

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2025] NZERA 708
3323360

BETWEEN JESSICA KIRK
Applicant

AND SUMMIT PROPERTY
MANAGEMENT LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Allan Halse, advocate for the Applicant
Stephen Galbreath, counsel for the Respondent

Investigation Meeting: 4 July 2025 in Nelson

Final information received: 28 July 2025

Determination: 4 November 2025

DETERMINATION OF THE AUTHORITY

[1] The respondent (Summit) employed the applicant, Ms Kirk from December 2021 as a property manager until it dismissed her in April 2024 for serious misconduct. She had worked as a property manager before. Summit is a real estate property business managing properties for its client property owners including finding tenants, collecting and enforcing rent, and maintaining properties. It operates six branches in a geographical region with a total of approximately 25 staff.¹ Within the geographical region Ms Kirk was employed in one branch situated in a small town. The directors of Summit are Stewart Henry-Steel (also the managing director), Allistair Nadler and Milissa Hall².

¹ Brief of Evidence, Stewart John Henry-Steel, 23 May 2025 at [2].

² <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/961093/directors>.

[2] Ms Kirk claims her dismissal was unjustified. This grievance was raised within the requisite 90 days³ and can proceed to be investigated, a point that has never been in dispute.⁴

[3] In summary, Ms Kirk considers that her dismissal was not sufficiently investigated as to two allegations of serious misconduct that Summit found and which resulted in her dismissal; that the procedure was flawed because Mr Henry-Steel was the investigator and decision maker: that he was prejudiced against her and Summit had sufficient resources to have had an independent person involved; that Summit did not consider the issues Ms Kirk raised through her second representative in response to its disciplinary outcome and proposed sanction of summary dismissal; that the disciplinary process and dismissal was not genuine and was Summit's retaliation towards Ms Kirk for having raised 'bullying' complaints throughout her employment about her senior colleague (A) who she claims is 'protected' by Summit.

[4] Ms Kirk also claims disadvantage grievances alongside the unjustified dismissal grievance. These disadvantage grievances particularly relate to her claiming she was 'bullied' by A throughout her employment; that this adversely affected her personally and caused her not to be supported and trained in her role; that Summit failed to properly investigate her claims during her employment and as such failed to keep her safe as it has obligations to do; that the bullying behaviour continued throughout her employment and was included in the way Summit used a non-genuine investigation and disciplinary process to dismiss her.

[5] Ms Kirk seeks various remedies including a global compensatory figure of \$50,000.00 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for 'the hurt and humiliation suffered because of the unjustified disadvantage and unjustified dismissal'; lost wages as a result of the unjustified dismissal; reimbursement of all sick leave and annual leave that were used in lieu of 'special leave' across (as I take it) the time she says she was on 'medical leave' and unable to work due to the way she felt unsafe in the workplace; and payment of various costs.

³ Employment Relations Act 2000, s114.

⁴ I confirmed this in the Case Management Conference with the representatives on 28 March 2025 and my subsequent Directions of the Authority dated 31 March 2025 and with Ms Kirk present at the Investigation Meeting held on 4 July 2025.

[6] Summit in reply says that to the extent that Ms Kirk's grievances are raised within time (the unjustified dismissal and some but not all of the claims for disadvantage) these and the remedies sought are denied.

Out of time challenge by Summit

[7] Summit says that some disadvantage grievances have not been brought by Ms Kirk within 90 days and it does not give consent for them to continue.⁵ This includes predominantly (amongst other challenges) that it investigated and dealt with grievances raised by Ms Kirk in June 2023 about her claims that she was being 'bullied' by A and that Mr Henry-Steel had done nothing to address these issues after she had previously raised them with him; that Ms Kirk did not then raise, within 90 days, a personal grievance to say that Summit's investigation of the June 2023 grievances was inadequate and as such raising that Summit continued to fail to keep her safe, supported and trained during her employment.

Ms Kirk's response to the out of time challenge

[8] Ms Kirk seeks to have all grievances she has brought before the Authority proceed. She says that she raised them within time or if not, that there were 'exceptional circumstances' that show it is just for the Authority to grant leave for them to continue.⁶ To the exceptional circumstances Ms Kirk says two successive representatives let her down and/or that her health affected her ability to further address the issues that she maintains continued to adversely affect her personally and in the workplace. It is submitted overall for Ms Kirk that it is just to grant these grievances within the context of a bullying claim in the workplace and the effect this has on a complainant's functioning.

Preliminary determination

[9] This determination only deals with the preliminary matter of whether under ss 114 and 115 of the Act, Ms Kirk's disadvantage grievances have (to the extent disputed) all been raised within 90 days and if not whether it is 'just' to grant leave for them to

⁵ Employment Relations Act 2000, s114(1).

⁶ Employment Relations Act 2000, ss114(4) and 115.

proceed based on 'exceptional circumstances.' To the extent Summit agrees that disadvantage grievances have been raised I will record these below in an end summary.

[10] Under s 114(5) of the Act, in the event leave is granted for any or all grievances in question to proceed, the Authority 'must direct the employer and employee to use mediation to seek to mutually resolve the grievance'. I will return to this below under my final heading of 'Next Steps'.

The Authority's investigation

[11] I held an investigation meeting. I heard under oath or affirmation evidence from Ms Kirk and her partner, Mr Aaran Hooper; for Summit, its managing director and co-director, Mr Henry-Steel. Representatives had an opportunity to ask questions of witnesses. Written submissions were then timetabled and received. There were further memoranda lodged by representatives in relation to 'additional evidence' lodged for Ms Kirk in submissions after the investigation meeting. I will deal with this as and where relevant below.

[12] This determination has been issued just outside the statutory period of three months with an exemption under s174D of the Act to do so.

[13] As permitted by s 174E of the Act I have not recorded all the evidence and submissions before me but set out my findings, conclusions and any orders made so as to dispose of this preliminary matter.

The issues

[14] The issues are:

- (a) Did Ms Kirk raise personal grievances for unjustified disadvantage in her employment within 90 days?
- (b) If Ms Kirk did not raise grievance(s) within time are there 'exceptional circumstances' as defined under s 115(a) of the Act and then did these cause the delay?

- (c) If there are ‘exceptional’ circumstances’ that caused the delay then under s 114(4)(b) of the Act is it ‘just’ to grant leave for Ms Kirk to raise her grievance(s) out of time?

The legislative and legal framework for raising and granting leave to raise grievances out of time

[15] Section 114(1) and (2) the Act includes that an employee must raise a personal grievance within 90 days (called the ‘employee notification period’) beginning with the date when the action that the grievance is based on occurred or came to their notice ‘unless the employer consents to the personal grievance being brought after the expiration of that period’.

[16] Under s114(7) of the Act the ‘employee notification period’ is defined (as relevant to this matter) as:

S117(7) ... (b) ... the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later.

[17] Section 114(2) of the Act includes that: ‘...a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.’

[18] The Employment Court has said that the grievance process is designed to be informal and accessible. A grievance may be raised orally or in writing with no formula of words that must be used. What matters is that the employee’s communications convey the substance of the complaint to the employer to enable it to respond, ‘with a view to resolving it soon and informally, at least in the first instance.’⁷ The words ‘personal grievance’ may not always need to be included when an employee raises a communication about actions that the employee considers have disadvantaged them unfairly in the workplace.

⁷ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, [36] to [38].

[19] In cases of alleged ‘bullying’ behaviour in the workplace there may be a series of actions over time giving rise to the grievance. At least one of these ‘actions’ must however occur with the required 90 day time frame to raise.⁸

Did Ms Kirk raise her personal grievances for unjustified disadvantage in her employment within 90 days?

Disadvantage grievance due to A’s alleged ‘bullying’ behaviour in that Summit did not address this sufficiently to keep Ms Kirk safe in the workplace during her employment.

[20] I will first consider what I will call Ms Kirk’s main disadvantage grievance and then consider in briefer terms the further disadvantage grievances in dispute. Summit agrees Ms Kirk raised a disadvantage grievance about her senior colleague (A) ‘bullying’ her in written emailed communication in June 2023. I find this can be reasonably read to have been communicated in two emails⁹ (the June emails) with the second slightly expanding on the first and also referencing back to the first. In the second Ms Kirk objects to Mr Henry-Steel inferring, as appears to have been interpreted by Ms Kirk when he responded to the first June email, that this was the first time she had raised matters with him. She repeats and expands on the previous times she says she raised matters with him.

[21] I find that the June emails came after Ms Kirk met with Mr Henry-Steel on 13 June 2023 and he told her to put something in writing. Summit accepts the June emails raised grievances about A’s bullying behaviour but disputes the exact details of what may have been reported during the series of times that Ms Kirk put forward that she had discussed issues with Mr Henry-Steel prior to this. I will outline those instances below.

3 May 2022

[22] Mr Henry Steel in his evidence has no recollection of the earliest of the times (3 May 2022) that Ms Kirk says she reported issues about A to him. Ms Kirk’s 19 June

⁸ *Premier Events Limited v Beattie (No3)* [2012] NZEmpC 79 [14] to [20]; *Davis v Commissioner of Police* [2-13] [2013] NZEmpC 2265 [47].

⁹ Emails Ms Kirk to Mr Henry-Steel dated 15 June 2023 and sent 16 June 2023; and 19 June 2023.

2023 email includes that she raised issues from 27 January 2023, so there is an inconsistency in Ms Kirk's evidence. I note that Ms Kirk's evidence says the 3 May 2022 discussion related to telling Mr Henry-Steel she had no support and training 'as promised' and was 'isolated and ignored' by colleagues and in particular A who she included was 'covertly interfering' with her files and not helping her get new clients. She includes that Mr Henry-Steel says he would talk to A but did not do so. I have from Ms Kirk a brief transcript of messaging between Ms Kirk and her partner, Mr Hooper, which is consistent with her having talked to someone about A at this time and the person was 'not happy about it'. There is reference to Ms Kirk saying A was interfering in her files. I do not find based on what little I have to support it that on its own a discussion on 3 May 2022 raised a personal grievance for disadvantage with Mr Henry-Steel for Summit about bullying behaviour by A towards Ms Kirk sufficient for Summit to have replied.

27 January 2024

[23] After 3 May 2023 is referenced I have nothing before me to support Ms Kirk raised anything about A with Mr Henry-Steel until 27 January 2023 where it is not disputed that a discussion occurred between them both. It is not in dispute that Ms Kirk informed Mr Henry-Steel that A had been misusing a company fuel charge card for private purposes and that Ms Kirk wanted her name kept out of it. Ms Kirk says she did this because she was advised and also considered it was the right thing to do.

[24] While Mr Henry-Steel agrees to the above he does not include in his evidence that the discussion further included what Ms Kirk says she told him about A having 'ceased communication' with her, that she had no support in the workplace, that he told her he would talk to 'A' and later did not. Mr Henry-Steel's evidence is that he told Ms Kirk in response to the fuel card disclosure, 'I am now aware of it but unless there was any evidence there was not much I could do.' Ms Kirk's 19 June 2023 email expands on what she says Mr Henry-Steel said in this discussion. She says he told her that it's not 'embezzlement' and he'd have to decide how to deal with it. Their respective evidence is different. Neither has produced any contemporaneous notes and this conversation was at best being recalled in June 2023 by Ms Kirk some six months on. I find it likely at least that Ms Kirk informed Mr Henry-Steel about a disclosure by A to her when they were friends (oral evidence of Ms Kirk) about the fuel card use. This

in itself is not a raising of a grievance about bullying behaviour by A. Whether Ms Kirk raised the further issue about A not talking with her appears to have been accepted when Summit latter responded to the June 2023 emails where they contained this reference. I find then it was the disclosure and a raising about A not talking with her likely occurred here and raised an employment issue for Summit to address.

[25] For the next two dates that Ms Kirk says she has raised further disadvantage grievances about bullying behaviour by A, Mr Henry-Steel has provided two file notes that I accept he likely made closer to the time.

22 March 2023

[26] Mr Henry-Steel's file note for 22 March 2023 says Ms Kirk told him there are things she is not happy about A; that A spoke in their 'native language' during what Ms Kirk considered were private calls; that Ms Kirk 'found it rude' and that Mr Henry-Steel replied, 'he would not have a problem with it' and 'that it can't be that often and that everyone gets personal calls'. He further recorded that Ms Kirk told him that A would not go to a property with Ms Kirk and that 'I asked if there was any reason and [Ms Kirk] said that [A] sometimes does not speak to her' and 'that [A] sometimes ignores [Ms Kirk] and won't answer questions, [and Mr Kirk's answer to the question above about any reason] said not that she knows of but [A] has had some personal issues'. The note continues that, 'When I asked was there anything else [Ms Kirk] said that she thinks I will protect [A] from any wrong doing' and that 'I said to [Ms Kirk] that everyone has busy days and that occasionally people don't want to chat however if there were issues that we need to look into then Jessica would need to give me a written summary.'

[27] Ms Kirk's evidence about the 22 March 2023 discussion excludes any mention that Mr Henry-Steel told her to put matters in writing, a not wholly implausible thing for a manager in Mr Henry-Steel's position to have done given the behavioural nature of what was being claimed and what Ms Kirk says she considered was a 'toxic untenable office environment' (not referenced in Mr Henry-Steel's file note) where she lacked support. It would be important for an employer to be able to have some more written detail about this to more adequately respond to. Ms Kirk says that Mr Henry-Steel said in this discussion that he would organise a meeting with her, A and himself

but this did not occur. There is then a further discussion two weeks later on 4 April 2023. Mr Henry-Steel made a file note.

4 April 2023

[28] Mr Henry-Steel's 4 April 2023 file note includes that Ms Kirk raised with him that '*something needs to happen*' about A. I find this likely supports this was not the first time that Ms Kirk had raised issue with Mr Henry-Steel about A. The file note includes that Ms Kirk told Mr Henry-Steel that A was not talking to her, not supporting her, ignoring her, and not going out to properties together. It further includes that A's husband came into the office and would not 'look [Ms Kirk] in the eye' and Ms Kirk said she had given them both help in the past with firewood and meat. Mr Henry-Steel's file note further recorded that he said he would have 'one on ones with them both soon and see if [A] has anything to say otherwise I would need to explain to [A] that Jessica was feeling ignored and try to find common ground.' This seems to support that Ms Kirk did not want her name mentioned. Ms Kirk's evidence is that in this discussion she explained to Mr Henry-Steel that to the extent A was communicating with her at all it was 'hostile', she was not receiving support, and that he would follow up with 'one on ones' in the coming weeks. I find it likely there was no follow up as promised. In oral evidence I confirmed the reasonably close proximity of the two women in the workspace. I take it they worked in a small outreach town branch. Again, at the very least, as supported by Mr Henry-Steel having actually taken time to record a second file of what had by then at least become a second similar discussion, I find it likely Ms Kirk raised what could reasonably be considered to be an issue she wanted her employer to address. There is nothing in this second file note to say Mr Henry-Steel wanted something in writing before he would do anything.

13 June 2023

[29] Mr Henry-Steel's evidence is that on 13 June 2023 he met with Ms Kirk and A at their branch 'to discuss a marketing campaign.' There is no mention of it being a follow up on any meeting to address matters raised by Ms Kirk above. He says after the meeting that Ms Kirk said she was having issues with A and he told her if she wanted Summit to investigate and look into it 'the best thing to do would be to put it in writing.' Ms Kirk's evidence is that in this discussion she raised issue about matters not being

addressed for her about A; that they had worsened; that she ‘urgently’ needed help from management sorting these issues. It is submitted for Ms Kirk that from about here she began to experience adverse health effects ‘from the bullying’ ‘exacerbated’ because Summit had done nothing to keep her safe under its obligations. Within days then Ms Kirk puts into writing a lengthy series of times she says she raised the issue of ‘bullying’ and lack of support and training with Mr Henry-Steel (as traversed above).

June 2023 emails raising a grievance

[30] While Summit says it accepts Ms Kirk raised a grievance in the June emails about ‘bullying’ behaviour towards her from A, it says that after this, Summit investigated and dealt with the matter (during a time that she was represented by her first representative) and did not raise a grievance about its investigation outcome which by a transcript of a meeting on 11 August 2023, was to say verbally to Ms Kirk that Summit concluded there was no bullying behaviour but that there was an interpersonal relationship problem. Summit says it was then not until 11 March 2024 when Ms Kirk instructed a response through a second representative to (by then) Summit’s Disciplinary Outcome letter (1 February 2024) that she raised issue with the outcome of the bullying investigation.

[31] The wording used in the 11 March 2024 letter by the second representative included under a heading ‘Failure to investigate [Ms Kirk’s] previous complaints regarding bullying in the workplace’:

4. [Ms Kirk] raised allegations of repeated unreasonable treatment by [A] in 2023, and claimed she had personal grievances, and the workplace was unsafe.
5. We are instructed that, as addressed in the disciplinary meetings, the allegations against [Ms Kirk] are retribution for raising complaints and concerns regarding her treatment in the workplace, particularly by [A].
6. Further, the purported process in 2023 was a sham. We are instructed that after [Ms Kirk] raised her concerns with you regarding workplace bullying towards her – A sent a text to [another Summit employee in the same workplace] saying ‘[Mr Henry-Steel] has told [A] that its nothing to worry about but just letting me know they have to follow it up so they are doing something although its nothing in case it goes further.’

7. Jessica's view, we are instructed, is that the current investigation is a vehicle to reach the predetermined outcome of terminating [Ms Kirk's] employment, and that this is a result of [Ms Kirk] raising the bullying allegations in 2023.
8. The previous complaints about unreasonable treatment, raised by Jessica, have led to a predetermined and fatally flawed investigation.

[32] Summit submit that the above came out of time to raise a grievance that Summit had not sufficiently dealt with the matters raised by Ms Kirk in June 2023. It responded to Ms Kirk's current advocate that it considered Ms Kirk's claim that she was 'bullied by a colleague throughout early-mid 2023' was an 'allegation of historic bullying' and that 'we are of the view we have provided a substantive response to this matter' at a time Ms Kirk was represented by her first representative.¹⁰

[33] I accept the submission for Summit that the disadvantage grievance Ms Kirk now seeks to bring is more than just about A's 'bullying' behaviour towards Ms Kirk. It is that the investigation Summit says it conducted was flawed, including that Ms Kirk was not well prepared enough after a first meeting on 23 June 2024, that when Summit held a further meeting on 11 August 2023 and delivered its outcome to say it concluded there had not been bullying, she was never provided the written findings to respond to. I will consider this further below but for now I am satisfied I have nothing before me to show Ms Kirk raised a grievance within 90 days that the investigation that delivered an oral outcome on 11 August 2024 to her was an action disadvantaging her.

Exceptional circumstances?

[34] An employee who fails to raise a personal grievance within the 90 day time to do so and where the employer refuses consent to it being raised out of time (as is the case here) may apply to the Authority under s 114(4) of the Act to have the matter heard if the Authority:

- a. is satisfied that the delay in raising the personal circumstance is occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and

¹⁰ Letter from previous representatives for Summit dated 9 July 2024 to Mr Halse responding to the raising of personal grievance and disadvantages on 1 July 2024 and referencing also the earlier pre termination grievance letter he sent on 1 April 2024.

b. considers it just to do so.

[35] Section 115 provides a non-exhaustive definition of ‘exceptional circumstances’ :

For the purposes of section 114(4)(a), ‘exceptional circumstances’ include-

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the applicable employee notification period under section 114 [the 90 days]; or

(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or [two further factors not applicable here].

[36] The Supreme Court¹¹ considered the definition of ‘exceptional circumstances’ preferring the meaning that they are ‘unusual’ and ‘the exception to the rule’. The Court further considered that,

...the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.

[37] It is submitted for Ms Kirk that she should be granted leave to continue with this grievance because there were exceptional circumstances under both s115 (a) and (b) as above.

Under s115(a) of the Act has Ms Kirk been so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within the applicable employee notification period under section 114 [the 90 days]

[38] Exceptional circumstances under s115(a) require a high level of evidence to show the type of trauma anticipated to have occurred to incapacitate a person from taking reasonable steps to raise a grievance within

¹¹ *Creedy v Commissioner of Police* [2008] 1 ERNZ 109.

‘the applicable employee notification period’. Ms Kirk, through her representative, included redacted medical records for Ms Kirk which I accept appear to be from doctor notes commencing on 28 November 2024 and through into 2025 where she reported workplace stress and in one instance bullying since 2023. I take note of Summit’s objection to not being in a position to test this evidence as it was provided after the investigation meeting. However, the result is that I do not accept I am assisted by the records to satisfy me that s115a exceptional circumstances are shown.

[39] Firstly, the medical notes provided do not describe a level of trauma during the period from when this grievance ought to have been raised which I calculate as 90 days after the 11 August 2023 when Summit verbally told Ms Kirk its investigation concluded that she was not bullied by A.¹² This by my count would have been an expiry date of 9 November 2023. Medical notes that I have reflect the matters Ms Kirk wants me to rely on and which were in part referenced in Mr Hooper’s oral evidence when I asked him about this. However, that type of information starts on 28 November 2023 at a time when by then Summit had commenced a disciplinary investigation on 14 November 2023 alleging fourteen allegations about the way Ms Kirk managed a tenancy property. The medical notes continue through into 2025 with reference to Ms Kirk’s explanations to her doctors about workplace stress, the disciplinary process, worry about the risk of dismissal, that she was unhappy with the second representative’s efforts and then reporting distress when she was dismissed. None of this likely came within the time for her to have raised the grievance.

[40] I note further that on 13 November 2023 after I accept Mr Henry-Steel had by then verbally told her about the disciplinary process, Ms Kirk was able to email Mr Henry-Steel and another Summit manager with a detailed email complaining about A’s behaviour in the workplace in relation to what Ms Kirk saw was A spreading ‘false accusations’ about her with reference to the disciplinary matter. Even if reasonably it could be considered that the time to raise the grievance was later than the 9 November 2023 giving time for Ms Kirk to have taken advice after the 11 August 2023 and considered instructions

¹² Allister Nalder in transcript of 11 August 2023 meeting with a Summit manager, Ms Kirk and her support person present.

to her then first representative (as I will consider below) I agree with the submission for Summit that Ms Kirk's evidence to support 'exceptional circumstances' under 115a falls short of what is required. Her raising of further issues about A on 13 November 2023 also shows me she was able to do so at that point. This is inconsistent with a level of incapacity.

[41] Accordingly, I do not find that exceptional circumstances existed under s 115a and do not need to consider if they caused the delay and then whether it is just to grant the application to proceed, a step I cannot take if I have not found 'exceptional circumstances' first.

Did Ms Kirk make reasonable arrangements to have the grievance raised on her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time?

[42] The transcript of the 11 August 2023 meeting includes Mr Nalder's verbal communication to Ms Kirk that Summit did not consider after investigating the matter of her June 2023 grievances that she had been 'bullied' but that there was a situation of interpersonal communication conflict between her and A. Mr Nalder also includes in his discussion in that meeting that he remained concerned that Ms Kirk felt 'bullied' and stated at the end of the meeting he would send an email to her solicitor covering what was discussed at the meeting. The meeting transcript shows me that in part Mr Nalder was reading off a document which I take it was likely the document he refers to when he says that this would be sent to Ms Kirk's solicitor.

[43] I have nothing before me to show the above document was ever sent. There has been opportunity to provide this if it existed. That it was not sent is supported by Ms Kirk's then first representative messaging her soon after the meeting says they had still not received the letter:

- a. Ms Kirk's representative messaged Ms Kirk on 14 August 2023 saying they did not appear to have 'the letter' yet;
- b. Ms Kirk continued to find out where the letter was by communicating with her first representative which I do not find unreasonable in the circumstances of her complaint relating to a bullying claim with the emotional impact this can have on an employee if they feel they are not being heard;

- c. Ms Kirk continued to chase up her first representative who indicated issues with having 'long Covid' and hence his delayed replies to her, and also that he continued not to have the letter from Mr Nadler;
- d. That by 27 September 2023 Ms Kirk was engaging with her first representative about next steps to respond to Summit which I take it was still in the absence of the letter from Mr Nadler about the investigation outcome. I accept her last communication to the first representative was on 11 October 2023 when she is referring, as I take it, to apologetically paying off the first representatives fees and then 'I'm not just gonna let it lie I want it in writing. Tension in the office again for no reason.' This appears to have been in response to options given to her in an earlier exchange with the first representative in late September 2023 where one of the 'options' was to 'let matters lie'.

[44] Ms Kirk and her partner's evidence included that the first representative then became unresponsive from mid-October 2023, and they had to find a second representative. I am not clear when the second representative was engaged but they were involved after Summit communicated its investigation into Ms Kirk's conduct on 14 November 2023 by sending a letter containing fourteen allegations to be investigated. The second representative was then listed as present on-line at meetings held during the subsequent investigation and disciplinary process.

[45] Material provided after the Authority investigation meeting by Ms Kirk includes complaints from Ms Kirk and her partner to the second representative about their service and fees and that the second representative was no longer instructed on the same day (11 March 2024) that they had sent on Ms Kirk's behalf a lengthy response to Summit's 1 February 2024 Disciplinary Outcome letter. The latter amongst other things proposed summary dismissal for two allegations Summit proposed to uphold as serious misconduct. As noted above, the 11 March 2023 communication from the second representative is what Summit says is the first indication of Ms Kirk being unhappy with Summit's response to her bullying grievances in 2023.

[46] I accept that the first representative has likely let Ms Kirk down by becoming unresponsive. There is evidence she tried to take reasonable steps to have them address the situation about her claims of bullying as late as October 2023 which is supported by her words to the first representative that she was not prepared to 'let things lie'. I

find this is likely about her not accepting the outcome of the investigation by Summit. This is the context of Ms Kirk not receiving from Summit what could have reasonably been expected was its written letter summarising all the things verbally discussed and in part (I find) read out on 11 August 2023 by Mr Nalder. I accept that Ms Kirk has shown me that exceptional circumstances apply under s 115(b) of the Act and they likely caused a delay in her raising the grievance.

Is it just to grant leave under s 115 of the Act for Ms Kirk to raise this grievance(s) out of time?

[47] Having found ‘exceptional circumstances’ occasioned the delay I am required to consider overall whether it is just to grant leave.

[48] The length of length of time that it took for Summit to be put on notice about this grievance would at most have been approximately four months after the expiry of the 90 days period on 9 November 2023 if taken to count from 11 August 2023 when Summit verbally told Ms Kirk it did not consider she had been ‘bullied’ by A. During this four months I find it likely Ms Kirk was distressed about the disciplinary process occurring. She was facing a significant list of allegations about her management of a tenancy. The complaint about this tenancy from the property owners was received by Summit on 25 October 2023. My observation is that in the context of what Ms Kirk has claimed was happening to her in the workplace in June 2023 and that Summit was failing to address those things; in the context of Ms Kirk then trying unsuccessfully to have her first representative raise her dissatisfaction with what I accept she felt was unresolved; I accept in what becomes a messy human context that Ms Kirk was likely caught in circumstances that may have been beyond her ability to manage.

[49] I then consider whether the time frame of four months delay (or if taken to be from the 1 April 2024 grievance) five months delay would have a detrimental effect on being able to test people’s memories of evidence as to what may have occurred. There are two full transcripts of the meetings which I take to be the beginning of Summit’s investigation into Ms Kirk’s bullying complaints (23 June 2023) and arguably the end result it verbally delivered (11 August 2023). There are also the two June emails still available and as I understand it, those involved ,may still be available as witnesses being Mr Henry-Steel and Mr Nalder; and potentially A and the Summit

manager who Ms Kirk reported to. I am satisfied that the time delay will not impede my ability to hear this evidence fairly.

[50] I also accept there is a human element that remains not straight forward for those in a workplace who claim they are being treated poorly by a senior colleague and where they may feel their employer is not doing sufficient to address their claims. This persuades me here that the justice of granting leave in the circumstances of having found exceptional circumstances weighs in favour of Ms Kirk.

[51] Accordingly, I find that based on the above, Ms Kirk is granted leave to bring her disadvantage grievance which is that her complaints about her senior colleague A's alleged 'bullying' behaviour *as raised by her in emails dated 15 (sent 16) June and 19 June 2023* were not addressed by Summit in its investigation of the same and as such did not keep Ms Kirk safe in the workplace.

Unjustified disadvantage- failure to provide a safe workplace

[52] I interpret this matter to be captured by the above which I will hereon call the main disadvantage grievance. This grievance may proceed for the same reasons. My finding is that this grievance is based on the June 2023 emails even if Ms Kirk did not use the specific words later used by her second and current representatives. This is in keeping with the informal and accessible nature of the grievance process for what was then, in June 2023, brought by a then unrepresented employee. There was sufficient in those June 2023 emails to have included that Ms Kirk felt A's actions made her feel unsafe. Mr Nalder got that message when he commented in the 11 August 2023 meeting that he remained concerned she says she felt bullied.

Unjustified disadvantage – failing to provide adequate induction and training

[53] I interpret this matter to be captured by the above main disadvantage grievance as well and may proceed for the same reasons to the extent that it is based on the content of the June emails in 2023.

Unjustified disadvantage -failing to pay for representative costs

[54] I find that this is not a grievance relating to disadvantage. To any extent that costs are disputed in the final outcome of the Authority's investigation parties are able to make application for costs according to the Authority's practice.

Unjustified disadvantage -Raising false and vexatious claims against Ms Kirk that were not then progressed during the investigation process.

[55] This relates to Summit withdrawing one of its disciplinary allegations before the end of the process, as confirmed in its disciplinary outcome letter dated 1 February 2024. There is no dispute this was raised within time.

Unjustified disadvantage -removal of work from Ms Kirk

[56] This relates to Ms Kirk saying that upon her return to work on 4 March 2024 after taking sick leave after she had been notified of the outcome of Summit's disciplinary process on 1 February 2024¹³ she had on her desk a printout of an email from Mr Henry-Steel which as I observe contained work she was expected to do after her absence 'before you uptake normal portfolio work for us.' This included various matters including asking her to explain what appear to be various problems on properties she was dealing with and alerting Ms Kirk to 'a number of complaints' that the Summit manager managing Ms Kirk by then, and Mr Henry-Steel 'are dealing with and will need your input into soon', asking Ms Kirk not to contact the complainants because they 'are very unhappy with the service'.

[57] I find that this grievance as a separate disadvantage grievance about removing properties from Ms Kirk's portfolio is out of time to have raised and do not consider there are exceptional circumstances that occasioned a delay in raising it. Even if I am wrong, I accept that it was raised within time on 11 March 2024 within the claim that the dismissal was unjustified. This was the position taken by Summit in its response on 9 July 2024. I will accordingly investigate this matter in line with the unjustified

¹³ The claim that the outcome letter was provided to Ms Kirk while on sick leave appears inconsistent with her email saying she was going home after receiving the letter.

dismissal claim and in particular whether what is before me shows Summit predetermined the outcome of dismissal as is Mr Kirk's claim.

Unjustified disadvantage- disparate treatment

[58] Summit does not appear to dispute this grievance was raised within time – in any event it responded to it without a claim that it was outside of the 90 days in its response to Ms Kirk's current representative on 9 July 2024. That response included a denial of disparity of treatment in taking a disciplinary process against Ms Kirk. The grievance can continue to be investigated but I am satisfied it is likely encompassed in the unjustified dismissal claim which may result in it being investigated and if appropriate remedied as such in the substantive matter. Ms Kirk is in any event granted leave to continue.

Unjustified disadvantage - Requesting Medical details

[59] I accept this grievance has been raised outside of the 90 day time frame and do not consider there are exceptional circumstances that would support granting leave. I again refer back to the high threshold level for s115(a) 'exceptional circumstances' and also I have nothing to show me that the second representative was instructed to raise this as a disadvantaged grievance as is 'exceptional circumstances' under s 115(b). I accept this matter remains context when investigating the claim by Ms Kirk in relation to her view that she has been treated unfairly as to a disciplinary process she says was wholly predetermined as retaliation. To that extent this is something I will investigate as part of the unjustified dismissal grievance being not genuine, a grievance that has been brought within time.

Unjustified disadvantage – that Summit breached Ms Kirk's right to not have A told it was her that disclosed knowledge about A misusing a company fuel card

[60] I acknowledge I have reframed what I understand this grievance of disadvantage is about. I accept this grievance was raised out of time. However, I find it is captured under the above main disadvantage grievance to the extent it was referenced in the June 2023 emails. Leave is granted for it to continue as part of the main disadvantage grievance for the same reasons set out above as to exceptional circumstances..

Unjustified disadvantage – locked out of Summit's operating system on 19 February 2024

[61] Summit does not dispute that this was raised as a personal disadvantage grievance within time.

Other grievances

[62] I have done my best above to consider the matters sought to be continued as part of Ms Kirk's claims. While I have considered as part of this the matters highlighted for Ms Kirk¹⁴ and while some I agree may not all be grievances as submitted for Summit, there are matters put forward that form the factual matrix here and may be things I will investigate as to disputes of fact and as relevant to the grievances going forward. The task of extrapolating the material has been less straight forward than I anticipated as a preliminary matter. To the extent that there may remain issues with discreet disadvantage grievance I will resolve these issues in the substantive investigation process where I may consider the factual matrix assist more to the unjustified grievance in any event.

Summary

[63] The following grievances will be investigated in a substantive investigation:

- a. As has continued to be confirmed to Ms Kirk, a personal grievance for unjustified dismissal.
- b. A disadvantage grievance due to A's alleged 'bullying' behaviour and that Summit did not address this sufficiently to keep Ms Kirk safe in the workplace during her employment, due to exceptional circumstances.
- c. A disadvantage grievance connected to the above at (b.) alleging that Summit failed to provide a safe workplace due to exceptional circumstances.

¹⁴ Statement of Problem amended 5 May 2025 in blue paragraphs.

- d. A disadvantage grievance connected to the above at (b.) alleging that Summit failed to provide adequate induction and training due to exceptional circumstances.
- e. A disadvantage grievance alleging Summit raised ‘false and vexatious claims’ against her that were not then progressed during the investigation process (not disputed as to raising).
- f. A disadvantage grievance regarding disparate treatment (not disputed as to raising).
- g. A disadvantage grievance that Summit breached Ms Kirk’s right to not have A told it was her that disclosed knowledge about A misusing a company fuel card due to exceptional circumstances.
- h. A disadvantage grievance that Summit locked Ms Kirk out of its operating system on 19 February 2024 (not disputed as to raising).

[64] The following disadvantage grievance will not be investigated in a substantive investigation:

- a. A disadvantage grievance that Summit removed work from Ms Kirk
- b. A disadvantage grievance that Summit unjustifiably requested her medical details.

Costs

[65] Costs are reserved and will be dealt with as part of the substantive investigation process. 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.¹⁵

Next steps

[66] The Authority will continue to hear Ms Kirk’s substantive unjustified dismissal grievance, and the matters identified above as disadvantage grievances either not disputed to continue or granted leave to do so. Dates are now currently being held in

¹⁵ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

2026 for a substantive investigation meeting. An Authority Officer will engage with the representatives regarding dates for this and to set a timetable for evidence provision.

[67] As noted above, and in the interim prior to a substantive investigation meeting, I *must* direct the parties to mediation under s 115(4) of the Act to seek ‘to seek to mutually resolve’ the grievances that have been granted leave to continue. The parties are obviously encouraged to revisit resolving all matters as part of this opportunity. The above substantive matters will be scheduled to best estimate time for this mediation to occur. To assist this Determination will be provided to the mediation service together with the initiating documents and attachments. For clarity the disadvantage grievances granted leave are listed above at [62] b,c,d and g.

Antoinette Baker
Member of the Employment Relations Authority