

NOTE: This determination contains an interim non-publication order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 488
3307720

BETWEEN DNL
Applicant

AND HEALTH AND DISABILITY
COMMISSIONER
Respondent

Member of Authority: Sarah Blick

Representatives: DNL, in person
Matthew McGoldrick, counsel for the respondent

Investigation Meeting: 20 March 2025 in Auckland

Submissions and information received: At the investigation meeting
26 March 2025 and 12 June 2025 from the applicant
24 March 2025 and 1 July 2025 from the respondent

Determination: 13 August 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] DNL says her employment with the Health and Disability Commissioner (HDC) was affected to her disadvantage by what she says were unjustifiable actions HDC took after she raised concerns about how she was being treated in the workplace. She says HDC did not fairly and reasonably investigate her concerns, a performance management process was used in retaliation to her raising them, and unfair and unreasonable conduct displayed towards her and her support person during a meeting, which she believes amounted to bullying.

[2] HDC denies DNL's allegations. It says it has not disadvantaged DNL, let alone unjustifiably, and it has not breached its duty of good faith. As such, DNL is not entitled to any remedies.

Non-publication orders

[3] DNL seeks permanent non-publication orders in respect of her name based on health reasons.

[4] HDC wished to place on record its opposition to an assertion that the reason for DNL has been leave was "workplace bullying". HDC otherwise did not respond to the assertions in DNL's affidavit evidence and was content to abide the Authority's decision in relation to the application concerning non-publication.

[5] DNL has advised that the parties' employment relationship has recently ended and an employment relationship problem will be pursued in relation to it. I am only satisfied that an interim non-publication order should be made at this stage, which will give the parties the best chance at resolving matters at further mediation. I make an interim order that DNL's name and identifying particulars are prohibited from publication.¹ This order will lapse 14 days after the date of the parties' next mediation, unless extended or replaced by further order of the Authority, upon application by DNL.

The Authority's process

[6] DNL lodged a witness statement. HDC lodged witness statements for former Associate Commissioner Complaints Resolution (now Manager of Complex Resolutions and Investigations) Mark Treleaven, team leader (TL) Diane Aki, and HR Business Partner Sujoy Nandy. All witnesses confirmed their statements and answered questions under oath or affirmation at the investigation meeting.

[7] The parties were given the opportunity to make submissions at the meeting and provided further information at the Authority's request following the meeting in relation to DNL's claim to recover a pay increase. DNL's application for non-publication orders came at a late stage.

¹ DNL has been referred to in this determination by a randomised abbreviation that bears no resemblance to her actual name.

[8] The Authority has checked the parties' views on issuing this determination in light of the ending of the parties' employment relationship. Both parties wish to have these matters determined based on the information already received.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and/or law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. Not all evidence or submissions are necessarily referred to but have been considered.

The issues

[10] The issues requiring investigation and determination are:

- (a) Was DNL's employment affected to her disadvantage by some unjustifiable action by HDC? With the unjustifiable actions alleged to be:
 - (i) the failure to fairly and reasonably investigate concerns she raised in May 2024;
 - (ii) the use of a performance management process in retaliation to her concerns;
 - (iii) unfair and unreasonable conduct displayed towards her and her support person, which she believes amounted to bullying.
- (b) If HDC's actions were not justified what remedies should be awarded, if any, and are there issues of contribution?
- (c) Has there been a breach of the duty of good faith and if so should a penalty be imposed under s 4A of the Act?

[11] Some weeks prior to the investigation meeting, DNL advised she wished to pursue a further disadvantage grievance since lodging her statement of problem. Those claims relate to further alleged bullying behaviour which are addressed later in this determination.

Background

HDC and Complaints Assessment Team

[12] HDC is an Independent Crown entity and is constituted by the Health and Disability Commissioner Act 1994. It has around 120 employees. During his time as Associate Commissioner, until November 2024, Mr Treleaven was responsible for managing the Complaints Assessment Team (CAT) at HDC.

[13] The CAT is responsible for managing new complaints to HDC about healthcare received by individuals themselves or on behalf of members of their family. When complaints come into HDC they are triaged, and decisions are made as to how to progress or close new complaints.

[14] The CAT is divided into three teams. Ms Aki is the TL of the Early Resolution/Intake Team, and two other teams are managed by two other TLs. Along with other roles, Ms Aki's team includes complaints assessors and complaints administrators.

[15] DNL was employed by HDC pursuant to an individual employment agreement. She started working at HDC on 16 January 2023, as a complaints administrator in the CAT. The role provides administration support to the CAT Teams.

[16] In about September 2023 Ms Aki took on management of TLD, and DNL was moved to Ms Aki's team. Ms Aki was a more experienced TL, and it was felt that having a TL with more experience would assist in managing TLD. Ms Aki reported to Mr Treleaven at relevant times.

[17] In light of her desire to progress within HDC, DNL was given some additional tasks, including but not limited to managing a phone roster and assisting with drafting of early resolution letters.

[18] At relevant times DNL had an agreed flexible work schedule. This accommodated DNL's study commitments and allowed her to work two days of work from home and three in the office, with specific agreed start and finish times.

Past timeliness and comments

[19] Ms Aki says when she first took over managing DNL, there was an issue about her timeliness. At first Ms Aki asked DNL to email her each day when she had logged on, which she did. After about a month, this requirement ended, and Ms Aki had no need at that point to raise any issue about timeliness.

[20] Ms Aki says that in or about March or April 2024, DNL told Ms Aki that "she looked angry". Ms Aki requested DNL to stop saying this as she was not angry with DNL and that she was working. Ms Aki's evidence is that DNL apologised for this and advised she would not say this again.

[21] Around the same period, following a phone call between Ms Aki and DNL, DNL sent an email to Ms Aki saying “You seemed quite angry on the phone”. Ms Aki responded saying she was not but apologised if that was how she came across.

[22] From time to time, Ms Aki made Mr Treleaven aware that DNL was challenging to manage, but was not involved in management of them.

Request to load new complaints on 30 April 2024

[23] On 30 April 2024, another TL in the CAT requested DNL and others to load new complaints because another staff member was away, emphasising the importance of loading complaints by the end of the day. DNL’s actions following that request are discussed later in this determination.

Events of 3 May 2024

[24] Part of Ms Aki’s role as a TL is to check the file loads of the team and manage them appropriately. When Ms Aki logged on early the morning of 3 May 2024, she says she saw that DNL had a large number of files assigned to her. Ms Aki says she was concerned this was too many and that DNL would be overloaded. Ms Aki emailed DNL asking her to unassign herself from these files, and to say that she would catch up with her over coaching about how many files should be assigned to her and a plan to get them completed.

[25] Later that morning, DNL responded to Ms Aki with two emails, including one in which she said “You seem angry with me this morning. May I please suggest we talk about this possibility with Mark?”. The email indicated DNL did not feel supported. Ms Aki responded to DNL a short time later:

Hi [DNL]

I am not angry with you, and am happy to discuss this with you and Mark. You’ve assigned 29 files to you which I’ve asked you to unassign and you’ve asked me why. I’ve explained that [other TL] or I will assign files to staff, I am also responsible for ensuring you are not taking on too much, you also have your own Admin job to do, which I know you manage well.

I’m not sure why you’re suggesting you are not being supported.

[26] Ms Aki says it was her expectation that now having asked DNL twice to unassign herself from files that she would do so. She was surprised with the assertion again that she was angry, as she was not.

[27] In response to this email, DNL responded, stating “I don't think you mean to come angry but just the tone this morning was upsetting for me”. She also said that “I don't feel supported as I would like you to believe in me and not to sabotage any good work that I would like to do”. She also referred to having spoken with another TL about the assigning of files, which Ms Aki was not aware of. Ms Aki says she then saw that DNL was actually working on four of the files at that time.

[28] Ms Aki then responded:

Hi [DNL]

Assigning of work will remain with [other TL] and myself, I wasn't aware that you had this conversation with [other TL]. I've since asked [other TL] to only assign a few files at a time to students and yourself. I'd appreciate you removing all but 4 files and we can review as you go.

[29] DNL then copied in Mr Treleaven into an email, saying she wanted to discuss the issue with him. This led to Mr Treleaven emailing DNL in response to say he appreciated her enthusiasm but “can you please unassign all but 4 files? It is easier for Diane to manage this if they are under the student list.”² It was in response to this final email that DNL said she would unassign the files.

[30] On the same day, after the email correspondence, Ms Aki send an email message to Mr Treleaven expressing her unhappiness about statements DNL had made in her emails.

[31] Mr Treleaven spoke to Mr Nandy about DNL's request for a meeting, and he suggested that Mr Treleaven and Ms Aki meet with DNL to hear what she wanted to discuss. Mr Nandy said if they could not resolve matters at this meeting then they should involve HR.

Meeting on 8 May 2024

[32] Mr Treleaven arranged to meet with Ms Aki and DNL on 8 May 2024. Mr Treleaven was planning to lead the meeting, with Ms Aki as notetaker. Ms Aki's notes of the meeting show DNL raised issues relating to Ms Aki's management. Mr Treleaven says Ms Aki became quite distressed about what she perceived as criticisms of her, and responded. During the meeting, Mr Treleaven cited the email exchanges on

² HDC employed or engaged students to assist with tasks such as assisting with drafting early resolution letters.

3 May 2024 and asked if the problem was that DNL was not doing what Ms Aki asked her to do. Mr Treleaven says it was a civil meeting until the very end of the meeting when it became “slightly heated”, meaning both Ms Aki and DNL were animated, passionate and strong in their views and comments. He said he felt the need to steer the meeting towards a close and get HR involved. The meeting notes record Mr Treleaven as saying he was trying to work through issues but if DNL was unhappy with the discussion, HR would need to be involved, suggesting a meeting with HR. DNL agreed an “employment relations discussion” would be good due to the barriers she believed she was finding inhibiting her progress.

[33] DNL says she cried twice at this meeting, and that Mr Treleaven was harsh towards her. Neither Mr Treleaven nor Ms Aki recall DNL crying in the meeting. He says had DNL done so, he would have offered her a break, offered to end the meeting, or reschedule it, which did not occur.

[34] DNL also states that Mr Treleaven said “What gives you the right to say that Diane looks angry?” Mr Treleaven says it is possible he said that, but it would have been in the context of, and after referencing, that Ms Aki had previously asked DNL to stop saying she was angry. Ms Aki does not recall this comment being made.

After the meeting

[35] During a debrief after the meeting, Ms Aki raised concerns about DNL with Mr Treleaven. Mr Treleaven received advice from Mr Nandy that if the issues raised by Ms Aki and DNL were sufficiently connected HDC could address them all together, in the sense of documenting them in one letter to DNL, and arranging a meeting to discuss all of the issues. Mr Treleaven asked Ms Aki to put her concerns in a report to him.

[36] In the period between 3 to 15 May 2024, she was late to work on a number of occasions. HDC says DNL omitted to notify that she would be or was late in arriving.

Ms Aki's report

[37] Ms Aki provided a report by email to Mr Treleaven on 16 May 2024 noting a number of concerns. Ms Aki's report outlined her understanding of the issue which had arisen on 30 April 2024 and a discussion with DNL about that on 1 May 2024, and the issues arising from their email correspondence on 3 May 2024. She also outlined her concern that at least three times DNL had said Ms Aki seemed angry or was angry

with her which, which Ms Aki says was not true. She mentioned a comment DNL made to another TL that they were DNL's "favourite team leader". Additionally, Ms Aki raised DNL's timeliness as an issue. Ms Aki stated DNL needed to be held accountable for her actions.

[38] DNL believes Ms Aki's report was punishment for her "speaking up", which Ms Aki denies. At the investigation meeting DNL did not deny being late to work, but describes period of lateness as a difficult time for health reasons after a scheduled surgery was delayed. DNL also says Ms Aki knew about DNL's health issues and failed to ask how she was following surgery. Ms Aki acknowledges knowing some information about DNL's health, and did ask her how she was coping and feeling. Ms Aki says she did not know DNL's health meant she would be late to work at times.

17 May 2024 letter

[39] DNL says instead of being providing with information about HDC's processes and next steps, she was presented with a letter on 17 May 2024. This letter set out the matters raised at the meeting on 8 May 2024, listed as:

- (a) A feeling of resentment and bias towards her from Ms Aki and the CAT TLs and that her progress was being restricted at HDC;
- (b) In respect of student files, the goalposts kept shifting, and that Ms Aki says one thing and does another;
- (c) Ms Aki disrespects DNL and has an angry tone in communications with her.

[40] The letter asked for details relied on in support of DNL's concerns, which could be talked through at a meeting on 22 May 2024, at which DNL could bring a support person.

[41] The letter also advised HDC would like to discuss concerns Ms Aki had brought to Mr Treleaven's attention, and outlined relevant details of Ms Aki's report:

- (a) DNL allegedly not following directions from TLs to do work tasks on 30 April and 3 May 2024;
- (b) Alleged careless and unsuitable comments to Ms Aki ("you seem angry" and "favourite team leader" comments); and
- (c) Alleged multiple occasions of lateness to work on and after 3 May 2024.

[42] The letter included the details from Ms Aki's report and asked at the meeting that DNL provide explanations. In relation to timekeeping, the letter outlined the dates and times DNL arrived late (from around 20-80 minutes) and on which she failed to notify. The letter advised after the issues were discussed Mr Treleaven could decide on future action which could include HDC establishing a performance improvement plan ("PIP") or taking disciplinary action.

[43] On 22 May 2024, DNL provided a written response to HDC's letter, and which she further spoke to at a meeting that day with Mr Treleaven and Mr Nandy. HDC recorded the meeting with DNL's consent. Mr Treleaven reiterated DNL was entitled to have a support person, that it was HDC's preference, and the meeting could be rescheduled if DNL wished to have one. DNL responded no and that she works as an employment advocate and has "broad shoulders". DNL was asked about and elaborated on her concerns. The meeting was unable to be completed in the one hour allocated, so the trio agreed to meet the next day.

[44] On 23 May 2024 the meeting continued, with DNL advising she wished to proceed without a support person. The meeting was again recorded with DNL's consent. DNL responded further to issues raised in the 17 May 2024 letter. The last issue raised was DNL's lateness, at which point DNL disclosed her medical situation and she was shortly to have surgery, and became upset. Mr Treleaven gave DNL the opportunity to be excused from the office for the rest of the day. DNL declined the offer to take the rest of the day off. Mr Treleaven ended the meeting, thanking DNL for answering questions and sharing information about her health.

[45] DNL emailed Mr Treleaven and Mr Nandy the next day asking for a change in TL, study leave, and about having a staff white board to show when staff would be away and when backup was needed. She did not reference the meetings of 22 or 23 May 2024. Mr Treleaven responded to these matters a few days later, referencing the importance of resolving the issues raised between DNL and Ms Aki.

DNL has surgery and Mr Treleaven makes inquiries

[46] On or about 30 May 2024, DNL underwent scheduled surgery.

[47] Between 23 May and 12 June 2024, Mr Treleaven sought further information from other HDC employees in relation to matters raised in the 17 May 2023 letter. He

says the information he obtained filled in the gaps for him, and he could finalise his decision on them.

[48] Mr Treleaven says he found no evidence there was bias from Ms Aki or any other TL in respect of DNL's development, did not see any "shifting of the goalposts" or that there had been disrespect from Ms Aki towards DNL or that she had an angry tone in her correspondence. He considered DNL had done the "bare minimum" on 30 April 2024 to assist with month-end file loading requirements, and that DNL had not followed Ms Aki's directions on 3 May 2024 until he intervened. Mr Treleaven also considered DNL had made unnecessary comments to Ms Aki. Further, notwithstanding DNL's medical issue, this did not explain why DNL had not advised Ms Aki she would be late to work on the relevant occasions.

[49] A letter was drafted generally upholding the concerns raised and not proceed to a disciplinary process. The letter outlined that:

- (a) HDC did not accept there was a basis for the issues raised by DNL;
- (b) DNL had not followed instructions, had made careless and unsuitable comments, and had been late to work multiple times without notification;
- (c) HDC would put in place a PIP requiring DNL to follow directions from her TL, communicate in a professional and courteous manner, and to arrive on time and communicate with her TL if she would be late.

Meeting on 12 June 2024

[50] Mr Treleaven arranged a further meeting with DNL. He says the purpose of the meeting was to advise HDC's decision and outcome on the matters in the 17 May 2023 letter.

[51] On 12 June 2024, DNL met with Mr Treleaven and Mr Nandy and another HDC employee as her support person. Having outlined his conclusions, Mr Treleaven attempted to bring the meeting to an end, at which point DNL's support person challenged the conclusions reached.

[52] Mr Nandy says it became clear to him that DNL was upset, and unhappy with the conclusions. He says he felt the meeting was not going in any direction, and that what DNL was wanting to do was effectively raise a personal grievance. The transcript

shows he told her “If you are concerned, if you’re grieved about this, go and raise your grievance.”

[53] DNL says this meeting “crossed the line”, was upsetting, and that she was subjected to “bullying behaviour” during it.

[54] Following this meeting, DNL was sent a copy of the letter.

PIP Process

[55] Ms Aki was given responsibility for managing the PIP process with DNL. With Ms Nandy’s assistance a draft PIP was prepared, and by 12 July 2024 Ms Aki requested DNL’s feedback on it. The proposed duration of the PIP was a period of four weeks. DNL provided some written feedback, following which Ms Aki and Mr Nandy met with her. DNL feedback was that the PIP did not provide satisfactory detail.

[56] Ms Aki says she took on board the feedback and worked with Mr Nandy to include additional details in the PIP, and updated the draft. She met with DNL again on 23 July 2024, together with Mr Nandy, to receive feedback on the updated draft PIP. Further feedback was provided and final amendments were made to the PIP which was sent to DNL on 25 July 2024, confirming the finalised PIP with immediate effect.

[57] Ms Aki then met weekly with DNL. She sent emails recording the details of these meetings, and DNL’s responses were largely along the lines of “no comment” or that she did not have any responses to make.

[58] In late August 2024, after the four-week PIP timeframe was completed, Ms Aki spoke with Mr Treleaven and recommended DNL be released from the PIP because she had met the requirements. Mr Treleaven agreed with the recommendation, and the PIP came to an end.

DNL does not receive pay rise

[59] DNL’s evidence was that she was told in a weekly staff meeting that a “pay rise for everyone at HDC” was going through, letters had been sent and payment would be back-dated. She says it was humiliating to hear this at the meeting, as at that time she had not had an appraisal or any communication sent to her. Mr Nandy recalled that there was a general announcement made by the Commissioner in a weekly meeting

about people receiving pay review letters, but no individual names were mentioned in that announcement.

[60] DNL reports that despite meeting annual and PIP objectives, she was told because she had been on a PIP in the relevant period, she did not receive a pay rise. Mr Nandy's evidence acknowledged that there is no written HDC policy on whether people on or had recently been on a PIP do not receive a pay rise, and as such, DNL did not. Only those people whose salary changed received a letter. Since there is no change in the terms and conditions for people who do not receive a pay rise, he says, they do not receive a letter. HDC says TLs inform their team members of any change or no change in salary. This is said to be done individually, in privacy and confidence, and was done in DNL's case.

[61] In the course of email correspondence in December 2024 after a coaching conversation, DNL made what Ms Aki considered to be inappropriate comments about Ms Aki's own working arrangements which the latter was very unhappy with. She told DNL was unhappy with her reference to this, and would be raising it further with HR. Ms Aki says she left the matter with HR and the Deputy Health & Disability Commissioner, to deal with. This led to the Deputy Commissioner reminding DNL of the expectations on her. The Commissioner further wrote to DNL in January 2025, in response her complaint that she had been bullied by the Deputy Commissioner by reminding her of the expectations on her.

[62] Until February 2025 Ms Aki was DNL's line manager. After that time DNL started reporting to another manager, which she reported being happy with.

Relevant law

[63] Section 103(1)(b) of the Act provides, in relation to a claim of unjustified disadvantage, that in order for an employee to have a personal grievance they must show:

...that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[64] Whether the employment is affected to the employee's disadvantage by some unjustified action involves focusing on what has occurred and then assessing the impact on the employee's employment.³

[65] The test of justification in s 103A(2) of the Act must be applied, which involves considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

Analysis

[66] Having carefully considered the relevant facts, the Authority has concluded that HDC followed a fair process in its dealings with DNL and there are no instances of any predetermination, bias or otherwise unfair conduct. HDC was entitled to address performance concerns with DNL, which it did. This led to a justified performance improvement process. To the extent that there were defects in the process HDC followed, these were minor and did not result in DNL being treated unfairly. The Authority's reasons follow.

Retaliation claims and dealing with the two sets of issues together

[67] Due to the way in which the 8 May 2024 meeting transpired, Mr Treleaven ended it, in order to get HR involved, a course with which DNL agreed. Following that meeting, Ms Aki raised concerns with Mr Treleaven, which she put in writing at his request. Although DNL believes these concerns were raised in retaliation to her raising concerns, the facts do not demonstrate this was the case. Faced with what he considered were genuine concerns about DNL's performance, Mr Treleaven sought HR assistance.

[68] DNL has asserted it was wrong for Mr Treleaven to deal with her concerns and Ms Aki's concerns together. However, the issue of the alleged "shifting of the goalposts" and the alleged "disrespect and angry tone", related to the concern that DNL had not followed Ms Aki's directions and made careless and unsuitable comments on 3 May 2024. While the issue raised about DNL's timeliness was of a different nature, it occurred in the same time period and related to communication concerns between Ms Aki and DNL. It is unclear how Mr Treleaven could practically or reasonably deal with

³ *Wiles v The Vice Chancellor of the University of Auckland* [2024] NZEmpC 123.

the issues raised to him in isolation from each other. It was open to Mr Treleaven to address the two sets of issues together.

[69] Following receipt of internal HR advice, Mr Treleaven wrote to DNL on 17 May 2024. That letter set out what Mr Treleaven understood to be DNL's concerns raised at the 8 May 2024 meeting, and to seek specific details about them. The letter also put to DNL, for her response, the detailed concerns raised with him by Ms Aki. Mr Treleaven appropriately put DNL on notice that a PIP or disciplinary process could follow, she could have a support person at the proposed meeting, and access support if required.

22 and 23 May 2024 meetings

[70] Mr Treleaven asked DNL to provide him a written document, which DNL did at the 22 May 2024 meeting. It was expressly agreed that the meeting could be recorded, and also expressly confirmed that DNL did not require a support person. She confirmed the same in respect of the 23 May 2024 meeting. While DNL complains about these meetings "crossing the line", this is not supported by the evidence. The transcript discloses that Mr Treleaven asked searching questions of DNL about her responsibility for the communication issues between her and DNL, or her lateness to work, which she did not accept. HDC was entitled to seek responses from DNL about those concerns.

[71] DNL says the meetings with Mr Treleaven and Mr Nandy left her feeling small, marginalised and humiliated. She says in the first meeting she explained her side in depth, in the second she felt attacked. She disclosed something private and personal to her related to perimenopausal symptoms and her upcoming surgery. She says this was humiliating as she is a private person and had to disclose very personal health challenges, which she says were not taken into account.

[72] The fact that DNL volunteered information about her medical issues towards the end of the 23 May 2024 did not render the meeting inappropriate. Rather, the information was offered by DNL as an explanation after being questioned about her lateness to work on the relevant days. The transcript shows in response, Mr Treleaven was sympathetic to DNL's medical situation and fairly and reasonably ended the meeting in light of her becoming upset.

[73] In the course of these meetings Mr Treleaven confirmed he would need to check DNL's responses with other individuals, and DNL confirmed her agreement to that.

[74] Mr Treleaven then made relevant inquiries and obtained relevant emails. DNL says Mr Treleaven ought to have put to her the additional inquiries he made. HDC submits that was not required. It points out that the information was largely confirmatory and there was no point in going back to DNL about it to seek further responses when it had confirmed certain of her replies.

Alleged bias and restriction of progress

[75] DNL was given the opportunity to provide evidence in support of her assertions that HDC was biased against her or there was restriction of her progress. Mr Treleaven considered interview processes followed by HDC after she had applied for another role. These indicated a successful candidate was appointed on merit, not because of any bias towards DNL. Mr Treleaven was entitled to conclude this concern DNL raised had not occurred.

"Shifting of goal Posts"

[76] DNL was given the opportunity to provide evidence regarding what she saw as Ms Aki "shifting goal posts" for her in relation to her work on early resolution letters. Having considered the evidence gathered, it was open to Mr Treleaven to conclude there was not a significant shifting of goal posts, but also that Ms Aki, as DNL's TL, was entitled to amend her earlier directions upon receiving further relevant information. Further, what Ms Aki was instructing DNL about was a task beyond by her role as a complaints administrator, which could have resulted in her being overloaded. Mr Treleaven was entitled to conclude this was a reasonable instruction by a TL.

Disrespect and "angry tone" in communications

[77] Although DNL disputes that she said three times to Ms Aki she was "angry", after which Ms Aki had asked DNL not to say such things to her, the evidence bears this out. Mr Treleaven acknowledged DNL interpreted Ms Aki's tone as angry, but Ms Aki had made it clear she was not. Despite this, Mr Treleaven advised he had had a conversation with Ms Aki about the importance of communicating in a positive way.

[78] Additionally, the relevant email communications did not objectively have “an angry tone”. Mr Treleaven was entitled to conclude that Ms Aki had given clear instructions, which did not have an angry tone.

Not following directions from TLs

[79] Mr Treleaven found that DNL had loaded two complaints on 30 April 2024, in line with information DNL had provided him. He was entitled to conclude that she could have been more helpful, in light of being asked to focus on loading the complaints and so had done the bare minimum of effort to achieve that.

[80] Mr Treleaven was also entitled to conclude DNL had not followed Ms Aki’s reasonable instructions in the 3 May 2024 correspondence. It is expected of employees to carry out their manager’s lawful instructions. DNL did not do that. In light of this, Mr Treleaven was entitled to conclude that the appropriate step was to institute performance management for DNL to follow such directions in the future.

Careless and unsuitable comments

[81] As outlined above, Mr Treleaven was entitled to conclude that, rather than Ms Aki having an “angry tone” in communications, DNL’s consistent assertion to Ms Aki on three occasions of her “seeming angry” was unnecessary. Mr Treleaven also considered a comment made about another TL being a “favourite team leader” was unnecessary. Mr Treleaven was reasonably entitled to conclude that the appropriate step was to institute performance management to mark out the requirement that such comments cease, and instead are professional and courteous.

Failure to notify of absences

[82] DNL says her lateness to work was due to a genuine reason, and HDC failed to have an open mind or give her the benefit of the doubt in relation to that. She says it was further humiliating to be asked to provide medical records “so that I could be placed on a management plan. And if I didn’t HDC would still put me on a management plan”.

[83] The 12 June 2024 letter shows Mr Treleaven considered the medical information DNL disclosed. Although there is some dispute about the level of knowledge Ms Aki had about DNL’s medical concerns, it is clear to the Authority that DNL was not exempted from the ordinary requirement to make Ms Aki aware when she would be late. It was for DNL to communicate with her manager when she was or

would be late. Mr Treleaven was entitled to conclude that this was an issue, it having been one arising and addressed earlier in DNL's employment, and one which DNL did not take personal responsibility for in the May 2024 meetings, such that it needed to be addressed in a PIP context.

[84] In saying this, Mr Treleaven asked if DNL wished to provide a medical report, expressing a keenness to support DNL in her work and manage her health in the workplace. He made it clear DNL was under no obligation to provide this, and if it was not, they would need to consider creating a management plan on the information currently available. This request was reasonably expressed and made in the circumstances.

Alleged predetermination

[85] DNL asserts that, by virtue of Mr Treleaven having discussed the potential outcome with Ms Aki in advance, that his decision was predetermined. The evidence does not support that claim. Mr Treleaven's evidence was that he was providing Ms Aki with an update, having undertaken his enquiries by that point. That does not equate to predetermination.

12 June meeting and decision to implement PIP

[86] DNL says she ought to have been given the opportunity to comment on the outcome (a PIP process) before the decision to implement one was made.

[87] At the meeting and in the letter provided shortly after, Mr Treleaven outlined a careful assessment of the concerns raised, responses provided by DNL (and/or further information collected) and an assessment of DNL's concerns. Clearly HDC could have chosen to separate the inquiry outcome from the decision to implement a PIP. However, its decision to combine these two was, if anything, a minor defect in the process which did not result in DNL being treated unfairly.

[88] The parties met on 12 June 2024 for Mr Treleaven to provide a copy of his letter, and to confirm the outcome of the process. Mr Treleaven outlined that the purpose of the meeting was for him to communicate the conclusions, and to provide those conclusions in writing following the meeting. Mr Treleaven proceeded to read or speak to the letter.

[89] DNL's evidence was that her and her support person's rights were disregarded, and she was not given any information about information had been gathered and not given an opportunity to comment. She says she was expected to sit there and take the conclusion. However, after hearing Mr Treleaven's conclusions, DNL and her support person sought to discuss the matters outlined. Both DNL and her support person were given time to comment on the outcomes at the meeting, which they did in a very forthright manner. There was nothing about the conduct displayed towards DNL and her support person which could be said to be unreasonable or to amount to bullying behaviour. Having heard from them both, it was not unreasonable for HDC to then seek to bring the meeting to a conclusion and confirm a PIP process would follow.

[90] I acknowledge that Mr Nandy's comment during this meeting about DNL pursuing a personal grievance certainly could have been expressed in a better way. However, I accept his evidence that his intention was to make clear that the next appropriate step for DNL to take, if she wished to dispute the outcome of the process, was to pursue a grievance.

Findings

[91] DNL says a fair employer would not in the manner HDC did, by taking one person's side (Ms Aki's) and be dismissive of the other (DNL's). The Authority is satisfied HDC fairly and reasonably investigated DNL's concerns. I agree that HDC was entitled to conclude DNL's assertions did not have sufficient foundation, and that rather the matters in issue concerning her own conduct justified placing DNL on a PIP.

[92] The evidence does not support DNL's view that a PIP was instituted in retaliation for DNL raising her concerns, but rather instituted a PIP due to having genuine concerns about aspects of her performance and about how DNL was interacting with her manager. I accept Ms Aki's evidence as genuine that she tried her utmost to be professional towards DNL as her TL and managed her in the same way she would manage other team members.

[93] It is not apparent what loss DNL has suffered, as her salary has remained the same throughout the matters concerning this proceeding, nor is the Authority able to fix an employee's terms and conditions.

[94] No personal grievance remedies are available to DNL on the Authority's findings.

DNL's other complaints

[95] DNL's evidence traversed the fact she was not appointed to the role of Complaints Assessor. Although the parties have addressed events surrounding DNL's applications for that role, her non-appointment is not a personal grievance before the Authority for determination, nor has it been articulated how any grievance related to it was brought within time under s 114 of the Act. In any event, HDC's explanations of the process it followed and DNL's recounting of it indicate its actions were unfair or unreasonable.

[96] DNL also mentioned during her evidence that she had "pay equity" complaints. These were not articulated and not identified as issues for determination.

[97] Although DNL has referred to the PIP itself being poorly drafted and the length of time it took to put in place as an issue, these were not issues raised by DNL as constituting an unjustified action. In any event, if the action (or inaction) was the PIP itself or the length of time it took for a PIP to be confirmed, that claim is unpersuasive. Some time elapsed between the June 2024 meeting and the start of the PIP. However, DNL was given an opportunity to respond to its contents (and did) and her feedback was incorporated. DNL has not explained how the interval had any impact on the terms and conditions of her employment of the sort required under s 103(1)(b) of the Act.

[98] During the PIP process, DNL responded "no comment" on almost all occasions during those PIP meetings. Overall, I am satisfied HDC fairly assessed that DNL had met the requirements of the PIP so as to discharge her from it.

[99] DNL's bullying complaint in December 2024 or January 2025 did not form an agreed issue for determination before the Authority. However, prior to the investigation meeting DNL raised this as a further complaint. Documents relevant to this period were put before the Authority by the parties, which have been considered. Having received evidence from DNL on this point, the Authority considers it was appropriate for HDC to remind her of its expectations. In any event, no performance improvement process or disciplinary process was followed. Again, it is not clear what impact there was on the terms and conditions of DNL's employment under s 103(1)(b) of the Act.

Outcome

[100] While I acknowledge DNL says her claim is not only about her right but also about the rights of other women in the workplace facing health challenges, the Authority must deal with the evidence before it in relation to this matter. DNL has not established a personal grievance. As such, she is not entitled to remedies. In light of these findings, the Authority also finds no basis for finding HDC has breached its good faith obligations towards DNL. Her claim for a penalty is therefore also dismissed.

Costs

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

[102] If the parties are unable to resolve costs, and an Authority determination on costs is needed, HDC 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 DNL 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.

[103] 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.⁴

Sarah Blick
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1