

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA142
3068712

BETWEEN	LIAM HARRISON Applicant
AND	APM WORKCARE LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Ronald Jones, advocate for Applicant Ray Parmenter, counsel for Respondent
Investigation Meeting:	6 December 2019
Submissions Received:	17 December 2019 from Applicant 6 January 2020 from Respondent
Determination:	7 April 2020

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Harrison’s employment were not affected to his disadvantage by the actions of AMP Workcare Limited.**
- B. Mr Harrison was not unjustifiably dismissed.**
- C. Mr Harrison has not established any breaches of good faith on the part of APM Workcare Limited.**
- C. Costs are reserved.**

Non-publication orders

[1] In a preliminary determination dated 18 December 2019 I made orders prohibiting the publication of recordings made by Mr Harrison in meetings with his manager, and the associated transcripts.¹ Those orders are permanent orders.

Employment relationship problem

[2] APM Workcare Limited provides vocational support to clients returning to work. It provides services under a range of contracts with the Ministry of Social Development (MSD) to support clients into sustainable work.

[3] APM set key performance indicators (KPIs) for all staff, including Mr Harrison, which were derived from APM's responsibilities under the contracts with MSD.

[4] An important factor associated with the work undertaken by APM is ensuring the confidentiality of the clients it works with. APM has a contractual obligation to report to MSD any breaches of privacy. To ensure protection of client information is maintained APM has published a policy prohibiting employees from copying or transferring APM and customer information via USB devices or removable hard disk drives unless appropriately secured.

[5] APM's privacy guidelines set standards for the use of client information. The standards prohibit producing lists of client names, details or information and requires all information to be saved into APM's approved operating systems.

[6] The privacy guidelines state that all privacy breaches and near miss breaches will be considered serious and a full investigation will be undertaken. Depending on the cause of a breach and how serious the breach is, it could be regarded as gross misconduct and grounds for dismissal.

[7] Training provided to employees of APM in respect to privacy issues includes a definition of personal information which includes any piece of information that relates to a living, identifiable human being, including names, contact details, financial, health and purchase records. Even where a name does not appear, APM considers it could be personal information if there is a reasonable chance that someone could be

¹ *Harrison v APM Workcare Ltd* [2019] NZERA 719.

identified from the information. The training information provided to employees makes it clear that employees are not to save personal information on USB or other portable storage devices.

[8] Mr Harrison worked for APM as an Employment Consultant from April 2017 until 24 December 2018. The terms and conditions of his employment were set out in a written employment agreement dated 4 April 2017. Mr Harrison worked with unemployed job seekers who had been referred to him from MSD. His clients suffered from mild to moderate mental health issues.

[9] Early on in his employment concerns were raised with Mr Harrison regarding compliance issues. While improvement was made in this area other areas of concern relating to his achievement of his KPI's remained.

[10] Given the range of concerns and in order to assist Mr Harrison to achieve all of his KPIs, APM decided to put Mr Harrison onto a Supportive Improvement Plan (SIP). Due to a number of intervening factors including losing his team co-ordinator the SIP document was not drafted and agreed until June 2018 and not finally signed off until 15 August 2018.

[11] From August until December 2018 Mr Harrison met regularly with his supervisor Ms Melissa Cruz. Mr Harrison secretly recorded a number of their meetings where they discussed achievement towards the measurements set out in the SIP document. Such discussions usually covered placements which necessarily involved the identification of client names, medical information and the identification of potential or actual employers within whom clients were or would be placed.

[12] APM became aware of the recordings after Mr Harrison disclosed to Ms Cruz during an SIP meeting on 15 November that he has recorded their meetings. APM was concerned client information had been recorded in contravention of its privacy policy requirements including the prospect that client information was being held outside its secure systems. APM implemented a disciplinary process to investigate the matter.

[13] At the time the issues were raised Mr Harrison was on sick leave. Against the advice of his doctor he attended a disciplinary meeting on 12 December 2018. After considering Mr Harrison's explanations including his response to a proposal to

terminate his employment APM summarily dismissed Mr Harrison for breaches of APM policies relating to the security of client information.

[14] Mr Harrison challenges the dismissal which he says was unjustified. Mr Harrison also claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of APM and that APM breached its statutory duties of good faith.

[15] APM denies the claims and says the Authority does not have jurisdiction to investigate and determine Mr Harrison's unjustified disadvantage claims because they have been raised outside the statutory period of 90 days.

Supportive improvement plan

[16] The terms and conditions of Mr Harrison's employment were set out in an individual employment agreement dated 4 April 2017. When he signed the agreement Mr Harrison acknowledged he had been advised of his right to seek independent advice about the employment agreement and had been given a reasonable opportunity to do so.

[17] Mr Harrison also signed a document confirming he had read and understood APM's Code of Conduct, agreed to conduct himself within the documented requirements, to undertake his role with honesty and integrity at all times and acknowledged that any breach of the policy would be subject to disciplinary action including the termination of his employment.

[18] The employment agreement between the parties provided for the fixing of minimum performance standards in the following terms:

MINIMUM PERFORMANCE REQUIREMENT

The employer shall fix a minimum performance requirement which shall be reviewed on an annual basis. New minimum performance requirements may be fixed for each succeeding one year period.

Failure to achieve the minimum performance requirement may result in you facing disciplinary action, including termination of this employment agreement.

PERFORMANCE REVIEW

The employer shall review your performance in carrying out the responsibilities and duties of your position at twelve monthly intervals. The employer may also conduct other reviews from time-to-time. The system of performance review shall be determined at the sole discretion of the employer.

[19] For the first five months of his employment Mr Harrison did not receive the same level of supervision that would normally be the case for a new employee. This was due to staffing issues and the availability of Ms Toni Jacob, Team Co-ordinator and Mr Harrison's direct supervisor. Ms Jacob's area of responsibility included a geographical area encompassing Waikato and Auckland. Ms Jacob's ability to closely supervise Mr Harrison was affected by her own workload and personal issues which she was dealing with at that time.

[20] In September 2017 Mr Harrison raised concerns with Ms Jacob, about fears for his and his family's safety after a number of incidents with a client. Ms Jacob gave Mr Harrison feedback on how he should manage the situation and escalated his concerns to her manager, Ms Melissa Cruz.

[21] No further concerns were raised by Mr Harrison with respect to this client. It seems the matter was satisfactorily resolved.

[22] In October 2017 Ms Cruz met with Ms Jacob and raised concerns she held about Mr Harrison's performance. Ms Cruz instructed Ms Jacob to put Mr Harrison on a SIP. Ms Jacob did not agree with subjecting Mr Harrison to a SIP process at that time as she believed any failings in Mr Harrison's performance were as a result of her inability to spend time properly coaching him in the requirements of his role.

[23] Ms Jacob asked for, and was granted, more time in which to turn Mr Harrison's performance around. Ms Cruz agreed to review the situation after a month. Despite this agreement Ms Jacob was instructed to implement a SIP process the following week. After a further discussion between Ms Jacob and Ms Cruz it was agreed to wait a further two weeks.

[24] Ms Jacob, still not happy with the outcome raised her concerns with Mr Paul Dingle, National Manager and Ms Cruz's direct manager. During that meeting it was agreed that Ms Jacob would meet regularly with Mr Harrison and advise him of the possible consequences if he failed to meet his KPI's and that expectations would be set and monitored.

[25] After her meeting with Mr Dingle Ms Jacob met with Mr Harrison as part of their regular catch up meetings. Ms Jacob advised Mr Harrison that he was not

meeting expectations and that if he did not show improvement he would be subject to a SIP process.

[26] Ms Jacob then worked closely with Mr Harrison to assist him, providing him advice, guidance and further training in administrative tasks. Ms Jacob says she observed improvements in Mr Harrison's overall confidence and progress toward meeting his KPIs.

[27] In December 2017, despite the improvements, Ms Jacob was once again instructed to progress matters to a SIP. Mr Harrison says he became confused when he was told on 21 December 2017 that he would be subject to a SIP process because he had been told he had made improvements.

[28] APM says Mr Harrison was not meeting expectations based on his KPIs and while he may have received encouraging feedback on some areas of his work there were still some areas that gave cause for concern. Mr Dingle told me the purpose of the SIP process was to provide support and assistance to help Mr Harrison improve his performance.

[29] Ms Jacob was uncomfortable with working through the SIP process as she had never implemented or conducted one before. She asked for assistance from Ms Cruz who confirmed she would assist at each step of the process. Ms Cruz drafted a SIP document in January 2018. Ms Jacob received the draft document and made some amendments.

[30] A meeting in early February had been confirmed between Ms Jacob and Mr Harrison to discuss the draft SIP document. That meeting did not proceed due to other intervening events (both Ms Jacob and Mr Harrison became ill during February). This led to the implementation of the SIP process being delayed.

[31] Despite Ms Jacob being away from work sick, she held a meeting with Mr Harrison via telephone later in February. After that meeting Ms Jacob emailed the SIP document to Mr Harrison and advised him he could take some time to go through it and to let her know if he had any questions. Mr Harrison advised Ms Jacob he was not happy with the document or the process and would be seeking advice.

[32] In March 2018 Ms Jacob's personal situation changed significantly and APM agreed she could focus on the Waikato region only and not be involved in the Auckland region where Mr Harrison was based. Ms Jacob left her employment with APM in October 2018.

[33] With Ms Jacob's departure from the supervision of the Auckland team members, Ms Cruz stepped in to continue with the SIP process. Ms Cruz and Mr Harrison met in April to discuss the SIP document. At this meeting Mr Harrison was provided with a new SIP document. Unhappy with the changes made to the SIP document Mr Harrison requested an adjournment to the meeting and asked for the document to be emailed to him.

[34] At a meeting on 8 March 2018 with Ms Cruz Mr Harrison was presented with a letter raising new concerns about his performance. He refused to accept the letter and asked for the meeting to be postponed until he could understand the new information and to organise a support person.

[35] The rescheduled meeting was to take place on 19 March 2018. The meeting did not proceed due to Mr Harrison being on sick leave that day. In responding to Mr Harrison's email explaining that he would not be at work that day, Ms Cruz advised Mr Harrison that it was important to put the draft SIP document in place and that she was keen to talk it over with him. Ms Cruz explained the SIP document was to provide clarity around expectations and to provide Mr Harrison with the necessary support to achieve the expectations. Ms Cruz told Mr Harrison that she would work with him to address any concerns either of them had. Ms Cruz suggested a new date of Friday, 23 March 2018 for the rescheduled meeting.

[36] The rescheduled meeting did not proceed until 10 April 2018 because Mr Harrison's support person was not available. I have been provided with the notes from that meeting which identifies its purpose as being to discuss and work through the draft SIP document and to discuss any concerns Mr Harrison had about it.

[37] Mr Harrison was represented at the meeting by his partner. Ms Cruz started the meeting by inviting Mr Harrison to identify his concerns with the proposed SIP document.

[38] A Mr Harrison raised concerns about the delays in implementing the SIP process and the way his previous manager had attempted to discuss it over the phone when he had explained to her that he felt uncomfortable dealing with it that way. This was the telephone meeting Ms Jacob held with Mr Harrison in February.

[39] It became apparent during their meeting that Mr Harrison and Ms Cruz were both working from different SIP documents. Ms Cruz explained this to Mr Harrison and told him that because his previous manager had now left, she would be managing the SIP process and she would like to start afresh.

[40] Ms Cruz explained to Mr Harrison that she was committed to working with him, he could expect to have weekly catch ups, and that she would follow up with him to discuss issues or concerns. Ms Cruz explained the SIP document was a mechanism to assist them to do that.

[41] Mr Harrison asked Ms Cruz if the meeting could be adjourned so that he could read the correct document. Ms Cruz agreed to adjourn the meeting and email the correct document to him.

[42] Ms Cruz confirmed their 10 April discussions in a letter dated 26 April. In this letter Ms Cruz confirms the concerns she held about Mr Harrison's performance including:

- a) The number of conversion of referrals to enrolments – expected rate was 90%, Mr Harrison's rate was 50%;
- b) Monthly enrolment numbers – expected number is 10 per month, Mr Harrison's average was 3.1 per month;
- c) Participation fees – at 27% Mr Harrison's missed participation fees was the highest of all those working in Mr Harrison's section nationally.
- d) Placements – APM's target was four placements per month, Mr Harrison had achieved a total of eight placements in nine months.

- e) Outcome sustainability – the standard was 60%, Mr Harrison’s rate was 50%.
- f) Number of employer interviews – APM’s target was for 20 employer interviews each month, Mr Harrison’s average over the period December 2017 to March 2018 was 3.5.
- g) Compliance with APM processes – Mr Harrison was not meeting the required standards which sets timeframes around particular actions to be completed and monthly compliance checks consistently showed Mr Harrison had outstanding actions to be completed.

[43] Ms Cruz invited Mr Harrison to meet with her on 1 May 2018 to discuss the issues set out in her letter.

[44] Before Ms Cruz could send her 26 April letter, APM received a letter from Mr Harrison dated 24 April raising an employment relationship problem regarding the delays in the implementation of the SIP process between December and March and suggesting attendance at mediation with a view to resolving the problem.

[45] Despite attempts being made, mediation dates could not be arranged. Instead on 27 June 2018 Mr Harrison met with Mr Dingle and their respective support people with a view to resolving the problem raised by Mr Harrison.

[46] The meeting resulted in an agreed SIP document with a set of guidelines, targets and time frames for monitoring. It was agreed Ms Cruz would monitor the process.

[47] In accordance with their agreement on 27 June Ms Cruz met with Mr Harrison on 11 July 2018 to review the draft SIP document. During the discussion they agreed on a few changes which were then incorporated.

[48] The final SIP document was to be signed at their next meeting which was scheduled for 25 July. Unfortunately the meeting could not proceed because while Ms Cruz was on pre-planned annual leave she became unwell and did not return to work until 2 August.

[49] Mr Harrison was then on leave until 8 August so the next scheduled one-on-one meeting was 15 August. Before returning to work on 8 August Mr Harrison wrote to Mr Dingle on or about 7 August expressing his disappointment that the SIP process was not being progressed and sought clarification and assistance. He raised concerns about the failure to appoint someone to continue with the process in Ms Cruz's absence that no tools had been provided to assist him, that he had received a lack of guidance around case load issues and the duration of the SIP process. In respect to the duration of the process Mr Harrison was concerned that work he had completed between June and August would not be recognised.

[50] Mr Harrison and Ms Cruz met in the first formal SIP meeting on 15 August. Mr Harrison signed off the SIP document at this meeting. Mr Harrison secretly recorded this and all other meetings with Ms Cruz. During these meetings the two discussed Mr Harrison's progress toward achieving the goals of the SIP which necessarily included reference to particular clients and potential and actual employers.

Issues

[51] In order to resolve Mr Harrison's application I must determine the following issues:

- a) Are any of Mr Harrison's claims barred as a result of him not raising his personal grievances within 90 days?
- b) If not, were one or more conditions of Mr Harrison's employment affected to his disadvantage by the unjustified actions of APM?
- c) Was Mr Harrison's dismissal unjustified and if so what if any remedies should be awarded?
- d) Did APM breach its statutory duty of good faith?

[52] 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 as a result. While I have not referred to all the submissions and evidence received from the parties in this determination I have carefully considered everything I have received.

[53] This determination has been issued outside the three month timeframe required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances exist to allow a written determination of findings at a later date.

Were disadvantage grievances raised within 90 days

[54] Section 114 subsections (1) and (2) of the Act deal with the timeframe for the raising of personal grievances in the following terms:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[55] Section 114(2) makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[56] What s 114(2) requires is that there should be a sufficient specification of the employee's concerns as to enable the employer to be able to address that grievance. To do so, the employer must know what to do.² There is no formality involved in notifying a grievance to an employer.³

[57] It is not enough to simply say the employee considers they have a personal grievance. In order to properly raise a personal grievance the employee needs to have conveyed to the employer enough information, so that the employer is in a position where it is able to respond on the merits of the alleged grievance, with a view to resolving it at an early stage.⁴

² *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

³ *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323.

⁴ Above n 1.

[58] Mr Harrison claims one or more conditions of his employment were affected to his disadvantage:

- a) when the SIP process was delayed;
- b) when APM failed to provide safeguards when Mr Harrison was required to deal with a particularly difficult client;
- c) when APM failed to investigate complaints that he was being bullied by Ms Cruz.

[59] In reaching conclusions about whether Mr Harrison raised his personal grievances within the statutory timeframe it has been necessary to consider the totality of the written communications between the parties.⁵

Delayed SIP process

[60] There were two different delays in the SIP process that concerned Mr Harrison. The first was a delay between December 2017 and March 2018. The second was a delay between 11 July and 15 August 2018.

First delay

[61] On 24 April 2018 Mr Harrison's representative wrote to APM raising an employment relationship problem over concerns about delays in the SIP process which had commenced in October 2017. The concerns about delay related to the period between December 2017 and March 2018. There can be no dispute that Mr Harrison raised this employment relationship problem within the requisite 90-day period.

[62] APM says this employment relationship problem was resolved by the parties on 27 June when they met and agreed on the process moving forward. I agree that this was the state of affairs in relation to the first delay.

[63] I have accepted APM's evidence that on 27 June the parties agreed there had been misunderstandings about the process on both sides. Mr Harrison was assured there was no threat to his employment and no intention on the part of APM in this regard. Mr Harrison was told APM's focus was to support him and it was important an agreed SIP document was put in place to help him achieve the desired goals. At

⁵ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36].

the meeting Mr Harrison accepted he had not been performing to expectations and it was best to move forward in good faith.

[64] I am satisfied Mr Harrison's employment relationship problem was resolved by agreement between the parties at the meeting on 27 June.

Second delay

[65] In accordance with the agreements reached between Mr Harrison and APM on 27 June, Mr Harrison met with Ms Cruz on 11 July to discuss the proposed SIP document. At this meeting changes were agreed and it was intended they would meet again to sign the finalised SIP document.

[66] Unfortunately the meeting did not proceed as scheduled due to Ms Cruz becoming unwell while on a period of leave and being unable to return to work until 3 August 2018.

[67] On or about 7 August while he, himself, was away absent from work Mr Harrison raised concerns about delays in progressing the SIP process. In his communication to APM he asked that the process be extended beyond two months to allow him adequate opportunity to demonstrate the required improvements.

[68] During the disciplinary process in December 2018, in response to APM's preliminary findings and proposal to terminate his employment, Mr Harrison again raised his concerns about delays in the SIP process. He was dissatisfied with the lack of management input or assistance during Ms Cruz's absence which he says demonstrates disadvantage. Mr Harrison complains that Ms Cruz's absence delayed and extended the time frame for the SIP process and this also demonstrates disadvantage.

[69] Mr Harrison then formally raised personal grievances on 26 February 2019 where he references once again the SIP process not being managed and left to languish and reiterates the content of earlier August complaint.

[70] Mr Harrison met with Ms Cruz on 15 August, signed the SIP document and from August to November attended one-on-one meetings as required. Any grievance in relation to the second delay arose at the latest by 15 August. This means and the 90-day period for raising a personal grievance expired on 13 November 2018.

[71] I am satisfied Mr Harrison's communications to APM made it clear he was unhappy with the SIP process and the delays he had experienced. He specifically uses language in his 7 August correspondence that indicates clearly he believes he has been disadvantaged. This is reiterated in his letter dated 19 December 2018 and in his letter raising personal grievances dated 26 February 2019.

[72] From as early as about 7 August APM were aware Mr Harrison was concerned about the delay in having the SIP document signed off. It had sufficient information to respond. For this reason I am satisfied Mr Harrison raised a personal grievance in relation to the second delay in the SIP process and the Authority has jurisdiction to investigate and determine that claim.

APM's failure to provide safeguards

[73] This claim by Mr Harrison is unclear although I have discerned from the statement of problem and other documents that Mr Harrison claims he was disadvantaged in his employment by in the way Ms Cruz reallocated a client to a second consultant and the reasons given for the reallocation.

[74] On 28 October 2018 Mr Harrison emailed Ms Cruz and raised concerns that a client suffering from depression, ADD, anxiety and conflict with others had been accepted into the service by Ms Cruz. Mr Harrison was concerned the client had been accepted after three employees had previously raised concerns about the client, including an Occupational Therapist. Mr Harrison raised concerns about the process of pre-screening manual referrals, the impact on his SIP process when raising the issue with management and that the client had been transferred to another consultant based on racial profiling.

[75] Mr Harrison lodged an incident in APM's internal incident reporting system. It was then fully investigated by an internal investigator who made recommendations to improve APM's systems relating to the acceptance or declination of referrals based on health and safety concerns and the involvement of therapists in the assessment process. The report writer identified difficulties in the relationship between Mr Harrison and Ms Cruz and suggested the practical step of instigating a mediation to repair the relationship.

[76] Mr Harrison wrote to APM on 19 December in response to APM's preliminary findings of serious misconduct relating to the retention by Mr Harrison of recordings in which confidential client information had been discussed. As part of his explanation Mr Harrison told APM that the only conversation he had in direct relation to a client was to make his safety concerns known to Ms Cruz as a result of threats and other dangerous behaviour being exhibited by the client when being interviewed.

[77] In his letter Mr Harrison says his complaint was treated with derision, and responded to by Ms Cruz making disparaging and racist comments. He points out in his letter that this demonstrates disadvantage and a lack of responsibility in terms of the Health and Safety at Work Act.

[78] In his letter formally raising personal grievances dated 26 February 2019 Mr Harrison reiterates his concerns in what appears to be a copy and paste of the wording contained in the 19 December letter.

[79] While Mr Harrison refers to this incident as evidencing a "disadvantage" I am not satisfied he was raising the issue as a personal grievance. Rather he raises this issue as part of his explanation to avoid a dismissal and to support his explanation that the recordings did not contain client information.

[80] There has been no personal grievance raised in relation to this issue and the Authority does not have jurisdiction to investigate and determine his claim.

Failure to investigate complaints of bullying

[81] On or about 5 November Ms Cruz was advised by another employee that Mr Harrison had been recording their one-on-one meetings. This advice was deeply concerning to Ms Cruz. She told me she felt violated and that the trust between her and Mr Harrison had been seriously damaged.

[82] Despite that knowledge Ms Cruz proceeded with the scheduled one-on-one meeting on 7 November. At this meeting Ms Cruz presented Mr Harrison with a \$50 gift card to recognise his achievements and progress toward meeting his KPI's.

[83] While it started well, the meeting on 7 November deteriorated after Ms Cruz raised with Mr Harrison a complaint she had received in respect his driving. Ms Cruz told me Mr Harrison became upset and told her he wanted to raise concerns about her

management style. Ms Cruz told Mr Harrison he was entitled to do so and that he could raise this with Human Resources, her manager or report it formally through the incident reporting system.

[84] The next one-on-one meeting took place on 15 November. At the beginning of the meeting Mr Harrison requested permission to record the meeting. Ms Cruz declined the request and asked Mr Harrison if he had recorded any other meetings. Mr Harrison acknowledged that he had been secretly recording all of their meetings.

[85] Ms Cruz informed Mr Harrison that the meeting would be adjourned because she was uncomfortable and advised Mr Harrison that she did not consent to him using any of the recordings. Ms Cruz asked Mr Harrison to leave her office and notified Mr Dingle of what had transpired.

[86] After the meeting on 15 November Mr Harrison lodged an incident report claiming that on 7 November 2018 Ms Cruz had lost her temper during their regular one-on-one meeting, had raised her voice, kicked him out of the meeting and slammed the door closed by behind him as he left.

[87] On 16 November Mr Harrison lodged two further incident reports relating to email enquiries he made of Ms Cruz on 9 and 13 November and his regular one-on-one meeting with Ms Cruz on 15 November.

[88] The emails on 9 and 13 November related to the rating he received from Ms Cruz for his performance during the month of October. During the 7 November meeting Mr Harrison and Ms Cruz disagreed about a rating for his performance. Mr Harrison wrote to Ms Cruz on 9 November requesting the rating be amended and providing his justification for his suggested.

[89] Mr Harrison reported Ms Cruz had ignored his first email and then on 13 November. Ms Cruz told him they would speak about the rating at the upcoming meeting on 15 November.

[90] In his incident report regarding Ms Cruz's conduct on 15 November Mr Harrison states:

Due to previous incidents raised where my direct manager [Ms Cruz] has behaved unprofessionally in one on one meetings and refused to respond to

email requests to amend the score of my October performance under my SIP. I felt uncomfortable about her erratic and untoward behaviour towards me.

Upon entering her office for our one on one meeting I informed her that I would be making audio recordings of the meeting.

[Ms Cruz] asked me if I had been recording meetings throughout my SIP process. I advised her “yes” for dictation purposes to ensure I fully understood what was expected of me.

[Ms Cruz] then told me that she was not comfortable with this, had not given me permission and would not proceed with the meeting.

I am now concerned about a potential backlash from [Ms Cruz] with regards my SIP process.

[91] His concerns about Ms Cruz were also contained in the letter dated 19 December 2018 where Mr Harrison refers to the complaints he has made about personal attacks and bullying by Ms Cruz and the lack of feedback from Mr Dingle to the complaints. In his letter Mr Harrison says he does not believe he has been treated fairly, properly communicated with, or that an investigation into his complaints had been conducted.

[92] In his letter formally raising personal grievances dated 26 February 2019 Mr Harrison repeats his complaints in what appears to be a copy and paste of the wording contained in the 19 December letter.

[93] I am satisfied Mr Harrison’s communications to APM made it clear he was unhappy with Ms Cruz’s conduct toward him and that he alleged he had been bullied by her. In his 19 December letter he refers to this conduct as being a “[f]urther disadvantage”. This is repeated in his letter dated 26 February 2019.

[94] From as early as 15 November 2018 APM were aware Mr Harrison was concerned about the conduct of Ms Cruz during the November meetings of the SIP process. For this reason I am satisfied Mr Harrison raised a personal grievance that he had been bullied by Ms Cruz and the Authority has jurisdiction to investigate and determine this claim.

Unjustified disadvantage

[95] I have found Mr Harrison raised personal grievances that one or more conditions of his employment were affected to his disadvantage by the unjustified

actions of APM within the statutory 90-day period. The actions relate to the second delay in progressing the SIP process and the allegations of bullying against Mr Cruz.

[96] Mr Harrison bears the onus of establishing on the balance of probabilities that he was disadvantaged in his employment. If Mr Harrison establishes one or more conditions of his employment were affected to his disadvantage the burden moves to APM to establish on the balance of probabilities that the disadvantage Mr Harrison suffered was justified.

[97] The justification test in s 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether APM's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

Second delay

[98] There is no dispute that the progression of the SIP process was delayed between 11 July and 15 August 2018. After meeting with Mr Harrison on 11 July Ms Cruz commenced a period of approved leave from 16-20 July. While she was absent on leave Ms Cruz became very ill and was hospitalised. She returned to work on 2 August.

[99] The next scheduled one-on-one meeting was to be held on 8 August but Mr Harrison, himself was away that day on leave. This meant the next meeting was scheduled to take place on 15 August.

[100] Mr Harrison has not explained to my satisfaction how this delay affected his employment to his disadvantage. The delay was not inordinate, nor was it intentional. He first raised this with APM on or about 7 August and the next meeting took place as scheduled on 15 August.

[101] Mr Harrison has not established that one or more conditions of his employment was affected to his disadvantage as a result of the delay between 11 July and 15 August 2018.

[102] For the sake of completeness I record here that even if Mr Harrison had established a disadvantage grievance, it would not have been unjustified. Mr Harrison had already endured a change of manager for the SIP process as well as a number of false starts. To have someone who had not been part of the discussions with Mr Harrison in setting the terms of the SIP document prior to it being signed off would, I am sure, have given him further cause for concern. That Ms Cruz became unwell during her annual leave was out of the control of APM and its actions in not having some else stand in her place for the short period of time that she was affected by her illness was an action a fair and reasonable employer could take in all the circumstances of this case.

Complaints about Ms Cruz

[103] Mr Harrison made a formal complaint about the conduct and behaviour of Ms Cruz during their meeting on 7 November 2018, her approach to the reallocation of a client in October 2018 and her conduct on 15 November.

[104] Each of these complaints were lodged into APM's system on or after the meeting on 15 November where Ms Cruz refused Mr Harrison's permission to record their meeting and his disclosure that he had secretly recorded their previous meetings.

[105] Mr Harrison has not adequately explained how Ms Cruz's conduct affected one or more conditions of his employment to his disadvantage. I have listened to all of the recordings from the one-on-one meetings made by Mr Harrison. My assessment of Ms Cruz's conduct is that she was supportive and constructive in each meeting. She clearly identified the measures to be met by Mr Harrison and discussed his achievements and possible actions he could take to continue to improve in his performance.

[106] On 7 November Ms Cruz took steps to recognise Mr Harrison's improved performance by giving him a \$50 gift card for his personal use. Having listened to the recording of the 7 November meeting, it is clear Mr Harrison was becoming more challenging toward Ms Cruz and for no apparent reason. Ms Cruz recognised Mr Harrison's escalation and attempted to calm the situation. When she could not Ms Cruz suggested they adjourn the meeting.

[107] It is not apparent from the recordings that Ms Cruz lost her temper with Mr Harrison nor did she raise her voice other than when she was attempting to calm Mr Harrison. There is no evidence that Ms Cruz conducted herself other than professionally.

[108] In relation to the emails on 9 and 13 November it is clear Ms Cruz did not wish to debate Mr Harrison's October rating by email. She, quite correctly in my opinion, advised Mr Harrison that they could talk about it during the 15 November one-on-one meeting.

[109] Unfortunately the meeting on 15 November did not proceed. At the beginning of the meeting Mr Harrison disclosed that he had been secretly recording all of his meetings with Ms Cruz. Ms Cruz was extremely unhappy about that and called the meeting to an end.

[110] Mr Harrison has not established his employment was affected to his disadvantage by the actions Ms Cruz during the SIP process. There was no evidence that Ms Cruz had embarked on a course of conduct that could be defined as bullying.

[111] When Mr Harrison raised his first incident report on 15 November APM determined it would not investigate or take any further action on the basis that Mr Harrison was subject to a SIP process and the concerns it now held about the recording of meetings where client information had been discussed and the retention of that information outside of APM's secure systems.

Conclusion

[112] Mr Harrison has failed to establish to my satisfaction that one or more conditions of his employment were affected to his disadvantage as a result of the actions of APM. His application for remedies is declined.

Unjustified dismissal

[113] On 27 November 2018 while Mr Harrison was absent on a period of sick leave APM wrote to him setting out concerns it held about Mr Harrison's conduct when he secretly recorded the one-on-one meetings he attended with Ms Cruz between August and November 2018. APM advised Mr Harrison they wished to understand why he recorded the meetings without Ms Cruz's consent but of particular concern was

whether the recordings included confidential discussions and information relating to APM's clients.

[114] APM advised Mr Harrison that if he had retained the recordings the information was unsecured and was being kept outside APM's systems. Mr Harrison was instructed to immediately and irrevocably delete any and all recordings held by him and to confirm in writing that he had done so.

[115] Mr Harrison wrote on 29 November acknowledging that he had recorded some of his one-on-one meetings with Ms Cruz and that he did so because he had no faith in her integrity or honesty and as a result of her unprofessional conduct at a recent meeting. Mr Harrison advised that he made the recordings because they provide an accurate and truthful account of what actually took place. Mr Harrison advised APM that the recordings had been provided to his representative.

[116] In an effort to address APM's concerns about the maintenance of confidentiality of client information Mr Harrison advised APM that the recordings had been edited prior to sending them to his lawyer and that he had deleted all original recordings that he personally held. These assurances have since proved to be unreliable.

[117] In addition to Mr Harrison's email his representative also wrote to APM confirming that the recordings he had heard did not make mention of individuals or their personal details. It has since become apparent that Mr Harrison had not passed onto his representative the full scope of the recordings he had made.

[118] APM wrote to Mr Harrison through his representative on 4 December requesting all recordings be returned to APM's offices where they would be securely stored and could be accessed if needed in the future. APM reiterated its concerns that Mr Harrison had recorded the meetings where private information about clients was discussed and these recordings were being held outside APM's systems in an unsecured environment, that Mr Harrison had breached AMP's Privacy Policies regarding the use and care of client information and had placed APM's contracts with government agencies at risk.

[119] Mr Harrison was advised the issues could be considered serious misconduct and there was the potential for disciplinary action up to and including dismissal. He

was invited to attend a meeting with a support person and to raise any questions with Mr Dingle.

[120] APM acknowledged Mr Harrison was on sick leave so the date for the meeting was left open and Mr Harrison's representative was invited to consider when a meeting could take place. In his letter Mr Dingle advised that the matter could be considered serious misconduct and disciplinary action up to and including dismissal was possible.

[121] In response Mr Harrison's representative advised APM that all direct references to APM's clients had been removed from all recordings but refused to return them to APM at that time. Mr Harrison's representative undertook to supply APM with the copies of recordings he held if the Authority required the recordings to be provided. Mr Harrison agreed to attend a disciplinary meeting on 12 December.

[122] Despite a direction from the Authority that the recordings be provided for these proceedings, they were not provided until after the investigation meeting had been completed. Prior to the investigation meeting the Authority had been provided with two incomplete transcripts.

[123] Mr Harrison attended the disciplinary meeting on 12 December 2018 where he was represented. He was told that holding confidential information on his mobile outside APM's secure systems was unacceptable and amounted to serious misconduct. Mr Harrison was asked to make submissions on an appropriate sanction in light of APM's advice that it was considering summary dismissal.

[124] Mr Harrison provided an explanation about why he felt the need to record the one-on-one meetings including that he started recording meetings on 15 August 2018 because he did not trust Ms Cruz. Mr Harrison explained that he had edited the recordings to ensure there were no references to clients retained on the recordings.

[125] In accordance with advice given to Mr Harrison on 12 December, APM wrote to Mr Harrison on 14 December APM setting out its preliminary findings and a proposal that his employment be terminated for serious misconduct.

[126] Mr Dingle confirmed that it was not the covert recording that was in issue. Rather, APM's primary concern was that Mr Harrison had recorded information that

included discussions about clients and the management of their cases including medical details. The information was held on Mr Harrison's personal mobile phone outside APM's secure systems in breach of APM's privacy policies.

[127] APM was concerned that Mr Harrison's phone was not secured to reduce any risk of loss nor was it satisfied the Application Mr Harrison said he used to apparently delete client information from the recording was secure. While no final decision had been reached APM advised Mr Harrison it was considering summary dismissal.

[128] Mr Harrison responded in writing on 19 December providing further explanations. In relation to APM's concerns that confidential client information had left the secure confines of APM's premises, Mr Harrison explained that he had edited the recordings before leaving APM's premises. As a result of his editing Mr Harrison confirmed there was no confidential client information leaving APM's premises in an unsecured manner. Mr Harrison reconfirmed his earlier explanation that his phone was both password and thumb print protected and that the Application he used for editing had its own separate password.

[129] APM was concerned that Mr Harrison did not have any knowledge of the Application he had used to delete the information or whether the material was fully deleted or remained available "in the cloud".

[130] After considering Mr Harrison's further explanation a final decision was made to terminate Mr Harrison's employment with immediate effect on 21 December 2018.

[131] Under s 103A of the Act I must objectively determine whether APM's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[132] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, APM sufficiently investigated issues, raised its concerns with Mr Harrison, gave him a reasonable opportunity to respond and genuinely considered his explanation prior making the decision to dismiss him.

[133] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in Mr Harrison being

treated unfairly.⁶ A failure to meet any of the s 103A(3) tests is likely to result in an action being found to be unjustified.

[134] Mr Harrison was dismissed because Mr Dingle had determined he had breached APM's privacy policies when he secretly recorded one-on-one meetings where identifiable clients were discussed including their confidential medical information. Mr Dingle did not accept Mr Harrison's explanations that he had edited all recordings before leaving APM's offices.

[135] After my investigation meeting into Mr Harrison's applications had been completed he lodged with the Authority nine different recordings he had secretly made during his meetings with Ms Cruz. I have had the benefit of listening to each of the recordings. In a number of the recordings client names, their medical information and their prospective or actual employers are identifiable. This information has been retained by Mr Harrison in clear breach of APM's policies and guidelines. Mr Harrison was aware through the training provided to him during his employment at APM that to retain this information outside APM's secure systems was a breach which could be considered serious misconduct.

[136] Mr Harrison has not provided an adequate explanation for retaining the recordings after APM requested they be returned to APM and assured him they would be kept secure in the event that they were required for litigation or other purposes.

[137] The procedural fairness factors set out in s 103A(3) of the Act have been satisfied in this case. Before dismissing Mr Harrison, APM put its concerns to him about the possible breach and gave him a reasonable opportunity to respond to its concerns. It sought reassurances from Mr Harrison as to the use of the recordings which Mr Harrison refused to provide. I am satisfied APM considered fully all of Mr Harrison's explanations and provided him with an opportunity to comment on its proposed sanction before making a final decision.

[138] Assessed objectively APM has acted fairly and reasonably and its decision to dismiss was a decision it could make in the circumstances at the time. Mr Harrison's dismissal was justified and his application for remedies is declined.

Breach of good faith

⁶ Employment Relations Act 2000 (the Act), s 103A(5).

[139] In his statement of problem Mr Harrison states that one of the employment relationship problems he wishes the Authority to determine is a claim that APM breached its statutory obligations of good faith. The statement of problem does not set out how Mr Harrison says APM breached its obligations and I am not satisfied Mr Harrison has established any breaches of good faith on the part of APM.

Costs

[140] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so APM shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Harrison shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[141] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority