ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES, WITNESSES, AND PERSONS IDENTIFIED IN THE EVIDENCE

IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

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

[2022] NZEmpC 223
EMPC 298/2021

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	FGH Plaintiff
AND	RST Defendant

Hearing:	25 – 29 July and 24 August 2022 (heard at Wellington)
Appearances:	S Henderson and D O'Leary, counsel for plaintiff M Richards and K Allan, counsel for defendant
Judgment:	6 December 2022

JUDGMENT OF JUDGE B A CORKILL

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Introduction

[1] FGH (Ms H), a current employee of RST, has raised three disadvantage grievances which flow from a series of events that concern disciplinary concerns RST wishes to investigate.

[2] A formal investigation has yet to take place. The role of the Court is to determine whether the preliminary steps which have been taken thus far are justified. I am not required to make any assessment of the merits of the issues the employer proposes to investigate. If the investigation proceeds, that is for the parties to engage in, in due course.

[3] The present proceeding is not the first involving Ms H and RST. The complex background has been considered in a previous proceeding in this Court. A central issue has concerned Ms H's medical circumstances since she suffers from Attention Deficit Hyperactivity Disorder (ADHD) and fluctuating problems with anxiety and depressed mood. That had given rise to challenges for her in the workplace and has raised questions as to how RST, as a government department required to be a good employer, should accommodate her illness. It is unnecessary to describe the

background in any further detail for present purposes, although it will be necessary to refer to a particular finding that was made in my earlier judgment of *FGH v RST*.[1]

[4] The present claims were brought initially in the Employment Relations Authority. The Authority removed the relationship problem to this Court in light of its previous involvement.

Core facts

[5] Three causes of action have been brought. Each raises a disadvantage grievance concerning a particular period of time. Each gives rise to different issues. The causes of action span a period amounting to well over two years.

[6] I will need to analyse each phase in depth when dealing with the discrete causes of action which have been pleaded. At this stage, I provide an overview.

[7] The background commences with the setting up of a return-to-work plan (RTW plan), which was agreed shortly before Ms H resumed work on 4 November 2019. She had been away from the workplace for a considerable period. Ms C was a senior manager who oversaw the return-to-work arrangements.

[8] Briefly, there were meetings before and after that date, which were followed by training for a role Ms H was about to assume in January 2020. The role began in early February 2020. At that time, Ms D became her team leader.

[9] Ms H's circumstances became complex in March 2020. These were compounded by the commencement of the first COVID-19 lockdown which commenced late on 25 March 2020. Since Ms H's work was an essential service, she was thus able to, and did, attend work from time to time.

[10] In April and May 2020, Ms H and Ms D exchanged a number of communications by text which suggested that, when not working and isolating, she was facing a number of significant personal challenges that distressed her.

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1 *FGH v RST* [2018] NZEmpC 60, (2018) 15 NZELR 944.

[11] Ms D then had some text exchanges with Ms H's father, who in one communication said Ms H had been unwell. She had become unfit to work. He eventually met with Ms D and Mr E, Ms D's manager, when he told them Ms H had been in care. There is a dispute as to whether Ms H's father also said this information was not to be passed on, in particular to Ms C, who had been ultimately responsible for managing Ms H's return-to-work in late 2019/early 2020.

[12] Ms H continued to be unfit to attend work. Three medical certificates were provided to Ms D during July 2020, signed by a psychiatric registrar from a local district health board (DHB). These certificates confirmed Ms H had a medical condition which required treatment. Ms H returned to full-time work in August 2020.

[13] In July 2020, RST commenced a restructuring process to implement what was described as a "transformation programme". Ms H applied for reassignment and was advised in December 2020 she had been successful in being selected for one of the new positions which she assumed as from 1 March 2021.

[14] On 22 March 2021, Ms C received an email from a lawyer, Ms Dyhrberg, who had represented RST in previous litigation involving Ms H. She raised concerns about posts Ms H had placed on a social media page. Ms C considered that these maligned Ms Dyhrberg and Ms H's work colleagues.

[15] Ms C was concerned about the work-related implications of the posts. She said she was unaware of any material changes in Ms H's wellbeing that would explain why she may have instigated these.

[16] After consulting with colleagues, including members of RST's Human Resources (HR) team, she appointed Ms F, a senior manager who reported to her, to act as a decision-maker with regard to an employment investigation about the posts.

[17] On 8 April 2021, Ms F sent Ms H an email inviting her, and a support person or representative, to meet with her the next day, so she could provide a copy of the letter. The purpose of the meeting was to present information. RST had received

copies of inappropriate social media posts, the sending of which could amount to serious misconduct.

[18] These developments resulted in Ms H's father becoming involved immediately, and soon after her lawyer, Mr Henderson. He took strong objection to the possibility of disciplinary action. He said there had been a fundamental failure of natural justice because Ms H had not been consulted prior to any disciplinary action being instituted.

[19] An allegations letter from Ms F, dated 15 April 2021, was forwarded to Mr Henderson. It explained that RST had received photo shots of social media messages allegedly posted by Ms H. If it was established that Ms H was responsible for the posts, this behaviour could amount to serious misconduct and/or a conclusion that the relationship of trust and confidence was seriously damaged or destroyed. Consequently, a disciplinary process would be undertaken, the details of which were outlined. In the meantime, it was proposed that Ms H be suspended.

[20] In the first instance, Ms F wished to meet with Ms H, so that she would have an opportunity of responding.

[21] After various exchanges between lawyers for each party, Ms C contacted Ms H's father to suggest that informal dialogue take place.

[22] This led to Mr H providing a detailed account of Ms H's medical circumstances, particularly during 2020 when she had suffered what he described as a "serious relapse". Then there had been a period of residential care, when it was confirmed she had been suffering from deep depression. The restructuring process had also caused uncertainty. Intensive medical supervision had been instituted, involving a fortnightly meeting with relevant health practitioners under the supervision of a psychiatrist. To advance a disciplinary process would have a serious effect on his daughter.

[23] A without prejudice meeting then took place. It resulted in a proposal being sent by Ms C a few days later, proposing a way forward. She said RST would withdraw the current proposal to suspend Ms H and would pause the disciplinary

investigation whilst medical information was obtained by Ms H and provided to RST. Ms H would work restricted hours on a temporary basis and would take paid special leave for the balance of each working day. She was asked to accept certain requirements as to conduct in the workplace.

[24] Ms H returned to work under the agreed regime, but difficulties arose. On 14 and 15 June 2021, a physical incident occurred with a member of Ms H's team. After an incident report was provided to Ms F, both Ms H and the work colleague completed email summaries as to what had occurred.

[25] The matter was escalated to Ms C, who telephoned Ms H's parents for a discussion as to what had occurred, on 17 June 2021. There is a debate between the parties as to whether Ms C stated that given the medical context, RST would not investigate the incident at all, or whether any investigation would be deferred pending the receipt of the medical information which had been requested.

[26] In summary to this point, Ms C had left open the possibility of treating the circumstances which had arisen as a "medical management" issue. This was, however, contingent on the provision of medical information, as requested in mid-May 2021. A problem arose in this material being provided; this resulted in Ms C requesting RST's lawyers to advise that an independent medical assessment would need to be obtained.

[27] In late June and early July 2021, breaches of good faith were alleged by each party against the other, via their lawyers. They were unable to agree an ADR process for resolving the significant issues which had arisen. Accordingly, Ms H initiated proceedings in the Authority, asserting that the instituting of formal disciplinary proceedings against her was unjustified.

[28] Eventually, those proceedings were removed by the Authority to the Court.[2] As soon as a statement of claim and a statement of defence were filed, a telephone directions conference was held with counsel. It was agreed that a Judicial Settlement Conference (JSC) should be convened.

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2 *FGH v RST* [2021] NZERA 377.

[29] Then, in mid-August 2021, Ms C wrote to Ms H regarding further concerns which she said had arisen. She said she understood Ms H had engaged in a conversation with a colleague where she had shared some of her concerns about her role at work and indicated that this was a "13 Reasons Why" scenario, and that she had been self-harming. This was understood as being a reference to an American television series that centres on issues of suicide.

[30] Consequently, Ms H was required to commence a period of paid sick leave with immediate effect. This would be a discretionary payment, which would not result in any deduction from her sick leave balance. Despite objections being raised by Mr Henderson, these arrangements proceeded.

[31] By 20 August 2021, the medical information sought from Ms H had still not been provided. Accordingly, Ms C instructed RST's lawyers to write to Mr Henderson confirming that an appointment had now been made with a psychiatrist, Dr Brown, to undertake an independent medical assessment of Ms H; this was scheduled for 25 September 2021.

[32] In the lead up to this appointment, the previously requested medical records were obtained. Reports relating to the period 2018 to 2019 were provided to RST's lawyers on 16 September 2021; a further tranche of more recent medical records were provided on 19 October 2021.

[33] Debate then arose between the legal representatives, as to what other information concerning Ms H's work history should be provided to Dr Brown.

[34] Ultimately, the assessment with Dr Brown proceeded on 4 December 2021, with his report being finalised on 15 December 2021. A JSC took place the next day.

[35] Matters were not able to be resolved at that event, but there was a proposal that the parties participate in a second JSC in early 2022. Although dates for such an event were offered, there was no consensus as to when this might occur.

[36] Then, on 4 March 2022, Mr Henderson advised that Ms H would not attend a second JSC. He sought dates for a substantive fixture.

[37] Since the JSC process had ended, and in light of Dr Brown's advice that Ms H was fit to work and participate in a disciplinary process, an allegations letter was sent to Ms H, care of Mr Henderson, on 22 April 2022. It was signed by Ms L, a senior manager who had now been appointed as the relevant decision-maker for the purpose of the disciplinary process.

[38] The allegations to be investigated concerned the social media postings which had been referred to in the earlier allegations letter of 15 April 2021; an alleged barging incident which had occurred on 14/15 June 2021; and alleged inappropriate communications with other staff about suicide and self-harm which had given rise to concerns for Ms H's wellbeing and safety, as well as that of others.

[39] These issues would be investigated by an independent lawyer. In the interim, Ms H could opt to remain on discretionary paid special leave for the duration of the investigation or return to work with conduct and behavioural conditions. To return to work she would need to contact Ms C so the practical implications could be discussed. As this step was not taken, she has remained on paid special leave.

[40] Soon after, I approved a timetable for the substantive hearing of Ms H's grievances which would commence on 25 July 2022.

[41] By the time of the hearing, three causes of action had been raised for Ms H. The first relates to RST's decision to commence a disciplinary process about the social media posts in April 2021. The second relates to RST's decision that Ms H take sick leave in light of communications about suicide and self-harm in August 2021. The third relates to RST's decision to proceed with a renewed disciplinary process, as notified in its letter of 22 April 2022.

[42] RST strongly contests each of these claims, pleading that all the steps it took were those a fair and reasonable employer could take.

Relevant principles

[43] I begin by discussing the legal principles which relate to each of the three disadvantage grievances. Such a grievance is one where an employee's conditions of employment are affected to their disadvantage by unjustifiable action by the employer.

[44] Section 103A of the Employment Relations Act 2000 (the Act) provides that the question of whether 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.
>
> …

[45] The section goes on to stipulate four factors which the Authority or Court must consider namely:[3]

> …
>
> (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.

[46] The Court may consider any other factors it thinks relevant.[4] 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.[5]

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3 Employment Relations Act 2000, s 103A(3).
4 Section 103A(4).
5 Section 103A(5).

[47] 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 (No 2),* 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.[6] Subsequently, the Court of Appeal in *A Ltd v H* discussed s 103A and observed:[7]

> [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.

[48] Next, I turn to a submission developed by Mr Henderson in reliance of extrajudicial statements of the Chief Justice of the Australian Federal Court of Appeal, Chief Justice Allsop, in a paper entitled "Statutes and Equity".[8] Mr Henderson submitted on the basis of this article that a given statute has a particular function which may influence the manner in which a court should investigate a particular issue. Here, the Act has the function of recognising the imbalance of power between the employer and employee; it is in that context an employee can seek remedies to ensure their workplace is safe. Equity requires a complete and thorough analysis of all the facts to supplement this purpose.

[49] Mr Henderson emphasised the following passage where Chief Justice Allsop stated that a relevant question must always be addressed in context. He stated that equity:

> ... recognises moral values... born of the context and the particular relationship. The extent of such concepts and what is required depends always on the circumstances and context.

[50] The Chief Justice also referred to a generalisation contained in the speech of Lord Stowell in the *The Juliana*, concerning the administration of equity:[9]

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6 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [36] – [44].
7 *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295, [2016] ERNZ 501 (footnotes omitted).
8 James Allsop 'Statutes and Equity" [2019] FedJSchol 16.
9 *The Juliana* 2 Dods 501 at 521.

> A Court of Law works its way to short issues, and confines its views to them. A Court of Equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case.

[51] Mr Henderson submitted that these observations were apt with regard to issues arising under the Act, given the moral values it reflects, such as good faith and fairness.

[52] At the heart of the disadvantage grievances raised for Ms H lie the requirements of s 103A of the Act. The section clearly describes the task which the Authority and Court must undertake when considering a disadvantage grievance.

[53] It stipulates particular considerations for determining whether there has been substantive and/or procedural fairness. There are certain factors which must be considered, as outlined in s 103A(3).

[54] But the section does not limit the factors that may be assessed. Section 103A(2) makes it clear that the context of the test of justification is all the circumstances which existed at the time the dismissal or action occurred. Section 103A(4) states that, in addition to the mandatory considerations of s 103A(3), the Authority or Court may consider any other factors it thinks appropriate.

[55] These provisions allow for a thorough and careful analysis of the test of fairness, in light of the objects of the Act and any other relevant provisions which may fall for consideration in the particular case, such as the important obligations of good faith which the parties owe to each other.

[56] In addition, a contextual analysis may require consideration of the provisions of other applicable statutes such as, in this case, the Health and Safety at Work Act 2015 (HSW Act).

[57] All of this is, in many respects, consistent with the comprehensive and equitable approach recommended by Chief Justice Allsop for recognising the values which are underpinned by the statute, such as what is “reasonable” and what is “fair”.

[58] But s 103A also provides checks and balances. A particular focus is to be adopted. Implicit in that analysis in a case such as the present is what a fair and reasonable employer knew or, with reasonable inquiry into the circumstances, could have known, and whether that information could have impacted on what occurred.

[59] The statutory test does not mandate a standard of perfection but what is reasonable given the mutual obligations of good faith. A balance must be struck.

[60] Next, I turn to the particular set of obligations that are relied on here concerning health and safety issues.

[61] RST is a Person Conducting a Business or Undertaking (PCBU) holding comprehensive obligations under the HSW Act. PCBUs are principal duty holders under that Act and are primarily responsible for ensuring the health and safety of workers at work. Their paramount duty of care requires them to ensure, as far as reasonably practicable, the health and safety of workers that work for the PCBU, and workers whose activities are influenced or directed by the PCBU.[10]

[62] "Reasonably practicable" means that which is, or was at a particular time, reasonably able to be done in relation to ensuring workplace health and safety, taking into account all relevant matters including these five listed considerations:[11]

i. the likelihood of the hazard or the risk concerned occurring;

ii. the degree of harm that might result from the hazard or risk;

iii. what the person knows or would reasonably know about the hazard or risk and ways of eliminating it; and

iv. the availability and suitability of ways to eliminate or minimise the risk; and

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10 Health and Safety at Work Act 2015, s 36.
11 Health and Safety at Work Act 2015, s 22.

v. after assessing the extent of the risk and available ways for eliminating or minimising the risk, the cost associated with available ways of doing so, including whether the cost is grossly disproportionate.

[63] The term "hazard" includes a person's behaviour in certain circumstances.[12] The term "health" includes mental health.[13]

[64] The judgment of *WorkSafe New Zealand v Athenberry Holdings Ltd* provides useful commentary on the meaning of "reasonably practicable".[14] The Court affirmed that it clearly excludes a counsel of perfection, and will not cover every possibility, regardless of remoteness of risk.[15] The perfection of hindsight should not be substituted for what was known, or should reasonably have been known at the time. The Court also noted:

> [25] The complexity of this legislation is obvious. The room for differing interpretations of what is "reasonably practicable" and "reasonably foreseeable" is considerable. Both involve an assessment of proportionality and rationality. Whether or not significant definitions apply to any factual matrix will depend on the context. The designed flexibility of the legislation carries with it the inevitable consequence that the legislation may well appear imprecise to those required to comply daily with its provisions, with little clarity, except perhaps the clarity of hindsight, and no certainties ...

[65] This dicta reflects several of the themes referred to by the Court of Appeal in the earlier judgment of *Attorney-General v Gilbert*,[16] to which I referred in *FGH v RST*.[17]

[66] In summary, liability is unlikely to arise if the risk of harm is not foreseeable. As the Court of Appeal put it in that judgment, an employer is not obliged to cocoon an employee from stress or harm, nor is it the guarantor of the employee's health and safety.

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12 Health and Safety Act 2015, s 16. See also Rebecca Atkins *Employment Law* (online looseleaf ed, Thomson Reuters) at [HSW16.27.01].
13 Health and Safety Act 2015, s 16.
14 *WorkSafe New Zealand v Athenberry Holdings Ltd* [2018] NZDC 9987, (2018) 16 NZELR 267.
15 At [151].
16 *Attorney-General v Gilbert* [2002] 2 NZLR 342, [2002] 1 ERNZ 31 (CA).
17 *FGH v RST*, above n 1, at [195]–[196].

[67] It is also the case that an assessment must take account of the current state of knowledge, and not be made with the benefit of hindsight. Hindsight analysis must therefore be avoided when analysing a health and safety issue.

[68] Finally, whilst the primary obligation for eliminating hazards falls on the employer, a worker is nonetheless required to take reasonable care for their own health and safety, and that their acts and omissions do not adversely affect the health and safety of other persons.[18]

[69] Although "reasonable care" is not separately defined, by virtue of the word "reasonable", the section clearly requires an objective assessment.[19]

First cause of action: initiation of an employment investigation on 8 April 2021

The parties' positions

[70] In Ms H's statement of claim, it is pleaded that RST unjustifiably commenced, and maintained, disciplinary proceedings against her from 8 April 2021, and thereby:

> [A]ltered to the disadvantage of the plaintiff the foundational condition of the employment relationship that the defendant provide her with 'a work environment that is without risk to [her] health and safety' in accordance with the Health and Safety at Work Act 2015 and without regard to the mandatory obligation in that Act that 'workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work' ... as is reasonably practicable.

[71] In subsequent memoranda and submissions, Mr Henderson submitted in summary:

(a) RST's implementation of Ms H's return-to-work arrangements in 2019 was mismanaged, so that it failed in its objective of supporting her as she returned to work. The obligation to implement a return-to-work programme was not a finite one; there were enduring obligations on the part of RST.

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18 Health and Safety at Work Act 2015, s 45.

19 *Mazengarb's Employment Law* (online ed, LexisNexis) at [HSWA 45.6].

(b) The conduct of Ms H participating during her own time with exchanges in a private chatroom on a Facebook Group was not serious misconduct; it did not cause any harm to the RST or any of its employees.

(c) RST was under a duty to check on Ms H's health before commencing the most serious of formal disciplinary proceedings, which carried an inevitable risk of damage to her health.

(d) RST had an obligation of natural justice which was not fulfilled. Ms F signed the letter of allegations of 15 April 2021, effectively as a complainant; then she wished to perform the function of fact-finder; and then become the decision-maker.

(e) The most punitive option was taken, because if serious misconduct were to be established, there would be a three-year ban from work in the public sector which would adversely affect Ms H's health.

(f) The process proposed by Ms F did not provide a proper opportunity to be heard. Nor was the step taken by Ms F impartial, given her working relationship with Ms C. It would have been appropriate to appoint an independent barrister to assess what had occurred and determine the level of seriousness of the matters raised, and then conduct a hearing with RST's witnesses carrying a burden of proof.

(g) There was an issue as to whether RST was justified to pause, but not withdraw, the disciplinary proceedings brought against Ms H, in light of the legal submissions which were advanced on her behalf.

(h) RST did not meet the contractual and statutory duties under s 73 of the Public Services Act 2020 in respect of a disabled employee; it continued to maintain the threat of disciplinary proceedings after being informed that natural justice obligations had not been met.

(i) There was a further issue as to whether RST met its contractual and statutory duties to maintain a health and safety workplace under the HSW Act.

(j) The foregoing caused Ms H to suffer harm by reason of her health status.

(k) The foregoing points establish a disadvantage grievance.

[72] The case for the defendant on the first cause of action, as distilled from its statement of defence and in submissions presented by Ms Richards, counsel for RST, is as follows:

(a) The circumstances of Ms H's return-to-work in 2019 are not the subject of a separate personal grievance/cause of action for unjustified disadvantage. The evidence about it is only relevant to establish the circumstances in which the Court must assess RST's actions from April 2021 onwards. The issues raised in relation to this aspect of the matter are a distraction from the key issues to be determined by the Court. In any event, RST acted appropriately.

(b) RST had reasonable grounds to commence the 2021 employment investigation.

(c) On the medical information RST held about Ms H's circumstances, it acted fairly and reasonably when it commenced the investigation without first obtaining further additional medical information.

(d) It was fair and reasonable for Ms F to act as investigator and decision-maker.

(e) It was open to RST to treat the allegations as potential serious misconduct, and to inform Ms H of that.

(f) RST proposed a procedurally fair process in commencing the 2021 employment investigation.

(g) RST's initial consideration of a proposal to suspend was fair and reasonable.

(h) RST's decision to withdraw the 2021 employment investigation, pending receipt of medical information, and without prejudice to the right to recommence, was fair and reasonable.

My approach

[73] For the purposes of the first cause of action, it is necessary to analyse in some detail the chain of events that ran from late 2019 when the terms of the RTW plan were agreed and implemented, down to the commencement of disciplinary action in April 2021.

Return-to-work

[74] I begin with the implementing of the RTW plan. Ms Richards submitted that RST's actions in doing so was not the subject of a separate personal grievance/cause of action for unjustified disadvantage. She argued that the evidence about the plan is only relevant to establish the circumstances as at April 2021. I agree. Those events are part of the factual matrix which it is appropriate to record. But that does not mean they are a "distraction" from the core issues which the Court must consider.

[75] Dr Ryder-Lewis, an occupational physician, made some important recommendations when he undertook a medical assessment of Ms H for the purposes of her return-to-work in early 2019. The parties endeavoured to incorporate these recommendations in the RTW plan.

[76] Dr Ryder-Lewis noted that Ms H had been ill in the past, so that there was always a risk she could become unwell again in the future. He thought the risk was not precisely quantifiable, but in his opinion, was likely to be "moderate". The steps he recommended, however, were designed to help achieve a successful long-term return-to-work.

[77] He then made a number of suggestions which included that Ms H should not return to the same team or work environment where she was originally employed. She

should see a psychologist as had been previously recommended. She would benefit from the opportunity to attend the gym during the working day if this could be accommodated.

[78] Then he outlined a graduated return-to-work, with increasing responsibilities and medical reviews from time to time, indicating she should continue to see her general practitioner (GP)/specialist and take medical advice as offered.

[79] After commenting on medication issues, Dr Ryder-Lewis noted that Ms H's condition made her more sensitive to criticism and stress, which could also affect her ability to work in the short and long-term and could affect her health.

[80] Dr Ryder-Lewis said that if at any time Ms H became unwell she should immediately bring this to the attention of her employer and see her GP.

[81] Feedback and critiquing should be given in a sensitive and gentle way. He thought it may be advisable to have managers who would be involved with Ms H being briefed by a clinical psychologist as to the best way to work with her. It would also be helpful for her to meet with a trusted colleague on a regular basis to discuss issues relating to her work.

[82] The recommendations were not expressed in a dogmatic way; Dr Ryder-Lewis suggested that in effect there should be a degree of flexibility. He said it was difficult to be precise with regard to the RTW details.

[83] Mr Henderson submitted that Dr Ryder-Lewis' report was overtaken by an email sent by Ms Jane Dyne, a psychologist who saw Ms H from time to time, to her regular GP several months later on 28 May 2019. The letter had been made available to RST.

[84] The letter referred to what Mr Henderson described as a "deep decline" in Ms H's health because of issues involved in arranging her return to work. This was a reference to the difficulties Ms H experienced while return-to-work details were being discussed. Ms Dyne said she had observed a decline in Ms H's mood in March and

April 2019, when she became lethargic and emotionally flat, indicating symptoms that were typical of depression. However, Ms Dyne remained of the opinion that a graduated return-to-work would proceed.

[85] The evidence does not detail the health-related steps which were then taken. What can be noted, however, is that Ms Dyne continued to meet with Ms H in counselling. She also met with Ms C after a return-to-work framework had been agreed in mediation in August 2019.

[86] This was to provide an opportunity for Ms Dyne to provide an assurance that Ms H had sufficient self-management skills to support a successful resumption of her work activities, it being important that she draw a line under the past and start afresh, and as to appropriate logistics for her return. Ms C said she was given that assurance by Ms Dyne.

[87] At that point, it was agreed there would be five sessions of counselling; later a further three sessions were approved.

[88] Lastly, Ms Dyne provided two helpful articles regarding ADHD to RST for use by its staff in understanding Ms H's circumstances.

[89] What is evident from these events is that, although Ms H suffered a deterioration in her health in March and April 2019, this was followed by several constructive steps. These included the successful mediation and then the further engagement between Ms C and Ms Dyne, who gave her the necessary assurance that Ms H was ready to take the next step of reinstatement. It was reasonable for Ms C, and others involved, to accept the advice provided by Ms Dyne.

[90] Mr H told the Court he was most impressed by the developed plan. He highlighted the positive exchanges which occurred in the final stages of the planning process held in late November 2019 which involved Ms H, Ms C and Ms Dyne.

[91] It is plain that by then there was a degree of optimism that the carefully developed plan would allow Ms H to move forward in a positive way.

[92] Mr G was Ms H's team leader for a relatively short period. He said some care was taken by HR personnel to prepare for Ms H's return to work. Mr G noted that although this was not supposed to occur, from the outset Ms H referred to negative events that had occurred in the workplace in the past. He felt that she was distracted by these events and had not focused on a fresh start. He felt she was not in the right mindset to be returning to work.

[93] On 16 December 2019, there was an important review meeting between Ms H and her parents, together with Ms C and Mr G, as well as Ms Dyne.

[94] At the meeting, Ms H was reminded of her prior agreement not to interact or discuss with persons with whom she had previously had adverse involvement. Ms H "spoke back" angrily about this. She was told by her father to calm down, and to stop discussing these people.

[95] A related issue concerned the number of counselling sessions RST was prepared to pay for between Ms H and Ms Dyne. As noted, it had originally been agreed there would be five. By 16 December 2019, this had been increased to eight. Ms H and her parents say she attended four sessions. It may be inferred from Ms C's evidence that RST had by this time paid for eight sessions, whether or not they were all attended. It is likely some were not.

[96] When the topic was raised as to whether further sessions would be underwritten, Ms C said RST had reached its limit, because the additional sessions were beyond what had already been agreed to as part of the RTW plan. She did not think it was fair or equitable to other employees to continue to pay for such counselling when there was in any event an employee assistance programme. Later, Ms H was told she could also access another specialist support organisation known as Umbrella Wellbeing.

[97] As mentioned, Ms Dyne was an attendee at the meeting. There is no evidence that she indicated to the parties that further counselling would be critical to the success of the return-to-work arrangements. That being so, I do not regard this issue as being significant in the overall assessment of events.

Other aspects of the RTW plan

[98] It was submitted that Mr G, who had been on the frontline of the implementation of the RTW plan, essentially adopted a defeatist attitude. Mr Henderson said this was evident from an email Mr G wrote on 4 December 2019 raising concerns about Ms H's distress after she had attended work late over several days and was then requested to attend work on time. She was making reference to staff who had been involved in her previous difficulties, which was not supposed to occur. All of this, it was submitted, showed that Mr G as a frontline member of the team had failed to come to grips with his role.

[99] I do not accept this submission. The email indicates a wish to support Ms H, and that there were difficulties in her becoming used to work routines again. Mr G was also adamant in his evidence that he did not consider Ms H to be a "lost cause". He said that he wished to continue learning how he could work with her. I am satisfied he attended the review meeting on that basis.

[100] Also at the review meeting, Ms H's father raised a question as to who would be one of Ms H's trainers at the training phase of the RTW plan which was to take place in January 2020. He explained that Ms I was thought to be a possible trainer, and that this would contravene a previous recommendation that Ms H was to have no contact with her. At the meeting, Ms C had agreed that such a contact would not be suitable.

[101] Mr G, who had attended the review meeting and was presumably aware of what Ms C had said on this topic, then spoke to Mr E, a senior manager who had not attended the meeting. It appears Mr G may not have referred to Ms C's views, because, on the morning of 19 December 2019, he told Ms H that his manager, Mr E, had said Ms I would be one of the two trainers.

[102] Mr H then became involved, sending an email to Mr G pointing out the relevant history about Ms I and referring to Ms C's recommendation.

[103] Ms H also raised the issue with Mr J, an HR adviser who was about to undertake a support role for her. At the time he was contacted, he had not been

properly briefed by Ms K, the HR adviser who had been involved in preparing the RTW plan for some months. Nevertheless, he agreed to meet Ms H and Mr H immediately to discuss relevant issues, one of which related to Ms I. The meeting was constructive. Early the next morning Mr G confirmed Ms I would not now be Ms H's trainer.

[104] Although it was unfortunate that there was delay in acting on Ms C's recommendation, and it was not optimal that Mr J was not fully briefed before the meeting to discuss it, he and Mr G acted reasonably promptly to sort out the issue.

[105] Ms H did not initially find the training programme in January 2020 easy. She felt, for example, that she received an unsympathetic reaction from the main trainer who "growled" at her for being a little late on occasions. Eventually this issue was addressed. Another trainer became involved, who Ms H found was calm and patient, and who assisted her in completing the course.

[106] Towards the end of the training, Ms H told Mr J on 22 January 2020 that she and her father wanted to meet him. He did not respond, substantively, until 3 February 2020, apologising for delay. He said he was happy to support her with any HR-related queries but would encourage her to raise these with her team leader in the first instance if possible. Ms H replied the next day by saying she would always try to resolve a problem with her team leader first and that, although he had been recommended for her to talk to in substitution for Ms K, she would now find another HR person.

[107] Mr Henderson submitted that Mr J was supposed to be the "chief support person" under the RTW plan but he adopted a "rejectionist approach", which created a risk for her welfare. Ms Richards submitted that Mr J had not withdrawn the HR support element of the RTW plan; he had merely encouraged Ms H to adopt a standard process within the organisation, which was to raise any concerns with the team leader first.

[108] Mr J said he remained happy and prepared to provide Ms H with the support she needed, but he was not contacted again by her after this particular exchange.

However, he did provide support to her team leader, Ms D, answering questions about her concerns, and providing coaching as to how to handle particular conversations with Ms H in an appropriate way; this included conversations about those who had been involved with her previously.

[109] It is apparent that Mr J was not proactive in interacting with Ms H, but that must be balanced against the fact that her team leader, Ms D, gave her considerable support, as will emerge shortly.

Ms H's initial interactions with Ms D

[110] At about the time that Ms H wished to meet with Mr J in late January 2020, she also contacted Ms D, who would from then on be her team leader. Ms H requested that they meet for an informal discussion about her health circumstances; the meeting would also be attended by her father. This occurred.

[111] There was a discussion as to relevant resources for assisting with ADHD issues. Mr H said in his evidence that he spoke frankly about Ms H's underlying health condition and was impressed by Ms D who listened with sympathy.

[112] For her part, Ms D said she understood the purpose of the meeting was to ensure she was aware of Ms H's health challenges. She tried to assure Ms H and her father that she had some knowledge about mental health and empathised with Ms H. She assured Mr H she would do her best as team leader.

[113] Ms D said she felt uncomfortable about this meeting, and felt she had been put on the spot, because Mr H was sharing private information with her about Ms H's health and wellbeing. She said she did not know if this was appropriate

[114] The next relevant event was the provision of a medical certificate Ms H had obtained from her GP, Dr Hurst, dated 26 February 2020. Dr Hurst advised that Ms H had made significant progress in the context of the RTW plan from November 2019. Ms H had acknowledged the burden of some of the challenges she had faced in the workplace since 2016. However, Dr Hurst anticipated that Ms H would continue to make further progress over the next six months, although she said that during that

period she may experience relapses related to these challenges. She would, however, expect the frequency and duration of these to reduce significantly over that time.

[115] Dr Ryder-Lewis had originally recommended that regular medical reviews should be undertaken in the early return-to-work phase, as hours of work per week were stepped up. There is no evidence to confirm whether or not these occurred. However, the position outlined by Dr Hurst was positive. It was reasonable for those involved to consider that despite difficulties, significant progress had been made, and that they were justified in proceeding with the agreed plan.

Submission as to implementing the RTW plan

[116] In his review of the circumstances to this point, Mr Henderson was critical of the steps taken by RST, from which I understand he meant the support given was lukewarm and inadequate. I have referred to some of his criticisms as to the way some personnel carried out their functions already. Mr Henderson also suggested the "withdrawal of psychological support" was significant. He said that there was a causal relationship with Ms H's later lapse in health, although had acknowledged that it is impossible to assign causation with precision.

[117] This submission has two problems. The first is that it does not, as I have indicated, square with the evidence. I have already noted that Ms Dyne is not recorded as having raised any concerns as to ongoing psychological support. Nor did Ms H's father, who held a good understanding of his daughter's circumstances. Nor did Dr Hurst express any reservations as to such support in her letter of 22 February 2020.

[118] Second, Mr Henderson's submission as to causation does not focus sufficiently on the circumstances as they were to unfold. It ignores the effect on Ms H of a number of significant events that occurred from the inception of the first COVID-19 lockdown.

[119] I will return to the question of whether the implementing of the RTW plan was ultimately significant, after reviewing the events which occurred from March 2020 to March 2021.

Issues arising in March/April 2020

[120] Ms H was back at work on full hours by the start of March 2020. Over the course of that month her health unfortunately deteriorated. Although she continued to be well supported by Ms D, it is possible that she found full-time work challenging. That said, in light of the events I am about to describe, it appears there were also medication issues.

[121] By mid-March 2020, Ms H was showing distress to her parents and her siblings. At the same time, she was conscious of concerns which were developing about COVID-19 in the community. Also she had a new flatmate, which became challenging.

Medical consultations from late March 2020

[122] Just prior to the commencement of Alert Level 4 late on 25 March 2020, Dr Hurst recommended Ms H see a psychiatrist, Dr Roy. Over several sessions during Alert Level 4, Dr Roy recognised a deteriorating depressive situation, and highly irregular sleep patterns. He therefore proscribed alterations to Ms H's medication regime.

[123] It appears the changed medication did not work well for Ms H. She says this was because she was not being managed by her GP given the lockdown circumstances which required her to isolate. She felt she should, during this time, have been under close medical supervision.

[124] Mr H felt his daughter was not coping well. He said she was "responding badly to other members of her family". This was compounded by the fact that she was unable to see her family in this period, and her relationship with her flatmate was deteriorating.

[125] As noted earlier, Ms H was categorised as an "essential worker", which meant she could attend her workplace occasionally, but by and large she was later described by her father as having been in "enforced isolation in her flat with a stranger for six weeks, all of which took a toll".

[126] From late March and into April 2020, Ms H was away from work on four occasions for varying periods up to six days. Most of this was taken as paid special leave.

The first tranche of social media posts

[127] Ms D was supporting Ms H by text messaging. In exchanges that occurred between 20 and 30 April 2020, Ms H referred to the fact that she had been troubled by family issues; and that her flatmate, who had been on the phone all night until 4.00 am, would possibly move out. Ms D was empathetic, recommending assistance from Umbrella Wellbeing.

[128] Ms H told the Court that from March 2020 she was spending time in the middle of the night on social media. She said she was unwell, lonely and isolated due to the lockdown.

[129] She also felt resentment against RST's former lawyer, Ms Dyhrberg. She said that it was in this context that she placed postings about her on a social media platform. She thought the posts were private and that she had not identified her employer or colleagues.

[130] On 18 April 2020, Ms Dyhrberg informed Ms C that she had been informed about posts that had been put up by Ms H. Ms C sought HR advice. Because the comments were not about RST's employees, the view was taken that this was not an employment-related matter.

[131] Accordingly, the issue was not raised with Ms H. At the time, Mr and Mrs H became aware of the posts; they told Ms H to desist.

Issues arising in late April/May 2020

[132] As soon as Ms H was no longer constrained by the restrictions of Alert Level 4, she left her flat and resided with her parents so she could be supported.

[133] However, her condition continued to deteriorate, as a result of which the Emergency Mental Health Call Centre was contacted by Mr H. A crisis team under

Dr Barron attended on 6 May 2020. Ms H was expressing suicidal ideation; it was recorded that this followed the breakup of a brief relationship as well as the recent conclusion of protracted legal proceedings against her current employer. It was arranged that Ms H would be admitted to a respite home for 24-hour care. After 10 days, Ms H returned to her family home on 22 May 2020.

Meeting of 20 May 2020

[134] This was the context of an exchange of texts between Mr H and Ms D. On 15 May 2020, Mr H raised the possibility of a discussion as to Ms H's leave status since she was not attending work at the time.

[135] Mr H told Ms D that the lockdown had been very hard for Ms H and asking if they could talk. Eventually, it was agreed that there would be a meeting once Alert Level 2 applied. This was the case from 13 May 2020.

[136] On 15 May 2020, Mr H sent a text to Ms D stating that Ms H was unwell, and he would elaborate at a proposed meeting. He also asked Ms D not to engage with Ms H. She responded by saying this would be difficult, as Ms H was still contacting her via text messaging, and she did not want to ignore her texts and questions.

[137] Ms D said she felt uncomfortable at the situation. She considered that, since Ms H is an adult, it was unusual for her as a team manager to speak to a parent of a staff member. She also had concerns as to whether Ms H's privacy would be breached by any discussion about her wellbeing. Given, however, Mr H's suggestion that she engage with him directly, she felt she had no choice but to meet with him.

[138] On 18 May 2020, Ms H sent a text to Ms D asking how much sick and annual leave she had. She also asked if Mr H had told Ms D where she was. Ms D responded by stating she had spoken to her father briefly, and that she and Mr E were to meet two days later. In this exchange, Ms H also referred to the end of a personal relationship which had apparently occurred recently, including comments about a "toxic guy who had sent her over the edge causing heartbreak". She said she was having issues because of the relationship ending and the lockdown, but she was healing and looking forward to getting back to work. Ms D responded appropriately.

[139] Ms D and Mr E met with Mr H on 20 May 2022. I interpolate that the meeting was two days before Ms H was to leave respite care and return to her parents' home.

[140] Ms D understood that Mr H wanted to know whether Ms H would be paid special leave if she did not come to work during the lockdown. As she understood it, he was concerned about Ms H's leave levels. Ms D said she would need to talk to the HR team as to how the absences would be treated for leave purposes.

[141] There is controversy as to what further information was disclosed about Ms H's circumstances. Ms D said that she and her colleague were told Ms H had gone into care and that they were asked that Ms C not be informed of this. She said Mr H seemed very hesitant about informing them of this development. But after telling them Ms H was in care, he asked that the information remain between the three of them. She thought that Mr H trusted them to ensure the information would go no further. She believed this was to avoid the health deterioration being held against her.

[142] For his part, Mr H said he had told Ms D and Mr E that Ms H had been in a respite house, although it was expected she would be shortly discharged. He said he had no reason to suggest that the information should not be passed on to Ms C.

[143] In the brief of evidence which Mr H provided in reply to Ms D's brief of evidence, he acknowledged that he asked for Ms H's privacy to be respected as regards her team colleagues, and that they not be told about the circumstances that had developed.

[144] Credibility submissions were advanced by both counsel, as to whether or not Ms D and Mr E – who was not called – were told not to disclose the information to Ms C who, it is common ground, was not appraised of the details of the meeting at the time. Ms C was told about the meeting by Mr E around 9 June 2020, and that it had been "to discuss [Ms H's] wellbeing". She was left with the impression that no significant concerns had been raised during the meeting.

[145] At the heart of Mr Henderson's submission was the proposition that it was inherently unlikely Mr H would have "instructed" Ms D and Mr E not to inform Ms C

as to the fact that Ms H had gone into care. He did acknowledge that the information was private.

[146] The circumstances certainly confirmed this. Ms H was not present, and there was a natural concern as to the provision of sensitive health information. That sensitivity was reflected in Mr H's request that work colleagues would not be informed of the respite admission. I find this request was not unreasonably understood as meaning all work colleagues. On the balance of probabilities, I find Ms C was not referred to by name, but the request not to advise team colleagues was understood as including her. This conclusion is confirmed by several contextual considerations.

[147] The subject of the meeting was to do with leave entitlements. That is, the direct focus of discussion was not on her health circumstances.

[148] Further, Ms D understood from Ms H's texts that she had been depressed over a recent relationship breakdown. It is hardly surprising that she saw the disclosure as arising in a particularly sensitive context which should not be discussed with third parties. It is understandable she concluded she was not at liberty to tell any third party about what she had been told; and that Mr E took a similar approach.

[149] I also note that on several occasions, before and after this meeting between 2019 and 2021, Mr H communicated directly with Ms C. Although he said in evidence that he had limited contact with her, I have no doubt that if he had considered it necessary to escalate concerns about Ms H to Ms C who had oversight of Ms H's RTW arrangements, he could and would have contacted her. Nor did he ask that Ms C be informed of the circumstances.

[150] The subject of discussion related, as I have noted, to leave entitlements. It is apparent that the focus was on helping Ms H regain fitness for work, which was important for her mental health. I conclude from this episode that Mr H did not consider it necessary to trouble Ms C with details as to what had occurred.

June/July 2020

[151] After being discharged from respite care, Ms H continued to reside with her parents. She did so until she returned to her flat in July 2020. It appears she worked reduced hours for a period, since, at least in Mr H's understanding when giving his evidence, RST had not resumed normal work at its offices by this time, there being potential public health issues in respect of a large open plan operation.

[152] On 18 June 2020, Dr Barron wrote to Dr Hurst, providing a "medications update"; this was apparently to document the care which had been given following the respite admission.

[153] Dr Barron confirmed that issues had arisen from Ms H's prescribed medications in early June; she said a different regime had been recommended. Then Ms H had been referred to a local Community Mental Health Team (CMHT) for oversight under a psychiatric registrar. Dr Barron recorded that return-to-work challenges, in these circumstances, could be addressed by exploring options for a gradual reintroduction to the workplace.

[154] On 2 July 2020, a certificate for Ms H's employer was prepared by a psychiatric registrar, Dr Kappagoda, confirming she would need four days off, that is, until 6 July 2020, for rest whilst there was an adjustment of her treatment. This certificate was passed on to Ms D.

[155] On 8 July 2020, Mr H sent an email to Ms D stating that Ms H was "quite unwell at present and is under the care of the hospital and Dr Kappagoda and staying at home with us until she recovers". The doctor would indicate a date when it was expected Ms H would recover sufficiently for full-time work. A further certificate would be forthcoming.

[156] On the same day, Ms H was seen again by Dr Kappagoda. Some improvement in mood was noted, but there was a further adjustment of the treatment. A certificate was signed that day. Dr Kappagoda said that treatment for her medical condition was ongoing, but that she could work half days from 13 July 2020, and would be fit for full duties on 21 July 2020. This certificate was also passed on to Ms D.

[157] A final certificate was dated 16 July 2020, at which point it was noted she was recovering from an acute illness which required reduced hours from 16 to 30 July 2020. This certificate was also passed on to Ms D.

[158] In summary, by 30 July 2020, Ms H was certified as being fully fit to return to work. No advice had been given suggesting special consideration would be necessary in the workplace.

[159] Although there had been absences in July 2020, the three medical certificates forwarded by Ms H to RST to explain why she was unfit for work suggested a finite period of treatment.

[160] As Ms D noted in her evidence, the certificates did not provide any further information as to Ms H's health circumstances. This was to be contrasted with the fact that Ms H felt able to disclose, at times, quite sensitive information regarding her personal interactions.

July to December 2020

[161] Ms H returned to full hours in August 2020. Her attendance and performance were still regarded as problematic, with Ms D making a significant effort to keep in touch with her about these issues.

[162] At this stage, consideration was given to performance management, with a rating of "needs improvement", due to the several concerns about her performance and behaviour during the training course, her attendance at work since returning to work following training and her work output.

[163] However, after obtaining HR advice, it was decided that the performance rating of "new to role or developing" would be appropriate, given the fact that Ms H's position upon returning to work was quite different from that which she had undertaken previously. Thus, she was assessed as someone who was new to the job but not yet performing at the required level.

[164] As recorded earlier, in the second half of 2020 RST implemented a restructure process with regard to the activities being undertaken by staff, including those in the team in which Ms H worked. The intention was to create a new role, which would require staff to work on more complex activities that could not be processed by digital means. This was described as being a shift from a "product centred model to a more flexible model", with staff being required to respond flexibly to patterns and customer demand.

[165] An external provider conducted a reassignment process to determine which employees would be offered reassignment to the new role. A significant number of affected employees asked for voluntary redundancy so that, ultimately, there was no requirement to make any employees redundant on an involuntary basis.

[166] The new structure would not come into effect until 1 March 2021, but, by late 2020, the process had been completed. In December 2020, Ms D and Mr E invited Ms H to a meeting, telling her she had been selected for one of the new positions. She was pleased about this and celebrated the positive development with her parents and other family members. She believed that she performed well because she prepared very carefully and was treated with respect by the persons involved in the reassignment process.

[167] Ms H said that, by 2021, she was looking forward to the new regime, which was set to commence in early March 2021.

[168] On 10 March 2021, Ms H was seen for a routine follow-up review by a psychiatric registrar who was a member of CMHT, who reviewed Ms H's medication and other issues. She was seen by Dr Ross, who recorded in summary that Ms H was no longer manifesting the symptoms which had troubled her in mid-2020. She did, however, refer to an episode at work the previous week when a misunderstanding had occurred over which Ms H had become upset and angry. Mr H was noted as referring to the fact that Ms H had a tendency to be sensitive in situations where she felt threatened.

[169] A request had been made for a medical certificate that Ms H could produce at work, the intention being that this would state that incidents at work would arise as an aspect of her illness. Dr Ross said it would be preferable for Ms H to specifically discuss with her employer any difficulties she might experience, and what might be a helpful response in such a situation. Dr Ross recorded that this would "encourage her to develop her own strategies and solutions" rather than rely on the advocacy of others such as her father. In the plan which was then recommended to Ms H's GP, she suggested Ms H should be encouraged to discuss with her employer specific difficulties she faced when distressed and what could be helpful when that occurred.

Overview of February 2020 – March 2021

[170] The circumstances of Ms H's return to the workplace from February 2020 onwards were challenging, as had been expected in the advice given prior to her return, both from Dr Ryder-Lewis and Dr Hurst.

[171] Also challenging were the events that occurred outside the workplace from March onwards. Like many New Zealanders, Ms H found the strict constraints of lockdown very difficult, which resulted in several relationship issues involving family members, a flatmate, and the person with whom she had a short relationship. It is reasonable to conclude that these events contributed to the marked deterioration of her mental health condition, which resulted in more intense management by health professionals, and then unforeseen problems when a review of her medications was undertaken.

[172] Throughout this period, Ms D did her best to fully support Ms H, a fact which she herself acknowledged, as did her parents.

[173] Relevant to later events is the insight held by Ms H and her parents as to her health vulnerabilities.

[174] As far as Ms H was concerned, she said that when she began to receive regular treatment with weekly, or fortnightly, therapy for about 12 months from May 2020, she learned much about her condition. She said that isolation and loneliness were her biggest enemies, and that she could sink into terrible lows losing self-confidence and

feeling a burden upon her family. She recognised the importance of getting on to correct medications, ensuring she had proper nutrition and exercise, and getting back to regular work supported by her family and friends.

[175] Mr and Mrs H also described their understanding as having increased as a result of what occurred in this period, in part because of attendance at a Family Connections Programme which focused on family members of persons affected by mental health issues.

[176] The period finished on a more positive note when compared with the position 12 months earlier. Ms H and her family members were clearly pleased by the way she had handled the restructuring process, and the encouraging outcome. Ms D commented on the resilience Ms H demonstrated through the process.

[177] Dr Hurst, in her February 2020 report, had noted that over the course of the succeeding six months Ms H might experience relapses due to the challenges she was facing. This advice was of course not intended to take account of a possible lockdown during a pandemic, but in broad terms Dr Hurst's opinion proved to be correct. Ms H did suffer a relapse, but with support she was able to move forward.

[178] Limited information had been provided to RST, first by Mr H at the meeting of 20 May 2020, when comparatively little was known as to the factors contributing to Ms H's deterioration in health, and then via the provision of brief medical certificates which were provided in July 2020. These essentially confirmed that there had been circumstances which affected Ms H's fitness to work which would entitle her to sick leave. Furthermore, the ultimate certificate authorising her return-to-work at the end of July 2020 gave rise to an inference that whatever had occurred was a treatment issue and that she could at the end of that period return to work; no caveats were noted.

[179] A significant recommendation was made in March 2021 by Dr Ross that Ms H should discuss difficulties she might experience, and what might be helpful, particularly when distressed. As noted, this was seen as preferable to providing a letter to that effect from the doctor. Although this advice focused on a discussion about

responses when certain issues arose in the workplace, it reinforced the need for Ms H to provide explanations of her medical circumstances if necessary.

[180] This advice resonates with the obligation under the HSW Act that a worker has an obligation to take reasonable care for their own health and safety. Regrettably, no detailed information about Ms H's relapse in 2020 was provided to RST before the disciplinary action commenced in April 2021.

[181] As far as Ms H and her family were concerned, across this period the focus was on getting back to work. Whilst medical information was provided to support the provision of entitlements, it was not considered necessary to provide a further summary of Ms H's medical circumstances.

Notification of second tranche of social media posts

[182] On 22 March 2021, Ms Dyhrberg forwarded to Ms C an email suggesting that Ms H had made more comments on a social media page that maligned her by name, as well as Ms H's work colleagues although they were not identified by name. Attached to the covering email was a video recording screenshots of multiple posts. Ms C then took screenshots of the images on the video.

[183] Ms C concluded that the posts were comparatively recent. She considered that they raised issues not only in respect of Ms Dyhrberg, but in respect of some of Ms H's work colleagues, and for RST as employer.

[184] After discussing the issue with Ms F at a scheduled meeting, she concluded that the organisation needed to address the issue.

[185] She then obtained internal HR advice and external legal advice. She was told there were issues of concern.

[186] As a result, Ms F worked with RST's legal advisors to prepare an allegations letter. Then on 8 April 2021, Ms F sent Ms H an email inviting her and a support person to meet with her the next day, so that information could be provided about social media posts for which it was alleged she was responsible.

[187] Understandably, Ms H was distressed. She said she felt ill with anxiety and was plunged into turmoil. All her worries of the preceding years returned.

[188] On her behalf, Mr H then wrote to RST making two key points. The first was a request for a deferral of the proposed meeting until Ms H had been able to see her GP, Dr Hurst; and second, that she was under permanent supervision of the mental health unit referred to previously having suffered "a serious health lapse last year [which required] institutional care at the time and now long-term medical supervision and regular nursing assistance".

[189] By 14 April 2021, Ms H had seen Dr Hurst, who then signed a letter which included the following:

> I have known [Ms H] for ten years as a patient. She has some unresolved mental health issues which are currently being treated via her specialists at CMHS. She is very motivated to manage her symptoms proactively and has excellent compliance with her treatment. She has experienced some traumatic events recently that have re-triggered her anxiety.
>
> It is in her best interests for her to remain at work and to maintain a regular routine. When she experiences heightened anxiety/panic attacks she knows she should manage this with a short break and walk around to reduce the symptoms. A fixed desk/work location would improve her structure/routine.
>
> I expect her current vulnerabilities will improve over time as she makes progress with her treatment and specialist follow-up.
>
> She has found her Team Leader outstandingly supportive.

[190] Late that afternoon, Ms F reverted to Mr H explaining that the purpose of the initial meeting was to advise Ms H of issues of concern, and that she would not be expected to provide a response. She also referred to the possibility of the letter being emailed rather than handed over to her in person. As a separate matter, Ms F stated that if Ms H was willing to provide medical information regarding the health-related matters to which reference had been made, that should be provided as soon as possible.

[191] It is apparent that neither Ms C nor Ms F had any detailed understanding of the medical circumstances to which Mr H referred.

[192] Also on 14 April 2021, Ms F instructed RST's lawyers to forward to Mr Henderson the letter which provided details of the proposed disciplinary investigation.

[193] The letter, dated 15 April 2021, confirmed RST had decided to undertake a disciplinary process because on the basis of information currently to hand, Ms H had:

(a) Posted messages on social media that were inappropriate, unprofessional and disparaging, including in relation to RST employees as well as the department itself; as to legal counsel previously engaged by RST; and as to members of the Authority.

(b) Engaged in behaviour, and held opinions, which raised significant health and safety risks in relation to other RST employees, including allegations that she had taken actions and intended to cause harm, distress or anxiety to those persons; and taken pleasure or satisfaction from causing, or witnessing, other employees' discomfort or distress in the workplace.

(c) Taken part in and/or endorsed discussions on social media that were critical and contained personal attacks on government ministers.

(b) By the nature of comments she had engaged in, and behaviour she was party to, there was a risk as to the health and wellbeing of RST employees, and of bringing RST into serious disrepute.

[194] The letter went on to state that if the allegations were established, it could be concluded Ms H was in breach of the department's Code of Conduct, and State Services Standards of Integrity and Conduct. These breaches may amount to serious misconduct. Under RST's disciplinary policy serious misconduct was proven behaviour that undermined the trust and confidence it had in an employee. An example given in the policy was conduct or actions that could bring the department into serious disrepute. These allegations were considered to be extremely serious.

[195] An intended process was outlined. That is, after an opportunity had been provided to consider the content of the letter, there would be a meeting to discuss the allegations. Ms F said she would note any comments made by Ms H prior to making any decisions and give them unbiased consideration. Then, a preliminary decision would be given, with an opportunity to respond to that before any final decision was made. The letter explained that these steps were in accordance with RST's disciplinary policy, a copy of which was attached to the letter.

[196] It was then stated that Ms H should be aware that, amongst the potential outcomes of the process, disciplinary action could be taken; and that serious allegations, if substantiated whether in whole or in part, could result in summary dismissal.

[197] Ms F went on to say that, given the serious nature of the allegations, she was considering whether it was appropriate to suspend Ms H from work on pay for the duration of the disciplinary process, under the applicable collective employment agreement (CEA). It was her preliminary view that this should occur. She was, however, mindful that Dr Hurst's medical certificate indicated it would be in Ms H's best interests to remain at work and to maintain a regular routine. Accordingly, if Ms H had suggestions as to how these considerations could be balanced, a response should be given by 21 April 2021. Then there would be an opportunity to meet. It was also suggested that paid special leave be taken for the duration of the process, which Ms F said she would be happy to consider. She then made some general observations about the confidentiality of the process.

[198] Finally, Ms F referred to a recently released Public Service Workforce Assurance Model Standard, which indicated that if any allegations could be substantiated after an investigation which were proven to be serious misconduct and were she to apply to any other public service agency or department, including a Crown entity, within the next three years, details of the serious misconduct would have to be provided by RST, if asked. A copy of this document was also attached to the letter.

[199] Two sets of communications then followed. The first of these were between Mr Henderson and Ms Richards. In summary, Mr Henderson took strong exception

to the taking of a step which he said was unwarranted in the particular circumstances because no prior consultation had occurred. The decision to suspend was also reached without hearing from Ms H. These assertions were resisted by Ms Richards. Focusing on the possibility of suspension, it was pointed out that a decision to suspend had yet to be taken, no response had been given to the option of paid special leave, and any medical information that was considered relevant should be forwarded.

[200] The second sequence of communications which is expressly relevant to the first cause of action concerned a decision by Ms C to contact Mr H informally. On 3 May 2021, she told him she wanted to avoid a litigious approach. After referring to the somewhat adversarial correspondence which had taken place between the legal advisors, she said she felt she and Mr H had always been able to talk freely and from a place of mutual respect. She suggested they meet – with legal representatives if possible – to understand and discuss the circumstances.

[201] It was agreed a meeting could take place. When setting it up, Ms C asked if any updated medical information could be shared.

[202] As a result, Mr H sent Ms C a detailed account of Ms H's medical information relating to what had occurred in 2020 and 2021, on 12 May 2021. He said the medical information could be corroborated by medical experts in due course.

[203] Ms C said it was at this stage she learned that Ms H had suffered a relapse during 2020, and that she would have expected to have been made aware of this at the time it occurred.

[204] The without prejudice meeting which then proceeded involved her, Ms Richards, and Mr and Mrs H. Mr Henderson had stated that he had no objection to the meeting proceeding without him being present.

[205] Following the meeting, Mr and Mrs H believed that it had been agreed the disciplinary process would be withdrawn, and that the parties would proceed to what was described as a "medical management approach".

[206] However, Ms C, in a letter of 1 June 2021, said that RST would "pause" the current disciplinary process "at least for now" and only on the basis of pending satisfactory and complete medical information being provided to RST so that the appropriate options could be considered on a fully informed basis; she said this was without prejudice to RST's right to recommence the employment investigation if it considered this to be appropriate. She went on to say that, due to ongoing concerns expressed by staff about Ms H's alleged inappropriate conduct at work, it may be necessary for her to take some paid special leave whilst the medical information was being obtained.

[207] Ms C also confirmed that, from soon after the without prejudice meeting, Ms H's hours would be from 12 noon to 4.00 pm each business day on a temporary basis, with paid leave being made available for the balance of each working day and no deduction from her leave balances. This was conditional on Ms H agreeing to certain minimum standards of conduct when at work with regard to interaction with her colleagues.

Analysis of issues regarding decision to commence disciplinary proceeding

RST's implementation of the RTW plan

[208] I return to the issue concerning the implementing of the RTW plan. Whilst I have accepted it was a part of the factual matrix, the significance of what occurred can only be relevant to later events if all of the relevant planks of Mr Henderson's submission about it are correct. Mr Henderson said that the RTW arrangements were not properly implemented and likely contributed to Ms H's subsequent lapse in health and that RST had ongoing responsibilities arising from the transitional arrangements which were agreed in late 2019.

[209] I have already noted that, when making his recommendations for the purposes of a RTW plan in early 2019, Dr Ryder-Lewis acknowledged Ms H could become unwell again in the future. He said the risk of this was moderate and not precisely quantifiable. Dr Hurst also referred to such a possibility in February 2020.

[210] Whilst the possibility of further illness which RST would need to consider was flagged, the employer could only proceed on the basis of the health information it was

given from time to time by Ms H or which it could reasonably be expected to have requested.

[211] As to the applicable obligations held by RST on such an issue, Mr Henderson relied on s 73 of the Public Service Act 2020 (PS Act) to submit that this particular employer, a government department, had enhanced good employer obligations, which included provisions requiring good and safe working conditions, and which recognised the employment requirements of people with disabilities. This, he suggested, meant a higher standard should apply when it came to health and safety obligations.

[212] Mr Henderson referred to a determination of the Authority, *Aubrey v The Chief Executive of the Department of Child Youth and Family Services*.[20] This case turned on whether certain requirements in an Equal Employment Opportunities policy had been met, to meet the interests of disabled persons. The determination is not authority for the proposition that such compliance amounts to being a higher standard than would otherwise fall on a good employer.

[213] Section 73 of the PS Act requires a chief executive of a department – of which RST is an example – to operate an employment policy that complies with the principle of being a good employer.

[214] Section 73(3) relevantly provides:

> ...
>
> (3) In this section, a **good employer** is an employer who operates an employment policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including for–
>
> ...
>
> (b) good and safe working conditions; and
>
> ...
>
> (h) recognition of the employment requirements of people with disabilities; ...

[20] *Aubrey v The Chief Executive of the Department of Child Youth and Family Services* NZERA Christchurch CEA 232/03, 13 August 2004.

[215] The conclusions reached in *French v Chief Executive of the Department of Corrections*, a case decided in 2002, are of assistance. There, the Court held a requirement of this kind does not necessarily mean that a state-sector good employer must maintain a significant margin of quality over the standard maintained by employers who are not bound by the relevant statute.[21] When considering the parallel provisions of the State Sector Act 1988, the Court found for the purposes of that case that the relevant obligations were derived from the health and safety legislation which was in place at the time, from the implied contractual term to take all reasonable care to expose employees to unnecessary risk of damage to physical or psychological health, and from the well-established implied mutual terms of trust confidence and fair dealing. These requirements were acknowledged by the employer in relevant policies. All of this meant that a higher standard was not required of that state sector employer because there were adequate standards in place.[22]

[216] Similar reasoning applies in this case. The provisions of the HSW Act impose comprehensive obligations on a PCBU, including the duty to act in a reasonably practical way, as explained earlier.

[217] I am satisfied that the duties held by RST under that statute are generally accepted as necessary for the fair and proper treatment of employees, including for good and safe working conditions, and in recognition of the employment requirements of people with disabilities. The necessary standard is set by the HSW Act which RST acknowledged in the applicable CEA, stating, in respect of workplace healthy and safety, that it was committed to and had "a responsibility to provide healthy and safe work environments". That Act imposed the standard which is generally accepted as necessary. It is evident from the CEA that RST operated the appropriate employment policy. It covered all employees, including those who were disabled. In these circumstances, there is no issue as to an enhanced standard.

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21 *French v Chief Executive of the Department of Corrections* [2002] 1 ERNZ 325 (EmpC) at [199].

22 At [99]–[101]. To similar effect is dicta in *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [55] and the cases footnoted to that paragraph: *National Union of Public Employees (Inc) v Asure New Zealand Ltd* [2004] 2 ERNZ 487 (EmpC) at [38]; *Matthes v New Zealand Post Ltd (No 3)* [1992] 3 ERNZ 853 (EmpC) at 890.

[218] Returning to the earlier discussion as to the obligations on RST when dealing with Ms H's return-to-work, which must be assessed in light of the standard imposed by the HSW Act, I am satisfied that the steps taken in late 2019 and early 2020 were "reasonably practical". They were in accordance with the plan developed by the parties in light of advice from Dr Ryder-Lewis and Ms Dyne.

[219] I am not persuaded that Ms C cancelled or withdrew agreed psychological support, or that the support provided by staff was not in accordance with the intent of the RTW plan. It is true that some elements of the plan did not proceed as smoothly as had been anticipated, but that does not lead to a conclusion that the plan obviously failed and/or that RST's efforts were wholly insufficient.

[220] A fundamental element of the plan was the day-to-day support which would be given by Ms H's team leader. There is no doubt that support was provided, as was acknowledged by Ms H and Mr H at the time and recorded in Dr Hurst's letter of 14 April 2021.

[221] I do not accept Mr Henderson's submission that there is a causal relationship with the withdrawal of psychological support, and the latter relapse of Ms H's health. As the events from March 2020 to March 2021 demonstrate, there were a number of factors at play in that period, emanating from the first lockdown as well as multiple relationship issues which had little to do with workplace activity. I am not persuaded that the way the RTW plan had been implemented was on a common-sense basis causative of those events, whether directly or indirectly.

[222] Finally, whilst RST had ongoing responsibilities for Ms H's welfare and health and safety at work, as I shall explain more fully later, the information it held was not sufficient to suggest that the recommendations which had been made by Dr Ryder-Lewis should be revisited, and/or the RTW arrangements needed to be supplemented.

Are the private social media posts able to be the subject of disciplinary action?

[223] Mr Henderson submitted that the posts created by Ms H were private and were put up in her own time pursuant to a right to express her own opinions.

[224] The social media posts that gave rise to RST's concerns were, Ms H accepts, posted on a Facebook page. Although it was described as a "private page", the evidence is that some 1,100 persons could access it.

[225] It is not for me to determine this or any of the other points raised about the pros and cons of the posts. All I need to say is that it is well established that Facebook is not a strictly private forum and that, depending on the circumstances, posted comments may substantiate a dismissal from employment or disciplinary action.[23] The cases generally recognise that asserted expectations of privacy will "likely be tested".[24]

[226] RST's Code of Conduct, promulgated in August 2013, echoes these obligations. It warns of the responsibilities which fall on an employee who chooses to place posts on social media platforms in a personal capacity.

[227] I am satisfied that the publishing of posts on a Facebook or other social media platform are not immune from consequences simply because they may have been put up in an employee's own time, and/or because they express a personal opinion.

[228] I make no further comment, however, as to whether the particular posts warrant a misconduct or serious misconduct finding in this instance. Mr Henderson submitted in effect there were significant contextual factors. Ms H has of course a right to raise those factors; if this occurred, these would then require careful consideration.

Duty to check before starting disciplinary proceedings

[229] The next issue centres on two questions, one legal and one factual. Each relates to the question of whether RST had a duty to check Ms H's medical circumstances before commencing disciplinary action.

[230] The legal matter relates to the finding I made in my earlier judgment that a fair and reasonable employer could be expected to obtain medical information about Ms H

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23 *Hook v Stream Group (NZ) Pty Ltd* [2013] NZEmpC 188, [2013] ERNZ 357 at [29]–[37].
24 At [36].

in the circumstances which pertained to her in 2015 – 2016; the question is whether the same conclusion should be reached with regard to the present circumstances.

[231] Mr Henderson submitted the Court should do so. He relied strongly on the findings I made as to the extent of RST's obligations for the purpose of the previous proceeding.

[232] A question had arisen as to whether RST carried an onus to obtain proper medical advice before undertaking a structured performance process. In summary, I found that RST knew Ms H was subject to an ADHD diagnosis and that this may have been related to the behaviours it was attempting to manage by way of an extended performance improvement plan and related disciplinary process.[25] Senior HR staff had recognised that medical advice may be needed for this purpose but assumed Ms H would provide the relevant material.[26] They knew of concerns about the impact that the processes being implemented were having on Ms H's health.[27] I held the steps which had been taken in the workplace to assist Ms H were, in the circumstances, insufficient because she continued to be distraught, and displayed obvious signs of heightened anxiety.[28] Then, relying on the dicta summarised in that judgment arising from the Court of Appeal's judgment in *Attorney-General v Gilbert*, I concluded:[29]

> [274] RST was driving a very structured performance process which, by February 2016, had been maintained for seven months. This was to break habits of an employee who not long before the process commenced had been regarded as performing well. It was known she had an underlying medical condition which meant she had considerable difficulty handling the stress of the process, and that there had been significant sleep deprivation.
>
> [275] It was entirely foreseeable she would continue to react adversely if the formal processes were maintained, because of her anxiety disorder.
>
> [276] All of this meant the organisation needed to take responsibility for requesting proper medical advice. In the particular circumstances, the onus was on the employer to work with the employee to obtain advice which was adequate in the circumstances.

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25 *FGH v RST*, above n 1, at [259] and [271].
26 At [259] and [271].
27 At [264].
28 At [264].
29 *Attorney-General v Gilbert* above n 16, at [196]–[199].

[233] However, the circumstances analysed on that occasion were significantly different from those which arise now. The behaviours of concern were connected to the procedural steps RST itself was taking because of Ms H's ADHD condition. By contrast, the present case involves behaviours which RST learned about in April 2021 that had occurred outside the workplace in the previous year.

[234] Whereas there was a particular obligation on RST in considering a performance process and related disciplinary proceeding in 2015/2016 it does not follow there was an identical obligation when considering misconduct issues in 2021.

[235] Should RST have been alerted to the possibility it may need to inquire about Ms H's medial circumstances? This question must be answered by reference to the information known to RST, as provided to it as from the inception of Ms H's return to work in late 2019.

[236] I repeat the key facts for the purposes of this issue. Senior managers including Ms C, knew that Ms H had been diagnosed for some years with ADHD and had associated problems.

[237] In February 2020, her GP confirmed she had made significant progress and was expected to continue to do so over the following six months but might experience relapses during that time.

[238] In May 2020, Mr H met with Ms D and Mr E to discuss leave issues. In doing so, he referred to the fact that she was presently in respite care. Ms D, the employee at RST who possessed the most information as to Ms H's circumstances, knew Ms H had experienced high anxiety during the lockdown, which had led to multiple relationship issues, involving her family, a flatmate; and that most recently she had suffered the breakdown of a personal relationship which had distress her.

[239] As the earlier analysis indicates, there were in fact multiple consultations between Ms H and medical practitioners thereafter, particularly in July 2020. The three certificates which were tendered referred to the fact that the treatment was being given would require a graduated return-to-work. Few particulars were given. Mr H

sent an email to Ms D which simply stated that his daughter was quite unwell, was under the care of Dr Kappagoda, was staying at home until she recovered, and that Dr Kappagoda would provide a date that he would expect Ms H to have sufficiently recovered for full-time work, but in the meantime she would be unable to do so.

[240] This note was sent after the first certificate, but before the second and third. It was reasonable to infer from the email and the certificates that when, by the end of July 2020, Ms H was stated as being fit to return to work on full-time hours, this was indeed the case.

[241] Although Ms D said she remained concerned about behavioural traits in the workplace, she also noted Ms H's resilience during the restructuring process which resulted in Ms H being reassigned to a new position. From August 2020 to March 2021, there was greater stability in the workplace, although there is some evidence of Ms H reacting adversely to stress in the workplace from time to time in the early part of 2021 as discussed with Dr Ross. It appears these incidents occurred occasionally, but Ms D, on the whole, had been able to manage them. Ms C was also concerned about Ms H's behaviour at work and the impact that behaviour was having on other staff, as referred to in an email she sent to Mr H on 17 May 2021.

[242] In considering these particular circumstances, and the obligation that fell on RST, it is necessary also to consider the obligation that fell on Ms H as an employee. That obligation is, as I mentioned earlier, spelled out in the HSW Act.[30] It stipulates that a worker must take reasonable care for their own health and safety.[31] It was also reflected in the CEA, which recorded that all employees had a responsibility to identify, and then eliminate and/or minimise risks or hazards in a timely, and appropriate, manner.

[243] Regrettably, there had not been a full disclosure of the medical problems that arose in 2020, at least before the inception of the disciplinary process.

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30 Above at [68].
31 Health and Safety at Work Act 2015, s 45.

[244] Dr Ross had recommended that rather than provide a medical certificate which Ms H could produce at work or relying on the strong advocacy of her father, "her own agency and self-efficacy needed to be encouraged".

[245] There is no doubt Mr H was at times a strong advocate for Ms H. On the issue of the provision of her medical information, however, he also understood he needed to be cautious about volunteering sensitive and private health information without express authority to do so. That caution was evident on a number of occasions. For instance, he was careful not to become closely involved in confidential doctor and patient consultations, withdrawing from those consultations so his daughter could speak privately to relevant health practitioners.

[246] I conclude that in the particular circumstances where Mr H was not of the view that he held an absolute authority to disclose medical facts and may in fact have been only partially informed on some of these in any event, the obligation to provide details of background medical information ultimately fell on Ms H herself, the employee involved, who held health and safety obligations.

[247] Standing back, I find that the information which had been provided to RST in 2020, when considered in the context of the events that occurred across that period, was insufficient to raise a red flag that could have caused a fair and reasonable employer to make inquiries before sending a disciplinary letter.

[248] On the related issue as to the foreseeability of possible harm by commencing such a process, this too is an issue that turns on the extent of medical information RST possessed. Ms F, in her evidence, outlined the steps she took when commencing the disciplinary process in some detail. She said she was unaware of Ms H having suffered any health issues in 2020. Moreover, to her knowledge, Ms H had been working in her new role without any limitations being raised as to her ability to perform that role.

[249] On receiving notification from Ms H and Mr H to the effect Ms H felt she had needed counselling and that she had suffered a serious health lapse in 2020, Ms F responded appropriately. She explained that the intended meeting was to advise of RST's concerns, and to set out its approach and next steps – not to receive comments

on the allegations. She asked for medical information. She rescheduled the meeting in anticipation of medical information being provided. These were all steps that were constructive, responsive, and justified in the circumstances.

Natural justice

[250] Mr Henderson's submissions referred to several other natural justice issues. These included:

(a) that the letter raising the initial disciplinary concerns was vague and unspecific;

(b) it inappropriately pitched RST's concerns at the level of serious misconduct;

(c) in framing the concerns at that level, no input was first sought from Ms H;

(d) Ms F was not a "conspicuous, impartial decider" being the "prosecutor, investigator, and potential decision-maker"; and

(e) she carried a burden of proof in bringing allegations which was not satisfied before the letter was sent.

[251] Mr Henderson, in an overarching submission, said that a "gold standard of procedural fairness" applied, and that a strict observance of natural justice principles was essential.

[252] The rules of natural justice are situation-dependent; the decision-maker must act fairly, but what that means will depend on the particular circumstances. What is appropriate is "always contextual".[32]

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[32] *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120].

[253] Context is provided by disciplinary provisions contained in the CEA and in the policy for managing disciplinary processes as cross-referenced in that provision. Clause 4.5 states:

> **4.5 Discipline procedures**
>
> When dealing with discipline the following principles will apply:
>
> - The employee is to be advised of their right to representation and/or a support person of their choice, including PSA representation.
> - The employee is to be informed of the issue/allegation in question and be given a reasonable period and the opportunity to provide an explanation or response to the issue/allegation.
> - An appropriate investigation in accordance with [RST's] policy/procedures will be undertaken before any substantive action is taken – see the Disciplinary Policy.
> - Depending on the seriousness of the issue a first warning will normally proceed a final warning.
> - In cases of alleged serious misconduct the employee may be suspended on pay while an investigation is undertaken. Usually, before suspension is invoked the employee will be given an opportunity to provide submissions as to the appropriateness of the suspension.

[254] The introduction to RST's disciplinary policy, referred to in the CEA, states that from time to time employment issues arise which need to be managed. When this happens a disciplinary process may be followed, the purpose of which is to ensure RST maintains high standards of integrity, conduct and behaviour with the aim of preventing a recurrence. This objective, however, is subject to the seriousness and gravity of any proven allegations.

[255] The policy emphasises that all disciplinary decisions will be made on a case-by-case basis taking into consideration all relevant factors including those personal factors that may impact the employee such as health, wellbeing and mental wellness.

[256] Then it provides:

> **Natural justice and procedural fairness**

13. When it is used, the disciplinary process will be conducted fairly, transparently, impartially and in accordance with the principles of natural justice and procedural fairness.

14. The principles of natural justice are:

- the matter is raised with the employee as soon as practicable after identifying or being made aware of an issue
- all relevant information and material relating to the matter is provided to the employee
- the employee will be provided with reasonable opportunity to prepare, input and respond to any allegations and intended actions, before a final decision is made
- all issues are investigated thoroughly, objectively and fairly.

15. The principles of procedural fairness are:

- the standards of conduct, behaviour and job performance required are made clear to the employee
- the employee is made aware of the likely next steps in the event that satisfactory behaviour is not maintained
- the employee has the right to be accompanied by a support person or representative at meetings at any stage of a disciplinary process
- allegations received from another person are usually verified before any disciplinary process is commenced or any disciplinary decision is made
- the employee has the right to respond to any allegations.

[257] The policy goes on to describe the three phases which apply to a disciplinary process: determination of the facts, meeting with the employee, then making a decision for implementation.

[258] Under "determine the facts", the policy includes provision for initial fact-finding to establish whether there is an issue to be raised with the employee. If so, the employee is to be informed of the employee's allegations, then decide whether suspension is appropriate. A decision may then be made that the allegations be investigated.

[259] Later, the policy describes disciplinary action, which it says depends on the circumstances and the severity of the issue/problem. The result of a disciplinary

process may range from no further action up to dismissal with or without notice, the appropriate step being that which is appropriate to the circumstances and seriousness of the issue.

[260] Serious misconduct was described as being proven behaviour that undermines the trust and confidence that RST has in an employee. Examples are then described.

[261] The policy also deals with other aspects of a disciplinary process, including the steps to be taken when an employee raises a medical condition during a disciplinary process. That is, the policy allows for the possibility that the employer may not be fully informed as to an employee's health status.

[262] In short, RST's own procedures largely reflect the provisions of the Act which require an employer to be responsive and communicative, and when investigating serious allegations to ensure that the employee is squarely on notice of the matters of concern.

[263] RST thereby set itself a high standard as to procedural fairness. It is in that context that the test of justification falls for assessment. In these circumstances, were the steps taken by RST those which a fair and reasonable employer could take?

[264] Against these general observations, I turn to consider the particular issues raised by Mr Henderson.

[265] The first relates to statements contained in the letter of 15 April 2021, which I summarised earlier.[33] Mr Henderson submitted that the allegations raised were vague and lacking in specificity, and that there was an insufficient evidential basis for them.

[266] I disagree. There is sufficient detail in the letter as to make it clear what needed to be investigated. Attached to the letter of allegations were copies of the posts, so there was plainly no doubt as to the source of RST's concerns. Nor is there any evidence that the allegations were not understood. When Ms H was first notified of the fact that a disciplinary step was to be taken because inappropriate social media

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[33] Above at [19] and [38].

posts had been advanced, her almost immediate reaction was to express concern about a lack of support over the previous year. She knew what the concerns related to. At the time, Ms H's response was not that the allegations were vague or unclear, but that it was essential to appreciate Ms H's health circumstances at the time they were sent.

[267] The next issue is whether the references to serious misconduct, and to the possible implications in the public sector were dismissal to occur, were steps a fair and reasonable employer could have taken.

[268] In response to questions from the bench, Ms Richards submitted that the letter needed to refer to the worst possible outcome as part of its obligation to express the concerns of the employer to which the employee would have an opportunity of responding. She said that, although the allegations were expressed as being "serious", the letter also made it clear that summary dismissal "could" result. She accepted that in many instances an employer might spell out a range of outcomes up to the level of serious misconduct.

[269] The letter arose in the context of RST's disciplinary policy, a copy of which was attached, which made it clear there is a potential range of outcomes that could result from disciplinary proceedings.

[270] I find a fair and reasonable employer could make express reference to the most serious option, so the employee is left in no doubt as to potential outcomes. But, as Ms Richards confirmed, lesser options were available. Some employers could have also referred also to lesser options, but not to have done so was not fatal in the particular circumstances. It would be unduly pedantic to conclude the letter was so defective on this point as to give rise to a grievance.

[271] I mention two other aspects of the letter. The first was the reference to the proposal to suspend. As noted earlier, Ms F, the author of the letter, said she was considering this option, given the seriousness of the allegations. But she also recognised it would be necessary to balance the medical advice given by Ms H's GP that it would in her best interests for her to remain at work and to maintain a regular

income. She said she was open to receiving suggestions as to how these considerations could be balanced, inviting feedback.

[272] From Ms H's perspective, reference to the seriousness of the matters and the possibility of suspension no doubt seemed draconian. However, the Court must make an objective assessment as to what a fair and reasonable employer could do in all the circumstances. I am satisfied that a reference to the possibility of suspension was justified and indeed necessary if this was a live option.

[273] I also refer to the reference made to the fact that the Public Services Commission had released a new Public Service Workforce Assurance Model Standards in 2020, the effect of which was that if serious misconduct were to be established and were Ms H to apply for employment in the public service sector, RST would be obliged to provide details of the serious misconduct if asked. Mr Henderson submitted this was unduly punitive.

[274] Ms H had the right to be fully informed as to this consequence if a conclusion of serious misconduct was reached. The reference does not fall foul of the justification test.

[275] The next, and related submission, made by Mr Henderson is that Ms F made a decision as to the level at which the alleged misconduct would be pitched without any input from Ms H. He said this was a very significant breach of natural justice, and indeed infringed the dicta of the Privy Council in *Mahon v Air New Zealand Ltd* in that a decision-maker must listen fairly to any relevant evidence before making a finding.[34]

[276] The letter was sent at the outset of the process. No decision had been made as to whether a conclusion of serious misconduct would result, and as already noted, a range of outcomes could result.

[277] It was also made clear that there would be opportunity for input and feedback in two subsequent stages: in response to the letter itself; and then once a preliminary

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[34] *Re Erebus Royal Commission* [1983] NZLR 662 (PC) at 671.

decision had been made after considering any such response. Those steps reflected the statutory requirements of s 103A(2), which reflect the dicta in *Mahon*. I do not consider the indicated process was potentially flawed.

[278] Given the potentially serious outcome, I find the intended disciplinary process was one a fair and reasonable employer could adopt. It was staged and deliberative. It allowed for proper input from the affected employee. The underlying policy specifically recognised the possibility that a medical condition could be raised by the employee as a contributory factor; it spelt out how the employer would then need to obtain additional information about the condition, including via examination from a registered medical practitioner nominated and paid for by RST.

[279] Mr Henderson submitted there was a burden of proof on Ms F as "accuser". But as the Court of Appeal has observed, it is not usual to impose the application of a legal standard of proof on decisions of an employer. It is not needed since there is already a standard of reasonableness.[35]

[280] It may perhaps have been Mr Henderson's intention to suggest that the letter demonstrated pre-determination. That is, that the employer had already decided serious misconduct had occurred, and that nothing that Ms H might say would persuade her otherwise. However, having heard Ms F give evidence as to the process she would have adopted, I am not persuaded this was the case.

[281] The final natural justice issue relates to the fact that Ms F was said to be the "prosecutor, investigator and potential decision-maker".

[282] Whilst there are cases where a separate individual – whether internal or external to the employing entity – may be tasked to investigate disciplinary concerns, it is not mandatory that this occur. A decision-maker may be involved in ascertaining what has happened and may carry the responsibility of weighing up the facts so as to reach a fair conclusion.

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[35] *Cowan v IDEA Services Ltd* [2020] NZCA 239, [2020] ERNZ 252 at [39]; *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (EmpC) at [19]–[20].

[283] In the present case, Ms F determined she would not need to engage an external investigator such as a barrister, because, having regard to the content of the posts, it was unlikely anyone other than Ms H needed to be interviewed. The main issues concerned their timing and the context in which they were sent. I am not persuaded that a fair and reasonable employer could have concluded that an external investigator would necessarily have to be involved – at least at that stage of the process. The complexity of subsequent events and concerns led Ms C to appointing an alternate decision-maker. That indicated she was open to considering other options if need be.

[284] A related submission was that Ms F's line manager was Ms C, and that she did not therefore possess the necessary degree of impartiality.

[285] Ms F and Ms C were questioned about the fact they had travelled together on work duties to visit RST's Sydney-based office. I do not consider that this aspect of the evidence establishes Ms F was accordingly influenced by Ms C when undertaking her role.

[286] Ms F told the Court that she framed the letter of concern after having received advice from HR practitioners within RST, and after consulting with RST's external legal advisors.

[287] In light of all the evidence, it is reasonable to conclude Ms F took the advice given to her by those persons into account, rather than the views of Ms C who took no part in preparing the letter.

[288] Drawing the threads of these concerns together, I am not satisfied at this early stage of the proceeding that the steps taken were not those which could be expected of a fair and reasonable employer. An effort was made to establish a professional, and thorough, process to deal with the concerns which Ms F said she had.

The pausing of the disciplinary process

[289] Mr Henderson submitted that the decision to pause, but not to withdraw, the disciplinary process was unjustified.

[290] I referred earlier to an initiative which was taken by Ms C on 3 May 2021, when she wrote to Mr H saying she had felt that discussions had involved the ability to talk freely, and from a place of mutual respect, "keeping everyone's best interests top of mind". After a response in which Mr H described his daughter's medical condition over the past year, a without prejudice meeting was held on 14 May 2021. Given the protection the parties agreed to for the purposes of their discussion, it is not for the Court to speculate as to whether there was, or was not, reference to a permanent suspension of the disciplinary action at that meeting.

[291] On the following Monday, 17 May 2021, Ms C wrote to Mr and Mrs H to detail the way forward. For present purposes two points should be emphasised. The first was her confirmation that there would be a temporary arrangement in which RST would withdraw the current proposal to suspend Ms H, and would pause the related investigation while medical information was obtained and considered. An interim work regime would apply. She reserved the right, however, to obtain a medical assessment from an independent medical specialist.

[292] On 19 May 2021, Mr H responded by saying there were legal ramifications to a continuance of the existing processes, which would need to be addressed by Mr Henderson.

[293] In response, Ms C clarified that RST would also discontinue the proposal to suspend and consider the circumstances as a medical management issue as had been agreed.

[294] Then Mr H stated, the next day, that he and Mrs H had thought that maintaining a punitive disciplinary process was not consistent with an agreed medical management process. He urged reconsideration of this possibility.

[295] Ms C told the Court that she envisaged that medical information would inform the decision as to whether the employment investigation should continue, or whether another pathway having a medical focus would be more appropriate.

[296] Accordingly, in a further letter sent by Ms C to Mr H on 1 June 2021, she confirmed that although the employment investigation was being withdrawn in the meantime, this was pending provision of medical information so RST could consider the options on a fully informed basis. She said the steps being taken were without prejudice to RST's right to recommence an employment investigation, if it considered that was appropriate taking into account the medical information received.

[297] In the same letter, she confirmed again that, should the information not be received by 11 June 2021, RST would seek a medical report from an independent psychiatrist.

[298] Ms C was consistent when indicating her intentions following the without prejudice meeting. The step she took was one that was well open to a fair and reasonable employer in all the circumstances. It was consistent with the provision of the disciplinary policy relating to medical conditions. Good faith dialogue occurred, and it resulted in an expectation that the information which had been requested would be provided within a relatively short period, during which Ms H would not be suspended, but would work restricted hours having regard to the anguish she had experienced when the allegations were notified.

[299] This particular process of consultation with Mr and Mrs H reflected steps which a fair and reasonable employer could have taken in the circumstances.

Conclusion as to first cause of action

[300] On this branch of the case, I am not satisfied that there was unjustified action on the part of RST.

[301] In the result, the various aspects of the first cause of action I have considered do not give rise to a disadvantage grievance.

Second cause of action: the letter of 13 August 2021

[302] The second cause of action focuses on the letter sent by Ms C to Ms H on 13 August 2021, in which reference was made to the fact that recent conversations and

emails showed a pattern of behaviour where Ms H had made reference to suicide and self-harm, which gave rise to serious concerns for the wellbeing and safety of her and other staff members who had been party to those interactions.

[303] Consequently, Ms H was directed to commence a period of paid sick leave with immediate effect, and until a report from an independent psychiatrist which was being arranged was available. Until then, Ms C said that she could not allow Ms H to remain in the workplace. She would be paid discretionary sick leave.

[304] For Ms H it is pleaded that this letter amounted to an unjustifiable suspension on the erroneous assumption that Ms H presented a risk of suicide, without first establishing the necessary facts; in addition, that timely return-to-work arrangements were not undertaken and that this was intended to prolong her absence from the workplace.

[305] Broadly, RST denies these assertions, stating that Ms H was placed on sick leave in the interests of the health and safety of herself and other staff. RST denies that it intended to harm Ms H.

The lead-up to the letter of 13 August 2021

[306] Before discussing these allegations, I need to refer to events which led up to the sending of the letter. Following Ms H's return to the workplace after the without prejudice meeting between Ms C and Mr and Mrs H on 8 May 2021, several relevant incidents occurred.

[307] On 20 May 2021, Ms D became increasingly concerned as to Ms H's behaviour and work performance, when working restricted hours. For her part, Ms H was stressed by the disciplinary proceedings that had been brought, a point which was emphasised in several of the letters sent on her behalf by Mr Henderson to Ms Richards.

[308] On 9 June 2021, Mr Henderson wrote to Ms C at length on several topics. One related to the request for additional medical information. He said RST already possessed reports that had been made available up to 2019. As regards later material,

Ms H had an appointment with Dr Hurst on 11 June 2021; some time after that DHB reports would become available. He went on to say that, if RST maintained a flawed and draconian disciplinary process that risked Ms H's health and future employment, he would have to advise her to bring a personal grievance proceeding.

[309] On 15 June 2021, what was described as a barging incident occurred involving Ms H and another member of her team. This resulted in the two providing email accounts as to what had occurred.

[310] By 17 June 2021, this issue had been escalated to Ms F, and then to Ms C. She telephoned Mr and Mrs H mid-evening to discuss those events. There is a debate as to whether Ms C said she would not investigate the incident that had occurred in the meantime, or whether she said it would not be investigated at all. I will return to this issue later.

[311] Parallel to this, Ms H continued to seek medical information via her GP and the relevant hospital from which she had received treatment in the previous year.

[312] In a letter from Ms Richards to Mr Henderson on 23 June 2021, it was noted the medical information had still not been received. The delay was hindering a medical management approach to Ms H's issues at work. Consequently, RST said it would now establish an independent medical assessment with input from Ms H's GP and other medical specialists as required. Formal consent documentation was provided. This step was being taken in recognition of RST's health and safety obligations to Ms H as well as other staff.

[313] It was also suggested that relevant medical information had been withheld. Ms C had not been informed of Ms H's health status in mid-2020. In her letter, Ms Richards said this material had been withheld by Mr H, and that this was inconsistent with the duty of good faith.

[314] Other topics were also discussed, including a review of the temporary work arrangement which had been set up in mid-May 2021 involving the parties. This was to have taken place on 11 June 2021 in the expectation the requested medical

information would have become available. Because, by this time, Mr Henderson was indicating that further proceedings may be necessary, the necessary review of the work arrangements that was to have taken place informally would now be appropriately undertaken via the lawyers.

[315] On 29 June 2021, Ms H signed an authority in favour of the relevant DHB hospital. No acknowledgment was received after it was faxed.

[316] On 2 July 2021, Mr Henderson wrote to Ms Richards at length stating that allegations of bad faith had been made about Mr H in her previous letter. Those assertions were denied.

[317] Against the background of these exchanges, by August 2021 there was obviously some tension between the parties. From the employer's perspective, the requested medical information had not been forthcoming; Ms C considered this was contrary to the initial understanding she had with Mr and Mrs H; good faith issues were accordingly raised. Ms D felt Ms H was demonstrating behavioural and performance issues at work, which she was finding it increasingly difficult to manage effectively. For her part, Ms H felt she was being unfairly targeted and that she was having to fight her employer. This had resulted in her being advised to file proceedings in mid-July 2021.

[318] The events which precipitated the letter sent by Ms C on 13 August 2021 occurred against this background. On 11 August 2021, Ms D wished to meet Ms H to discuss a work plan for the following week. She referred to the possibility of Ms H not undertaking a particular task where performance concerns had arisen previously. During a meeting to talk about these matters, Ms H became agitated and swore at Ms D.

[319] On the same day, Ms H had a conversation with a co-worker, in which she said that her situation at RST was a "13 Reasons Why" scenario and that she had been self-harming.

[320] The next day, Ms H sent Ms D an email which included a comment that "if you guys aren't careful there will be another Olivia situation. Not from me but from someone who isn't as strong". This was understood to be a reference to Olivia Podmore, a New Zealand athlete who had recently taken her own life.

[321] On the same day, Ms H made an unsolicited contact with a person who she was not supposed to contact, with the subject line "I forgive you". This caused the recipient significant distress.

[322] Ms C was informed about these statements. She was immediately concerned about Ms H's wellbeing and the impact of her behaviour on other staff. She contacted Mr H by text outlining what had occurred. He responded saying he did not think there was any real risk of Ms H self-harming and that he would discuss the issue with Ms H's nurse later that day.

[323] However, Ms C remained of the view that she had obligations under the HSW Act, and that doing nothing was not an option. She felt that when people discuss suicide or self-harm as here, it was an indication they are unwell, and that in Ms H's case there was a mental health issue. She was also concerned about the impact on other employees, including Ms D, who in her assessment was suffering from extreme stress as a result of the ongoing interactions with Ms H.

[324] Ms C felt that Ms H was not managing her own behaviour, notwithstanding the assurance she had received from Ms H and Ms Dyne in late 2019 that she would.

[325] Accordingly, she decided that it was necessary to consider placing Ms H on compulsory paid special sick leave until the psychiatrist who was able to undertake a full assessment of Ms H's health on 25 September 2021.

[326] Before sending a letter to this effect, there was a further text exchange between Ms C and Mr H. In the early afternoon of that day, Ms C told Mr H that she needed to meet with Ms H, Mr H, and if she wished Mrs H, at 4.15 pm that day. She would be accompanied by a member of her HR team.

[327] Mr H responded saying he was not in a position to attend such a meeting and asked what its purpose would be. Ms C said she had grave concerns on which she needed to act. She wanted to communicate this, describing why she needed to do so. Her preference was to meet in a room at RST's premises which had been booked.

[328] Ms C then waited at the designated location. However, Ms H and her parents did not attend. Accordingly, she instructed RST's lawyers to send a letter confirming Ms H was to take sick leave, until the psychiatric report was available.

The concerns of the second cause of action

[329] Ms H's amended statement of claim alleges that this was an unwarranted "suspension". Mr Henderson argued this was because RST was not justified in assuming that Ms H indeed present a risk of suicide without first establishing the necessary facts according to natural justice principles.

[330] The CEA did contain a power to suspend on pay whilst an investigation was undertaken, at cl 4.5, but this power was not invoked by Ms C. Indeed, she did not use the word "suspension" at all.

[331] She considered Ms H should be on compulsory sick leave until the psychiatric assessment which was already in train was available. As well as the broad responsibilities which RST had for ensuring its employees were healthy and safe in the workplace under the CEA as noted earlier, it also had a statutory duty to do so under the HSW Act. Under the statutory powers, Ms C had the power, if not obligation, to take the step she did if the health and safety circumstances warranted this.

[332] In fact, it is not alleged in the present case there was no power to take this step. Rather, the assertion is that it was unreasonable to have done so without first establishing whether or not there was in fact a health and safety issue.

[333] In essence, a natural justice issue is raised. Ultimately, the test must be the fairness and reasonableness of the employer's conduct.

[334] Ms C went to some lengths to meet with Ms H and her parents. Mr H said he did not think there was a real risk of self-harm. In an email sent that day by RST's lawyers to Mr Henderson, it was recorded that it was understood Mr H had declined to attend the meeting on advice.

[335] Updated medical information had been awaited since 17 May 2021, but for whatever reason it had not been provided. RST had engaged a psychiatrist to carry out an assessment, which it was entitled to do. The earliest this could occur was on 25 September 2021. Ms C went to some trouble to meet with Ms H, and her parents. I am satisfied natural justice obligations were met. I conclude it was reasonably practicable for Ms C to take the step she did. It was one which a fair and reasonable employer could take.

[336] The next question is whether the length of time that Ms H was absent from work on a paid basis was justified under the statutory test. Was Ms H unjustifiably shut out from the workplace for an unreasonably long period in light of the fact that she first requested a fresh return-to-work plan on 10 November 2021?

[337] Relevant to this issue is the request for medical information which had not been satisfied for several months.

[338] I referred earlier to the steps that were taken on this topic in June 2021. This included Ms H seeing Dr Hurst to advance this request; and then on 29 June providing a written authority to the hospital involved, which was faxed to that institution. No acknowledgment was received. Later, Mr H sent a complaint to the DHB, addressed to the manager. He said no reply was received. Mr H also said that Dr Hurst was in the process of relocating her practice and this had caused delays in the obtaining of the records.

[339] The issue concerning medical records became pressing as the date of the consultation with Dr Brown approached. On 13 September 2021, Mr Henderson advised Ms Richards that Dr Hurst believed the hospital records could be provided "within the week". He then resent to Ms Richards copies of various reports that RST already possessed on 16 September 2021.

[340] An associated initiative was an apparent request from Dr Hurst to sign a new authority in her favour for the hospital records to be released. This was provided on 23 September 2021.

[341] It appears that by this time she had received them because the next day Dr Hurst sent the records that the parties had awaited since April 2021, to both Dr Brown and to Ms H. They were not forwarded at the time to Ms Richards or to Ms C.

[342] The appointment which had been fixed for 25 September 2021, however, was cancelled because agreement could not be reached between the parties as to the further background information Dr Brown would be given. In light of the cancellation, Mr Henderson requested Dr Brown to return to him the medical records which had been forwarded. He said this was necessary to ensure that there were no details in those records that would be irrelevant to the issues Dr Brown would need to consider, such as childhood illness or trauma.

[343] The Court became involved in setting up arrangements for the briefing of Dr Brown, in the hope his report would be available prior to the JSC which had been scheduled for 2 November 2021. I held telephone directions conferences with counsel on 6 and 13 October 2021. By the latter date, it was agreed that the medical records that had been obtained by Ms H would be forwarded to RST. This occurred on 16 October 2021.

[344] Regrettably, Dr Brown was not available for a rescheduled appointment until December. In fact, it did not go ahead until 14 December 2021, with the JSC taking place two days later.

[345] Returning to the issue of a RTW plan, Ms Richards stated in a letter of 24 November 2021 that it would be premature to consider this option prior to the receipt of Dr Brown's report, or the holding of the JSC. Rather, the parties needed to attend that event with an open mind, willing to explore all potential options.

[346] Although the JSC did not result in an agreement as to the way forward, the parties were considering a second JSC for early 2022. Ultimately, however, no date for this was agreed. Then, on 4 March 2022, Mr Henderson advised that after reviewing the circumstances, Ms H had been advised not to proceed to the reconvening of a second JSC.

[347] Not long after, on 22 April 2022, a comprehensive letter was written to Ms H on a range of topics. One of these concerned a possible RTW plan.

[348] It was suggested that during the intended disciplinary process, Ms H could either remain on discretionary paid special leave, or a RTW plan could be coordinated and agreed with Ms C, subject to conduct and behavioural conditions.

[349] The evidence is that because it was never agreed that the second option should be explored, the first option has continued.

[350] On the assertion, therefore, that there was a failure to engage on the possibility of Ms H returning to work from mid-November onwards, the evidence establishes that medical records took time to be obtained, and that a psychiatric assessment was undertaken that would be discussed at a JSC where it was likely RTW options would be discussed. Soon after the discontinuance of this process, RST proceeded with disciplinary action, and raised an option for returning to work.

[351] The steps taken by RST at the various stages of the chronology from mid-August onwards concerning Ms H's presence in the workplace were amongst the options that could have been taken by a fair and reasonable employer in the complicated circumstances which developed.

[352] For completeness, I do not accept the assertion made by Ms H that RST acted in a manner intended to render her incapable of working. The circumstances were, and are, complex. In my view, this allegation is unwarranted.

[353] The disadvantage grievance raised under the second cause of action is dismissed.

Third cause of action: the letter of 22 April 2022

The concerns of the third cause of action

[354] The third cause of action centres on a letter of allegations sent by RST to Ms H on 22 April 2022, as summarised earlier. It followed notification by Mr Henderson that it was not agreed that a second JSC should proceed.

[355] The first allegation, Allegation A, concerned the social media postings. The allegations were broadly similar to those which had been raised in the first letter of 14 April 2021.[36] It is unnecessary to repeat the details.

[356] Allegation B concerned alleged barging behaviour towards other staff. This centred on the incidents which had occurred involving a co-worker, on 14 and 15 June 2021. The concerns were based on an incident report provided by the co-worker who alleged Ms H had barged into her and had displayed aggressive, unnecessary, and erratic behaviour. It was acknowledged that Ms H had a different account of the situation, in that she had alleged the co-worker lunged at her and attacked her, to the point that she feared for her physical safety.

[357] Allegation C related to alleged inappropriate communications with other staff. It was asserted that a large number of messages had been exchanged between herself and Ms D via email and Microsoft Teams which were inappropriate communications in the workplace, using RST's IT system. Communications sent to other staff showed a pattern of behaviour where Ms H had referred to suicide and self-harm, which not only gave rise to serious concerns for her wellbeing and safety but also serious concerns for the wellbeing of other staff who had received such communications.

[358] It was alleged that these allegations may be considered in breach of relevant codes of conduct, the HSW Act, and the CEA.

[359] It was stated that, if any of the allegations were found to be substantiated, and there was a finding of a breach of any of them, then such behaviour may amount to misconduct or serious misconduct. The author, Ms L, would also need to consider

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[36] At [193].

whether the trust and confidence required of Ms H as an employee had been damaged or destroyed. The letter went on to summarise the intended process and work arrangements which would apply during the investigation.

[360] In summary, the main points made for Ms H were:

(a) The disciplinary policy required disciplinary matters to be raised "as soon as possible" after occurrence; the letter of allegations referred to three allegations, each of which were out of time in light of the terms of the policy.

(b) There was no justification for proceeding with any of the three allegations:

- Allegation A related to the social media posts. Dr Brown had confirmed Ms H was fit to participate in future employment investigations, but that assessment was not intended to validate an investigation of past issues.

- Allegation B related to incidents that had occurred in mid-June 2021, when Ms C had told Mr and Mrs H that RST would not be pursuing concerns about these events. RST had elected not to start a disciplinary process in a timely way whilst Ms H was still attending her place of work, and before she was excluded from the workplace. The delay caused prejudice.

- Allegation C related to alleged inappropriate communications by Ms H which included references to suicide and self-harm. This was a health and safety matter and not a disciplinary matter. Instituting a disciplinary process at the time the Court was establishing a timetable and dates for a substantive hearing created unnecessary legal complications and costs. It was unfair Ms H was forced to respond to an independent investigation at the same time as she had to prepare for proceedings in this Court.

[361] In summary, the main points made for RST in response were:

(a) Dr Brown had made it clear in his report Ms H was fit to participate in employment investigations, providing appropriate support was available. This is also what he said in effect to Mr and Mrs H at the time of the consultation with Ms H. He told them he would recommend Ms H could return to work on conditions. He also said logically if she was fit for work, it followed she was eligible for discipline, subject to her being supported during the disciplinary process.

(b) RST was entitled to proceed with an investigation of each of its concerns – indeed it was obliged to do so given its health and safety concerns in respect of Ms H and other employees.

(c) RST was not precluded from commencing the 2022 investigation because Ms H had issued proceedings against it; and doing so did not cause any disadvantage.

Dr Brown's advice

[362] Mr and Mrs H understood that Dr Brown had advised that Ms H could participate in any disciplinary proceeding which might concern future events, rather than for past events. Dr Brown recorded the issues on which he was to advise. These included Ms H's ability to work, and to participate in applicable employment-related processes.

[363] On this issue Mr Brown said in his report:

> Considering her mental health and working history and her current condition, I believe [Ms H] is fit for work in general terms. In general terms she is also able to engage professionally, constructively, and appropriately, with other personnel and customers at work. As such, it follows, with her current stable and positive mental state, and signs of ongoing progress with treatment, that at present, she has the capacity to participate in any employment-related proceedings, such as employment-investigation processes, or other disciplinary employment-related matters.

[364] When considering Ms H's likely prognosis, he said:

> I note her current stable mental state, evidence of progress with treatment, the sustained evidence of improved mood and anxiety symptoms, and the early signs of positive progress in emotional management and interpersonal skills. Considering these factors, at this stage, there is evidence of an improved prognosis for [Ms H], compared to a year ago, (or previously) around her health and her ability to sustain work in general, her ability to engage professionally, constructively, and appropriately with other personnel and customers at work. The history of recurrent episodes of major depression will mean that, additional life events or losses will always pose a risk for another manageable episode to arise in future. That said, I do not see a negative prognosis around her ability to participate in the kind of proceedings summarised in my previous answer. It is likely/possible that [Ms H] would require reasonable adjustments to support her participation in any employment/disciplinary proceedings, such as having time to manage stress and process information with her representatives.

[365] The language used by Dr Brown when giving his advice was consistent with the language of the questions he was asked to consider.

[366] Neither the questions, nor the answers, made any distinction for disciplinary purposes between events that had occurred in the past, and events that may occur in the future. It is apparent that Dr Brown considered Ms H could participate in disciplinary action concerning past events as well as future events.

[367] This understanding is confirmed by his reference to the social media posts. He had been specifically asked to comment on Ms H's assertion she had been ill when she had made the posts. His opinion on this topic was plainly relevant to the question of whether a charge might be brought in respect of this past event and as to the merits of the issue.

Allegations out of time?

[368] One of the stated principles of natural justice in the disciplinary policy was that a concern should be raised, with an employee "as soon as practicable after identifying or being made aware of an issue". Mr Henderson argued that, just as there is a 90-day limitation period for employees raising a personal grievance, the requirement in the disciplinary policy was for similar reasons, so that stale issues would not be raised. The dynamics of the employment relationship demanded, he said, a problem-solving constructive approach on a timely basis.

[369] In the assessment of time, what is "practicable" is fact-specific. There may be good and proper reasons for not raising and/or proceeding with a particular concern immediately.

[370] That is the case here. In the case of the first allegation, as soon as a potential medical issue was raised the investigation was suspended, to see whether a medical management approach should be adopted. As I have explained, it took many months to resolve that issue, which culminated with Dr Brown's advice. The parties attended a JSC very shortly thereafter, expecting it to be resumed in early 2022. It was only when this did not prove to be the case that RST formalised its disciplinary concerns and gave notification of these.

[371] With regard to the second allegation, initially emails were requested from Ms H and her colleague as to what had occurred. These provided a contemporaneous account as to the events. Then Ms C reflected on the pros and cons of proceeding at that stage or waiting until medical information was available. She decided to wait until an independent medical assessment was available, consistent with her decision as to the social media posts.

[372] Finally, with regard to the third allegation which concerned the events giving rise to Ms H's statements about suicide and self-harm, she was initially placed on leave while Dr Brown's report was awaited.

[373] Mr Henderson submitted that prejudice arose because a video recording the social media images, as given to Ms C in April 2021, was no longer available; and CCTV footage of the barging incidents in June 2021 was also unavailable to Ms H when she sought it at the time. These are points that may be considered during the investigation if raised but are not matters that the Court should evaluate at this preliminary stage.

[374] The fact that investigations of any of the three allegations were suspended for a lengthy period is understandable in the complex circumstances I have reviewed. It was "practicable" to do so.

[375] I conclude that the decision to proceed with the three allegations after it was confirmed the JSC would not resume were within the range of options which a fair and reasonable employer could take.

Did RST waive the right to proceed with any of the three allegations?

[376] Other objections have been raised in relation to RST's decision to proceed with each of the three allegations.

[377] I have already reviewed the evidence as to whether Ms C said she would withdraw the disciplinary action about the social media posts or whether she would pause that investigation. I am satisfied in light of the contemporaneous correspondence that she decided to explore whether a medical management approach should be adopted, without prejudice to the possibility of going ahead with a disciplinary investigation later if such an approach was not required.

[378] Next, I refer to the conversation held between Ms C and Mr and Mrs H by telephone on the evening of 17 June 2021. There is no doubt Ms C said she would not be going ahead with an investigation into the barging incident of which she had been given notification. As before, there was a temporary halt on the investigative process, given the uncertainties concerning Ms H's medical situation.

[379] I am satisfied Ms C did not say she would shelve any investigation about this incident permanently. Ms C's position was confirmed by a letter written by RST's lawyers the next day in which it was made clear she was "now considering the appropriate process for looking into and addressing the matters raised (and differing accounts of the same incidents) by each employee against the other". The letter explained that, in accordance with RST's policies, the normal and appropriate course of action would be to initiate an investigation, and to suspend the employee in the meantime.

[380] The employer's right to investigate this matter was not waived. I accept Ms C's evidence there were health and safety obligations which required an incident of this kind to be considered by the decision-maker who was appointed in due course, Ms L.

The formalising of a process for advancing those concerns in the form of the letter of April 2022 was one that was open to a fair and reasonable employer.

[381] Turning to the third allegation, Dr Brown had provided an assessment that Ms H was not at risk of suicide or self-harm. The author of the allegations letter, Ms L, thus decided that the communications made by Ms H on that topic should be investigated on a disciplinary basis rather than treated as a medical management issue.

[382] Mr Henderson submitted that, with regard to "the suicide talk", the question was whether RST had failed Ms H, or whether Ms H failed RST. He said this was now an open question for a judicial decision, and potentially for a private investigator appointed by RST. I do not consider it is a question for the Court since its role is limited to the question of whether it was fair and reasonable for the issue to be raised. I have concluded that it was. Accordingly, I agree with Mr Henderson that the issue he raises, and indeed any other relevant points that may be made on this matter, could be considered by the investigator and decision-maker in due course.

[383] Given that the relevant communications occurred in the workplace and that other co-workers were recipients of those communications, I also consider that a fair and reasonable employer could have decided to take this step for health and safety reasons.

The decision to proceed alongside the Court process

[384] The third cause of action was raised soon after the letter of allegations was sent. In various communications, Mr Henderson suggested that the advancing of the notified investigation was both illegal and unfair.

[385] There is no doubt that RST took a risk in proceeding with the investigation on the basis of allegations which were currently being reviewed for legality by the Court. As it turns out, I have concluded that the investigation could be brought. Had I concluded otherwise, however, the Court may well have also decided that proceeding with the disciplinary process when one or more allegations were not justified, was not the step of a fair and reasonable employer. Ms Richards submitted that, if it transpired in due course the process had led to some unjustified disadvantage, Ms H could seek

appropriate relief. In the circumstances, where RST took a risk, the prospect of yet further litigation would have been quite unsatisfactory.

[386] On the question of whether proceeding with the investigation in parallel with the Court action was unfair, it is necessary to set out the procedural steps which occurred from the date when the three allegations were raised, that is 22 April 2022. On 27 April 2022, a telephone directions conference was held. Mr Henderson referred to the possibility of seeking a stay of the contractual process. I noted this and went on to set this proceeding down for a five-day hearing, to commence on 25 July 2022. Standard pre-hearing directions were made.

[387] On 19 May 2022, terms of reference were finalised by Ms L for the independent barrister who had been tasked to carry out the disciplinary investigation. It referred to timing, stating that it was important the investigation be carried out and completed without undue delay. Accordingly, the investigation was to be commenced and completed as soon as was reasonably practicable with a view to providing a final investigation report to Ms L by 31 July 2022. This was one day after the substantive hearing was scheduled to conclude.

[388] Although there were exchanges between counsel as to whether the disciplinary process be suspended until the outcome of this case was known, agreement could not be reached. The possibility of a formal order of stay was mentioned in memoranda filed with the Court but ultimately was not pursued.

[389] At the substantive hearing, the Court was informed that Ms H had been requested to meet with the independent investigator but had been advised not to do so. This had the effect of stalling the investigation.

[390] After the hearing, I was advised the independent investigator had again requested an interview with Ms H. Following discussion with counsel, it was agreed that the disciplinary proceeding would not be advanced whilst the Court's judgment was pending.

[391] In the result, then, no formal order for stay was made prior to the substantive hearing, or indeed after it. At a practical level, the investigation was not advanced despite the timeframe which had been included in the independent investigator's terms of reference.

[392] In the absence of a formal application for stay being applied for and granted, as a matter of law it was open for RST to proceed with a fresh disciplinary process. As a matter of process, however, it was potentially unfair that Ms H, a vulnerable employee involved in significant litigation, would be required to participate in a disciplinary process which would have been comprehensive, whilst at the same time preparing for the hearing in this proceeding. Had RST required its investigator to press on under the original timetable given to her, there might well have been an issue as to whether it was acting as a good employer and/or engaging with its employee in good faith.

[393] That issue was overcome by the effect of the advice given to Ms H not to attend a meeting with the investigator. In the end, the process was not advanced alongside the present proceeding. Nor was it advanced whilst this Court's judgment was pending. The disadvantage contemplated by the third cause of action did not ultimately eventuate.

[394] Accordingly, I conclude that the disadvantage grievance is not established. The third cause of action is dismissed.

[395] However, that is not necessarily the end of the issue. It was appropriate in my view for concerns reflected in that cause of action to be raised. The implications of a disciplinary proceeding being advanced under an intended timetable that coincided with the timetable for the hearing of this proceeding were potentially significant. This may well be an issue I will need to consider further at the costs stage of this matter if the parties are unable to reach agreement on that topic.

Non-publication orders

[396] After the present proceeding was removed to this Court, I made an interim order of non-publication of the parties' names and identifying details. This was to

ensure that previous non-publication orders, such as those that were made in *FGH v RST*, would not be undermined.[37]

[397] At the substantive hearing, Mr Henderson sought a continuation of the orders made in relation to the plaintiff. He also had no objection to a cross-application which was advanced by Ms Richards for the defendant. RST sought permanent orders, both of its identity, and the persons from that organisation who gave evidence, or were referred to in evidence. Reference is also made to sensitive medical information concerning Ms D.

[398] The standard for departing from the principle that justice should be administered openly is high.[38] Specific balancing of the competing factors is required.[39]

[399] The main reason that persuades me there should now be a permanent order in respect of the names of the parties, and of persons referred to in this judgment, is the fact that there are existing orders concerning the present parties, and in some instances, those who have given evidence, such as Ms H, Mr and Mrs H, and Ms C.

[400] Having regard to the particular issues which it has been necessary to consider in this case, including the medical circumstances of Ms H, consistency is desirable. No application has been made to discharge the earlier orders; given the parties' circumstances, there is no convincing reason for doing so. The earlier orders should not be compromised by publication of names in this case.

[401] Although it is unusual to make an order in respect of an employer such as RST, it is necessary in this case. Naming the employer and/or the employees which it called would likely lead to identification of Ms H. I agree also that the open justice considerations do not require Ms D's personal information to be disclosed.

[402] Accordingly, permanent orders are made as outlined below.

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37 *FGH v RST*, above n 1.
38 *Urceg v Urceg* [2016] NZSC 135, [2017] 1 NZLR 310.
39 *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96].

Result

[403] I dismiss each of the disadvantage grievances raised for Ms H.

[404] Permanent non-publication orders are made in respect of names and identifying details of the parties, the names and identifying details of the witnesses, and the names and identifying details of all other persons referred to in the evidence. Given the sensitive medical information, which is contained on the Court's file, I also make an order that the file not be searched without leave of a Judge.

[405] I reserve costs. These are to be discussed in the first instance between the parties, taking into account the observation I have made concerning the third cause of action.

[406] My preliminary view is that costs should be considered on a 2B basis. If agreement cannot be reached, any application may be made by a memorandum by 31 January 2023, with a response being given by 21 February 2023.

B A Corkill
Judge

Judgment signed at 3.50 pm on 6 December 2022