

**ORDER PROHIBITING PUBLICATION OF THE NAME AND
IDENTIFYING PARTICULARS OF THE PLAINTIFF AND ANOTHER
PERSON AT [120] AND [130]**

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

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

**[2025] NZEmpC 114
EMPC 114/2023**

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
AND IN THE MATTER OF	applications for non-publication orders
AND IN THE MATTER OF	an application to re-open the hearing
BETWEEN	VXO Plaintiff
AND	HEALTH NEW ZEALAND – TE WHATU ORA (IN RESPECT OF THE FORMER NORTHLAND DISTRICT HEALTH BOARD) Defendant

Hearing: 7 – 10 October 2024
(Heard at Whangārei)

Appearances: VXO, plaintiff in person
D Grindle, counsel for the defendant

Judgment: 9 June 2025

JUDGMENT OF JUDGE J C HOLDEN

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This judgment resolves two challenges

[1] The plaintiff challenges a substantive and a costs determination of the Employment Relations Authority.¹

[2] He says he was:

- (a) unjustifiably disadvantaged by the Northland District Health Board (NDHB) in the course of an employment investigation and disciplinary process regarding his conduct towards a colleague; and
- (b) unjustifiably dismissed by the NDHB.

[3] He also alleges a breach of the NDHB’s obligation of good faith.

¹ *VXO v Northern District Health Board* [2023] NZERA 97 (the substantive determination); and *VXO v Northern District Health Board* [2023] NZERA 210 (the costs determination).

[4] His allegations are in respect of:

- (a) an employment investigation and disciplinary process undertaken by the NDHB in respect of allegations made against the plaintiff, commenced in late April 2020 and which was paused on 10 August 2020, after the plaintiff became unwell; and
- (b) the termination of the plaintiff's employment by the NDHB for medical incapacity on 19 May 2021.

[5] This judgment resolves both challenges.

NDHB commenced an investigation

[6] The plaintiff is an experienced, UK-qualified, medical consultant. He was initially employed by the NDHB as a senior medical officer (SMO) for a fixed term between April 2019 and April 2020. He became a permanent fulltime SMO in April 2020.²

[7] The general consensus is that the department in which the plaintiff worked has a relatively informal atmosphere, with an open culture of being supportive and collegial. This includes shared humour, including some medical "black" humour.

[8] On or about 30 April 2020, the NDHB received a complaint from a resident medical officer in the same department as the plaintiff (the RMO).

[9] The RMO did not report directly to the plaintiff, but he was her senior and, with other SMOs, had a supervisory role over resident medical officers in the department, including the RMO. This included being involved in assessing their performance and signing off on their observations.

[10] In her complaint, the RMO alleged that she had been subject to inappropriate texts, actions and comments from the plaintiff.

² Since the Authority's determinations were issued, the NDHB has been subsumed into Health New Zealand – Te Whatu Ora.

[11] As a result of receiving that complaint, the NDHB decided to commence an employment investigation and appointed a senior employee as the investigator. The investigator had no previous involvement with either the plaintiff or the RMO. An HR service partner, employed by the NDHB, was assigned to assist the investigator.

[12] The complaint from the RMO covered:

- (a) a text message conversation between the RMO and the plaintiff on 27 and 28 November 2019;
- (b) a conversation between the plaintiff and the RMO in a clinic room two days later; and
- (c) other comments from the plaintiff to the RMO that she said had caused her to feel uncomfortable.

[13] The RMO acknowledged that the complaint came sometime after the initial incidents but said that she had been endeavouring to put the situation out of her mind and avoid contact with the plaintiff. She said she had decided to share her experiences as she was then on a ward week with the plaintiff, during which she was unable to avoid working closely with him. She said that, in the time leading up to the ward week, she had become increasingly anxious and worried about having to work with the plaintiff, which had affected her sleep and taken away her usual enjoyment of work. She also said that she was particularly worried that she may be unwilling or unable to seek his help in a clinical situation due to her apprehension about interacting with him.

[14] Her complaint concluded that she hoped the inappropriate behaviour from the plaintiff towards her would stop and, ideally, that she would not have to work directly with him again. She also said that she hoped this would not happen to others in the future.

[15] The investigator interviewed the RMO about her complaint on 5 May 2020. The RMO was accompanied by a colleague in her department, who was there as a support person.

[16] On 13 May 2020, Jeanette Wedding, a general manager at the NDHB, met with the plaintiff and advised him that a written complaint had been received from the RMO. That day, the plaintiff was provided with a letter advising him of the process that the NDHB intended to follow, a copy of the complaint with a transcript of the text messages obtained from the RMO's mobile phone, and notes from the interview with the RMO. Mrs Wedding's letter proposed that the investigator meet with the plaintiff on 18 May 2020 and said that the plaintiff was welcome and strongly encouraged to have a support person and/or representative present at the meeting with him.

[17] In the letter, Mrs Wedding said that she was offering the plaintiff a period of special paid leave commencing that day to last until the investigation process was completed. This was said to be to enable the plaintiff to prepare for the meeting and to have sufficient time to seek advice and support. He also was strongly encouraged to access the NDHB's Employee Assistance Programme (EAP), which would be in a position to provide him with confidential counselling.

[18] The plaintiff discussed the matter with his collegial supervisor, who was a clinical director. The plaintiff said that he and the clinical director had a good professional relationship marked by a history of constructive interactions, with regular communication, collaborative decision-making, and shared patient care and departmental commitments. They also shared a UK background and sense of humour.

[19] The clinical director suggested that the plaintiff raise his concerns with the Association of Salaried Medical Specialists (ASMS) who had helped the clinical director with issues in the past. The plaintiff advised the clinical director that he was not a member of the ASMS. The clinical director said he would liaise with the ASMS and endeavour to arrange for the plaintiff to use their services. The clinical director suggested that Miriam Long at the ASMS would be a good person to assist the plaintiff.

[20] Thereafter, the ASMS accepted a backdated membership for the plaintiff, and he was able to arrange for Ms Long to represent him.

The plaintiff met with the investigator

[21] The plaintiff met with the investigator on 29 May 2020. The plaintiff was accompanied by Ms Long and the investigator was accompanied by the HR service partner. The HR service partner took notes of the meeting, and, after the meeting, she sent a copy of those notes to Ms Long for her and the plaintiff to review and annotate. Ms Long returned a revised version of the notes as accepted by the plaintiff, who had signed all pages, confirming their accuracy.

[22] The annotated notes confirm that the plaintiff accepted that, at the meeting, he described the working relationship within the department he and the RMO worked in, as “really positive and a great place to work.” He said that he and the RMO worked together on the ward, and occasionally in the clinic, and that the interactions between them had been relaxed, informal, and professional. He said there had been some joking and light banter between them, which seemed fine to him at the time.

[23] The plaintiff acknowledged that he and the RMO had the text conversation included in the complaint. He said that, due to data issues, he deleted most of his text messages but that he would check to see whether that conversation was still on his phone, in which case he was happy for the investigator to see it.³

[24] When asked about the context around the messaging, the plaintiff noted that he was sleep-deprived at the time of the conversation, there were things that needed to be done on the ward, and he and the RMO started texting. He then says:

I can see that there was a mixing between social and professional interactions. At sometime, the boundary became blurred and as we sent responses and read the replies, the repartee became more risqué. I said something close to cheeky and got a cheeky response back. It was quite entertaining. At the time, I thought that this was something perhaps flirty, that you would say in social interactions.

³ It seems nothing came of the plaintiff’s offer to check his phone, or to provide it to the investigator.

[25] He then acknowledged that, with retrospect, he did not always have insight into the young doctor/senior doctor relationship and that this insight was not there in his responses to the RMO. He says he realised quite quickly from the RMO's body language the next time he saw her that this type of interaction was no longer wanted. He said, however, that their interactions continued to be quite relaxed and pleasant but without the tone of the texts. He put the banter down in part to his UK background but acknowledged that he had to get better at recognising when it was unwanted, when people might become insulted, and also when the seniority gap prevents retort.

[26] He said he was embarrassed, and that in retrospect, the conversation went too far. He said, however, that he did not usually interact in such a way and had not before or since that conversation. He said: "I may not have stopped all the banter, but now do this in an appropriate way." He acknowledged that he had misinterpreted and overstepped boundaries with the RMO and that the text conversation was inappropriate and unprofessional.

[27] The incident in the clinic room two days later had been described by the RMO in her written complaint of 30 April 2020 as her sitting at a desk, alone in the clinic room and the plaintiff entering the room, and sitting on top of the desk in front of her "with his legs spread wide" and then saying: "You're more fun to text than you are in real life."

[28] When the RMO was interviewed by the investigator on 5 May 2020, however, her description no longer referred to the plaintiff having his legs spread wide. Rather, she said that the plaintiff came into the clinic room and sat on top of the desk next to her with his coffee, before making the comment about her being more fun to text. She said there was no "pre-conversation."

[29] At the meeting on 29 May, the plaintiff accepted that the interaction occurred and described it in a similar way:

The room had a large desk in it with chairs at the back. She was sitting at the corner with the keyboard facing the computer. I sat on the desk to one side of her, or else I would have been sitting behind her. I don't think that I invaded her personal space.

[30] He acknowledged saying to the RMO that she was more fun to text than she was in real life.

[31] He says he had noticed that her body language was different, and the comment was to signal to her that he then realised and understood that the sort of interaction of the text conversation was unwanted. He acknowledged that, at the time, he did not have the insight that this comment would have left a young woman feeling uncertain and that, although it was his way of underlining the point, in retrospect it was “not a very nice way of doing it.” He said he had not meant to insult her and that he does have a direct way of saying things sometimes. The plaintiff went on to acknowledge that this was an inappropriate way of ending that interaction for her, that it was intended to be harmless humour, but that in retrospect, he could now see the different levels of seniority and life experience.

[32] Three further specific incidents were discussed at the meeting. The first of these was an occasion after the RMO had lunch with her father in the hospital café, and then hugged him goodbye. The RMO told the investigator that when she saw the plaintiff afterwards, he said to her: “Who was that you were hugging and kissing downstairs? If I had known that was your preferred age I would have behaved differently.”

[33] At the meeting, the plaintiff recalled the interaction. His recollection was that he said something along the lines of: “Who is that you’re hugging and kissing, is that your latest conquest?” On being advised by her that the man was her father, the plaintiff said that he “realised that he had made a social faux pas” and that the RMO looked a little put out. He says he apologised for his “silly mistake”, but she had walked away to do something else. He says he made the mistake of thinking that the issue was resolved.

[34] The second incident was one where the RMO recalled being in the handover room with the plaintiff and, as she was gathering her things to go home, he said something like: “If you look at me with that cheeky smile, you could get whatever you want.” At the meeting with the investigator, the plaintiff said he did not think he would have used the term “cheeky” but that he would have said something along those lines,

as it is the sort of phrase he sometimes uses when somebody, including other colleagues, asks him for a favour. He said that he regarded it as a “gentlemanly phrase” but that he now realised it was outdated and sexist. In evidence, the plaintiff said his intent was to be humorous.

[35] The third incident was when the RMO had her wedding cancelled due to COVID restrictions. The RMO recalled a comment from the plaintiff about her having been lucky and “dodged a bullet”. At the meeting with the investigator, the plaintiff agreed that he said something about getting married not being a good idea, and that the RMO had “dodged a bullet”. He said that his comments were spoken as “a sardonic male”; that he thought people would have understood they were intended to be humorous – a fairly standard trope for men to joke about. He said that he was sorry the RMO was embarrassed and insulted by his comments and acknowledged that they were not very empathetic.

[36] When the investigator asked whether he had anything he wished to add about the complaint and his interactions with the RMO, the plaintiff said that the complaint had come as a complete surprise as he thought of himself as someone supportive of the junior doctors. He continued:

However, in retrospect that text conversation in November and my subsequent comments have had a cumulative effect. I need to do more work in understanding the senior/junior relationship. This has given me some insight and I have never looked at things from a female perspective of a young female going through training.

[37] He said he had discussed the matter with his wife, who had given him some understanding and that he was trying to learn things from the perspective of a younger person who had not had “the same life experiences and developed a thick skin over time”. He said that he needed to be more aware of his own body language and that banter can be insulting. He said that if he could retract what had happened he would; that all he could do was apologise and try and do something to repair the relationship. Ms Long said that the plaintiff wished to apologise to the RMO and wanted to see the focus shift to a restorative process.

[38] The plaintiff then referred to courses on communications and staff interaction and harassment., He said that he was open to completing a formal programme as he had not done anything for a number of years. He hoped that, with the NDHB understanding his thinking, they could come to a resolution. He said he wanted to get back to a normal way of working; that he acknowledged that it had been a horrible experience for the RMO, that he had a lot of learning to do, and wanted to develop more understanding from this situation.

The investigator concluded her investigation

[39] The investigator then concluded her investigation report and sent it to Mrs Wedding, the plaintiff and the RMO on 25 June 2020.

[40] The investigator found that the interactions between the plaintiff and the RMO, as acknowledged by the plaintiff, were inappropriate and unprofessional, and that the plaintiff breached several aspects of the NDHB's Code of Conduct. She said his interactions with the RMO were not in keeping with the requirement to respect other persons as staff engaged in work-related matters can expect. The investigator said that the undertones and crossing of boundaries inhibited the ability to achieve high quality work, performed safely; and that proper standards of integrity had not been maintained as the plaintiff's conduct became of an intrusive and personal nature, causing offense. The investigator found that the interactions could bring the NDHB into disrepute; there was potential risk to patients' safety as the RMO was hesitant in approaching the plaintiff.

[41] Specifically, the investigator found that the text messaging, the comments relating to the RMO's father, and the comment of a "cheeky smile" (or similar), whilst not sexually explicit, were suggestive of a sexual undertone when taking into account the wider context of the interactions. She found that, in sitting on the desk next to the RMO, the plaintiff encroached on the RMO's personal space. Taking into account the context and the texting incident, the investigator considered that displayed a lack of sensitivity and no recognition or understanding that such interactions were unwelcome. She also noted that the comments made by the plaintiff in relation to the RMO's "conquests", particularly as they were age-related, could be defined as

intrusive questions about a worker's sex life, as defined in WorkSafe New Zealand's Guide on Sexual Harassment. She said that the comments made regarding the RMO's upcoming marriage were insensitive and intrusive.

[42] The investigator was of the view that the behaviours detailed in the statements of both the plaintiff and the RMO had a serious harmful effect on the RMO and impacted on her training, resulting in a potential risk to patient safety.

[43] The investigator also found that the plaintiff had failed to demonstrate the insight that he claimed to have developed as a result of the process. His reference to comments being "a social faux pas" and a "silly mistake" were examples of this, as were his failure to pick up on the concerns the RMO had regarding the invasion of her personal space, his view that he was being "gentlemanly" in his comment about the RMO being able to get whatever she wanted, and effectively blaming the RMO when he said that he was trying to learn things from the perspective of a younger person who had not had "the same life experiences or developed a thick skin."

[44] While the investigator was confident that the plaintiff had made a conscious effort to educate himself on the matters of concern over recent weeks, she considered that there continued to be a significant lack of insight. She concluded that her recommendation was that the complaint be upheld and that the matter was significant enough to warrant disciplinary action.

A disciplinary process was commenced

[45] On 29 June 2020, having considered the investigation report, Mrs Wedding wrote to the plaintiff to say that she would like to meet with him to discuss the concerns that were highlighted in the report so that she could hear from him directly. The specific concerns raised by Mrs Wedding were that:

- (a) potentially, his behaviours and the resulting impact on the RMO met the definition threshold for sexual harassment in accordance with

WorkSafe New Zealand's guidance, being guidance that is in line with the Human Rights Act 1993.⁴

- (b) The plaintiff's behaviours and actions did not meet the standards or the expectations of the NDHB in terms of its values. Specifically, that:
 - (i) he had not treated the RMO in a respectful manner;
 - (ii) he had not communicated appropriately or in a safe manner;
 - (iii) he had not treated the RMO with care;
 - (iv) excellence could not occur on the basis of the relationship;
 - (v) he was unable to inspire confidence.
- (c) The plaintiff acknowledged inappropriate and unprofessional behaviour and the investigator's view was that the behaviour was offensive and unacceptable.
- (d) The findings in the investigation report indicated that there may have been breaches of the NDHB Code of Conduct.

[46] The plaintiff was invited to meet with Mrs Wedding on 3 July 2020. He was again encouraged to have a support person and/or representative present at the meeting.

[47] Mrs Wedding advised that the plaintiff would be given every opportunity to discuss the findings and to provide his views and responses at the meeting. She undertook that his views and responses would be given full consideration before any final decision on the matter was reached.

⁴ The letter refers to S63.1 and S63.2; I assume it was intending to refer to ss 62(1) and 62(2).

[48] Mrs Wedding also advised the plaintiff that the NDHB may be obliged to inform the Medical Council of New Zealand of the outcome of the meeting.

[49] The plaintiff was offered continuing special paid leave until such a time as an outcome to the process could be provided and was again encouraged to access EAP services.

[50] The plaintiff had by then instructed counsel who wrote to the investigator and Mrs Wedding the next day, raising issues with the process to date.

[51] There followed a meeting on 17 July 2020, attended by the plaintiff, his wife, his legal representative, Mrs Wedding, and David Grindle, the NDHB's legal representative.

[52] The plaintiff's legal representative confirmed that the plaintiff agreed that there was inappropriate conduct, but denied any deliberate harassment and bullying behaviour, or being aware of any discomfort on the part of the RMO at the relevant points in time. The legal representative also raised concerns over the way the investigation had been conducted, suggesting that there had been a clear bias.

[53] The plaintiff raised a personal grievance for unjustifiable disadvantage through his counsel by letter dated 4 August 2020.

[54] In that letter, the plaintiff's counsel again raised issues with the investigation process, alleging a lack of good faith, bias, and a lack of objectivity.

[55] Mr Grindle responded by letter dated 7 August 2020. He acknowledged the personal grievance but said it was not appropriate to conflate the grievance with the NDHB's employment investigation.

[56] He confirmed that the NDHB proposed that there be another meeting and asked whether the plaintiff would attend, or whether he would prefer to make further submissions in writing or, alternatively, rely on the letter of 4 August 2020.

[57] Mr Grindle included a signed letter from the NDHB also dated 7 August 2020, that proposed the finding of serious misconduct and a sanction of summary dismissal.

The disciplinary process was paused

[58] On 9 August 2020, the plaintiff was admitted to hospital as a result of a serious health matter. His counsel subsequently advised the NDHB that the plaintiff could not be put under any stress whatsoever. The first medical certificate provided to the NDHB advised that the plaintiff was unfit to resume work until 17 October 2020.

[59] Mr Grindle, for the NDHB, invited the plaintiff to either attend a preliminary review meeting in person or via Zoom, or to provide his views in writing. He advised that if the plaintiff wanted to meet in person but did not feel well enough to do so until after his return to work on 17 October 2020, the NDHB would adjourn matters until that time.

[60] In the event, the disciplinary process was paused, and the plaintiff remained on paid sick leave until his employment ended over nine months later.

The plaintiff's employment was terminated for ill health

[61] By letter dated 23 February 2021, being six months after he commenced sick leave, the NDHB sought to advance a review pursuant to cl 27 of the applicable collective agreement.

[62] Clause 27 of the collective agreement provided that, where a period of leave on account of illness exceeds three months, the NDHB was entitled to seek a review of the employee's condition and likely fitness to return to work. The review would be done by a representative of the employer, a representative of the employee, and a mutually agreed medical practitioner, or such other group as agreed on by the employer and employee. Once advice was received, the NDHB, after consulting the employee and taking into account any other relevant information, would decide whether to extend the period of sick leave (with or without pay) or terminate the employee's employment. Termination in these circumstances was to be on notice.

[63] Consistent with the process in the collective agreement, medical reports were obtained. They did not provide clarity as to the likely return to work date for the plaintiff but indicated it would not be before 13 June 2021. Further, the advice was that a return to work was, in all likelihood, not possible while the employment investigation remained unresolved.

[64] By letter dated 7 May 2021, Mr Grindle advised that the NDHB proposed terminating the plaintiff's employment from 14 May 2021. As a result of ongoing discussions, the termination date was enlarged until Wednesday 19 May 2021. On that date the NDHB confirmed that, with the plaintiff having been absent from work due to illness for more than nine months, with no clear date upon which he was likely to be able to return, the NDHB was terminating the plaintiff's employment from 5pm that day with payment of three months' wages in lieu of notice.

The plaintiff proceeded to the Authority

[65] The plaintiff changed solicitors at some point after the termination of his employment and his new representative lodged a personal grievance on his behalf covering unjustifiable disadvantage and unjustifiable dismissal. He also claimed a breach of good faith and a breach of the collective agreement.

[66] The matter proceeded to the Employment Relations Authority, and the Authority concluded that the plaintiff was not unjustifiably disadvantaged by the NDHB, it did not breach the duty of good faith owed to the plaintiff and did not breach cl 27 of the collective agreement.⁵

[67] The Authority subsequently ordered the plaintiff to pay the NDHB the sum of \$18,000 as costs.⁶

The plaintiff has challenged the Authority's determinations

[68] By the time the plaintiff filed his challenges in the Employment Court, he was acting for himself (with a support person in Court). That brought with it some

⁵ The substantive determination, above n 1, at [188], [190] and [191].

⁶ The costs determination, above n 1, at [33].

challenges for the Court and for the NDHB. No doubt it also was difficult for the plaintiff.

[69] After the hearing had concluded, the plaintiff filed further documents with the Court. This led to a directions conference on 13 May 2025 and to the Court accepting further submissions from the plaintiff that were included in his memorandum dated 6 May 2025. This was an indulgence. Naturally, the NDHB had to be given the opportunity to file further submissions in reply, which it did on 29 May 2025. Both the plaintiff's memorandum and the NDHB's reply have been considered by the Court.

[70] In summary, the issues that were of particular concern to the plaintiff were:

- (a) the order, gaps between, and reciprocal nature of the text messages sent on 27 and 28 November 2019, which he says were not taken into account by the investigator;
- (b) if there had been the alleged invasion of personal space in the meeting in the clinic room two days later, that would have been noticed by another doctor who was in the vicinity;
- (c) the investigator had not taken into account that the RMO may have been reacting to criticism of her by the plaintiff over an earlier incident where she did not take a call;
- (d) the investigator should have taken into account that the RMO may have been influenced by the reactions from her boyfriend and from her family;
- (e) his other comments were not sexual and not intended to upset the RMO;
- (f) the investigation was not independent of the NDHB which, he says, was particularly important given that the RMO had familial connections with others in the NDHB and at the ASMS;

- (g) he was treated unfairly throughout the investigation, particularly in the initial meeting, by the lack of support provided throughout the process, and by the investigator “stonewalling” him after sending him the investigation report;
- (h) a conciliatory and restorative approach should have been taken by the NDHB; and
- (i) there was no proportionality over the proposed outcome of the investigation.

[71] The plaintiff also objected to his placement on “special leave”.

[72] The dismissal for ill-health was not the focus of the hearing before the Court, but I infer the plaintiff considers it to be unjustifiable as he considers that the NDHB did not sufficiently take into account the investigation and unfinished disciplinary process, and his personal grievances in respect to them.

The plaintiff is concerned about the RMO’s missing phone

[73] The telephone operated by the RMO was an older-style Android telephone, so text messages were not recorded in sequence between the parties to the messaging; rather, they seem to be recorded in separate files, with unreliable timestamps due to the capabilities of the phone used.

[74] The plaintiff sought recovery of the phone itself so that it could be checked by technical experts, but the NDHB advised that the phone was unavailable. The plaintiff accepted at a directions conference that he would pursue what he saw as gaps in the evidence at the hearing, rather than as a pre-hearing issue. However, it was apparent from his later memorandum of 6 May 2025, and his comments at the telephone directions conference on 13 May 2025, that he still continues to be dissatisfied over the missing phone.

The plaintiff accepted he sent the text messages in issue

[75] Despite the plaintiff's focus on the physical phone, it simply does not have the importance that he attributes to it. In particular, he accepted that the text messages were themselves accurate. Further, the list of the texts in chronological order prepared by the NDHB corresponded with the list that was prepared by an investigator engaged by the plaintiff to assist him with his challenge, and who gave evidence in the hearing. That list is as follows:

Recorded time	Party	27/11/2019
10:19	RMO	No AAU on Monday. She could get the bloods done at the lab? If you leave a form for the bloods you want at the hospital on level 1 she could come in any time to do them. If she doesn't need coags again they could all be heel prick.
09:24	VXO	Okay, thanks [RMO]. Did you confirm that the vit ADE levels are being processed?
10:23	RMO	No but the lab hasn't said otherwise...
09:28	VXO	Okay, if that's been sorted a skin/heel prick for LFTs FBC and CRP should be fine. I'll see if [named nurse] will be able to arrange it next Monday.
10:26	RMO	Sounds good.
09:32	VXO	If you happy with that now you can stop being mean to me.
10:30	RMO	Never! Too much fun and works both ways...
09:36	VXO	,'(
10:36	RMO	All good natured :-)
09:41	VXO	What if I want to be bad, natured?
10:39	RMO	Haha try it and see what happens
09:43	VXO	if you insist, how can I resist?
10:43	RMO	Haha but I won't be held responsible for anything!
09:49	VXO	Yes, I know you are all innocent and sweet
10:51	RMO	In that case you don't know me very well at all :P
09:58	VXO	...interesting...
10:12	VXO	So, where are you when I need you?
11:11	RMO	Currently hiding in the handover room doing paperwork as there is still no power in CHC!
10:18	VXO	There's no power in the whole of Whangarei. It's the Apocalypse Now. What do you want to do in your last few hours? Catch up on your letters?
11:25	RMO	Not my idea of a good time, but I have a feeling clinic letter will continue to pile up even after the apocalypse! They are a law unto themselves
10:45	VXO	Don't mention work. Don't you know I'm ill?
11:44	RMO	Bet it's Man Flu
10:49	VXO	I'm seriously sick and going to bed. I need someone to look after me.

11:50	RMO	In that case I might give you some sympathy, but you'll have to look after yourself.
10:59	VXO	Lol
13:01	VXO	Re. [named patient], spoke to [named doctor], haematology at SSH: he also recommended another month of anticoagulation for [named patient] despite the DVT USS showing probably resolution, can you ensure that scan is added to the next Tuesday am radiology meeting?
15:19	RMO	So you're still alive and power back on! The world didn't end after all :-)
14:30	VXO	Thanks, at least you're good for one thing (<i>emoji not able to be seen</i>)
15:32	RMO	That's the last thing I'll do for you then!!
14:36	VXO	Okay, [name]'s my fall back
15:35	RMO	He'll probably talk back less too!
14:43	VXO	He's a Saint, not a sinner
15:57	RMO	He might be, but I know which one is more fun!
15:03	VXO	Just add alcohol (<i>emoji not able to be seen</i>)
16:01	RMO	Haha exactly!
15:04	VXO	Are you texting during handover, you naughty thing?
17:00	RMO	Hadn't started, but I do like to break the rules!
16:50	VXO	As your priest, I will take your confession.
16:51	VXO	If I knew where you were, I'd take it right now
20:00	RMO	Too busy in ED to worry about confessing my sins!
20:41	VXO	Hail Mary x4

Recorded time	Party	28/11/2019
15:33	VXO	Was that you (<i>received at approximately 4:30 pm, during handover</i>)
17:31	RMO	Was what me?
16:50	VXO	just thought I saw you (Must have been a figment of my nightmare).
17:54	RMO	Well I'm at work, so depends where you are!
17:52	VXO	Visiting Mrs McMorrisey ⁷

[76] The plaintiff says the RMO started the conversation and was reciprocal in her responses, and that should have been taken into account. As can be seen from the chronological list, although the RMO sent the first text in the conversation, the first few texts were appropriate, work-related messages. It is the text the plaintiff sent that read "If you happy with that now you can stop being mean to me" that started the unprofessional messaging. While the conversation was two-way, I consider that it was

⁷ McMorrisey's is a local Pub.

open to the investigator to reach the view that it was inappropriate for a senior doctor to induce and continue a conversation of this sort with a junior doctor who they worked with. Further, the investigator's conclusions turned on the cumulative effects of the plaintiff's behaviour across each of the incidents complained of.

[77] The plaintiff also says that the "quick fire" nature of the conversation was not reflected in the times that were recorded (and which everyone accepts are inaccurate).⁸ He says this was a significant point not recognised by the investigator. The plaintiff did not make that point to the investigator at the time, but, in any event, it was open to the investigator to reach conclusions on the conversation based on its contents and its nature as reported by both the RMO and the plaintiff.

[78] In summary, therefore, with the content of the text messaging being accepted by the plaintiff, and the order of the texts also being accepted as accurate, I make no criticism of the investigation on this point.

The plaintiff accepted the essence of the clinic room encounter

[79] One point made by the plaintiff about the clinic room encounter was that the RMO's description of the incident changed between her written complaint and her interview with the investigator. In particular, the plaintiff pointed to the initial description of the plaintiff being in front of the RMO with his legs "spread wide".

[80] However, the investigator, and then Mrs Wedding, both operated on the basis of the description the RMO gave at the interview, which corresponded with the way the plaintiff described the interaction in his interview. Accordingly, he was not disadvantaged by the RMO's original description. Further, the plaintiff has suggested that the RMO's change in description impacts her credibility. Credibility, however, was not in issue given the plaintiff essentially agreed with the description of the interaction given by the RMO at her interview.

⁸ The speed of the conversation, however, can be inferred from the timestamps on each party's own messages.

[81] The other complaint made by the plaintiff about the way this incident was dealt with was that the investigator should have spoken to other potential witnesses to their conversation. He referred in particular to another doctor who was in the vicinity of the clinic room at the time of the interaction.

[82] That doctor was called by the plaintiff to give evidence. He confirmed to the Court that he did not hear or observe anything unusual or inappropriate happening. He said that, from his office, however, he had a partially obstructed view of the clinic room and was not able to see the area where the desk was located and would not necessarily hear what was being said, especially as the area is often noisy.

[83] He said that he approached the RMO to check in with her after he became aware that something may have happened to her. In the course of that conversation, the RMO said that something had happened and that he may have been nearby or in proximity. He told her he did not know what she was referring to. On that basis, there was no reason for the RMO to suggest the investigator interview him; he would not have been of any assistance to the investigator.

[84] In any event, given that there was no real dispute between the RMO and the plaintiff as to what occurred, it was unnecessary for the investigator to go further and interview other potential witnesses. The investigator was entitled to operate on the basis of those largely corresponding descriptions, and the plaintiff's acceptance of his behaviour.

The other three incidents are substantively accepted by the plaintiff

[85] The plaintiff accepted the three further incidents occurred, basically as described by the RMO. He does not accept the characterisation and importance attached to them by the RMO or the NDHB, seeing them as misjudged and intended to be humorous.

[86] The plaintiff says that the acceptance of the incidents was not on his own accord but on the strong advice of Ms Long, the ASMS representative, and that she was appointed by the NDHB rather than by him autonomously. In making that point the plaintiff refers to the clinical director's help in securing Ms Long's assistance.

Regardless of who pursued the representative in the first instance, it is not accurate to say that she was appointed to assist the plaintiff by the NDHB. Ultimately, the plaintiff chose to take assistance from Ms Long and chose the way in which he expressed his experience and views.

The RMO's motivation was not in issue

[87] In Court, the plaintiff suggested that the RMO was motivated by revenge when she made her complaint because he had previously criticised her. This does not appear to have been raised in the context of the investigation and there is no further evidence that this is the case.

[88] In any event, again the difficulty for the plaintiff is that, regardless of the RMO's motivation for making the complaint, he accepted the actions complained of, and it was his acceptance of those actions that allowed the investigator to move quickly to complete her investigation.

No basis for suggesting the RMO was improperly influenced by others

[89] There is no dispute that the RMO discussed the matter with her partner and with others who, it seems, encouraged her to proceed with her complaint. That in itself is not an issue; of course, people can get support and advice from people they trust. There is no suggestion that any of the people that the RMO consulted suggested that she put in a false complaint and, again, the principal difficulty for the plaintiff is that the actions the RMO complained of were not disputed by him.

[90] The plaintiff also takes issue with the RMO having another doctor in the department as a support person. I do not accept his criticism. Having a colleague as a support person is unremarkable. That doctor had no role in any decision-making; there is no record of her saying anything of substance in the interview between the investigator and the RMO; and there is no evidence that she attempted to influence the investigation or the disciplinary process.

The investigator noted the plaintiff's subsequent conduct

[91] The investigator noted the comments made by the plaintiff in respect of making a conscious effort to understand and educate himself on the relevant matters and wishing to be conciliatory. She also noted other contrasting comments by him that gave her concern as they appeared to demonstrate a continuing and significant lack of insight into the cause and nature of the RMO's aggrievement.

The plaintiff's comments were fairly characterised

[92] Having reviewed the notes signed by the plaintiff and the comments recorded by the investigator, I find there was no unfairness in the way his comments were characterised. I note, because it was a point of particular concern to the plaintiff, that it was appropriate that the investigator referred to relevant definitions from external sources as objective points of reference to assess the plaintiff's behaviour.⁹ There was no obligation on the investigator or NDHB to make particular or exclusive reference to the Employment Relations Act 2000 in making that assessment. There was also substantial reference to the NDHB's own policy, which prevailed in Mrs Wedding's letter delivering the preliminary decision.

[93] There is another issue raised by the plaintiff, which I address. The investigator noted that he sat on a desk, which she said demonstrated a lack of cultural sensitivity in Tikanga Māori, and which, she said, was widely-spoken about in DHB environments, as being a practice actively discouraged. I agree that the note, which appears in parentheses but as an "important note for the record", seems gratuitous and was irrelevant to the matters the investigator was considering. It does not, however, form part of her, or Mrs Wedding's, conclusions on the plaintiff's conduct. While the plaintiff may feel aggrieved at the inclusion of the comment, it does not carry the importance that he places on it.

⁹ "Sexual harassment" in the Human Rights Act 1993 and from WorkSafe New Zealand; "unprofessional behaviour" from the Medical Council of New Zealand; and "workplace bullying and harassment" from the New Zealand Medical Association.

The investigation was sufficiently independent

[94] The plaintiff suggests that the investigation was not sufficiently independent. In part he refers to the fact that the RMO had relatives who were involved in the health sector and with the ASMS. However, he draws no clear connection between the RMO's relatives and the matters being investigated, and there is no suggestion in any of the evidence that anyone connected to the RMO influenced the investigator or Mrs Wedding.

[95] There is no rule that requires an employer to engage an external investigator, even though it is accepted that employers are usually not in a position of complete neutrality.¹⁰ There is nothing here that demonstrates that the actions of the investigator or of Mrs Wedding were compromised. The investigator was deliberately selected as somebody who did not have involvement with either the RMO or the plaintiff. Although the plaintiff is strongly critical of the investigator and her report, I do not accept the plaintiff's criticisms.

The claim of unfair treatment and “stonewalling” is not made out

[96] The plaintiff says the initial meeting regarding the complaint was an “ambush”. I accept that initial meeting was primarily to inform the plaintiff that a complaint had been made against him and provide him with the substance of that complaint, and to advise the process that would be followed, so that he could properly prepare himself. He was not expected to provide any sort of response at that time. Accordingly, I do not consider that the plaintiff was disadvantaged by the way that initial meeting was carried out, other than in regard to the special leave, which I address below.

[97] The plaintiff also says that during that meeting he was instructed not to communicate with anybody from his department and that there was a continued lack of support provided to him throughout the process. I consider that the plaintiff was reasonably supported throughout the process by the prompt and clear communication from the NDHB, and the continued availability of EAP services, which he was reminded of. It is also reasonable that an employer wishes to limit the discussion of a

¹⁰ *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36 at [48].

complaint within the workplace while an investigation is carried out. There is nothing to suggest that, if the plaintiff had wished to seek the support of a particular colleague throughout this time, as did the RMO, that would have been an issue. As noted, the plaintiff did initially obtain support from his collegial supervisor.

[98] The allegation of the investigator stonewalling is also not made out. Once the investigator had completed the report, her involvement with this matter was at an end.

The approach of the NDHB was open to it

[99] I have already outlined the investigator's description of the plaintiff's subsequent conduct. It appears clear from the transcript that, at that stage, the plaintiff, guided by the ASMS, was looking to a restorative approach that would have enabled him to continue in his role. At least at the point that the disciplinary process was paused, the NDHB had not accepted that approach. Whether that was reasonable would have been an issue for the Court, had the plaintiff been dismissed by the NDHB as a result of the disciplinary process, but at the point that the disciplinary process was paused, dismissal remained a proposal and open to submission.

[100] Further, given that the plaintiff was not dismissed for serious misconduct as proposed, the evidence did not, and could not, address fully the reasoning that would have been required for that decision.

Proportionality would have been an issue had the plaintiff been dismissed for serious misconduct

[101] The issue of proportionality falls into a similar category. Whether summary dismissal was a proportionate reaction to the found misconduct would have been an issue for the Court had the plaintiff been dismissed on that basis.

[102] Although it is fair to say that things were not looking good for the plaintiff at the time that he went on sick leave, the point is that the disciplinary process had not concluded and no decision to dismiss him had been made. The Court cannot determine whether a hypothetical dismissal for serious misconduct would have been justifiable.

Special leave should have been discussed

[103] The NDHB's disciplinary policy provided that consideration may be given to placing an employee on special paid leave (where there are genuine concerns for the employee's health and/or welfare) while an investigation for alleged misconduct is being investigated. That policy continues:

This will occur only after a formal documented meeting has been held with the employee to consider whether special paid leave is appropriate and to consider any views that the employee may have regarding a proposal to place them on special paid leave.

[104] In the circumstances, I accept that there was no real opportunity for the plaintiff to consider and respond to the proposal he go on special paid leave. The placement of the plaintiff on special paid leave was raised in the plaintiff's personal grievance letter of 4 August 2020, but it is unclear what remedies were sought at that time. The plaintiff raises the issue in his statement of claim and seeks compensation for humiliation, loss of dignity, and injury to his feelings, covering all matters raised.

[105] I agree with the Authority that the plaintiff should have been provided with an opportunity to comment on the proposal that he take special leave in accordance with the NDHB policy and that the fact he was not asked for his views before that took effect was a flaw in the procedure.¹¹

[106] That is not the end of the consideration, however. Pursuant to s 103A (5) of the Act, the Court must not determine an action to be 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. Here, I take the point made by the Authority that the plaintiff did not object to being placed on special leave at the time, or after he had instructed the ASMS to represent him. Further, although the NDHB should have consulted him before making the decision, it is not clear that he was disadvantaged by them not doing so. Following its policy, the NDHB could and, given the nature of the complaint and the working environment, likely would have reached the same conclusion even having consulted with the plaintiff. In the circumstances, I do not consider that the flaw in the process leads to a finding that the plaintiff was

¹¹ The substantive determination, above n 1, at [159].

unjustifiably disadvantaged by the NDHB, certainly not to the extent that compensation would be payable.

The dismissal for ill health was open to the NDHB at the time

[107] Clause 27 of the applicable collective agreement provides a process where an employee is on sick leave for a period that exceeds three months. The procedure set out in the collective agreement was followed here, well after the three-month period had elapsed.

[108] The medical advice provided to the NDHB made it clear that the plaintiff was not able to return to work at that stage. Further, it advised that he would likely not be able to return to work while the disciplinary process was continuing. That placed the NDHB in an impossible situation. It would have been unreasonable for the NDHB to have abandoned the disciplinary process it was undergoing at the time that the sick leave commenced, and therefore the plaintiff was not able to safely return to work.

[109] The plaintiff also claimed that the NDHB, in dismissing him for medical incapacity, did not properly account for the way he says its allegedly faulty investigation contributed to that incapacity. As already canvassed, I do not consider the investigation to have been faulty. I accept that being the subject of a workplace complaint and investigation would have been markedly stressful for the plaintiff. While that stress seemed to contribute to the plaintiff's medical incapacity, it cannot be attributed to faults on the part of the NDHB, such that dismissal for ill-health was not a fair and reasonable option.

[110] At the time the plaintiff was dismissed for ill-health, he had been on paid sick leave for over nine months. There was no prospect of a return to work in the foreseeable future based on the medical reports provided. He was paid three months' salary in lieu of notice.¹² His dismissal for ill-health was a decision that followed the process set out by the collective agreement and was open to a fair and reasonable employer in the circumstances, hence it was justifiable.

¹² The plaintiff has not suggested he was disadvantaged by being paid in lieu of notice, rather than being placed on paid notice for three months.

In conclusion, the plaintiff's challenge does not succeed

[111] In conclusion, although there was a minor flaw in the process leading to the plaintiff being placed on paid special leave, overall, the procedure followed by the NDHB after the complaint was made was a procedure that was open to a fair and reasonable employer in the circumstances that the NDHB was in. The plaintiff was not unjustifiably disadvantaged by that process and there were no breaches of good faith by the NDHB. The plaintiff's ultimate dismissal for ill-health also was a decision open to a fair and reasonable employer in the position of the NDHB.

[112] Accordingly, the plaintiff's challenge to the substantive determination does not succeed. The challenge to the cost determination was consequent to the challenge to the substantive determination. It too fails.

Non-publication orders are made

[113] There are two issues regarding non-publication. The first is in respect of the RMO. Both parties accept that it is appropriate for her identity to be protected by a non-publication order. The second issue is the plaintiff's application for a non-publication order with respect to his identity. That application is opposed by Health New Zealand. Health New Zealand says further, that if the Court is minded to issue a non-publication order in respect of the plaintiff, any such order should not fetter Health New Zealand's ability to interact with the New Zealand Medical Council in respect of the proper carriage of the Medical Council's duties.

[114] The Court has a broad discretion to make non-publication orders, but that must be exercised consistently with the applicable principles.¹³ The full Court in *MW v Spiga* outlined the Court's general approach to non-publication orders.¹⁴

[115] First, the Court will assess whether there is reason to believe that specific adverse consequences could reasonably be expected to occur. The necessary evaluation will focus on such evidence as has been submitted and/or is available. Inferences may be required by the Court. However, these must be reasonable

¹³ Employment Relations Act 2000, sch 3 cl 12.

¹⁴ *MW v Spiga* [2014] NZEmpC 147, (2024) 20 NZELR 723.

inferences that may be taken from the evidence, based on the specific circumstances of the case, when considered in context.¹⁵

[116] The second step is a weighing exercise in which the Court may consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case.¹⁶ In conducting that weighing exercise, a number of factors may be relevant, including:¹⁷

- (a) the circumstances of the case;
- (b) the interests of the person or entity applying for a non-publication order;
- (c) the interests of the other party or parties to the litigation;
- (d) the interests of any third party;
- (e) the public interest, including the rights of media;
- (f) any further issues of equity and good conscience; and
- (g) tikanga, and its principles, values, or concepts.

[117] The underlying test for non-publication, however, is not whether there are specific adverse consequences justifying a departure, but rather whether a departure from open justice is necessary to serve the ends of justice.¹⁸ In particular, the Court has recognised that in the majority of cases involving allegations of sexual harassment, the interests of justice will require that the identity of a complainant be protected.¹⁹

[118] In this case, I accept the position of the parties that the identity of the RMO should be protected by a non-publication order. The evidence was that she was a

¹⁵ At [88].

¹⁶ At [89].

¹⁷ At [94].

¹⁸ At [87].

¹⁹ At [60]. See also *Z v A* [1993] 2 ERNZ 469 (EmpC) at [495].

relatively junior doctor, distressed by what had occurred, and who has now moved to another workplace. Both parties agree there is a need for complainants in such cases generally to be granted anonymity to protect vulnerable people, and to encourage people in such situations to come forward with their concerns. There also is a lack of any discernible public interest in the precise identity of the RMO.

[119] I also am conscious that throughout these proceedings, the plaintiff has made remarks criticising the RMO's veracity and motives. At no time has he resiled from those comments and he continues to make them.

[120] I accept that non-publication is appropriate. Accordingly, there is a permanent order prohibiting publication of the name and any identifying details of the RMO. The only condition I place on that order is that it does not prevent the RMO herself from identifying that she is the person referred to as "the RMO" in the Court's judgment and "BUW" in the Authority's determination.

[121] The plaintiff's position is different. He applies for non-publication orders on the basis of the ramifications he says would otherwise occur on his fragile health, his reputation, career, and his family's wellbeing, and because of societal biases that could lead to unfair public judgement. He says that the principle of open justice, while vital, must be balanced against the significant and, in his view, disproportionate harm that would likely result from the exposure of personal and sensitive details in this case.

[122] However, the plaintiff's submissions were largely based on his substantive complaints about the process and outcome of the NDHB's investigation; essentially that the ramifications of publication would be unfair and disproportionate in light of the allegedly flawed investigation and findings. Those complaints have not been upheld and are therefore not bases for a non-publication order.

[123] I also discount the concerns he has raised regarding his family. While I have no doubt that publication would be unwelcome by members of the plaintiff's family, the family is based in another centre, well away from Whangārei; no specific adverse consequences have been identified that would justify a non-publication order.

[124] The medical evidence, however, is more compelling. In particular, Dr Tan, the plaintiff's treating psychiatrist, gave evidence on what he saw as the likely significant impacts on the plaintiff's health should his name be published in the community. He said the plaintiff's health has been improving in recent times, and that there is a real risk that publication of his identity would set that back to a quite concerning position.

[125] On the basis of Dr Tan's evidence, I accept that there is reason to believe that the plaintiff would suffer specific adverse consequences should his identity become known in the community.

[126] In considering whether those consequences justify departure from open justice in the circumstances of the case, I take into account a number of issues. This matter has involved a large number of people at the NDHB, and has been extremely difficult for everyone involved. The plaintiff has made numerous allegations in respect of many of those people that I consider to be unfair. Again, he has not in any way resiled from his views, if anything they have become more entrenched.

[127] As noted by counsel, Health New Zealand has obligations with respect to the Medical Council, and any order from the Court would have to reflect those obligations.

[128] I also note that Health New Zealand will be conscious of its obligations under the Privacy Act 2020, which provides significant protection for the plaintiff.

[129] On balance, I consider that the concerns raised by Dr Tan can be addressed first by anonymising the name of the plaintiff in these proceedings and second by a limited non-publication order covering the news media and other publicly available databases. This would allow people affected by this matter to speak of it without concern of retaliatory action from the plaintiff, but gives him protection in the broader community, including in respect of internet searches.

[130] Accordingly, the judgment intituling is anonymised and retains the initials "VXO" as used in the Authority. The plaintiff has not been named in the body of the judgment. Further, there is a permanent order prohibiting the publication of the plaintiff's name or other identifying information in the context of these proceedings

in the news media or on other publicly available databases. For the avoidance of doubt, this order does not prevent Health New Zealand and the New Zealand Medical Council from carrying out their respective obligations with respect to the plaintiff.

[131] Finally, and in order to protect both the RMO and the plaintiff, I make an order that the court file is not to be inspected by any non-party without the leave of a judge.

Health New Zealand may seek costs

[132] Health New Zealand has been successful in its defence of the plaintiff's challenges and is entitled to costs. In the event the parties are unable to agree on costs, Health New Zealand will have 28 days from the date of this judgment within which to file and serve any memorandum in support of its claim for costs. The plaintiff is to respond by filing and serving memoranda within a further 21 days. Any reply from Health New Zealand then should be filed and served within a further seven days.

J C Holden
Judge

Judgment signed at 12 pm on 9 June 2025