

**ORDER PROHIBITING PUBLICATION OF THE NAME OR IDENTIFYING
PARTICULARS OF THE DEFENDANT**

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2025] NZEmpC 161
EMPC 103/2024**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	THE CHIEF OF THE NEW ZEALAND DEFENCE FORCE Plaintiff
AND	YFX Defendant

Hearing: 9-12 December 2024
(Heard at Wellington)

Appearances: J P A Boyle and I Kitchin, counsel for plaintiff
A Mapu and A De La-Cruz, advocates for defendant

Judgment: 1 August 2025

JUDGMENT OF JUDGE K G SMITH

[1] YFX began working as a civilian employee of the Chief of the Defence Force (NZDF) on 10 November 2008. In 2009, she was promoted to be enquiries team leader and acting supervisor. In November 2014, a restructuring occurred and her role changed to become one of two subject matter experts in an administrative division of NZDF.

[2] YFX remained employed by the NZDF until she resigned on 6 July 2020. The circumstances of that resignation led to claims that she was unjustifiably disadvantaged in her employment and constructively dismissed.

[3] The Employment Relations Authority rejected YFX's claims that she was unjustifiably disadvantaged but accepted that she was constructively dismissed.¹ NZDF was ordered to pay \$40,000 as compensation for humiliation, loss of dignity and injury to her feelings under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). The Authority declined to award lost wages holding that there was no entitlement to them.²

[4] An order was made by the Authority prohibiting the publication of YFX's name or any information that might identify her.³

The challenge

[5] The NZDF challenged the determination and a full rehearing of the entire matter was sought. YFX responded by supporting the determination and by seeking to establish personal grievances that she was disadvantaged during her employment. Where the Authority held that some of the alleged grievances were not raised within time, YFX sought a contrary finding.

What happened?

[6] YFX lives with complex mental health conditions which are adequately described for present purposes as dissociative identity disorder (DID), a complex post-traumatic stress disorder and a generalised anxiety disorder. She has multiple personalities and suffers from misophonia.

[7] YFX's mental health seems to have been first disclosed to her immediate managers after she was hospitalised in 2016. She admitted herself to hospital where she remained for about a month. The catalyst for that hospital admission was her concern about how certain staff reacted to her appointment as a subject matter expert.

¹ *YFX v Chief of the New Zealand Defence Force* [2024] NZERA 86.

² At [90] and [91].

³ At [101].

[8] A return-to-work plan was developed by YFX's team leader, Geoff Fox, following a meeting with YFX's husband. As matters progressed, there was more than one meeting attended by YFX's husband as her representative. Occasionally, by agreement, he attended meetings on her behalf but without her being present. There is no dispute that on those occasions he was authorised to represent her and to make arrangements for her.

[9] At a meeting on 4 July 2016 there was a discussion about available workplace support. Some disclosures were made about YFX's mental health. In the same meeting, Mr Fox was advised that she was easily upset by things such as a door beeping and lighting in her work environment as symptoms of her misophonia.

[10] On 22 July 2016, the return-to-work plan was discussed in a meeting between YFX, her husband, Mr Fox and his manager, Cheryl Pointon. It was finalised that day. On 3 October 2016, YFX provided to Mr Fox a copy of a wellness plan she prepared while in hospital in July that year. While this plan included early warning signals, "triggers" and support mechanisms, it was not supported by medical advice.

[11] YFX returned to work on reduced hours and resumed full-time work on 30 November 2016. The situation appeared to have returned to more or less normal until she was evaluated for a national security clearance by the New Zealand Security Intelligence Service (SIS) in late 2018 and early 2019. The security clearance was required for YFX's work. YFX found the process to be invasive and distressing because of the time it took and the content of the questions she was asked which included inquiring about her physical health.

[12] On 22 February 2019, Ms Pointon was advised by NZDF's personnel security advisor that YFX's security clearance was approved. It appears to be a quirk of this process that there are situations where what is granted must be conveyed in person. To that end, a meeting was organised for 4 March 2019. Several people were present at the meeting, some at the invitation of YFX. NZDF's Personnel Security Advisor, Ian Keyes, was present as were YFX and Ray Marshall as her supporter, Peter Vasbenter (NZDF's Personnel Security Psychologist), Colonel Clare Bennett (a serving officer and psychologist) and Ms Pointon. Colonel Bennett attended at YFX's request and as a support person.

[13] The security clearance formalities were completed but the meeting was not entirely successful. YFX found it stressful, and she strongly expressed her views about the SIS process. After the meeting she took sick leave and returned to work on 15 March 2019.

[14] While YFX was waiting for the security clearance a separate incident prompted her to write to Mr Fox. On 28 January 2019, she wrote to him about the effects on her caused by another employee's cough which was described as "significantly harsh and disruptive". She accepted that there were limits to the expectations that could reasonably be placed on her employer about quietening the workplace. However, she held the view that, with a cough of the sort complained about, the other employee should be expected to "cover her mouth while coughing" and for that outcome to be supported by Mr Fox. YFX was not the only person to complain.

[15] On 5 February 2019, YFX sent an email to Mr Fox and Ms Pointon, about the disruption caused by the coughing and asked if she could be relocated somewhere else so as not to be disturbed by it. Of her own volition she began working in another room. She informed Mr Fox and Ms Pointon that she would need to work there until the coughing was resolved.

[16] YFX's move further away from the coughing employee did not resolve the problem. However, she knew NZDF had taken advice and that practical steps were being taken to try to address it. In the first instance, the coughing employee was sent home until a medical clearance was obtained confirming she was not contagious. Other steps did not appease YFX, such as reminding the other employee to cough into a handkerchief to muffle the noise.

[17] Eventually, the coughing employee complained about YFX, alleging she was being bullied. YFX was invited to a meeting about the complaint, which NZDF described as fact finding. The meeting took place on 24 May 2019. YFX considered that she was not engaged in bullying, particularly because she raised issues through the "chain of command", meaning with her managers.

[18] The conclusion to this complaint was NZDF's decision to deliver a letter of expectation to YFX, dated 12 July 2019. YFX was not satisfied with that outcome and she asked Mr Fox to review the letter.

[19] Meanwhile, by letter dated 15 April 2019, Mr Fox invited YFX to a meeting to discuss his concerns about her overall wellbeing, behaviour in the workplace and relationships with other colleagues. What prompted this request was described in four bullet points. In summary, they were that:

- (a) Mr Fox had been advised that, during the meeting on 4 March 2019, YFX made comments that she had not received adequate support from him.
- (b) YFX was alleged to have made a comment misrepresenting the discussion at a leadership meeting on 4 March 2019 and, after that was queried, went on sick leave during which time she emailed a formal request asking for the name of the person who made the allegation.
- (c) An interaction Mr Fox observed between YFX and another employee, on 25 March 2019, appeared to cause that other employee some distress. Mr Fox's letter said he had attempted to discuss the situation with her but she was defensive about it and did not accept her conduct was unacceptable, even though she apologised to the other employee.
- (d) She had raised noise level concerns in the workplace as an ongoing frustration, which NZDF had attempted to mitigate. Mr Fox's letter said that he was concerned that her ongoing frustration was impacting on her wellbeing and on her colleagues.

[20] As would be expected given the nature of the proposed meeting, Mr Fox listed in his letter what he wanted to better understand. That included how she viewed the support from him and what she expected, how she should receive constructive feedback and coaching in the workplace, her views on the relationship with the other employee in the 25 March 2019 incident and how he could support her "overall wellbeing and any relationship issues" within the office.

[21] The letter told YFX that the proposed meeting was not disciplinary but she was invited to bring a support person with her. She was informed that NZDF's Human Resources Manager, Ann Nordin, would be at the meeting. The letter ended by advising YFX that the matter would be handled on a confidential basis. She was asked

not to discuss its subject matter except with close family members and her support person or representative.

[22] There was a tragic response to this letter. It was handed to her in a sealed envelope and she was asked not to open it except in her husband's presence. However, she opened it without her husband being present and later that evening harmed herself.

[23] When YFX returned to work following the self-harm incident, steps were taken to create what NZDF considered to be a support plan. Ms Pointon and Mr Fox decided that they needed to seek medical information, so that they were better placed to understand YFX's condition and how to deal with it. That is not how YFX viewed what was happening. She believed efforts were being made to manoeuvre her towards dismissal for medical incapacity.

[24] The need for a support plan was explained by Ms Pointon. She said that in 2016 she was made aware that YFX suffered from DID. However, she was not given supporting medical advice at that time. In considering a support plan in 2019, the advice she received from NZDF's human resources department was that a routine performance management process would not address the impact on YFX's performance of the complex mental health condition and could cause unreasonable stress given what was known about it. Ms Pointon accepted YFX's unique needs had to be balanced with concerns about performance and behaviour. The need for medical advice to inform the support plan being considered became more acute following the self-harm incident.

[25] At a meeting on 24 April 2019, to discuss behavioural and wellbeing concerns with YFX, her husband explained the mental health condition and told NZDF about her multiple personalities. Apart from that disclosure about YFX's health, the meeting discussed the security clearance process she found difficult, her concern that she had not been supported by Mr Fox during the meeting that ended the process, and concerns about responsibilities for allocating work which was described as a "big gray area". There was a general discussion about the working environment and an agreement was made to meet again.

[26] On 26 April 2019, Ms Pointon contacted YFX's husband concerned about her health. In the conversation, she referred to requesting medical advice and the power

to do so being in the employment agreement between NZDF and YFX. The request was not rejected but YFX's husband thought it was a good idea to first discuss providing that consent with her psychiatrist.

[27] There was another meeting on 6 May 2019. What lay behind the need for this meeting was the self-harm incident. YFX did not attend because she had found the previous meeting unsettling.

[28] There was a further wellbeing meeting on 21 May 2019, which YFX's husband attended on her behalf. Mr Fox, Ms Pointon and Ms Nordin were present. The meeting took place even though by that stage there was no supporting medical information about YFX's mental health. Ms Pointon explained, and I accept, that it was apparent YFX was finding it difficult to cope and that was having an impact on other employees.

[29] During this meeting, Mr Fox responded to concerns raised during previous meetings. Some further information was disclosed about DID. However, there is a dispute about some aspects of this meeting; certain comments were alleged to have been made by Ms Pointon which she denies having made. They were to the effect that YFX just needed to change her behaviour and attitude. It is not necessary to resolve that dispute given the conclusions reached in this judgment.

[30] On 5 August 2019, Mr Fox wrote to YFX asking for medical information to be disclosed. The letter referred to them having met several times to discuss her health and NZDF's concerns about her wellbeing and behaviour in the workplace. Mr Fox went on to comment that, despite requesting medical information, up to the date of the letter it had not been supplied. The absence of that information was described as making it difficult for NZDF to ascertain her limitations in the workplace and the support that could reasonably be provided to assist her at work.

[31] Mr Fox's letter did not shy away from touching on the problems he was concerned about. The letter referred to having growing concerns about her wellbeing and her relationships with colleagues. His letter included a comment that she appeared to struggle with receiving feedback and to effectively perform her role especially when required to liaise with colleagues. He referred to NZDF's aim being to identify the support she required to be able to meet its behavioural expectations, to ensure that she

was operating in line with NZDF's civilian code of conduct, and that she was supported to meet its performance expectations.

[32] Mr Fox's letter mentioned NZDF complying with its duties under the Health and Safety at Work Act 2015 in managing an employee's mental health issues and stated it was practical to require further medical information before considering routine performance management processes.

[33] While couched as a request, the letter reminded YFX that, if she did not provide the information, she might be required to undergo a medical assessment at NZDF's cost as provided for in the employment agreement between them.

[34] Mr Fox's letter enclosed a consent form to collect medical information. It was derived from a template which provided that the information may be used for possible "medical retirement". Despite that comment, he was adamant throughout his dealings with YFX, and her husband, that the information was being sought in an attempt to better understand the situation that needed to be dealt with and was not a pathway to dismissal.

[35] Preparing the support plan and the wellbeing meetings were on hold during June, July and the first week of August 2019, because of the investigation into the bullying complaint against YFX and because of issues she raised over the outcome of her annual performance review. YFX was concerned that the performance review assessment was lower than it had been in previous years.

[36] YFX was on special leave from 12 to 20 August 2019. On 22 August 2019, she left Ms Pointon a copy of the NZDF published guide; "Building and Maintaining Positive Mental Health". Ms Pointon's response was to email Colonel Bennett for advice about the policy and managing staff with mental health conditions. There was, it turns out, little information available about managing civilian staff but Ms Pointon spoke with Mr Vasbenter and gave him an overview about trying to prepare a support plan for YFX and was satisfied that she could proceed.

[37] Between August 2019 and November 2019 Ms Pointon, Mr Fox and Ms Nordin developed a draft support plan.

[38] On 27 August 2019, YFX's consultant psychiatrist and clinical psychologist each provided a report to NZDF. They stated the medication prescribed and therapy sessions being undertaken by YFX to target improving resilience and distress tolerance, and lessen "emotional dysregulation and dissociative behaviours and processing past trauma". NZDF was advised that YFX was actively engaged in her treatment and taking her medication. The psychiatrist's report advised that there were no concerns over YFX's ability to perform her work duties or about impaired judgment, lack of reliability or trustworthiness because of the mental health issues.

[39] The clinical psychologist had been treating YFX since March 2017. His report outlined circumstances that might impact on her. His opinion was that if she was provided with a safe environment where she felt supported, valued and trusted then he did not envisage any issues with a full return to work. The opinion included a comment that she was able to perform her duties but recorded that her trust in management had significantly deteriorated.

[40] On 30 September 2019, Mr Fox sent an email to YFX. The email was an apology because, following receipt of the report from the clinical psychologist, it appeared to him that NZDF had been remiss in acknowledging some letters and emails. Some information was provided in this email about how NZDF would progress. Importantly, Mr Fox was not prepared to conclude the support plan in Ms Pointon's absence on bereavement leave, but YFX was informed that he would return to her about it when matters could progress.

[41] On 18 October 2019, YFX was asked to attend a meeting either at the end of that month or on 1 November 2019.

[42] YFX attended work on 21 October 2019 but only briefly. She took stress-related leave from 25 October until 11 November 2019. She planned to return to work on 4 November, because she could not be off work unpaid, but NZDF's response was that she needed a "fitness to work" certificate from her doctor before she could return to work.

[43] On 12 November 2019, YFX asked for a copy of the support plan. The next day Mr Fox declined to send it to her until he had received a medical certificate that she was fit to return to work. A few days later, on 15 November 2019, a medical

certificate was supplied stating that she was unfit for work until 20 December 2019 which prompted a response from NZDF that it would not discuss the support plan until work resumed on 6 January 2020.

The 11 December 2019 letter

[44] On 11 December 2019, a letter was written to NZDF on YFX's behalf alleging several personal grievances and seeking urgent mediation. The letter began by stating that it was raising personal grievances for unjustified disadvantage, referring to s 103(1)(b) of the Act. What followed was a summary of alleged shortcomings attributed to NZDF in nine paragraphs, each one of which became the basis for the pleaded claims in this proceeding. In addition, the letter asked for remedies; reinstatement of annual leave and sick leave payments which were used to cover leave for stress, reimbursement for lost wages from the date of the letter until the matter was resolved, compensation under s 123(1)(c)(i) of the Act, an independent investigation into the performance review, and the costs of the claim. NZDF was invited to attend mediation. The letter ended with a statement on YFX's behalf that she was pragmatic and not interested in making this matter any more difficult than it needed to be.

[45] The letter was acknowledged by NZDF on 13 December 2019. A few days later, on 19 December 2019, the Mediation Service asked both parties about participating in a mediation on either 17 or 24 January 2020. On the same day NZDF informed the Mediation Service and YFX's advocate that the proposed dates for mediation were unacceptable. Three reasons were given to decline them:

- (a) NZDF was not able to respond to the personal grievance claims before Christmas given the time of year and the volume of information accompanying the letter which exceeded 150 pages.
- (b) Once NZDF had assessed the personal grievance claims it would be better placed to hold a view on liability to take to mediation.
- (c) Staff involved had already started leave or were away in January and a mandatory shutdown period was about to begin.

[46] In declining the proposed mediation dates, NZDF said it did not want YFX to incur unnecessary expense by agreeing to participate without adequate time to prepare.

[47] A detailed response to the claims was supplied by letter dated 7 February 2020. NZDF objected to some of the claims as being out of time, denied that personal grievances existed, and refused to provide any of the claimed remedies.

[48] YFX reacted by lodging a claim in the Authority. On 21 April 2020, the Authority directed the parties to mediation which eventually occurred on 28 May 2020.

[49] Agreement was not reached and YFX's attention turned to her ongoing employment. Advice that she was considering resigning was supplied by her advocate to NZDF on 23 June 2020. She resigned on 6 July 2020. The last day of employment was a month later, on 5 August 2020.

The issues

[50] The issues are:

- (a) whether YFX raised personal grievances for alleged unjustified disadvantages within time;
- (b) if the answer to (a) is yes, whether any action by NZDF was an unjustified disadvantage within the meaning of s 103(1)(b) of the Act;
- (c) whether the resignation was, in fact, a dismissal; and
- (d) if there was an unjustified disadvantage or dismissal, should compensation be awarded?

[51] Mr Mapu raised the possibility of a penalty being imposed if any of YFX's claims succeeded, but that claim was not pleaded and is not considered any further.

Were the claims for unjustified disadvantage raised within time?

[52] YFX pleaded nine alleged personal grievances claiming unjustified disadvantages. The first six pleadings were that NZDF failed to:

- (a) address the impact of an invasive security clearance process on YFX, knowing of her mental health history;

- (b) take practical steps to mitigate the noise hazard in a timely manner, despite knowing that noise is a “trigger” of YFX’s mental health issues;
- (c) justify a letter of expectation which was unfairly imposed on her following a flawed investigation process;
- (d) consult her before removing a job duty from her;
- (e) set out clear performance objectives for her, which effectively set her up to fail; and
- (f) provide quantitative justification relating to her performance review, which dropped her rating from 102.5 per cent to 97.5 per cent.

[53] The remaining three claims were that NZDF created unjustified disadvantages by:

- (a) inaction by “various senior managers” in relation to her complaints about Ms Pointon;
- (b) inaction by Mr Fox and Ms Nordin when they were made aware that YFX was considering leaving as she could no longer “bear the suffering arising out of her work situation”; and
- (c) failing the fundamental obligation of good faith in an employment relationship where no sensitivity was shown to YFX’s mental suffering; particularly when there were serious life-threatening events such as suicide attempts following “various work meetings”.

[54] During Mr Mapu’s submissions he confirmed that a personal grievance was not being separately pursued for the annual performance review rating, referred to in paragraph [52](f). That claim is not considered any further.

[55] A brief comment is required about the test to apply in considering what is required to raise a personal grievance. Mr Boyle and Mr Mapu both relied on *Chief*

of *Executive of Manukau Institute of Technology v Zivaljevic* which provided the following review about raising personal grievances.⁴

[56] A personal grievance must be raised with an employee's employer within the relevant notification period unless the employer consents to that step happening after the period has expired.⁵ A grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants to have addressed.⁶

[57] The process is informal and accessible.⁷ A personal grievance may be raised orally or in writing. No particular formula of words is required.⁸ All that is required is for the employee to provide sufficient information for the employer to be able to respond to the grievance.⁹ Where there has been a series of communications the totality of them may have to be considered to see if they constitute raising a grievance. It does not matter what an employee intended the complaint to be, or the preferred process for dealing with it in the first instance. Nor does it matter whether the employer recognised the complaint as a personal grievance. The issue is whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) by conveying the substance of it to the employer.¹⁰

[58] *Zivaljevic* agreed with the earlier judgment in *Creedy v Commissioner of Police*, to the effect that it is insufficient for an employee to simply advise an employer that he or she considers a personal grievance exists, or even to specify the type of grievance. The employer must know what is to be responded to and be given sufficient information to address the grievance on the merits with a view to resolving it soon and informally (at least in the first instance).¹¹ I agree with the summary and conclusions in *Zivaljevic* and *Creedy*.

⁴ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

⁵ Section 114(1).

⁶ Section 114(2).

⁷ At [36], relying on *Idea Services Ltd (in statutory management) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [40].

⁸ At [36], relying on *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]–[37].

⁹ At [38].

¹⁰ At [37], relying on *Clark v Nelson Marlborough Institute of Technology* [2008] 5 NZELR 628.

¹¹ *Zivaljevic*, above n 4, at [38] and relying on *Creedy*, above n 8, at [36]–[37].

[59] The notification period for each of YFX's alleged personal grievances was 90 days.¹² NZDF's response to these alleged grievances pleaded by YFX was unchanged from its 7 February 2020 letter. Mr Boyle submitted that the first time personal grievances were raised on YFX's behalf was in the letter dated 11 December 2019. Calculating back 90 days from that date, he said, meant any event before 12 September 2019 was time barred. Mr Mapu did not disagree with that proposition but he argued that many of the claims were brought to NZDF's attention in interactions between YFX and NZDF well before the 11 December 2019 letter and could be pursued.

[60] In dealing with the first and second issues identified in para [50], each of the alleged personal grievances for the disadvantage claims will be addressed in turn.

NZDF failed to address the impact of an invasive security clearance process

[61] What is pursued in this claim is an alleged failure by NZDF to address the impact of the security clearance process on YFX. It has taken the form of a complaint that insufficient steps were taken to support her.

[62] There was no dispute that YFX found the process distressing. There was also no dispute that the 11 December 2019 letter, by itself, was too late to raise this personal grievance given that the events relied on ended in March 2019. However, Mr Mapu attempted to deal with that timing problem by saying that YFX's communication with Colonel Clare Bennett was sufficient.

[63] On 26 November 2018, YFX sent an email to Colonel Bennett about the "mental distress" being caused by the lengthy security clearance process. She had previously told Colonel Bennett about the questions she was being asked. In YFX's email, seven bullet points summarised her concerns. Most of them were about the SIS officer's questions.

[64] Mr Mapu said that was enough to raise the alleged grievance. I do not agree. The submission is not supported by the content of the email. It raised with Colonel Bennett dissatisfaction with what was said and done by the SIS and described YFX's distress. It was not, however, about the quality of NZDF's support for YFX during the SIS process. It did not contain any information from which a reasonable employer in

¹² Section 114(7)(b).

the circumstances could appreciate that a concern about a lack of support was being pursued.

[65] Further, while Colonel Bennett is a serving officer, she had no supervisory or managerial responsibility over YFX and was being corresponded with in her capacity as a support person given her profession.

[66] Even if the email was sufficient the personal grievance claim would have been unsuccessful. YFX was supported by her managers, Mr Fox and Ms Pointon. She was encouraged to contact them at times when she needed extra support and offered flexible working hours when she became distressed. They raised YFX's concerns with SIS. In addition to Colonel Bennett, Mr Vasbenter attended the security clearance meeting to support YFX. It is difficult to see what more could have been done by NZDF in this instance.

[67] The second aspect to Mr Mapu's submissions about this alleged personal grievance was that, during the security clearance meeting, Ms Pointon caused YFX distress by making a comment that other staff members had complained about her. The submission was that the issue remained unresolved and could therefore be progressed.

[68] The personal grievance pleaded by YFX attributes a failure by NZDF to address the impact of an invasive security clearance process. Mr Mapu's submission does not sit comfortably with the pleading and, further, it amounts to pursuing a claim because YFX objected to Ms Pointon's comments made during it. There was no adequate explanation in the submissions, however, about why a direct (or perhaps blunt) comment would give rise to a personal grievance; Mr Mapu did not point to anything in s 103(1)(b) of the Act from which it might be said a grievance arose.

[69] Nothing said or done by YFX in her dealings with Colonel Bennett, or with Ms Pointon during the security meeting, could give rise to such a claim. This alleged personal grievance was not raised within time.

Failure to take practical steps to mitigate the noise hazard

[70] This claim is about an alleged failure to mitigate the noise hazard, caused by the coughing referred to earlier, in a timely manner despite NZDF knowing noise is a

trigger for YFX. The parties agreed that the coughing was unpleasant, persistent and lasted for several months.

[71] This subject was covered in the 11 December 2019 letter. In the letter the coughing was said to have started before the Christmas break in 2018, continued when work resumed in January 2019, and remained ongoing by the time YFX took stress leave in October 2019. To further support this aspect of the alleged personal grievance, the letter referred to the prospect of the risk of hearing loss, although that aspect of the claim was not pursued at the hearing.

[72] Mr Boyle submitted that this claim was outside the relevant notification period. Mr Mapu submitted that it was within time because a coughing-related noise concern was raised by YFX in a meeting on 20 August 2019.

[73] The meeting on 20 August 2019 was between YFX, her husband, Mr Fox and Ms Nordin. A detailed file note of the meeting was kept which both parties accepted was reliable and referred to in their evidence and submissions. It was a wellbeing meeting, covering several subjects, beginning with YFX's health after returning from leave. The file note records discussions about YFX's dissatisfaction over the handling of the bullying allegation that was made against her, which arose from her response to the coughing issue. However, the notes record only brief comments being made. YFX said she was not the only member of staff who was annoyed by the coughing. She described the open plan working environment as toxic, and that she attempted to lessen the impact on her by wearing headphones, something recommended previously. She claimed, however, that she was told off for wearing them because it isolated her from others. Other employees wear headphones, so YFX felt it was unfair that she was told off for wearing them.

[74] Mr Mapu stopped short of saying how those brief comments amounted to raising a personal grievance about a failure to mitigate the noise or, for that matter, how it continued to be a hazard for YFX.

[75] It is instructive that in YFX's evidence she did not refer to this meeting as an occasion on which she raised a personal grievance. When cross-examined, she could not remember whether she had taken any step to raise a noise-related personal grievance complaint after July 2019.

[76] I am not satisfied that a personal grievance for the coughing-related noise complaint was raised at any time before the 11 December 2019 letter. It is therefore out of time.

[77] Even if one was raised within time it would have been unsuccessful. Steps were taken by NZDF to deal with noise in ways that were reasonable and amounted to a constructive response in all the circumstances. An architect redesigned the office. YFX's team was moved to the quietest part of the office and she was given her choice of desk to minimise her exposure to noise. Instructions were given to the coughing employee on her return to work, about steps to take to try to ameliorate the noise. An office etiquette guideline was introduced to attempt to reduce the impact of noise in the office. NZDF was also alive to hygiene issues. Hand sanitiser was provided and posters with advice about the cold and flu season were acquired.

[78] Finally, despite what YFX said, she was able to wear headphones to reduce the impact of noise on her. Importantly, she accepted that an employer would not be able to completely accommodate her level of sensitivity to noise.

[79] I accept Mr Boyle's submission that the steps taken by NZDF to manage the issue of the noise were appropriate in the circumstances.

Failure to justify a letter of expectation which was unfairly imposed on YFX following a flawed investigation process

[80] This alleged personal grievance has its origins in the concerns about the coughing noise and subsequent complaint of bullying made against YFX.

[81] This complaint was not brought to YFX's attention immediately. It was given to her on 22 May 2019, about two months after it was made. On the same day, Mr Fox wrote a letter inviting her to a fact-finding meeting about it. In the letter she was informed that, if the complaint was substantiated, NZDF's code of conduct might be breached. She was informed that there were three potential outcomes; no further action would be taken, the complaint may become a performance issue, or a formal disciplinary matter.

[82] The meeting took place on 24 May 2019. On 12 July 2019, Ms Pointon wrote to YFX about the complaint. Ms Pointon's correspondence was described as a letter

of expectation. Ms Pointon was satisfied that the coughing employee who complained had managed the cough as best she could. In the rest of the letter, Ms Pointon informed YFX that she would not tolerate anyone being “targeted for making reasonable noises, which includes coughing”. In the context of the letter, “targeting” was considered to be repeated complaints about someone, glaring, audibly sighing, commenting on someone else’s conduct in the workplace, or gossiping. Despite those comments Ms Pointon’s letter recognised YFX’s misophonia and acknowledged that it made the situation difficult when working in an old wooden building in which noise could not be eliminated.

[83] The letter stopped short of initiating a performance issue or disciplinary matter. Instead, Ms Pointon used the opportunity to state her expectations for the future and went no further. The first expectation was that if YFX had concerns about noise in the workplace they were to be discussed informally with Mr Fox in the first instance. This step was described as important, because NZDF needed to consider if the noise was excessive for a normal office environment before raising it with any other staff member. The second expectation was that when YFX found office noise irritating she was to be mindful of how she expressed her feelings to the people around her and to remember that they were not intending to irritate her.

[84] On the morning of 20 August 2019, a few hours before a wellbeing meeting scheduled for later that day, YFX sent an email to Mr Fox about the letter of expectation. In one sentence she told Mr Fox that she wanted it reviewed but did not say why.

[85] The letter was discussed at the meeting that day. YFX referred to struggling with it, giving as an example not being allowed to sigh in the workplace and saying that everyone is annoyed by others at times and has bad days. YFX told Mr Fox that she was being asked to bring up matters with him in the first place, which was at odds with the first part of the letter of expectation where, in her view, she was being told off for doing just that. YFX felt that the tone of the letter was unprofessional. She was concerned about why the complaint went unmentioned for so long. She told him she felt disempowered and that her reputation was being “chipped away”. In her evidence, YFX said that her difficulty with the letter was that she took it to be a formal warning.

[86] During the meeting, Mr Fox explained that the letter was not a warning, despite what YFX thought. YFX's husband commented that a decision had been made to not take the letter of expectation any further.

[87] Despite what was said in the meeting on 20 August 2019, Mr Fox asked YFX for information about what she wanted looked at or reviewed and whether it was the fact-finding process or the outcome of it. She was asked if there was any new material she would like to present. There was no response.

[88] Mr Mapu submitted that NZDF had sufficient information to understand the alleged personal grievance and the remedy being pursued, which was to have the letter reviewed. He accepted that there was no response to Mr Fox's request for information but relied on criticisms of the letter of expectation during the meeting.

[89] Mr Boyle's response began by referring to the concession made in cross-examination by YFX, that this personal grievance claim was first raised in December 2019 and was therefore late. As to the substance of the claim itself, NZDF's reply was that it had followed a fair process, the outcome was low key and could not be seen as disciplinary.

[90] The first task is to assess whether the claim was raised within time. If reliance is placed solely on the 11 December 2019 letter, then it was clearly late, since the issues materialised at the latest in mid-August 2019, meaning 90 days elapsed well before that letter was written.

[91] That leaves the possibility that something said or done in interactions between YFX and NZDF before the December letter was written was sufficient to raise a personal grievance. The only time the letter of expectation was discussed was in the meeting on 20 August which was primarily about YFX's health. Mr Mapu did not explain how the discussion satisfied the test for raising a personal grievance as described in *Creedy* and *Zivaljevic*. It needs to be borne in mind that YFX's husband said during the meeting, in YFX's presence, that the matter would not be taken any further. Additionally, it is difficult to see what is contemplated by justifying the letter in this context, because NZDF stopped short of any disciplinary action.

[92] Even if the personal grievance claim was raised within time, it would have been unsuccessful. The letter of expectation had no consequences for YFX so it would not have engaged s 103(1)(b) of the Act. It follows that not reviewing it also had no consequences for her that could give rise to a personal grievance.

Failure to consult YFX before removing a job duty from her

[93] As part of YFX's job she allocated certain work to other employees. On one occasion, when she was on leave, other staff members changed the work allocation method previously used by YFX. After she returned to work there was resistance to reverting to YFX's work allocation method. Once this problem was brought to NZDF's attention it was corrected. At no time was there any suggestion that the change was a step taken by NZDF or approved by it.

[94] While pleaded as an alleged personal grievance, Mr Mapu accepted that it could not be separately advanced as one. While making this concession, he reserved the ability to put forward this event to support the claim that YFX's resignation was in fact a dismissal.

[95] For completeness, this claim would not have succeeded as a personal grievance. The actions complained about were not taken by NZDF or endorsed by it and the situation was promptly rectified.

Failure to set clear performance objectives for YFX which effectively set her up to fail

[96] This claim as pleaded did not provide particulars describing what steps taken, or not taken, by NZDF amounted to a failure to set performance objectives or were effectively setting YFX up to fail. The lack of clarity in the pleading makes it difficult to assess whether a personal grievance existed and was brought to the attention of NZDF.

[97] Mr Mapu explained that YFX accepted that the responsibilities for her role as a subject matter expert were outlined to her. He submitted that she did seek a position description with "clear KPI's" but said that was not the basis for the claim. It seems that this pleading is about the anticipated expectations, or objectives, in the support plan NZDF was drafting. The submission was that in the absence of such information a disadvantage occurred.

[98] There were discussions between YFX and NZDF about her position description before the support plan was developed which are briefly touched on to be complete.

[99] In a meeting on 6 May 2019, YFX discussed with Ms Pointon and Ms Nordin concerns she had about performance expectations and her position description in the context of returning to work after she had been on leave. At the end of the notes of that meeting there is a table referring to the existing position description, and expectations such as service delivery, document management, customer service, conduct, the employment agreement and performance assessment.

[100] The structure of that table was, it seems, to provide an opportunity to record YFX's views. Most of the views were positive. One was in response to a comment that certain staff members whose work she organised did not like to be told when they had done something wrong. Her proposed solution to that problem was that she needed more authority. Another comment, appearing in the section of the table dealing with the individual employment agreement and performance expectations, was a brief statement that she did not feel that her position description and role were clear enough. The notes record YFX's view that while that description referred to "KPI's" there were none.

[101] Those comments were directed towards refining and clarifying the position description. However, they fall well short of drawing to NZDF's attention a deficiency as pleaded. The purpose of the meeting was primarily about finding ways to support YFX. In that context there were constructive discussions but nothing said or done was sufficient to place NZDF on notice that anything more was intended.

[102] In any event, the thrust of this alleged personal grievance was the anticipated support plan. The pleading contemplates that what was expected from the plan was a refinement of performance objectives or expectations against which YFX was to be measured. Where the pleading referred to her being effectively set up to fail, I infer that is intended to mean NZDF's expectations could never be met because they were either unknown or unachievable.

[103] The submission goes further than the evidence supports. Preparing the support plan can be directly traced back to NZDF's concerns about YFX's mental health

condition and how to deal with it. The plan was intended to be supportive, and to probably contain expectations but, while it was being prepared, the position description that was discussed in May 2020 remained in place.

[104] There was no evidence that YFX was in any way disadvantaged in her employment while the plan was being prepared. She knew why NZDF wanted the plan and had cooperated by making medical information available. Mr Mapu did not refer to any aspect of YFX's terms and conditions of employment that were in some way compromised while the support plan was being drafted.

[105] This personal grievance claim is unsuccessful.

Inaction by various senior managers

[106] The pleaded claim was an allegation of inaction by senior managers in relation to YFX's complaints about Ms Pointon. On 19 August 2019, Mr Fox wrote to YFX proposing a meeting with her prior to her return to work from leave. He set out the scope of the meeting, which was to see how she was feeling, covering queries about supplying medical information, how she felt about returning to work and interacting with other team members as well as his expectations for her daily duties. Mr Fox informed YFX that he would be supported at this meeting by Ms Pointon and Ms Nordin. YFX was invited to bring a support person.

[107] YFX agreed to attend. However, she objected to Ms Pointon's presence, attributing to her a misuse of power by bullying. YFX stated that she would not feel safe if Ms Pointon was present.

[108] Mr Fox confirmed that Ms Pointon would not be at the meeting and it proceeded without her. Aside from the statement alleging bullying by Ms Pointon, no information was supplied in this exchange of correspondence to describe what gave rise to the allegation.

[109] On 17 October 2019, NZDF responded to the bullying allegation. Bob Bulman, NZDF's Director of Human Resource Services, wrote to YFX saying the subject had come to his attention. He informed her that the allegation was serious and that NZDF had a legal duty to investigate. An invitation was extended to attend a meeting with him to discuss the situation. Mr Bulman informed her that Ms Pointon

would continue to be one of her managers until such time as she was able to provide sufficient details to allow a response. YFX did not provide any further information to Mr Bulman to support her claim.

[110] The subject of alleged bullying was mentioned in the letter of 11 December 2019. The only information it referred to about the allegation was a statement that it had occurred and a reference to the subject having been raised at “various meetings”.

[111] When YFX gave evidence she briefly referred to her dissatisfaction with Ms Pointon arising from what happened during the security clearance meeting. The rest of YFX’s evidence touching on this alleged bullying was confined to a general comment that what happened during that meeting was a feature of the working relationship between them.

[112] Mr Mapu submitted that there was sufficient information about the allegation conveyed to NZDF during the meeting on 20 August 2019 to reach a conclusion that the personal grievance was raised. It is difficult to discern what part of the conversation in the meeting achieved that outcome. NZDF was aware that YFX did not want Ms Pointon at the meeting but not much more than that.

[113] There are only a few passages in the notes of the security clearance meeting that might, potentially, support YFX’s claim that she was being bullied by Ms Pointon. There was an exchange between them during that meeting, which occurred when YFX was critical of the SIS process. At some point a remark was attributed to Ms Pointon to the effect that she was dismissive of YFX’s mental health. In response to Ms Pointon being told about YFX seeing a psychiatrist, she was said to have commented that other staff faced challenges and mental health concerns. It would seem that YFX felt the response was insensitive and demeaning. A remark also attributed to Ms Pointon was that certain unnamed employees had difficulty in dealing with YFX. That was as far as the exchange went.

[114] It first needs to be established that something said or done by YFX placed NZDF on notice that she was pursuing a complaint about Ms Pointon. I am not persuaded that what happened during the security clearance meeting should have been seen by NZDF as amounting to a personal grievance to the effect that YFX was being bullied by Ms Pointon. The evidence was that comments were made that YFX did not

like but nothing more. Mr Mapu did not point to any other aspect of the meeting from which it might be said that NZDF ought to have been on notice that bullying, or potentially bullying, was in issue and needed to be dealt with.

[115] If the inaction referred to was the length of time it took for Mr Bulman to write asking for further information, then that claim is unpersuasive. Certainly, some time elapsed between the August meeting and Mr Bulman's correspondence. However, YFX was given an opportunity to supply information but she did not respond. Mr Mapu did not explain how the interval from 19 August 2019 until 17 October 2019 had any impact on the terms and conditions of YFX's employment of the sort required under s 103(1)(b) of the Act.

[116] This claim is unsuccessful.

Inaction by Mr Fox and Ms Nordin

[117] This claim was an allegation that Mr Fox and Ms Nordin did not take any action, having been made aware that YFX was considering leaving her job because she could no longer bear the "suffering arising out of her work situation".

[118] Mr Mapu submitted that this personal grievance was relating to the allegation of bullying by Ms Pointon, the letter of expectation and difficulties over the support plan. The alleged bullying and letter of expectation were discussed earlier and do not need to be repeated.

[119] Mr Mapu was especially critical of NZDF's attempts to prepare a support plan, what its draft contained, and how long it took to prepare. The possibility of such a plan emerged in about March 2019 and continued to be at the forefront of NZDF's thinking until about January 2020. Several events led NZDF to consider that a plan would be appropriate, bearing in mind that after YFX's hospitalisation in 2016 the return-to-work plan that was produced was not assisted by any independent medical assessment or information.

[120] NZDF formed the view that it was appropriate to have a support plan because of the problems that were developing during 2019. To prepare the plan it wanted information about YFX's mental health from a medical practitioner. YFX viewed any

investigation of her mental health as unnecessary. She thought NZDF was surreptitiously beginning the process for dismissing her for medical incapacity.

[121] To consider these competing positions it is necessary to return to the first time NZDF became aware of her mental health. It will be recalled that YFX was employed with NZDF in 2008 but it was not until 2016, when she admitted herself to hospital, that a disclosure about her DID condition was made.

[122] Mr Fox explained that the reason for wanting to develop a support plan so many years later followed events in early to mid-2019 some of which have already been touched on.

[123] On 3 July 2019, Mr Fox's sent an email to YFX's husband and informed him that NZDF lacked clear, independent medical advice about her condition and any restrictions or specific support that may be required. He referred to the possibility of a performance management process but clarified that statement by adding NZDF had not arrived at that stage but rather was looking to put in place a support plan:

...that will cover what we think is reasonable support to assist [YFX] in improving her performance and general behaviour, and rebuild relationships within the workplace.

[124] Mr Fox went on to say that NZDF would clearly outline its expectations. In the same email he noted that the support plan may not meet all of YFX's expectations but, without specific medical advice, NZDF was unable to take a therapeutic approach in day-to-day interactions. Mr Fox's email stated that NZDF did not have sufficient independent advice about what was required or appropriate to assist her, or what might be expected of others within the area where she worked in liaising with her. As previously described, Mr Fox wrote again, on 5 August 2019.

[125] Preparing the support plan did not take place in a vacuum. Mr Fox provided YFX with an update about progress while it was being prepared but not the drafts as they were written. He explained that the intention was to discuss the plan with her, but that did not happen because she went on sick leave on 21 October 2019. In mid-November 2019, Mr Fox sent her an email stating his intention, once she was fit to return to work, to arrange a meeting to provide the support plan with an overview of what NZDF was trying to achieve. He anticipated a second meeting to go through the

plan's individual points. This email was in response to one sent to him by YFX the previous day where she had asked for the support plan to be sent to her.

[126] Mr Mapu was critical of NZDF for creating the stress YFX was experiencing and submitted that it put her through further stress by demanding she prove her fitness to work and by rationalising its actions on the basis of her mental health. He described NZDF's email to YFX's husband asking for medical information as coercing her into giving consent. The submission was that a reasonable employer might just have asked for a medical certificate from a psychiatrist or doctor confirming capacity to work or something similar. Part of this submission was that it was clear that, had the medical assessment returned advice about incapacity, NZDF would have moved towards terminating employment.

[127] Mr Mapu's submission goes further than the evidence realistically supports. There was no indication before YFX was hospitalised in 2016 that NZDF was aware of her mental health let alone its nature or how it could be managed.

[128] It took time to prepare the draft support plan, but that time cannot be described as inaction. The problem confronting the submission is that it does not take into account the difficult position NZDF was facing in dealing with a complex situation which needed to be addressed in the draft plan. NZDF also wanted to present the plan in a controlled environment which was entirely reasonable. Mr Fox knew what had happened when he provided the 15 April 2019 letter to YFX in an environment that was not controlled. These circumstances do not give rise to a personal grievance.

[129] This personal grievance claim is unsuccessful.

Failed the fundamental obligation of good faith

[130] Mr Mapu submitted that NZDF failed "the fundamental obligation of good faith". The pleaded personal grievance alleged a failure by NZDF of the duty of good faith where no sensitivity was shown to YFX about her mental health. He relied on three broad submissions, that NZDF:

- (a) withheld information about staff interactions that could have allowed YFX to adequately respond, and improve where substantiated, and advice that there were complaints created unnecessary stress;
- (b) delayed progress towards resolution of the support plan for some time as well as saying it was complete when it was not; and
- (c) delayed mediation; NZDF had an obligation to attend and issues that it raised about YFX's capacity were not relevant.

[131] The evidence relied on to support the first contention, about withholding information, is scant. The submission was not further developed to identify what staff interactions were relied on.

[132] The only staff interaction that might have been referred to, is about those persons mentioned by Ms Pointon at the security clearance meeting in March 2019, the complaint by the employee with the persistent cough, and the event witnessed by Mr Fox which left another employee distressed.

[133] The exchange between Ms Pointon and YFX during the security briefing was inconsequential. The complaint that YFX was engaged in bullying was addressed through the letter of expectation. She responded during that process. The outcome was not disciplinary and produced nothing adverse.

[134] There has already been a discussion about the support plan. It is not accurate to characterize NZDF's handling of that subject as delaying progress towards resolution, especially when taking into account the need to obtain medical advice and to work out what the plan needed to contain. Any delays in being able to review the plan with YFX are explicable given concerns about how the information was to be relayed to her and Mr Fox's reluctance to send it in advance of a meeting given his previous experience. The criticism that the plan was not complete is inconsequential.

[135] That leaves whether there was a personal grievance arising from a breach of good faith over the way in which NZDF approached mediation. The letter of 11 December 2019 invited NZDF to participate in mediation. NZDF responded immediately, but only to the extent of explaining that there would be a delay in

supplying a full response and that mediation was premature. NZDF made the point that it did not want to commit YFX to the cost and time of attending mediation when it would not be in a position to respond meaningfully to the issues raised.

[136] Unfortunately, the practicality of attending mediation at that time was not the only impediment NZDF raised.

[137] In mid-February 2020, NZDF raised an issue with the Authority about YFX's capacity to conduct litigation and to potentially enter into a binding resolution in mediation. It asked the Authority to appoint a litigation guardian.

[138] In April 2020, the Authority declined to appoint a litigation guardian. It thought that step was unwarranted and the parties were directed to attend mediation. Shortly before the scheduled mediation, NZDF requested that YFX provide confirmation from a medical practitioner that she had capacity to enter into a settlement agreement. The request was declined. Mediation took place but was unsuccessful.

[139] Mr Boyle submitted that NZDF's approach to participation in the mediation was reasonable given the decision in *TUV v Chief of New Zealand Defence Force*.¹³ He relied on NZDF being on notice about the DID diagnosis and that, at various times YFX and/or her husband said she could get "foggy", that her personalities would sometimes not communicate and that she accepted that sometimes she struggled with her memory or to recall what one personality had done. NZDF's case was that in asking about YFX's capacity before attending mediation it was acting in accordance with the duty of good faith.

[140] It is regrettable that this request was made. What YFX described was a long way short of sufficient to justify asking her to establish her mental capacity before participating in mediation. NZDF already had two medical reports about her mental health and on any reasonable reading of them she had capacity to engage in mediation and litigation. However, while NZDF's approach was misplaced, clumsy and insensitive, it did not prevent mediation.

¹³ *TUV v Chief of New Zealand Defence Force* [2018] NZEmpC 54.

[141] I do not accept that NZDF delayed the mediation or did so in ways that could give rise to a personal grievance. There was, in fact, little or no evidence that NZDF obstructed organising mediation and it attended after being directed to do so.

[142] Raising capacity-related issues with the Authority did no more than bring to YFX's attention NZDF's concerns. The fact that they were completely misplaced does not establish a breach of s 4 of the Act.

[143] This personal grievance claim is unsuccessful.

Was the resignation in fact a dismissal?

[144] There was no dispute about the test to apply when the claim is that a resignation was a dismissal. Conventionally, there are three circumstances in which an apparent resignation is a dismissal:

- (a) Where the employee is given the choice of resigning or being dismissed.
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) Where a breach of duty by the employer leads to the resignation.¹⁴

[145] The foreseeability of the employee's resignation was added to this test by the Court of Appeal in *Auckland Electric Power Board v Auckland Provisional District Local Authorities Officers IUOW Inc.*¹⁵ In that case, the Court considered that the first relevant question was whether the resignation was caused by a breach of duty on the part of the employer. To decide that question all the circumstances of the resignation have to be examined and not just the terms of the notice or other communication through which the employee tendered the resignation. If causation exists the next question is whether the breach of duty was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the prevailing conditions; that is, whether a substantial risk of resignation was

¹⁴ See *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 375, [1985] ACJ 963, [1985] ERNZ SEL CAS 136 (CA).

¹⁵ *Auckland Electric Power Board v Auckland Provisional District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA).

reasonably foreseeable having regard to the seriousness of the breach. This test is objective.¹⁶

[146] If the Court finds that the resignation was a constructive dismissal what must then be determined objectively is whether that dismissal was justified given the test in s 103A of the Act.¹⁷

[147] Mr Mapu concentrated on the third limb in this test, namely a breach of duty by NZDF. He described the totality of events which occurred from about March 2019 until June 2020 as a failed duty of care by NZDF such that it should have come as no surprise that YFX resigned. He said that duty encompassed the obligation to act as a fair and reasonable employer, in good faith, and to create a safe and healthy work environment.

[148] Mr Boyle submitted that there was no breach of duty and NZDF's responses were fair and reasonable throughout. He pointed to evidence that YFX was considering resigning in October 2019 and had spoken to her psychologist about that prospect, referring to negotiating an exit package. There was also evidence that the resignation followed financial concerns, because she had been on leave without pay and was finding matters difficult financially.

[149] Mr Boyle also drew attention to the fact that the allegations were largely made about events between March and October 2019, with the only exception being the delayed mediation complaint in 2020. The resignation did not take effect until July 2020 and the prospect that there might be a claim for constructive dismissal was not raised until 3 November 2020 in a statement of problem lodged with the Authority.

[150] The essence of Mr Boyle's submission was that this timing casts doubt on whether it could be said that the alleged breaches made the resignation foreseeable. This submission was rounded out by a comment that, while YFX may have been unhappy in the workplace, that did not meet the objective test required to establish that the resignation was in fact a dismissal and it was also insufficient if all that could be

¹⁶ *Edmonds v The Attorney General* [1998] 1 ERNZ 1 (EmpC) at 13 and 14.

¹⁷ *Pivott v Southern Adult Literacy Inc* [2013] NZEmpC 236, [2013] ERNZ 377.

done was characterize NZDF's behaviour or conduct as inconsiderate or causing unhappiness. The argument was that the conduct must be dismissive or repudiatory.¹⁸

[151] There is an overlap between each of the previously discussed personal grievance claims and the claim that there was a dismissal. Mr Mapu submitted that all of those events contributed to the decision to resign and therefore establish this claim. That is not an attractive proposition. First, while I accept that an employer must act in good faith and provide a safe and healthy workplace, there was no evidence that NZDF failed to do so. The opposite is apparent. NZDF went to considerable lengths to address YFX's needs in the workplace and to retain her employment which are entirely consistent with that duty.

[152] The second problem with Mr Mapu's submission is that many of the alleged personal grievances were not raised within time, so it is difficult to see them forming part of the circumstances that would have made the resignation foreseeable. Third, and overlapping with the other points just made, where those personal grievances would have failed it cannot be said that those claims support a conclusion that there was a breach of duty and that YFX's resignation was foreseeable.

[153] No doubt the situation was difficult for all concerned and troubling for YFX. That does not mean, however, that the employer's actions forced YFX's hand in a situation where the result was inevitable. NZDF faced a dynamic situation which constantly slipped away from resolution, but I am not satisfied that anything it did, or did not do, either failed to adequately discharge its obligations to YFX. The reality was that NZDF was dealing with an extremely difficult and uncertain situation, attempting to understand the problem which needed to be addressed, and was trying to address it in an appropriate manner.

[154] I disagree with the Authority's decision. There was no breach of duty and no dismissal.

Non-publication

[155] The Authority made a non-publication order prohibiting the publication of YFX's name or any information that might identify her. The circumstances in which

¹⁸ *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Associate Employment Agency and Complete Fitness Centre)* (1983) ERNZ SEL CAS 95 at 104.

that order was made clearly satisfy the test in *MW v Spiga Ltd*.¹⁹ For the avoidance of doubt, the order made by the Authority is now repeated in this judgment. There is to be no publication of YFX's name or any information that might identify her.

Conclusion

[156] The challenge by NZDF is successful and the Authority's determination is set aside.

[157] Costs are reserved. If they cannot be agreed memoranda may be filed.

K G Smith
Judge

Judgment signed at 3.45 pm on 1 August 2025

¹⁹ *MW v Spiga Ltd* [2024] NZEmpC 147, [2024] ERNZ 678.