IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 345
3080152

	BETWEEN	RICHARD PAUL NOLAN Applicant
	AND	CIVIL AVIATION AUTHORITY Respondent

Member of Authority:	Philip Cheyne
Representatives:	David Balfour, advocate for the Applicant Amy Keir, counsel for the Respondent
Investigation Meeting:	1 & 2 July 2020 at Queenstown
Date of Determination:	28 August 2020

DETERMINATION OF THE AUTHORITY

A. Civil Aviation Authority is to pay Richard Paul Nolan $14,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

B. Civil Aviation Authority is to pay Richard Paul Nolan $6,321.56, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Employment relationship problem

[1] The Civil Aviation Authority operates a service called AVSEC[1] to provide airport security services. Mr Nolan was employed by AVSEC as an Aviation Security Officer (ASO) at Queenstown Airport from May 2016 until his dismissal in March 2020.

[1] I will use CAA or AVSEC when I refer to the respondent employer.

[2] Mr Nolan raised an unjustified disadvantage grievance with AVSEC by letter of 1 October 2019 and applied to the Authority in November 2019. In April 2020, Mr Nolan lodged an amended statement of problem, claiming a further disadvantage grievance and an unjustified dismissal grievance. AVSEC lodged an amended reply. The additional grievances covered by the amended statement of problem were not raised with AVSEC before the amended problem was lodged in the Authority. Counsel drew my attention to this informality but did not oppose me validating Mr Nolan's grievance proceedings as set out in the amended problem to the extent necessary, which I do. All Mr Nolan's grievance claims are resolved by this determination.

[3] In response to the November 2019 application to the Authority, AVSEC says that Mr Nolan did not suffer any unjustified action causing him disadvantage. In response to the April amended application, AVSEC says that Mr Nolan has not suffered any unjustified action causing disadvantage, that it justifiably dismissed Mr Nolan in March 2020 and that it acted in good faith in respect of all matters concerning Mr Nolan.

[4] More should be said about the events which gave raise to these proceedings before considering the grievance claims. The following account is mostly taken from contemporaneous documentary evidence. I do not set out all the evidence and submissions provided but will state relevant findings of fact and express conclusions on matters necessary to determine the problem.

What happened

[5] The two staff involved in the following event were part of roster pattern Team 1 along with Mr Nolan. At the time there were two other roster patterns. Some overlap occurred between the three roster teams covering the airport security requirements seven days each week.

[6] On 4 May 2019, two work colleagues took some photos using Mr Nolan's personal iPad which he had left unattended at work. The first colleague took a photo of the second colleague holding up the second colleague's device displaying an image of her own naked breasts. Several other photos were taken but there is no issue about the content of these other photos. They then deleted the photos. However, the photos remained accessible in the deleted items folder.

[7] Mr Nolan discovered the photos on his iPad when he was at work on 5 May. Some other workers and a Team Leader were present on 5 May but did not know who had used Mr Nolan's iPad the day before. There followed a discussion between Mr Nolan and other Team Leaders and they formed a view about who had used Mr Nolan's iPad, piecing together the location, time and rosters. It was agreed that Team Leader Borland would speak to the two women. Only the second colleague was on duty. She admitted her involvement, offered Mr Nolan an apology but said of the image "great set of tits" or something similar. Team Leader Borland asked Mr Nolan whether he accepted the apology. Mr Nolan's evidence, which I accept, is that he decided "to still accept the apology."

[8] Mrs Nolan's evidence, which I accept, is that she was told by Mr Nolan about the iPad photo, the second colleague's comment and the apology the same day.

[9] Mr Nolan in evidence said that the first colleague returned to work on 25 May and then offered an apology, which he accepted. When questioned, Mr Nolan accepted the date was incorrect. I find that the apology from the first colleague was on 7 May 2019, before the formal complaint.

[10] On 7 May at work Mr Nolan was involved in a discussion with several other colleagues about his jetski. Although the second colleague was not directly involved in the discussion, she was nearby and overheard it. She asked whether you could fit "two abreast" on the jetski. Mr Nolan is reported as telling the investigator that he "laughed this comment off" at the time. His evidence is that he realised then that the second colleague's apology was not genuine and decided to make a formal complaint.

[11] Mr Nolan's iPad is connected to other family devices via iCloud. Mr Nolan had not permanently deleted the offending image and it was shared to his 13 year old son's device. The son saw the image and on 12 May asked Mrs Nolan about it. Mrs Nolan explained to him what had happened on 4 and 5 May. Mrs Nolan's evidence is that she explained to her son that it was part of a "sexual harassment investigation". While there is no reason to doubt Mrs Nolan's evidence about how she characterised the incident in her discussion with her son, there was no employment investigation of any nature at that stage. I take it that Mrs Nolan told Mr Nolan about the discussion with their son.

[12] On 13 May Mr Nolan and the second colleague were on duty together. There

was an exchange between them about her attending to a work task which was marked on a whiteboard. The later investigation report records the second colleague claiming that Mr Nolan spoke in a very aggressive manner. Mr Nolan's evidence is that her response that she knew how to read a board was "negative and aggressive". The second colleague reported the exchange to a Team Leader.

[13] On 15 May Mr Nolan lodged a formal complaint about the 4 May incident.

[14] Mr Nolan now emphasises that the "great set" comment followed his acceptance of the second colleague's apology, showing that the apology was insincere and justifying his complaint. I place no significance on this sequence or the timing of the complaint. Mr Nolan was entitled to make a formal complaint and have it investigated.

[15] Sarah Preece is an HR Advisor for AVSEC at Queenstown Airport. Mr Nolan spoke to Ms Preece shortly before emailing her the formal complaint. The complaint includes reference to the 4 May incident, the admissions and apologies including the accompanying comment by the second colleague, the "two abreast" comment, the iCloud family sharing event and the 13 May exchange. It is alleged that the second colleague refers to a social media forum shared by several male Team 1 members in a derogatory fashion as "The Boys' Club". In the complaint, Mr Nolan questioned the sincerity of the second colleague's apology, described his family's unwitting involvement as unacceptable and distressing, and said that the second colleague's lack of professionalism made his work environment extremely uncomfortable. He said his privacy was violated, his computer was accessed without consent, he was subjected to unwanted and inappropriate sexual material and his family life was gravely compromised. Mr Nolan left it to Ms Preece to identify the "appropriate HR" breaches.

[16] Ms Preece conferred with the AVSEC Queenstown Station Manager (Mr Rivers). Mr Rivers had earlier referred Mr Nolan to Ms Preece to discuss the formal complaint process and also knew some of the background from a Team Leader report. Mr Rivers decided to appoint as an investigator a manager who had not been involved to that point (Ms McLeod). AVSEC describes this as an independent investigation.

[17] On 17 May Ms Preece acknowledged receipt of the formal complaint, said there would be an investigation, explained her future availability, asked Mr Nolan to

contact her or any management team member to discuss any matter and offered access to Employee Assistance Programme (EAP). Ms Preece contacted Mr Nolan by email again on 24 May, explained her availability and the arrangements she had made for Mr Rivers to update Mr Nolan and invited him to call or email her if there were any questions. Ms Preece's evidence is that Mr Nolan was off work for a short period in late May/early June and was then on annual leave for two weeks from 6 August. These absences were unrelated to the 4 May incident. Mr Preece says that when Mr Nolan was on duty she checked with him by phone or in person to see that he was okay. I accept this evidence.

[18] The terms of reference for Ms McLeod's investigation are dated 29 May 2019 and her report is dated 12 July 2019. It is not necessary to summarise these documents, except to say that the report concluded that the second colleague breached AVSEC's code of conduct and its core behaviours by her actions and that a disciplinary process might reasonably be initiated.

[19] While on leave, on 13 August Mr Nolan emailed Ms Preece to ask if the "ongoing issue" had been resolved or when it would be, referring to his and his family's stress. By this time a disciplinary process with the colleague[2] was underway. Ms Preece responded outlining why its resolution had been delayed and referring to a disciplinary meeting then planned for the following week. She expected that things would be resolved soon and Mr Nolan would be advised. Ms Preece repeated the offer of EAP support and invited Mr Nolan to contact her or other managers at any time if there was anything further they could do in support.

[20]

[21] Mr Nolan says that there was an incident when he and the second colleague were working together. There is an email dated 14 August 2019 from a Team Leader to Ms McLeod which gives an account of the incident. I take from this that the incident must have occurred before Mr Nolan commenced his leave. The colleague thought that Mr Nolan had deliberately sent her in the wrong direction to return a personal item to a passenger. Mr Nolan's evidence is that he mistakenly directed the colleague to the wrong area. There is no reason to doubt Mr Nolan's evidence that his directions were based on an innocent mistake. ASOs carry and use notebooks as part

[2] In what follows, I use "colleague" to refer to the second colleague.

of their work. The colleague used her notebook to record the incident, telling the Team Leader that she thought Mr Nolan had tried to set her up by sending her in the wrong direction. The Team Leader in his email says he spoke to Mr Nolan about the colleague's reaction. This too must have been before Mr Nolan went on leave. The Team Leader in his email asked whether it was time to separate Mr Nolan and the colleague as he did not know what to do anymore.

[22] Mr Rivers' evidence is that the possibility of separating the colleague and Mr Nolan was discussed amongst the Team Leaders. There were differing views. Some thought that moving the second colleague would send a signal that bad behaviour might be rewarded by a transfer,[3] while others thought that shifting Mr Nolan might be seen as the victim being punished. Ms Preece's evidence, which I accept, is that the Team Leaders had been asked to arrange duties so that Mr Nolan and the colleague were not working on the same duties at the same time, to minimise their contact and interaction. Work tasks are sufficiently varied across the whole site so that a degree of separation between ASOs is achievable for those on the same team.

[23] On 1 September, Mr Nolan in an email to Ms McLeod and others described a situation on that day where he was using a work computer to check emails and was told by the colleague that she needed to use the computer for a work task. The email stated that the colleague stood behind him "in an aggressive stance as if to intimidate me and make me aware of her presence". Mr Nolan repeats the assertion in his evidence. He also says in evidence that the colleague reported the incident to the Team Leader as him bullying her. I treat with caution Mr Nolan's evidence that the colleague deliberately shut down the computer, meaning he was inconvenienced by having to restart it. This was not asserted in the email and it is unlikely that Mr Nolan's recollection now is better than compared to the day of the incident. I accept that Mr Nolan's perception of the interaction was that the colleague acted "as if to intimidate" him. However, it is also apparent that the colleague considered that Mr Nolan was bullying her by his interactions at the time.

[24] Karen Urwin is AVSEC's Group Manager Operations. Ms Urwin who has authority for disciplinary matters including dismissal conducted the disciplinary process which followed Mr Nolan's formal complaint and the investigation report.

[3] There is a 2 September email from Mr Rivers which mentions this. There is also an email the same day from a Team Leader to Mr Rivers supporting moving the colleague.

The disciplinary process concluded on 3 September when Ms Urwin decided to issue the colleague a final written warning, effective for 12 months.

[25] Mr Nolan called in sick on 2 September.[4] On 4 September he sent a medical certificate to Ms McLeod with the subject line "Stress Leave". Except for a short period mentioned below, Mr Nolan was off work until his dismissal.

[26] Ms Preece's evidence, which I accept, is that after the disciplinary process ended there was agreement between Mr Nolan and the colleague to attend mediation. I infer that the purpose was to resolve difficulties in the working relationship between them. I note emails on 12 September and 19 September between Ms Preece and Mr Nolan about the mediation. It appears that 26 September was the date set for the mediation to be led by Fairway Resolution.

[27] There is a further medical certificate dated 16 September which records that Mr Nolan felt ready to return to work after time off for "work-related stress and issues relating to a colleague at work". Mr Nolan returned to work on or about 17 September.[5] However, on 23 September Mr Nolan was certified unfit for two weeks as "his current work situation is causing some mental health issues".

[28] In an email on 26 September with the subject "Workplace wellbeing", Ms Preece summarised her phone discussion on the previous day with Mr Nolan. Mr Nolan sought approval for AVSEC to fund some private counselling as he had not found the EAP provider to be helpful. Ms Preece reported that funding for three sessions was approved, with ongoing funding to be reviewed after then. The email referred to a memorandum of understanding prepared by the mediator and mentioned AVSEC's willingness to make reasonable changes in the workplace, with the colleague "moving teams as part of this".

[29] Despite arrangements, the mediation did not occur. Mr Nolan learnt that the colleague intended to bring as a support person another work colleague who Mr Nolan did not trust to respect the confidentiality of mediation. Mr Nolan declined to participate if that person was involved. Mediation arrangements depend on mutual agreement. Mr Nolan's participation in the proposed mediation was entirely voluntary

[4] Referred to in a 2 September 2019 email from Ms Preece to a Team Leader.
[5] A medical certificate dated 16 September records that Mr Nolan "now feels ready to return to work after some time off for work-related stress and issues relating to a colleague".

and he was entitled to withdraw, as he did.[6]

[30] By the letter dated 1 October 2019, Mr Nolan's initial personal grievances were raised. A response by 3 October was sought.

[31] Ms Neilson is CAA's HR Services Manager. She had a discussion with Mr Nolan's representative (David Balfour) on 2 October and then sent an email summarising what had been agreed. AVSEC agreed to reimburse some expenses in relation to Mr Nolan seeking support and counselling, pay any leave without pay and reimburse any annual leave taken and ensure that Mr Nolan and the colleague are not in the same team when he returns to work. Unrelated to these issues, a culture review process was underway for AVSEC. AVSEC agreed with Mr Nolan's request to talk to the reviewer. However, on 16 October the representative in an email said that Mr Nolan now wished to progress his grievance claims, saying that the colleague was still shown as being in Mr Nolan's team.

[32] On 4 October, Mr Nolan was certified by his doctor as unfit for work from 4 October but should be fit to turn to work on 24 October. There is a further certificate dated 21 October confirming that Mr Nolan should be fit to restart work on 24 October.

[33] Mr Rivers sent an email to the representative on 23 October, summarising a discussion between Mr Rivers and Mr Nolan the day before. The email notes an arrangement in the discussion with Mr Rivers that Mr Nolan will move to Team 3 when he returns to work without loss of pay or disadvantage. AVSEC was also moving the "support person" who accompanied Mr Nolan when he spoke to the reviewer. Mr Rivers wrote that AVSEC was not in agreement to grant any further special leave in addition to what had to that point been paid.

[34] There was a prompt response from the representative who disputed why any AVSEC worker had to accept the presence of the colleague in the workplace, telling it to shift her and to stop "revictimising" Mr Nolan and stating that the personal grievances would be lodged in the Authority seeking urgency, if not resolved that day. Later that afternoon, the representative advised that Mr Nolan wished to access the "Protected Disclosure Act resources" and sought a copy of those policies. Ms Neilson

[6] Mr Nolan's evidence is that Mr Rivers affirmed his view about the support person. It is not necessary to make any finding on that point, given that Mr Nolan was entitled to withdraw regardless.

sent the requested documentation the next morning. In the meantime, Ms Neilson sent an email to Mr Rivers, Ms Preece and AVSEC's counsel in which she summarised a discussion she had with Mr Nolan's representative. Ms Neilson had explained that they were attempting to achieve the best operational option to support Mr Nolan, given that at Queenstown Airport completely separating them was difficult.

[35] There is a significant evidential dispute between Mr Rivers and Mr Nolan about an aspect of their 22 October discussion. Mr Nolan says that Mr Rivers untruthfully conveyed to him that the support person's move to Team 3 was permanent, when it would only be for a limited time. Mr Rivers knew that Mr Nolan would talk to the support person, and realised that the support person would tell Mr Nolan the duration of the support person's reassignment. It is improbable that Mr Rivers would have misled Mr Nolan, given that. In addition, Mr Rivers generally impressed as providing careful and balanced evidence while Mr Nolan did not exhibit that care and balance with his evidence. I do not accept Mr Nolan's evidence that Mr Rivers was untruthful in what was said on 22 October.

[36] Mr Nolan did not return to work and saw his doctor on 25 October. He was certified as unable to attend work from 24 October and should be able to return to work on 9 November pending outcome of "current investigations which are causing significant stress".

[37] Mr Nolan's grievance was lodged in the Authority on 4 November.

[38] There was a discussion between Mr Rivers and the representative on Friday 8 November, following which Mr Rivers sent an email to the representative. Mr Rivers affirmed his wish for Mr Nolan to return to work and sought confirmation that he would attend as rostered that weekend. He asserted that AVSEC had taken appropriate steps in response to the 4 May conduct. He said that moving Mr Nolan to Team 3, which had been discussed with him, was to provide support for his wellbeing, to reduce the risk of friction with the colleague and with regard to operational needs which required additional drivers in Team 3. Mr Rivers affirmed that AVSEC would participate in mediation concerning the grievances. There was a response later that day from the representative giving "formal notice we intend to use the Whistle Blower Legislation" and disputing that the two colleagues involved on 4 May were dealt with appropriately.

[39] Mr Nolan did not return to work but saw his doctor on 8 November and was certified as unable to attend work from 10 November and should be able to return to work on 16 December. Meantime, counsel for AVSEC on 27 November wrote to the representative stating:

> Avsec remains willing to explore any reasonable measures which you consider useful to enable Mr Nolan's safe return to work in the circumstances. It has offered medical and psychological support, rearranged workers to ensure that Mr Nolan is not required to work within the same team as ASOs [names], implemented a cultural development programme following this incident, re-emphasised workplace standards and behavioural expectations, supported your client's extended leave, and offered professional assistance to manage and even repair the interpersonal relationships at stake here.

[40] The employment relationship problem was not resolved at mediation.

[41] On 6 December counsel wrote to Mr Nolan's representative. AVSEC said it remained prepared to explore reasonable measures which Mr Nolan considered useful to enable his safe return to work. However, short of an agreed plan for Mr Nolan's return, AVSEC said it would have to evaluate the future of its employment relationship with Mr Nolan. Medical disengagement based on long-term illness or termination for incompatibility or frustration were raised. A meeting on 13 December with Mr Rivers and Ms Preece but without counsel was proposed.

[42] There followed email exchanges, which I will summarise. The representative responded that the date was unsuitable, saying that "… my client does not wish to ever be within the same location with the offender." Counsel in reply asked for suitable meeting dates. That drew a response that "He does not want to come into contact with the … offender." Counsel replied that both parties in the employment relationship have an obligation to be constructive about how that will work in the future. Updated medical information was requested. The representative said that Mr Nolan wished to proceed with an Authority determination and considered further discussion was unlikely to advance matters. Counsel responded referring to good faith and inviting email or discussion between advocates. Counsel stated "There is a real difficulty here with your client's unwillingness to contribute to the process of problem solving, and I fear the parties are approaching a point of irreconcilable relationship breakdown." Counsel mentioned that Mr Nolan's medical certificate had expired and

asked for an update on the medical situation as a matter of urgency. The representative in reply listed several options, one of which included moving Mr Nolan to another role within AVSEC. Some further detail was requested and the representative mentioned reassignment to the dog unit. Counsel acknowledged receipt of a medical certificate dated 4 December meaning it was unlikely that progress could be achieved before Christmas. Counsel advised that there were no current vacancies and none expected in the dog unit.

[43] On 14 January 2020 the representative forwarded Mr Nolan's email with the subject "Return To Work" to Mr Rivers and to counsel. Mr Nolan asked to return to work on Team 1 and the colleague to be moved to other work. Counsel responded to the representative, commenting on the apparent change in Mr Nolan's position. Previously AVSEC had understood it to be that Mr Nolan would not return to work while the colleague remained employed by AVSEC, but was now saying that he would return to work so long as the colleague was not assigned to Team 1. Counsel proposed a meeting to discuss "a strategy for and the parameters of a return to work" and referred to some issues.

[44] On 16 January, the representative forwarded to counsel an email from Mr Nolan which refers to an unrelated matter involving the colleague.[7] The representative criticised[8] AVSEC for not dismissing the colleague, asserting that there had been an abysmal lack of support for Mr Nolan. Counsel repeated her request for meeting availability to discuss a return to work and the issues she had identified. Counsel followed up on 21 and 23 January seeking a response.

[45] In the meantime, Mr Nolan emailed CAA's Chief Executive Officer. The CEO passed Mr Nolan's correspondence to the HR Services manager to respond on his behalf. I set out part of that response:[9]

> From what I understand:
>
> 1. Your personal device had an inappropriate picture placed on it at work;
>
> 2. The Station investigated the issue and you were interviewed as part of that process. Disciplinary action was taken against the individuals involved;

[7] The details are not material to consideration of Mr Nolan's grievances so do not need to be canvassed in this determination.
[8] As with many of the representative's emails, the language was inflammatory. It need not be set out for present purposes.
[9] Email dated 30 January 2020.

> 3 You have raised a PG dated 1 October 2019 against Avsec in regards to this incident seeking remedies;
>
> …
>
> 6. We are currently awaiting to hear from the ERA regarding a date for the investigation of your personal grievance;
>
> 7. You attended mediation with Avsec in December 2019, but the matter was not resolved.

[46] The HR Services manager referred to Mr Nolan's wish to return to work, affirmed AVSEC's similar wish and noted that Mr Nolan and the colleague were no longer assigned to the same team although there would be cross-over. The manager repeated the wish to arrange a meeting to "work through how we can appropriately transition you back into the workplace in a way that both you and Avsec are comfortable with." Mr Nolan was asked to confirm a time for him and his representative to meet with counsel, Mr Rivers and Ms Preece.

[47] In the absence of any contact, counsel followed up with the representative on 7 and 12 February. The representative replied on 13 February, saying that Mr Nolan was awaiting a response to his earlier queries. To summarise, Mr Nolan had asked AVSEC to list those people it referred to when it said[10] "there has been considerable damage to … [Mr Nolan's] other relationships within the workplace during this process". Counsel replied asking for confirmation whether Mr Nolan was or was not willing to meet.

[48] Meantime, there had been some txt exchanges with Mr Rivers initiated on 3 February by Mr Nolan about meeting without representatives. Mr Rivers was delayed responding as he was in Wellington and said he would reply when back in Queenstown. Mr Nolan said he was not available on 12 and 13 February as he was away on a fishing trip. Mr Rivers proposed meeting on 14 February. On 13 February Mr Nolan sent a txt to say he was not available because he was returning later than expected from the fishing trip. Mr Rivers was then on annual leave. No meeting resulted from this exchange.

[49] On 19 February 2020, Ms Urwin wrote to Mr Nolan seeking a meeting to discuss "a proposal to terminate your employment on the basis of severe and irresolvable incompatibility." I say more about the letter later but note that the

[10] Counsel's email dated 15 January 2020 seeking a meeting to discuss a return to work.

proposed meeting was only to discuss the proposed termination of the employment. In response, Mr Nolan said he was surprised and disappointed to read the suggestion of termination of employment, offered to return to Team 1 but with the colleague transferred to another team and agreed to meet on 11 March.

[50] Ms Preece forwarded a reply from Ms Urwin who agreed some arrangements for the meeting and repeated that the 11 March meeting was only to discuss the "proposal" in her 19 February letter. Ms Urwin also said that AVSEC was willing to meet to discuss a return to work, saying while it endeavoured to support staff where possible it was not able to assign teams based on transport preferences. Ms Urwin said any return to work meeting had to be before the 11 March meeting. Ms Preece reinforced AVSEC's willingness to meet to discuss a return to work before 11 March and invited Mr Nolan to contact her with his availability.

[51] Mr Nolan followed up with an email to Ms Preece. He repeated his proposal to return to Team 1 with the colleague transferred to another team. He undertook to act professionally in all dealings with AVSEC staff and said he was happy to meet to discuss and resolve matters.

[52] The mail exchanges between Mr Nolan and Ms Preece resulted in a discussion between them on 5 March. Mr Nolan recorded this call without telling Ms Preece.[11] I will summarise the discussion. Ms Preece said that Mr Nolan would need a medical clearance to return to work and Mr Nolan said that the issue was safety in the workplace not his mental state. He said if there was an agreement he could not see any reason why his doctor would not give him a clearance as he was fit and healthy. There was some discussion over a phased approach to assigned tasks. Mr Nolan said he could manage some cross-over if they were on different teams but doubted that it would work if they were on the same team. He confirmed that a return to work on the same team as the colleague was not agreeable at that stage. Ms Preece said that AVSEC would require a mediation process between Mr Nolan and the colleague. Mr Nolan was willing to consider that. It was agreed that some retraining would be necessary. Mr Nolan noted that the Team Leaders had been switching duties to separate him and the colleague, but thought it best that they be in separate teams, at least initially. Ms Preece noted that matters were in Ms Urwin's hands at that point.

[11] A transcript was produced in evidence with some redactions.

[53] On 10 March Ms Urwin emailed Mr Nolan ahead of their meeting. It reads:

> Hi Richard,
>
> I have spoken with Sarah regarding your recent conversation with her and considered the points discussed as well as your recent emails.
>
> Unfortunately you appear to remain willing to accept that ASO [name] has learned, improved and moved on from the incident. Nor are you of the belief that the Queenstown Management team have the ability to handle matters like this adequately now and in the future. You state you are willing to complete private mediation with ASO [name] however you are doing so to appease Avsec and not because you wish to work towards a better working relationship. This leads me to believe that there may be a fundamental break down in the employment relationship.
>
> You have discussed ASO [name]'s behaviour whilst you have been away from the workplace with your colleagues. You have formed opinions based on this information which we consider to be false. I question the motivation behind these discussions and it indicates that you may not be operating in a professional manner or in good faith.
>
> Your commitment to resolving this manner has been minimal in the past few months and your enthusiasm this week appears somewhat insincere. You have not proposed any practicable solutions to the dispute, other than changing teams, however this was agreed to a long time ago and was not acceptable to you then so it seems disingenuous at this point. Whilst we appreciate your willingness to actually have a discussion it seems nothing has changed other than you deciding that you would like to remain employed. It appears the employment relationship remains incompatible and unable to be reconciled.
>
> Regards
>
> Karen Urwin

[54] Mr Nolan responded, refuting the statements made by Ms Urwin. To summarise, Mr Nolan said he would be professional in all his dealings with the colleague, that he had been the recipient not the initiator of information from friends who work at AVSEC, that his recent emails showed his genuine attempt to resolve matters and that he remained open to a mutual resolution.

[55] The meeting on 11 March involved Mr Nolan, Mr Balfour (by phone), Ms Urwin, Ms Preece and Mr Rivers. With consent, AVSEC recorded the meeting. A summary follows. Ms Urwin referred to the letter expressing her view that the employment relationship was "very tenuous". Mr Nolan referred to his emails. Mr Balfour referred to several matters and disputed that the colleague had learnt any lesson. Ms Urwin observed that those matters preceded the disciplinary outcome, which she described as a private matter. Mr Balfour persisted and said that it would not be private when Mr Nolan's matter got to the Employment Relations Authority. Ms Urwin said that AVSEC was "relaxed" about any publicity and that the disciplinary outcome was based on independent legal advice. She said that there would be no payment to Mr Nolan and whether the employment relationship depended on him being able to "rule a line" under the matter. Mr Balfour interrupted to describe the colleague as a "sex offender". He said it should have been reported to Police, as a "harmful digital communication" and that "you have covered up a crime." Ms Urwin said that Mr Nolan could have reported the matter to Police but Mr Balfour stated that AVSEC had a "legal responsibility" as it happened on its premises. Mr Balfour questioned what AVSEC had done for his client as the "victim". Ms Urwin referred to counselling, reimbursement of medical fees and paid special leave. Mr Balfour said it was insufficient as AVSEC had not "removed" her. Ms Urwin commented that what Mr Balfour had been saying supported the view that the employment relationship was no longer tenable. There was then an exchange between Ms Urwin and Mr Nolan about him moving teams for operational reasons, which Mr Nolan regarded as disadvantageous. Mr Balfour described this as "revictimising" Mr Nolan, saying if Mr Nolan had "flashed his balls on her screen" he would not still be employed. Ms Urwin said her patience for listening to abuse was beginning to end. Responding to an assertion that the letter showed pretermination, Ms Urwin said it was a "preliminary decision". Mr Balfour said "Wasn't it conditional on undergoing mediation with the creature?" He again described the colleague as a "creature" and said "I'll call her a full-frontal flasher." Ms Urwin brought the meeting to an end saying "this is grossly inappropriate and completely unprofessional".

[56] Taking the view that Mr Nolan had not had a proper opportunity to be heard because of the approach taken by Mr Balfour, Ms Urwin decided to instruct an independent lawyer (Mr Bevan) to provide AVSEC with submissions on behalf of Mr Nolan, based on a description of the background and file material it provided to the

lawyer. The lawyer provided comprehensive written submissions by letter dated 17 March, arguing that a dismissal for reason set out in Ms Urwin's letter of 19 February would almost certainly be unjustified.

[57] Meantime, Mr Nolan sent an email on 17 March to Ms Preece. He said he was disappointed, felt the meeting was shut down prematurely by Ms Urwin,[12] she was under the impression that Mr Nolan only wanted money and was not there to listen to his point of view. He asked for a final outcome. Ms Preece acknowledged the email, saying it had been forwarded to Ms Urwin who would respond as soon as she was able.

[58] In a letter dated 19 March Ms Urwin announced and explained her decision to terminate Mr Nolan's employment on notice, on the basis of "a severe and irresolvable incompatibility between you and ASO [name]" and AVSEC's election to pay him notice in lieu.

Grievances raised by the 1 October letter and the 4 November application

[59] I summarise the letter as follows. Mr Nolan claims grievances of "disadvantageous conduct" and breaches of good faith. Mr Nolan is said to be the victim of indecent exposure, the colleague remained in his immediate workplace but should have been dismissed and reported to the Police. The "Harmful Digital Communications Act", the "crimes Act" and the "Summary Offences Act" are listed. It is claimed that Ms McLeod transferred blame for the 4 May incident to Mr Nolan "for not closing down his computer". This was said to be equivalent to blaming a rape victim. It is claimed that if Mr Nolan had done "the equivalent" to a woman, AVSEC's response would have been "vastly different". Mention is made of the colleague's "fabricated" bullying allegation against Mr Nolan. Mr Nolan sought payment and crediting for unpaid and paid leave taken, removal of the colleague from any work location where Mr Nolan was assigned, compensation of $20,000.00, an independent review of the 15 May complaint and Ms McLeod's investigation, a written apology and full costs.

[60] The November statement of problem refers to the 4 May incident, asserts that the AVSEC investigation was conducted with little or no feedback to Mr Nolan, says that the "perpetrators" were not removed from the workplace or his team and that

[12] I do not consider Ms Urwin could be fairly criticised for her conduct during the 11 March meeting.

AVSEC was instead attempting to transfer Mr Nolan. It says that AVSEC is failing to make him safe in the workplace and that he is the victim of sexual harassment. Mr Nolan seeks compensation under s 123 of the Act and penalties for breaches of s 4 of the Act.

[61] The Authority has no jurisdiction to consider whether the 4 May incident constituted a breach of the Harmful Digital Communications Act 2015, the Crimes Act 1961 or the Summary Offences Act 1981. I say no more about these assertions.

Claims lodged by amended statement of problem

[62] Mr Nolan repeats the disadvantageous conduct grievance claim but includes a more comprehensive account of events which also covers events since the original statement of problem.

[63] Mr Nolan says his dismissal is unjustifiable.

[64] The amended problem claims that there were breaches of the duty of good faith and refers to s 4(1) and s 4(1A) of the Act. There is a claim for penalties for breaches of s 4.

Penalty claim

[65] There was an employment relationship between Mr Nolan and AVSEC, so a penalty might be available, subject to s 4A of the Act. No bargaining for an employment agreement was involved and AVSEC throughout had no intention to undermine its employment relationship with Mr Nolan. That leaves the possibility of a penalty on proof that a failure to comply with the duty of good faith was deliberate, serious and sustained.[13]

[66] Parliament has set a high threshold before a breach of good faith renders a party potentially liable for the imposition of penalty.[14] I will shortly consider Mr Nolan's grievances. While an established personal grievance probably includes a breach of good faith, the circumstances here fall well short of showing any breach of good faith was deliberate.

[67] The claim for penalties for breach of good faith must be dismissed.

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[13] Employment Relations Act 2000 s 4A(a).
[14] *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 112.

Personal grievance of retaliatory action

[68] The Protected Disclosure Act 2000, mentioned by Mr Nolan's representative in correspondence to AVSEC, can engage the Authority's personal grievance jurisdiction. In the present case, there is no evidence that Mr Nolan could have made or did make a protected disclosure, nor is there any evidence that he suffered any retaliatory action by AVSEC as a result. There is no grievance by reference to the Protected Disclosure Act 2000.

Personal grievance of sexual harassment

[69] An employee may have a personal grievance against their employer because of a claim they have been sexually harassed in the employee's employment by their employer or their employer's representative. The colleague involved in the 4 May incident had no authority over Mr Nolan or other employees so is not a representative of CAA.[15] Mr Nolan only has a potential claim against his employer if the circumstances set out in s 117 and s 118 apply.

[70] Mr Nolan complained about the 4 May incident to his employer on 15 May. Mr Nolan might only have a sustainable personal grievance against AVSEC if, after his complaint, AVSEC did not take whatever steps are practicable to prevent a repetition of offending behaviour by a co-worker.

[71] There are three incidents of conduct which might fall within the definition of sexual harassment in s 108 of the Act: the 4 May incident, the comment made as part of the apology and the comment made during Mr Nolan's discussion with other colleague's about his jetski. Both comments which Mr Nolan says were offensive were before and part of his 15 May complaint. In the absence of any repetition of proscribed behaviour after his complaint, Mr Nolan cannot establish a sexual harassment grievance against AVSEC.

[72] AVSEC submits that no sexual harassment grievance was raised with it before its mention in the statement of problem. Given my view that Mr Nolan cannot have a sexual harassment grievance against his employer, it is not necessary to consider whether any of Mr Nolan's exchanges within 90 days were sufficient to raise a grievance based on the 4 May incident and comments soon after. Nor is it necessary

[15] See Employment Relations Act 2000 s 103(2).

to consider whether AVSECs responses subsequently to Mr Nolan and Mr Balfour would amount to implied consent for a late grievance.

[73] I find Mr Nolan does not have a sexual harassment grievance.

Personal grievance of unjustified disadvantage

[74] Mr Nolan maintained his stance that the apology of the first colleague involved in the 4 May incident was genuine whereas the apology of the second colleague was not genuine. A grievance claim is based on AVSEC's decision not to dismiss the second colleague, meaning that she remained in the workplace. Once the colleague's continued employment became apparent, Mr Nolan was certified as medically unfit for work. Initial certificates refer to workplace stress or similar, to the extent they give a reason. Mr Nolan attributes the stress to the 4 May incident and his interactions with the second colleague after then, not any other workplace factor. There is no basis to doubt that Mr Nolan was genuinely unable to work due to this stress.

[75] Counsel summarises the legal obligations as requiring an employer to take reasonably practicable steps to prevent harm in the workplace including harm by sexual harassment.

[76] The steps taken by AVSEC can be summarised as follows. Throughout, it had a code of conduct which proscribes conduct such as occurred on 4 May. When conduct was brought to the attention of team leaders, prompt action resulted in the colleagues admitting and apologising for their behaviour. The two comments by the second colleague which Mr Nolan objects to were not due to any action or inaction by AVSEC. AVSEC's approach up to the formal complaint is consistent with its policies and guidelines.

[77] Mr Nolan elected to make a formal complaint covering the 4 May incident, the two comments, various verbal and non-verbal interactions with the colleague after 4 May, the "Boy's Club" comment and the 13 May "whiteboard" exchange.

[78] Mr Nolan was appropriately supported when he inquired about making a formal complaint. AVSEC acknowledged his complaint promptly and offered various

forms of and avenues for support, some of which Mr Nolan utilised.[16] AVSEC responded fairly when Mr Nolan brought to its attention his lack of satisfaction with the EAP service. AVSEC repeated its offers of support.

[79] AVSEC met its obligations and acted fairly and reasonably in the way in which it conducted the investigation in response to Mr Nolan's formal complaint. No issue was taken with the terms of reference. No issue was taken at the time with the appointment of Ms McLeod as the independent investigator. Mr Nolan and Mr Balfour now say that Ms McLeod was not "independent" as she is a CAA employee and based in Queenstown. AVSEC's policy supports the appointment of an independent investigator, meaning a person free from any potential bias given the issue and people subject to investigation, which Ms McLeod was. During the Authority's investigation meeting it emerged that Ms McLeod had not provided a draft of her proposed report for any comment by Mr Nolan before it was finalised. However, there was no unfairness to Mr Nolan from that minor procedural irregularity. The final report upheld Mr Nolan's complaint.

[80] Mr Nolan says that Ms McLeod attributed to him some responsibility for the incident. This is a reference to the comment in the report that if personal devices were not accessible in the work area it would rule out the possibility of the incident occurring again. I do not read into this comment any criticism of Mr Nolan for having or leaving his iPad in the work area.

[81] The complaint was on 15 May, the terms of reference are dated 29 May and the final report is dated 12 July. AVSEC needed to manage obligations owed to others as well as to Mr Nolan, which resulted in the time taken to complete the investigation. Once Ms McLeod completed her report, AVSEC initiated a disciplinary process with the colleagues. The disciplinary issues were more important than they were urgent. There is no reason to doubt AVSEC's evidence explaining that it took some time due to other commitments of various people involved on each side. Over that time Ms Preece contacted Mr Nolan and responded appropriately to any issues he raised. These actions as they affected Mr Nolan were those of a fair and reasonable employer in the circumstances.

[16] Mr Nolan now says no support was offered for his family. AVSEC's offers left it to Mr Nolan to request such support but he did not.

[82] A substantial part[17] of Mr Nolan's claim is that his conditions of employment were affected to his disadvantage because at the end of the disciplinary process the colleague was not dismissed but remained in the workplace. Mr Nolan was only at work briefly once the disciplinary outcome became known and there were no objectionable interactions between the colleague and Mr Nolan after then.

[83] Mr Nolan expresses concern that the colleague had access to his complaint and related information but he has not been given access to any statements by her. AVSEC owed disclosure obligations[18] to the colleague as part of the disciplinary process as it was likely to have an adverse effect on the continuation of her employment. It did not owe a reciprocal disclosure obligation to Mr Nolan as AVSEC was not proposing to make a decision which was likely to have an adverse effect on the continuation of his employment. AVSEC also needed to be mindful of disclosure restrictions under the law.[19] Mr Nolan's concern about disclosure does not give rise to any legal liability on AVSEC.

[84] Mr Nolan in evidence claims that there were several other situations not involving him where the colleague was guilty of misconduct in her AVSEC employment. Mr Nolan also produced claims by others about her conduct in other employment to support and reinforce his criticisms of her and AVSEC. It is not necessary to canvass these assertions. Mr Nolan's grievance claims do not turn on whether or not AVSEC should have dismissed or not employed the colleague based on other conduct.

[85] Mr and Mrs Nolan both gave evidence about an interaction in public with the colleague, following Mr Nolan's dismissal. It is not necessary to set out the evidence. It makes no difference to the outcome of Mr Nolan's personal grievance and penalty claims against AVSEC.

[86] I find that AVSEC's decision not to dismiss the colleague on its own did not amount to an unjustifiable action affecting Mr Nolan's employment to his disadvantage.

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[17] I note that in evidence including by way of reply Mr Nolan retreats from saying he could not work at AVSEC while the colleague remained employed there. However, throughout it was strongly argued by Mr Nolan and especially by Mr Balfour that the colleague should have been dismissed.
[18] Employment Relations Act 2000 s 4(1A) and s 103A.
[19] Employment Relations Act 2000 s 4(1A) and 4(1C).

[87] However, more should be said about the roster allocations. AVSEC says that work and roster allocations are within its discretion to manage. By mid-August a Team Leader, referring to Mr Nolan and the colleague, asked Ms McLeod whether it was "now time to separate them?" This was in an email with the subject "Another incident". There is no evidence to prove issues other than those mentioned in this determination. There was a discussion and an email on 2 September involving Team Leaders. By 26 September Ms Preece advised "[name] is in the process of moving teams as a part of this" as part of AVSEC making reasonable changes to support Mr Nolan. Ms Neilson on 2 October wrote to Mr Balfour "We will ensure [they] are no[t] in the same team. This process is in place now and when Richard returns to work this will be in place." Mr Balfour pointed out to Ms Neilson that the colleague was still in Mr Nolan's team as at 16 October. Mr Nolan's medical certificate received on 21 October confirmed Mr Nolan was fit to resume work on 24 October. On 22 October Mr Rivers spoke to Mr Nolan about him moving to Team 3 to minimise contact and for operational reasons. Mr Rivers' evidence is that when he asked Mr Nolan about moving to Team 3, Mr Nolan said he was not happy about it "but you're the boss". I accept this evidence. Mr Rivers proceeded on the basis that Mr Nolan had agreed to move teams, however I find that Mr Nolan's response amounted to an acknowledgement rather than agreement. Mr Rivers in his 23 October email to Mr Balfour confirmed Mr Nolan's move to Team 3 on his expected return on 24 October.[20]

[88] Mr Rivers' advice assigning Mr Nolan to Team 3 on his intended return to work is an action by AVSEC. AVSEC must show that this action and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.[21]

[89] The circumstances include the colleague's 4 May conduct, Mr Nolan's 15 May complaint which was upheld, occasional tension between Mr Nolan and the colleague after his complaint, the decision not to dismiss the colleague and Mr Nolan's absence from work on stress leave from then. AVSEC provided substantial support additional to its contractual obligations but advised in Mr Rivers' email that it would not grant any further special leave. Before the 22 October discussion with Mr

[20] An email exchange from a Team Leader to Mr Rivers on 23 October sounded a note of caution that Mr Nolan should be the one to move to Team 3 only if he was "100% onboard".
[21] Employment Relations Act 2000 s 103A(3).

Rivers, Mr Nolan had several times been assured that the colleague would be allocated to a different team.

[90] AVSEC had in those communications recognised that the reasonably practicable steps it should take to ensure a safe working environment for Mr Nolan included team separation between him and the colleague. I accept that AVSEC had a business need for more authorised drivers on Team 3 and that need could have been met in part by reassigning Mr Nolan to Team 3. However, AVSEC did not explain to Mr Nolan what changed about its business requirements, meaning its earlier assurances that the colleague was being reassigned could no longer be implemented.

[91] Given this, I find that AVSEC's action in requiring Mr Nolan rather than the colleague to change teams on his intended return to work on 24 October is unjustifiable.

[92] I find that Mr Nolan's employment was disadvantaged by this action. As Mr Rivers advised in his 23 October email to Mr Balfour, Mr Nolan had exhausted his sick leave and was on leave without pay, pending his return to work on 24 October. In the face of his reassignment to Team 3, Mr Nolan sought medical advice and was re-certified unfit for work. I find that Mr Nolan has a personal grievance.

Remedies

[93] There is a claim for compensation for humiliation, lost dignity and injured feelings. For the most part, Mr Nolan's and Mrs Nolan's evidence on point is directed at AVSEC's decision not to dismiss the colleague. However, I accept that some of his anger was caused by AVSEC's decision that he, rather than the colleague, would be reassigned. There is no professional evidence to assist with establishing the overall extent of this loss, or the portion attributable to AVSEC's unjustified roster decision. I fix an award of $5,000.00 compensation as reasonable to cover non-pecuniary loss caused by the roster decision.

[94] There is a claim for reimbursement of lost remuneration. The loss is recoverable only if it is the result of Mr Nolan's personal grievance.

[95] From 23 October Mr Nolan's absence must have resulted from the colleague's continued employment, based on Mr Nolan's and Mr Balfour's communications. The medical certificates must be understood in that context. On 14 January Mr Nolan

proposed a return to work if the colleague was reassigned. On 30 January 2020 Mr Nolan was certified by his doctor unfit for work as follows:

> the history I have obtained is that the disability has been sufficient that the patient has been unable to attend work since **16/02/2020** and should be able to attend work on **31/03/2020.**

In the discussion on 5 March with Ms Preece, Mr Nolan said in relation to his medical certification that he would need to talk with his doctor and see what he said, but the biggest thing at that point was "safety in the workplace and not my mental state now it is just waiting on Avsec to provide a safe working environment which is what we are trying to get to now moving teams". I accept Mr Nolan accurately described his view but it does not displace the statement in the 30 January certificate that his disability assessed at that time meant he was unable to work before 31 March. I do not have any evidence to establish that the assessment on 30 January left open the possibility that Mr Nolan would be fit to return to work subject to a roster arrangement. I must find that the "disability" in the 30 January certificate is the same disability covered by earlier certificates on 23 September 2019, 4 October 2019, 25 October 2019 and 4 December 2019. I find that Mr Nolan's absence from work from 24 October 2019 up to his dismissal and his lost remuneration were caused by his refusal to work while the colleague was still employed there, not by AVSEC's unjustified decision to assign him to Team 3.

[96] As Mr Nolan's lost remuneration was not the result of his personal grievance, he is not entitled to an order for reimbursement.

[97] In deciding the nature and extent of the remedies, I must consider the extent to which Mr Nolan's actions contributed in a blameworthy way towards the situation giving rise to the personal grievance, and reduce the remedies accordingly.

[98] While Mr Nolan, principally through his representative, raised the colleague's continued employment rather than the roster re-assignment as his grievance, I do not include that as a blameworthy contribution to the circumstances giving rise to his grievance. Later communications by and on behalf of Mr Nolan could not have contributed to the circumstances giving rise to the grievance on 22 October. Earlier communications might have not been a constructive approach to the maintenance of the employment relationship, but they were not causative of the established grievance.

I find that Mr Nolan did not contribute in a blameworthy manner to that grievance.

[99] There will be an order for AVSEC to remedy this grievance by paying compensation of $5,000.00 to Mr Nolan.

Personal grievance of unjustifiable dismissal

[100] AVSEC must show its actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. In applying this test, there are matters I must consider and I am entitled to consider other matters I consider are appropriate.[22]

[101] It is first helpful to describe AVSEC's concerns, as set out in Ms Urwin's letter of 19 February. AVSEC said that Mr Nolan's ongoing employment might be untenable because of a severe and intractable incompatibility between him and the colleague. Ms Urwin says that Mr Nolan had made clear his view that the colleague should be dismissed and his representative "appears to indicate you are still unwilling to return to work until certain demands relating to [name] are met." AVSEC considered that it would be impossible to bring Mr Nolan back to the workplace in a manner which would be acceptable to him and appropriate for other staff. It considered Mr Nolan's attitude towards the matter since September had caused it to escalate.

[102] Following some exchanges, the meeting involving Mr Balfour and Mr Nolan and consideration of points raised by the independent lawyer, Ms Urwin announced the decision to terminate the employment because of a severe and intractable incompatibility between Mr Nolan and the colleague.

[103] The law has long recognised that on relatively rare occasions an employer may justifiably terminate an employment relationship on the grounds of incompatibility. AVSEC must establish that there is an irreconcilable incompatibility, that it is attributable wholly or substantially to the employee and that the dismissal is carried out in a procedurally fair manner.[23]

Irreconcilable incompatibility

[22] Employment Relations Act 2000 s 103A(3).
[23] *Walker v Procare Health Ltd* [2012] ERNZ 303.

[104] I find that AVSEC has not established that there was an irreconcilable incompatibility.

[105] By January, Mr Nolan was saying that he would return to work to Team 1 so long as the colleague was reallocated to another team. This was repeated in other exchanges in February and March and was discussed between Mr Nolan and Ms Preece on 5 March. Ms Urwin challenged Mr Nolan in her email on 10 March and Mr Nolan in response repeated his view that he should return to Team 1 with the colleague reallocated to another team. He however left it open to consider why he should be the one reassigned to another team, as had been earlier been discussed between Mr Rivers and Mr Nolan.

[106] I do not discount the offensive way in which Mr Balfour referred to the colleague during the 11 March meeting. However, the point was whether the offensive descriptions by Mr Nolan's representative meant that there was a state of irreconcilable incompatibility between Mr Nolan and the colleague. Mr Nolan did not dissociate himself from Mr Balfour's offensive descriptions of her but he had committed to working professionally with the colleague on his return if their roster patterns overlapped. Mr Balfour's offensive descriptions did not provide a sufficient basis on which AVSEC could disregard or reject that assurance.

Attributable wholly or mainly to Mr Nolan

[107] Any incompatibility originated with the colleague's misconduct on 4 May and the later comments, not with Mr Nolan.

[108] Mr Nolan worked from mid-May until the beginning of September and then returned to work briefly on the same team as the colleague. Mr Nolan attributes blame to the colleague for the several difficulties mentioned in evidence. I bear in mind that the colleague was subject to an investigation into Mr Nolan's formal complaint, a formal disciplinary process and a final written warning throughout this period. Given that, I do not accept Mr Nolan's evidence that the colleague acted improperly in any interactions with him. The probabilities are that the colleague acted in a guarded way in her dealings with Mr Nolan following his formal complaint. For example, any note taking by her was likely to be for the purpose of making a contemporaneous record of

the interaction and not for the purpose of intimidating Mr Nolan. I accept there would have been tension between Mr Nolan and the colleague, but short of incompatibility. Any tension over this time was attributable both to the colleague and Mr Nolan.

[109] After Mr Nolan was certified as medically unfit for work, Mr Nolan directly and through his representative referred to several unrelated allegations about the colleague as warranting her removal from the workplace. Mr Nolan directly and through his representative referred to the colleague in an offensive manner. Any incompatibility caused by this conduct would be attributable to Mr Nolan. However, there is no evidence that Mr Nolan or Mr Balfour conveyed these allegations or offensive descriptions to the colleague.

[110] Taken overall, AVSEC cannot show that any incompatibility is attributable wholly or mainly to Mr Nolan.

Procedural fairness

[111] I include here factors covered by s 103A(3) of the Act even though they cover issues of substantive as well as procedural fairness.

[112] AVSEC is a statutory authority and has resources that enable it to thoroughly investigate any concerns before dismissing an employee. However, this matter does not turn on the sufficiency of AVSEC's investigation.

[113] Mr Nolan is critical that AVSEC did not accept the independent legal advice when it decided to dismiss him whereas it sought[24] such advice when it did not dismiss the second colleague. Mr Nolan misconstrues the basis of Mr Bevan's advice.[25] AVSEC was legally represented in its dealings with Mr Nolan. It did not seek independent advice regarding its own position. It sought and obtained submissions on Mr Nolan's behalf from Mr Bevan as an independent lawyer, because of its concern that Mr Balfour's approach meant that Mr Nolan had not had a fair opportunity to be heard in response to AVSEC's concerns.

[114] The difficulty that arises for AVSEC, even though it was attempting to protect Mr Nolan's position, is that Mr Bevan's views were relevant to its decision about the

[24] Mr Nolan observes that the advice was not disclosed. AVSEC is entitled to hold it in confidence.
[25] Mr Nolan also is critical that personal information was disclosed to Mr Bevan without his consent. AVSEC was entitled to disclose relevant material for the purpose of obtaining submission from Mr Bevan. It could rely on his obligation to hold it in confidence.

continuity of Mr Nolan's employment but he was not given an opportunity to comment on, adopt or supplement those views before AVSEC decided to dismiss him. Compliance with the good faith obligation in s 4(1A) is part of the s 103A test for justification.

[115] I am not satisfied that AVSEC can show that Ms Urwin genuinely considered Mr Nolan's comments in response to the 19 February letter. Having been told by Ms Preece about the 5 March discussion, Ms Urwin on 10 March characterised Mr Nolan's "enthusiasm this week" for a resolution as "insincere". She also characterised Mr Nolan's willingness to return subject to a change in teams as seeming "disingenuous". The discussion with Ms Preece followed AVSEC raising the possibility of dismissal. AVSEC expressly left open the possibility of a return to work discussion and the discussion with Ms Preece was positive, including Mr Nolan expressing a willingness to consider mediation with the colleague as part of a return to work. Ms Urwin had no basis for characterising Mr Nolan's exchange with Ms Preece as "insincere" or "disingenuous" other than to reinforce her view expressed in the dismissal letter that there was a "severe and irresolvable incompatibility" between Mr Nolan and the colleague.

[116] Prior to the 11 March meeting, Ms Urwin in her 19 February letter said the meeting was to discuss its "proposal (and this proposal alone)" that Mr Nolan's employment be terminated on the basis of "severe and irresolvable incompatibility". However, in the dismissal letter Ms Urwin said she "attended the meeting expecting that we might be able to agree a timeline to facilitate your return to work." AVSEC did not propose a timeline before or at the meeting and did not alert Mr Nolan to its expectation that a timeline might be agreed then. To the extent that the lack of an agreed timeline was of concern to AVSEC, it was not raised with Mr Nolan and he had no opportunity to respond before the dismissal.

[117] I find that AVSEC did not act in a procedurally fair manner when it made its decision to dismiss Mr Nolan.

Conclusion

[118] AVSEC has not shown that there was an irreconcilable incompatibility, attributable wholly or substantially to Mr Nolan. AVSEC did not carry out the dismissal in a procedurally fair manner.

[119] I find that AVSEC's actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances at the time. Mr Nolan was unjustifiably dismissed and has a personal grievance.

Remedies

[120] Mr Nolan claims reinstatement. I must order reinstatement wherever practicable and reasonable. I find that reinstatement is neither practicable nor reasonable.

[121] Mr Rivers gave evidence that an interpersonal issue such as between Mr Nolan and the colleague creates a lack of trust which affects AVSEC's ability to provide aviation security. I accept this evidence. The Covid-19 border restrictions since Mr Nolan's dismissal have affected the roster and work arrangements, meaning there is now less opportunity to separate Mr Nolan and the colleague.

[122] Putting aside the issues raised in his formal complaint, Mr Nolan in his evidence was very critical of the colleague. He persisted with serious hearsay assertions about the colleague's work conduct affecting other staff, unrelated to the issues arising in his personal grievance claim. He also produced a letter apparently from one of her former employers which includes a range of demeaning assertions about the colleague. Mr Nolan's purpose is to attack the colleague's character.

[123] Mr Nolan cannot be fairly criticised for holding and expressing critical views of the colleague's conduct relating to the 4 May incident. He was the victim of her workplace misconduct. However, his evidence during the investigation of his personal grievance claims demonstrates he now had a hardened attitude to the colleague that makes his reinstatement to the work environment impracticable and unreasonable.

[124] Mr Nolan offered no evidence in support of his claim for reimbursement of lost remuneration. In response to my questions, he said he had received no taxable income, that he had worked for Mrs Nolan's company although unpaid and that he had done "odd jobs" for neighbours. When pressed, Mr Nolan said he worked irregularly ("3 hours here, 3 hours there") for his wife's company generating income for it, which he estimated might amount to $2,000 - $3,000 worth of income for him if paid a wage. When questioned by counsel, Mr Nolan admitted that he worked as security for 3 hours per day 7 days per week for a neighbour's business, invoiced

through his wife's company. Mr Nolan also said he worked in his wife's business and kept himself busy. However, he denied involvement in listing short-term rental properties. Mr Nolan admitted he had not applied for any jobs, as he was awaiting the outcome of this case.

[125] An applicant is obliged to prove their loss and their attempts to mitigate that loss in support of their claim under the Act for reimbursement of lost remuneration caused by an unjustified dismissal. Mr Nolan has not proven the extent of his loss or that he took reasonable steps to mitigate it. I am unable to award lost remuneration.

[126] There is a claim for compensation for humiliation, lost dignity and injured feelings. Any award must be limited to such affects caused by the unjustified dismissal, rather than Mr Nolan's reaction to the colleague's misconduct.

[127] Mr Nolan sought professional assistance, some of which cost was reimbursed by AVSEC, but his evidence is that this ended in January 2020. For the most part his evidence is directed at his response to the colleague's continued employment despite her misconduct. Much of Mrs Nolan's evidence is similarly directed. However, I am unable to award a remedy for that loss as it is not attributable to any breach of obligation by AVSEC.

[128] Mrs Nolan gave evidence about the financial difficulties, worry, sleepless nights and resulting relationship issues which have affected Mr Nolan. I accept that this is partly attributable to the unjustified dismissal. Mr Nolan also gave evidence that AVSEC decided to resolve matters in a "callous and grossly unfair way…with my unwarranted dismissal, the disappointment, resentful, frustration, anger and disillusionment my family and I feel cannot be put into words." I accept that Mr Nolan has suffered these effects.

[129] There is no independent, professional evidence about the effects suffered by Mr Nolan.

[130] I find that these proven effects attributable to the unjustified dismissal are remedied by an award of $10,000.00 compensation.

[131] In deciding the nature and extent of the remedies, I must consider the extent to which Mr Nolan's actions contributed in a blameworthy way towards the situation giving rise to the personal grievance, and reduce the remedies accordingly. Mr

Nolan's medically certified time off work from September is not blameworthy conduct so is not part of the present assessment.

[132] However Mr Nolan contributed in a blameworthy way to AVSEC's conclusion that there was a severe and irresolvable incompatibility between him and the colleague. This finding is based particularly on the offensive way in which Mr Balfour described the colleague in his exchanges with AVSEC on Mr Nolan's behalf following Ms Urwin's 19 February letter. To the extent that there was a point of substance to make, Mr Balfour could have made it without recourse to offensive descriptions. Mr Nolan engaged Mr Balfour, did not resile from the offensive descriptions (some of which had been earlier used by them both) and must be taken as endorsing them.

[133] I do not accept that Mr Nolan's decision in September[26] not to participate in mediation was blameworthy conduct on his part, for the reasons given earlier. AVSEC might reasonably have proposed a reconciliation process as part of Mr Nolan returning to work but never got to the point of including that in a comprehensive return to work proposal. Bearing in mind that Mr Nolan's claims for reinstatement and reimbursement fail, s 124 of the Act further requires a reduction in compensation of 10%.

Summary

[134] Mr Nolan's employment was affected to his disadvantage by an unjustifiable action by AVSEC. To remedy this grievance there will be an order that Civil Aviation Authority pay Mr Nolan compensation of $5,000.00 pursuant to s 123(1)(c)(i) of the Act.

[135] Mr Nolan was unjustifiably dismissed. To remedy this grievance there will be an order that Civil Aviation Authority pay Mr Nolan compensation of $9,000.00 pursuant to s 123(1)(c)(i) of the Act.

[136] There is a claim for costs but Mr Balfour made no submissions in support. Counsel's submission is that the Authority should apply the standard daily tariff. I agree with counsel's submission. The problem was set for a two day investigation meeting and occupied most of that time. I fix time for the daily tariff at a day and a

[26] The same point extends to a restorative justice process suggested in December.

half, given that Mr Nolan has succeeded on two grievances but failed on other aspects of his claim. There will be an order for costs at $6,250.00 and a further $71.56 to cover the lodgement fee, in total $6,321.56.

[137] All Mr Nolan's other claims fail.

Philip Cheyne
Member of the Employment Relations Authority