

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 772  
3167263

BETWEEN                      GXQ  
                                         Applicant  
  
AND                                NMK  
                                         Respondent

Member of Authority:        Marija Urlich

Representatives:              Andrew Schirnack and Rebecca White, counsel for  
                                         the Applicant  
                                         Philip Skelton KC and Eloise Callister-Baker, counsel  
                                         the Respondents

Investigation Meeting:        8 – 19 May 2023, 23-25 May 2023 and 15 June 2023

Further information and        16 June 2023 from the Applicant  
submissions received:

Determination:                28 November 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      GXQ worked for NMK in a senior role for 19 months when they resigned with immediate effect. GXQ says they were unjustifiably constructively dismissed or in the alternative unjustifiably disadvantaged in their employment. They seek remedies for losses consequent.

[2] NMK denies the claims GXQ brings before the Authority. It says it has acted at all times as a fair and reasonable employer could have in the circumstances.

[3] The Authority is satisfied the parties have attempted to find a resolution of this employment relationship problem themselves including attending mediation.

### **Non-publication order**

[4] GXQ seeks permanent non-publication order of their name and any information likely to identify them. NMK does not oppose the application and seeks non-publication extend to both parties.

[5] It is appropriate to grant the order in the terms sought because it concerns information for which there is no public interest in the publication including medical information.

[6] The order is made permanent: clause 10(1) of the second schedule of the Employment Relations Act 2000.

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

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and information received. The Authority received extensive evidence from a significant number of witnesses over the course of the investigation meeting. The documentation provided in support of the application was extensive. As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three-month timeframe required by s 174C(3) of the Act.

### **Issues**

[8] The issues identified for investigation and determination are:

- (i) Was GXQ unjustifiably constructively dismissed or, in the alternative unjustifiably disadvantaged in their employment, by way of the following alleged actions of NMK:

- a. failed to protect GXQ from discrimination due to national origin;
- b. engaged in an unsafe workplace investigation process and failed to put in place reasonable safeguards to protect GXQ from the significant psychological harm caused by the investigation;
- c. unreasonably commenced and then failed to stop a disciplinary process against GXQ in respect of attendance at a conference when at that time they were deemed medically unfit for work;
- d. unreasonably dismissed GXQ's concerns of being ostracised at work as 'preposterous' and failed to undertake an investigation into that concern;
- e. unreasonably refused to exercise a discretion and provide GXQ with paid sick leave;
- f. unreasonably refused to provide GXQ with information relevant to the disciplinary process;
- g. unreasonably insisted GXQ undergo a medical assessment for the purposes of assessing a date to return to work;
- h. unreasonably and without consultation stopped recruitment process for three roles reporting to GXQ and removed their responsibility for recruitment;

(ii) If so, is GXQ entitled to a consideration of remedies sought including:

- a. Reimbursement for lost income (and interest);
- b. Compensation of \$60,000 under s 123(1)(c)(i) of the Act;
- c. Compensation of lost benefits under s 123(i)(c)(ii);
- d. Special damages in respect of legal fees; and
- e. Recommendations under s 123(1)(ca) of the Act

- (iii) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by GXQ which contributed to the circumstances which gave rise to his grievance?
- (iv) Should either party contribute to the costs of representation of the other party?

### **The parties' employment agreement and relevant policies**

#### *The IEA*

[9] The parties' written employment agreement (the IEA) contains specific reference to a policy document (the policy document) which deals with matters including health and safety, disciplinary processes and workplace culture.<sup>1</sup> The IEA required GXQ to know and observe the contents of that policy document. A code of ethics was also expressly incorporated into the IEA.<sup>2</sup> With respect to health and safety the IEA required GXQ to take all reasonable precautions for their health and safety and that of other employees and to comply with all rules and policies concerning health and safety including the requirement to notify of any danger or hazard of which they become aware.<sup>3</sup>

[10] The IEA provides for suspension "...on ordinary pay while investigating or deciding the outcome of a disciplinary matter".<sup>4</sup> It also provides for termination for misconduct or serious misconduct and refers to the examples of such provided in the company house rules document.<sup>5</sup> With respect to termination of employment for medical reasons the IEA provides:<sup>6</sup>

We may terminate your employment at any time if you are unable, due to medical reasons, to perform your duties to a satisfactory standard. In making that decision, we will take into account:

- The nature of the illness or incapacity, and the prospects and time frame for recovery;
- The length of time it is reasonable for us to keep your position open;
- Anything else which you ask us to take into account.

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<sup>1</sup> IEA, clause 12.

<sup>2</sup> Above, clause 13.

<sup>3</sup> Above, clause 14.

<sup>4</sup> Above, clause 17.

<sup>5</sup> Above, clause 18.

<sup>6</sup> Above clause 18.1.

You agree that on our request, you will undergo an examination by a doctor nominated and paid for by the Company. The doctor may report directly to the Company. If the doctor reports to you, you agree to immediately give us a copy of the report. We will take into account that report and any other reports you provide.

[11] The IEA provides for 8 days sick leave after three months' continuous service with additional leave provided consistent with policy guidelines.<sup>7</sup>

#### *Code of ethics*

[12] The code of ethics expresses a commitment to "...the highest degree of integrity and honestly (sic) in the conduct of [NMK's] business affairs" and required "the highest possible standards of ethical and business conduct of [employees and directors] in the performance of their responsibilities and duties".

#### *Handbook*

[13] NMK's handbook contains sections headed "Honesty & integrity" and "Without discrimination". The handbook describes these as business standards and emphasises the importance and value of diversity in the workplace.

[14] The house rules list conduct which may amount to misconduct or serious misconduct. The lists are non-exhaustive. The policy also includes a three-step disciplinary procedure "...which is used to investigate all allegations of misconduct and poor performance". The house rules provide an employee may be suspended "...on full pay where a serious issue is being investigated, eg: suspected dishonesty or where safety or security is threatened". Consultation prior to suspension is expressly required.

[15] The policy document also deals with harassment which is described as:

Zero tolerance on harassment

- workplace violence, harassment and bullying

We are committed to providing a work environment that is pleasant for you to work in and which is free from violence, harassment or bullying and which supports our cultural values and core purpose.

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<sup>7</sup> Above clause 10.

All team members are expected to refrain from any behaviour which may be seen as workplace violence, harassment or bullying during the course of their employment with us.

[16] Extended sick leave described as “Wellness support” is provided for as follows:

Where possible we help you if you need to take extended sick leave because of more serious illness. If you have been with us for more than three months you may be eligible to paid sick leave for a period of up to three months. This leave is for personal, unexpected health issues and is at our discretion.

You apply for this leave through your Manager and it also requires Employment Relations manager approval. We need documentation from your medical provider so that we understand your diagnosis, prognosis and medical needs. Your application is considered on its merits. At the end of the three months your situation will be reviewed. If extra leave is required, then any other sick or discretionary leave must be taken before any further extended leave can be considered.

## **The law**

### *The test for justification*

[17] In considering personal grievances for unjustified action and dismissal, as here, the Authority must apply the test for justification set out at section 103A of the Act. The Authority must carefully assess the reasons given to the employee by the employer and decide, on an objective basis, whether the employer’s actions were reasonable. In addition, a fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations which include at s 4(1A)(b):

The duty of good faith in subsection (1)—

...

(b) 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;

...

[18] Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law”.<sup>8</sup>

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<sup>8</sup> *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

[19] In assessing the fairness and reasonableness of the employer's actions in a s 103A setting focus is required on the employment relationship overall. In *FMV v TZB* the Supreme Court discussed this emphasis in the Act and its relationship with the statutory good faith obligations:<sup>9</sup>

[46] ...As its name suggests, the current Act takes a relational approach, insisting that employment is more than a market transaction theoretically conducted at arm's length between individuals with equal bargaining power. The result is that while the employment agreement remains very important, it is the employment relationship that is the real focus under the current Act. The scope of the employment relationship is wider than the employment contract and it adds an additional dimension to contractual rights and obligations. This is reflected in two important ways.

[47] The first is the statutory incorporation of the principle of good faith into the employment relationship. This principle underpins the Act's relational approach.

[48] Part 1, "Key provisions", begins by stating that the object of the Act is:

to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship...

[49] This is to be done, first and foremost, by:

... recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour...

[50] Section 4 then provides that parties to an employment relationship "must deal with each other in good faith". This means, of course, that parties must not mislead or deceive one another, but its effect is wider than that. Parties must also actively and constructively establish and maintain a productive employment relationship; they must be responsive and communicative; and employers must comply with procedural fairness requirements...Parliament was at pains to ensure that the principle of good faith should be the driver of all employment relationships, independently of and in addition to obligations in the employment contract.

### *Unjustified constructive dismissal*

[20] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

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<sup>9</sup> *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [46].

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.<sup>10</sup>

[21] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.<sup>11</sup>

## **Background**

2018

[22] NMK is a large, national organisation. GXQ started employment with NMK in a senior role in mid-2018. The role had significant responsibilities including strategy development and implementation and reported to a senior executive (the immediate manager) who in turn reported to a more senior executive (the senior manager). GXQ had previously worked with these two key NMK employees and in their roles at NMK the three worked closely together.

[23] GXQ's felt in the first few months of their employment things were going well though they noted there was some resistance to the changes being implemented.

[24] On late August GXQ was invited to join a short-term incentive programme (STIP) for the 2019 financial year. In October they were invited to join two other long term cash bonus incentive programmes. The terms of these included being employed at the relevant future date. GXQ said they felt encouraged by these invitations to join bonus schemes and indicated NMK was satisfied with their performance including how they were approaching the challenging areas in their role. For completeness there is no evidence before the Authority that concerns about conduct, performance, communication, attitude or style were raised with GXQ prior to events which unfolded from 6 August of the following year. Also, in October GXQ travelled overseas to attend

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<sup>10</sup>*Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

<sup>11</sup>*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

a conference which they had done so in previous years with their prior employer. NMK paid for GXQ to attend the conference.

*28 November – ‘Heads of’ meeting*

[25] On 28 November a meeting was held with senior leaders, the ‘heads of’ across the business. GXQ said the purpose of the meeting was to get the group to “...commit to the new vision for [NMK], in order for us to move forward”. The meeting was not successful. GXQ said there was a lot of blaming and complaining in the meeting about what was wrong. GXQ recorded the meeting. They provided a copy of the recording to the senior manager with whom they worked closely who encouraged GXQ to persevere with implementing the change. GXQ said they recorded the meeting due to their concern at the level of hostility and opposition directed towards them in the performance of their role. The evidence shows NMK listened to the recording and expressed a view to the immediate manager that it demonstrated the issues of opposition. There is no suggestion NMK sought to understand why GXQ had taken the unusual step of recording a meeting without advising the attendees. I find that it is more likely than not because NMK accepted GXQ was facing opposition in their role and supported their approach and its continuation.

*2019*

[26] GXQ’s concerns that there was something wrong at work continued through into 2019. They felt they needed to be cautious about advice received from colleagues and that they were not receiving relevant information.

*August*

[27] On 6 August GXQ was advised by the senior manager that an investigation into allegations against them was to commence. I accept GXQ’s evidence that during this discussion the senior manager inferred the investigation was not their doing, that “these things” do not always end in dismissal and they needed to go through the motions. They also asked GXQ if they still had the ‘heads of’ meeting recording, winked and said that would be their “get out of jail card”. The senior manager provided a letter in the meeting which included:

- (i) complaints by five named persons had been received;

- (ii) the complaints alleged GXQ had "...engaged in inappropriate conduct that, if proven, may amount to bullying and/or other inappropriate conduct";
- (iii) the "formal complaints [had] been refined into the allegations...as outlined in the Terms of Reference";
- (iv) the terms of reference were attached to the letter;
- (v) to meet NMK's obligation to thoroughly investigate the allegations an independent investigation would be conducted;
- (vi) a general review into the culture of the team in which GXQ worked would be run simultaneously to the investigation and would be "...independent and will not be focussed on the Allegations";
- (vii) the name of the appointed investigator was provided;
- (viii) the process to be used by the investigator was broadly outlined - that GXQ would meet with the investigator to respond to the allegations, written summaries of interviews with the complainants would be provided with sufficient time for consideration by GXQ, GXQ may identify potential witnesses to be interviewed, an opportunity to comment on material conflicts would be provided, GXQ was welcome to bring a support person, the interview would be recorded, a written statement of their interview with the investigator would be provided for comment to GXQ and then provided to the complaints for comment;
- (ix) GXQ would be provided an opportunity to comment on a draft report which was "...designed to ensure that you have a full and fair opportunity to respond before any conclusions are reached";
- (x) that the outcome of the report "...will determine whether you have engaged in the inappropriate conduct as alleged and this will determine whether or not disciplinary action is appropriate";
- (xi) the investigation would be confidential; and
- (xii) access to the employee assistance programme (EAP) was available and the contact details provided.

[28] The terms of reference attached to the letter is a letter dated 6 August from NMK's lawyers addressed to the workplace investigators. The letter deals with the following:<sup>12</sup>

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<sup>12</sup> In italics the subheadings in the 6 August letter.

### *Engagement*

- (i) the workplace investigator was engaged to investigate complaints about GXQ and their immediate manager;
- (ii) names the complainants from whom specific complaints were received;
- (iii) attached a summary of key allegations arising from the complaints;

### *Appointment*

- (iv) the appointment of the workplace investigator was to make findings of fact in relation to the allegations;
- (v) that the workplace investigator was chosen because they specialise in investigating workplace complaints and are independent to NMK;

### *Scope*

- (vi) the scope of the investigations was described as:

The scope, as agreed with you, is to investigate the [a]llegations and make factual findings to determine whether:

- (a) the [a]llegations against [GXQ and their immediate manager] are substantiated, or unable to be substantiated, based on the balance of probabilities;
- (b) in the opinion of the [i]nvestigator, proven [a]llegations amount to bullying and/or other inappropriate conduct (such as intimidation or retaliation) (**Investigation**).

### *Terms of reference*

- (vii) that the investigation be carried out as follows:
  - (a) review and consider the documents provided by [NMK] listed at Schedule 2 – list of Investigation Documents;
  - (b) interview the Complainants to obtain a detailed statement;
  - (c) interview relevant witnesses to obtain detailed statements regarding [GXQ and their immediate manager] and their interactions with them;
  - (d) provide [GXQ and their immediate manager] a copy of the Complainants and witnesses' statements;
  - (e) interview [GXQ and their immediate manager] to obtain a detailed response to the Allegations;
  - (f) provide the Complainants a copy of [GXQ and their immediate manager] statements;
  - (g) conduct any follow up interviews with the Complainants, the witnesses, [GXQ and/or their immediate manager] as necessary to obtain any further information which is required to complete the Investigation into the Allegations (including about any new issues arising or any contradictory evidence obtained during the interview);
  - (h) once the investigation is complete, provide a written report to [NMK] setting out the evidence and findings on whether:
    - (i) the Allegations against [GXQ and their immediate manager] are substantiated, not substantiated, or unable to be substantiated, on the balance of probabilities; and
    - (ii) in the opinion of the [workplace investigator], proven Allegations against [GXQ and their immediate manager]

amount to bullying and/or other inappropriate conduct (such as intimidation or retaliation) (**Investigation Report**)

In reaching a conclusion as to whether or not particular conduct occurred, the following will also be taken into account:

- (i) the seriousness of the Allegations;
    - (ii) the inherent likelihood of the conduct occurring based on the evidence; and
    - (iii) the gravity of the consequences flowing from the particular finding;
  - (ii) provide a draft Investigation Report to the Complainants and [GXQ and their immediate manager] for comment
- (viii) and that a sound recording be made of each interview and provided to the interviewee and no recommendation as to disciplinary action if any was required.

*General*

- (ix) the workplace investigator was asked to write to participants that NMK requested they participate honestly and frankly in the process and that NMK was committed to ensuring participants were not subject to retaliatory action or pressure as a result of participating in the process or in relation to the “content of the evidence they give”;
- (x) that the investigation was to be conducted in a confidential manner and any documents created during the investigation were to be confidential; and
- (xi) the letter then described the investigation report would be used to provide legal advice to NMK and its governing organisation.

[29] Schedule 1 to the terms of reference letter set out the allegations which were broadly described as:

alleged bullying or other inappropriate behaviour by [GXQ and their immediate manager]. If substantiated, the allegations may amount to bullying and/or other inappropriate behaviour by [GXQ and their immediate manager] which may subsequently result in a disciplinary process being commenced by NMK.

[30] In respect of GXQ 13 instances of their alleged behaviour were set out in some detail “as part of the Complainants’ allegations of bullying and other inappropriate behaviour”. Most of the events occur between April and June 2019 and are, on their face, matters of communication, style and attitude. The complaints raise complex

dynamics between senior employees in the organisation and their views about strategic change and implementation of such. They squarely nest within the context of the strategic change process to which opposition and discomfort had been consistently expressed. This context is not clearly conveyed or emphasised in the allegation document.

[31] The schedule 2 list of documents attached to the terms of reference listed three documents – the workplace policy referred to above, the “guide” to workplace violence, harassment and bullying and the code of ethics. There are no express references drawn between these documents and the allegation document. It does not appear GXQ’s employment agreement was included in the schedule 2 list of documents.

[32] The following day the senior manager provided GXQ with a list of lawyers. It was made clear it was GXQ’s decision if they would be represented through this process and who that might be.

[33] On 15 August GXQ’s lawyer wrote to the senior manager which included:

It is noted that [GXQ] has not been consulted upon the Terms of Reference or upon who would be appointed as investigators. With that noted, [GXQ] accepts that [they] should participate in the investigation now commenced, and on that basis now decided upon by [NMK].

Before [they] can do so, however, [they require] clarity on the events giving rise to the investigation. In particular, the Terms of Reference record that [NMK] has received “complaints”, and goes on to summarise “key allegations. [GXQ] is entitled to full disclosure of the complaints made against [them], and to understand the context in which they were made. The context will include a description of how the complaint was laid, to whom, when, in what circumstances etc. To the extent that such information is not yet committed to documentary form, [NMK] is requested to arrange for that.

[34] By reply, NMK advised the workplace investigator would provide the relevant information and documentation as part of that process.

[35] For completeness, NMK had, in addition to the workplace investigation into GXQ’s alleged conduct and the culture review, commissioned a workplace investigation into complaints received about GXQ’s immediate manager. The workplace investigations and culture review were designed to be conducted concurrently.

[36] The next communication occurred on 5 September when the workplace investigator wrote to GXQ by email subject line “Private & Confidential – Workplace Investigation and Cultural Review”. The email included that:

- (i) interviews with the complainants had commenced on 9 August and with witnesses on 29 August;
- (ii) they expected the interviews with the witnesses to be complete by the end of the week;
- (iii) they had met twice with four of the complainants as the culture review and workplace investigation were separate processes;
- (iv) written statements from the complaints and witnesses would then be provided for GXQ’s consideration for which sufficient time would be provided;
- (v) they hoped to meet with GXQ later in the week of 16 September and would provide an update that week as to how progress was tracking; and
- (vi) invited any questions as to the process.

[37] GXQ asked the workplace investigator to direct all communications to their representative.

*24 September – advised STIP terms varied*

[38] On 24 September NMK wrote to GXQ advising their salary would be increased by approximately \$2,000 per annum and that the STIP entitlement would be withheld pending the outcome of the investigation. The letter advised that on 19 September the Board had exercised its right to vary the STIP scheme rules to determine additional criteria for participants and in reliance on that change NMK was advising given the ongoing investigation into their conduct it was appropriate to withhold any payment until any possible disciplinary process arising from findings of the investigation had been completed. The letter recognised this may be a difficult time for GXQ and again reminded them access to EAP support was available.

*25 September – first interview documents provided from workplace investigator*

[39] On 23 September the workplace investigator emailed GXQ’s lawyer copying in GXQ advising the witness interviews (as identified by the complainants) were complete

and written statements from the interviews with the complainants and witnesses would be provided by the end of the working day on 25 September. The email went on to seek to arrange a meeting before 2 October.

[40] GXQ received an email to their workplace email address on 25 September from the investigator, also to their lawyer attaching 137 pages of written statements of 22 interviewed witnesses for their consideration and response. Sections of the statements were redacted which referred to the other ongoing workplace investigation. It is fair to say some of the statements contain floridly negative and personally critical comments about GXQ. GXQ said they found these statements extremely distressing to read and this sense of distress was augmented by their being received in their open plan workplace office during work time. By this time the originating complaints had not yet been provided to GXQ or their lawyer as requested on 15 August.

[41] GXQ said the atmosphere at work changed because of the workplace investigation. They gave an example of a co-worker asking them in July if they needed to provide GXQ with a requested detail because they, GXQ, would be leaving soon anyway.

[42] From 26 September GXQ accessed the NMK provided EAP and from 27 September saw a counsellor through that programme. The counsellor's notes of the first session record GXQ spoke about how they felt they were being left in the dark, felt very alone, that they still did not have the full details of the complaints, described themselves as emotionally broken and struggling to cope. GXQ also started to see a general practitioner around this time, attending several appointments over the following months.

#### *27 September – change in reporting line*

[43] On 27 September GXQ was advised the reporting line of part of their team would move to a colleague due to health and safety concerns. The decision had been made on or around 24 September.

#### *1 October – drop box of workplace investigation documents provided*

[44] The workplace investigation was progressing. On 1 October the workplace investigator provided to GXQ through their lawyer a drop box of over 100 pages of

supporting documents. These documents had been provided by witnesses who had been interviewed through the workplace investigation process.

[45] On 2 October GXQ's lawyer wrote to the workplace investigator with subheading "Information requests":

- (i) restating the request made on 15 August for full disclosure of the complaints and the context in which they were made;
- (ii) recording that by reply NMK had advised the information would be provided by the workplace investigator;
- (iii) confirming the information had not been provided and described it as was necessary for GXQ to prepare their response;
- (iv) that GXQ understood the other employee subject to a workplace investigation consented to removal of redactions because they considered it essential to preparing their responses. GXQ also consented to redaction removal as described;
- (v) commented on the use of shorthand and brackets in the statements as making them difficult to understand and sought questions and answers put in full;
- (vi) recorded "...a concern that the investigation was proceeding by way of "statement" rather than a transcript interview; and
- (vii) once the above was provided GXQ could prepare to attend the meeting.

*2 October 2019 – directed not to attend overseas work trip*

[46] In October GXQ and their immediate manager, also subject to a workplace investigation, were to be part of a group attending an overseas study tour (the study tour) as part of the development of the change process. On 2 October GXQ was advised by the senior manager they were not to go on the tour and were to prioritise responding to the workplace investigation. GXQ said this was distressing on a professional level because of the potential impact of not gaining the knowledge necessary to implement the change the business may need and would contribute to the adverse speculation about them amongst their colleagues. They also said it had a personal impact because they had arranged to meet their mother and partner, an opportunity provided by the study tour, and this was important given the distress they were experiencing about their work circumstances. These issues were raised in a letter from GXQ's lawyer to NMK on 3

October and requested the decision made, it noted without consultation, be reconsidered. The letter stated an information request had been made to the workplace investigator which was unlikely to be met and considered within the time allowed before the tour was concluded.

[47] By reply NMK's senior manager acknowledged the emotional stress the process could create and that they were keen to ensure addressing the investigation was a priority for GXQ. The unfortunate impact on the family plan of GXQ not attending the study tour was acknowledged. With respect to the professional impact on GXQ the senior manager advised it was not essential for GXQ's role at that stage, the business had not decided if the change would be made and if it was there would be other opportunities for GXQ to learn what would be required. The information request was acknowledged and with respect to the comments about GXQ's wellbeing advised they were happy to speak directly with them or through their lawyer on how best to assist and support them as they work through the response.

[48] On 4 October GXQ applied and was granted leave on 9 and 10 October to see their family as planned. The senior manager to whom the request was made stated in reply they were happy GXQ would be able to get support from their family.

*4 – 29 October – events prior to the meeting with workplace investigator*

[49] This meeting was first scheduled for 16 October. Relevant events prior to the meeting are set out below.

[50] On 4 October the workplace investigator provided a response to the information request:

- (i) the original complaint and context thereof would be collated and provided as soon as possible;
- (ii) the request for the un-redacted interview statements was declined – ensuring confidentiality of the process was important, the respective terms of reference were redacted and consistent with that approach was redaction of interview statements, GXQ and the other employee would be asked to participate as witnesses in relation to the respective workplace investigations and GXQ should focus on preparing their response;

- (iii) statements were best given the complexity of the investigation, the 28 hours of transcript would not be accessible to review for GXQ and therefore not fair and would require further redaction with associated cost; and
- (iv) the verbatim questions could not be provided because that would require re-listening to the audio recording, the context of the statements was in response to the allegations and further context could be provided to any area GXQ wished highlight.

[51] On 9 October the workplace investigator wrote to GXQ's lawyer attaching the four written complaints and outlining their involvement in the complaints and the context in which they arose:

- (i) they had been appointed in early July;
- (ii) they were asked to meet with two of the complainants to take their statements, because they had advised NMK they wished to make complaints and be part of an investigation process;
- (iii) these two complainant statements were taken on 12 and 27 July respectively; and
- (iv) separately, the email complaints of the other two complainants were provided to the workplace investigators when they had confirmed they wished to be part of the investigation.

[52] On 11 October GXQ attended their doctor and was certified medically unfit for the period 14 – 27 October. During this consultation they discussed their planned attendance at a conference overseas in late October. This was also discussed with the counsellor around this time. Both encouraged GXQ's attendance on grounds it would help to bring a sense of normalcy to their situation.

[53] GXQ sent the medical certificate to their manager on the evening of 13 October. The covering email stated:

While I thought I have been managing the process well, as I prepare, I have been extremely overwhelmed with anxiety from the sheer amount of information and actions to date. Seeing my loved ones last weekend was helpful, however, on the plane home I was met with more anxiety with the upcoming week and have continued to seek professional assistance to help me through how I am feeling.

[54] The meeting with the workplace investigators was rescheduled to 31 October after GXQ's lawyer advised GXQ was "...increasingly unwell and... deemed unfit until 28 October".

[55] On 14 October GXQ asked their manager for help with getting approval for 3 additional counselling sessions from the NMK provider. The manager replied:

I just wanted to touch base with you regarding your sick leave.

You have eight days' sick leave available to you, but have not applied for any sick leave. Please make sure that you process all sick leave that you have taken, including prior leave earlier this year and nay taken last year. If you use, or have used, all your paid sick leave entitlement, any further sick leave will be unpaid sick leave or you can use annua leave to cover your absence once your paid sick leave entitlement has been used up. It is important that you follow the processes we have in place and set a good example.

I will follow up on the [counselling] issue and get back to you.

[56] On 22 October the workplace investigator wrote to GXQ's lawyer seeking confirmation the scheduled interview could proceed on 31 October. They acknowledged GXQ was certified unfit to work until 28 October and stated they were not prepared to reschedule the interview again if it cannot proceed on 31 October because they "...must complete the investigation process without further delay" as "[i]t is unfair on the complainants and witnesses for the process to be delayed any longer". The email went on:

- (i) "primary evidence from the respondents" must be obtained by 1 November and subsequent evidence by 8 November;
- (ii) in the interest of natural justice and procedural fairness GXQ must be given a fair opportunity to respond to the allegations;
- (iii) GXQ was provided with the complaint and witness written statements on 25 September and had been provided an opportunity to meet for interview; and
- (iv) proposed alternative interview options by audio-visual technology, a written response or through GXQ's lawyer their health prevented them meeting next week.

[57] By reply email GXQ's lawyer confirmed they were willing to attend the interview as scheduled if they were well enough, which would be confirmed and sought "...an assurance that you have provided all information to which you have been privy in relation to or connected with the allegations".

[58] Later that day the workplace investigation provided a response to GXQ's lawyer:

- (i) they had carried out a thorough review of their file;
- (ii) attached the first complainant's 21 June initial email complaint provided to a member of the governing organisation;
- (iii) confirmed "per the Terms of Reference" all information the workplace investigators had access to "...in relation to or connection with the allegation against [GXQ]..." had been provided except the audio recordings of the interviews; and
- (iv) the audio recordings could not be provided to GXQ because the interviewees had been told at the start of the interview they would not be provided to anyone else.

[59] On 29 October the workplace investigator emailed GXQ's lawyer seeking confirmation they were available to attend the interview scheduled for 31 October because "We understand that [they] attended a conference [overseas] last week and we wanted to confirm he is back in the country for Thursday's interview". The agenda of the meeting was then outlined – the allegations against GXQ, questions about the allegations against the other worker and then the culture review. The email stated this was likely to take some time, that a further meeting may be required for the culture review and noted "...trying to get through everything in one sitting might be too big an ask for [GXQ]".

[60] By reply GXQ's lawyer asked who had advised the workplace investigator GXQ was at a conference overseas last week and later in the day requested the emails sent to the complainants and copies of all responses. They confirmed the interview could proceed as scheduled. The workplace investigator replied they had received the information when they provided an update to the complainants as to progress with the investigation including delays with the interviews with GXQ and their immediate

manager. The email made clear they had done this at NMK's request and that they had not provided a reason interviews had been rescheduled. The email continued:

On Friday evening [25 October] we received an email from one of the complainants expressing their concern that the interview with [GXQ] had been delayed because [they] were attending a conference in Paris...had seen posts on [GXQ's] LinkedIn profile to this effect. We verified this through our own LinkedIn search.

Please let us know if this is not the case.

[61] The period GXQ was certified unfit to work overlapped with annual leave booked for the week of 21 October and requested and granted in late September. GXQ visited their family 17 to 29 October and attended and presented at the overseas conference on 22 and 23 October.

### *31 October – first interview with workplace investigator*

[62] This interview was conducted over a day. GXQ attended with their lawyer. They broke down several times during the interview and the meeting had to be adjourned several times to allow GXQ to recover themselves. They said they found the experience excruciating. The interview was recorded and an interview statement later provided for GXQ's verification and approval. GXQ provided comment on the allegations under investigation.<sup>13</sup> GXQ's opening comment to the workplace investigators, as recorded in the statement, provides context for their state of mind at this time:

This has been a struggle for me. It's something I have endured since I arrived in NZ, specifically at work – lack of value, understanding. I look at NZ and see multi-cultures integrated but not at work. I have done everything I can to integrate, I am a first generation [country of origin] and my family had it tough moving to the [country of origin] but they did not experience what I have here. The fact people have put lives on the table, it is very concerning. I am 100% alone, I wake up alone, I [go] to bed alone, I am alone at work and that is my entire life here. Reading these documents, including people who I thought were my colleagues and peers has been really stressful.

[63] Following the meeting the workplace investigator expressed serious concerns to GXQ's lawyer about GXQ's wellbeing. Their evidence to the Authority was they could not raise these concerns with NMK because the terms of reference did not provide such a mechanism.

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<sup>13</sup> Allegation 4a, in part and 4c, as described in the terms of reference, were covered in the first interview.

[64] Also on 31 October GXQ received an invitation to join the 2020 long term incentive plan.

*1 November – hiring for roles and reporting line put on hold*

[65] In early November GXQ found recruitment for three roles reporting to them had been put on hold and they had been removed as the hiring manager for those roles. They said there had been no consultation or notice of this change. They also said around this time meetings were cancelled in their calendar without warning, and they were not invited to meetings they would normally attend.

*5 November – second interview with workplace investigators*

[66] GXQ attended the second interview with their lawyer who raised the importance for the workplace investigator of their credibility assessment of the complainants given the close friendship between the first complainant and the member of the governing body who initially received the complaint and the close friendships and strong community links between complainants. The statement records the belief “...there is collusion which creates momentum when you have a pack mentality”. At the meeting GXQ provided responses to the allegations.<sup>14</sup>

*6 November – disciplinary process initiated*

[67] On 6 November NMK wrote to GXQ inviting them to attend a disciplinary meeting to discuss serious concerns about their conduct. The conduct in question was their attendance at the conference on 20 and 21 October where GXQ gave a presentation, attaching relevant supporting information and the concern about such was described as follows:

- (i) on 13 October GXQ had sought and been granted sick leave for the period 14 to 28 October and requested authorisation of additional counselling sessions;
- (ii) the context of the request was the workplace investigation which GXQ said had made them too anxious to work;

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<sup>14</sup> Continuation of allegation 4a, 4b, 4c, 4d, 4e(i), 4e(ii) and 4f, as described in the terms of reference, were covered in the second interview.

- (iii) during that period of sick leave GXQ travelled to the conference and presented at a conference;
- (iv) if GXQ was well enough to attend and present at a conference then there was no reason they were not well enough to be at work and participate in the investigation; and
- (v) NMK was also concerned GXQ's intention to attend the conference was not discussed with it when the parties discussed NMK's decision that they remain in New Zealand instead of going on the study tour.

[68] The letter proposed GXQ attend a meeting on 14 November to respond to the allegation and outlined matters dealing with GXQ's ability to fairly respond to the allegation including that they could bring a representative to the meeting. The letter also noted if serious misconduct was found, a preliminary view as to disciplinary action would be provided for comment and that such action could include summary dismissal. The letter asked that the matter be treated with strictest confidence, acknowledged the difficult time this may present for GXQ, reminded them of the availability of EAP services and to contact the writer with any questions about the letter or the meeting.

*12 November – third interview with workplace investigators*

[69] This was the last interview GXQ attended with the workplace investigators during which they provided responses to the balance of the allegations. The workplace investigator said GXQ was more emotional during this meeting and a break was offered and taken. The notes of the meeting record GXQ saying at the end of the meeting "I feel very abandoned. I feel I'm left alone".

*14 November – disciplinary meeting*

[70] The disciplinary meeting into the matters raised in the letter of 6 November was held. Following the meeting further concerns were raised with GXQ that they had misled the senior manager as to their intention to attend and present at the overseas conference.

*4 December – mental health event at work*

[71] GXQ said from early November their health deteriorated further, and their stress was manifesting in physical symptoms such as pain in their shoulders and arms. They

said they had paranoid thoughts, were distracted and worried and had lost weight. They said they were unable to sleep. On 4 December GXQ became unwell at work. They locked themselves in a meeting room at work and called their lawyer who arranged transport to a A&E clinic where they received medical assistance. They were diagnosed as having had an acute reaction to stress. NMK were advised of the event. The head of health and safety was asked by the senior manager to check in with GXQ that evening and the next morning and offer support. The following day the head of health and safety asked GXQ's lawyer what assistance could be provided by NMK. Following a request on behalf of GXQ for discretionary paid sick leave NMK agreed to 5 days paid sick leave.

[72] From this date a series of medical certificates were provided certifying GXQ unfit to work until at least 28 January 2020. GXQ attended their treating physicians through this time and on 12 December they saw the consultant psychiatrist.

[73] On 6 December GXQ's lawyer advised the senior manager that they were "seriously unwell". NMK confirmed that day the disciplinary investigation would be placed on hold for the remainder of the year.

*17 December – draft report provided*

[74] The workplace investigator provided GXQ's lawyer with a copy of the draft report on 17 December with the expectation GXQ's response would not be expected until the New Year when he was well enough.

*2020*

*10 January – MNK seeks update*

[75] On this date NMK wrote to GXQ's lawyer seeking an update as to their whereabouts. On 21 January GXQ attended the consultant psychiatrist who advised they were not well enough to return to work for a month and provided a medical certificate. On 22 January GXQs lawyer wrote to NMK advising the workplace investigator's draft report would not be shared with them until they were well enough.

*5 February – request to undergo medical assessment*

[76] The senior manager wrote to GXQ’s lawyer requesting they consent to a medical assessment to understand their likely prognosis. The opinion of GXQ’s consultant psychiatrist was such a request was “redundant”.

*4 March – resignation*

[77] By letter from their lawyer dated 4 March GXQ resigned their employment with NMK. The letter stated NMK with the knowledge that GXQ was “socially isolated” and new to New Zealand with no family support here had engaged in a course of conduct that caused them serious harm and destroyed the trust they had in their employer and that such outcomes were readily foreseeable. The letter then listed the conduct as including:

- taking no action to protect GXQ when the senior manager was aware of discriminatory attitudes and behaviour directed towards them on grounds of national origin;
- engaging an “unsafe investigation” process where the workplace investigators collected the complaints they were re-investigating;
- failing to build protections in the workplace investigation where it was foreseeable significant psychological harm could result;
- commencing a disciplinary process for which GXQ had prior approval to attend and continuing the process in the face of medical evidence as to efficacy of attendance;
- dismissing concerns and undertaking no investigation of those concerns even when GXQ suffered a significant mental health event;
- refusing to provide discretionary paid sick leave;
- refusing to provide information as to who reported GXQ’s attendance at the overseas conference in breach of the Privacy Act 1993 and natural justice rights;
- failing to respond to the personal information request made 4 December;
- taking no steps to investigate concerns of workplace harm suffered by GXQ in breach of the Health & Safety at Work Act 2015; and

- “insisting” GXQ participate in a medical assessment to assess return to work date when their treating psychiatrist reported it was too soon to make such an assessment.

[78] The letter ends:

As [NMK] is aware, these events precipitated [GXQ] suffering a Major Depressive Episode. [GXQ]’s psychiatrist has now determined that a return to the [NMK] workplace is likely to cause [them] further psychological harm. As such, [GXQ] has no option but to resign from [their] employment, and does so by this email, giving [their] contractual notice. [GXQ] will not be well enough to work out [their] notice period. There is no reasonable basis for requiring [GXQ] to participate in assessment by a [NMK] psychiatrist given [they] have now resigned...

Given the significance of the harm caused, we are now instructed to issue proceedings...[NMK] must now ensure that all records relevant to the above are preserved...

[79] Following an initial same-day acknowledgement of receipt NMK, through its lawyer’s provided a substantive reply on 13 March in which NMK:

- acknowledged GXQ’s resignation, requested the return of NMK property and reminded them of their post-employment restraints;
- outlined how NMK would advise staff GXQ would not be returning to work; and
- apologised that the 4 December Privacy Act request had been overlooked and would be responded to as a priority.

[80] The letter ended with NMK outlining broadly its response to the concerns GXQ had raised:

Other than the Privacy Act information request, [NMK] disagrees with the concerns raised in your email. In particular, it disagrees that its conduct caused a destruction of trust and confidence. [GXQ]’s reactions to the investigation into complaints made about [their] conduct at work and the disciplinary process regarding [their] trip to [overseas city] were, in [NMK]’s view, quite unexpected. [NMK] responded appropriately when put on notice of [NMK]’s health issues and has at all times acted as a fair and reasonable employer in observing its duties towards [GXQ].

If there is anything [NMK] can do to support [GXQ]’s recovery, such as providing ongoing EAP support, please do let me know.

## **Discussion**

*Was GXQ unjustifiably constructively dismissed and/or unjustifiably disadvantaged in their employment by NMK's actions?*

[81] GXQ says they were unjustifiably constructively dismissed as a result of the course of conduct engaged by NMK with the deliberate and dominant purpose of coercing them to resign or, in the alternative that a series of breaches of duty by their employer led them to resign. GXQ says their resignation was reasonably foreseeable in the circumstances where they had communicated NMK the increasing levels of harm they were suffering as a result of NMK's conduct and where NMK took no reasonable steps to protect their health and safety.

[82] The course of conduct/breaches of duty which GXQ say have resulted, cumulatively in their constructive dismissal are set out at [8] above. In the alternative, GXQ says the various conduct and breaches of duty amount to a series of unjustified disadvantage personal grievances. GXQ also says NMK breached their IEA by failing to take reasonable steps to maintain a safe workplace.

*(i) Did NMK fail to protect GXQ from discrimination due to national origin?*

[83] GXQ is not a New Zealand national. When they commenced their employment with NMK they had no family or cultural connection to New Zealand other than they had previously worked in different organisations offshore with two members of the executive team one of whom was a good friend. These circumstances were known to NMK. GXQ had come from a global role which involved frequent travel.

[84] GXQ says NMK failed to adequately prepare them for the known criticism both within NMK and from external stakeholders towards its recruitment of foreign nationals to senior positions and when they drew their concerns to NMK's attention when such attitudes were directed towards them, the concerns were brushed off. To succeed in a discrimination action the employee must establish that they have suffered a disadvantage and that the disadvantage arose "by reason of" one of the prohibited

grounds of discrimination.<sup>15</sup> National origin is one such prohibited ground.<sup>16</sup> Discrimination “by reason of” a prohibited ground is whether the prohibited ground:<sup>17</sup>

...was a material ingredient in the making of any decision to treat the complainant in the way he or she was treated...

[85] It is wholly accepted the situations GXQ faced at work would have been unsettling and embarrassing. Questions put to them and their partner in an open office setting in November 2018 were intrusive and rude. Questions as to their motivation for taking up the role in New Zealand and wanting to move here understandably made GXQ feel unfairly challenged. Those situations included reporting employees openly expressing negative attitudes towards GXQ’s national origin in the context of meetings in which they had a leadership role and a holiday branding exercise for which GXQ was responsible. It is also accepted that having arrived in New Zealand to start a new job and to find third party stakeholders had openly expressed critical views about the recruitment of foreign nationals to NMK would have been unsettling.

[86] I am also satisfied GXQ raised these matters with sufficient specificity with the senior executive to understand the nature of the concern. The concerns were raised in the context of internal challenges to the change management GXQ was responsible for leading and implementing. The senior manager accepted in their evidence there were cultural challenges in the workplace for overseas recruits including GXQ and an induction process may have assisted.

[87] There is evidence their national origin was a material ingredient in disadvantage they suffered as a consequence of action taken by NMK. The evidence is hostility and challenges they faced at work were cloaked as arising from their nationality, they raised this with the senior manager who then encouraged GXQ to push on. Given the zero-tolerance policy in place for bullying and harassment at work, this response was inadequate and did not meet the obligations NMK had provided under the parties’ employment agreement. I accept to a degree NMK’s characterisation that the nationality issue is a smoke screen given the accepted challenging environment where groups of employees resisted the significant transformational changes NMK and its governing body wished implemented. However, as the van garde of that implementation GXQ was asked to face and absorb that challenge and hostility and that challenge and hostility

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<sup>15</sup> Employment Relations Act 2000, section 104

<sup>16</sup> Employment Relations Act 2000, section 105(1)(g).

<sup>17</sup> *McAlister v Air New Zealand* (2010) 1 NZLR 153 at (48).

was expressed in terms of GXQ's national origin NMK was obliged, having set a zero tolerance for such conduct, to address the behaviour directly and provide GXQ with reasonable support. This did not occur, and this breach of duty is established.

(ii) *Did NMK engage in an unsafe workplace investigation process and fail to put in place reasonable safeguards to protect GXQ from the significant psychological harm caused by the investigation?*

[88] There is no dispute GXQ suffered significant psychological harm as a consequence of the workplace investigation undertaken by a third party engaged by NMK. This is the opinion of their treating psychiatrist which has been made available to the Authority. The opinion is clear and robust on its face. The basis of the harm is unequivocal and is accepted.

[89] In June and July 2019 NMK received serious concerns from multiple employees about the conduct of GXQ and their immediate manager and the culture of the team they led. The concerns were raised directly with NMK's governing body. In evidence to the Authority members of the governing body described receiving such complaints directly as highly unusual. It is accepted that is the case. How then did this situation come about that a member of the governing body received complaints of that nature directly?

[90] The original complaint was received by a member of the NMK's governing body from an employee who was also a longstanding friend. They met with the person and suggested they put their complaint in writing. On receipt of the complaint the governing body member forwarded it to other governing body members with an endorsement of the complainant including "[the complainant] is a very solid individual...I would 100% back [their] word over anything [GXQ] and [their immediate manager] could say to me". Documents provided during the course of the Authority investigation detail continued correspondence between the receiving member of the governing body and the complaint about the issues including after GXQ had left NMK. These documents also show members of the governing body corresponding on the complaint with reference to earlier discussions they had had regarding their concerns about GXQ, their immediate manager and the senior manager.

[91] NMK says on the face of the complaints the matters raised were serious and it was obliged to undertake an investigation. It says having taken legal advice the

investigation it undertook was fair and reasonable and sufficient safeguards were in place including engaging an independent third-party to undertake a fact-finding investigation who was experienced in workplace investigations.

[92] While that is broadly accepted, NMK was obliged to make a preliminary assessment of the complaints prior to embarking on a significant process of investigation and such an assessment would need to be informed by the relevant, known factors in the employment environment. This did not occur in a manner that could reasonably be expected. For example, the senior manager told the Authority they had not read or considered the complaints and acted on the assessment of the governing body Chair that the complaints were serious and warranted a workplace investigation. Given their senior role in the organisation and their direct and close knowledge of the employment environment, including the dynamics from which the complaints arose, the senior manager reasonably could have been involved in the threshold inquiry as to whether an external workplace investigation was warranted.

[93] In addition there are significant deficiencies in the investigation process commissioned by NMK:

- (i) how the complaints were originally received by NMK was not disclosed to the workplace investigator or to GXQ;
- (ii) the attempt to draw clarity for the workplace investigation has risked introducing a perception that the circumstances in which the complaints were received has been shielded;
- (iii) the terms of reference required the investigator to collect and be involved in the drafting of complainants statements which they were then required to investigate so blurring their role;
- (iv) the timing of the commissioning of the workplace investigation and the commencement of it was not communicated to GXQ until some time later and after GXQ had repeatedly sought the information;
- (v) GXQ was not consulted on the terms of reference in breach of s 4(1)(A) which includes the obligation of access to information relevant to the continuation of an employee's employment – commissioning a

workplace investigation is a category of proposed decisions with potentially adverse effect;<sup>18</sup>

- (vi) the delay in providing all relevant information given the resources NMK had to hand was unreasonable and undermined GXQ's trust in the process;
- (vii) the commissioned terms of reference required the investigation to undertake an factfinding process which was untethered from the statutory requirement for the employer to sufficiently investigate what became readily apparent or could reasonably have been readily apparent issues of attitude and style;<sup>19</sup>
- (vi) the commissioned terms of reference into the complaints against GXQ were unreasonably complex because the same workplace investigator was engaged in a concurrent disciplinary investigation and culture review arising from the complaints against NMK and their immediate manager with inevitable factual and documentary complexity and volume including redactions which have undermined GXQ's confidence in the process and caused them to feel overwhelmed;
- (vii) the response was disproportionate to what was repeatedly described by both senior and experienced governing body members and executive staff in evidence to the Authority as minor – why this was not communicated to the investigator is unclear because ensuring a proportional response is fundamental to a fair and reasonable process;
- (viii) that GXQ was not suspended was a significant indicator, present from the outset of the workplace investigation process, that the issues for investigation were likely to be in a lesser category of seriousness;<sup>20</sup>
- (ix) the commissioned terms of reference and the ensuing factfinding process failed to put in place sufficient support for NMK particularly given their known personal circumstances including their limited personal support in New Zealand;
- (x) the workplace investigation was untethered from the employment relationship and the employment environment without clear and

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<sup>18</sup> Employment Relations Act 2000, section (1A).

<sup>19</sup> Employment Relations Act 2000, section 103A(3)(a).

<sup>20</sup> This finding should not be overstated. On an objective analysis reasonable inference as to seriousness could be drawn and considered from a decision not to suspend. For completeness, there is no compelling evidence NMK considered whether to suspend GXQ.

transparent mechanisms for matters to be referred back for guidance which has created further procedural complexity in matters of concern for example employee wellbeing, compliance with good faith obligations and further undermined GXQ's confidence that the process was fair and reasonable.

[94] NMK developed a detailed workplace investigation process having received complaints which raised matters which it was obliged to carefully consider. As found above there were features of the workplace investigation including matters around its commission which have occasioned significant unfairness to GXQ, undermined their confidence that they would be treated fairly through the process and ultimately caused them harm. NMK did provide support to GXQ through this process however, that support was not sufficient to minimise the risk of harm arising from the workplace investigation and its circumstances which I find was readily foreseeable. This claim is established.

(iii) *Unreasonably commenced and then failed to stop a disciplinary process against GXQ in respect of attendance at a conference when at that time they were deemed medically unfit for work?*

[95] GXQ's leave records show on 26 September 2019 they requested and were approved annual leave by their immediate manager for the period 21 to 25 October 2019. GXQ gave unchallenged evidence that the approving manager knew their intention was to use this time to visit family overseas and attendance at the conference which they had approved. Given this, how could NMK reasonably write to GXQ on 6 November 2019 inviting them to a disciplinary investigation regarding an allegation of serious misconduct, being their attendance and presentation at the conference, noting a possible disciplinary consequence may include summary dismissal?

[96] NMK says it had two concerns which it considered appropriate to investigate – firstly, on 13 October GXQ had provided a medical certificate for the period 14 to 27 October certifying unfit for work and then attended and presented at a conference overseas during that period and secondly, they had not told the senior manager about the conference when earlier that month NMK had directed them not to attend the work tour. On the face of the issues, as outlined in NMK's 6 November letter, it was reasonable for NMK to seek to understand with GXQ they're attendance at the

conference. What was not reasonable was to place the initial discussion in a disciplinary context without providing GXQ with an opportunity to first comment. This was because there was information within NMK's knowledge at 6 November which invited a more nuanced approach to the matters of concern:

- (i) GXQ's immediate manager had approved the annual leave and their attendance at the conference;
- (ii) GXQ had not requested paid sick leave for the period for which annual leave had already been approved; and
- (iii) in early October NMK had approved annual leave for overseas travel for wellbeing reasons related to the impact of the workplace investigation.

[97] In addition when the parties met on 14 November at the disciplinary meeting GXQ provided information that their counsellor and doctor had encouraged them to attend the conference as a measure to manage their mental health and that their immediate manager had approved the leave to attend the conference and was aware of and had approved the presentation they gave. I accept the submission for GXQ that the basis of the senior manager's evidence that approval should have been sought from them for attendance at the conference is unclear. NMK had not suspended GXQ or their immediate manager during the workplace investigation or expressly changed their reporting requirements particularly in respect of leave requests.

[98] For these reasons the disciplinary process was unreasonably commenced and continued and has caused GXQ disadvantage in their employment.

- (iv) *Unreasonably dismissed GXQ's concerns of being ostracised at work as 'preposterous' and failed to undertake an investigation into that concern?*

[99] At the 14 November meeting GXQ's lawyer said they had been subject to "marginalisation and a sustained course of fairly high-handed treatment". The senior human resources manager in attendance at the meeting in support of the senior manager responded, "those allegations are just preposterous". Those exact words were used because GXQ covertly recorded the meeting, and the recording has been provided in evidence.

[100] GXQ says this was a clear breach of the obligation to be responsive and communicative and to investigate health and safety concerns when put on notice of such because the conduct was unfair and dismissive of GXQ's wellbeing and notified concerns.

[101] NMK has submitted these were matters which GXQ could have readily escalated given their own knowledge and that they were represented throughout this process. In general terms that is correct. The escalation option remained available to GXQ and the acute health event GXQ suffered at work a few weeks later could not have been anticipated by the NML attendees at the meeting. However, the proposition expresses a somewhat adversarial approach to solving the employment relationship problems involving GXQ which I find tended to characterise NMK's response to problems which at their heart arose from workplace dynamics occasioned by challenges faced in the implementation of strategic goals of the organisation.<sup>21</sup>

(v) *Unreasonably refused to exercise a discretion and provide GXQ with paid sick leave?*

[102] On 6 December GXQ requested NMK exercise its discretion and grant further paid sick leave above their contractual entitlement. NMK had granted GXQ 4 days paid sick leave above their entitlement following the 4 December workplace event.

[103] The relevant policy provides in respect of discretionary sick leave that a request must be supported by documentation, made to the requestor's manager and that the employment relations manager must also be involved in the decision making. The policy states the request will be considered on its merits.

[104] While I accept the decision to grant paid sick leave above entitlement was a discretionary decision, having put in place a policy to guide how such a request would be considered, NMK was obliged to follow that policy. This did not occur including and significantly the policy requirement of a merit-based assessment of the request and the involvement of the employment relations manager. The contemporaneous documentation does not show a merit-based assessment of the request was made – the senior manager's email 6 December contains no assessment of the merits of the request or indication such an assessment had been made and GXQ's lawyer's request of 10

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<sup>21</sup> *Campbell v Commissioner of Salford School* [2015] NZEmpC 122 at [148].

December for the decision to be reconsidered does not appear to have been responded to despite their setting out the context of the request including reference to the manager with apparent approval authority explaining the availability of further paid leave at the 14 December meeting. NMK's response to the request for extended paid sick leave appears to have been made with the benefit of legal advice. This breach is established.

(vi) *Unreasonably refused to provide GXQ with information relevant to the disciplinary process?*

[105] GXQ's concern is that NMK initially refused and then unreasonably delayed providing the information requested as to who had brought to NMK's attention their attendance at the overseas conference. The delay was two weeks – the request was made on 18 November, correspondence exchanged and the information provided on 4 December. GXQ says the delay left them feeling unsafe in their employment and amounted to a further breach of duty by NMK. This breach is not established. While it is accepted GXQ's responses were heightened by concerns about the workplace investigation and the impact on their treatment at work, the information was provided, and it is not established the timeframe in which the information was provided occasioned any specific disadvantage. Matters concerning costs incurred are separately considered.

(vii) *Unreasonably requested GXQ undergo a medical assessment for the purposes of assessing a date to return to work?*

[106] The parties' employment agreement provides at clause 18.1 that NMK may request and the employee agrees to undergo a medical examination by a doctor nominated by NMK in the circumstances of termination or medical reasons. The provision is expressly within the context of the employer considering termination. This was not the circumstances faced by the parties when NMK requested GXQ undergo a medical examination in February 2020. NMK says GXQ had been certified medically unfit to work for 14 weeks, this was a significant period of time and it wished to understand their prognosis for a safe return to work. NMK also says GXQ's absence from work had implications for when the workplace investigation could be complete.

[107] NMK's letter of 5 February 2020 made the medical examination request purportedly in reliance on clause 18.1 of the IEA. Such a request was not reasonably

available to NMK given - first the evidence of their witnesses that GXQ's termination was not the motivating feature of the request and second the recourses available to NMK to express the basis of the request correctly. How such an apparent error could have been made was not clear. It is not surprising GXQ suffered further concern that their employer did not intend to comply with the terms of the parties' employment agreement. This unjustified action is established.

(viii) *Unreasonably and without consultation stopped recruitment process for three roles reporting to GXQ and removed their responsibility for recruitment?*

[108] There is no dispute an underway recruitment process was stopped and GXQ's responsibility for recruitment moved to a co-worker without those matters being discussed with them first and their being provided an opportunity to comment. There is also no dispute that responsibility was GXQ's under the terms of their job description.

[109] NMK says the action was fair and reasonable because:

- (i) it was a temporary measure taken to alleviate health and safety concerns members of the team reporting to GXQ were raising regarding their leadership while the workplace investigation was ongoing;
- (ii) the decision was not punitive and did not reflect predetermination;
- (iii) the decision benefited GXQ because it lessened their workload and gave them more time to respond to the workplace investigation; and
- (iv) GXQ does not challenge the substance of the decision.

[110] I accept NMK took seriously the health and safety concerns raised by staff and identified a temporary step, having taken legal advice and the advice of the internal health and safety advisor, to pause the identified recruitments and remove this responsibility from GXQ. I also accept the senior executive discussed with GXQ in some detail the recruitment matter. There is however no compelling evidence NMK discussed with GXQ stopping the recruitment process or removing this role from them and sought and considered their view. The employment agreement did not expressly provide for the temporary change as implemented.

[111] NMK's action breached the parties' employment agreement and was not consistent with the good faith obligations which requires amongst other things parties in an employment relationship to be responsive and communicative.<sup>22</sup> The matters were part of GXQ's role and any change to that role, even on a temporary basis ought to have been discussed with them and their views sought and considered. It is not accepted the removal of these matters without seeking and considering GXQ's views was not a substantive matter. By this stage NMK was aware the investigation was negatively impacting GXQ's health and that GXQ was concerned about the negative impact of the investigation on them at work. NMK could reasonably anticipate such a change might add to GXQ's stress and concerns about the impact of the investigation on them and feel that the step was taken to undermine them at work. Much of this readily anticipatable impact could have been mitigated to a fair degree by having an open discussion with GXQ about the concerns raised and how they may be addressed. Why this did not occur is unclear particularly given NMK took similar steps earlier during the workplace investigation regarding GXQ's removal from the overseas tour.

*Did the found breaches by NMK cause GXQ to resign?*

[112] NMK failed to meet its contractual obligations to GXQ, and failed to meet its broader obligations, including in respect of being active and constructive, providing relevant information and a fair opportunity to comment and have that comment considered, and significantly, failed to take reasonable steps to maintain a safe workplace including one free from discrimination and psychological harm. When GXQ took steps to support their wellbeing NMK initiated disciplinary action against them.

[113] It is well settled that a breach of duty by the employer that causes an employee to resign amounts to a constructive dismissal, provided it is reasonably foreseeable that resignation would occur having regard to the seriousness of the breach.<sup>23</sup>

[114] In this matter the evidence supports a claim that NMK's breaches of duty caused GXQ's resignation, and that resignation was reasonably foreseeable. GXQ was unjustifiably constructively dismissed in all the circumstances.

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<sup>22</sup> Employment Relations Act 2000, s 4(1A).

<sup>23</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA); and *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415, [1994] 1 ERNZ 168 (CA).

## **Remedies**

[115] GXQ has established personal grievances for unjustified constructive dismissal. They are entitled to a consideration of the remedies sought.

### *Special damages*

[116] GXQ seeks an award of special damages totalling \$25,274.31.<sup>24</sup> These are the total legal fees incurred by GXQ relating to attendances connected to the workplace investigation and the disciplinary processes until their resignation. It is accepted it was reasonable for GXQ to seek and receive legal advice on these issues and a clear line can be drawn between the events during employment and the subsequent litigation. Findings have been made that the investigation was significantly flawed from the outset as was the disciplinary process. GXQ is entitled to recover the fees as sought by way of special damages.

### *Reimbursement lost wages*

[117] GXQ seeks reimbursement of earnings lost as a result of their dismissal pursuant to s 123(1)(b) and s 128 of the Act. The period of claim is 25 weeks from 10 December 2019 from when they were on unpaid sick leave to 1 June 2020 when they started their new role.

[118] While GXQ was successful in establishing NMK did not properly apply the discretionary paid sick leave clause it does not follow if it had been applied correctly, they would have been paid for the balance of their employment. This part of the lost wages claim does not succeed.

[119] GXQ is entitled to salary of \$80,903 (gross) being the 87 days between their last day of employment with NMK and their new employment commencing. They have established reasonable attempts to mitigate their losses and in the circumstances of this matter it is reasonable that the Authority exercise its discretion and award more than the s 123(b) entitlement.

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<sup>24</sup> Refer calculation and supporting information supplementary submission or GXQ 16 June 2023.

### *Benefits*

[120] GXQ seeks an award of two short term incentive payments for the 2019 financial year of \$195,000 (\$97,000 each). NMK submits:

- (i) it is unlikely GXQ would have received a STI payment for the 2019 financial year because they were subject to misconduct allegations during that year; and
- (ii) if they were eligible the unchallenged evidence of NMK's remuneration expert was GXQ was on one STI which if paid would have been at most \$55,618.47.

[121] The Authority has found the workplace investigation, and the disciplinary process were in breach of obligations owed to GXQ. But for the consequences of those breaches GXQ would have been eligible for, I accept one STI payment. NMK is to pay GXQ \$55,618.47.

### *Hurt and humiliation compensation*

#### *GXQ*

[122] In evidence GXQ said they cannot overstate the impact these events have had on them and their family. They said several times during their evidence to the Authority they were lucky to be alive. I accept the submission that there is no reason not to accept this given the circumstances of this matter. As a result of losing their income they faced financial difficulties as well as emotional distress and uncertainty.

#### *Counsellor*

[123] GXQ sought the assistance of a counsellor in relation to work-related issues and the impact on their health attending 13 counselling sessions from 27 September 2019 to 12 February 2020. Access to this counselling was through NMK's EAP. The counsellor GXQ attended has significant experience in treating depression and anxiety. They record from the earliest sessions GXQ's concerns about isolation in the workplace and being kept in the dark, that they still did not have the full details of the complaints and described themselves as emotionally broken and struggling to cope. These concerns continued and developed in the coming months.

### *Consultant psychiatrist*

[124] GXQ sought the assistance of a consultant psychiatrist in relation to work-related issues and the impact on their health. From 12 December 2019 to 3 March 2020 GXQ attended 7 sessions with them. The medical notes of those sessions have been provided to the Authority. The psychiatrist diagnosed GXQ as suffering a severe major depressive episode and that any return to the workplace would likely cause further psychological harm. Their opinion was they had “no doubt [GXQ’s] current mental state is the direct result of the actions of the employer”.<sup>25</sup>

### *GXQ’s partner*

[125] GXQ’s partner gave evidence to the Authority of the impact of this employment relationship problem on GXQ and their relationship. In general terms they described GXQ as easy-going, laid-back and “somewhat geeky”, as someone with a love of learning with a sharing and generous nature and an ability to engage meaningfully with groups or individuals. They also described their excitement and happiness as a couple about the move to New Zealand and the opportunity it presented to start a new stage in their lives including their wish to start a family. The evidence establishes the commitment they made as a couple to a life in Auckland including putting a deposit on a new build apartment in the city and the significant period of time spent apart in the year it took for the partner’s visa to be approved.

[126] GXQ’s partner said they were in regular, daily contact and discussed in detail events at work which have given rise to the employment relationship problems before the Authority. They gave evidence of the trajectory of the impact of the events of late 2018, through 2019 and early 2020 on GXQ including:

- (i) the intrusive and hostile nature of comments directed to GXQ and their partner in November 2018 when they visited the office together which confirmed the concerns GXQ had raised with their partner of a negative attitude towards them;
- (ii) GXQ’s growing concerns that “something was wrong at work” from June 2019;

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<sup>25</sup> GXQ’s treating psychiatrist’s file note 19 February 2020 following review consultation 18 February 2020.

- (iii) their decision to put on hold concrete plans to move to New Zealand subsequent to the investigation commencing in August 2019 and GXQ's feeling that he did not have the support of NMK and that they were on their own;
- (iv) GXQ's feeling the allegations were "cuts by a thousand words" and his concern over the intense frequency and volume of documentation referred to him by the investigation;
- (v) GXQ's increasing depression, paranoia and constant worry leading to fear of working in the office and inadvertently saying something which may lead to another complaint;
- (vi) the challenges and inherent cruelty of continuing to work during the investigation including a sense of scrutiny and judgement by colleagues when it was apparent the confidentiality of the investigation had broken down and co-workers openly expressed an expectation GXQ's employment with NMK was drawing to an end;
- (vii) loss of motivation and positivity and fear of surveillance outside the office by NMK;
- (viii) from October 2019 GXQ was drained, devoid of expression or emotion and avoided usual contact with friends and family;
- (ix) also, in October 2019 GXQ's partner suffered a personal tragedy which was devastating to them as a couple, made more acute by their physical distance and the impact of the investigation process; and
- (x) following GXQ's resignation and return to their home country they were unable to live together for some months due to covid restrictions and the Auckland home was sold at a loss, factors described as constant reminders of the loss of the dream to come to New Zealand and start a family.

[127] NMK submits GXQ's ability to secure productive employment indicates they have overcome the difficulties they faced are significant mitigating factors in assessing quantum. While it is correct GXQ was able to secure productive employment the

evidence before the Authority does not support a finding the effects of the harm suffered as a consequence of the personal grievance are mitigated to a significant degree. Indeed, GXQ's evidence of harm, years after the subject events can be described as raw.

[128] It is accepted the impact of the unjustified dismissal and the breaches of duty which occasioned it have had a profound and negative impact on GXQ. The Authority is satisfied they experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter GXQ is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings they have suffered consequent to their established personal grievances of \$40,000.00.<sup>26</sup>

*If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by GXQ that contributed to the situation giving rise to his grievance?*

[129] No deduction from the remedies awarded is to be made under s 124 of the Act. GXQ's conduct did not contribute in a blameworthy way to the situation giving rise to their personal grievances. The investigation report completed after GXQ's employment ended makes some findings against them. The report cannot be given weight in this s 124 context because GXQ was unable to respond to information relied to in it or to the draft report.

### **Recommendation**

[130] The recommendations sought are declined. The issues that arose during the course of this employment relationship problem have occasioned solemn reflection within NMK and significant changes have been made to address matters of workplace culture since GXQ's resignation.

### **Summary of orders**

[131] The Authority orders as follows:

Within 21 days of the date of determination NMK is ordered to pay GXQ the following sums:

- (i) \$25,274.31 in special damages;

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<sup>26</sup> *WIkaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

- (ii) \$80,903 (gross) under s 123(1)(b) and s 128;
- (iii) \$40,000 (gross) under s 123(1)(c)(i); and
- (iv) \$55,618.47 (gross) under 123(1)(c).

### **Costs**

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

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

[134] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>27</sup>

Marija Urlich  
Member of the Employment Relations Authority

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<sup>27</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).