New Zealand Employment Relations Authority Decisions

Crush v Southern District Health Board (Christchurch) [2017] NZERA 1117; [2017] NZERA Christchurch 117 (6 July 2017)

Last Updated: 14 July 2017

Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 117
5539675

BETWEEN KATE CRUSH Applicant

A N D SOUTHERN DISTRICT HEALTH BOARD Respondent

Member of Authority: David Appleton

Representatives: Tim Castle, Counsel for Applicant

Janet Copeland & Jess Frame, Co-Counsel for

Respondent

Investigation Meeting: 21 to 23 February 2017 at Queenstown

20 and 21 June 2017 at Dunedin

Submissions Received: 17 March 2017 (on jurisdiction) and 21 June 2017, from the Applicant

21 June 2017, from the Respondent

Date of Determination: 6 July 2017

DETERMINATION OF THE AUTHORITY

A. **The applicant was unjustifiably disadvantaged by the manner in**

which the preliminary investigation was carried out, and is awarded $6,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

B. **The Authority does not have the jurisdiction to investigate the second and third stages of the respondent's investigation as no sufficiently specific personal grievance was raised in respect of them.**

C. **The respondent did not act in bad faith in declining to grant**

further special paid leave to the applicant.

D. **Costs are reserved.**

Employment relationship problem

[1] Ms Crush claims that she has suffered an unjustified disadvantage in her employment by the way that the respondent conducted an investigation into her complaints against a colleague. There are many strands to Ms Crush's argument, which are set out below in the issues section of this determination. The respondent denies that it has subjected Ms Crush to unjustified disadvantage. The respondent also raises jurisdictional objections to part of Ms Crush' claim.

[2] Ms Crush also claims the reallocation of 53.5 hours of sick leave and 45.5 hours of annual leave, which was utilised when her request to be granted special leave was denied. The respondent denies that it was obliged to exercise its discretion to grant Ms Crush additional special paid leave as requested.

Prohibition from publication order

[3] The statement of problem, the statement in reply, and the written and oral evidence before the Authority referred to a clinical professional with whom Ms Crush had ongoing work relationship problems, and who was the subject of the complaint by Ms Crush which was investigated by the respondent. This individual was not a party to the proceedings and did not give any evidence. It is not known if he is even aware of the claim brought by Ms Crush.

[4] It would not be appropriate for this individual's identity to be publicised, given the nature of the allegations, and I therefore prohibit publication of any information that would lead to the identification of this individual other than that set out in this determination. In this determination, the individual shall be known as Mr X.

[5] In addition, there was reference made in the documentation put before the Authority, and in oral evidence given, to a patient of the respondent who committed suicide. It is not appropriate for the identity of this patient to be made known and I prohibit from publication any information that may lead to her identity becoming known. She shall be referred to in this determination as Patient Y.

Main events leading to the personal grievance

[6] Ms Crush is a registered nurse who, at the material time, was working in one of the respondent's specialist units, although she now works elsewhere in the respondent DHB. She has had a strained working relationship for many years with a clinical professional who is referred to in this determination as Mr X.

[7] The inter personal problems seemed to have started as long ago as 2005, and recurred in or around 2010 and 2012, although the investigation carried out by the respondent which was the subject of the current proceedings before the Authority occurred between August 2014 and July 2015.

[8] In 2012, a plan was put in place, agreed to by Ms Crush and Mr X, to manage their relationship. However, Ms Crush believes that Mr X continued to take certain actions which amounted to harassment. She asserts that there was a prevailing workplace environment which undermined her confidence in the respondent's ability to provide a safe workplace for her.

[9] The catalyst for Ms Crush's complaint about Mr X which led to the current proceedings being lodged occurred on 25 June 2014 when Mr X approached a colleague, Cate Price, to elicit her help to make a complaint against Ms Crush. Mr X is alleged to have said, "if other staff backed him up there was a better chance of getting [Ms Crush] dismissed". Ms Price alleged that Mr X said that "he was going to get rid of her" and that he "would continue to ...seek out information and monitor what she does to see that she no longer works at [the specialist unit]".

[10] Ms Price relayed these comments to Ms Crush and, on 31 July 2014, wrote an email to their mutual line manager, Adrienne Lee, the combined services manager, setting out her concerns at Mr X's comments and declared intentions towards Ms Crush. Mr X himself had written a letter containing a formal complaint about Ms Crush dated 2 July 2014 to the Nursing Director of the directorate in which he and Ms Crush worked, Heather Casey.

[11] The gist of Mr X's complaint is that Ms Crush had allowed a receptionist to leave her work early, that she herself must therefore do the same (referring to a comment Ms Crush had made to him eight years earlier, in 2006) and that Ms Crush had implied that everyone in the building left work early. He also complained that he found Ms Crush assuming authority irksome.

[12] Mr X's complaint was addressed by Ms Casey by way of a letter dated

5 August 2014 in which she dismissed the complaint, saying that it could be seen as vexatious, given that he had raised an allegation about an incident that occurred on a day when he was not at work and therefore not present to witness the conversation and circumstances which led to the receptionist being able to finish work early. Ms Casey finished her letter by stating that it was her expectation that he would continue to work professionally with respect to all members of the team and the wider organisation, and reminding him of his obligations under the respondent's Code of Conduct and Integrity Policy.

[13] Ms Crush complains that she was told about Mr X's written complaint against her by a colleague and that she then immediately rang Ms Lee. However, Ms Crush says that Ms Lee told her that neither she, nor the HR adviser, Faye McLeod,

could deal with any claims she had of harassment by Mr X until they had completed the investigation into his complaint that had already been tabled. She says that this letter left her feeling victimised by the respondent. It was at that point that Ms Crush decided to submit a written complaint.

[14] Ms Crush wrote her letter of complaint about Mr X to Ms Lee on 1 August

2014. As there is a dispute about whether Ms Crush was complaining about a pattern of harassment by Mr X of her, including historic actions by him, or whether she was complaining about recent events since mid-2014, it is necessary to set out the text of the letter of complaint in full.

Dear Adrienne,

Further to the numerous verbal conversations we have had over the past month, I would like to document in writing the serious concerns I have for my safety both physical and psychological in my work place [redacted].

As we have discussed there is an unwarranted and fixated attention paid to me by the [redacted] [Mr X].

This has resulted in behaviours in the building, focusing on my power usage, leaving notes on my desk on a regular basis addressing his displeasure at my leaving a switch on or computer screen. Turning my light off when ever he passes my room, generally ignoring me unless he is spoken to in the first instance.

He has made numerous complaints and the last of these in 2012 showed evidence of him keeping detailed notes on me dating back to

2005. At the time of this complaint there was an external investigation facilitated by the DHB and it was my understanding that

due process was followed and there was to be a concerted effort on the part of all involved to move forward and attempt to build professional relationships that would lead to a conducive and safe work place for all.

Since this investigation in 2012, I have made a concerted effort to conduct myself in accordance with the expectations that are set by both yourself and Heather Casey. I have attended supervision as requested and focused on my responsibilities within my team.

[Mr X] has remained focused on my manner and conduct in a disproportionate way considering we work in two different specialities in two different teams. I have a sense he is constantly observing me and documenting my conduct, seeking to find fault or failing as perceived by him, in order to facilitate further complaints.

The intensity in this has increased over the past months and I now have a growing sense of vulnerability and persecution in my workplace.

I have first hand experience of him having conducting [sic] himself in disrespectful ways such as outlined to you regarding the death [patient Y], further supported by Katy Early's witnessing of same.

You already have detailed notes on this from our previous conversations so I will go into further detail in this correspondence [sic].

[Mr X] has now sort [sic] to discredit me among my colleagues in the [redacted] team by requesting meetings with them to discuss his dislike of me and his desire to see me no longer working in the team.

In one such meeting with Cate Price he directly stated his intention to compile a complaint and was actively soliciting grievance from her to enable him to do so. This behaviour has a direct result on my psychological well being and professional standing.

It is my understanding that the organisation has numerous other reports from clinicians as to his fixation with me and his agenda to discredit me both personally and professionally. Like wise the organisation has reports of his unbecoming conduct that is not in keeping with the expectations he holds for others.

The purpose of this letter is to highlight the psychological stress I am currently enduring, its impacts on me and to directly request that the DHB take steps to address this. I have been experience work place induced anxiety, leading to physical symptoms of nausea, headache and tearfulness when at work. Sleep disturbance for the past six weeks, and difficulty concentrating. I am saddened to report that this has become systemic and is no longer contained within the workplace and has a rebound effect on my family and my roles as wife and mother.

[Mr X] is persecuting me in an unacceptable manner and there is clear evidence of same. I wish for this to be stopped. I hold real and imminent concerns for my well being due to his conduct.

I wish to continuing [sic] to work in the [redacted] team and be able to attend to the roles and responsibilities of my job without the attention and criticism paid to be [sic] by [Mr X].

This is a written summary of the numerous verbal conversations we have had on this matter. I wish a response from the DHB

as to how this matter will be addressed in the future and what steps will be taken to protect me form [sic] this work place bulling [sic] and harassment. I wish there to be consideration to the verbal and written evidence as provided by other members of the [redacted] and others in the organisation who have raised concerns with you.

This is **not** a letter to be shown directly to [Mr X] as I feel it will only fuel his already fervent focus on me, it is written to yourself as a representative of the organisation to request assistance in this matter and that it be dealt with in a way to protect me and not provide antagonism to an already unsafe situation.

I await your reply and plan for dealing with the above as documented. In the meantime I continue to focus on client care and exciting new

direction for the team with the amalgamation of us and [redacted].

Yours sincerely

Kate Crush

[15] On 15 August 2014 Ms Lee wrote to Ms Crush advising her that the respondent intended to investigate her complaint fully in accordance with the Complaints and Harassment at Work Policies. Ms Lee stated that the respondent had put in place interim support measures to provide her with a safe working environment, including the Team Manager being on site when both she and Mr X were in the building; alternating her days of work so that Ms Crush's and Mr X's work days did not coincide whenever possible, and providing her access to the Employee Assistance Provider, and clinical supervision. Ms Lee stated that they also intended to move Ms Crush's office space within the building as soon as they were able.

[16] On 20 August 2014 Ms McLeod issued the terms of reference for investigating Ms Crush's complaints. Two individuals were tasked with carrying out the investigation. One was Simon Donlevy, a service manager in the medical directorate of the respondent, who worked outside of the directorate in which Ms Crush and Mr X worked. The other investigator was Jan Samuel, a director of a company that specialises in employment relations, investigations, performance management and resolving conflict. She had contracted her services to the DHB both before her involvement in the matter, and has done so since.

[17] On 22 August 2014 Ms Crush lodged an Official Information Act request with Ms McLeod seeking a copy of all written complaints made about her by Mr X to the respondent, together with a copy of all notes taken in relation to verbal complaints made by him about her to certain named individuals. This request covered all written complaints and those regarding verbal complaints dating back to 2005 up until the most recent complaint made in July 2014.

[18] On the same day, Ms Crush was signed-off by her GP as being medically unfit for work until 5 September 2014.

[19] Ms Lee also invited Ms Crush to attend an appointment with an occupational health specialist to assess the impact the matter had been having on her health. Ms Crush consented to this appointment and attended the assessment on 2 September

2014.

[20] Between late August and mid-September 2014, the investigators interviewed Ms Crush, Ms Lee and Ms Price. Detailed records were made of each interview. A copy of the draft notes of the interview with Ms Crush was sent to her for her comments. It is not known whether copies of the notes of the interviews with Ms Lee and Ms Price were sent to the interviewees for their comments.

[21] Ms Samuel and Mr Donlevy also received an unsolicited statement from a nurse colleague of Ms Crush, Verona Cournane. However, Mr Donlevy and Ms Samuel decided not to interview Ms Cournane because, according to their written and oral evidence, they believed that her statement was detailed enough, not requiring elucidation, and she had not referred to any relevant evidence to give in relation to the matters they were investigating. In their view, all of Ms Cournane's evidence related to past matters which were outside of the scope of their investigation.

[22] On 3 September 2014 the occupational health physician (an Advanced Registrar in Occupational Medicine) prepared a comprehensive report on Ms Crush. The physician diagnosed her as suffering from "Acute Stress Reaction related to her perception of the work circumstances", stating that, rather than Ms Crush's workplace being a contributing factor to her symptoms, he found it more plausible that it was her perception of the work related dispute with Mr X that was a contributing factor to the physical and psychological symptoms she had.

[23] The physician assessed Ms Crush as being fit for her normal duties, and safe to work, and opined that a return to normal duties would help manage her stress symptoms but that the most important step was the rapid resolution of the dispute at hand. He suggested one option would be to involve a dispute resolution support service.

[24] On or around 4 September 2014, Ms Crush answered some supplemental questions posed by the investigators. On 25 September 2014 Mr Donlevy and Ms Samuel sent to Ms Casey the initial outcome of the preliminary investigations into Ms Crush's complaint against Mr X. The preliminary findings analysed six specific allegations as follows:

(a) That Mr X would leave notes on Ms Crush's desk alerting her to alleged fire risks created by electrical equipment being left

on. The initial finding was that there was limited evidence on this as the alleged notes had not been produced. They found that the leaving of notes *per se* was not behaviour that could constitute harassment or bullying and that, in the absence of confirmation that the notes' contents were inappropriate or unacceptable, it was not a matter they considered could be elevated to a disciplinary level.

(b) That Mr X would turn off the light in Ms Crush's office. It was alleged that Mr X did this two or three times a week. The preliminary finding was that there was no direct evidence that Mr X was responsible for the action, and that one rationale for it could be a drive to save costs on power. They found that there was insufficient evidence that Mr X was responsible, or that the activity amounted to harassment and so they did not consider it could be elevated to a disciplinary level.

(c) That Mr X would ignore Ms Crush. Ms Crush alleged that Mr X did not say anything to her that was unsolicited unless other people were present and that Mr X had complained about her not saying good morning to him, but that he was guilty of the same conduct himself. If she said good morning to Mr X, he would just say *thank you*. The initial finding by the investigators was that there were limited examples in evidence of this issue and it was possible that both

individuals were using avoidance to reduce contact. They did not consider it unreasonable to conclude that both parties were avoiding each other and that avoidance is not behaviour that could constitute harassment or bullying. Therefore they did not consider it was a matter that could be elevated to a disciplinary level.

(d) That Mr X kept detailed notes on Ms Crush in order to facilitate complaints. The initial finding of the investigators was that there was evidence to suggest that Mr X had been observed to ask questions of other staff about Ms Crush and to gather information about her, but there was a lack of evidence about how other witnesses knew that he gathered evidence about her. They believed that the allegation had an historic element and there was no evidence that would lead them to conclude that it had happened since 2012.

(e) That Mr X showed disrespectful conduct to Ms Crush following the death of patient Y, one of her clients. The investigators found that, although the behaviour by Mr X appeared insensitive, and perhaps indicative of the poor working relationship between him and Ms Crush, it was not a matter that was sufficiently serious to warrant elevation to a disciplinary level.

(f) That Mr X discredited Ms Crush to colleagues and solicited colleagues to complain about her. The finding of the investigators was that Mr X's last complaint dated 1 July 2014 was a catalyst for Ms Crush's present complaint and that that complaint by Mr X had been found to have no validity and was vexatious. Therefore they considered that the matter had already been addressed with Mr X and could not be further investigated as there was no evidence that the behaviour had been repeated since the investigation. Therefore, they found that it was not a matter that could be elevated to a disciplinary level.

[25] Their overall preliminary findings were that the events outlined were either historic, dating back to 2012, or related to a recent complaint made by Mr X in July

2014 which had already been addressed. They concluded that there was no valid justification for reopening that issue. They found that there was evidence that the working relationship between Mr X and Ms Crush had largely broken down, but

actions had been taken to try to reduce Ms Crush's distress and provide a safe working environment. They stated that it was not clear whether Ms Crush would be able to move past those issues.

[26] They believed that there was insufficient evidence of the specific detail for the allegations made that would justify the matter being investigated to a disciplinary level.

[27] This preliminary finding was sent to Ms Crush by way of a letter from Ms Casey dated 1 October 2014. In her letter, Ms Casey stated that "we are mindful that Fit for Work [the occupational health organisation which assessed Ms Crush] have diagnosed that it is your perception of events that have caused an acute stress reaction for you". Ms Casey acknowledged that "this is a very difficult process for you and that there were clearly difficulties within the working relationship with [Mr X] which we believe need to be addressed."

[28] Ms Casey's letter to Ms Crush included the following statement:

As you will appreciate, whilst it is obvious that you are suffering significant difficulty as a result of your view of [Mr X's] conduct at work we are unable as an employer to proceed to discipline people if the allegations are based on perception rather than reality in the form of tangible evidence.

Before we draw any conclusions on this we first wish to hear your perspective and would like to give you and Jenny Guthrie [Ms Crush's representative at that time] time to work through the preliminary conclusions and provide your comment and any additional information that you consider appropriate. You [sic] comments on how the working relationship between yourself and [Mr X] could be improved would also be welcomed.

We would be grateful if you could have this back to us by Monday

06 October 2014.

I appreciate that this preliminary finding is not what you were hoping for. I am hopeful we can, following the finalisation of the decision, work together to identify the best way forward for you in order to improve your health and working situation in the [redacted] team.

Thank you for your consideration and we look forward to hearing from you.

[29] Ms Guthrie replied to Ms Casey with Ms Crush's response to the preliminary report by way of a letter dated 8 December 2014, although it appears that it may not have been received by the District Health Board until 12 December 2014.

[30] In this response, Ms Guthrie took issue with the findings that there was insufficient evidence that Mr X left post-it notes on Ms Crush's desk and that he turned the light out in her office. She said that there was corroborating evidence from other staff members, one of whom the investigators would not interview. Ms Guthrie said that the findings with respect to Mr X ignoring Ms Crush were accepted but that they did not reflect that Mr X wanted to continue to take issue on the matter. Ms Guthrie also indicated that the preliminary finding in respect to the alleged disrespectful conduct to Ms Crush following the death of one of her clients was accepted.

[31] However, Ms Guthrie said that Ms Crush did not accept the preliminary finding with respect to Mr X keeping detailed notes about Ms Crush as there was evidence that he was continuing to do this. They also said that there was evidence of a serious failure in the investigation as two witnesses could have been interviewed who had relevant evidence on the matter and Ms Price gave evidence that Mr X had told her that he would continue to seek out information and monitor what Ms Crush did.

[32] With respect to the allegation that Mr X was discrediting Ms Crush to colleagues and soliciting colleagues to complain about her, Ms Guthrie said that there had not been a full investigation as there was considerable evidence available on this point. Ms Guthrie also inferred from the investigation report that Mr X himself had not been interviewed by the investigators.

[33] In the same letter, Ms Guthrie raised a personal grievance on behalf of Ms Crush alleging unjustifiable disadvantage and stating that there were a number of flaws with the investigation as follows:

(a) The investigators are not independent; (b) Not all witnesses had been interviewed; (c) Mr X had not been interviewed;

(d) There was disparity of treatment between Ms Crush and Mr X;

(e) There had been breaches of the Code of Conflict and Integrity by Mr X

that had not been addressed by the investigators;

(f) The harassment policy had been breached, but the respondent had not considered this policy at all; and

(g) Ms Crush had been disadvantaged by being isolated in a small office with small frosted windows and no outlook.

[34] Ms Guthrie sought remedies on behalf of Ms Crush.

[35] In March 2015 the respondent requested Mr Donlevy and Ms Samuel to review their findings in relation to the allegation that Mr X solicited help from other colleagues to *get rid of Ms Crush.*

[36] They interviewed Ms Lee again on 12 March 2015 and, on 17 March 2015, they finalised their report. They did not interview Mr X.

[37] In the finalised report, which was sent to Ms Crush on 25 March 2015, the investigation team recommended that the respondent establish whether they felt that the behaviour exhibited by Mr X in soliciting other staff members in an attempt to "get rid of Ms Crush" had been adequately dealt with. If they felt that it had not, then the investigators recommended that a full investigation be undertaken and the necessary action be taken. From that point on, Mr Donlevy and Ms Samuel ceased to have any further involvement in the matter.

[38] The respondent decided that that issue did merit further investigation and two members of staff were tasked with doing this. One was Grant O'Kane, a human resources manager based in Dunedin, and the other was Louise Travers, general manager of mental health services.

[39] Mr O'Kane and Ms Travers reviewed the initial email complaint from Ms Price and then interviewed Mr X and his representative on 21 April 2015. In his evidence Mr O'Kane said that Mr X emphatically denied making the comments attributed to him by Ms Price. Mr O'Kane says in his brief of evidence that, as there was no independent third party validation of the events, the allegation was unable to be sufficiently substantiated and it was one person's word against another.

[40] It is worth noting at this point that, in her interview with Ms Samuel and

Mr Donlevy, Ms Crush had named two colleagues who "in the last two months have

been pulled aside by [Mr X] stating 'I want her dismissed, do you have anything we

can use as a complaint?"".

[41] In his oral evidence to the Authority, Mr O'Kane said that there was a conscious decision not to speak to anyone else (other than Mr X) about the allegation they were investigating because of the length of time that the matter had been taking to resolve up to that point, and because of the impact that delay had been having on the team in which Ms Crush and Mr X worked. He said that he and Ms Travers were also influenced by "the olive branch" that Mr X extended to try to have the interpersonal tensions resolved in mediation.

[42] Mr O'Kane also stated that the purpose of the investigation he and Ms Travers carried out was not to determine whether a disciplinary process should be engaged against Mr X but to try to rebuild the relationship between Mr X and Ms Crush. Mr O'Kane said that he and Ms Travers did take into account that Ms Crush was likely to have been upset by their conclusion, but that steps could be taken to enable her and Mr X to have a working relationship.

[43] On 6 July 2015 Ms Casey wrote to Ms Guthrie stating that the respondent has investigated with Mr X the allegation from Ms Crush that he had allegedly discredited her to colleagues and was soliciting colleagues to complain against her. Ms Casey stated that the investigation into the complaint was unable to substantiate the allegation made. The investigation was now complete and they needed to look at how they could rebuild the relationship between Ms Crush and Mr X to ensure that they were able to have a productive working relationship in order to fulfil the requirements of their roles.

[44] Ms Casey invited comment from Ms Crush as to whether she would participate in a mediated discussion between herself and Mr X to assist with improving their working relationship. She also asked for any further suggestions that Ms Guthrie or Ms Crush may have to assist the parties to repair their working relationship. According to Ms Crush, she and her representative did not take up the offer of mediation because her personal grievance was still outstanding, and Ms Crush wanted that resolved first.

[45] Ms Crush's statement of problem was lodged with the Authority on

15 September 2015 and a mediation took place on 16 April 2016.

[46] Mr Castle, on behalf of the applicant, alleged that statements made by the respondent on 16 April 2016 were not made as part of the mediation, and he wished to bring before the Authority evidence of these statements made. A direction was made prohibiting this on the grounds of inadmissibility, and Mr Castle, on behalf of the applicant, then applied for removal to the Employment Court the question of whether the statements he wished to be before the Authority had to be kept confidential. Another member of the Authority, Member Doyle, declined to remove the matter to

the Employment Court in the determination dated 1 August 2016.1

[47] As a result of this litigation, the substantive matter that was originally set down for 10 and 11 May 2016 had to be delayed, and was not heard until 21 to 23

February 2017. A further two days of investigation then had to be set down in June

2017 because there had been insufficient time to hear all of the witnesses.

[48] At the time of the Authority's investigation, Ms Crush was employed by the respondent in a new position and she was no longer working in the unit with Mr X. It was a material change to her working conditions which, her counsel said, was working well.

[49] Ms Crush's counsel also advised the Authority that, since the statement of problem had been lodged with the Authority, three complaints had been made against Ms Crush which the respondent had been investigating.

[50] For these two reasons, and for a third reason (that Ms Crush may have wanted to make an application to the Court for special leave to remove a question of law, which was the subject of the Authority's previous determination referred to above), Mr Castle sought an adjournment *sine die* of the substantive investigation meeting set down for 21 to 23 February 2017. However, on the basis that the matters cited had no material relevance to the issues to be investigated by the Authority, that adjournment

application was declined.

1 [2016] NZERA Christchurch 126

The issues

[51] The principal matter to be investigated by the Authority is whether the investigation into Ms Crush's complaint raised in 2014 was conducted in such a way as to cause Ms Crush an unjustified disadvantage in her employment.

[52] This matter has a number of strands to it. The first issue is the jurisdictional one. Namely, whether the Authority has the jurisdiction to consider any action alleged to have caused Ms Crush unjustified disadvantage which occurred after the date of her personal grievance dated 8 December 2014.

[53] At the start of the Authority's investigation, Mr Castle handed up a written synopsis of what he said were the issues to be determined. These were as follows:

(a) Whether the preliminary investigation had too narrow a scope;

(b) Whether the outcome of the investigation had been predetermined;

(c) Whether there was a failure to properly investigate the allegation that

Mr X solicited colleagues to complain against Ms Crush;

(d) Whether there was disparity of treatment by the respondent towards

Ms Crush and Mr X;

(e) Whether the investigation called into question Ms Crush's personal and professional competence. This issue was later expressly dropped by Mr Castle in his closing submissions.

(f) Whether there was an undue reliance upon the medical report of the occupational health physician by the respondent.

[54] At the end of the matter, during closing submissions, Mr Castle said that the following were the actions of the respondent that caused unjustified disadvantage in Ms Crush's employment2:

(a) The respondent unjustifiably failed to make the link between:

2 These overlap to an extent with the issues at paragraph 54, but I address them for the sake of completeness.

i. the respondent finding that Mr X's complaint about Ms Crush had been vexatious;

ii. Mr X's prior behaviour, which Ms Crush says had resumed;

iii. Ms Price telling Ms Lee that Mr X had solicited complaints about Ms Crush; and

iv. Ms Crush's complaint of 1 August.

(b) The respondent's failure to recognise that Ms Crush's distress was "its reality" as well as Ms Crush's. I believe this to be a complaint that the harassment policy was not followed by the respondent.

(c) The failure to interview all relevant witnesses.

(d) The inadequacy of the O'Kane/Travers investigation and its flawed

conclusion.

[55] Mr Castle also said that he relied on the statement of problem and a letter from Ms Guthrie to the Authority dated 15 October 2015. These documents are not particularly precise in their description of the issues, but I take from them that the following additional issue needs to be addressed; that the investigation into the complaint was not sufficiently independent.

[56] Finally, it is necessary to determine whether Ms Crush should have her sick leave and annual leave reimbursed and special leave substituted.

[57] Ms Copeland asserts that Ms Crush's case has been built on 'shifting sands', changing as the proceedings have unfolded. I find that the focus of Ms Crush's case has shifted over time, and I have had difficulty at times in understanding what precise aspects of the overall investigation Ms Crush finds fault with. This could be because of the way that Ms Guthrie, and then Mr Castle have articulated the theory of the case over time. However, I am satisfied that the issues set out above capture the key issues of concern to Ms Crush.

Does the Authority have the jurisdiction to consider any action alleged to have caused Ms Crush unjustified disadvantage which occurred after the date of her personal grievance dated 8 December 2014?

[58] It was only on the third day of the Authority's investigation in February 2017 that Ms Copeland stated that the Authority did not have the jurisdiction to consider any alleged disadvantageous action that occurred after Ms Guthrie's letter dated

8 December 2014. This means, she submitted, that the Authority did not have the jurisdiction to investigate the possible impact of the final version of the preliminary investigation report, nor the investigation carried out by Mr O'Kane and Ms Travers.

[59] Mr Castle was highly critical of Ms Copeland in only raising this jurisdictional point on the third day of the investigation. It also came as a surprise to me at the time. However, on reflection, I believe that there was a genuine misapprehension between the parties and the Authority in respect of what aspects of the respondent's investigation Ms Crush was seeking a determination

about. Ms Crush and Mr Castle's position was that she was complaining about the entire investigation process. The position of the DHB and Ms Copeland was that Ms Crush had only raised a grievance about the preliminary investigation up to the point when the preliminary report was issued. The difference in view emerged only at the end of the second day of the investigation.

[60] In any event, whilst the respondent raised its jurisdictional concerns late in the day, that does not invalidate what would be an unassailable jurisdictional impediment to the Authority investigating the final version of the preliminary investigation report, and the investigation carried out by Mr O'Kane and Ms Travers if no personal grievance has been raised in respect of them.

[61] Section 102 of the Employment Relations Act 2000 (the Act) provides that an employee who believes that he or she has a personal grievance may pursue that grievance under the Act. Section 161 of the Act gives the Authority exclusive jurisdiction to make determinations about employment problems generally, including, inter alia, personal grievances.

[62] Section 114 of the Act provides as follows:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must,

subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) 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.

(3) Where the employer does not consent to the personal grievance

being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave

accordingly, subject to such conditions (if any) as it thinks fit, if the

Authority—

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and

(b) considers it just to do so.

(5) In any case where the Authority grants leave under subsection

(4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

(6) No action may be commenced in the Authority or the court in

relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[63] The first key issue to determine is whether Ms Crush ever raised a personal grievance about the final outcome of the Donlevy/Samuel investigation, which was sent to Ms Crush on 25 March 2015, and about the result of the O'Kane/Travers investigation, which was made known to Ms Crush, via Ms Guthrie, on 6 July 2015.

[64] It is a well-established principle that a personal grievance must be raised with sufficient specificity to enable the employer to understand and address it, as was stated by the Chief Judge Colgan of the time in *Creedy v Commissioner of Police* 3. Specifically he said, at [36]:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a

3 [2006] NZEmpC 43; [2006] ERNZ 517

personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as in cases under the previous legislation, for an employer must know what to address. I do not consider that

this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[65] The key question is whether a relevant and sufficiently specific personal grievance was raised by or on behalf of Ms Crush which post-dates the advice to her of the final outcome of the Donlevy/Samuel investigation, and the outcome of the O'Kane/Travers' investigation, which occurred on 6 July 2015.

[66] In submissions received from Mr Castle on this preliminary issue, he says that Ms Crush relies upon a number of documents in showing she did raise a personal grievance about these two actions:

(a) The letter from Wilkinson Rodgers lawyers to the respondent dated

8 December 2014;

(b) An email from Ms Guthrie to Mr O'Kane, Ms Casey and Ms Copeland dated 30 June 2015;

(c) The statement of problem dated 9 September 2015;

(d) The letter from Wilkinson Rodgers lawyers to the Authority dated

15 October 2015; and

(e) Ms Crush's statement of evidence lodged on 2 March 2016. [67] I examine each of these documents in turn.

The letter dated 8 December 2014

[68] The letter dated 8 December 2014 predated both the final outcome of the Donlevy/Samuel investigation and the outcome of the O'Kane/Travers investigation, and so need not be examined for these purposes as one clearly cannot grieve about actions that have not yet occurred. I do not agree with Mr Castle's submission that this letter "was sufficient to meet the requirements of section 114 of the Act in respect of the applicant's personal grievance in relation to the entire investigation".

The email dated 30 June 2015

[69] The email dated 30 June 2015 predated the outcome of the O'Kane/Travers investigation being made known, and so shall be ignored for that purpose, for the same reason. It did follow the final outcome of the Donlevy/Samuel investigation however. A careful analysis of this email shows that Ms Guthrie did not raise a personal grievance about the final outcome of the Donlevy/Samuel investigation on behalf of Ms Crush in it. In fact, Ms Guthrie stated "Finally, and following mediation, your letter dated 25 March 2015 identified that Kate's complaint had been substantiated and would need further investigating". This is not a grievance about the outcome.

[70] What Ms Guthrie was doing in her email was, rather, complaining about the length of time that the investigation, and Ms Crush's 8 December 2014 personal grievance, were taking to resolve. Therefore, I am satisfied that this email did not raise a personal grievance about the outcome of the Donlevy/Samuel investigation.

The statement of problem

[71] The statement of problem lodged with the Authority on 15 September 2015 contains no express mention of the final outcome of the Donlevy/Samuel investigation, nor of the O'Kane/Travers' investigation.

[72] There is a statement that "at no time did the SDHB investigate either of these matters (statement to Cate Price or the complaint)". There is also the statement that "this groundless complaint, when considered in conjunction with the comments [Mr X] had made to Cate Price, should have raised a red flag and set any amount of processes in motion, not just to investigate but also to protect Kate, it did not."

[73] The list of actions stated to give rise to alleged unjustified disadvantage are generic or unspecific, referring, for example, to "an investigation" and "a full investigation". I disagree with what I infer to be Mr Castle's submission; namely, that this was enough to raise the personal grievance about the final outcome of the Donlevy/Samuel investigation, nor of the O'Kane/Travers' investigation.

[74] I am satisfied that the statement of problem did not raise with sufficient specificity a personal grievance about the final outcome of the Donlevy/Samuels investigation, nor the O'Kane/Travers' investigation.

The letter to the Authority dated 15 October 2015

[75] The Authority had directed Ms Guthrie to lodge a more fully particularised statement of problem, and she did so on 15 October 2015. This contains, inter alia, the following statements:

• Cate Price's clear and unequivocal evidence was at the heart of the applicant's formal complaint.

• The applicant gave names of witnesses who would give corroborating evidence but the investigation chose not to speak to these witnesses.

• The investigation was then dismissive of Cate Price's evidence and then dismissive of the applicant's complaint in relation to which this evidence was paramount.

"As you will appreciate, whilst it is obvious that you are suffering a significant difficulty as a result of your view of [Mr X's] conduct at work we are unable as an employer to proceed to discipline people if the allegations are based on perception rather than reality in the form of tangible evidence." (Heather Casey 1/10/14)

• To conclude the investigation into the applicant's complaint on the basis that her allegations were based on perception rather than tangible evidence was, in the face of real and unequivocal evidence, incredible.

• On the evidence, this outcome was not available to a fair and reasonable employer, it did not discharge the employer's statutory obligations to act in good faith (towards the applicant) and it was not justified.

...

As far as the applicant was aware and at the time she notified her grievance there had been nothing from the SDHB to reassure that any action had been taken with [Mr X] in relation to his statement to Cate Price. [Mr X] was still watching her, monitoring her and on a mission to get rid of her. For the applicant this was even more concerning when [Mr X] had his written complaint dismissed with no reference to the statement he had made to Cate Price.

The respondent's Harassment at work policy is that *the person being complained about should also be interviewed* (p.4).

[Mr X] was not disciplined in relation to the statement he made to Cate Price (H Casey 1/10/14). As far as the applicant is aware, [Mr X] was not interviewed, in fact, not even spoken to about the statement.

As part of the investigation, the applicant asked that Verona Cournane, Velda Raybone Jones, Heather Clay, Nadine Mcphedran and Gen Numajuchi be spoken to. This did not happen when Verona

Cournane submitted a written testimony, it was referred to as unsolicited (which it was) and it appears, given no credence.

For the applicant this did not feel like it was a genuine investigation. On the contrary, she felt the onus was on her to prove her case.

....

5.5. Heather Casey in dismissing the applicant's complaint on the grounds that there was no tangible evidence was a finding that had to have disregarded Cate Price's unequivocal evidence.

5.6 The applicant's claim is that the finding there was no tangible

evidence of her complaint was incorrect:

• Cate Price's evidence was unequivocal;

• Verona Cournane's evidence in the form of a written

testimony was disregarded;

• The applicant's own evidence was given no credence and the

witnesses to her evidence given no opportunity to participate in the investigation;

- The respondent did not interview and accordingly, without hearing it, rejected the evidence of Verona Cournane, Velda

Raybone Jones, Heather Clay, Nadine Mcphedran and Gen

Numajuchi;

• It was a step too far to find that there was no tangible

evidence and accordingly, the respondent's findings were

incorrect.

[76] I am satisfied that all of these statements refer to the preliminary outcome of the investigation conducted by Jan Samuel and Simon Donlevy, and not the final outcome of the Donlevy/Samuel investigation, nor the O'Kane/Travers' investigation. Whilst Ms Crush now complains that Mr O'Kane and Ms Travers also did not interview relevant witnesses, Ms Guthrie's statements are made against the context of Ms Casey's comments about tangible evidence, which predated Ms Crush's

December 2014 personal grievance.

[77] In addition, Ms Guthrie's letter says that Mr X was not interviewed, whereas he was interviewed as part of the O'Kane/Travers investigation. This again suggests it was referring to the preliminary stage of the investigation. Ms Guthrie also made reference in her letter to comments made by Ms Casey about Ms Crush's perceptions; this again refers to matters arising from the first stage of the investigation.

[78] I have also examined the statement in reply, which addresses in detail both the statement of problem and the further particulars in Ms Guthrie's letter of 15 October. If the statement in reply had raised defences about alleged irregularities in the final stage of the Donlevy/Samuel investigation and the O'Kane/Travers investigation, that

fact would be evidence that the respondent understood that grievances had been raised about these issues. However, whilst the statement in reply makes express mention of those stages of the investigation, it does so as part of an account of the history of the matter. I cannot infer that these stages of the investigation are referred to in reply to specific criticisms of them.

Ms Crush's brief of evidence

[79] The final document to check in respect of whether Ms Crush ever raised a personal grievance about the O'Kane/Travers' investigation prior to the Authority's investigation meeting is her written brief of evidence, which is only two pages long. Nowhere does she refer in this brief to the final outcome of the Donlevy/Samuel investigation, or to the O'Kane/Travers' investigation, either expressly or impliedly. The focus of her brief is Mr X and the actions and alleged failing of the respondent prior to her grievance dated 8 December 2014. Whilst some of her statements could be construed to refer to the O'Kane/Travers' investigation and its outcome, that is not clearly articulated. In other words, any such concern has not been clearly articulated.

[80] It was the respondent who called Mr O'Kane and Ms Travers to give evidence to the Authority about their investigation. Written briefs of evidence by them were lodged and Ms Copeland led further, detailed oral evidence from them. Had I been able to find that Ms Crush had raised a sufficiently specified personal grievance about the O'Kane/Travers' investigation, albeit out of time, I am likely to have found that the respondent had consented to it being raised out of time by their leading evidence from the two relevant witnesses without contesting jurisdiction.

[81] However, the fact that I have had to undertake a line by line analysis of several documents to try to find specific and unambiguous references to the final outcome of the Donlevy/Samuel investigation, and to the O'Kane/Travers' investigation, strongly suggests in itself that no personal grievance has been properly raised by or on behalf of Ms Crush about these two stages of the investigative process.

[82] Finally, Ms Crush has not applied under s 114(3) of the Act for leave to raise her grievances out of time.

[83] In conclusion, I am not satisfied that Ms Crush, or her representatives, have ever at any time raised a personal grievance with sufficient specificity about the final outcome of the Donlevy/Samuel investigation, and about the result of the

O'Kane/Travers investigation. Consent by the respondent, express or implied, does not, therefore, come into play. I would add that I do not agree with Mr Castle when he says that *Twentyman v The Warehouse Limited4* is authority for the proposition that an employer can impliedly consent to the raising of a personal grievance which is not raised with sufficient specificity. *Twentyman* does not say that and, indeed, that proposition cannot be correct as a grievance which is not sufficiently specific is not a

personal grievance at all.

[84] I will acknowledge that this is a very unsatisfactory outcome from Ms Crush's point of view, as this conclusion artificially limits the Authority's enquiry to only the first stage of what was an on-going investigation. However, if no personal grievance has been properly raised about a concern, the Authority is jurisdictionally prohibited from investigating that concern.

[85] Therefore, as the Authority does not have the jurisdiction to do otherwise, the Authority's investigation is confined to matters about which Ms Crush complained in Ms Guthrie's letter of 8 December 2014.

Unjustified disadvantage in employment

[86] In order to determine this specific issue, it is necessary to set out the test against which the Authority must judge whether the actions of the respondent were justified or not. This test of justification is set out in s 103A of the Act, and provides as follows:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could

have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court

must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations

against the employee before dismissing or taking action against the

employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the

employee; and

4 [2016] NZEmpC 172

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee. (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects

in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

Did the preliminary investigation have too narrow a scope?

[87] In support of this allegation, Ms Crush relies on the respondent confining itself in the Donlevy/Samuel investigation to matters which were close in time to Ms Crush's complaint of 1 August 2014, and not taking into account the historical pattern of harassment of her by Mr X that she says she suffered. Ms Crush says that this approach precluded the respondent from being able to find that Mr X had resumed conduct which he had been asked to cease earlier.

[88] Ms Crush also says that the respondent adopted a compartmentalised approach to the investigation, which caused it to fail to see an overall pattern.

[89] Ms Crush also asserts that the respondent failed to take into account the complaint that Mr X had made against her in July 2014, saying it had already been dealt with (when it was rejected by the respondent). She says it failed to distinguish between dismissing Mr X's complaint and the act of making a vexatious complaint.

Timeframe over which alleged actions were investigated

[90] The complaint made by Ms Crush does not limit her complaints to any particular period, and it can be seen as complaining about Mr X "remaining focussed on [her] manner and conduct in a disproportionate way" since 2012. However, she also referred to "numerous verbal conversations" with Ms Lee "over the past month". In short, I believe that Ms Crush's complaint was ambiguous as to the period over which she wanted the investigation to range.

[91] The terms of reference prepared on behalf of the respondent for the

Donlevy/Samuel investigation do not circumscribe the time over which the alleged

actions of Mr X were to be considered. The scope of the investigation was stated to be as follows:

Scope of the Investigation

1. Ascertain the circumstances giving rise to the 1 August 2014 complaint from Kate Crush including but not limited to the following:

1.1 Is there any evidence to suggest inappropriate behaviour?

1.2 Does the information that you have obtained from a preliminary investigation meeting warrant a full investigation being undertaken?

2. Interview by whatever means suitable and with their prior agreement, such witnesses as you believe are required to complete your investigation.

3. Obtain such additional information as you believe is required to complete your investigation.

[92] The notes of the interview with Ms Crush that took place on 27 August 2014 record that Mr Donlevy stated "We are focusing on the alleged behaviours you state you have experienced in the last 6 weeks from 1 July 2014. We are unable to investigate any issues that have already been investigated or have an outcome." There is no record of Ms Crush, or her representative Ms Guthrie, objecting to this statement, and Ms Crush did not give evidence to say that either of them did.

[93] The statement made by Mr Donlevy was unequivocal, and left no room for doubt as to the modus operandi that he and Ms Samuel intended adopting. The interview was part of a preliminary investigation, and gave Ms Crush the opportunity to raise her concerns about the approach the investigators were taking. Ms Guthrie did raise her concerns about the conclusions of the preliminary investigation in her letter of 8 December 2014, including the ignoring of historical conduct, and the respondent did not change its position, save in respect of one allegation but, of course, that subsequent failure to change its position has not been the subject of a personal grievance, as found above.

[94] In her oral evidence, Ms Crush confirmed that she had not raised any concerns about Mr X between 2012 (when she had last done so, and had herself been the subject of a complaint by Mr X, and two other colleagues) and 2014. She said that

she had noticed an elevation in Mr X's interest in her from around February 2014, but

had not said anything to management until around May 2014.

[95] My finding is that, if Ms Crush had wanted the Donlevy/Samuel preliminary investigation to consider Mr X's alleged recent actions against an overall pattern of historical behaviour, she needed to have made that clear. Her letter of complaint did not do so, and she did not object when Mr Donlevy said that the investigation would focus on the period of six weeks.

[96] In light of this, I cannot find that the respondent's actions in adopting the timeframe it did were the actions that no fair and reasonable employer could have taken in all the circumstances.

Was a compartmentalised approach adopted, and if so, did it unjustifiably disadvantage Ms Crush?

[97] The preliminary investigation outcome addressed six specific allegations (as summarised in paragraph 24 above) one after the other. It then stated the "Overall Preliminary Findings". Ms Samuel said in evidence that these final paragraphs show that she and Mr Donlevy looked at both the individual complaints and the overall pattern. The final paragraphs of the preliminary report state as follows:

Overall Preliminary Findings:

In summary, given all the information we have to date, it seems that the events outlined above are either historic dating back to 2012, or related to the recent complaint made by [Mr X] in July 2014 which was already addressed. There appears to be no valid justification for reopening that issue.

There is a lack of evidence to suggest that the other behaviour complained of would reach the threshold of bullying or harassment. There is evidence that the working relationship between [Mr X] and Kate Crush has largely broken down. This and the events surrounding this have lead [sic] Kate to experience distress in the workplace. Actions have been taken to try to reduce and eradicate Kate's distress and provide a safe working environment. It is not clear whether Kate will be able to move past these issues.

Based on all the information we have and in line with the Southern DBH Code of Conduct, Harassment Policy and other procedures, there is insufficient evidence of the specific detail for the allegations made that would justify this matter being further investigated at a disciplinary level.

The allegations relate to matters which are largely historical and some of which have already been addressed.

It is therefore our preliminary recommendation that Kate's complaint is not elevated to a disciplinary level. We recommend that you now consider our preliminary findings and provide us with your feedback in order that we may finalise our investigation.

If the final conclusion is as outlined in this preliminary report the investigators understand that this will not resolve the issue from Kate's perspective however we believe that other measures should and can be taken to address the issues relating to the working relationship between Kate and [Mr X].

We look forward to your response to our preliminary findings.

[98] I do not accept that these final paragraphs show that the investigators considered the pattern of alleged harassment, as well as individual complaints, and considered the connection between Mr X's complaint about Ms Crush and her complaint of

harassment. It was Mr X's 2014 complaint about Ms Crush which had prompted her complaint, as the preliminary report acknowledges, and it was a significant failing not to have considered whether it was evidence of targeted harassment as alleged by Ms Crush.

[99] Could a fair and reasonable employer have failed in this way in carrying out its preliminary investigation, in all the circumstances? I believe that the answer is no. I address this in more detail below.

Was the outcome predetermined?

[100] Mr Castle submits that the fact that the respondent determined that "sending" notes to Ms Crush and turning off Ms Crush's office light were not acts that could constitute bullying showed predetermination, which led it to decide not to interview witnesses.

[101] The first allegation was that Mr X left notes on Ms Crush's desk, rather than sent her notes. Specifically, she complained that he had been "leaving notes on my desk on a regular basis addressing his displeasure at my leaving a switch on or computer screen". The finding of the preliminary investigation was that there was limited evidence as the notes had not been produced, and that leaving notes on Ms Crush's desk would not, of itself, be regarded as inappropriate action in the absence of evidence of aggressive, offensive or inappropriate language being used.

[102] I cannot find that this conclusion was one that no fair and reasonable employer could reach given that Ms Crush said in her interview with the investigators that the

notes were always about power usage, that she "had great pleasure in ripping the notes up" and that she had received "at least one that year" (as at late August 2014). She gave no evidence of aggressive, offensive or inappropriate language being used and could not produce any copies.

[103] In relation to Mr X turning off her office lights, the preliminary report found that there was no direct evidence that Mr X was responsible for turning off Ms Crush's office lights or that doing so amounted to harassment. The investigators suggested that the matter could be addressed by asking staff not to turn lights off in other people's rooms and to make power saving an individual responsibility. It is not known whether this recommendation was implemented.

[104] The investigators said that, in the absence of evidence of malicious intent, the matter could not be elevated to a disciplinary level.

[105] Whilst I do not see any evidence of predetermination here, given that the respondent went on to investigate the solicitation of complaints allegation, I do note that the investigators did not interview Mr X, and so were not in a position to ascertain intent. The respondent's Harassment Policy states that the person being complained about should be interviewed, and it is, in my view, a fundamental requirement of a fair process to interview an alleged harasser.

[106] In addition, the Harassment Policy states expressly that harassment is measured by the impact of the harasser's behaviour, not his or her intent, so the reference to Mr X's intent in the preliminary investigation report is misconceived.

[107] In conclusion, whilst I do not find there was predetermination, I do find that Mr X should have been interviewed by Mr Donlevy and Ms Samuel. I believe that no fair and reasonable employer could have failed to have done so in all the circumstances. The failure to do so meant that the investigators were not in a position to reject the allegation about the lights being turned off.

Was there a failure to properly investigate the allegation that Mr X solicited colleagues to complain against Ms Crush?

[108] The preliminary findings stated as follows;

The investigation into [Mr X's] complaint in July 2014 concluded that the complaint had no validity and was vexatious. As part of the outcome of that complaint the DHB set some explicit expectations

for [Mr X] relating to the issues outlined above. In this regard the investigators consider that the matter had already been addressed with [Mr X] and therefore cannot be further investigated. The investigation has not revealed that this behaviour has been repeated since the investigation.

[109] I believe that the respondent fell into error when it concluded in the preliminary investigation report that Mr X's conduct having been investigated and dismissed, and expectations having been made clear to him, it was precluded from investigating whether Mr X had solicited complaints about Ms Crush. The "expectations" as set out in Ms Casey's letter to Mr X do not refer to him soliciting complaints and there is no evidence that he was spoken to about such a serious allegation.

[110] Dismissing Mr X's complaint on the one hand and considering whether it was evidence of him soliciting colleagues to complain about Ms Crush on the other were two completely different issues. I believe that the investigators saw that eventually. However, there was no reason they should not have seen that at the preliminary stage.

[111] A fair and reasonable employer could not have concluded at the preliminary investigation stage to dismiss that allegation,

in all the circumstances.

Was there disparity of treatment by the respondent towards Ms Crush and

Mr X?

[112] It is not clear exactly what disparity is being argued. Mr X's complaint against Ms Crush was investigated at a preliminary level, dismissed and Mr X was warned about his complaint being possibly seen as vexatious. Ms Crush's complaint was investigated at a preliminary level, partly dismissed and then investigated further in respect of the solicitation of complaints aspect. I do not find that there was any unjustified disparity in treatment by the respondent of Ms Crush compared to Mr X, as Mr X's complaint about Ms Crush was not comparable to the complaint of Ms Crush against him.

Was there an undue reliance upon the medical report of the occupational health physician by the respondent?

[113] Ms Casey's letter to Ms Crush dated 1 October 2014, which attached the report of the preliminary investigation, cited from the Fit for Work report and stated "we are unable as an employer to proceed to discipline people if the allegations are based on perception rather than reality in the form of tangible evidence". Ms Casey

accepted the preliminary findings of Mr Donlevy and Ms Samuel. There is no evidence that Mr Donlevy and Ms Samuel had access to that report, and they cannot have therefore relied upon it. I am not convinced on a balance of probabilities that Ms Casey relied on the medical report in adopting the findings of Mr Donlevy and Ms Samuel. I believe that her reference to "perception rather than reality" was her gloss on the findings, but did not underpin them.

The respondent failed to make the link between Mr X's complaint, previous harassment by him, Ms Price's statement about solicitation and Ms Crush's complaint

[114] I have already found above that the dismissing of the solicitation complaint at the preliminary stage was flawed, and I believe that this allegation is another way of asserting the same thing.

[115] I will say, however, that I have not had any evidence put to me of proven historical harassment of Ms Crush by Mr X. The report into the complaint by Mr X and two colleagues about Ms Crush, published in October 2012, certainly did not state that the complaint was ill conceived or vexatious. Ms Crush was counselled in the report in respect of certain behaviours.

The respondent's failure to recognise that Ms Crush's distress was "its reality" as

well as Ms Crush's

[116] As stated above, I believe this to be a complaint that the harassment policy was not followed by the respondent. I accept that it was not followed because Mr X, as the alleged harasser, was not interviewed, as required by the policy.

The failure to interview all relevant witnesses

[117] It is not clear to me that all of the witnesses suggested by Ms Crush had relevant evidence. Certainly, some of them had either left the service a significant time prior to the time when the alleged actions being investigated had allegedly taken place, or had no direct evidence. However, Mr X and another witness, Dr Numaguchi, both had potential relevant evidence, and I believe that a fair and reasonable employer could not have failed to have interviewed them in all the circumstances as party of the preliminary investigation.

The inadequacy of the O'Kane/Travers investigation and its flawed conclusion

[118] I am unable to investigate this matter as the Authority does not have the jurisdiction to do so.

The investigation into the complaint was not sufficiently independent

[119] I believe that Ms Crush is speaking here about Mr Donlevy and Ms Samuel, alleging that they were not independent of the respondent. First, I do not believe that the mere fact that Ms Samuel had previously worked for the respondent as an independent contractor meant she was not independent. She had no knowledge of either Ms Crush or Mr X. Similarly, whilst employed by the respondent, Mr Donlevy worked in a different directorate.

[120] Most importantly, though, Ms Crush never objected to Mr Donlevy and Ms Samuel until after they had published their preliminary report. Up to that point, she was content with their appointment. I therefore reject this allegation.

Should Ms Crush have her sick leave and annual leave reallocated to her?

[121] Ms Crush claims the reallocation of 53.5 hours of sick leave and 45.5 hours of annual leave, which was utilised when her request to be granted special paid leave was denied. This claim relates, Ms Crush says, to sick leave which she took on

11 and 12, 16 to 19, and 23 to 25 September 2014, and annual leave taken between

26 September and 5 October 2014.

[122] Ms Crush had already been granted special leave between 22 August and

10 September, on 13 September, 21 September, 7 and 8 October 2014.

[123] Ms Crush says that she had applied for special leave because of the "immense stress, anxiety and vulnerability" she had been feeling due to Mr X's harassment and the investigation process. Ms Crush had asked for the special leave to be extended until the investigation concluded or the preliminary report was issued. Ms Casey granted Ms Crush an additional two days' special leave only. Ms Crush says she did not feel safe or capable to return even on days when Mr X would not be in the building, so took sick leave.

[124] With respect to her annual leave, Ms Crush says that she took a week's leave

for the school holidays between 29 September to 6 October 2014, but was unable to

enjoy them because she was so stressed about the investigation becoming increasingly protracted. She was sent the preliminary report on 1 October, during the holidays and that ruined the holiday for her as well she says. Whilst this latter point is contested by the respondent, which says that Ms Crush got the report after her annual leave, I am satisfied that Ms Crush is correct as to when she first received it.

[125] Clause 14 of the applicable Multi Employer Collective Agreement (the MECA) for Nursing and Midwifery Employees deals with sick and domestic leave. Clause 14.2 and 14.3 provide as follows:

In the event an employee has no entitlement left, they may be granted an additional 10 days per annum. In considering the grant of leave under this clause the employer shall recognise that discretionary sick and domestic leave is to ensure the provision of reasonable support to staff having to be absent from work where the entitlement is exhausted. Requests should be considered at the closet possible level of delegation to the employee and the quickest time possible, taking into account the following:

- The employees length of service

- The employees employment record

- The consequences of not providing the leave

- Any unusual and/or extenuating circumstances.

Reasons for the refusal shall, when requested by the employee, be given in writing and before refusing a request, the decision maker is

expected to seek appropriate guidance.

Leave granted under this provision may be debited as an advance on

the next years' entitlement up to a maximum of 5 days.

14.3 At the employer's discretion an employee may be granted

further anticipated sick or domestic leave. Any anticipated leave taken in excess of an employees entitlement at the time of cessation of employment may be deducted from the employees final pay.

[126] In her evidence, Ms Casey said that the respondent did not consider Ms Crush was not fit to return to work because of the conclusions of the Fit for Work report. Ms Casey said that it is unusual to grant an employee special leave, and that the leave entitlements under the MECA were usually considered to be adequate. She said that Ms Crush had been granted more special leave than anyone else.

[127] Ms Casey said that she had decided initially to allow Ms Crush special paid leave, even though she had some sick leave entitlement remaining, as she weighed up the distress Ms Crush was exhibiting and accepted that she could not be at work at that point. However, Ms Casey said that, in deciding not to grant any further special paid leave to Ms Crush, she took into account the Fit for Work report and the strategies that had been put in place to protect Ms Crush. These were:

(a) Moving her office so it would not be near Mr X's;

(b) Ensuring that an HR manager was present in the building on the two days a week when both Ms Crush and Mr X worked there;

(c) Ensuring Ms Crush would never be rostered on call at the same time as

Mr X;

(d) Instructing Ms Crush and Mr X not to speak to each other unless the

HR manager was present;

(e) Reinforcing the availability of the EAP; and

(f) Checking that Ms Crush had frequent clinical supervision.

[128] In the exercise of a discretion, an employer must do so in good faith, and "not act arbitrarily, capriciously, dishonestly, covertly, or with ulterior motive"5 In deciding not to exercise its discretion to grant further paid leave to Ms Crush, I am satisfied that the respondent appropriately took account of its obligations under the MECA, the assessment of her being fit for work in the Fit for Work report and the measures it had taken to protect her in the workplace.

[129] The Authority cannot order an employer to exercise its discretion in any particular way, and can only order it to reconsider its discretion in good faith. However, that only arises when the Authority is satisfied that the discretion has not been exercised in good faith. I am unable to come to that conclusion. I must therefore decline to make the order sought by Ms Crush.

Conclusion

[130] I have found that there were flaws in the way that the preliminary investigation was carried out. This relates to the failure of the respondent to interview Mr X prior to rejecting Ms Crush's claim about him frequently turning out her office lights, a rejection it could not safely make without having interviewed Mr X. This failure to interview Mr X also potentially rendered unsafe the rejection of the allegation about

Ms Crush being left notes by Mr X.

5 Citing *Dorset v Chemcolour Industries (NZ) Ltd,* Employment Relations Authority, 8 April 2004, AA117/04.

[131] The failure to interview Mr X also amounted to a breach of the harassment policy.

[132] In addition, the failure to link Mr X's complaint about Ms Crush to her allegations of harassment was a flaw. If the respondent had made this link, its conclusion in the preliminary investigation report may have been different, as a pattern of harassment may have been discerned.

[133] Finally, the failing to interview Dr Numaguchi was a flaw which deprived Mr Donlevy and Ms Samuel of the opportunity to reach an early conclusion about solicitation of complaints in the preliminary report. This flaw was never rectified, although the solicitation of complaints issue was eventually investigated separately.

[134] Standing back, I see that these flaws did lead to disadvantage to Ms Crush, as she was reasonably expecting her complaints to be investigated thoroughly, and her concerns acknowledged at the preliminary stage. I cannot safely conclude that had the flaws not occurred, a different outcome would not have occurred as far as the preliminary report is concerned.

[135] I also find that the disadvantage was unjustified, as no fair and reasonable employer could have failed in its process as the respondent did, in all the circumstances. In reaching this conclusion, I have regard to the resources available to the respondent, the clear guidance of its Harassment Policy and the experience of the investigators, and Ms Casey.

Remedies

[136] Section 123 of the Act provides:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous

to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a

result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the

employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain

if the personal grievance had not arisen.

[137] There is no evidence that Ms Crush has lost any wages or other money arising out of the specific instances of unjustified disadvantage that I have found. However, she is eligible to be considered for an award under s 123(1)(c)(i) of the Act.

[138] Ms Crush's brief statement of evidence does not address in any fulsome way the effects on her of the respondent's failure in the preliminary investigation to find that Mr X harassed her. It states that she has been left feeling victimised by her employer, and that she has been left in a "horrible limbo". This evidence is really about the entire process, rather than the preliminary report and the investigation leading up to it. Her oral evidence was, similarly, about the entire process.

[139] Ms Guthrie's letter of 8 December 2014 raising the personal grievance is the only document that addressed expressly that preliminary report and the investigation to that point. There is reference in this letter to Ms Crush and Ms Guthrie being "at a loss", and to the findings being "staggering", "disappointing" and "incredible'. There is no direct reference to the effect on her of the findings.

[140] However, I do accept on a balance of probabilities that there would have been an effect upon her of the disadvantage caused to her by the preliminary investigation and the preliminary report, as is evidenced by her raising of a personal grievance. This effect would have been in the nature of injury to her feelings as her genuinely held concerns had not been found to have been vindicated, and she felt this was due to the flawed process.

[141] Whilst it is difficult to assess accurately the 'worth' of these effects under s 123(1)(c)(i), I regard them as relatively moderate at that stage, and would have fixed the award at $8,000, had Ms Crush not stated expressly that she sought payment of

$6,000 in her statement of problem. In accordance with the principle in *McIver v Saad6* that "... the case law is clear that a grievant cannot be awarded more than is claimed specifically...", I award the sum of $6,000.

[142] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be

6 *McIver v Saad* [2015] NZEmpC 145, at [56]

provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act). I am satisfied that Ms Crush did not contribute in any blameworthy way (or at all) to the situation giving rise to the personal grievance. I therefore do not reduce the award.

Orders

[143] I order the respondent to pay to Ms Crush within 14 days of the date of this determination the sum of $6,000 pursuant to s 123(1)(c)(i) of the Act.

Costs

[144] Costs are reserved. Ms Copeland sought a face to face investigation meeting to address the issue of costs, but I am not convinced that this is necessary given that there will be no need to take evidence from any party. I invite Ms Copeland and Mr Castle to first seek to agree between them on behalf of their respective clients how costs are to be dealt with. If they are unable to do so within 14 days of the date of this determination, they shall then each have a further 14 days with which to serve and lodge comprehensive memoranda on costs detailing their clients' respective positions. They shall then have a further 14 days within which to serve and lodge replies.

David Appleton

Member of the Employment Relations Authority