

Attention is drawn to the order prohibiting publication of certain information referred to in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 396
3102592

BETWEEN TIM ANDREWS
Applicant

AND AA INSURANCE LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Allan Halse, advocate for the Applicant
Richard Upton, counsel for the Respondent

Investigation Meeting: 21 April 2021 at Hamilton

Submissions [and further 12 May and 8 June 2021 from the Applicant
Information] Received: 31 May 2021 from the Respondent

Date of Determination: 8 September 2021

DETERMINATION OF THE AUTHORITY

- A Tim Andrews was not unjustifiably constructively dismissed from his employment with AA Insurance limited.**
- B Tim Andrews was unjustifiably disadvantaged in his employment.**
- C AA Insurance Limited is ordered to pay to Tim Andrews taking contribution into account compensation in the sum of \$9,000 without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- D Costs are reserved and failing agreement a timetable has been set for an exchange of submissions.**

Employment Relationship Problem

[1] Tim Andrews was employed by AA Insurance Limited (AA Insurance) in the role of Contact Centre Representative. He was party to a written individual employment agreement (the employment agreement) dated 17 July 2017.

[2] Mr Andrews had disclosed at the time he applied for and was offered the role with AA Insurance that he had a severe allergy to nuts. On 26 July 2017 a safety and wellbeing specialist emailed Mr Andrews advising that she had been made aware by the human resource team that he had an allergy and carried an EpiPen. She asked if he would be happy for that information to be shared with the first aiders and team leaders in sales and service. Mr Andrews responded by email and advised that he was happy for the information to be shared and that he had a problem when he ingested peanuts, chickpeas or crustaceans.

[3] Mr Andrews undertook induction/training and work in the contact centre role. He was promoted to the role of sales representative on 25 November 2017 and started work in that role in early December 2017. Whilst working in the sales team there was an incident on 15 February 2018 involving Mr Andrews, another employee and a Slinky, which is a pre-compressed spring toy. For reasons noted later, the other employee is referred to in this determination only as Ms B, an initial unrelated to her name. There are different views that will need to be resolved about whether Ms B was a “supervisor” or “superior” and what that may mean in the context of this employment relationship problem.

[4] Following the incident Mr Andrews made a formal complaint to AA Insurance on 19 February 2018:

Initially I had dropped a slinky in the rubbish. Noticing that the rubbish bags are not changed (just emptied) I did not get it out of the rubbish as it could quite plausibly and possibly be contaminated by peanuts, bearing in mind I have a very serious peanut allergy and that [Ms B] was very aware of this. A co-worker [Ms B] had taken this out of the rubbish for me and multiple times tried to get me to grab and use the slinky even though I explained each time I wouldn't due to my concerns of that it would set my allergy off and send me into anaphylactic shock. On Thursday 15.2.18 [Ms B] told me to grab that slinky again. I once again gave my reasons for not touching it. [Ms B] responded to this by grabbing the potentially contaminated slinky and rubbing it on my face.

Whilst this didn't send me into anaphylactic shock, it raises some concerns for me around how flippantly she deals with an allergy and issue that could kill me. I would like to submit a formal complaint for this incident please.

[5] The formal complaint was provided in the first instance to Mr Andrews's supervisor Allen Williams. Mr Williams escalated the written complaint to Margaret Smith who is employed as the customer service manager of the Hamilton service team. Mr Williams reports to Ms Smith.

[6] The employment relationship problems that Mr Andrews wants the Authority to resolve flow from that incident.

[7] Mr Andrews says that he was unjustifiably disadvantaged by the failure of AA Insurance to follow process, properly investigate the incident and provide him with a safe workplace.

[8] He says that he resigned because of breaches by AA Insurance and that his resignation was in the nature of an unjustified constructive dismissal.

[9] He further says that there are breaches of the duty of good faith and a breach of s 110A (1)(c) of the Act in relation to the Health and Safety at Work Act 2015 (HSWA).

[10] In his statement of problem Mr Andrews seeks the sum of \$150,000 as compensation, \$11,498.83 for lost wages, an apology, payment for medical expenses and counselling sessions and payment of costs.

[11] AA Insurance says that the personal grievances of unjustified disadvantage and dismissal were not raised within the statutory timeframe and if they were then neither claim is made out and that there has been no breach of the Health and Safety at Work Act 2015. It says that if there were grievances raised within the statutory timeframe its actions and what it did were those of a fair and reasonable employer in all the circumstances. It has raised that some of the remedies are not available to Mr Andrews under s 123 of the Employment Relations Act 2000 (the Act).

The Investigation Process

[12] Following a telephone conference with the Authority, Mr Halse and Mr Upton on 8 June 2020 the matter was initially set down for an investigation meeting to determine the preliminary issue as to whether grievances had been raised within the statutory timeframe.

[13] The Authority then received a joint memorandum from Mr Halse and Mr Upton that the objection to the raising of grievances within the statutory timeframe would be adjourned and addressed at any substantive hearing that may occur in due course. Pending any substantive investigation meeting the parties would agree to mediation as soon as practicable and ideally on 3 September 2020 which date had been set for an investigation meeting for the preliminary issues. There was no issue of costs in relation to the objection.

[14] Following receipt of that joint memorandum the Authority adjourned the preliminary investigation and noted that jurisdiction to hear the grievances would be addressed at any substantive hearing that may occur and that the parties would attend mediation.

[15] Advice was received that the matter had not resolved at mediation and the Authority held a further telephone conference with the representatives on 20 October 2020. During that telephone conference a meeting date for the substantive matter was set for 21 and 22 April 2021 in Hamilton. The Authority set out in its Minute the issues for investigation.

[16] During the telephone conference Mr Halse raised an issue about summoning Ms B, the employee who had been involved in the Slinky incident. The Authority set out that any request for a witness summons needed to be made in a timely manner. Mr Upton had raised a concern about summoning Ms B. The Authority noted it would hear from both representatives about that in due course. The matter proceeded on 21 April 2021. There was no request for a witness summons.

Prohibition from Publication

[17] At the end of the investigation meeting Mr Upton asked for an interim order for non-publication of the name of Ms B and any information that could identify her. Mr Halse said that he would not publish her name in the interim. The Authority accepted that and did not make interim orders. The Authority advised it would consider the matter again following receipt of timetabled written submissions.

[18] In written submissions Mr Upton seeks permanent prohibition from publication of the employee's name.

[19] Mr Andrews does not support non-publication of Ms B's identity. Mr Halse refers to this being a further attempt by AA Insurance to protect her and minimise the impact on

Mr Andrews. He refers to a submission from Mr Upton that Ms B remains a trusted and well regarded member of AA Insurance. He said that this implies Mr Andrews is not. The evidence supported that Mr Andrews was well regarded when he worked at AA Insurance and a good performer. I have taken Mr Upton's submission to be comment about and confined to Ms B.

[20] Mr Upton recognises in his submission that a non-publication order represents a departure from the fundamental principle of open justice and that there must be grounds to depart from that principle.¹⁴ In *Chief of NZ Defence Force v Darnley* the Employment Court described decisions on the non-publication of names and identifying details as ultimately a matter of weighing the interests of open justice with other interests.¹⁵ In that case the application for non-publication was made in relation to four individuals who were not parties and were not expected to give evidence. There was some discussion in the judgment about the potential for long term damage to reputation including future job prospects by publication. The application for permanent non-publication was granted in that case.

[21] AA Insurance was concerned about Ms B's actions on 15 February 2018. It commenced a disciplinary process against her. The Authority was not advised about the disciplinary outcome because of privacy issues. Ms B remains in employment with AA Insurance. She is not a party to the proceedings. The Authority did not hear evidence from her.

[22] The Authority was able to conduct its investigation without hearing from Ms B because its focus was not on her actions which were not disputed but on the actions of AA Insurance following its knowledge of her actions.

[23] Another matter to consider is the role Ms B had. She was described in the statement of problem and in the statement of evidence as a supervisor. When Mr Andrews gave his oral evidence he referred to her as a superior in that she was a "sales specialist" and had more responsibility. She had also worked longer at AA Insurance than he had. Mr Andrews was new to the team. Mr Andrews's evidence that was disputed was that she was also the team's health and safety representative. Mr Williams agreed that the employee had undertaken additional training beyond that which Mr Andrews as a sales representative had done. She was trained to

¹⁴ *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.

¹⁵ *Chief of NZ Defence Force v Darnley* (2021) NZEmpC 40.

underwrite additional product as a result. Mr Williams said that she was not Mr Andrew's supervisor and she had no management responsibilities in her role.

[24] I do not consider that there is any particular difference in view that Ms B was a more experienced employee but did not have any managerial responsibility. She was not a supervisor but a more experienced colleague of Mr Andrews. When all the above is considered I conclude publication would be unnecessary and prejudicial in circumstances where the name and any detail that may identify the employee are not materially important to the issues before the Authority. There are grounds on that basis to depart from the usual principle of open justice.

[25] As I indicated to the parties at the time the proper course of action if Mr Andrews is not happy with such an order is to challenge that to the Employment Court and have the matter reconsidered.

[26] I order that the name of Ms B and any details that may identify her are prohibited from publication under clause 10(1) of the second schedule to the Act.

The Issues

[27] The Authority needs to resolve the following issues in this matter:

- (a) Were grievances of unjustified disadvantage, constructive dismissal and alleged engagement in adverse conduct for a prohibited health and safety reason raised within the statutory timeframe in accordance with section 114(1) and (2) of the Act?
- (b) If a grievance of unjustified constructive dismissal was raised within the statutory timeframe was the resignation caused by breaches of AA Insurance's obligations towards Mr Andrews.
- (c) If there were breaches by AA Insurance then were they of sufficient seriousness that it would be foreseeable that Mr Andrews would not be prepared to work in the prevailing conditions?
- (d) Alternatively, if grievances of unjustified disadvantage were raised within the statutory timeframes then were there actions or omissions of AA Insurance that were unjustified and did they cause disadvantage to Mr Andrews?

- (e) If a grievance under s 103(j)(i) was raised then was there engagement in adverse conduct for a prohibited health and safety reason.
- (f) If grievances are made out then what remedies should be awarded and are there issues of contribution and mitigation?

Background against which the issues will need to be discussed and analysed

The employment agreement and policies

[28] The employment agreement provided in clause 1.3 that it constituted the full employment agreement between the employer and employee. Clause 2.3 provided that the employee is required to observe any employment policies and guidelines which the employer issues from time to time.

[29] At the end of the investigation meeting AA Insurance was asked to provide copies of its policies regarding disciplinary matters, health and safety and harassment and bullying.

[30] The Harassment and Bullying Policy defined harassment as offensive, insensitive, intimidating and unasked for behaviour. It defined workplace bullying as unwanted and unwarranted behaviour that a person finds offensive, intimidating and/or humiliating and is repeated so as to have a determined effect on a person's dignity, safety and wellbeing.

[31] If an employee makes a formal complaint in terms of harassment and workplace bullying the policy provides it will be "thoroughly investigated". During the investigation the person who complains may be given paid leave. The "alleged offender" has the right to know a complaint had been made and the details of the complaint. If a complaint is upheld disciplinary action may be taken.

[32] If the complainant wishes to take the complaint outside of AA Insurance there are options to lodge a personal grievance, make a complaint with the Human Rights Commission or involve the Police.

What happened with Mr Andrew's complaint?

The sales team

[33] The sales team at AA Insurance sit in an open plan area. In his oral evidence Mr Andrews said that there were divides between the desks or cubicles and whilst sitting you could only see the tops of other team members' heads.

[34] Mr Williams described the sales team as extroverts. He said that he was endeavouring to create a more professional culture in the team without losing the fun and engaging environment that the team had enjoyed working in.

[35] Mr Williams stated about Mr Andrews as follows in his written evidence:

I observe that Tim's interactions with his peers were somewhat unorthodox for a work environment. The image Tim portrayed of himself was one that I would describe as like a jester. He was witty, outgoing, eccentric and he engaged with the team well. The Sales Team was made up of a lot of extroverts who all maintained close relationships full of fun and banter, and Tim fitted in and contributed to this culture really well, often joining the team on social events such as BBQs, games night and after work drinks. I believe that his peers really enjoyed having Tim as part of the team.

[36] Shortly before the incident Mr Andrews was shifting to a new desk further away from Ms B. He had left the Slinky on the old desk because of the fear that it could potentially be contaminated with peanut oil. There was some evidence about the length of time it had sat there. The Authority was not able to conclude with any accuracy how long it was but it more likely than not sat there for some time.

The incident itself

[37] The date of the incident was 15 February 2018. It was a Thursday. Mr Williams said Ms B was packing her bag to leave. Mr Williams observed out of the corner of his eye that Ms B was trying to touch Mr Andrews' face with the Slinky and Mr Andrews was pushing her arm away. He told them to "cut it out" as he considered it was not professional and the behaviour was inappropriate. Mr Williams said that Ms B apologised and immediately stopped what she was doing and left to go home soon after. Mr Andrews in his oral evidence said that Mr Williams may had said to "cut it out." He could not recall Ms B apologising.

[38] There was a difference in the evidence about what happened then. Mr Andrews' evidence was that he went to wash his face and called his father to come and pick him up. Mr Williams said that Mr Andrews continued after the incident to work until the end of his shift without raising any issues. I do not need to resolve the dispute because what happened subsequently supports how Mr Andrews regarded the incident when he raised the formal complaint.

Proceeding to the formal complaint

[39] Mr Andrews was not rostered to work the day after the incident on the Friday. On the Saturday he sent an email to Mr Williams asking to meet with him on Monday morning. A meeting was arranged for the Monday 19 February 2019 with Mr Williams.

[40] At that meeting Mr Andrews raised a complaint about the incident. Mr Williams saw the situation as potentially serious and requested that Mr Andrews put the complaint in writing. He was given some time away from phone duties to do so.

[41] When the formal complaint from Mr Andrews was received on 19 February 2018 Mr Williams escalated it to Ms Smith. Mr Williams said that in discussions that he had with Ms Smith that day it was decided she would be the best person to conduct the investigation alongside the HR Business Partner (HR). This was because he was new to the leadership role, the seriousness of the complaint and because he had observed the incident Ms Smith did not consider it was not appropriate that he undertake the investigation.

[42] Mr Williams was not involved in the investigation and disciplinary process that followed.

Ms Smith's initial involvement

19 February 2018

[43] On 19 February 2018 Ms Smith contacted Mr Andrews acknowledging receipt of his complaint and they arranged to meet that day.

[44] Ms Smith took a written note of the discussion. Mr Andrews, the note confirms, emphasised that there was an awareness of people who suffer nut allergies and it was constantly brought up with the team. Further that he had explained to Ms B on multiple occasions why he

couldn't touch/use the Slinky. The notes record that Ms Smith asked Mr Andrews whether he had any preference with how the incident was dealt with. Mr Andrews responded as recorded in the notes as set out below:

Tim said 'he could not work with Ms B again because she shows a total disregard for my allergy and kept on doing it anyway and that he would be nervous she would do it again'. Tim explained how he had to restrain her by holding down her arm when she tried to rub the 'slinky' into his face.

Tim said, 'I draw the line when doing something like this, because it is playing with someone else's life.'

[45] The notes record that Ms Smith thanked Mr Andrews for raising the incident and advised that she would talk to HR. It is set out in the record of the meeting that she reassured Mr Andrews that the type of behaviour is "inappropriate, disrespectful and shows a disregard for our company values and the team."

What happened then?

[46] On 20 February 2018 management met with Ms B about what had happened on 15 February 2018. The written record of the discussion provides that Ms B's explanation at that point was that she misread the situation and that she had "taken it too far". She also said that she thought it was only an issue for Mr Andrews if nuts were ingested. She accepted that her actions were inappropriate. Ms Smith said in her evidence that Ms B was very upset and "appeared genuinely remorseful". Ms Smith advised Ms B that she'd been discussing the matter further with HR and it was likely Ms B would be invited to a formal disciplinary meeting.¹⁶

[47] A formal disciplinary meeting then took place on 26 February 2018 with Ms B and Ms Smith's evidence was that all the people who were involved at that meeting believed that the outcome meant they were confident that Ms B would not do something like this again.

Apology delivered by Ms B

[48] Following the formal disciplinary meeting Ms B provided Mr Andrews and the company with a written letter of apology and met with him and apologised in person. Mr Williams had looked at the written letter of apology before it was provided to Mr Andrews but could not recall what it said. Mr Andrews was not happy about the written and verbal

¹⁶ Described by AA Insurance in a record of the meeting notes with JIC as a "formal".

apology and the manner in which it was given because he was alone with Ms B in a small room. The Authority was not provided with a copy of the written apology and it seems it is no longer available.

[49] An exact date for the provision of the written apology and the meeting between Mr Andrews and Ms B is not possible from the evidence. It can however be narrowed down to a period between 26 February and 7 March 2018.

Meeting between Mr Andrews and Mr Williams on 7 March 2018

[50] On 7 March 2018 Mr Williams had a meeting with Mr Andrews. Mr Williams recorded parts of the discussion in an email to HR that same day seeking advice. The email to HR from Mr Williams reflects that Mr Andrews felt Ms B only apologised because of the formal disciplinary process not because she felt she had done something wrong. Further that Mr Andrews still did not want to work with Ms B. Mr Williams wrote in his email to HR that he told Mr Andrews that AA Insurance had taken reasonable steps and would not be taking any further steps and Ms B would remain part of the team. He set out that he had asked for suggestions as to how they could move forward. The email records that Mr Andrews advised his mother had already approached a family lawyer for advice and they were exploring other avenues. Mr Williams wrote to HR that it did not look like the situation would be resolved but noted that Ms B would be going on parental leave in a fortnight.

[51] In his written statement of evidence and in his oral evidence Mr Williams said that he offered a mediated meeting with Ms B to Mr Andrews at this meeting but that Mr Andrews refused the offer as he did not consider a satisfactory outcome would arise. When the Authority put this to him Mr Andrews said that this “did not occur”.

[52] This offer does not appear in the emails sent by Mr Williams to HR at this time. I place more weight on what was written at the time bearing in mind the period that has elapsed from the meeting on 7 March 2018. Such a suggestion of a meeting would have been eminently sensible but I cannot be satisfied it was an offer made and rejected to the required standard.

[53] A window into some of the conclusions reached by AA Insurance during the formal process with Ms B is available from the HR email response to Mr Williams on 7 March 2018. It had not been concluded by AA Insurance that Ms B deliberately tried to hurt Mr Andrews or

put his life at risk. It was concluded that the Slinky incident was a “poorly placed joke that went too far” because Ms B did not read the situation correctly. It was felt that she had learnt from that. There was reference to Ms B cleaning and disinfecting the slinky after removing the slinky from the rubbish bin and believing ingestion posed the risk to Mr Andrews.¹⁷ It was suggested in the HR email that there needed to be a really clear understanding about the allergy risk to Mr Andrews and that there be some reiteration to the team that the allergy is very serious and the team need to respect and be aware of that.

Meetings between Ms Smith and Mr Andrews in March 2018

[54] The evidence supported two meetings in March or early April 2018 between Ms Smith and Mr Andrews. The first was on 8 March 2018 and the second in all likelihood shortly after Ms B went on parental leave. I was not able to obtain an exact date when Ms B’s parental leave commenced. Mr Williams put it at a date from 15 to 22 March 2018 noting that Ms B was “heavily pregnant” at the time of the incident on 15 February 2018. Given that two weeks was mentioned in Mr Williams’s email of 7 March before parental leave commenced the start date of that leave in all likelihood was the last week of March 2018. Ms B’s date of return after maternity leave was 4 February 2019. She was away from the workplace for about 11 months.

[55] Ms Smith in an email to Mr Williams on 7 March 2018 said that she wanted to discuss with Mr Andrews why he was feeling the way he was, explain the process followed to date and fully understand the allergy. There was no record kept about the meeting.

[56] The second meeting was called for at Mr Andrews’s instigation. There was no record kept about that meeting.

[57] From the evidence it is difficult to attribute matters discussed between Ms Smith and Mr Andrews to one or other meeting. I do not find it necessary for current purposes.

[58] During the two meetings the evidence supports that Ms Smith discussed the formal process AA Insurance had undertaken with Ms B. It was discussed that the investigation was concluded and the outcome was confidential. Further that there had been an apology. Ms Smith also advised that AA Insurance had been clear with other team members not to eat food that

¹⁷ Mr Andrews in his oral evidence that he believed it had only been washed under running water from what Ms B told him.

contained nuts when out on the floor at their desks. Mr Andrews raised that he was not happy to accept the apology and could not work with Ms B and that he still considered she thought she had done nothing wrong. Ms Smith said that she struggled to understand what he wanted AA Insurance to do. She recalled him mentioning him seeking some legal advice. Ms Smith said that she asked to be kept informed about what else AA Insurance could do. At one of the two meetings Ms Smith advised Mr Andrews of a work from home option.

[59] There were no further discussions between Mr Andrews and Ms Smith about the Slinky incident before Mr Andrews resigned on 20 May 2020.

Mr Andrews escalates his concerns in May 2018 and refers to further concerns in his relationship with Ms B

Email dated 14 May 2018 to General Manager People and Capability

[60] On 14 May 2018 Mr Andrews wrote to NH, the General Manager of People and Capability.

[61] In his email he stated that over a period of time a colleague had belittled him daily insinuating he was gay or laughing at the fact he used to have an eating disorder. He stated that this culminated in her intentionally and knowingly rubbing “something” near his mouth that he had told her about 6 different times may be contaminated with peanuts and could threaten his life if near his mouth. He wrote that he wears a medic alert necklace and carries an EpiPen which she was aware of and that the singular outcome from his formal complaint was that the colleague had a formal meeting and apologised to him blaming him for what happened. The way that she blamed him he recorded was that she said he never told her how serious the allergies were and that he jokes about everything. He then wrote that once he had raised his concerns about working with her there was clear disregard for him and his manager suggested that he work from home. Mr Andrews stated in his email that he did not think this was the way of reacting to an issue of the seriousness that put his life at risk and he said it indicated that AA Insurance don’t value staff the same and asked what she thought about the way he had been treated.

[62] There was a response to Mr Andrews that same day from NH who advised that she was very sorry to hear how he felt and what had occurred. A telephone call between them then took place.

Olivia Nilsson-Udarbe meets with Mr Andrews about his concerns and proposes facilitated meeting with Ms B

[63] Olivia Nilsson-Udarbe is a People Business Partner. She reports to NH and was asked to deal with the concerns raised by Mr Andrews.

[64] Ms Nilsson-Udarbe works in Auckland but has general responsibility for providing human resource advice to various parts of the business including the contact centre in Hamilton. She contacted Mr Andrews on 23 May 2018 by email and arranged to meet with him in Hamilton on 24 May. Before the meeting she contacted the health and wellbeing specialist to obtain some knowledge of his allergies. This was the health and wellbeing specialist who had emailed Mr Andrews shortly after he commenced his employment about his allergies seeking permission to talk to first aiders and team leaders about them and the fact he carried an EpiPen.

[65] Ms Nilsson-Udarbe summarised the nature of the concerns raised with her by Mr Andrews in their meeting on 24 May 2018 in an email that she sent to Mr Andrews on 29 May 2018 as below:

- (a) Ms B had made comments to him insinuating that he was gay and laughing about the fact that he used to have an eating disorder. Mr Andrews explained his manager Mr Williams spoke to her about this about two days prior to the slinky incident and the comments continued for another day however the comments about those matters had stopped.
- (b) He explained the Slinky incident.
- (c) His allergies were serious enough that he wore a medic alert necklace and carried an EpiPen.
- (d) Since the incident Ms B had apologised to Mr Andrews after he had complained. He did not feel the apology was genuine and he felt blamed for the incident.
- (e) He did not feel that she showed any remorse and he was not confident that a similar incident would not arise in the future.

- (f) The possibility to work from home was seen by him as a punitive measure.
- (g) He did not think he could continue to work with Ms B as he has lost trust.

Basis for working from home proposal explored

[66] Ms Nilsson-Udarbe followed up after the meeting with Ms Smith about Mr Andrews' concerns with respect to working from home. Ms Smith advised Ms Nilsson-Udarbe that she'd offered that to Mr Andrews because another member of the Hamilton team had done the same thing and worked from home in order to manage their own peanut allergy. She did not accept that it was blaming Mr Andrews for anything. When the suggestion was made about working from home Ms B was about to, or had just, commenced parental leave. That makes it less likely the suggestion was made to separate Mr Andrews and Ms B and more likely it was for the reason Ms Smith stated.

Meeting and proposed facilitated discussion recorded in an email from Ms Nilsson-Udarbe to Mr Andrews dated 29 May 2018

[67] On 29 May 2018 Ms Nilsson-Udarbe sent Mr Andrews an email that set out the concerns Mr Andrews raised as set out above. It also set out Mr Andrews "ideal outcome" to the concerns would be that Ms B no longer worked at AA Insurance or worked from home. Ms Nilsson-Udarbe wrote that she had looked into the matter and the disciplinary process that was followed and that the outcome was appropriate to the situation and consistent with the disciplinary policy and the values of AA Insurance. However Ms Nilsson-Udarbe recorded that Mr Andrews' wellbeing is of "great importance to us" and that it is "important you are happy, healthy and safe in your work environment". There was a proposal of a facilitated discussion between Mr Andrews and Ms B on her return from parental leave. The facilitator was proposed to be either Ms Smith or Ms Nilsson-Udarbe and would focus on discussion and agreeing a way forward so that they would both be happy and safe with the focus being to ensure a similar situation did not arise again, and the expectations agreed to would be monitored by Ms Smith and Mr Williams. In the interim it was stated that it may be useful for Mr Andrews to have a one on one discussion with her about what he would like to discuss at the facilitated meeting and any other arrangement that could be put in place before the return of Ms B.

Further email sent 29 May to Mr Andrews about working from home

[68] Ms Nilsson-Udarbe had omitted to refer to the working from home proposal concern so she sent another email that same day setting out her discussion with Ms Smith and confirming that working from home was not offered as a punishment. It was also noted that there had been a recent move in Hamilton to “hot desking” and that Mr Williams was working with Mr Andrews to address any concerns about contact with peanut. If however he wished he could also discuss that with Ms Nilsson-Udarbe and the health and wellbeing specialist.

Mr Andrews goes to the police about the incident on 15 February 2018

[69] The evidence supports that additionally in or about May 2018 Mr Andrews went to the police about the incident on 15 February 2018. The police appear to have considered it an employment matter.

Mr Andrews’s response to the facilitated meeting suggestion

[70] There was no response received from Mr Andrews and after about three weeks Ms Nilsson-Udarbe followed up noting that she had not heard from him about the proposed facilitated meeting but was in Hamilton the following week and could meet with him.

[71] Mr Andrews agreed to a meeting. Ms Nilsson-Udarbe confirmed in an email dated 29 June 2018 to Mr Andrews that she would arrange a facilitated meeting when Ms B returned to work following her parental leave. It would involve both Ms B and Mr Andrews as well as Ms Nilsson-Udarbe and either Mr Williams or Ms Smith. It was noted that Ms B was not expected to return for some time however it would be arranged when confirmation of the return date was known. Ms Nilsson-Udarbe confirmed that Mr Andrews’ health and safety was of great importance and she was confident that expectations set and monitored following the meeting would ensure this. In the meantime if he had any other concerns or suggestions about the facilitated meeting he was invited to get in touch.

What happened on Ms B’s return?

[72] Ms B returned to work on 4 February 2019 having been away from late March 2018. Ms Nilsson-Udarbe candidly accepted in response to a question from the Authority that she had overlooked the organising of a facilitated meeting. She put this down to the fact that

initially it was anticipated Ms B would return earlier from parental leave after about six months however because of some complications following the birth of Ms B's baby the leave was extended.

[73] When Ms B returned to the office in February 2019 Mr Williams said that he decided to keep a close eye on the interaction between her and Mr Andrews. He said he was really impressed to see that whilst Ms B was cautious and maintained her distance, Mr Andrews was warm and welcoming and interacted with her positively in team meetings and team huddles. He acknowledged this in a complimentary manner in an email to Mr Andrews dated 15 February 2019. Mr Williams in his evidence said that he did not notice anything untoward or significant when Mr Andrews and Ms B worked together after she returned from parental leave. Mr Andrews confirmed in his evidence that there were no repeat of an incident in his interactions with Ms B.

[74] When questioned at the Authority investigation meeting Mr Andrews said about the possibility of reminding Ms Nilsson-Udarbe about the facilitated meeting that "didn't like to think that he had to chase her up."

[75] I have considered on the balance of probabilities whether Mr Andrews continued to raise concerns after 4 February 2019 before he indicated his intention to resign on 20 May 2019. Mr Andrews said that he raised that he was still concerned about working with Ms B at formal and informal meetings with Mr Williams after February 2019.

[76] Mr Williams said that there were fortnightly one on one meetings with Mr Andrews which were casual and informal and six monthly performance meetings. He said that Mr Andrews did not raise any further concerns about Ms B with him from the time Ms B went on parental leave until the day Mr Andrews resigned. He said that he observed at team meetings in 2019 that Ms B maintained her distance from Mr Andrews and interacted professionally.

[77] Mr Williams had escalated initial concerns raised with him by Mr Andrews in February and March 2018 to Ms Smith and HR. I conclude it would have been more likely than not that he would have done this had Mr Andrews raised concerns following Ms B's return in February 2019. On the balance of probabilities it is less likely that Mr Andrews raised concerns about working with Ms B after she returned to work in February 2019 with Mr Williams.

[78] Mr Andrews produced some medical notes from a consultation that he had with his doctor on 5 February 2019. The notes refers to amongst other matters:

PTSD Feb 2018: work colleague rubbed object on his face. Due to his peanut allergies has [occasional panic attacks]

[79] Mr Andrews said that this was the first time what he was experiencing was described as Post Traumatic Stress Disorder (PTSD). The Authority asked Mr Andrews whether he told AA Insurance about this diagnosis. Mr Andrews said that he was “not sure”. Mr Williams said that he did not recall any discussion about PTSD at all. Ms Nilsson-Udarbe said that she was very clear in her recollection that Mr Andrews did not say anything to her about suffering from PTSD or any other medical issues associated with the incident on 15 February 2018 when she met with him.

[80] I could not be satisfied from the evidence that AA Insurance was aware that Mr Andrews had been diagnosed with PTSD and suffered occasional panic attacks before the statement of problem was lodged and served on or about 6 February 2020.

Events in April 2019

[81] During April 2019 Mr Andrews was unwell. Mr Andrews discussed his unwellness with Mr Williams and advised that he was dizzy and not able to drive. He said that he was seeking some medical help with diagnosing his condition to find a long term resolution. Mr Andrews had booked some annual leave from 20 April to 28 April 2019. Part of this period overlapped with Mr Williams’ own annual leave from 27 April to 20 May 2019. On 29 April Mr Andrews called in sick and advised that the team leader who answered the call that he couldn’t come to work as he didn’t feel comfortable driving due to ongoing medical issues.

[82] Later that evening Mr Andrews messaged the team via Facebook chat to say he’d been in an accident where he’d rear-ended another vehicle. On 1 May 2019 Mr Andrews advised he was still feeling unwell from the accident and on 2 May advised that he had cracked ribs. From 4 to 8 May 2019 contact was made with Mr Andrews about his absence. Mr Williams said from 8 May it became difficult to contact Mr Andrews although Mr Andrews provided some text messages that do demonstrate there were exchanges with AA Insurance.

The resignation

[83] On Sunday 19 May 2019 Mr Andrews sent a text message asking Mr Williams to meet with him on Monday morning. He explained that he had to get the ACC forms completed by a doctor and asked if it would be okay to come in late to work. Mr Williams said that was fine and a time was scheduled to meet.

[84] On Monday 20 May 2019 Mr Williams met with Mr Andrews to discuss his absence. It was at this meeting that Mr Andrews provided his letter of resignation. The letter of resignation provided as follows:

To Whom it may concern,

I sadly feel as though I have no option other than to resign from my position at AA Insurance. Due to ongoing issues relating to working with someone who intentionally tried to kill me and then lied to my face in a blatant attempt to blame me for her actions as well as the ongoing lack of sufficient action by AA Insurance. This is an untenable position I am placed in where every day I must either be constantly aware of what that said colleague is doing or face the very real risk that she will, once again, put my life at risk 'for a joke'. I am extremely upset that it has come to this as I really have enjoyed my time up to this point and if it weren't for the actions of an irresponsible and reckless colleague I would still be working happily.

As I have taken every step possible for me to sort this issue out I see no other option other than to resign my position with immediate effect.

It does sadden me that it has come to this but that changes nothing.

Regards,

Tim Andrews

[85] Mr Williams was concerned and adjourned the meeting to seek some advice from Ms Nilsson-Udarbe.

[86] He then met with Mr Andrews a few minutes later to discuss the resignation in more detail. He explained that he was somewhat taken aback by the reasons for the resignation. Mr Andrews accepted under questioning that Mr Williams did seem surprised. Mr Williams said he highlighted that Ms B had been back at work for a period of three months and that from what he'd seen, all interactions between Mr Andrews and her had been nothing "short of professional". He explained that there didn't seem to be any evidence to suggest the other employee would put Mr Andrews' wellbeing at risk.

[87] Mr Andrews advised that his lingering feelings about the February 2018 incident had not lessened in the 15 months following it. Mr Williams offered Mr Andrews, as recorded in an email sent the same day, the opportunity to attend a meeting with Ms B with either a manager or HR business partner in attendance. He also suggested that Mr Andrews take the night to think about his decision before confirming his resignation. Mr Andrews explained that he had been thinking about the resignation for a while and would not be taking the offer of a meeting up. The resignation was then accepted.

[88] Nothing further was heard until a statement of problem was received by AA Insurance from Mr Andrews on or about 6 February 2020. At that stage it was the view of AA Insurance, and this was expressed to Mr Andrews in a letter from Ms Nilsson-Udarbe dated 12 February 2020, that the grievances were out of time. Mr Halse then advised in an email dated 2 March 2020 that CultureSafe NZ Limited was now representing Mr Andrews. The different views about whether grievances had been raised or not continued.

Were grievances of unjustified disadvantage and constructive dismissal and engagement in adverse conduct for a prohibited health and safety reason raised within the statutory timeframe in accordance with section 114(1) and (2) of the Act?

[89] Section 114(1) of the Act provides that every employee who wishes to raise a personal grievance must raise it with their employer within the period of 90 days beginning with the date on which the action alleged to amount to the personal grievance occurred or came to the notice of the employee, whichever is the later.

[90] Section 114(2) provides:

For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[91] As Mr Upton states in his submissions the matter has progressed with AA Insurance participating both in mediation and the Authority investigation meeting “without prejudice” to its view that grievances were not raised in accordance with s 114(1) and (2) of the Act.

[92] Over the years there have been many cases in the employment area about what is required to raise a grievance. These cases provide there does need to be sufficient information provided so that the employer can address the grievance as contemplated by s 114(2) of the

Act. There is no requirement that the raising of a grievance be in writing or using a particular formula of words. The level of detail that may be found in legal documents such as a statement of problem is not required. A leading case that both Mr Halse and Mr Upton referred to that sets out the test to apply is *Creedy v Commissioner of Police*.¹⁸

[93] I have little difficulty finding from the factual matrix set out above in detail that Mr Andrews raised grievances of unjustified action causing disadvantage, commencing with the formal complaint on 19 February 2018 that he wanted AA Insurance to address, within the statutory timeframe. After AA Insurance had completed their initial investigation and formal disciplinary processes with Ms B further concerns were raised about the apology and that Mr Andrews could not work with Ms B from early March until May/June 2018.

[94] These concerns included a fear (a safety issue) clearly articulated to Ms Nilsson-Udarbe that he could not be confident another issue would not arise in the future. AA Insurance were provided with sufficient information to be able to address the concerns. Ms Smith suggested working from home albeit to deal with the broader allergy issues and contact with peanuts. Ms Nilsson-Udarbe suggested a facilitated meeting between Mr Andrews and Ms B.

[95] Mr Upton submits that when Mr Andrews resigned he simply set out why he was resigning and did not raise a grievance. Mr Upton submits that there is nothing in the letter that clarifies what he wants to address his claim.

[96] The Employment Court in *Idea Services Limited (in Statutory Management) v Valerie Barker* stated that the¹⁹:

- (a) ...informal, non-technical, nature of the personal grievance procedures relating to raising a grievance tell against an interpretation that requires an employee to specify the precise nature of the remedy or remedies they seek.

[97] The focus it was held in *Barker* was "...squarely on the alleged grievance, and the extent to which the employee had drawn (or reasonably attempted to draw) that grievance to the employer's attention."⁶

¹⁸ *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 at [35]

¹⁹ *Idea Services Limited (in Statutory Management) v Barker* [2012] ERNZ 545 at [48].

[98] I find that a grievance was raised on 20 May 2019 that the resignation was in the nature of a constructive dismissal because of what was in the letter of resignation and at the meeting on 20 May 2019 between Mr Andrews and Mr Williams. Although no remedies as such were set out Mr Williams did offer a facilitated meeting.

[99] Additionally described in the statement of problem was a breach of s 110A (1)(c) of the Act with reference to the s 85 of the Health and Safety at Work Act 2015. Section 110A of the Act defines adverse conduct for a prohibited health and safety reason for the purposes of the part of the Act it falls within. The part of the Act s 110A falls within is Part 9 which is concerned with personal grievances, disputes and enforcement. The definition of the words in s 110A of the Act is provided for the purposes of Part 9.

[100] There is a personal grievance in s 103(1)(j)(i) of the Act that the employee's employer has, in relation to the employee:

- (i) engaged in adverse conduct for a prohibited health and safety reason; or
- (ii) contravened section 92 of the Health and Safety at Work Act 2015 (which prohibits coercion or inducement).

[101] I do not find that a personal grievance about engagement in adverse conduct for a prohibited health and safety reason was raised within the statutory timeframe by Mr Andrews under s 103(1)(j) of the Act.

[102] In conclusion personal grievances of unjustified actions causing disadvantage and unjustified constructive dismissal were raised within the statutory timeframes. These grievances can be considered together with statutory good faith obligations. There was no grievance raised under s 103(1)(j) of the Act within the statutory timeframes.

Constructive dismissal

[103] In some circumstances a resignation may amount to a dismissal. As was stated in the Court of Appeal Judgment in *Wellington Clerical Union v Greenwich* by Judge Williamson:²⁰

There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

²⁰ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

[104] There were three situations listed by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive.²¹

- (1) Where the employee is given a choice of resignation or dismissal;
- (2) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (3) Where a breach of duty by the employer leaves a worker to resign.

[105] It was stated by the Court of Appeal that the conduct complained of must amount to a repudiation of the contract rather than just be unreasonable. Conduct can also be a breach of an express or an implied term not to act in a manner calculated to destroy or damage the relationship of trust and confidence between an employer and employee.

[106] Mr Andrews relies on the third situation as described by the Court of Appeal in *Woolworths* that there has been a breach or breaches of duty by AA Insurance.²²

[107] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW INC* held that the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.²³ In determining that matter, all of the circumstances of the resignation have to be examined, not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found by the employer, was of sufficient seriousness to make resignation reasonably foreseeable.

[108] Mr Andrews has the burden of establishing that the resignation was actually a dismissal.

Was the resignation caused by a breach of duty?

[109] AA Insurance took Mr Andrews' complaint seriously. There was a disciplinary outcome that satisfied AA Insurance that such conduct would not be repeated. The conduct was not repeated over the time that Mr Andrews and Ms B worked together. To the extent it is

²¹ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

²² Above n 2.

²³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

suggested otherwise it is for AA Insurance acting as a fair and reasonable employer to reach a decision about a disciplinary outcome.

[110] The language in the resignation letter that Ms B “intentionally trying to kill him” was stronger than that used in Mr Andrews’s original complaint letter. AA Insurance did not conclude when undertaking its disciplinary process that there was that intention on the part of Ms B. Rather that Ms B had misread the situation in that it was a “poorly placed joke” and it had gone too far and was inappropriate. Further that she had misunderstood that Mr Andrews’ allergy was triggered by ingestion only.

[111] Ms B wanted to apologise. AA Insurance did not control when and where that would occur. There was also an apology letter. Mr Williams could not recall what was in it. Mr Andrews stated that the only matter that was addressed was Ms B apologising for “coming into his personal space”. I accept Mr Andrews’ view that a third person at the apology meeting to support him would have assisted. Mr Andrews said that AA Insurance looking more carefully at the apology letter may have assisted. In any event AA Insurance was advised by Mr Andrews that the apology had not resolved concerns or improved the relationship and in fact appeared to negatively impact on it further because Mr Andrews felt blamed.

[112] There was a further meeting between Mr Andrews and Ms Smith before Ms B went on parental leave. Ms Smith did take steps to make sure the team understood not to eat anything with nuts at their desk.

[113] Where I do find that AA Insurance’s actions were not those of a fair and reasonable employer was its dealings with the relationship between Mr Andrews and Ms B to reduce his known concern that the behaviour may be repeated and that he could not work with Ms B again.²⁴

[114] Mr Williams and Ms Smith said that they were not sure what Mr Andrews wanted. Both knew however that Mr Andrews did not want to work with Ms B and that the apology was not received well.

[115] Mr Andrews escalated his concerns in May 2018. Ms Nilsson–Udarbe acted appropriately in taking the concerns seriously and meeting with Mr Andrews and recording his

²⁴ First interview with Mr Andrews after formal complaint 19 February.

concerns. The proposed facilitated meeting on Ms B's return from leave was an appropriate step. Mr Andrews when I asked him about this process said that it "might have helped". Organising such a meeting was unfortunately overlooked. Forgetting to do something occurs in a wide range of life situation including employment. It is a part of being human and because of that less helpful to take it as a personal slight or conclude it means somehow that the person is not taking the matter seriously. Mr Andrews could have reminded Ms Nilsson-Udarbe about that after Ms B's return from parental leave.

[116] I conclude that the actions to investigate the incident itself were those of a fair and reasonable employer and there was a disciplinary outcome that reassured AA Insurance there would not be a repeat. Less emphasis however was placed on Mr Andrews and his concerns going forward. A fair and reasonable employer could have been expected to take some steps in the knowledge that Mr Andrews remained nervous of a repeat of the behaviour, had said that he could not work with Ms B and was unhappy with her apology.

[117] Such steps would have been consistent with the statutory obligations of good faith to be active and constructive in maintaining a productive employment relationship. If steps had been taken they could have restored some level of confidence in and restoration to the relationship between Mr Andrews and Ms B with particular focus on the period immediately after the disciplinary outcome and before parental leave. I conclude there was a breach of AA Insurance's obligations in that respect. There could have been a facilitated meeting as Ms Nilsson-Udarbe suggested and/or an MBIE mediation.

[118] There are circumstances in this case that require assessment about the seriousness of the breach and whether it would have been reasonably foreseeable that Mr Andrews would not be prepared to continue to work in the prevailing circumstances. From late March 2018 until 4 February 2019 Ms B was away from the work place. I have not been satisfied that after her return Mr Andrews raised further issues of concern. His behaviour, as observed by Mr Williams, towards Ms B was professional and welcoming. Mr Williams commented on this in an email to him dated 15 February 2019 and thanked Mr Andrews for being supportive of the new team culture. I have not been satisfied that AA Insurance knew of any of Mr Andrews' medical issues related to the 15 February 2018 incident including the diagnosis of PTSD on 5 February 2019.

[119] There is no dispute that Mr Williams was surprised to receive the resignation and told Mr Andrews to take some time to think about it and the possibility of a facilitated meeting.

[120] I do not in all the circumstances find that the breach was of such a seriousness that resignation was reasonably foreseeable. I do not find that Mr Andrews has established a claim that he was constructively dismissed.

Unjustified actions causing disadvantage

[121] The statutory definition of unjustified action causing disadvantage is found in s 103(1)(b) of the Act:

- (a) That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer...

[122] Conditions include all rights, benefits and obligations arising out of an employment relationship and is a concept wider than the terms of the employment agreement.²⁵

[123] Whether or not there had been an unjustified action requires assessment under s 103A of the test of justification.

[124] AA Insurance acted appropriately in the escalation and investigation of the complaint made by Mr Andrews about his colleague Ms B. There was no repeat of the behaviour. It acted appropriately in clarifying and emphasising behaviour in a work place where employees suffer from nut allergies.

[125] Mr Andrews had raised a concern in his complaint about working with Ms B again and indicated to Ms Smith that he was nervous such an incident may occur again. He raised concerns again with AA Insurance in March 2018 on at least three occasions following what he considered an unsatisfactory apology from Ms B during which he felt blamed. A fair and reasonable employer could have been expected to have recognised the difficulties in the working relationship and take some further steps in good faith to deal with the concerns. Whilst Mr Andrews was asked what he wanted in March 2018 and did not return to Mr Williams with

²⁵ *ANZ National Bank v Doidge* [2005] ERNZ 518.

anything concrete, AA Insurance could have been expected to propose some action itself and the sooner after the disciplinary outcome the better.

[126] When that did not occur Mr Andrews continued to feel concerned and in May 2018 escalated the concerns and raised further concerns about Ms B's conduct. Ms Nilsson-Udarbe acted appropriately and held meetings to try to understand the concerns which were recorded in emails. A sensible way forward was proposed and agreed. I do not find it unjustified that a facilitated meeting could not be implemented immediately given Ms B was on parental leave. There was then about a further eight months from June 2018 before Ms B returned to work in early February 2019. A facilitated meeting with expectations going forward was not arranged as Mr Andrews was told it would be.

[127] Not every shortcoming in an employment relationship or deviation from a perfect process by an employer can form the basis of a claim. I am also required to consider under the test of justification in s 103A(5) of the Act whether the defects in the process were minor and did not result in Mr Andrews being treated unfairly. If they were then the Authority must not determine an action or omission to be unjustifiable. Care also has to be taken not to revisit the process with the benefit of hindsight but rather consider it with what was known at the time. I have not been satisfied on the balance of probabilities that AA Insurance knew Mr Andrews had panic attacks following the incident or had been diagnosed with PTSD.

[128] I have paused and considered the actions of AA Insurance. In the main their actions were those a fair and reasonable employer could be expected to take. They took the complaint seriously and there was a disciplinary process. There was no repeat of the behaviour.

[129] What does persuade me that the failure to take steps with respect to known concerns in the working relationship with Ms B was more than minor was that AA Insurance knew that Mr Andrews was nervous about a repeat of the conduct. This was because of his serious and complex allergies and it was known Ms B's apology had not allayed those concerns. That knowledge has to be seen with the decision not to tell Mr Andrews about the disciplinary outcome. Mr Andrews could not be reassured by that information although he had asked for it.

[130] In those circumstances the need to take steps was important and the failure do so more than simply minor. In May and June 2018 there was an appropriate action proposed consistent with knowledge of the concerns. Importantly AA Insurance had reiterated that Mr Andrews'

health, wellbeing and safety was important and that the expectations set at the facilitated meeting, monitored closely, would ensure that. The omission to have that meeting as promised viewed with the failure to take earlier steps in March 2018 before parental leave commenced resulted in Mr Andrews being treated unfairly.

[131] I do weigh that after the return of Ms B in February 2019 Mr Williams kept a close eye on Mr Andrews' and Ms B's interactions and this was appropriate. He did not detect a reason for concern. I was not satisfied Mr Andrews raised further concerns with Mr Williams.

[132] I find there was an unjustified action/omission in 2019, viewed against concerns raised by Mr Andrews in March 2018, to have a facilitated meeting when Ms B returned from parental leave as AA Insurance had agreed there would be. When this became apparent at the point when Mr Andrews resigned a meeting was offered. Mr Andrews felt it was too late.

[133] Mr Andrews was disadvantaged by this as he continued to be concerned about a repeat of the conduct because he had serious allergies.

[134] I find that the unjustified actions that caused disadvantage arose in March 2018 and with the failure to arrange a facilitated meeting in February 2019. I do not find as submitted by Mr Halse that AA Insurance breached its policies.

[135] Mr Andrews has made out his grievance of unjustified disadvantage in the aspects set out above and is entitled to consideration of remedies.

Remedies

Compensation

[136] I have not concluded Mr Andrews was unjustifiably constructively dismissed and the remedies should properly focus on the unjustified disadvantage claim made out and whether there should be an award of compensation for those.

[137] Mr Andrews has claimed the sum of \$150,000 compensation. I am unaware of any award that has been made in the Employment institutions of that amount. In part such a claim appears to have been made because of the diagnosis of PTSD related to the incident in February 2018 made on 5 February 2019. A psychologist report has been attached. It was largely based

on self-reporting. Mr Andrews said he is no longer able to work as a result of the PTSD. The Authority did not hear any medical evidence.

[138] The Authority would need to be satisfied of a causal link between the unjustified actions and corresponding disadvantage found and the PTSD. I cannot be satisfied that the unjustified actions found made out were the primary or main cause of the PTSD diagnosis. This is not a case where there was a complaint with no action taken whatsoever or a repeat of the behaviour. There were also steps taken to understand and emphasise the need for the team to be careful with nut allergies. Ms B and Mr Andrews worked together for about five weeks after the incident and then not again for 11 months.

[139] I do accept, as Mr Andrews said, that a facilitated meeting may have helped and that the failure by AA Insurance to take some action when he went to them initially in March and then in May and June 2018 caused some humiliation, loss of dignity and injury to his feelings.

[140] In all the circumstances subject to any issue of contribution the Authority is of the view that an appropriate award is the sum of \$10,000 compensation.

[141] I do not consider that an award should be made for medical costs. An apology is not available as a remedy under s 123 of the Act. I did note that when AA Insurance received Mr Andrews statement of problem in February 2020 after he resigned Ms Nilsson advised Mr Andrews in a letter dated 12 February 2020 that he could utilise EAP services.

Contribution

[142] The Authority is required to consider under s 124 of the Act where an employee has a personal grievance the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance. If the Authority consider that the actions require it must reduce the remedies that would otherwise have been awarded.

[143] I have no doubt in an overall assessment that had Mr Andrews raised a concern about the failure to arrange a facilitated meeting with Ms Nilsson-Udarbe in February 2019 she would have attended to organising this. I conclude that the failure by Mr Andrews to remind her about that was blameworthy. Good faith obligations require both parties to be active, constructive and communicative in the maintenance of a productive employment relationship.

[144] I reduce the above amount for compensation by 10% for contribution as set out above.

Costs

[145] I reserve the issue of costs. Failing agreement Mr Halse has until 29 September 2021 to lodge and serve submissions as to costs and Mr Upton has until 20 October 2021 to lodge and serve submissions in reply.

Order made

[146] I order AA Insurance Limited to pay to Tim Andrews the sum of \$9,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

Helen Doyle
Member of the Employment Relations Authority