IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2019] NZEmpC 65
EMPC 439/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AMANDA RAYNER Plaintiff
AND	DIRECTOR-GENERAL OF HEALTH Defendant

EMPC 30/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DIRECTOR-GENERAL OF HEALTH Plaintiff
AND	AMANDA RAYNER Defendant

Hearing:	9 – 12 and 17 April 2019 (heard at Christchurch)
Appearances:	A Oberndorfer and A Fechney, counsel for Mrs Rayner D Traylor, counsel for the Director-General of Health
Judgment:	27 May 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mrs Amanda Rayner was an investigator employed by The Ministry of Health (the Ministry). An online submission came to the attention of her managers via the

Crimestoppers website, asserting that she had lied about her previous experience as an investigator in the United Kingdom (UK) before she came to New Zealand.

[2] The Ministry undertook an investigation. Soon after it began, Mrs Rayner declined to give her consent for inquiries to be made in the UK to verify her qualifications and experience, since she believed those details had already been checked, and she was very concerned about her privacy. Ultimately, she was suspended. Then the Ministry threatened dismissal unless the consent was provided. Consents were then given. In due course, a range of information was obtained. In the course of this process, Mrs Rayner made a number of defensive statements, including that she did not trust her managers. Eventually, the Ministry determined that the allegations regarding her qualifications and experience were not substantiated but that her conduct during the investigation had destroyed the relationship of trust and confidence, justifying summary dismissal.

[3] Mrs Rayner raised two personal grievances; the first asserted she had been disadvantaged by an unjustified suspension, and the second asserted she had been unjustifiably dismissed. The Employment Relations Authority (the Authority) considered these allegations, finding both the suspension and dismissal were unjustified.[1]

[4] Dealing with remedies:

a) The Authority was not persuaded there should be an order of reinstatement, essentially because there were issues of trust and confidence.

b) Three months' wages were ordered.

c) $20,000 was to be paid for humiliation, loss of dignity and injury to feelings.

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1 *XCT v UHG* [2018] NZERA Christchurch 174.

d) Financial remedies were reduced by 15 per cent because of contributory conduct; the Authority accepted Mrs Rayner's behaviour during the investigation was mostly "a robust defence of her position", but at times crossed the line to obstruction, thus warranting the reduction.

[5] Soon after the issuing of the determination, Mrs Rayner filed a non-de novo challenge relating to remedies; she repeated her claim for reinstatement and also sought increased financial remedies.

[6] Subsequently, the Ministry instituted a de novo challenge. I granted leave for the Ministry to bring its challenge out of time on 11 February 2019.[2] Subsequently, I directed that the issues raised would be heard on a de novo basis, having regard to the challenge brought by the Ministry.

[7] Accordingly, the issues for resolution are:

a) Does Mrs Rayner have a personal grievance because her dismissal was unjustifiable, or because actions were taken by the Ministry to her disadvantage that were unjustifiable?

b) If remedies need to be considered, should she be reinstated, and should she receive financial awards for lost remuneration and compensation for humiliation, loss of dignity and injury to feelings?

Evidence

[8] The parties placed a significant quantity of evidence before the Court. There were 10 witnesses and five volumes of documents.

[9] As often happens, all key witnesses tended to focus on events purely from their own perspective. The job of the Court is to analyse events from an objective standpoint.

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2 *Rayner v Director-General of Health* [2019] NZEmpC 13.

[10] In the next section of this judgment it is necessary to set out the somewhat complex chronology with care. This detailed history of events will then enable the Court to make findings as to the steps taken by the various parties involved.

[11] Although credibility issues will need to be considered in the usual way,[3] this is a case where the many documents which were generated at the time – particularly emails and letters – assist in obtaining a clear picture of events.

Chronology

Appointment as auditor – 2005

[12] In 2005, Mrs Rayner, having recently emigrated to New Zealand from the UK, applied for a position with the Ministry as a risk and intelligence coordinator. She was unsuccessful in obtaining this role. At the time, however, the organisation was recruiting for an auditor. Ms Sharon McGregor, a member of the recruitment panel, recommended Mrs Rayner for such a position to the Audit Manager at the time, Mr Michael Moore. In due course, she was appointed as an auditor on 26 April 2005.

[13] A copy of Mrs Rayner's application for appointment dated 2 February 2005 is before the Court. The document records the names, descriptions, telephone numbers and email addresses of two work-related referees from the UK. They were Mrs Bernice Beecham, Fraud Manager at the time Mrs Rayner ceased employment in the UK; and Ms Debra Stringer who had been her Team Leader at an earlier stage.

Appointment as investigator – 2008

[14] In 2008, Mrs Rayner applied for a vacancy which had arisen for an investigator in the Audit and Compliance Unit. In her letter of application, she outlined previous work experience in the UK, which she said would be relevant to the role. Before the Court there is a copy of the curriculum vitae (CV) she submitted at the time, which, amongst other things, outlined in some detail her relevant UK experience. It stated:

> 1999-2005 **Counter-Fraud Investigator Manager**
> The Department of Work and Pensions, Berkshire, England

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[3] As recently reviewed in *Emmerson v Northland District Health Board* [2019] NZEmpC 34 at [99]-[100].

Responsibilities and Duties
Manage 100 constant fraud investigations to a positive outcome. Interviewing claimants legally under caution, while adhering to the Police and Criminal Evidence Act and Social Security Legislation. Team Leader to four Counter Fraud Investigators and one Administration Officer, keeping staff records and statistical information, monitoring, quality control and authorising fraud prosecutions for the team. Liaising with other Government Departments, Police and Solicitors. Attending court on behalf of the Department, giving evidence and swearing warrants for offenders. Authorised Warrant Officer, taking statements, and adjudicating on the information obtained. Undertaking covert mobile and static surveillance and taking contemporaneous notes.

1997-1999 **Counter Manager**
The Department of Work and Pensions, Berkshire, England

Responsibilities and Duties
Manage, support, and motivate six Counter Administration Officers and two Administration Assistants. Preparing staff rotas to provide adequate cover for telephone and counter caller duties. Keeping staff informed of new benefit legislation, identifying and providing training when required. Department Central Index and National Insurance number specialist, interviewing customers arriving into the country wishing to apply for a National Insurance number. Providing statistical caller information to the District Office. Advising clients of their entitlement to in work Tax Credits

1993-1996 **Team Leader for Benefit Processing and Caller Office Team**
The Department of Work and Pension, Berkshire, England

Responsibilities and Duties
Team Leader to eight Benefits Administration Officers and one Administration Assistant. Responsible for the processing and management of a 4000 unemployed caseload. Adjudicating on complex claims for benefits and quality control for the team's output. Responding to Client, MPs and Local Bodies letters and telephone calls. Keeping staff informed of new benefit legislation, identifying and providing training when required. Responsible for identifying and attending employer's redundancy seminars. Advising clients of their entitlement to in work tax Credits.

[15] I interpolate that the Department for Work and Pensions (DWP) was previously known as the United Kingdom Department of Social Security (DSS). An executive agency of the Department was the Benefits Agency; it merged with the Employment Service in April 2001 to form Jobcentre Plus.

[16] In support of her application for the investigator's role in 2008, Mrs Rayner provided the names of three NZ referees: Ms McGregor, a Team Leader, Mr Thomson, a retired investigator, and Ms Mather, whose status was not specified. Attached to the application was a certificate from the University of Portsmouth, issued in 2000, certifying that she had completed professional training to become an accredited Counter-Fraud Officer. Also attached was a one-page summary of the employment in the UK, which referred to her two UK referees, Ms Beecham and Ms Stringer. As will be explained more fully later, these materials were thereafter lost by the Ministry for a period of time.

[17] Mr Dave Landreth, Acting Investigations Manager at the time and a member of the appointment panel, said it had been recognised in 2008 Mrs Rayner did not have "the greatest of investigator skills," but that was outweighed by her industry knowledge acquired as an auditor, and that, with support, she could be a valuable member of the investigation team.

[18] Mrs Rayner was appointed as an investigator on 18 August 2008.

Mrs Rayner's role as investigator

[19] Following her appointment, Mrs Rayner became a member of an investigation team, which was in the Audit & Compliance unit (A&C), part of the Finance and Performance Directorate of the Ministry. Included in this unit were teams carrying out audits and the investigation team. The focus of the teams in the A&C unit is to consider and inquire into prima facie evidence of fraudulent activity relating to contracts and claiming practices with healthcare providers such as PHOs and NGOs, health professionals and rest homes, and to consider any professional disciplinary issues that may arise.

[20] Mrs Rayner was one of several investigators required to conduct investigations into these issues. They collected and collated relevant evidence. They undertook interviews and statements. They evaluated information and coordinated the presentation of a case to a court, whether for civil or criminal action, or to a relevant professional disciplinary body. Mrs Rayner said that between 2008 and 2017, she gave evidence on four occasions.

[21] More recently, Mrs Rayner and other investigators have reported to Mr Aaron Burnside, as Team Leader. Mr Burnside reports to Mr Paul Merrett, Investigations Manager, and Mr Merrett reports to Mr Gary Lennan, National Manager of the A&C unit. These managers are all former police officers. Mr Lennan has two other managers reporting to him: Mr Chris Unsted, Risk and Intelligence Manager, and Ms Linda Rundle, Audit Manager.

[22] Statements regarding Mrs Rayner's performance as an investigator are before the Court. Her performance assessments from 2009 record that Mrs Rayner took some time to come up to speed on the particular requirements of her role. However, her managers considered that she demonstrated commitment and achieved improvements in her performance. She was regarded as a well-liked and constructive member of the investigations team. That said, several performance issues had been identified by mid-2017. There was an intention to address these, but the events I am about to describe overtook.

[23] Another relevant matter of context relates to Mrs Rayner's support for a colleague, Ms Miller, who had worked for A&C until mid-2016, after raising a relationship problem asserting she had been bullied and intimidated. An aspect of this matter related to what Mrs Rayner described as a lewd comment made by Mr Merrett in an open-plan office, which she said he subsequently denied making. Ms Miller had cited this as an aspect of her relationship problem, complaining about the remark in writing. Mrs Rayner was strongly supportive of Ms Miller when the problem was raised to the point of being interviewed by Ms Miller's lawyer about the remark made by Mr Merrett. When departing her employment, Ms Miller warned Mrs Rayner she could suffer negative repercussions for having done so.

[24] Mrs Rayner was also affected by health issues, requiring her to have significant periods off work in 2009-2010, 2014, 2015 and 2016. This issue reached a head in mid-2016, when she was asked by Mr Burnside and Mr Merrett to consent to an assessment by a medical practitioner appointed by the Ministry. As will be explained later, this request became controversial. Mrs Rayner was defensive as to the possibility of attending a consultation about her health with a medical practitioner appointed by the Ministry. She felt strongly she was being singled out, and treated

differently from two particular colleagues in the investigators team who had also taken leave but who had not been asked to undertake such a process. She told her managers that they were taking this step because she was a woman and were attempting to justify their actions by saying they were doing so on the advice of Human Resources (HR). She herself took advice from the Public Service Association (the PSA). Ultimately, the issues were able to be resolved with the provision of a report from her own medical practitioner certifying that she was fit for work.

[25] In 2017, issues arose within the investigation team as to timekeeping. Mr Burnside emailed members of his team, which brought adverse comment, including from Mrs Rayner. Subsequently, a team meeting was held involving not only Mr Burnside but also Mr Merrett and Mr Lennan. The meeting was plainly robust, with a range of concerns as to management being raised by the investigators; one of the agenda's items they raised was described as being "trust". Subsequently, the Ministry's coach met with those involved. The purpose of this exercise was to improve the team dynamics. In the course of those discussions, Mr Burnside said he did not trust members of his team.

Anonymous complaints

[26] Mrs Rayner said that three anonymous complaints were made about her, in 2007, 2010 and 2017. When she was first interviewed about the 2007 complaint, she referred to Mr Moore, then Audit Manager, having spoken to her about it, following receipt of a telephone call by A&C questioning Mrs Rayner's investigative experience and qualifications. She had said Mr Moore had made inquiries with her UK referees as part of that inquiry, and the matter had thereby been resolved.

[27] The 2010 anonymous complaint was made in writing. It stated Mrs Rayner had obtained her job by lying on her curriculum vitae (CV). It said the author had overheard her at her home saying she had represented to the Ministry that she had been an investigator in the UK, but she had never been anything like that. It also stated she had never been involved in investigations, and that she had told friends she knew nothing about it, as her lack of ability would show. The letter was signed "concerned tax payer" and was purportedly copied to the media outlet "Campbell Live".

[28] This complaint was investigated by Mr Landreth, then Investigations Manager. He subsequently prepared a memorandum to Mr Moore recording his conclusions after investigating the accuracy of the information in the letter.

[29] He recorded an interview he undertook with Mrs Rayner; she had been quite shocked by the letter and had spontaneously stated it was a "load of rubbish". She had given him a large folder of documentation relating to her previous employment in the UK. Although there were some photocopied documents on it, by far the majority of documents in the folder were originals, consisting of payslips, tax information, performance appraisals, appointments to positions, promotion reports and various other employment records. Mrs Rayner had provided the folder to him to take away and inspect at his leisure. As a result, he was able to closely examine the documents. Having done so, he said he had no doubt whatsoever that the documentation contained in the folder was "genuine, valid, and clear evidence that [Mrs Rayner] had been working as an investigator with the Benefits Agency as claimed in her CV".

[30] Mr Landreth also took photocopies of 10 "original documents" and two other documents of which there were copies only, placing these with his report on Mrs Rayner's file. He went on to say that, whilst it was important that the writer of the letter be located, this had not been possible, so that the identity of that person would remain unknown. He concluded by stating that, after reviewing the documentation provided by Mrs Rayner, he had no doubt the claims made in her CV were genuine, and that the letter was "malicious and totally unfounded". He concluded by saying:

> As it is possible that further letters could arise in the future I feel this Memo and attached documentation should be placed on [Mrs Rayner's] file in the event some further matters develop in the future as it is important that we be able to refute these without the need for a major investigation.

[31] The third complaint, in 2017, was again anonymous. It was submitted through the Crimestoppers website. It is evident from the face of the submission that it was then forwarded automatically to the Ministry's Health Integrity Line email address, as well as that of Mr Unsted. It was his role to triage calls and online systems associated with these facilities. He directed the complaint to Mr Merrett.

[32] The text of the submission stated:

> A staff member of the ministry of health called [Mrs Rayner] has been boasting that she has no investigation experience in the U.K but fooled the ministry into thinking she is an investigator so they hired her several years back. Her family know she wasn't an investigator in England. [Mrs Rayner] thinks it funny that her bosses haven't worked out she is a fraud when she is investigating fraud. She said they looked into her a few years back but didn't contact her references so didn't work it out.
>
> [Mrs Rayner] Works for ministry of health.

Initial steps

[33] Following receipt of the anonymous complaint, Mr Merrett briefed Mr Lennan. Mr Merrett said he was aware of the 2010 complaint. When he joined the Ministry in 2014, he had reviewed the locally-held personnel files of all staff and saw Mr Landreth's memorandum.

[34] It was agreed that Mr Lennan would source such information as was held by the Ministry concerning Mrs Rayner and then speak to her about the issue.

[35] As a result, he contacted Ms AB, a senior HR Advisor at the Wellington office of the Ministry.[4] Mr Merrett spoke to, and then emailed, Ms AB, requesting relevant documentation from Mrs Rayner's personnel file.

[36] In response, Ms AB confirmed the previous inquiries undertaken by Mr Landreth, noting he had sighted and copied certificates and appraisal documents which were included in Mrs Rayner's file. She also said no recruitment information was available from 2008 when Mrs Rayner was appointed as an investigator. Nor did the Ministry appear to have information relating to Mrs Rayner's original appointment.

[37] In response, Mr Merrett said that Mr Landreth appeared not to have made any inquiries overseas to confirm Mrs Rayner's roles in 2010. He noted it was a shame the 2008 appointment information was not held on the Ministry's files, as this would have been valuable. He went on to say that he would make a preliminary assessment

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[4] This employee's name has been anonymised. She no longer works for the Ministry. She did not give evidence. Because of criticisms made of her later in this judgment, non-publication of her name is necessary.

of the material held by the Ministry and that he would likely seek Mrs Rayner's written authority to make overseas inquiries so as to assist with the process.

[38] Ms AB commented there could be difficulty in obtaining information from the UK agencies. She observed that the Benefits Agency (as referred to in Mr Landreth's 2010 memo) had been disestablished and that there had been several changes to the "home agency" since Mrs Rayner left, so finding out whether she was employed by them could be difficult. She also said "Are we trying her twice for the same offence? Do we have any new evidence that puts the earlier information in doubt?".

[39] Mr Merrett replied, stating that his only concern was the reputation of the A&C unit and whether Mr Landreth had gone far enough to satisfy the Ministry that it could defend its inquiries if the informant chose to air the matter in another forum such as the media. He proposed to have an informal chat with Mrs Rayner. He would be keeping in touch with HR whilst undertaking this process.

Meeting with Mrs Rayner on 22 September 2017

[40] Mr Merrett met Mrs Rayner on 22 September 2017. She says that, in summary, she was told:

- Mr Merrett was aware Mr Landreth had looked into an allegation in 2010, but he had not looked far enough; accordingly, Mr Merrett would need to "dig deeper" into her work history as the previous allegation had referred to the possibility of going to the media and that Mrs Rayner had lied on her CV.

- He would need to interview her managers, team leaders, or someone who she had worked with in the UK to establish if she had the experience and qualifications stated in her CV or on her application to the Ministry.

- He thought the allegation was from the same person as had made the 2010 allegation.

- He required her CV as submitted in 2005, a copy of her job application, her qualifications obtained in the UK, and any proof of experience whilst an investigator there.

[41] Mrs Rayner said she was very upset at the idea of going through such a process again and made this clear to Mr Merrett. She was worried about why he needed to proceed. She told him about the involvement of Mr Moore in 2007 as she understood it; that she believed the previous allegations were from relatives of a neighbour she had assisted, details of which she provided to Merrett; that she had not kept contact with anyone in the UK except her parents, siblings and two friends; that she had not fallen out with anyone; and that the submission could not have been made by an ex-boyfriend or her ex-husband, nor a member of her family.

[42] She told the Court that in a general ramble about her previous employment, she mentioned the names of her two referees, but did not attach significance to this information, as she believed it was on documents the Ministry would have on her personnel file to which Mr Merrett would have access.

[43] She also said that she was genuinely frightened of being victimised, and she believed someone was out to get her. She referred to the fact that she had been the victim of a stalker in the UK and that this was one of the reasons she came to New Zealand to live. She told the Court she did this so Mr Merrett could comprehend the need to tread carefully and respectfully about her past.

[44] Mrs Rayner told Mr Merrett to "do what you want", believing that this would be an inquiry of the DSS, which would have limited information only. Mr Merrett also said that he would check what had occurred previously with Mr Moore and Mr Landreth.

[45] Later that day, Mr Merrett contacted Mr Landreth by email, who said he only had the vaguest recollection of the matter, and that, if his report in 2010 did not answer the relevant questions, he doubted he could add anything.

Steps taken in late September 2017

[46] On 25 September 2017, Mrs Rayner emailed the Ministry's HR to request a copy of her personnel file. She was contacted by Ms AB, who told her of the memo held on file from Mr Landreth, which she had not previously seen. Mrs Rayner asked her whether another investigation was necessary given that memo. Ms AB said she thought another investigation would be pointless and a waste of time. Ms AB also said that her personnel file had no documentation prior to 2008. A copy of the Mr Landreth's memorandum, but not its attachments, was forwarded to her.

[47] Also that day, Mr Merrett commenced sending a series of emails to verify information contained on documents which the Ministry possessed, as photocopied by Mr Landreth in 2010. Included in those inquiries was one to the Berkshire Healthcare NHS Foundation Trust, stating that Mrs Rayner (whose previous name was referred to as well as her staff number) had worked for the Benefits Agency in Newbury in 2001. He said he wanted to obtain personnel records and wondered if the agency still existed. The response given was that the email had been forwarded to Jobcentre Plus in Newbury for a response.

[48] At the same time, Mr Merrett spoke to Mr Moore, who had retired from the Ministry, by telephone. In summary, Mr Moore was recorded as having said he had made no UK inquiries either at the time of Mrs Rayner's initial appointment or in relation to a 2007 complaint. Nor did he recall discussing such a complaint with Mrs Rayner 10 years previously in 2007.

[49] Mr Merrett also asked Mr Unsted to check whether there had been a complaint prior to 2010 on the Ministry's former hotline. Mr Unsted said he had not been able to identify such a complaint in the period 2005 to 2008.

[50] On 26 September 2017, Mrs Rayner contacted an organiser from the PSA, Mr David Coates. He said that a third investigation would be overkill and not to sign any documentation until he had spoken with Ms AB. He would inform Ms AB that in light of the previous events and Mr Landreth's memorandum, a further investigation would not be viewed favourably by the PSA.

[51] The next day, 27 September 2017, Mrs Rayner forwarded an email to Mr Merrett in which she said she had conducted an extensive search for the material she had submitted to the Ministry when she applied for her first job but had found nothing. She had no old or current CV. She attached Mr Landreth's 2010 memorandum, which she had by this time obtained from Ms AB. She went on to say that she was not in contact with colleagues who had worked previously for the DSS and so could not provide contact details. She said it would be ineffective to contact the HR department of that organisation, as all they would confirm would be her dates of employment and grade.

[52] She attached emails from the University of Portsmouth which she said ran the Counter-Fraud Professional Accreditation Board, which would be a first port of call to confirm that qualification.

[53] She went on to say, however, that in light of Mr Landreth's memorandum, she now believed all aspects of her past employment and experience had been fully investigated and that a further investigation would be inappropriate. She said if there were any further anonymous allegations regarding her past employment or life in the UK, she wished these to be held on her personnel file, but she had no need to be informed or to see this, as it would cause her unnecessary distress. She said she could not keep looking back but had to focus on looking forward.

[54] Also, on 27 September 2017, Mr Merrett spoke to Ms McGregor. They had a detailed conversation concerning Mrs Rayner's recruitment and experience. She said she believed Mr Moore had, as the most senior manager, conducted referee checks, recalling conversations about overseas calls being made. She recalled Mrs Rayner saying when interviewed she had given evidence in Court cases in the UK. She also told him that, in addition to the HR files held with regard to A&C staff in Wellington, personnel files for all such staff were stored by the office manager of the unit. The conversation concluded by her advising Mr Merrett that he needed to be sure about what he was investigating. That is, he only had to prove or disprove Mrs Rayner had lied on her CV. Her work as an auditor and investigator had been acknowledged as acceptable by her previous team leaders and managers.

[55] On 28 September 2017, Mr Merrett replied to Mrs Rayner's email of the previous day. He said he took it she no longer wished to provide the waiver she offered when they first discussed the matter; he sought confirmation that she was, however, happy for him to make inquiries relating to the counter-fraud certification. He also said he was taking HR advice in any event. Mrs Rayner said she would revert with answers to these questions, as she had to take further advice.

[56] On 1 October 2017, Mr Merrett sent a repeat email to the DWP, requesting information about Mrs Rayner's employment, providing her name, the name of her current employer, and her social security Benefits Agency staff number.

[57] On 3 October 2017, Mr Merrett was advised by Ms AB that Mrs Rayner's hardcopy personnel file had been misplaced and did not appear to have been scanned into her electronic file. The electronic file consisted of material sent by Mr Merrett to Ms AB in a clean-up exercise in November 2016. Mr Merrett said his recollection was that this did not include her CV or other material relating to job applications.

Events of 5 October 2017

[58] Mr Merrett, with the assistance of Ms AB, prepared a letter to Mrs Rayner stating that in the absence of any previous CV or employment history, the Ministry formally sought her consent to contact the DWP to verify her employment history. Mr Merrett said in the letter this verification would then be placed on her personnel file to clear up the issue once and for all.

[59] Because Mr Merrett was absent, he asked Mr Burnside to provide the letter to Mrs Rayner. He met with her. After she read the letter, there was a brief discussion. He suggested that provision of the requested consent would enable the matter to be cleared up. She queried whether such a step would in fact bring the complaints to an end.

[60] He then asked whether she wanted to talk to someone about the problem. She was recorded by Mr Burnside in a contemporaneous note, which he later transcribed to a formal job sheet, that Mrs Rayner said she did not trust anyone at the workplace, including him. There is no dispute that this statement was made.

[61] Mrs Rayner then contacted Mr Coates for advice, being told that the PSA would now become formally involved. She was advised to tell Mr Merrett that she would give his request serious consideration over the upcoming weekend.

[62] She then asked to speak to Mr Unsted, because she regarded him as trustworthy. She felt that the pressure on her to sign what she regarded as an "open consent letter" was of concern. She requested a confidential discussion. She says that Mr Unsted agreed to meet her on this basis. He said there was no such agreement although he acknowledged she wanted to speak to him "privately for advice"; and that she probably would not have expected him to share the conversation.

[63] There is controversary between Mrs Rayner and Mr Unsted on two other matters. The first is whether she said that she "despised" Mr Merrett. Much later, both produced file notes of the discussion. In her document, Mrs Rayner denied making this statement, although she did say she disliked Mr Merrett.

[64] Secondly, the two went on to discuss who might have been the author of the online submission; Mrs Rayner expressed the view that someone from the Ministry wrote it, because of the use of her married name which was known only to a few; her work colleagues were aware of that name. There is a dispute as to whether she also said the author of the online complaint could have been Mr Merrett as a response to her earlier support of Ms Miller when she had a relationship problem; Mr Unsted recorded Mrs Rayner's statement to this effect; she denies saying this.

[65] Mr Unsted said he told Mrs Rayner that the best way of clearing up the issue once and for all would be to arrange for a former supervisor to speak to Mr Merrett. He also said he understood two previous managers, Mr Moore and Mr Landreth, had informed Mr Merrett that no reference checks had been undertaken as part of prior inquiries. She said this was a revelation to her because she had hitherto understood such inquiries had been made.

[66] Mrs Rayner considered that this information had been conveyed to her by Mr Unsted on an off-the-record basis, and that because of the confidential nature of the meeting it would be inappropriate for her to disclose her awareness of it.

9 – 19 October 2017

[67] Having received no response on the consent issue from Mrs Rayner by 9 October 2017, Mr Merrett rang her at home, when she was on annual leave. He asked her if she had given the consent letter any thought over the weekend. She told him she was still taking advice and that she had nothing to hide, but the issue had been investigated twice previously. He requested that she respond by 4.00 pm the following day.

[68] The same day, Mr Coates emailed Ms AB, explaining he was supporting Mrs Rayner. As a result, Ms AB sent him documents relating to the 2010 and 2017 allegations, as well as the letter requesting Mrs Rayner to give her consent to contact her previous employer. She did not advise him of the steps being taken by Mr Merrett. Mr Coates said he would review these documents and discuss them with Mrs Rayner as soon as he could. However, prior to these documents being forwarded to him, Mr Coates rang Mrs Rayner and suggested she "just sign the form". She was not told why his view had changed. Mrs Rayner said she was highly distressed by this development, and decided to seek legal advice, informing Mr Merrett and Ms AB that she was doing so.

[69] On 11 October 2017, Ms AB emailed Mrs Rayner, pressing her to provide the consent. She said that the outstanding allegation had potential to jeopardise her reputation as a fraud investigator, and that of the Ministry when she was providing evidence in court on files she had investigated. The delays she had created, including withdrawal of initial support for an investigation into the allegations, were raising concerns and having "a significant impact on the trust and confidence of your manager in you as an investigator".

[70] The next day, Mrs Rayner replied, confirming she was seeking legal advice, and requested adequate time to do so. A short time later, her representative, Ms Anna Oberndorfer, confirmed to Ms AB that her firm was acting for Mrs Rayner, expressing a preliminary view that Mr Merrett was not entitled to pursue matters in the UK without Mrs Rayner's consent. She also requested time to undertake a comprehensive assessment of the matter. She would be meeting Mrs Rayner the following day and would respond thereafter.

[71] Mr Merrett then emailed Mrs Rayner, stating that the Ministry would now be "commencing preliminary enquiries" into the allegation received. He said the Ministry had attempted to work with her and as an act of good faith had sought her consent to contact her previous employer. However, they were not obliged to do this, as they were not seeking a reference, only verification of employment. He went on to state that Mrs Rayner's actions during the process had raised questions about her honesty and that her actions could be seen as a deliberate attempt to delay the fact-finding process.

[72] Mr Merrett almost immediately initiated a number of email inquiries as to the whereabouts of a person named in documents photocopied by Mr Landreth as an appraiser for Mrs Rayner, Mr Patrick Ruffles. He also called the Worthing Borough Council and asked whether Mr Ruffles worked there. None of these initiatives brought results.

[73] Mr Merrett had formed the view it was essential for him to speak to Mr Ruffles. He asked Mr Burnside to make inquiries as to how Mr Ruffles could be contacted via the Combined Law Agency Group (CLAG), which is a national information, intelligence and resource sharing entity, made up of a number of law enforcement and intelligence agencies. Mr Burnside sent several emails to establish whether the Ministry had any contacts within the DWP or if there was a police liaison officer in the UK who may be able to assist.

[74] About the same time, Mr Merrett established contact details for a person who it transpired was Mr Ruffles' wife. He sent her an email asking her to help him contact Mr Ruffles. He also tried to telephone her.

[75] Ultimately, he made contact by telephone with an employee at DWP who confirmed Mr Ruffles' email address. That person also explained the process for obtaining employee information from the DWP's HR department.

[76] In an initial email to Mr Ruffles, Mr Merrett named Mrs Rayner (using both her former and current surnames), gave her UK Benefits Agency staff number, and asked a series of questions as to the nature of her role, qualifications, and period she

worked for the Agency. In an email to the person he believed might be related to Mr Ruffles, he again referred to Mrs Rayner by her former and current names and stated that she had previously worked for the Benefits Agency.

[77] On 17 October 2017, Mr Merrett received two emails from Mr Ruffles, Local Service Change and Implementation Lead for the Department of Work and Pensions, in its Counter-Fraud and Compliance Directorate. In the first email, he told Mr Merrett to refrain from making unsolicited calls to his wife's office. He also provided a telephone number for the DWP's HR section, although he said they would probably require written consent from Mrs Rayner, whose first name he used, to provide any information.

[78] Mr Merrett persisted. He wrote again to Mr Ruffles at length. He set out the online submission and said that he had been asked by the Ministry's HR group to make contact with Mrs Rayner's previous supervisor to see if he could shed any light about her previous work history, as the Ministry attempted to confirm or negate the allegations. He also referred to the 2010 allegation and its result. He asked whether Mr Ruffles would be prepared to discuss Mrs Rayner's employment history. He noted that Mrs Rayner had given, and then rescinded, her consent to access employment records, which he said had "created some suspicion around her work history".

[79] Mr Ruffles replied, stating that in the absence of any consent from Mrs Rayner, again using her first name, it would not be permissible for him to respond further.

[80] That inquiries of this nature had been made were not disclosed to Mrs Rayner at the time.

[81] After receiving a report from Mr Merrett, Mr Lennan prepared a summary of steps being taken for the Deputy Director-General of Health, Mr Stephen O'Keefe, telling him verification of Mrs Rayner's background had not been obtained without her consent. He then told Ms AB that Mr O'Keefe was of the view that "a stern approach was required" if consent was not forthcoming; he had raised the question of whether there was a need for some form of stand-down if the issue was to drag on. Mr Lennan told Ms AB that a suspension should therefore be considered. At this stage,

he understood Mr O'Keefe would be the decisionmaker if the problem progressed to the possibility of dismissal.

The Ministry's requests, 19 – 31 October 2017

[82] On 19 October 2017, Ms AB told Ms Oberndorfer that, unless the requested consent was provided by the end of that day, the Ministry would be seeking urgent mediation.

[83] This resulted in Ms Oberndorfer writing to Ms AB at some length. She focused on the previous inquiry which Mr Landreth had undertaken. She said this had been a thorough check into Mrs Rayner's qualifications and employment history. She noted Mrs Rayner had been with the Ministry for some 12 years and had fulfilled training requirements. The Code of Conduct (the Code) required Mr Merrett to treat Mrs Rayner with dignity and respect; insistence on a further investigation was unjustified and distressing. She pointed out that Mrs Rayner was entitled to the support of her employer, but this was not forthcoming. She also stated that it appeared no steps had been taken to investigate the anonymous complaint itself. She requested that the investigation cease immediately.

[84] On the same day, Mr Lennan provided Mrs Rayner with a letter proposing that the parties meet on 27 October 2017 to discuss the possibility of suspension. In the meantime, Mrs Rayner was not required to attend work.

[85] On 19 October 2017, Ms Oberndorfer told Ms AB there was no basis for the Ministry to demand Mrs Rayner's consent under threat of proceeding to mediation, which by this time had been proposed. She said this was a breach of good faith obligations; she repeated this on 24 October 2017.

[86] On 25 October 2017, Ms AB said again that, if the consent was not forthcoming, urgent mediation would be sought; and that Mrs Rayner had good faith obligations as well as the Ministry. On the same day, Ms Oberndorfer emailed Ms AB, stating that it was unlawful for the employer to threaten to use legislated mechanisms to coerce Mrs Rayner into complying with an unlawful instruction. Her earlier detailed letter had set out why this was the case. She argued there could, in those

circumstances, be no breach of good faith by Mrs Rayner. She said she was concerned that the Ministry's actions indicated institutional bullying.

[87] Then, Ms Oberndorfer sent a formal letter to Mr Lennan, contesting many of the statements contained in his letter of 25 October 2017. She stated Mrs Rayner was willing to consider mediation but preferred to receive a substantive response to Ms Oberndorfer's earlier letter. She said that multiple requests for such a response had been made, which were unanswered. Suspension was not a reasonable step since it would only cause further distress and isolation for Mrs Rayner. She requested that the investigation cease immediately.

[88] Mrs Rayner attended work on 26 October 2017; Mr Merrett telephoned her, stating that she was not to undertake any investigation work or any work that could be construed as such, and to complete administrative work only, until the meeting scheduled for the following day. Mrs Rayner said she would pass this information on to her lawyer. Mr Merrett followed this telephone conversation up with an email to the same effect.

[89] Several communications occurred on 27 October 2017. First, Mrs Rayner sent an email to Mr Lennan with regard to the meeting which had been proposed for that day to consider suspension. She pointed out that her representative had indicated such a meeting was not necessary, noting that she believed it would only increase the stress she was already suffering. She requested that she and her lawyer be advised by email of its outcome. She also requested that it would be appreciated if the Ministry would provide just one point of contact for her lawyer, as the involvement of multiple parties was causing confusion.

[90] On the same day, Mr Merrett met with Mrs Rayner and provided her with a letter proposing her dismissal. It recorded Mrs Rayner had taken legal advice and refused to participate in the investigation to clear her name. His letter stated that, due to the significant reputational risk she was bringing to the Ministry, it was proposing to dismiss her for serious misconduct due to the loss of trust and confidence in her being able to effectively carry out her role. However, she would have until 3.00 pm on 1 November 2017 to submit a response.

[91] Because Ms Oberndorfer requested information about the inquiries Mr Merrett had undertaken, this was forwarded to her via Ms AB. Copies of Mr Merrett's numerous emails to various UK addresses, including to Mr Ruffles, were provided. It was at this point that it was learned for the first time the extent of the tenacious inquiries undertaken by Mr Merrett, in the course of which significant personal information relating to Mrs Rayner had been disclosed.

[92] Ms AB also informed Ms Oberndorfer that Mr Merrett had contacted Employment Services of DWP, who advised that a written consent for HR records would not be sufficient: a former staff member would also have to telephone the service, provide a staff number and answer pre-arranged security questions.

[93] By way of response to the letter proposing dismissal, Ms Oberndorfer wrote urgently to the Director-General on 31 October 2017. She outlined many of the matters she had referred to in her earlier letter of 19 October 2017. She went on to say Mrs Rayner had no issue in assisting with the collection of reasonable information in order to confirm her employment and qualifications. There was a suspicion, however, about the overly suspicious manner in which Mr Merrett had embarked on the matter. Mr Merrett's actions were not those of a fair and objective investigator, and it was requested that he be immediately removed from the process. She said Mrs Rayner's employment should not be threatened on the basis of an anonymous complaint. No steps had been taken to follow up on what appeared to be a repeated act of harassment, which called into question the Ministry's good faith obligations as well as its health and safety obligations. She requested immediate confirmation that an independent investigator be appointed, that the threat of dismissal be withdrawn, and that Mrs Rayner be permitted to return to the workplace to continue her duties.

[94] Later that day, as a result of communications between Ms Oberndorfer and Ms AB, it was agreed that the parties would meet to discuss the outstanding issues. She, and Mrs Rayner, understood the meeting would be with Ms AB only. She also confirmed to Ms Oberndorfer that Mr Merrett would no longer be involved in the matter (advice which Mr Lennan told the Court she was not authorised to give).

Meeting of 1 November 2017, and its sequel

[95] The meeting duly occurred, attended by Mrs Rayner and Ms Oberndorfer on the one hand, and Ms AB as well as Mr Lennan, who participated at relatively short notice on the other.

[96] No full meeting notes were made. The meeting took longer than an hour, and at times became heated. I will discuss the nature and content of the conversation later. It suffices at this stage to set out what Ms AB recorded as having occurred:

> ...
>
> Agreement was reached for AO to draft a consent regarding allowing MOH (Ms AB) to contact the UK previous employer (for Department for Work & Pension) and Mr Ruffles. [Ms AB] agrees to send through a list of questions that Mr [Ruffles] will be asked:
>
> AR speaks at length about:
>
> - The lack of trust in Paul Merrett to fairly complete the enquiry;
> - She hinted strongly that it was likely in her view that the complaint itself was made by someone within the Ministry. She claimed "only MOH people know her by the name of Rayner".
> - She stated she "felt unsafe" in the workplace.
> - She stated she was being "victimised" and asked what we intended to do about that.

[97] Although the meeting was difficult – Mr Lennan acknowledged to the Court that by this stage he was very frustrated – the parties thought agreement had been reached as to the steps that would be taken. However, there was an exchange of emails soon after the meeting, from which it became clear there were different views as to the way forward.

[98] First, Ms AB emailed Ms Oberndorfer confirming Mr Merrett would no longer undertake the investigation and that she would be the person responsible for obtaining information from the UK. She said she would be following up queries with the DWP, and the University of Portsmouth. She requested a copy of an email exchange Mrs Rayner had undertaken earlier that day with DWP and that Mrs Rayner provide a consent for the Ministry to obtain verification of her employment history. She also

outlined a series of questions for Mr Ruffles concerning Mrs Rayner's role with the Benefits Agency, including experience and qualifications. Decisions regarding dismissal would be postponed until the matter had been resolved. She said Mrs Rayner would be on paid special leave in the interim.

[99] For her part, Ms Oberndorfer in an email sent later that day, stated it was agreed Mrs Rayner would remain "on suspension"; that she would forward the email Mrs Rayner had sent to DWP; and that she would obtain employment information from that source and forward it to Ms AB, additionally providing consent to the Ministry to obtain confirmation of the details by phone or email. Only if the foregoing steps were not adequate would Mrs Rayner provide permission to contact Mr Ruffles on the basis of prior agreement being reached as to the questions being asked of him.

[100] The next day, Ms AB responded, stating that she had understood from the discussion the approaches to DWP, the University of Portsmouth and Mr Ruffles were to be concurrent. She requested a response to the proposed questions and the signed consent by 1.00 pm on 3 November 2017.

[101] In the meantime, Mr Lennan had discussed various issues arising from the meeting of 1 November 2017 with Mr Merrett. This included him obtaining Mr Merrett's confirmation that the stalking issue, which had been referred to by Mrs Rayner at the meeting of 1 November, had been raised by her at the outset. Mr Merrett said he had not believed that her concerns about an unknown stalker in England meant he could not seek information from DWP and Mr Ruffles.

[102] Mr Lennan then told Ms AB he was concerned at a number of Mrs Rayner's statements about her managers at the meeting. These included having said that she did not trust Mr Merrett or Mr Burnside, that the complaint may have been made by somebody within the Ministry because only Ministry staff knew her recently acquired surname, that she felt unsafe in the workplace, and that every day she was away from the workplace added to the distrust and breakdown of the employment relationship.

[103] He also recorded that another matter of concern was Mrs Rayner's poor work performance, which he said supported the Ministry's suspicion that there may be some validity to the complaint.

[104] On 3 November 2017, shortly before the expiry of the deadline imposed by Ms AB, Ms Oberndorfer emailed Mrs Rayner, confirming again her understanding that a stepped process had been agreed. Logically, if DWP could verify Mrs Rayner's employment history, that would be the end of the matter. She also said it was unlikely Mr Ruffles would speak to the Ministry unless Mrs Rayner had first spoken to him by phone authorising him to do so. It was noted that it had been some 15 years since she and Mr Ruffles had any contact. Thirdly, Mrs Rayner had not been obstructive. A balance between reasonable verification and respecting privacy – which had already been breached – needed to be struck. This was in the context of "an anonymous complaint of dubious content", and one which Mrs Rayner considered "malicious and harassing". A signed consent for the Ministry to contact HR at the DWP was attached.

[105] A further concern which had been raised at the meeting between the parties related to Mrs Rayner's initial assertion that Mr Moore and Mr Landreth had spoken to UK personnel. On 3 November 2017, notes made by Mr Lennan of his conversations with Mr Moore and Mr Landreth were forwarded to Ms Oberndorfer. To Mr Lennan, Ms AB said that this material "strengthens our case".

[106] Further email exchanges occurred: on 6 and 7 November 2017, Ms AB told Ms Oberndorfer that the Ministry would recommence its disciplinary process. An opportunity was offered to provide any further feedback on the proposal to dismiss by 1.00 pm on the following day, before it took a final decision.

[107] Ms Oberndorfer asked for particulars of the allegations that Mrs Rayner was being required to answer for the purposes of a disciplinary process, and as to a meeting time when such allegations would be answered. She went on to say, in summary, that Mrs Rayner was cooperating with the collection of information to verify her employment and qualifications. She submitted that disciplinary action would be inappropriate in the circumstances. In a separate email, she requested copies of all information pertaining to the investigation; and gave notice that an injunction would

be sought in relation to an unjustified suspension and for urgent reinstatement if necessary.

The Ministry's disciplinary process

[108] Mr Lennan continued to be concerned as to what he regarded as a lack of progress. In a long email to Ms AB on 8 November 2017, he referred to the fact that the consent the Ministry sought had not been provided. He added that there was now a question as to how Mrs Rayner's investigative capabilities could be so poor given the qualification and experience she purported to hold, noting that, at the time the allegations surfaced, her team leader was preparing to place her on a Performance Improvement Plan. He proposed that lawyers should become involved, that there should be an off-the-record discussion as to the impaired employment relationship, and that, if this did not obtain a resolution, there should be a meeting where Mrs Rayner would have the opportunity of responding to the various concerns he had articulated.

[109] At the same time, Ms AB drafted a letter for him to send, alluding to these matters. It was headed "Final Decision Letter – Dismissal on Notice". The draft letter concluded by stating that placing conditions on contact with the former employer raised suspicion and pointed to dishonesty on Mrs Rayner's part. The only plausible explanation was because Mrs Rayner wanted to avoid information coming to light. Before making a final decision on the allegation of serious misconduct, there would be a formal disciplinary meeting.

[110] In fact, the letter which was finalised and given to Mrs Rayner on 9 November 2017 was a modification of the draft letter, in part. It was now characterised as being an invitation to a formal disciplinary meeting, where some 10 allegations were raised, as follows:

> ...
>
> - You failed to provide consent in order for us to verify your previous employment and qualification details, which, in the circumstances was a fair and reasonable request.
> - You have actively obstructed and unnecessarily delayed our attempts to gain consent

- Your repeated and ongoing refusal to give consent has aroused suspicion about your employment history and gives some weight to the anonymous complaint.
- Your repeated and ongoing refusal to give consent is a breach of your good faith obligations to your employer.
- Your repeated and ongoing refusal to give consent has caused us to question your honesty and integrity and has damaged the trust and confidence we have in you.
- Upon finally agreeing to provide consent at the 1 November 2017 meeting, this was not fully followed through and that has only given rise to further suspicion and dishonesty.
- The only plausible explanation for refusing consent is because you want to avoid some information coming to light.
- You have failed to recognise the importance of the Ministry being able to verify your qualifications and experience as an investigator, and the significant reputational risks that exist for the Ministry.
- You made a misleading statement about an investigation that occurred in 2006/2007, when Michael Moore was your manager; namely that, at that time, Michael Moore contacted your previous UK employers and conducted reference checks.
- The performance concerns and recent test results we raised with you in September 2017, made it clear that you were not operating at the level required of a competent investigator and this lends credence to the anonymous complaint received.

...

[111] A meeting was proposed to enable a response to be given. It was stated that, if proven, the allegations would amount to a breach of Mrs Rayner's employment agreement, the Ministry's policies and/or Code, and could constitute misconduct or even serious misconduct.

[112] The letter was accompanied by an email from Ms AB to Ms Oberndorfer stating that in light of recent correspondence, the Ministry was prepared to give Mrs Rayner a further opportunity to respond to its concerns. The proposed decision of 27 October 2017 was "no longer valid"; rather, a formal disciplinary meeting was proposed, so that a response could be given. She also said that in the Ministry's view, Mrs Rayner would remain on "mutually agreed special leave during the course of [the] disciplinary process".

[113] Believing that she needed to take steps to defend herself and her position, Mrs Rayner reacted by sending an email to Mr Ruffles on 10 November 2017. She said she wished to take an opportunity "to profoundly apologise" for Mr Merrett's contact without her knowledge or consent. She went on to say that she was not sure

if he would recall her, outlining her work as a Counter-Fraud Investigator. She explained that an allegation had been made against her after 12 and a half years of working for the Ministry, which cast doubt on her experience and qualifications obtained whilst working as a Counter-Fraud Investigator. She said that, as a means of dispelling the allegations, she had provided the Ministry with copies of some of her appraisals, showing him as the appraiser or reviewing manager. The Ministry had then become "fixated" on needing to speak with him directly. She had provided consent to the Ministry to approach the DWP to obtain relevant information. She closed by stating that he was not her most recent manager when employed with the department, and that, after 15 years he may not recall anything about her but would appreciate him taking her call to reintroduce herself and discuss "this very embarrassing matter further".

[114] Mr Ruffles replied almost immediately, confirming that he did remember her and hoping she was well. He said that, as she had now provided consent for her current employer to contact the DWP HR department, that was the appropriate route for the Ministry to follow. He said it would be inappropriate for him to have any additional input into the matter, unless directed to do so by DWP, as it was a matter for HR.

[115] At the same time, Ms Oberndorfer sent another urgent letter to the Director-General, outlining what had occurred in some detail. She said that having regard to flaws in the process, there should be an independent investigation so as to gather information to confirm Mrs Rayner's employment history and qualifications for a final time. She said Mr Lennan had condoned Mr Merrett's actions, which were unlawful because they breached privacy requirements. Performance issues were also now being raised. She referred to the applicable collective employment agreement (CEA), which confirmed that the Ministry would provide an opportunity for redress against unfair or unreasonable treatment by it. Vitriolic criticisms were being levelled at Mrs Rayner. She requested an immediate lifting of suspension, investigation of Mrs Rayner's employment history and qualifications by an independent person, and further inquiry into the employment history and qualifications in a logical and thorough manner. She added that the inquiries should not be for the purpose of intruding into Mrs Rayner's past, or as a fishing exercise for other information and that no further disciplinary action or processes would be undertaken.

[116] On 20 November 2017, Ms AB responded to the letter Ms Oberndorfer had sent to the Director-General. In summary, it was not accepted that an independent investigation should be undertaken; the Ministry was confident Mr Lennan had sufficient independence and should remain the decision-maker. However, the concerns as to the breaches of privacy which had occurred in the preliminary inquiries were acknowledged and were matters that were taken very seriously. Mediation was again proposed.

[117] Later that day, Ms Oberndorfer confirmed Mrs Rayner was willing to attend mediation, and asked whether the disciplinary process was being maintained. She also said Mrs Rayner's preference was to get back to work as soon as possible and sought confirmation as to when that could occur. In reply, Ms AB sought clarification as to whether there was no longer agreement as to the taking of special leave.

[118] On 24 November 2017, Ms AB stated that if it was Mrs Rayner's preference to return to work, the Ministry would need to consider whether suspension might be appropriate. She suggested that "the current agreed paid special leave" continue until mediation had occurred. Ms Oberndorfer replied on 27 November 2017, confirming that paid special leave would be agreed to for the following two days until mediation could be attended on 29 November 2017.

[119] Mediation did not resolve matters. Later that day, Mr Lennan wrote to Mrs Rayner, stating that it was now necessary to consider whether it would be appropriate to suspend her during a disciplinary process. Her response was sought by 5.00 pm that day.

[120] Ms Oberndorfer replied to this letter, observing that five hours had been provided for a response. She disagreed with statements made in the letter proposing suspension, including whether Mrs Rayner had engaged in any act that could be construed as serious misconduct which would justify suspension under the CEA. She said Mrs Rayner would prefer to carry on with work as normal. If necessary, she could conduct auditing duties.

[121] On 1 December 2017, Mr Lennan wrote in detail to Mrs Rayner, confirming the decision to suspend. He said the concerns were as set out in the Ministry's earlier letters of 9 and 20 November 2017. He referred to a lack of full cooperation with inquiries into the anonymous complaint; the incurring of delays in the investigation; steps taken after the 1 November 2017 meeting which may have been inconsistent with what had been agreed on that occasion, including her contacting Mr Ruffles directly herself; the statement that Mr Moore and Mr Landreth had previously undertaken reference checks when that may have been untrue because neither recalled having done so; and statements as to lack of trust in her managers.

[122] In early December 2017, Mr Unsted learned informally that the issues concerning Mrs Rayner had not been resolved. He decided that the conversation he had held with Mrs Rayner in early October 2017 might be relevant and perhaps provide some explanation for the impasse. He recalled Mrs Rayner had indicated she was reluctant to cooperate with the investigation. He thought comments she had made to him might be the reason for that reluctance, apparently a reference to the remarks she made about Mr Merrett in connection with Ms Miller's departure from the Ministry. He telephoned Mr Lennan to speak to him about it, giving a brief account.

[123] Mr Lennan emailed him later that day, stating that what they had discussed was significant and could help assist in resolving matters. He asked for a file note of the conversation, stating that it would be appropriate for Mr Unsted to say he had rightly tried to keep the discussion confidential in the hope issues would be resolved, but as two months had passed with no resolution in sight, Mr Unsted had decided to pass the information on. As a result, Mr Unsted drafted a file note and provided it to Mr Lennan on 5 December 2017, the day prior to the disciplinary meeting. In the document, he recalled the statements that Mrs Rayner had made about despising Mr Merrett; that she had said previous complaints were cleared by Mr Moore and Mr Landreth, but he had told her that Mr Merrett had been advised by both of those persons that they had not contacted her past employer in the UK; that she believed someone within the Ministry had authored the complaint, possibly Mr Merrett, since she believed he was "against her" given her support of Ms Miller previously; and that, given the conclusions reached previously, she saw no point in taking the matter any further.

[124] That file note was provided to Mrs Rayner. As a result, and on the same day, she produced her own account of the meeting she had with Mr Unsted, since she believed that he had chosen to betray a confidence. She said her file note, produced for the first time at the Authority's investigation, was based on notes she had recorded on her work computer on 5 October 2017 and transferred on 26 October 2017 by way of a memory-stick to a home computer, the metadata for which suggested a modification of the document on 5 December 2017, the date when she finalised the document and provided it to Ms Oberndorfer.[5] It recorded that the meeting was confidential, that Mr Unsted had assured her he would keep her confidence, and that she had said she "disliked" Mr Merrett and not that she "despised" him. It referred to her being told that Mr Merrett had already contacted Mr Moore and Mr Landreth, both of whom had advised they had not contacted her past employers in the UK, as she had believed was the case. Her summary did not record her as having said Mr Merrett could be the author of the online submissions. She also recorded that she did not like her past life being looked into as it was "unsettling for [her]".

[125] In mid to late November 2017, Ms AB located Mrs Rayner's hardcopy file in a "rarely used, locked cupboard located behind the HR information services team. It was sitting amongst a pile of old hardcopy manuals/books". On this file was Mrs Rayner's original application for appointment to a position at the Ministry dated 2 February 2017 and her subsequent application for appointment of 21 July 2008, together with a covering letter, CV, and copy of the confirmation of professional training to become an accredited Counter-Fraud Officer of 4 May 2000.[6] This material was not disclosed to Mrs Rayner until 8 May 2018, well after she had been dismissed. Mr Lennan told the Court that he was unaware of the existence of this material during the disciplinary process, which he agreed was "regrettable". Even more troubling is the fact that Ms AB attended the disciplinary meeting on 6 December 2017 when issues relating to the identity of Mrs Rayner's referees were discussed; she did not reveal that this file had been located.

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5 I interpolate that a similar explanation was given to the Court regarding a file note produced by Mrs Rayner as to her meeting with Mr Merrett on 22 September 2017.

6 As summarised above at [14].

Disciplinary meeting of 6 December 2017

[126] The scheduled disciplinary meeting took place on 6 December 2017, attended by Mrs Rayner and Ms Oberndorfer on the one hand, and by Mr Lennan, Ms AB, and Ms Claire McMahon, a principal HR advisor, on the other.

[127] Two transcripts are available in respect of the meeting, so that an accurate account of what occurred is before the Court. A wide range of topics were discussed and responded to by Mrs Rayner, assisted by Ms Oberndorfer. It suffices to say at this stage that they included:

- a detailed review of the requests made of Mrs Rayner to provide consents, initially by Mr Merrett and then at and after the meeting on 1 November 2017;

- whether Mrs Rayner knew that the Ministry did not apparently have a copy of her CV and details of her referees;

- that she was reluctant for any broad inquiry to be made given her history of having been stalked in the UK;

- that she did not want her private life to be inquired into;

- that her concerns were enhanced when it became apparent that privacy laws had been breached;

- that Mr Ruffles was not her last manager; towards the end of her employment they were Mr Keith Potter, and then Ms Beecham;

- the process of her taking advice from the PSA;

- the dynamics of the difficult meeting which had occurred on 1 November 2017;

- a discussion of the statements she had made about Mr Burnside, and then about Mr Unsted when she stated that she would let his conscience deal with the fact he had disclosed the contents of a confidential meeting;

- in stating she "disliked" Mr Merrett, there was a difference to be noted between trust of work colleagues on a personal level and trust of colleagues on a professional level;

- she denied asserting Mr Merrett was the author of the online submission, although she did say that, because of the use of her surname, she believed the author could be somebody in the Ministry; and

- she had been concerned about Mr Merrett contacting her friends, or colleagues, team leaders and managers, so she did not provide consent.

[128] At the conclusion of the meeting, Mr Lennan advised Mrs Rayner he would consider the matter further and come back to her on next steps. He then decided he would postpone making any decision on any issues, until the information which had by then been requested from Ms AB from the DWP had been received.

Post-meeting steps

[129] In a letter to Mrs Rayner dated 8 December 2017, Mr Lennan said the Ministry was in the process of finalising its notes of the meeting, but, in summary, she had provided the names of two people who were referees when she initially applied to join the Ministry, and had given an explanation as to her approach concerning the Ministry's inquiries with regard to the complaint, including her reluctance to provide consent to contact her previous employer. He said that, as steps were now in place to obtain information from that employer which would be available within the next couple of weeks, he would await its receipt before making any decisions. In the meantime, the suspension would continue, and be reviewed on 14 December 2017.

[130] On 7 December 2017, Ms AB wrote to the address for DWP HR matters, a shared services address, which Mrs Rayner had obtained. Ms AB attached Mrs Rayner's consent as forwarded to DWP on 1 November 2017, and a further

consent Mrs Rayner had now signed. She requested details of Mrs Rayner's employment with DWP.

[131] On 13 December 2017, Mr Lennan sent an email to Ms AB and Ms McMahon wishing to clarify the process by which Mrs Rayner's UK personnel file would be forwarded; Mrs Rayner was noted as having said at the disciplinary meeting that she had asked the information to be sent direct to the Ministry; it appeared this was not now considered possible. He also said she had stated the Ministry had accused her of doctoring certificates on the file – he observed that this had never been done, but he accepted that was the inference from the Ministry seeking third party verification of her qualifications and experience. Ms AB then confirmed that the Ministry had been advised that the HR file would be sent, first, to a European (EU) address and that she was going with this process. On 15 December 2017, Ms AB asked Ms Oberndorfer to arrange for the parcel to be redirected from the EU address without being opened. Ms AB also confirmed that Mrs Rayner would remain suspended on pay whilst the requested information was awaited.

[132] On 19 December 2017, Ms AB was provided with an email from a shared services agency on behalf of DWP, confirming that Mrs Rayner was a former employee of DWP, with a period of service running from 1996 to 2005, and that she had resigned.

[133] On 22 January 2018, Ms Oberndorfer wrote to the Director-General, raising a disadvantage grievance. She referred to previous correspondence and stated that there were multiple flaws in the process adopted by the Ministry in dealing with the complaint; and that the "protracted indefinite and unjustified" suspension was in contravention of relevant contractual obligations.

[134] The next day, Ms Oberndorfer wrote to Ms AB, stating that the documents from DWP had been received. The Court was told that the packet containing these documents had been received in Ms Oberndorfer's office and opened by her and Mrs Rayner; irrelevant documents were removed. Ms Oberndorfer then forwarded documents from HR from which, she said, when compared with the documents which had already been provided to the Ministry, made it overwhelmingly clear Mrs Rayner

had been employed as an investigator. She emphasised that all that had ever been sought was verification of employment history, and that had been obtained. She sought Mrs Rayner's immediate reinstatement.

[135] On 19 January 2018, Ms Oberndorfer advised Ms AB that Mrs Rayner had tracked down one of her UK referees, Ms Beecham. Ms AB asked for details, saying that she would then "arrange a call" to confirm Mrs Rayner's employment.

[136] By 26 January 2018, Mrs Rayner had provided a Gmail address to Ms AB for Ms Beecham. On that date, Ms AB did not call Ms Beecham. Rather, she sent an email to her containing questions regarding Mrs Rayner's professional background, after obtaining Mrs Rayner's written consent. In response, Ms Beecham confirmed she had been contacted by Mrs Rayner through Facebook, to ask if a reference could be given, and to answer some questions. She went on to say that she had retired from DWP, previously the Benefits Agency, for more than five years, and that prior to doing so she had been the higher executive officer for Oxfordshire Sector Fraud. She confirmed that she had worked with Mrs Rayner at the Berkshire Sector Fraud and Newbury Benefits Agency from approximately 2001 to 2004, being Mrs Rayner's senior in that role, and advising her with regard to more complex fraud investigations. Mrs Rayner had been employed, she said, as a Counter-Fraud Investigator by the Benefits Agency. She elaborated the responsibilities entailed in that role with regard to fraud investigations. She said Mrs Rayner had completed numerous training courses prior to her arrival at Berkshire Sector Fraud, although she was unable to provide details. She was, however, aware Mrs Rayner had completed and passed the relevant exams for professionalism in security in order to become an accredited Counter-Fraud Investigator. She had also held a warrant and would have completed and passed the training required to do so.

[137] Ms AB then replied to Ms Beecham, asking whether she had undertaken performance appraisals or whether these were carried out by someone else. Ms Beecham replied that these were done by "HR". No request was made by Ms AB, or any other person from the Ministry involved, to speak directly to Ms Beecham to clarify this or any other issue.

[138] On 2 February 2018, the Ministry responded to the personal grievance letter of 22 January 2018. In essence, the various disadvantage assertions were rejected. It was stated the suspension should continue until current inquiries had been concluded and that no financial remedies were appropriate.

[139] On 9 February 2018, at the request of Ms Oberndorfer, details of the communications between Ms Beecham and Ms AB as to Mrs Rayner's status as an investigator at Benefits Agency were provided.

Outcome of disciplinary investigation

[140] On 19 February 2018, Mr Lennan wrote to Mrs Rayner as to the outcome of the Ministry's investigation. As this letter is at the heart of the dismissal grievance, it is necessary to summarise it in some detail:

a) First, a brief account of the genesis of the online complaint was given. It was stated that, given the nature of Mrs Rayner's role, especially the fact that her credentials could be challenged were she to give evidence and the fact the 2017 complaint made specific references to the inadequacy of the investigation into the 2010 complaint, the Ministry resolved to undertake inquiries. In doing so, Mr Lennan had reviewed the information held by the Ministry, including that provided to Mr Merrett in September 2017, the information provided by the University of Portsmouth and DWP, and the information supplied by Ms Beecham on 27 and 30 January 2018.

b) Mr Lennan said he had concerns regarding the veracity of this information. This was because "despite instructions from the Ministry to the contrary" the file of information from DWP had been opened by Mrs Rayner, or her legal representative, prior to it being received by the Ministry. Ms Beecham had not been identified by Mrs Rayner as a referee until 6 December 2017, two and a half months after notification of the complaint. Her name did not appear in any of the documentation viewed by the Ministry or received from DWP, she was not a supervisor but was a senior colleague, and she had not undertaken performance

reviews. Finally, it was stated that the Ministry had not been able to speak to the person whose name appeared on the appraisal records, Mr Ruffles.

c) The letter went on to outline two broad issues. The first of these was that there had been an asserted lack of cooperation. A detailed chronology followed in which it was variously stated:

- that Mrs Rayner had modified her position as to the provision of consent;

- that materially different steps were taken following the 1 November 2017 meeting from those that had been agreed including Mrs Rayner communicating directly with Mr Ruffles and providing information to him which was likely to undermine the independence of any subsequent verification he could give, and that the Ministry had "become fixated" on speaking to him;

- that in discussion on 6 December 2017, Mrs Rayner had been reluctant to provide consent to inquiries because of concern for her safety as a result of having had a stalker, and that she was concerned originally about Mr Merrett speaking to managers, team leaders and colleagues – these comments were said to be inconsistent with the position she had taken previously when she said she was refusing consent as a matter of principle;

- that she identified referees Ms Stringer and Ms Beecham for the first time on 6 December 2017, being names which did not appear on any of the documentation viewed by the Ministry prior to that time; the spontaneous submission of names was said to be unreasonable.

These matters led Mr Lennan to conclude on a preliminary basis that Mrs Rayner had failed unreasonably to cooperate with the Ministry's investigation.

d) The second broad issue was that concerns had arisen in respect of the relationship of trust and confidence, particularly with regard to comments made about Mr Burnside and Mr Merrett.

e) Mr Lennan expressed the preliminary view that summary termination was appropriate, but before making any final decision offered the opportunity for written comments to be provided by a date which was later extended to 26 February 2018.

[141] By letter of 26 February 2018, Ms Oberndorfer responded on behalf of Mrs Rayner. All of the assertions made were denied. In particular:

a) Concerns were expressed as to how the investigation had been handled, including a breach of Mrs Rayner's privacy and a failure to disclose information which had been obtained in a timely way.

b) The misunderstandings which had apparently arisen as to the process were due to the fact that the Ministry had failed to make an adequate record of the meeting held on 1 November 2017.

c) Mrs Rayner had provided the Ministry with a plethora of documentary evidence about her employment and qualifications.

d) She had stated that she had respect for her supervisors in a professional capacity, and that her personal feelings with regard to managers had no bearing on her employment or her ability to perform her role. She had been a loyal employee for 12 years.

e) She had disclosed to Mr Merrett at the outset she had been stalked; she had expected Mr Merrett to respect and manage the situation accordingly, but this did not happen. Knowing her privacy had been breached, it was only natural she adopted a cautious approach thereafter.

f) With regard to the information eventually provided by DWP, it was unreasonable for the Ministry to expect it could receive her personal

information without her seeing it or knowing its contents. Nor was there an agreement to the contrary. In a situation where the Ministry had not properly secured personal information it previously held about Mrs Rayner, her responses were not unreasonable. Moreover, they were in accordance with advice given to Ms AB.

g) The conclusions drawn with regard to Ms Beecham's information were unreasonable.

h) The chronology referred to in the Ministry's letter was selective and inaccurate.

i) There was no reasonable basis to find Mrs Rayner had failed to cooperate. She had provided adequate information. The Ministry had taken a hostile stance towards her without justification, and she naturally reacted to defend herself against a raft of allegations.

j) She had been candid with regard to trust issues. It was manifestly unfair to keep attacking her until she reacted and then use that reaction as a reason for dismissal.

k) A request was made that she be permitted immediately to return to work and resume the career she had built for herself over the past 12 years.

The Ministry's decision to dismiss

[142] On 8 March 2018, a final decision letter was sent by Mr Lennan, confirming Mrs Rayner's dismissal. The letter maintained the points that had been contained in the Ministry's earlier letter of 19 February 2018 and rejected assertions to the contrary made in Ms Oberndorfer's letter of 26 February 2018. Mr Lennan concluded:

a) Mrs Rayner had unreasonably failed to cooperate with the Ministry's investigation and that these actions seriously undermined the relationship of trust and confidence.

b) With regard to the issue that had been raised as to statements made by Mrs Rayner about her managers, it was not accepted a distinction could be validly drawn between personal and professional feelings about managers. It was further stated that Mrs Rayner's views of them would inevitably impact on her professional dealings with such persons.

c) With regard to the reference to comments made in the "purportedly confidential" conversation with Mr Unsted, the issue was not that comments had in fact been made about Mr Merrett, but that there were underlying trust issues that caused her to hold the view which was expressed. Mr Lennan's final view was that the relationship of trust and confidence between Mrs Rayner and the Ministry were seriously undermined because of the level of distrust she held for all her managers.

d) Mr Lennan needed to consider the nature of Mrs Rayner's role as an investigator, the importance of both parties being honest and open with each other as well as responsive and communicative, given that a team of investigators needed to be able to communicate effectively. He did not consider a facilitative process would be successful. The appropriate decision was to terminate Mrs Rayner's employment summarily, with effect from 8 March 2018.

[143] A personal grievance was then raised on behalf of Mrs Rayner for unjustified dismissal on 15 March 2018, on the basis of the many previous letters and emails which had been sent by Ms Oberndorfer.

Overview of parties' cases

[144] In summary, Mrs Rayner's case as to justification is as follows:

a) Her dismissal was not substantively justified. The allegations of damage to trust and confidence were a "bolt-on" at the point of dismissal. Alternatively, the dismissal could not be justified, as there was no serious misconduct justifying such a conclusion.

b) Nor was the dismissal procedurally justified, there being multiple flaws in the investigative process.

c) Overall, it was submitted the dismissal could not be justified. Mrs Rayner was never asked why she was hesitant in providing the consent which was being sought; she was never given the opportunity to discuss matters without the disciplinary sanction being held over her. She was never asked how she would like to provide the information which was being sought or how she could assist in collecting it. This was solely because the Ministry was intent on substantiating the complaint, not verifying her employment as expressly requested. The plaintiff claimed it had lost trust in Mrs Rayner over the process but had not made any attempt to repair the relationship; in the face of such concern, it had an obligation to attempt to resolve the situation.

d) It was argued that the dismissal was not procedurally justified on multiple grounds. The process adopted was not fair or reasonable and was inconsistent with the Ministry's policies; Mrs Rayner did not have an opportunity to speak to the true decision-maker, who it was submitted was Mr O'Keefe; and the investigation and disciplinary processes were not conducted with an open mind.

[145] In summary, the Ministry's case as to justification was as follows:

a) Mrs Rayner was justifiably dismissed on the basis that the necessary relationship of trust and confidence in the employment relationship had been broken because she had unreasonably failed to cooperate with the Ministry's investigation; and had demonstrated a high level of distrust in her managers.

b) It was imperative the Ministry obtain third-party verification of Mrs Rayner's work history in the face of the online complaint. Not to do so risked any work she conducted as an investigator being called into question, particularly where there may have been court or media scrutiny.

There was an issue as to the Ministry, and its A&C team, being brought into disrepute; and there was possible further detriment to Mrs Rayner in the event of future complaints regarding her credentials being made without the Ministry having the necessary information to refute such a complaint.

c) It was submitted that Mrs Rayner was initially cooperative, but from 27 September 2017 onwards, she strenuously resisted the Ministry's attempts to undertake inquiries. She did not, in any of her refusals, indicate that the basis of her objection was fear arising from having had a stalker in the UK. In each case, it was premised, essentially, on a principled objection to further inquiries being conducted, having regard to previous inquiries. This was unreasonable in the face of a fundamental deficiency in the 2010 investigation in that her previous manager had not undertaken reference checks in the UK.

d) There was a material change in her position from 31 October 2017 when Mrs Rayner agreed to cooperate constructively with the inquiries. There was no reasonable or logical reason for her to have adopted one approach to that date and to then modify that approach. Accordingly, it was open to the Ministry to reasonably form the view that her actions between 27 September and 31 October 2017 were unreasonably obstructive.

e) It was argued that the steps taken following the meeting of 1 November 2017, on her part, involved a fluctuating approach to the provision of assistance. For example, she initially resisted the Ministry contacting Mr Ruffles without good reason, and then without telling the Ministry she would do, contacted him. It was open to conclude that her actions in contacting Mr Ruffles following the 1 November 2017 were unreasonably obstructive. Her approach also undermined the independence of any subsequent verification he may or may not have been able to provide, as well as casting the Ministry in a negative light by claiming it had "become fixated" in speaking to him. Reference was

also made to the way in which the names of referees emerged over the course of the investigation.

f) Based on these factors, the employer could reasonably form the view Mrs Rayner had adopted a deliberately unhelpful approach by not volunteering information.

g) Turning to the conclusion concerning a lack of trust in managers, adverse comments were made regarding senior managers which were justifiably of concern to the employer. Mrs Rayner sought to draw a distinction between trusting managers with personal matters as against trust with regard to work matters, but it was submitted such a distinction could not reasonably or validly be drawn because of the nature of the comments and the context within which they were made.

h) Based on these factors, the dismissal met the test of justification on substantive grounds. It was also submitted that the Ministry had followed a fair and reasonable process, which included a conclusion that the 2017 complaint could not be substantiated on the balance of probabilities; Mrs Rayner was not dismissed on that basis.

[146] It will be necessary to refer to the representatives' submissions in more detail where relevant below.

Legal principles

[147] Section 103A of the Employment Relations Act 2000 (the Act) provides that the question of whether a dismissal or an action was justified must be determined on an objective basis by applying the test in subs 2, which provides:

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

[148] The section goes on to stipulate four factors which the Authority or Court must consider namely:[7]

> …
>
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
>
> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
>
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[149] The Court may consider any other factors it thinks relevant.[8] It cannot determine that a dismissal or an action is unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.[9]

[150] It is not for the Court to substitute its decision for what a fair and reasonable employer could have done in the circumstances and how such an employer could have done it. In *Angus v Ports of Auckland Ltd,* it was emphasised there may be a range of responses open to a fair and reasonable employer, and that the Court's task is to examine objectively the employer's decision-making process and determine whether what the employer did, and how it was done, were what a fair and reasonable employer could have done.[10] The Court of Appeal, when discussing s 103A, has observed:[11]

> [46] It is apparent that the effect of the statute is that there may be a variety of ways of achieving a fair and reasonable result in a particular case. As the Court in *Angus* observed, the requirement is for an assessment of substantive fairness and reasonableness rather than "minute and pedantic scrutiny" to identify any failings.

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7 Employment Relations Act 2000, s 103A(3).
8 Section 103A(4).
9 Section 103A(5).
10 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [36] – [44].
11 *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295.

[151] Dicta of the Court of Appeal in an earlier case, that of *Air Nelson Ltd v C,* is also of assistance:[12]

> [19] Section 103A requires the Court to undertake an objective assessment both of the fairness and reasonableness of the procedure adopted by [the employer] when carrying out its inquiry and of its decision to dismiss [the employee]. Within that inquiry into fairness and reasonableness the Court is empowered to determine whether [the employer] had a sufficient and reliable evidential basis for concluding that [the employee] had been guilty of misconduct.

[152] I proceed in light of these principles.

Relevant contractual provisions and policies

[153] Mrs Rayner was covered by a CEA entered into between the PSA and the Ministry.

[154] Clause 4 stated that the Ministry had the responsibility of providing employees with appropriate disciplinary and dispute procedures and the opportunity for redress against unfair or unreasonable treatment by the Ministry.

[155] Clause 43 governed terminations of employment. The Ministry was required to give permanent employees one months' notice of intention to terminate their employment. Then it went on to state:

> Employment may be terminated with a lesser period of notice, or with no notice, if the employee is found to have committed serious misconduct. The Ministry may suspend an employee from duty on pay where it considers it necessary to do so in order to investigate any possible serious misconduct on their part. The Ministry will consult with the employee and allow them [an] opportunity for representation before any such suspension takes place.

[156] Employees also had responsibilities, including the requirement to comply with the Ministry's Code, to be honest, diligent and perform to the best of their abilities, and to maintain proper standards of integrity, conduct and concern for the public interest.

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[12] *Air Nelson Ltd v C* [2011] NZCA 488, (2011) 8 NZELR 453.

[157] The Code also stated that the State Services Commission's standards of integrity and conduct apply, there being four core principles of fairness, partiality, responsibility, and trustworthiness. It spelt out the Ministry's obligations in light of those standards; and went on to refer to expectations of employees. Breaches of the Code were also referred to, with examples being given of both misconduct and serious misconduct.

[158] A range of policies were also produced. They included:

- guidance as to the conducting of an investigation;
- rules and guidelines relating to the managing of unacceptable behaviour;
- a description of the Ministry's disciplinary process; and
- examples of serious misconduct.

[159] It will be necessary to refer to some aspects of these policies later.

Analysis

My approach

[160] I make two preliminary observations as to the correct approach. First, although the Ministry ultimately determined that the 2017 online submission could not be substantiated on the evidence available, the process that led to that conclusion gave rise to the related conclusions that Mrs Rayner unreasonably failed to cooperate with the Ministry's investigation, and that the relationship of trust and confidence was seriously undermined because of the level of distrust Mrs Rayner had for all her managers. Plainly, there is an overlap in the three conclusions, because they all arose from the Ministry's investigation. It is therefore necessary to examine that process in some detail, since it is central to the grievance allegations the Court must resolve.

[161] Secondly, the inquiry and investigation arose in a particular context. The background circumstances are, in my view, relevant to those processes, although as I

will explain that background was not adequately acknowledged or understood at the time the 2017 complaint was considered. I begin by a consideration of that context.

Background circumstances

[162] During the investigation, Mrs Rayner said she had been stalked in the UK. Despite the sensitivity and potential relevance of this information, she was never asked to provide details about it in a suitable way. I will return to how the issue was treated in the course of the investigation later.

[163] When she gave her evidence, I asked Mrs Rayner for details of this aspect of her past. Despite this being an intensely difficult topic for her to discuss, these were provided. They are now the subject of a non-publication order.[13] It suffices to say that Mrs Rayner believes that those involved in stalking her knew of her whereabouts because a person in her workplace had provided that information. Also relevant are the significant health consequences of these events, which she described. Following my questions, counsel did not cross-examine her to the contrary.

[164] Mrs Rayner described these events as being an "immensely private matter" and indeed a reason for coming to New Zealand to live. There was consistent evidence from members of the investigation team and from a close friend that she is indeed a private person, who distinguishes what she describes as the business side of her life and the personal side of her life. She believes, as it was put by her friend, Mrs Shirley Arps, that those "should remain separate". By way of illustration, Mrs Arps said she knew little of Mrs Rayner's work circumstances, and indeed had only learned about aspects of her personal life, which she described as "difficult, painful and personal", over time. In the course of the investigation, Mrs Rayner said she could not look at her past, as it unsettled her, and that she needed to move on.

[165] I infer from these factors that Mrs Rayner has sought to distance herself from past events, and that she is reluctant to discuss her personal history, even with a close friend.

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[13] The evidence is recorded at pages 457 - 458 of the transcript.

[166] A further illustration of these difficulties is given by events that occurred prior to the investigation. Mrs Rayner said she was "sickened" by the lewd comment she says Mr Merrett made in the workplace in early 2016. Such a reaction from a person who had been stalked would be understandable.

[167] With regard to the health issues that arose later that year when it was proposed by Mr Merrett and Mr Burnside that Mrs Rayner undergo a consultation with a medical practitioner appointed by the Ministry, she was defensive and strident in her opposition to this possibility. In the course of the two discussions which occurred with her managers, she said she was "scared of the unknown" and that she felt the request was an "attack on [my] integrity". She was sufficiently concerned as to take advice from the PSA. In short, she had a strong adverse reaction to a request which related to her personal information.

[168] Such strands of evidence as these point to a clear conclusion that Mrs Rayner was indeed the subject of stalking and significant adverse behaviour when in the UK and that she has been deeply affected by those events. She is naturally reluctant to discuss this painful past. I find she is also likely to react adversely to events which may remind her of that past. Given her history, it is unsurprising that, facing a request for historic information she would be defensive, wishing any such details to be obtained in a controlled fashion, as ultimately occurred in November 2017. It is also unsurprising that she would have significant issues of trust with regard to the disclosure of personal or confidential information. These circumstances require consideration when assessing what occurred during the Ministry's investigation.

The meeting of 25 September with Mr Merrett

[169] In her evidence to the Court, Mrs Rayner said that, upon being informed about the online submission, she was genuinely frightened that she was being victimised and believed that someone was out to get her. In that context, when speaking to Mr Merrett she referred to the fact she had been stalked in the UK and that this was one of the reasons she came to New Zealand to live. She explained she made this statement so that Mr Merrett could comprehend the need to tread carefully and respectfully with regard to her past. She was very distressed at the time.

[170] There is a dispute between her and Mr Merrett as to whether this statement was made, as Mr Merrett put it in his evidence, "under her breath". Although he habitually took notes of conversations with persons with whom he was speaking, he did not record this matter. He undoubtedly realised she had said it, because several weeks later after the meeting of 1 November 2017, when Mrs Rayner had again referred to the stalking issue, Mr Lennan asked Mr Merrett whether she had raised it initially. He confirmed she had done so, saying he had not believed that it was relevant to what he described as a limited inquiry with a previous employer. Whether or not she referred to this issue under her breath, I find Mrs Rayner intended Mr Merrett to hear what she said, and he did.

[171] Another issue which arises from this meeting is whether Mr Merrett said he would need to "dig deeper" into the question of whether Mrs Rayner had been an investigator in the UK. Mr Merrett denies saying this, pointing out that such a statement is not consistent with his notes. Mr Merrett did not record what he said as to his intended process at all, but he acknowledged to the Court he did say he thought Mr Landreth may not have gone far enough with his inquiries.

[172] I am satisfied Mrs Rayner was left with the impression that a more thorough inquiry into her previous work experience as an investigator would be undertaken than Mr Landreth had performed and that questions could be asked of more than one person. That Mr Merrett would have conveyed this impression is confirmed by the fact that he then set about making elaborate inquiries as described earlier.

[173] I refer also to the controversary between Mrs Rayner and Mr Merrett as to whether she mentioned her two UK referees in this conversation. Mr Merrett is adamant she did not, saying that he would have recorded this information which would have been of interest to him; a factor which further confirms he intended to conduct a thorough investigation.

[174] Mrs Rayner said that at the time she believed Mr Moore and Mr Landreth, when dealing with previous complaints, had contacted her UK referees (a point to which I shall return), and that she thought the Ministry held this information on her personnel records which included the CV that named them. She said she rambled

somewhat in this conversation, and in that context, she mentioned their names because Mr Moore had, she understood, contacted them. But she acknowledged she had not provided the names "directly" to Mr Merrett.

[175] Mr Merrett himself said Mrs Rayner was "understandably upset", although he put that down to the fact that she was in receipt of a yet further complaint which was apparently malicious.

[176] I find Mrs Rayner referred to the fact she believed her two UK referees had been spoken to, but not with the intention of advising Mr Merrett of the names of persons to contact.

Referee checks

[177] An issue which was explored by Mr Merrett was whether UK referees had been contacted previously and whether Mrs Rayner was correct in saying she understood this had occurred.

[178] In 2005, it was apparently the practice that applicants for appointment as auditors were interviewed by three persons, each of whom would complete an interview schedule. In Ms Rayner's case, none of these materials, or any records of contact with referees, have survived.

[179] Ms McGregor gave evidence as to the original appointment process. She said it was Mr Moore who had conducted referee checks for Mrs Rayner when three auditors were recruited from England, Wales and South Africa. She said he was meticulous about those processes. She could recall conversations with Mr Moore about him making calls to referees from his home in the evenings to account for time differences; she said she told Mr Merrett this when they spoke on 27 September 2017. She was not challenged on this point.

[180] Mrs Rayner said that, in a visit to the UK in 2006, one of her referees, Ms Beecham, told her that she had been contacted by a person from the Ministry for reference purposes. Ms Beecham had recalled that she was phoned by a person with an accent that was consistent with Mr Moore's accent.

[181] Mr Moore said in an email to Mr Merrett in November 2017, part way through the investigation, that he did not recall making referee checks himself concerning Mrs Rayner's appointment, but that Ms McGregor may have done so as it would have been normal standard practice for one of the two to carry out such checks

[182] At that point, there was Ms McGregor's information that Mr Moore may have contacted at least one referee in the UK at the time of Mrs Rayner's initial appointment and Mr Moore's information that he had no recall of this. This uncertainty was not explored further with either of them in the course of the investigation.

[183] Mrs Rayner believed there was a further check by Mr Moore after receipt of the 2007 complaint and that he told her this. Mr Moore was certain this had not occurred.

[184] The appointing manager in 2008 was Mr Landreth. He said in an email he wrote after issues on this topic arose that he had only "the vaguest recollection of the matter", and that if this point was not referred to in a report he wrote in 2010, to which I will refer shortly, he doubted if he could add anything. There was no reference in that report to reference checks being undertaken in 2008. Mr Merrett was thus left with another uncertain recollection as to UK checks.

[185] Mrs Rayner also said she was told by Mr Landreth he had checked the UK referees when dealing with the 2010 complaint. As there was no reference in his memo that he had done so, it is unlikely this occurred. However, Mrs Rayner was not given a copy of Mr Landreth's memo at the time; there is no doubt he was satisfied the complaint was vexatious. I infer Mrs Rayner was told of his conclusion and incorrectly assumed the UK referees must have been checked.

Mrs Rayner's views as to the giving of consent

[186] The next matter concerns Mrs Rayner's views as to providing consent. These changed from time to time. This became a core issue, and indeed one of the grounds for dismissal. It is necessary, however, to review what happened in context, so as to assess whether a fair and reasonable employer could have concluded that she was obstructive in light of all the circumstances.

[187] Initially, at her meeting with Mr Merrett on 22 September 2017, Mrs Rayner said "do what you've got to do". At that stage, she was upset and was not in fact well informed as to what information was held by Mr Merrett. She did not know, for example, that he already held a copy of Mr Landreth's 2010 memorandum, a document which she herself only learned about later that day.

[188] On 25 September 2017, Mrs Rayner sent Mr Merrett nine documents relevant to her previous experience as an investigator. She said she had the originals with her if he wished to view them. She also said she was obtaining advice on what further information relating to her career could be released due to its confidential nature.

[189] The nine documents consisted of a range of certificates and certifications which confirmed Mrs Rayner had attended training with regard to skills required by an investigator of fraud; these certificates were endorsed with various logos including those of the DSS and the Benefits Agency.

[190] Given her understanding about previous steps, her distress at the prospect of further inquiries into information she regarded as confidential was understandable.

[191] Mr Merrett then raised several queries. To recap, he asked whether she was still happy to sign a release form of some description that could be sent to the previous employer to access previous personnel records and whether she had contacts with her former employer so that a release could be sent to them in due course – which again confirms the fact Mr Merrett would be making detailed inquiries, as he did, commencing soon after.

[192] By 27 September 2017, Mrs Rayner had been in touch with Ms AB, who told her further inquiries would be a waste of time and unnecessary; she had been provided with a copy of Mr Landreth's memorandum, but not its attachments. She thereby became appraised of his consideration of the documents contained in the file she had made available to him in 2010. But she did not know Mr Merrett had the memorandum and attachments, one of which was her qualification as an Accredited Counter-Fraud Officer from the University of Portsmouth. She forwarded a copy of both documents to him. She then expressed the view that it would be ineffective to contact the HR

department of her former employer, the DSS, as it would only confirm dates of employment and grade and would have no other details relating to her role. She did say, however, that the University of Portsmouth should be the first port of call in confirming that her qualification was genuine.

[193] In light of all the information she now possessed, she believed a further investigation would be inappropriate. She also said that if any further anonymous allegations regarding her past were received, she did not wish to know about them, as these caused her unnecessary distress. She observed that she could not keep looking back but had to focus on looking forward. Again, these remarks were understandable and significant; in all the circumstances they could not have caused a fair and reasonable employer any difficulty.

[194] The next step with regard to this aspect of the chronology, as far as Mrs Rayner was concerned, occurred when she received Mr Merrett's letter of 5 October 2017, formally seeking a consent to contact the DWP.

[195] Soon after receiving this letter, she met with Mr Unsted and spoke to him in what she believed was a confidential conversation. One of the topics touched on was that inquiries had been made of Mr Moore and Mr Landreth, from which Mr Merrett had concluded UK reference checks had not in fact been undertaken by them.

[196] I am satisfied that this was indeed a confidential conversation. Much later, Mr Unsted told Mr Lennan he initially treated the conversation as confidential in the hope Mrs Rayner would cooperate. All the circumstances of the meeting establish Mrs Rayner did not want or expect her information to be disclosed by Mr Unsted. Mr Unsted also acknowledged the conversation was candid; and that Mrs Rayner may have obtained the impression from him that he despised Mr Merrett as much as she did.

[197] That Mrs Rayner would not wish to refer information provided to her in a confidential conversation could not have been regarded as unreasonable.

[198] In response to the Ministry's letter, Mrs Rayner sought advice from Mr Coates of the PSA. On 9 October 2017, he contacted Ms AB, who provided him with copies of the 2010 and 2017 complaints, as well as the letter provided to Mrs Rayner seeking consent to contact her previous employer to verify employment details, but did not advise him of the numerous steps taken by Mr Merrett to that point.

[199] Mr Coates advised Mrs Rayner that an investigation was "not appropriate" and that she was being subjected to a "triple jeopardy", which I infer was a reference to the three complaints Mrs Rayner said had arisen during the years of her employment with the Ministry. He told her that as "a matter of principle" she did not need to cooperate.

[200] Subsequently, she repeated this statement more than once to her employer. She said she did not want further inquiries to be made as a matter of principle.

[201] It is also to be noted that, by this time there had been no further substantive conversation with Mr Merrett. He told the Court he felt sorry for her; but this was not conveyed to her. She said she felt completely unsupported in the workplace because of the questions that were being asked, which related to her past. She is correct. That too is a relevant matter of context when assessing her responses.

[202] For reasons that are unclear, Mr Coates then suggested Mrs Rayner should provide the requested consent. Mrs Rayner was distressed at this development, and so took legal advice, informing her employer she was doing so on 12 October 2017. She requested patience. Ms Oberndorfer then confirmed to Ms AB that she was now acting, expressing a preliminary view Mr Merrett was not entitled to pursue matters in the UK without Mrs Rayner's consent. She also asked for time to enable her to undertake a comprehensive assessment.

[203] To this point then, Mrs Rayner had not provided a formal consent and had been advised, initially by a Union organiser, Mr Coates, and then her representative, Ms Oberndorfer, that she should not. This remained the position until late October 2017 as a result of several steps taken by the Ministry.

[204] On 25 October 2017, Mr Merrett escalated matters by writing to Mrs Rayner about a proposed suspension, because, he said, the Ministry wished to verify past employment with her support which had not been forthcoming. A meeting was proposed for two days later to discuss the proposed suspension.

[205] Ms Oberndorfer sent a strong reply stating Mrs Rayner had not been obstructive, that she was willing to consider mediation, that suspension was unreasonable, and that the investigation should cease immediately.

[206] On 27 October 2017, the Ministry escalated the issues again, now proposing that Mrs Rayner be dismissed because of a "refusal to participate in this investigation to clear your name". She was given three days to give a response.

[207] On the same day, Ms AB sent to Ms Oberndorfer copies of Mr Merrett's various communications with persons in the UK, including Mr Ruffles, as described earlier. Mrs Rayner learned about Mr Merrett's inquiries a day or so later from Ms Oberndorfer.

[208] She also learned that Mr Merrett had made an inquiry of DWP to ascertain the process required to access former employee records, and that not only was a former staff member required to sign a waiver, but that person then had to call employees' services and answer various prearranged security questions.

[209] Mrs Rayner said she "felt defeated" by the provision of the information which included contact with Mr Ruffles, and the fact that she had been incessantly requested for a signed consent which was never going to be enough. I accept her evidence.

[210] The communications Mr Merrett had undertaken, particularly with Mr Ruffles, were of course a serious breach of Mrs Rayner's privacy entitlements. Given her particular background, she had every right to feel deeply aggrieved by what had occurred. Not only had her legal rights been infringed, but her ability to trust her employer was inevitably affected.

[211] However, with the assistance of her representative, she agreed on 31 October 2017 to attend a meeting which she thought would be attended by Ms AB. Ms Oberndorfer recorded Mrs Rayner had no issue in assisting with the collection of reasonable information in order to confirm her employment and qualifications. She also said Mrs Rayner was concerned about the "overly suspicious manner" in which Mr Merrett embarked on the matter.

[212] Later, and at the hearing in the Court, it was suggested that this was yet another change of position for which she should be criticised. However, Mrs Rayner was under threat of losing a long-held job, to which she was committed and wished to resume as soon as possible. The process had become unduly adversarial, as Mr Lennan accepted. Mrs Rayner and her adviser, notwithstanding her difficult personal circumstances, believed she was being forced to provide a consent she had no legal obligation to provide. The position which was taken, however, was that Mr Merrett should no longer be involved, and that the requested information would need to be obtained in a controlled fashion. It was not unreasonable for her to have put the matter in this way given the significant pressure the employer was applying.

[213] The meeting of 1 November 2017 became very difficult. Mr Lennan attended unexpectedly and only learned at the meeting that Mr Merrett had breached Mrs Rayner's privacy.

[214] From the totality of the evidence before the Court, I find that the meeting was hostile and heated; Mr Lennan threatened to walk out twice. It lasted for more than an hour. He acknowledged that he was frustrated by the fact the inquiries had not been undertaken. It is likely he was also frustrated by the activities undertaken by Mr Merrett, because he accepted Mr Merrett should no longer be involved in the process.

[215] As recounted earlier, there was then a dispute as to what had actually been agreed at the meeting, which, given the fraught circumstances, is hardly surprising. I accept Mrs Rayner's evidence that she believed a controlled, two-step process would be undertaken, since it is unlikely in the circumstances she would have agreed to inquiries being undertaken on a more open-ended basis.

[216] In summary, Mrs Rayner agreed that a consent would be provided to the HR department of DWP, although it may not have held the information which was sought as to her role with the Benefits Agency. She was reluctant, however, to provide a consent to be provided to Mr Ruffles, being embarrassed at the contact which Mr Merrett had made about her; nor was he her most recent supervisor; nor had she ever suggested he should be a referee. She also reiterated the importance of contacting Portsmouth University.

[217] In my view, a fair and reasonable employer could not in all the circumstances have concluded her stance was unreasonable.

[218] Following the meeting of 1 November 2017, Mr Lennan developed a concern, which had been raised at the time that dismissal was proposed in late October, that there were now significant trust and confidence issues because of the way Mrs Rayner had reacted to the Ministry's request for consents. Although he now knew that the stalking issue had been raised at the commencement of the process, and again in the meeting on 1 November 2017, he did not resile from his view that the provision of a consent was a straightforward matter, and that statements Mrs Rayner had made as to trusting her managers were unjustified.

[219] On 6 November 2017, Ms AB told Ms Oberndorfer that the meeting of 1 November 2017 had not been successful in resolving the issues so that the disciplinary process would be recommenced. This statement was made notwithstanding the fact that a formal consent had now been provided to the HR department at DWP and that, once again, it had been proposed that verification of the qualification obtained from Portsmouth University should be obtained, a step Ms AB had yet to take.

[220] In spite of a representation from Ms Oberndorfer on 7 November 2017 that disciplinary action would be "highly inappropriate", the Ministry proposed a formal disciplinary meeting so as to hear from Mrs Rayner as to what were described as "numerous and escalating concerns".

[221] On the day she received the Ministry's latest letter, Mrs Rayner rang the HR department of DWP to clarify the process for obtaining of a copy of her personnel file. She was told HR had not yet received her signed consent form from the Ministry, which would at least have allowed verification of her employment to be given from that source.

[222] In a further step for which she was also criticised, she contacted Mr Ruffles, by an email which was disclosed a short time later to the Ministry via her representative. In cross-examination, when pressed as to why she had taken this step, she said she had "panicked" and contacted him. Given the severe pressure which was being placed on her, it was unsurprising she took this step. I will comment more fully later as to what she actually said to him and whether that could sensibly be regarded as endeavouring to influence his opinion.

[223] A constructive step was taken by both parties prior to the proposed investigation meeting in that they attended mediation. That at least demonstrated good faith on the part of both parties. However, the issues were not resolved.

[224] Shortly before the meeting of 6 December 2017, Mr Unsted reported to Mr Lennan the contents of his conversation with Mrs Rayner, which had taken place on 5 October 2017. Mr Unsted recalled she had stated she "despised" Mr Merrett and speculated whether he may have been the author of the online submission. I record that Mr Merrett strongly denied this allegation in his evidence, stating the assertion was palpably untrue.

[225] There had also been a discussion about trust issues. Mr Lennan regarded this information as very important, and encouraged Mr Unsted to document it, notwithstanding Mr Unsted had "rightly tried to keep the conversation confidential".

[226] The transcripts of the investigation meeting held on 6 December 2017 confirm the parties discussed in detail the 10 allegations which by now were being advanced. As described earlier, they related to dealing with consent issues in a way which was said gave rise to suspicion and dishonesty, and that the only plausible explanation for refusing it was because Mrs Rayner wanted to avoid information coming to light, a

failure to recognise the importance of what the Ministry was trying to do by verifying qualifications and experience as an investigator, the making of misleading statements regarding managers, and that there were performance issues.

[227] Because of the importance of the issue, I refer to the discussion concerning the fact Mrs Rayner had been victimised by a stalker. In the course of the meeting, Mrs Rayner explained that she had been concerned about what she described as "deep searches" and that this was naturally a concern when she had been the victim of a stalker. She also explained that this was why she did not want to discuss her personal life with people, and that, in fact, she had been brave to refer to this issue at all when speaking initially with Mr Merrett. She said it was something she did not want people to know about and that she was frightened. She had hoped Mr Merrett would have respected what she had said and proceed more carefully. That was why she did not want inquiries being made that could have impacted on her private life.

[228] It is also relevant to note Mrs Rayner's reaction to the disclosure by Mr Unsted of the conversation she had had with him on 5 October 2017. As stated earlier, I consider that the meeting had been confidential. Mr Unsted's disclosure was a breach of trust. Mrs Rayner was obviously vulnerable on issues of this kind. Her reaction to the disclosure, when she said she would let his conscience deal with the issue, is unremarkable. Similarly, she believed Mr Burnside had also breached a confidence on another matter, which she saw as also imperilling their particular relationship of trust and confidence.

[229] It is also necessary to mention again, with regard to the meeting of 6 December 2017, the wholly unexplained fact that by this time, Mrs Rayner's personnel file had been located by Ms AB. That file included her CV, which contained the names of her UK referees. Notwithstanding the fact that a senior HR advisor, Ms McMahon, stressed the importance of the Ministry knowing those names at an early point since they were on her CV, Ms AB, who was present did not disclose the fact that the file had been located which had that information in it. The tortuous conversation as to whether Mrs Rayner had or had not disclosed these names was, therefore, quite unnecessary and was unfair when it was the Ministry who possessed

this information all along but had not looked after it properly and was not now tabling it.

[230] I also note that notwithstanding all that had been said about contacting the University of Portsmouth, Ms AB had not attended to this matter until 4 December 2017. The response from that entity was that Mrs Rayner had indeed achieved the Accredited Counter-Fraud Specialist award. That this step had at last been taken, and a response received, was not disclosed at the meeting on 6 December 2017.

[231] In summary, a fair and reasonable employer could not have concluded in all the circumstances that Mrs Rayner's position as to the provision of consent was obstructive or unreasonable.

Information gathered after 6 December 2017

[232] Following that meeting, Mr Lennan determined that he would wait until the information requested from DWP arrived. It emerged that this was not a straightforward process, because that organisation would only send the material to an address within the EU, rather than to someone in New Zealand, including the Ministry. Ultimately, it was agreed that the documents would be sent to a family member of Mrs Rayner, who would forward it, unopened, to Ms Oberndorfer.

[233] At about the same time, Ms AB received a response to her request for information from DWP; the response was 18 December 2017. It confirmed Mrs Rayner had indeed been a former employee of DWP.

[234] The personnel file eventually arrived in Ms Oberndorfer's office; she and Mrs Rayner opened the envelope together. Mrs Rayner told the Court that she removed some of her personal documents, which were not relevant to the question of her prior experience as an investigator. She described to the Court the nature of the information that was removed. This was later said to suggest that the information verifying her previous employment was unreliable.

[235] Now very anxious for her position, Mrs Rayner then decided to see if she could contact the person who was a referee and her final supervisor, Ms Beecham. She contacted her former administrative assistant via Facebook, who gave her a link to Ms Beecham with whom she communicated. As already described, she said that, by this means, she obtained a Gmail address which she provided to Ms AB. She communicated with, and obtained, a substantive response that confirmed Mrs Rayner's previous employment as an investigator; she answered a further question soon after it was asked by Ms AB. Ms AB did not telephone Ms Beecham to resolve the question which was later raised that the use of a Gmail address left doubt as to the genuineness of Ms Beecham's response, an obvious step a fair and reasonable employer could have taken if it was concerned about the mode of communication.

[236] Since the steps Mrs Rayner took in December and January were expressly referred to in the letters pertaining to her dismissal, I will return to them when reaching my conclusions about the decision to dismiss.

Conclusions as to the process adopted

The stalking issue

[237] As I have found in the findings of fact just made, there was a fundamental failure on the part of the Ministry to take account of what it either knew or should have known concerning Mrs Rayner's background. She referred expressly to the fact she had been stalked at the three key meetings of 22 September, 1 November and 6 December 2017 when she spoke directly to Mr Merrett or Mr Lennan. She was obviously upset at the prospect of open-ended inquiries being made; and also told Mr Merrett at an early point she could not keep looking back at her past and that she needed to move on; and to Mr Unsted, according to the file note he gave to Mr Lennan, she did not like her past life being looked into, as it was unsettling.

[238] At no time was adequate consideration given to this matter. It could not have been ignored. It was a circumstance requiring careful consideration and sensitive dialogue in a constructive way. It needed to be considered in light of previous interactions with her, for instance in 2016 when she was reluctant to have anybody other than her own medical practitioner to provide personal information relating to her

health. There was also a failure to consider her various exchanges with Mr Merrett and Mr Burnside adequately, or at all, so as to understand why issues of trust had arisen.

Failure to proceed transparently

[239] There are a number of related problems that stem from this overarching failure. First, there were many failures to disclose relevant information during the process. For example:

a) Mr Merrett did not disclose that he held Mr Landreth's 2010 memorandum, and its attachments, which he had in his possession at the first meeting with Mrs Rayner on 22 September 2017.

b) He did not disclose, by 27 September 2017, that he had communicated with both Mr Moore and Mr Landreth. In fact, Mrs Rayner did not learn what they had allegedly said until 27 October 2017. She had of course been given some information on this topic by a third party, Mr Unsted, on 5 October 2017, but this was in the context of a confidential conversation and the information she was given was not necessarily accurate, since Mr Unsted was not involved in the inquiry process.

c) On 12 October 2017, Mr Merrett implied he would now commence preliminary inquiries. In fact, he already had.

d) Mr Merrett did not disclose until 27 October 2017, when an express request for documents was made, that there had been a wide range of communications to various addressees in the UK, utilising Mrs Rayner's personal details.

e) Mr Lennan did not disclose that, on 9 November 2017, he had been provided by Mr Merrett with detailed information about the processes adopted with regard to Mrs Rayner's back injury and that there could be performance issues for this reason.

f) At the disciplinary meeting of 6 December 2017, Ms AB did not reveal the discovery of Mrs Rayner's personnel file or that inquiries had been made of Portsmouth University.

[240] The Ministry's policies required investigations to be undertaken in a fair and transparent way. A fair and reasonable employer could not have proceeded in this way, in breach of its policies.

The focus on Mr Ruffles

[241] Next, I refer to the employer's insistence on establishing contact with Mr Ruffles, and the conclusions that were drawn as to Mrs Rayner's resistance to such a step. Mr Merrett, and then Mr Lennan, wished to speak to him because his name appeared on several performance appraisals which Mr Landreth had photocopied in 2010. As already mentioned, at the outset, Mrs Rayner did not know the Ministry held these appraisals, since she was not provided with these attachments by Ms AB in late September 2017. Such documents as were available to the Ministry indicated he was a reviewing manager who confirmed Mrs Rayner's reporting manager's promotion report, in late 2000, and that he was also one of two persons who signed appraisals in 2001 and 2002; in each of those instances, he was the appraiser, and another person was the reviewing manager. Mrs Rayner said he worked in a different town from her place of work, and she had only met him once.

[242] Mrs Rayner said that the practice of giving such appraisals then ceased, and that other people became her supervisors, one of whom she consistently named as a referee, Ms Beecham.

[243] Two issues arose. The first was that other possibilities were not considered. This was a case of tunnel vision, with an unwillingness to take into account broader or alternative possibilities.

[244] The original documents held by Mrs Rayner, including those that were offered by her to Mr Merrett early in the process, could have been considered by a handwriting or other suitable expert; and the authenticity of documents such as wage slips showing her position could have been checked against bank statements.

[245] Another obvious line of inquiry was to consider whether a member of the Ministry's staff was responsible for the online submission. Mrs Rayner had said that few people were aware of her recently adopted surname; staff at the Ministry knew her by that name because she used it in the workplace. Accordingly, it might have been considered whether the author was a Ministry employee who accessed Mrs Rayner's personnel file, where steps taken or not taken by Mr Landreth in 2010 would have been evident, a fact which was apparently known to the author; and whether there was someone within the workplace who bore Mrs Rayner animus sufficient to have filed the online submission. Ms Oberndorfer properly raised the possibility of an independent investigation as to the genesis of the online submission.

[246] The second issue related to the fact that Mrs Rayner was criticised for contacting Mr Ruffles directly on 10 November 2017. I have reviewed that circumstance and concluded it was not an unreasonable step for her to take given she was under a threat of dismissal from a long-held job. Moreover, I do not consider that the details she included in her email to Mr Ruffles could sensibly be regarded as undermining "the independence of any subsequent verification Mr Ruffles might have been able to provide", as it was put in the Ministry's letter of 19 February 2018.

[247] Mr Ruffles was a senior fraud investigator. He had been contacted, initially, by Mr Merrett via his wife, a fact which it is apparent he did not appreciate. Mr Merrett had told Mr Ruffles that the giving and subsequent recission of consent to access employment records created "suspicion" about her work history, a statement which was plainly prejudicial to Mrs Rayner. Mrs Rayner's email essentially confirmed the details already provided by Mr Merrett.

[248] Mr Ruffles concluded that he should only provide information if directed to do so. That was obviously an option open to him. Viewed from his perspective as a senior fraud manager, it was hardly surprising. It could not seriously be concluded Mrs Rayner's single email could have influenced him in any material way.

[249] Nor, as I have already found, could Mrs Rayner be criticised for an initial reluctance to agree to contact being made with Mr Ruffles in the context of "digging deeper". She said that the management set up in the UK was different from that of the

Ministry, "when it comes to the silver service". He did not work in the same office as she did and had 150 staff working for him. She was unsure if he would recall her, and she had been embarrassed because of the unauthorised communications made by Mr Merrett.

[250] I conclude that the strong focus on Mr Ruffles, and the findings made by the Ministry as to Mrs Rayner's contact with him, were not steps that a fair and reasonable employer could have taken.

The steps taken by Mrs Rayner in December and January

[251] Another demonstration of the unduly adversarial approach relates to the comments made concerning the way in which personal information ultimately arrived in New Zealand from the HR department of DWP. Criticism was raised because Mrs Rayner removed, in the presence of Ms Oberndorfer, documents she did not consider relevant which she told the Court related to her medical circumstances. If this really was a problem, it could have been raised and dealt with constructively.

[252] At least in evidence, Ministry witnesses also suggested Ms Beecham's evidence was not reliable because it came from a Gmail address. As already noted, it is apparent from Ms Beecham's emails that she was communicating freely; if there was a concern that the emails were not genuine, a fair and reasonable employer could have readily resolved that matter by communicating with her in other ways, via an alternative email address or by phone. Ms AB originally said she would call Ms Beecham. It was apparently her decision not to.

Other issues

[253] The foregoing findings lead to broader comments concerning the Ministry's approach. Not only was it unduly adversarial, but it was also unsupportive in a situation which required considerable sensitivity and care.

[254] The unstated fact, underlying the Ministry's approach, was that Mrs Rayner must be providing forged documents. At the disciplinary meeting of 6 December 2017, she said she was being accused of doctoring the certificates on file. Mr Lennan subsequently stated, in an internal email, that such an accusation had not in fact been

made, but he accepted that this was the inference to be drawn from the Ministry seeking third party verification of her qualifications and experience.

[255] A related problem concerns onus. Mrs Rayner was essentially placed in a situation where she was required to take steps to disprove the allegations which had been raised in the online submission. Mr Lennan was, until late in the process, taking the view that this should be established to the criminal standard, since that threshold would apply were she to give evidence in a prosecution. A fair and reasonable employer could not have approached the matter in this way; rather, such an employer could conduct a supportive and constructive dialogue with its employee, obtaining information as to all aspects of the relationship problem in context.

[256] There is no doubt Mrs Rayner became defensive, but as I have found, she is not to be blamed for that. It was a reaction to be assessed in light of her particular circumstances, which the Ministry either knew or should have known about. On one level, her defensive approach did not assist the Ministry's inquiries, and some details of her recollection were inaccurate. However, a fair and reasonable employer could not have failed to understand why this dynamic was occurring.

[257] An issue was raised as to the authenticity of file notes she had created. As to their provenance, no forensic evidence was called by the Ministry to refute her explanation as to how these documents came into existence. She may well have annotated those documents before releasing them, so as to accord with her understanding of events, but I do not regard this as a matter for which she could be criticised in the difficult circumstances she faced.

The totality of information received as to Mrs Rayner's work in the UK

[258] By the time these events occurred, in early 2018, the Ministry held confirmation of Mrs Rayner's qualifications and experience in the UK from several sources; the evidence I am about to summarise clearly establishes that she had been an investigator employed by the DWP:

a) A range of certificates confirming training for an investigator's role.

b) The University of Portsmouth, when Ms AB finally checked this issue, confirmed the authenticity of the qualification obtained at that institution.

d) The contents of the personnel file ultimately received from DWP contained information that confirmed dates of employment by DWP on the documents Mrs Rayner had previously provided, such as the date of her promotion to the Executive Officer pay band in March 2001; this date was consistent with a relevant date on documents the Ministry already had in its possession. The documentation also referred correctly to the fact that by May 2004, the employer unit was known as "Jobcentre Plus", an agency within DWP.

c) Mr Ruffles referred to Mrs Rayner using her first name in two emails to Mr Merrett, who is referred to by his surname. The inference that he knew her professionally was obvious; and in any event, this was confirmed by the later email he sent to Mrs Rayner herself which was disclosed soon after to the Ministry.

e) Ms Beecham's evidence was also consistent with information already provided, including as to her qualifications.

[259] There was no document which cast doubt on the authenticity of Mrs Rayner's representations that she had worked as an investigator in the UK. Mr Lennan considered, however, that doubt remained because of what he considered was obstructive behaviour in the course of the investigation.

[260] On the basis of the information held by the Ministry, a fair and reasonable employer could not have been in any doubt as to the fact that Mrs Rayner was both qualified to act as an investigator in the UK, that she had done so, and that she had not lied to the Ministry about her previous qualifications and experience.

[261] Now, the Court has the advantage of reviewing all this information against the contents of Mrs Rayner's misplaced file, which became available after her termination.

The details described in her CV are consistent with the range of information I have described.

Dismissal grievance

[262] Mr Lennan's final decision indicated he held ongoing concerns regarding the veracity of the information received, although he accepted the 2017 complaint could not be substantiated on the evidence available. This conclusion indicated that he was not in fact persuaded there was no substance to the complaint, a fact which he confirmed to the Court.

[263] Having regard to the information which had been obtained as reviewed in this judgment, and the way in which it was gathered, I find that such a reservation was not one which a fair and reasonable employer could have held.

[264] The next finding related to an asserted lack of cooperation. As I have already found, the responses given by Mrs Rayner to the provision of a consent were never adequately understood. The conclusion that there was a lack of cooperation was in all the circumstances not one which a fair and reasonable employer could have reached.

[265] The third conclusion related to the state of the employment relationship. It centred on statements Mrs Rayner had made regarding certain of her managers during the investigative process. Those statements needed, as I have already found, to be understood in a complex context. Mr Merrett, in late October, latched onto this criticism, supported by Ms AB; then it was maintained by Mr Lennan. There was a strong focus on it thereafter, suggesting a resolve to dismiss.

[266] In all the circumstances, a fair and reasonable employer could not have failed to understand the importance of exploring the complex issues that lay behind the statements about trust of managers which Mrs Rayner made in the course of the investigation.

[267] A further unstated factor which was at play related to performance concerns. Mr Lennan told the Court that the performance issues that were raised in the process were so as to inform Mrs Rayner that these were matters that were relevant to the state

of the relationship and that they would have to be dealt with when she returned to work. However, this is not how this concern was put in the invitation to a formal disciplinary meeting, where the concern was expressed as apparently supporting the inference from the complaint that she was not qualified or experienced as an investigator. It was not made clear thereafter that this issue was no longer relevant, if that was the case.

[268] The threats of suspension and dismissal were intended to coerce Mrs Rayner into agreeing to provide the consent the Ministry sought. A fair and reasonable employer could not have misused these disciplinary tools for such an objective.

[269] Finally, if indeed there were issues as to an apparent lack of cooperation and/or trust and confidence, a fair and reasonable employer could have given proactive consideration to alternatives short of dismissal. The policies of the Ministry are comparatively brief on this point, but they do state that unless there has been misconduct serious enough to warrant instant dismissal, the employee is to be given clear standards to aim for and a general opportunity to improve. A fair and reasonable employer could not have failed to constructively explore such possibilities.

[270] As I have endeavoured to explain, the substantive and procedural flaws are inextricably linked, and in those circumstances, I do not at this stage need to undertake a separate analysis of procedural flaws. I find the dismissal was unjustified.

Disadvantage grievance

[271] On the topic of Mrs Rayner's assertion of a disadvantage grievance, Ms Oberndorfer submitted in summary:

a) A unilateral decision had been made to remove Mrs Rayner from her duties.

b) Relevant information had been withheld from her during the processes involved.

c) There was a failure to properly consider information which was made available.

d) A disciplinary proceeding was embarked upon without justification, so as to force Mrs Rayner to acquiesce in the Ministry's requests.

e) A new performance allegation was created in the midst of a disciplinary process, despite such issues not having been raised previously.

f) There was a refusal to appoint an independent investigator.

g) Suspension was imposed without justification.

h) Emphasis was placed on the series of steps that compelled her to take special leave and which resulted in her being formally suspended on an indefinite basis.

[272] For the Ministry, Mr Traylor submitted in summary:

a) The suspension was procedurally fair because Mrs Rayner was put on notice of the proposal to suspend.

b) Mrs Rayner was given a full opportunity to comment, which she took; her responses were carefully considered before the decision was made.

c) The decision to suspend her was substantively justified because the employer had a contractual ability to suspend and was investigating possible serious misconduct.

d) The issues which were under investigation potentially amounted to serious misconduct.

e) The anonymous complaint had the potential to jeopardise Mrs Rayner's reputation as a fraud investigator and that of the Ministry.

f) It could also seriously impact on the integrity of any investigation in which she might be involved.

g) It was inappropriate to assign her to any investigation until the inquiries had been completed.

h) There was insufficient non-investigative work for her to undertake.

i) The ongoing appropriateness of suspension was also reviewed periodically.

Analysis

[273] Most of the allegations raised for Mrs Rayner under this head are in fact part and parcel of the dismissal grievance, and I am not persuaded that they justify separate findings in support of a conclusion there was a disadvantage grievance.

[274] The assertion of unjustified suspension, however, is a standalone issue warranting separate consideration.

[275] Following the employer raising the prospect of suspension, Mrs Rayner agreed to placement on special leave. This was from 1 November 2017. On 13 November 2017, Ms Oberndorfer wrote to the Director-General, requesting that Mrs Rayner's "suspension" be lifted. Her status was unclear from that date to 27 November 2017, although the employer did not want her to attend work. At that point, she agreed to go on special leave for a period of two days until mediation. Following that event, the employer proposed again to consider suspension and made a decision to that effect as from 1 December 2017.

[276] Synthesising this chronology, I find Mrs Rayner had no option but to take special leave from 1 to 30 November 2017 and that she was formally suspended from the following day until she was dismissed on 8 March 2018.

[277] The CEA stated that the Ministry could suspend an employee from duty where necessary to investigate any possible serious misconduct. No other basis for suspension was referred to.

[278] The serious misconduct relied on to justify suspension was said to be because "the anonymous allegation had the potential to jeopardise Mrs Rayner's reputation as a fraud investigator, as well as that of the Ministry", as it was put in Mr Lennan's letter of 29 November 2017. In his decision letter of 30 November 2017, he stated that he remained of the view that Mrs Rayner's involvement in investigation files could undermine the integrity of those investigations. It was stated the suspension should continue until the Ministry's inquiries concerning the anonymous allegation were completed.

[279] I am satisfied that this was a step taken in an attempt to persuade Mrs Rayner to provide the requested consent, like the step proposing dismissal.

[280] At this stage, Mr Lennan understood Mr O'Keefe would be the decisionmaker if Mrs Rayner was to be dismissed – he later learned that this was not the case. Mr O'Keefe had indicated that a stern approach needed to be adopted, including as to a stand-down process. Although Mr O'Keefe was provided with a summary of steps being taken, there is no evidence to suggest he was informed about the complexities of Mrs Rayner's circumstances. It is likely that his views influenced Mr Lennan, the decisionmaker at that point, to propose suspension.

[281] These were not actions which a fair and reasonable employer could take. Accordingly, the disadvantage grievance is established.

Remedies

[282] The first remedy I address is that of reinstatement, a topic about which the parties gave a great deal of evidence, as well as careful submissions.

Applicable principles

[283] The applicable provision is s 125 of the Act, which was amended from 11 December 2018 to make reinstatement a primary remedy. However, as Mrs Rayner's personal grievance proceeding was brought before the commencement of the amended s 125, it falls to be determined under the unamended provisions.[14]

[284] There is a useful discussion of the twin concepts of reasonableness and practicality, in *Angus v Ports of Auckland Ltd (No 2)*, where a full Court stated:[15]

> [61] Reinstatement is now no longer the primary remedy for unjustified disadvantage in, or unjustified dismissal from, employment. The remedy of reinstatement is available but now has no more or less prominence than the other statutory remedies for these personal grievances. That is not to say that in a particular case, reinstatement may not still be the most significant remedy claimed because it is of particular importance to the grievant. As in the past, the Authority and the Court will need to examine, on a case by case basis, whether an order for reinstatement should be made if it is sought.
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> [62] Not only must the Authority and the Court be satisfied that the remedy of reinstatement is practicable in any particular case, but they must also now be satisfied that it is reasonable to make such an order. Parliament has clearly intended that there be factors which are additional to those of practicability as the Employment Court and the Court of Appeal have interpreted that notion.
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> [63] It is only necessary to refer to the most recent case in which the Court of Appeal examined practicability of reinstatement, *Lewis v Howick College Board of Trustees*. The Court of Appeal upheld the reinstatement test applied by this Court at first instance, which reiterated the Court of Appeal's judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School (NZEI)* which had, in turn, affirmed the test applied by the Labour Court in first instance in that case. The Employment Court in *NZEI* said:
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> > Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

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[14] Employment Relations Act 2000, sch 1AA, cl 15. Although the representatives did not address this issue, it is clear cl 15(1) is intended to ensure that the amendment to s 125 does not have retrospective effect in respect of proceedings commenced by the date when the amendment took effect. In my view, the sub-clause should be reviewed in light of the common law principles to that effect – as to which see Judge Inglis analysis in *Allen v C3 Ltd* [2012] NZEmpC 124, [2012] ERNZ 478 at [55]-[87]. In that instance, common law principles applied because there were no transitional provisions.

[15] *Angus v Ports of Auckland Ltd (No 2),* above n 10 (footnotes omitted).

[64] In *Lewis* the Court of Appeal added:

> [6] ... The test for practicability requires an evaluative assessment by the decisionmaker and the factors to be considered have been clearly identified by this Court in the *NZEI case*. We see no basis on the wording of s 125 of the Employment Relations Act to import into the test a distinction between procedural and substantive grounds for unjustified dismissal. We consider that a unitary approach to the issue of reinstatement is preferable.
>
> [7] There is no dispute between the parties that the onus of proof of lack of practicability rests with the employer. ...

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[285] The Court went on to say that not only must a grievant claim the remedy of reinstatement, but if it is opposed, that person will need to provide the Court with evidence to support the claim. It also observed that an employer opposing reinstatement will need to substantiate that opposition by evidence. In both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement. The Court emphasised that it was not a matter of laying down rules about onuses and burdens of proof, but, rather, on a case-by-case basis, the Court needed to weigh the evidence and assess from there the practicability and reasonableness of making an order for reinstatement.

[286] The Court also emphasised:

> [67] Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.

[287] To similar effect is a statement to which reference has often been made. In *Ashton v Shoreline Hotel*, former Chief Judge Goddard confirmed that employment protection is the dominant goal of the legislation, and concluded:[16]

> That goal is not obtained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely

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16 *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 (EmpC) at 436.

> compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.

[288] Finally, in this review of expressions of judicial principle, I refer to the dicta of former Chief Judge Colgan in *Sefo v Sealord Shellfish* when considering s 125 of the Act in the form in which it then appeared.[17] He stated it was not uncommon for reinstatement to be regarded as embarrassing to the employer and managers responsible for the original dismissal in a way that compensatory money awards are not. He went on to observe that reinstatement may be seen as an obvious criticism of the decision to dismiss, but that is not the intention of such an order, though it may be one of the consequences. He also said it is a remedy which must be approached "robustly and matter-of-factly".[18]

[289] I proceed in light of these principles.

The parties' submissions

[290] For Mrs Rayner, Ms Oberndorfer submitted in summary:

a) Mrs Rayner seeks reinstatement to her former role as an investigator. It is both reasonable and practicable for this to occur.

b) Any damage to trust and confidence is not irreparable. Mrs Rayner believes that the differences which have occurred could be resolved with understanding and professionalism from both parties. She emphasised that both parties would have an obligation to conduct their employment relationship in good faith, and from that perspective the employment relationship could be successfully re-established.

c) Specifically, she could re-establish her relationship with Mr Burnside in spite of the interactions that occurred during the investigation. It was noted Mr Burnside had conceded Mrs Rayner could give evidence at Court based on her current experience and qualifications gained whilst an employee of the Ministry; that her performance could be improved

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17 *Sefo v Sealord Shellfish* [2008] ERNZ 178 (EmpC).
18 At [72].

with formal support; and that the Ministry was moving away from carer support towards other areas such as audiology, which meant there would be more work available for the investigations team.

d) His assertion that he would seek alternative work should Mrs Rayner be reinstated should be taken with a grain of salt. To give weight to such statements would be to encourage employers to gather similar witness statements from their managers and employees, which would create the potential for management to bully an employee out of the workplace, without regard to their own wrongdoing.

e) The Ministry's performance concerns were overstated and had never been put to Mrs Rayner.

f) It was noted that Mrs Rayner has support of colleagues, one of whom had given evidence.

g) It was also submitted that the fact Mrs Rayner is currently on ACC following a physical injury late last year should not be a barrier to reinstatement.

[291] For the Ministry, Mr Traylor submitted in summary:

a) The Ministry did not consider reinstatement to be either reasonable or practicable. Counsel submitted that trust and confidence had been seriously undermined as a result of Mrs Rayner's unreasonable approach during the investigation and her stated distrust of her managers; as a result, her former managers could no longer exercise trust and confidence in her.

b) Mrs Rayner would require significant direction and mentoring, although it was noted she had acknowledged that such mentoring would be required. It was not accepted that the Ministry's concerns were overstated and/or were designed to bolster the Ministry's case.

c) Mrs Rayner had been very critical of Mr Burnside and his leadership. Reference was also made to her defensive reaction to Mr Burnside (and Mr Merrett) when the sick leave issue was discussed in 2016, and to the subsequent issue over time management, which involved all the investigators, and in which there were frank exchanges by both parties, which later necessitated a team building initiative.

d) Mrs Rayner had referred to an alternative possibility of her being reinstated to the audit team within A&C. It was submitted this would entail her taking up a less advantageous role because remuneration was provided on a lower band than applied to investigators. Reference was made to dicta indicating that the reinstatement provision did not permit "demotion reinstatement".[19]

e) Finally, it was submitted that Mrs Rayner's ACC status also impacted on the practicability of reinstatement.

Analysis: practicability

[292] I begin with a consideration of issues as to practicability. The parties have provided evidence about two options: reinstatement as investigator or as an auditor.

[293] I deal first with Mrs Rayner's preferred option, to resume her job as an investigator. Each of the A&C managers who gave evidence to the Court on the topic of reinstatement made it clear that they were completely opposed to the prospect of Mrs Rayner resuming the role of investigator.

[294] This was for several reasons. First, they all remain concerned that, were Mrs Rayner to do so, she may be required to give evidence, and could be questioned as to her qualifications and experience as an investigator. They said that notwithstanding the information which has been obtained as described earlier, and notwithstanding her significant work experience with the Ministry itself as an

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[19] *Harris v The Warehouse Ltd* [2014] NZEmpC 188, [2014] ERNZ 480 at [205]-[207]; reference was also made to *X v Auckland District Health Board* [2007] ERNZ 66 (EmpC), at [189] to similar effect.

investigator, her credibility could be challenged, thus potentially undermining any evidence she might give. They said that this could have implications for prosecutions the Ministry might undertake.

[295] I have analysed these concerns in some depth already. On the basis of the material before the Court, it is plain Mrs Rayner was employed as an investigator in the UK on fraud cases in the period 1999 – 2005 and that she undertook relevant training. As I have found, no single piece of documentary evidence was placed before the Court which challenges the veracity of the documents she has produced confirming that work experience.

[296] The next theme in their evidence relates to the issue of trust. I have also commented at length on this topic. The statements Mrs Rayner made as to whether she could trust her managers with personal information was never properly understood. She attempted to explain this at the meeting of 6 December 2017 when she outlined her belief that there was a difference between trusting colleagues on professional matters and trusting them on personal matters. This distinction was not understood at the time in the correspondence leading to dismissal or at the hearing.

[297] Turning to the specific statements she made in the course of the investigation, Mrs Rayner said to Mr Burnside, in the brief conversation which occurred on 5 October 2017, that she did not trust him: that is, with regard to her personal information. Mr Burnside too had previously told members of his team that he did not trust them. The evidence suggests that, at times, the investigation team works in an environment where robust or candid statements might be made, but then they move on.

[298] In Mrs Rayner's case, in spite of previous hard words concerning, for example, health and timekeeping issues, and notwithstanding the difficulties of the investigation, she and Mr Burnside were able to communicate with each other constructively and professionally, as is apparent from friendly emails that passed between them later in the investigation period.

[299] Many of Mr Burnside's comments in support of the opposition to reinstatement related to events in which he had not participated. He, like any individual involved in these matters, is entitled to his opinion, but it is not, with respect, a persuasive one on the issue of reinstatement.

[300] Mr Burnside referred to the possibility of seeking alternative work were Mrs Rayner to return as an investigator. That is, of course, a matter for him and not a factor which it is appropriate to consider for present purposes.

[301] By contrast, Mrs Rayner remained strongly critical of Mr Merrett. In her evidence, she confirmed that she does not trust him, and that she thought he had been trying to oust her since she had supported Ms Miller when she had a relationship problem. These apparently long-held and definitive views would not auger well for the proper resumption of a constructive employment relationship as an investigator, even given her right to feel aggrieved as to the breach of her privacy for which Mr Merrett was responsible, and his part in a flawed investigation.

[302] Although Mrs Rayner was critical of Mr Lennan and his role in the decision to suspend and then dismiss her, she did not see that as an impediment to effective reinstatement, stating that his particular role was not one which would require regular interaction, since there would be, as she put it, a degree of separation.

[303] Another theme referred to by Ministry witnesses relates to performance. They say effective reinstatement as an investigator would be impracticable given the need to deal with such matters upon her being reinstated. Mrs Rayner makes two points about this. First, she says, correctly, that performance issues were never put to her properly during the investigation nor prior to it; she has never had an opportunity of responding to them. Second, she also acknowledges that, after a period away from the workplace, she would need mentoring and other forms of support in returning to the workplace. Further, Mr Burnside agreed that, with appropriate support, she could produce the required work. I do not regard these concerns as being a significant issue going to practicability.

[304] I turn now to the alternative possibility which Mrs Rayner raised, reinstatement as an auditor as a short-term measure. She would thereby be in a different team, although as it happens one for which Mr Burnside is the temporary team leader, but there would be other senior managers of the audit team who were not involved in the investigation in whom Mrs Rayner expressed confidence. She said she could foresee no practical difficulties arising due to the fact the audit team is ultimately accountable to Mr Lennan as National Manager of the A&C unit.

[305] The position description for an auditor in the A&C unit states that the audit team is responsible for identifying overpayments and verifying accuracy of reporting in relation to funding distributed to health service providers. These are the same providers as would be considered by an investigator. The A&C auditors check the payments made to such providers after services have in fact been provided, and that they are complying with the relevant contracts. The members of the team also provide financial/solvency or governance audits on request from DHBs or the Ministry and undertake accreditation of providers against applicable standards. Where irregularities arise, their audit findings are then passed over to the investigation team for an in-depth inquiry, including as to the possibility of legal options.

[306] Ms McGregor told the Court that Mrs Rayner was a very competent auditor when she held that role. She also said Mrs Rayner was well liked and respected by team members. When Ms McGregor travelled away from New Zealand for six months in 2007, Mrs Rayner had taken on additional responsibilities to help cover her absence.

[307] A member of the investigations team, Ms Scott, gave evidence in support of Mrs Rayner's case. She said she had worked with her as a fellow investigator since May 2009. She had found her to be a person of high integrity and a committed member of the investigations team. She said she was well liked by members of the wider A&C team and by other members of the Christchurch-based Ministry staff.

[308] In answer to questions from the Court, she expressed her views as to the pros and cons of reinstatement. She candidly said she thought it would be difficult for Mrs Rayner to return to the investigation team, because, as she put it, there had been no change in the "chain of command" within that team. She did not think it would be

a safe environment for Mrs Rayner to return to. However, she did not see any reason why Mrs Rayner could not return as an auditor. She commented there would be no issues as to Mrs Rayner's background qualifications for the role of auditor.

Reasonableness

[309] Having considered the practicalities of the two options, I turn to a consideration of what is reasonable. That requires, as noted earlier, a broad inquiry into the equities of the parties' cases. The result of the Court's findings is that Mrs Rayner has been the victim of a significant wrong caused by numerous process failures which inevitably caused a breakdown of trust and confidence. The wrong needs to be put right by the Ministry. It would be wholly unreasonable for reinstatement to be refused on the basis of views as to trust and confidence which the Court has found were unjustified. The consideration of this factor points strongly to reinstatement.

Conclusions

[310] In summary, although it would be entirely reasonable to order reinstatement of Mrs Rayner, practicability is less straightforward.

[311] Even taking into account the different professional interactions each of the three managers has had with Mrs Rayner over the years, in the end, there would, in my view, be a significant risk of dysfunctional relationships were Mrs Rayner to be reinstated immediately as an investigator in the very team where the multiple issues arose. The causes of those issues being of some complexity, I find that, at this stage, it would not be safe, as it was put earlier, for Mrs Rayner to return to that team at the present time.

[312] In my judgement, the alternative possibility of reinstatement to the role of auditor does not carry risks to the same extent.

[313] On the evidence before the Court, there is a better prospect of a constructive employment relationship being able to be formed, albeit with appropriate support.

[314] Mrs Rayner has relevant experience, and she is willing to undertake any necessary training and mentoring which may be necessary.

[315] I note there is no evidence from the Ministry that it does not have the ability to place her in an auditor's role.

[316] I do not regard the fact that the investigation team works in the same area as the audit team as being an insurmountable problem; no doubt these are issues which the Ministry is well capable of resolving.

[317] As mentioned, Mr Burnside is currently team leader of the audit team, of which Mrs Rayner was a member before she moved to the investigations team. It is anticipated that he will remain in that role until the end of this month, although he says it may be longer under a planned review to be undertaken later in the year. There is no certainty Mr Burnside would in fact be Mrs Rayner's team leader were she to resume work as an auditor, but this is not an insurmountable factor. With a professional approach, I am satisfied Mrs Rayner and Mr Burnside could interact in a constructive and professional manner, were she to be employed as an auditor rather than an investigator.

[318] I consider that Mr Lennan's seniority is such that it is probable there would be few direct interactions with Mrs Rayner as an auditor, and that, in any event, these are capable of being appropriately managed.

[319] There are two remaining issues. The first relates to the technical point raised by Mr Traylor, to the effect that because remuneration for the role of investigator is on a different band to that of an auditor, reinstatement to the role of auditor would in fact be to a position which was "less advantageous" to Mrs Rayner, contrary to the requirements of s 123 of the Act.

[320] For her part, Mrs Rayner requests consideration of this option. Arguably, the subsection requires a subjective assessment. From her perspective, this position would not be no less favourable to her.

[321] Since the technical point has been raised, I deal with it, although I note that no Ministry witness gave any evidence with regard to the operation of the Ministry's remuneration system, or its potential application to Mrs Rayner. The Court must

therefore consider the issue on the basis of documents which the parties included in the common bundle, but did not address.

[322] The Ministry's remuneration bands are set out in a schedule to the CEA, which expires on 29 July 2019. Although it is correct that Band 16 applies to the investigators role, and Band 15 applies to the auditor's role, there is a range of potential salary payments within each band that overlap.

[323] I was provided with no direct evidence as to where Mrs Rayner's remuneration sat in Band 16, as at 15 March 2018. The most up-to-date information which the parties placed before the Court related to the outcome of Mrs Rayner's 2014 remuneration review. She was then placed on a total fixed remuneration which was approximately 110 per cent of the current Band 15.

[324] Given the overlap between Band 15 and 16, I conclude that Mrs Rayner can be reinstated as an auditor on a remuneration equivalent to that which she would have received as an investigator. She can be paid thereafter no less favourably than would have been the case if she was employed as an investigator.

[325] The final issue relates to the fact Mrs Rayner is currently in receipt of ACC. This is because, in late 2018, when working for several months in a nursery, a tree fell on her, fracturing her shoulder. I was provided with no evidence as to when ACC may conclude that she would be fit to return to work, but that is a detail capable of being established and discussed between the parties.

[326] I conclude that it is both reasonable and practicable for Mrs Rayner to be reinstated by the Ministry to the role of auditor on the same remuneration as applied at the time of her dismissal; the Ministry is to pay her on no less favourable terms thereafter. Mrs Rayner should return to work seven days after ACC or her medical practitioner certifying that she is sufficiently recovered from her shoulder injury, to do so.

[327] Detailed consideration will need to be given to the return-to-work process. There may be other practical steps which will be taken so as to ensure that both parties

can meet their respective obligations to be active and constructive in establishing and maintaining a productive employment relationship in which each are, among other things, responsive and communicative.

[328] Section 188(2)(c) of the Act provides that the Court must, in the course of hearing and determining any matter, consider from time to time as it thinks fit whether to direct the parties to mediation.

[329] It is appropriate to direct the parties to attend mediation as soon as possible so that they may have the opportunity of discussing arrangements relating to Mrs Rayner's return to work; I intend that her reinstatement to the role of auditor should occur in a carefully structured way, and, as soon as can be arranged. Mrs Rayner's remuneration will recommence on the date when she resumes her work with the Ministry.

[330] Finally, although Mrs Rayner said such a step should be an interim measure, I do not consider it appropriate for the Court to so order. What may occur in the future is a matter for the parties to discuss in good faith. If Mrs Rayner wishes these discussions to occur, they should.

Lost wages

[331] For Mrs Rayner, it is argued she should receive remuneration not only for the three months following her dismissal but also for lost earnings thereafter to the present time, allowing, I assume, for any earnings and ACC compensation received. It is also submitted she has taken reasonable steps in mitigation.

[332] Mr Traylor submitted that, given Mrs Rayner's conduct throughout the investigation process and the distrust she has in her then managers, together with factors which the Ministry submitted weigh against reinstatement, it was not reasonable to expect the employment relationship would have survived for any extended period. Then it was argued that any reimbursement should be capped at the amount of any proven loss, not exceeding three months' salary. It was also submitted that insufficient evidence of actual loss and efforts to mitigate has been provided,

reference being made to evidence that other entities in Christchurch employ investigators, several of which had vacancies in the post-dismissal period.

[333] Mrs Rayner told the Court that, soon after dismissal, she had applied for work, including as an investigator, and for what she described as manual work. She said that, at interviews, she had been asked why she had left her last job, and once the circumstances were explained, "that was really the end of the interview".

[334] Then, she applied for reinstatement, and so as to hold herself available for that possibility, sought temporary work only, which she obtained. As already indicated, she worked for a nursery for a few months until she was physically injured. She has not worked since, although she said she had applied for Christmas work at a particular outlet, but was unsuccessful.

[335] I do not accept, on an analysis of the counterfactual outlined by Mr Traylor, that the Court should conclude the employment relationship would not have survived for any extended period. The dismissal was unjustified. There were performance issues, but they were not so serious that termination of Mrs Rayner's employment would have inevitably followed. In fact, shortly before the online submission was received, Mr Merrett made inquiries of the Police College for constructive support with regard to matters of training, not only for Mrs Rayner, but also other members of the investigation team. There is no basis for concluding the performance issues were so serious that termination for poor performance was imminent. Mrs Rayner herself was nothing other than determined to retain her job and to take such steps as would be necessary to do so. She made it clear to the Court that if she was told to "pull up her socks", then that is what she would have done.

[336] I turn to mitigation. For much of the post-termination period, there has been uncertainty as to whether Mrs Rayner might be reinstated and as to the circumstances of her dismissal. The Authority resolved the liability issues but was not persuaded to make an order of reinstatement in its determination of late November 2018. Then, Mrs Rayner brought a challenge to the Court, maintaining her claim for reinstatement. In all these circumstances, she could not have been expected to apply successfully for a job elsewhere as an investigator.

[337] Having regard to the applicable principles concerning mitigation of loss, I am satisfied that the steps taken by Mrs Rayner were reasonable, judged according to the necessary standard.[20]

[338] I am also satisfied that this is a case where the discretion should be exercised under s 128(3) of the Act. Mrs Rayner has lost remuneration as a result of the personal grievance. I order the Ministry to pay her lost wages for a period of six months; that sum is to be reduced by any income she received during that period. She should also receive holiday pay and KiwiSaver entitlements under s 123(1)(c)(ii) of the Act, calculated with reference to remuneration which would have been payable during the six-month period.

Compensation for humiliation, loss of dignity and injury to feelings

[339] Ms Oberndorfer submitted that a global sum of $35,000 should be paid under s 123(1)(c)(i) of the Act. She said that Band 3, as referred to by Chief Judge Inglis in *Waikato District Health Board v Archibald*, was appropriate; that is, a claim involving a high level of loss and injury.[21] She stated the parameters of that band for present purposes, should be taken as $26,667 - $40,000.

[340] Mr Traylor submitted that it is important that compensation be awarded only in respect of hurt and humiliation that is directly attributable to unjustified acts, as found. He also made the point that the purpose of compensation is not to punish the employer. He submitted that compensation, if ordered, should fall within the lower band or the lower part of the middle band.

[341] In my assessment, there is no doubt that the dismissal impacted significantly on Mrs Rayner. Witnesses described her as having been "soul destroyed" and "heartbroken" with her confidence being significantly affected.

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20 *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016[NZEmpC 136, [2016] ERNZ 628 at [89]-[114].

21 *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62]. The three bands which were identified were: Band 1 – low level loss or injury; Band 2 – mid-range loss or injury; Band 3 – high level loss or injury.

[342] I accept Mrs Rayner's evidence that she feels humiliated by the dismissal and feels she has let her family down. She provided details of these impacts in evidence which I accept. It is obvious that her reputation has also been harmed.

[343] The circumstances of the dismissal followed an unjustified investigation, which had at its heart an allegation of dishonesty. The significant impacts which Mrs Rayner has described have to be understood in that context. But it is correct that a compensatory award is not to be made for the purposes of punishing the employer.

[344] Evidence was given that a prior diagnosis of a complex post-traumatic stress disorder, which had been maintained at a manageable level through her 12 years of employment, was triggered by the dismissal events. I do not attribute significant weight to this point since the Court was provided with no medical evidence which would have facilitated an assessment of the extent of the deterioration of that condition.

[345] Turning to the disadvantage grievance, which arises from the enforced special leave and then unjustified suspension, I accept the evidence that this also caused significant humiliation and isolation from colleagues over a period of some four months. Mrs Rayner was not at liberty to speak with them about the events which had occurred, or were occurring. It is clear Mrs Rayner values the relationships she holds with work colleagues, not only with members of the investigation team but also with others in the A&C unit. She was unable to be supported by them.

[346] Turning to the necessary assessment, Ms Oberndorfer referred to a particular range for Band 3 purposes which appear to have been taken from observations made by the Authority in *Dawber v Church Lane NZ Ltd;*[22] those comments are based on assumptions which I consider are unsound.[23]

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22 *Dawber v Church Lane NZ Ltd* [2017] NZERA Christchurch 211.

23 The Authority stated that the band ranges it identified were derived from the Court's judgment in *Waikato District Health Board v Archibald* [2017] NZEmpC 132. The Member referred to the statement in *Archibald* that $20,000 fell "around the middle of Band 2", at [63]. This led the Member to conclude there were three bands of "between $1 to $13,033 for Band 1, $13,034 to $26,666 for Band 2 and $26,667 to $40,000 for Band 3. The adoption of a ceiling led to the calculation the Member undertook. There is nothing to suggest the Court intended there to be a ceiling in respect of Band 3; it is to be noted that s 123(1)(c)(i) of the Employment Relations Act 2000 does not cap potential compensation. Nor is it clear why the Member then split the bands as he did.

[347] The fixing of a range for particular bands is likely to be a case-specific exercise, which has regard to a range of factors, as discussed by Chief Judge Inglis in *Richora Group Ltd v Cheng*.[24] These may include the type of grievance, and whether compensation is sought for one, or more than one, established grievances.

[348] The primary grievance in this case is the dismissal grievance. Chief Judge Inglis considered such a grievance in *Richora*. I respectfully adopt the reasoning and ultimate conclusion set out in that instance which was as follows:[25]

- Band 1: $0 to $10,000
- Band 2: $10,000 to $40,000
- Band 3: above $40,000

[349] However, in this case, I must also recognise that a disadvantage grievance has been established. It is, however, a secondary grievance. Its circumstances were inextricably linked to the circumstances of the primary grievance. The Court must be careful to ensure that Mrs Rayner is not compensated twice, which could occur if two separate analyses were undertaken. A global approach is therefore desirable.

[350] Assessed globally, the two grievances establish a high level of loss and injury; that is, Band 3. A fair figure for payment in all the circumstances is $42,500.

[351] This exceeds the sum referred to by Ms Oberndorfer in her closing submission. That submission appears to have been based on an error of reasoning in an Authority determination.

[352] No particular sum was specified in the statement of claim, although it was pleaded there should be an increase in the award made by the Authority at first instance. This is not a case where a pleading-limit may create a difficulty if it emerged

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24 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, (2018) 15 NZELR 996 at [41]-[68].
25 At [67].

the Court was satisfied a sum more than that pleaded could have been awarded.[26] Nor was any discernible prejudice created by the submission.

[353] Having regard to the broad and remedial objects of the Act, and the obligation of the Court to act in equity and good conscience under s 189, it is appropriate to award the sum which the Court in its independent assessment considers to be fair and reasonable.

[354] Accordingly, the Ministry's liability under s 123(1)(c)(i) of the Act is to pay Mrs Rayner $42,500.

Contribution

[355] Ms Oberndorfer submitted that, contrary to the Authority's determination, the Court should not find that Mrs Rayner's conduct contributed to either of her grievances. She analysed the findings of the Authority, suggesting that they were in error.

[356] Mr Traylor submitted that Mrs Rayner had been obstructive during the investigation and that this warranted a significant reduction in remedies.

[357] Mrs Rayner originally raised a non-de novo challenge as to remedies only, which would have required a detailed consideration of the Authority's findings. Because of the subsequent challenge instituted by the Ministry, I directed that the hearing would take place on a de novo basis, which occurred. Accordingly, the Court must reach its own conclusions on this as on all other topics. Moreover, it is apparent that the Court received evidence on a number of topics which the Authority did not.

[358] The investigation was triggered by an online submission. The Court has found that the steps taken by Mrs Rayner in the course of the investigation were, in all the circumstances, both understandable and reasonable when assessed from the perspective of a fair and reasonable employer.

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[26] As arose in *Richora Group Ltd v Cheng,* above n 24, at [71]-[76].

[359] I have found that the employer was not justified in concluding Mrs Rayner had in effect obstructed the investigation, which suffered from many defects. I have also found that the statements as to trust were either not properly understood or considered.

[360] For much of the period of the investigation, Mrs Rayner was acting under advice. Despite numerous attempts to point out the flaws in the process that was being adopted, it was progressed, becoming increasingly adversarial. Whilst it is the case that Mrs Rayner became vocal and defensive in those circumstances, that is not, in the present case, a factor justifying a finding under s 124 of the Act. It was the Ministry's responsibility to act in a fair and reasonable way, as both the Act and its policies stated. The particular circumstances required a non-adversarial approach.

[361] In all the circumstances, I find that there should be no reduction under s 124 of the Act.

Conclusions

[362] Mrs Rayner's dismissal grievance and disadvantage grievance are established.

[363] I order Mrs Rayner to be reinstated to the position of auditor on the same remuneration as applied at the time of her dismissal; thereafter she is to be paid no less favourably than would have been the case if she was employed as an investigator. She is to return to work seven days after either ACC, or her GP, certifies that she is sufficiently recovered from her shoulder injury to do so. The parties are directed to attend mediation as soon as possible to discuss return-to-work arrangements. Mrs Rayner's remuneration is to recommence on the date when she resumes work with the Ministry. I reserve leave for either party to apply for any necessary directions on seven days' notice.

[364] The Ministry is to pay Mrs Rayner the following sums:

a) six months' ordinary pay as reimbursement for lost wages;

b) contributions to KiwiSaver and payment of holiday pay for the same period;

c) compensation in respect of humiliation, loss of dignity and injury to feelings for both established grievances in the sum of $42,500.

[365] Deductions are to be made for such sums as the Ministry may have already paid so as to satisfy the determination of the Authority.

[366] This judgment replaces the Authority's determination.

Costs

[367] I reserve costs. The parties are encouraged to agree costs, but if that does not prove possible, Mrs Rayner may file and serve a memorandum seeking costs within 20 working days of the date of this judgment; the Ministry may respond within a further 10 working days; and any submissions strictly in reply may be made five working days thereafter.

B A Corkill
Judge

Judgment signed 12.00 pm on 27 May 2019