

**NOTE: This determination contains an order prohibiting publication of certain information at paragraph [172].**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2025] NZERA 466  
3251299

BETWEEN ASMITA ELLIOT  
Applicant

AND HE HERENGA KURA TRUST  
Respondent

Member of Authority: Natasha Szeto

Representatives: Zachary Pentecost and Sheridan Climo, counsel for the Applicant  
Barbara Bucket, counsel for the Respondent

Investigation Meeting: 28 August 2024, 11 and 12 March 2025, and 14 April 2025 in Wellington

Submissions and further information received: 17 April 2025 from the Applicant  
5 May 2025 from the Respondent

Date of Determination: 1 August 2025

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**DETERMINATION OF THE AUTHORITY**

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**The Employment Relationship Problem**

[1] Asmita Elliot was employed by Ngāti Kahungunu ki Pōneke Community Services Incorporated, known as Kahungunu Whānau Services as an enrolled care and support nurse on 23 August 2021. The organisation later underwent structural changes, moving its operations from the incorporated society into a charitable trust - He Herenga Kura Trust (HHKT).

[2] In 2023 Ms Elliot began to experience extreme anxiety and intrusive thoughts including panic attack symptoms associated with going to work. These reactions were linked to Ms Elliot seeing a former employee, ACR<sup>1</sup> in the workplace and allegations that had been made against ACR. Ms Elliot raises personal grievance claims against HHKT for unjustified (constructive) dismissal and unjustified disadvantage associated with allowing ACR into the workplace and pressuring her to attend a meeting while on sick leave. Ms Elliot also says HHKT discriminated against her, breached her employment agreement and did not act in good faith.

[3] HHKT says the only claim Ms Elliot raised within time is for unjustified dismissal and the disadvantage and discrimination claims are out of time. HHKT denies it acted in bad faith towards Ms Elliot, and in its counter-claim for damages says it was Ms Elliot who acted in bad faith by not providing HHKT with medical information to allow it to assess her condition and prognosis, and for making secret recordings of meetings.

### **The Authority's Investigation**

[4] Written witness statements were lodged from Ms Elliot and Talia Brewer. Witnesses for HHKT were Mike Hinton (CEO), Nikki Winter (General Manager Accounts and HR), Rebecca Kiddle (Deputy Chair of the Board) and Keith McGregor (Psychologist). A written statement from Ms Elliot's former manager was withdrawn at the investigation meeting.

[5] All witnesses attended the Investigation Meeting, and answered questions under oath or affirmation. I granted an application for Ms Brewer's evidence to be given by audio-visual link (AVL) and Ms Elliot's counsel also appeared by AVL for Ms Brewer's evidence and closing submissions.

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

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<sup>1</sup> ACR is a randomly generated string to identify the former employee, who was not a witness at the Authority's investigation. I consider it is not in the public interest that they be named or identified in this determination.

## Issues

- [7] The issues the Authority is to investigate and determine are:
- (a) Whether Ms Elliot was unjustifiably (constructively) dismissed.
  - (b) Whether Ms Elliot has raised claims for unjustifiable disadvantage within time and in accordance with s114 of the Act, and if so, whether she was unjustifiably disadvantaged in her employment.
  - (c) Whether Ms Elliot has raised a claim for discrimination within time and in accordance with s114 of the Act, and if so, whether she was discriminated against in her employment.
  - (d) If Ms Elliot has a valid personal grievance(s), whether she should be awarded compensation, lost wages and benefits (subject to mitigation), and interest and whether any remedies for personal grievances should be reduced for contribution.
  - (e) Whether HHKT breached its statutory obligation of good faith, and if so, whether penalties should be ordered.
  - (f) Whether HHKT breached the implied terms of Ms Elliot's individual employment agreement in failing to provide a safe workplace, and if so, whether compensatory damages should be awarded.

[8] At a case management conference on 25 October 2023, I granted Ms Elliot leave to file an amended statement of problem which she did on 14 November 2023. HHKT then filed amended statements in reply on 7 March 2024, 2 July 2024 and 3 September 2024. In its 2 July 2024 statement in reply, HHKT raised a counter-claim against Ms Elliot for breaching her statutory obligation of good faith.

[9] During the course of the investigation, an issue emerged as to the correct entity to be named as the respondent in these proceedings.

[10] This determination resolves the correct name of the respondent, whether Ms Elliot was unjustifiably (constructively) dismissed, whether disadvantage and discrimination claims were raised in time and (if so) are made out, whether there has been a breach of Ms Elliot's employment agreement, and whether either party has breached their duty of good faith.

## **Relevant Background**

[11] Ngāti Kahungunu ki Pōneke Community Services Incorporated (NKKP) was a kaupapa Māori organisation providing housing and social services to vulnerable whānau. The incorporated society was more commonly known as Kahungunu Whānau Services (KWS).

[12] Asmita Elliot was first employed by KWS as a community nurse on a casual contract on 23 August 2021, which became permanent on 3 October 2021. Ms Elliot worked as an enrolled care and support nurse for emergency and community housing and events.

[13] When Ms Elliot started at KWS, she was one of three nurses but over time became the sole nurse. In late November 2022 through to early 2023, Ms Elliot's main role was driving the community van, the waka ora, to conduct PCR testing for Covid-19 and occasionally filling in on reception at KWS's office when needed.

[14] In November 2022 ACR, who worked with Ms Elliot, resigned and left KWS. Ms Elliot had professional dealings with ACR including seeing them regularly at the office. Ms Elliot had heard rumours and gossip about something that had happened with ACR, but these were passing conversations at the time. Later, Ms Elliot was involved in a discussion with three leaders at KWS and this conversation confirmed for her that a sexual harassment complaint had been made against ACR.

[15] KWS was undergoing significant organisational changes around this time including at senior leadership level. Mike Hinton was the interim chair of the Board from December 2022 until April 2023.

[16] In February 2023, Ms Elliot saw ACR come into KWS' office when she was filling in on reception and ACR told Ms Elliot they had been brought back in an advisory capacity. Ms Elliot was shocked as she thought ACR had left the organisation.

[17] In March 2023 Ms Elliot was driving the waka ora for census when she had a discussion with a woman in the community who said that ACR had sexually harassed her in the past and she could not believe they were still working in the same field. Ms Elliot says she raised this issue with her team leader although not in a formal capacity.

[18] Ms Elliot says she saw ACR a few times in the office over the period February to April 2023. On two occasions, Ms Elliot says ACR was in the boardroom - once

with Mr Hinton and once with the previous Chair of the Board. Ms Elliot also heard from a KWS team leader that ACR was involved in contract negotiations.

[19] Over the weeks following her discussion with the woman in the community, Ms Elliot began to experience extreme anxiety and intrusive thoughts including panic attack symptoms associated with going into the office. She felt sick and unwell, and like throwing up. She could not sleep. Ms Elliot identified her feelings were linked to seeing ACR and bringing up something from her past. To assist her anxiety, Ms Elliot felt she had to know what had happened with the sexual harassment complaint she found out about after ACR had left KWS in November 2022. Ms Elliot contacted the relevant team leader and was put in touch with Talia Brewer.

[20] Ms Elliot and Ms Brewer met in mid-March 2023. Following the meeting, Ms Elliot understood Ms Brewer had made a complaint to KWS some months prior, alleging she had been sexually harassed by ACR. Ms Brewer had attended a hui with her manager. Ms Brewer said KWS was aware at management level that there was an issue with ACR. Ms Brewer had also seen ACR return to KWS's office and was so concerned that she emailed Mr Hinton on 27 March 2023 in his capacity as acting Chair of the Board.

[21] Mr Hinton says Ms Brewer's email was the first time he became aware of her earlier complaint. Mr Hinton says no issues regarding ACR came to the Board's attention during his time on the Board. Shortly after receiving Ms Brewer's email, Mr Hinton was appointed the interim Chief Executive Officer of KWS effective from 4 April 2023. His appointment was made permanent in June 2023.

[22] The organisational changes at KWS were also being formalised around this time. On 1 May 2023, NKKP established a charitable trust which was registered on 10 May 2023. Employees including Ms Elliot were advised KWS would cease operating and they would need to elect to transfer to the new employer - He Herenga Kura Trust (HHKT).

[23] Ms Elliot was continuing to struggle with anxiety and intrusive thoughts. She was unable to focus on work and was worried that she would make a mistake that would cost her nursing registration. Ms Elliot went to her doctor on 26 April 2023 and was referred to ACC for counselling. She was provided with a medical certificate for her

employer certifying her as unfit for work from 27 April 2023 until 11 May 2023 inclusive.

*Sick leave*

[24] Ms Elliot decided to raise the issue with Nikki Winter, the human resources contact for the KWS change process. Ms Elliot felt more comfortable talking to a woman rather than to her male manager about what she was going through. On 26 April Ms Elliot met with Ms Winter and told her that something from her past had been brought up in a work context, she felt afraid and sick about coming into work. Ms Elliot told Ms Winter she needed a couple of weeks off work on medical advice, but wanted to delay the start of her sick leave so she could finish her commitment to census for the week. Driving the waka ora would not require Ms Elliot to go into the office and she then planned to take two weeks off on sick leave from 4 May, which Ms Winter agreed to. Ms Winter would be Ms Elliot's main point of contact at KWS for dealing with her sick leave at this time.

[25] Ms Winter had not heard about any issues to do with ACR before Ms Elliot raised them with her. After her conversation with Ms Elliot, Ms Winter talked to her colleague and discovered a sexual harassment complaint had been made about ACR by a former employee of KWS.

[26] On 4 May Ms Elliot called Ms Winter to update her, as it had been a week since Ms Elliot had raised the issue about ACR and passed on her medical certificate. Ms Elliot was due to go on leave and wanted to reach out for support because she felt at a loss. Ms Elliot recorded the conversation on 4 May without Ms Winter's knowledge. Ms Elliot explained to Ms Winter why she needed to take time off. Ms Elliot told Ms Winter she had prior history with family violence. Ms Winter agreed to keep details of what Ms Elliot told her confidential. Having said that, Ms Winter knew she would need to report to Mr Hinton that Ms Elliot had suffered a past trauma and had been triggered by the situation with ACR. However Ms Winter says she did not tell Mr Hinton anything about the type of support that Ms Elliot was accessing.

[27] Ms Elliot says she knew Ms Winter would need to tell Ms Elliot's manager and KWS certain details about why she was going on sick leave, but she did not expect Ms Winter to share details about her history. Ms Elliot was comfortable with KWS knowing she was taking steps to get a counsellor, but she did not want KWS to know what type of ACC support she was accessing.

[28] On 8 May, while Ms Elliot was off work on sick leave, Ms Winter asked Ms Elliot to attend a meeting on 10 May. Ms Elliot initially agreed but then postponed until 12 May. Around this time, Mr Hinton took over dealing with most of the matters involving Ms Elliot because Ms Winter felt she did not have the human resources experience to guide KWS through the process and needed distance from the situation. Mr Hinton wanted to reach out to Ms Elliot to check how she was doing and see what KWS could do to help.

[29] On 11 May Ms Elliot sent Ms Winter a text message cancelling the 12 May meeting. Ms Elliot's text said she was not going to be able to meet the next day, that she had not been able to focus on herself the entire week and felt disappointed that she had asked for time to herself but instead had spent the week thinking about Ms Winter and Mr Hinton wanting to meet and trying to find a support person. Ms Elliot said that she wanted to feel better about what's happened and how the work situation has affected her mental health. She said she had been anxious all week and felt pressured to have a meeting, and she was going to seek advice as it was too much for her to handle herself.

[30] Ms Winter responded offering Ms Elliot access to the employee assistance programme (EAP), and apologising for making Ms Elliot feel that way as that was "never our intention". Mr Hinton asked Ms Winter to contact Ms Elliot and see whether she would be prepared to speak to him. Ms Winter did not think it would do any harm and saw it as KWS offering support by phone as an alternative to a meeting. Ms Winter asked Ms Elliot if she could give Mr Hinton Ms Elliot's number as "he would really like to talk to you". Ms Elliot responded "can call on my work phone".

#### *12 May communications and meeting*

[31] Mr Hinton called Ms Elliot on 12 May. Ms Elliot recorded the conversation with Mr Hinton on 12 May without Mr Hinton's knowledge. Mr Hinton and Ms Elliot discussed a variety of matters around how KWS could support her. Mr Hinton said he had "dealt with" ACR, and ACR would not be coming back into the KWS building.

[32] Later that day, Ms Winter and Mr Hinton went to Ms Elliot's home to collect the keys for the waka ora. KWS understood Ms Elliot had agreed to talk to Ms Winter and Mr Hinton about her leave and how KWS could help and support her.

[33] When Ms Winter and Mr Hinton came to her house, Ms Elliot recorded the meeting without their knowledge. Ms Elliot says she was asked a number of questions

unrelated to her concerns about the workplace including about her personal history and upbringing, her marriage and her husband, her children and religion. Following the meeting, Ms Elliot remained on sick leave.

[34] On 17 May KWS sent a change proposal to Ms Elliot advising of KWS's intention to transition to a new charitable trust entity – He Herenga Kura Trust (HHKT). All employees were to keep their jobs, but they had to elect to transfer employment to the new entity. Ms Elliot did not make an election and she did not receive a technical redundancy letter.

[35] KWS gave Ms Elliot special paid leave between 19 May and 20 June 2023. On 22 May Ms Elliot advised KWS she would not be at work and would provide a further update after seeing her doctor. Ms Winter responded on behalf of KWS asking for a date of return to work and stating Ms Elliot is a very valued member of the organisation and Ms Winter would be happy to meet with her. Ms Elliot responded that she would make contact after seeing her doctor.

[36] On 23 May 2023, Ms Elliot's then lawyers wrote to KWS advising they were now acting, requesting a copy of the employee handbook and enclosing a further medical certificate covering the period 22 May to 25 June 2023. KWS acknowledged the medical certificate and provided the handbook.

#### *The 26 May letter*

[37] On 26 May, Ms Elliot's then lawyers again wrote to KWS raising a number of concerns on her behalf (the 26 May letter). These included KWS's repeated attempts to contact Ms Elliot while she was on sick leave, making inappropriate enquiries into her personal life and failing to provide Ms Elliot with a safe workplace. Ms Elliot requested to be placed on paid special leave until the parties had an opportunity to discuss a way forward.

[38] On 31 May, KWS's lawyers responded. KWS denied it had failed to provide Ms Elliot with a safe workplace and said it was unsure of the basis for paid special leave and KWS's priority was to have Ms Elliot return to work. KWS said it was agreeable to attending mediation, having pre-mediation discussions, or exploring other dispute resolution such as facilitation.

[39] On 20 June, KWS put Ms Elliot onto unpaid leave as Ms Elliot had not confirmed that she wanted to use her annual leave entitlements to be paid.

### *Discrimination claim*

[40] On 21 June the Human Rights Commission (HRC) advised KWS that Ms Elliot had made a complaint that KWS discriminated against her on the grounds of disability and treated her adversely as someone affected by family violence. In June, Ms Elliot also started counselling.

[41] Around the end of June, Ms Elliot engaged new legal counsel. Between 26 June and 31 August 2023 Ms Elliot was off work on an ACC medical certificate on the basis she was not fit to attend work. From 1 July 2023, KWS executed instruments and transferred property to HHKT to give effect to the new charitable trust taking over KWS's operations. Ms Elliot remained employed continuously throughout this period.

### *Mediation and medical information*

[42] In early July, the parties corresponded about dates and modes of mediation. HHKT wanted mediation to proceed *kanohi ki te kanohi* (face to face) and Ms Elliot wanted it to proceed by Zoom.

[43] On 12 July 2023 the HRC wrote to the parties, confirming it had closed the matter at its end because HHKT wanted to resolve the complaint through the employment route. The HRC said Ms Elliot could make a claim at the Human Rights Review Tribunal if the claim was not resolved.

[44] On 19 July 2023 Ms Elliot told HHKT she had another upcoming medical appointment on 27 July, so HHKT agreed to await the outcome of the appointment. On 28 July 2023 an ACC report was generated by Ms Elliot's clinical psychologist and Ms Elliot underwent an ACC consultation.

[45] On 3 August, the clinical psychologist wrote a report, responding to HHKT's questions about the causes of Ms Elliot's medical issues. The clinical psychologist included measures that needed to be taken and provided further details about Ms Elliot's situation to understand and accommodate the issues preventing Ms Elliot from being at work. On 11 August Ms Elliot provided the clinical psychologist's report to HHKT, along with the name of her ACC case manager as HHKT had requested.

[46] On 15 August HHKT asked Ms Elliot to confirm that the clinical psychologist's report had also been provided to the ACC case manager so that it could liaise with the case manager about a return to work plan. There was still no agreement to attend mediation or facilitation over this time because Ms Elliot did not agree to meet in

person, and HHKT did not agree to meet over Zoom. HHKT also advised Ms Elliot that she had exhausted her annual leave and would move to unpaid leave.

### *Resignation*

[47] Ms Elliot sent a letter to HHKT on 22 August responding to the 15 August 2023 email. Ms Elliot had run out of sick leave and annual leave and she resigned from HHKT effective immediately. Ms Elliot raised a personal grievance for constructive dismissal.

[48] Ms Elliot lodged a statement of problem in the Authority on 15 September 2023. Ms Elliot's ACC report was signed by the clinical psychologist on 26 September 2023, but she did not provide it to HHKT as she had already left her employment.

[49] After she took leave from HHKT, Ms Elliot attempted a job through Tu Ora Compass Health, who she had done casual work for since Covid times. She was unable to complete the job. Ms Elliot has been on ACC since 26 September 2023. Working with ACC, Ms Elliot started to take up some casual jobs again with Tu Ora from February 2024.

### **Who is the correct respondent?**

[50] Ms Elliot was on leave and did not return to work at KWS over the period of time that KWS was transitioning to HHKT. Ms Elliot named NKKP as the respondent when she lodged her statement of problem. HHKT says the legal entity to be cited as the employer is a matter for the Authority. Ms Elliot says the correct respondent is HHKT. For the reasons that follow, I find HHKT is the correct respondent.

[51] KWS sent Ms Elliot a job description, change documentation and letter from Mr Hinton on 17 May 2023 while she was on leave. The letter advised that KWS was transitioning to a charitable trust model, all operations previously under NKKP were anticipated to operate under HHKT from 1 July 2023 and that for all intents and purposes NKKP (and as a consequence, KWS) would cease operating from 1 July 2023 and would subsequently be wound down as an operational entity.

[52] The documentation makes it clear that KWS intended its kaimahi (employees) would elect to transfer to the new entity, or deliberately choose not to. There is no record that Ms Elliot did either. The consultation document does not anticipate a situation where kaimahi do not make a choice either way, but it does note that if kaimahi choose not to transition that will give rise to a situation of technical redundancy and

kaimahi will be issued with a notice of termination of employment for reason of technical redundancy and provided with notice. Again, this did not happen to Ms Elliot. KWS advised that none of its kaimahi were issued with technical redundancy letters. The consultation document states that it hopes all kaimahi will choose to transfer their employment to the new charitable trust entity rather than opting for technical redundancy, and to retain all kaimahi in their employment. Ms Winter confirmed that the change proposal sought to reconfirm Ms Elliot in her role under the new organisation.<sup>2</sup>

[53] Mr Hinton provided the Authority with an affidavit in relation to the legal entity. Mr Hinton says that the technical redundancy situation described above took effect on 1 July 2023 and Ms Elliot remained employed by KWS (which at the time Mr Hinton made his affidavit, was a registered incorporated society) until she resigned from KWS on 22 August 2023. On 3 October 2023 a statement in reply was filed by HHKT on behalf of KWS. Documents filed by the Respondent since have variously been in the names of NKKP and KWS. The incorporated society NKKP was dissolved on 1 May 2025.<sup>3</sup>

[54] Based on the evidence before the Authority, I find Ms Elliot was not made technically redundant, and despite her lack of deliberate election, her employment continued into the new entity HHKT. Ms Elliot continued to be paid based on continuous and uninterrupted employment throughout this time. Her final payslip on 29 August 2023 was issued under the name of NKKP but recorded her year to date balances and leave balances based on continuous employment. From 1 July 2023, I find Ms Elliot was employed by HHKT.

### **Issue 1: Was Ms Elliot unjustifiably (constructively) dismissed?**

*What is the law?*

[55] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* stated:<sup>4</sup>

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment.

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<sup>2</sup> Nikki Winter statement (14 August 2024), paragraph 40.

<sup>3</sup> Incorporated Societies Register.

<sup>4</sup> *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* [1983] ACJ 965.

[56] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited*<sup>5</sup> where a constructive dismissal might occur. These situations are not exhaustive:

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

[57] The conduct complained of must amount to a repudiation of the contract rather than just be unreasonable.

[58] The Court of Appeal has stated the broad legal approach starts with the question of whether the resignation has been caused by a breach of duty on the part of the employer by looking at all the circumstances of the resignation.<sup>6</sup> If so, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under those conditions. The court has emphasised that the focus of such claims is on the employee's motivation for their decision to leave, and whether that motivation arises from a breach of the employer's duty, or some other factor.<sup>7</sup>

[59] In determining whether a dismissal was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether the employer's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

#### *Ms Elliot's submissions*

[60] Ms Elliot relies on the third category of constructive dismissal, in that she says HHKT breached duties to her by:

- (a) Conducting itself in a manner calculated to, or likely to, destroy or seriously damage the relationship of trust and confidence; and

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<sup>5</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374.

<sup>6</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA) at 419.

<sup>7</sup> See for example, *Commissioner of Police v Hawkins* [2009] NZCA 209.

- (b) Breaching implied terms of her individual employment agreement (IEA) relating to the safety of the workplace; and
- (c) Breaching good faith.

[61] Ms Elliot says multiple actions by HHKT underpin these breaches including that HHKT failed to investigate concerns raised about ACR and allowed them to return to the workplace and HHKT continually contacted her during her sick leave, accosting her with unreasonable questions about her past and personal life during the meeting at her home.

[62] Ms Elliot says HHKT failed to take fair and reasonable steps to understand, address and resolve the concerns she had, disregarded the medical information she provided and blamed her for her own condition. By the end of her employment, Ms Elliot says she had exhausted all her annual and sick leave entitlements and had no option but to resign in order to be eligible for the job seeker benefit.

#### *HHKT's submissions*

[63] HHKT says there was no causative link between its actions and Ms Elliot's resignation and it was not foreseeable that she would resign. HHKT says the clear motivation for Ms Elliot's resignation was financial because she had exhausted paid leave entitlements including discretionary special leave and she had to resign to receive an income benefit. HHKT says Ms Elliot's main motivation was not related to its actions including the health and safety reasons she now raises, and Ms Elliot had options available to her other than resignation including attending a kanohi ki te kanohi mediation, facilitation or meeting, engaging in a return to work process, and responding to HHKT's letter dated 31 May 2023. HHKT says it has not breached good faith obligations or the requirement to provide Ms Elliot a healthy and safe workplace and it is not a breach of duty not to attend a Zoom mediation.

[64] HHKT also says there was no pressure on Ms Elliot to resign. At the stage she handed in her notice, the parties were communicating over medical evidence. If there was a breach, which HHKT denies, it says it was not sufficiently serious to amount to repudiation and inconsiderate questioning does not meet the standard. HHKT says Ms Elliot's resignation came out of the blue with no foreshadowing, no procurement or incitement by it. HHKT says its intention was not to have Ms Elliot resign, it was

always to get her back to work on a return to work plan. While the relationship was not solid, in HHKT's view it was salvageable.

*Analysis of constructive dismissal*

[65] Based on the evidence before the Authority, I find the main motivation for Ms Elliot's resignation were the actions Ms Elliot has outlined. Ms Elliot felt unsafe at work and when HHKT did not give her time and space to work through her issues and what it meant for the employment relationship, she felt she had no option but to resign.

[66] Firstly, I find HHKT breached the implied term of Ms Elliot's employment agreement relating to the safety of her workplace. It created an unsafe workplace by exerting pressure on Ms Elliot to engage with it when Ms Elliot was on sick leave, and by its conduct during the meeting on 12 May. Ms Elliot's plan to have uninterrupted sick leave and take time for herself was derailed by Mr Hinton's and Ms Winter's visit to her home on 12 May. The evidence shows that Ms Elliot did agree for Ms Winter to contact her about a return to work plan because Ms Elliot felt comfortable talking to Ms Winter, and she was concerned about the implications of being away from work after her medical certificate had expired. However I am not persuaded that on any objective view Ms Elliot genuinely consented to having a meeting at her home with Mr Hinton and Ms Winter and she did not consent to being asked the types of questions that were asked. Ms Elliot says Mr Hinton's request to come round to her house took her by surprise and she did not feel she had a choice in saying yes or no. HHKT should have been aware of the power imbalance in the employment relationship and the need for appropriate boundaries around visiting an employee at home while on sick leave. While I accept HHKT's motivation for wanting to talk to Ms Elliot in person was well-intentioned, it was patently ill-advised.

[67] I also come to this conclusion because prior to 12 May, Ms Elliot had sent clear signals to HHKT that she was not well enough to engage in a meeting. Ms Elliot had agreed to a meeting, postponed it and then cancelled it, saying that she was anxious about the prospect of a meeting and had been unable to focus on herself. She told HHKT she had been thinking about an appropriate support person, which she clearly did not have at the meeting on 12 May. The visit by HHKT to Ms Elliot's home while she was on sick leave created an unsafe environment because of her vulnerability.

[68] Secondly, in choosing to visit Ms Elliot and engage with her in the way that it did, HHKT conducted itself in a manner likely to destroy or seriously damage the

relationship of trust and confidence, which was a fundamental breach. The meeting left Ms Elliot feeling stressed and totally overwhelmed and was the catalyst for her seeking legal representation. HHKT's later apologies and assurances that there would not be a repeat of the behaviour was not sufficient to "put matters back on an even keel", because HHKT has never genuinely accepted that it created an unsafe environment for Ms Elliot through its actions.

[69] Thirdly, there was then a continuous chain of events from the phone call and meeting on 12 May through to Ms Elliot's resignation that had the effect of continuing to undermine the relationship of trust and confidence. The action that preceded Ms Elliot's resignation was HHKT's communication regarding the clinical psychologist's report. In the email, HHKT says the report confirms Ms Elliot's "unwellness" was not triggered by anything it was responsible for. It says in all other respects, the report is "predicated on serious factual inaccuracies". There is no acknowledgement of the impacts of the 12 May meeting on Ms Elliot. HHKT reiterates its view that it was Ms Elliot who had rejected face to face mediation.

[70] There is validity to Ms Elliot's feeling that HHKT was denying and disregarding medical information she had provided and concerns she had raised. In the Authority, HHKT gave evidence that it did not accept Ms Elliot's clinical psychologist was qualified to give a medical diagnosis or prognosis, there was no accompanying medical evidence about how to accommodate Ms Elliot's needs, the purpose of the report was to support an ACC claim and consequently did not offer any solutions about a graduated return to work plan. These issues were not raised clearly with Ms Elliot at the time. Apart from medical certificates, the clinical psychologist's report was the first medical evidence Ms Elliot had provided to HHKT about her condition and based on the communication I have seen, HHKT was dismissive of the report. These actions lead to the conclusion that HHKT has acted in a way that was not active and constructive in maintaining a productive employment relationship, which is a breach of good faith.

[71] For the reasons I have set out above, I conclude it was objectively reasonably foreseeable that Ms Elliot would resign. The breakdown in the relationship was clear when considering the correspondence between the parties, which had become combative and not conducive to trying in good faith to resolve the employment relationship problem. The rejection of the report was the "last straw" in a chain of events that was put in motion from 12 May. HHKT's inability or unwillingness to

acknowledge and take responsibility for creating an unsafe work environment continued until Ms Elliot's resignation. For that reason, I am not persuaded there was a break in the causative chain between the events of 12 May and 22 August when Ms Elliot resigned. At the time Ms Elliot resigned, she felt she had exhausted options to work through the issues with HHKT and based on the evidence before the Authority, Ms Elliot's view was reasonable.

### *Conclusion*

[72] Based on all the evidence before the Authority, I find Ms Elliot's resignation was motivated by HHKT's failure to provide a safe workplace and breach of good faith which led to a breakdown of trust and confidence. I conclude Ms Elliot felt she had no choice but to resign and this should have been reasonably foreseeable to HHKT. HHKT has not acted as a fair and reasonable employer could, and Ms Elliot was unjustifiably constructively dismissed.

### **Issue 2: Has Ms Elliot raised claims for unjustifiable disadvantage within time and in accordance with s114 of the Act, and if so, was she unjustifiably disadvantaged in her employment?**

#### *The law on raising personal grievances*

[73] An employee must raise a personal grievance with their employer within the applicable employee notification period of 90 days,<sup>8</sup> which begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later.<sup>9</sup> A personal grievance can only be raised outside that time with the employer's consent,<sup>10</sup> or with the leave of the Authority which can only be granted in exceptional circumstances.<sup>11</sup> No action can be commenced in the Authority more than three years after the personal grievance was raised.<sup>12</sup>

[74] The case law supports that the grievance process is designed to be informal and accessible.<sup>13</sup> A grievance may be raised orally or in writing and there is no particular formula of words that must be used. Each communication in a series should be

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<sup>8</sup> Section 114(1) of the Act.

<sup>9</sup> Section 114(7)(b) of the Act.

<sup>10</sup> Section 114(1) of the Act.

<sup>11</sup> Section 114(3) and (4) of the Act.

<sup>12</sup> Section 114(6) of the Act.

<sup>13</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at 36.

examined as to whether it might raise a grievance, but the totality of communications might also constitute raising a grievance.<sup>14</sup>

[75] The grievance raised must be in the nature of a complaint under s 103 of the Act, and the employee must take reasonable steps to make the employer aware of the substance of the complaint to enable the employer to address it.<sup>15</sup> The employer must know what it is responding to, be given sufficient information to address the grievance, and be able to respond to the complaint on its merits with a view to resolving the complaint informally and as soon as practicable, but it is not necessary for the employee to state how they would like the matter resolved. It may be relevant to consider that employers and employees have a mutual good faith obligation to be active and constructive in maintaining a productive employment relationship in which the parties are communicative.<sup>16</sup> Raising an employment relationship problem might constitute raising a personal grievance.<sup>17</sup>

#### *Parties' submissions*

[76] HHKT raises a jurisdictional issue in that it says a personal grievance for disadvantage was not raised with it in time and in accordance with the Act. It does not consent to Ms Elliot raising a personal grievance out of time.

[77] Ms Elliot says her personal grievance was validly raised. Ms Elliot relies on the 26 May letter, but also the totality of communications between the parties which she says made it clear that she had been significantly impacted by something that had happened at work. At the investigation meeting Ms Elliot made an oral application for leave to raise a personal grievance out of time based on exceptional circumstances as an alternative argument, but she later withdrew her application in submissions and I am no longer required to determine whether exceptional circumstances existed.

[78] HHKT says the 26 May letter did not raise a disadvantage personal grievance, but even if it had, the remedy sought was reinstatement of Ms Elliot's sick leave balance. If a disadvantage was raised in time, HHKT says Ms Elliot's claim is confined to the disadvantage grounds and remedy she raised in her letter of 26 May, namely that

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<sup>14</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at 36.

<sup>15</sup> *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 (Emp C).

<sup>16</sup> Section 4(1A)(b) of the Act.

<sup>17</sup> *Clark v Nelson Marlborough Institute of Technology* [2008] 8 NZELC 99, 483 (Emp C).

she was asked to attend to work-related matters while on sick leave. HHKT says it addressed the issue of Ms Elliot's sick leave balance.

### *Analysis*

[79] Ms Elliot's personal grievances for disadvantage relate to three actions by HHKT: allowing an alleged sexual harasser into its premises (from February to April 2023), pressuring Ms Elliot to attend a meeting during a period of sick leave (from 8 to 12 May 2023), and asking unreasonable questions during the meeting (12 May 2023).

[80] Ms Elliot first raised concerns with HHKT in conversation with Ms Winter on 26 April 2023. However, I consider the conversations Ms Elliot had with HHKT prior to the 26 May letter were not sufficient to raise a grievance because concerns were raised in a generic and non-specific way. HHKT was not made aware of the substance of the complaint in a way that would have allowed it to be addressed.

[81] However, I find Ms Elliot did raise personal grievances for disadvantage with HHKT in the 26 May letter for the reasons that follow.

[82] The 26 May letter referenced events that had occurred between February 2023 and May 2023. It was within 90 days of events that occurred in late February through to May 2023. The letter alleges that HHKT has failed to provide Ms Elliot with a safe workplace by: failing to take reasonable steps to minimise or eliminate the risk of having ACR in the workplace, impacting her ability to rest and recuperate while on leave, and making inappropriate comments into her personal affairs. The 26 May letter also refers to the inappropriate enquiries into Ms Elliot's personal life during the phone call with Mr Hinton and the 12 May meeting with Mr Hinton and Ms Winter. The letter clearly refers to a disadvantage when it states: "we are concerned that our client has been disadvantaged as she was being asked to attend to work-related matters during her period of sick leave, and we ask that her sick leave balance be reinstated for the period between 8 to 12 May 2023".

[83] Looked at objectively, the 26 May letter provided HHKT with sufficient information to enable it to know what it was responding to, be able to address the grievance and be able to respond to Ms Elliot's complaint on its merits. It is settled law that there is no prescribed wording for raising a personal grievance and it is not necessary for an employee to specify what outcome they are seeking. I am therefore not persuaded by HHKT's submission that mentioning a specific remedy (and having

that remediated as requested) is relevant to whether a grievance has been validly raised in accordance with s 114 of the Act. It may be relevant to whether the employer's actions were fair and reasonable, and to remedies.

### *Conclusion*

[84] I find Ms Elliot did raise personal grievances for disadvantage within time and in accordance with the Act.

### ***Was Ms Elliot unjustifiably disadvantaged?***

#### *What is the law?*

[85] For her disadvantage claims to succeed, Ms Elliot must establish that one or more conditions of her employment was affected to her disadvantage by an unjustified action by HHKT.<sup>18</sup> This means I need to determine whether Ms Elliot suffered a disadvantage in her employment, and – if so – whether this was caused by an action by HHKT and whether that action was unjustified.

[86] HHKT's actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

#### *Parties' submissions*

[87] Ms Elliot says the inappropriate handling of her concerns caused her to suffer a re-triggering of past trauma. Ms Elliot says she was given two weeks' sick leave but then constantly contacted about meetings and phone calls, culminating in an intrusive meeting at her home. At the time of the meeting, Ms Elliot was waiting on an ACC assessment and she says the nature of the questions, which were irrelevant to her return to work, caused her harm.

[88] HHKT says it was empathetic to Ms Elliot's situation. However, HHKT says Ms Elliot cannot claim a disadvantage in relation to being contacted while on sick leave because she asked Ms Winter to contact her and put a plan in place for her return. HHKT also says it reinstated Ms Elliot's sick leave balance and therefore it has not breached a legal liability and has acted as a fair and reasonable employer could. HHKT says its actions did not affect a condition of Ms Elliot's employment to her disadvantage.

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<sup>18</sup> *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

### *Analysis*

[89] Ms Elliot's claim requires me to assess firstly whether the actions complained of occurred. If so, I am required to assess whether those actions disadvantaged her and whether HHKT's actions were unreasonable.

[90] Based on the evidence before the Authority, I find that HHKT did pressure Ms Elliot into meeting during her sick leave, and it did ask her unreasonable and intrusive questions during that meeting. However, I find HHKT did not fail to take reasonable steps to eliminate or minimise the risk associated with having ACR in the workplace.

[91] In relation to HHKT's actions relating to Ms Elliot's sick leave and the meeting on 12 May, I find its actions disadvantaged Ms Elliot, and in all the circumstances HHKT's conduct was unreasonable in that it has not acted as a fair and reasonable employer could. This is because Ms Elliot was clear with HHKT that she was feeling pressured to meet and despite the direct wording of Ms Elliot's 11 May text message, HHKT did not appear to accept that Ms Elliot did not wish to meet. While Ms Winter's initial response to Ms Elliot properly acknowledged that HHKT had not intended to make Ms Elliot feel pressured, only a day later on 12 May Ms Winter was asking Ms Elliot's permission to give Mr Hinton her number. It is apparent from the shortness of Ms Elliot's response that she did not welcome the approach. It should also have caused HHKT to question whether Ms Elliot genuinely consented to meeting.

[92] It is necessary to consider how the 12 May meeting came about. During the conversation of 12 May Ms Elliot told HHKT she had the waka ora keys and suggested someone could pick them up. Mr Hinton suggested a lunch meeting at a nearby café, which Ms Elliot declined. Ms Elliot told Mr Hinton she had anxiety around the idea of talking in person. At the end of the conversation, Ms Elliot told Mr Hinton that she did not think she could be around lots of people and "you can just come here and yeah", to which Mr Hinton said "have a chat and pick up the keys". There is some ambiguity around what Ms Elliot was proposing and agreeing to, and what Mr Hinton was intending by "have a chat". Despite there being clear red flags, HHKT decided to visit Ms Elliot at her home and try to engage her in discussion which went well beyond matters relevant to her work. Mr Hinton acknowledges some of his questions may have been clumsy and he subsequently offered an apology. However, the impact of the meeting was that it damaged the relationship of trust and confidence between Ms Elliot and HHKT and made Ms Elliot's ongoing employment less secure. The actions by

HHKT were unreasonable because HHKT did not contemplate Ms Elliot's vulnerability at the time and accommodate her request for time and space.

[93] In relation to the disadvantage relating to allowing ACR into the workplace, HHKT allowed ACR back into the workplace after ACR had left HHKT, and this action disadvantaged Ms Elliot, but it was not unjustifiable. This is because based on the evidence, I am not persuaded that HHKT as an organisation knew that ACR presented a risk to Ms Elliot at the time that ACR was back in the workplace between February and April 2023. Ms Elliot first raised an issue about ACR on 26 April 2023 with Ms Winter. As already discussed, prior to this date I accept Ms Winter's evidence that she was not aware of any issue with ACR. While Mr Hinton was generally aware of issues with ACR from the time Ms Brewer raised them on 27 March, the first time Mr Hinton became aware that Ms Elliot had an issue with ACR was after Ms Winter brought the matter to his attention.

[94] By the time HHKT received the 26 May letter, Mr Hinton had excluded ACR from the workplace and had advised Ms Elliot of this. For that reason, I conclude it was not unjustifiable for HHKT to have allowed ACR into the premises in February and April 2023 because I am not persuaded that HHKT had sufficient knowledge of the risk ACR presented to Ms Elliot at this time.

### *Conclusion*

[95] I conclude HHKT's actions relating to pressuring Ms Elliot to attend a meeting during a period of sick leave (from 8 to 12 May 2023), and asking unreasonable questions during the meeting (12 May 2023) did unjustifiably disadvantage Ms Elliot.

[96] HHKT's action in allowing an alleged sexual harasser into its premises (from February to April 2023) did not unjustifiably disadvantage Ms Elliot.

[97] The disadvantages relate to failing to provide Ms Elliot with a safe workplace. These were also matters raised in relation to her constructive dismissal grievance. The actions that underpin the dismissal and disadvantage personal grievances are substantively the same. For those reasons, while I find the disadvantage personal grievances were raised in time and are substantively made out, they do not give rise to separate remedies.

**Issue 3: Has Ms Elliot raised a claim for discrimination within time and in accordance with s114 of the Act, and if so, was she discriminated against in her employment?**

*What is the law?*

[98] Section 112 of the Act says an employee may apply to the Authority to resolve a grievance that could also give rise to an entitlement under the Human Rights Act 1992, or they may make a complaint under the Human Rights Act 1993. The Employment Court has confirmed that the irreversible choice in procedures under the Act is made when proceedings are commenced, not when a complaint is made.<sup>19</sup> Employees are able to utilise the mediation services of either jurisdiction without compromising their choice of election. In certain circumstances, an employer could become aware of a personal grievance when alerted to it by a complaint or claim made in another jurisdiction,<sup>20</sup> however the complaint would specifically have to be about the employer's actions.<sup>21</sup>

[99] The law on raising a personal grievance is the same as that set out above.<sup>22</sup>

[100] For a discrimination claim to be made out, the employee must have been discriminated against in their employment by reason directly or indirectly of any of the prohibited grounds of discrimination.<sup>23</sup> The employee also has to show they were subjected to detriment in circumstances in which other employees are not or would not be subjected to that detriment. Detriment includes anything that has an effect on employment, job performance or job satisfaction.<sup>24</sup>

*Parties' submissions*

[101] Ms Elliot says she raised a claim within time that she was discriminated against on the grounds of disability as a result of her PTSD diagnosis, and she suffered adverse treatment as someone who has experienced family violence, which are prohibited grounds of discrimination. Ms Elliot says these concerns were raised with HHKT in a letter provided by the HRC. Ms Elliot says after she disclosed to HHKT that she was suffering extreme anxiety, intrusive thoughts and felt unsafe at work, HHKT took actions that resulted in further detriment to her including insisting on meeting, meeting

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<sup>19</sup> *Wang v Hamilton Multicultural Services Trust* [2009] ERNZ 322 (EmpC).

<sup>20</sup> See *FMV v TZB* [2024] NZERA 584 at [78] and *Sharma v Rodney Farm 'N' Machinery Ltd* [2025] NZEmpC 64 at [33] to [39].

<sup>21</sup> *Health Waikato v Turner* [2004] EMHNZ 198.

<sup>22</sup> Paragraphs [73] to [75].

<sup>23</sup> Section 104(1) of the Act.

<sup>24</sup> Section 104(1)(b) and (2) of the Act.

in her home, and disregarding medical information. Ms Elliot says these were not circumstances that other employees were subjected to, and these actions caused her to resign.

[102] HHKT says there was no discrimination personal grievance raised with it under s 103(1)(c) of the Act and the HRC letter does not raise a grievance in the employment jurisdiction. Even if a grievance was properly raised, HHKT says there is no detail to support a claim of discrimination, and there is no evidence that Ms Elliot was treated differently due to a disability.

#### *Analysis*

[103] Ms Elliot relies on the letter of complaint sent on 21 June 2023 to HHKT from an HRC mediator as evidence that a personal grievance was raised with HHKT in time and in accordance with the Act. To determine whether a discrimination personal grievance was raised in time, I need to carefully consider the circumstances around the letter of complaint.

[104] The letter states that Ms Elliot has a complaint about HHKT's treatment of her based on her PTSD diagnosis and / or family violence history. The letter sought confirmation that HHKT was willing to participate in the HRC's dispute resolution process. The HRC advised if the complaint was not resolved, the complainant could file proceedings in the Human Rights Review Tribunal for a decision. The letter confirms the voluntary nature of its dispute resolution service, including mediation assistance.

[105] In response to this letter, HHKT confirmed it wanted to resolve Ms Elliot's concerns about discrimination via the employment jurisdiction. The HRC accepted this position and advised both parties on 12 July 2023 that it would close the matter at its end and if the matter was not resolved, Ms Elliot could make a claim at the Human Rights Review Tribunal.

[106] Firstly, I find that Ms Elliot had not made an irreversible choice to proceed with her discrimination claim before the HRC. Instead, HHKT had declined to engage in the HRC's voluntary dispute resolution procedure given the other employment matters at issue at the time, as it had a right to do in a voluntary process.

[107] Secondly, the complaints raised in the HRC letter were about HHKT's treatment of Ms Elliot based on her PTSD diagnosis and / or family violence history. HHKT as

an organisation knew some details of Ms Elliot's history from 26 April 2023 when Ms Elliot had her first conversation with Ms Winter, and was clearly aware of her history by 12 May 2023 when Ms Elliot had her first conversation with Mr Hinton. The HRC letter of 21 June 2023 therefore brought these issues to HHKT's attention within 90 days of the action occurring and was within time.<sup>25</sup>

### *Conclusion*

[108] As at the date of the HRC's letter on 21 June 2023, I find Ms Elliot had raised a discrimination personal grievance with HHKT because the letter was in the nature of a complaint under s 103 of the Act and Ms Elliot had taken reasonable steps to make HHKT aware of the substance of the complaint to enable HHKT to address it.<sup>26</sup> The HRC letter was received by HHKT within 90 days of the action alleged to have given rise to the personal grievance occurring.

[109] By advising the HRC it wanted to proceed in the employment jurisdiction, I find HHKT acknowledged the grievance and consented to it proceeding. Accordingly I conclude Ms Elliot's discrimination personal grievance was raised in time and in accordance with the Act.

### ***Did HHKT discriminate against Ms Elliot?***

[110] For her claim of discrimination to be successful, Ms Elliot must show that she was treated differently to other employees because of one of the prohibited grounds under the Act. Ms Elliot's claim of discrimination was not substantiated by any evidence of differential treatment. Instead, Ms Elliot alleges that HHKT's actions have caused detriment to her in that she was unable to perform her role and cumulatively its actions caused her resignation, which are grounds covered by her unjustified dismissal claim. Although I find a personal grievance for discrimination was raised within time, the discrimination claim was unsubstantiated on the evidence and does not succeed.

## **Issue 4: Remedies for personal grievance claims**

### *What is the law?*

[111] Where the Authority determines that an employee has a personal grievance, it may provide for the payment of compensation including for humiliation, loss of dignity

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<sup>25</sup> Section 114(7)(b) of the Act.

<sup>26</sup> *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 (Emp C).

and injury to feelings.<sup>27</sup>

[112] The Authority may also order the reimbursement of wages or other money lost as a result of the grievance.<sup>28</sup> Under section 128(2) of the Act, the Authority must order the employer to pay the employee the lesser of three months' ordinary time remuneration, or a sum equal to the actual lost remuneration. This is the default position if the employee has lost remuneration as a result of the personal grievance. However, s 128(3) allows that the Authority "in its discretion" may award a greater sum where appropriate. Awards of compensation are discretionary and moderation is appropriate.

[113] When deciding whether to apply my discretion and award more than three months ordinary time remuneration, the starting point is that there is no automatic entitlement to full loss. Whether I award more than three months ordinary time remuneration, and if so how much more (bearing in mind the actual loss merely represents the upper award) this should be assessed based on the circumstances of the case. I need to ask and answer the hypothetical question as to how the employee would have been placed in the absence of the legal wrong in issue (counter-factual analysis).<sup>29</sup>

[114] The Accident Compensation Act 2001 (AC Act) creates a bar to awarding compensation for personal injury if the damages arise directly or indirectly out of personal injury covered by the AC Act or former Acts.<sup>30</sup>

#### *Parties' submissions*

[115] Ms Elliot seeks compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act at the level of mid to high compensation of \$25,000 to \$50,000. Ms Elliot says she did not contribute to the situation giving rise to her grievances.

[116] HHKT says no compensation should be awarded, but if it is, Ms Elliot's contribution was 100 percent. It says any hurt and humiliation and injury to feelings Ms Elliot experienced was not linked to HHKT's actions or any breaches by it. It also says compensation is only available where the hurt and humiliation is unconnected to any personal injury for which the employee received accident compensation.<sup>31</sup> Because

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<sup>27</sup> Section 123(1)(c) of the Act.

<sup>28</sup> Section 123(1)(b) of the Act.

<sup>29</sup> *Telecom New Zealand Ltd v Nutter* [2004] NZCA 127/03, 2 NZELR 83 at 73.

<sup>30</sup> Section 317 of the Accident Compensation Act 2001.

<sup>31</sup> *Joe v Juken NZ Limited* [2020] NZERA 167.

there is little or no evidence of the ACC payments Ms Elliot has been receiving, HHKT says that creates a bar to awarding compensation.

*What is the impact of ACC payments?*

[117] The Employment Court has confirmed that despite the bar on awarding compensation for personal injury under the AC Act, such compensation remains available under s 123(1)(c)(i) of the Act where the cause of the hurt, humiliation and/or injury to feelings is entirely disjunctive of the personal injury.<sup>32</sup> The Court also held that compensation must be causally linked to the employer's breach.

[118] In terms of lost wages claims, the Employment Court has held that any award under s 123(1)(b) "raises the spectre of duplication of payments"<sup>33</sup> but the liability to pay compensation for wages rests with the employer and the payment of accident compensation does not displace this liability. Any question of repayment falls on the Accident Compensation Corporation and the claimant, and can be put to one side by the Court. By analogy, these principles apply to the Authority when assessing the impact of ACC payments.

*Compensation for humiliation, loss of dignity and injury to feelings*

[119] In this case, I consider the emotional impacts Ms Elliot has suffered as a result of her dismissal are entirely disjunctive of her personal injury, and consequently there is no barrier to the Authority making an award. This is based on the findings I have made about the reasons Ms Elliot's employment ended.

[120] I consider it appropriate to make one global award of compensation for Ms Elliot's personal grievances for the reasons given earlier – the disadvantages relate to failing to provide Ms Elliot with a safe workplace based on its actions around 12 May and subsequent, which overlaps with the matters raised in relation to her constructive dismissal grievance. The humiliation, loss of dignity and injury to feelings Ms Elliot experienced arose from her personal grievances, as a result of HHKT's actions.

[121] The impacts on Ms Elliot have been significant. She says the process has been exhausting and difficult which has taken a toll on her family life, her self-esteem, her financial situation and her career. Ms Elliot says she went from being happy, friendly and having the best job to not being able to leave the house. She just wants to be alone.

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<sup>32</sup> *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC99 at [46].

<sup>33</sup> *Judea Tavern Limited v Patricia Jesson* [2017] NZEmpC 82 at [40].

She has bouts of blackouts and anxiety. Since leaving HHKT Ms Elliot has struggled to work and to be around people. The loss of her employment has had a significant financial impact going from a nurse's salary to being on the benefit and ACC. Ms Elliot has not returned to employment. She says it should be a relevant factor that she actively sought medical assistance and support to treat her symptoms.

[122] I have considered the general range of compensation awards in other cases. Based on the information before the Authority and standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$25,000.00.

*Compensation for lost wages*

[123] In this case, I consider Ms Elliot has lost wages as a result of her dismissal. The reasons for this are also entirely disjunctive of her personal injury, and consequently there is no barrier to the Authority making an award. This is based on the findings I have made about the reasons for Ms Elliot's resignation which I have concluded amounted to a constructive dismissal.

[124] Ms Elliot has been on ACC since 26 September 2023, receiving approximately 80 percent of her ordinary earnings with HHKT. Ms Elliot took up some casual work with Tu Ora from February 2024. Ms Elliot claims lost income of 20 percent of her ordinary earnings between August 2023 and the date of the Authority's determination. Based on the records provided of Ms Elliot's payslips and the detailed income breakdown from Inland Revenue, it appears that Ms Elliot was paid around 83 percent of her usual weekly income from ACC after she left her employment with HHKT.<sup>34</sup>

[125] HHKT says Ms Elliot's Inland Revenue records demonstrate she has not suffered any loss because ACC was paying her more than 80 percent of her earnings and where the loss has been mitigated or reduced by other earnings, it would be contrary to s 123(1)(b) of the Act to award more than actual loss.<sup>35</sup> In addition, HHKT says the ACC compensation addresses the issue of Ms Elliot's fitness for work and she has not provided any evidence of mitigation.

[126] Ms Elliot has the onus of showing that she has lost income as a result of the personal grievance, which is subject to a duty to mitigate her loss. The default is to

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<sup>34</sup> Based on a weekly wage of \$1,538.47 (gross) with HHKT, and weekly payments of \$1,278.47 (gross) from ACC, there was a shortfall of \$260.00 (gross) per week or 17%.

<sup>35</sup> *New Zealand Steel Limited v Haddad* [2023] NZEmpC 57 at [163 – 164].

award three months' ordinary time remuneration.<sup>36</sup> Based on the evidence before the Authority, I am satisfied that Ms Elliot did lose income in the three month period after her employment with HHKT ended but I am not satisfied that Ms Elliot's lost income beyond the three month period was directly attributable to her grievances. Ms Elliot's claim is for actual lost remuneration, which over the three month period was her usual wages from HHKT minus the amount she received from ACC. For the three month period (13 weeks) from 22 August 2023 until 22 November 2023, Ms Elliot could have expected to earn \$20,000.11 (gross) from HHKT and she was paid \$13,017.62 (gross) by ACC until the end of November. The difference is \$6,982.49 (gross). I consider this a modest and appropriate claim and I order this to be paid, subject to contribution.

#### *Interest on lost wages*

[127] The Authority has discretion to order interest in any matter involving the recovery of any money, such interest to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.<sup>37</sup>

[128] Ms Elliot seeks interest on lost earnings from the date of her dismissal. HHKT says interest is not available because compensation is not a matter involving recovery of money owed by HHKT.

[129] My discretion to order interest is not invoked in Ms Elliot's case, because she claims interest on a compensation award made under s 103(1)(b), and not on a matter involving the recovery of money. I decline to order interest.

#### *Contribution*

[130] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Ms Elliot may have acted in a way that contributed to the situation that gave rise to her grievances.<sup>38</sup>

[131] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:<sup>39</sup>

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<sup>36</sup> Section 128(2) of the Act.

<sup>37</sup> Clause 11, Schedule 2 of the Act.

<sup>38</sup> Section 124 of the Act.

<sup>39</sup> *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

- (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- (b) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[132] The Court also stated:<sup>40</sup>

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[133] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[134] HHKT says Ms Elliot's contribution is at the higher extremes and 100 percent would be appropriate. This is because HHKT says Ms Elliot took it upon herself to investigate ACR through Ms Brewer's issues and therefore Ms Elliot's grievance and unwellness was directly the result of her own actions.

[135] For the reasons given above, I have found Ms Elliot's grievances arose from HHKT's conduct. I am therefore not persuaded that Ms Elliot's actions contributed to the situation giving rise to either the unjustified constructive dismissal or disadvantage claims. I decline to reduce any appropriate award for contribution.

### **Issue 5: Has either party breached their statutory obligation of good faith?**

#### *The law*

[136] The statutory obligation of good faith requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.<sup>41</sup> The duty of good faith is a mutual obligation. In this case, each party has raised claims against the other, alleging breaches of good faith.

#### *Claims*

[137] Ms Elliot says HHKT breached its statutory obligation of good faith in that it was combative and dismissive of Ms Elliot's concerns and medical condition, refused to attend a Zoom mediation, and refused to engage with her to resolve her concerns.

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<sup>40</sup> *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [17].

<sup>41</sup> Section 4(1A)(b) of the Act.

[138] By way of counter-claim HHKT says it was Ms Elliot who breached her statutory duty of good faith by not providing HHKT with medical information in her possession and control. HHKT also says Ms Elliot:

- (a) Recorded conversations without HHKT's knowledge or consent;
- (b) Did not provide or deliberately withheld the recordings from HHKT; and
- (c) Withheld relevant medical information (with reference to AEX1 - ACC Application and Counselling Notes).

*Parties' submissions*

[139] Ms Elliot says HHKT unreasonably ignored and dismissed her medical information, failed to take steps to understand her circumstances and failed to take steps to obtain further or alternative medical information including medical notes from a doctor. Ms Elliot says her clinical psychologist's report should have been accepted at face-value as providing appropriate medical information about her diagnosis and prognosis. Ms Elliot says although Mr Hinton was the key decision-maker he was not provided with the 26 May letter, or the medical information to assess Ms Elliot's condition. Ms Elliot also says HHKT refused to attend a Zoom mediation even though Zoom mediations are standard.

[140] In response to the counter-claim about recordings, Ms Elliot says her genuine reason for recording the conversations was that she felt vulnerable and recorded the conversations for her own recollection. Ms Elliot says she had no intention of using the recordings for any other purpose, or to HHKT's detriment. Ms Elliot also says the conversations were not intended to be confidential to the parties, and recording was not unlawful.

[141] HHKT says it wrote to Ms Elliot seeking necessary and relevant information about her medical diagnosis between May and August 2023, but the medical information provided no detail about why Ms Elliot was unfit for work. HHKT says Ms Elliot has consistently either withheld relevant information or chosen not to provide medical information within her control – particularly counselling session notes.

[142] HHKT says Ms Elliot's actions in withholding medical information and making secret recordings which were not revealed until more than a year after they were made

were “destructive”. HHKT does not accept Ms Elliot had proper reasons for making recordings of the conversations and says her conduct was inappropriate, unacceptable and undermining of the employment relationship and it would be appropriate to award a penalty against Ms Elliot as has been done in other cases where employees have made secret recordings.<sup>42</sup>

[143] HHKT says it actively and constructively engaged with Ms Elliot on the topic of mediation. Although Mr Hinton acknowledged the organisation could have done better, HHKT says failing to attend a Zoom mediation cannot amount to a breach of good faith given the voluntary nature of attendance at mediation.

*Analysis – medical information*

[144] The most significant and contentious part of the claim and counter-claim relates to Ms Elliot’s medical information.

[145] Based on the evidence before the Authority, I find Ms Elliot did not deliberately conceal relevant medical information from HHKT, and there was no intention by HHKT to deliberately misunderstand her condition. I accept Ms Elliot’s evidence that she was open and transparent with HHKT about trying to understand her own condition and about the professional help she was seeking. The communications between the parties demonstrate that generally Ms Elliot provided the information requested by HHKT when it became available, but much of the information HHKT now says should have been provided was not in Ms Elliot’s possession while she was employed. One of the contentious documents was an ACC form<sup>43</sup> which was only signed by the clinical psychologist on 28 September 2023 after Ms Elliot’s employment had ended. To the extent that HHKT expected to receive Ms Elliot’s counselling notes –which she says she did not have at the time of her employment - that was not a reasonable expectation given the highly sensitive and personal nature of the content.

[146] In questioning at the investigation meeting, HHKT raised with Ms Elliot that she had not provided her employer with notes from doctor visits. However, these notes were not specifically requested by HHKT even though it had received multiple medical certificates certifying Ms Elliot as unfit for work. HHKT also did not articulate to Ms Elliot the reasons it now says it did not accept the clinical psychologist’s report

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<sup>42</sup> *Nicol v Canterbury Concrete Cutting NZ and Simpson v IBM New Zealand*.

<sup>43</sup> Part of AEX1.

including questioning the psychologist's qualifications to give a medical diagnosis or prognosis, the lack of accompanying medical evidence and the lack of proposed solutions about a graduated return to work plan.

[147] Even if Ms Elliot had provided HHKT all the medical and therapeutic information in her possession at the time, I find it would not have assisted HHKT to understand her condition and move forward with a return to work plan. HHKT may have had to ask Ms Elliot to consent to a further medical report, which was an option available to it under the terms of its own employee handbook.

[148] I conclude that while HHKT did disregard the clinical psychologist's report and communications between the parties had become combative and dismissive, it was not combative and dismissive of Ms Elliot's concerns and medical condition as a whole. I also conclude that Ms Elliot did not deliberately conceal relevant medical information from HHKT. Much of the medical information HHKT says it should have been provided with was not available during Ms Elliot's employment and therefore a failure to provide it cannot have been undermining of the employment relationship. I conclude that on balance, the evidence does not support there was a breach of good faith by either party in relation to the medical information.

#### *Analysis – secret recordings*

[149] In certain cases, making a secret recording may constitute a breach of good faith and may undermine the trust and confidence at the heart of good working relationships.<sup>44</sup> The motivation for making the recording may be a relevant consideration.<sup>45</sup>

[150] I accept Ms Elliot's evidence that the recordings were made to assist her recollection to ensure that she had an accurate record of conversations with Ms Winter and Mr Hinton. I also accept the evidence of HHKT's witnesses that they would have agreed to Ms Elliot recording the meetings if she had asked.

[151] While an employee secretly recording a meeting with their employer might be considered in some circumstances to constitute a failure in the trust and confidence which exists in an employment relationship, in this case there was no evidence that the meetings and discussions were to be confidential. Ms Elliot was not asked if she was

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<sup>44</sup> *Talbot v Air New Zealand Ltd* [1996] 1 NZLR 414, [1995] 2 ERNZ 356.

<sup>45</sup> *Duddy v Nevada Sport Ltd* [2021] NZERA 514 at [67].

recording the conversations and she did not deny she was doing so. It would not have been a breach of good faith if Ms Elliot had made contemporaneous notes of the meetings. The fact that the recordings only came to HHKT's attention almost a year after they were made lends support to Ms Elliot's contention she had no intention of using the recordings unless or until it became necessary to do so.

[152] I therefore find that Ms Elliot's actions in recording the meeting and discussions with Mr Hinton and Ms Winter were not a breach of good faith in the circumstances.

#### *Analysis - mediation*

[153] Attendance at mediation is voluntary unless it is directed by the Authority. In this case, the parties explored different options for a mediated outcome including kanohi ki te kanohi mediation, Zoom mediation and facilitation.

[154] Fundamentally, the parties could not agree on a mutually acceptable mode of mediation which would have allowed Ms Elliot access to her representative in what she considered to be a safe environment, and which also addressed HHKT's requirement for kanohi ki te kanohi resolution which it considered necessary for an ongoing employment relationship.

[155] I accept HHKT's submission that non-attendance at mediation cannot be a breach of good faith because of the voluntary nature of mediation. I conclude there was no breach of good faith by HHKT declining to attend a mediation other than kanohi ki te kanohi.

#### *Conclusion*

[156] Based on the information before the Authority, I find that there was no breach of good faith by either party on the grounds raised.<sup>46</sup> On the basis that I have not found any breaches of good faith, the issue of penalties does not arise.

### **Issue 6: Did HHKT breach the implied terms of Ms Elliot's individual employment agreement?**

#### *Ms Elliot's submissions*

[157] Ms Elliot says HHKT breached the implied term of her individual employment agreement to provide a safe workplace. This is in respect of:

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<sup>46</sup> I have found HHKT did breach its good faith obligations in respect of Ms Elliot's dismissal claim, but this has been separately addressed above.

- (a) Failing to take steps to minimise or eliminate the risk associated with having ACR in the workplace;
- (b) Repeated and inappropriate communications with her while on sick leave including the meeting;
- (c) Making inappropriate enquiries into her personal life;
- (d) Refusing to attend mediation by Zoom and ignoring / disregarding the medical information she provided.

[158] Ms Elliot says HHKT was on notice of the potential likelihood that its actions would cause further harm and was well aware of the risk posed by ACR. HHKT's action in re-engaging ACR after it knew of ACR's actions continued to make the workplace unsafe. Ms Elliot says HHKT not only failed to take any steps to minimise or eliminate the risk of further harm to her, but through its actions, increased the harm which resulted in a full relapse of her PTSD.

#### *HHKT's submissions*

[159] HHKT says its legal requirement to mitigate harm to its employees only arises when it knows or ought reasonably to know about the circumstances giving rise to the risk. In this case, HHKT says it was not aware that ACR posed any risk of harm to Ms Elliot until Ms Elliot's first contact with Ms Winter on 26 April 2023, by which time ACR had ceased working for it. HHKT says that it was not, as an organisation, aware of Ms Brewer's complaint and even if it had been, this did not give rise to any legal obligation in relation to Ms Elliot. In summary, HHKT says it cannot be responsible for that which it did not know.

[160] HHKT further says its communications to Ms Elliot while on sick leave do not amount to a breach of the implied term to provide a safe workplace because the contact was either requested or agreed to by Ms Elliot.

[161] In relation to the 12 May meeting, HHKT says the intention was to build rapport with Ms Elliot and show concern about her safety. HHKT says it has subsequently apologised to Ms Elliot on more than one occasion.

#### *Analysis*

[162] Section 113 of the Act provides that bringing a personal grievance is the only way to challenge a dismissal. For her breach of contract claim, Ms Elliot relies on a

breach of the implied term of her employment agreement relating to safety of the workplace, which is one of the grounds relied on for her constructive dismissal claim. I conclude s 113 of the Act precludes me from considering this claim again as a breach of contract.

[163] The claims relating to a safe workplace have also already been addressed by the disadvantage personal grievances and the claims of breaches of good faith. The specific risk associated with having ACR in the workplace was raised as context for Ms Elliot's disadvantage claim. I found the claim was not made out as an unjustified action. For the same reasons, a breach of contract is not substantiated on the evidence because Ms Elliot has not persuaded me that HHKT was responsible for failing to minimise or eliminate the risk of ACR being in the workplace, when it was not aware of a specific risk to Ms Elliot.

[164] In terms of refusal to attend mediation by Zoom and ignoring or disregarding medical information, again these grounds claimed as breaches of contract have been raised in the context of the personal grievance claims and breach of good faith claims. I found the refusal to attend mediation by Zoom was not a breach of good faith because of the voluntary nature of mediation. For the same reason, this claim is not substantiated as a breach of contract. In relation to the claim of disregarding medical information, I have found the rejection of the clinical psychologist's report was the "last straw" leading to Ms Elliot's resignation and is clearly part of her constructive dismissal claim.

### *Conclusion*

[165] For the reasons given above, I have not found the breach of contract claim made out. Even if I had found otherwise, the remedies sought of compensatory damages would have given rise to an issue of double recovery because the breach of contract and personal grievance claims have arisen from the same cause and rely on the same underlying facts. Ms Elliot would also have faced an evidential hurdle in showing that HHKT's actions caused the medical condition she relied on for her breach of contract claim. The breach of contract claim does not succeed and I decline to order compensatory damages.

## **Non-publication**

### *The law*

[166] The Authority has the power to prohibit publication of names and evidence, subject to such conditions as the Authority thinks fit.<sup>47</sup>

[167] The Employment Court's judgment in *MW v Spiga Limited*<sup>48</sup> confirmed the principles applicable when considering whether non-publication orders should be made. The starting principle is open justice, which is of fundamental importance. The Authority may depart from open justice but only to the extent necessary to serve the ends of justice and based on sound reasons.

[168] The first step requires consideration of whether there is reason to believe that specific adverse consequences could be reasonably expected, based on evidence and/or reasonable inference. The second step requires the Authority to consider whether those consequences justify departing from open justice in the circumstances of the case. This is a weighing exercise that looks at relevant factors. Relevant factors include the circumstances of the case, the interests of the person or entity applying for the order, the interests of the other party or any third party, the public interest (including the rights of media), any issues of equity and good conscience and tikanga and its principles, values or concepts.

### *Analysis*

[169] On 13 June 2024 Ms Elliot applied to the Authority for a non-publication order and non-disclosure orders over certain sensitive information including counselling notes and a psychologist's report disclosed to ACC (AEX1). On 21 June, Ms Elliot added a letter from her counsellor (AEX3). I made an interim non-publication order over AEX1 and AEX3 under clause 10, Schedule 2 of the Act, such order to continue until further order of the Authority.<sup>49</sup>

[170] Ms Elliot now asks the Authority to make a permanent non-publication order over her sensitive medical information, specifically documents referred to in this matter

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<sup>47</sup> Clause 10, Schedule 2 of the Act.

<sup>48</sup> [2024] NZEmpC 147.

<sup>49</sup> Directions of the Authority, 9 July 2024.

as AEX1 and AEX3.<sup>50</sup> An oral application for permanent non-publication over Ms Elliot's name and identifying details was withdrawn in submissions.

[171] HHKT opposes non-publication of Ms Elliot's name and identifying details. In respect of documents included in AEX1 and AEX3, HHKT says that as Ms Elliot is a member of a publicly registered professional body, it may be in the public interest for the information to be available, but it is ultimately in the hands of the Authority.

### *Conclusion*

[172] The information in documents AEX1 and AEX3 is personal information of a highly sensitive and personal nature. Specific adverse consequences could be reasonably expected to arise for Ms Elliot if the information was to be made public. The standard is met to justify departing from open justice in the circumstances of this case. I consider it is in the interests of overall equity and good conscience that a permanent order is made for non-publication of the documents AEX1 and AEX3 and I make that order.

### **Orders**

[173] Ms Elliot has been successful in her personal grievance claim in that she was unjustifiably (constructively) dismissed from her employment, and was unjustifiably disadvantaged in her employment. Although her discrimination grievance was raised in time, Ms Elliot was not successful on this claim or her breach of employment agreement claim. Neither party was successful on the separate claims of breach of good faith made against the other.

[174] I order within 28 days of the date of this determination He Herenga Kura Trust is to pay Asmita Elliot:

- (a) Compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act in the amount of \$25,000.00.
- (b) Lost wages under s 123(1)(b) and s 128 of the Act in the amount of \$6,982.49 (gross).

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<sup>50</sup> AEX1 and AEX3 consist of the following documents: ACC Form (26 September 2023); In Between client initial consultation notes (29 June 2023); In Between client session notes (22 August 2023); In Between EMDR re-evaluation (3 October 2023); Good Grief Counselling (20 June 2024).

## **Costs**

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

[176] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Elliot as the successful party 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 HHKT 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.

[177] 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>51</sup>

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>51</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)