Howard ($1,201.75), and legal advice from Ms Lear ($10,663.30).

[164] Mr Lucie-Smith did not advance any submissions with regard to this aspect of Mr Johnson's claim.

[165] Section 123(1)(b) of the Act permits, when a grievance has been established, reimbursement of "other money lost by the employee as a result of the grievance".

[166] This issue was discussed in *Hall v Dionex Pty Ltd*, where it was found that there may be limited circumstances in which an employee can claim legal expenses associated with an employment investigation, such as where the employer has commenced a baseless investigation reasonably requiring the employee to engage the services of a lawyer.[22] But expenses which are properly considered when fixing costs according to the Court's costs jurisdiction under cl 19 of sch 3 of the Act, should not be awarded under s123(1)(b).

[167] Somewhat surprising evidence was given by Group Captain Woon and Mr Owen, to the effect that it was not reasonable for Mr Johnson to have obtained the assistance he did. Having regard to the way in which NZDF raised its concerns with Mr Johnson in its letter of 12 January 2018, I disagree.

[168] Mr Cleary did not assert that the employment process was baseless; rather, he submitted that because a reverse onus was applied, Mr Johnson was placed in a situation where he had to prove his innocence. This, he submitted, was not a case where an employer was obtaining information to deal with its concerns. He submitted Mr Johnson incurred unnecessary costs because of the onus placed on him.

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22 *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, [2015] ERNZ 502 at [114].

[169] I make two points. First, the costs in question are clearly separate from those incurred in the proceeding, so they may be considered under s 123(1)(b) of the Act. Second, had NZDF not applied a reverse onus, I find that Mr Johnson would in all probability have nonetheless considered it appropriate to obtain legal and IT assistance.

[170] Taking all factors into account, I find he should be reimbursed 50 per cent of the costs he incurred.

[171] A claim for interest is made in respect of these costs. Under cl 14 of sch 3 of the Act, interest may be awarded if the Court thinks fit, calculated in accordance with sch 2 of the Interest on Money Claims Act 2016 (IMCA), on the whole or part of the money for the whole or part of the period between the date when the cause of action arose, and the date of payment in accordance with the judgment.

[172] Mr Cleary submitted interest should run from the due date of each invoice, which he said was when the cause of action accrued. Mr Lucie-Smith submitted that the correct date was the date when the personal grievance was raised, 24 May 2018.

[173] In my judgment, it is appropriate to direct that interest:

a) shall be paid by NZDF on 50 per cent of each invoice rendered to Mr Johnson by Ms Lear and Mr Howard;

b) is to run from the date of the outcomes letter, 22 March 2018 in respect of Ms Lear's first and second invoices and Mr Howard's first invoice, and from the due date of each subsequent invoice which each of them rendered, until the date of payment; the commencement dates in each instance are the dates when the cause of action accrued in respect of each invoice.

c) is to be paid at the rate calculated in accordance with sch 2 of the IMCA.

[174] If there are any problems over the use of the calculator referred to in that schedule, leave to apply for further orders is granted.[23]

Recommendation under s 123(1)(ca)

[175] Mr Cleary submitted that NZDF through its workplace conduct and practice had caused a personal grievance which was entirely avoidable, had a correct process been adopted. It had acted, he said, unreasonably; without remedial action there may be repeats of the deficits which arose in this case. He submitted that the Court should therefore make a recommendation to the effect that those involved in the various breaches by NZDF attend managerial training in relation to workplace investigations and decision-making, including the duty of good faith to employees.

[176] I do not consider such a recommendation is necessary having regard to the contents of this judgment, which I am confident will be considered carefully by NZDF.

Disposition

[177] The challenge is allowed. Mr Johnson has established a disadvantage grievance, and is entitled to be paid compensation by NZDF as follows:

a) for humiliation, loss of dignity and injury to feelings, in the sum of $20,000; and

b) for legal and IT costs incurred, in the sum of $5,932.51. Interest is also payable in accordance with the directions given in paras [172] and [173].

[178] Finally, Mr Johnson is entitled to costs regarding this proceeding. This topic should be discussed in the first instance between counsel. The parties have previously advised the Court that the appropriate costs classification is Category 2, Band B under the Practice Directions Guideline Scale.[24] If agreement as to quantum cannot be

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23 The foregoing reflects the reasoning and process adopted by Judge Smith in *Roach v Nazareth Care Charitable Trust Board* [2018] NZEmpC 123 at [89]-[95].

24 Employment Court of New Zealand Practice Directions https://employment court.govt.nz/assets/Documents/Publications/EMPLOYMENT-COURT-PRACTICE-DIRECTIONS-as-published-on-EC-Website20181214.pdf.at 18.

reached, Mr Johnson may apply by memorandum filed and served by 31 January 2020; and NZDF may file and serve a response by 14 February 2020.

B A Corkill
Judge

Judgment signed at 2.25 pm on 19 December 2019