

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 467
3172027

BETWEEN DAVID GREEN
 Applicant

AND KIWIRAIL LIMITED
 Respondent

Member of Authority: Rowan Anderson

Representatives: Matt Belesky, counsel for the Applicant
 Matthew McGoldrick, counsel for the Respondent

Investigation Meeting: 27 and 28 April 2023 at Wellington

Submissions received: At the investigation meeting

Determination: 22 August 2023

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] David Green is a longstanding employee of Kiwirail Limited (Kiwirail) having commenced his employment in 1981, some 42 years ago. During the period relevant to this employment relationship problem, Mr Green’s role was that of Technical Officer. Mr Green’s work primarily relates to the EM80 Track Recording Car (EM80). His work on EM80 involves frequent travel with EM80 being used to test tracks throughout the country.

[2] Commencing in 2021, Mr Green says that he encountered difficulties with another employee¹ (Employee A) that he was required to work closely with. This

¹ I have referred to the relevant employee as ‘Employee A’ throughout this determination. The individual in question was not present at the investigation meeting and did not give evidence as part of the Authority’s investigation.

included several separate incidents in June, July and August of 2021 in relation to which Mr Green says Employee A acted inappropriately towards him. Generally speaking, the behaviours are said to be in the nature of bullying.

[3] Mr Green says that he raised his concerns about the relevant incidents with Kiwirail management. This included a report following an incident on 14 August 2021 during which Mr Green alleges that Employee A threatened to punch him in the face. Mr Green's concerns culminated in a formal written complaint being made on 4 October 2021. On 18 October 2021, Kiwirail provided an initial response to the complaint advising that it would be investigated.

[4] An investigation was commenced by Kiwirail and the findings of that investigation, including that the specific allegations could not be substantiated, were provided to Mr Green on 22 February 2022. Mr Green claims that there are several issues with the process followed and conclusions reached in relation to the investigation.

[5] Mr Green was advised that the investigation had been completed; that his allegations relating to the period June to August 2021 had not been raised through appropriate processes; that no disciplinary action was to be taken; and that Kiwirail would be in further contact to arrange a facilitated meeting between Mr Green and the other employee to '...discuss the way forward...'. Mr Green raised a personal grievance on 14 March 2022. The proposed facilitated meeting ultimately did not proceed.

[6] Mr Green claims that he was unjustifiably disadvantaged in his employment by, amongst other things, a failure by Kiwirail to conduct a reasonable investigation into his complaints. He says that Kiwirail failed to investigate some of his complaints at all, that it erroneously applied a criminal standard of proof when conducting its investigation, and that there were procedural failings in its conduct of the investigation. Mr Green also claims that Kiwirail failed to comply with its contractual and good faith obligations. Mr Green seeks compensation for humiliation, loss of dignity and injury to feelings.

[7] Kiwirail denies the claims made and says that a restorative rather than punitive approach was justifiably taken. It says that its actions, including in seeking to arrange a facilitated meeting, were fair and reasonable and consistent with its good faith obligations and its policies.

The Issues

[8] The issues identified for investigation and determination are:

- (a) Was Mr Green unjustifiably disadvantaged in his employment?
- (b) If the Kiwirail's actions were not justified, what remedies should be awarded in terms of compensation under section 123(1)(c)(i) of the Act?
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Green that contributed to the situation giving rise to his grievance?
- (d) Should either party contribute to the costs of representation of the other party?

[9] In order to determine the relevant issues, the Authority must determine whether Mr Green's employment, or 1 or more conditions of his employment, were affected to his disadvantage. The Authority must also then determine whether Kiwirail's actions, as to any disadvantage, were justifiable.

[10] If I find that Mr Green was disadvantaged in his employment, then remedies would need to be considered. This would include whether he should be compensated for any humiliation, loss of dignity, and injury to his feelings.

The Authority's Investigation

[11] In compliance with directions issued at a case management conference held on 12 October 2022, the parties lodged written witness statements prior to the investigation meeting. All witnesses attended the investigation meeting and answered questions under oath or affirmation.

[12] Mr Green and his partner, Mary Norman, attended the investigation meeting and gave evidence. The following witnesses from Kiwirail also gave evidence at the investigation meeting:

- (a) Alexander Swenson, North Island Field Production Manager Track Machines.
- (b) Racheal Fenton, National Resources Manager.
- (c) Gregory Stewart, National Plant & Equipment Manager for Construction Delivery.
- (d) Natasja Kleijwegt, Human Resources Business Partner.

[13] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. The Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

Background and Investigation

[14] Mr Green gave evidence of seven separate incidents occurring prior to 14 August 2021. It is not necessary to detail the full substance of those alleged incidents, and I summarise the incidents as alleged by Mr Green as follows:

- (a) An incident in Auckland on 4 June 2021 where Employee A made a “fist shaking dance” gesture to Mr Green.
- (b) An incident in Picton on 23 June 2021 where Employee A yelled abuse at Mr Green and a co-worker, and also threw items towards them in a forceful manner.
- (c) An incident in Greymouth on 2 July 2021 where Employee A “ranted” about the use of a heater and electric blanket in their accommodation and shouted at Mr Green.
- (d) An incident in Christchurch on 16 July 2021 where Employee A refused to take his earmuffs off when Mr Green was attempting to talk to him.
- (e) A further incident on 16 July 2021, this time in Picton, where Employee A threw a “tantrum”, slammed a car door, swore, and spoke to Mr Green in a loud and forceful voice.
- (f) An incident on 17 July 2021 where Employee A yelled at Mr Green; and
- (g) An incident on 4 August 2021 where Employee A made a “clucking noise (like a chicken)” when Mr Green was waiting to pull out into traffic.

[15] Mr Green alleges there were other incidents including where Employee A deliberately ignored him, where Employee A repeatedly asked Mr Green whether he had completed a COVID-19 test, and where Employee A pulled faces when Mr Green was talking.

[16] On 14 August 2021 Mr Green and Employee A travelled from Tauranga to Hamilton. Mr Green says that there was an incident culminating in Employee A saying,

“I will punch you in the face if you carry on like that”. Mr Green says he felt threatened and unsafe and that he then removed himself from the situation. He says that he then called Mr Swenson to report the incident.

[17] Mr Green’s evidence is that he received a letter dated 17 August 2021 asking him to attend a meeting to discuss the incident of 14 August 2021. Employee A was removed from working with Mr Green in the interim, and the proposed meeting was delayed on account of COVID-19 related issues. Mr Stewart called Mr Green in late September 2021 asking him to meet with himself, Mr Swenson and Employee A. Mr Green says that a meeting then took place on 29 September 2021.

[18] Mr Green says, and there is little dispute, that the meeting that took place focused on proposed options relating to work moving forward. For example, Mr Green says that one proposal floated was that Employee A would follow in a separate vehicle and that other arrangements would be made so that there would be some separation between the two in performing their tasks. Mr Green says that he felt pressured and uncomfortable at the meeting.

[19] The meeting concluded and Mr Green and Employee A shook hands. Mr Green says that he did that because he felt pressured. Mr Green further says that he did not agree to anything at the meeting, and that the meeting was left with Mr Green to be given time to consider the proposed way forward.

[20] Mr Green’s evidence is that he ultimately did not agree with the proposals made and did not feel safe working with Employee A. Mr Green informed Mr Swenson of this on 1 October 2021 and asked Mr Swenson what the next steps should be regarding his concerns with Employee A’s behaviour. Mr Swenson then told him a written complaint would be required if his concerns were to be actioned.

[21] Mr Green sent a formal written complaint to Mr Swenson on 4 October 2021. Mr Green says that the complaint included details as to the incident of 14 August 2021, but that it also raised a number of other incidents, including those summarised above in this determination, because he felt there was a pattern of inappropriate and intimidating behaviour by Employee A.

[22] The covering letter to the written complaint of 4 October 2021 reads as follows:

...

Dear Alex

This is a formal complaint for you to investigate the intimidating behaviour, abuse and threatened assault that I have been receiving from [Employee A], now you have the facts I wish that this issue be investigated and resolved with the business unit of Human Resources.

You have the daily report and summary of events leading up to the threatened assault (these were verified by you that I had reported these instances to you at the meeting) leading up to the latest incident being threatened assault on the 14th August, prior to this discussion meeting.

If the company decides and puts [Employee A] back on EM80, the company has failed on its responsibility to ensure my safety at work, especially when I have been continually reporting and advising my manager of his intimidating behaviour and continue abuse towards me, leading up to the latest threatening assault on the 14th August.

Does KiwiRail condone his actions towards me as being good behaviour?

I now feel that any interaction with [Employee A] on the EM80, will add undue stress....

[23] The second and third pages of the complaint dealt with the events of 14 August 2021. The final page of the complaint described a number of alleged behaviours by Employee A and described the incidents in June, July and August of 2021. The complaint also noted that the incidents had been reported at the time they occurred. The final page of the complaint included a number of other comments, including:

I want to know what the company is going to do to keep me safe, in the future as [Employee A] has being shown (sic) intimidating behaviour on numerous occasions.

...

My boss said just don't talk to him in the morning, but very hard to convey safety things or what we are doing for the day.

...

These have now escalated to threatening imitating (sic) behaviour: latest instances.

...

He has never apologised about his behaviour for any of the instances.

...

We work in remote locations where cell coverage is erratic at times, and cannot always contact if I need assistance.

[24] Mr Green received a letter dated 18 October 2021 from Ms Fenton acknowledging his complaint. The letter advised that Ms Kleijwegt had been asked to lead the investigation into Mr Green's complaint and set out in general terms the process

that would be followed. That same day, Ms Fenton sent Mr Green an email containing relevant policies and statements from Employee A and Mr Stewart.

[25] Significantly, the letter sent by Ms Fenton on 18 October 2021, in reference to the meeting on 29 September 2021, said that “[t]here was a mutual consensus that we had a plan forward and the meeting ended positively for all parties”. Mr Green denies there was any agreed outcome and says that the meeting ended with Mr Green having expressly reserved his position.

[26] Mr Green attended a meeting by Microsoft Teams on 15 December 2021 at which he says he was asked four questions relating to the incident of 14 August 2021 and the meeting on 29 September 2021. The questions, provided to him in an email on 9 December 2021, were:

...

1. Do you recall any further incidents taking place after 14 August up to 29 September?
2. You have received a statement from Greg Stewart in regards to the meetings that took place on 29 September, where the incident was discussed and the meeting ended with a good result and a “handshake”. Do you have any additional comments on this?
3. Do you recall any other issues between yourself and [Employee A] that took place between 29 September and today?
4. What is the outcome you would like to achieve in regards to this complaint and matters going forward?

...

[27] Employee A was sent correspondence on 16 November 2021 advising that he would be asked questions at a meeting to be held the following day. The questions were of a very similar nature to those outlined above that were asked of Mr Green.

[28] Employee A provided an undated statement and a copy of that was provided to Mr Green. The statement does not explicitly deny the allegation that Employee A threatened to punch Mr Green. However, according to the investigation report Employee A denied the allegation at the meeting he attended.

[29] Mr Green says that he was not provided with necessary information in relation to the investigation, and that there were other issues with the investigation, including that:

- (a) no interview or meeting was arranged with Mr Green at the outset of the investigation;

- (b) he was not provided with nine pages of material provided by Employee A that related to events prior to 14 August 2021;
- (c) no consideration was given to his complaint about incidents prior to 14 August 2021;
- (d) the investigation had commenced prior to his being notified on 18 October 2021, including on the basis that Mr Stewart had provided a statement dated 15 October 2021;
- (e) Employee A had made complaints about Mr Green, but that Mr Green was not made aware of them;
- (f) Employee A was never asked about the incidents occurring prior to 14 August 2021 that Mr Green had complained of;
- (g) Mr Swenson had been provided a copy of Mr Stewart's statement and asked to verify its content; and
- (h) Another employee that Mr Green had suggested be interviewed was instead asked about his working relationship with Mr Green and the incident of 14 August 2021 during which he was not present.

[30] Mr Green says he received a copy of the final report/investigation findings on 22 February 2022. In an accompanying letter, Ms Fenton made the following comments:

...
Whilst your complaint raises the alleged threatening behaviour by [Employee A], the facts cannot be established beyond reasonable doubt as there is a "he said, he said" situation, and there were no witnesses to the incident.

The alleged incidents that occurred throughout June-August 2021, as indicated in your statement, have allegedly never been properly addressed through the appropriate process and bar one occasion, there were no witnesses to these incidents.

On accessing the evidence available and the statements made by staff and managers interviewed, the specific allegations from the complaint cannot be substantiated based on above findings.

Having considered the information available to us from all parties throughout the investigation process, The (sic) investigation is now concluded and closed with no progression to potential disciplinary outcomes due to the insufficiency of evidence to the allegations....

[31] Ms Fenton's letter otherwise recounted a range of recommendations apparently arising from the investigation, including a gradual return to work on EM80 by

Employee A and a facilitated meeting between Mr Green and Employee to "...discuss the way forward...".

[32] The investigation report itself reflected the content in Ms Fenton's letter. In the report's summary, it noted that Mr Green lodged a "formal compliant (dated 4 October 2021) against [Employee A] for allegedly threatening him with assault on 14 August 2021".

[33] The report contains little other mention of the pre-14 August 2021 allegations aside from a brief reference to Mr Green having provided "...examples of alleged childish behaviour and verbal abuse...", and a conclusion that "[t]he alleged incidents that occurred throughout June-August 2021, as indicated in David's statement, have allegedly never been properly addressed through the appropriate processes and bar one occasion, there were no witnesses to these incidents".

[34] Kiwirail attempted to arrange the facilitated meeting but as at the date of the investigation meeting that had not occurred.

[35] Mr Green notified Kiwirail of his personal grievances on 14 March 2022.

[36] Mr Green and Employee A both continue to be employed by Kiwirail. However, Mr Green has not been required to, at least regularly, work with Employee A.

Was Mr Green unjustifiably disadvantaged in his employment?

Mr Green's submissions

[37] Mr Green claims that he was unjustifiably disadvantaged by the way in which Kiwirail conducted its employment investigation and by its investigation findings. Mr Green submits the following issues are relevant:

- (a) whether Kiwirail's investigation was conducted in a procedurally fair and reasonable manner;
- (b) whether Kiwirail's investigation findings were justified/once that a fair and reasonable employer could have come to after following a fair process;
- (c) whether Kiwirail acted in good faith during the investigation; and
- (d) whether Kiwirail breached clauses 4.1 and 5 of the employment agreement?

[38] Mr Green submits that Kiwirail did not comply with its own policies and procedures, including its “Harassment and Bullying Prevention Policy”, “Just and Fair Culture Policy”, and “Disciplining with Fairness Policy”. The relevant obligations are said to be numerous, but for present purposes include the following alleged requirements:

- (a) “The Manager will conduct a Just and Fair Culture investigation and disciplinary process”.²
- (b) “All complaints and reports will be assessed on their merits and based on facts”.³
- (c) “All parties involved will be kept fully informed throughout the process including being told what to expect during the investigation process...”.⁴

[39] Kiwirail’s Harassment and Bullying Prevention Policy seeks to define ‘bullying’, providing a number of examples. Those examples include ‘ignoring’ behaviours, ‘verbal abuse’ and ‘ridiculing’. It also defines bullying by reference to the following:

...
Workplace bullying is repeated unreasonable behaviour directed towards a person or group of people that creates a risk to that person’s health and safety. Repeated behaviour is persistent action or behaviour and can involve a range of actions or behaviours over a period of time. Unreasonable behaviour means different things to each individual. Therefore each complaint will be treated on its merits.

[40] Mr Green claims that he was disadvantaged by a failure by Kiwirail to comply with clauses 4.1 and 5 of his employment agreement. Those clauses require Kiwirail to “conduct all dealings in good faith” and to “share any information that is relevant to the other party”. Mr Green submits that Kiwirail breached those clauses by failing to act in accordance with its duty of good faith, and by failing to share relevant information. Mr Green relies upon what is said to be a failure to provide documentation Kiwirail was supplied by Employee A, and that it failed to communicate to Mr Green that it did not intend to investigate the incidents occurring prior to 14 August 2021 because it did not consider they met the definition of ‘bullying’.

² Disciplining with Fairness Policy, common bundle of documents, at p 165.

³ Harassment and Bullying Prevention Policy, common bundle of documents, at p 170.

⁴ *ibid*, at p 170.

[41] The basis for the non-compliance with the duty of good faith relates effectively to the same subject matter, but also to Mr Green having not been provided relevant information, nor afforded an opportunity to comment, prior to an adverse finding having been made against him.

Kiwirail's submissions

[42] Kiwirail maintains that its actions were those of a fair and reasonable employer. It accepts that an erroneous reference was made to the criminal standard of “beyond reasonable doubt” but says that reference did not undermine Ms Kleijwegt’s report or her conclusions. It also submits that the investigation did not mis-frame the complaint and nor did it fail to inquire into all the matters complained of by Mr Green. It says the finding reached were reasonably open to it.

[43] Kiwirail submits that Employee A had not worked with Mr Green since August 2021 and that on that basis it is difficult to see how Mr Green could be said to have suffered any loss. Kiwirail also submits that it had an obligation to act in good faith, which included maintaining a productive employment relationship with Mr Green and Employee A.

[44] In summary, Kiwirail submits that the investigation was sufficient such as to demonstrate substantive fairness and reasonableness, that the conclusions reached were open to the investigator, and that even if there were procedural issues (which it denies) that a different process would highly likely have resulted in the same outcome. It also submits that there may be a range of responses open to a fair and reasonable employer, and that is not for the Authority to substitute its decision for what a fair and reasonable employer could have done in the circumstances.

Analysis and discussion

[45] Section 103A of the Act sets out the test for justification. I must consider, on an objective basis, whether Kiwirail’s actions, and how Kiwirail acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.⁵

⁵ Employment Relations Act 2000, s 103A.

[46] Justification requires the consideration of both substantive and procedural fairness. The onus is on Kiwirail to justify its actions. Section 103A of the Act requires me to consider the factors set out at s 103A(3) and I must also consider the requirements of good faith set out at s 4(1A) of the Act.

[47] Mr Green claims that he raised the allegations of bullying and harassment that occurred prior to August 2021. I accept that he discussed some of those incidents with Mr Swenson. However, I am not satisfied that the matters were raised in any formal way such as occasioned a significant failure by Kiwirail to investigate the matters at the time. However, that position changed in my view when Mr Green made the formal written complaint on 4 October 2021.

[48] It is appropriate at this point to pause and consider what Mr Green's complaint was. Mr Green complained of "intimidating behaviour, abuse, and threatened assault". The complaint was not limited to the alleged threatened assault on 14 August 2021. Mr Green specifically noted that Employee A had exhibited "intimidating behaviour" on several occasions. He provided examples of that alleged behaviour and recorded that the behaviour had escalated, resulting in six other specific incidents occurring prior to 14 August 2021. The complaint clearly concerned an alleged ongoing course of behaviour that on any reasonable view might amount to bullying and harassment.

[49] I do not accept the position put forward by Kiwirail that the correspondence sent to Mr Green during its investigation made it clear that they were not investigating the incidents prior to 14 August 2021. The acknowledgement letter, dated 18 October 2021, might be said to have had a focus on the 14 August 2021 incident. It also referred to Ms Kleijwegt leading an investigation "...into [his] complaint and the timeline of events after the 14 August 2021". However, it did not explicitly, nor in my view impliedly, disclose the reasons for not investigating Mr Greens full complaint or the reasons for that.

[50] I find that Kiwirail failed to comply with its own Harassment and Bullying Prevention Policy. The investigation was infected with an erroneous view that the matters between Mr Green and Employee A had in effect been resolved at the meeting on 29 September 2021. However, I find as a matter of fact that Mr Green had clearly reserved his position on whether he wanted to escalate the matters further, and indeed he did so.

[51] Mr Green was entitled to have his complaint seriously considered and to have it assessed on its merits and based on facts. Instead, a selective approach was adopted focused on the incident of 14 August 2021 and subsequent events and Mr Green's full complaint was not investigated. The allegations Mr Green raised relating to events prior to 14 August 2021 were given no real consideration and effectively discarded.

[52] Ms Kleijwegt, at the investigation meeting, stated in response to questioning that there was a focus on events after 14 August 2021 and that she had been told that the meeting on 29 September 2021 had been taken as resolving the matters. Ms Kleijwegt also said that Mr Green had been informed, through the letter of acknowledgement dated 18 October 2021, that the pre-August 2021 matters would not be investigated. I do not accept that was the case.

[53] In relation to the pre-August 2021 incidents, Ms Kleijwegt also gave evidence that on review of those incidents "...I did not believe they aligned with any definition of bullying and harassment". Ms Fenton said at the investigation meeting that she agreed the prior incidents "appeared to be banter". I find that position unsustainable when considering the definitions contained in the Harassment and Bullying Prevention Policy. Mr Green's complaint was clearly concerned with a pattern of alleged abusive, bullying, and threatening behaviours.

[54] Concerningly, the investigation report concluded that "[t]he alleged incidents that occurred throughout June-August 2021, as indicated in David's statement, have allegedly never been properly addressed through the appropriate processes...". I find that conclusion was erroneous and there was no proper basis for it. In effect, the finding sought to conveniently dispose of Mr Green's complaint without investigating it.

[55] Kiwirail, whilst of course not obligated to conclude that Mr Green's complaints were substantiated, were required to deal with his complaints in good faith and in accordance with its own policies and procedures. It failed to do so in that it conveniently disregarded the alleged incidents said to have occurred prior to 14 August 2021. That resulted in Mr Green's complaint not actually being investigated.

[56] I find that the investigation was problematic from its commencement. It is apparent from both the written communications during the investigation, the evidence of Ms Kleijwegt at the investigation meeting, and the investigation report, that the focus

of the investigation was misdirected. It was, in effect, focused only on the incident of 14 August 2021 and, for some reason, the events afterwards. That position appears to have resulted from a conversation between Ms Fenton and Ms Kleijwegt at the time the investigation was initiated.

[57] Ultimately, the focus of the investigation was not Mr Green's complaint, but rather an attempt to move on and focus on the ongoing work relationships and communications. Whilst, in the right circumstances, that might be considered a positive approach and one that is often appropriate, that approach was taken without dealing with the substance of Mr Green's complaint.

[58] Ms Kleijwegt accepted that the nine-page document from Employee A was not provided to Mr Green and that it should have been. I do not consider the withholding of that document was deliberate. The documents not provided are in one sense inconsequential. They appear to have been provided in support of a position that Mr Green's behaviour in the workplace was an issue. Ultimately no such finding was made. However, it is also the case that Mr Green's complaint, so far as it can be said to have been investigated, was not upheld and the documents were considered in the context of that investigation. The information should have been provided and was not.

[59] Whilst it is correct to say that compliance with the good faith obligations requires consistency with the maintaining of a productive employment relationship, the failings in this case do not in my view align with that obligation. Whilst a facilitated meeting of the type proposed by Kiwirail may be an appropriate step, such an approach appears inherently problematic where complaints of bullying are unresolved. This is not least because the full scope and substance of the issues cannot properly be understood until they have been investigated. I find that did not occur in this case, and that Mr Green was unjustifiably disadvantaged as a result.

[60] Mr Green was disadvantaged in that Kiwirail failed to take appropriate steps to investigate his safety concerns relating to bullying in the workplace, Kiwirail's failure to comply with its own policies and procedures in dealing with Mr Green's complaint, and Kiwirail's failure to comply with both its contractual and statutory duties of good faith.

[61] Kiwirail's failures were substantially unjustified in the sense that there was no proper justification for its failure to investigate the full scope of the complaint, and in

that it breached its duty of good faith by disregarding Mr Green's complaint such as it concerned an alleged pattern of bullying behaviours. Because of those issues, the findings of the investigation report were consequentially without reasonable justification. Put another way, no findings could reasonably be made as to the complaint without having investigated and considered the totality of the complaint and relevant background to the incident of 14 August 2021, including the incidents identified by Mr Green.

[62] Kiwirail's actions were also procedurally unjustified. I have considered the test of justification in light of the factors identified at s 103A(3) of the Act. The factors identified in the Act do not neatly fit an employment relationship problem of this nature and there is considerable overlap with Kiwirail's substantive actions and omissions. I find that Kiwirail's actions were procedurally unjustified in that it failed to notify Mr Green that it was not going to investigate his full complaint and its focus on events after 14 August 2021, and in that it failed to provide Mr Green information relevant to its investigation.

[63] I accept that Kiwirail, had it investigated Mr Green's complaint appropriately, may have reached the conclusion that his claims could not be substantiated. However, I am not at all persuaded that would inevitably be the case given the matters were not investigated at all.

[64] Whilst Kiwirail, somewhat understandably, wished to focus on the future relationship between the two employees, I find that its approach to the investigation of the complaint was unreasonable and that its actions, on an objective basis, were not open to a fair and reasonable employer in all of the circumstances at the time.

Is Mr Green entitled to compensation for humiliation, loss of dignity and injury to feelings?

[65] Mr Green gave evidence that he suffered as a result of Kiwirail's actions and defaults, that his self-worth and status have been diminished, and that he has suffered from significant stress. He says that nothing was done to resolve the reporting of safety issues at work, that he feels undervalued, feels unsupported and hurt, and that his relationship with Kiwirail has been damaged. He also says that he is isolated at work at his relationship with management, including Mr Swenson, has changed.

[66] Mr Green says that, because his complaint was not upheld, that he feels anxious, stressed, and fearful for his safety when at work. His evidence is that, following the incident in July 2021, he had to double his blood pressure medication. Mr Green says that his life outside of work has also been impacted, including in that he has withdrawn from activities and hobbies outside of work.

[67] Ms Norman, Mr Green's partner, gave evidence that she was concerned about Mr Green's safety when he was away from work, and that he had been losing sleep and had been stressed because of the events. She also said that he withdrew from shooting competitions and woodworking activities as a result. Her evidence was that he was particularly stressed and upset by Kiwirail's failure to properly investigate his claims, that he is no longer the cheerful and outgoing person that he was before, and that the events have taken a huge toll on his health.

[68] Kiwirail submits that Mr Green's relationship with Mr Swenson at work has not changed as alleged, and that Mr Green's evidence about blood pressure medication pre-dated the events of 14 August 2021 and Kiwirail's investigation. Further, Kiwirail submits that Mr Green ought to have taken up Kiwirail's attempts to put the working relationship back on track and that that is a relevant factor to be taken into account in relation to contribution.

[69] I accept Mr Green's evidence that, as a result of Kiwirail's approach to the investigation and handling of his complaints, that he has felt more unsafe in the workplace and that he is now a less trusting person. This is understandable having regard to the nature of his complaints, as to alleged bullying and threatened violence, and what I consider to be an underestimation by Kiwirail as to their seriousness and the need to properly comprehend the complaint and investigate it appropriately.

[70] I am satisfied that Mr Green has suffered as a result of Kiwirail's unreasonable actions. The impact of those actions, and inactions, is not insignificant and I accept that Mr Green has had to endure damage to his self-worth and status, and that he has suffered ill effects such as a loss of sleep and increased stress and anxiety. However, I am not persuaded that the medical impacts on Mr Green are of such a significant nature that would justify an award at the high end.

[71] Having regard to all of the evidence and the range of compensation awarded in other cases of a comparable nature, I consider \$13,500 as an appropriate level of compensation for humiliation, loss of dignity, and injury to feelings.

Should any remedies be reduced on account of contribution by Mr Green?

[72] Section 124 of the Act requires that I consider the extent to which Mr Green's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.⁶

[73] I am not satisfied that any of Mr Green's actions were blameworthy, nor am I satisfied that any of his actions contributed to the circumstances giving rise to his grievance. The complaints related to potential health and safety issues, and I am not satisfied that Mr Green unreasonably refused to engage in facilitation. Even if I were wrong about that, I would not have considered Mr Green's refusal to be relevant to the circumstances giving rise to the grievance such as would form a proper basis for a finding that Mr Green's actions were contributory in terms of s 124 of the Act.

[74] I decline to make any reduction to remedies on account of contribution.

Orders

[75] I order that Kiwirail Limited, within 28 days of this determination, make payment to Mr Green of \$13,500 as compensation for humiliation, loss of dignity, and injury to feelings under s 123(1)(c)(i) of the Act.

Costs

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

[77] If they are not able to do so and an Authority determination on costs is needed Mr Green may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Kiwirail would then have 14 days to lodge any reply

⁶ Employment Relations Act 2000, s 124.

memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[78] 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.⁷

Rowan Anderson
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.