

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 388
5459353**

BETWEEN MICHAEL NAGER
 Applicant

AND NORTHLAND REGIONAL
 COUNCIL
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Catherine Stewart, Counsel for Applicant
 Don MacKinnon, Counsel for Respondent

Investigation Meeting: 20 – 23 October 2015 at Whangarei

Submissions received: 5 November 2015 from Applicant
 5 November 2015 from Respondent

Determination: 9 December 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Michael Nager (now known as Michael Henwood), claims that he was unjustifiably dismissed by the Respondent, Northland Regional Council (the Council), on 17 March 2014.

[2] Mr Nager also claims that he was unjustifiably disadvantaged by certain actions of the Council during the course of his employment which constituted a pattern of bullying and harassment, and that there was a breach of good faith on the part of the Council.

[3] The Council denies that Mr Nager was unjustifiably dismissed or unjustifiably disadvantaged or that it breached the duty of good faith in its dealings with him during the course of his employment.

Issues

[4] The issues for determination are whether or not:

- Mr Nager was unjustifiably disadvantaged during the course of his employment as a result of the Council:
 - failing to remove a Council owned vehicle (allocated to Mr Nager) from Mr Nager's premises following an assault by third parties on Mr Nager (the Assault);
 - failing to provide support during the period Mr Nager was absent from work (as a result of the Assault) and following his return to work;
 - asking Mr Nager to sign the email dated 5 August 2014;
 - requiring Mr Nager to continue to use the vehicle he was using at the time of the assault on 10 June 2013 (the 'old' vehicle);
 - initiating an investigatory process;
 - proposing that Mr Nager should work from the Council's Whangarei office should he return to work;
 - refusing to destroy the first ACC report initially;
 - holding a meeting on 14 March 2014
- The alleged unjustifiable disadvantage actions constitute a pattern of bullying and harassment;
- Mr Nager was unjustifiably dismissed by the Council;
- the Council breached the duty of good faith it owed to Mr Nager during the course of his employment

Note

[5] I have considered all of the evidence given, information provided and submissions made during the preparation of this determination, however as permitted by s 174 of the Employment Relations Act 2000 (the Act) I have not set out a full record of these matters. I have however stated findings of fact and law and expressed my conclusions on those matters and/or issues that require determination in order to dispose of the matter; and have specified the orders made as a result.

Background facts

[6] The Council is a local government authority with its Head Office located in Whangarei and three regional offices in Dargaville, Kaitaia and Opuā. The Council has operational teams responsible for a range of environmental activities which include consenting, monitoring, planning and policy and economic development.

[7] There are approximately 160 employees, of whom 7 full-time employees work at the Opuā office, in addition to two full-time Environmental Monitoring Officers (EMO).

[8] Mr Nager commenced employment with the Council on 6 April 2010 in the position of EMO based at Opuā.

[9] Mr Nager's role as an EMO was primarily to inspect resource consents that had been issued and to monitor the consent activities to make sure that any conditions associated with those consents were being met. EMOs also have a number of other responsibilities including collection of environmental data and samples, testing, and the investigation of complaints by members of the public.

[10] The Council runs a 'Hotline' where members of the public can ring in to raise concerns or lodge complaints which sometimes require an immediate response and investigation. Staff working on the Hotline operated according to a roster, the manning of which is voluntary, and which merited a financial allowance being made. Mr Nager regularly worked on the Hotline during the course of his employment with the Council.

[11] Mr Nager was employed pursuant to an individual employment agreement (the Employment Agreement). The Employment Agreement stated at para.26:

Policies and Procedures

The Employee agrees to abide by Council policies and procedures (specifically those contained in the Delegations Manual, Health and Safety Manual, Human Resources Manual and Management Policy and Procedures Manual with any amendments, deletions and additions ...).

The Assault and Immediate Aftermath

[12] On 10 June 2013 Mr Nager was the subject of the Assault. Prior to the Assault, Mr Nager was involved in two quite complicated cases, one in Hokianga and the other north of Kaitaia. The second of the cases involved two companies, Sovereign Station Trustees and Manganui Development and Civil Construction (Sovereign) as well as a Mr Bird and Mr Beckham. There were allegations that these parties had caused substantial damage to important wetlands in the area.

[13] The Council decided to prosecute both companies and their two directors, and asked Mr Nager as the main EMO who had been inspecting the wetlands, to give evidence in the prosecution.

[14] On 10 June 2013 Mr Nager was due to give evidence on behalf of the Council in the Whangarei District Court regarding the alleged breach of an enforcement order. He was travelling in a Council marked vehicle to the District Court in Whangarei when he was stopped and assaulted by two men. During the course of the Assault bleach was thrown into his face and he was subsequently taken to Whangarei Hospital where he was seen by an eye specialist.

[15] Mr Colin Dall, Consents/Monitoring Manager, was the first Council employee to be advised of the assault on Mr Nager, and he contacted Ms Judy Macdonald, Human Resource Manager, and told her that Mr Nager had been attacked on his way to Whangarei.

[16] After speaking to Mr Dall, Ms Macdonald telephoned Mr Nager's partner on her cell phone and subsequently spoke to Mr Nager. Ms Macdonald said that she and Mr Nager discussed what action the Police were taking, especially in terms of the immediate issue of his safety.

[17] She advised Mr Nager that he could obtain counselling which would be paid for by the Council in addition to any other services offered by Victim Support and that this counselling would also be made available for his partner. Ms Macdonald also informed Mr Nager that Mr Malcolm Nicolson, the CEO and other employees would want to contact him when he was well enough, and Mr Nager agreed to this.

[18] Ms Macdonald said she and Mr Nager also discussed matters such as the medical treatment Mr Nager was to receive and the loss of his mobile telephone. They had also briefly discussed his involvement in the Sovereign case and she had indicated that this was something that would be talked through with him in due course.

[19] Mr Nager was medically certified as unfit for work from 10 June until 17 June 2010. He and his family moved to a safe house for approximately one week after the Assault at the recommendation of the Police.

[20] Ms Macdonald said she had kept in close contact with Mr Nager during his period of absence and that Mr Nager was generally quite positive and very determined to get back to work.

[21] Mr Dall said he was in regular contact with Mr Nager, mainly by telephone, over the following weeks after the Assault.

[22] Ms Theresa Dacre, Monitoring Programme Manager/Water and Waste, and Mr Nager's immediate manager reporting to Mr Dall, also said that she had been in touch with Mr Nager following the Assault and provided by way of evidence a printout from Telecom which indicated that she had made contact either by telephone or text messages on ten occasions between the period 11 to 18 June 2013.

[23] Mr Nager confirmed at the Investigation Meeting that Ms Macdonald, Mr Dall and Ms Dacre had been supportive during the period following the assault prior to his return to the workplace on 20 June 2013.

Vehicle removal

[24] Following the Assault, the Council owned vehicle driven by Mr Nager at the time of the Assault, had been returned by the Police to Mr Nager's home address. Mr Nager had been concerned that the vehicle could be a target for those who had assaulted him, and on 11 June 2013 he asked Ms Dacre to have the vehicle removed.

[25] Mr Nager said it took the Council eight days to remove the vehicle he had been driving at the time of the Assault from his property, despite his having requested Ms Dacre on several occasions to have the vehicle removed. He referred to some diary entries as supporting this statement.

[26] Ms Dacre said that she recalled Ms Nager asking for the vehicle's removal on two occasions, once in a conversation and once just prior to his returning home on 17 June 2013 from the safe house. On each occasion, it was she who had initiated the call to Mr Nager, on neither occasion had she felt there was any urgency attached to the request.

[27] Moreover she said Mr Nager had not been at his home immediately following the Assault, nor had the Police, who returned the vehicle to his property after the Assault, raised the vehicle's removal as a safety issue with her.

[28] On 17 June 2013 Ms Dacre sent a text to Mr Nager telling him that the vehicle would be collected the following day to which he responded: "*Thanks Jess*", and the vehicle was duly collected the following day as promised

[29] Ms Dacre confirmed that she had not been aware that the location of the vehicle at Mr Nager's home was upsetting him, or that the removal of it was to be a priority.

Return to work 20 June 2013

[30] Mr Nager returned to work following medical clearance from his GP on 20 June 2013.

[31] Mr Nicolson said he met with Mr Nager on the day he returned to work, 20 June 2013. During the meeting he said that Mr Nager was very positive about returning to work and he appeared to be appreciative of the support he had received to that point. He had emphasised that the Council would look at any additional support Mr Nager felt he required and stated that Mr Nager could approach him at any time if he had the need.

[32] Mr Nicolson said Mr Nager mentioned that he was concerned that the Assault and his giving evidence in the Sovereign case might be linked and expressed concern about having to give evidence. He had explained that he was not sure how essential Mr Nager's evidence would be but he would get a briefing from Mr Dall to understand the timeline and how important it would be that Mr Nager remain involved.

[33] On 6 August 2013 Mr Nager wrote to the Crown Prosecutor, with a copy sent to Mr Nicholson. In the letter Mr Nager requested that he not be required to provide evidence in the Sovereign case and offered to discuss the matter with the Crown Prosecutor.

[34] Mr Nicolson said upon Mr Nager's return to work he was provided by the Council with an unmarked car which had a camera installed in it. Mr Nager said that he had considered the camera to be: "*a joke*" however he did not mention this to his managers.

[35] Ms Macdonald said that although Mr Nager had been certified as fit to return to work on 20 June 2013, she had been concerned that his return was so soon following the Assault on him, and she had arranged for him to see Dr McLeod, a doctor based in Whangarei who had a good understanding of the type of work carried out by Council employees. On 20 June 2013 Ms Macdonald emailed Mr Dall, Ms Dacre and Mr Rowland stating:

I have arranged an appointment for Mike Nager with Dr Jim McLeod for Tuesday 25th June 2013 at 2.30pm. I will brief Jim before this appointment so he knows some of his history – last appointment was 11 March 2013.

[36] Mr Nager said that he believed that Dr McLeod had been instructed by Ms Macdonald on what the outcome of his visit should be, however Ms Macdonald denied this and said her brief had been limited to the circumstances of Mr Nager's Assault and the ambit of his role as an EMO. She pointed out that she was not medically qualified to do otherwise.

Meeting with Mr Murray Rowlands 25 June 2013

[37] Mr Nager said he had met with Mr Murray Rowlands, Health and Safety Advisor, on 25 June 2013. Mr Rowlands said that Mr Nager had discussed his situation, and said that he had felt he was being ignored by the Council. He had also discussed the fact that he was receiving counselling, and that he had an appointment to see Dr McLeod.

[38] He also said that Mr Nager had told him that if Dr McLeod's report was contrary to that of his own GP, he would oppose it. Mr Nager had also made a comment to him about not remaining with the Council, and had mentioned redundancy. He said that although Mr Nager had mentioned being ignored, he had not understood that to be the case as Mr Nager's managers were all communicating with him.

[39] Following their meeting, Mr Rowlands emailed Mr Dall and Ms Macdonald. The email dated 25 June 2013 stated:

Mike came and spoke to me this morning and reiterated his complaint of no one making contact with him. He said no one has asked him any questions not even staff and feels ignored.

Him and his wife are seeing Victim Support Services and feels this is important as they are both struggling to cope.

I asked him of his visit to Dr Jim and he made a remark that if the report was different to the one his doctor or ACC have he will challenge it.

He also made a vague comment about not being here in a couple of months, ask what he meant he said leave NRC.

Not sure if this is an attempt at attention seeking or what, but thought I'd best pass it on. ...

[40] Ms Macdonald said that she had been concerned and disappointed to hear from Mr Rowlands that Mr Nager had felt unsupported during this period as following his return to work on 20 June 2013 she had kept in regular contact with Mr Nager dealing with a number of matters including meeting his medical costs and replacing his suit which had been damaged in the Assault.

[41] Mr Dall also said he was in regular contact with Mr Nager, mainly by telephone, initially and once he returned to work.

[42] Ms Dacre said that she had considered it inappropriate that she discussed the assault with Mr Nager as he was receiving counselling and she was not qualified to deal with such an issue; however she had been in regular contact on normal work issues following his return to work.

Meetings with Dr McLeod

[43] Dr McLeod met with Mr Nager on 25 June 2013, and declared him fit for work subject to certain restrictions which were set out in an email he wrote to Ms Macdonald and Mr Nager on 25 June 2013 as being:

long distance driving;

Hotline and on call/incident work;

*Routine monitoring or visits with clients he knows but does not trust;
and*

Unknown clients i.e. new clients

[44] On 5 July 2013 Mr Nager emailed Ms Macdonald requesting a meeting to discuss Dr McLeod's recommendations, commented that he was sleeping better, felt comfortable going to some incidents, and the counselling NRC was funding had helped him a lot. Mr Nager asked if Ms Macdonald wanted him to see Dr McLeod again before undertaking more duties.

[45] Ms Macdonald emailed Mr Nager on 10 July 2013 referring to a meeting between Mr Nager, Mr Dall, Ms Dacre and herself the previous day and reiterated an offer made during the meeting that Mr Nager should contact them if he had any questions or concerns regarding work, and reminding him that counselling continued to be available to him.

[46] Ms Macdonald also referred to the Sovereign case stating:

It is also noted that you should have no involvement with any work related to Beckham and Bird. Also that any continued involvement with the Sovereign case would be discussed and agreed in advance of this occurring.

[47] On 12 July 2013 Mr Nager had visited his own GP and had asked for another clearance to return to work on full duties which had been duly provided to him.

[48] Ms Macdonald arranged for Mr Nager to see Dr McLeod again on 26 July 2013. Following his examination of Mr Nager, Dr McLeod emailed Ms Macdonald and Mr Nager stating:

I have reviewed Mike today and have discussed with him returning to normal duties including being on hotline duty.

He expressed some dissatisfaction with not being back on normal duties given a clearance he had received from his doctor.

He stated that contrary to the recommendations in my last email, he had been doing normal duties, bar being on the hotline call roster. That is, he had done call outs, driven long distances and responses to unknown people and areas in the course of his normal hours. He has coped with this.

I cannot comment as to the accuracy of these statements but report them as Mike was sounding very frustrated by these issues.

He states that he has court dates set for the future and feels able to manage these.

He feels that the risks are therefore no different for this time compared to after-hours work.

I discussed with him the possibility of meeting people who may be responsible for his assault. I also discussed with him the possible Court appearances for the case potentially related to the assault. ... He believes he can cope with this. He states both his doctor and his counsellor believe he is fit for normal work including call work.

After further discussion with regards to Mike's health I find that he is fit to return to his normal work including call work.

[49] At the Investigation Meeting Mr Nager confirmed that the Council would not have been aware that he had been undertaking the restricted duties as identified by Dr McLeod in the email dated 25 June 2013.

Meeting 2 August 2013

[50] Ms Macdonald said that despite Dr McLeod having cleared Mr Nager to return to work on full duties including all call outs and hotline responsibilities on 26 July 2013, she needed to ensure that the Council was taking the necessary steps to ensure Mr Nager's safety at work. Accordingly she set up a meeting with Mr Nager, which took place on 2 August 2013.

[51] The meeting held on 2 August 2013 to discuss Mr Nager's return to full duties was attended by Ms Macdonald, Mr Dall, Ms Dacre, Mr Rowland and Mr Nager.

[52] Ms Macdonald made minutes of the meeting which were given to Mr Nager for checking that same day and he confirmed at the Investigation Meeting that he had raised no objections that they were inaccurate at that time. The minutes note the following actions as having been agreed during the course of the meeting:

1. *Mike to attend CERT training including any one on one training that can be arranged (action: Mike/Murray)*
2. *When on hotline Mike to use his old NRC vehicle (noting that he is currently in an unmarked vehicle)*
3. *Colin to review if Mike's vehicle can be made plain with just magnetic stickers that can be applied on and off (Colin/Mike)*
4. *Jude to prepare declaration that Mike can sign re hotline (Jude/Mike)*
5. *Mike being placed on hotline roster would therefore be deferred until the next roster (Tess)*

[53] Mr Nager said that he had felt overwhelmed by the number of managers present at the meeting and that he was not given any option or choice in the matters discussed, he believed that his opinion did not count and he felt he had to accept management's conditions or not return to full duties.

[54] Mr Dall said that during this meeting he, and the other members of management present, were concerned primarily about Mr Nager's safety and health. During the meeting it had been emphasised that the Council had concerns about jeopardising Mr Nager's safety. However Mr Nager was of the firm view that he should now be doing his full role.

[55] The minutes also note that concerns had been raised regarding Mr Nager's return to Hotline duties and the recent assault and noted that Mr Nager stated: "*there was an element of risk in everything he did and in the instance of Bird or Beckham ringing Hotline he would contact the police and in the event of the Crown prosecution he would be provided with suitable protection*".

[56] The minutes noted and set out the various agreed points as being:

(i) *CERT Training*

[57] Mr Dall said it was agreed that Mr Nager would attend some further CERT training, this being specific compliance, enforcement and security focused training for compliance enforcement and regulatory personnel.

(ii) Use of the 'old' vehicle and vehicle markings

[58] Mr Dall explained that Council vehicles were marked with logo identifying them as such which was to protect employees carrying out their duties on official Council business. The Council considered that this enhanced staff safety, particularly when they are accessing private property during the course of their work, and was particularly important when carrying out Hotline duties.

[59] Mr Nager said that he had not realised that the discussion at the meeting about the marked vehicle he would be required to use when he returned to full duties would be the vehicle he had been driving on 10 June 2013.

[60] All the members of the Council management present at the meeting confirmed that it had been made very clear to Mr Nager that it was the vehicle which he had been driving at the time of the Assault, referred to as the 'old' vehicle, and that he had raised no objections to this.

[61] Mr Dall said that Mr Nager had no issues with driving the 'old' vehicle, other than he was not fully comfortable about using a permanently marked vehicle all the time. He had therefore offered to investigate if it could be made plain by removing the sign writing from the vehicle and using magnetic stickers with Council identification, which could be put on and off as required.

[62] As a result of the investigation, it was concluded that as an alternative to the placing magnetic stickers which Mr Nager could potentially forget or choose not to place them on the vehicle when using it for work purposes, it would be of more assistance to change the number plates on the vehicle. Mr Dall confirmed that whilst he believed another employee had discussed this matter with Mr Nager, he had not personally reported back to him on the conclusions reached on the matter.

(iii) Declaration

[63] It was agreed during the meeting that Ms Macdonald would prepare a declaration that Mr Nager could sign, making it clear that he was going back to work on the Hotline at his request.

(iv) Hotline duties

[64] It had been agreed that, the Hotline roster for the current period having been set, Mr Nager would be placed on the following roster.

[65] Ms Dacre said that the general tone of the meeting had been supportive of Mr Nager and that the only tension had arisen when she had mentioned that when Mr Nager was operating in the field he appeared to run into quite a lot of conflict and her comments seemed to make Mr Nager angry.

[66] On 5 August 2013 Ms Macdonald emailed Mr Nager attaching her notes of the meeting and summarising what had been agreed. The email stated:

At the meeting on Friday you advised that you have no concerns with commencing for duties and in particular you wished to recommence your hotline duties. The recent doctors report indicates that there are no ongoing medical reasons why you cannot now return to full duties.

...

Hotline call outs have by their nature some unknown factors in them – new clients, new areas, new issues. However you advise that your position is that there is an element of risk in everything you do and if you felt that the assailants or anyone associated with the Crown prosecution were to contact you at work or via the hotline then you would contact the Police. You did not think that the risks at work were any different to the risks you face outside work.

I therefore accept that you can return to full duties but with the following provisos:

- *In doing so you agree that the organisation has taken all reasonable steps to ensure your safety at work*
- *You agree that it is your desire to return to hotline responsibilities*
- *That you will continue to use your discretion and refuse any call outs that you feel unable to attend*
- *Your return to hotline responsibilities is on a trial basis from the next roster cycle. I will review the matter as required*
- *You will advise us of any changes to the situation surrounding your assault and/or upcoming Crown prosecution matters that may impact on your safety at work*
- *And you are to raise any concerns with your managers as they arise.*

We also agreed at the meeting that you would attend CERT training including any one on one training that could be arranged. You are to use your old NRC vehicle and we are to review use of magnetic stickers for your current vehicle.

Mike, please sign a copy of this email and return it to me to confirm that you have received this email and accept its contents. And best wishes for your return to full time duties.

[67] Mr Nager had raised no objections to either the content of the minutes of the meeting, nor had he objected to signing the declaration relating to working on the Hotline and returning it to Ms Macdonald. He had returned the declaration email duly signed to Ms Macdonald on 7 August 2013 stating in the attached email: *“Please find attached email as discussed. Thanks for your help throughout a tough time”*.

[68] Mr Nager stated at the Investigation Meeting that he had not realised that the vehicle he would be driving subsequently would be the vehicle he had been driving at the time of the Assault, despite the reference in both the minutes and the declaration to his ‘old’ NRC vehicle.

[69] Mr Nager’s ‘old’ vehicle was returned to him on 20 September 2013. Mr Nager said that although the number plate had been changed he knew it was the same vehicle he had previously used because it had a strong smell of bleach in it, and both the warrant of fitness and registration road user stickers still had the original number plate written on them.

[70] Mr Nager said that the smell of bleach triggered a ‘flash-back’ to the Assault on 10 June 2013. He said that the flash backs were so bad that he had to take annual leave on 3 October and during the week of 7 to 10 October 2013 as a result. However the Council records show that Mr Nager took flexi time hours on 3 October and had booked annual leave from 7 to 10 October 2013 in July 2013, some three months earlier.

[71] Mr James Mitchell, Hazardous Substance Specialist and also the in-house Health and Safety Representative for the Council at its Whangarei office, was a friend of Mr Nager at that time. He said that Mr Nager had not raised any health and safety concerns with him and he had never mentioned to him that he felt he wasn’t coping when the ‘old’ vehicle had been returned to him.

[72] Ms Dacre said that Mr Nager had never told her that he felt the ‘old’ vehicle had a strong smell of bleach in it. She had been unaware that Mr Nager was having flashbacks because he had not told her of this, although she had spoken to him by telephone on several occasions and exchanged emails. She had also met with Mr Nager in the Whangarei office on 30 September 2013 and discussed a number of things he had been working on. However there had been nothing in his demeanour that had caused her to have any concerns and he had not mentioned having any concern about driving his ‘old’ vehicle.

[73] Mr Dall said he had not been aware that Mr Nager had believed the car smelt of bleach and caused him to have flash backs until he had read a newspaper article some months later. He said that numerous other people had used the vehicle in the interim between the

Assault on 10 June 2013 and it being reassigned to Mr Nager on 20 September 2013 and no one had reported to him that it smelt of bleach.

[74] In addition Mr Nager had not once brought this to his attention. However, if he had done so, he said he would have acted immediately to remove the vehicle.

[75] Mr Dall said that in the four months since Mr Nager had returned to work on 20 June 2013 his impression had been that Mr Nager was doing well in the full role, that he was receiving good support from the Council, and that things were going quite well for him.

Investigation October 2013

[76] In late September 2013 Ms Dacre said she had learned from Ms Karenza de Silva that Mr Nager had reported an incident to the Police on 19 August 2013 to the effect that a vehicle had followed him while he was driving an unmarked Council vehicle and had tried to run him off the road.

[77] In an email dated 23 September 2013 addressed to Ms Dacre, Ms de Silva confirmed that Mr Nager had told her about an incident on 6 September 2013 which he had reported to the Police, and that he had requested that she did not talk to anyone about the incident.

[78] Ms Dacre said she was very surprised by this as it was the first the Council had heard about the incident, despite Mr Nager having been specifically asked to report any concerns to the Council and his duty under the Council Health & Safety policy to report such matters.

[79] Ms Dacre had reported the incident to Mr Dall and Ms Macdonald and they had agreed that they should try and ascertain more information by asking the Police for a copy of their report.

[80] The Police report of the incident was obtained by the Council on 6 October 2013 stated: "*Henwood had fears for his safety during the incident in that he felt he was going to be run off the road. He felt the incident may be related to the 'bleach incident'.*"

[81] Ms Dacre said she examined the GPS records of the Council marked vehicle driven by Mr Nager to see if there were any other anomalies. In so doing she had noticed a number of vehicle movements that appeared to be very unusual and difficult for her to explain. She had attempted to align Mr Nager's vehicle movements with his entries on his timesheets and there appeared to be a number of inconsistencies.

[82] As a result, Ms Macdonald drafted a letter addressed to Mr Nager which was subsequently signed by Mr Tony Phipps, Operations Director/Deputy CEO and sent to Mr Nager. The letter which was dated 14 October 2013 stated:

It came to our attention last week that you reported a motor vehicle health and safety related incident to the Police in Kerikeri on Monday 19 August 2013. We have no record of you reporting this incident to us as your employer, noting that you were in a Council vehicle at the time.

In conjunction with this we have reviewed the location tracking GPS data for the Council vehicle you have been driving and there is some travel and stops indicated that we would like to discuss with you.

You are advised that as an outcome of the meeting, further investigation, suspension, training, counselling and/or discipline may be taken as a result.

[83] On 15 October 2013 Mr Nager was declared unfit for work by his GP due to: “Worsening anxiety, PTSD, insomnia, reliving experience”. He was signed off work for a period from 15 October to 14 November 2013. Although Mr Nager said in his written evidence that the contents of the letter of 14 October 2013 exacerbated his stress levels, during the Investigation Meeting he stated that he: “would have got to that point without that letter”.

[84] Ms Dacre said that the medical certificate sent by Mr Nager, which referred to worsening anxiety, PTSD, insomnia, and reliving experience had come as a surprise to her, however once she had become aware that Mr Nager had been diagnosed with these symptoms she suggested to Ms Macdonald that it was important that Mr Nager was not badgered by work and made to feel that he had to respond to any work pressures.

[85] She therefore suggested that Mr Nager be asked to return his work telephones while he was away, and his IT access be temporarily disabled so that he did not receive any work emails. The Council also offered Mr Nager further counselling at its expense at this time.

[86] Ms Macdonald emailed Mr Nager on 17 October 2013 and confirmed in regard to the issues raised in the letter dated 14 October 2013:

In terms of answering all the allegations, please note that given you are off work on ACC you should not be working and we will not be addressing the allegations until you are fit to return to work. And as per our letter the first step would be to meet with you to discuss the allegations in a general manner and then give you an opportunity to respond in detail.

[87] On 12 November 2013 Mr Nager was further certified as unfit for work for the period 12 November 2013 to 1 December 2013. At this time he consulted Ms Hyndman of Henderson Reeves Connell Rishworth, solicitors, for advice.

Letter from Henderson Reeves Connell Rishworth

[88] On 20 November 2013 Ms Hyndman sent a letter to Mr Nicolson raising concerns about the Council's management of Mr Nager's return to work.

[89] Mr Nicolson said there were a number of claims in the letter from Ms Hyndman that had come as a complete surprise to him. The first being the claim that whilst Mr Nager evidently wanted to return and recommence his normal duties, this was being: "*hampered by failure to adequately address health and safety issues*". In this context concerns had been raised about the declaration Ms Macdonald had asked Mr Nager to sign in early August, which was an acknowledgement that Mr Nager would return to Hotline work at his request, and that the Council was doing all it could to ensure his safety at work.

[90] Another concern raised in the letter was the statement that it was: "*obviously traumatic for our client to drive the vehicle in which the assault occurred* and that this had: "*seriously undermined his ability to return to work.*" It was suggested that on Mr Nager's return to work he should be able to drive an unmarked vehicle.

[91] Mr Nicolson said he was surprised by the comment relating to Mr Nager having concerns about driving the 'old' Council vehicle since this had not been brought to his attention or to his knowledge, or that of any other manager at the Council.

[92] The letter also raised concerns about the requirement that Mr Nager was to give evidence in the Court proceedings against Sovereign Station and Manganui Development, claiming that it was unfair to pressurise Mr Nager to be involved.

[93] The request for a meeting in regard to the failure to report the incident in August 2013 and the GPS and timesheet discrepancies was cited as being: "*counter-productive to his recovery as it increases pressure on him*"

[94] Mr Nicholson said that whilst he considered the matter should be concluded when Mr Nager returned to work, there was no expectation, as had been made clear to Mr Nager, that the allegations would be progressed prior to his returning to work.

[95] On 27 November 2013 Mr Nager was medically certified as unfit for work for a further period from 2 December 2013 until 12 January 2014.

[96] Following receipt of the letter from Ms Hyndman Mr Nicolson said he had learned that those involved in the prosecution of Sovereign Station and Manganui Development had pleaded guilty to all charges. As a result the issue of who was required to give evidence would no longer be relevant. He therefore sent an interim letter to Mr Nager's solicitors on 27 November 2013 informing them of this.

[97] Mr Nager said he had been upset to receive that same day the letter from Mr Nicolson informing him that he would not be required to give evidence in the Sovereign case. He was upset because he had been contacted when he was off work with workplace stress and PTSD.

[98] Mr Nicolson responded to the letter from Ms Hyndman on 11 December 2013. In the letter Mr Nicolson addressed the issues raised stating:

... There are a number of matters that you raise in your letter that which I dispute and refute. I categorically state at the outset that Northern Regional Council has acted at all times as a good employer including treating any health and safety issues as paramount.

[99] The letter concluded with a suggestion from Mr Nicolson that a meeting with all parties take place with a view to facilitating Mr Nager's return to work.

[100] Mr Nicolson said that over the following few weeks the Council had tried to arrange a meeting with Mr Nager and his solicitor but dates could not be agreed until after the Christmas break.

[101] On 9 January 2014 the Council received another medical certificate extending Mr Nager's sick leave to 3 February 2013.

[102] A Without Prejudice meeting took place between the parties on 15 January 2014, prior to which Mr Nicolson said he had become aware of a statement Mr Nager had made on a Facebook page which said:

After being the victim of a vicious roadside bleacher attack in June, I am now looking for a career change. Would maybe look the right small business as well. Any ideas would be appreciated.

[103] During the meeting Mr Nager said he would provide a specialist report to the Council, however ACC had subsequently decided it was inappropriate to release the report at that time.

Medical Certificate 3 February 2014

[104] On 16 January 2014 Mr Nicolson said Mr Nager sent an email which stated he had medical clearance for full time work from 3 February 2014 subject to certain restrictions,

these being not visiting incidents and not driving his 'old' vehicle. The email also mentioned ACC was going to arrange a meeting between himself, ACC and the Council to put together a plan for his return to work.

[105] The medical certificate to which Mr Nager referred was dated 9 January 2014 and certified Mr Nager as fit to return to work from 3 February 2014. Under the heading 'Work Capacity' it stated: "*Needs to be seen by psychiatrist/psychologist prior to return to work*", and at paragraph 5 stated: "*ACC Case Review/Assessment (to be approved by ACC)*."

[106] Mr Nicolson said he had discussed the email with Ms Macdonald and they had felt it essential that the Council first receive a clear medical report from Mr Nager's specialist or ACC which confirmed that he was fit to resume work and under what conditions, prior to him returning to work on 3 February 2014.

[107] Ms Macdonald emailed Mr Nager on 16 January 2014, requesting a formal report from the psychologist or ACC confirming Mr Nager's return to work and a rehabilitation plan.

[108] Mr Nager replied later that same day stating:

If you need a report from the psychiatrist then you will have to negotiate with ACC with this as they have paid for it and own the report.

Working at the Whangarei Office

[109] Mr Nicolson said that over the following weeks Mr Nager indicated on several occasions that he was going to get a medical clearance for work starting back at the Opuia office doing office work.

[110] Mr Nicholson said he had been concerned with the suggestion because the Opuia office was very small and Mr Nager would have been working without collegial contact, supervision or support. His view had been that if the only work that Mr Nager could undertake at the outset was administrative type work he would need to be based at the Whangarei office where there was adequate support.

[111] However Mr Nager said that the suggestion that he work at the Whangarei office was unreasonable in that he lived in Kerikeri and this would involve a considerable amount of driving time.

[112] Mr Nager said that it was not possible for him to obtain medical clearance until the Council had support in place for him to return without making the drive to the Whangarei office daily. As a result, he was being placed under a lot of stress which was making his

PTSD worse. His perception was that the Council appeared to be putting barriers in place to stop him returning to work.

[113] Mr Nager said that on 28 January 2014 he received a letter from Dr Chohye Park of Forenpsych Ltd that advised that the cause of his illness in October 2013 was attributable to being in his 'old' vehicle. However he had not given a copy of this letter to the Council.

[114] On 31 January 2014 Mr Nager went to see his GP and was found to be unfit for work from 31 January to 20 February 2014.

[115] On 4 February 2014 Mr Nager said he received an email from Mr David McDonald his ACC Case Manager in which he stated he had spoken to Ms Macdonald and she had clarified the proposal was for Mr Nager to travel by private car to Opuia and then on to Whangarei in the Council vehicle. He said the offer of a company vehicle made the prospect of travelling to the Whangarei office financially viable for him and he was hopeful that the travel issue could be resolved.

[116] The suggestion was however not progressed as a result of Mr Nicholson's concerns about issues of parity and equal treatment of all Council employees, some of whom travelled a considerable distance to their work in the Whangarei office.

[117] Further Mr Nager was not cleared for work prior to the termination of his employment and remained on sick leave.

ACC Reports

[118] On 4 February 2014 ACC sent a copy of a Return to Work (RTW) plan dated 29 January 2014 for Mr Nager to the Council. Mr Nager said the RTW plan contained a lot of incorrect and inaccurate information and private medical information that the Council was not entitled to see.

[119] Mr Nicholson said Ms Macdonald advised him in early February 2014 that the Council had received a report from ACC that suggested that Mr Nager was not only unfit to return to work, but that he be offered assistance to recover and to seek alternative work. This had raised serious concerns on his part about Mr Nager returning to work at all.

[120] On 19 February 2014 Mr Nicholson wrote to Mr Nager, advising that it might not be possible for the Council to hold his job open indefinitely, stating:

... I am also aware that we cannot hold open indefinitely the EMO role based in Opuia as this will be adding extra workload and uncertainty for other staff within the Council. ...

... I need to advise you that a possible outcome is that we conclude that you are not able to return to your current Opuā based role. We would then need to assess the feasibility of alternatives for you within the organisation.

... I would now like you to attend a session with medical professionals of our choosing to enable us to gather information we may need to assess your work capabilities now and for the future.As your employment may be affected by the outcome (a medical termination of your employment is, unfortunately, one of the possible outcomes) we encourage you to continue to take legal advice through the process ...

[121] On or about this time Mr Nicolson said he became aware that the other EMO at Opuā, Ms Cathy Orevich, was working under huge pressure and that the work was suffering. Both Ms Dacre and Mr Dall had approached him to make it clear that Mr Nager's extended absence was having a real impact on the department.

[122] On 25 February 2014 Mr Nicholson wrote to Mr Nager. In the letter he stated:

Dear Mike,

We have been working with you in the last months to facilitate your return to work following a period of leave. ... Due to previous events, I was concerned with the health and safety aspects of you returning to your current role at this time and we have been discussing with you the possibility of your return to some office duties based at our Whangarei office.

However, we have a current medical certificate from you dated 31 January 2014 advising that you are unable to return to any work until at least 28 February 2014. ...

As you know, we were in receipt of a report from Margo Forrest dated 29 January 2014. It now transpires that report was forwarded to us inadvertently by ACC. But even despite that report I have concerns regarding your situation as we have no timeframe for a possible return to work from you and not resolving your employment issues will undoubtedly be impacting on you and your family Time is now of the essence. ...

I need to advise you that a possible outcome is that we conclude that you are not able to return to your current Opuā based role. We would then need to assess the feasibility of alternatives for you within the organisation. ...

I would now like you to attend a session with medical professionals of our choosing to enable us to gather further information we may need to assess your work capabilities for now and in the future. ... As your employment may be effected by the outcome (a medical termination of your employment is, unfortunately, one of the possible outcomes) we

encourage you to continue to take legal advice through the process and have forwarded a copy of this letter to your legal adviser.

[123] It was following this letter that the Council received the medical certificate stating that Mr Nager was totally unfit for work until 30 April 2014. Ms Dacre said from her perspective a crisis point had been reached when the medical certificate was received from Mr Nager stating he was going to be off work until 30 April 2014, which at that date Mr Nager would have been absent for six and a half months.

[124] Arrangements were subsequently made by the Council for Mr Nager to see Dr Kenny, an Occupational Medicine Specialist.

[125] Following receipt of this further medical certificate, Mr Nicholson said he was made aware by Mr Dall and Mr Dacre of the pressure this was going to have on the ongoing staff.

[126] As a result he wrote a further letter to Mr Nager on 3 March 2014 pointing out the impact Mr Nager's absence was having on other staff and whilst the Council is not pressurising him to return, the impact of stress on other staff was an important factor for the Council to consider when deciding how long it could keep his role open.

[127] Mr Nicholson advised that he was aware that Mr Nager would be undertaking an assessment by Dr Gollop of ACC, and also a Council appointed medical expert (Dr Kenny). He suggested that a meeting was arranged with Mr Nager and his representative, and stated: *"You will have the opportunity to respond to all matters I intend to take into account in reaching my decision going forward."*

[128] On or about this time the Council received a revised RTW Plan from ACC dated 29/01/14 amended 28/02/14. The comments from ACC in the report were

Mike has experienced considerable trauma as a result of an attack in the course of his work. He is anxious to RTW as soon as possible due to financial pressures. He believes he is capable to carry out 10% of his work starting from the 3rd February 2014 and that he is prepared to increase his field work to incorporate "state of the environmental monitoring".

Mike's employer requested that Mike work from the Whangarei office which would require Mike to travel approximately 180 kilometres return on a daily basis which would add to the pressure/stress and add to the financial cost. Mike sees this option as untenable.

It is this OT's clinical opinion following consultation with Mike, his employer and his GP that Mike not RTW with his pre-injury employer at this time, that he be offered further assistance to recover from his injury.

However, further clarification as to this man's diagnosis and mental health state is necessary to proceed. A psychiatrist report is awaited. Thus further recommendations are pending.

[129] ACC wrote to Ms Macdonald on 4 March 2014 advising her that the ACC RTW Plan dated 29 January 2014 had some incorrect information in it and had since been updated, and requested that the Council destroy its copy.

[130] Mr Nicholson responded to ACC on 6 March 2014 stating that he had not seen the 29 January 2014 report but advised that: *"the concerns in the first report were quite major and posed a potential threat to Mr Nager's well-being and potentially to that of his work-mates were he to return."* Mr Nicholson also advised that he was prepared to agree to remove and destroy the original ACC report, but that a copy would be retained by the Council's legal advisors.

[131] Mr Nager refused to see Dr Kenny, advising in an email dated 4 March 2014 that his refusal was based upon his view that Dr Kenny's findings could cause a conflict with his ACC claim and legal action against ACC and also cited Dr Kenny's *"well known bad reputation"*.

[132] Ms Macdonald wrote to Mr Nager on 12 March 2014 confirming that the Council had instructed its legal adviser to destroy all copies of the ACC report dated 29 January 2014 in her possession.

Communications about the meeting on 14 March 2014

[133] In a letter dated 6 March 2014 Mr Nicholson referred to this decision of Mr Nager's regarding his refusal to see Dr Kenny and stated:

In the next few days I will need to make a decision as to whether or not Northland Regional Council can keep your job open for you any longer or not. ...

Meeting required

I therefore have determined that I am now at the point in needing to make a decision about your current role and whether I can keep it open for you or not. I would like to meet with you and your legal representative at your earliest convenience to discuss this issue. ...

I am available for a meeting at 3.30pm on Friday 14 March 2014 and ask that you keep this time available.

[134] Mr Nicholson explained that he wanted to hold a meeting on 14 March 2014 as he would be out of the office after that week.

[135] Ms Macdonald emailed Mr Nager on 7 March 2014 acknowledging Mr Nager's advice that he had engaged Employment Dispute Services Limited (EDS) as his representative, and asking for his confirmation that he would be attending the meeting on 14 March 2014.

[136] On 10 March 2014 at:

- 8.23 a.m. Mr Nager emailed Ms Macdonald confirming Ms Stephanie Bould of EDS as his representative, and stated that he would not be attending the meeting on Friday 14 March 2014 as he had: "*a prior appointment*";
- 10.59 a.m. Ms Macdonald emailed reiterating that the Council awaited Mr Nager's confirmation that he would be attending the meeting on Friday 14 March 2014 at 3.00 p.m.;
- 12.09 p.m. Ms Bould emailed Ms Macdonald to ask if Friday morning at 10.00 would be a suitable time for the meeting;
- 2.10 p.m. Ms Macdonald emailed Ms Bould confirming 9.45 a.m. on 14 March 2014 would be a suitable time for the meeting;
- 2.20 p.m. Ms Bould emailed Ms Macdonald stating that Mr Nager had another appointment Friday 14 March 2014 and asked if the meeting could be rescheduled to Monday 17 March 2014;
- 4.55 p.m. Ms Bould emailed Mr Nager advising him that: "*It is really important that you attend this meeting with NRC. ... If you refuse to attend a meeting with NRC, they are legally entitled to dismiss you, and may well do so*".
- 5.05 p.m. Mr Nager responded to Ms Bould: "*It's not that I am refusing as I have medical appointments which are more important than an exit package*".

[137] Mr Nicholson emailed Mr Nager on 11 March 2014 advising that he would be making a decision in the near future about whether or not the Council could keep Mr Nager's position open, and stating that he was keen to have as much information as possible to assist with that decision. Mr Nicholson said the Council had been advised by Ms Bould that Mr Nager could not attend any alternative date during the week ending 14 March 2014 and in the letter stated:

To that end I had set up two different meeting times on Friday to meet with you ... Unfortunately you cannot make either time or

indeed any time this week due to prior arrangements. ... I can be available with my advisor at 5pm on Friday 14 March at my Whangarei office. By offering a time out of working hours I am hopeful that you may be able to attend as it will likely be beyond the time of your other appointments. I can make later that afternoon if it works better and I have an alternative as well. I am happy to meet in the late afternoon of Saturday, 15 March. As we are both domiciled in the Bay of Islands we could get together there?

If you cannot make either of these times I think the best way would be to forward me any additional information that you would like me to look at.

[138] On 11 March 2014 Ms Bould emailed Ms Macdonald stating that Mr Nager was insisting that: *“it’s simply not possible for him to make it this week ...”*, and stating that as she understood that Mr Nicholson could not arrange a meeting for the following week, asked if either Mr Nicholson or Mr Nager could attend the meeting by telephone conference call as this: *“would at least allow our client to be involved in the decision making process, and express his ideas in regards to continuing his employment with NRC”*.

[139] Ms Macdonald confirmed that Mr Nicholson had agreed to a telephone conference and on 13 March 2014 Ms Bould emailed in response: *“I am pleased to confirm that Glenda (a contractor to EDS) can attend the meeting in person at 5.30 p.m. tomorrow at NRC premises. Mr Nager will attend via phone conference from his home phone”*.

[140] Ms Macdonald replied: *“This time and date for the phone conference is all confirmed”* and confirmed the telephone number for Mr Nager to dial into the meeting.

[141] During late February 2014 Mr Nicholson was made aware by Ms Dacre and Mr Dall that the staffing situation at Opuia was concerning and this concern intensified following the medical certification of Mr Nager as unfit for work until at least 30 April 2014.

[142] Mr Nicholson then wrote to Mr Nager by letter dated 13 March 2014 advising him that:

It is only fair that I am completely clear with you, at this point, that your current position with Northland Regional Council may soon cease.

For that reason it is important that you engage with me in discussions so that I can have as much information available as possible before making my decision. ...

I note that you are unavailable on the four occasions that I have tried to set up a meeting thus far. However I also note that your advocate suggests a phone conference and I am hopeful that a meeting, albeit via the medium of a phone, can now take place.

We are available from 3.30 p.m. for a phone conference.

Meeting 14 March 2014

[143] Ms Glenda Norris-Palmer, a contractor to EDS, said she had been asked to attend the meeting on 14 March 2014 as Mr Nager's representative. Ms Norris-Palmer who had not received the file until late the previous evening said her understanding was that the purpose of the meeting was to negotiate an exit package for Mr Nager.

[144] Mr Nicholson was accompanied at the meeting by Ms Jeanette Richardson, Managing Director/CEO of Richardson Management Consultants Limited, a human resources company. Ms Richardson said she had understood that Mr Nager's advocate would be attending the meeting in person and Mr Nager would be attending by telephone.

[145] Ms Norris-Palmer said that she explained her understanding that the purpose of the meeting was to negotiate an exit package, but Mr Nicholson had insisted that the purpose of the meeting was to give Mr Nager a further opportunity to explain any issues or concerns, and he confirmed that he had said that he would have to look at making a decision about Mr Nager's future employment with the Council.

[146] Mr Nicholson and Ms Richardson said that they had waited for Mr Nager to telephone in and join the meeting, and after some time had elapsed Ms Norris-Palmer had tried to telephone him. Ms Norris-Palmer said she had tried to text Mr Nager and that Mr Nicholson tried to telephone him.

[147] Ms Richardson said Ms Norris-Palmer made it clear that Mr Nager knew about the telephone call, she had spoken to him and given him the details, she expected him to call and did not understand why he was not doing so.

[148] Ms Richardson said Mr Nicholson had then explained how much Mr Nager's absence was affecting the other employees in the Council, and that he had to make a decision about whether or not he could keep Mr Nager's job open for him.

[149] Mr Nicholson said, and Ms Richardson confirmed, that the meeting had ended with an agreement that Ms Norris-Palmer contact Mr Nager over the weekend and that Mr Nicholson would be available to receive feedback until Monday morning.

[150] Ms Richardson said that Mr Nicholson had made it clear that if he heard nothing over the weekend from Mr Nager or Ms Norris-Palmer, he would have to make a final decision about whether or not Mr Nager's position would be kept open or terminated.

[151] Ms Norris-Palmer said her understanding at the conclusion of the meeting was that Mr Nicholson would contact her in regard to a future meeting with Mr Nager which she had requested, and said that Mr Nicholson had not raised the possibility of terminating Mr Nager's employment following the weekend if no further information had been received.

[152] Ms Norris-Palmer confirmed her understanding of what had occurred at the meeting on 14 March 2014 in an email to Mr Nager in which she stated that Mr Nicholson had denied the purpose of the meeting was to discuss an 'exit' package, and that she hoped Mr Nager would have a further opportunity to attend a meeting with the Council.

[153] Ms Norris-Palmer also emailed Ms Bould stating that Mr Nicholson had made it clear that: "*it was a meeting to consult further with Mike, not an exit package meeting*" and that she had stressed that Mr Nager was happy to meet with Mr Nicholson in the future.

[154] Mr Nicholson said he had not heard from either Mr Nager or Ms Norris-Palmer over the weekend, and on Monday 17 March 2014 he had made the decision to terminate Mr Nager's position, confirming this in a letter dated 17 March 2014. In the letter Mr Nicholson set out the information he had taken into consideration in making the decision:

1. *Information from staff members who are finding it difficult working with one less person than the establishment provides for.*
2. *The doctor's certificate you recently supplied saying you are "totally unfit" for work until (at least) 30 April, 2014.*
3. *The second ACC report supplied to us at NRC on 28 February 2014 ("the revised report") in which the occupational therapist gave her opinion that you should not return to work at this time.*

Additionally I offered (exhaustively) to take into account any information or insights that you were able to supply me with. To that end I offered (several times) to meet or speak with you in order to receive any information that you wished to give or send me. ...

Regrettably I have decided that I cannot keep your position open any longer and I must terminate your current employment with Northland Regional Council. It is not feasible to consider alternative roles as you are “totally unfit”.

[155] Mr Nager filed a Statement of Problem with the Authority on 8 May 2013, and an Amended Statement of Problem was filed on 21 May 2015. The parties attended mediation, however this did not resolve the issues between them.

Determination

Unjustifiable disadvantage in employment

[156] All of the claims brought in this Personal Grievance originated as a result of the Assault on Mr Nager, by persons unknown, whilst he was on Council business driving a Council vehicle on 10 June 2013.

[157] Virtually all of the individual actions which Mr Nager claims are unjustifiable disadvantage claims are statutorily time expired as not having been raised within the statutory time limit pursuant to s 114 of the Act. Mr Nager therefore claims that together they constitute a pattern of behaviour of bullying and harassment and accordingly constitute part of his unjustifiable dismissal claim.

[158] In *Davis v Commissioner of Police*¹ The Employment Court stated:²

As the case law establishes, particularly in relation to unjustified disadvantage grievances, the relevant evidence to be considered by the courts not necessarily confined to events in those 90 day periods. Disadvantageous acts or omissions in employment frequently do not occur in isolation but as part of a continuum of conduct which needs to be understood to determine whether the employee has suffered an unjustifiable disadvantage in respect of what has happened to that period within the 90 day period. Remedies for unjustified disadvantage can, however, only relate to the grievance, that is to the events occurring within the relevant 90 day period, but the nature and scope of such remedies may need to be informed by a broader background to the events that should be compensated for.

¹ [2013] NZEmpC 226

² At [47]

[159] In *Ale v Kids At Home Limited*³ Judge Inglis commented upon this passage from *Davis v Commissioner of Police*:⁴

[26] I do not read the judgment as authority for the proposition that pre-90-day events morph into in-time grievances simply because they form part of the background context. As the Court of Appeal observed in Waikato District health Board v Clear, there can be no separate liability of an employer based on out of time actions or events.

[160] Accordingly I shall address whether or not each of the alleged unjustifiable disadvantage actions was disadvantageous and whether or not they, viewed cumulatively, constituted bullying and harassment. This is a claim raised by Mr Nager in his originating Statement of Problem dated 8 May 2014 and the Amended Statement of Problem dated 21 May 2015.

[161] Mr Nager is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[162] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[163] Mr Nager must therefore establish that there was some unjustifiable action or actions by the Council which affected his terms and conditions of employment to his disadvantage.

Was Mr Nager unjustifiably disadvantaged by the Council failing to remove the Council owned vehicle (allocated to Mr Nager) from Mr Nager's premises following the attack?

³ [2015] NZEmpC 209

⁴ At para [26]

[164] The vehicle which Mr Nager had been driving at the time of the Assault had been returned to Mr Nager's home address. Mr Nager claims that the Council should have removed the vehicle in a timely manner from his property. I observe that:

- This matter was not raised in Mr Nager's Original Statement of Problem despite a detailed 'time line' of events being produced by Mr Nager. In the Amended Statement of Problem Mr Nager claims that he contacted his manager multiple times by text and spoke to her a number of times to request removal of the vehicle. The vehicle was removed on 18 June 2013.
- Mr Nager refers to his diary entries as evidence supporting his claim that he made multiple telephone calls requesting that the Council remove the vehicle, although I note that there is no record of any text message. Copies of such a text message could have easily been obtained from the relevant ISP. In his brief of evidence Mr Nager states that the diary entries were made "on *the day of each phone call to Ms Dacre.*" However the diary entries clearly refer to '*calls from Tess*', and '*phone call from Tess*', and '*call from Tess and Colin*'.
- It was Ms Dacre who initiated the telephone calls during which Mr Nager may have raised the issue of the vehicle's removal rather than the telephone calls being initiated by Mr Nager, as he stated.
- Mr Nager claims that the police wanted the vehicle removed from his premises: in fact it was the Police who had returned the vehicle to Mr Nager's home address, which belies any concern that the police expressed such a requirement to the Council.
- Ms Dacre denies that Mr Nager expressed any urgency about the vehicle's removal to her; and
- Mr Nager's response of: "*Thanks Jess*" when advised that the vehicle would be removed the following day does not indicate an obvious sense of urgency for an immediate removal

[165] In circumstances in which it was the Police who returned the vehicle to Mr Nager's home address, the fact Mr Nager did not initiate the calls requesting the vehicle's removal, and that no evidence of urgent text messages was produced, I consider that Ms Dacre may not have realised there was any urgency for the vehicle's removal or that it constituted a safety hazard, such as to create disadvantageous consequences to Mr Nager.

[166] I do not find that the Council took any unjustified action relating to the timing of the removal of the property from Mr Nager's premises such as to constitute an unjustifiable disadvantage.

Was Mr Nager unjustifiably disadvantaged by the Council failing to provide support during the period he was absent from work (as a result of the Assault) and following his return to work?

(i) *Alleged lack of support during the period immediately following the Assault 10 June – 20 June 2013.*

[167] Mr Nager does not provide any specific details of the alleged lack of support from the Council during the initial 10 days following the Assault, nor does he make any suggestions as to the support he felt he should have received.

[168] In fact Mr Nager's oral evidence at the Investigation Meeting confirmed that he did feel Ms Macdonald, Mr Dall and Ms Dacre had offered sufficient support during this initial period after the assault.

[169] Although Mr Nager provided diary notes which he said he made on 20 June 2013 in support of his claim that he was not offered sufficient support by the Council during the initial period prior to his return to work, I find that following the evidence provided by Mr Nager at the Investigation Meeting, the diary notes are not accurate in terms of the support which had been provided to him during the period he was absent from work between 13 and 20 June 2013, and therefore I do not find them conclusive on this issue.

[170] I find that there was no failure on the part of the Council to provide support and/or address Mr Nager's concerns during his initial period of absence from 10 June – 20 June 2013 following the Assault

(ii) *Lack of support in relation to the Sovereign case*

[171] Mr Nager states that immediately following his return to work on 20 June 2013 he had a meeting with Mr Nicholson when he voiced his concerns at his continuing involvement in the Sovereign case, and that Mr Nicholson should have reverted to him as regards the need for him to give evidence in the Sovereign case.

[172] Mr Nicholson confirmed that the Sovereign case had been raised by Mr Nager and that he had agreed to look into it.

[173] Whilst Mr Nicholson himself did not speak to Mr Nager on this topic, I note that other Council managers did so in that the matter was discussed at the meeting held on 9 July 2013 at which Ms Macdonald, Mr Dall and Ms Dacre were, and the matter was also discussed at the meeting held on 2 August 2013.

[174] Not only do the minutes of the meeting held on 2 August 2013, which Mr Nager accepted were accurate, indicate that Mr Nager felt able to cope with Hotline duties despite the managers' concerns in this regard given the Sovereign case and the assault, and the fact that the assailants had not been apprehended, but also in the email from Dr McLeod dated 26 July 2013 records that Mr Nager: "*states that he has court dates set for the future and feels able to manage these*".

[175] I also note that Mr Nager wrote to the Crown Prosecutor on 6 August 2013 on the matter, with a copy to Mr Nicholson who therefore would have reasonable grounds on that basis for believing the issue was being addressed directly by Mr Nager and the Crown Prosecutor.

[176] Once it became clear that Mr Nager's involvement was no longer necessary, on 27 November 2013 Mr Nicholson wrote to Mr Nager's solicitor and asked her to advise Mr Nager of this. Mr Nager claims that this communication was a cause of stress to him; however I note that the letter was sent to Mr Nager's solicitor, and not to him directly, it was Ms Hyndman who forwarded the letter to Mr Nager. Moreover I observe that given Mr Nager's stated concern about the possibility of remaining involved in the Sovereign case, the news that a trial was no longer required and consequently no longer a need for him to appear as a witness should have been welcome news to him, such as to alleviate, rather than increase, his anxiety in that respect.

[177] I find that there was no failure on the part of the Council to provide support and/or address Mr Nager's concerns relating to his appearance as a witness in the Sovereign case.

(iii) Lack of support: Mr Rowlands and Mr Nager's Managers

[178] In his evidence Mr Nager claims that he met with Mr Rowlands on at least two occasions and that he was disappointed with the outcome of each meeting. Mr Rowland disputes that and states that there was only one occasion when he met Mr Rowlands on 25 June 2013 when he had been back at work for 3 days. At that meeting it was made clear to Mr Rowlands that Mr Nager was still shaken by the assault and feeling ignored by the Council. Mr Rowlands informed Mr Nager's managers of these comments that same day.

[179] I have already found that adequate support had been provided to Mr Nager prior to his return to work on 20 June 2013.

[180] Whilst Mr Rowlands made reference in his email dated 25 June 2013 to Mr Nager possibly attempting attention seeking, I find that the management team did not act upon this view, instead the Council ensured that Mr Nager saw Dr McLeod later on 25 June 2013 who certified he was fit for work subject to certain restrictions. These restrictions were observed by the Council.

[181] Ms Macdonald emailed Mr Nager in the days immediately following 25 June 2013 and dealt with various issues on his behalf; Ms Dacre and Mr Dall had also been in regular contact with Mr Nager on various work issues which I find supports the fact that the Council did not ignore Mr Nager.

[182] I accept that Mr Nager did not believe Ms Dacre was sympathetic, and indeed she confirmed that she had not discussed Mr Nager's emotional responses with him on the basis that she did not feel qualified to do so, although she had been in regular contact with him on work-related matters.

[183] However Ms Macdonald asserted that she did ask Mr Nager how he was feeling during her communications with him at this time and I find her evidence on that point to be credible and supported by Mr Nager's own comment in the email dated 7 August 2013 in which he thanks Ms Macdonald: *"for your help throughout a tough time"*.

[184] I also note that the Council funded additional counselling during this period.

[185] There was a meeting on 9 July 2013 at which Mr Nager's managers reiterated that he could raise any concerns with them.

[186] Despite Mr Nager having obtained a full medical clearance to work from his own GP on 12 July 2013, the Council made an appointment for him to see Dr McLeod on 26 July 2013 to ensure he had been examined by a doctor who understood the work undertaken by Council employees before accepting he was fully fit to return to his full duties.

[187] Finally, before agreeing that Mr Nager could resume Hotline duties, the managers directly involved with Mr Nager met with him to discuss all the implications this may have.

[188] I find that there was no failure of support by the Council to provide Mr Nager with adequate support following his return to work and he was unjustifiably disadvantaged thereby.

Was Mr Nager unjustifiably disadvantaged by the Council asking him to sign the email dated 5 August 2014?

[189] A meeting was held on 2 August 2013 to discuss Mr Nager's return to work on full duties. It is clear from the minutes of the meeting that the paramount concerns were for Mr Nager's personal safety. In particular Mr Nager wanted to return to work on the Hotline and the Council wanted to be certain that Mr Nager understood the risks that this may involve. The minutes of the meeting recorded agreement on the part of those attending, including Mr Nager, that he would sign a declaration to be prepared by Ms Macdonald stating that he understood the risks associated with working on the Hotline.

[190] Mr Nager confirmed that he had read the minutes that same day and had not raised any concern that they were not accurate.

[191] Mr Nager subsequently signed the email dated 5 August 2013 containing the declaration referred to in the minutes of the meeting held on 2 August 2013. There is no evidence that he raised any objection before signing the email.

[192] Given the concern of the Council that Mr Nager did not return to Hotline duties too soon, despite having obtained medical clearance to resume full duties, and his insistence that he do so, I do not think it unreasonable of the Council to ask Mr Nager to sign a declaration ensuring all parties were clear on what had been agreed.

[193] There is no evidence that Mr Nager was being pressurised to resume full duties including Hotline duties, quite the converse in fact, or to sign the email as requested. I find no disadvantage to Mr Nager in the Council's actions by asking him to sign the email.

Was Mr Nager unjustifiably disadvantaged by the Council requiring him to use the 'old' vehicle he was using at the time of the Assault for work duties?

[194] I accept the evidence of Ms Macdonald, Mr Dall, Ms Dacre and Mr Rowlands that the subject of Mr Nager being re-assigned the 'old' NRC vehicle had been discussed at the meeting held on 2 August 2013, and it had been made clear that this was the vehicle which would be re-assigned to Mr Nager.

[195] The minutes of that meeting record: “*when on hotline Mike to use his old NRC vehicle (noting that he is currently in an unmarked vehicle)*”. Mr Nager confirmed that he had read the minutes and had not raised any concern that they were not accurate.

[196] The ‘declaration’ email dated 5 August 2013 also made clear reference to the use of Mr Nager’s ‘old’ NRC vehicle: “*You are to use your old NRC vehicle*”. Mr Nager signed and returned that email to Ms Macdonald as requested, making no objection to any of its contents.

[197] The declaration email also raised a specific provision in relation to any concerns which Mr Nager might have, which was to raise these with his managers as they arose.

[198] The vehicle had been thoroughly cleaned, and new licence plates fitted.

[199] Mr Nager was reassigned his ‘old’ NRC vehicle on 20 September 2013, which he stated triggered an immediate adverse response. Despite this, he did not raise any concerns about driving the vehicle with the Council, until the issue was raised in the letter from Ms Hyndman on 20 November 2013 when Mr Nager was already medically certified as unfit to work and had been absent from work for over 4 weeks.

[200] I find it was incumbent on Mr Nager to raise any concerns with the management team as soon as they arose, and he failed to do so in regard to driving his ‘old’ NRC vehicle after 20 September 2013.

[201] I do not find the Council unjustifiably disadvantaged Mr Nager by requiring him to use his ‘old’ vehicle for work duties.

Was Mr Nager unjustifiably disadvantaged by the Council initiating an investigatory process?

[202] An employer is entitled to raise any issues of concern with an employee. In this case, despite the Council encouraging Mr Nager on several occasions to raise issues of concern with it, he failed to do so in regard to the tailgating incident which had alarmed him enough that he had reported it to the Police on 19 August 2013. Further despite being in an NRC vehicle at the time, he had not reported the incident to the Council

[203] In accordance with s 103A (3) of the Act, what is required of an employer is that it carries out a fair investigation and follows a fair procedure.

[204] In *Ministry of Maori Development v Travers-Jones*⁵ the then Chief Judge Goddard stated in regards to a fair procedure:⁶

What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer or explain, including adequate time for preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.

[205] At the time Mr Nager was sent the letter dated 14 October 2013 advising him that he was required to attend a meeting to assist in the Council's investigation of the issues set out in that letter, he was medically certified as fully fit to attend his full range of work duties and had been at work for 4 months. During that period he had not advised any member of the management team of any concerns. On that basis, I find there was no reason why the Council, as a fair and reasonable employer, could not initiate an investigation into properly held concerns with Mr Nager.

[206] The letter dated 14 October 2013 sets out the details to be investigated clearly, and advised Mr Nager of a meeting to be held on a suitable date to discuss the various matters, and he was advised of his right to take legal advice and to have a support person or representative at the meeting.

[207] I find that the Council followed a fair procedure regarding an investigation it was entitled to conduct. Although the letter referred to disciplinary actions as being a possible outcome of the process, this was one of a range of outcomes specified and did no more than put Mr Nager as an employee on notice of all possible eventualities which is a fair step and what is expected of an employer in such circumstances.

[208] Once the Council became aware that Mr Nager was medically unfit to attend work, the investigation process was suspended until such time as he was fit to return to work. I find this to be a reasonable response on the part of an employer.

[209] I do not find that Mr Nager was unjustifiably disadvantaged by the Council's initiation of an investigatory process

⁵ [2003] 1 ERNZ 174

⁶ Ibid at para [30]

Was Mr Nager unjustifiably disadvantaged by the Council proposing he work from the Whangarei office should he return to work;

[210] Mr Nager had been certified as unfit to work as a result of worsening anxiety, PTSD, insomnia and re-living experiences. In that situation I find that a fair and reasonable employer would have wanted to ensure that his return to work was handled in a safe manner.

[211] The evidence of the Council was that during the summer period in particular, employees in the Opuia office were frequently out of that office, which had a small staffing component throughout the year. In that situation Mr Nager as an employee suffering from worsening anxiety and other serious medical problems would have been in a solitary position. The tasks he was indicated as being able to undertake were administrative in nature, and the Council administration was based in Whangarei.

[212] In those circumstances I observe that in working out of the Whangarei office Mr Nager would have the support of managers and colleagues, and supervision to assist him with the work he was to undertake. I also note that the Employment Agreement states that ‘Your primary place of work will be Whangarei’.

[213] Whilst I accept that travelling long distances was not an issue for Mr Nager as stated in his evidence at the Investigation Meeting, and as indicated on the ACC RTW Plan which specified Mr Nager’s daily work travelling day of 200 – 500km, I accept that there was an additional cost involved if Mr Nager was to use his own vehicle.

[214] However this issue was not progressed due to the fact that Mr Nager was not cleared for work and did not in fact return to work prior to the termination of his employment, consequently I find that the proposal that Mr Nager work from the Whangarei office did not constitute a disadvantage.

Was Mr Nager unjustifiably disadvantaged by the Council initially refusing to destroy the first ACC report?

[215] The Council received the first ACC report dated 29 January 2014 on 4 February 2014. What Ms Macdonald told Mr Nicholson about that report resulted in him having serious concerns about Mr Nager’s ability to return to work, and to request that Mr Nager see medical professionals of the Council’s choosing as it was contractually entitled to do pursuant to clause 5(a) of the Employment Agreement.

[216] I consider that Mr Nicholson's letter to Mr Nager dated 19 February 2014 had been to some extent influenced by what he had been told by Ms Macdonald was contained in the ACC report which he accepted during the Investigation Meeting had not been accurate, however I also find that the major concern referred to was the indeterminate length of Mr Nager's continuing absence and the increasing strain on the employees at Opua.

[217] This concern was reiterated in the letter dated 25 February 2014 in which Mr Nicholson acknowledged the subsequent advice from ACC received on 21 February 2014 about the ACC report dated 29 January 2014.

[218] In making its decision to terminate Mr Nager's employment I find that (i) the ACC report dated 29 January 2014 was not relied upon; and (ii) the initial refusal to destroy it did not have a major influence on that outcome, and I find that the initial refusal to destroy it did not constitute a disadvantage to Mr Nager.

Was Mr Nager unjustifiably disadvantaged by the Council holding a meeting on 14 March 2014 despite him having prior appointments?

[219] Mr Nicholson had made it clear to Mr Nager in the letters sent to him that the termination of his employment on medical grounds was a possibility, and that he wished to meet him to discuss his continued employment with the Council. Despite being on paid sick leave at this time, Mr Nager's representative had advised the Council that he was not available to attend meetings during the week ended 14 March 2014.

[220] His representative had however agreed to attend the meeting on 14 March 2014 on his behalf, and it was her suggestion that Mr Nager could attend by means of a telephone conference call. This had been agreed by the Council on 13 March 2014.

[221] Mr Nicholson also offered to meet with Mr Nager on 15 March 2014, but Mr Nager again refused to meet claiming he had a personal commitment. Mr Nicholson also offered in the letter dated 11 March 2014 to consider any additional information Mr Nager wanted to provide to him.

[222] On that basis I find no unjustifiable disadvantage to Mr Nager by the Council holding a meeting on 14 March 2014 which had been agreed, confirmed and never cancelled by Mr Nager's representative.

Bullying and Harassment

[223] It is submitted by Ms Stewart that the actions by the Council detailed above constituted bullying and harassment, and they undermined Mr Nager's health.

[224] Workplace bullying is defined by Worksafe NZ and MBIE as:

*repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety*⁷

- *Repeated behaviour is persistent and can involve a range of actions over time.*
- *A single incident of unreasonable behaviour is not considered workplace bullying, but it could escalate and should not be ignored.*
- *Harassment ... can be part of bullying,*

[225] Having examined the overall situation, the individual actions claimed as disadvantage grievances and cumulatively as a pattern of behaviour, I find no repeated and unreasonable behaviour directed at Mr Nager as set out in his disadvantage claims such as to constitute a pattern of behaviour which created a risk to his health and safety. I find that Mr Nager was not victimised, humiliated, intimidated or threatened by any of the actions outlined in the preceding paragraphs.

[226] On the contrary I find that the Council tried to handle what was a fairly unique and difficult situation with sensitivity and that the way in which it acted was how a fair and reasonable employer could be expected to act in a similar set of circumstances.

[227] I determine that the Council did not bully or harass Mr Nager.

Was Mr Nager unjustifiably dismissed?

[228] Mr Nager was dismissed as a result of extended absence due to his medical incapacity.

[229] The law is clear that an employer is not bound to hold a job open indefinitely in the case of an employee who is no longer able to perform the duties for which they were employed. In *Hoskin v Coastal Fish Supplies Ltd*⁷ Judge Horn made the statement: “*There can come a point at which an employer ... can fairly cry halt*” which has been regularly cited since that time. Similarly in *Canterbury Clerical Workers IUW v Andrews & Beaven Ltd*⁸ Judge Castle stated:⁹

⁷ [1985] ACJ 124

⁸ [1983] ACJ 875

⁹ *Ibid* at 877

... it is well established law that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period ...

[230] The test more normally in recent time in cases concerning whether a dismissal for incapacity was justified is that which was set out by the Court of Appeal in *Lang v Eagle Airways*.¹⁰ In that case the Court of Appeal agreed that “*the test to be applied is whether the decision to dismiss was one to which a fair and reasonable employer could come as at the time when it became effective.*”¹¹

[231] In the English Court of Appeal case *Marshall v Harland & Wolff*¹² the Court set out factors to be taken into consideration to be considered for long term sickness cases. The factors are:

- i. The terms of the contract;
- ii. How long the employment was likely to last in the absence of sickness or injury;
- iii. The nature of the employment;
- iv. The nature of the illness, its duration and prognosis; and
- v. Any other relevant factors.

[232] In examining whether or not the Council had substantial justification for its decision to terminate Mr Nager’s employment in light of these factors I find the following:

- i. At the date of termination 17 March 2014 Mr Nager had been absent since 15 October 2013 and was in receipt of ACC benefit; had been certified as unfit for work until 30 April 2014, and there was no certainty that he would be well enough to return to work at that date;
- ii. Had Mr Nager been well and fit to attend for work, his employment would have been ongoing;
- iii. The evidence of the Council was that the role of EMO was fairly specialised and not amenable to being easily replaced; Mr Nager did not disagree with

¹⁰ [1996] 1 ERNZ 574

¹¹ *Ibid* at 582

¹² [1972] 1 WLR 899

this assessment of his role. I also accept that Opuā, Northland, would not be an easy location to which to attract a replacement.

- iv. Mr Nager had been diagnosed with worsening anxiety, PTSD, insomnia and reliving experience in October 2013, he had been medically certified as unfit to work until 30 April 2014 on the last medical certificate received by the Council prior to the termination. At the date when the decision to terminate his employment was made, Mr Nager would have been absent on sick leave for approximately 6.5 months. Further there was no evidence before the Council, especially given Mr Nager's refusal to meet Dr Kenny, of when he would be able to return to work.
- v. The evidence of the Council is that by the date of the termination of Mr Nager's employment, the situation as regards the employees at Opuā who had been under severe pressure for some time, had reached crisis point when advised that Mr Nager would be absent at least until 30 April 2014. The evidence was that the time of the year was particularly busy and that a temporary employee could not fulfil the role requirements due to the specialised knowledge of the relevant legislation and duties. In addition the length of time and input required to train a temporary employee to undertake the role duties would use the time of those very employees who were already under pressure as a result of Mr Nager's absence.

At the date of termination Mr Nager would have had 4 years continuous employment.

[233] It is submitted for the applicant that in an email dated 2 February 2014 he had made it clear that provided the issue about his working in Whangarei was resolved, he would receive medical clearance. He had provided a medical certificate in support dated 3 February 2014.

[234] Mr Nager had been absent from work for some 3.5 months at the beginning of February 2014. He had been medically diagnosed as suffering from: "*Worsening anxiety, PTSD, insomnia, re-living experience*". These are serious conditions, and had resulted in a protracted period of inability to resume his work duties with the Council.

[235] An employer is constrained by health and safety considerations from permitting an employee who has been signed off work as medically unfit from resuming work with medical certification that certifies him or her as fit to do so.

[236] Mr Nager was in addition on ACC cover, and the Council had received no valid RTW plan at that date. The medical certificate certifying Mr Nager was fit to return to work on 3 February 2014 had two provisos on it, the first that Mr Nager be seen by a psychiatrist/psychologist prior to returning to work, the second that Mr Nager did not resume any duties at work from: “*ACC Case Review/Assessment (to be approved by ACC)*”

[237] I find that the medical clearance for Mr Nager to return to work was therefore dependent on those two factors being fulfilled and consider it would have been unwise of the Council to not satisfy itself those factors had been fulfilled.

[238] In the event, although Mr Nager had seen Dr Parks, he had not advised the council of this, and he refused to see Dr Kenny. In those circumstances I do not find that the Council could regard the email and medical certificate as anything other than provisional, and the provisos contained therein were not fulfilled.

[239] Having considered all the circumstances and the relevant factors, I find that the Council had substantial justification for its decision to terminate Mr Nager’s employment on grounds of medical incapacity.

[240] The Monitoring Officers are highly specialist roles that require a lot of knowledge, especially concerning the different legislation and a broad range of skills.

[241] In regards to the procedure followed I find that Mr Nager should have been aware from the letters sent by Mr Nicholson during the period 19 February to 13 March 2014 that his continued employment was in jeopardy. There were clear statements in the letters that his job could not be held open indefinitely by the council, that it wished him to see a medical professional of its choosing, and that medical termination of his employment was a possible outcome.

[242] In her letter dated 10 March 2014 Mr Nager’s representative makes it very clear that his refusal to attend the meeting with the Council could lead to dismissal and goes further to confirm that: “*also they have told you dismissal is a possibility*”.

[243] I have considered already the issue of whether or not holding the meeting on 14 March 2014 constituted a disadvantage grievance. I consider it extraordinary that Mr Nager, who was at home on paid sick leave and had been made aware from Mr Nicholson’s communications and his own representative’s advice that his continued employment was in jeopardy, made no real effort to accommodate meeting with his employer during the week

ending 14 March 2014, as advised to Mr Nicholson by Ms Bould, on whom I find Mr Nicholson was entitled to rely as having Mr Nager's authority to represent him.

[244] In addition, Mr Nicholson had offered several times for the meeting on 14 March and had also agreed to meet near to Mr Nager's home on the Saturday. 15 March 2014.

[245] It was Ms Norris-Palmer who advised Mr Nicholson that Mr Nager would telephone in to the meeting on 14 March 2014, again information on which I consider he was entitled to rely. And Mr Nager failed to do so.

[246] Not only do I find that Mr Nager inexplicably refused to accommodate this important meeting with his employer, he also refused to attend the meeting with Dr Kenny, an Occupational Medical Specialist, citing his "*well-known bad reputation*".

[247] I find that given these circumstances, that Mr Nager failed to behave towards his employer in good faith by failing to be "responsive and communicative" as he was required to be.¹³

[248] Considering further the meeting on 14 March 2014, whilst there is some conflict in the evidence given by Ms Norris-Palmer, Mr Nicholson and Ms Richardson; during the Investigation Meeting Ms Norris-Palmer stressed that she had had inadequate briefing and time to prepare for the meeting on 14 March 2014, and that she may have misunderstood the purpose of the meeting. By contrast the evidence of Mr Nicholson and Ms Richardson was quite firm and distinct. I therefore accept their evidence that Mr Nager and Ms Norris-Palmer could submit further information over the weekend in light of the advice that Mr Nicholson would be making a decision on Monday 17 March 2014. No further information was received by the Council.

[249] Having considered at some length all the circumstances of the case, I find that the Council carried out a fair procedure.

[250] I determine that Mr Nager was not unjustifiably dismissed by the Council.

Did the Council breach the duty of good faith it owed to Mr Nager during the course of his employment?

[251] Having found no disadvantage grievances and that the Council did not bully or harass Mr Nager in the period between 10 June 2013 and 17 March 2014, and that Mr Nager's dismissal was justifiable substantively and procedurally, I find no breach of the duty of good faith by the Council pursuant to s4 of the Act.

¹³ S4(1A)(b) of the Act

Costs

[252] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority