

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 671
3267059

BETWEEN KXL
Applicant

AND IZE
Respondent

Member of Authority: Lucia Vincent

Representatives: Andrew Shaw, counsel for the Applicant
Alastair Espie and Rosie Davison, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further information received: Up to and including 3 September 2024 from the Applicant
Up to and including 31 October 2024 from the Respondent

Determination: 14 November 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] KXL (an employee) says IZE (his employer) breached implied terms of his employment agreement when it suspended him and engaged an external person to investigate a complaint of sexual assault made against him by a colleague. He seeks remedies that include general and special damages.

[2] IZE says KXL's claims cannot proceed because the Authority cannot investigate KXL's claims as anything but a personal grievance - his concerns are essentially about his dismissal or an aspect of it. Even if KXL could bring his claims, IZE says KXL is out of time by bringing his claims more than six years after events occurred.

[3] The Authority must determine whether KXL's claims are barred by s 113 of the Employment Relations Act 2000 (the Act) because they relate to KXL's dismissal or any aspect of it. If not so barred, does s 142 of the Act act as a backstop for claims raised after six years?

[4] This determination sets out the preliminary determination of the Authority on these issues.

Non-publication order

[5] KXL and IZE initially lodged a joint application for non-publication dated 11 March 2024 seeking non-publication of the names of both parties, any witnesses, and any other person referred to in the pleadings and evidence in this matter. The grounds included the sensitive nature of the complaint subject of the proceedings (an alleged sexual assault) and the potential for publication to cause acute emotional distress to third parties (KXL's family and the complainant). Further grounds were to be expanded on in parties' submissions and evidence. The application relied on clause 10(2) of Schedule 2 of the Act¹ and principles set out in *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94.

[6] In directions dated 14 March 2024 the Authority made an interim order for non-publication. The reasons included that identifying KXL and IZE had the potential to identify KXL's family and the complainant, that it was reasonable to expect acute emotional distress could result (not least because of the sensitive nature of the allegations), and that the risk of that distress could outweigh any public interest in knowing the parties' identities. After receiving evidence and submissions, the Authority would consider making the order permanent.

¹ The Authority may order all or any part of evidence given or the name of any party not to be published subject to conditions the Authority thinks fit.

[7] In submissions lodged on 14 May 2024, KXL withdrew his agreement to non-publication on a permanent basis.²

[8] IZE maintained a stance that it was appropriate for the interim non-publication order to remain in place and for it to be made permanent.³

[9] The Authority sought further information from the parties about what other Courts may have ordered, such as any suppression or non-publication orders made in respect of the complainant's identity and that of KXL and IZE in criminal proceedings.

[10] On 8 August 2024 the Employment Court published a full court decision on the issue of non-publication: *MW v Spiga Limited* [2024] NZEmpC 147.

[11] In *MW*, the Employment Court described the approach to take to non-publication orders:⁴

Open justice is of fundamental importance. Open justice may be departed from, but only to the extent necessary to serve the ends of justice. This means there must be sound reasons for the making of an order of non-publication such that a departure is justified.

In most cases, there must first be reason to believe that the specific adverse consequences could reasonably be expected to occur. The necessary evaluation will focus on such evidence as has been submitted and/or is available. Inferences may be required by the Authority or Court. But these must be reasonable inferences that may be taken from the evidence, based on the specific circumstances of the case, when considered in context.

Second, the Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case. This is a weighing exercise. Equity and good conscience may play a part. Consideration of tikanga will, where appropriate, be woven through that weighing exercise.

[12] The Court listed relevant factors as examples of what to consider when determining whether to order non-publication:

- (a) the circumstances of the case;
- (b) the interests of the person or entity applying for a non-publication order;
- (c) the interests of the other party or parties to the litigation;
- (d) the interests of any third party;

² KXL's submissions dated 14 May 2024 at [48].

³ IZE's submissions dated 28 May 2024 at [54].

⁴ At [87] to [89], numbering and footnotes omitted.

- (e) the public interest, including the rights of media;
- (f) any further issues of equity and good conscience; and
- (g) tikanga and its principles, values, or concepts.

Circumstances of the case

[13] KXL confirmed in submissions that he consents to the complainant's identity being made subject of a permanent order for non-publication. However, he no longer consents to an order for the parties' names to be included in that order. KXL disclosed that in two separate jury trials involving KXL, he did not make, and was not granted, non-publication orders regarding his name. The Court granted non-publication orders regarding the complainant's identity.

[14] IZE highlights the sensitive nature of the circumstances (an alleged sexual assault) and the distress and harm likely to emanate from identifying the parties, particularly to the complainant and as set out in the initial joint application and the basis for the interim order made. IZE pointed to the preliminary nature of the proceedings as supporting an order: if decided in IZE's favour, the matter would be at an end (unless challenged). One could reasonably expect publication would cause the complainant unnecessary distress if she becomes aware of proceedings - particularly if the Authority determines it does not have jurisdiction to progress the matter to a substantive investigation meeting.

[15] The sensitive nature of the subject matter of the proceedings, risk of harm to a third party (particularly the complainant), preliminary stage of proceedings and existence of another order in another Court for non-publication regarding the complainant, are circumstances supporting an order being made.

[16] At a preliminary stage, the evidence is untested and will remain that way if and until a substantive investigation meeting. If IZE successfully resists KXL's claims on a preliminary basis, then there is merit to the argument non-publication orders should remain in place. Although the Authority does not know the exact framing of the non-publication order issued in the criminal proceedings, the Authority must be careful not to risk undermining any order made by another Court, especially at a preliminary stage.

Interests of party or entity applying for order

[17] IZE says it wishes to protect its staff member (the complainant), making this factor the same as the interests of a third party.

Interests of other party to dispute

[18] KXL no longer supports the application.

Interests of third party

[19] There is a reasonable risk the complainant would be adversely affected by publication.

[20] A statement of evidence provided by a senior manager of IZE confirmed the complainant is unaware of proceedings in the Authority. IZE does not wish to involve the complainant who over the course of nearly seven years, participated in an independent investigation and two criminal trials. The senior manager expressed concern about the significant and negative impact that publication would have on the complainant who he has witnessed needing professional support to manage the trauma she has experienced. The senior manager expressed concern that publication of the parties' names would cause unnecessary distress and harm to the complainant because she would know the proceedings were about her complaint, at a time when she had begun to move on. The evidence establishes (albeit untested at a preliminary stage) that publication would exacerbate the significant adverse impact to date on the complainant's wellbeing.

[21] This factor strongly supports an order being made.

[22] It is noted that KXL's initial joint application referred to concern about his family suffering acute emotional distress if the parties' names were published. It is unclear if this concern remains. Given KXL's change in stance on this issue, the Authority has not placed weight on this aspect.

Public interest (including media rights)

[23] The public interest in open justice is important. There is less public interest in knowing the parties' names at a preliminary stage in a case involving allegations of sexual assault.⁵

Equity and good conscience

[24] IZE says KXL resiling from his support for non-publication goes against equity and good conscience, especially where it is unclear why he has done so. The evidence would need to be tested at a substantive investigation meeting which cannot occur until the preliminary jurisdictional issues are resolved.

Tikanga

[25] Neither party made submissions on this aspect.

Order

[26] An order for non-publication is appropriate in the circumstances. Relevant factors supporting an order include that proceedings are at a preliminary stage, the case involves sensitive subject matter, and there is a reasonably anticipated result of significant distress for the complainant simply by becoming aware of the employment proceedings involving her complaint. These factors outweigh any public interest in knowing the names of the parties and details of the substantive matter. The interests of justice require a departure from open justice in this instance.

[27] The Authority makes an order for non-publication of:

- (a) The identity of the complainant and any details that could identify her;
- (b) The parties names; and
- (c) The names of witnesses and any other person referred to in the pleadings and evidence in this matter.

⁵ Relevant factors in *FVB v XEY* [220] NZEmpC 182 at [11] and [13].

How did the Authority investigate?

[28] KXL lodged a statement of problem on 6 December 2023. IZE submitted a statement in reply on 18 December 2023. The Authority held a case management conference on 5 March 2024.

[29] The parties agreed to deal with the jurisdictional issues as a preliminary matter on the papers and agreed to timetabling directions for statements of evidence and submissions from 2 April 2024 through to 28 May 2024. The parties provided further submissions on 3 and 16 September 2024. Further information was received on 31 October 2024.

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

What were the issues?

[31] The issues for investigation were:

- (a) What does KXL claim IZE did wrong?
- (b) Does s 113 of the Act prevent KXL from bringing his claims against IZE?
- (c) If the claims are not barred by s 113, does s 142 of the Act prevent KXL from bringing his claims against IZE?

What does KXL claim IZE did wrong?

What happened?

[32] The following key events appeared to be common ground:

- (a) IZE employed KXL in 2016.
- (b) During 2017, the complainant, another employee of IZE, alleged KXL had sexually assaulted her following a work function held less than a week earlier.
- (c) On 10 November 2017, IZE suspended KXL.

- (d) IZE engaged an external person to investigate the complaint.
- (e) KXL participated in the investigation.
- (f) KXL denied the allegations.
- (g) The investigator provided his report to IZE on 14 December 2017. The report upheld the complaint.
- (h) IZE and KXL attended a meeting on 15 December 2017.
- (i) IZE dismissed KXL during that meeting.
- (j) KXL has not raised a personal grievance.

What does the statement of problem allege?

[33] Almost six years after his dismissal, KXL lodged a statement of problem on 5 December 2023, alleging IZE had breached implied terms of his employment.

[34] KXL relies on three implied terms – duties he says were implied into his individual employment agreement with IZE:

- (a) Natural justice;
- (b) Trust and cooperation; and
- (c) Fair and reasonable treatment.

[35] After describing events leading up to the suspension of KXL on 10 November 2017, KXL refers under the heading “Suspension” to IZE’s failures to:

- (a) Consult with KXL prior to suspending him;
- (b) Advise KXL of his ability to seek legal representation;
- (c) Advise KXL of the potential outcome(s) of the investigation and disciplinary process;
- (d) Provide KXL with details of the allegation, unfairly prejudicing his ability to prepare for the investigation and disciplinary process; and
- (e) Offer KXL EAP services despite the serious nature of the allegations.

[36] After describing the above failures, KXL says “The unlawful suspension continued throughout and therefore impacted upon the Applicant, until his dismissal on 15 December 2017.”

[37] The statement of problem then describes subsequent events including that IZE instructed an external person to investigate the complaint on 20 November 2017 using the Terms of Reference (**TOR**). KXL claims IZE failed to (in breach of its contractual obligations):

- (a) Advise KXL in a timely manner about the existence of the TOR;
- (b) Provide for the rights of KXL within the TOR;
- (c) Provide the TOR (in draft or otherwise), to KXL for comment or feedback;
and
- (d) Take any other steps to consult with KXL regarding the TOR.

[38] KXL says he did not get the TOR until he received the final investigation report (which was completed on 14 December 2017) and that the TOR governed the investigation and impacted on the subsequent disciplinary process, resulting in KXL’s termination on 15 December 2017.

[39] The statement of problem then describes the timeline of interviews by the investigator (from 28 November 2017 to 12 December 2017) and raises concerns about:

- (a) The investigator’s interviewing technique with the complainant;
- (b) An alleged failure to provide all relevant documents in a drop box link sent to KXL for audio files and transcripts of interviews;
- (c) Assumptions made by an interviewed witness about KXL (which may have been taken into account by the investigator when writing the final report, unfairly prejudicing KXL’s interests);
- (d) The investigator’s interview of KXL for one hour – an allegedly insufficient length of time for the investigator to fully investigate the allegations;

- (e) The investigator's failure to advise KXL in advance of or during the interview that he was entitled to representation and had the right not to answer given the serious and criminal nature of the allegations;
- (f) KXL did not have an opportunity to review the interview transcript of his own interview which contained a number of inaccuracies when added to the Dropbox link on 13 December 2017; and
- (g) The investigator's failure to identify inconsistencies or negative evidence about KXL in other witnesses' evidence and put this to him for comment.

[40] In respect of the investigation report, KXL alleges in breach of contractual obligations that the investigator (on behalf of IZE) failed to:

- (a) Provide a draft investigation report to KXL for comment or feedback;
- (b) Take any other steps to consult with KXL before finalising the investigation report;
- (c) Took insufficient time (two days from interviewing KXL and providing a final report) to fully consider the evidence (as well as any further investigation or evidence required) before forming a conclusion;
- (d) Interview additional witnesses (that KXL claims acted in breach of natural justice principles and unfairly prejudiced KXL); and
- (e) Investigate further relevant information including the complainant's Facebook posts, use of a product and CCTV footage.

[41] After receiving the investigation report on 15 December 2017 KXL then claims that in breach of contractual obligations, IZE failed to:

- (a) Consider whether the investigation was complete or further investigation was needed;
- (b) Advise KXL he was entitled to representation at the disciplinary meeting that occurred on 15 December 2017 in which he was dismissed;
- (c) Make a preliminary decision and consult with KXL about any preliminary decision before issuing a final decision;

- (d) Provide KXL with an opportunity to respond to the allegations or findings in the report;
- (e) Consider alternative sanctions to dismissal;
- (f) Offer KXL EAP services; and
- (g) Provide KXL with all relevant documents in advance of or at the meeting including invitation letters and evidential documents.

[42] The statement of problem goes on to say IZE's procedural failures in the disciplinary meeting were evidenced by the fact the meeting lasted 30 minutes. It also says IZE had already paid KXL his final pay and holiday pay indicating IZE had predetermined the outcome of the disciplinary process (dismissal).

[43] KXL claims the investigator conflated his role of investigator with that of decision maker for IZE because he said in his report that he had found KXL had "engaged in serious misconduct," which unfairly prejudiced KXL's interests, and that IZE relied on KXL's conclusions, rather than making that assessment independently.

[44] Under the heading "Respondent's Substantive Failings," KXL says IZE's actions, "... in concluding serious misconduct occurred capable of making a finding of dismissal, breached the Contractual Obligations."

[45] Under the heading "Breach of Contract," KXL says "In light of these procedural and substantive failings, the Respondent has committed numerous breaches of its Contractual Obligations owed to the Applicant" leading to damages suffered by KXL.

Submissions for KXL

[46] Submissions for KXL expanded aspects of the claims but focussed on actions by IZE that occurred in the six years prior to lodging the statement of problem "(post 4 December 2017) in relation to the alleged unlawful suspension and unjustifiable investigation (not the dismissal)." Submissions listed "15 key breaches in the suspension and investigation processes" summarised as follows:

1	IZE failed to provide KXL with details of the allegation against him for which he was being investigated.
2	IZE failed to advise KXL of the potential outcomes of the investigation process.
3	IZE failed to advise KXL about the existence of the TOR for the investigation, until he received the final investigation report on 14 December 2017. KXL was not allowed any input into the TOR.
4	IZE failed to provide KXL with all relevant documents for the investigation, such as photos allegedly depicting aspects of the alleged incident.
5	KXL's interview during the investigation on 12 December 2017, lasted one hour, being an insufficient length of time for the investigator to fully investigate the allegation – the investigator did not properly question KXL in the interview.
6	IZE failed to advise KXL that, given the serious and criminal nature of the allegations, he should seek legal representation to assist him in the investigation process.
7	IZE failed to provide KXL with the opportunity to review his interview transcript of 12 December 2017, which KXL says contained material inaccuracies.
8	IZE failed to identify inconsistencies or negative evidence about KXL in other witnesses' evidence, and failed to put this to KXL for comment in the investigation process.
9	IZE failed to interview all relevant witnesses for the investigation.
10	IZE failed to investigate further relevant information, including the complainant's Facebook posts and use of a product.

11	IZE failed to request CCTV footage.
12	IZE failed to provide KXL with a draft investigation report for comment or feedback.
13	IZE took two days between interviewing KXL and a final investigation report being issued. KXL says this was insufficient time to fully consider the evidence, undertake any further investigation or seek any further evidence, which KXL says was necessary in the investigation.
14	IZE did not offer KXL EAP at any point throughout his suspension and the investigation process.
15	IZE continued to suspend KXL on full pay during the investigation process, without any ongoing consultation or support.

Does s 113 of the Act prevent KXL from bringing his claims against IZE?

[47] Section 113(1) of the Act says:

113 Personal grievance provisions only way to challenge dismissal

- (1) If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this part as a personal grievance.

[48] Applying s 113 to this case, IZE says if KXL wants to bring a claim about his dismissal (or any aspect of it), he had to have raised it as a personal grievance. Having failed to do so, he cannot now challenge it another way, including by alleging contractual breaches about his suspension and the investigation process.

[49] Relatively few cases have commented on what s 113 means. The Supreme Court said a claim in respect of dismissal can only be brought by way of a personal grievance, replacing the right not to be dismissed in breach of contract.⁶ The Employment Court

⁶ *Brown v New Zealand Basing Limited* [2017] NZSC 139 at [52].

referred to claims for termination of an employment relationship as being “... pursued by way of personal grievance or breach of contract (common law)” subject to s 113(1).⁷

[50] The Employment Court’s decision in *Hall v Dionex PTY Ltd* [2015] NZEmpC 29 applied s 113 to a situation where personal grievances for unjustified disadvantage and dismissal had been raised following a disciplinary process (including suspension) and dismissal for serious misconduct. The Court said:⁸

The effect of s 113(1) is to prevent employees from challenging a dismissal through a common law action for wrongful dismissal, an action for breach of contract or under the Contractual Remedies Act 1979. As the authors of *Mazengarb’s Employment Law* point out, the effect of the provision would appear to be far reaching. The authors of *Employment Law* suggest the appropriate approach is as follows:

if a common law action can be brought by a (dismissed) plaintiff, with no reliance on the fact or manner of dismissal as an element in the cause of action, then such a claim will clearly not be barred by s 113(1).

In the present case there is a clear causal connection between the failings of the disciplinary investigation, Ms Cameron’s lack of authority and Mr Hall’s ultimate dismissal. I agree with Mr Erickson’s submission that it would be artificial, in the circumstances, to separate out the failings relating to the process leading up to the dismissal and the dismissal itself. All were inextricably intertwined. In my view s 113 applies and prevents the plaintiff from pursuing a claim for damages for breach of contract.

[51] KXL attempts to distinguish *Dionex* because he does not seek special damages (of the kind claimed in *Dionex*) and has not alleged a personal grievance (for unjustified disadvantage or dismissal), instead alleging a breach of implied terms due to his suspension and what he claims was an unjustified investigation process.

[52] The Authority is investigating whether what KXL now claims are breaches of implied terms, can be separated from his dismissal or any aspect of it. That KXL did not raise a grievance does not in and of itself distinguish *Dionex*. KXL could have raised a grievance if he wanted to challenge his dismissal (or any aspect of it).

[53] To determine the issue, it has been useful to analyse the claims through the lens of s 103A – the test the Authority would have applied had it determined a claim for a personal grievance in relation to KXL’s dismissal.

⁷ *Employees v Attorney-General* [2021] NZEmpC 141 at [7].

⁸ At [108] and [109], footnotes omitted.

[54] Broadly, s 103A requires the Authority to determine the question of whether a dismissal was justifiable on an objective basis applying the test of whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In applying the test, the Authority must consider four compulsory factors:

- (a) Whether, having regard to resources, the employer sufficiently investigated the allegations against the employee (before dismissing or taking action against the employee);
- (b) Whether the employer raised their concerns with the employee (before dismissing or taking action against the employee);
- (c) Whether the employer gave the employee a reasonable opportunity to respond to their concerns (before dismissing or taking action against the employee); and
- (d) Whether the employer genuinely considered the employee's explanation (if any) about the allegations (before dismissing or taking action against the employee).

[55] The Authority may also consider any other appropriate factors.

[56] The compulsory considerations in s 103A must all occur before dismissing or taking action against the employee. Together with the broader test these factors all resemble the requirements of the implied terms relied upon by KXL (natural justice, fair and reasonable treatment, trust and cooperation).

[57] Whether or not IZE could justify its dismissal of KXL under s 103A requires the Authority to consider not only the substance of the decision to dismiss, but also the process leading to that decision. The process includes KXL's suspension at the outset of the process, the investigation carried out by the external person, the report relied upon by IZE in making its decision to dismiss, and the meeting KXL participated in before the decision to dismiss. These procedural aspects of the chain of events leading to the decision to dismiss would then be considered in the context of whether the decision ultimately made by IZE to dismiss was fair and reasonable in all the circumstances.

[58] Having considered the statement of problem and submissions for KXL, I find all of the concerns raised by KXL relate to his dismissal or an aspect of it:

- (a) the sufficiency of the investigation process before his dismissal;
- (b) the extent to which IZE raised its concerns with KXL before dismissing him;
- (c) whether KXL had a reasonable opportunity to respond to the concerns before being dismissed; and
- (d) whether IZE genuinely considered what KXL had to say before dismissing him.

[59] Claiming KXL's concerns are somehow separate to KXL's dismissal and the process leading to it, is strained in the context of s 103A – the test that would apply if the Authority were to assess the justifiability of his dismissal as a grievance. Separately identifying each aspect of the investigation process loses sight of the substance of the employment relationship problem – the dismissal, encompassing both the decision and process.

[60] Although KXL has not challenged the decision to dismiss him as a personal grievance, he has expressed clear dissatisfaction with the outcome. He has then attempted to challenge many aspects of the process leading to that outcome. The suspension, investigation, report and meetings were all key elements of the process leading to KXL's dismissal. It would be artificial (as accepted in *Dionex*) to separate out these aspects of the process from the dismissal.

[61] Section 113(1) operates as a bar to KXL bringing his claims.

The claims are barred by s 113 - does s 142 of the Act operate as a bar too?

[62] Section 142 of the Act provides:

142 Limitation period for actions other than personal grievances

No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[63] Although the Authority has found KXL's claims are barred by s 113, s 142 also operates as a bar for claims made about events that occurred more than six years prior to them being commenced in the Authority.

[64] For completeness, if KXL was not barred by s 113 from bringing his claim about his unlawful suspension, I consider KXL also cannot bring a claim about IZE's decision to suspend KXL on 10 November 2017, because it occurred more than six years after the date on which the cause of action arose.

[65] As noted above in the statement of problem, after describing events leading up to the suspension of KXL on 10 November 2017, KXL refers under the heading "Suspension" to IZE's failures to:

- (a) Consult with KXL prior to suspending him;
- (b) Advise KXL of his ability to seek legal representation;
- (c) Advise KXL of the potential outcome(s) of the investigation and disciplinary process;
- (d) Provide KXL with details of the allegation, unfairly prejudicing his ability to prepare for the investigation and disciplinary process; and
- (e) Offer KXL EAP services despite the serious nature of the allegations.

[66] After describing the above failures, KXL says "The unlawful suspension continued throughout and therefore impacted upon the Applicant, until his dismissal on 15 December 2017."

[67] In submissions, KXL attempts to claim the cause of action arose afresh on each day of his suspension:⁹

KXL's Statement of Problem was filed on 5 December 2023. Whilst KXL was unlawfully suspended on 10 November 2017, this unlawful suspension lasted beyond 4 December 2017 and continued until 15 December 2017.

IZE had an obligation throughout this period to consult and support KXL in relation to his ongoing suspension. Therefore, every day after 4 December 2017 that IZE chose to continue suspending KXL, constituted continuing causes of action.

⁹ At [39] and [40] and [46].

[68] The summary of key breaches attached to KXL's submissions noted the following at 14 and 15:

IZE did not offer KXL EAP at any point throughout his suspension and the investigation process.

IZE continued to suspend KXL on full pay during the investigation process, without any ongoing consultation or support.

[69] How KXL described his concerns about his suspension in the statement of problem seemed to shift when set out in submissions. What initially appeared to be a focus on what happened prior to suspension (such as a failure to consult or provide information to KXL at the outset), became a submission about a lack of ongoing consultation or support (such as EAP) during the suspension period.

[70] IZE submits the statement of problem did not raise the concerns as now framed, so are out of time i.e. the concerns could not have been raised until the submissions were filed on 14 May 2024, well over the six year timeframe. That submission has merit.

[71] KXL did not rely on any express contractual terms in support of the alleged ongoing obligations. The individual employment agreement between the parties contained the following clause about suspension:

32 SUSPENSION

32.1 Where circumstances warrant it, the Employer has the discretion to temporarily suspend the Employee from his/her duties prior to a full investigation of the allegations surrounding the circumstances involving the Employee's conduct. The Employer may elect to suspend the Employee when his/her safety and/or the safety of others is at risk.

[72] Clause 32 provides for suspension prior to a full investigation. Clause 32 does not require IZE to continue to consult and support KXL on each day of the suspension in the way alleged. It would be inconsistent with an express term to imply such a term.

[73] IZE made the suspension decision on the day it communicated that decision to KXL – on 10 November 2017. That is the day the cause of action arose consistent with clause 32. KXL cannot bring his claim about an unlawful suspension (or any other claims that occurred prior to 5 December 2017) more than six years after it (or they) arose. To the extent KXL could be said to have raised a different claim in submissions (about an

ongoing obligation to consult daily and provide EAP), the claims are also similarly time-barred because they occurred more than six years prior to when raised in submissions. KXL is barred by s 142 from bringing these claims.

Summary of findings

[74] KXL's claims are barred by s 113 and s 142. The Authority cannot assist KXL further.

[75] The non-publication order remains in place.

Costs

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

[77] If the parties are unable to resolve costs, and an Authority determination on costs is needed, IZE 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 KXL 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.

[78] 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.¹⁰

Lucia Vincent
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1