

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 580
3305921

BETWEEN

PREETI MALA
Applicant

AND

SPECTRUM CARE LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Ruth Pettengell, advocate for the Applicant
Saadi Radcliffe, counsel for the Respondent

Investigation Meeting: 3 – 4 April and 8 May 2025

Further submissions and information received: 22 May, 12 June and 7 August 2025
5, 13 June and 7 August 2025

Determination: 19 September 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Preeti Mala was employed by Spectrum Care Limited (SCL) as a “community support worker – VHN home support” for 10 hours per week from March 2023 until her resignation on 11 October of that year.¹ SCL provides support services for people with disabilities. Ms Mala says she had no choice but to resign due to unfair and unjustified treatment by SCL and that her resignation was in law an unjustifiable constructive dismissal. She also says SCL’s actions prior to her resignation amount to unjustified disadvantage. Ms Mala has raised personal grievances in relation to these matters and seeks compensatory remedies and a contribution to costs.² She also seeks to recover holiday pay received when she was off work sick.

¹ See letter of offer 2 May 2023. “VHN” is an abbreviation of “Very High Needs”.

² A preliminary determination dealt with jurisdictional issues about what personal grievances Ms Mala had been raised: *Preeti Mala v Spectrum Care Limited* [2025] ERA 59.

[2] SCL says Ms Mala was treated fairly and reasonably throughout her employment. It says given the nature of the allegation it was necessary to investigate following which Ms Mala was cleared to return to work and that she did not return to work is not a consequence of any breach of duty on SCL.

Non-publication orders

[3] SCL seeks made permanent interim orders prohibiting publication of the name of, and any other identifying information about any person supported by SCL (PWS), or any member of their family, who is or may be referred to in this matter. Ms Mala does not oppose the application. There is no public interest in that information and given the circumstances it is appropriate that the orders sought are granted.

[4] Under clause 10 of the second schedule of the Employment Relations Act 2000 non-publication orders are made prohibiting the publication of names and information which may lead to the identification of persons described in paragraph [3] above: section 160(1)(f) and Schedule 2, clause 10 of the Employment Relations Act 2000.

The Authority's investigation

[5] During the investigation meeting the Authority received evidence from Ms Mala and for SCL, Marc Wells, human resources advisor, Angela McKay, service lead and Samantha Faafoina, house leader. Ms Mala summonsed two SCL employees to give evidence - Olga Smyrnova, an SCL support worker who worked with Ms Mala and Piri Rutherford, SCL service manager. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[6] The following issues are identified for investigation and determination:

- i. Was Ms Mala unjustifiably disadvantaged in her employment by the actions of SCL?

- ii. Was Ms Mala unjustifiably constructively dismissed?
- iii. If so, is Ms Mala entitled to a consideration of remedies sought including:
 - a. Compensation under s 123(1)(c)(i) of the Act;³
 - b. Compensation for lost benefit being holiday pay under s 123(1)(c)(ii).
- iv. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Ms Mala which contributed to the circumstances which gave rise to established grievance(s)?
- v. Is either party entitled to an award of costs?

Relevant law

The test for justification

[7] In considering personal grievances for unjustified action and dismissal, as here, the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer and decide, on an objective basis, whether the employer's actions were reasonable. In addition, a fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations which include at s 4(1A)(b):

The duty of good faith in subsection (1)—

...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;

...

[8] Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law".⁴

³ At the investigation meeting Ms Mala withdrew her claim for lost wages.

⁴ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

[9] In assessing the fairness and reasonableness of the employer's actions in a s 103A setting focus is required on the employment relationship overall. In *FMV v TZB* the Supreme Court discussed this emphasis in the Act and its relationship with the statutory good faith obligations:⁵

[46] ...As its name suggests, the current Act takes a relational approach, insisting that employment is more than a market transaction theoretically conducted at arm's length between individuals with equal bargaining power. The result is that while the employment agreement remains very important, it is the employment relationship that is the real focus under the current Act. The scope of the employment relationship is wider than the employment contract and it adds an additional dimension to contractual rights and obligations. This is reflected in two important ways.

[47] The first is the statutory incorporation of the principle of good faith into the employment relationship. This principle underpins the Act's relational approach.

[48] Part 1, "Key provisions", begins by stating that the object of the Act is:

to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship...

[49] This is to be done, first and foremost, by:

... recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour...

[50] Section 4 then provides that parties to an employment relationship "must deal with each other in good faith". This means, of course, that parties must not mislead or deceive one another, but its effect is wider than that. Parties must also actively and constructively establish and maintain a productive employment relationship; they must be responsive and communicative; and employers must comply with procedural fairness requirements...Parliament was at pains to ensure that the principle of good faith should be the driver of all employment relationships, independently of and in addition to obligations in the employment contract.

The parties' employment agreement

[10] Ms Mala's terms of employment are contained in the letter of offer dated 2 March 2023 and the relevant collective agreement.⁶ The letter of offer includes:

⁵ *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [46].

⁶ Spectrum Care - PSA Collective Agreement 2021.

- (i) Ms Mala's job title was "community support worker – VHN home support";
- (ii) her position location is described as "[street address of a SCL residence]. The details of your primary workplace will be notified to you by your service coordinator after completing your induction and meeting the family of the person you will be supporting";⁷ and
- (iii) the ordinary hours of work were 10 per week.

[11] The relevant terms of the collective agreement include:

5.3 Support Staff Working in Home Support

The Home Support service supports people who are living with their families by providing in-home support and respite.

The start and finish times and hours of work shall be agreed between the family and the employer and employee.

In order to provide an employee with more or fulltime hours of work, an employee's ordinary hours of work in a week may comprise work at more than one workplace and/or location.

...

63 Disciplinary policy

Spectrum Care's objective is to resolve any disciplinary matters according to the principles of fairness to every individual employee and the effective management of Spectrum care. All disciplinary procedures involving any employee(s) shall be conducted according to Spectrum Care Policy and Procedures.

63.1 Suspension

An employee may be suspended on full pay during an investigation into serious allegations.

[12] The disciplinary and performance management policy provides a process for resolution of concerns about performance or behaviour of an employee. It provides managers are responsible for following the policy including that "any disciplinary action to be taken must be carried out by the manager/service coordinator with the appropriate delegated authority to do so". The policy also deals with suspensions and how they should be implemented, if one is required.

⁷ It was common ground between the parties a home support worker could support clients who lived in SCL's residential homes.

Background

14 June – concerns raised

[13] Ms Mala's duties involved her facilitating a PWS' access to recreational activities outside their home. Her then allocated duties required Ms Mala to meet the PWS at the SCL residence and with a co-worker and using the SCL vehicle (or other nominated suitable vehicle) facilitate the PWS' access to the elected recreational activity for the allocated time, providing support and care as necessary. At the end of the allocated time Ms Mala returned with the PWS to the SCL residence and undertook any necessary handover and completed her notes which she said took about 10 minutes. Ms Mala's evidence to the Authority was she had very limited need to access the SCL residence beyond the office.

[14] On Wednesday 14 June 2023 a co-worker of Ms Mala's raised concerns with Ms Faafouina about alleged conduct of Ms Mala observed that day while they were working together at a recreational venue with a PWS. Ms Faafouina contacted Ms Mala by telephone that evening to put the allegation to her for comment and to tell her not to come to work the following day. During the conversation Ms Mala strenuously denied the conduct as alleged and Ms Faafouina accepts she said something in reply to the effect "Are you sure, [the co-worker] does not lie". Ms Faafouina then told Ms Mala she would try to locate the CCTV footage at the location of the alleged conduct.

[15] Ms Mala was alarmed and embarrassed by the call. That evening she wrote to Ms Faafouina a detailed response denying the alleged conduct, setting out her recollection of the events and surrounding context including a detailed account of care instructions received from the PWC's family. The letter included detail of recent exchanges with the co-worker, outlining recent events and her concerns about the co-worker's skill level and ability. The letter ended:

Once CCTV is recovered and the truth is shown, I will expect an apology and formal steps taken against [the co-worker] for giving me mental stress and for making me go out of my way to clear my name from workplace gossip, toxicity [and] made-up stories. I have always said I can work with her; she is a challenge to work alongside but I have been nothing but professional with [the co-worker] and never complaint (sic) about anything previously and I expect the same respect, empathy and kindness back, which [the co-worker] lacks.

[16] Ms Mala called the co-worker that evening about their raising with SCL the alleged conduct.

[17] On 18 June the co-worker provided their concerns about Ms Mala's conduct in writing to SCL.

19 June – Ms Mala is suspended

[18] On 19 June Mr Rutherford, who has responsibility for managing such matters, rang Ms Mala and said the alleged conduct would have to be investigated due to its nature. By this date he had Ms Mala and the co-worker's letters of 14 and 19 June respectively. During the call Mr Rutherford says they discussed Ms Mala being suspended on pay while the matter was investigated, and she agreed this was reasonable given the nature of the allegation. He said he decided suspension was warranted and told Ms Mala this and that the full details of the suspension and investigation would be provided in a letter. Mr Rutherford said Ms Mala mentioned the CCTV footage and that this would clear her of the allegation. He said he recalls saying he agreed this could be useful and that she should try to get it. Ms Mala told Mr Rutherford Ms Faafouina had offered to try to retrieve the footage, but she said she would do it herself because she did not believe Ms Faafouina would act in her best interests. I do not accept Ms Mala told Mr Rutherford Ms Faafouina had said the co-worker does not lie – this is not recorded in her letter 14 June and Mr Rutherford's contemporaneous note to Ms Wells does not mention it.

[19] Later that day Mr Rutherford emailed Mr Wells who was providing human resource (HR) support on this matter, confirming he had suspended Ms Mala on pay, that, referring to the investigation "...it is in our interest to get this done as soon as possible" and that while Ms Faafouina had offered to retrieve the CCTV footage, Ms Mala would "...try to do it herself as she does not believe [Ms Faafouina] has the best intentions for her".

20 – 26 June – attempts to secure the CCTV footage

[20] The following day, 20 June Ms Mala emailed Mr Rutherford – she had been to the venue, they told her SCL HR would need to contact them directly to release any

CCTV footage and provided the venue manager contact details including their name, mobile telephone number and email address.

[21] Later that day Mr Wells emailed the venue manager, introducing himself, forwarding Ms Mala's email and requested "If you would be able to provide the footage that would be greatly appreciated and help us to resolve this case". The venue manager responded that day forwarding advice they had received from their people and culture team including "...they will need to go through the police to request the footage from us" and recommending the footage is saved locally. Mr Wells forwarded the email to Ms Mala noting:

Please see below from [the venue manager]
I did think this may be potentially the process, however, confirmed below that you will require to go through NZ Police in order to get the footage from [the venue].
They have however, saved the footage...
Please let me know how you get on with obtaining the footage.

[22] Ms Mala replied to Mr Wells including she would need a basis on what to tell the police and asked directly "Please guide me through it so I can either call 105 or directly go into [location] Police Station". She emailed him further that day:

I'll try to get PSA to help me with this situation as they might have resources, moving forward.

As retaining this footage is urgent and I need to get it as soon as possible.

[23] On 21 June Mr Wells sent Ms Mala a letter dated 19 June under Mr Rutherford's name confirming her suspension from 19 to 26 June, the date it was proposed they meet to discuss the allegation. The letter included the detail of the allegation and stated it may amount to serious misconduct and that if upheld disciplinary consequences may result up to and including dismissal. The letter included the purpose of the meeting was to "...present the complaint in full, including the results of any investigation completed by us" and to provide Ms Mala the "...opportunity to present her account of events...". Ms Mala was encouraged to bring a support person to the meeting and advised a letter confirming the meeting time and date would be provided. Subsequently and by agreement the meeting was scheduled to 10am 28 June. Mr Wells confirmed this in writing to Ms Mala and noted with respect to the CCTV footage:

I have not as yet heard from [the venue] – however, as the police have now been involved to ask for the footage, potentially it may come straight to you in the first instance.

[24] Mr Wells said in his evidence to the Authority that he did not respond further to Ms Mala's request for guidance on dealing with the police because she had advised soon after that she would seek support from her union. For completeness SCL did not have a policy or process for recovery of CCTV footage from external venues.

[25] Later that day Ms Mala replied confirming the meeting time, advising she had tested positive for covid and with respect to the CCTV footage:

I did call them [the venue] earlier and they stated that they have passed my email to HR and that usually they need police to go and retrieve it but will see what they can do in this situation. As I don't believe the police will have time to go and retrieve the footage for me.

Well in this instance, I'm just praying to retrieve the footage. If we cannot then I'll just leave it to God and HR to conclude.

As I have tried my best to help this investigation.

Will keep you posted.

...

[26] On 26 June Ms Mala emailed Mr Wells and Mr Rutherford with an update on retrieval of the CCTV footage.

...[the venue] have advised that they only hand the cctv to a police officer in USB format and then the officer would be able to hand it to me.

...

I also requested if they could verbally give you feedback and solve the matter as they have access to it and have seen it. They advised; they cannot out it in writing; however, they may be able to discuss the situation over a phone call.

[27] The email continued with a request that SCL HR speak to the venue HR to "...discuss things further" and that Ms Mala had spoken to police 105 who were waiting for an officer to contact Ms Mala and that officer would be able to go to the venue. Ms Mala asked that the meeting be moved to the end of the week or the following week given the uncertain timeframe to progress the CCTV footage retrieval and that she was recovering from covid. Mr Rutherford was also unwell. The meeting was by agreement scheduled to 5 July.

5 July – first disciplinary meeting

[28] The meeting went ahead on 5 July by audio-visual technology. Mr Rutherford attended with Mr Wells. Ms Mala attended without a representative. The allegation was put to her and Ms Mala responded, recalling the events of the day in question and advised of care instructions she had received from the mother of the PWS. Regarding the CCTV footage, Ms Mala said the venue had advised they could not assist any longer and that only the police could retrieve it. The meeting ended with agreement the footage was important to the matters under investigation and an understanding Ms Mala would continue to attempt to retrieve the footage. Following the meeting Ms Mala emailed Mr Rutherford and Mr Wells providing an update on the police process and likely more time involved:

...

The only solution is to put me on unpaid leave until after next week if we fail to receive it by next week...

Otherwise, if you could also follow up with [the venue] team and explain this situation and asked for a verbal statement or just a recording of [the co-worker, the PWS] and I then that might take less time.

...

[29] Mr Wells emailed by reply that he had emailed the venue manager asking for a verbal statement and had called that day but the call was not picked up. He expressed a hope the call would be responded to soon and asked a specific question relating to a detail of the alleged conduct. By reply, Ms Mala sent Mr Wells photographs from her phone showing the detail requested and then a follow up email providing further narration of the circumstances shown in the photograph.

[30] On 10 July Ms Mala forwarded an email she had received advising further likely delay in securing the CCTV footage. Mr Wells replied that day suggesting they move the next meeting to Thursday 13 July to give the best opportunity of securing the footage. Ms Mala replied "Marc you're wonderful, thank you!" in acknowledgement of more time being provided.

[31] The following day, 11 July Mr Wells emailed Ms Mala:

We have been asked to complete some further work regarding this case, which means we have had to put off our meeting until 1.45pm on Thursday 20th of July – I have sent you a new meeting request.

This will also give a few more days to potentially get a copy of the CCTV footage.

[32] The further work to be undertaken concerned contacting the PWS's family to verify the information Ms Mala had provided regarding care instructions which needed to be done appropriately because there were sensitivities to be considered. Ms Mala replied "This sounds intense and wonderful at the same time. Hoping we get that CCTV by then!".

12 July – police advise unable to assist in retrieval of the CCTV footage

[33] On Wednesday 12 July Ms Mala emailed Mr Wells and Mr Rutherford that the police had contacted her and advised the matter was not serious enough for them to be involved. She attached a text message exchange she had with a worker at the venue dated 4 July as written verification of her conduct with the PWS, which was described positively. The email ended:

I have tried my best to help and cooperate in this unfortunate situation and I still do want [the co-worker] to be investigated as I have not done anything to create this awful situation to deal with.

From my end there has been no form of abuse nor I ever intend to abuse anyone because I fear losing a registration, I cannot apply for due to this investigation and it is not my character to harm anyone. Considering I have a social work background and also will be working towards a counselling degree soon.

I hope justice will be served as this has caused me so much anxiety and stressed and I pray no one has to go through this situation being a victim.

[34] Ms Mala said she felt this was a turning point in the employment relationship – that she had been sent on a hopeless task by her employer to secure the CCTV footage to prove she had not behaved as alleged, that she was scared when she was unable to secure the CCTV footage and her trust in her employer had been undermined.

[35] On Tuesday 18 July Ms Mala received a letter from SCL inviting her to attend a disciplinary meeting. Ms Mala had by this stage instructed a representative who wrote to SCL that day advising they would attend the meeting scheduled for 20 July with her and requested copies of information collected through the investigation and the employment agreement.

[36] On 19 July Mr Wells responded providing a copy of the original complaint, the venue employee's text message exchange with Ms Mala and her email confirming the police approach. He stated in the email that they had been waiting on information including CCTV footage, which police had confirmed could not be secured and would

shortly provide information from Ms Mala's service coordinator. The service coordinator's 19 July file note of the discussion with the PWC's family member was provided prior to the meeting the following day. The file note confirmed the instructions received as Ms Mala had described.

20 July – disciplinary outcome meeting

[37] The meeting proceeded as scheduled. Ms Mala attended with her representative. Mr Rutherford and Mr Wells attended for SCL. The meeting was held by audio-visual technology. Mr Wells' minutes of the meeting have been provided to the Authority. In answer to a question from Ms Mala's representative, the purpose of the meeting was described as to discuss the further information received including the update on the police involvement and the account of the service coordinator. The meeting adjourned for Mr Rutherford to consider matters. On resumption he advised his decision was that the allegation was not upheld, there was no evidence of wrongdoing on Ms Mala's part and she could return to work. The meeting then turned to options for her return to work. The meeting adjourned and on resumption Ms Mala, through her representative asked how she could return to work given the disruption of the investigation to the workplace relationships, that she was a victim. She made a specific request to return to the SCL residence named in the employment agreement and asked that the co-worker who had made the complaint be moved. SCL said this could not be accommodated due to the co-worker's terms of employment. The minutes record this was not accepted by Ms Mala. Ms Mala, through her representative, confirmed she would make a formal complaint based on the co-worker's complaint "...due to false allegations being raised against her and damage to her reputation". The meeting continued to discuss how Ms Mala could return to work in the circumstances. Ms Mala's representative suggested she go on special leave until a solution could be found for her to return to work. SCL agreed to this pending discussion with the relevant service managers and service coordinators. In the meeting the parties discussed Ms Mala's hours of work which had been varied on a short-term basis from 10 to 25 hours per week which SCL agreed to pay Ms Mala for the period of her suspension.

[38] It is common ground the meeting was difficult. Later that day Ms Mala's representative apologised in writing for their conduct. On 21 July Ms Mala attended her doctor and was certified unfit to work until 7 August.

21 July – return to work options

[39] The following day Mr Rutherford wrote to Ms Mala's representative confirming the outcome of the disciplinary investigation and declined a proposal of an exit package made on Ms Mala's behalf - SCL had conducted a necessary and robust investigation, it held no concerns about Ms Mala providing support for people in SCL's service and Ms Mala's employment was not affected as a result of the investigation. The letter went on address Ms Mala's return to work, expressed an expectation that that matter would be resolved by 31 July and confirmed she would be on special leave at 25 hours per week until then and beyond that point the special leave would be reviewed. Options for Ms Mala's return to work were then outlined:

Below are the potential options for Preeti moving forward:

- Debrief the staff at [SCL residential location], and set expectations around confidentiality and not spreading rumours etc – if staff were to do this and there was evidence to support the claim, this would lead to disciplinary action taken against the staff member. Preeti will continue to work with [the PWS] at [SCL residential location] also supported by [the co-worker], since the family has a preference for [the co-worker] to support [the PWS]. Where possible, we will attempt not to roster [the co-worker] with Preeti but this is not guaranteed. As was requested by you in our meeting, this solution will keep Preeti safe and will protect her from gossip in the house.
- Continue to provide community VHN support to [the PWS] but using [the family home] as a base, rather than [SCL residential location]. This would not change Preeti's role but only the location for picking up [the PWS]. This option may require a change of days, but would be during school hours which Preeti has confirmed is desirable for her. If travel to the family home is further than [SCL residential location], SCL can temporarily pay excess mileage costs to Preeti, subject to clause 42 (Transport Allowance on Transfer) of the Collective Employment Agreement. Preeti could use [the PWS]'s family vehicle for any community-based activities.
- Temporary redeployment to [two identified SCL residential locations]. Preeti will be paid her contracted hours during this assignment and SCL will attempt to find suitable work for her in the meantime that meets her requirements.

[40] Ms Mala was asked to confirm a preferred option by close of business 31 July 2023. An offer of \$500 towards the costs of representation was included in the letter which was duly accepted.

[41] Ms Mala attended her doctor on 21 July who certified her unfit to attend work until 7 August on grounds "She is suffering from stress and feeling traumatised following the recent incident at her work. She is unable to attend work as is currently unfit due to the above reason".

3 August – personal grievances and formal complaint raised

[42] On 3 August Ms Mala's representative wrote to SCL on a range of matters, discussed in more below, including a response to the return to work offers. Folded into the response is a formal complaint that the co-worker's original complaint was ill-motivated and a request SCL find Ms Mala a VHN Community Support Worker place "...working 25 hours per week where she does not need to interact with [the co-worker] ...". The letter also raises a concern SCL's response to Ms Mala's concerns about a safe return to work was "uninterested and cold" and it was unreasonable for SCL to propose Ms Mala work in the home of the PWS.

[43] Mr Wells responded the following day:

- SCL would endeavour to respond to the 3 August letter by 11 August;
- consideration would be given to whether a formal investigation of Ms Mala's formal complaint was warranted;
- confirming Ms Mala's advice she would be fit to return to work from 7 August;
- [the co-worker] could not be moved, as requested by Ms Mala without grounds to do so which were not established or she volunteered to move;
- the debrief to staff at the residential location could be put in place; and
- SCL would endeavour not to roster Ms Mala and [the co-worker] together but it could not be guaranteed.

[44] The letter ended with further options for Ms Mala to return to work:

With this in mind we would like [Ms Mala] to return to work at [residential location] from Monday, 7 August 2023 for her contracted 10 hours per week moving forward or we can have [Ms Mala] work at our [another residential location] with our VHN clients for her contracted 10 hours per week until we resolve other matters stated in your letter.

In the meantime, [Ms Mala] can contact EAP services directly...

We can also let you know that our payroll team have processed the back pay for [Ms Mala] and have confirmed it will be paid in a manual pay run today.

[45] On 5 August Ms Mala's representative raised questions from Mr Wells' email including where the alternative residence was located, would SCL ask the co-worker to move voluntarily, when the debrief would be carried out and that Ms Mala be informed. The request was also made if possible that Ms Mala work 25 hours per week and confirmed Ms Mala would contact Ms Faafouina to make arrangements to return to the residential address the following week.

[46] While the representatives were exchanging correspondence Ms Mala contacted the VHN coordinator exchanging text messages through 2 to 7 August asking about hours for two identified PWS. The messages show Ms Mala understood there were 10 hours per week for the PWS with whom she worked, and that she sought to secure more hours. They also show she understood she was to arrange her shifts directly with the service coordinator:

Could you let [Ms Faafouina] know I am back to work from tomorrow and to send me a residential roster so I can select another day as Tuesday is [activity] and this way I can select a day when [the co-worker] isn't rostered with [the PWC]. I did message as I was asked to return today, but as she wants confirmation to [another service coordinator]. Our investigation is ongoing...as my advocate and I made complaints...You can confirm this message with [Mr Wells]...

[47] On Saturday 7 August Mr Wells provided a response to Ms Mala's representative's 5 August questions including confirmation that any excess travel costs would be covered by the relevant provision of the collective agreement. In the email SCL appeared to move away from the voluntary movement proposal and the approach outlined was that a potential outcome of the investigation into Ms Mala's complaint, if upheld, may be relocation of the co-worker to another site. Ms Mala's contracted hours were confirmed as 10 per week and that any worked beyond that would be considered overtime hours. The letter included directions to Ms Mala about her return to work in the next two weeks:

- (i) instead of contacting Ms Faafouina about returning to work the following week, as Ms Mala had proposed, she was asked to contact the new service coordinator whose name, mobile number and SCL email were provided; and
- (ii) for the coming week she was provided Ms McKay's name, mobile number and SCL email address and asked to contact her to make the arrangements.

[48] On the morning of 7 August Ms Mala sent a text message to Ms McKay advising she was available to work 10 hours at the residence for which Ms McKay was responsible.

[49] On 8 August Ms Mala's representative confirmed she was contacting the advised persons to set up work and acknowledged the advice the debrief would occur.

[50] Also on 8 August Ms Mala instructed a new representative which was communicated to Mr Rutherford that day. Ms Mala said she became very stressed and upset during 7 and 8 August.

[51] On 9 August Ms McKay contacted Ms Mala by text message that she had called her and left a message and looked forward to hearing from her.

[52] On 11 August SCL wrote to Ms Mala's new representative:

- (i) asking that she provide a written complaint about [the co-worker] "so that matters can be properly investigated";
- (ii) confirming Ms Mala would be working at a different location during the investigation "...to allow for some distance between Ms Mala and [the co-worker] ...and to avoid the potential of disharmony and disruption to the vulnerable people [SCL] supports";
- (iii) contact details of Ms McKay were provided for Ms Mala to arrange her shifts and explore if additional hours were available; and
- (iv) the requested employment information was provided.

[53] By reply Ms Mala's representative advised SCL had received the complaint both orally and in an earlier letter and it was a disadvantageous action to require Ms Mala to secure her hours of work - Ms Mala had been paid up to around 30 July, no work had been provided since and SCL had "...not taken any real responsibility for her to return to work".

[54] On 14 August SCL's representative wrote to Ms Mala's:

- (i) in the absence of further comment SCL would investigate the complaint titled "a Formal Complaint about the lies and targeted accusations her complainant made in an attempt to damage Preeti's reputation" as contained in the 3 August letter; and

- (ii) work was available as advised and Ms Mala had been provided with contact details to organise shifts provided to her.

[55] Later that day Ms Mala's representative advised she was "...away sick due to work stress caused by all of this situation".

[56] Also on 14 August Ms McKay sent a follow up text message to Ms Mala asking her to contact her about work. On 15 August she emailed Ms Mala offering to pay her 20 hours annual leave to cover her period of sick leave from 31 July to 6 August, for which she had not yet accrued an entitlement and the period 7 to 13 August when she had not contacted her to arrange shifts, which was marked "leave without pay". Ms Mala replied that day to Ms McKay electing to use her annual leave. She also asked when she would receive sick leave and made no comment on Ms McKay's description of her recent two weeks away from work.

[57] On 17 August Ms Mala wrote to Mr Wells:

- (i) she understood the complaint outcome "[was] coming out last Friday week";
- (ii) she had let her second representative "go";
- (iii) she wished to move forward with the complaint so she could resume work next week;
- (iv) she would touch base with Ms McKay to see what she had to offer but still wished to return to her original location and work two days per week; and
- (v) she was interested in working 15 – 20 hours a week, to stay working with her original PWS and keen to see what work Ms McKay and other service coordinators may have to offer.

[58] Mr Wells replied that day:

- (i) the complaint process had started and she would be informed as to the outcome;
- (ii) until that process was completed SCL asked that she contact Ms McKay about work at the location she managed for which she was cleared to work; and
- (iii) a mediation was being set up if she agreed and the purpose and process was outlined in some detail.

[59] Ms Mala by reply email said she was unaware mediation was being proposed, asked to be kept updated with the investigation and advised she would contact Ms McKay the following day “and discuss client, hours and what she has to offer tomorrow surely”.

[60] There was a further exchange of emails that day. Ms Mala repeated she was unaware what her then representative had asked for from SCL including mediation and:

Money was not my motivation; my motivation is still to get justice on the basis of the damage [the co-worker] has done to my reputation and self-respect... This is not about money for me and never has been. This is about my reputation and because I was wrongly investigated on an accusation of ...and that is a big deal for me...

[61] On 19 August Ms Mala attended her doctor and was certified unfit to attend work from 18 to 28 August.

21 August email – personal grievance regarding return to work

[62] On 21 August Ms Mala’s representative contacted Mr Wells by email that she had again been authorised to represent Ms Mala. She raised her sincere concerns about Ms Mala’s wellbeing including Ms Mala appeared exhausted by the process to date, and the final straw appeared to be on 8 August with Ms Mala’s attempts to engage with the coordinators about returning to work and “...none were getting back to her”. The details of these attempts were provided in the email. In this email a personal grievance for unjustified disadvantage was raised:

...due to failure of [SCL] to assist [Ms Mala’s] return to work, leaving her to do all that work without assistance, which set her up to fail. As far as I know neither HR or a Manager checked in with her in the week 7 August 2023 to ask how the return to work arrangements were going. This was despite me notifying you via email on 8 August 2023 that she was reaching out to coordinators and [SCL] staff to return and the process was lumpy.

[63] The email continued that no response had been received to the personal grievances raised on 3 August and requested an update on that and the information request made also on that date.

[64] The email then acknowledged SCL’s advice that the investigation into Ms Mala’s complaint about her co-worker had started and asked for the terms of reference and that the failure to provide it to date had prevented Ms Mala from understanding how the investigation was being conducted and by whom and denied her the ability to

provide information which may be relevant. The email asked for an update on whether the advised debrief had occurred and sought payment as agreed towards costs.

[65] On 21 August Ms McKay sent a further text message to Ms Mala asking her to call her about work arrangements. Ms McKay then emailed Ms Mala subject line “sick leave/LWOP”:

I have made several attempts to contact you via phone and text message.

Could you please contact me on [mobile phone number] to discuss shifts at our [residential address] site in Onehunga.

I look forward to hearing from you.

[66] On 25 August SCL’s representative wrote to Ms Mala’s representative that the claims of unjustified disadvantage set out in the letters 3 and 21 August were not accepted. SCL detailed the reasons it did not accept it had poorly managed the disciplinary investigation, including “dragging it out”, conducting a biased investigation, failing to provide guidance on the retrieval of the CCTV footage, leaving Ms Mala “to flounder” or failing to support her return to work. The letter raised a concern and asked for Ms Mala’s comment about a text message she had sent a service coordinator on 7 August advising she had been instructed to contact them about work the following day when, the letter provided, she had been asked to contact a coordinator at a different service. The letter acknowledged Ms Mala had been certified unfit for work as well as Ms Pettengell’s expressed concerns about her wellbeing and included a reminder that EAP was available with the contact number to call.

[67] By reply on 27 August Ms Mala’s representative wrote to SCL’s representative asking them to reconsider “...the tone of the letter to something constructive and not destructive...”. The request was declined on 28 August and confirmation was sought that the letter would be sent to Ms Mala.

[68] By return it was confirmed the letter had been provided to Ms Mala and it had caused her frustration. Ms Mala’s recent medical notes were attached for the advised purpose of SCL understanding the negative impact on her of the process to date and Ms Pettengell’s observations of Ms Mala’s circumstances were detailed to provide context.

[69] On 28 August Ms Mala’s doctor certified her unfit to return to work indefinitely.

[70] The next communication between the parties occurred by letter dated 22 September from Ms Mala's representative to SCL's representative including:

- (i) arrangements to set up a mediation were in train and Ms Mala would attend;
- (ii) restating Ms Mala's position in respect of the 14 June complaint including that she "...had done nothing wrong and ...been stitched up";
- (iii) Ms Mala was not confident she had been cleared of the allegation because the finding "...was no evidence of the accusations [which] left [Ms Mala] believing her Manager still harboured suspicions but couldn't prove them";
- (iv) that "People want exoneration when they have been accused of something they haven't done..." and it was unfortunate SCL had not been able to find "...a way to smooth the situation" given the allegation and suspension;
- (v) seeking an update on the investigation of Ms Mala's complaint, cognisant that any disciplinary action would be shielded as private and requesting the terms of reference;
- (vi) seeking confirmation the staff debrief had occurred at Ms Mala's workplace as requested in the 3 August letter;
- (vii) also, in reference to the 3 August letter, asking for a response to her request for a change of line manager and advising if not she would record all future conversations or have a witness present;
- (viii) a follow up to the Privacy Act 2020 request in the 3 August letter for all personal information collected during the disciplinary investigation and extending the request to 25 August 2023; and
- (ix) that a response and all information requested be provided before the parties attended mediation.

[71] On 26 September Mr Wells wrote to Ms Pettengell with the outcome investigation into Ms Mala's complaint which, he advised, was not upheld. Attached to the letter was the requested information regarding the disciplinary investigation into Ms Mala's alleged conduct and two emails documenting the terms of reference provided to Ms Mala's previous representative. They also exchanged emails trying to understand why Ms Mala and Ms McKay had not been able to contact one another, other than by

email, identifying a cause at least part may have been an incorrect mobile number being provided.

[72] On 28 September the parties attended mediation.

[73] On 11 October Ms Mala wrote to SCL resigning. She said she had been forced to resign because she had been treated badly at work:

- (i) the work environment had become unsafe due to negative behaviour of co-workers and failure of managers to ensure the workplace was safe;
- (ii) she had been ignored by colleagues, had not received an apology and not treated with empathy and kindness;
- (iii) a serious allegation was made against her by a co-worker unsupported by evidence and her manager told her the co-worker “does not lie”;
- (iv) the investigation by SCL into the allegation was not completed in a reasonable time and she was sent on a “wild goose chase” to retrieve CCTV footage which she would never be able to secure;
- (v) her managers should have provided guidance about the retrieval of the CCTV footage because she was “...vulnerable after the allegations were made and didn’t know what to do”;
- (vi) she was made to feel like the guilty party when she was to work elsewhere and the co-worker against whom she made the complaint could remain in the workplace;
- (vii) all the information about her complaint had been provided in the 14 June letter to her manager and nothing was done with the information;
- (viii) she tried to return to work on 8 August as she was told, messaging all the coordinators and her manager on 7 August and “...got the run around being told I couldn’t come back. I do not believe [SCL] acted properly to get me back to work at that time and it was the final straw”; and
- (ix) the failure to provide a safe work environment had caused her health to deteriorate and she had been advised by her doctor to leave the workplace for the good of her health.

[74] On 12 October Mr Rutherford wrote to Ms Mala’s representative acknowledging receipt of her resignation with sadness, expressed SCL’s best wishes

for her future and asked for confirmation her resignation was with immediate effect. The letter then addressed the issues raised by Ms Mala:

- (i) efforts had been made to get Ms Mala back to work but it appeared to SCL she had not engaged with it to preserve the employment relationship;
- (ii) the reasons for investigating the original complaint had been communicated to Ms Mala “on multiple occasions” as was that she was cleared to work immediately after the investigation was complete;
- (iii) Ms Mala was provided specific rostered days of work so she would not need to contact her supervisor; and
- (iv) a fresh start at another location was offered to avoid the risk of conflict with team members which could impact the service and an offer made to find employment in another service to eliminate the concerns she had communicated about Mr Rutherford continuing as her manager.

[75] On 3 November, through her representative Ms Mala raised a personal grievance for unjustified constructive dismissal. The letter states SCL’s actions on 7 August 2023 amount to a repudiation of the employment and that was the date of her unjustified constructive dismissal.

Discussion

- (i) *Was Ms Mala unjustifiably disadvantaged in her employment by the actions of SCL?*

[76] These personal grievances for unjustified disadvantage were raised on behalf of Ms Mala in communications to SCL dated 3, 11 and 21 August 2023. In the 3 August letter the following personal grievances relating to the disciplinary investigation were raised on Ms Mala’s behalf:

- (a) a poorly managed disciplinary investigation;
- (b) bias in favour of the co-worker complainant;
- (c) failing to provide all relevant information to Ms Mala; and
- (d) unreasonably delaying the disciplinary investigation meeting.

[77] The 11 August email raises an unjustified disadvantage personal grievance on behalf of Ms Mala relating to actions or inactions of SCL to facilitate her return to work. This personal grievance is echoed in the 21 August letter.

[78] Personal grievances for unjustified disadvantage require consideration of the following matters:⁸

1. What is the action underlying the alleged disadvantage?
2. Did the action affect the employee's employment, or terms or conditions of their employment?
3. Was the employee disadvantaged by the action?
4. Was the action unjustified?

(a) Was the investigation process poorly managed?

[79] Ms Mala says she was disadvantaged in her employment by SCL's poorly managed disciplinary investigation. The letter of 3 August describes the action underlying this grievance as that by 5 July SCL had all the information needed to clear Ms Mala of the allegation and unreasonably sat on the information for 15 days until the meeting on 20 July when she was cleared of the allegation.⁹

[80] Ms Mala could reasonably expect the disciplinary investigation to be concluded as soon as practicable. She could also expect the investigation to be non-punitive.¹⁰ She could also expect, particularly given the seriousness of both the allegation and the potential disciplinary outcome that the investigation would be thorough. These factors were all represented to her as foundational elements to the disciplinary investigation in Mr Rutherford's 19 June letter and are articulated in the relevant policy document.

[81] The information before the Authority does not establish SCL knew by 5 July or was likely to know by that date that the CCTV footage would not be able to be secured

⁸ *Fredricsen & Anor v Air New Zealand* [2024] NZEmpC 198 at [48] – [50] citing *Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994 (CA) at 997–998; see also *Wiles v Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123 at [98].

⁹ Letter 3 August 2023.

¹⁰ SCL disciplinary and performance management policy, page 2.

or that it could have taken steps to secure it. Ms Mala identified to Mr Rutherford that the CCTV footage was potentially important and he agreed. This was not unreasonable given the footage may have shown the physical position and actions of Ms Mala, the PWS and the co-worker at the relevant time. The contemporaneous record of the parties' communications over the ongoing attempts to understand how the CCTV footage might be secured show Ms Mala sought and received more time because the parties agreed that was reasonable. This record also shows it was not until 12 July that it was certain the footage could not be retrieved when the police advised they would not collect it. The time taken by police to confirm this to Ms Mala was not in the control of SCL.

[82] Also by the meeting on 5 July SCL had not received Ms Mala's photographs of the PWS at the venue. She provided them after that meeting following a discussion about location at the venue.

[83] With regard to confirming the family's care instructions, I am satisfied there were sensitivities which had to be appropriately accommodated, and this was within SCL's judgement to assess. The information before the Authority does not support a finding SCL delayed providing it to Ms Mala - Mr Wells wrote to Ms Mala on 11 July that further inquiries were being completed and provided the information on 19 July to Ms Mala's representative when it was received. For completeness it was reasonable for SCL to seek confirmation of the care instructions from the family because, the information before the Authority is this information was not in the support plan.

[84] The submission is not accepted that the investigation was concluded or could reasonably have been concluded by 5 July, the day of the first disciplinary meeting or that SCL sat on a concluded investigation between 5 and 20 July. On 5 July Ms Mala and SCL agreed more investigation was necessary, there was indeed more relevant information to be gathered by the investigation team importantly and significantly confirmation of the care instructions from the family and photos in Ms Mala's possession, which occurred up to 19 July and which ultimately resulted in Ms Mala being cleared of the alleged conduct.

(b) Did SCL express bias in favour of the co-worker who raised concerns about Ms Mala's conduct?

[85] The 3 August letter describes the action underlying this alleged disadvantage as SCL's lack of action to address Ms Mala's written notification "...on 14 June outlining [the co-worker's] malicious behaviour" and this showed bias in favour of the co-worker.

[86] Ms Mala's 14 June letter appears to request the investigation into her alleged conduct be concluded first and her concerns about the co-worker's conduct then addressed. That this was her intention is reinforced by the matter not being raised again until the meeting on 20 July when Ms Mala's representative advised a formal complaint of that matter would be provided. Ms Mala's intention or likely intention is not determinative because it is SCL's actions to which the test of justifiability apply. Given the nature of the issues before SCL, including a serious allegation concerning a vulnerable person, it may have been reasonable, as SCL submits for it to deal with one issue at a time. Further, given Ms Mala was not in the workplace because she was suspended pending resolution of the disciplinary investigation, relieved any potential immediate risk to Ms Mala. For completeness the substantive or procedural basis of the suspension, including Ms Faafouina's initial investigation of 14 June are not part of this personal grievance. In her evidence to the Authority Ms Mala accepted her suspension was reasonable given the seriousness of the allegation for disciplinary investigation.

[87] However, having received a complaint SCL was obliged to consider it and if reasonable to do so undertake an investigation. It is clear from Ms Mala's 14 June letter that she had serious concerns about her co-worker's conduct and motivation. At the very least that these issues were raised should have been acknowledged by SCL with Ms Mala and a proposal to deal with them put to her for comment. It is clear from the 3 August letter that Ms Mala's view was her employment was affected by this action or, in this case inaction.

[88] How Ms Mala says SCL's (in)action establishes bias (actual or apparent), which is the disadvantage she says she suffered as a consequence, in favour of the co-worker by 3 August is not clear. If it relates to Ms Faafouina's comment to Ms Mala that the co-worker does not lie, this was not recorded by Ms Faafouina in for example a file

note then provided to the decision maker Mr Rutherford and Ms Mala did not include it in her letter of 14 June letter to SCL. Ms Mala first raised the comment with SCL in her resignation letter of 11 October. There is insufficient evidence before the Authority that the decision-maker knew by 3 August of Ms Faafoina's unfortunate comment to Ms Mala during their conversation on 14 June or that this was a view held by SCL generally. I have also considered concerns raised by Ms Mala that the failure to undertake the investigation in a reasonable time allowed gossip and speculation about her absence to occur in the workplace. While I accept absence from work for a period of time may lead co-workers to speculate as to the cause of that absence there was no compelling evidence that Ms Mala had been exposed to that or that it was tied to a bias by SCL in favour of the co-worker. The evidence was Ms Mala, the co-worker and Ms Faafoina had been asked to maintain the confidentiality of the process.

[89] The question then for consideration is whether the (in)action was disadvantageous and unjustified. As set out above Ms Mala appears, at least initially, to have expected the inquiries to be sequential. SCL's initial inaction cannot amount to a disadvantage to Ms Mala when it was objectively consistent with her request. As to how SCL's consideration of Ms Mala's complaint against her co-worker developed after 3 August and the overlap with matters concerning her return to work are outside the scope of this unjustified disadvantage and are considered below. This personal grievance is not established.

(c) Was all relevant information provided to Ms Mala and a fair opportunity to comment?

[90] The 3 August letter describes the basis of this unjustified disadvantage as follows:

The suspension letter sent to [Ms Mala] on 19 June 2023 tells her there will be an investigation meeting on 26 June 2023, but does not outline the steps the organisation will take to investigate and gives [Ms Mala] no information about what processes the organisation would use for the disciplinary investigation. **We assert the lack of information provided to [Ms Mala] about the investigation process unjustifiably disadvantaged [Ms Mala] as she was left to flounder while trying to defend herself.** While she was waiting for the investigation meeting on 26 June 2023 and attempting to obtain video footage. [Ms Mala] also asked the Police to help obtain CCTV footage, but in the end the police said it was not a police matter and would not help.

[91] The letter goes on to identify information Ms Mala understood SCL had by 3 August but had not provided her or provided in an unreasonable timeframe:

- (i) SCL had contacted the venue and spoken to a witness who told them they had seen Ms Mala with the PWS that day and saw “nothing untoward” and Ms Mala was told this on 4 July;
- (ii) the confirmation of the family’s care instructions could have been obtained earlier and not caused the delay as advised by Mr Wells on 11 July; and
- (iii) the co-worker must have been interviewed again because of comments by Mr Rutherford about what they had said about the position of the PWS’ ponytail.

[92] The letter develops the grievance further that prior to the 20 July 2023 meeting Ms Mala was concerned all information gathered from all the witnesses and sources, in the co-worker, because she had not been told what had been gathered:

Spectrum Foundation unjustifiably disadvantaged [Ms Mala] in their investigation process by not providing [Ms Mala] with all the information gathered as part of the investigation so that she could properly prepare herself for the disciplinary investigation meeting on 20 July 2023. I can testify as I was present on 20 July 2023 that the left hand/right hand side ponytail question was the only investigation question asked and it was a complete surprise to [Ms Mala] when she was told by [Mr Rutherford] that [the co-worker] had said the ponytail was on the left. [Mr Wells] had not identified to [Ms Mala] in his email to her on 5 July 2023 that [the co-worker] had provided information to the investigators saying the ponytail was on the left side. But [Ms Mala] had in any event dispelled that information and provided photographic evidence that the ponytail was on the right-hand side, which showed that [the co-worker] was untruthful.

[93] Mr Rutherford’s first letter to Ms Mala dated 19 June outlined:

- (i) the allegation and that it was based on information received;
- (ii) the seriousness of the allegation and the possible disciplinary consequences including dismissal;
- (iii) that SCL was obliged to investigate the allegation;
- (iv) the investigation would be thorough and would seek to “preserve the emotional and physical wellbeing of all parties concerned;
- (v) the fact of the suspension, the basis of it and its expected length;
- (vi) that Ms Mala was suspended did not presume wrongdoing on her part;

- (vii) an invitation to a meeting on 25 June to present the complaint, the results of any investigation and hear Ms Mala's response which would be considered before any decision was made; and
- (viii) the attendees at the meeting were outlined and Ms Mala was invited to bring a support person.

[94] The action as described in the 3 August letter is that the 19 June letter, received by Ms Mala on 21 June, did not outline the steps and processes SCL would use for the disciplinary investigation. The 19 June letter does outline the steps and process. It does not state who SCL would speak to and when and about what. The employment agreement and the relevant policy document does not require disclosure by the employer at that early stage in a disciplinary investigation of that information to the affected employee indeed it may be unreasonable to do so and indicate a narrow view of what is needed to be investigated. In addition, after the 19 June letter Mr Wells provided ongoing information to Ms Mala, including on request and responded to information received from her. The action claimed in this regard is not established.

[95] SCL was unable to secure a statement from the venue employee. The 4 July text message Ms Mala seeks to rely on as evidence of SCL contact with a venue employee does not, on its face establish such contact occurred or, if it did, what relevance it would have had to the investigation. The action claimed in this regard is not established.

[96] The confirmation of the family's care instructions and the comment of the co-worker were put to Ms Mala at the 20 July disciplinary investigation meeting. Both matters were robustly resolved in Ms Mala's favour. Ms Mala received the file note of the discussion with the family member and my findings regarding the time taken for that discussion to be held are set out above. The note of the discussion with the co-worker or when that occurred were not provided to Ms Mala at the time. Given the factual dispute was put to her with sufficient specificity for her to respond to and the dispute was resolved in her favour, it is unclear what disadvantage Ms Mala suffered in this respect by 3 August when this personal grievance was raised. This claim is not established.

[97] The 5 July meeting was an opportunity for SCL to set out clearly to Ms Mala what investigation it had conducted to date. The letter 19 June stated that is what would

occur at that meeting and this is reflected in the policy which provides that where a disciplinary process is initiated an employee must be provided relevant information to ensure they have a fair opportunity to respond to the allegations.¹¹ Relevant information is an update of the process being undertaken by the employer and, using the language of the 19 June letter this would I find include the results of the completed investigation. Why this did not occur is unclear particularly given elements of the investigation were being progressed by SCL - by 19 June steps had been taken to interview the co-worker who had made the complaint and who had provided information relevant to the investigation about the position of the PWS. It was fair therefore for Ms Mala to raise this prior to the 20 July meeting as a concern and seek the information from SCL which set out clearly the investigation steps it had taken and the information gathered which was relevant to the matters under investigation. That this did not occur goes some way to explaining Ms Mala's strong sense that she had to defend herself and disprove the allegation. This was not the purpose of the investigation and was a flaw in the process which was significant enough to establish this claim of unjustified disadvantage.

(d) Unreasonable delay in concluding the disciplinary investigation meeting?

[98] The 3 August letter describes the underlying action to this alleged unjustified disadvantage as:

The above [photographs of the PWS provided by Ms Mala] key piece of evidence was all the organisation needed to clear [Ms Mala]. On or around 26 June 2023 the organisation had received information from [the venue] witness that [Ms Mala] had not been observed being abusive with the young person on 14 June 2023 or at any other time. Then on 5 July 2023 [SCL] received corroborating information from [Ms Mala] that [the co-worker] had lied in photographic form. **[SCL] unjustifiably disadvantaged [Ms Mala] by delaying the investigation meeting for the manager's own benefit for 15 days after they had all the information they required to dismiss all the allegations.**

[99] The letter goes on to describe the effect on Ms Mala of the delay – the unnecessary continuation of the suspension and negative impact on her pay.

[100] A significant feature of the underlying action asserted by Ms Mala amounting to unjustified disadvantage is that the delay of 15 days was for the manager's benefit. There is no evidence before the Authority that the investigating manager sought or

¹¹ Discipline and Performance Policy, page 3, bullet point 4.

received a benefit by delaying the investigation by 15 days. This is a serious allegation and could reasonably be expected to be supported by evidence of equally probative value. The letter of 3 August claims that because the manager employed Ms Mala, they, during that process necessarily had access to sensitive personal information which has coloured his view of her. Again, given the seriousness of this claim without compelling supporting evidence that he held a negative view of Ms Mala, is speculative.¹² A key factual basis of the alleged underlying action is not established.

[101] Putting that key finding aside, if it is accepted 15-days was a delay which effected Ms Mala's terms of employment she is unable to establish she suffered the disadvantage as claimed. When Ms Mala asked at the 20 July meeting to be paid at 25 hours per week this was agreed to and extended to cover the period of suspension. As found above SCL's investigation reasonably continued until 20 July and for that period Ms Mala's suspension was continued on pay. The evidence does not establish she requested the suspension be lifted after 5 July and shows she understood the investigation was ongoing in which she actively participated.

[102] For the above reasons this personal grievance is not established.

(e) Was Ms Mala unjustifiably disadvantaged in her employment by the actions of SCL – her return to work?

[103] There are two grounds to this claim of disadvantage. The first that SCL did “nothing” or failed to take reasonable steps to reinstate Ms Mala to the workplace. The second, that it was unfair and unreasonable to propose Ms Mala work elsewhere while the investigation into her complaint was undertaken.

[104] The information before the Authority demonstrates Ms Mala understood she needed to and was confident in the process, at least initially, that SCL put in place to reinstate her to work after the suspension was lifted and the allegation dismissed. This required her to directly contact the identified service coordinators and service leads to confirm the shifts she wanted to work. From the information before the Authority, including the parties' employment agreement this was normal for a part time worker such as Ms Mala. That matters became complicated including with more hours being asserted then contracted, failing to connect with the correct people, including a mistaken

¹² For completeness, SCL's offer to change Ms Mala's reporting lines is not acceptance of the claim.

contact detail and unavailability due to sick leave, does not establish SCL failed to take reasonable steps to reinstate Ms Mala to the workplace.

[105] The analysis of the second ground is detailed below under the heading of the claim of constructive dismissal. The proposal that Ms Mala work elsewhere was triggered by the formalisation of her complaint about her co-worker. Given the nature of the complaint and Ms Mala's serious concern about Ms Faafouina, including her advice to Mr Rutherford on 19 June that Ms Faafouina did not have the best intentions for her, it was appropriate for Ms Mala, as a short-term solution, to be offered work at a different location with steps to minimise the impact. That Ms Mala has characterised this proposal as a punishment is to a degree understandable – she had suffered a suspension and been subject to an investigation into her conduct of serious allegations of which she was cleared. However, it does not follow that such action was unjustified and on the information before the Authority, is not established.

(iii) *Was Ms Mala unjustifiably constructively dismissed?*

[106] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether SCL's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the alleged dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Ms Mala being treated unfairly.¹³ The Authority's task is to examine objectively SCL's decision-making process and determine whether what it did and how it was done were steps open to a fair and reasonable employer.

[107] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (i) An employer gives an employee a choice of resigning or being dismissed.
- (ii) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

¹³ Employment Relations Act 2000, s 103A.

(iii) A breach of duty by the employer causes an employee to resign.¹⁴

[108] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.¹⁵

[109] Ms Mala says she was unjustifiably constructively dismissed by SCL on 7 August when it unreasonably advised she could not return to work at the location provided in the parties' employment agreement. In the 3 November letter raising this personal grievance, this conduct was described as a repudiatory breach of the parties' employment agreement.

[110] The claim does not succeed for the following reasons.

[111] One of the unjustified disadvantage grievances has been established. It is confined to the period between 5 and 20 July and its impact exhausted by the time of Ms Mala's resignation. Other matters raised in Ms Mala's resignation letter were not established during any process with SCL and have not been established before the Authority.

[112] Proposing Ms Mala work at a different location, with travel allowance and following consultation with her as to the nature of the work undertaken at the different location, while an investigation of her complaint into a co-worker was undertaken, cannot amount to a repudiatory breach of the parties' employment agreement. It was a temporary solution crafted to accommodate the investigation Ms Mala sought into her concerns about her co-worker and to minimise risk of disruption in the workplace. This later reason was reasonable given the vulnerability of the client group and the serious concerns Ms Mala had raised about Ms Faafouina, that she did not have the best intentions for her and the co-worker, variously that she had targeted her, had taken a dislike to her, was a malicious liar and a bully and more generally that there was gossip

¹⁴*Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

¹⁵*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

about her in the workplace.¹⁶ Further, on Ms Mala's evidence she spent no more than 10 minutes at the residence and her work was significantly community based. In these circumstances, it was prudent for SCL to propose Ms Mala work at a different location until the investigation was complete.

[113] Further, under the terms of the parties' employment agreement there is ambiguity as to Ms Mala's location of work. While it is accepted the 2 May letter describes the position location as a SCL residential address, it also refers to a primary workplace being advised after induction and meeting the PWS's family. Further, the collective agreement anticipates changes to work location for part time employees, of which Ms Mala was one, to access more hours and employees with Ms Mala's job title are described as "providing in-home support and respite".¹⁷ Further, while Ms Mala was understandably proud of the work she did with the identified PWS, it was not a term of her employment that she provide support to that individual. Given the nature of Ms Mala's work, part time and often with an individual PWS, it is understandable change including change in location could occur and to achieve that the parties have agreed a degree of flexibility in their contractual arrangements.

[114] Ms Mala's engagement with SCL after 7 August is not consistent with an understanding at that time that it's conduct was repudiatory. On 14 and 17 August she engaged with Ms McKay and Mr Wells respectively regarding hours of work, including seeking more than her contracted hours of work at different locations. This action was consistent with confirming the employment agreement as described above.

[115] The personal grievance Ms Mala has established relates to an element of the disciplinary investigation and SCL's failure to update her in a clear way as to the progress of its investigation. These matters are confined to the period up to 20 July when Ms Mala was cleared of the disciplinary allegation.

Remedies

[116] Ms Mala has established a personal grievance for unjustified disadvantage.

Compensation for humiliation, loss of dignity and injury to feelings

¹⁶ Refer 3 August 2023 letter.

¹⁷ Collective agreement, cl 5 and 5.3.

[117] The evidence before the Authority is the disciplinary process, the subsequent attempts to return her to work and her complaint about her co-worker have overwhelmed Ms Mala and affected her deeply. She has established one of her claims and the remedial inquiry must be confined to the damage she has suffered consequent to the found breach. Her direct evidence of this relevant period is that by 12 July she felt she had been sent on a hopeless task by her employer to secure the CCTV footage, she felt scared and her trust in SCL was undermined.

[118] It is accepted the impact of her personal grievance has had a negative impact on Ms Mala. The Authority is satisfied she experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter Ms Mala is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings she has suffered consequent to her established personal grievance of \$7,000.00.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Ms Mala that contributed to the situation giving rise to her grievance?

[119] No deduction from the remedies awarded is to be made under s 124 of the Act. Ms Mala's grievance arises from SCL's failure to do what it said it would, that is update her at the first disciplinary meeting on its investigation and is not a circumstance Ms Mala contributed to in a blameworthy way.

Summary of orders

[120] Within 21 days of the date of determination Spectrum Care Limited is to pay Preeti Mala \$7,000.00 compensation under s 123(1)(c)(i) of the Act.

Costs

[121] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Mala may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service of that memorandum Spectrum Care Limited will then have 14 days to lodge any reply memorandum.

[122] On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. 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.

Marija Urlich
Member of the Employment Relations Authority