

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 15
3013476

BETWEEN CORAL SHANKS
 Applicant

A N D ALLIANCE GROUP LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Karina Coulston, Counsel for Applicant
 Lucia Vincent, Counsel for Respondent

Investigation Meeting: 29 and 30 November 2017 at Timaru

Submissions Received: 15 December 2017 & 2 February 2018 from Applicant
 26 January 2018 from Respondent

Date of Determination: 9 February 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms Shanks was unjustifiably disadvantaged in her employment to the extent set out in this determination and is awarded \$10,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- B. Costs are reserved.**

Prohibition from publication order

[1] During the course of the Authority's investigation meeting evidence was given regarding Ms Shanks' personal history. I prohibit from publication details of that evidence.

Employment relationship problem

[2] Ms Shanks claims that she was subjected to an unjustifiable disadvantage in her employment between 13 January and 7 April 2017. The respondent denies that Ms Shanks suffered disadvantage in her employment but that, if any, disadvantage has occurred, it has been justified in all the circumstances.

The parties' account of the events

[3] The respondent is a meat export processing company with plants across New Zealand. Ms Shanks worked in the further processing room (FPR) of the Smithfield plant near Timaru. The FPR receives carcasses from the chiller and workers there cut the carcasses up into pre-specified portion sizes and place them in cartons. Ms Shanks is a packer. The Smithfield plant season starts around the end of November and ends around the end of July each year. Ms Shanks, who continues to work for the respondent, works on the night shift. Ms Shanks' direct supervisor at the material time was Dion Henderson.

[4] According to Ms Shanks, on Friday, 13 January 2017 at around 2:10am, she was working when meat product began to fall on the floor from the conveyor belt. She tried to attract the attention of Mr Henderson but was unable to get him to respond. She therefore decided to pull an emergency cord which stopped the entire production. It appears that the reason why product was falling on the floor was because a co-worker was not in place where she should have been. The respondent now accepts that pulling the cord was the correct action to take.

[5] When production stopped, another supervisor, Jordan Wihone, appeared on the walkway above the conveyor belt and started to shout at Ms Shanks, berating her for having pulled the cord and calling her abusive names. He walked down the stairs and continued to abuse Ms Shanks. Mr Wihone did this in front of the entire department and also abused another female member of staff. It was only when a colleague spoke to Mr Wihone that he stopped. Ms Shanks says that the abuse lasted for between five to ten minutes.

[6] Ms Shanks' shift ended at 2:30am. She said that, as everybody was leaving, she was ordered by the then senior supervisor, Leo Fotofili, to attend a meeting in the supervisor's office with him, Mr Henderson and Mr Wihone. She says that she was frightened because of what had just happened and did not want to go into the office. She was also frightened of Mr Fotofili himself. She says that she told Mr Fotofili several times that she did not want to go into the office, that her partner was waiting for her, and she said that she was scared to go into the office. She said, however, that he made her go into the office, along with the co-worker who had been also shouted at by Mr Wihone.

[7] Ms Shanks says that, whilst she was in the office, Mr Fotofili was aggressive and told her that the incident was her fault and that she had been yelled at because she had pulled the cord. He said that she should have put her hand up to attract the attention of a supervisor. She says that he also told her that she would not be paid for the additional time that the department had to work as the whole incident and the reason they all had to work longer were her fault.

[8] During her oral evidence, Ms Shanks says that Mr Fotofili and the co-worker started to argue with one another, and that Ms Shanks decided to get up and leave, which she did. She was not prevented from doing so. It was accepted by Ms Shanks that Mr Wihone did not take part in the conversation in the office, and that he was attending to another matter. Mr Wihone said he was not concentrating on what was being said, but he did not believe that Mr Fotofili was being aggressive to Ms Shanks. Mr Fotofili and Mr Henderson did not give evidence to the Authority.

[9] Ms Shanks says that she felt bullied and intimidated while she was in the office with Mr Fotofili, Mr Henderson and Mr Wihone, and had not been asked whether she wanted her union representative there. She said that Mr Fotofili did not ask for her explanation for what had happened but just accepted what Mr Wihone had told him. She says that she felt vulnerable, unsafe and distressed, that she was shaking and just kept her head down and felt like she was going to vomit.

[10] Ms Shanks said that, later that day, she got a call from Robert Harris, the Production Manager, who had worked at the Smithfield plant for more than 20 years. She says that he told her that he had been watching the video of the incident and that she had been right to pull the cord and stop production in the circumstances.

[11] Ms Shanks says that she could not attend work on the afternoon of 13 January as she was too exhausted, upset, humiliated and distressed. She said that she had been seriously thinking about resigning because of Mr Wihone's abuse. She decided instead to make a written complaint, which she gave to the company on 16 January 2017.

[12] The written complaint was three pages long and set out the events that had happened during the shift on 13 January. As one of Ms Shanks' complaints is that her complaint was not properly investigated, it is necessary to replicate the letter here as the respondent says she did not make clear what she wanted the respondent to do. It stated as follows:

To Whom it May Concern¹

On Friday 13th Jan 2.10 am approx, Hinemoa and I were in the Cut Station area packing mutton product while Olga was repacking leakers as there were so many of them. Next thing I looked up and saw shoulders coming through the shrink wrapper so asked Hinemoa to pop over and pack them. With that I realised legs were also coming through the shrink wrapper so I asked Olga to come help pack legs.

Meanwhile there was nobody to label shoulder[s] as they were still in other areas clearing product from previous cut as myself, Olga and Hinemoa were when the change of cut started arriving.

I looked for a supervisor to stop the room as meat was starting to fall on the floor. Deon appeared on the bridge so I yelled out to him to stop the room. He looked to have no idea what was happening so then again [I] yelled out to him to stop the room. He walked into the office and then both himself and Jordon appeared on the bridge in which again I yelled out for them to stop the room because by this time there was meat falling everywhere.

Another co-worker saw what was happening and said pull the cord and I did and with that Jordon started pointing his finger at me and yelling you have no f***en right to pull the f**ing cord all the while standing on bridge above bulk pack area. I replied it was health and safety issue with product falling on us and the floor.

¹ The punctuation and formatting have been tidied up for ease of comprehension.

He then started screaming from the bridge where the f*** is Olga and why I haven't told f***en Olga to come help pack, in which I yelled I have twice but she was busy trying to clean up the previous cut.

Meanwhile, Hinemoa and myself were trying to clear the mess up and he was still screaming abuse from bridge. By this stage it had all become muffled as I felt so humiliated. Jordon then came down to the packing area and proceeded to abuse Olga telling her she should f***en listen to Coral when she asked you to help. A lot of swearing was also involved until Monique Coulter (QA) told him he can't speak that way and then he finally stopped with the abuse.

I stopped the room not only as a health and safety but also for the product being put into jeopardy and a chance of contamination with the floor because I'm aware that the product is the main priority and is produced according to its standards and specifications and was not prepared to put further product in jeopardy over losing production time.

So why I was singled out and verbally abused in front of a room full of co-workers for this is unfair.

I have no organisation to tell any workers where to go or what to do as this is a supervisor or leading hands job. So I felt humiliated in front of my co-workers.

I have been with the company 9 years and in that time have never been verbally abused with language like that from anybody let alone a supervisor who should have had more self-control and respect for his employees.

Because this supervisor (Jordon) had a lack of experience he should have consulted with his senior supervisor before losing control and verbally dousing his workforce. Between all the supervisors there is enough knowledge to have known how to deal with this situation before it got out of hand.

Mentally it is very hard as a woman to be sworn at continuous in front of your co-workers for doing your job correctly and to be called into the office at the end of the night without representation and told the whole incident was my fault. It was not only intimidating but also unnecessary.

I could not attend work on Friday night as I was still visibly upset because the whole situation was my fault. Thoughts of resignation were on my mind all night and did not sleep at all.

I have found dealing with this very emotional [and] am requesting this situation be looked at as I am unhappy with the blame and the supervisors unexpected comments directly pointing to me not only verbally but also using hand gestures as if to make sure I understood I was running things.

At the start of the season the management team spoke to us in regards to health and safety and work harassment. The last thing I thought was that those issues would be caused by the supervisor.

When I came home I spoke to Rhys² and expressed how I felt so worthless and didn't want to go back, felt embarrassed to be around co-workers all for doing what I thought was the right thing.

Yours sincerely

C A Shanks.

[13] There are two aspects of the incident on 13 January 2017 which are in dispute. The first is whether or not Mr Wihone said to her "*You are a stupid f***en bitch*", which Mr Wihone had denied. This is relevant because Ms Shanks stated in her brief of evidence that Mr Wihone said this, but she had not referred to the comment in her written complaint. Mr Nigel Cuthill, the plant manager, said in his brief of evidence that he would have taken notice of this had it been in the original complaint as it would have made the complaint more serious. Ms Shanks said she did not refer to it in her original complaint because she had not been sure what Mr Wihone had said, but that her colleagues told her later. She did not tell anyone in the company about this at the time though.

[14] The other aspect of the incident that is in dispute is how long the abuse lasted. Mr Wihone says he did not abuse Ms Shanks for five to ten minutes, whereas other witnesses said he did.

[15] After having submitted her complaint, Ms Shanks had a brief meeting with the Personnel Manager, Laylyne Laplanche, and her union delegate, Barry (Sid) Davidson, during which Mr Laplanche said that the complaint would be taken seriously. She said that, although she was still visibly upset, no support or help of any kind was offered to her and she was not asked if she felt unsafe or needed some time off work to deal with what had happened.

[16] Ms Shanks said that when she returned to her department after the brief meeting with Mr Laplanche and started work she noticed that Mr Wihone was there. She did not expect him to be working in the room and to be able to have contact with her after what had happened and the written complaint she had made. She says that she thought the company should have suspended him or transferred him to the day shift while her complaint was investigated. She said that she was extremely anxious when she saw him and started to cry.

² Ms Shanks' partner

[17] Ms Shanks says that, from the night of 16 January 2017, Mr Wihone would stand on the bridge and stare at her, which made her feel nervous, and that she would try to go a different way to avoid him if she had to walk past him.

[18] Mr Laplanche says that, once he received Ms Shanks' complaint, he arranged for Mr Wihone to attend a disciplinary investigation meeting, which took place on Thursday, 19 January. Mr Cuthill was in attendance, and Mr Wihone was accompanied by a support person. Mr Laplanche says that Mr Wihone immediately accepted that what he had done was wrong and that it was unacceptable to swear at staff. Mr Laplanche says that Mr Wihone accepted that he faced disciplinary action.

[19] Mr Laplanche says that Mr Wihone was a new supervisor and that Mr Wihone struck him as being sincere, which made him believe that it was much less likely that Mr Wihone would do something similar again.

[20] Mr Laplanche had already interviewed the member of staff who had told Mr Wihone to stop swearing on 13 January, but did not interview anyone else because Mr Wihone had admitted what he had done. Mr Laplanche says that the decision was that Mr Wihone would get a written warning, which would remain valid for 12 months, and that he would have to write a written apology to Ms Shanks. It was also agreed that Mr Wihone would have fortnightly meetings with Mr Cuthill which were to continue as long as they were needed.

[21] According to Mr Laplanche, he was satisfied that Mr Wihone had learned from the experience, and was sincere in his remorsefulness.

[22] Mr Laplanche says that part of the explanation that Mr Wihone gave was that Ms Shanks had begun swearing at Mr Henderson on the night of the incident when the product started to fall on the floor. Mr Henderson was also a new supervisor and he had refused to engage with Ms Shanks because of the swearing. He had come out when Ms Shanks had pulled the cord, having been told by Mr Henderson that he was not going to engage with her because of her swearing. Ms Shanks, by the way, denies that she had been swearing directly at Mr Henderson although conceded in her oral evidence that she had sworn in general.

[23] Ms Shanks also says that Mr Henderson approached her during the shift of Monday, 16 January to apologise to her for what had happened on 13 January, saying that he had been dumbfounded and had not known what to do when she had asked him to stop the room. She says that she doubts that Mr Henderson would have apologised to her if she had sworn at him on the night of 13 January. It seems likely that Ms Shanks would have been swearing out of frustration, but possibly not at Mr Henderson directly.

[24] Nothing turns on whether Ms Shanks swore at Mr Henderson or not in my view, as she was not disciplined in relation to it. I do not accept the submission that the respondent was “attempt(ing) to blame the victim – The Applicant”. In making this submission Ms Coulston relies on a short file note of an interview with Ms Coulter, the colleague who stopped Mr Wihone’s verbal abuse of Ms Shanks. I believe Ms Coulston is reading too much into the note, and Ms Coulter did not give evidence to the Authority.

[25] The written apology was given to Ms Shanks via the Union. Mr Wihone’s apology is worth repeating in this Determination. It stated as follows:

Dear Coral

On the morning of Friday the 13th January, my actions were unacceptable and I know have affected you deeply, for that I am sorry. I know you received an apology from me in person but was hoping on top of that a written one would help to bring you closure on the matter.

I have an enormous amount of respect for you and the work you do in the cut stations and always have. I value your experience, expertise and knowledge in your area and can assure you I did not mean to be personal in the way I attempted to deal with the situation on that morning. I lost control verbally and for that I have no excuse.

In the future I hope we can move forward and continue to work alongside each other in a positive and productive way.

And thank you for taking my apology in person the other night so graciously, as I’m sure you were still unsettled from the incident that took place a few days prior.

Yours sincerely
Jordan Wihone

[26] With respect to the reference to the in-person apology given previously, Ms Shanks says that Mr Wihone approached her in an isolated place to apologise to her. She says that he motioned for her to come over to an isolated area and she did not want to and felt frightened, intimidated, powerless and that she could not refuse. She says she did not think the apology was genuine and was just an excuse to bully, intimidate and harass her again. Ms Shanks says she felt totally unsafe and vulnerable having to talk to him. She says she began to shake and feel anxious. She says that she did not respond to his apology and just walked away as quickly as she could. Ms Shanks denies that Mr Wihone had apologised to her in the week of 16 January, saying that it happened about two weeks after she had received the written apology. However, in her oral evidence, she conceded that she may have been mistaken about when the apology happened.

[27] With respect to this oral apology, Mr Wihone says that he gave it before his disciplinary meeting on 19 January and said to her that he had wanted to apologise for what had happened and to assure Ms Shanks that it was not going to happen again. He says that Ms Shanks said something like “*No, no thank you very much for that, that’s okay*”. I find that Mr Wihone did apologise before the written apology, and that Ms Shanks was confused about the sequence of events. It does not appear that Mr Wihone’s oral apology is being treated as an unjustified action by the respondent causing disadvantage, but if it is, I would not find that it was an action of the respondent. I find that Mr Wihone decided to approach Ms Shanks of his own volition, without the prior knowledge of the respondent.

[28] Ms Shanks says that she is aware that, both before and after Mr Wihone abused her, he had also abused other workers in the department. She says that he abused two cutters about two weeks after he had abused her. She says that she was walking past and heard Mr Wihone calling them “*F***en stupid*”. She said that she put her head down and kept walking because she was fearful of being abused again by Mr Wihone. She says that she also heard that Mr Wihone abused another worker around a month after he had abused her. Mr Wihone denies he abused these workers.

[29] On 22 February 2017 a personal grievance was raised on behalf of Ms Shanks by Ms Coulston. The letter of personal grievance raised concerns about the instance of abuse on 13 January, together with the meeting with Mr Fotofili afterwards. In the letter of personal grievance Ms Coulston stated that Mr Fotofili had “unlawfully detained” Ms Shanks in his office at the end of her shift.

[30] Ms Coulston also raised a concern about Ms Shanks having to continue to work with Mr Wihone after she had put in her complaint. In addition, Ms Coulston stated that Ms Shanks had not been given an opportunity to express her ongoing concern about the incident, was not asked whether she felt safe to continue to work with Mr Wihone, and was not advised of the outcome of the investigation carried out by the company following Ms Shanks’ written complaint.

[31] Ms Coulston also expressed concern that Mr Wihone had been permitted to approach Ms Shanks to apologise, instead of the apology being given in an office with members of management present.

[32] Ms Coulston stated that Ms Shanks continued to be fearful of Mr Wihone and Mr Fotofili in case they again abused, humiliated, demeaned, intimidated and embarrassed her, given that no processes, procedures or sufficient deterrents had been put in place to prevent a recurrence of such behaviour.

[33] Ms Coulston also stated in the letter that the company was “*sending a clear message to its male staff who are in positions of power that it is acceptable to abuse, demean, harass and humiliate female workers*”. Ms Shanks has not brought a claim of sexual harassment or discrimination by reason directly or indirectly of sex in the Statement of Problem. However, Ms Coulston submits that the gender dimension in the interaction is relevant to the unjustified disadvantage grievances.

[34] The respondent responded to Ms Coulston’s letter of personal grievance on behalf of Ms Shanks by way of a letter dated 29 March 2017. In this letter the writer, the Group legal counsel, denied that Ms Shanks had a valid personal grievance of any description. In this letter it stated: “There is simply no credible basis for your claim that your client continues to live in fear”.

[35] The letter in reply also stated that the meeting with Mr Fotofili was not a disciplinary meeting and that supervisors talked to workers all the time about incidents in the workplace without invoking the formality of an investigation process. The focus of such meetings is invariably operational issues and a discussion of what happened and why it happened. The letter ended with the statement that the focus of the written complaint was Mr Wihone and that has been dealt with.

[36] In her written evidence Ms Shanks states that Mr Henderson later approached her and told her that Mr Cuthill had told him to say that she had abused and swore at him on the night of the incident. Mr Henderson was not present at the investigation meeting and so it is not possible to take this any further, as this is hearsay.

[37] A mediation was arranged to take place on 13 April 2017 between Ms Shanks and the company. Ms Shanks says that she would take her breaks in the smokers' area but that in the week before mediation Mr Wihone started to come into the smokers' area and would stare at her in a hostile and aggressive way in order to intimidate her. She says that this made her feel unsafe, vulnerable and frightened. According to Mr Wihone, he did not know when Ms Shanks was about to have her mediation and did not follow her around and try to intimidate her. He says that he did take smoking up again in March/April 2017 and that is why she may have seen him in the one designated smoking area of the plant.

[38] Ms Shanks also complained that Mr Wihone used to stare at her from the bridge, although he says he was just supervising the room. In her oral evidence, Ms Shanks conceded that she may have been misinterpreting Mr Wihone's actions because she was not feeling very well mentally at the time. Ms Shanks also said that she had been prescribed sleeping tablets and anti-depressants.

[39] Ms Shanks says that, as a result of the trauma she experienced on 13 January and afterwards, she had to take a number of days off work, and took five sick days in total. She says that in or around April or May she received a letter from the company threatening her with disciplinary action because of what they called her "high absenteeism".

[40] Neither Ms Shanks nor the respondent had kept a copy of the absenteeism letter sent to her by an HR manager, but a similar copy was provided to the Authority. This stated that unauthorised absence, lateness or patterns of absenteeism are deemed as misconduct under the company code of conduct and that continued absenteeism could result in disciplinary action taking place up to and including the termination of her employment. The letter also states: *“If there are issues around your absenteeism that we are not aware of, we are willing to discuss these with you. Alternatively we can offer you support through our OCP Programme. This support will be confidential”*.

[41] Ms Shanks says that she was upset when she received the letter as no-one had talked to her first before issuing it, or asked for the reasons why she had taken that amount of time off work.

The issues

[42] Ms Coulston lodged an amended Statement of Problem with the Authority on 31 October 2017. This set out in detail the alleged unjustifiable actions and failures to act by the respondent that Ms Shanks says disadvantaged her. There are 22 such actions and failures to act alleged, and it is necessary to set each of these out and investigate each one of these in order to dispose of this matter. The following issues are alleged to amount to unjustifiable actions or failure to act:

- a) Ms Shanks was subjected to “brutal and prolonged abuse, bullying and harassment” by Jordan Wihone on 13 January 2017;
- b) Ms Shanks was compelled by senior supervisor Leo Fotofili to attend a meeting on 13 January 2017 in circumstances where she was well aware that Mr Fotofili had previously assaulted another worker, causing the applicant further trauma and fear;
- c) Ms Shanks was compelled to attend a meeting with three male supervisors (including Mr Wihone) 20 minutes after she had been brutally abused by Jordan Wihone;

- d) Ms Shanks was shouted at, demeaned, and bullied during the meeting with the supervisors on 13 January 2017;
- e) The failure of the respondent to provide Ms Shanks with the opportunity to have representation or support at the meeting she was compelled to attend on 13 January 2017 in circumstances where the respondent was well aware she was a union member;
- f) Ms Shanks was unlawfully detained outside her working hours by the supervisor during the course of the meeting on 13 January 2017;
- g) The failure of the respondent to protect Ms Shanks and provide her with a safe workplace immediately subsequent to the incident on 13 January 2017, given senior staff of the respondent were well aware of the incident prior to Ms Shanks providing her written formal complaint;
- h) The failure of the respondent to protect Ms Shanks and provide her with a safe workplace immediately subsequent to her providing her formal written complaint on 16 January 2017 and on an ongoing basis;
- i) The failure of the respondent to suspend (or transfer) Mr Wihone during the alleged investigation and thereby compelling Ms Shanks to work with a supervisor who had power and control of her that she felt, and was, unsafe with;
- j) The failure of the respondent to communicate with Ms Shanks during the course of the alleged investigation;
- k) The failure of the respondent to advise Ms Shanks of the process and the procedure that would be followed in the investigation of her complaint;
- l) The failure of the respondent to fairly and reasonably investigate Ms Shanks' complaint against Mr Wihone;

- m) The failure of the respondent to fairly and reasonably investigate Ms Shanks' complaint in relation to the meeting she was compelled to attend on 13 January 2017;
- n) The failure of the respondent to fairly and reasonably investigate Ms Shanks' complaint in relation to her being unlawfully detained at the meeting she was compelled to attend on 13 January 2017;
- o) The failure of the respondent to sufficiently discipline Mr Wihone in order to provide a deterrent to him against further act of bullying, abuse, intimidation and harassment in relation to Ms Shanks and other workers;
- p) The failure of the respondent to advise Ms Shanks of the outcome of her complaint against Mr Wihone;
- q) The failure of the respondent to provide procedures and strategy to protect Ms Shanks from future abuse and intimidation by Mr Wihone, including, but not limited to, Mr Wihone approaching her, staring at her from the bridge and the events of the week of 3 April 2017;
- r) The failure of the respondent to sufficiently discipline and provide a deterrent to Mr Wihone which resulted in further workers being abused, intimidated, harassed and bullied by him. As a direct consequence of the subsequent bullying and abuse of other workers, Ms Shanks suffered further trauma and fear that she would be the victim of further abuse and bullying;
- s) The intimidation of subsequent complainants and witnesses by the respondent which resulted in further trauma and fear being experienced by Ms Shanks;

- t) The respondent issuing Ms Shanks with a letter threatening disciplinary action (including dismissal) and requiring medical certificates for sick leave in circumstances where the respondent failed to investigate the reasons for her absenteeism and was well aware of the trauma she had suffered as a result of the events of 13 January 2017. Ms Shanks was in fact absent because of those events.
- u) The respondent's Plant Manager at Smithfield failed to discourage staff from, and supported senior staff members to, bully, harass and intimidate workers.
- v) The respondent's Plant Manager bullying, intimidating and harassing workers and particularly workers who are complainants and witnesses in relation to bullying instances by senior staff members.

[43] In her written submissions dated 15 December 2017, Ms Coulston raises a number of further issues, some of which coincide with the alleged unjustified actions listed above, and some of which are of a more general, or legal nature. However, rather than list and address these further issues separately, I shall address them as part of the analysis of the alleged unjustified actions. I should like to take this opportunity to thank both counsel for their very comprehensive sets of written submissions.

General legal principles

[44] Section 4 of the Employment Relations Act 2000 (the Act) sets out the mutual duties of good faith owed by employer and employee to one another. The relevant part of s 4 provides as follows:

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(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;

[45] Section 103(1)(b) of the Act provides that a personal grievance means a grievance that an employee may have against the employee's employer or former employer because of a claim that the employee's employment, or one or more conditions of the employee's employment (including any condition that survives termination of the employment) is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[46] Section 103A of the Act sets out the test of justification that the Authority must apply when deciding whether an action was justifiable. Section 103A provides as follows:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) 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.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly

Ms Shanks was subjected to “brutal and prolonged abuse, bullying and harassment” by Jordan Wihone on 13 January 2017

[47] First, there is no question that Ms Shanks was subjected to unacceptable verbal abuse from Mr Wihone. Mr Wihone and the respondent both fully acknowledge that what Mr Wihone said to Ms Shanks, and how he said it, was not acceptable in the workplace.

[48] In regards to the two factual disputes, I shall address them briefly. As to whether Mr Wihone called Ms Shanks “a f***en stupid bitch”, on balance I find he did. Mr Wihone was angry and stressed when he lost control, and it is not likely that he would have remembered exactly what he said whilst he was letting off steam. He says he does not call people abusive names, but people are often not their normal selves when they lose emotional control. On the other hand, Ms Shanks gave credible evidence that she was told later by her co-workers about what Mr Wihone had called her, which explains why it was not referred to in the written complaint. Ms Shanks knew Mr Wihone had called her something unpleasant but could not recall what. I therefore accept Ms Shanks’ evidence in this regard.

[49] However, even though she found this out, she did not advise her employer that she wished to add that to the complaint. Whilst I understand her reasons for not doing so, which is that she was badly traumatised by what had happened, the respondent could only investigate what it was told. Ms Shanks says that, if she had been interviewed, she may have been able to have told the respondent this new aspect of her complaint. I shall address that below.

[50] The second factual dispute is how long the abuse lasted. Ms Shanks says five to ten minutes, whereas Mr Wihone says two to five minutes. It seems to me that the disagreement is illusory, and that it is likely to have lasted 5 minutes. It is not surprising that it felt like a long time to Ms Shanks, given how humiliated she felt.

[51] Turning to whether the abuse by Mr Wihone was an unjustified disadvantage in her employment, it is necessary to consider whether the respondent can be held responsible for one-off incidents of abuse committed by a supervisor under New Zealand law. The starting point must be the statutory provision, which states that an employee suffers an unjustified disadvantage in her employment if it was affected to the employee's disadvantage by some unjustifiable action by the employer.

[52] Was the abuse by Mr Wihone action by the employer? In my view it was not. It was unauthorised action which Ms Shanks' employer had no prior knowledge of, and which it treated as a disciplinary matter. Obviously, action taken by individual supervisors and managers is capable of being 'action by the employer', but that is when the action is carried out by the supervisor or manager in his capacity as an agent of the employer. Action which is clearly not authorised action cannot be the action of the employer for these purposes.

[53] Could the respondent be otherwise responsible for it? I think it could in theory, if the respondent had taken no steps to train Mr Wihone in how to manage staff, or in relation to bullying and harassment, prior to promoting him, despite knowing that he represented a material risk of verbally abusing staff³. Ms Coulston submits that employers owe a general duty of care to train managers and staff to prevent bullying, but has not cited a New Zealand authority for such a thesis. Whilst a similar duty exists in the UK, I understand that that derives from judicial interpretation of specific anti-discrimination legislation. Section 68(3) of the Human Rights Act 1993 may arguably encompass a duty to train in some circumstances, but the Authority does not have the jurisdiction to make findings pursuant to that section.

³ For the avoidance of doubt, I make no finding that it did have this knowledge.

[54] However, I do not have to make a finding on whether such a general duty exists in New Zealand because I am satisfied that Mr Wihone did have training in how to act as a supervisor, including attending a one day leadership course. He is also likely to have attended the start of season induction in which Mr Cuthill reminded all staff about bullying and harassment. I would respectfully suggest that it is easy, in retrospect, to assert that Mr Wihone would not have reacted as he had if only he had had further, or better, or more focussed training. However, he was young, and newly promoted, and was faced with an unexpected, disruptive and potentially expensive event (the spoiling of product and the stopping of production) whilst working in an already stressful environment. His colleague, Mr Henderson, had also effectively washed his hands of the situation that was unfolding. Self-control when under stress normally develops with maturity and experience. I am not convinced that further anti-bullying training prior to this incident would necessarily have prevented Mr Wihone from losing control and verbally abusing Ms Shanks.

[55] Similarly, whilst the company handbook provided that staff would be trained to work safely, it is stretching the requirement too far in my view to assert that the respondent failed to comply with its own handbook by failing to expressly train Mr Wihone not to verbally abuse the staff under his supervision. Whilst it is self-evident that staff need to be properly trained in how to operate hazardous machinery, say, it is not self-evident that a supervisor needs to be expressly trained not to verbally abuse staff.

[56] Furthermore, the company handbook expressly prohibits harassment and bullying of any kind. Such an express prohibition, coupled with the reminder by Mr Cuthill at the start of the season that bullying and harassment are not tolerated, are sufficient in this instance to satisfy me that the respondent did not unjustifiably fail to prevent Mr Wihone's unexpected and unauthorised verbal attack.

[57] These actions by the respondent were also sufficient to enable me to find that the respondent did not breach its duty to provide a safe work environment for Ms Shanks prior to Mr Wihone verbally abusing her, as I do not accept that there is any cogent evidence that it was reasonably foreseeable that he would do so, contrary to Ms Coulston's submission. Mr Wihone being "inexperienced" and "young" does not make it reasonably foreseeable that he would go on to verbally abuse a staff member, and there was no objective evidence presented to the Authority that Mr Wihone was known to be "arrogant" or "aggressive" prior to being promoted to supervisor. Ms Coulston effectively suggests that it was the respondent's fault that Ms Shanks was verbally abused by Mr Wihone because they should never have made him a supervisor in the first place. This argument is simply too speculative. For the same reason, I do not accept that clause 16 of the applicable collective agreement, dealing with health and safety, had been breached by the respondent leading to Mr Wihone's verbal abuse.

[58] In addition, this is not a case where a manager witnessed the verbal abuse and let it continue, as Ms Coulter stepped in and stopped it.

[59] In conclusion, I find that Ms Shanks was not subjected to an unjustified disadvantage in her employment under 103(1)(b) of the Act by being verbally abused by Mr Wihone on 13 January 2017, as that was not an action by her employer, and it was not caused by any unjustified action, or unjustified failure to act by the employer.

Ms Shanks was compelled by senior supervisor Leo Fotofili to attend a meeting on 13 January 2017 causing her further trauma and fear

[60] The first issue to decide is whether this was an action by the respondent, or another unauthorised act by a supervisor. I am satisfied that this was an action by the respondent. The respondent's witnesses said that it is normal for supervisors to speak to staff to investigate matters informally when an incident occurs, such as the cord being pulled. This meeting was, therefore, an authorised action by Mr Fotofili. It was a meeting about the cord being pulled, which was a legitimate reason to ask an employee to a meeting.

[61] The statement of problem says that this as an unjustified action because Ms Shanks was well aware that Mr Fotofili had assaulted another worker, and so she was caused further trauma and fear. No evidence was given by the respondent about whether it accepted that Mr Fotofili had assaulted another worker or not. Also, Mr Fotofili did not give evidence and he no longer works for the respondent I understand. Ms Shanks' evidence was that he had assaulted Mr Henderson, one of the other supervisors in the room.

[62] This aspect of the complaint seems to be that the disadvantage was caused by the fact that it was Mr Fotofili who asked her to attend the meeting, because she was scared of him. I do not believe that it can be an unjustified disadvantage in Ms Shanks' employment to be asked to attend a meeting by a senior supervisor about a legitimate issue. There was no complaint made by Ms Shanks prior to the meeting that she was scared of Mr Fotofili. The respondent could therefore not have known that she was scared of him and it cannot reasonably be said that it ought to have guessed. The respondent cannot, therefore, be responsible for Ms Shanks feeling scared when Mr Fotofili asked her to attend a meeting with him.

Ms Shanks was compelled to attend a meeting with three male supervisors (including Mr Wihone) 20 minutes after she had been brutally abused by Jordan Wihone

[63] As expressed, this alleged disadvantageous action has four aspects to it; namely that:

- a. Ms Shanks was compelled to attend a meeting;
- b. The meeting was with three men;
- c. The meeting included Mr Wihone; and
- d. The meeting was 20 minutes after the abuse by Mr Wihone.

Compulsion

[64] The first element relates to the element of compulsion. Ms Shanks said that she was asked to attend by Mr Fotofili three times, and she agreed after the third request. Is this compulsion? I believe that it is capable of being compulsion. Ms Shanks was not physically compelled, nor threatened. However, Mr Fotofili was Ms Shanks' senior supervisor, and had authority over her. To have refused the repeated instructions of a senior supervisor is not something that most workers would take lightly. Indeed, she could have faced disciplinary action for refusing.

[65] Did it constitute a disadvantage in her employment? Just being asked to attend a meeting for a legitimate purpose is not a disadvantage in an employee's employment. The element that could be a disadvantage is that the meeting occurred after Ms Shanks' shift had ended. To be a disadvantage, the action must have affected Ms Shanks' employment or one or more conditions thereof. In *Spotless Facility Services NZ Ltd v MacKay*⁴ the Employment Court held

The meaning of "conditions" of employment is well established. It includes all the rights, benefits and obligations arising out of the employment relationship; the concept is necessarily wider than the terms of an employment agreement.

[66] Ms Shanks had a right to leave work at the end of her shift, unless arrangements had been made for her to work overtime. That right was a condition of her employment. I accept that being asked to attend a meeting at the end of the shift was a disadvantage to Ms Shanks' employment as it impinged upon her right to leave work when her prearranged shift had ended.

[67] Was that disadvantage justified? I believe it was not. There was no need for the meeting to have taken place when it did. It could have occurred prior to the end of Ms Shanks' shift or the following day, at the start of her next shift. I find that no fair and reasonable employer in all the circumstances could have required Ms Shanks to have attended the meeting after the end of her shift, and ignore her statements that her partner was waiting for her and that she wanted to leave.

⁴ [2017] NZEmpC 15 at [50]

Meeting with three men

[68] I accept Ms Coulston's submission that the respondent is a 'male dominated environment'. However, I do not agree that the fact of having been asked to attend a meeting with three men can, in itself, be a disadvantage in Ms Shanks's employment or a condition of it. Men are employed by the respondent in all positions. Ms Shanks apparently happily interacts with men in her workplace all the time, as many of her co-workers are men, and she was supported by male colleagues at the Authority's investigation meeting. As senior supervisor, Mr Fotofili was the appropriate person to address the cord issue with Ms Shanks, and he happened to be a man.

[69] However, I do not believe that is what Ms Shanks is complaining about. It is that she was expected to attend the meeting with three men shortly after having been abused by Mr Wihone. However, at the time the meeting took place, the respondent was not aware of Ms Shanks' feelings about the abuse, and was particularly not aware of her feelings about the gender dimension of the abuse as there was no clear and overt gender dimension to it. One could argue that calling Ms Shanks a "f***en stupid bitch" imports a gender dimension into the interaction (although that term of abuse is not exclusively used by men) but Ms Shanks herself did not recall Mr Wihone using that insulting epithet immediately after the incident.

[70] Without having been told, even if Ms Shanks was "visibly upset", it is not reasonable to have expected the respondent to have inferred that Ms Shanks was upset by the gender dimension of the interaction and would have been unwilling to attend the meeting with men because of it. To have inferred as such without any overt evidence of Ms Shanks' feelings in this regard could, in itself, have been gender biased, as it would have been making assumptions based on gender. Every individual will have their own personal reaction to an incident such as Ms Shanks experienced, based on a myriad of factors unique to them.

[71] Therefore, even if the fact that Ms Shanks was instructed to attend a meeting with men 20 minutes after the abuse was disadvantage in her employment, it was not due to any unjustified action of the respondent.

The meeting included Mr Wihone

[72] Technically, the meeting did not include Mr Wihone, as he was not taking an active participation in it. However, he was in the room. It is understandable now, with the benefit of hindsight, that Ms Shanks would have been very disturbed by his presence. Was it reasonable for the respondent to have known that at the time of the meeting?

[73] It appears that Mr Fotofili had not witnessed the verbal abuse, and got his report of the cord being pulled from Mr Wihone. No doubt Mr Wihone did not tell Mr Fotofili that he had verbally abused Ms Shanks. It is also not clear whether Mr Henderson witnessed the verbal abuse himself. I infer that he may not have done, as he went back into the office at the start of the incident.

[74] On balance, I conclude that neither of the other supervisors saw the incident of verbal abuse. At the time the meeting was called, Ms Shanks had not complained about the abuse. Therefore, the respondent could not reasonably have known about Ms Shanks being upset by Mr Wihone's presence in the room when the meeting occurred.

[75] In conclusion, whilst I find that Ms Shanks suffered a disadvantage in her employment by being required to sit in a room with Mr Wihone shortly after he had verbally abused her, that was not caused by any unjustified action of the respondent.

The meeting was 20 minutes after the abuse by Mr Wihone

[76] The same considerations apply as in the previous element of this complaint. I find that Ms Fotofili and Mr Henderson were not aware of the verbal abuse when the meeting occurred, and so any disadvantage suffered by Ms Shanks was not due to an unjustified action of the employer.

Conclusion

[77] I find that Ms Shanks did suffer from an unjustified disadvantage in her employment by being made to attend a meeting after her shift had ended. Whilst I have deconstructed this alleged disadvantageous action into its constituent parts, and considered each separately in terms of s 103(1)(b), I believe that it is relevant to take into account the overall effect on Ms Shanks of the meeting, taking into account her upset emanating from the other elements, when considering remedies. I shall address this below.

Ms Shanks was shouted at, demeaned, and bullied during the meeting with the supervisors on 13 January 2017

[78] The respondent did not call either Mr Fotofili or Mr Henderson to give evidence. Only Ms Shanks and Mr Wihone were able to give evidence to the Authority about the meeting and Mr Wihone, by his own admission, was not taking an active part in the meeting and was concentrating on 'doing the pays'. Therefore, I must prefer Ms Shanks' evidence in regard to this allegation.

[79] It was clearly a disadvantage in her employment to be shouted at in a meeting with Mr Fotofili and Mr Henderson. No employee should expect to be shouted at, bullied or demeaned. In addition, no fair and reasonable employer could have carried out those actions in all the circumstances. I therefore find that Ms Shanks was subjected to an unjustified disadvantage in her employment in this regard.

The failure of the respondent to provide Ms Shanks with the opportunity to have representation or support at the meeting where the respondent was well aware she was a union member

[80] The respondent says that the meeting was not a disciplinary meeting, and so it was not required to have invited Ms Shanks to have a representative there. The respondent says that the meeting was more of an exploration of what had happened, so all parties could learn from it.

[81] However, I have found that Ms Shanks was shouted at at the meeting. Ms Shanks agreed in her evidence that she was subjected to a 'telling off'. It may not have been a formal disciplinary meeting, but there was an element of discipline to the meeting.

[82] In these circumstances, I find that Ms Shanks was entitled to have had her union representative present at the meeting. Not having a representative there caused Ms Shanks a disadvantage as it is more likely than not that, if she had, she would not have been subjected to the shouting, demeaning and bullying she complains of. Was that disadvantage unjustified? I find that it was, as no fair and reasonable employer could have failed to ensure that Ms Shanks could have a representative present in circumstances where Mr Fotofili knew that he was going to blame Ms Shanks for the stoppage of production.

Ms Shanks was unlawfully detained outside her working hours by the supervisor during the course of the meeting on 13 January 2017

[83] Ms Shanks said in her oral evidence that she just walked out of the meeting when she got fed up with the argument between her co-worker and Mr Fotofili. She was not stopped from leaving, nor disciplined for having left. She was not detained in the meeting therefore. I have already dealt with the fact that she was compelled to attend the meeting after hours.

The failure of the respondent to protect Ms Shanks and provide her with a safe workplace immediately subsequent to the incident on 13 January 2017

[84] This allegation goes to the same issue explored above, about the knowledge of the respondent immediately after the incident of abuse. I have found on balance that neither Mr Fotofili or Mr Henderson (and no other supervisor or manager) knew of the verbal abuse by Mr Wihone. Ms Coulter, the person in charge of quality assurance, knew as she stopped Mr Wihone from continuing his tirade. However, Ms Shanks has never suggested that Ms Coulter was ever at fault, and it is not clear that she was in any position to take any steps to protect Ms Shanks any further.

[85] Furthermore, once Ms Shanks left work on 13 January, she did not return until 16 January, when she lodged her written complaint.

[86] I find that the respondent (that is to say, its managers) was not aware of the need to protect Ms Shanks until after she had lodged her written complaint. Therefore, its duty to enquire and take steps to protect Ms Shanks was not engaged immediately after the abuse.

The failure of the respondent to protect Ms Shanks and provide her with a safe workplace immediately subsequent to her providing her formal written complaint

[87] Mr Laplanche and Mr Cuthill effectively admitted that they did not think to take proactive steps to find out what Ms Shanks needed after they found out about the abuse. I suspect that they approached the complaint solely as a potential disciplinary issue, and did not address their minds to the situation of the victim as well.

[88] WorkSafe New Zealand has published guidance⁵ on what businesses should do when they have been advised of an allegation of bullying in the workplace. Whilst I accept Ms Vincent's submission that a single incident of unreasonable behaviour is not considered 'workplace bullying' as defined in the WorkSafe guidance, the guidance is still informative in regard to an appropriate approach to take in circumstances where a member of staff had been subjected to unwanted and unwarranted hostility, whether by way of a one off incident or not.

[89] The WorkSafe guidance states that, if a formal approach is taken (which it was in Ms Shanks' case) the employer must decide whether to take interim measures to ensure the safety and welfare of the people involved in the investigation. Interim measures may include suspension of the subject of the complaint pending the outcome of an investigation, or reassignment to other duties until an investigation is complete⁶.

⁵ Preventing and responding to bullying at work. ISBN:978-0-908336-98-2 (online)

⁶ Ibid, page 10.

[90] Whilst the guidance is not binding on the Authority, it is informative, and is clearly relevant even in a one off act of verbal abuse which may not satisfy the definition of ‘bullying’, as an employer cannot be sure that there would not be a repeat of the abuse, or other acts of hostility, and cannot be sure how the abuse affected the victim.

[91] Ms Shanks’ evidence was that she was shocked when she saw that Mr Wihone was still working in the room after she had lodged her formal complaint. She also gave evidence that she felt anxiety that he may abuse her again. This evidence was not challenged by the respondent, and is entirely understandable, given that Ms Shanks had, only a few days before, been exposed to a public tirade of verbal abuse which had affected her significantly. The respondent’s failure to explore ways of ensuring Ms Shanks felt safe in the workplace was a disadvantage in her employment, as she had a legitimate expectation that her employer would do so.

[92] I find that, in all the circumstances, no fair and reasonable employer could have failed to have explored ways of ensuring Ms Shanks felt safe in the workplace immediately after she had lodged her complaint. This does not mean the respondent should necessarily have suspended Mr Wihone, but it should have explored with Ms Shanks what steps it could reasonably have taken to ensure that she felt safe from further possible verbal abuse. Ms Shanks was therefore unjustifiably disadvantaged in her employment by this failure.

The failure of the respondent to suspend (or transfer) Mr Wihone during the alleged investigation

[93] This is part and parcel of the previous allegation. Suspension or transfer may not have necessarily been the right step, but the point is that the respondent did not explore with Ms Shanks what she felt was needed to protect her and make her feel safe.

The failure of the respondent to communicate with Ms Shanks during the course of the alleged investigation

[94] This complaint is the same as the following complaint (‘the failure of the respondent to advise Ms Shanks of the process and the procedure that would be followed in the investigation of her complaint’) and so I shall treat them as one.

[95] The WorkSafe guidance referred to above makes clear that the investigator of a complaint should tell everyone of the process and timelines that s/he has decided on. Ms Shanks was not kept informed about this.

[96] Ms Shanks did not give express evidence about her feelings about not being kept informed of the process and progress of her complaint. However, I can readily infer that she did suffer a disadvantage because of her nervousness of having to work in the same room as Mr Wihone. Not knowing what was happening about her written complaint would have exacerbated that anxiety. In addition, the respondent had a duty of good faith to be responsive and communicative with Ms Shanks as Ms Coulston points out.

[97] Was the disadvantage justified? I find that it was not. Ms Shanks was entitled to be told what was happening, and simply telling her that it would be taken seriously, was insufficient. I find that, in all the circumstances that prevailed at the time, no fair and reasonable employer could have failed to have advised Ms Shanks of the process to be followed, and communicated with her, once it had received her written complaint.

The failure of the respondent to fairly and reasonably investigate Ms Shanks’ complaint against Mr Wihone;

[98] This is a generic complaint about the investigation process, which I have partially addressed above. However, there was also a failure to interview Ms Shanks. Ms Vincent refers in her submissions to *Murphy and Routhan t/a Enzo’s Pizza v Van Beek*⁷ to argue that Mr Wihone admitted wrongdoing and so the respondent did not need to interview Ms Shanks. However, *Enzo’s Pizza* can be distinguished on the facts as there was no ‘victim’ in that case (other than the respondent itself) to whom the respondent owed separate duties.

⁷ [1998] 2 ERNZ 607

[99] Whilst I accept the evidence of Mr Laplanche that Mr Wihone accepted the contents of Ms Shanks' complaint, and so he saw no need to interview other witnesses, it is good practice to interview the complainant as well as the alleged perpetrator, even where the accused admits the conduct. This is made clear in the WorkSafe guidance referred to above.

[100] Was the failure to do so an unjustified disadvantage in Ms Shanks' employment? Insofar as an interview has as its aim the objective of eliciting further information from the complainant about her complaint, (as opposed to communicating with the complainant about process, and ensuring she is safe) had the respondent interviewed her it would more likely than not have realised that she wanted to have investigated the fact that she was compelled to attend a meeting with Mr Fotofili as well.

[101] Failing to interview Ms Shanks did, therefore, cause a disadvantage in her employment, as she was not given the chance to explain her complaint and what she wanted to be achieved by it. That disadvantage was also unjustified as no fair and reasonable employer could have failed to have interviewed the complainant in all the circumstances.

The failure of the respondent to fairly and reasonably investigate Ms Shanks' complaint in relation to the meeting she was compelled to attend on 13 January 2017

[102] Mr Laplanche and Mr Cuthill said that they did not focus on the part of Ms Shanks' complaint that referred to this meeting and so did not realise it needed investigating. I am satisfied that they did not deliberately ignore that part of the complaint. It was not very clearly expressed. However, if they had interviewed Ms Shanks, they probably would have elicited that information.

[103] Furthermore, and importantly, Ms Coulston's personal grievance letter made clear just over a month later that Ms Shanks was complaining about the meeting. Mr Cuthill said he treated that personal grievance letter as a legal matter, and passed it to the Group legal counsel. Whilst it was for the respondent to decide how to deal internally

with a personal grievance, it was not simply ‘a legal matter’ or a letter before action. Unfortunately, that is exactly how it was treated by the respondent and it provoked a wholly defensive response.

[104] The letter from Ms Coulston was a grievance given on behalf of an existing employee which needed to be considered in good faith. A personal grievance in these circumstances, even if from a lawyer, should be treated as a request to resolve an employment relationship problem.

[105] In short, not having her complaint about the meeting investigated was a disadvantage in her employment, as she was entitled to have it investigated in good faith. The failure to investigate the complaint was unjustified as no fair and reasonable employer could have failed to have investigated the complaint in all the circumstances. Treating the personal grievance letter simply as a letter before action perpetuated the unjustified disadvantage suffered by Ms Shanks.

The failure of the respondent to fairly and reasonably investigate Ms Shanks’ complaint in relation to her being unlawfully detained at the meeting

[106] I have already found that Ms Shanks was not detained at the meeting.

The failure of the respondent to sufficiently discipline Mr Wihone in order to provide a deterrent to him against further acts of bullying, abuse, intimidation and harassment in relation to Ms Shanks and other workers

[107] First, I find that Ms Shanks was not subjected to further bullying, abuse, intimidation and harassment by Ms Wihone. Ms Shanks’ evidence of him staring at her from the bridge and in the smoko room after she had lodged her complaint being possibly due to an erroneous perception caused by her mental state at the time creates too much doubt for me to safely find, on a balance of probabilities, that this occurred.

[108] Next, the Authority has no jurisdiction to investigate his alleged bullying of other workers as they have not lodged personal grievances with the Authority.

[109] Next, I do not accept, as asserted by Ms Coulston, that there was any cogent evidence of “a campaign of minimisation, defense [sic] and justification of Mr Wihone [sic] actions and ...a campaign of blaming the female victim in a male dominated industry....”. For example, Mr Pullar, a senior supervisor (not senior management as asserted by Ms Coulston) remarked that Mr Wihone ‘would not act in this way in the future’. However, he was acting as Mr Wihone’s support person, and such a statement is not expected from someone acting in such a capacity.

[110] I find that the respondent did take seriously Mr Wihone’s verbal abuse of Ms Shanks, and that it did not seek to ‘protect’ him, as submitted. Whilst Ms Coulston may have imposed a harsher sanction on Mr Wihone, the sanction that the respondent imposed was within a reasonable range of responses open to it.

[111] Finally, I do not accept that Ms Shanks’ employment or conditions of employment were unjustifiably disadvantaged by the respondent not sanctioning Mr Wihone more severely. The allegation is based on a speculation that Mr Wihone was not going to be sufficiently deterred by the sanction he received. However, at the time Mr Wihone expressed contrition and accepted his culpability. The sanction imposed upon Mr Wihone was one which a fair and reasonable employer could have imposed in the circumstances.

[112] I will say that I am not entirely convinced that the Authority has the jurisdiction to make the finding I have made in any event, given that it is Ms Shanks who complains, not Mr Wihone. Therefore, an alternative finding is that the Authority is precluded from making a finding about the sufficiency of Mr Wihone’s punishment when considering any disadvantage suffered by Ms Shanks. I believe it may be judicial overreach for the Authority to interfere with or comment on the sanction imposed upon someone who is not a party to the proceedings.

The failure of the respondent to advise Ms Shanks of the outcome of her complaint against Mr Wihone

[113] Ms Coulston accepts that the respondent owed a duty of confidentiality to Mr Wihone. The respondent could not have legitimately advised Ms Shanks exactly what disciplinary outcome he was to receive. I believe that Ms Shanks' complaint is better rolled up with the following one, and I shall address it there.

The failure of the respondent to provide procedures and strategy to protect Ms Shanks from future abuse and intimidation by Mr Wihone

[114] The WorkSafe guidance note referred to above states at page 10 that, as part of a formal process, the investigator or employer should meet with the people involved separately to discuss the recommended actions. Mr Laplanche did meet with Ms Shanks but simply said that the matter had been dealt with⁸. Ms Shanks was also given a copy of Mr Wihone's written apology.

[115] However, no material steps were taken to ensure that Ms Shanks felt safe after the incident. She was, after all, the victim of the abuse. It was not simply a matter of her complaining and her complaint being upheld. There also needed to be taken the step of ensuring her health, safety and welfare going forward. If Ms Shanks had been physically injured, one would have expected her employer to have met with her to ensure that she was fit and able to work. An emotional assault such as she suffered is not fundamentally different in my view.

[116] The respondent says that a nurse was available to be consulted with by Ms Shanks at the time, and that there is a formal, confidential EAP programme available. However, it seems from evidence conceded by Mr Laplanche that the nurse was not well respected by some workers. Ms Shanks was also not aware of the EAP option, although she suggested she would not have used it anyway. Ms Shanks also gave some evidence which suggests that she would not have necessarily engaged with a meeting with management to talk about the effect on her of the abuse she suffered from Mr Wihone.

⁸ I do not believe that he said that the matter had been dealt with "in a disciplinary meeting" despite his file note to that effect.

[117] In light of this evidence from Ms Shanks, on balance I find that Ms Shanks did not suffer a disadvantage in her employment in not having a formal follow up meeting in which she was asked how she was feeling, and advised of the options available to her. However, that finding should not be taken to mean that, in other circumstances, such a follow up meeting would not be an appropriate action.

The failure of the respondent to sufficiently discipline and provide a deterrent to Mr Wihone which resulted in further workers being abused, intimidated, harassed and bullied by him

[118] Ms Shanks says that, as a direct consequence of the subsequent bullying and abuse of other workers, she suffered further trauma and fear that she would be the victim of further abuse and bullying. However, first, she did not witness one of the alleged incidents, but only heard of it, and it seems she witnessed a robust discussion between Mr Wihone and another worker, on another occasion. I am unable to find that Mr Wihone did go on to abuse, intimidate, harass or bully other workers.

[119] Second, Ms Shanks says she did not want Mr Wihone to be dismissed. That would have been the only sure way of guaranteeing he did not go on to take other actions that may have indirectly upset Ms Shanks. It is pure speculation that a more harsh sanction short of dismissal would have prevented further abuse.

[120] Third, I have already found that the respondent's actions in disciplining Mr Wihone were what a fair and reasonable employer could have done in the circumstances, given his contrition and acknowledgement of wrongdoing.

[121] Finally, I am not convinced that the Authority has the jurisdiction to make a finding that the actions of an employee against third parties are capable of constituting an unjustified disadvantage in the employment or conditions of Ms Shanks. What Ms Coulston proposes is a form of vicarious liability, which is a tortious concept, which falls outside the scope of the Act, and the Authority's jurisdiction. As Ms Vincent points out, there is no equivalent in the Employment Relations Act of s 68 of the Human Rights Act 1993.

The intimidation of subsequent complainants and witnesses by the respondent which resulted in further trauma and fear being experienced by Ms Shanks

[122] This is an element of the alleged action considered above.

The respondent issuing Ms Shanks with a letter threatening disciplinary action (including dismissal) and requiring medical certificates for sick leave

[123] Ms Shanks says that the respondent failed to investigate the reasons for her absenteeism and was well aware of the trauma she had suffered as a result of the events of 13 January 2017. Ms Shanks was in fact absent because of those events.

[124] On 9 June 2017 Ms Shanks received a letter from a HR manager which advised Ms Shanks that she had exceeded her allocation of sick leave for the 12 month period. She was told that she was entitled to 5 days paid sick leave and that she had taken 7.5 days off in total. She was then told that unauthorised absence, lateness or patterns of absenteeism are deemed as misconduct under the code of conduct and that continued absenteeism could result in disciplinary action being taken up to and including dismissal. She was also advised she would have to provide a doctor's note for further days' absence until her absenteeism reached an acceptable level.

[125] The letter also stated that, "if there are issues around your absenteeism that we are not aware of, we are willing to discuss these with you. Alternatively we can offer you support through our OCP Programme. This support would be confidential". She was also invited to contact the writer or another named individual "if there are any issues regarding this".

[126] First, the respondent is entitled to take steps to address absenteeism, as it calls it. These steps may include writing to an employee to tell them that their sick leave has exceeded an acceptable level. Second, the letter invited Ms Shanks to contact the writer, and advised her of ways of getting support. Ms Shanks did not know what the OCP Programme was, but she could easily have asked.

[127] Ms Shanks was not subjected to any disciplinary action following the receipt of the letter. I do not accept that the letter was a warning, as submitted by Ms Coulston; at least, it was not a disciplinary warning. Also, it appears that the respondent would not have been aware when the letter was sent what had caused the absence.

[128] I do not find that the receipt of this letter caused Ms Shanks an unjustified disadvantage in her employment. Sending such a letter was an action that a fair and reasonable employer could have taken in all the circumstances. However, I will comment that I question whether it is appropriate to label 'patterns of absenteeism' as misconduct, when it could be caused by sickness or injury beyond the control of the employee. A disciplinary approach based on a potential misconduct in such circumstances could result in unjustified action.

The respondent's Plant Manager at Smithfield failed to discourage, and supported senior staff members to, bully, harass and intimidate workers.

[129] I heard absolutely no evidence to support this allegation, which is not expressed as an action suffered by Ms Shanks in any event.

The respondent's Plant Manager bullying, intimidating and harassing workers and particularly workers who are complainants and witnesses in relation to bullying instances by senior staff members.

[130] I heard absolutely no evidence to support this allegation, which is not expressed as an action suffered by Ms Shanks in any event.

Conclusion

[131] Ms Shanks was subjected to unjustified disadvantage in her employment as follows:

- a. By being instructed to attend a meeting with Mr Fotofili after her shift had ended;
- b. By being shouted at, demeaned and bullied by Mr Fotofili;

- c. By not being given an opportunity to have a representative present at the meeting with Mr Fotofili;
- d. By the respondent not exploring with Ms Shanks what steps were needed to be taken so she felt safe after lodging her written complaint;
- e. By not being kept informed of the progress of the investigation;
- f. By not having been interviewed as part of the investigation; and
- g. By the respondent not investigating her personal grievance about the meeting with Mr Fotofili.

[132] I shall now assess what remedies are due to Ms Shanks.

Remedies

[133] Section 103 of the Act materially provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

[134] In *Waikato District Health Board v Kathleen Ann Archibald*⁹ Her Honour Chief Judge Inglis referred¹⁰ to assessing compensation in terms of a broad analytical framework of three bands, as follows:

- a. Band 1 involving low level loss/damage;
- b. Band 2 involving mid-range loss/damage; and
- c. Band 3 involving high level loss/damage.

[135] Chief Judge Inglis designated her award of \$20,000 in *Waikato District Health Board*¹¹ as falling “around the middle of band 2”, which suggests that she theoretically envisages the three bands as justifying awards of between \$1 to \$13,333 for Band 1, \$13,334 to \$26,666 for Band 2, and \$26,667 to \$40,000 for Band 3. Presumably, a more approximate approach would need to be adopted for practical purposes.

[136] It is clear that Ms Shanks was affected quite significantly by the experience of being publically abused by Mr Wihone, and the sum of \$20,000 sought by Ms Coulston on behalf of Ms Shanks may well have been an appropriate sum. However, as I have found, that was not an action of the respondent, and so the effects Ms Shanks suffered as a direct result of having been abused are not compensable in the Authority.

[137] However, I accept that Ms Shanks will have suffered further humiliation, loss of dignity and injury to her feelings when she was compelled to attend the meeting with Mr Fotofili after her shift ended, and when she was shouted at, demeaned and bullied in the meeting. I also accept that the effects she was suffering from as a result of the verbal abuse by Mr Wihone would have been exacerbated by Mr Fotofili.

[138] In addition, I accept that the respondent not exploring with Ms Shanks what steps were needed to be taken so she felt safe after lodging her complaint will have added to Ms Shanks’ humiliation, loss of dignity and injury to her feelings.

⁹ [2017] NZEmpC 132

¹⁰ at [62]

¹¹ at [63],

[139] It is not possible to tease apart the different effects suffered as a result of the different unjustified actions. I will therefore assess the effects overall, bearing in mind that the primary effect is not compensable. This is a difficult task, and I can only estimate an appropriate award, by reference to Chief Judge Inglis' bands.

[140] I believe that the effects of the unjustified actions I have found will have fallen within the upper end of band 1, and I assess \$10,000 as being a suitable award, in all the circumstances. I would note that the cases cited by Ms Vincent in which compensation has been awarded for disadvantage predate *Hall v Dionex Pty Ltd*¹², in which the Employment Court commented on "average compensatory awards made by the Court [having] remained at stagnant levels for the last 20 years, despite the inflationary effect that might otherwise be expected to have increased them"¹³.

[141] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s 124 of the Act).

[142] I disagree with Ms Vincent that Ms Shanks swearing prior to her pulling the cord justifies a reduction for contribution, as that is totally unrelated to the unjustified actions that I have found occurred. I also disagree that Ms Shanks failed to proactively seek assistance (she had Ms Coulston raise a comprehensive grievance on her behalf). I agree with Ms Coulston that Ms Shanks did not contribute in any blameworthy way (or at all) to the situation giving rise to the personal grievances she suffered, and so I do not reduce the award of compensation.

[143] I agree with Ms Vincent that failing to provide footage cannot justify any uplift in the award.

¹² [2015] NZEmpC 29

¹³ At [87].

Reinstatement of 5 days sick leave that the Applicant took as a result of the unjustifiable disadvantages

[144] Ms Shanks seeks the reinstatement of five days sick leave which she says she took as a result of the effects she felt after the verbal abuse. Ms Coulston submits that, to have the leave reinstated is no different to her being reimbursed for wages lost as a result of a personal grievance except that the Applicant has lost her entitlement to her statutory leave through no fault of her own. Ms Coulston says that, had the Applicant not had an entitlement to sick leave then she would be seeking reimbursement of lost wages for the days she took off work as a result of the personal grievance and would be entitled to that reimbursement. Therefore it would seem inequitable to in effect penalize the Applicant because she had an entitlement to sick leave and was able to utilize it because she had not previously used it.

[145] Whilst s 123 of the Act does not provide for the reinstatement of sick leave taken because of a personal grievance for unjustified disadvantage, I believe that s 123(c)(ii) of the Act may be broadly defined enough to enable the Authority to award compensation for any sick leave which Ms Shanks took over and above her allowance due to having had to take five days sick leave because of the effect on her of the verbal abuse.

[146] However, this presupposes that Ms Shanks took the sick leave because of having suffered the unjustified disadvantages that I have found. I cannot be satisfied that she did. I believe she is likely to have taken the sick leave because of the verbal abuse by Mr Wihone, which was not an unjustified action of the respondent. I therefore decline to award any compensation for unpaid sick leave.

Order

[147] I order the respondent to pay to Ms Shanks the sum of \$10,000 pursuant to s 123(1)(c)(i) of the Act, within 7 days of the date of this determination.

Recommendations

[148] Ms Coulston asked that the Authority make recommendations under s 123(1)(ca) of the Act. I make the following recommendation, as I do find that workplace conduct or practices were a significant factor in the personal grievance.

[149] My recommendation is that, within the next three months, the respondent formally adopts the WorkSafe guidance on investigating bullying as part of its process to deal with complaints against other workers, supervisors or managers of hostile conduct. This process should minimally include the following steps, where the investigation is formal:

- a. assessing the accuser's vulnerability, with his or her input;
- b. exploring ways of making the accuser feel safe, whilst protecting the rights of the accused;
- c. consulting with all affected parties about the process to be adopted in investigating the complaint;
- d. interviewing the accuser to ensure the complaint is fully understood;
- e. keeping the parties informed about the progress of the investigation;
- f. advising the accuser of the outcome, whilst protecting the rights of the accused; and
- g. exploring ways to ensure the accuser remains safe after the investigation is concluded.

[150] I also recommend that any personal grievance received (whether raised in writing or orally) in respect of an employee who remains employed with the respondent be treated as an indication of an employment relationship problem that requires an attempt at resolution in accordance with the Act, and not just treated solely as a legal matter. I acknowledge, however, that an overly combative approach by a representative for an employee may make such an attempt impracticable, and that it may also be impeded by an insistence that all communications with the employee be made via his or her representative.

[151] I note that Ms Coulston seeks a recommendation relating to training in relation to bullying, harassment and abuse. Whilst training of supervisors and managers (as well of workers) is undoubtedly a desirable practice, I do not make a formal recommendation under s 123(1)(ca) of the Act as I did not find that a lack of training can be blamed for what transpired.

[152] Finally, I acknowledge that the respondent did not completely shut its eyes to the issues that arose from the investigation into Ms Shanks' complaint. It did initiate a period of intense mentoring of Mr Wihone and addressed the issues of bullying with all night shift supervisors shortly after the conclusion of the disciplinary investigation and with all staff and supervisors at the start of the following season. I also believe that the apology that was given to Ms Shanks was given in good faith, and with honourable intentions.

Costs

[153] Costs are reserved. The parties are to seek to agree between themselves how costs are to be dealt with, but if they cannot agree within 14 days of the date of this determination, Ms Coulston will have a further 14 days within which to serve and lodge a memorandum of counsel, setting out what contribution is sought, and the basis for it, and Ms Vincent will have a further 14 days within which to serve and lodge a reply. A determination will then be made on the papers.

David Appleton
Member of the Employment Relations Authority