

**NOTE: This determination contains orders prohibiting publication of certain information at [1] and [113]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 735  
3217459

BETWEEN                      AKW  
Applicant

AND                              TRIQUESTRA NEW  
ZEALAND LIMITED  
Respondent

Member of Authority:        Shane Kinley

Representatives:             Paul Pa'u, advocate for the Applicant  
Emma Crowley, counsel, and XOC for the Respondent<sup>1</sup>

Investigation Meeting:        4 October 2023, 11 and 12 June 2024 in Auckland and  
by AVL<sup>2</sup>

Submissions and further      Up to 12 November 2024 from the Applicant  
information:                    Up to 22 November 2024 from the Respondent

Determination:                12 December 2024

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication orders**

[1]     At the investigation meeting on 12 June 2024, I made non-publication orders under cl 10(1) of sch 2 of the Employment Relations Act 2000 (the Act) prohibiting publication of the names of and any other identifying information about witnesses in relation to this matter, and other individuals referred to in witness statements or

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<sup>1</sup> Triquestra was represented by counsel at the investigation meeting on 4 October 2023. Triquestra were represented by a company representative XOC at the investigation meeting on 11 and 12 June 2024.

<sup>2</sup> All witnesses and representatives were present in person on 4 October 2023. AKW and DQD appeared by AVL on 11 and 12 June 2024.

evidence. All witnesses are referred to in this determination by randomly generated identifiers, with job titles referred to in a generic manner.

[2] These orders were made based on discussion with the representatives about the nature of allegations raised, medical information including references to mental health issues<sup>3</sup> and discussion about the potential for specific adverse consequences. While the orders were made prior to the Employment Court's judgment in *MW v Spiga Ltd*<sup>4</sup>, I am satisfied the orders made remain appropriate in light of the Court's comments.

### **Employment relationship problem**

[3] AKW was employed by Triquestra New Zealand Limited (Triquestra) from 2016 until 2022. AKW raised claims Triquestra's actions unjustifiably disadvantaged them, they were unjustifiably dismissed, and Triquestra had breached the duty of good faith and AKW's employment agreement.

[4] Triquestra broadly denied AKW's claims saying it had not unjustifiably disadvantaged or dismissed them, and it had not breached the duty of good faith or AKW's employment agreement. During the investigation meeting Triquestra made an open offer to settle AKW's claims, which was not accepted. I return to that offer at paragraph [107] of this determination.

### **The Authority's investigation**

[5] For the Authority's investigation written witness statements were lodged for AKW by themselves and their mother DQD, and for Triquestra by XOC, VUL, JUB and DXH. All witnesses answered questions, under oath or affirmation, from me and from the representatives for AKW and Triquestra. The representatives also provided written submissions and further information as directed by me.

[6] The investigation meeting commenced on 4 October 2023 however was adjourned by agreement of the representatives, with agreement that day would be disregarded for costs purposes. The investigation meeting recommenced on 11 June 2024.

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<sup>3</sup> The nature of allegations raised means some reference to mental health issues is necessary in this determination, however, details have been omitted with only general references to mental health made.

<sup>4</sup> [2024] NZEmpC 147.

[7] On 9 October 2024 I requested further submissions on whether claims of unjustified disadvantage related to an alleged warning and suspension at a meeting on 24 August 2022 could be considered and on what basis. Submissions on this point were provided as timetabled in October and November 2024. As these claims arose during the investigation process rather than being identified at an earlier stage, they have been addressed in this determination rather than as a preliminary issue.

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

### **The issues**

[9] The issues requiring investigation and determination are:

- (a) Was AKW disadvantaged by unjustifiable actions of Triquestra regarding:
  - (i) Bullying, harassment and lack of support for mental health problems, causing an unsafe work environment and mental health breakdown; and
  - (ii) Warning for poor performance, including only allowing a week for performance to improve after warning?
- (b) Were AKW's claims of unjustified disadvantage in relation to an alleged warning and suspension raised within 90 days as required by ss 114(1) and 114(7)(b) of the Act and, if not, should leave be granted to raise these claims under s 114(4)?
- (c) Was AKW unjustifiably dismissed, including consideration of giving four weeks' notice during a period they were unable to work due to their mental health?
- (d) If Triquestra's actions were not justified (in relation to disadvantaging or dismissing AKW), what remedies should be awarded, considering:
  - (i) Lost wages under s 123(1)(b) of the Act; and
  - (ii) Compensation under s 123(1)(c)(i) of the Act?
- (e) Did Triquestra breach its duty of good faith by:
  - (i) Allowing AKW to work in an unsafe working environment; and
  - (ii) Its treatment of AKW during the period they were unable to work because of their mental health?
- (f) If Triquestra breached its duty of good faith should it be penalised?

- (g) Did Triquestra breach AKW's employment agreement, with reference to obligations to review remuneration annually and to follow policies and procedures?
- (h) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by AKW that contributed to the situation giving rise to their grievances?
- (i) Should either party contribute to the costs of representation of the other party.

### **Was AKW disadvantaged by unjustifiable actions of Triquestra?**

#### *Relevant law*

[10] For AKW's unjustified disadvantage claims under s 103(1)(b) of the Act to be successful requires:

- a. That AKW's employment, or one or more conditions of their employment, was (in this case, as AKW's employment has since ended) affected to their disadvantage; and
- b. This was due to some unjustifiable action by Triquestra.

[11] In assessing this, I must apply the test of justification under s 103A of the Act, being whether Triquestra's actions, and how Triquestra acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[12] In reaching my conclusions about AKW's unjustified disadvantage claims, s 103A(3) requires I consider:

- a. having regard to the resources available to it, did Triquestra sufficiently investigate before taking action?
- b. did Triquestra raise concerns it had with AKW before taking action?
- c. did AKW have a reasonable opportunity to respond? and
- d. did Triquestra genuinely consider AKW's explanation or comments?

[13] I may also take into account any other factors I think are appropriate under s 103A(4). I must not determine an action to be unjustifiable where there were defects in Triquestra's process that were minor and did not result in AKW being treated unfairly under s 103A(5).

### *Context and timeline*

[14] Triquestra's primary decision maker in relation to the events which led to AKW's claims was XOC. DXH was AKW's manager at the time of those events. VUL and JUB were two other managers at Triquestra, who were involved to differing and lesser extents in those events.

[15] XOC acknowledged AKW was a competent worker during most of their time at Triquestra, although also said concerns had been raised with AKW on an informal basis. XOC also said concerns had been raised with them in general terms about AKW's performance prior to August 2022.

[16] In June and July 2022 DXH raised a number of concerns with AKW, which Triquestra's witnesses largely described as informal performance issues, raised under Triquestra's Continuous Performance Management policy. AKW complained to XOC about DXH's raising of those concerns on 3 August 2022 and requested XOC's assistance in relation to those concerns.

[17] XOC met with AKW and DXH on 5 August 2022. XOC advised AKW they did not accept AKW's complaints, rather they considered AKW's performance was not acceptable leading to a formal performance improvement plan (PIP) being initiated, with three areas of "performance" concerns where improvements were sought. A recording of this meeting was provided by AKW and played at the investigation meeting on 4 October 2023.

[18] Review meetings occurred with XOC, AKW and DXH on 12 and 23 August 2022, with the second review meeting being supported by a review document prepared by DXH on 19 August 2022. The first week's review was summarised in an email from XOC where they stated "Overall, progress is positive and is heading in the right direction, this is good to see".

[19] The second week's review held on 23 August 2022 was not as positive and was followed by a heated meeting on 24 August 2022, with notes taken by DXH during that meeting disclosed by Triquestra in September 2023. Those notes included the following comments attributed to XOC:

In terms of the performance plan and your feedback. We've considered your responses to the example given. And as we've given feedback yesterday, some areas have shown improvement, and there are still some areas where performance is still substandard to what we would expect. ...

So, we are going to issue [sic] you with a formal warning that ... [interrupted by AKW] ...

Okay, so you will be given a written warning and you'll be given the process from here ...

I would like to you go home. Take two days off, full pay, and really consider this process. You can use that time to organise [sic] and consider what you want to do in terms of this process

[20] These comments are focussed on the decisions communicated by XOC during this meeting and are part of notes which run to two pages. I return to other aspects of this meeting later.

[21] XOC sent AKW a follow-up email on 26 August 2022, which included the following references to the meetings on 23 and 24 August 2022:

In follow up to that meeting, I asked you to meet with [DXH] and I at short notice. In that meeting, we discussed our consideration of your feedback and our preliminary view that a formal warning may be appropriate. On reflection, this was not fair and meant you [sic] did not give you sufficient notice of this meeting, time to prepare or to invite a support person to attend. Therefore, we have decided not to proceed with the formal warning and instead extend the performance review process by a further two weeks to 9 September. We also plan to reduce the scope of the performance improvement plan. To be specific we propose to focus solely on the productivity objectives in your original plan with slight modification ...

[22] A third review meeting was held on 2 September 2022, where the revised scope of AKW's PIP was confirmed. A fourth review meeting was held on 9 September 2022, following which XOC advised AKW:<sup>5</sup>

[their] preliminary view was that you had not met the standards outlined in the PIP and that you'd been given adequate time and support to do so. You were invited to talk through each example provided of why not. Following the meeting, your explanations were considered and found to be unacceptable. [XOC] issued a formal warning and a further review period. ...

[23] At all of the above meetings AKW was not represented and did not have a support person present, though evidence was provided of discussions where AKW acknowledged they were aware of their right to have a support person or representative present and provided reasons why no support person or representative was present. Following the fourth review meeting AKW's advocate contacted XOC to advise AKW was now represented by the advocate.

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<sup>5</sup> Source: Timeline in email from XOC to AKW's advocate *RE: Performance review: [AKW]*, 13 September 2022.

[24] A final review meeting occurred on 16 September 2022, attended by AKW and their advocate. A transcript of that meeting was provided and accepted by the parties and representatives as being accurate. Following this meeting AKW was off work on sick leave, annual leave and unpaid leave, and did not return to work. I return to events related to the ending of AKW's employment later.

*Did Triquestra's actions unjustifiably disadvantage AKW in relation to bullying, harassment and lack of support for mental health problems, causing an unsafe work environment and mental health breakdown?*

#### Submissions of the parties

[25] Submissions for AKW said Triquestra breached its performance management policy in numerous ways, including:

- a. by failing to advise AKW they were subject to informal performance management;
- b. by failing to share notes of issues raised with AKW including notes from DXH taken during one-to-one meetings with AKW said to be part of the informal performance management process;
- c. in relation to initiating the formal performance management process, as there was no written meeting request or notice the reason for the meeting was to discuss performance; and
- d. by having DXH mentor AKW during the performance management process, when XOC knew this would cause AKW distress.

[26] Specific claims were made that Triquestra acted unjustifiably in relation to the meeting on 24 August 2022, given the lack of notice of that meeting or what would be discussed. Overlapping claims were made that Triquestra's actions were a breach of the duty of good faith in relation to the decision to commence a PIP without any input from AKW, and in relation to DXH acting as a spokesperson for others at Triquestra when raising informal performance issues with AKW.

[27] Submissions for AKW alleged Triquestra's actions and specifically those of XOC at the meeting on 5 August 2022 led to a severe deterioration of AKW's mental health and wellbeing. It was further alleged XOC's response "to soldier on using [DXH] as mentor and support during the formal PIP process" was unreasonable "when any reasonable person could see that this would only make the situation worse". Concerns were also raised about XOC commencing a disciplinary process during the PIP process,

saying this “caused unnecessary further stress and distress”, and showed XOC “was not acting impartially or objectively”.

[28] Submissions for Triquestra said it had reasonable grounds to commence the PIP and subsequent disciplinary process, with concerns clearly raised informally with AKW, leading to their complaints about DXH. A genuine PIP process, which this was claimed to be, was said not to amount to bullying or harassment. XOC was said to have reasonably investigated AKW’s complaints and considered AKW’s performance, before commencing the PIP and in determining DXH should continue to manage AKW and to support them in the PIP process.

[29] Triquestra also said XOC had acted appropriately in raising concerns about AKW’s mental health, asking whether they were OK, encouraging them to access EAP services and to use funded medical insurance to access health specialists. When AKW asserted they had no mental health issues, Triquestra said it was reasonable to take those statements at face value and it had acted having taken specialist HR advice.

[30] Triquestra also raised a concern in submissions that the claim of an unlawful suspension was new and additional issue, which had not been pled in the Statement of Problem and was not raised within the 90-day timeframe required under s 114 of the Act. By implication Triquestra’s concern also related to the claim an unlawful warning alleged to have been issued at the meeting on 24 August 2022. Triquestra requested an opportunity to provide further evidence and submissions if these claims were allowed to proceed.

[31] Submissions in reply for AKW said these issues were not known of until the investigation meeting, where XOC accepted notes taken during the meeting on 24 August 2022 were accurate and acknowledged they may have suspended AKW.

[32] As noted at paragraph [7] above, I requested further submissions on whether claims of unjustified disadvantage related to the alleged warning and suspension at a meeting on 24 August 2022 could be considered and on what basis.

[33] Submissions for AKW said their advocate only became aware of the warning and suspension during the investigation meeting in June 2024 and claimed XOC misrepresented whether AMW had been suspended or given a warning, only conceding these points at the investigation meeting. DXH’s notes of the meeting on 24 August 2022 were said to have been “buried in the Respondent’s Additional Bundle of

Documents dated 12 September 2023” with “such a huge amount of written material that I had not understood their significance until I asked [DXH] about [their] notes during the IM”. These submissions did not seek leave to raise this grievance out of time. They referred to “not knowing of the warning and suspension on 24 August 2022, [being] more than a mere technicality”.

[34] Submissions for Triquestra said no written warning was issued on 24 August 2022 and no grievance was raised in relation to either an unjustified warning or suspension. Triquestra also said AKW’s representative became aware of the direction to take leave and intention to issue a warning on 13 September 2022 and received DXH’s notes on 12 September 2023. On this basis these grievances were said to have been raised out of time, with no exceptional circumstances identified and leave should not be granted. If leave were to be granted under ss 114(4) of the Act, then Triquestra said these claims would need to be referred to mediation under ss 114(5) of the Act.

[35] Submissions in reply for AKW as to whether separate grievances were raised about the warning and suspension asserted “It is difficult to see how the personal grievance could have come to the notice of the employee in those circumstances”, with reference to the timing for when DXH’s notes were disclosed, the lack of reference to the warning and suspension in the Statement in reply and amended Statement in reply, and different version of events in XOC’s evidence.

### Analysis

[36] Based on all the evidence before me, including the recordings of various meetings, I consider Triquestra established reasonable grounds for raising performance concerns with AKW. There were numerous examples of AKW attempting to deflect from the raising of those performance issues and to attribute issues to other Triquestra employees.

[37] There were however a number of procedural faults in the process Triquestra adopted and it failed to follow its own policy in relation to setting up the meeting on 5 August 2022 between XOC, AKW and DXH. Triquestra’s performance management planning policy is clear such a “meeting request should be in writing [with] sufficient time for [the employee] to consider the issues and their response (at minimum 24 hours) ... [stating] the reason for the meeting is to discuss performance [with] a list of specific areas of concern [and advice] the employee can bring a support person with them to the meeting”.

[38] XOC's decision to combine their response to AKW's complaint with advice AKW was being placed on a PIP failed to meet these requirements of Triquestra's policy. I find this amounted to an unjustified disadvantage and is not a minor procedural failing.

[39] During the meeting on 5 August 2022, which I have reviewed a recording of, I consider otherwise XOC's actions were reasonable and they expressed genuine concern for AKW's wellbeing. XOC also followed a reasonable process in setting clear and measurable standards for the performance improvements expected and establishing a process for monitoring and reviewing performance. I also consider XOC acted reasonably in seeking HR advice, which was provided to the Authority, on how to deal with their concerns about AKW's behaviours and to seek to ensure the PIP process was fair. The PIP was amended in response to advice it would be more appropriate to address some aspects which had been raised as performance issues as behaviour issues, and credit was given for improvements in performance in the first week of the PIP process.

[40] However, I consider XOC's actions in calling and during the meeting on 24 August 2022 are capable of giving rise to further unjustified disadvantages. XOC's evidence was honest in accepting they regretted this meeting and saying it had gone "terribly, no, poorly". XOC acknowledged the meeting was called at short notice, saying this was because AKW was very agitated, making a lot of noise in Triquestra's open plan office. XOC also acknowledged AKW had no opportunity to invite a support person to this meeting and conceded DXH's notes taken during the meeting, extracts of which are at paragraph [19] above, which strongly supported a verbal warning being issued during the meeting, "maybe more accurate" than their recollection. I refer below to this statement as XOC's concessions.

[41] I consider XOC's email to AKW on 26 August 2022, extracts of which are at paragraph [21] above, downplayed the formal warning by suggesting it had been discussed and was being considered, but was not being proceeded with. On the evidence before me, I find the warning was verbally issued, but consider XOC then regretted doing so and attempted to effectively retract the warning. XOC also said a formal warning needed to be in writing. While Triquestra's Disciplinary Procedures Policy requires "formal written warning" and applies in circumstances of inadequate

performance, I do not consider that changes the clear meaning of XOC's actions in issuing a verbal warning.

[42] XOC's evidence supported them being exasperated by AKW's behaviour and XOC raising multiple concerns about AKW's mental health and wellbeing. Having asked and encouraged AKW to seek support, and having reminded AKW of their ability to access EAP or to use Triquestra funded medical insurance to access health specialists, XOC said they made the decision during the meeting on 24 August 2022 to send AKW home. XOC said it was "best for [AKW's] health and in line with broader duty of care, best for [AKW] to take a rest and consider the process going forward". While this was not formally presented as a suspension, XOC clearly issued an instruction AKW not work for two days. I consider XOC's instruction amounted to a suspension, where there was no consultation with AKW. This is capable of representing a further unjustified disadvantage to AKW during the meeting on 24 August 2022.

[43] I consider AKW's employment was affected negatively by all three of the above actions (being the calling of the meeting, the issuing of a warning and the suspension) as it became less secure, although the effects were temporary and some efforts were made by Triquestra to rectify those negative effects on AKW and to correct procedural failings.

[44] My notes from the Authority's investigation meeting from 12 June 2024 recorded XOC's concessions about the meeting on 24 August 2022, in response to questions about DXH's notes and evidence. Based on XOC's concessions, I consider it appropriate to make findings AKW was unjustifiably disadvantaged by those actions, including the suspension and warning.

[45] However, while Triquestra was clearly on notice AKW was complaining about their treatment throughout the PIP process and in relation to their dismissal, with grievances raised initially on 27 September 2022, I do not consider separate grievances were clearly raised about the suspension or warning of 24 August 2022, which needed to occur by late November 2022.

[46] I do not consider leave has been sought to raise these grievances out of time under s 114(3) of the Act, despite references to exceptional circumstances in submissions in reply for AKW in November 2024.

[47] My records of the Authority's investigation meeting on 4 October 2023 include notes of a preliminary discussion where AKW's advocate referred to the suspension, which was objected to by Triquestra's then counsel on the basis it was out of time. My records show AKW's advocate accepted this was out of time but suggested it could be considered as an issue other than as found or a grievance other than as raised. I recorded a preliminary view this grievance appeared to be out of time.

[48] The investigation meeting on 4 October 2023 was adjourned by agreement of the representatives and the issue of whether this grievance had been raised within time was not focussed on again until submissions. I do not consider this is a technicality and for completeness neither do I consider leave should be granted under ss 114(4) of the Act for the following reasons.

[49] AKW's advocate first raised grievances about the broader PIP process on 27 September 2022. I accept AKW's advocate may not have been aware of the suspension or warning at that time, however it is AKW's knowledge which determines the timeframe for raising a grievance, not the advocate's knowledge.

[50] I accept AKW may not have been able to raise those grievances at that time, due to the impacts of the process on their mental health, including acute mental health issues at times after August 2022. However, AKW was medically cleared to participate in the Authority's investigation process on 8 March 2024 and no issues were raised about their ability to instruct their advocate at that time.

[51] I do not accept XOC's concessions amount to exceptional circumstances in themselves, given the disclosure of DXH's notes of the meeting on 24 August 2022 occurred on 12 September 2023 and AKW's advocate raised the possibility of the suspension being a separate grievance at the first investigation meeting date on 4 October 2023. While submissions for AKW said they could have reasonably expected their advocate to have raised all relevant grievances, no evidence was provided of instructions having been given to do so or why their advocate did not do so, other than the statement they did not realise the significance of DXH's notes until the investigation meeting.

[52] In totality, I am not satisfied exceptional circumstances have clearly been established or that it would be just, as is required under ss 114(4)(b) of the Act to grant leave due to these grievances only clearly being raised in submissions and in the

absence of a formal application for leave. I do not consider it would be in the interests of finality for this matter to grant leave for these grievances to be raised, especially as doing so would require I direct these grievances to mediation, separate from disposing in this determination of the other grievances which were raised within time.

[53] I find AKW's grievances related to the suspension and warning issued at the meeting on 24 August 2022 were raised out of time and decline to grant leave for these grievances to be raised out of time.

[54] For completeness I do not consider Triquestra's actions amounted to bullying or harassment of AKW or caused an unsafe work environment, rather Triquestra was attempting to commence a PIP process where I consider it had reasonable grounds to do so and other than as noted above I consider it followed a reasonable process.

[55] I consider DXH could potentially have been clearer when they raised informal performance issues with AKW, which had been raised with them by others at Triquestra, and in signalling a shift to informal performance management from regular continuous improvement feedback. I consider these matters were minor procedural failings, which do not amount to separate disadvantages.

[56] I do not consider Triquestra's commencement of a disciplinary investigation into separate issues while AKW was under a PIP process amounts to a disadvantage. While this may have added to AKW's stress and distress, I consider XOC did not act unreasonably in raising their concerns and acted reasonably in ultimately not taking the matter further than clarifying expectations. The process of considering the issues being investigated appeared reasonable to me.

[57] I do not consider I have sufficient evidence to make a finding whether Triquestra's actions disadvantaged AKW in relation to alleged bullying, harassment and lack of support for mental health problems. Submissions for AKW said XOC's treatment of AKW at the meeting on 5 August 2022 led to a severe deterioration of AKW's mental health and wellbeing. There was however some evidence of behaviour which suggests AKW's mental health issues may have been emerging prior to that meeting, including AKW being argumentative and blaming others for issues related to their work. The evidence is however not clear enough for me to attribute any impacts on AKW to unjustified actions of Triquestra or its employees.

### Summary of findings

- [58] I have found AKW was unjustifiably disadvantaged by Triquestra's actions in:
- a. XOC combining their response to AKW's complaint with advice AKW was being placed on a PIP, which failed to meet the requirements of Triquestra's policy for notice a PIP was being considered; and
  - b. XOC's calling the meeting on 24 August 2022.

[59] AKW is entitled to consideration of remedies in relation to these disadvantages, which I return to at paragraphs [104] to [111] below.

[60] While I have also found AKW was unjustifiably disadvantaged by Triquestra's actions in relation to their suspension and the issuing of a verbal warning at the meeting on 24 August 2022, I find these grievances were raised out of time and decline to grant leave for these grievances to be raised out of time. These grievances are not taken into account in the assessment of remedies below.

[61] I do not consider Triquestra's actions otherwise amounted to bullying, harassment and lack of support for mental health problems, or caused an unsafe work environment, or Triquestra's commencement of a disciplinary investigation into separate issues while AKW was under the PIP process amounts to a disadvantage.

*Did Triquestra's actions unjustifiably disadvantage AKW in relation to a warning for poor performance, including only allowing a week for performance to improve after warning?*

### Submissions of the parties

[62] Submissions for AKW said "No reasonable employer would have issued a warning on 9 September" as AKW was "making a genuine attempt to engage constructively with the process despite the pressure and stress that [they] was under" and where "the only performance concern that formed part of the PIP **was productivity**" [emphasis in original]. Submissions alleged this was a breach of Triquestra's performance management policy, as was AKW being "given only one week to improve that performance or [their] employment might be terminated".

[63] Submissions for Triquestra said its:

decision to issue a warning after the further improvement period of one week, based on the information it had at the time, was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made.

[64] Triquestra pointed also to the process which had led up to the issuing of the warning, including informal performance and coaching discussions, changes to hours of work to assist with performance, support with day to day work from a number of senior managers, requesting advice of what additional support or training was required, and removing some performance standards from the PIP to give AKW “the opportunity to focus on the fundamentals first”. Triquestra said its “view that more time would not have helped [AKW] to attend the office on time and work [their] contracted hours was a view open to a fair and reasonable employer in the circumstances”.

#### Analysis

[65] Based on all the evidence before me, including the recordings or transcripts of various meetings, I consider Triquestra did not unjustifiably disadvantage AKW in relation to the warning given to them on 9 September 2022 for poor performance, or by allowing one week only before the next performance review was due to occur.

[66] In reaching this view I considered the evidence before me, including transcripts of meetings on 2 and 9 September 2022, correspondence related to review meetings and discussions about support people availability, and the warning letter of 9 September 2022.

[67] I consider Triquestra set clear and measurable standards for AKW to achieve, and removed other expected standards from the PIP process so AKW could focus on productivity measures related to work attendance, hours of work and recording what work was done according to instructions and feedback on AKW’s records.

[68] During the review meetings on 2 and 9 September 2022 I am satisfied Triquestra communicated its view of performance during the review period, allowed a reasonable time for improvement and assessed performance fairly, as required under the framework for assessing performance articulated by the Court in *Trotter v Telecom Corporation of NZ Ltd*<sup>6</sup> and endorsed as remaining relevant in subsequent judgments.

[69] While submissions for AKW criticised Triquestra for not providing an assessment of performance in advance, I do not consider that is required under the framework in *Trotter*.

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<sup>6</sup> [1993] 2 ERNZ 659.

[70] I consider the most relevant question from those listed in *Trotter* to be the following:<sup>7</sup>

- (5) Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected, including:
  - (a) Using an objective assessment of measurable targets;
  - (b) Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;
  - (c) Listening to the employee's explanation with an open mind;
  - (d) Considering the employee's explanation and all favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and
  - (e) Exhausting all possible remedial steps including training, counselling, and the exploration of redeployment?

[71] While a weekly review of performance may appear to be a reasonably short timeframe for improvements to be demonstrated, I consider given the nature of the productivity expectations being assessed, this timeframe falls within the bounds of "acceptable action" as articulated by the Court in *Wilson-Grange Investments (t/as Grange Bar and Restaurant) v Guerra*.<sup>8</sup>

[72] As events evolved in this case, AKW attended the next performance review meeting with XOC and DXH on 16 September 2022 with their advocate representing him. I have reviewed the transcript of that meeting, which did not progress to an assessment of AKW's performance. Following that meeting AKW was away from the workplace until the end of their employment, including on periods of sick, annual and unpaid leave. I do not attribute fault for that meeting failing to progress to Triquestra. AKW's advocate certainly advanced their views of procedural fairness strongly during the meeting, which is not unusual when grievances are being raised. As it eventuated, the PIP process did not go further due to AKW's absence, with the next events I consider material leading to the ending of AKW's employment.

### Summary of findings

[73] I find Triquestra did not unjustifiably disadvantage AKW in relation to the warning given to them on 9 September 2022 for poor performance, or by allowing one week only before the next performance review was due to occur.

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<sup>7</sup> Ibid at 681.

<sup>8</sup> [2023] NZEmpC 39 at [41].

**Was AKW unjustifiably dismissed, including consideration of giving four weeks' notice during a period they were unable to work due to their mental health?**

*Relevant law*

[74] The Court has addressed the principles to consider where dismissal for long term absence including medical incapacity is being considered in *Lal v The Warehouse Ltd*, including the following comments which reflect the requirements of s 103A(3) of that Act, referred to at paragraph [12] above:<sup>9</sup>

[30] It is well established that an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work. An employer will be justified in dismissing an employee for long term absence where it can be shown that the decision was substantively and procedurally justified. ...

[33] The employer must give the employee a reasonable opportunity to recover. The terms of the employment agreement, any relevant policy, the nature of the position held by the employee and the length of time they have been employed with the employer are factors which are likely to inform an assessment of what is reasonable in the particular circumstances.

[34] The employer must undertake a fair and reasonable inquiry into the prognosis for a return to work, engaging appropriately with the employee. This will likely involve seeking and considering relevant medical information. It will also involve explaining the reasons for the inquiry, the possible outcome of it, and providing the employee with an opportunity for input and comment.

[35] The employer must fairly consider what the employee has to say before terminating their employment. An employer is entitled to have regard to its business needs in deciding an appropriate response to the situation and any applicable time-frames. An employer is not obliged to keep a job open indefinitely, no matter how long an employee has been employed or how large the organisation is. For their part, an employee is obliged to be responsive and communicative.

[36] In cases of medical incapacity, and a reduced ability to undertake certain tasks, a level of engagement with attempts to facilitate a return to work may reasonably be expected. Fairness cuts both ways, consistently with the mutual obligations which exist in employment relationships. ...

[48] An employer cannot be held to ransom by an incapacitated employee, dictating the terms on which they will return to work and where. An employee can however expect that their concerns will be genuinely considered and appropriately responded to. The employer's actions must be within the range of what a fair and reasonable employer could do in the circumstances.

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<sup>9</sup> [2017] NZEmpC 66, affirmed in *Lyttelton Port Co Ltd v Arthurs* [2018] NZEmpC 9 at [32].

### *Context and timeline*

[75] AKW was dismissed by Triquestra on 30 November 2022 following a process commenced by XOC on 8 November 2022. All communications on behalf of AKW were with their advocate. Key steps in the ending of the employment relationship were:

- a. On 8 November 2022 XOC wrote to AKW's advocate advising they did not consider Triquestra could accommodate AKW's ongoing absence and were considering terminating their employment in accordance with cl 6.7 of their employment agreement (discussed below). Information was sought about AKW's "short to medium term prognosis from [their] doctor" with consent sought for disclosure of medical information. A response was requested by 15 November 2022, with advice a decision could be made on that date if a response was not received by then;
- b. AKW's advocate replied on 9 November 2022 raising concerns with the proposal, saying "The timeframe you have suggested is unreasonable". A request was made to respond by 22 November 2022, with a request for a meeting to "please [their] case about why it is unfair and inhumane to fire [them] when [their] employer, and your behaviour in particular, is the reason [they are] unwell";
- c. XOC replied on 9 November 2022 agreeing to extend the timeframe for "information about [AKW's] condition and comments on the possibility of termination of employment" until 22 November 2022, and agreeing to meet on that date to discuss the matter. XOC expressed clearly a decision would be made "After that time, ... about whether we can continue keeping [AKW's] role open, or whether to terminate [their] employment";
- d. AKW's advocate contacted XOC on 22 November 2022 advising a medical report had not been obtained, providing a number of reasons why this was the case including reference to a complaint to Police (about a matter which does not appear related to AKW's employment) and requesting a further extension of 4 weeks. They asserted AKW's role was not senior, there was no pressing business need to make a decision and they did not consider there was prejudice to a further delay in the circumstances;
- e. XOC replied to AKW's advocate on 22 November 2022, requesting a copy of a Police report about the complaint made to Police and raising

concerns about AKW's posting on social media. A response was requested by 28 November 2022, with an indication a final extension may be granted till 12 December 2022;

- f. XOC advised AKW's advocate on 30 November 2022 that in the absence of the provision of the requested Police report, they intended to make and communicate their decision, and in the absence of response to concerns about AKW's social media posts, they would draw conclusions; and
- g. Later on 30 November 2022 XOC gave AKW, via their advocate, notice of the termination of their employment under cl 6.7 of their employment agreement. Four weeks' notice of termination was provided, with employment to end on 28 December 2022.

#### *Submissions of the parties*

[76] Submissions for AKW acknowledged their employment agreement allowed Triquestra to end the employment relationship if they were unable to work due to mental or physical illness of a period of 20 working days. Triquestra's decision was said however to not be consistent with good faith obligations and case law on termination for incapacity, with it having provided no evidence of business impact. In addition, as the employment agreement allowed Triquestra to require a medical examination, its failure to do so was unreasonable. Triquestra were also said to have failed to consider AKW's employment history, six years of loyal service and that their "behaviour from August 2022 was completely out of character for [them] and it was clear to everyone working with [them] that [they] were suffering a serious crisis of mental health". Submissions for AKW concluded "It was not unreasonable to give [them] more time to provide the information the employer wanted or to get better".

[77] Triquestra submitted its decision to dismiss AKW for medical incapacity was one a fair and reasonable employer could make, having followed a fair consultation process and having twice provided extensions for medical information to be provided. It pointed also to there being no response to concerns about AKW's social media posts and the Police report requested not being provided.

[78] Reply submissions for AKW said they had only been absent for nine weeks when dismissed, reiterated Triquestra had chosen not to direct a medical assessment

under the employment agreement and restated a fair and reasonable employer would have allowed more time.

### *Analysis*

[79] Clause 6.7 of AKW's employment agreement clearly states Triquestra could terminate employment where AKW was absent for a continuous period of 20 working days or more, and cl 6.8 says Triquestra may require a medical examination at its expense.

[80] Triquestra clearly advised AKW via their advocate it was considering invoking this provision and sought consent for a medical report to be provided, rather than directing this occur. Triquestra also granted two extensions to the timing for medical information to be provided and comment on issues which had arisen with AKW's social media posts and other communications. Triquestra's final substantive communication clearly advised it would make a decision based on the information it had and it also advised early on the day of the decision it intended to do so.

[81] I find Triquestra has met both the procedural requirements of s 103A and its contractual obligation in relation to invoking the termination clause. The period of approximately ten weeks, by my calculations, since AKW had been at work in mid-September to the date of termination at the end of November 2022 is not overly long and included some periods of paid leave, and certainly is not as long as the 12 months before termination occurred in *Lyttelton Port Company Ltd v Arthurs*.<sup>10</sup> The Court noted however in *Arthurs* "Other employers have started such an enquiry sooner"<sup>11</sup> in relation to the employer commencing an enquiry into Mr Arthurs' ability to return to work after a seven-month absence.

[82] In doing so, the Court referred to *Barry v Wilson Parking New Zealand [1992] Ltd*<sup>12</sup> saying that was a matter where an employer had started its enquiry after six weeks of absence and dismissed the employee after a further six weeks. While *Barry* predates the statutory duty of good faith and the test for justification in s 103A, I consider it remains a relevant indicator of reasonable timeframe requirements for an employer when considering termination.

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<sup>10</sup> [2018] NZEMPC 9.

<sup>11</sup> *Ibid* at [37].

<sup>12</sup> [1998] 1 ERNZ 545.

[83] The Court said in *Barry*:<sup>13</sup>

... the employer has to wait a reasonable time to give the injured employee an opportunity to recover (what is reasonable being a question of fact in each case) and after that it has to inquire in a fair and open-minded way whether the employee has any realistic prospects of returning to work within a further reasonable time. ...

In the present case, the respondent was ungenerous in the times that it allowed ... However, the Court's function is not to compel employers and employees to be generous or kind to each other but only to see that they treat each other justly.

*AKW was not unjustifiably dismissed by Triquestra*

[84] The length of time Triquestra allowed before commencing considering terminating AKW's employment is not however determinative of whether Triquestra's decision was reasonable or procedurally fair.

[85] I find Triquestra's decision to terminate AKW's employment under the incapacity clause in their employment agreement was not unreasonable and as a result AKW's dismissal was not unjustified. Triquestra referred to the contractual provision and sought medical information about AKW's likely timeframes to be able to return to work. I consider Triquestra followed a fair process including requesting information and granting initial extensions, provided an opportunity for comment and only made its decision when medical information was not forthcoming, having considered the general comments made including that dismissal was unfair and there was no pressing need to make a decision.

### **Did Triquestra breach its duty of good faith to AKW?**

*Submissions of the parties*

[86] Submissions for AKW claimed breaches of the duty of good faith by Triquestra related to allowing AKW to work in an unsafe working environment and its treatment of AKW during the period they were unable to work because of their mental health, distinguishing between events prior to and from 5 August 2022. Those breaches were said to be deliberate, serious and sustained or the failure was intended to undermine an employment agreement, warranting penalties in both cases.

[87] Triquestra submitted it acted in good faith at all material times, took reasonable steps to investigate concerns about AKW's mental health, paused the PIP process,

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<sup>13</sup> Ibid at 549.

granted leave and repeatedly sought to constructively engage with AKW including providing them with multiple extensions.

*Analysis and finding*

[88] AKW's claims Triquestra breached its duty of good faith overlapped with their claims of unjustified disadvantage and dismissal discussed above, with the facts supporting both sets of claims being the same. Submissions for AKW pointed to serious breaches of good faith for example in Triquestra's failure to follow its own policies, as well as referring to XOC misleading AKW about the nature of their investigation of AKW's concerns.

[89] I consider Triquestra's actions, which I found at paragraphs [58] and [60] above unjustifiably disadvantaged AKW, were also breaches of its duty of good faith to AKW as follows:

- a. XOC misled AKW in organising the meeting on 5 August 2022 as they did not advise AKW they were combining their response to AKW's complaint with advice AKW was being placed on a PIP; and
- b. XOC's actions in calling and then during the meeting on 24 August 2022, including both issuing a verbal warning to AKW and suspending AKW, were not consistent with the requirement of the duty of good faith to be "active and constructive in establishing and maintaining a productive employment relationship".

[90] I do not consider however these breaches are sufficient for penalties to be imposed on Triquestra, in addition to compensation as ordered at paragraph [108] below, as I am not satisfied the high bar for penalties in s 4A of the Act, as it was described by the Court in *Wiles v Vice-Chancellor of University of Auckland*<sup>14</sup>, has been met. Specifically, I do not consider the above breaches of good faith were either deliberate, serious, and sustained as required under s 4A(a) of the Act. I consider XOC's actions were single instances of breach, rather than a sustained course of action intended to undermine an employment relationship as required under s 4A(b)(iii) of the Act. I also consider more likely that not XOC reflected on their actions during the meeting on 24 August 2022 and genuinely changed their position and did not proceed to issue a

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<sup>14</sup> [2024] NZEmpC 123 at [138].

written warning. While I have found they issued a verbal warning, I do not think they acted in breach of the duty of good faith in changing their position.

[91] For completeness I found at paragraph [54] above I was not satisfied Triquestra's actions caused an unsafe work environment and do not consider those actions could amount to a breach of good faith. I have also found at paragraph [84] above Triquestra did not unjustifiably dismiss AKW due to incapacity. Triquestra's interactions with AKW once advised they were unable to work because of their mental health were through AKW's advocate, primarily related to XOC enquiring about AKW's prognosis to return to work but also involved XOC showing concern about AKW's behaviour. I consider those actions were reasonable, in relation to seeking medical reports necessary to reach a decision about AKW's capacity to return to work, or necessary and done in good faith, in relation to concerns about AKW's behaviour, having reviewed the social media posts which prompted XOC's queries to AKW's advocate.

[92] As a consequence, penalties do not need to be considered further.

**Did Triquestra breach AKW's employment agreement, with reference to obligations to review remuneration annually and to follow policies and procedures?**

*Relevant law*

[93] AKW sought penalties under s 134 of the Act and damages for breaches of cl 19.9 of their employment agreement in relation to provisions related to remuneration reviews and for failures by Triquestra to follow its own policies, as required under cl 3.3 of their employment agreement.

[94] Both AKW and Triquestra referred to Court judgments<sup>15</sup> which have described the approach to interpreting employment agreements, which I paraphrase as involving an objective approach to ascertain the meaning of a clause to a reasonable person, taking into account context and what the parties would have known when entering the agreement.

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<sup>15</sup> *E Tū Inc v New Zealand Steel Ltd* [2024] NZEmpC 29 at [16] and *Television New Zealand Ltd v E Tū Inc* [2024] NZEmpC 93 at [11].

*What do the relevant clauses say?*

[95] Clause 19.9 of AKW's employment agreement includes the following:

**Remuneration Reviews:** Your remuneration shall be reviewed on a yearly basis in conjunction with a performance review. ... The outcome of any salary review will be in our sole discretion but will not be less than the preceding annual period.

[96] Clause 3.3 of AKW's employment agreement starts by saying Triquestra "may from time to time make policies and procedures concerning employment-related issues which are not specified in this agreement but which you accept are incorporated terms of this agreement".

*Submissions of the parties*

[97] Submissions for AKW said "any objective observer reading [the last sentence of cl 19.9] would understand it to say that the salary review will not be less than the amount granted in the previous review". As AKW received an increase of \$15,000 in 2018, it was submitted they were "entitled to further increase in the following years, no less than \$15,001" and "irrational" criteria were used to assess performance, leading to "insignificant and unfair" increases. It was alleged Triquestra failed to undertake AKW's performance review meaning they were not "told in writing of any concerns about [their] performance in a structured and collegial way".

[98] Finally, it was submitted Triquestra breached cl 3.3 "when it failed to follow its Continuous Performance Management Policy and the Formal Performance Management Policy".

[99] Triquestra submitted the intention of cl 19.9 "is to assure employees that their salary will not be reduced as part of any annual review of their salary" and "any reasonable person would interpret 'the outcome' of a remuneration review to be the new salary, not the amount of the increase in salary". Triquestra says it complied with its contractual obligations including considering performance as part of annual salary reviews, and cl 16 did not require it "to undertake performance reviews at any specific interval or in any specific form". Triquestra also said no employees, including AKW, had previously advanced the interpretation cl 19.9 required increases in pay increases each year.

[100] Submissions in reply for AKW said they did not have an annual performance review and were "seriously disadvantaged as [they] did not know what [they were]

doing well and what [they] could improve on”. Clause 19.9 was said to be “clear on its face and [AKW] is entitled to the raises back dated”.

*Analysis and finding*

[101] I do not accept the interpretation of cl 19.9 advanced on behalf of AKW. I consider the plain language of the last sentence is a salary review cannot result in a reduction in salary, rather than requiring each year’s salary increase to be greater than the prior year’s increase. No evidence was provided for AKW which would support their view being the intent of the parties or their interpretation being required by context or the knowledge of the parties. As a consequence, I find Triquestra has not breached cl 19.9, penalties do not need to be considered for this alleged breach and no damages are due.

[102] I do not consider I can take the other claims for breaches of AKW’s employment agreement further, as:

- a. Triquestra’s witnesses said informal performance concerns at a low-level were raised with AKW prior to 5 August 2022, when the decision was made to place AKW on a PIP;
- b. DXH’s evidence was they followed the process required under Triquestra’s Continuous Performance Management policy, though not necessarily using the templates. Emails provided supported DXH’s evidence;
- c. XOC advised AKW’s advocate that under Triquestra’s “continuous performance management process (attached), we don’t document or hold on record performance appraisals / assessments outside of a formal PIP process”;<sup>16</sup>
- d. Email correspondence between AKW and XOC about their salary review in 2022 shows AKW was advised of the outcome of their annual review by JUB in July 2022, then followed up with XOC as they were not satisfied with the increase they were provided. XOC provided constructive feedback and AKW appeared to accept the feedback; and
- e. XOC’s evidence AKW performed to an acceptable level for most of their tenure, with issues able to be addressed informally until the matters which led to the PIP emerged in August 2022. XOC also said in email

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<sup>16</sup> Source: Email from XOC to AKW’s advocate *Information requested*, 18 October 2022.

correspondence with AKW's advocate when the decision was made on AKW's 2022 pay review in early July 2022 "We did not know ... that a PIP process was about to start".

[103] I am not satisfied there was sufficient evidence of material breaches of AKW's employment agreement or Triquestra's policies, beyond those which I have found at paragraph [58] above unjustifiably disadvantaged AKW, for which I have already determined compensation is appropriate. No further orders are made.

**What remedies should be awarded to AKW in relation to the unjustified disadvantages which have been established?**

[104] Having determined AKW was unjustifiably disadvantaged by Triquestra's actions as summarised at paragraph [58] above, I need to consider what remedies should follow. AKW sought compensation of \$15,000 for hurt and humiliation under s 123(1)(c)(i) of the Act for each of the disadvantages I have found established.

[105] AKW provided general evidence of impact on them of Triquestra's actions, including describing being humiliated, highly stressed and intimidated. AKW also discussed candidly their mental health issues and seeking medical assistance.

[106] Determining compensation in this matter is challenging as the medical evidence before me does not address causation or separate the impact other events may have had on AKW's mental health, including the impact their dismissal may have had on them, which compensation is not due for as I have found their dismissal was not unjustified.

[107] During the investigation meeting Triquestra made an open settlement offer of \$5,000 compensation under s 123(1)(c)(i) of the Act and conversion of AKW's dismissal to a resignation. I do not consider this sufficient to compensate AKW for the impacts of the combined unjustified disadvantages on them.

[108] Based on AKW's evidence of the impacts of Triquestra unjustified actions on them, taking into account comparable cases, I consider a global award of compensation of \$15,000 under s 123(1)(c)(i) of the Act is appropriate, before considering contribution.

### *Contribution*

[109] Section 124 of the Act requires I consider the extent to what, if any, AKW's actions contributed to the situation that gave rise to their personal grievance and assess whether any remedies should be reduced. Submissions did not address contribution.

[110] While Triquestra had performance concerns about AKW, I do not consider AKW contributed to the matters where I have found they were unjustifiably disadvantaged. I consider XOC was responsible for those grievances as it was their decisions to combine their response to AKW's complaint with advice AKW was being placed on a PIP, which failed to meet the requirements of Triquestra's policy for notice a PIP was being considered and to call the meeting on 24 August 2022. AKW was not responsible in any way for those decisions by XOC.

[111] No reduction is made for contribution accordingly.

### **Orders**

[112] For the above reasons I order Triquestra New Zealand Limited to pay AKW compensation of \$15,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) within 28 days of the date of this determination, without reduction.

[113] I also make permanent non-publication orders under cl 10(1) of sch 2 of the Act prohibiting publication of the names of and any other identifying information about witnesses in relation to this matter, and other individuals referred to in witness statements or evidence.

### **Costs**

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

[115] If the parties are unable to resolve costs, and an Authority determination on costs is needed, AKW may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Triquestra will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[116] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.<sup>17</sup>

[117] As noted at paragraph [6] above a partial day of investigation meeting on 4 October 2023 was adjourned by agreement of the representatives, with agreement that day would be disregarded for costs purposes. As the investigation meeting for this matter continued on two full days on 11 and 12 June 2024, my preliminary view is the notional daily rate for two days is the appropriate starting point for a determination of costs.

[118] While costs were clearly identified as an issue to be determined, AKW’s advocate also advised they were acting on a pro bono basis on multiple occasions. Should an application for costs be made, the impact of those representations will need to be addressed and proof of costs actually incurred will be required.

Shane Kinley  
Member of the Employment Relations Authority

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<sup>17</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)