IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE

[2023] NZERA 119
3157721

	BETWEEN	NIVE SEITULA Applicant
	AND	ISS FACILITY SERVICES LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Peter Cranney, counsel for the Applicant Paul McBride, counsel for the Respondent
Investigation Meeting:	20 and 21 February 2023 at Wellington
Submissions received:	At the Investigation Meeting
Determination:	8 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nive Seitula has been employed at Wellington Hospital since 9 April 2000 by a series of cleaning contractor companies, most recently by ISS Facility Services Limited (ISS) from December 2019. Mrs Seitula has had a number of different roles at Wellington Hospital, as a cleaner, team leader and part-time supervisor. Mrs Seitula is a senior union delegate for E tū Union.

[2] Mrs Seitula says she was discriminated against in her employment with ISS on the grounds of involvement in union activities, which led ISS to decide not to promote her to a supervisor position, and that she was unjustifiably disadvantaged by the issuing of a warning. Mrs Seitula is seeking compliance orders requiring reconsideration of the

promotion decision without unlawful discrimination and withdrawal of the warning, lost moneys arising from non-promotion and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] ISS says that Mrs Seitula has not been discriminated against on the basis of involvement in union activities. ISS also says that the warning was justified as Mrs Seitula failed to comply with a lawful and reasonable instruction.

The Authority's investigation

[4] During my investigation, I received evidence from Mrs Seitula, Lalopua Sanele, Mele Moaata and Isobel (Izzy) O'Neill. For ISS I received evidence from Maurice King, Wayne Peterson and Tony Stone. All witnesses gave evidence and answered questions on oath or affirmation. The representatives also gave oral closing submissions and provided written notes or closing submissions. Further written evidence referred to during the Investigation Meeting was provided by ISS on 22 and 24 February 2023.

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

The issues

[6] The issues requiring investigation and determination were:

(a) Was Mrs Seitula discriminated against in her employment (as defined in s 104) with ISS on the grounds of involvement in union activities (as defined in s 107)?;

(b) Was Mrs Seitula unjustifiably disadvantaged by the issuing of a warning by ISS on 30 September 2021?;

(c) If ISS discriminated against Mrs Seitula in her employment or ISS' actions in issuing the warning were not justified (in respect of disadvantage), what remedies should be awarded, considering:

- The request for compliance orders requiring reconsideration of the promotion decision without unlawful discrimination and withdrawal of the warning;
- Lost moneys arising from non-promotion; and
- Compensation under s 123(1)(c)(i) of the Act;

(d) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mrs Seitula that contributed to the situation giving rise to her grievances?; and

(e) Should either party contribute to the costs of representation of the other party?

Background

[7] The following facts were agreed between the parties:

a. Mrs Seitula has been employed at Wellington Hospital since 9 April 2000 by a series of cleaning contractor companies, most recently by ISS;

b. Mrs Seitula transferred employment under Part 6A of the Act from Spotless to ISS in December 2019 – the terms on which transfer occurred are contested, however, this is not part of the claims to be determined;

c. ISS undertook a restructuring process which led to a number of long-standing staff leaving employment at Wellington Hospital in June 2021, including Mrs Sanele, who had been the senior union delegate for E tū;

d. Mrs Seitula applied for a number of supervisor vacancies with ISS and was interviewed for at least two of those vacancies, including an interview on 28 June 2021 for a Monday to Friday day cleaning supervisor role. Mrs Seitula was not successful in those applications – the reasons why are contested;

e. Mr King, Contract Manager for ISS, approached Mrs Seitula at a farewell function for staff on 29 June 2021, including Mrs Sanele, requesting to meet and there was subsequently an in-person meeting attended by only Mr King and Mrs Seitula – what was said by Mr King at that meeting is contested;

f. On 16 July 2021 Mr King sent an email to Mrs Seitula advising his reasons why she had not been appointed to two supervisor positions – I return to this email below;

g. Cleaning staff were invited to meetings on 21 July 2021, the purpose of which was to introduce those staff to their new supervisor, Jeff van Wylk. Mrs Seitula was invited to attend meetings for that purpose three times, by requests over smartpage, a system used at Wellington Hospital primarily for assigning work and occasionally for requesting staff attend

meetings. Mrs Seitula twice declined to attend those meetings, replying "no thank you" over smartpage;

h. On 27 July 2021 Ms O'Neill, then an E tū Union organiser, raised a personal grievance on behalf of Mrs Seitula for unjustified action in not being appointed to three supervisor positions and discrimination due to her role as a union representative;

i. A number of disciplinary issues were raised with Mrs Seitula, with the relevant issues for the purposes of this determination contained in two letters from Mr King to Mrs Seitula of 29 July and 12 August 2021;

j. A meeting occurred to discuss those issues on 23 September 2021 – at a minimum, the issue that led to the warning below remained a live issue at the end of that meeting. Whether other issues had been disposed of is contested;

k. A preliminary decision was communicated by Mr King to Ms O'Neill, who was representing Mrs Seitula in the disciplinary process, on 27 September 2021. The preliminary decision was that Mrs Seitula be given a written warning;

l. Ms O'Neill replied to Mr King on 27 September 2021, seeking clarification on a number of matters relating to the preliminary decision;

m. Mr King emailed Ms O'Neill on 30 September 2021, with a letter to Mrs Seitula attached "Outcome of investigation meeting" advising that two matters were not being taken further. That letter also advised in relation to the refusal to attend a meeting that Mr King had "considered the information that you provided and have decided that a written warning is warranted."; and

n. Ms O'Neill emailed Mr King on 8 October 2021 on behalf of Mrs Seitula "raising a personal [grievance] in relation to the issuing of a written warning under section 103 1(b), (c) and (f) of the [Act]".

[8] This determination makes findings of fact in relation to the contested elements of the above chronology and facts, and the application of the law to those facts.

[9] This employment relationship problem occurred in the context of a challenging relationship between E tū and ISS, and a substantial amount of evidence about interactions between E tū and ISS. The witnesses for ISS frankly admitted that this was a very challenging relationship. This was acknowledged by Mrs Seitula and her

witnesses, who referred to the important role that the Act provides for unions, union organisers (such as Ms O'Neill) and union delegates (including Mrs Seitula, Mrs Sanele and Mrs Moaata) in raising issues on behalf of union members.

[10] This challenging relationship no doubt provides the context for the employment relationship problems raised by Mrs Seitula and coloured some of the responses of ISS' witnesses. There were a number of differences of views about how union delegate roles should be discharged, including the approach to provisions in the relevant collective agreement, which provided extra paid time for the senior union delegate to deal with union matters. I have referred to this context where relevant to the findings I make in this determination.

Was Mrs Seitula discriminated against in her employment with ISS on the grounds of involvement in union activities?

[11] While the broader context of Mrs Seitula's employment with ISS, and the relationship between E tū and ISS, were all referred to in evidence, the focus of the discrimination claim for investigation was on two interactions, which are discussed below.

The legal position in relation to discrimination

[12] There are three main sections in the Act which are relevant to a claim of discrimination and were referred to me. For clarity these are set out below:

> 104 Discrimination
>
> (1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or involvement in the activities of a union in terms of section 107,—
>
> (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
>
> (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or …
>
> (c) retires that employee, or requires or causes that employee to retire or resign.

(2) For the purposes of this section, detriment includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.

(3) This section is subject to the exceptions set out in section 106.

107 Definition of involvement in activities of union for purposes of section 104

(1) For the purposes of section 104, involvement in the activities of a union means that, within 12 months before the action complained of, the employee—

(a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or was otherwise an official or representative of a union or part of a union; or

…

(d) had made or caused to be made a claim for some benefit of an employment agreement either for that employee or any other employee, or had supported any such claim, whether by giving evidence or otherwise; or

…

(g) was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees.

119 Presumption in discrimination cases

(1) Subsection (2) applies if, in any matter before the Authority or the Court,—

(a) the employee establishes that the employer or the employer's representative took any action or omitted any action as described in any of paragraphs (a) to (c) of section 104(1) in relation to that employee; and

(b) if it is a case where the employee alleges that the discrimination was by reason directly or indirectly of the employee's involvement in the activities of a union, the employee establishes that he or she was a person described in section 107.

(2) If this subsection applies, there is a rebuttable presumption that the employer or representative of the employer discriminated against the employee on the grounds, or for the reason, specified in section 104(1) and alleged by the employee.

[13] In order to establish that discrimination has occurred, there must be a causative link between the prohibited ground and the treatment complained of. The question raised by the phrase "by reason of" in s 104(1) is whether the prohibited ground was a material ingredient in the making of the decision to treat the employee in the way in which they were treated.[1]

[1] *Air New Zealand Ltd v McAlister* [2009] NZSC 78 at [49] per Tipping J.

Did Mr King make a statement that he did not trust Mrs Seitula because she was a union delegate?

[14] The first interaction was said to have occurred during the in-person meeting attended by only Mr King and Mrs Seitula on 29 June 2021. As noted above, this meeting occurred on the same day as a farewell function for a number of ISS employees and Mrs Seitula was emotionally affected at and by that function. There are two starkly different accounts of what was said at that meeting.

[15] Mrs Seitula says that Mr King told her that she had not been appointed to a supervisor position as he did not trust her. Various versions of the reasons for this were recounted, including alleged statements that Mr King did not trust Mrs Seitula with the client and did not trust Mrs Seitula because she was a union delegate.

[16] While slightly different words that were used in different versions of Mrs Seitula's written witness statements and oral evidence, I consider that the essence of what Mrs Seitula alleges Mr King said was consistent through-out.

[17] Mrs Sanele and Ms O'Neill provided evidence that Mrs Seitula had recounted a consistent account of this conversation, at a relatively contemporaneous time (on the day of the meeting or in the week thereafter). Ms O'Neill said that she had no doubt that Mr King would have said words of this nature and that her view was he was under considerable pressure and spoke about members in a way that meant it was within the realms of possibility that he said what was alleged. Ms O'Neill also noted that she considered Mrs Seitula was an honest person and her view of the conversation fitted with a pattern of engagement with Mr King. However, these views are essentially based on what Mrs Sanele and Ms O'Neill were told by Mrs Seitula.

[18] In terms of Mr King's interactions with Mrs Seitula and Ms O'Neill, the evidence before me pointed to a challenging relationship, where there were differences of views about the roles of union delegates and entitlements under the collective agreement. There were many occasions where there was disagreement and managerial prerogative was asserted for Mr King to make decisions, where the collective agreement required agreement (for example, the release of union delegates to attend meetings and the timing of when senior delegate time was able to be used). There was clearly frustration on both sides of the relationship, with occasionally brusque

communications, but there was no direct evidence of other communications similar to those alleged by Mrs Seitula.

[19] Ms O'Neill formally raised a personal grievance on behalf of Mrs Seitula in a letter to Mr King on 27 July 2021. This letter appeared to be the first time that Mr King's alleged statement was raised, stating:

> On 29 June you asked to meet with her and told her that she had not been appointed to the supervisor position as she did not qualify for the position. When Nive asked why she didn't qualify you told her because you could not trust her because she was a union delegate.

[20] During her evidence Ms O'Neill was questioned about the reasons for the delay in raising what ISS accepted was a very serious allegation. While I accept that the allegation was clearly raised in Ms O'Neill's letter, I was not convinced by Ms O'Neill's reasons for the time that it took to raise the discrimination issue, being due to other workload or priorities. No evidence was provided of contemporaneous discussions to support this reasoning.

[21] Ms O'Neill was also questioned about her understanding of union discrimination provisions in the Act. Ms O'Neil's response was that she was continuously learning about these sorts of matters, though she acknowledged she was aware of the law before the time of the alleged statement by Mr King. She was unable to elaborate further on any reasons for delays in raising the alleged statement.

[22] Mr King in contrast has been adamant that he did not and would not have uttered any version of the words he is alleged to have said. Both Mr King and Mr Stone (an Employment Relations Manager for ISS) were questioned about this. Mr King maintained a consistent position that he did not and would not have said any version of what he was alleged to have said, which was supported by Mr Stone. Mr King did concede that he may have said words to the effect that he did not have confidence in Mrs Seitula to deliver what ISS wanted her to, for a client. However, he categorically denied that he would have used words to the effect that he did not trust her with a client.

[23] ISS submitted that had Mr King uttered words of this nature that this would be "dynamite" in the case of an alleged union discrimination case and that:

> It beggars belief that a senior manager on a highly unionised site with strong if not aggressive union approach would adopt any such approach, let alone express that to a senior delegate.

[24] On the balance of probabilities, I am not convinced that Mr King uttered a statement at the meeting on 29 June 2021 that clearly expressed a lack of trust based on Mrs Seitula's involvement in union activities, being her role as a union delegate. In relation to this incident, I find that unlawful discrimination did not occur.

Did the written reasons for non-appointment amount to discrimination?

[25] The second interaction was the email Mr King sent to Mrs Seitula on 16 July 2021 advising his reasons why she had not been appointed to two supervisor positions. This email included reference to behaviours that had given Mr King concerns about Mrs Seitula's suitability for the supervisor position, including "walking out of the roster review meeting".

[26] At the investigation meeting Mr King acknowledged that Mrs Seitula was acting as a senior union delegate at the roster review meeting, although he prefaced this by saying his reference to that meeting related to Mrs Seitula's actions, rather than union delegate status.

[27] The acknowledgement that Mrs Seitula was a senior union delegate and was acting as such at the time of the roster review meeting, means I find the second limb of the test for a presumption that discrimination has occurred in s 119(1)(b) is met. Section 119(1) requires, however, that both limbs of the test are satisfied for the rebuttable presumption to be engaged.

Has the presence of a discriminatory action been established?

[28] To raise the rebuttable presumption of discrimination, s 119(1)(a) also requires that there be an action or omission as described in any of paragraphs (a) to (c) of s 104(1). Mrs Seitula's claim of discrimination was focussed on non-appointment or promotion to a supervisor role. There are two challenges to this claim.

[29] The first is that s 104(1)(a) refers to opportunities for promotion. Mrs Seitula's complaint is that she was not appointed or promoted to a supervisor position, rather than was not offered an opportunity for promotion. For Mrs Seitula it was submitted her involvement in union activities was a material reason for her non-appointment and that this was shown by Mr King's email of 16 July 2021.

[30] In support of Mrs Seitula's claim that she should have been appointed to a supervisor position, reference was made to the collective agreement between Spotless and E tū. It was accepted that the terms of this collective agreement were applicable at the time ISS made its decisions to not appoint Mrs Seitula. I was pointed to cl 8.10 of the collective agreement, which provides a right to be interviewed but not a right to appointment:

> In the event of staff vacancies, the positions will be advertised internally and externally. Suitable internal candidates will be interviewed before an appointment is made.

[31] *Post Office Union (Inc) v Telecom (Wellington) Ltd* establishes that, in relation to non-promotion, it is the denial of the opportunity for promotion which, if discriminatory, is proscribed:[2]

> In our view a refusal or omission to offer or afford an opportunity for promotion is not necessarily the same thing as a refusal or omission to offer or afford promotion. Parliament has deliberately incorporated the concept of "opportunity". This places competitors for promotion upon an equal footing in the sense that … it ensures that any prejudice … does not stand in the way of a fair and impartial consideration of the application for promotion on its merits.

[32] Given Mrs Seitula was interviewed multiple times by ISS for a supervisor position, I find that she was offered opportunities for promotion.

[33] ISS' witnesses all provided evidence that the reasons for Mrs Seitula not being appointed or promoted to the supervisor role were that she did not meet ISS' expectations for the attributes of a supervisor. Mr King told me that a structured process was in place for all vacancies, involving generating a job description, obtaining approval to advertise, and assessing internal and external applicants through a structured questionnaire used for all interviews.

[34] While Mr King was candid that there were no records retained from Mrs Seitula's interviews (having been told by his manager that there was no obligation to do so) and that he would take his knowledge of internal applicants into account, his email of 16 July 2021 is consistent with the evidence I heard. That email records Mr King's reasons for not appointing or promoting Mrs Seitula as follows:

> At the interview unfortunately [Mrs Seitula] didn't respond to the questions at the level which I would expect from a supervisor. …
>
> … I don't believe that you have the level of experience which would enable you to undertake the role at the level which I require.

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[2] [1989] 3 NZILR 527 (LC) at 549.

[35] *Gilbert v Transfield Services (New Zealand) Ltd* involved a similar assessment of whether discrimination had occurred based on the grounds of involvement in union activities to that required in this matter.[3] I was referred to *Mount Cook Group Ltd v Airline Stewards & Hostesses of NZ Industrial Union of Workers (IUOW/IUW)*[4], which also related to alleged discrimination against a union delegate.

[36] The difficulties of such cases was reflected on in *Gilbert v Transfield Services (New Zealand) Ltd*, where it was stated:[5]

> Claims of unlawful discrimination in employment on grounds of union activity are not only rare, but are notoriously difficult to establish by direct and persuasive evidence. In some cases that is because, despite a genuinely held suspicion, an employer's dismissal or other conduct that is detrimental to an employee, is not so motivated.

[37] Based on all the evidence before me, I am not satisfied that, on balance, Mrs Seitula's involvement in union activities was a material ingredient in her non-appointment or non-promotion to a supervisor's role. The s 119 rebuttable presumption is not engaged. The evidence before me supports the argument that Mr King's decisions to not appoint or promote Mrs Seitula to a supervisor's role were based on concerns about her capabilities and experience not meeting ISS' expectations for the attributes of a supervisor. I find that, in relation to the decision to not appoint or promote Mrs Seitula to a supervisor's role, discrimination did not occur.

[38] As the claim for unlawful discrimination is not made out, I do not need to consider the remedies that were sought in relation to it.

Was the warning of 30 September 2021 justified?

[39] The issues requiring investigation and determination in relation to this warning were:

a. Whether Mrs Seitula's refusal to attend a meeting on 21 July 2021 was a failure to follow a lawful and reasonable instruction?; and
b. Whether ISS' decision to issue a warning was substantively and procedurally justified?

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[3] [2013] NZEmpC 71; (2013) 10 NZELR 810 at [42] to [82].
[4] [1991] 2 ERNZ 425.
[5] Above n 3, at [58].

Was Mrs Seitula's refusal to attend a meeting on 21 July 2021 a failure to follow a lawful and reasonable instruction?

[40] The fact that Mrs Seitula was invited to attend a meeting on 21 July 2021 is not contested. There was some difference in evidence as to whether Mrs Seitula was directly advised of the purpose of the meeting, however, she acknowledged that she was aware that the likely purpose for the meeting was to introduce her to her new supervisor. Screenshots from smartpage show that at a minimum Mrs Seitula was invited to the meeting. Evidence was provided that smartpage could be used for the purpose of scheduling meetings but was unlikely to record the reasons for a request to attend a meeting.

[41] The evidence shows that Mrs Seitula's response to the request to attend the meeting was twice expressed politely, saying "no thank you". Mrs Seitula was clear that her reasons were that she was upset about both her non-promotion and meeting the new supervisor, raising an argument that this meant the instruction was not lawful as Mrs Seitula had concerns for her safety. The evidence before me showed that the first time that Mrs Seitula offered that explanation and concern about safety was at the investigation meeting on 23 September 2021.

[42] In those circumstances, I find that it was a lawful and reasonable instruction from ISS that Mrs Seitula to attend the meeting. Accordingly, it was reasonable for ISS to commence an investigation into Mrs Seitula's refusal to attend the meeting.

Was ISS' decision to issue a warning procedurally and substantively justified?

[43] The test of justification is set out at s 103A of the Act.

[44] The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[45] In reaching my conclusion, I must consider:

a. having regards to the resources available to it, did ISS sufficiently investigate before taking action;
b. did ISS raise concerns that it had with Mrs Seitula before taking action;
c. did Mrs Seitula have a reasonable opportunity to respond; and
d. did ISS genuinely consider Mrs Seitula's explanation or comments.

[46] I may also take into account any other factors I think are appropriate.

[47] ISS is a substantial multi-national employer with significant resources, which had a dedicated people and culture adviser (Mr Stone) supporting Mr King in this disciplinary process and a number of other senior managers involved.

[48] Taking into account those resources, I consider that ISS acted reasonably in investigating Mrs Seitula's refusal to attend the meeting on 21 July 2021 and in raising concerns with Mrs Seitula. I am not satisfied, however, that ISS provided Mrs Seitula with a reasonable opportunity to respond or genuinely considered Mrs Seitula's explanation or comments, for the reasons that follow.

[49] There is a degree of consistency in the evidence about what was discussed at the investigation meeting on 23 September 2021. It was accepted that Mrs Seitula was emotionally affected at that meeting by some of the matters discussed and a break was taken. Ms O'Neill's notes from this meeting reflect this and this was accepted by Mr King and Mr Stone.

[50] There also appeared to be a degree of consensus between Mrs Seitula and ISS's witnesses that smartpage was not an appropriate place to have a conversation about either the reasons for requesting a meeting or the reasons for declining to attend a meeting. Ms O'Neill and Mr King both gave evidence that a conversation about these matters would have been more appropriate. It appears that at the time of Mrs Seitula's refusals to attend the meeting, neither Mrs Seitula or Mr King (or anyone else from ISS in a supervisory position) took the initiative to have such a conversation. In essence, neither party was acting fully consistently with the duty of good faith to be open and communicative. Rather both parties considered the other to be at fault, when a good faith conversation would have been appropriate. This was undoubtedly a reflection of the overall challenges in the relationship and heightened emotions in June and July 2021.

[51] Where the evidence differs is whether it was clearly communicated that two of the issues that were discussed at the investigation meeting were no longer live at the end of that meeting, with only the refusal to attend a meeting on 21 July 2021 being taken further. While this is a reasonable inference from Ms O'Neill's notes and was both Mr King and Mr Stone's evidence was what they understood, the interactions that

follow show there was not a meeting of minds on what matters remained under investigation.

[52] The next step was that Mr King issued a preliminary decision by email to Ms O'Neill, which stated:

> After considering the information which was provided at the meeting last week with regard to Nive my preliminary decision is that she be given a written warning.

[53] ISS submitted that there is no obligation in a disciplinary process for an employer to issue a preliminary view on the outcome, meaning that there could be no unjustified disadvantage relating to this part of the process.

[54] The fact that Mr King chose to issue a preliminary view means he needed to follow a reasonable process in reaching a final outcome. It was not disputed that Ms O'Neill asked by email of 27 September 2021 for clarification of:

> 1. Why the allegations (and which ones) were up held on the balance of probabilities and;
> 2. Why the written warning is proportionate in the circumstances
>
> In response to point 1, please outline how you have taken into account Nive's explanation and mitigating factors she disclosed. Please specify what these are.

[55] Mr King and Mr Stone's views about what matters were live coloured Mr King's non-response to Ms O'Neill's email. Mr King confirmed that he believed that his email of 27 September 2021 had set out the matters that were live and that he had communicated what allegations were upheld in his final decision.

[56] Mr King accepted, with hindsight, that he could and should have responded to Ms O'Neil's email. Mr Stone also acknowledged that ISS could have reiterated its position on what matters were live, in response to Ms O'Neill's email. Doing so would have ensured it was clear what matters were still being investigated.

[57] Most importantly for the issue of whether the warning was justified, this meant that Mr King did not clearly express how he had considered Mrs Seitula's explanation for refusing to attend the meeting on 21 July 2021 or the mitigating factors that she had raised.

[58] This was precisely one of the matters that Ms O'Neill asked to be clarified. I find that the failure to respond to that request means that the warning was procedurally unfair and, therefore, Mrs Seitula' claim for unjustified disadvantage is made out.

[59] Mr King explained that his motivation in sending a brief email only was to expedite the process, which he understood was something that E tū also wanted. This email did not, however, indicate how and by when Mrs Seitula or Ms O'Neill could respond to the preliminary view. Mr King also candidly admitted that sending a brief email was, in part, a response to his view that it was taking too long to close out incidents, which many people in ISS were concerned about.

[60] Mr King issued a warning letter to Mrs Seitula on 30 September 2021. While this letter arguably addressed some of the issues that had been raised in Ms O'Neill's request of 27 September 2021, there was no opportunity to respond to his preliminary view and that letter did not clearly address how Mr King had taken into account Mrs Seitula's explanation for refusing to attend the meeting on 21 July 2021 or the mitigating factors that she had raised.

[61] I find that the absence of the opportunity to meaningfully respond to the preliminary view also means that the warning of 30 September 2021 was substantively unjustified. Applying the test of justification in s 103A, having arrived at a preliminary view, a fair and reasonable employer could not have proceeded to issue a written warning without responding to the matters that Ms O'Neill asked to be clarified or providing a clear timeframe for a response to the preliminary view.

Remedies

[62] Having determined that the warning of 30 September 2021 constitutes an unjustified disadvantage, I need to consider what remedies should follow. In relation to the warning, Mrs Seitula has sought compensation for distress, a compliance order requiring withdrawal of the warning and costs.

[63] In relation to the claim for compensation for hurt and humiliation under s 123(1)(c)(i) of the Act, mixed evidence was provided on the impact of the warning on Mrs Seitula. In response to my questions, Mrs Seitula initially said she could not recall the impact of the warning. ISS submitted that this, and responses to other questions, indicated the warning did not have any impact on Mrs Seitula. In contrast, for Mrs Seitula it was submitted that she had blocked out aspects of the warning process, due to the significance of the impact.

[64] Mrs Seitula described the warning as having affected herself and her family, making her really frustrated and impacting on her sleep. I am unable to take into account the impact of the warning on Mrs Seitula's family, as compensation is provided for hurt and humiliation of employees and not distress to their family.[6]

[65] ISS submitted that the warning was spent and had no impact that required compensation.

[66] I find that the warning had an impact on Mrs Seitula and that an award of compensation is appropriate. Subject to any contribution, Mrs Seitula is entitled to payment of compensation in the sum of $5,000 under s 123(1)(c)(i) if the Act. In reaching this figure I have taken into account other comparable cases.

[67] Given I have found that the warning was unjustified, Mrs Seitula is entitled to be reinstated to the position she was in before the warning was issued, as if no warning had been issued.[7] ISS is to take all reasonable and practical steps to remove the warning from Mrs Seitula's employment record within three days of the date of this determination.

Contribution

[68] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mrs Seitula that contributed to the situation giving rise to her grievances. ISS submitted that Mrs Seitula had not acted in good faith, as required under s 4 of the Act, and specifically had not been open and communicative in in failing to provide reasons for not attending the meeting on 21 July 2021 until the investigation meeting on 23 September 2021. This was characterised as being inconsistent with the obligation of good faith going both ways.

[69] While good faith is undoubtedly a two-way obligation, I do not consider it appropriate to reduce remedies for this reason (if that is what ISS were seeking).

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[6] *Air New Zealand Ltd v Johnston* [1992] 1 NZLR 159 (CA) at [167].
[7] See *Creedy v Commissioner of Police* [2011] ERNZ 285, *Pathways Health Ltd v Moxon* [2013] NZEmpC 18, *X v Secretary of Justice* [2011] NZERA 177 and *Asiata v New Zealand Post Limited* [2017] NZERA 187.

[70] The unjustified disadvantage arose from ISS' failures in the disciplinary process, to which no contribution by Mrs Seitula can attach. Accordingly, I do not reduce the award of remedies.

Summary

[71] ISS Facility Services Limited is ordered to:

a. reinstate Nive Seitula to the position she was in before the warning of 30 September 2021 was issued, as if no warning had been issued;
b. take all reasonable and practical steps to reflect the order set out in [71]a above on Nive Seitula's employee record within three days of the date of this determination; and
c. pay Nive Seitula compensation in the amount of $5,000.00 without deduction under s 123(1)(c)(i) of the Act.

Costs

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

[73] If they are not able to do so and an Authority determination on costs is needed Mrs Seitula may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum ISS would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[74] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[8]

Shane Kinley
Member of the Employment Relations Authority

[8] See www.era.govt.nz/determinations/awarding-costs-remedies.