

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION (REFER PARAGRAPH 5)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 162
3009191

BETWEEN	JOYCE MATAIRE Applicant
AND	EMERGE AOTEAROA LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Daniel Church, counsel for the Applicant Penny Shaw, counsel for the Respondent
Investigation Meeting:	7 – 10, and 15 December 2020
Submissions and/or further evidence	15 January and 26 February 2021 from Applicant 19 February and 26 February 2021 from Respondent
Determination:	22 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Joyce Mataire, claims that she was unjustifiably disadvantaged by the Respondent, Emerge Aotearoa Limited (Emerge) in relation to:

- i. An investigation into allegations in respect of the Forrest Hill Service;
- ii. In relation to an offer of training that was withdrawn; and
- iii. In relation to recruitment processes.

[2] Ms Mataire further claims that she was constructively dismissed by Emerge.

[3] Emerge denies that Ms Mataire was unjustifiably disadvantaged or constructively dismissed. It claims that it was entitled to, and justified in, commencing a disciplinary process during which Ms Mataire voluntarily resigned.

The Authority's investigation

[4] 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 submissions received.

Prohibition on publication

[5] **I order that medical information pertaining to Ms Mataire, which is subject to a permanent non-publication order, is not to be published. I order that the names of employees not directly involved in the claim are not to be published. The employees will be referred to by a letter, a letter bearing no relationship to the employee's actual name. These orders are made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Issues

[6] The issues requiring investigation are whether or not Ms Mataire was:

- Unjustifiably disadvantaged by Emerge failing to:
 - properly investigate allegations about staff at the Forrest Hill;
 - fulfil a training offer
 - properly consider Ms Mataire for positions
- Constructively dismissed by Emerge

Background

[7] Emerge provides a wide range of community-based mental health, addiction, disability support, and social housing services throughout New Zealand.

[8] Ms Mataire was employed as a Community Support Worker working 16 hours a week. She commenced employment in January 2014 working across two Dual Disability Services: the Forrest Hill Service (Forrest Hill) and Henderson-Rathgar Road Service (Rathgar Road). The clients at these locations were residential clients with both a diagnosed mental illness and an intellectual disability.

[9] As a Community Support Worker Ms Mataire was expected to support clients by assisting them to develop and maintain living skills, relationships and daily activities in order

to be active participants in their communities. Ms Mataire was not available to work weekends during the initial part of her employment.

[10] Ms Marija Jelesic is a District Manager in which position she is responsible for supporting the Service Managers who in turn managed the frontline staff. Her responsibilities included Forrest Hill and Rathgar Road.

[11] In December 2015 Ms Jelesic was responsible for supporting the Service Managers in both Forrest Hill and Rathgar Road. Ms Jelesic said that both Forrest Hill and Rathgar Road are part of the same contract Emerge has with the Ministry of Health. The service specifications are exactly the same, staff employed to work within both services have the same job descriptions and perform the same set of tasks and duties. Forrest Hill only supports male residents, Rathgar Road only supports female residents. Both are dual disability sites with the staff performing personal care for the clients and activities of daily living.

[12] Residents at both sites are fully resident and have weekly schedules and different tasks and activities that they do, within the home or outside of it. The staff provide support to the residents.

The Forrest Hill complaint and Investigation Process December 2015

[13] In December 2015 Ms Mataire raised allegations about the behaviour of three of her colleagues at Forrest Hill. She said that she tried to bring the issues to the attention of her Manager but she was not believed and she found this very frustrating.

[14] In December 2015 Ms Mataire made a formal complaint to Ms Jelesic detailing specific incidents and advised that there were witnesses who could support what she was alleging. In relation to the witnesses Ms Mataire stated:

I once had a conversation with [Mr C] a staff member who would stand as a witness to the harassment of clients. ... [Mr C] and I agreed that what our colleagues are doing is unacceptable but he feels he does not want to be involved. Another witness is [Ms B]. She worked at Forrest Hill and she may be happy to share what she witnessed at Forrest Hill.

[15] Ms Jelesic said that the formal complaint from Ms Mataire arose from concerns Ms Mataire had raised with her manager at Forrest Hill during an 'On Track Chat' meeting. The complaint had been handled by her because the manager at Forrest Hill was one of those cited on the complaint from Ms Mataire.

[16] Prior to receiving this complaint, Ms Jelesic said she had not been aware of any similar issues relating to Forrest Hill. She was surprised by the complaint because the Forrest Hill employees were a strong team who had been working together for a long time.

[17] Ms Jelesic said that Forrest Hill had a very good reputation from the state sector and the Ministry of Health who monitored Emerge services. Forrest Hill had always performed well in regular audits.

[18] In addition, she explained that there are many safeguards Emerge has within its systems to ensure it is aware of any issues within the services. These include feedback from families, feedback from a Health and Disability Commissioner Advocate who would visit Forrest Hill on a set schedule, and audits by the Ministry of Health which involve interviews with the clients and their families. The auditors also check contract compliance, health plans, records, incident reports, and interview clients as part of that process.

[19] Ms Jelesic said she also frequently visited Forrest Hill and Rathgar Road, meeting with the team and attending staff meetings. In addition, there are visits from Lived Experience partners who are people within Emerge who come on site at a set cycle to take feedback directly from residents and report back. Some clients also have their own independent advocates who come to check on them each month and report back to Emerge on client satisfaction.

[20] As a result Ms Jelesic said she was confident that any issues concerning client care would have been brought to Emerge's attention through any of these channels, but no such concerns had been raised prior to Ms Mataire's complaint.

Forrest Hill investigation process January 2016

[21] Emerge's normal procedure into any serious complaints is to appoint another District Manager to head up an independent investigation. Ms Ngaire Clough (formerly Candido) was appointed to undertake the investigation into Ms Mataire's complaint because she had no prior connection to Forrest Hill.

[22] Ms Jelesic said that during the investigation process Ms Mataire raised concern that she did not feel safe working at Forrest Hill and in response to that concern, she was transferred to work solely at Rathgar Road.

[23] Ms Jelesic said she informed Ms Mataire by telephone prior to 15 January 2016 that Ms Clough was to be the lead investigator into her complaint and she (Ms Jelesic) would be present to take minute notes at the interview with her. Ms Jelesic also sent an email to Ms Mataire dated 15 January 2016 confirming the meeting details and stating: "Ngaire Clough (Lead Investigator) will be leading the meeting and I will be present to scribe (take minutes)". Ms Mataire was invited to bring a support person and to contact Ms Jelesic if she had any questions.

[24] Ms Mataire said she was surprised to find Ms Jelesic present when she attended the meeting with Ms Clough on 15 January 2016. She said she did not recall a telephone conversation with Ms Jelesic prior to the meeting, and she had not responded to the email.

First Interview 15 January 2016

[25] Ms Clough said she commenced the interview on 15 January 2016 by outlining the process and describing the purpose of the meeting. She informed Ms Mataire that she would be the lead investigator, and Ms Jelesic was present to take notes. She said that Ms Mataire made no objection to Ms Jelesic being present during the interview. Ms Mataire confirmed that she had raised no objection to Ms Jelesic being present.

[26] Ms Clough said Ms Mataire had attended without a support person so she advised her of her right to have a support person present, but Ms Mataire said she was prepared to continue without one.

[27] Ms Clough clarified for Ms Mataire that she had read through her complaint and this was an opportunity for her to provide context and full details.

[28] Ms Mataire said that she was able to talk to each aspect of her complaint and in answer to questions asked by Ms Clough provided specific examples of unacceptable employee behaviours she had observed at Forrest Hill.

[29] During the interview Ms Clough said she went through each line of Ms Mataire's written complaint and asked for clarification because she was concerned that there were not sufficient details concerning the nature of the allegations.

[30] Ms Clough said that because by the end of the interview she had been concerned that the examples of unacceptable employee behaviours were not sufficiently specific and there were no dates provided, she gave Ms Mataire the opportunity to clarify the additional information provided at a second interview held on 26 January 2016.

Second interview 26 January 2016

[31] Ms Mataire said she provided clarification of her complaint at a second interview which took place on 26 January 2016.

[32] Ms Clough said that following the second interview she felt the information provided by Ms Mataire was serious enough to warrant a careful and thorough investigation. Although she received some criticism from her manager subsequently about the length of time she was

taking in carrying out the investigation, she considered that the nature of complaints necessitated it.

[33] Following consultation with HR, Ms Clough said that she commenced interviewing Forrest Hill employees accompanied by another District Manager, Mr A, who took the meeting minutes. In total she interviewed six employees:

- three employees cited in Ms Mataire's complaint;
- the Service Manager;
- a permanent employee, Mr C, whom Ms Mataire said would corroborate her allegations; and
- a casual employee who is also a client advocate.

[34] Ms Clough said there were only five permanent employees in the Forrest Hill team and they were all interviewed as part of her investigation. Ms B was a casual employee and not often on site at Forrest Hill and therefore she had seen no value in interviewing her because the other interviewees had more relevant information.

[35] The investigation found no evidence produced during the investigation that supported any of the behaviours Ms Mataire alleged were occurring at Forrest Hill. This included evidence from the witness, Mr C, the permanent employee whom Ms Mataire had specifically said would corroborate her allegations.

[36] After discussing the evidence with Human Resources (HR) personnel and Mr A, Ms Clough said she concluded that she could not substantiate Ms Mataire's allegations.

Investigation Outcome Meeting with Ms Mataire 17 March 2016

[37] Ms Clough emailed Ms Mataire on 14 March 2016 to inform her that the investigation was complete and to invite her to a meeting to be held on 17 March 2016 in order that she could be provided with an update. Ms Jelesic was to be present at the meeting as the relevant District Manager because there was to be a discussion about whether or not Ms Mataire would remain working at Forrest Hill after the investigation concluded.

[38] During the meeting on 17 March 2016 Ms Mataire said she was informed that the investigation had found no support for her allegations. She said she had felt "blindsided" by this outcome and felt aggrieved that Ms B, whom she had named as being able to support her allegations, had not been interviewed.

[39] Ms Clough said she had told Ms Mataire that if she had any further evidence or another complaint this would be investigated.

Transfer to Rathgar Road March 2017

[40] Part of the discussion during the meeting held on 17 March 2016 focused on whether or not Ms Mataire should continue to work at Forrest Hill with the employees about whom she had complained. Ms Clough said that throughout the investigation Ms Mataire had expressed concern about not feeling safe at Forrest Hill.

[41] Ms Jelesic said Ms Mataire was asked if she would like to work at Rathgar Road on a permanent basis and Ms Mataire confirmed that she was happy to do so. Ms Jelesic said Ms Mataire was already familiar and comfortable within the team, the clients, and the site but she asked Ms Mataire if travelling would be an issue for her and she confirmed it would not.

[42] Ms Mataire said that she had not wanted to work at Rathgar Road on a permanent basis because there were more challenging clients at that facility service, although she confirmed that she had been content to work there during the investigation period.

[43] Ms Mataire was made a formal offer of a variation to her terms and conditions of employment which confirmed her agreement to the variation in her place of work as being Rathgar Road. She signed the variation on 11 April 2016 and as a result was appointed to a full-time position at Rathgar Road.

[44] Ms Clough said that the outcome of the investigation was provided to the employee subjects of the investigation because they had received formal invitations to the meeting suggesting disciplinary action might result, and so a formal letter recording that the matter was at an end was required. .

[45] Ms Mataire said she was upset at the outcome of the investigation and sent emails to Emerge on 20 and 22 March 2016 in which she said she was going to seek assistance from the Authority and the Health and Disability Commissioner because she wanted the assistance of: “the Government of New Zealand to help me get my name cleared, the only way this can be done is through the courts ... and I am happy to take a lie detector test to prove my innocence”.

[46] Ms Mataire also stated: “I cannot stand the hurt, stress and humiliation which had been caused by my Experience at Forrest Hill and the outcome of my complaint ” and: “my main witness Ms B was not given a chance to testify”. Ms Mataire complained that Mr C witness had been interviewed even though she had told Emerge that he was not willing to testify against his colleagues.

[47] Ms Clough responded in an email dated 21 March 2016 in which she stated that all the staff named in Ms Mataire's complaint had been interviewed: "We also interviewed a staff member you informed us would be able to corroborate your complaint."

[48] Ms Clough also commented that she did not understand why Ms Mataire needed to: 'clear her name' since the investigation had been commented in accordance with normal procedure, but advised Ms Mataire that she could access EAP assistance to help with any hurt and stress she was experiencing.

[49] Ms Mataire responded confirming her dissatisfaction that Ms B had not been interviewed and stating that she did not need support from EAP because: "Marija has spoken to me several times."

Withdrawal of Training opportunity issue

[50] Ms Jelesic said Service Managers conducted regular supervision sessions with all their team members to check on their well-being, help them with any professional development activities and provide ongoing support with tasks for which they had responsibility.

[51] After Ms Mataire had moved full time to Rathgar Road, Ms Jelesic said that she was Acting Service Manager for Rathgar Road and she held regular supervision meetings with Ms Mataire. During one such meeting Ms Mataire requested assistance in her desire to become a social worker following completion of her degree. Ms Jelesic said she was supportive of this, and arranged for a supervisor to assist Ms Mataire with working on her portfolio with a view to obtaining her Social Work Registration. The supervisor appointed to work with Ms Mataire was Ms T.

[52] Mr Ashleigh Hopkins commenced as Service Manager at Rathgar Road in July 2016. He said that Service Managers were also employed as a Mental Health Professional (MHP) and responsible for ensuring that MHPs were providing sound clinical advice. Mr Hopkins also had responsibility for Te Ara Takahanga (TAT), a service which dealt with mental health issues.

[53] Once he was appointed as Service Manager for Rathgar Road, he took over the regular supervision sessions with Ms Mataire. Ms Mataire said, and Mr Hopkins confirmed, that they had a good working relationship.

[54] Ms Mataire said that during a supervision meeting held on 22 August 2016, Mr Hopkins had told her that he wanted to start training her as a MHP and that Emerge would

pay for any training courses to help her upskill and qualify for a MHP role. Once Ms Mataire was a registered Social Worker she would be eligible to apply for the role of MHP within Emerge. The roles are only by appointment.

[55] Ms Mataire said she was excited by the offer and in reliance on what Mr Hopkins had told her regarding Emerge paying for any necessary training, she applied to Auckland University of Technology (AUT) to study for a Post Graduate Certificate in Mental Health and Addiction, and said she was thrilled to be offered a place.

[56] She emailed Mr Hopkins on 31 August 2016 advising him that she had managed to select the course at AUT stating: “Following the discussion we had in my supervision I managed to select a Post Graduate Certificate in Health Science Mental Health and Addiction under AUT”.

[57] Mr Hopkins had responded: “That’s fantastic. Let’s have a look and see what it entails”

[58] Mr Hopkins said he wanted to encourage Ms Mataire who had a Social Work qualification and whom he knew wanted to be a MHP and suggested during the meeting in August 2016 that she look for additional training to position herself for any future job opportunities.

[59] Mr Hopkins said they had discussed Ms Mataire applying for a scholarship at Te Pou (a national centre for workforce development resources in mental health, addiction and disability sectors) and he had encouraged her to look at the Te Pou website to ascertain what was available. He said he had also mentioned to Ms Mataire that a number of the Emerge MHPs had completed their Mental Health Certificates at no cost through Wananga o Aotearoa.

[60] When he had received the email from Ms Mataire dated 31 August 2016 Mr Hopkins said he had made the assumption that Ms Mataire had secured a scholarship through Te Pou as he had suggested. He realised this would involve Ms Mataire needing study leave to complete the qualifications which was why he had responded: “Let’s have a look and see what it entails.”

[61] Mr Hopkins denied that he had told Ms Mataire that Emerge would pay for the training because he did not have the authority to commit to this. However he had subsequently been advised by Ms Jelesic that there was special funding through Emerge’s Learning and Development Team for which Ms Mataire could apply, and Ms Jelesic had

suggested that he encourage Ms Mataire to apply. He advised Ms Mataire of this information by email dated 6 September 2016.

[62] When questioned during the Investigation Meeting, Mr Hopkins said that whilst he had not told Ms Mataire that Emerge would pay for any courses, he had not told her Emerge would not pay for the courses.

MHP vacancy

[63] Ms Mataire said that on or about August 2016 she had expressed an interest to Mr Hopkins in applying for a MHP role at TAT, but Mr Hopkins had told her the position was not suitable for her because she did not want to work weekends.

[64] Ms Mataire said she told Mr Hopkins that she was prepared to work weekends if given the MHP role at TAT and Mr Hopkins had commented to her that there were qualified applicants who had worked at Emerge longer than her who were waiting for such a role to become available. Ms Mataire said she felt Mr Hopkins was actively trying to discourage her from applying for the position.

[65] Mr Hopkins said that Ms Mataire had previously refused to work at weekends, and he was surprised when she told him that she would be available for weekend work. He had then advised her that she was welcome to apply for the position.

[66] Mr Hopkins said that he and Ms Mataire exchanged emails on 6 September 2016. Ms Mataire had a concern that Mr Hopkins had approached an employee from the casual work pool, Ms Q, about applying for the 0.5 FTE MHP vacancy. In her email which she copied to Ms Jelesic, Ms Mataire set out her view that Mr Hopkins had prevented her from applying for the MHP vacancy and also stated:

... You told me you were looking into helping me with training. I obviously thought it was internal training. Later you asked me to find a course which I did ... As you are my manager I would be happy if promises are fulfilled.

[67] Mr Hopkins responded to Ms Mataire in an email later on 6 September 2016 that any training applications had to be submitted to the Learning and Development team and stated:

I would also like to reiterate that when we spoke about the 0.5 FTE MHP position, I did not prevent you from applying for the role, I was simply explaining the terms and conditions connected to the position. This included working across weekends. You are welcome to apply for any vacancy in the organisation and I can assure you that any recruitment process will be fair. Any recruitment decisions are made by a panel and ultimately signed off by my District Manager.

[68] In response to her comment that he was approaching employees Mr Hopkins responded:

... managers are within their rights to inform staff of current vacancies. If an employee is informed about a position and then applies they would go through the same recruitment process as anyone else.

[69] Ms Mataire said that she had heard from an employee Ms F that she had been interviewed for the 0.5 FTE MHP role at TAT and would soon be commencing shifts at TAT.

[70] Ms Jelesic said that Ms Mataire had not mentioned in the email dated 6 September 2016 that Mr Hopkins had said Emerge would pay for the necessary courses, so she was not aware of that issue. After receiving the emails she had spoken to Mr Hopkins and suggested that he confirmed to Ms Mataire the correct procedure to follow to apply for vacant positions.

[71] On 5 October 2016 Ms Mataire emailed Ms Jelesic advising that she had seen on the Emerge intranet that two MHP jobs were available and she wished to apply for them. In her email she referred to Mr Hopkins preventing her from applying for the 0.5 FTE MHP position, and expressed her view that he was only approaching people he wanted to work with him at TAT, including a casual employee.

[72] She stated that Mr Hopkins had told her that Emerge allowed him to approach staff and advise them about vacancies, but she considered this was being done in a discriminatory manner. Ms Mataire concluded by: "I feel like I should inform that CEO straight away."

[73] Ms Jelesic responded that same day, 5 October 2016, informing Ms Mataire that 0.5 FTE MHP position she referred to had not been filled and was still vacant, and providing her with details of all the MHP roles available. She stated: "There is no intent from anyone in the organisation to try and stop you from applying for positions. Emerge Aotearoa takes EEO principles very seriously."

[74] Ms Jelesic also advised Ms Mataire that she had included the HR team and her line manager Mr Raj Sodhi, Regional Manager for Counties and Central Auckland, in the email because Ms Mataire had advised her that she felt she needed to inform the CEO of her concerns.

[75] Ms Ramjee, HR Partner, emailed Ms Mataire on 5 October 2016 acknowledging the email from Ms Jelesic and advised her that Ms Trish Evers, Senior HR Business Partner, was on leave but that she and Ms Jelesic would arrange to meet with Ms Mataire on Ms Evers return to discuss Ms Mataire's concerns.

[76] Ms Mataire replied by email dated 6 October 2016 explaining that she did not want to attend a meeting because she still felt concerned about the Forrest Hill investigation and felt

she was being: ‘punished’ for raising her concerns. She stated that she still wanted to inform the CEO of her discrimination concerns and explained that what concerned her was Mr Hopkins ‘changing the story’ rather than admitting that he had made a mistake.

[77] Ms Mataire concluded the email: “Thanks very much for all the support I am getting from Marija and the HR.”

Meeting with HR 13 October 2016

[78] Mr Sodhi and Ms Evers met with Ms Mataire on 13 October 2016. Mr Sodhi said the purpose of the meeting was to provide Ms Mataire with a forum in which she could voice her concerns, to see what Emerge could do to support her, and to resolve the issues for her.

[79] During the meeting Ms Mataire raised her concern about the Forrest Hill investigation, but Mr Sodhi said Ms Mataire’s main concern was that Mr Hopkins was not giving her, or interviewing her, for a job. He said Ms Mataire believed that Mr Hopkins was ‘shoulder-tapping’ unqualified people to apply for roles at the same time as finding reasons why she could not apply for the role. She had specifically mentioned an employee Ms D who had been appointed to a MHP role despite not having a practicing certificate.

[80] Mr Sodhi said he reassured Ms Mataire that he would explain the process she could follow to apply for jobs, and set out for her Emerge’s usual practice and policies around recruitment.

[81] The meeting concluded with Mr Sodhi reassuring Ms Mataire that he would look into her concerns. He advised Ms Mataire that he was going on leave so there would be a delay in coming back to her.

[82] On his return from leave Mr Sodhi said he had discussed the Forrest Hill investigation with Ms Evers (who had provided HR advice), and also with Ms Clough and Ms Jelesic, and had been assured by Ms Evers that six employees had been interviewed and the Forrest Hill investigation had been thorough and robust.

[83] He ascertained that the employee Ms D had been employed in a Community Support Worker role, not a MHP role, and he had told Ms Mataire this when he telephoned her. He said Ms Mataire had not mentioned another employee, Ms F, to him, so he had not investigated that.

[84] Mr Sodhi said he had also encouraged Ms Mataire to seek OCP (a form of EAP) because he had been concerned at the level of distress she had been displaying in the meeting on 13 October 2016.

[85] On 7 November 2016 Ms Mataire emailed Ms Jelesic regarding two MHP vacancies she had seen advertised. Ms Jelesic responded with information about the positions, and advised that she would answer any specific questions from Ms Mataire.

[86] On 10 November 2016 Ms Mataire emailed Mr Hopkins, copied to Ms Jelesic and Ms T stating: "Many thanks to you, Marija and [Ms T] for all the support you gave me to get my SWRB Registration."

Failure to be properly considered for MHP applications

[87] Ms Jelesic said that Ms Mataire applied, and was interviewed, for two full-time MHP roles, but she did not apply for the 0.5 FTE MHP role despite having been told it was vacant. Ms Mataire was interviewed for both roles by a panel of three Service Managers which was Emerge's usual procedure.

[88] On 21 October 2016 Ms Mataire was interviewed for a permanent full-time MHP role at TAT by a panel consisting of Mr Hopkins, and two other Service Managers. Ms Jelesic said it had been decided to offer the position to another applicant because Ms Mataire did not have sufficient mental health experience to be effective in the role, specifically experience with service users with enduring, chronic and complex mental health issues.

[89] Ms Mataire was provided with feedback after the interview and advised that she needed to expand her working experience beyond the intellectual disability/carer role which she had at that time. Ms Jelesic said Ms Mataire was offered an opportunity to apply for grants and funds via Emerge to assist with her development.

[90] Ms Mataire said that she became aware of employees she considered to be less qualified than her being offered positions for which she had been overlooked, and concluded that the only explanation was unlawful discrimination, given that neither she or three other black African colleagues had been offered pathways to promotion and improvement.

Email to Ms Disley 14 November 2016

[91] On 14 November 2016 Ms Mataire emailed the CEO of Emerge, Ms Barbara Disley, raising issues about the investigation at Forrest Hill and about the recruitment process for the MHP positions. In the email Ms Mataire named two employees, Ms D and Ms F, who had been approached and/or appointed to MHP positions in preference to her.

[92] Ms Mataire raised an issue that there had been discrimination. She stated:

What I am experiencing within our organisation is unlawful discrimination. If some deserves something they should get it regardless of race, age and colour of their skin.

[93] Ms Jelesic said that she did not agree with Ms Mataire's claim that there had been discrimination. Ms Mataire had referred to three employees from Africa who had not been afforded pathways to promotion and improvement. Ms Jelesic said that none of the three employees were eligible for a MHP role because they did not hold Registration or an annual Practising Certificate from the relevant Professional Boards, and, like Ms Mataire, they had been encouraged to obtain practicing certificates.

[94] Ms Ramjee said that she was contacted by Ms Nicola Coom, GM People, Strategy and Performance, who had been asked by Ms Disley to examine Ms Mataire's recruitment concerns.

[95] After Ms Coom and Ms Disley had reviewed the information Ms Disley responded that she was satisfied that both the Forrest Hill allegations and the MHP recruitment processes were appropriately handled. Ms Disley stated in the email response to Ms Mataire dated 5 December 2016:

The concerns you have raised have been reviewed and I am satisfied that the processes we have in place have been followed in regards to the recruitment process. I have been informed that you did not apply for the .5 fte role to which you refer below, which is still vacant and that you were given feedback about the reasons you were unsuccessful for the permanent full time MHP role that you did apply for.

Joyce all of our positions are on our careers website, I have attached a link for you. You are able to register your interest on line so that you are alerted to any positions that come available.

Complaint December 2016 and allegations about Ms Jelesic

[96] By email dated 13 December 2016 Ms Mataire sent a complaint to Mr Hopkins raising two issues, one concerned a shift swap issue and the other about his use of offensive language. The email was copied to Ms Jelesic and Ms Disley.

[97] Mr Hopkins said that he responded to the shift swap issue, and because another team member had asked him to refrain from swearing, he had apologised to the whole team at the next handover meeting for swearing, however said that he had never sworn at a team member.

[98] Shortly after this he had left Auckland to take up a management position in Whangarei.

[99] On 7 December 2016 Ms Mataire was interviewed for another permanent full-time vacancy at TAT. Ms Jelesic said that the Service Managers who conducted the interview

provided feedback that she had interviewed well, but that the answers she provided indicated that she did not have sufficient mental health experience.

[100] Ms Jelesic said she disagreed that Ms Mataire was being discriminated against because all appointments were based on an assessment of the applicant's range of skill, experience and potential to learn. Experience and skills required were to deal with clients with chronic, severe and enduring mental health issues and addiction issues, whereas Ms Mataire's role consisted of working with people with a mixture of physical and intellectual disabilities.

[101] Ms Jelesic said that Emerge supported Ms Mataire to complete her registration and annual practicing certificate, offered organisational resources to provide appropriate supervisions and offered her shifts to assist her learn and develop.

[102] Ms Jelesic invited Ms Mataire to a meeting on 27 January 2017 after she was copied into an email chain between Ms Mataire and Mr Ashleigh. Ms Disley and two other members of the Group Executive Team had been copied, raising issues of discrimination again. Ms Jelesic said she had wanted to provide Ms Mataire with an opportunity to provide further context and information in order that the allegations could be investigated.

[103] Ms Mataire refused to attend the proposed meeting, explaining in an email dated 28 February 2017 why she would not be attending, and alleging that Ms Jelesic had been dishonest in relation to alleged appointments to MHP roles. The email stated:

I have several emails from the management with contradicting messages towards the discrimination I was facing. As my District Manager you were not honest to me when I told you that Ashleigh had offered the 0.5 MHP job to D and the same D was offered the FTE MHP job after she had only worked as a 0.5 MHP at Tat. I received an email from you where you were explaining the Emerge Aotearoa EEO policy again you were not honest at that one. If you were honest we should not have got where we are today.

[104] Mr Don MacKinven, Regional Manager, said he had seen an email from Ms Mataire dated 26 February 2017 in which she said she was going to present a report to the Minister of Health: "and all the other relevant ministries", Bill English, and the news media. On the 28 February 2017 there had been another email from Ms Mataire in which she stated that she was going to write to the Ministry of Health and: 'Minister of Labour'.

[105] Following the email to Ms Jelesic dated 28 February 2017 in which she accused Ms Jelesic of being dishonest, he considered matters were escalating and that it was timely to meet with Ms Mataire.

[106] On 3 March 2017 Mr MacKinven invited Ms Mataire to a meeting to clarify the issues raised and to provide further information. He also wished to discuss the issues she had

with Ms Jelesic after she called Ms Jelesic's honesty and integrity into question. Ms Mataire was advised in the email that Emerge would not: "*engage in further discussion regarding all previous concerns raised.*"

[107] By way of return email dated 3 March 2017 Ms Mataire advised that she would not be attending the meeting and by further email dated 6 March 2017 she listed examples of why she did not trust Ms Jelesic noting that casual employees who had just finished training and had no Annual Practicing Certificate were appointed to MHP positions, and that Ms Jelesic was helping Mr Hopkins to discriminate on the basis of race.

[108] Mr MacKinven said that he viewed these as serious allegations to make against a manager and concerning that, despite the meetings which had been held with Ms Mataire to explain that her perceptions regarding casual employees being promoted to MHP positions was incorrect, she continued to make the allegations.

[109] On 31 March 2017 Mr MacKinven advised Ms Mataire that Emerge would no longer be engaging with her about issues that: "*have been raised and actioned in accordance with our policies and procedures*". The letter also stated that Emerge had policies and procedures in place to deal with complaints and asked Ms Mataire to follow them.

[110] Ms Mataire filed a Statement of Problem with the Authority on 3 May 2017.

[111] Mr MacKinven said that he wrote to Ms Mataire on 9 May 2017 inviting her to a meeting with Ms Ramjee because he wanted to give Ms Mataire an opportunity to set out her complaint. At this stage he said he was not aware that Ms Mataire had filed a statement of problem with the Authority.

[112] He did not want to engage with Ms Mataire about the Forrest Hill investigation or recruitment as he understood these had been already investigated by another Regional Manager, the HR Department and the Chief Executive.

[113] Ms Mataire met with Mr MacKinven and Ms Ramjee on 12 May 2017. Ms Ramjee said the meeting was primarily to explain the Emerge complaints procedure, but she also informed Ms Mataire that Ms D had been employed as a Community Support Worker, not a MHP.

Events May 2017

[114] Ms Mataire said that in May 2017 she had verbally complained to Ms Kerry Debrah, Service Manager at Rathgar Road, about suspected physical abuse of a client. On 12 May 2017 at 9.26 a.m. Ms Mataire sent a photograph of bruising on the client to Ms Debrah.

However she did not complete an incident form or raise any concerns about it with Ms Debrah or Ms Jelesic.

[115] That same day Ms Mataire had been one of six employees to send a letter of complaint about this client to Ms Debrah. The letter set out that the employees were concerned about the client's continued behaviour which put their well-being at risk because they were exposed to the client's behaviours.

[116] The email stated that the behaviours had been occurring for over five years, with numerous incident reports being completed, but had escalated to: "the point of high risk to the facility. We now deem them as a very serious hazard that we are being exposed to in our workplace that is deemed unsafe.". The email concluded with the advice that the employees were pleased that the final plan for the client: "is to be exited from this residence."

[117] In July 2017 Ms Debrah said she was involved in a recruitment process to appoint a 0.5 MHP. Ms Mataire was interviewed for the position but Ms Debrah said she was not successful because Ms Mataire lacked clinical experience, post qualification and mentoring and coaching experience which were two advertised criteria.

[118] Ms T, who was the successful candidate, had supervised Ms Mataire and helped her work towards and obtain SWRB Registration, as Ms Mataire acknowledged in the email dated 10 November 2016.

Mediation 28 July 2017

[119] Mr MacKinven said that after Emerge became aware that Ms Mataire had filed a statement of problem with the Authority, it was agreed to attend mediation which took place on 28 July 2017. A document was drawn up as result of mediation (the Mediation Document) which stated:

Dear Joyce,
Here are the matters we agreed to at mediation:

We wish to acknowledge the good work that you do for the organisation and that you are respected.

There are a limited number of opportunities for MHP roles within the organisation. If a role arises you should view the position description. There may be considerable competition for that role; or there may not be an appointment because there are not always suitable candidates.

It is inappropriate in the workplace for you to make allegations of lying or dishonesty by managers. If you perceive anything to be wrong you should raise these concerns through the appropriate channels.

We agree that we both want to put this matter behind us and proceed in a cooperative manner. We understand that you will withdraw the proceedings that you have filed with the Employment Relations Authority.

[120] Both parties were represented at the mediation. The document was signed by Ms Mataire, and Mr MacKinven, on behalf of Emerge and the Mediator.

September 2017

[121] Ms Mataire said that following the mediation Rathgar Road had become a toxic place for her to work. As a result she became unwell and took sick leave during August - September 2017. She attended a staff meeting upon her return to the office on 5 September 2017 at which it was advised that Ms T had been appointed as a MHP at Rathgar Road. Prior to the meeting starting, Ms Mataire said she had tried to greet Ms T but had been ignored.

[122] During the meeting Ms Mataire said she had flashbacks to previous experiences at Emerge and experienced a panic attack.

[123] Ms Debrah said that Ms T was due to start work at Rathgar Road on 8 September 2017 and visited Rathgar Road on 5 September 2017 to introduce herself to the team.

[124] Ms Debrah said she had not noticed anything untoward in the interaction between Ms Mataire and Ms T, although she had noticed that Ms Mataire had been sitting with her head down and her shoulders slumped during the meeting. Knowing that Ms Mataire had recently returned from sick leave, she had enquired how she had been feeling. Ms Mataire had responded that she was well.

[125] Ms Debrah said that she received an email from Ms Mataire dated 7 September 2017 in which Ms Mataire stated that she had been ignored twice by Ms T at the start of the meeting on 5 September 2017 and this had also occurred on a previous occasion in November 2016. She stated that she considered that what had occurred was: "a form of bullying and harassment."

[126] Ms Debrah said she had met with Ms Mataire the following day when Ms Mataire repeated the complaint and stated that only she and Ms T had been present at the time she says Ms T ignored her. Following their meeting, Ms Debrah sent Ms Mataire an email recapping on what had been discussed and advising that she would be speaking to Ms T.

[127] Ms Debrah said when she spoke to Ms T, she had no recollection of Ms Mataire having spoken to her, and assured Ms Debrah that any ignoring of Ms Mataire was completely unintentional.

[128] Ms Debrah said during a supervision session on 27 September 2017 Ms Mataire had reported feeling not well physically and mentally, and she had passed the information to Ms

Jelesic because she had been trained to be mindful of what people needed to support them when they had made such comments.

[129] Ms Jelesic said that her view had been that there was no reason why Ms T would ignore Ms Mataire given that Ms T supervised her, helped her with her professional development, completing her documentation and signing off her registration portfolio which enabled Ms Mataire to become a Registered Social Worker.

[130] Ms Jelesic said that at this stage Emerge was concerned about the amount of complaints made by Ms Mataire, these being:

- a. about her colleagues at Forrest Hill;
- b. about her previous manager Mr Hopkins and the training issue;
- c. about being discriminated against when she was not successful in being appointed to other positions for which she had applied;
- d. allegations about her (Ms Jelesic's) honesty; and
- e. about being ignored by Ms T.

[131] In addition Ms Debrah had raised concerns about Ms Mataire's health and whether or not she was fit to be in the workplace.

[132] On 5 October 2017 Mr MacKinven wrote to Ms Mataire about the outcome of the investigation into her concern about Ms T ignoring her, setting out that Ms T had no recollection of being greeted by Ms Mataire and her reassurance that she would never intentionally ignore her.

[133] In the letter Mr MacKinven set out in detail the reasons for Emerge's concern about Ms Mataire's health and asked that she provide her doctor's written confirmation that her mental health and well-being allowed her to safely carry out her Support Worker role.

[134] Ms Mataire said she felt it was inappropriate for Emerge to ask about her private medical information, but after a follow-up request from Mr MacKinven, she did provide a medical certificate dated 25 October 2017 which confirmed that she was fit to be at work. Emerge accepted the medical certificate reassurance that Ms Mataire was fit to be at work.

November 2017

[135] Ms Debrah said that she had held a coaching session with Ms G in early November 2017 who had raised issues relating to Ms T. She had asked Ms G to tell her more about the reason for her distress with Ms T, and Ms G told her that Ms Mataire had told her to complain and she had done so to avoid being the next person: "to be picked on." Ms Debrah had asked

that Ms G put it in writing and she did so in an email dated 2 November 2017, which Ms Debrah had forwarded on to Ms Jelesic.

[136] Ms Debrah said that Ms G told her that she had discussed her conversation with her (Ms Debrah) and the fact that Ms Debrah had asked her to put her concern in writing, with another colleague, Ms H.

[137] Ms Mataire said that she had been concerned since 27 October 2017 about Ms G who had stopped taking medication she had been prescribed, and she emailed Ms Debrah on 3 November 2017 to inform her of the concern.

[138] Ms Debrah said that when she received the email she had been very concerned that Ms Mataire was disclosing personal medical information about Ms G the day after she became aware that Ms G had alleged Ms Mataire had coerced her into making a complaint about Ms T.

Disciplinary Meeting November 2021

[139] Ms Mataire was invited to attend a disciplinary meeting by letter dated 8 November 2017 from Ms Jelesic. In the letter Ms Jelesic stated that the meeting was to discuss several matters which had been brought to her concern by Ms Debrah. The letter set out the allegations as being:

Allegation 1

It is alleged that on 2 November 2017, you coerced a co-worker, [Ms G], to make a complaint regarding [Ms T] (another co-worker). You advised Ms G that this would “strengthen the case”.

Allegation 2

In addition, on 3 November 2017, you inappropriately discussed private and confidential information to your manager regarding the health status of [Ms G] and made inappropriate comments about her potential reasons for raising this issue (allegation 1) with Kerry.

[140] The letter set out the allegations in relation to breaches in the Emerge Code of Conduct and advised that Ms Mataire’s actions could constitute misconduct and if this was found to the case, could result in disciplinary action, up to and including dismissal.

[141] The relevant sections from the Code of Conduct were set out in the letter as follows:

Emerge Aotearoa Code of Conduct, specifically:

Employee responsibilities:

No matter what your role is, or which location you work in, you are expected to:

- Contribute to a safe and healthy working environment for self, colleagues and clients
- Live the Emerge Aotearoa values and set an example for others by contributing positively to the organisational and team culture.

Examples of Misconduct and Serious Misconduct

- Being discourteous or not treating others with respect and dignity. This includes using language and/or aggressive behaviour which may cause offense to another person.

[142] Ms Mataire said she had been shocked and upset to receive the letter dated 8 November 2017 which invited her to a disciplinary meeting. She considered that she had communicated the issues about Ms G in good faith. However she responded and asked if Ms H could be her support person. Ms Jelesic had emailed her stating the Emerge's preference was that she bring an alternate support person because Ms H could potentially be involved in the issues being investigated by Emerge.

Disciplinary meeting 14 November 2017

[143] Ms Mataire attended without a support person at the disciplinary meeting held on 14 November 2017. Mr MacKinven said he checked with Ms Mataire if she was happy to proceed without a support person and she confirmed she was.

[144] During the disciplinary meeting Ms Mataire said she had provided an explanation and tabled a number of reasons why she had disclosed Ms G's medical situation to Emerge, the primary reason being: "because I love her and because I care for her."

[145] Mr MacKinven said that he had wanted to discover Ms Mataire's reason for the timing of her disclosure about Ms G because it had become clear that Ms Mataire had known of Ms G's health status for some considerable time before reporting it to Ms Debrah.

[146] During the disciplinary meeting he questioned Ms Mataire who had confirmed that she had disclosed the information when she did, not because she was concerned for Ms G, but because she was annoyed with her for not supporting her in laying a complaint about Ms T and for reporting her to Ms Debrah for trying to pressurise her into doing so.

[147] Ms Jelesic said that Ms Mataire had said that she had been told by Ms H about the email sent by Ms G, and she was angry about it.

[148] Ms Mataire said she considered Mr MacKinven to have been aggressive and intimidating in the meeting, and her view had been that Emerge were looking for an excuse to terminate her employment. She had informed Mr MacKinven that she would be resigning the following day, and said he had not tried to dissuade her from doing so.

[149] Mr MacKinven and Ms Jelesic said that Ms Mataire had not mentioned her intention to resign during the meeting.

[150] The following day, 15 November 2017, Ms Mataire sent her letter of resignation dated the same day as the disciplinary meeting, to Mr MacKinven in which she stated: “I have suffered a lot of emotional stress throughout the years I have worked for Emerge Aotearoa.”

[151] Mr MacKinven wrote to Ms Mataire on 16 November 2017 responding to some of the statements she had made in her resignation, and stating: “As investigations with a potential for disciplinary action can be stressful I will not proceed with your resignation until Friday pm, this will enable you almost 48 hours should you reconsider your decision.”

[152] Ms Mataire said that she did not consider that Mr MacKinven’s email reflected a genuine desire on the part of Emerge for her to rescind her resignation. She considered it untenable for her to reconsider her resignation so did not respond to Mr MacKinven’s offer for her to do so.

[153] That same day, 16 November 2017, Ms Mataire visited her GP and obtained a medical certificate signing her off work for 14 days.

[154] Mr MacKinven said that because Ms Mataire was working out her notice period, it was decided to continue with the investigation.

[155] Ms Mataire’s medical certificate dated 16 November 2017 expired and was replaced by one which recommended that she work morning shifts only.

[156] Ms Mataire was advised that Emerge’s preliminary decision upon conclusion of the investigation was that a written warning for misconduct was the appropriate outcome. The letter set out Ms Mataire’s responses to the allegations:

- ... You denied applying pressure or coercing [Ms G] to write the email about [Ms T] to Kerry.
- You acknowledged that you discussed the allegations made against you with [Ms G] directly despite being asked formally to keep the information confidential ...
- You acknowledged releasing [Ms G]’s private health information because you were ‘annoyed’ at her for ‘making a complaint against’ you. You confirmed being aware of [Ms G]’s health situation for approximately 3.5 weeks before releasing her health information; however you reported it less than 24 hours following [Ms G]’s submission of concerns to Kerry; ...

[157] The letter set out Emerge’s response to the allegations, noting that the first allegation could not be substantiated due to a lack of evidence in support, but that the second allegation was substantiated.

[158] Ms Mataire was invited to respond to the investigation report and preliminary decision by written submission by 14 December 2017.

[159] Ms Mataire said that despite the fact that she considered the disciplinary process was redundant given she had resigned, she provided written feedback on 14 December 2017 advising that she did not agree that a written warning was a fair or reasonable decision.

[160] On 15 December 2017 Emerge confirmed its decision that a written warning for misconduct was appropriate. Ms Mataire said it did not appear to her that Mr MacKinven had considered her written feedback before issuing the decision.

Discussion

Unjustifiable Disadvantage

[161] As set out in s 103 (1)(b) of the Act a disadvantage grievance requires an unjustifiable action by the employer which affects the employees terms and conditions of employment to their disadvantage.

[162] Ms Mataire must therefore establish that there was some unjustifiable action by Emerge which affected her terms and conditions of employment to her disadvantage.

Was Ms Mataire unjustifiably disadvantaged by Emerge failing to properly investigate allegations about the staff at Forrest Hill?

(i) The process

[163] Ms Mataire claims that the investigation by Emerge of her complaint of verbal abuse at the Forrest Hill was flawed because Emerge failed to interview a key witness [Ms B].

[164] When Ms Mataire made her formal complaint regarding Forrest Hill in December 2015, Emerge responded by appointing a District Manager, unconnected with the facility and the employees who worked there, to conduct an investigation.

[165] That investigation involved two interviews with Ms Mataire and interviews with all the permanent employees at Forrest Hill, including the manager, and a casual employee who was a client advocate. These included the permanent employee [Mr C] whom Ms Mataire had stated would: “stand as a witness”. Whilst Ms Mataire had stated that [Mr C] preferred not to be involved, [Mr C] was nonetheless interviewed and provided evidence.

[166] Emerge elected not to interview [Ms B] whom Ms Mataire had stated: “may be happy to provide evidence.” This was a decision made by Ms Clough, who considered that her pool of interviewees was satisfactory within the context of the complaint.

[167] The outcome of the interviewing process was that no evidence in support of Ms Mataire’s complaint was produced. There was also no supporting evidence from any of the

external parties who had connections with Forrest Hill and which included disinterested parties such as the Health and Disability Commissioner Advocate and auditors from the Ministry of Health, and parties with an interest in the client welfare, namely family members.

[168] There is no evidence that the investigation process was rushed or the conclusion rushed. On the contrary Ms Clough's evidence was that she refused to conclude the investigation until she was satisfied despite some adverse comment by her manager about the length of time the process was taking.

[169] I find that the process conducted by Ms Clough was robust and the fact that Ms B was not interviewed was a reasonable decision made by Ms Clough in light of the evidence she gathered. I find there is no basis of it having affected the conclusion given the weight of evidence collected during the process.

(ii) Bias

[170] It is submitted on behalf of Ms Mataire that Ms Jelesic being present at the interviews with Ms Mataire on 15 and 26 January, and 17 March 2016, was a flaw in the process because Ms Jelesic may have improperly influenced the outcome.

[171] Ms Mataire's evidence was that there was no telephone call from Ms Jelesic prior to the first interview on 15 January 2016, and that she had not opened an email advising that Ms Jelesic would be acting as note taker during the meeting on 15 January 2016. Respective of whether or not Ms Mataire had realised Ms Jelesic would be there prior to the meeting, she was provided with an opportunity to object to Ms Jelesic's presence but did not do so.

[172] I have considered whether or not Ms Mataire may have felt inhibited from making an objection, but the evidence is that Ms Mataire had no difficulty raising concerns during her employment at Emerge. However there is no evidence that she raised an objection to Ms Jelesic being present either at the beginning of the meeting on 15 January 2016, or when she first raised a complaint about the process in emails dated 20 and 22 March 2016.

[173] Indeed in the email dated 22 March 2016 Ms Mataire stated in response to an offer of EAP support: "I do not need support from EAP at all. Marija has spoken to me several times."

[174] I find no evidence that Ms Jelesic was involved in any discussions with Ms Clough regarding the findings of the investigation or influenced the outcome of the investigation process which was conducted by Ms Clough, a person unconnected to Forrest Hill.

(iii) The move to Rathgar Road

[175] During the investigation Ms Mataire who had worked at both the Forrest Hill and Rathgar Road facilities moved to work solely at Rathgar Road. This was as a result of her concern that she did not feel safe being at Forrest Hill whilst the investigation was being conducted.

[176] Ms Mataire said during the Investigation Meeting that she had been content working at Rathgar Road during the investigation process, but she had not wanted to work there on a permanent basis because she found the clients to be more challenging.

[177] The evidence of Ms Clough and Ms Jelesic was that during the meeting held on 17 March 2016 Ms Mataire had been asked if she would like to continue working at Rathgar Road and she confirmed she would.

[178] I accept that the Variation Agreement signed by Ms Mataire on 11 April 2016 documenting the change to Ms Mataire's terms and conditions of employment was backdated to 6 April 2016, but it nonetheless succeeded the meeting on 17 March 2016 when the transfer was discussed with Ms Mataire and she agreed to it.

[179] Ms Mataire's evidence was that the move to Rathgar Road disadvantaged her due to the more challenging clients. Apart from the difference in the sex of the clients at each facility, the evidence was that both sets of clients had similar care needs.

[180] Whilst I accept that from time to time the mix of clients may have made it slightly more challenging to work at one facility rather than the other, I also accept that the mix of clients could, and did, change from time to time. Moreover Ms Mataire worked at Rathgar Road from January until April, and there is no evidence that she raised concern about the workload in that period.

[181] Ms Mataire's evidence was that she suffered depression as a result of the move to Rathgar Road and that the move was not good for her health considering that she had a pre-existing medical condition.

[182] During the Investigation Meeting Ms Mataire confirmed that this information about a pre-existing medical condition had not been provided to Emerge because the medical advice she had was that there was no need to disclose details of her chronic illness to an employer. Consequently Emerge could not have assessed the impact of the move to Rathgar Road in light of its effect on any pre-existing medical condition suffered by Ms Mataire as a result of the move to Rathgar Road.

[183] In addition there is no evidence provided to support Ms Mataire having made known to Emerge her depression or the fact that the move to Rathgar Road had either triggered or exacerbated it as a result of the move to Rathgar Road.

[184] As such Emerge could not reasonably have taken either condition into account when discussing the move on a permanent basis to Rathgar Road with Ms Mataire.

[185] There was no change to Ms Mataire's terms and conditions of employment as a result of her transfer to Rathgar Road, her hours of work, position, duties and remuneration were all unaffected by the move.

(iv) Reputational/emotional damage

[186] Ms Mataire's evidence was that she had experienced hurt, stress and humiliation as a result of the outcome of the investigation, and that she considered that she was regarded as a 'liar'.

[187] I find there is no evidence that supports Ms Mataire's reputation having suffered as a result of the investigation. Her complaint had been taken seriously by Emerge which had conducted a robust investigation, and following the outcome Ms Mataire had been supported by Ms Jelesic in her request for assistance in her wish to become a social worker with Emerge arranging for a supervisor to assist her with her portfolio.

[188] I am supported in this view by an email sent by Ms Mataire to Ms Jelesic dated 9 June 2016 in which Ms Mataire states:

I would like to thank you so much for all the support you gave me during your stay at Rathgar Service, I really appreciate everything you have done for me including being my mentor and a role model. Marija you are a star, continue with your good work.

[189] I determine that Ms Mataire was not unjustifiably disadvantaged by Emerge failing to properly investigate allegations about the staff at Forrest Hill.

Was Ms Mataire unjustifiably disadvantaged by Emerge failing to fulfil a training offer?

[190] Ms Mataire's evidence was that Mr Hopkins had told her that he wanted to encourage her by training her as a MHP and that Emerge would pay for any training. Ms Mataire acted consistently with this advice by applying to AUT.

[191] Mr Hopkins' evidence was that he did not have the authority from Emerge to represent on its behalf that it would pay for any training, but that he had encouraged Ms Mataire to apply for a scholarship from Te Pou.

[192] Ms Mataire was very clear about the representation made to her by Mr Hopkins, and she acted in reliance on that representation by applying to AUT. There is no evidence that she applied to Te Pou and made enquiry about scholarships which would have been expected had Mr Hopkins advised her to do so.

[193] Moreover Mr Hopkins' response when advised by Ms Mataire that she had selected a course at AUT was to reply in such terms to indicate that he was pleased by the information, and I find the words: "Let's have a look and see what it entails" are ambiguous. They were taken by Ms Mataire to mean that they were to examine the course outline rather than funding was to be discussed. I think this understanding was reasonable.

[194] In addition I found Mr Hopkin's evidence to lack certainty about what he may have conveyed to Ms Mataire when they were discussing her future training needs. At the Investigation Meeting his evidence was that he had not told Ms Mataire that Emerge would pay for any courses, but he also stated that he had not informed Ms Mataire definitely that Emerge would not pay for the courses.

[195] I find this renders as reasonable the understanding of Ms Mataire that she could place reliance on Emerge paying for the courses to assist with her professional development.

[196] I find this to be especially the case in that there is no reason why Ms Mataire would have known the limits of Mr Hopkins' authority to commit Emerge in respect of paid training unless he specifically advised her of that fact, and there is no evidence that he did so.

[197] I do not find that the misunderstanding regarding the training funding unjustifiably disadvantaged Ms Mataire: there was no definite offer of paid training such as to form a term of the employment agreement. There is also no evidence that Emerge not funding the training course prevented Ms Mataire from developing in the career she wanted to pursue.

[198] I determine that Ms Mataire was not unjustifiably disadvantaged by Emerge failing to fulfil a training offer.

[199] However I do find that Emerge breached the duty of good faith in respect of the training expectation of Ms Mataire. Pursuant to s 4 of the Act, parties are to deal with each other in good faith. As set out in s4(1)(b) this requires that parties:

...must not, whether directly or indirectly, do anything-

- (i) To mislead or deceive each other; or
- (ii) That is likely to mislead or deceive each other.

[200] I find that Mr Hopkins failed to be sufficiently clear when discussing the training situation and funding with Ms Mataire. This resulted in her having, and acting upon, a reasonable expectation that Emerge would pay for suitable professional training. Once advised that this was not the case, Ms Mataire suffered hurt and her trust and confidence in Emerge was adversely affected.

Was Ms Mataire unjustifiably disadvantaged by Emerge failing to properly consider her for other positions?

[201] Ms Mataire submits that she was disadvantaged by her non-appointment to a 0.5 FTE MHP role at TAT, having been actively discouraged and prevented from so doing by Mr Hopkins.

[202] Mr Hopkins confirmed in an email dated 6 September 2016 that he had advised Ms Mataire that the 0.5 FTE MHP role might not be suitable for her because it involved weekend work based upon his understanding that she preferred not to work weekends. However once advised that his understanding was incorrect, he responded that Ms Mataire was welcome to apply for the role.

[203] However I find that Emerge did encourage Ms Mataire about MHP roles at Emerge:

- (a) By email dated 6 September 2016 Mr Hopkins advised Ms Mataire that she could apply for any vacancy and assured her that any recruitment process would be fair;
- (b) On 5 October 2016 following an email from Ms Mataire in which she raised the issue that Mr Hopkins had approached employees from the casual team to work at TAT which she considered was being done in a discriminatory way; Ms Jelesic reiterated Mr Hopkins' advice that Ms Mataire was welcome to apply for any position within Emerge, and specifically provided detailed information on two vacant MHP roles at TAT;
- (c) Also on 5 October 2016 Ms Ramjee emailed Ms Mataire in connection with a meeting to be arranged to discuss Ms Mataire's concerns about the recruitment process. A meeting to discuss her concerns with Mr Sodhi and Ms Evers took place on 13 October 2016;
- (d) Following the meeting on 13 October 2016 Mr Sodhi investigated Ms Mataire's concerns that employee Ms D who was unqualified for the 0.5 FTE MHP position had been appointed to it, and assured her that was not the case;

- (e) On 14 November 2016 Ms Disley advised Ms Mataire that the 0.5 FTE MHP position remained vacant.

[204] Despite what Ms Mataire may have been told by unqualified employees that they had been interviewed and/or appointed to MHP positions at TAT, this was not correct and she had been informed by both Ms Jelesic and Ms Disley that the 0.5 FTE MHP position at TAT was still vacant.

[205] In addition Mr Sodhi had advised Ms Mataire that Ms D had been appointed, not to a MHP role, but to a Community Support Worker role. This information was reiterated by Ms Ramjee in a meeting held with Ms Mataire on 12 May 2017 and she was again advised that the 0.5 FTE MHP position was vacant.

[206] I find that Emerge was active in encouraging Ms Mataire to apply for other positions in the organisation. In particular despite Ms Mataire's belief based upon what she had been told by the employees in question about appointments to positions for which they were not qualified, they had not in fact been appointed to MHP positions or the 0.5 FTE MHP position at TAT. She was advised of this on a number of occasions by various members of the management team.

[207] I accept that Ms Mataire was not successful in the applications which she did make for other positions within Emerge. However I find no evidence that Ms Mataire was discriminated against in relation to the recruitment process, racially or otherwise: the information about vacancies was available on the Emerge website and the recruitment process involved a decision made by a panel, rather than by an individual.

[208] Ms Mataire had been provided with feedback by the panel who explained her lack of success was attributable to her lack of experience. I note Ms Jelesic's evidence that Ms Mataire had been offered the opportunity to apply for funding and grants from Emerge to assist her gaining this experience.

[209] The information provided included that the 0.5 FTE MHP position at TAT was still vacant. This meant that despite Ms Mataire's belief to the contrary regarding the 'shoulder-tapping' approach to appointment filling, she had sufficient information available from which to conclude that unqualified people were not being given preferment for positions.

[210] None of Ms Mataire's terms and conditions of employment were affected by her not being successful in her applications for other roles.

[211] I determine that Ms Mataire was not unjustifiably disadvantaged by Emerge failing to properly consider her for other positions.

Was Ms Mataire constructively dismissed by Emerge?

[212] An employee is usually entitled to resign from their employment on a unilateral basis. The agreement of the employer to such unilateral notice is not required; the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.¹

[213] There is no obligation on the employer to dissuade the employee from leaving, although he or she may choose to do so in some cases. An employee who has resigned has not been dismissed.

[214] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[215] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ)* there are three fundamental situations in which a constructive dismissal claim may arise.² These are:

- a) An employee is given a choice between resigning and being dismissed;
- b) There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- c) There had been a breach of duty by the employer which causes an employee to resign.³

[216] Ms Mataire is claiming a breach of duty on the part of Emerge, or in the alternative that there was a course of conduct followed by Emerge with the intention of coercing her to resign.

¹ *Stiffe v Wilson & Horton* 12/00 AC 94/100, AEC 106/00 at para 21

² *Auckland etc Shop Employees etc IUOW v Woolworths (NZ)* [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

³ Cf: *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

[217] The leading case in the third category of constructive dismissal, a breach of duty, is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*. The Court of Appeal in examining the question of constructive dismissal observed:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.⁴

[218] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- a) First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- b) Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[219] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁵ observed in describing this type of constructive dismissal:⁶

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[220] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employer, made in circumstances where he or she had no other option.

[221] Therefore in examining whether a constructive dismissal has occurred two questions arise:

⁴ *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW* [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA) at [172]

⁵ *Harrod v DMG World Media (NZ) Ltd* [1983] ACJ 965

⁶ at [975]

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[222] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.⁷

(a) *Breach of Duty*

[223] Ms Mataire submits that the disciplinary process was informed by a number of issues which gave rise to a breach of duty and repudiation of contract and made it reasonable for her to infer that Emerge's motivation for the disciplinary meeting was to remove her from her employment at Emerge. I shall address each issue which were as follows:

- i. The Forrest Hill process was flawed because Emerge failed to interview a key witness;
- ii. Emerge misled Ms Mataire about Ms Jelesic's involvement in the Forrest Hill investigation;
- iii. Ms Mataire was required to sign a backdated variation document requiring her to transfer to Rathgar Raid on a full-time basis, a more stressful environment because of higher need clients;
- iv. The withdrawal of paid training;
- v. Ms Mataire being actively discouraged from applying for vacant roles at TAT by Mr Hopkins and the failure by Emerge to follow up on this concern;
- vi. Being turned down for eight MHP roles;
- vii. Being subjected to behaviour by Mr Hopkins which contributed to a negative work environment i.e. his swearing in the workplace;
- viii. The complaint to Ms Disley which was handled dismissively;
- ix. After raising complaints, being accused by Mr MacKinven of not acting within Emerge's values and questioning the honesty and integrity of Ms Jelesic which complaints were not investigated;

⁷ *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

- x. Ms Mataire being actively ignored by Ms T, and this concern not being properly investigated;
- xi. Ms Mataire being required to obtain medical clearance; and
- xii. The failure to investigate the verbal complaint of client abuse in May 2017.

i. Forrest Hill process flawed as a result of it not interviewing a key witness

[224] I have found that the investigation carried out by Emerge was thorough and that the decision not to interview one employee was not influential as regards the outcome given the weight of other witness evidence.

[225] Ms Mataire raised concerns that the investigation process was flawed. These concerns were taken seriously by Emerge and investigated at a senior level by a Regional Manager, the HR department and the CEO.

[226] I accept that Ms Mataire was aggrieved by the outcome of the Forrest Hill investigation because the evidence of that investigation did not support her allegations. However I find no evidence that Emerge acted in such a way as to constitute a breach of contract and repudiate the employment relationship.

ii. Misleading Ms Mataire about Ms Jelesic's involvement in the Forrest Hill investigation.

[227] Ms Jelesic's evidence was that she had advised Ms Mataire that she would be present at the first interview with Ms Clough in the capacity of minute taker by telephone and email. Ms Mataire's evidence was that there was no telephone call and she had not opened the email.

[228] I find there was no attempt by Emerge to mislead Ms Mataire about Ms Jelesic's involvement which was limited to a note taker capacity in the initial meeting only. Moreover Ms Mataire did not voice any concern about Ms Jelesic's involvement at the meeting on 15 January 2016.

[229] Ms Jelesic was present at the meeting regarding the permanent transfer to Rathgar Road. Ms Jelesic was the District Manager for both Forrest Hill and Rathgar Road and it was appropriate that she be present in a situation regarding staffing which affected both services.

[230] I find no evidence that Emerge mislead Ms Mataire about Ms Jelesic's involvement in the Forrest Hill investigation in which she took no active part in the investigation into the complaint or the outcome decision and nothing inappropriate in her attendance.

[231] I find no evidence that that Emerge acted in such a way as to constitute a breach of contract and repudiate the employment relationship.

iii. The Variation Agreement backdating

[232] I have found that the dating of the variation document took place after the meeting held on 17 March 2016 when Ms Mataire agreed to transfer to Rathgar Road.

[233] I find no evidence in the dating of the Variation Agreement that Emerge acted in such a way as to constitute a breach of contract and repudiate the employment relationship.

iv. Withdrawal of paid training

[234] I have found that there was a breach of good faith on the part of Mr Hopkins. However I do not find that alone is evidence that Emerge acted in such a way as to constitute a breach of contract and repudiate the employment relationship.

v. Being actively discouraged from applying for vacant roles at TAT by Mr Hopkins, and the failure by Emerge to follow up on this concern;

[235] After Ms Mataire told Mr Hopkins that she was able to work weekends, he emailed her on 6 September 2016 and advised that she was welcome to apply for any position.

[236] When Ms Mataire raised her concerns with Ms Jelesic on 5 October 2016 Ms Jelesic responded to her that same day confirming that the 0.5 FTE MHP role was still vacant, and providing details of all the MHP positions available.

[237] Mr Sodhi and Ms Evers explained the process for applying for jobs to Ms Mataire during the meeting on 13 October 2016, and explained Emerge's policy about recruitment.

[238] Ms Disley advised Ms Mataire on that the 0.5 FTE MHP role was still available, and provided Ms Mataire with a link to the Emerge jobs intranet website.

[239] After Ms Mataire had raised her concern about being discouraged from applying for the MHP role at TAT, she had positive responses from not only Mr Hopkins, but the District and regional Managers, HR and the CEO.

[240] I find no evidence that that Emerge acted in such a way as to constitute a breach of contract and repudiate the employment relationship.

vi. Being turned down for eight MHP roles;

[241] It was explained to Ms Mataire that all positions were advertised and there would be an interview panel consisting of three Service Managers.

[242] Ms Mataire was not successful in the MHP positions for which she applied, this was on the basis that she lacked sufficient mental health experience. There is no evidence that Ms Mataire was unjustly discriminated by Emerge during the interview process. Her application was considered alongside the job criteria.

[243] On 21 October 2016 Ms Jelesic advised Ms Mataire that she was welcome to apply for grants and funding from Emerge to assist with her professional development, and I note that supervision had been provided by Emerge to assist Ms Mataire in obtaining her SWRB Registration, support she acknowledged with thanks in November 2016.

[244] Ms Mataire did not apply for the 0.5 FTE MHP position in a timely manner after being advised that it was still available in October and December 2016.

[245] Ms T was eventually appointed to the position in July 2017. Ms Mataire was interviewed for the position but was not successful because she did not have training and mentoring skills which were two advertised criteria, and which Ms T did have. I note also that Ms Mataire had thanked Ms T in her email dated 10 November 2016 for her support in helping Ms Mataire obtain the SWRB Registration.

[246] I find no evidence that Emerge acted in such a way as to constitute a breach of contract and repudiate the employment relationship.

vii. Swearing by Mr Hopkins;

[247] Ms Mataire's evidence was that she was upset by Mr Hopkins swearing in the workplace. Whilst Mr Hopkins confirmed he had sworn in the workplace, and clearly this took place whilst Ms Mataire was present, his evidence was that it was not Ms Mataire who had complained to him about his swearing but another team member who had made him aware that she objected to his swearing.

[248] Once made aware that his swearing was not acceptable to the team, he had apologised to the whole team.

[249] Mr Hopkins had left Auckland shortly thereafter.

[250] There is no evidence that the swearing was either directed at Ms Mataire or was used with the intention to offend, and I find no evidence that Emerge acted in such a way as a result of this issue to constitute a breach of contract and repudiate the employment relationship.

viii. Dismissive handling of complaint by Ms Disley

[251] The complaint to Ms Disley was handled by her involving the GM of HR, Ms Coom, to investigate the issues raised by Ms Mataire. There is no evidence that Ms Coom failed to investigate Ms Mataire's concerns properly, I note Ms Ramjee's evidence that Ms Coom had contacted her for information about the recruitment process.

[252] Once the investigation was complete, Ms Disley responded to Ms Mataire confirming that she was satisfied that the recruitment processes were fair, noting that the 0.5 FTE MHP position about which Ms Mataire had complained was still vacant, and providing a link to the job website to assist her with applications.

[253] I take into account Ms Jelesic's evidence that she was aware of the complaint of racial discrimination and was aware that the three African employees referred to by Ms Mataire were not qualified for the positions concerned, and that they had been offered similar support in regard to obtaining the necessary qualifications as Ms Mataire herself.

[254] I find no evidence that Ms Disley was dismissive in her handling of Ms Mataire's complaint, and no evidence that Emerge acted in such a way as a result of this issue to constitute a breach of contract and repudiate the employment relationship.

xi. Claim not acting in accordance with policies and complaints about Ms Jelesic not investigated;

[255] In respect of the complaints about Ms Jelesic, Ms Mataire was questioning her honesty and integrity which I find to be at variance with the positive comments Ms Mataire made concerning Ms Jelesic's support of her during the period of Ms Mataire's employment e.g.:

- 10 June 2016 in an email to Ms Jelesic: "I would like to thank you so much for all the support you gave me during your stay at Rathgar Service, I really appreciate everything you have done for me including being my mentor and a role model. Marija you are a star, continue with your good work."
- 6 October 2016 in an email to Ms Ramjee: "Thank you very much for all the support I am getting from Marija and the HR."
- 10 October 2016 in an email to Ms Jelesic thanking Ms Jelesic for explaining the key responsibilities of the MNP role: "At this time I fell you have answered all my questions and I cannot ask for anything else."
- 10 November 2016 in an email to Ms Jelesic and Ms T: "Many thanks to you, Marija and [T] for all the support you gave me to get my SWRB registration."

[256] However the mediation document wording indicates that the complaint about Mss Jelesic was raised, and addressed as part of that mediation.

[257] The claim that Ms Mataire was not adhering to the Emerge policies and procedures arose as part of the disciplinary process within the context of the allegations made against Ms Mataire.

[258] Employees invited to attend a disciplinary process are entitled to know the nature of any allegations and this includes being advised of the context against which the allegations will be considered.

[259] I find no evidence that Emerge acted in such a way as a result of these issues to constitute a breach of contract and repudiate the employment relationship.

x. Concern about treatment by Ms T not being properly investigated;

[260] Ms Mataire complained that Ms T had ignored her on two occasions. On each occasion there were no witnesses. When advised of Ms Mataire's complaint, Ms Debrah met with her in a timely manner to obtain details of her concern about the issue, and subsequently met with Ms T, who did not have any recollection of ignoring Ms Mataire.

[261] Ms Debrah informed Ms Jelesic about Ms Mataire's complaint that she had been deliberately ignored by Ms T. Ms Jelesic in considering the issue took account of the history of the relationship between Ms Mataire and Ms T in reaching her view that it was unlikely Ms T had deliberately ignored Ms Mataire.

[262] I find that this view was not an unreasonable view given the circumstances in which the relationship between Ms Mataire and Ms T had been that of supervision in which Ms Mataire had acknowledged Ms T's assistance with thanks in an email dated 10 November 2016.

[263] I find that Emerge did investigate Ms Mataire's complaint and find no evidence that Emerge acted in such a way as a result of this issue to constitute a breach of contract and repudiate the employment relationship.

xi. Being required to obtain medical clearance

[264] A good employer is expected to ensure employees have a safe working environment. The circumstances in which Ms Mataire was asked to obtain a medical certificate on 5 October 2017 were that at the time Ms T visited Rathgar Road on 5 September 2020 she had just returned to work after a period of sick leave.

[265] During the staff meeting that day, Ms Debrah had been concerned about Ms Mataire's well-being and had enquired if she was feeling well. Whilst Ms Mataire had replied in the affirmative on that occasion, Ms Debrah said she had reported feeling unwell mentally and physically during a supervision session on 27 September 2017. Ms Debrah thought the issue serious enough to report it to Ms Jelesic.

[266] When advised Mr MacKinven was concerned sufficiently to ask Ms Mataire to provide medical confirmation she was well enough to be in the workplace.

[267] I note that Emerge is a challenging environment in which to work because the clients have high needs for care and support. I consider it to be reasonable that Emerge, alerted to the fact that Ms Mataire had voiced that she was feeling mentally and physically unwell, should ask for medical confirmation that her health was such that it was appropriate for her to be in the workplace to avoid putting her health or that of others at risk.

[268] I find no evidence that Emerge, by requesting medical clearance for Ms Mataire, acted in such a way as a result of this issue to constitute a breach of contract and repudiate the employment relationship.

xi. Complaint of client abuse not being investigated

[269] This issue was raised outside of the statutory 90 day timeframe for raising a personal grievance. However I make the observation that whilst Ms Mataire's evidence is that she complained verbally about treatment of the client and sent a photograph of bruising to Ms Debrah, Ms Debrah's evidence was that the nature of the particular client meant that Emerge had her checked by a doctor whenever bruising was noticed. If bruising had been brought to her attention, she was confident it would have been dealt with in the same way as usual.

[270] Ms Mataire was a party to the email sent to Ms Debrah and dated 12 May 2017, the same day Ms Mataire sent a photograph of bruising to her. The email set out concerns of the staff about the client, which also addressed the nature of the client which had made the staff concerned about their own health and safety.

[271] I find no evidence that Emerge acted in such a way as a result of this issue to constitute a breach of contract and repudiate the employment relationship.

Summary

[272] Having considered the interactions between Ms Mataire and Emerge, I find no evidence that Emerge acted in such a way as to constitute a breach of contract and repudiate the contract between them.

[273] Throughout her employment with Emerge, Ms Mataire made a number of complaints to which I have found Emerge to have given consideration and investigated. Members of management at various levels of seniority met with Ms Mataire on a number of occasions to discuss her concerns and try to reassure her.

[274] Ms Mataire believed that casual, unqualified employees were being appointed to MHP positions, but despite being informed several times that this was not the case, she persisted in this belief which I consider to have influenced adversely her view of Emerge and its behaviour towards her.

[275] I observe also that Emerge encouraged and supported Ms Mataire towards her goal of being a MHP, which help she acknowledged in the email dated 10 November 2016.

[276] Emerge had a concern about Ms Mataire divulging personal medical information about a colleague and the timing of that. An employer is entitled to raise issues with employees and to meet with the employee to discuss them.

[277] During that process the employer must act reasonably and fairly by advising the employee of his or her right to representation, to advise the employee of the nature of the allegations, to provide the employee with an opportunity to provide an explanation, and genuinely consider that explanation.

[278] Emerge followed the above process. Although Ms Mataire chose to resign during the process, she was given time to reconsider that decision, but having chosen not to do so, I find Emerge was entitled to continue with the process to its conclusion. I find no grounds for concluding that Emerge did not genuinely consider Ms Mataire's explanation.

[279] I find no breach of duty or repudiation of contract or by Emerge and no constructive dismissal on that basis.

b. 'The Last Straw'

[280] It is submitted for Ms Mataire in the alternative that Emerge's actions over a lengthy period of time constituted a course of action with the deliberate and dominant purpose of coercing her to resign. The ultimate trigger or 'last straw' for this it is submitted was the disciplinary process where it was alleged that Ms Mataire had 'coerced' Ms G to make a complaint against Ms T, and inappropriately disclosed confidential information regarding Ms G's health status.

[281] It is submitted that, given everything that had occurred prior to receiving the disciplinary meeting invitation letter, it was reasonable for Ms Mataire to infer that the disciplinary process was motivated by a desire by Emerge to remove her from the business.

[282] It is submitted that the disciplinary process was purely opportunistic and retaliatory and had a profound impact on Ms Mataire and was the final affront which forced her hand.

[283] It is submitted for Emerge that there has been no breach of obligation on the part of Emerge, in that it dealt with all complaints and issues raised by Ms Mataire in a fair and reasonable way.

[284] Further it is submitted that Emerge provided significant support for Ms Mataire by:

- (i) responding to her to reassure her about the recruitment process and providing support for the roles;
- (ii) meeting with her in May 2016 to listen to her concerns and reporting back to her;
- (iii) investigating when she raised concerns about her treatment; (iv) attending mediation with her and agreeing to move forward in a positive way;
- (iv) investigating complaints she raised (Forrest Hill, Ms T); and
- (v) showing concern for her health.

[285] As set out above I have already found no breach of duty on the part of Emerge, and that it acted as a fair and reasonable employer during the disciplinary process.

[286] On that basis I am unable to conclude that Emerge followed a course of action with the deliberate intention of forcing Ms Mataire to resign. That would be at variance with the support it offered her throughout her employment to achieve her career aspirations.

[287] Moreover I also find it significant that Ms Mataire continued in her employment with Emerge and reaffirmed the employment relationship following the actions she claimed constituted a breach of duty and repudiation of contract. She also continued to work out her notice period following her resignation.

[288] I determine that Ms Mataire was not constructively dismissed by Emerge.

Remedies

[289] I have found that there was a breach of good faith by Emerge in its duty of good faith to Ms Mataire in respect of her paid training expectation.

[290] A penalty can be awarded for a breach of good faith on the application of a party to the employment agreement who has been affected by the breach.⁸

[291] Ms Mataire has however not made an application for a penalty and therefore I am unable to award one.

Costs

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

[293] If they are not able to do so and an Authority determination on costs is needed the Applicant 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 the Respondent 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.

[294] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[295] 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.⁹

Eleanor Robinson
Member of the Employment Relations Authority

⁸ Section 135(1)(a) of the Employment Relations Act 2000.

⁹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].