

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 582
3213959

BETWEEN KELLY DRAKE
 Applicant

AND ETE
 Respondent

Member of Authority: Helen Doyle

Representatives: Marilyn Suchley, advocate for the Applicant
 Brenda Thom, counsel for the Respondent

Investigation Meeting: 28 May 2024 in Dunedin

Submissions Received: 4 and 18 June 2024 from the Applicant
 11 June 2024 from the Respondent
 Further information about earnings up to 3 July 2024

Determination: 3 October 2024

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] ETE has asked the Authority to prohibit from publication this determination in its entirety or prohibit from publication the names of employees, residents and families who have been referred to in the evidence and any material that might identify the employees, residents, and their families.

[2] The grounds for the application are the vulnerabilities of the current residents of ETE and their families who might be concerned and/or distressed about the wellbeing of

family members who are resident at ETE. Ms Thom submits that individuals who have been referred to in the evidence have not had an opportunity to respond to any evidence about them and it has been a considerable amount of time since the allegations were made.

[3] Open justice as observed by the full Court of the Employment Court is of fundamental importance. Departures from open justice should only be made if there are sound reasons to do so and if specific adverse consequences could reasonably be expected to occur with publication.¹

[4] The Authority is not satisfied it would be appropriate to prohibit from publication the determination in its entirety. That would be extremely unusual and there is nothing in this matter to suggest such a step is necessary.

[5] It is appropriate to prohibit from publication the names of any residents of ETE and any names of their families. It is also appropriate to prohibit from publication the names of employees who have been referred to in the evidence but have not provided evidence to the Authority. There is no objection to this on behalf of Ms Drake.

[6] The Authority is not prepared to prohibit from publication the nature of the complaint made by Ms Drake to ETE by way of an incident report on 21 September 2022. The alleged incident would need to be described as a serious allegation which would lead to speculation about its nature. That could be as distressing to family members as stating what was actually alleged. As the Authority understands the evidence a member of that family was made aware of the allegation and the family member contacted ETE about it. Other family members of residents will know that the alleged incident did not concern one of their family members if they are residents at ETE.

[7] The Authority is not prepared to make the wide orders for non-publication sought. There is an interim non-publication order for the respondent to enable a challenge for a period of 28 days. At the end of the 28-day period, the interim non-publication order for the respondent will lapse if there has not been a challenge to the Authority determination and/or a further order of the Authority or Court.

¹ *MW v Spiga Limited* [2024] NZEmpC 147 at [85] to [87].

The employment relationship problem

[8] Ms Drake commenced her employment with ETE on 9 May 2018. She initially worked as a kitchenhand on a part-time basis and then began working as a healthcare assistant from in or about early September 2020. Her hours over the years fluctuated but the evidence supported she was working as a 0.8 or 0.9 full time equivalent at the material time.

[9] Ms Drake is still employed by ETE but has not physically attended work from 21 December 2022. She has in the meantime been employed elsewhere. Ms Drake was at the material time employed under ETE's collective employment agreement 1 August 2022 to 31 July 2023.

[10] Ms Drake says that she was unjustifiably disadvantaged because she was not provided with a safe workplace at ETE and was subjected to repeated and ongoing bullying behaviours by other employees which ETE failed to adequately investigate or address. Further she says that she was disadvantaged financially and unjustifiably by way of deductions to her sick leave and annual leave because she had to take time off due to the stress of the unsafe workplace together with additional medical and travel expenses. Ms Drake also says ETE refused to act in good faith in respect of providing a safe workplace.

[11] ETE says that it has provided a safe workplace for Ms Drake. Further, that as far as it is aware, she has not been subjected to repeated and ongoing bullying behaviours. ETE says that it fairly and reasonably investigated all issues raised with it by Ms Drake. It says that it is still in the process of investigating a complaint of bullying made by Ms Drake on 21 November 2022 but she has not presented herself to enable an interview to take place and has remained away from the workplace. As a result of this the investigation has not been able to be concluded. ETE does not accept that it has acted in an unjustifiable way in respect of deductions from sick and annual leave, or additional medical and travel expenses and says it has acted towards Ms Drake in good faith at all times.

[12] Remedies sought by Ms Drake are set out in the statement of problem but modified in final submissions. The remedies in the statement of problem were set out as follows:

- (a) Compensation for humiliation and loss of dignity and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in the sum of \$70,000;
- (b) Compensation for failing to act in good faith and failing to provide a safe work environment in breach of the Health and Safety Act under s 123(1)(c)(i) in the sum of \$70,000;
- (c) Payment of special leave for all the time the applicant has been on leave while her workplace has been unsafe and reinstatement of sick and annual leave used;
- (d) Payment of medical expenses including mileage;
- (e) Payment of mileage to attend counselling sessions;
- (f) A comprehensive return to work plan which ensures Ms Drake's safety;
- (g) Recommendations by the Authority to ETE as to what actions they should take to prevent similar relationship problems occurring under s 123(1)(ca); and
- (h) Payment of costs.

[13] These claims were quantified in final submissions on behalf of Ms Drake as one compensatory award of \$50,000, reimbursement of sick leave of \$3,070.73, alternative holidays \$1,691.89, statutory holidays \$168.42 and annual leave \$12,229.77 used by Ms Drake because of a refusal to pay her special paid leave.

The investigation meeting

[14] On 17 February 2023 a statement of problem was lodged on behalf of Ms Drake.

[15] On 24 April 2023 a case management conference was held with the Authority and Ms Drake's then representative, Alan Halse, and Ms Thom. Until Mr Halse lodged a second personal grievance Ms Drake's advocate had been Joanne Thomson.

Ms Thomson was a previous employee of ETE until November 2020. Since 2021 Ms Thomson has worked for Christchurch Culturesafe and then Hamilton Culturesafe which trades under Maniototo Enterprises Limited.

[16] There was a preliminary issue for the Authority whether a letter dated 16 October 2023 from Ms Drake to ETE raised a personal grievance within the 90-day statutory timeframe.

[17] By agreement the Authority dealt with this matter on the papers. Submissions from Mr Halse and Ms Thom were timetabled. The Authority did not find that a personal grievance had been raised by the letter of 16 October 2021. The Authority stated in its determination that it would hear evidence to determine whether there was a continuing course of conduct that could provide context to the grievances that were raised within the 90-day period.

[18] The matter was originally set down for a three-day Authority investigation meeting from 10 October 2023. Shortly before the date scheduled for the investigation meeting the Authority was advised that Mr Halse was unwell. The investigation meeting was adjourned.

[19] A further case management conference was held with the Authority, Mr Halse and Ms Thom on 20 November 2023. The investigation meeting was rescheduled for 28, 29 and 30 May 2024 in Dunedin. The Authority had in anticipation of the earlier dates set for investigation issued seven summonses for witnesses requested by Mr Halse.

[20] At the rescheduled investigation meeting Ms Drake was represented by Ms Suchley. Only one of those summoned to attend to give evidence, Ms Thomson, was present at the investigation meeting.

[21] Ms Thom in an earlier application to the Authority dated 27 May 2024 had advised that her instructions were that if Ms Thomson gave evidence wider than that provided in four paragraphs of her “will say” statement, there would likely be a claim lodged that she was in breach of a record of settlement.

[22] The concerns, and Ms Drake's instructions, were repeated at the Authority's investigation meeting.

[23] The Authority proceeded to hear sworn evidence from Ms Drake. The representatives were encouraged over the luncheon adjournment to see if they could reach some pragmatic resolution rather than leaving Ms Thomson facing the potential of legal action. There was agreement that instead of hearing evidence from Ms Thomson the fact a complaint had been made by her against one of the same employees that Ms Drake complained about was able to be admitted as evidence.

[24] The Authority heard affirmed evidence from Rebecca Crawford who is employed in the role of Clinical Nurse Manager and Thelma Brown who was employed from 30 August 2022 as General Manager of ETE. At the end of the evidence the Authority timetabled for an exchange of submissions. There was also some additional material received about Ms Drake's earnings requested by Ms Thom.

[25] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified any orders made. It has not recorded all evidence and submissions received.

The issues

[26] There is wide-ranging criticism of the actions or omissions of ETE in investigating two written complaints from Ms Drake.

[27] The issues that require determination are:

- (a) What were the material employment agreements, codes of conduct and policies relating to bullying and staff complaints at the material time?
- (b) Was ETE aware of complaints from Ms Drake about behaviour in the nature of bullying before October 2022?
- (c) Had there been previous issues with the same employees at ETE?
- (d) What is the legal framework for unjustified disadvantage?

- (e) Were the actions of ETE justified and in accordance with the obligations of good faith in investigating complaints made by Ms Drake from September 2022?
- (f) This will include assessing:
 - (i) Was the investigation team impartial and should one of the team members have been independent?
 - (ii) Was Ms Drake discouraged from making further complaints?
 - (iii) Did ETE take appropriate steps to ensure a safe working environment for Ms Drake while investigations were underway?
- (g) Why has Ms Drake not returned to work since 21 December 2022?
- (h) Did ETE act justifiably in responding to the requests from Ms Drake for paid special leave?
- (i) If Ms Drake is successful in making out her grievances, what remedies should be awarded and are there issues of contribution and mitigation?
- (j) Should ETE be ordered to pay Ms Drake special leave for periods of absence and reverse deductions for annual and sick leave?
- (k) Should either party contribute to the representative costs of the other party.

What were the material employment agreements, codes of conduct and policies relating to bullying and staff complaints at the material time?

Collective agreement

[28] The collective employment agreement 1 August 2022 to 31 July 2023 that covered Ms Drake's employment provided the following:

27 **HEALTHY WORKPLACES**

27.1 The parties of this employment agreement agree that all employees should have a healthy workplace. Achieving healthy workplaces requires:

- (a) ..
- (b) ..

- (c) A workplace culture between employees and their managers that reflects an understanding and actively advocates a balance between safe quality care, a safe quality work environment and organisational efficiencies.

Code of conduct

[29] ETE has a Code of Conduct. The Code of Conduct recognises that bullying in the workplace can create a risk to health and safety and is a form of misconduct. Bullying is described as follows:

Workplace bullying is repeated and unreasonable behaviour directed towards a worker or a group of workers that can be physical, verbal or relational/social. Repeated behaviour is persistent and can involve a range of actions over time. It includes victimising, humiliating, intimidating or threatening a person. A single incident of unreasonable behaviour isn't considered workplace bullying, but it could escalate and won't be ignored. All incidents of reported bullying will be investigated fully by management and dealt with appropriately.

Policy and procedure for staff complaints

[30] ETE has a policy and procedure for staff complaints. It provides that complaints about other employees should be made to the complainant's immediate supervisor, nurse manager or general manager.

[31] The process for an investigation of a formal complaint is set out on page 3 of the policy under a heading Complaint Process. It will follow the procedures directed within the appropriate employment contract and formal processes are:

A preliminary enquiry will be conducted by the general manager or designated person of authority if appropriate. **Resolution aimed to be achieved at the earliest opportunity but within two months.** The preliminary investigation completed within one month. These timeframes may vary according to the complexity of the complaint but the parties concerned will be advised and kept informed of any delay.

[32] Under the heading "Advanced process" in the policy the procedural components are set out:

Interview of complainant to determine facts.

Provide copy of complaint to any person being complained about. Obtain a response.

Prior to interview the individual must be allowed sufficient time to consider their position – at least 24 hours – and be allowed a support person or representative.

If the facts are disputed evidence may be sought from witnesses.

If complaints are harassment or bullying, which are provided in writing, an informal resolution would not be appropriate. The matter should be investigated and could form part of a disciplinary process in more serious cases.

An impartial investigation team is required, with at least two investigators, one of which may be independent to the organisation. The option of having a union representative on the team as an observer should be considered.

The investigators would usually interview and gather all the information from the complainant and any witnesses first before providing all of the information to the respondent of the complaint and prior to meeting with them.

Note during the investigation it is important that measures are put in place to ensure both parties have a safe working environment.

The investigators will need to write up a summary of the investigation, including the evidence and witness notes and their findings. This document will need to be released both to the respondent and the decision maker. The report will only go so far as to determine whether the allegations are based on fact or not.

It is important, where possible, to resolve all complaints in the first instance informally. The responsibility for deciding what steps to take rests with the employer.

Where the complaint has been substantiated, disciplinary action may be warranted. Every case is different and must be dealt with on the basis of the facts presented.

...

Appeal

Any party not happy with the procedure or outcome may appeal to the Chair of the Board in writing.

Was there a continuous course of bullying conduct?

[33] Two personal grievances were raised by Ms Drake of unjustified disadvantage on 23 November 2022 and 23 January 2023.

[34] If evidence outside of the 90-day period of those personal grievances is to provide context to them it must be of a nature to constitute a continuous cause of conduct. It may then inform whether there has been an unjustified disadvantage within the 90-day period but remedies are confined to the events in the relevant 90-day period. The broader background however could inform the nature and scope of the remedies.²

² *Davis v Commissioner of Police* [2013] NZEmpC 2265 at [46] at [52].

[35] The 16 October 2021 letter from Ms Drake to ETE was about a lack of professional standards by another employee who I shall refer to as A. The letter was focussed on concerns for patients and residents from A's behaviour rather than matters in the nature of a personal grievance. It was not a complaint about bullying. Ms Drake referred in the letter to being scared to make a complaint as she would be "targeted and bullied by A." She stated in the letter that she wrote it with the residents/patients in mind and her other colleagues. The nature of the letter was not found in the Authority's preliminary determination to be the raising of an unjustified action personal grievance.

[36] Ms Drake's next written complaint was in September 2022 about an employee who will be referred to as B. It was not a bullying complaint.

[37] A verbal concern about conduct in the nature of bullying by B and two others was raised during a meeting on 11 October 2022 with Ms Brown and Ms Crawford.

[38] A written complaint of bullying was then made by Ms Drake on 21 November 2022. It concerned the actions of three employees. One was A, the subject of the earlier October 2021 complaint. Another was B who was also the subject of the September 2022 complaint and the third was another employee C.

[39] Ms Drake said that during her employment she was subjected to bullying behaviours from A, B and C and she had also witnessed A and B bully other staff members. Ms Drake described behaviours including being shouted at, glared at, continuously criticised, excessive monitoring of work, micromanaging, and sarcastic comments. Ms Drake in her written evidence said that B "is the ringleader", A "is the sidekick" and C "just comes at you gun's blazing." Her evidence was that if B took a dislike to you then she set about making your time at work miserable with the help of A and C in and out of the workplace. Ms Drake said that her confidence was undermined, and she felt on edge at work as a result.

[40] The evidence from Ms Drake was that she raised complaints verbally with Ms Crawford about three employees before September 2022. Ms Drake said that she had previously made Ms Crawford aware of A "screeching at her" and criticising her in front of the residents and was told to ignore the behaviour. She also said that on occasion she

had verbally raised concerns about B's behaviour towards her with Ms Crawford and was told "that's how she is" and told to ignore it and take notes. Ms Drake said there is a perception among staff that A and B are protected by management and there is no point in making a complaint and those staff who do are then blamed for how they are treated and have not returned to the workplace.

[41] In her oral evidence Ms Drake said that on some shifts there was no bullying but the majority of time there was bullying, and she was micromanaged. She also said in her oral evidence that the bullying "didn't start getting too serious until after the September 2022 incident."

[42] Ms Crawford is responsible for all the clinical domestic and kitchen staff and the management of care for medical admissions and residents in the aged care facility. There was evidence about meetings that Ms Crawford facilitated with staff and that she met individually with each staff member each year about performance. She said that she had an open-door policy and was available to staff when they needed to talk.

[43] Ms Crawford said that Ms Drake's complaint in October 2021 was addressed by the then General Manager and Ms Crawford was involved in a subsequent follow-up process with the employee who was the subject of the complaint. I was satisfied from the evidence that steps were taken in relation to the October 2021 complaint.

[44] Ms Crawford did not accept that Ms Drake complained to her about A "screeching" at work but she was aware that Ms Drake and A had an altercation outside of work about a dog and she spoke to A about ensuring she was appropriate and professional towards Ms Drake. Ms Crawford said in her evidence that no previous complaint had been raised with her about B by Ms Drake until the complaints in September and November 2022.

[45] Ms Crawford said that aside from the November 2022 complaint Ms Drake made that included complaints about C she was not aware of any other complaints Ms Drake had made about C. Ms Crawford did not accept that A and B are protected by management and did not accept that they are treated differently than other employees. She did not accept that the three employees A, B, and C are referred to generally as bullies

in the workplace and that others “dread working with them.” Ms Crawford does the rosters for shifts and said no-one had raised concerns with her about being rostered with A, B and C. Ms Crawford said that residents are at the centre of everything they do at ETE. The evidence is that there is a focus on providing a safe environment for residents and there is constant assessment of any risks the residents may face. ETE has an adverse event system where all risks and events are reported and a no blame system where if there are errors the focus is on prevention and education rather than punishment.

[46] Mr Halse attached some notes to the second letter raising a personal grievance dated 23 January 2023 that Ms Drake had made about exchanges with other employees at an earlier stage. One is dated 28 October but refers to not getting a note from another employee not A, B or C. One is dated 18 March 2022 about C and the placement of some milk jugs, one is about an exchange on 26 April 2022 about a concern how Ms Drake was spoken to by B and another employee not A or C, four are about exchanges in May 2022 which include a reference to comments from A and B. The evidence did not support these notes were provided to ETE prior to them being attached to the personal grievance letter in January 2023.

[47] Some reliance can be placed on Ms Drake’s evidence that matters did not get “too serious” for her until after the September 2022 complaint. The Authority concludes it more likely that ETE was not aware of complaints from Ms Drake about conduct in the nature of bullying by A, B or C before a verbal complaint on 11 October 2022 and written complaint in November 2022. The evidence therefore does not establish a continuous cause of conduct outside of the 90-day period of the personal grievances.

Previous complaints about bullying by other employees?

[48] There was evidence to support two other employees had complained about B at earlier points in time. Ms Thomson had made a complaint about B in October 2020 and in May 2021 there was investigation of a complaint by another employee about B.

[49] The complaint in May 2021 about B was investigated by an independent investigator who concluded in a final report dated 23 June 2021 that no bullying had occurred. The independent investigator’s report was redacted except for part of two

paragraphs under a heading “Recommendations.” The report writer had commented in the report that it was positive ETE had commenced a professional development programme for its staff including elements of communication training and what is “above the line and below the line” in terms of acceptable behaviour. This included training on tolerance.

[50] The evidence supported communication training was implemented for all the staff at ETE including Ms Drake. Ms Drake said that she found the external training useful. Resilience training was subsequently implemented. The implementation of such training is an action a fair and reasonable employer could take to improve and/or strengthen the culture of the workplace. It cannot be discounted that this training may have resulted in some improvements in the working environment following Ms Thomson’s time at ETE.

[51] ETE was required to provide a safe workplace for Ms Drake by protecting her against a foreseeable risk of harm. There was a policy for staff complaints and these could be verbal or in writing and dealt with both formally and informally. The Authority does not conclude these previous complaints about B in the absence of a complaint by Ms Drake means a risk of harm to her ought to have been reasonably foreseeable to ETE.

The legal framework for consideration of the claims of unjustified disadvantage

[52] Section 103(1)(b) of the Act defines a disadvantage grievance as below:

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee’s employer or former employer because of a claim-

(a) ...

(b) 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 been terminated) affected to the employee’s disadvantage by some unjustifiable action by the employer; or

...

[53] The personal grievance of unjustifiable disadvantage in s 103 (b) of the Act requires an action or omission by the employer which is unjustifiable. In assessing justification, the Authority applies the test of justification under s 103A (2) of the Act and objectively considers whether ETE's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the action. The Authority does not determine justification by considering what it may have done in the circumstances. The unjustified actions must also affect the employee's terms and conditions of employment to their disadvantage.

[54] Unjustified disadvantage in employment is not confined to breaches of the contract between the parties and a personal grievance is a broader notion.³

[55] The Employment Court in *FGH v RST* stated that an employer's failure to address bullying in the workplace may give rise to an unjustifiable disadvantage claim as an aspect of the duty to provide a safe workplace.⁴

Were the actions of ETE justified and in accordance with the obligations of good faith in investigating complaints made by Ms Drake from September 2022?

[56] Ms Drake has not returned to ETE after 21 December 2022 and has worked elsewhere. In order to obtain other employment after December 2022 Ms Drake had to shift away for a period from her family and her hometown.

[57] The actions that Ms Drake complained of in the workplace were not those of ETE or one of its representatives. They were those of other employees. ETE's obligations were to investigate the complaints made and provide a safe workplace for Ms Drake from any risk of harm that was reasonably foreseeable.

[58] It is not the role of the Authority to pedantically examine every aspect of the investigations of Ms Drake's complaints to see if ETE has made some error. The Authority is required to objectively assess substantive reasonableness and fairness to

³ *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 at [45]

⁴ *FGH v RST* [2018] NZEmpC 60 at [201].

determine whether what ETE did, and how it was done, was what a fair and reasonable employer could have done in all the circumstances at the time.

The first complaint

[59] On 21 September 2022 Ms Drake logged an incident report that B had assaulted a resident and sworn at a resident.⁵ Ms Drake said in her evidence that she was reluctant to report the incident because she knew that B would retaliate but considered it needed to be reported.

[60] Ms Crawford read the incident report when she came onto her shift and Ms Drake was asked to come to her office. Ms Drake was accompanied by a support person. There was a transfer of the location of the report from the adverse event reporting system to the complaint system which is confidential and cannot be seen by other staff. The evidence did not support anything untoward about that. Ms Drake checked the report and added some further detail. Ms Drake was advised that Ms Crawford would get back to her in a few days.

[61] Ms Crawford then immediately assessed the resident for any signs of a physical assault and found no bruising. She was unable to hold a coherent conversation with the resident.⁶ A further check the following day did not show evidence of bruising but difficulties with conversing remained. Ms Crawford however observed the resident to be relaxed and happy.

[62] On 27 September 2022 Ms Drake was provided with a letter signed by Ms Crawford and Ms Brown to acknowledge the complaint in relation to the resident and she was advised that an investigation into the allegation would be undertaken and she would be kept informed of progress and eventual outcomes. The letter stated that support can be made available if required and not to hesitate to ask for this.

[63] On 5 October 2022 the complaint was provided to B. Ms Crawford said that B had no idea who had made a complaint about her and was shocked to hear it was a

⁵ The contact alleged was that B “slammed a flat hand” onto the resident’s chest by their left clavicle.

⁶ This was due to the resident’s existing condition which made conversation difficult.

complaint from Ms Drake. Ms Crawford said that she asked B to behave in a professional manner with Ms Drake and not to talk to her about the complaint. Ms Crawford suggested that it was best for B to do work that did not bring her in close contact with Ms Drake.

[64] B was formally interviewed on 10 October 2022 with a support person. She agreed she had called the resident a “bitch” but said she was responding to the resident using a similar type of language to that of the resident to diffuse the situation. B denied that she swore at residents regarding the use of the word “bitch” as different to swearing because of the context and tone. The complaint amongst other matters referred to B “yelling” back at the resident. That was denied. B did not accept that she assaulted the resident.

Meeting on 11 October 2022

[65] On 11 October 2022 there was a formal interview meeting with Ms Drake, Ms Crawford and Ms Brown about the first complaint. The notes of the meeting were typed and included in information provided to the Authority. Ms Suchley submits that Ms Drake was not given an opportunity to have a support person at the meeting. Ms Crawford and Ms Brown’s evidence was that Ms Drake was given an opportunity to bring a support person and chose to proceed without one. Ms Brown said that if she had wanted a support person the meeting would have been adjourned. The notes do not record any discussion about a support person. I am satisfied that Ms Drake knew from other meetings and because she had undertaken some delegate work that she could have a support person. I conclude it more likely that the opportunity for support would have been offered for this meeting. That would have been consistent with B’s interview the day before at which she had support.

[66] Amongst other matters the notes record Ms Drake was thanked for advising about her concerns and B’s explanation was put to Ms Drake for comment. This type of process is consistent with the complaints policy. Ms Drake responded that “of course B would deny everything.” Ms Drake was advised that it was a difficult situation, and it is “one person’s word against another’s” The notes record that Ms Crawford and Ms Brown told Ms Drake that it did not mean the incident did not happen, but it is difficult when there is “no evidence.” The use of the term “no evidence” concerned Ms Drake. The context of

this from the subsequent outcome letter dated 2 November 2022 and from the evidence supported what was meant was there was no corroborating (supporting) evidence.

Comments made at the interview meeting by Ms Drake about safety

[67] During the meeting on 11 October 2022 Ms Drake made comments that she felt unsafe in the workplace. She referred to a “gang of three health care assistants who made life hell for her and were always snipping at her.” She advised Ms Crawford and Ms Brown that the three employees undermined her and she did not want to come to work and wanted to hide from them in the kitchen or elsewhere. She was asked how she would feel working with B going forward and if she would like to meet with her and talk things through. Ms Drake is recorded as saying that she would not meet with B as she feels so threatened by her and the others that she would not put her mental health at further risk. She said that she was so afraid she had talked to the local Police constable about making the complaint in case there were repercussions outside of work. She said that she would hide away in the kitchen and lock the door if there was a key and would remove herself from engagement with B. Ms Crawford and Ms Brown are recorded in the notes as saying that was not possible or appropriate. Ms Drake referred to B as “sly and careful” when she says undermining things to Ms Drake and that was “occurring all the time.” She is recorded as saying that she is “really frightened of B.” It was recorded that Ms Drake was emotional and crying toward the end of the meeting.

[68] Ms Drake accepted when questioned at the Authority investigation meeting that access to support was offered but Ms Drake said that she can also access this through the New Zealand Nurses Organisation (NZNO). Ms Drake was thanked for having the courage to make the complaint and for her work. It was suggested that Ms Drake have a walk outside before returning to work.

Plan of action following meeting with Ms Drake

[69] The bundle of documents includes notes taken from a further discussion between Ms Crawford and Ms Brown and a plan of action after meeting with Ms Drake and B on 11 October 2022. The notes record that neither B nor Ms Drake wanted to meet with the

other for a facilitated meeting although B thought that she could work with Ms Drake in a professional manner.

[70] Ms Crawford and Ms Brown as recorded in the notes talked at the nurses' staff meeting on 12 October about tension rising between health care assistants and for the registered nurses to call out bad behaviour and language and keep an eye on things. Ms Drake agreed that Ms Crawford had checked in on her once or twice after 11 October 2022. Ms Crawford's evidence that she checked in with Ms Drake more frequently. Ms Crawford gave evidence that Ms Drake raised concerns with her about how B was interacting with her differently. Ms Crawford said that this was "not real" because B had not been told at that time about the complaint. The timing of this would be before 10 October 2022 which was the date B was interviewed and told who had made the complaint. Ms Crawford said that her office door was always open if issues arose. Ms Brown said that she advised Ms Drake that she could see her if she felt unsafe.

Measures to keep Ms Drake safe after 11 October 2022

[71] The complaints policy provides that during an investigation it is important measures are put in place to ensure both parties have a safe working environment. It also provides that complaints can be made verbally. The interview meeting on 11 October 2022 was whilst the investigation was proceeding.

[72] The Authority has considered whether the steps ETE took at that time to keep Ms Drake safe were appropriate or whether they fell below what a fair and reasonable employer could have done. Ms Crawford checked in on Ms Drake although the frequency of that was disputed. The nurses were made aware of possible tensions and asked to call out and investigate bad behaviour. Ms Crawford and Ms Brown expressed their availability if issues arose for Ms Drake. B was told to work as much as possible away from Ms Drake and act professionally. Ms Brown was satisfied that Ms Drake would be safe because of these steps.

[73] ETE could as a fair and reasonable employer have examined more closely the reasons for the rather extreme fear that Ms Drake said she had about B in particular. ETE recorded from the discussion of 11 October 2022 that Ms Drake raised many more issues

of “workplace bullying and intimidating behaviour.” The evidence did not support these were discussed other than in a general way with encouragement from Ms Brown and Ms Crawford to make a written complaint. A discussion about the basis for these concerns would have ensured safety measures were tailored to address them whilst the investigation into the allegations took place.

[74] A failure to explore the reasons for the safety concerns and implement suitable measures to ensure safety meant that ETE fell below the standard of what a fair and reasonable employer could have done in all the circumstances at this time. The evidence did not support Ms Drake raised any complaint during this time until 21 November 2022. Ms Crawford was aware that Ms Drake was likely coming to work a little late to avoid contact with B.

Outcome of the September complaint

[75] Ms Brown and Ms Crawford wrote a letter dated 2 November 2022 to Ms Drake. It is likely that there was a discussion with Ms Drake when the letter was handed to her. The investigation undertaken into the complaint about B and conclusions reached were set out in the letter. Ms Drake was advised by Ms Brown and Ms Crawford that the complaint that B has assaulted a resident was not established although B agreed she used the word “bitch” but the tone as alleged was not able to be established. That aspect of the use of that word was stated to have been conduct that breached the Code of Conduct/House rules and would be dealt with accordingly with B.

[76] There was mention in the letter of 2 November of the other concerns raised by Ms Drake on 11 October 2022. The letter set out that the other concerns had not been investigated as part of the complaint and Ms Drake was asked to consider if she wanted to follow through with these as a separate complaint. The employee assistance programme was offered.

Discouraged from making further complaints?

[77] Ms Suchley said that Ms Drake was “passively discouraged” from making further complaints in part because of Ms Crawford’s involvement in the investigation process

and the “bias” against Ms Drake. Ms Drake did however complain further in November 2021 having been encouraged to do so.

Impartial investigation team?

[78] The complaint policy provides that an impartial investigation team is required with at least two investigators one of which **may** be independent to the organisation.

[79] Ms Suchley submitted that there was a serious lack of impartiality and independence of both the investigators Ms Crawford and Ms Brown in respect of both complaints. She submitted that there was bias, and that A, B and C had an “unhealthy hold of the hospital management and were enabled to act as quasi management with the belief they had seniority over other staff.” Ms Suchley referred to day to day interactions that Ms Crawford had with employees in her role. She referred in evidence to it being well known that B and the other employees were well known for their anti-social behaviour in town and that the investigators would choose the “path of least resistance” by minimising the concerns in favour of A,B and C.

[80] The Employment Court has stated with reference to employment relationships that “there can be no expectation that an employer will approach decision making processes involving an employee unaffected by any prior knowledge or views.”⁷ Further that complete neutrality is not the appropriate standard. What the Authority is required to consider is whether there is evidence that the fairness of the actions and decisions have been negatively affected.⁸

[81] ETE does not accept that Ms Crawford and Ms Brown could not be fair and impartial investigators in the investigation of Ms Drake’s complaints. Ms Brown had only recently before Ms Drake’s complaints commenced her employment as General Manager. When questioned during the Authority investigation Ms Brown said she had no prior knowledge of Ms Drake and the other people and felt she could be fair and that she had the appropriate skills to investigate complaints and interview in a fair and

⁷ *Yan v Commissioner of Inland Revenue* [2015] ERNZ 247 at [48] with reference to *Peters v Collinge* [1993] 2 NZLR 554 (HC) at 566.

⁸ Above n 1 at [48].

reasonable manner. Whilst Ms Crawford had some knowledge of the other investigations involving some of the employees that Ms Drake complained about she had not been involved as an investigator. When questioned at the investigation meetings Ms Crawford showed insight into how to impartially investigate a complaint with awareness of the possibility of bias and how to address that.

[82] On receipt of the first complaint from Ms Drake investigations were undertaken and it was regarded as a serious matter. Ms Crawford said in her evidence that she checked the resident twice but there was no bruising evident on the area Ms Drake said had been hit by B. Ms Drake said she was reluctant to report the incident immediately because of a fear of retaliation. It was not unreasonable though for the investigators to have taken into account the lack of clinical notes about the resident being particularly difficult or distressed on the date of the incident 20 September 2022. The registered nurse on duty for the shift on 20 September 2022 had gone home sick. Cover on the day of the incident had been provided by Ms Crawford however she was not advised by Ms Drake verbally of any incident. This was set out in the letter of 2 November 2022.

[83] ETE could refer staff complaints to an investigator independent of the organisation under its complaints policy but was not required to. The Authority heard evidence that ETE is a small organisation and has to manage its resources carefully. From an assessment of the first investigation process a lack of impartiality on the part of Ms Crawford and Ms Brown in undertaking investigations into the complaints to see if they were established is not evident.

[84] The investigation into the second complaint was not able to be concluded because Ms Drake could not be interviewed. The concerns about the makeup of the investigation team for the second investigation was only raised in January 2023 after the process had already commenced.

The second complaint dated 21 November 2022.

[85] On 21 November 2022 Ms Drake made a written complaint about A, B and C. C had made a complaint about Ms Drake with respect to an incident that occurred on 20

November 2022 and Ms Drake also complained about C in respect of that incident and another incident.

[86] In final submissions Ms Thom stated that Ms Drake gave evidence that her complaint about C was made because C has complained about her. In its minute book the Authority recorded that Ms Drake in answer to a question said that she found out about C's complaint through Ms Thomson who was her advocate at that time. Ms Drake did say that the "other complaints were instigated because C made a complaint about her." The timing is somewhat difficult to reconcile with attachment of C's complaint to a letter to Ms Drake dated 14 December 2022. Not too much can be made of the reason for Ms Drake making the complaints of bullying on 21 November 2022.

Ms Thomson is instructed

[87] On 22 November 2022 Ms Thomson advised Ms Brown in an email that she was acting for Ms Drake, attached a copy of Ms Drake's complaint and asked how the "unacceptable behaviour" directed at Ms Drake over the last few weeks would be resolved.

Ms Thom is instructed

[88] Ms Thom was instructed by ETE. Ms Thom emailed Ms Thomson on 23 November 2022 to set up a meeting the next day to go through the details of Ms Drake's complaint and discuss the ongoing working environment for the next few weeks and expectations. Ms Thomson was invited to the meeting. A blank form for reports of unreasonable behaviour that ETE uses was attached for Ms Thomson to transfer the information to from Ms Drake's complaint letter of 21 November. This was criticised by Ms Suchley in her submission as an intention by ETE to make it difficult for Ms Drake by making her jump through hoops. The form sensibly separated out each incident to enable the complaints to be put separately to the employee complained about and was appropriate.

First personal grievance raised 23 November 2022

[89] Ms Thomson raised a personal grievance for unjustified disadvantage by letter dated 23 November 2022 alleging that ETE did not act in good faith when bullying concerns were raised and for failing in the duty to provide a safe work environment for Ms Drake. This was alleged to breach both the Employment Relations Act 2000 and the Health and Safety at Work Act 2015 leading to a “mental health crisis.” Paid stress leave was requested. Attendance at mediation was requested. A medical certificate was attached that provided Ms Drake was unfit to work from 20 November until 9 December 2022.

[90] Ms Thom responded that same day and advised that in the circumstances they would not be able to meet with Ms Drake the next day. The letter set out that Ms Drake had 16 days sick leave but there was no agreement to paid stress leave.

Concerns arise about confidentiality.

[91] Before 9 December 2022 ETE became aware of concerns Ms Thomson was talking to a family member of the resident who was the subject of the 21 September 2022 complaint. Ms Crawford said that the family member when spoken to by her was comfortable with the approach ETE had taken with the complaint. Ms Crawford said that she had been told by the family member that she was encouraged by Ms Thomson to make a complaint.

[92] ETE’s concerns about this resulted in a requirement for confidentiality undertakings to be signed. The initial confidentiality undertakings requested of Ms Thomson and Mr Halse were amended to be consistent with those signed by others who were interviewed as part of the investigation. Much correspondence resulted from this requirement. It is not unusual for the need for confidentiality to be emphasised when investigations of bullying are being undertaken so the evidence is not tainted. Additionally, a need to preserve confidentiality in the small community ETE operates in was seen as understandably necessary in this matter.

Ms Drake returns to the workplace

[93] On 6 December 2022 Ms Thom wrote to Ms Thomson seeking confirmation that Ms Drake would be available for work on 9 December 2022. To ensure a safe workplace it was set out in the letter that there would be rostering of Ms Drake at different times to A, B and C as much as possible. There was advice that A, B and C had been advised to keep interactions with Ms Drake professional and to a minimum. Further that employees involved in the investigation were to talk to the charge nurse or clinical nurse manager if there were any issues. ETE also spoke with the registered nurses and asked them to be vigilant in relation to any inappropriate behaviour.

[94] Ms Thomson confirmed that Ms Drake would return to work on 10 December 2022 in a letter dated 7 December 2022 to Ms Thom. Ms Thomson wrote that Ms Drake appreciated the “Return-to-Work Strategy” outlined in the letter and was happy to return to work provided her “safety is paramount.” Ms Thomson also advised that Ms Drake wanted to resolve matters at a “low level” and “return to a job she enjoys”. The incidents referred to in Ms Drake’s letter of complaint dated 21 November 2022 were transcribed into ETE’s reports of unreasonable behaviour. The earliest incident was dated 30 October 2022.

[95] Ms Drake duly returned to work on 10 December 2022.

[96] On or about 14 December 2022 the employees complained about were provided with a letter inviting them to an investigation meeting in relation to the complaints by Ms Drake. Ms Drake was invited at the same time to a meeting to discuss the complaint raised by C and she was provided with a copy of the staff complaint process and advised that she could bring a support person to the meeting.

[97] Ms Thomson was asked to provide the names of the staff involved in two incidents on 30 October and 20 November 2022 and the staff member who allegedly said “B was out to get her [Ms Drake]”. The request for this information was repeated by Ms Thom on several occasions but seemingly not provided until a second personal grievance was raised on 23 January 2023 and there was further information when the statement of problem was lodged.

[98] A, B and C and other staff who may have observed the incidents complained of by Ms Drake were interviewed and the notes of the interviews provided to Mr Halse on 23 December 2022.

Ms Drake is away from the workplace

[99] On 21 December 2022 Ms Drake advised that she had contracted COVID-19. She was on paid special leave from 21 December 2022. That was followed by scheduled annual leave from 26 December 2022 to 8 January 2023. Further medical certificates were provided when they were requested including one on 11 April 2023 that indicated Ms Drake was unfit for work until 1 July 2023. Ms Drake did not return to work at ETE after 21 December 2022.

[100] Four separate dates were provided by ETE to meet with Ms Drake and interview her about C's complaint about her. The dates were 21, 29 and 30 December 2022 and 12 January 2023. There was then another date offered on 16 January 2023. Ms Drake for a variety of reasons including unwellness and annual leave did not attend at the meetings. One of the reasons advanced by Ms Drake's then representative for not attending at work was the stress from reading the witness statements. In her evidence Ms Drake could not recall if she had read the witness statements.

[101] ETE say they have been unable to conclude the investigation of the 21 November 2022 complaints by Ms Drake or C as a result.

[102] Ms Thom in her submissions said that Ms Drake admitted in evidence that she never intended to return to the workplace. That was not accepted to have been her evidence in Ms Suchley's submission in reply. The Authority's minute book records that Ms Drake said about continuing to work "can't stomach working with the three employees, walking on eggshells and watching her back". Ms Drake is also recorded as saying about the workplace that she "couldn't handle it." The Authority did not record Ms Drake expressly stating that she did not intend to return to work although such an intention could be implied because Ms Drake has not returned to work for almost two years and what the Authority recorded in its minute book.

[103] Ms Thomson was instructed by Ms Drake at the time of her second complaint and there was constructive engagement with ETE about the return to the workplace. Measures were put in place to roster Ms Drake away as much as possible from A, B and C from 10 December 2022. Ms Drake only returned to the workplace for a short period from 10 December and did not return at all after 21 December 2022. The evidence did not support ETE were aware of any difficulties during the period Ms Drake did return to work in December 2022. Attendance by Ms Drake at a Christmas party was referred to.

[104] From January 2023 the communications sent on behalf of Ms Drake became particularly critical of ETE and challenged matters such as the impartiality of the investigators, the investigation process, witnesses interviewed and other aspects. The parties attended have mediation but the matter was not resolved. As set out earlier Ms Drake has not resigned from ETE but is working elsewhere.

[105] Ms Thom raised concerns on receipt of the Inland Revenue information that Ms Drake received considerably more income when she was working elsewhere for the 2023 financial year and was still for a period of time being paid holiday pay entitlements. Further that whilst one, perhaps two of the medical certificates confine the inability to work to ETE the others do not but Ms Drake was working elsewhere. Ms Suchley submits that subsequent medical certificates were related to these earlier certificates.

Conclusions

[106] The evidence supports that the two written complaints Ms Drake made were investigated promptly. The investigation process was consistent with ETE's complaint policy and Ms Crawford and Ms Brown were impartial investigators. Ms Drake was not discouraged from making a further complaint after the first complaint and did so. The Authority is not satisfied that requests made of Ms Drake and her representatives about confidentiality, provision of witness names and separating out the complaints for each person complained about were designed to obstruct and make it difficult for Ms Drake to raise complaints. Objectively assessed there was a reasonable basis for the requests. Ms Suchley submitted that the bullying investigation was too limited and not wide enough. Ms Drake was not interviewed, and the investigation remains incomplete. Wider issues could have been potentially discussed at an interview with Ms Drake and behaviour

concerns put in a broader context. Ms Suchley refers to the absence of a terms of reference but this was not a requirement of the complaints policy. The investigation into the complaints was what a fair and reasonable employer with limited resources could have undertaken.

[107] Ms Drake's answer to a question at the Authority investigation about what more ETE could have done shows insight on her part about the employment relationship problems. Ms Drake acknowledged in her answer the situation was "hard" and could not really think of anything ETE could have done. She did refer to possibly being rostered apart from A, B and C as providing some resolution.

[108] The one area where I find ETE did fall below the expected standard of a fair and reasonable employer and the requirements of its complaints policy is the safety measures for the period after 11 October 2022. ETE knew that Ms Drake was very afraid of B. Ms Drake continued after 11 October 2022 to work with B whilst there was an investigation process into the first complaint. A failure to explore the reasons for the concerns and address these with appropriate safety measures, probably rostering apart from B, was an unjustified action. Ms Drake felt on edge and anxious in the work environment. Ms Crawford understood that she was arriving late to work to avoid seeing B. There was corresponding disadvantage.

[109] Ms Drake has made out a personal grievance that she was unjustifiably disadvantaged in her employment in this respect. Remedies will be addressed after consideration of the alleged grievance about special leave.

Was the failure to pay special leave when requested an unjustified action?

[110] Special leave for periods of absence from 21 November 2022 and then from January 2023 were requested but declined. Ms Drake was paid for these periods using sick and annual leave balances.

[111] The Authority was not directed to any provision for special leave in the collective agreement and is not satisfied that there is such a provision. Other clauses such as clause 10.8 about leave without pay state that such leave would normally only be granted

after all other leave balances are exhausted. There was no evidence to support Ms Drake was treated differently than other employees when special leave was declined.

[112] ETE did not act unreasonably in declining to pay special leave. In November 2022 sick and annual holiday leave had not been exhausted and was available to be used. It was not unreasonable for ETE to decline a request that would have been open ended and indefinite in January 2023 when it was unclear if Ms Drake when was going to return to the workplace.

[113] An unjustified disadvantage grievance about special leave and reinstating sick and annual leave balances is not established. There is no evidence to support some other claims such as those about travel, medical and counselling costs. These claims were not repeated by Ms Suchley in final submissions.

Remedies

[114] The appropriate remedy for the disadvantage grievance established is compensation under s 123(1)(c)(i) of the Act. Ms Suchley seeks the sum of \$50,000 based on an award in an Authority determination where an unjustified disadvantage grievance was made out for bullying and failure to provide a safe workplace.⁹ There must be a link between the grievance established and the loss. In the determination Ms Suchley refers to it was found that the director of the employer organisation subjected the employee to behaviour which was concluded to be bullying in nature and there were no processes at all to deal with any complaints. There was compelling evidence of deterioration in health and wellbeing because of the work-related stress.¹⁰ There are distinguishing features between the determination Ms Suchley refers to and this matter.

[115] The unjustified actions of ETE in not exploring the reasons for Ms Drake's concerns about safety so that appropriate safety measures could be implemented to address these from 11 October 2022 left Ms Drake in a stressful situation where she continued to work with B in an environment she found unsafe. The evidence supported she suffered some sleeplessness and became nervous about attending work and felt

⁹ *Parker v Magnum Hire Limited and Field* [2024] NZERA 85.

¹⁰ Above n 9..

isolated. Her written complaint of bullying dated 21 November 2022 referred to incidents in late October and November 2021. There was a period of stress leave after the written complaint was provided to ETE on 21 November 2022. From the evidence between 11 October and 21 November 2022 which is a little over five weeks Ms Drake experienced harm under each of the heads in s 123(1)(c)(i) of humiliation, injury to feelings and loss of dignity.

[116] The Authority does not conclude a link between the grievance and all of the loss claimed. A causal connection is not available from the evidence for the subsequent impacts Ms Drake refers to such as moving away to get employment. When a written complaint of bullying was made ETE appropriately commenced to investigate it and took steps to roster Ms Drake away from A, B and C. Ms Drake after a short period of time with no reported incidents left the workplace in December 2021 and never returned.

[117] Taking all of these matters into account and awards in other similar cases the compensatory award is appropriately limited to \$8000 subject to any contribution.

Contribution

[118] Ms Drake did not raise concerns about her safety again with ETE on 2 November when it is likely there was some discussion with Ms Crawford until 21 November 2021. Ms Drake had however verbally raised concerns about bullying and her safety in the workplace on 11 October 2022. I do not conclude it blameworthy that there was a delay in her reducing her concerns to writing. Reducing concerns to writing is not an easy matter and given the clear verbal concerns steps could have been taken earlier. The Authority does not conclude that Ms Drake contributed to the situation giving rise to the personal grievance.

[119] The above award is not reduced.

[120] The Authority does not conclude that recommendations to ETE are required.

Ms Drake and continued employment

[121] Ms Drake remains an employee at ETE but is working elsewhere and had not worked at ETE for almost two years. She was unsure when questioned at the Authority investigation meeting why she had not resigned earlier. Ms Drake will now need to sensibly consider her employment with ETE.

Summary of findings and outcome

[122] The Authority has found that the investigation processes for both complaints was that a fair and reasonable employer could have undertaken.

[123] A personal grievance for the refusal to pay special leave for periods of time to Ms Drake was unjustified is not established. Sick leave and annual leave are not reinstated accordingly.

[124] There has been one unjustified disadvantage grievance established relating to the failure by ETE to properly assess appropriate safety measures between 11 October and 21 November 2022 for Ms Drake.

[125] To settle the personal grievance established ETE is ordered to pay to Kelly Drake the sum of \$8000 without deduction under s 123(1)(c)(i) of the Act.

[126] The Authority does not consider it necessary to make recommendations to ETE about actions to prevent similar employment relationship problems occurring.

Costs

[127] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[128] If they are not able to do so and an Authority determination on costs is needed, the Ms Suchley may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Ms Thom would then have 14 days to lodge any reply memorandum. If

requested by the parties, an extension of time to resolve costs between themselves may be granted.

[129] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹¹

Helen Doyle
Member of the Employment Relations Authority

¹¹ See www.era.govt.nz/determinations/awarding-costs-remedies.