

**NOTE: This determination contains an order prohibiting publication of certain information referred to at paragraph [8] below.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 618  
3314381

BETWEEN LDA  
Applicant

AND CHT HEALTHCARE TRUST  
Respondent

Member of Authority: Andrew Gane

Representatives: Keziah Singleton, counsel for the Applicant  
Mark Donovan, counsel for the Respondent

Investigation Meeting: 17-18 June and 23 July 2025 at Auckland

Submissions: 26 June and 8 July 2025 from the Applicant  
3 July 2025 from the Respondent

Date: 2 October 2025

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] Pursuant to s 10(1), Schedule 2 of the Employment Relations Act 2000 (the Act), CHT Healthcare Trust (CHT) has applied for a permanent non-publication order prohibiting the publication of names or identifying details of the parties, CHT resident clients (the residents) and certain CHT staff members.

[2] The reasons for CHT's request for a non-publication order was to ensure it met its obligations under Health Information Privacy Code 2020 to protect the unwarranted disclosure of information in relation to its residents.

[3] LDA opposed the application for non-publication orders saying the publication of her name would show she had brought proceedings before the Authority and would clear her name.

[4] However, LDA submits that if the Authority saw it is necessary to protect the identity of CHT's residents, it would be sufficient to anonymise only LDA's name and the location of her employment. LDA also said that because CHT operates 21 care homes, the publication of CHT's name would not risk identifying the resident, who was the subject of LDA's claims before the Authority.

[5] In *MW v Spiga Ltd* the Employment Court held that the existing presumption of open justice should only be departed from where sound reasons exist.<sup>1</sup> This affirms the existing leading authority of the Supreme Court in *Erceg v Erceg*.<sup>2</sup> The majority in *Spiga* set out a twofold test:

(1) Firstly, there must be "reason to believe that the specific adverse consequences could reasonably be expected to occur."

(2) Secondly, the "Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case." The Court said this part is a weighing exercise and that equity and good conscience may be involved.<sup>3</sup>

[6] The Court also suggested examples of what may be relevant balancing factors when determining whether an order is made and included:

- (a) the circumstances of the case;
- (b) the interests of the person or entity applying for a non-publication order;
- (c) the interests of the other party or parties to the litigation;
- (d) the interests of any third party; and
- (e) any further issues of equity and good conscience.<sup>4</sup>

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<sup>1</sup> *MW v Spiga Ltd* [2024] NZEmpC 147.

<sup>2</sup> *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

<sup>3</sup> Above n 1 at [88] and [89].

<sup>4</sup> *MW v Spiga Ltd* [2024] NZEmpC 147 at [94].

[7] Given the circumstances of the breakdown of the employment relationship between the parties and CHT's obligations under Health Information Privacy Code, a non-publication order to some degree is appropriate for this matter. For this reason, the principles of equity and good conscience favour the making of an order.<sup>5</sup>

[8] Pursuant to Clause 10 of schedule 2 of the Act, I grant a permanent order prohibiting the publication of the identity of LDA, the residents and CHT's witnesses to this employment relationship problem. They will be identified only by randomised initials which have no correlation to their actual names and any information referencing them is prohibited from publication.

### **Employment relationship problem**

[9] LDA first started her employment for CHT in 2016. On 15 December 2023 LDA was dismissed. On 10 January 2024 LDA raised personal grievances against CHT claiming she was unjustifiably disadvantaged by CHT's extended disciplinary investigation, and then unjustifiably dismissed. LDA sought remedies for reimbursement of wages and compensation.

[10] CHT denied LDA's claims and explained it lawfully terminated her employment after she failed to engage with CHT over a proposal to transfer her employment to another CHT facility.

### **The Authority's Investigation**

[11] During the course of investigating this employment relationship problem the Authority heard evidence from LDA and her husband and a former work colleague. In support of CHT the Authority heard evidence from the following CHT representatives:

- (a) ENT, head of people and culture;
- (b) LED, care home manager;
- (c) BDA and SWP; area managers; and
- (d) a CHT advisor.

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<sup>5</sup> *DQJ v commissioner of Inland Revenue* 481 [2024] NZEmpC 178 at [25].

[12] All witnesses answered questions under affirmation. After the close of hearing evidence from the parties the investigation meeting was adjourned until 23 July 2025 where the parties' representatives made oral closing submissions.

[13] As permitted by s 174E of the Act, this determination does not record all the evidence and submissions received and fully considered during the Authority's investigation, but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

## **Issues**

[14] The issues for determination and investigation were:

- (i) Whether LDA has raised claims for unjustifiable disadvantage within time and in accordance with s 114 of the Act, and if so, whether she was unjustifiably disadvantaged in her employment?
- (ii) Whether LDA was unjustifiably dismissed by CHT?
- (iii) If CHT's actions were found to be unjustified, what remedies should be awarded considering:
  - a) Reimbursement of lost wages, including employer KiwiSaver contributions and holiday pay, pursuant to s 123(1)(b) of the Act (subject to evidence of reasonable endeavours to mitigate this loss); and
  - b) compensation under s 123(1)(c)(i) of the Act?
- (iv) If any remedies are awarded, should they be reduced under s 124 of the Act for any blameworthy conduct by LDA that contributed to the situation giving rise to this grievance?
- (v) Should either party contribute to the cost of representation of the other party?

## **Background**

### *The start of LDA's employment*

[15] CHT operates as an age care service provider operating 21 care homes across the Auckland, Waikato and Bay of Plenty regions. In 2016, CHT took over ownership of the care home facility (the facility) where LDA was previously employed.

[16] LDA was employed by CHT on 1 November 2016 as her employment was transferred from previous owners of the facility. Her prior service with the previous owners was recognised as commencing on 29 September 2005.

[17] LDA was employed to an individual employment agreement that was based on the terms set out in the CHT Collective Employment Agreement.

[18] Her role was a nonclinical role, however she worked closely with the residents on a daily basis. She was required to work in a cooperative and professional manner as part of a team, but at times needed to take direction from the clinical staff. These staff included the registered nurses and the clinical coordinator who had key roles in managing care issues relating to the residents. LDA reported to LED, the care home manager.

*LDA's complaint about CHT's records*

[19] In February 2021 a resident known to LDA was admitted to CHT (the resident). The resident was known to LDA through LDA's husband who had the enduring power of attorney for the resident. In terms of CHT's records, LDA was named as a person to be contacted in relation to queries regarding the resident.

[20] During June 2023 LDA became aware and concerned about some incorrect information on the resident's file. LDA then became involved in various discussions with CHT related to the resident's care.

[21] On 2 August 2023 LDA asked the clinical coordinator to correct some information regarding the resident's care. The clinical coordinator declined to do so.

[22] On 3 August 2023 LDA escalated her concerns about the situation with LED. On 8 August 2023, on instructions from LED, LDA asked a registered nurse to amend the resident's information. The registered nurse refused to amend the information on the file. A few days later, the resident's lawyer wrote to LED and the resident's information was subsequently updated.

[23] On 21 August 2023 LDA made a notification to the Nursing Council of New Zealand about both the registered nurse and the clinical coordinator. In her notification LDA included copies of previous complaints made in March 2023 by other staff members about the clinical coordinator's behaviour.

[24] On 30 August 2023 the clinical coordinator was informed of LDA's notification to the Nursing Council and consequently was provided with copies of the complaints made about her some months previously.

[25] On 31 August 2023 LDA and several other staff members attended a meeting with CHT managers to discuss the March 2023 complaints about the clinical coordinator. LDA would later raise a complaint about the CHT managers' alleged behaviour during this meeting.

#### *Serious misconduct allegations and suspension*

[26] On 4 September 2023 the area manager, SWP wrote to LDA raising allegations that she had engaged in serious misconduct breaching the CHT code of conduct in the manner in which she had accessed and used certain information obtained through her employment (misconduct letter). The misconduct letter alleged:

[LDA] blurred/crossed the professional boundaries lines and placed CHT reputation at risk.

Through your actions you may have accessed documentation through incorrect channels by placing yourself and CHT employees in disrepute.

Your continued actions are causing harm and against to other CHT employees.

[27] CHT also alleged that there may be a conflict of interest relating to her relationship with the resident and breach of confidentiality regarding CHT information. CHT proposed that LDA be suspended from her employment while the matter was investigated. She was invited to provide comments on the proposal to suspend her employment by midday 5 September 2023.

[28] LDA failed to provide a response to the proposed suspension. As a result, SWP confirmed the decision to suspend LDA on Friday 8 September 2023. LDA was suspended on full pay.

[29] On 12 September 2023, LDA emailed LED to complain about ENT and SWP's alleged bullying behaviour at the meeting on 31 August 2023.

#### *CHT's further allegations*

[30] On 22 September 2023 SWP wrote to LDA stating CHT was now concerned about the way LDA had progressed her Nursing Council complaints relating to clinical coordinator and registered nurse. CHT also enclosed an email from the LED which stated that LDA:

- (a) had disclosed to him that she had a health issue;
- (b) had told him she did not feel safe at work;
- (c) was concerned that some of her documentation was missing from notes;  
and
- (d) was showing signs of stress.

[31] The letter also offered LDA the opportunity to undergo a health assessment paid for by CHT.

[32] On 27 September 2023 LDA's representative wrote to CHT's advisor confirming that LDA did not have health issues and would not be undertaking any health assessment.

[33] On 16 October 2023 CHT wrote to LDA's advisor providing documents relating to its disciplinary investigation. In the same letter, CHT expressed concern that LDA denied having a health condition.

#### *The disciplinary meeting*

[34] On 3 November 2023 LDA attended a disciplinary meeting with CHT. During that meeting CHT confirmed to LDA it was considering whether her role at her current CHT facility posed a possible conflict of interest due to her relationship with the resident, and regarding her complaints against the clinical coordinator.

[35] On 17 November 2023 CHT wrote to LDA providing her with additional information about the allegations and invited her to comment or attend a further meeting on 21 November 2023. This letter also referred to a 'separate process' in respect of wider concerns about her conduct.

#### *CHT's provisional disciplinary decision*

[36] After not receiving a response from LDA in regard to attending a further meeting, SWP wrote to LDA on Friday 1 December 2023 with her provisional decision on the investigation (provisional decision letter). The letter stated that CHT had concluded its investigation, and had decided no formal disciplinary action was proposed to be taken.

[37] Although the provisional decision letter confirmed LDA's conduct did not amount to serious misconduct, it outlined CHT's concern that LDA working in the same facility where the resident was placed, presented a conflict of interest.

[38] The provisional decision letter also raised CHT's concerns about:

- (a) LDA's ongoing work relationship with senior staff members at the facility given she had raised complaints about their conduct; and
- (b) Staff concerns about LDA's behaviour including allegations about her erratic and at times aggressive way she had been interacting with them.

[39] In addressing its concerns about LDA's conflict of interest, CHT proposed to LDA her transfer to another nearby CHT facility. In making the proposal, CHT asserted that if LDA did not agree to the transfer, it would have to review the viability of her ongoing employment.

[40] The letter invited LDA to attend a further meeting on Tuesday 5 December 2023. LDA stated that, due to a change of staff at the firm representing her she did not receive the letter until Friday 8 December 2023.

*Proposed change of location and LDA's dismissal*

[41] On Wednesday 6 December 2023 LDA's representative advised CHT that LDA wanted to meet with CHT, with LDA's likely availability being from the middle of the following week.

[42] On Thursday 7 December 2023 and in response to LDA, CHT offered additional time to the end of the week (the following day on Friday) to meet with her to discuss her views about its concerns and the proposal.

[43] LDA stated at the Authority's investigation meeting that she did not agree that a conflict of interest had arisen, and she did not wish to transfer her location of employment as her current CHT location was within walking distance of her home. However, she did not communicate this to CHT at the time.

[44] On Friday 8 December 2023 LDA's representative advised CHT that LDA could not attend that day. Later on the same day, CHT provided LDA a proposed letter of variation to her employment agreement, stating that LDA had the right to obtain advice on the variation. LDA was still on paid suspension at his time.

[45] The variation letter also stated that her signature was required by Monday 11 December 2023 and that she was to report for work at the new location on 12 December 2023. CHT noted that if she did not respond to the proposal by Monday 11 December 2023, it would have no option but to give her notice of termination.

[46] On 12 December 2023 LDA's representative informed CHT that he expected to provide a substantive response to its letter of 1 December 2023 by Thursday 14 December 2023.

[47] CHT's advisor replied the same day stating that there was nothing preventing LDA from returning to work, although she would be working at a different location. LDA would therefore be placed on unpaid leave, and CHT would be looking to end LDA's employment in the event that it does not hear from LDA, or her representative by Thursday 14 December 2023.

[48] On Wednesday 13 December 2023 LDA's representative emailed CHT's advisor to propose that the parties meet for a without prejudice discussion.

[49] On 15 December 2023, CHT terminated LDA's employment. The grounds for termination were:

- (a) there was a significant conflict of interest in her ongoing employment at her present employment location;
- (b) there had been a breakdown in her relationship with key staff;
- (c) that LDA's representative had failed to provide a substantive response to CHT's proposal; and
- (d) that LDA had not engaged with the proposal to transfer her location of employment.

[50] On 10 January 2024 LDA raised personal grievances for unjustified disadvantage and unjustified dismissal.

## **Did LDA properly raise a grievance for unjustified disadvantage?**

### *Legal Principles*

[51] The parties disputed whether some of LDA's unjustified disadvantage claims were raised in accordance with the Act. Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the date the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[52] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

- (3) 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.

[53] The key principles for establishing if a communication, or series of communications, has/have sufficient information to make the employer aware that the employee is alleging a personal grievance are set out in various court decisions, in summary:<sup>6</sup>

- (a) The personal grievance process is informal and accessible.
- (b) Personal grievances can be raised in writing or orally and by a series of communications. There is no particular formula of words to be used.
- (c) The communications, in whatever form, must allege a complaint that is in the nature of a personal grievance - the type of personal grievance is not required to be specified, nor does the complaint even need to be labelled a personal grievance.
- (d) The communications must indicate that the employee wants the employer to respond to the complaint, although the employee does not need to identify its

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<sup>6</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 (NZEmpC) at [36]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139; *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (NZEmpC) at [37]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112; *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132; and *Disabilities Resource Centre v Sonia Moana Maxwell* [2021] NZEmpC 14.

preferred process for dealing with the complaint in the first instance, nor does it need to specify the type of relief sought.

- (e) The communications must convey the substance of the complaint with sufficient information so that the employer knows what it is that the employee expects it to respond to. The employer must be able to respond by addressing the merits of the complaint with a view to resolving it.
- (f) Generally, it is insufficient for an employee to make a bland statement that it believes it has a personal grievance, even naming the statutory type, without specifying more. However, it may be that identifying an unjustifiable dismissal would suffice if it were clear that in identifying the unjustifiable dismissal grievance the employee is complaining about the dismissal by the employer.

[54] In *Creedy v Commissioner of Police*, then Chief Judge Colgan observed the personal grievance procedures in the Act are:

“...aimed not at preserving rights to litigate past or current injustices at some indefinite future time at which an employee may elect to revive them. Rather, the procedures exist to have alleged injustices identified and addressed quickly, and initially at least, informally, and directly between employer and employee ...<sup>7</sup>”

*LDA’s unjustified disadvantage claims*

[55] By letter dated 10 January 2024 LDA’s representative raised two unjustifiable disadvantage grievances against CHT for:

- (a) stopping LDA’s pay from 12 December 2023; and
- (b) allegedly making untimely demands for her response during the disciplinary process.

[56] In LDA’s closing submissions, she raised further unjustified disadvantage claims (the additional claims) against CHT for:

- (a) unfairly suspending her; and
- (b) making unfounded statements about her health.

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<sup>7</sup> *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 at [15].

*LDA's additional claims*

[57] LDA said these additional claims were raised in time through both her formal complaint she made to CHT on 12 September 2023 and her representative's letter to CHT's advisors on 27 September 2023.

[58] CHT disputed LDA's additional claims on the basis they were not raised within the 90-day period. In response to LDA's arguments in respect of the two prior communications in September 2023, CHT explained these did not meet the requirements of the Act given the communications did not provide sufficient information to address the grievance and did not properly alert CHT that LDA had a grievance it wanted to address.

*Assessing LDA's claim for unfair suspension*

[59] LDA claimed she was unfairly suspended at the meeting on 31 August 2023. She stated her 12 September 2023 email to CHT was sufficient to make CHT aware of a grievance that she wanted CHT to address. Although she expressed her position as a "formal complaint" she claimed it was essentially a personal grievance. In her email she raised the following:

I would like to make a formal complaint of verbal abuse, physical entrapment, disturbing accusations, [b]elittlement, cultural concerns, pressure, workplace bull[y]ing, disturbing behavio[u]r, berating a[n] employee.

..She then told me that I'm suspended, and if she could she would fire me right now ...

[60] LDA claims her unfair suspension was unjustified and disadvantaged her in her employment. She claims she was hurt by both her suspension and the manner in which it was carried out.

[61] CHT submitted the substance of LDA's 12 September 2023 email was about the issues that needed to be investigated, which led to the proposal for her suspension. She did not specifically communicate that the suspension was the substance of her complaint. This meant she did not provide CHT with sufficient information to determine how it was expected to respond to her claim. In short LDA's reply did not effectively raise a personal grievance.

[62] I find the wording in LDA's email of 12 September 2023 did raise a complaint about the manner of her suspension. This complaint should have made CHT aware LDA

was raising an unjustifiable disadvantage personal grievance regarding her suspension. I find LDA did raise this personal grievance within the statutory time limit.

[63] Having raised an unjustifiable disadvantage personal grievance regarding her suspension within the statutory time limit, LDA must establish that her employment conditions had been affected to her disadvantage.<sup>8</sup> Once established the burden shifts to CHT to demonstrate that under s 103A of the Act their actions were that of a fair and reasonable employer could have done in the circumstances at the time the action occurred.

[64] The facts around what occurred, and what was actually said at the meeting of 31 August 2023 were disputed by the parties. LDA's version of events could not be corroborated by other witnesses who attended the meeting.

[65] CHT submitted LDA was not in fact initially suspended on 31 August 2023. She agreed to leave work once authorised to do so. This was reflected in her representative's text message to ENT at 2.54pm that day, in which he wrote: "Yes, I mentioned to her that you will authorise her that she can go home and she will leave. She agreed".

[66] CHT submitted that LDA's agreement to remain away from work is also reflected in her letter handed to ENT in their meeting that day, which indicated that she had no issue with taking time off work, only that it be characterised as annual leave rather than garden leave.

[67] This was confirmed by LDA when giving evidence at the investigation meeting. Therefore, her absence from work from 31 August 2023 was by agreement.

[68] After LDA received the 4 September 2023 letter proposing her suspension and requesting she respond by 5 September 2023, she did not respond, nor did she instruct her then representative to respond on her behalf. She also did not seek to return to work. On 8 September 2023, after not having had a response from LDA, CHT confirmed that the proposed suspension would proceed.

[69] In the circumstances I am satisfied LDA was not suspended on 31 March 2023. I am also satisfied she was later fairly suspended on 8 September 2023 after having

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<sup>8</sup> Employment Relations Act 2000, s103(1)(b).

been consulted regarding the proposed suspension and failing to respond. I find on the evidence LDA was not disadvantaged by being suspended.

*Assessing LDA's claims relating alleged statements about her health*

[70] LDA claims she was disadvantaged by CHT making unfounded statements about her health. LDA referred specifically to LED having expressed his understanding that she had a health issue.

[71] LDA made two arguments in support of this claim. Firstly, she referred to her email on 27 September 2023 claiming she raised a personal grievance when she referred to being unhappy about LED's understanding about her health.

[72] Alternatively, as her second argument, LDA argued that CHT's original statement in reply did not raise a 90 day jurisdictional issue in respect of her disadvantage claims relating to allegations about her health. She said CHT only raised the issue in its amended Statement in Reply of 27 February 2025.

[73] LDA contends that if this specific grievance was found to be raised out of time. LDA stated it had been consented to be raised out of time by CHT when it failed to object to it being raised out of time when it filed its original statement in reply.

[74] CHT submitted the email of 27 September 2023 did not sufficiently alert CHT that LDA had a grievance that she wanted addressed. For example, it did not request that CHT take any action in relation to the matter.

[75] Firstly, I find LDA's email to CHT on 27 September 2023 did not specify sufficient information to raise a personal grievance. This meant it would not have been clear to CHT what they needed to respond to. The email was a response to CHT's offer of assistance for LDA. The reference to the LED's views was essentially a denial of her having a health issue.

[76] Secondly, I find LDA also did not properly raise the personal grievance for an unjustified disadvantage in her statement of problem. LED referred to the factual background regarding the alleged health issue and CHT provided a factual response in the statement in reply. LED did not seek leave to raise the personal grievance out of time and CHT did not consent to the personal grievance being raised out of time. For

this reason, CHT's non objection to the issue in its original statement in reply was not sufficient for it to constitute its consent to a grievance being raised out of time.

[77] I find CHT did not consent to the raising of an unjustifiable disadvantage personal grievance outside the statutory time limit.

*Conclusion on alleged unjustifiable disadvantage grievances for unfair suspension and unfounded statements about LDA's health.*

[78] For the reasons already stated above, I find LDA's personal grievance claims for unjustified disadvantage on these additional claims cannot proceed.<sup>9</sup>

### **LDA's remaining unjustified disadvantage claims**

*Allegations against CHT of stopping of LDA's pay*

[79] On 12 December 2023 CHT informed LDA that she was on unpaid leave from that date. She remained on unpaid leave until her employment was terminated on 15 December 2023.

[80] LDA submitted she was not consulted about CHT's decision to stop her pay and was not properly warned about it before the decision was made.

[81] LDA submits CHT's timeframe for a response was unreasonable, because key documents relating to the 'proposal' were not supplied until 2.14 pm on Friday 8 December 2023, meaning that LDA had only one working day to consider them.

[82] CHT submits the decision to stop LDA's pay arose after she failed to respond to the proposal to vary her location of work from her current CHT location to a new CHT location.

[83] CHT's argument is that it had given sufficient time for LDA to respond to its proposal. It did so by;

- (a) signalling the proposal on 3 November 2023;
- (b) clarifying the proposal on 8 December 2023; and
- (c) confirming that the proposal would take effect from 12 December 2023.

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<sup>9</sup> Employment Relations Act, s 114(7).

[84] CHT argued it was not obliged to wait indefinitely for a response.

[85] CHT stated it had made it clear that it was offering LDA the opportunity to return to work, albeit at a new location from 12 December 2023. CHT submitted this offer effectively lifted the paid suspension from that date.

[86] CHT contends that LDA's refusal to attend work at the offered location, without providing any substantive reason, meant she was no longer 'ready, willing, and available' for work. In those circumstances, CHT was not lawfully obliged to continue payment, and CHT's decision to stop her wages was a justifiable and a direct consequence of the LDA's own actions.

[87] In practical terms CHT was without consultation, unilaterally amending the terms of LDA's suspension, from suspension on full pay to unpaid suspension.

[88] Suspension, and particularly suspension without pay, may amount to an unjustifiable disadvantage.<sup>10</sup> An unpaid suspension is a serious step in an employment relationship.<sup>11</sup>

In the absence of express agreement to suspension without pay, either in the applicable employment agreement or by agreement between the parties at the time, suspension without pay will not be justifiable other than in very few truly exceptional circumstances.

[89] I find that LDA was not consulted on, or given any notice that her paid suspension was ceasing. This was an unreasonable and unfair unilateral action by CHT. In the circumstances LDA was unjustifiably disadvantaged by CHT's actions in stopping her pay.

*CHT allegedly making untimely demands for her response during the disciplinary process*

[90] Throughout her disciplinary process, LDA believed CHT continued to act with unnecessary haste. In assessing this aspect of LDA's unjustified disadvantage claim, the Authority has assessed LDA's claim up until events occurring on 29 November 2023, which was before CHT's provisional disciplinary decision. For reasons set out

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<sup>10</sup> *Canterbury Rubber Workers IUW v Dunlop (NZ) Ltd* [1983] ACJ 367.

<sup>11</sup> *Singh v Sherilee Holdings Ltd, EmpC, AC 53/05*, 26 October 2005.

below, CHT's actions after 29 November 2023 were assessed as part of LDA's unjustified dismissal claim.

[91] As a result of CHT's actions prior to the provisional disciplinary decision, LDA claimed the imposition of short timeframes to respond were stressful and upsetting. This was especially given CHT was aware she was:

- (a) seeking advice throughout its process (noting also her representative had considered CHT's timeframes as being procedurally unfair); and
- (b) not all of the delays in her responding to CHT were of her own making.

[92] CHT submitted it acted fairly and reasonably in providing deadlines and offering to accommodate LDA's requests for further extensions to respond. In regard to the disciplinary investigation meeting, CHT stated that on 16 October 2023, it provided information from its investigation and initially proposed a meeting for 19 October 2023. However, at LDA's request the meeting to receive feedback did not occur for nearly 3 weeks later on 3 November 2023, providing LDA with ample time to prepare her response.

[93] On 17 November 2023 CHT provided further information it had obtained and proposed a meeting for 21 November 2023 for LDA to provide her response. After receiving no response from LDA she was asked for an alternative meeting time to be proposed. However, no alternative times were proposed.

[94] On 28 November 2023, a week after the date that CHT had proposed to meet, LDA's representative advised that he was leaving his firm that day. Requests were made to LDA's new representative to suggest a date for a further meeting, but none was proposed.

[95] I find that the timeframes CHT was imposing on LDA up to 29 November 2023 to be fair and reasonable. The period of time that had elapsed between providing the information on 17 November 2023 and the date of the provisional decision being made, was approximately two weeks. LDA failed to suggest alternative dates to meet or to provide a written response during that two-week period.

[96] I find LDA was not unjustifiably disadvantaged by the timeframes imposed on her for response during the disciplinary process up until 29 November 2024.

## **Whether LDA was unjustifiably dismissed?**

[97] In assessing LDA's claim for unjustifiable disadvantage for the period between 29 November to 15 December 2023, it is appropriate to address these claims together as part of her unjustified dismissal claim. The factual matrix and grounds relied on by LDA for this disadvantage claim relate to the same facts and grounds as her claim for unjustified dismissal.

[98] Taking into account the above, LDA's unjustified dismissal claim required an analysis of two areas of allegations against CHT. Firstly, whether the timeframe imposed by CHT on LDA to respond to its allegations and communications was reasonable. Secondly, whether there were sufficient substantive grounds relied on by CHT to reach the conclusion to terminate her employment.

[99] Section 103A of the Act sets out the test for justification which requires an objective assessment of whether CHT's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. An employer's decision to dismiss an employee must be, when examined objectively, substantively justifiable and procedurally fair for it to survive scrutiny by the Authority or the Employment Court.

*Were CHT's timeframes leading to LDA's dismissal unreasonable?*

[100] LDA claimed the timeframe of events and any expectations for her to respond between 1 to 15 December 2023 was unreasonable and she did not have adequate time to respond.

[101] CHT submitted it undertook a fair and reasonable process in coming to the decision to dismiss. It also said LDA was given ample opportunity to respond to CHT's provisional decision, and was put on notice several times that CHT was contemplating dismissal if she did not respond on the issue of the proposed transfer. LDA should have been mindful that her employment was in jeopardy if she failed to respond by the deadline of 14 December 2023.

[102] On Wednesday 29 November 2023 CHT advised it would prepare its provisional decision and then issued its provisional decision two days later on 1 December 2023.

[103] After issuing the provisional decision it appeared CHT was seeking to resolve the situation with LDA in a swift manner. This was evident by CHT allowing LDA only seven days to make a decision between relocation, or the termination of her employment.

[104] On Friday 8 December 2023 CHT wrote to LED providing new contractual documents and expected LDA to consider them, obtain advice, resolve any queries, and return signed documents by Monday 11 December 2023. It also advised her that if she did not respond to the letter, it would issue her notice of her termination of employment.

[105] It should be noted also, CHT's advisor gave evidence at the investigation meeting that the approaching Christmas holiday period made resolution of the issue critical, as skeleton staff at Head Office over the Xmas period would make it difficult to progress matters. This had not been previously advised to LDA.

[106] I accept that CHT must have found LDA's lack of engagement frustrating, but I agree with LDA's view that the truncated timeline was unreasonable. LDA was expected in a single working day to review the documents and seek advice on a variation to her employment agreement that would significantly change the environment that she had worked in for the past 18 years.

*CHT's conclusion on LDA's workplace relationships*

[107] CHT in its termination letter of 15 December 2023 alleged that it was neither reasonable nor practicable for LDA to continue in her role due to the breakdown of her relationships with key staff. The inference being that the accusations LDA made about her managers and others, raised a level of distrust in the workplace. ENT also confirmed the impact on the wider team, stating that staff were anxious about where their confidential complaints had gone. LED's evidence was that there would be a stressful situation if LDA had returned with clinical co-ordinator still there.

[108] I find that while there was evidence of some past conflict between LDA and other staff, CHT took no steps to properly investigate whether there was a relationship breakdown in the workplace and if so, what steps (if any) could be taken to address such a breakdown.

*CHT's conclusion on LDA's conflict of interest*

[109] CHT's approach regarding the conflict-of-interest issue was a significant aspect of LDA's employment relationship problem and subsequent disciplinary investigation. CHT's investigation concluded that LDA's presence, working at the same facility as the resident was under care, presented a conflict of interest. However, CHT were well aware of this conflict prior to its investigation into LDA's conduct.

[110] Besides some relatively minor references to conflicts of interest in both LDA's employment agreement and the employee code of conduct, CHT did not have a detailed conflict of interest policy to deal with specific conflicts of interest issues between staff and residents. As such there was no adequate guidance for staff and management to manage potential conflicts of interest or mitigate such conflicts.

[111] The failure by CHT to have an adequate policy or guidance in place to address a conflict of interest, and accordingly follow a fair process was significant and placed LDA in a vulnerable position. CHT correctly accepted responsibility for this situation and decided not to proceed with disciplinary action against LDA.

*CHT's lack of consultation*

[112] The findings of the disciplinary investigation were also flawed in that the actions taken by CHT did not adequately or sufficiently meet the requirements of s 4(1A) of the Act. Compliance with those requirements was not to an extent that was reasonable in the circumstances and having regard to the objectives and purposes of consultation. LDA was entitled to expect she would be adequately consulted on the possible relocation to another CHT site or any alternative proposal.

[113] In its letter of 1 December, CHT told LDA to transfer to the new location;

“we will need to review your ongoing employment, because we do not believe it is possible for you to continue at CHT [location]”. .... “we do not see it as tenable for you to continue at [location].”

[114] LDA was not meaningfully consulted about a change from her usual place of work. She was presented with a choice between accepting a new location or being dismissed.

[115] CHT concluded that relocation was the only action available to it, without consulting with LDA, or considering whether future conflicts could be managed by

education and training, a letter of expectation, or mitigated through implementing other measures.

[116] There will be some cases where a conflict of interest cannot be managed, and the employment relationship cannot continue in the same workplace. However, that position had not clearly been reached at the time CHT decided to terminate LDA's employment.

### **Conclusion on unjustified dismissal**

[117] CHT is a moderately sized employer with its own expertise in human resources. As a reasonable employer it should have followed a fair process when investigating and contemplating the termination of employment of a potentially disadvantaged employee.

[118] CHT hastened the dismissal process through December 2023 and in doing so precluded any chance of adequate consultation with LDA. CHT also failed to effectively manage the conflict of interest, and failed to address the alleged breakdown in working relationships, being the grounds relied on for dismissing LDA. CHT's evidence fails to demonstrate how the procedural fairness requirements incorporated in the test of justification set out at s103A of the Act were met by CHT. I find those requirements were not met and LDA was unjustifiably dismissed by CHT for this reason.

[119] For completeness, I do not consider the defects in CHT's process mentioned were minor and consider those defects resulted in LDA being treated unfairly. I consider that given the resources CHT had available, a fair and proper dismissal process could have been expected to have been undertaken.

### **Remedies**

[120] Having determined LDA was unjustifiably disadvantaged and unjustifiably dismissed by CHT I need to consider what remedies should follow. I may award any of the remedies provided for under s 123 of the Act.

[121] The factual matrix relied on by LDA for the unjustifiable disadvantage finding regarding CHT's actions in stopping LDA's pay, relate to the same facts as her claim for unjustified dismissal. I will address both claims globally under compensation for unjustified dismissal.

## **Reimbursement of lost wages under sections 123(1)(b) and 128 of the Act.**

### *The parties' submissions*

[122] LDA seeks reimbursement of loss of earnings for the period from the date of dismissal. She also seeks to be paid for the three days she was not paid prior to her dismissal.

[123] Where the Authority finds that an employee has a personal grievance, and that the employee has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[124] LDA stated she had been unsuccessful in seeking further full-time employment. LDA indicates that she had picked up some cleaning work sometime after her dismissal, earning about \$230 per week.

[125] CHT submits the Authority should decline to award LDA lost wages, because it offered her alternative employment at another CHT location at the same rate of pay that she had been on at the time of her dismissal. Had LDA agreed to work at that location, she would not have lost any wages.

[126] CHT submits the Authority should decline to award LDA lost wages because she has failed to mitigate her loss. While she refers to having made applications, she did not state how many, to what companies she had approached and when these were made. There was also no evidence that she sought a reference from CHT.

### *Conclusion on Reimbursement of lost wages*

[127] LDA was dismissed on notice. LDA is entitled to recover three months' salary at the contractual rate she was paid at the time of her dismissal. She is also entitled to recover her salary for the three days she was placed on unpaid leave before her dismissal. As her limited income from cleaning work was obtained sometime after her dismissal, I do not intend to make a deduction from any order for reimbursement of wages.

[128] I find CHT is to pay LDA three months' (\$11,017.5 gross) and three days salary (\$508.50 gross) and holiday pay (\$922.08 gross) and KiwiSaver contributions (to be assessed by CHT) for lost wages.

### **Compensation award under s 123(1)(c)(i)**

[129] LDA had been employed by CHT for 8 years. LDA has set out in her evidence the devastating effect that the loss of her job, and her workplace for the last 18 years has had on her, and it is accepted the unjustified dismissal has had a profound and negative impact on her. As an example of LDA's dedication for her workplace, she gave evidence how she had provided her own pool table, fish tank and other items in the common room for the benefit of the residents.

[130] LED gave evidence that LDA had at all other times been highly professional in her dealings, including where the resident was concerned.

[131] LDA sought compensation in the region of \$30,000 for hurt and humiliation under s 123(1)(c)(i) of the Act.

[132] CHT opposes any award of compensation. CHT submits LDA does not distinguish between any award for the dismissal grievance and her disadvantage grievance and any payment if granted should be treated as a global sum.

[133] I am satisfied LDA experienced hurt and humiliation under section 123(1)(c)(i) of the Act. Having regard to the particular circumstances of this matter LDA is entitled to an award to compensate the hurt and humiliation suffered consequent to the established personal grievance.

#### *Conclusion on compensation*

[134] LDA has succeeded in her claim that CHT did not act as a fair and reasonable employer could have done with respect to her dismissal. LDA was a long serving loyal employee who until recently had a good employment record.

[135] I find in the circumstances outlined above CHT is to pay LDA compensation of \$20,000.

### **Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by LDA that contributed to the situation giving rise to his grievance?**

[136] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by LDA that contributed to the situation giving rise to his grievance.

[137] Summarising the key principles relating to contribution as follows:

- (a) The Authority must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; and if so
- (b) Does an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[138] As stated by the Employment Court:<sup>12</sup>

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[139] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[140] LDA submitted that her conduct cannot be considered culpable, because she has not contributed to her personal grievance. She participated in the investigation and disciplinary process; she was entitled to seek advice before responding to a communication which contemplated the ending of her employment. She stated she did attempt to seek advice and the length of time it took to obtain that advice was not due to any blameworthy conduct of her own.

[141] CHT stated LDA's failure to comply with her good faith duty to be responsive and communicative was at very least a significant contributing factor to her dismissal, if not the ultimate cause. If the Authority decides against exercising its discretion not to award remedies at all, it must go on to consider LDA's contribution. CHT contends that her contribution should be at least 50%.<sup>13</sup>

[142] LDA did have a duty to be responsive and communicative, and I find LDA's lack of engagement with CHT in the latter stages of the dismissal process did contribute to the situation that gave rise to her personal grievance, and compensation should be modestly reduced for contribution. This is not a case of an imperfection or peripheral fault that would not attract a deduction.<sup>14</sup>

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<sup>12</sup> *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

<sup>13</sup> *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [216].

<sup>14</sup> *Paykel Limited v Morton* [1994] 1 ERNZ 875 (NZEmpC) at 886

[143] Standing back and considering the remedies I am awarding, I reduce LDA's compensation under 123(1)(c)(i) of the Act by 20 percent to \$16,000.<sup>15</sup>

### **Summary of orders**

[144] CHT is ordered, within 28 days of the date of this determination, to make payment to LDA;

- (a) \$11,526.00 (gross) as reimbursement of lost wages of 3 months' and 3 days salary and KiwiSaver contribution (to be assessed by CHT);<sup>16</sup>
- (b) \$922.08 (gross) holiday pay and KiwiSaver contribution (to be assessed by CHT); and
- (c) \$16,000.00 as compensation for hurt humiliation and injury to feelings.<sup>17</sup>

### **Costs**

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

[146] If the parties are unable to resolve costs, and an Authority determination on costs is needed, LDA may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum CHT will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[147] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>18</sup>

Andrew Gane  
Member of the Employment Relations Authority

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<sup>15</sup> *Maddigan v Director-General of Conservation* [2019] NZEmpC190, [2019] ERNZ 550\_

<sup>16</sup> Employment Relations Act, ss 123(1)(b) and 128.

<sup>17</sup> Employment Relations Act, ss 123(1)(c).

<sup>18</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)