

NOTE: This determination contains an order at [12] prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 323
3282639

BETWEEN

YUJING LI
Applicant

AND

SYNLAIT MILK LIMITED
Respondent

Member of Authority: Lucia Vincent

Representatives: Applicant in Person
Scott Wilson, counsel for the Respondent

Investigation Meeting: 19 March 2025 in Christchurch

Submissions Received: Up to and including 30 April 2025

Determination: 10 June 2025

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Having obtained her Bachelor of Food Science, Ms Li intends to pursue a career as a Food Science Technician. Shortly after completing her qualification, Ms Li began working for Synlait Milk Limited (Synlait) in March 2023 as a Process Technician in the Blending and Canning Department of its Rakaia based factory. Regrettably, her experience working with Synlait did not go as well as she hoped, due to an injury and incident during her time there.

[2] Ms Li says Synlait unjustifiably disadvantaged and unjustifiably (constructively) dismissed her because it:

- (a) inadequately supported her return to work following an injury including by following an unfair medical incapacity process;

- (b) failed to fairly investigate a bullying allegation she made against her Team Leader resulting in her feeling unsafe about returning to work; and
- (c) breached its obligations in other ways, such as misleading her in breach of its good faith duty and failing to follow its own policies.

[3] Synlait says it fairly and reasonably investigated the concerns Ms Li raised about an alleged bullying incident. After finding it unsubstantiated, Synlait proposed a facilitation process between Ms Li and her Team Leader, which ultimately did not occur before her employment ended.

[4] In relation to Ms Li's injury, Synlait says it supported her as well as it could with limited information. It says it fairly and reasonably started a medical incapacity process after Ms Li had been unable to work reliably for several months. It asked for more information from Ms Li a number of times and got to the point of considering making a decision about her ongoing employment. This process remained incomplete at the time of Ms Li's resignation.

[5] Legally, Synlait says Ms Li chose to resign rather than participate in the processes underway – and that the end of her employment cannot be considered a constructive dismissal. Synlait rejects any unjustified disadvantage occurred.

[6] The parties were unable to resolve their employment relationship problem and have asked the Authority to do so.

How did the Authority investigate?

[7] The Authority held an investigation meeting on 19 March 2025 to hear from Ms Li and the respondent's witnesses, Synlait Production Manager Jeffrey Kirby and Synlait Human Resources Business Partner Rachel Hyett. Two of Ms Li's former co-workers were summonsed. All witnesses answered questions under oath or affirmation. Written submissions followed.

[8] As permitted by s 174E of the Employment Relations Act 2000 (Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Non-Publication

[9] At the investigation meeting, the Authority made an interim order for non-publication of the names of people who did not appear as witnesses and were unable to comment on statements made about them.

[10] The Authority may order that the name of any party or witness or other person not be published, subject to any conditions it thinks fit.¹ Exercising this discretion should be according to principle. The Employment Court has recently outlined the approach to take that starts with a presumption of open justice that may be departed from after weighing relevant factors like the interests of the parties, third parties and the public, if adverse consequences could be reasonably expected to result from publication.²

[11] I am satisfied there is good reason for making a permanent order in relation to the Team Leader. He was not a party nor a witness. He did not have an opportunity to comment on the statements made about him in the Authority, particularly statements by Ms Li alleging he was a bully. This determination does not need to decide whether the Team Leader did or did not bully Ms Li. An association with such statements is however likely to lead to adverse impact for the Team Leader if his name was published.

[12] I make an order prohibiting publication of the Team Leader's name and any details that might identify him. No one may search the Authority's file without leave from a Member of the Authority.

[13] I have used a title to anonymise the Team Leader for the purposes of this determination. I have also used titles for others who were not witnesses or were summonsed to give evidence.

What are the issues?

[14] The issues before the Authority are:

- (a) Did Synlait unjustifiably disadvantage Ms Li by:
 - (i) inadequately supporting her return to work following an injury including by following an unfair medical incapacity process; or

¹ Clause 10, Schedule 2, Employment Relations Act 2000.

² *MW v Spiga Ltd* [2024] NZEmpC 147 at [87] to [96].

- (ii) failing to fairly investigate a bullying allegation she made against her Team Leader resulting in her feeling unsafe about returning to work?
- (b) Did Synlait breach its obligations in other ways, such as misleading her in breach of its good faith duty or failing to follow its own policies?
- (c) Did Synlait unjustifiably (constructively) dismiss Ms Li?
- (d) What (if any) remedies should the Authority award Ms Li?

[15] Prior to the investigation meeting, Ms Li withdrew her claim under the Protected Disclosures (Protection of Whistleblowers) Act 2022.

[16] Ms Li also made claims under the Human Rights Act 1993, Health and Safety at Work Act 2015 and Accident Compensation Act 2001. Synlait objected to these claims being raised out of time and jurisdiction.

[17] Setting aside any timing and jurisdictional issues, the substance of these claims was the same as the grievance claims. To approach the matter pragmatically, the Authority has focussed on the grievances alleged that arise out of the same situation.

What happened?

Ms Li worked for Synlait as a Process Technician

[18] Ms Li worked for Synlait from 27 March 2023 until she resigned on 31 January 2024, giving four weeks' notice. Her role as a Process Technician in the Blending and Canning department was a factory based one requiring her to complete physical tasks.

Collective agreement applied

[19] Ms Li provided a copy of the Collective Agreement between Synlait and the New Zealand Dairy Workers Union / Te Runanga Wai U for the term 1 January 2021 to 31 December 2022 covering her work (CA).

[20] The CA allows for Synlait to require an employee to undergo a medical examination:

- 11.3.3.4 The Company may require the employee to undergo a medical examination or the Company may request a second medical opinion by an appropriately qualified practitioner of the Company's choosing and at the employer's expense in the event of the employee requiring paid or unpaid leave due to sickness or injury.

Any medical information provided by the employee will be kept confidential.

[21] The CA also includes a term about terminating for medical reasons and requesting a medical assessment:

13.6 Termination for medical reasons:-

(a) If the employee is unable to perform full duties because of illness (including physical or mental) or injury, clause 13.1 does not apply and the Company may terminate by giving four **(4) weeks notice**.

(b) Before terminating employment under this clause, the Company will:-

- (i) Request that the employee undergo an appropriate medical assessment by a registered medical practitioner nominated by the Company at the Company's expense. The employee agrees to authorise the nominated medical practitioner to release the results of any assessment to the Company; and
- (ii) Take into account any such reports or recommendations provided as a result of that assessment or which the Company might receive (including any form a practitioner of the employee's choice).

(c) During any period of incapacity the employee must keep in regular contact with the Company regarding the status of the injury or illness and provide any information requested by the Company to keep it fully informed.

[22] The CA covers accident reporting too:

20.3 Accident Recording and Reporting

All accidents, injuries and near misses which occur arising out of, or in the course of employment must be reported to the Company before the end of the employee's normal working day, or as soon as practicable after the accident occurs. An accident report must be completed for all accidents. This gathers information as required by the Health and Safety at Work Act 2015 such as:

- The time, date and location of the accident;
- The activity in which the employee was engaged at the time the accident occurred;
- The general nature of any injuries suffered;
- The names of any other people in the vicinity of the accident who may have witnessed what took place.

Synlait had policies on health and safety

[23] Synlait has an *employee handbook* that contains a section on health, safety and wellness. This refers to immediately reporting all injuries, incidents or hazards in the MySafety app.³ The handbook also refers to a policy on harassment.⁴

³ Page 15.

⁴ Page 16.

[24] The Bullying and Harassment Policy makes the following key points:

- (a) Managers must take all reasonable steps to ensure the working environment is free from all forms of workplace bullying. This includes ensuring all staff reporting to them are familiar with the policy, treating all complaints seriously and taking prompt steps to resolve any complaints made.
- (b) Bullying is defined as “... any repeated unreasonable behaviour directed towards a person, or group of people, that creates a risk to their mental or physical health and safety.”
- (c) “Unreasonable behaviour” means “... behaviour that a reasonable person, having regard to all the circumstances, would judge to be vitamising, humiliating, undermining, or threatening.”
- (d) Examples of behaviour that may constitute bullying include:
 - (i) “Continually making jokes or demeaning remarks about a person or making more remarks about one member of a team compared to other team members;”
 - (ii) “Verbal abuse, swearing or name calling;” and
 - (iii) “Excluding or isolating individuals.”

Synlait trained Ms Li in health and safety matters

[25] Ms Li received health and safety training including on 8 April 2023 and on 31 July 2023- Synlait 101 (which covers health and safety at a high level). She also received a training workbook and access to standard operating procedures and a buddy system (albeit it appeared access was not smooth for Ms Li). Ms Li also used Synlait affiliated providers of EAP and physiotherapy during her employment.

Ms Li accidentally injured herself at work

[26] On 15 July 2023 Ms Li accidentally bumped her left knee on the RML machine, aggravating a previous injury she had received when overseas in May 2023. Ms Li told someone on site. She applied some first aid.

[27] Ms Li formally reported her injury to Synlait on 21 July 2023. The report says the injury occurred at around 11:00pm on 15 July 2023. She described what happened as a re-injury of

her knee whilst conducting normal role tasks and that it had occurred when she bumped her knee into one of the corners on the RML machine when squatting down. She applied first aid as a corrective action. It also records the six-day delay in reporting (Ms Li says she did not know how to report on MySafety initially).

[28] The report was submitted to Mr Kirby. Concerns were noted about the injury being a pre-existing non work-related injury and delay in reporting.

[29] It was not suggested Ms Li's injury occurred due to a lack of training in health and safety matters.

After her injury in July 2023, Ms Li was unable to work full time

[30] From July 2023 Ms Li could not work full time and later not at all.

[31] A series of medical certificates record Ms Li's first consultation was on 17 July 2023 and that she bumped her left knee on the corner of a machine re-injuring herself, causing a contusion (bruise).

[32] Certificates also record that Ms Li's work capacity was limited for the remainder of her employment, recording that she was unable to resume any duties or was fit for some work for reduced hours with work assistance required.

Synlait asked Ms Li for more information about her injury

[33] By way of letter dated 22 September 2023 Mr Kirby wrote to Ms Li asking for more detail about her injury. Up until this point in time, Synlait had received relatively limited information about the injury and any prognosis for her return to work. After noting Ms Li had been off work for ten weeks impacting on her team, Mr Kirby summarised the certificates Synlait had received between 18 July and 24 August 2023, and then said:

Next Steps:

- Synlait have been in contact with ACC to understand the injury that is being treated as it is unclear if this is a pre-existing injury or a new work-related injury from 15 July 2023
- Please provide Synlait with an updated timeframe of fitness for work and a return-to-work plan, based off your review that took 21st September 2023 (As per ACC medical certificate provided)

Please could you endeavour to provide this information by 29 September 2023. Once we have this, we will review it and determine how to best support your integration back to full duties.

It has also been noted that there was a significant delay in reporting this incident in MySafety therefore impacting the ability for Synlait to be able to understand the severity of the injury, causing further delays in your return to work.

We will look to hold a meeting with you at your earliest convenience once you have provided the latest return to work plan and would also like to discuss and reconfirm the business expectations on raising safety events.

[34] Ms Li responded by way of email dated 26 September 2023. She confirmed she had been injured from a bad fall in May but was fine when she returned to work. She explained she had reported her injury on the day to another employee resulting in her applying first aid, then sent her back to work. She explained there was some complexity to her injury and had received a range of medical opinions including a sports doctor who said she should make a full recovery in six months. She planned to visit her sports doctor on 16 October 2023 and would get further information then.

[35] Mr Kirby wrote to Ms Li again on 28 October 2023 setting out a summary of the medical certificates that said she could do anything between light duties on reduced hours to being fully unfit for periods. Mr Kirby explained Synlait were struggling to understand what and when she may be able to return to work, so sought to meet with her with a representative and/or support person on 3 November 2023. Ms Li's Team Leader and Ms Hyett would also attend.

[36] Mr Kirby wrote again to Ms Li on 7 November 2023 proposing to meet instead on 24 November 2023, without Ms Li's Team Leader, the subject of a complaint (discussed below).

Communications started to overlap

[37] At around this time, communications started to overlap. Ms Li communicated about her concerns relating to her injury and return to work, an investigation into her bullying complaint and intended meeting with her Team Leader to focus on their future relationship, as well as a personal grievance raised while processes were underway (described below).

Ms Li claimed she was bullied

[38] Ms Li says that on 27 October 2023 she received a Stay at Work Programme recommendation from ACC that she increase her hours of work. When Ms Li tried to talk to her Team Leader about it that day, she says he bullied her.

[39] Ms Li emailed the Manufacturing Manager on 30 October 2023 outlining her bullying complaint and concerns about her return to work. Her email refers to the conversation with her Team Leader on 27 October 2023 saying he was "... hysterically abusing me and humiliating me for over half an hour with groundless accusation, wanting me to resign from Synlait." After providing some background about her injury, Ms Li describes the conversation as follows:

On the 27th of October, I told [*Team Leader*] I wanted to increase my hours with the assistance of the ACC stay-at-work program. [*Team Leader*] replied, "you have already met the 3-month deadline, I will report it to HR and [*Mr Kirby*]. I am not willing to give you more chances as you make everyone feel stressed. Therefore, I don't want to be involved; let ACC talk to [*Mr Kirby*] instead. I have stopped [*Mr Kirby*] from finding you trouble, and since the company is already losing money, as the CEO's new policy, we are wasting money on you." I know nothing about the three-month deadline, I also didn't know that he was holding [*Mr Kirby*] back. He should have told me. He continued, "You have already seen 3-4 medical practitioners, so you might never get better with the wound. We can't have you doing light duties and working limited hours. You must return to 12 hours next week or do what the medical certificate says. I am not giving you a chance anymore. You know your body/your health. You should just quit. I don't think that works for you. You should think about what I said." I felt shocked, and my brain wasn't working. It was overwhelming.

I thanked him for shouldering the pressure for me after I calmed down. He started to get furious soon, saying: "90%, no 99% of the people in this team don't like you and are unhappy with you. You are causing stress and being a pain to everyone. Who is willing to talk to you while you are having a break, who is willing to talk to you while you are working," He was accusing me groundlessly. Am I not allowed to do what I want during break time? His logic was when people sit by themselves at the break, they are unliked by their colleagues. He also said, "You are not suited for any factory job. You shouldn't complain about any problems, getting sore feet, sore arms and such. I have enough of that." He continued saying: "You are too slow for everything. Other people must do your jobs and work harder because of you." I asked him, does that mean that I must be fast without cleaning everything properly then he agreed. When people are working fast, they miss a lot of details, in the food industry, food safety is of paramount importance. It is vital to a firm's reputation. He also mentioned: "If you were to return to full-time work, you must work in the not-at-all important and boring debagging and cleaning. You would never go to the other departments if everyone does not come up to me and say that I am happy or okay with Elizabeth." That is not stated in my contract. He was using coercive power on me to make me feel inferior.

...

That is only a part of my conversation, I have more details. I was in tears, humiliated and shocked.

[40] Ms Li's email referred to the Team Leader's remarks as verbally bullying, that she was feeling especially stressed and would shake at the thought of seeing him again, was unable to sleep and felt unsure about how she could get over it and return to work.

[41] During the investigation meeting, Ms Li said she may have made notes when she went home that night, recording what the Team Leader had said. Among other things, these

handwritten notes she later found, record about the conversation with the Team Leader that:

- (a) “He said he have stopped [*Mr Kirby*] from finding me trouble.”
- (b) “He said it is already 3 months & that is already enough time. He have to report it to HR & [*Mr Kirby*].”
- (c) “He said he is not pressurizing me to leave work. But he said that this work does not suit for me he want me to think.”
- (d) “He said that I am not suited for any factory job.”
- (e) “At last he told me I should quick this job myself. As this is making ppl & him very unhappy.”

[42] The Manufacturing Manager responded to Ms Li’s email complaint the next day, assuring her he would work with Mr Kirby to look into her concerns based off the information provided, and that the Team Leader would be excluded from future meetings about her injury and return to work plan. He asked if she would be able to attend the meeting scheduled for 3 November 2023 about her work injury, which could be rescheduled.

[43] Ms Li responded the day after, attaching a medical certificate confirming she was unfit for work. She said she had sought help from her doctor for the symptoms of stress after the incident with the Team Leader. She asked to postpone any meeting to later in the month, between 22 and 24 November 2023, which it was.

Synlait internally investigated bullying complaint

[44] After receiving Ms Li’s complaint, the Manufacturing Manager appointed Mr Kirby to conduct an internal investigation.

[45] As part of his investigation, Mr Kirby received an email from the Team Leader during the evening of 30 October 2023 outlining his version of events during the conversation with Ms Li. Mr Kirby made further notes in a different colour following his discussions with the Team Leader and Ms Li’s co-worker who had been present for part of the conversation.

[46] Looking at this email record, the account of the Team Leader and Ms Li’s co-worker (who had been present for part of the exchange), was similar in some ways to the record of events by Ms Li and different in other key ways. For example, the email said the conversation was calm and the Team Leader was not angry at any point - he did not say to Ms Li she must

return to work 12 hour shifts the next week. Some aspects supported what Ms Li said such as her being in tears at some stage indicating she was upset by what was discussed.

[47] Synlait did not provide a copy of the email to Ms Li during its investigation.

[48] Mr Kirby concluded bullying had not occurred. He said he discussed his investigation by way of peer review with Ms Hyett and the Manufacturing Manager, who drew the same conclusion.

[49] During November 2023, Ms Li followed up with the Manufacturing Manager requesting an update of the progress on the investigation into her complaint about bullying. The Manufacturing Manager emailed Ms Li on 21 November 2023 saying all that could be disclosed was that a process was followed and managed with the support of HR, and to speak directly to Mr Kirby about any concerns about working with the Team Leader.

Parallel processes

[50] Ms Li, her mother, Mr Kirby and Ms Hyett met on 24 November 2023 online. Ms Li recorded the meeting and provided a transcript. Among other things, Synlait told Ms Li it had looked into her concerns about the Team Leader and concluded it was not bullying, and the focus would be on moving forward, by arranging a facilitated meeting between the two. They also discussed the medical incapacity process, requested more medical information, and agreed to two meetings – one to repair the relationship between the Team Leader and Ms Li, and the other to discuss a return to work.

[51] On the same day as the meeting, Ms Li emailed Ms Hyett asking for an update on the investigation in writing. Ms Hyett responded reiterating what had been said in the meeting. Ms Li responded expressing her dissatisfaction with her response.

[52] As an outcome of the 24 November 2023 meeting, Mr Kirby emailed Ms Li on 30 November 2023 attaching two letters. The first addressed the medical incapacity issue and the other scheduled a meeting with the Team Leader, Ms Hyett and Mr Kirby for 13 December 2024. The covering email said in relation to the bullying investigation:

... (W)hile you alleged/accused [*Team Leader*] of workplace bullying it was deemed that **workplace bullying by [*Team Leader*] did not occur.**

-it was however established that there was miscommunication and misalignment between yourself and [*Team Leader*] therefore the next steps were advised to you that we will facilitate a meeting between yourself and [*Team Leader*] to reconcile any differences and move forward.

- With that being said, we will not tolerate any reference to workplace bullying from [*Team Leader*] this has not been substantiated.

...

For your reference, the below is the definition of workplace bullying and what is taken into consideration when reviewing an allegation and conducting a process:

What is workplace bullying

Workplace bullying is repeated, and unreasonable behaviour directed towards a worker or a group of workers that can cause physical or mental harm. Bullying can be physical, verbal, psychological or social. This may include victimising, humiliating, intimidating or threatening a person.

A single or occasional incident of insensitive or rude behaviour towards another person isn't consider workplace bullying, but it could become more serious and shouldn't be ignored.

[53] The letter dated 30 November 2023 addressing medical incapacity expressed concern about the lack of clarity regarding Ms Li's return to work. At that stage, the medical information provided related solely to Ms Li's knee injury. Mr Kirby asked for further information to be provided by 8 December 2023 with a view to meeting to discuss it on 12 December 2023. Neither meeting went ahead with Ms Li's participation.

[54] At around this time, Ms Li contacted mediation services with the Ministry of Business, Innovation and Employment. Synlait declined the request at that time, preferring to address matters through the processes already underway with Ms Li.

[55] Ms Li responded to Mr Kirby's 30 November 2023 email on 4 December 2023 asking if Mr Kirby agreed the Team Leader had "... said something inappropriate that has caused me high level of stress?" She said she would only feel comfortable meeting with the Team Leader and Mr Kirby after at least one session of EAP, online, with someone from mediation services and her union representative present.

[56] Ms Li sent an updated bullying complaint to Synlait's CEO by way of email dated 7 December 2023. She expressed concern that after complaining to Mr Kirby and requesting an investigation, she had been excluded from access to the investigation outcome and been told workplace bullying did not occur because it was not repeated. She expressed doubt Mr Kirby had investigated and asked for a third party investigation.

[57] Synlait wrote a letter to Ms Li dated 13 December 2023 noting Ms Li's Union representative had attended on her behalf at a meeting that day (Ms Li later claimed he acted outside his authority, but this was not known to Synlait at the time). The letter asked Ms Li to

see a Synlait appointed doctor during the week starting 8 January 2024 who could provide a report to Synlait and Ms Li about what support and assistance Synlait could provide to Ms Li to get her back to fulltime working capacity. They planned to meet after receiving the report. Synlait required Ms Li's consent to receive the report.

[58] Ms Li emailed Synlait's Manufacturing Director on 30 December 2023 expressing a desire to return to work with reservations due to her remaining concerns about working with the Team Leader and the medical incapacity process. She referred to resigning as a last resort in the hope that she could exit on good terms. She made a number of other requests such as for discretionary paid leave and reimbursement of medical expenses.

[59] Ms Hyett emailed Ms Li on 8 January 2024 providing context for the appointment made for 11 January 2024 with Synlait's doctor. Ms Li responded that day indicating she felt stressed and that she wished to postpone the appointment.

[60] Ms Hyett responded the next day. Her email materially said:

Because we are in the process of reviewing your medical incapacity for your role as a process technician at Synlait and whether we can continue to keep your role open for you, we need to ensure we are reviewing all information provided to us before we make this decision.

You currently have not provided us with any diagnosis or prognosis for your knee injury apart from the ACC forms which have you on reduced hours, no RTW plan of full-time hours. You have also not provided us with any details on a diagnosis or prognosis in relation to your mental capacity, we still have no indication on when you plan to be back at work and have only been provided with medical certificate stating "fully unfit for work", therefore Synlait is now in a position where we need to find out more information by way of requesting for you to see a Synlait assigned Doctor.

[*Synlait's Doctor*] will provide Synlait with a report that will include both your knee injury and your mental capacity and provide us an indication of what a realistic return to work date/capacity looks like for you and how Synlait can best support this return. This will also inform whether we are able to keep your role open for you, given it's been 6 months since you have worked a shift at Synlait.

Ms Li raised a personal grievance for unjustified disadvantage

[61] Ms Li raised a personal grievance for unjustified disadvantage with Synlait's Manufacturing Director in an email sent on 11 January 2024. In summary, Ms Li raised her concerns about what she perceived as a lack of a fair and full investigation into her complaint of bullying, and concerns about the way in which Synlait had conducted itself with her injury and the subsequent medical incapacity process.

Matters escalated

[62] Ms Li, her mother, her Union representative, Ms Hyett and the Manufacturing Director met on 16 January 2024 at Synlait. Key points include that:

- (a) Ms Li conveyed she was physically fit to attend work (although her medical certificates to that point said otherwise).
- (b) Ms Li felt held back from returning due to delays in meeting with the Team Leader to resolve relationship issues. She wanted to move shifts so she did not have to work with the Team Leader (this was met with reluctance unless it was via usual recruitment channels).
- (c) Ms Li expressed concern about the bullying investigation and outcome.
- (d) There appeared to be a misunderstanding about which meeting should occur first (meeting with the Team Leader to discuss their relationship or a meeting about medical incapacity), and the significance of this for Ms Li, who had cancelled a meeting and was waiting for it to be rescheduled.
- (e) Synlait made it clear it wanted a medical report about Ms Li's fitness for work to support her return to work both physically and mentally. Once they had that report they could then meet to discuss it.
- (f) Ms Li was encouraged to have further sessions through EAP.
- (g) Ms Li asked the Manufacturing Director for a response to her grievance she had sent a few days prior. Synlait indicated it would respond to Ms Li's representative (events overtook that).

[63] Regrettably, the intended appointment for Ms Li with Synlait's doctor after that meeting did not eventuate.

[64] Synlait sent a letter dated 29 January 2024 outlining their concerns about the lack of medical information that had been provided by Ms Li, noting she had not attended an appointment with Synlait's doctor to provide the information sought. Synlait said it may make a final decision about her employment based on the information currently available but gave Ms Li a further opportunity to attend an appointment with Synlait's doctor to obtain a report for it to consider.

Ms Li resigned, raising a constructive dismissal personal grievance

[65] Ms Li resigned giving four weeks' notice in a letter dated 31 January 2024. Her resignation materially said.

(M)y decision of resignation in less than one year is made from reluctance. I was anxious to learn and ready to contribute my food science knowledge to Synlait. In the first few months I went through unjustified disadvantages such as being ignored when reporting pain and discomfort from work, being excluded from work resources by people leaders, not receiving proper training for work and workplace health and safety, but I was expecting things to improve as time moved on. The unexpected work injury on 15 July 2023 started my Synlait days as the worst memory of my life. I was excluded from medical assistance, was suspected of authenticity of work injury, was verbally abused and humiliated by my shift leader during two conversations to push me to resign as per instruction by his upper manager. My request to investigate the incident was skimped on but focused on the medical incapacity process to dismiss me instead. I was in tears, heavy-hearted, having numerous sleepless nights trying to get out of this situation by writing to managers of all levels, explaining my effort to seek the medical treatment, showing my eagerness to return to work and the support required. sending evidence of the work injury to clarify any misunderstanding.

A few more months passed, I received the right treatment of my injury, but the employment relationship has no signs of improvement. I am exhausted, worry-laden, and highly stressed. The first employment could cost my who career as a food science technician. I realize the best way to get out is to leave the employment with Synlait. With the construction of dismissal, the deliberate ignorance of workplace health and safety policies, whatever explanation and returning to work efforts I have made are doomed to failure. During the long days, I have tried hard to be heard, but no one in Synlait was listening. Synlait managers are indifferent and showing no good faith in dealing with my ACC injury, no fairness or impartialness on workplace incident investigation as an employer.

[66] Ms Li attached her resignation letter to an email of the same day, asking for stress leave for the duration of her notice period. She did not return to work.

[67] After resigning, Ms Li expressed a desire to still meet with the Team Leader. Synlait did not consider this necessary however given Ms Li did not return to work.

Did Synlait unjustifiably disadvantage Ms Li?

Unjustified disadvantage a broad concept

[68] An employee has been unjustifiably disadvantaged in their employment, if their employment, or one or more of their conditions, has been affected to their disadvantage by some unjustifiable action by their employer.⁵

⁵ Act, s 103(1)(b).

[69] An unjustified disadvantage is about more than money and warnings. The Employment Court discussed the scope of s 103(1)(b) and the relevance of good faith in *Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192:⁶

Mr Johnson's primary claim is brought under s 103(1)(b) of the Act. That section allows an employee to bring a personal grievance if the employee's employment, or one or more conditions thereof, is, or are, affected to the employee's disadvantage by some unjustifiable action by the employer.

In 1989, the Court of Appeal was required to consider in *Alliance Freezing Company (Southland) Ltd v New Zealand Engineering Workers etc Union* whether the action involved had caused some material or financial loss. That court held that such a restriction was not appropriate. Any disadvantage, whether material or otherwise, could form the basis of a personal grievance. In that particular case, it was accordingly determined that the giving of an unjustified warning could constitute disadvantage.

In 1990, in *NZ Storeworkers etc IUOW v South Pacific Tyres (NZ) Ltd*, the Labour Court held that a "condition" was not confined to a contractual condition but, rather, included the total environment of the job and how the employment and practice operated.

Nine years later, in 1999, the Court of Appeal discussed the provisions of the Employment Contracts Act 1991 relating to a personal grievance brought on the grounds of discrimination: *Tranz Rail Ltd v Rail and Maritime Transport Union (Inc)*. The Court said:

Broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of an employment contract.

This interpretation was supported by references to United Kingdom case law which emphasised that the phrase was one of wide meaning and included customary benefits and reasonable expectations provided as a result of the employment relationship.

In 2005, former Chief Judge Colgan relied on this dicta when discussing the concepts described in s 103(1)(b) of the current Act: *ANZ National Bank Ltd v Doidge*. At issue was whether an employee was entitled to a mileage allowance as a term of her employment agreement. The Court held that a "personal grievance is a broader notion than a breach of contract". Payment of the mileage allowance may have been a "condition of employment" but not a "term of the contract".

Such a broad approach leads to a conclusion that there are many ways in which disadvantage may arise. In my view, such a conclusion is reinforced by the overarching obligations of good faith which may fall for consideration when assessing whether a disadvantage grievance is established.

A failure to comply with good faith obligations could found a disadvantage grievance where a fair and reasonable employer could be expected to comply with the law. It is therefore necessary to elaborate on the meaning of the good faith references in the Act.

... Drawing these threads together, the statutory duty of good faith involves a broad and flexible concept, but it manifests in a standard which must be complied with. Honesty and transparency in communications between parties to an employment relationship are obligations which may

⁶ At [72] to [79], and [87] (numbering and footnotes removed).

fall for consideration. The scope and content of those obligations will depend on the circumstances.

Synlait fairly and reasonably addressed concerns about Ms Li's fitness for work

[70] Ms Li claims Synlait unjustifiably disadvantaged her by inadequately supporting her return to work following an injury including by following an unfair medical incapacity process.

[71] An employer can fairly and reasonably address concerns about an employee's absence from work for medical reasons, and can fairly "halt" to an employment relationship if an employee has been unfit for work for an extended period of time:⁷

It is well established that an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work. An employer will be justified in dismissing the employee for long term absence where it can be shown that the decision was substantively and procedurally justified.

[72] Exactly when an employer can make such a call depends on a range of factors including the medical information available. The Employment Court has approached medical incapacity with the following framework:⁸

The employer must give the employee a reasonable opportunity to recover. The terms of the employment agreement, any relevant policy, the nature of the position held by the employee and the length of time they have been employed with the employer are factors which are likely to inform an assessment of what is reasonable in the particular circumstances.

The employer must undertake a fair and reasonable inquiry into the prognosis for a return to work, engaging appropriately with the employee. This will likely involve seeking and considering relevant medical information. It will also involve explaining the reasons for the inquiry, the possible outcome of it, and providing the employee with an opportunity for input and comment.

The employer must fairly consider what the employee has to say before terminating their employment. An employer is entitled to have regard to its business needs in deciding an appropriate response to the situation and any applicable time-frames. An employer is not obliged to keep a job open indefinitely, no matter how long an employee has been employed or how large the organisation is. For their part, an employee is obliged to be responsive and communicative.

In cases of medical incapacity, and a reduced ability to undertake certain tasks, a level of engagement with attempts to facilitate a return to work may reasonably be expected. Fairness cuts both ways, consistently with the mutual obligations which exist in employment relationships.

⁷ At [30], *Lal v The Warehouse Ltd* [2017] NZEmpC 66.

⁸ At [33]-[36], *Lal*, above at note 7, footnotes omitted. Applied in *Lyttelton Port Company Limited v Arthurs* [2018] NZEmpC 9.

[73] The final point made by the Court about the duty of good faith is an important one in medical incapacity situations – it requires active engagement from both parties, not solely an employer:⁹

Employment relationships involve a two-way street. Both parties have an obligation to be responsive and communicative and to deal with each other in good faith. It ill-behoves an employee to complain about a failure to adequately progress a rehabilitative process when they themselves fail to engage in constructive dialogue in a genuine attempt to resolve issues.

[74] Synlait reasonably raised its concerns about Ms Li's fitness for work. I do not accept Synlait's process was unfair or that it inadequately supported Ms Li:

- (a) Although it was unfortunate Ms Li did not know how to report her injury in MySafety on the day it happened, there was no evidence this somehow disadvantaged her recovery or support she received. Reporting was completed within the week and an investigation as with any injury.
- (b) Ongoing uncertainty about Ms Li's injury and her return to work arose from an ongoing confusion or reluctance on Ms Li's part to provide medical information when requested through an informal then formal process. Synlait asked for more information.
- (c) Ms Li could choose not to attend the appointment with Synlait's doctor. It was not unfair for Synlait to progress a process to address her ongoing absence and seek to understand more from an appropriate medical professional to inform any decisions about Ms Li's ongoing employment including supporting her return to work.
- (d) Synlait attempted to support Ms Li's return to work but reasonably required input from a medical professional to ensure Ms Li returned safely without compromising her health and safety.
- (e) Ms Li was not excluded by Synlait from its resources and support. Ms Li accessed EAP and physiotherapy and had been asked to see a Synlait doctor. That she also chose to see her own medical professionals and was not reimbursed for this does not mean she was somehow excluded from Synlait's support and resources.

⁹ At [43], *Dunn v Waitemata District Health Board* [2014] NZEmpC 201.

- (f) Synlait did not follow a process designed to dismiss her. It started a process to find out more about her injury to support her return to work. Any suggestion of a decision being made about her ongoing employment did not arise until Ms Li had been off work for a significant period without information needed to assess Ms Li's prognosis of returning to work fully fit.

[75] For completeness I note that although Ms Li has also raised concerns about the adequacy of her training, I find she had received training appropriate to her role. Although there were some delay in her training, this did not cause her injury nor did it disadvantage her. Training was an ongoing process and early on interrupted by her leave to travel overseas early on and her subsequent injury and limited capacity for work.

[76] Ms Li was not unjustifiably disadvantaged.

Synlait unjustifiably disadvantaged Ms Li in how it handled her bullying complaint

[77] Ms Li claims Synlait unjustifiably disadvantaged her by failing to fairly investigate a bullying allegation she made against her Team Leader resulting in her feeling unsafe about returning to work. After considering all the circumstances, I find Synlait did not act fairly and reasonably in how it handled Ms Li's bullying complaint.

[78] Although Synlait is not required to follow a perfect process when investigating a complaint about bullying, there were a number of areas where I find Synlait's actions cumulatively caused a disadvantage to Ms Li and fell short of what she could reasonably expect from her well-resourced employer in all the circumstances.

[79] At the outset, nobody spoke to Ms Li about her complaint to obtain any more detail and information from her including about how she wanted it handled, before it was investigated. Although Ms Li's complaint contained considerable detail, she had offered to provide further detail and said she had described *part* of the conversation. Had someone spoken to Ms Li to gather more information, she may have provided the contemporaneous notes she recalled at the investigation meeting, and described any further instances of bullying behaviour she alleged to support her complaint. As a result, Ms Li remained sceptical about what (if any) investigation Synlait undertook into her complaint and felt like she had not been taken seriously.

[80] Regrettably, although Synlait promptly appointed an internal investigator, Sunlit selected someone who was less impartial than they needed to be. Mr Kirby played a role as a

witness about what he allegedly told the Team Leader, undermining the independence he could have otherwise brought to the investigation. Although Synlait did not necessarily need to appoint someone external to Synlait, the difficulty Mr Kirby faced was that his evidence became relevant to his findings and decision to prefer the Team Leader and co-worker's account over that of Ms Li's. Ms Li asked Mr Kirby about what he had told the Team Leader during the meeting on 24 November 2023 - he denied saying what Ms Li said the Team Leader had told her. This demonstrated the conflicted position he was in.

[81] Unfortunately, Mr Kirby also did not share relevant information about Ms Li's complaint with her such as the email dated 30 October 2023 containing details of the Team Leader and her co-worker's recollections of what was said. If Mr Kirby had asked for Ms Li's input at any stage during the investigation including about this email, she may have clarified or commented on her own account, or at least understood that Mr Kirby had spoken to these people as part of his investigation and why her complaint was not upheld.

[82] Ultimately, Mr Kirby did not communicate his factual findings about what had occurred and why he had concluded it did not meet the definition of bullying, to Ms Li. Whatever the reasons, Ms Li reasonably struggled to understand the conclusion because she was in the dark about what Synlait concluded had happened beyond it not being bullying. Mr Kirby did not refer Ms Li to Synlait's policy on bullying (which requires a manager to ensure a complainant is familiar with it). His 30 November 2023 email concluding no bullying had occurred referred to definition of bullying with different phrasing suggests he was not referring to Synlait's policy (although similar).

[83] The result of how Synlait handled Ms Li's complaint was that she was unaware of the steps Synlait had taken to look into her complaint, leading her to believe Synlait had "skimmed" on its investigation and not taken her seriously. Appointing Mr Kirby who also was a witness contributed to Ms Li's distrust of the investigation and ultimately her difficulty in accepting his conclusion bullying had not occurred. Without any information that addressed what Mr Kirby had concluded happened and why it did not meet the definition of bullying, Ms Li struggled to understand and found it difficult to move forward to repair the relationship as Synlait wanted her to. All of this contributed to Ms Li's belief no or inadequate investigation had been undertaken.

[84] I am conscious that Synlait's policy does not prescribe the specific process to undertake. In the absence of Synlait having a policy on how to investigate bullying complaints, I have had regard to the *Good Practice Guidelines on Preventing and Responding to Bullying at Work* by Worksafe.¹⁰ The guidelines for example say that consideration should be given to:¹¹

- (a) natural justice principles for both parties to a complaint;
- (b) appointing a neutral investigator wherever possible – someone who is not directly involved in the incidents;
- (c) informing parties what to expect during the process and clear reasons for actions taken (or not); and
- (d) if bullying is a possibility, taking the views of the complainant into account when deciding on an approach to take.

[85] Synlait did take immediate steps to appoint Mr Kirby to internally investigate Ms Li's complaint. However, Synlait did not involve Ms Li in the investigation until after a conclusion had been reached, by which time the focus from Synlait's perspective moved from investigating the complaint, to repairing the relationship between Ms Li and her Team Leader. Ms Li struggled to move forward because of her lack of involvement in the investigation, creating a further barrier for her successful return to work. This was preventable.

[86] I find Synlait unjustifiably disadvantaged Ms Li in how it carried out its investigation into her bullying complaint.

Has Synlait breached its duty of good faith or any policies?

[87] Ms Li says Synlait breach its obligations in other ways, such as misleading her in breach of its good faith duty or failing to follow its own policies. I have dealt with the situation giving rise to these concerns in relation to the grievances. Any separate issues, such as whether Synlait breached its disciplinary process, or Synlait mislead her, are not made out. The disciplinary process did not apply at any stage to Ms Li's complaint. I do not accept anyone at Synlait misled Ms Li.

¹⁰ [Preventing and responding to bullying at work | WorkSafe](#)

¹¹ Page 36 and 37.

Did Synlait unjustifiably (constructively) dismiss Ms Li?

Constructive dismissals require a resignation caused by an employer's serious breach

[88] Case law defines a dismissal as an employer initiated termination covering constructive and actual dismissals with or without notice.¹² When considering a case of constructive dismissal and distinguishing it from a voluntary resignation, I must look at who drove the end of the employment relationship.¹³

[89] Two key questions are often asked:¹⁴

- (a) What were the terms of the contract?
- (b) Was there a breach of those terms by the employer of a seriousness sufficient to warrant the termination action actually taken by the employee?

[90] The Court of Appeal put it this way:¹⁵

... the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[91] Although I have found Synlait did not handle Ms Li's bullying complaint fairly (resulting in her being unjustifiably disadvantaged), I do not consider that was so serious that it warranted Ms Li's resignation nor that it was a reasonably foreseeable consequence. Synlait had taken steps to address her concerns – it had not ignored them. Ms Li resigned before participating in the facilitated meeting planned with her Team Leader which she wished to participate in even after she resigned (by that stage Synlait did not consider it necessary given she had resigned and did not return to work).

¹² *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ACJ 965 at [103]. Many cases refer to and rely on this definition and the sending away concept also described in *Greenwich*.

¹³ At [104]: "If the real source of the initiative for termination is the employer, or the basic causation comes from the employer, then the case is one of constructive dismissal."

¹⁴ At [113].

¹⁵ *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Offers IUOW Inc* [1994] 1 ERNZ 168 (CA) at [172].

[92] At the time Ms Li resigned, Synlait had not yet made a decision about Ms Li's ongoing employment in relation to the medical incapacity process. Synlait had given Ms Li a further opportunity to provide more information from Synlait's doctor so it could make an informed decision. It was in Ms Li's interests to provide that information and Synlait had appropriately addressed its concerns and made requests of Ms Li in a reasonable way that was supported by relevant clauses in the CA enabling Synlait to do so up to that point in time.

[93] Ms Li was not constructively dismissed.

What if any remedies should the Authority award?

Compensation

[94] Ms Li seeks an award of compensation under s 123(1)(c)(i) of the Act. She provided a medical report that described the impact on her of the workplace situation at Synlait, including a negative impact on her mental health.

[95] It is difficult to distinguish between the impact of matters I have found not made out and the impact of the disadvantage grievance made out. In the circumstances, and after considering the evidence, what has been awarded in other cases and trends generally,¹⁶ I award Ms Li \$12,000 under s 123(1)(c)(i) of the Act.

Contribution?

[96] Ms Li did not contribute to the situation giving rise to her grievance in terms of section 124 of the Act.

Order

[97] I order Synlait to pay Ms Li \$12,000 compensation under s 123(1)(c)(i) of the Act.

Costs

[98] Ms Li represented herself in the Authority. Costs would not normally be awarded.

[99] If any issues of costs remains, the Authority reserves its determination. The parties are encouraged to resolve any issue of costs between themselves.

¹⁶ Such as *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [161] to [162].

[100] If the parties are unable to resolve any issues as to costs, and an Authority determination on costs is needed, the party who thinks they are entitled to costs 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 the other party 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.

[101] 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.¹⁷

Lucia Vincent
Member of the Employment Relations Authority

¹⁷ [Practice Direction of the Employment Relations Authority](#)