

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 570
3150021

BETWEEN	AGW Applicant
AND	OPY Respondent

Member of Authority:	Claire English
Representatives:	Tanya Kennedy, counsel for the Applicant Geoff Davenport, counsel for the Respondent
Investigation Meeting:	21 July and 5 September 2022 at Wellington
Submissions received:	2 and 5 September 2022 from Applicant 5 September 2022 from Respondent
Determination:	3 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant is a civil servant who was issued with a first written warning for a period of 12 months. The applicant claims that this amounts to an unjustified disadvantage in his employment, as well as breaches of good faith and breaches of his employment agreement, and seeks compensation, medical expenses and costs.

[2] The respondent says that the warning was both substantively and procedurally justified. In addition, it states that some health concerns raised by the applicant are

outside the 90-day timeframe within which grievances must be raised, and that in any event, the applicant's own conduct contributed materially to the situation.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from the applicant, and his partner. Evidence on behalf of the respondent was given by its deputy chief executive, and a human resources advisor. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

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

Application for Non Publication

[5] The applicant has made application for non-publication orders covering the following information:

- a. His name and identifying details;
- b. His health and medical information¹.

[6] The respondent does not oppose the application for a non-publication order over the information relating to the applicant's health. It does oppose the remainder of the application on the grounds that the (relatively high) threshold has not been met.

[7] The application for non-publication orders regarding the applicant's health and medical information was granted prior to the hearing of this matter, and this determination records that those orders are permanent. There is no suggestion that there is any public interest in having this type of personal and potentially sensitive information in the public domain. Accordingly, this determination has been written in such a way so as to exclude these details as far as possible.

¹ As confirmed in submissions dated 2 September 2022.

[8] This leaves the application for non-publication of the applicant's name and identifying details, on the grounds that:

- a. the applicant is in an ongoing relationship with his employer, his employment record is private and there is no public interest in his work colleagues being made aware of his employment record; and
- b. there is potential for serious damage to the applicant's professional reputation and job prospects if his name and identifying details are published; and
- c. disclosure of the applicant's name and identifying details would have an adverse impact on his mental health.

[9] Two points are particularly relevant when considering these submissions. First, when the applicant and his partner attended the investigation meeting they brought with them to the investigation meeting multiple persons who were not involved in these proceedings in any way. When I inquired who these people were, I was advised that they were the applicant's neighbours, who he had told about these proceedings, and who were present to support him, in other words, the applicant himself had already actively shared details of his claim with members of the public. Second, the applicant has stated in evidence that he continues to work for the respondent, and that he is not actively looking for other roles.

[10] I now turn to consider whether it is necessary to make orders for the non-publication of the applicant's name and identifying details.

[11] There is a high threshold for non-publication, particularly in light of the Court of Appeal's comment that: "open justice considerations are always extremely important and the reality is that those who litigate necessarily put themselves and their affairs in the public domain".² The submission on the applicant's behalf that he will suffer a detriment in the employment market if his name is published must be weighed in light of his own evidence that he is not seeking other employment. I also place lesser weight on the submission that he will suffer embarrassment more generally, as he has already

² *White v Auckland District Health Board* (Court of Appeal, CA 102/07, 8 June 2007), at [16].

acted inconsistently with this submission by actively telling others of these proceedings himself.

[12] However, the applicant has provided a brief report from his psychiatrist, advising details of his physical and mental health, and stating his view that the publication of the applicant's name and identifying details "would be very harmful to his current mental wellbeing and also in the long term." In considering this evidence, I note the comments from the Court that "It is appropriate to refer to the opinions expressed by the medical practitioners. These are sound and must be respected by the Court".³ In that case, the Court found that the applicant's health concerns were of such a nature that they justified a departure from the fundamental principles of open justice, and granted a permanent non-publication order in favour of the plaintiff.

[13] In my view, the same must apply here. Accordingly, the applicant's name and identifying details are not to be published. Upon reflection, I have concluded that this also requires that the name of the respondent, and the names of the respondent's witnesses and other employees not be published either, as to do so would identify the applicant. This determination has been written to reflect this.

The issues

[14] The issues requiring investigation and determination, as set out in the Statement of Problem, were:

- (a) Was the applicant unjustifiably disadvantaged by being issued with a first written warning for a 12 month period?
- (b) Did the respondent's actions amount to a breach of good faith?
- (c) Did the respondent's actions amount to a breach of the applicant's employment agreement?
- (d) Did the respondent act in breach of its own policies and procedures?
- (e) Did the respondent fail to be a good employer?
- (f) If the respondent's actions were not justified, what remedies should be awarded, considering:
 - Compensation under s123(1)(c)(i) of the Act; and
 - Other losses.

³ *FGH v RST*, [2018] NZEmpC 145 at [14]

- (g) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to the grievance?
- (h) Should either party contribute to the costs of representation of the other party?

Background

[15] In July 2020, the applicant was scheduled to have a short feedback meeting with a graduate, who was working for the respondent on a temporary basis to gain relevant work experience. After giving work-related feedback, he then made various comments about the graduate and her name, and initiated discussions about racism, trans rights, the “Black Lives Matter” movement, and quoted from the movie “Romper Stomper”. This continued for approximately an hour.

[16] The graduate was offended by the applicant’s comments, including feeling discomfort⁴ because she was alone in a meeting room with the applicant well after the end of her working day.

[17] She spoke with her manager about her discomfort and raising her concerns with the respondent. I pause here to note that there was some discussion at the investigation meeting about whether this was a complaint. For ease of reading, I will use the word “complaint” to describe the concerns raised.

[18] The initial complaint was made verbally to the human resources advisor on 22 July 2020. There was then some delay, as the graduate fell severely ill including requiring hospitalisation.

[19] She emailed the human resources advisor setting out her complaint in her own words on 7 September 2020.

[20] The respondent via its Deputy Chief Executive (DCE), then considered this complaint. The DCE gave evidence that the Chief Executive delegated to her the task of managing and resolving this matter, as she was considered to be of appropriate seniority. The DCE decided that the subject matter of the complaint was sufficiently

⁴ She described feeling trapped, in her emails to the respondent.

serious to warrant a disciplinary process. She invited the applicant to a disciplinary meeting by email dated 22 September 2020.

[21] The DCE's email of 22 September attached the graduate's email of 7 September 2020 and set out various questions the DCE had for the applicant. The 22 September email also mentioned that the respondent considered that it spoken with the applicant about his professionalism on two previous occasions, once when he had made blog posts critiquing members of parliament, and once when comments allegedly critical of a colleague were attributed to him.

[22] The email stated among other things:

In the first instance I would like to discuss this with you and talk through my questions above. I'm not reaching any views yet on what the next steps would be, even if my concerns are substantiated, and I may consider that nothing more is needed than the discussion. In case you are worried, I can be very clear that I am certainly not thinking of terminating your employment from this incident. However, some form of formal warning may be appropriate depending on the findings I reach at the at the end of this process.

[23] The applicant gave evidence that he found the email stressful and confusing. He talked about his fear of termination, and his confusion as to what the next steps in the process were.

[24] When asked to explain why he feared his employment would be terminated despite the assurances in the email itself, he stated that he did not fear that the process itself would lead to termination, because he viewed the assurances in the 22 September 2020 email as being binding on the respondent.

[25] Rather, he explained that he felt that the DEC held a negative view about him, and was trying to find ways to take action against him, up to and including terminating his employment. At no point during the process that followed, did the applicant express this concern.

[26] The applicant gave evidence during the investigation meeting that his reference to being "confused" by the process was a reference to his view that disciplinary action was not justified, and that in his view, the respondent should have followed a "complaints process" instead. The idea that the respondent should have followed a "complaints process" was not something that the applicant mentioned during the disciplinary process that followed.

[27] The applicant participated actively in that process, providing detailed written and verbal submissions to the respondent. The applicant provided a total of 27 pages of formal written responses, in addition to a number of questions and queries by email, as follows:

- a. Fifteen pages of response on 5 November 2020;
- b. Nine pages of response on 8 December 2020;
- c. Two pages of response on 18 December 2020;
- d. A further 1 page response on 20 January 2021.

[28] He was at all points represented by a union advocate, and email correspondence shows that the union advocate actively advocated on the applicant's behalf.

[29] The applicant objected to the DCE including reference to two other incidents, (the blog posts, and comments allegedly critical of a colleague) in the email of 22 September 2020. He viewed these matters as being resolved and in the past, and generally irrelevant. He emailed the DCE on 15 December 2020 about this. The DCE considered this, and agreed with him.

[30] She emailed the applicant in reply on the same day, stating that she had decided not to rely on those prior matters as contributing to the proposed outcomes in the current situation. At the investigation meeting, the DCE said that, on reflection, she wished she had not originally mentioned these matters in her email of 22 September at all, because upon consideration she agreed they were not relevant to the event in question, and did not lead to the applicant being issued the written warning.

[31] Despite receiving this email assurance of 15 December 2020, and despite there being no evidence that those matters had in fact been taken into account in the warning that followed, the applicant repeatedly expressed the view at the investigation meeting that those matters had been improperly taken into account by the DCE. When asked to explain why, he was unable to point to any evidence that this had occurred.

[32] Instead, he referred back to his view that the DCE disliked him, and was trying to find a way to end his employment.

[33] I note that the DCE was visibly shocked to hear the strength of the applicant's views against her as expressed by him in the investigation meeting. In contrast, both she and the human resource advisor expressed positive views of the applicant and his work and contributions to the respondent.

[34] During the investigation meeting, it became clear that the applicant viewed the issuing of the first written warning as unjustifiable for two reasons.

[35] First, his view that the warning was motivated by the DCE's (supposed) dislike for him and her (supposed) desire to bring his employment to an end.

[36] Second, that the substance of what had occurred was not sufficiently serious to warrant a written warning, including that he did not accept that the graduate had been upset, because she had not seemed upset to him, and this could only mean that she was concealing her emotions in a misleading way.

[37] The applicant said that he had experienced on-going distress and confusion, as he feared for the continuation of his employment, he was confused as to the status of the warning, and he was confused as to the process being followed by the respondent.

[38] He maintained that he feared for the continuation of his employment this despite also maintaining the contradictory stance that he was aware of the DCE's assurance in the 22 September 2020 email that his employment would not be terminated and that he considered this a binding statement.

[39] When questioned about why he was confused about the status of the warning, when it had been confirmed in writing to him that this was a first written warning, (and was in fact the first and only written warning the applicant had received), the applicant relied on the statement at the end of the warning letter, which stated:

Any breach of this warning will be viewed seriously and may, depending on the circumstances and their seriousness, result in further disciplinary action being taken against you, including, if appropriate, a final warning or dismissal.

[40] The applicant's view was that this statement "elevated" the warning into "first and final" warning, and the DCE's written assurance to him to the contrary should be disregarded.

[41] When questioned about why he was confused by the process being followed, despite that being set out in the email of 22 September 2020, the applicant referred generally to his idea that a “complaints” process should have been followed rather than a disciplinary process.

[42] After being issued with the warning on 22 January 2021, the applicant then sought new representation and raised a personal grievance claim of breaches of good faith and unjustified disadvantage on 19 March 2021.

[43] The parties attended mediation but were not able to resolve matters. The written warning expired on 22 January 2022.

[44] Throughout this time, the applicant has continued to be employed by the respondent.

[45] During the 12 month period the written warning applied, no other disciplinary action of any kind was taken with regard to the applicant. As at the date of the investigation meeting, some 6 months later, there had still been no further disciplinary concerns raised.

[46] The applicant stated at the investigation meeting that he was on 8 July 2022, subject to a “letter of expectation” indicating that the respondent was disadvantaging him after the expiry of the warning. He did not provide a copy of this letter of expectation. The respondent, in the break, was able to provide a copy of the relevant email, from a Director of the respondent. The email from the Director was an expression of support for the applicant and encouraged him to reach out if he needed anything.

[47] The applicant also raised that, at Christmas time, another staff member of the respondent had a Christmas-themed display with refreshments which he invited others to share. The applicant’s view was that this was unprofessional, yet the staff member involved had not been issued with a written warning as far as the applicant was aware, thus this was an example of unfairly disparate treatment.

[48] The matter then came before the Authority for determination.

Findings

[49] The primary claim before the Authority is a claim of unjustified disadvantage. There are several other claims raised by the applicant which all rely on the same factual matrix, being that he was issued a written warning for 12 months, and the process followed by the respondent when issuing that warning.

[50] The applicant's position is two-fold. First, the applicant does not believe his conduct warranted a written warning at all. This may be expressed as a "substantive justification" argument.

[51] Second, the applicant also takes the position that if the respondent had followed a proper process, he would not have been issued with a written warning, and the matter would have been resolved in an informal manner.

[52] In order for the applicant's claims to succeed, section 103(1)(b) of the Act requires both an unjustified action on the part of the employer; and that the applicant's employment must be affected to his disadvantage.

[53] I will first consider whether, viewed objectively, the applicant's behaviour on 8 July 2020, could have justified a written warning. This is the substantive argument. The facts show that:

- a. The applicant was a senior and relatively experienced staff member at the respondent. He had been tasked with supervising the work of a short-term graduate.
- b. The graduate was a woman of colour, in her first civil service role, as part of an internship programme.
- c. The applicant arranged a meeting between them. The meeting was during work time, and on work premises.
- d. The stated purpose of the meeting was for the applicant to give feedback to a new graduate on her work.
- e. The applicant and the graduate were alone in the meeting room. The meeting took place at the end of the working day, commencing at 4.30 pm and continued until 5.55 pm.

[54] The applicant started by giving feedback on work-related matters, which took approximately 20 minutes. General social conversation was made for a few minutes.

[55] The applicant then began sharing his views on other matters. The applicant's own explanations of the matter show that this included:

- a. commenting that the graduate's last name "sounds Arabic";
- b. asking her where she was from, and being apparently dissatisfied with the answer given her last name, then asking "where her family was originally from";
- c. describing the "Black Lives Matter" movement as involving "propaganda" or "distortion of facts", even after being informed she was a supporter of that movement;
- d. referring to "the intolerance and aggression of some parts of the trans movement";
- e. "describe[ing] my belief about what, as a Christian, I believe the pedigree of every human being to be"; and
- f. quoting from the movie "Romper Stomper" including using the word "abos" because "the movie explores attitudes".⁵

[56] These comments were not work related. They continued for the better part of an hour. The applicant and the graduate were not friends, and there was no prior reason for him to have assumed that she would be receptive to his comments.

[57] Comments that cause offence to other staff can be considered misconduct, and justify a warning⁶. The duration of the warning is relevant, and the Authority has previously found that a warning for 12 months was justified in a single case of misconduct⁷.

[58] In my view, and given the facts that I have set out above, the applicant's conduct was not appropriate in the workplace. The subjects that the applicant raised and the things he himself admits to saying were objectively likely to offend, or cause hurt and distress to, others. In fact, the graduate advised that she did feel offended and distressed

⁵ These quotes are taken from the applicant's written responses provided to the respondent.

⁶ See for example *Stevenson v Richmond Limited*, 19 April 2002, WA 30/02.

⁷ *Kennedy v Brambles New Zealand Limited t/a Recall New Zealand*, [2011] NZERA Auckland 87.

by the applicant's comments. Standing back and considering the circumstances of this conversation, what was said, and the respective positions of the applicant and the complainant, I am satisfied that the applicant's comments were of such a nature that they substantively justified the issuing of a warning.

[59] The next question I will consider is whether the process followed by the respondent in deciding to issue a warning, was procedurally fair.

[60] Accordingly, I must consider whether the respondent's actions, how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred⁸. This includes considering whether:

- a. the respondent sufficiently investigated the allegations before taking action; and
- b. the respondent raised the concerns that it had with the applicant before taking action; and
- c. The applicant was given a reasonable opportunity to respond to the respondent's concerns before action was taken; and
- d. the respondent genuinely considered the applicant's explanation (if any) before taking action; and
- e. any other factors I think appropriate⁹.

[61] Did the respondent sufficiently investigate the allegations before taking action? The allegations were a complaint from a single staff member, against another staff member, the applicant. They concerned what was said by the applicant at a specific time and place. The respondent investigated the allegations by:

- a. receiving the initial complaint from the graduate to human resources advisor on 22 July;

⁸ Section 103A(2) of the Employment Relations Act 2000.

⁹ Section 103A(3) and (4) of the Employment Relations Act 2000.

- b. Seeking the graduate's written confirmation of the complaint, in her own words, before proceeding further;
- c. Putting the complaint as expressed in the graduate's own words to the applicant for his response, together with a summary of the respondent's concerns;
- d. Meeting with the applicant to hear his response, and receiving and considering written submissions by the applicant;
- e. Engaging in various email correspondence with the applicant and his representative to answer questions throughout the process;
- f. Putting a preliminary view to the applicant for his comment, and receiving and considering that comment, as well as further unsolicited comments at a second point in time, before deciding on the ultimate outcome.

[62] Given that this was a single complaint, about a single incident, from a single staff member (the graduate), against a single staff member (the applicant), the investigation process was both appropriate and sufficient to establish what had occurred, and why this might be of concern. It is noteworthy that there is very little difference between the graduate's view of what occurred, and the applicant's view. The difference is that the applicant takes the view that his conduct did not merit a written warning.

[63] When considering whether the respondent raised the concerns that it had with the applicant before taking action, the answer to this question must be "yes". The respondent wrote to the applicant setting out its concerns in writing. The applicant and his representative engaged with this, particularly raising that two prior matters should not be properly of concern to the respondent in this circumstance. The respondent agreed, and removed those matters from consideration. The respondent then wrote to the applicant setting out its preliminary views, and seeking a response, which was provided, and considered. The correspondence records that the respondent set out its concerns clearly and consistently, with the only significant change being the removal from consideration of two unrelated prior instances, at the request of the applicant (which is beneficial to him).

[64] In considering whether the applicant was given a reasonable opportunity to respond to the respondent's concerns before action was taken, I particularly consider that the applicant and his representative were active participants throughout the disciplinary process. The applicant provided a 15 page written statement (which took him almost an hour to read out, which he was allowed to do without questions or interruptions at his request) to the DCE. He provided a further 9-page written statement in response to further questions, and a further 3 pages in response to the preliminary view letter. In addition to these more formal responses, he and his representative asked various questions of the respondent via email during the time the applicant was preparing his responses, which questions were answered within the same day. Throughout, the applicant requested, and was granted extensions of time to prepare his responses. The respondent was responsive to these requests, and engaged with him on an on-going basis.

[65] The applicant was given a reasonable opportunity to respond to the respondent's concerns, both in terms of the time made available to him, and the way in which the respondent engaged with his questions and requests in a timely way.

[66] In considering if the respondent genuinely considered the applicant's explanation (if any) before taking action against him, on balance, the answer to this question must be yes. This can be seen most clearly in the preliminary view letter, where the respondent sets out its understanding of the applicant's position on various points, sets out its own understanding, and asks him for comment. The preliminary view letter identifies both the lack of real factual dispute over what occurred, and also identifies the applicant's view (which was in the end not accepted by the respondent) that his conduct was not unprofessional and did not justify a written warning. It shows that the respondent did consider the applicant's explanations, but did not fully accept them.

[67] I also consider other factors that I think are appropriate in all the circumstances. Here, it is relevant to note the applicant's relative age, work experience, and seniority compared to the graduate. This created a clear power imbalance in the applicant's favour. It is also relevant to note that the applicant essentially invited a new and junior staff member, to a private meeting room late in the day, for what should have been a short (less than half an hour) feedback session about her work on a particular project, which then unexpectedly turned into a 90-minute long discourse about a variety of

matters which were not work-related, and which had inherent potential to be at best insensitive or even offensive. The graduate is a person of colour. There is no reason why the applicant should or would have embarked upon this type of non-work-related conversation, with a junior person who he did not know, without considering their needs and feelings. The applicant himself was unable to explain why he acted as he did.

[68] The applicant further maintained when answering questions from me at the investigation meeting, that the graduate did not appear to him to be particularly upset by this conversation, even though she reported to the respondent that she had in fact been quite upset and offended. And that this could only mean that she had concealed or not accurately reported her true feelings. With respect, this is not the only interpretation that could be placed on what occurred. The applicant has consistently failed to accept that he mis-read the situation in its entirety, and the graduate was deeply upset by what he had said, but he simply did not notice. The applicant showed a consistent inability to understand and accept that he may have genuinely offended (and I suspect, frightened) the graduate - even if he did not intend to do so. This lack of insight is a relevant factor in this matter.

[69] Finally, I have also taken into account that the respondent was consistent in its messaging to the applicant throughout, and did its best to reassure him that, even though disciplinary action was a real prospect, he should not fear for his job security. In the end, this is exactly what transpired, and although a written warning was issued, it was for a limited period of time, which has now expired as stated in the warning itself.

[70] Overall, I find that the process followed by the respondent was procedurally fair. The applicant was given multiple opportunities to engage with the respondent. He did so, on a number of separate occasions. This is shown in that there is remarkably little dispute over the facts of what occurred, as opposed to the seriousness and significance of what occurred. Having engaged fairly and appropriately with the applicant over some considerable time, it was open to the respondent to issue him with a written warning. In doing so, the respondent acted consistently with the various indications that it had given to the applicant along the way that his employment was not at risk.

Other Matters – allegation of undue delay

[71] The applicant has complained that there was undue delay in completing the disciplinary process. This is a factor in why he says the warning is unjustifiable, and is also part of his claim that a breach of good faith occurred. He refers to the fact that the meeting itself took place on 8 July 2020, and the applicant was not contacted by the respondent until 22 September 2020. The reason for this (as advised to the applicant when the respondent first wrote to him on 22 September 2020) was that the graduate became severely ill. The applicant claims that this delay was “undue”.

[72] The applicant’s claims on this point are not made out. The delay, such as it was, was not “undue”. This is because there was a little under a month between the respondent asking the graduate to confirm her position in writing, which is not a significant amount of time. In addition, the reason that time was taken was because the graduate was unable to respond any faster. I am advised that in this intervening period of under a month, the graduate was on sick leave for more than 3 weeks. This means that she effectively took a week to respond to the respondent. There is no suggestion that she delayed, and every suggestion that she did her best to respond as soon as her health allowed. There is no suggestion that the respondent delayed in progressing this matter either, given the steps they took to progress the matter at each stage.

[73] In addition, the applicant has not been able to point to any practical disadvantage resulting. He simply says that he wishes the matter had been brought to his attention sooner, which while understandable, fails to properly take into account the specific circumstances that lead to this delay.

Further “letter of expectations”

[74] The applicant points to what he says is a subsequent “letter of expectation” from the respondent, which he says demonstrates that the respondent holds an adverse view of him and which following on from the written warning, makes his employment less secure.

[75] The “letter of expectation” is an email from a senior staff member of the respondent. It says, referring to the applicant:

It is worrying to hear you say that “you have been getting dissed a bit lately”. Everyone working at [the respondent] should be treated politely, professionally, and with kindness and respect – no one should be disrespected. If this has happened to you/happens to you, please let me, [the applicant’s

manager] HR, or any other manager that you feel comfortable with know right away so that we can address this...If it would be helpful for you, I am very happy to meet and chat.

[76] The applicant says that this email is a reminder of the behaviour the respondent expects of him, and was “designed for my HR file”. Having read the email, I do not agree that this is what the plain words of the email convey. This is not an instruction to the applicant to act in a certain way, nor is it a negative comment about him or his behaviour. It is a comment that the respondent considers the applicant worthy of treatment that is “polite”, “professional”, “kind”, and “respectful”. It ends with the comment that, if he feels he has been treated otherwise, the senior staff member would be worried by this on his behalf, and encourages him to reach out to someone in authority he feels comfortable talking to if needed.

[77] When I put it to the applicant at the investigation meeting that the email was in fact supportive of him, the applicant was reluctant to accept that this could be so, on the grounds that he did not feel he could trust this senior staff member either. He gave no reasoning for his view, and nor is there any evidence in support of it.

[78] This email is an informal attempt to offer workplace support. There is no evidential basis for the applicant’s negative view of this email. Accordingly, I find that there is no basis for any complaint of unjustifiable action (or otherwise) arising from this email.

Breaches of good faith

[79] The applicant has claimed that the respondent acted in breach of its good faith obligations towards him. The applicant says that there are several actions of the respondent which are in breach of the respondent’s good faith obligations towards him. I pause here to note that there is significant overlap between the applicant’s claims of unjustified disadvantage, and claims of breaches of good faith.

[80] The actions of the respondent which the applicant says are in breach of good faith are in summary:

- a. A failure to disclose the complaint early;
- b. Undue delay;
- c. The respondent’s reliance on two informal conversations;

- d. A failure to provide all relevant information, including copies of all communications between the respondent and the complainant, and full copies of all the respondent's policies;
- e. On-going delay during the disciplinary process;
- f. The failure by the respondent to prepare a report, being a document which summarised the respondent's initial findings, to be provided to the applicant for his comment before any final decision was made;
- g. The changing nature of allegations made by the respondent.

The various allegations of delay

[81] First, I will consider the allegations that there was a failure to disclose the complaint early, and undue delay. I have already found that there was no undue delay between the respondent being made aware of the complaint, and advising the applicant of its concerns, especially in circumstances where the graduate was severely ill. In addition, there is no evidence to suggest that the applicant was prejudiced by what delay there was. The evidence shows that he was able to recollect and share his views on the meeting between him and the graduate in the volume of some 27 typed pages of text.

[82] In respect of the allegation of on-going delay during the disciplinary process, this claim by the applicant needs to be assessed in light of the fact that he was an active participant in agreeing on key dates for meetings and feedback during this process. The applicant asked for more time to prepare, and was granted this time. Meeting dates were as agreed by him and his representative, taking their needs into account.

[83] The final outcome (the warning) was then conveyed to the applicant on 22 January 2020. The applicant indicated to me that he would have preferred a quicker resolution. In contrast, the DCE explained that she took time both before and after the holiday break to consider the 27 pages of written feedback that had been provided by the applicant, most recently on 20 January 2020.

[84] The applicant's claim that there was on-going delay during the disciplinary process to the extent that this amounted to a breach of good faith by the respondent cannot be made out. An objective reading of the extensive email correspondence that occurred between the parties show that the applicant and his representative actively engaged with the respondent by email, asking for extensions of time, various questions of clarification, and repeated requests for document disclosure, all of which were

promptly responded to by the respondent. This is consistent with the respondent's obligations to act in ways that are active, responsive, and communicative. It is therefore surprising that the applicant now claims that the actions the respondent took in responding positively to his various requests, including his requests for extra time, amount to a breach of good faith. For the sake of completeness, I further note that I can perceive no evidence that there was in fact any disadvantage to the applicant caused by the time taken for the respondent to make and convey its final decision to the applicant on 22 January 2022.

The allegation the respondent relied on informal conversations

[85] The applicant claims that the respondent's reliance on two informal conversations, amounts to a breach of good faith. I have already found, as set out above, that the respondent did not in fact rely on those two conversations. I reiterate that there is no evidence to support this claim, and the applicant admits that he bases this claim on his personal belief that the DCE has an adverse view of him and wishes to end his employment. I find that, to the contrary, there is evidence that once the DCE had considered and agreed with the applicant's request that these two matters be excluded from consideration as being irrelevant, she did so. In addition, I find that there is no evidence to support the applicant's allegations that the DCE had an adverse view of him. This claim is not made out.

The alleged failure to provide all relevant information

[86] The applicant claims that there was a failure to provide all relevant information, including copies of all communications between the respondent and the graduate, and full copies of all the respondent's policies, sufficient to amount to a breach of good faith. In particular, the applicant refers to an idea that he has not been given "all" of the correspondence that exists between the graduate and the respondent, particularly during the time period of 8 July when the incident occurred, and 22 September 2020, when the respondent wrote to the applicant about it. The respondent's position is that there was very little correspondence between itself and the graduate during that time period, due to her illness, and it has declined to provide correspondence relating to her illness or sick leave, on the grounds that it is irrelevant to the applicant, and private to the graduate. The human resource advisor's evidence of her correspondence and meeting with the graduate during this time period is that the respondent has provided the applicant with all relevant correspondence, and that there

was simply not large volume of correspondence over this period of time. The applicant's unwillingness to accept this is unexplained. This claim is not made out.

[87] In relation to the claim that the respondent did not provide copies of relevant policies and this was sufficient to amount to a breach of good faith, paragraph 2.73 of the Statement of Problem clarifies that this is a claim that the respondent did not provide the applicant with a full copy of the "PSC Guidance on the Code of Conduct".¹⁰ By this, I understand the applicant refers to the well-known document titled "Understanding the code of conduct – Guidance for State servants" produced by the Public Service Commission, and freely available on their website¹¹. The applicant is an experienced public servant, and arguably had an obligation to be actively aware of this document already. It is well-known, and freely available, and there can be no breach of good faith in the respondent failing to provide it in hard copy. This claim is not made out.

Failure by the respondent to prepare a report

[88] The applicant claims that the respondent failed to prepare a report, being a document which summarised the respondent's initial findings, to be provided to the applicant for his comment before any final decision was made, and that this lack of a report amounts to a breach of good faith. This is a reference to the respondent's Discipline and Dismissal policy. Paragraphs 18, 19, and 20 of that policy states:

The [Chief Executive] or nominee will produce a report in writing that will set out the nature of the allegation, a record of any supporting evidence, any responses to the allegation, and an assessment of the allegations. The [Chief Executive] or nominee will give a copy of the report to the staff member and invite the staff member to provide written or oral comment (at the staff member's discretion).

The [Chief Executive] will consider the report, any comment of the staff member, and decide whether there has been misconduct and whether that misconduct is serious. The [Chief Executive] will consider whether there have been any earlier incidents of misconduct and will then form a preliminary view on what, if any, disciplinary action should be taken.

If disciplinary action is being considered, the [Chief Executive] will inform the staff member of the disciplinary action proposed and invite comment. The [Chief Executive] will consider any comments, make a decision, and inform the staff member.

¹⁰ Noting that the respondent the respondent did provide the applicant with a copy of the code of conduct for the State Services entitled - *Standards of Integrity and Conduct* - <https://www.publicservice.govt.nz/resources/code/>

¹¹ <https://www.publicservice.govt.nz/resources/code-guidance-stateservants/>

[89] I have considered the claim that the respondent failed to provide a report, as required by the Discipline and Dismissal policy. The respondent wrote to the applicant on 10 December 2020. This letter set out the allegations, discussed the applicant's responses to those allegations, and gave the respondent's assessment of the allegations. The applicant was invited to provide comment, which he did in writing. This is in accordance with the requirements of paragraph 18 of the Discipline and Dismissal policy.

[90] Paragraph 19 of the Discipline and Dismissal policy requires the respondent to consider the report, and any comments of the staff member, and decide whether there has been misconduct, or serious misconduct. Paragraph 19 also requires that the respondent form a preliminary view on what, if any, disciplinary action should be taken.

[91] The evidence shows that the respondent did consider both the letter of 10 December 2020, and the applicant's responses to it (on 18 December 2020 and on 20 January 2021), before finalising its view that misconduct had occurred and that a written warning was appropriate¹², confirmed in writing on 22 January 2021. This is in accordance with paragraph 19 of the Discipline and Dismissal policy.

[92] The respondent also complied with paragraph 20 of the Discipline and Dismissal policy, by proposing a written warning and inviting the applicant's comment on this proposal before finalising its views.

[93] At the investigation meeting, the applicant explained that in his view, the Discipline and Dismissal policy required a "report" that was a document separate from and in addition to, the preliminary view letter provided by the respondent on 10 January 2021. After having read the Discipline and Dismissal policy, my view is that this is not what the policy actually requires. In addition, the applicant's claim that the respondent should have followed a process that was more time-consuming is not consistent with his other claim that there were undue delays.

[94] Looking at the Discipline and Dismissal policy overall, I also note that it starts with the explanation, at paragraph 3, that "the process followed in any particular situation may depart from the following process where the [Chief Executive] or their

¹² As set out in the letter of 22 January 2021, and as per the in person evidence given by the DCE.

nominee forms the opinion that another approach may be more appropriate in the circumstances but does not deviate from the principles of natural justice.” In my view, the respondent fulfilled the requirements of natural justice by summarising the matter, setting out its preliminary view that the applicant had committed misconduct and why, and setting out its preliminary view that a written warning was the appropriate outcome, and then asking the applicant to comment before any final decision was made. If there were any defects in the process (and in my view, none are made out), those defects were minor and did not result in the applicant being treated unfairly¹³.

[95] The claim that the respondent committed a breach of good faith due to a failure to prepare a required report is not made out.

The changing nature of the allegations

[96] The applicant has claimed that a breach of good faith occurred due to the changing nature of the allegations made by the respondent. The alleged changes are that, in the initial email of 22 September 2020, the respondent referred to obligations set out in clauses 5.2(b), 5.2(c) and 5.2(e) of the applicant’s employment agreement, and in the Public Service Commission’s Code of Conduct referred to in clause 5.2(e) of the employment agreement. Yet in the preliminary view letter of 10 December 2020, the respondent referred to the obligations in the applicant’s employment agreement set out in clauses 5.2(b), 5.2(c), 5.2(e), and the obligations in the applicable standards of conduct. The applicant argues that this change in wording amounted to a change in the allegations he was facing and that this was significant enough to amount to a breach of good faith.

[97] The difficulty with this claim is that the respondent has consistently referred to the same clauses in the applicant’s employment agreement, and has consistently referred to the Public Service Commission’s code of conduct. The applicant’s argument on this point appears to be based on the change of wording from “code of conduct” to “standards of conduct”, in circumstances where the underlying document and document references remain the same. There was no change in the subject matter under discussion, namely the respondent’s concerns arising from what was said at the meeting on 8 July 2020. In addition, I note that the Public Service Commission’s own website

¹³ Section 103A(5) provides that: “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.”

refers to the “code of conduct for the State Services – Standards of Integrity and Conduct.”¹⁴ In other words, the document is described by its owner using both the words “code” and “standards” in the same introductory sentence.

[98] This claim lacks substantive merit. It is not enough to amount to a breach of good faith, and if this change of a word from “code” to “standard” was sufficient to amount to a defect (which in the circumstances, I find it did not), it was not unjustifiable on the grounds that it was minor and did not result in the applicant being treated unfairly.¹⁵ This claim is not made out.

Failure to follow policy

[99] This is a claim that the respondent was obligated to follow and complete a separate stand-alone complaints process, before any disciplinary process could be commenced. It is based on the submission that the respondent is bound by all its policies, and did not follow the complaints policy, thus putting it in breach of both that policy, good faith, and obligations of the employment agreement.

[100] The Complaints Policy provides, at paragraph 23, that: “However, if at any time, the manager or other person conducting the investigation considers that the issues could, if substantiated, amount to misconduct, the respondent may decide to then progress the issues under the Disciplinary policy”.

[101] This is what occurred in this case. The handling of a complaint in accordance with the Disciplinary policy is specifically provided for as part of the Complaints policy. Therefore, there can be no breach of the Complaints policy. This claim lacks substantive merit, and is not made out.

[102] The applicant has also raised the suggestion that the ultimate decision maker could only have been the Chief Executive themselves, on the grounds that paragraphs 19 and 20 of the Disciplinary Policy refer to the Chief Executive making decisions as to the appropriate outcome of the disciplinary process. In this matter, the DCE was the decision-maker. The DCE gave evidence that she was specifically delegated by the Chief Executive to act as the decision maker in this matter, and that in any case, the respondent’s delegations policy specifically empowered her in her role as a DCE, to

¹⁴ <https://www.publicservice.govt.nz/resources/code/>

¹⁵ See the requirements of 103A(5) of the Employment Relations Act 2000.

both initiate disciplinary action for misconduct, and to issue what that policy referred to as a “penalty” not including termination.

[103] The DCE acted consistently with her standing delegations, and gave uncontested evidence that she had also received a specific delegation from the Chief Executive to act in this matter. She did not exceed her delegations. There is nothing improper in this. No claim is made out.

New claims relating to the applicant’s health

[104] During the investigation meeting, the applicant suggested that his mental health had been adversely impacted by the Covid-19 lockdowns in 2020. The applicant gave evidence that he had been prescribed medication in 2019, and that at certain times in 2020, the doses of this medication had been increased. His lawyer submitted that the respondent had failed to take this into account, and this was one of the reasons why the written warning was unjustified.

[105] The applicant was clear in his evidence that he had not disclosed any of this to the respondent prior to being issued with the written warning. The respondent says this issue was not raised with it until after the expiry of the 90-day period for raising personal grievance claims.

[106] Without discussing further details relating to the applicant’s health, the key evidence is that the applicant himself accepts that he never disclosed these details to the respondent until some time after he had raised his personal grievance claim.

[107] If the applicant wished his private health status to be taken into account by the respondent, he had a duty to advise the respondent of this in a timely manner. The respondent could not otherwise have been aware of these matters. The applicant did not do this. Accordingly, no action arises, as the respondent cannot take into account information which (on the applicant’s own account) was never given to it by him. No claim is made out.

Conclusions

[108] I note there is significant overlap between the actions the applicant has claimed are procedural failures by the respondent, and the same actions he claims amount to breaches of good faith, breaches of policy, and/or breaches of his employment agreement. As I have already set out above, none of these various claims are made out

on the facts of this situation. I have not found that the respondent has acted in a manner that is procedurally unfair. I also decline to find that there have been breaches of good faith, breaches of policy, or breaches of an employment agreement generally, arising out of the same factual matrix. The facts on which the applicant relies on to make these claims have not in my view been made out, and these claims do not succeed. To this extent, this determination records relevant findings of fact, but does not record all of the evidence received or all of the submissions made by the parties¹⁶.

[109] In addition, the applicant has not been able to point to any disadvantage in his employment that has occurred as a result of his being issued a written warning, active for 12 months, which has now expired. During the period the warning was expressed to be active, no further action occurred which negatively impacted on the applicant's employment security. Although the applicant states that he was issued with a "letter of expectation" in July 2022, I have found that that email did not impact negatively on his employment security, and in any event, it did not occur within the time the warning was active. The applicant's complaint that another staff member acted unprofessionally in having a seasonal Christmas display (which is not concerning) does not disclose any disadvantage to the applicant, and nothing flows from this.

[110] Accordingly, I find that no disadvantage has resulted to the applicant from the issuing of the warning. His claims in respect of it do not succeed overall.

Costs

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

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

¹⁶ In accordance with section 174E of the Employment Relations Act 2000.

[113] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁷

Claire English
Member of the Employment Relations Authority

¹⁷ Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>