IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 132
3175723

	BETWEEN	KAMAL (BILLY) PRASAD Applicant
	AND	AUCKLAND TRANSPORT Respondent

Member of Authority:	Shane Kinley
Representatives:	Allan Halse, advocate for the Applicant Charlotte Parkhill and Stacey Fletcher, counsel for the Respondent
Investigation Meeting:	12 and 13 December 2023 in Auckland
Submissions and further information:	22 December 2023, 19 February 2024 and 1 March 2024
Determination:	6 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Kamal (Billy) Prasad has been employed by Auckland Transport (AT) as a Transport Officer (TO) since 2018. Mr Prasad raised claims that AT unjustifiably disadvantaged him in his employment in relation to the issuing of a warning (in March 2022 and failing to investigate his complaints of bullying and failing to provide a safe workplace (in relation to an incident that occurred in January 2023).

[2] AT denies that Mr Prasad has been unjustifiably disadvantaged in his employment and says that its decision to issue a warning was fair and reasonable in all

the circumstances. AT further denies that it failed to investigate Mr Prasad's complaints of bullying and says that the incident was a one-off interaction which was not repeated.[1]

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged for Mr Prasad by himself, Kea Te Kani, Rajneet Kaur and Mahesh Kumar (all of whom were also TOs who worked with Mr Prasad)[2], and for AT by Rick Bidgood (Head of Transport and Parking Compliance) and Keith Barrington-Pace (previously a Supervisor at AT). Messrs Prasad, Kumar, Bidgood and Barrington-Pace and Mses Te Kani and Kaur answered questions, under affirmation, from me and from Mr Prasad's advocate and AT's counsel. The representatives also provided written submissions following the investigation meeting. The representatives were also invited to discuss and provide any further relevant information referred to during the investigation meeting, however no further information was provided.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

(a) Whether AT in issuing a warning to Mr Prasad has unjustifiably disadvantaged him, considering whether:

(i) AT breached its duty of care towards Mr Prasad,

(ii) AT breached its health and safety obligations by failing to ensure Mr Prasad was safe from stress and psychological harm, and

(iii) AT breached Mr Prasad's employment agreement?

(b) Whether AT has unjustifiably disadvantaged Mr Prasad by failing to progress him through the pay framework at the same or a similar rate to

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[1] AT's response to alternative versions of Mr Prasad's claims were that further details were needed to respond to the alternative versions of those claims and, in any event, it denied these claims. AT's response to these claims is addressed in relevant sections of this determination.

[2] Further documents were lodged on behalf of Mr Prasad from three other individuals. Mr Prasad's advocate advised, following a case management conference to discuss arrangements for the investigation meeting, that two of those people would not be providing evidence at the investigation meeting. The third person was not able to attend the investigation meeting. As the evidence from these potential witnesses was not able to be tested, I have not considered it further in making this determination.

other transport officers (or in the alternative this amounts to a breach of Mr Prasad's employment agreement)?

(c) Whether AT has unjustifiably disadvantaged Mr Prasad by failing to investigate his complaints of bullying and failing to provide a safe workplace?[3]

(d) If Mr Prasad has been disadvantaged by the actions of AT (or other versions of his claims are made out), what remedies should be awarded, considering lost wages, compensation for hurt and humiliation, and removal of all warnings?

(e) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Prasad that contributed to the situation giving rise to his grievance?

(f) Should either party contribute to the costs of representation of the other party.

[6] Issue [5](b) was withdrawn at the investigation meeting by Mr Prasad's advocate and is not addressed further in this determination.

Relevant law applicable to Issues [5](a) and (c)

[7] For Mr Prasad's unjustified disadvantage claims under s 103(1)(b) of the Act to be successful requires that:

a. Mr Prasad's employment, or one or more conditions of his employment, is or are (in this case, as Mr Prasad's employment with AT is ongoing) affected to Mr Prasad's disadvantage; and
b. This was due to some unjustifiable action by AT.

[8] In assessing this, I must apply the test of justification under s 103A of the Act: whether AT's actions, and how AT acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[3] Mr Prasad's statement of problem also referred to AT having failed to act in good faith (as required under s 4 of the Act) and AT having engaged in adverse conduct for a prohibited health and safety reason (as defined in s 110A of the Act). These points could be considered as alternative claims, however, were raised as part of the claim of unjustified disadvantage. Submissions for Mr Prasad which presented these as alternative claims are addressed as appropriate in the relevant sections of this determination.

[9] In reaching my conclusions about Mr Prasad's unjustified disadvantage claims, I must consider:

a. having regard to the resources available to it, did AT sufficiently investigate before taking action;
b. did AT raise concerns that it had with Mr Prasad before taking action;
c. did Mr Prasad have a reasonable opportunity to respond; and
d. did AT genuinely consider Mr Prasad's explanation or comments.

[10] I may also take into account any other factors I think are appropriate. I must not determine an action to be unjustifiable where there were defects in AT's process that were minor and did not result in Mr Prasad being treated unfairly.

Did AT, in issuing a warning to Mr Prasad, unjustifiably disadvantage him?

Context for Issue [5](a)

[11] While there were a number of agreed facts relevant to this issue there were divergences in what inferences should be taken from those facts, and different views about what the law required (including both the Act and the Health and Safety at Work Act 2015 (HSWA)) and whether AT's or Mr Prasad's actions were justified or not.

[12] The agreed facts included that:

(a) Mr Prasad sent a survey to an AT TO email distribution group on 14 February 2022. The results were shared by Mr Prasad on 17 February 2022 with the AT TO email distribution group and copied to Mr Bidgood, a union delegate and other recipients. Both of Mr Prasad's emails included the email signature ending "HSWR". Mr Bidgood responded asking a number of questions about who in "H&S Management" or operational management had been involved with the survey and expressed a view that the survey was "unacceptable". Mr Prasad responded saying the answer to Mr Bidgood's questions was in the HSWA;

(b) An AT HR staff member had entered an area at AT's office on the morning of 16 February 2022 (during COVID-19 restrictions), where TOs had been storing equipment in bubbles of approximately three TOs per meeting room and had moved the equipment of three TOs (including Mr Kumar and Mses Te Kani and Kaur). The HR staff member had then sent an email to Mr Bidgood, a number of TOs and supervisors, but not Mr Prasad, which included reference to the room having been used as a "closet";

(c) There was discussion at a team briefing of TOs on the afternoon of 16 February 2022 (including Messrs Prasad and Kumar, Ms Kaur and a union delegate) with Mr Barrington-Pace (at the time the supervisor of those TOs) about the HR staff member's actions and email. There was a difference of opinion between Mr Barrington-Pace and the TOs about the significance and appropriateness of the HR staff member's actions. Following this the union delegate and Mr Prasad both sent emails to different recipients at AT;

(d) Mr Bidgood responded to the union delegate's email, supporting the HR staff member's actions and saying he did not consider they had acted in malice but had been unaware of health and safety protocols in a changing context of COVID-19. Mr Bidgood viewed the union delegate and Mr Prasad's emails quite differently, which is key to the reason Mr Prasad was eventually issued with the final written warning;

(e) On 21 February 2022 Mr Bidgood invited Mr Prasad to a "formal Disciplinary Investigation Meeting" to discuss three allegations, including in relation to Mr Prasad conducting the survey (referred to at paragraph [12](a) above) and Mr Prasad's email to the HR staff member referred to at paragraph [12](c) above), both of which were considered to be actions which could amount to serious misconduct under AT's Code of Conduct. A third allegation was included but subsequently withdrawn;

(f) An Investigation Meeting was held on 28 February 2022 attended by Messrs Prasad and Bidgood, the union delegate (as a support person), a union organiser, an HR business partner (who was supporting Mr Bidgood) and a note-taker. The meeting occurred in a hybrid manner, with some participants in person and others attending by AVL. The allegations were presented with Mr Prasad, his support person and the union organiser responding. There were a number of adjournments, and then a break until the meeting reconvened on 2 March 2022 where, following further adjournments, a verbal outcome was advised by Mr Bidgood; and

(g) Mr Bidgood, on behalf of AT, issued Mr Prasad a final written warning on 8 March 2022 in relation to Mr Prasad actions in conducting the survey and sending the email to the AT HR staff member, both of which were considered to amount to serious misconduct.

Submissions of the parties

[13] Submissions for Mr Prasad were that AT's actions in relation to the employment investigation which led to AT issuing Mr Prasad a warning "were not those of a fair and reasonable employer or those of an employer acting in good faith". In relation to Mr Prasad's email to the HR staff member, submissions said that there was no evidence of a complaint, the email did not contain any disrespectful language and the email was to "inform relevant staff of bubble breaches and to raise awareness of covid exposure". In relation to Mr Prasad conducting the health and safety survey, submissions said AT had no justifiable basis for initiating a misconduct investigation when Mr Prasad was carrying out a function which was in accordance with his duties and responsibilities as a health and safety representative.

[14] Submissions for Mr Prasad also said that:

(a) Mr Bidgood's role as the person initiating the complaint, investigating the complaint and as decision maker was inappropriate, with the process being significantly worse than in another case involving Mr Bidgood considered by the Employment Court[4];

(b) There was disparity of treatment in relation to the email sent by the union delegate;

(c) Mr Prasad was subject to workplace bullying for five years; and

(d) AT's actions were retaliatory acts against Mr Prasad when exercising his functions as a health and safety representative, in breach of s 110A of the Act (related to adverse conduct for a prohibited health and safety reason) and ss 88 and 89 of the HSWA.

[15] Submissions for AT were that Mr Prasad had not suffered any unjustified disadvantage, it had not breached the Act or the HSWA, or engaged in adverse conduct against Mr Prasad for a prohibited health and safety reason, and its decision to issue Mr Prasad with a final written warning was fair and reasonable. AT submitted that it had followed an appropriate process, including raising allegations with Mr Prasad, providing him with an opportunity to respond to those allegations and considering his response before reaching a conclusion.

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[4] *Hong v Auckland Transport* [2019] NZEmpC 54.

[16] Submissions for AT elaborated that:

(a) It was fair and reasonable for Mr Bidgood to conduct the investigatory process, with this matter able to be distinguished from *Hong v Auckland Transport* as Mr Bidgood was not required to make any assessment of credibility of his own account of events and could make his decision based on uncontested documentary evidence;

(b) Given the documentary evidence related to the first two allegations, that is the survey and the email, it was reasonable to not conduct any interviews and to focus the investigation on whether there was any reasonable explanation for why the conduct in question occurred;

(c) Mr Bidgood was entitled to prefer Mr Barrington-Pace's evidence that he instructed Mr Prasad not to send the email to the HR staff member, over Mr Prasad's evidence that he did not. In any event, Mr Prasad should have known that sending the email to a wide distribution group was inappropriate;

(d) Not providing Mr Barrington-Pace's file notes as part of the investigation process was a minor procedural defect as Mr Prasad was aware of the allegation Mr Barrington-Pace had instructed Mr Prasad not to send the email to the HR staff member, with knowledge there was a file note to that effect;

(e) The Authority should not substitute its own view for that of AT's (specifically Mr Bidgood's) that the explanation provided by Mr Prasad did not justify his actions;

(f) Mr Prasad knew or ought to have known that the email and survey were inappropriate;

(g) There was no disparity of treatment, as Mr Bidgood determined that the email sent by the union delegate was appropriate, compared to the email sent by Mr Prasad which was determined to be inappropriate; and

(h) The powers conferred on a Health and Safety representative under the HSWA cannot be intended to provide an unconstrained ability for an employee to engage in misconduct and to avoid any potential disciplinary outcome.

[17] There was no reference in Mr Prasad's correspondence or at any other stage of the AT investigation meeting or the process of his employment relationship problem, including at the investigation meeting or in submissions following, to cl 16 of of Sch 2

of the HSWA which provides health and safety representatives acting in good faith with immunity in the performance or exercise of their functions or powers. I therefore requested comment or supplementary submissions on the relevance of this clause.

[18] Submissions for Mr Prasad were that this clause demonstrated Parliament intended that "health and safety representatives must be able to carry out their duties and responsibilities without any fear of civil or criminal liability". Submissions for AT were that this clause did not apply to "employment processes (such as an investigation or disciplinary process) … [and was] therefore not relevant to the Authority's determination of [Mr Prasad's] claim".

Findings about whether AT, in issuing a warning to Mr Prasad, unjustifiably disadvantaged him

[19] As discussed in paragraphs [11] and [12] a number of facts relevant to this issue were agreed. There is no dispute that Mr Prasad sent an email to an HR staff member, copied to a number of email distribution groups at AT, or that Mr Prasad undertook a survey of TOs about COVID-19 matters and then shared the results of that survey. What is primarily in dispute is whether Mr Prasad's actions were reasonable and whether AT could justify its actions in response as being those of a fair and reasonable employer, as required by s 103A of the Act. To determine this, there are a number of other issues where findings of fact are needed.

[20] As context for the findings that follow, I observe that at the investigation meeting Mr Prasad presented as being passionate about his role as a TO and having been passionate about health and safety matters, including representing his colleagues. He also expressed frustrations at the culture of the TO department and some negative views about management responses to issues and his past treatment when raising issues. Mr Prasad was supported by a number of his TO colleagues who provided evidence at the investigation meeting and who expressed appreciation for Mr Prasad raising issues on their behalf. These observations are relevant to my findings below about Mr Prasad's rationale for his actions.

[21] Mr Bidgood was questioned about his views of Mr Prasad, outside of the context of this matter. He said that he liked Mr Prasad as a person and had no reason not to, however, also acknowledged frankly that when he had taken over managerial responsibility for the TO department that Mr Prasad's name had come up during handovers and that had not involved favourable comments. Mr Bidgood also

acknowledged that there had been significant effort into culture change for the TO department, in response to issues that had occurred and culture survey results. These observations are relevant to my findings below about Mr Bidgood's actions.

Mr Bidgood's role in the disciplinary process was not inappropriate

[22] There is no dispute that Mr Bidgood initiated the disciplinary process based upon documentary evidence, investigated the allegations and was the decision maker, supported by an HR business partner. Mr Bidgood's decision was also reviewed by Mr Strawbridge, when Mr Prasad raised his personal grievance about the disciplinary process, and Mr Bidgood's decision was effectively endorsed.

[23] Given there was also no dispute that Mr Prasad had conducted the survey and sent the email to the HR staff member, I consider that Mr Bidgood was able to rely on the documentary evidence to raise concerns with Mr Prasad. While Mr Bidgood had previously expressed support for the HR staff members actions, in his reply to the union delegate, I do not consider that this tainted his investigation of the allegations put to Mr Prasad such that it would have been inappropriate for him to undertake the investigation. Mr Bidgood provided clear evidence of the reason why Mr Prasad's email was considered inappropriate, being the tone and content of the email, and why the survey was of concern. I accept AT's submissions that Mr Bidgood's consideration of the allegations put to Mr Prasad did not raise the same concerns as were present in *Hong v Auckland Transport* as Mr Bidgood was not required to make any assessment of credibility of his own account of events and could make his decision based on uncontested documentary evidence.

[24] I also do not consider that a formal complaint was needed from the HR staff member for Mr Bidgood to commence an investigation and he was able to rely on the documentary evidence of Mr Prasad's email. Mr Bidgood provided evidence that he had spoken to the HR staff member, who said that they were humiliated and traumatised by Mr Prasad's email. While it may have been preferable to have requested that the HR staff member make a formal complaint and to have then provided that to Mr Prasad, I consider that Mr Prasad was clearly made aware of the reasons for Mr Bidgood's concerns. In these circumstances I do not consider the absence of a formal complaint to be anything more than a minor procedural defect.

Decision making process and outcome were not inappropriate and any procedural defects were minor

[25] A number of concerns were raised with the disciplinary process on Mr Prasad's behalf. I do not consider that the overall disciplinary process or outcome of a warning was inappropriate for the following reasons.

[26] While a third allegation was raised that Mr Prasad's overall behaviour had not been appropriate, that allegation was appropriately withdrawn by AT during the disciplinary process, when it was challenged by Mr Prasad's union representative and did not form part of the reasons for the outcome of a warning. I am not convinced that the raising of that allegation tainted the process in relation to the allegations which were upheld and led to Mr Prasad receiving a warning.

[27] There were a number of statements from Mr Bidgood in the notes from the investigation meeting which raised the potential that he had pre-determined the matter, such as a statement during discussion of the allegations that Mr Prasad may have felt he had done everything correctly but he hadn't. While this statement by Mr Bidgood is in isolation potentially concerning, it was clear from the remainder of the notes from the meeting that there was an opportunity for Mr Prasad and his union representative to respond to the allegations and those responses were considered (including with breaks to consider those responses) prior to a decision being reached. I do not consider that those statements therefore are sufficient to reach a conclusion that the overall outcome of the disciplinary process was predetermined.

[28] I do not consider that there was an unjustified disparity of treatment between Mr Prasad and the union delegate in relation to the separate emails that they sent about the HR staff member's action and in response to their email. Throughout the disciplinary process and in evidence at the investigation meeting for this matter it was clear that the reason for different treatment was Mr Bidgood's view that the union delegate's raising of concerns was done in an appropriate manner, while Mr Prasad's email was not appropriate. Having reviewed both emails I consider that is a conclusion that was open to Mr Bidgood to reach.

[29] While Mr Prasad requested that the disciplinary meeting be recorded, there is no absolute right for this to occur. When questioned about why he declined this request Mr Bidgood said that was not normal practice at the time and referred to the presence of a notetaker, who he said was an incredibly fast typer and took close to verbatim

notes, which he considered would have reflected the meeting. It was acknowledged that the notes were not shared at the time, however, I consider that this could be considered a minor procedural defect given the outcome of the disciplinary meeting and reasons for that outcome were clearly communicated shortly after the meeting.

[30] While Mr Barrington-Pace's notes were not disclosed prior to AT's investigation meeting, they were clearly read into the record of that meeting. Disclosing the notes in advance would have been preferable, but they were not the primary basis for the allegation and Mr Prasad was able to provide his response to those notes at AT's investigation meeting, saying (as he maintained in his in-person evidence) that he did not accept that Mr Barrington-Pace had told him not to send an email or who to send an email to. I consider that this was also a minor procedural defect, given the nature of the allegation addressed at the investigation meeting was that Mr Prasad had sent an inappropriate email, rather than the allegation being focussed on the email having been sent contrary to a lawful instruction from his supervisor.[5]

[31] There was no clear policy of AT that directly addressed what was needed in relation to Mr Prasad undertaking his survey. I consider it was reasonable, however, for AT to raise concerns with Mr Prasad about that survey given he was not trained as a health and safety representative and did not appear to recognise that he could have engaged on whether a survey was appropriate and what sorts of questions should be asked.

While Mr Prasad's concerns were genuine, some of his actions were not appropriate and were not protected by his role as a health and safety representative

[32] Mr Prasad has throughout the process of his actions, AT's investigation meeting and the process of his employment relationship problem, including during his in-person evidence, maintained the view that his actions were justified as a health and safety representative. His emails in relation to the survey and replying to the HR staff member's email were all signed off HSWR, and in relation to the survey when questioned by Mr Bidgood he justified his actions with reference to various provisions of the HSWA, including the functions of a health and safety representative under cl 1 of Sch 2 of the HSWA.

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[5] While the failure to follow a lawful instruction was referred to in a response from Mr Strawbridge to Mr Prasad's personal grievance, AT's primary position was that Mr Prasad had sent an inappropriate email.

[33] The allegations raised against Mr Prasad were that he had initiated the survey outside his role as a TO and as a health and safety representative, noting that he had not completed AT's training for health and safety representatives.

[34] The notes from AT's investigation meeting show that Mr Bidgood repeated questions to Mr Prasad about who in AT's health and safety team authorised, scripted or approved the release of the survey and asked when Mr Prasad intended to discuss the survey with Mr Bidgood. Mr Prasad's response was clear that he had not engaged with anyone about the survey, though he claimed that he undertook the survey in good faith. There was limited further discussion of this allegation at AT's investigation meeting before Mr Bidgood advised that the allegation had been upheld and the warning repeated that saying:

> There was no reasonable explanation offered that could provide a sound rationale as to why you undertook this course of action without proper authorisation. We outlined to you that being a HSW representative does not entitle you to undertake any initiatives that you may deem appropriate and that we have a dedicated safety function who provide expert advice on this basis.

[35] At the investigation meeting Mr Prasad maintained that he had acted in good faith, in response to concerns of other TOs. Mr Prasad acknowledged that he had not completed AT's health and safety representative training and had not engaged with anyone from AT's health and safety team about the survey but maintained that his actions were appropriate.

[36] Mr Prasad was questioned about reference in the notes from AT's investigation meeting that Mr Prasad's union representative had acknowledged on his behalf that, while he had acted in good faith, he recognised AT's view was that he had not followed an appropriate process in relation to the survey and would be taking that on board in the future. Mr Prasad said he had no recollection of such an acknowledgement.

[37] At the investigation meeting Mr Bidgood elaborated on the reasons that he considered Mr Prasad's actions in relation to the survey were not appropriate, including the context of COVID-19 meaning it was essential that health and safety matters were very carefully handled. He emphasised that his actions were very closely coordinated with AT's health and safety team and said he expected during the COVID-19 time that anyone doing something with as much potential impacts as the survey would have checked it with appropriate people.

[38] Mr Bidgood acknowledged that there were no specific provisions (including in AT's Health, Safety and Wellbeing Policy) that required Mr Prasad consult or get approval before sending the survey, however, maintained that the Code of Conduct applied to Mr Prasad's actions and that Mr Prasad had not acted appropriately.

[39] I am satisfied that Mr Prasad had concerns about health and safety matters which motivated him to send the survey, but consider he misinterpreted his powers and functions as a health and safety representative. In order for his actions to be protected under cl 16 of Sch 2 of the HSWA they must have been done in good faith.

[40] I am not convinced that Mr Prasad fully met the requirements of good faith as reflected in s 4 of the Act, particularly in relation to the requirement to be active and constructive, and responsive and communicative. This would have called into question whether Mr Prasad's actions were protected under cl 16.

[41] Neither, however, do I consider that Mr Bidgood adequately considered Mr Prasad's responses to the allegation in relation to the survey. The portion of AT's investigation meeting which covered this allegation was very short and appears to restate positions, rather than showing full consideration of Mr Prasad's response.

[42] Were concerns around the survey the sole basis for the warning then I would have needed to very carefully consider whether the warning was justified overall. I do not consider I need to reach a finding on this point, however, as I am satisfied that AT's decision to issue Mr Prasad with a warning in relation to the email he sent to the HR staff member was not unjustified.

[43] In relation to that email Mr Prasad's position was similar to his position in relation to the survey, in terms of saying that his actions were in response to genuine concerns and undertaken in good faith. Submissions for him were that the email did not contain any disrespectful language. His evidence at the investigation meeting was that other TOs were concerned about the breaching of their bubbles and he was concerned that Mr Barrington-Pace was not taking appropriate action in relation to that risk. He remained of the view that the issue he was raising was very serious and he needed to send the email and has consistently stated that he did not hear Mr Barrington-Pace tell him not to send the email to a wide group of people.

[44] Mr Bidgood's evidence, the notes from the investigation meeting and AT's response to Mr Prasad's personal grievance emphasised that AT did not accept that Mr

Prasad's email was sent in good faith, with an emphasis on the personally directed nature and tone of the email. The warning letter also emphasised that Mr Bidgood did not consider Mr Prasad had recognised the impact that the email had on the HR staff member or how the email was disrespectful.

Conclusions in relation to AT issuing a warning to Mr Prasad

[45] I consider that it was open to Mr Bidgood to conclude that Mr Prasad's email was not sent in good faith as reflected in s 4 of the Act, particularly in relation to the requirement to be active and constructive. The tone of Mr Prasad's email means I consider that Mr Prasad's actions in sending the email are not entitled to protection under cl 16 of Sch 2 of the HSWA. I also consider it not unreasonable for Mr Bidgood to have chosen to have preferred the evidence of Mr Barrington-Pace to that of Mr Prasad over whether an instruction had been provided over who to raise concerns with.

[46] The evidence before me shows that Mr Bidgood investigated the circumstances of Mr Prasad's email to the HR staff member, before raising his concerns with Mr Prasad and inviting him to AT's investigation meeting, where Mr Prasad had a reasonable opportunity to respond (which he did and his union representative did also on his behalf), and Mr Bidgood genuinely considered Mr Prasad's explanation or comments. I consider that any defects I have noted above in relation to AT's process were minor and did not result in Mr Prasad being treated unfairly in relation to Mr Bidgood's conclusion that his actions in sending the email to the HR staff member constituted serious misconduct and justified a final written warning.

[47] It follows from these findings that Mr Prasad's claim that AT unjustifiably disadvantaged him, by issuing a warning to him, is unsuccessful.

[48] In relation to the claims that AT's actions were retaliatory acts against Mr Prasad when exercising his functions as a health and safety representative, in breach of s 110A of the Act (related to adverse conduct for a prohibited health and safety reason) and ss 88 and 89 of the HSWA, I do not consider that these claims have been established. Submissions for Mr Prasad on this point overlapped with Mr Prasad's claim for unjustified disadvantage and did not provide further reason why that was the case. Those submissions simply cited s 110A of the Act and ss 88 and 89 of the HSWA and asserted that "Breaching statutory obligations, particularly in a retaliatory manner, are not the actions of an employer acting in good faith".

[49] I consider that AT had reasonable grounds for raising its concerns with Mr Prasad about his actions that were labelled as being taken in his role as a health and safety representative, and whether they were in good faith, particularly in relation to the email to the HR staff member. I do not consider that the warning AT issued Mr Prasad was because he was a health and safety representative or because he had asserted he was exercising statutory rights and powers. AT clearly presented the warning as being related to how Mr Prasad acted, not the fact that he asserted his right to act as a health and safety representative.

Did AT unjustifiably disadvantage Mr Prasad by failing to investigate his complaints of bullying and failing to provide a safe workplace?

Context for Issue [5](c)

[50] As with Issue [5](a), there were a number of agreed facts relevant to this issue with divergences in what inferences should be taken from those facts, and different views about what the law required (including both the Act and the HSWA) and whether AT's or Mr Prasad's actions were justified or not.

[51] The agreed facts included that:

(a) An incident occurred on 27 January 2023 between Mr Prasad and another TO, during the Auckland weather events of that day;

(b) The other TO complained about the actions of Mr Prasad, which led to an informal investigation undertaken by an AT Manager. Mr Prasad did not participate in the informal investigation, which was said to have reached the conclusion that there was fault on the part of both Mr Prasad and the other TO, and that no further action should be taken in relation to the incident (Mr Prasad did not accept that conclusion and there was no documentary evidence of the conclusion of the investigation, which was said to be due to the informal nature of the investigation);

(c) The AT Manager responsible for that informal investigation left AT and Mr Prasad's Regional Operations Manager attempted to arrange a meeting to close out the investigation with him. There was miscommunication about the purpose of that meeting and whether the investigation had been closed, which led to an exchange between Mr Prasad and Mr Bidgood, who then met. Mr Bidgood then issued Mr Prasad with a letter of expectations (LoE), said to be non-disciplinary, which included an offer to "draw a line in the sand";

(d) Mr Prasad accepted in his in-person evidence that a complaint in writing on his behalf was first raised on 29 June 2023, in response to the letter of expectations; and

(e) Mr Prasad did not seek leave under s114(3) of the Act to raise this grievance out of time.

[52] Mr Prasad considered that he had raised a complaint about the incident verbally, which was not adequately responded to by AT. In support of this he referred to an email reference from a TO supervisor to the AT manager investigating the incident saying that Mr Prasad had requested a meeting about the incident and had been told that the TO supervisor could not meet with him, as the matter had been passed to the AT Manager and HR.

[53] AT say that the lack of a formal complaint until June 2023 means that Mr Prasad did not raise a personal grievance until that time and is out of time to raise that grievance under s 114(1) of the Act.[6]

[54] The different perspectives of Mr Prasad and AT mean that I need to determine whether Mr Prasad raised this grievance in time and, if so, whether Mr Prasad was unjustifiably disadvantaged by AT's actions in relation to this issue and its decision to issue Mr Prasad with the LoE.

Relevant law

[55] The relevant law in relation to this unjustified disadvantage claim under s 103(1)(b) of the Act is summarised at paragraphs [7] to [10] above, including the test of justification under s 103A of the Act. In addition, I need to consider whether Mr Prasad raised this grievance within the notification period required under s 114 of the Act, taking into account his acknowledgement that leave was not sought under s 114(3) to raise this grievance out of time.

[6] While s 114 was amended effective 13 June 2023, this did not change the 90-day timeframe for Mr Prasad to have raised this grievance.

[56] Relevant considerations for whether Mr Prasad raised his grievance in time, drawing upon the Court's summary of applicable principles in *Chief Executive of Manukau Institute of Technology v Zivaljevic*, include:[7]

> The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. …
>
> It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.
>
> It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

Submissions of the parties

[57] Submissions for Mr Prasad said that he had raised personal grievances on a range of dates, with the relevant dates for this claim being in January and June 2023.

[58] Submissions for Mr Prasad also referred to him having been subjected to workplace bullying over a period of five years, with reference to the process that led to Mr Prasad being issued a warning (covered in paragraphs [11] to [48] above) as well as the Mr Prasad's complaint about an incident with another TO in January 2023. Those submissions also said that "bullying and the widely known physical and mental consequences of bullying mean that the respondent is not providing a safe work environment as required under the HSW Act".

[59] Submissions for AT were that Mr Prasad was out of time to bring a grievance in relation to the January 2023 incident, with there being no record of Mr Prasad lodging a complaint, particularly through AT's internal complaints system, Pā Mai. AT also said that Mr Prasad did not push for his complaint to be investigated and he was aware that the complaint that was being investigated, from the other TO, related to his behaviour.

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[7] [2019] NZEmpC 132 at [36] to [38].

[60] AT referred to the results of the informal investigation undertaken referred to at paragraph [51](b) above and said that showed it did not fail to investigate the allegation of bullying. Finally, AT submitted that the LoE which followed that informal investigation and Mr Bidgood's concerns about Mr Prasad's subsequent behaviour "was not disciplinary in nature … [and there was] no evidence … of any detrimental impact on [Mr Prasad's] employment".

While Mr Prasad raised his grievance orally, he has not established he was disadvantaged

[61] I consider that Mr Prasad orally raised his grievance in relation to the January 2023 event. The email exchange between Mr Prasad's supervisor and the AT Manager responsible for the informal investigation of the January 2023 event, forwarded to Mr Prasad, said that Mr Prasad had requested a meeting to discuss the incident. Mr Prasad's supervisor's email was titled "Incident Billy/[other TO's name] Friday night" and said the supervisor had informed Mr Prasad that they could not meet as the incident had "progressed pass [sic] me to [the AT Manager and the HR team]. He seemed happy with this response". This email was dated 30 January 2023, the Monday after the incident occurred.

[62] Based on the Court's summary of the principles regarding raising a grievance referred to at paragraph [56] above, on balance I consider Mr Prasad had done enough to draw his complaint to AT's attention and to request that it be investigated. If AT were unclear on what response Mr Prasad was seeking, it should have sought clarification from him.

[63] Mr Prasad then chose to not engage with the process of the AT Manager investigating the January 2023 event. Mr Prasad's evidence and submissions on his behalf talked of general notions of being bullied and having inappropriate action taken against him. I do not consider that Mr Prasad has established that AT's actions in relation to the complaint about the January 2023 event show that AT failed to investigate Mr Prasad's complaints of bullying or failed to provide a safe workplace. To the contrary, I consider the evidence showed that AT undertook a reasonable, albeit informal, investigation process in relation to the January 2023 event and wanted to engage with Mr Prasad about the January 2023 event, but he chose not to do so.

[64] In addition, I do not consider Mr Prasad has clearly identified how AT's response to that event disadvantaged him. He appeared to equate the LoE with a

disadvantage, however, this was contrary to the evidence of AT that a LoE was a non-disciplinary outcome intended to "draw a line in the sand". While Mr Prasad was clearly unhappy with the issuing of the LoE and talked about that as part of broader bullying behaviour by AT, there was no evidence presented that the LoE had been used in that way. On balance, I prefer the evidence of AT that the LoE was non-disciplinary, particularly given there are also references in the LoE to it reflecting agreed expectations on future communications and interactions.

[65] Neither do I consider there is any evidence that Mr Prasad has suffered adverse conduct in relation to the LoE.

[66] Finally, the Court has referred to the definition of bullying adopted by WorkSafe, as meaning: "repeated and unreasonable behaviour directed towards a worker or a group that creates a risk to health and safety".[8] While AT's informal investigation of the January 2023 event reached the conclusion that there was fault on the part of both Mr Prasad and the other TO involved, there was no evidence that this was more than a one-off incident, meaning my view is this does not meet WorkSafe's definition of bullying.

[67] While there were also references in submissions for Mr Prasad to a prolonged period of workplace bullying, I do not consider sufficient details or evidence has been provided to support that claim, in light of my findings about the specific incidents that Mr Prasad has raised grievances about.

Summary of outcome

[68] I have found that Mr Prasad's claims that AT unjustifiably disadvantaged him, by issuing a warning to him and by failing to investigate his complaints of bullying and failing to provide a safe workplace, are unsuccessful. A further claim of unjustified disadvantage was withdrawn at the investigation meeting. Alternative versions of Mr Prasad's claims were also unsuccessful.

[69] No orders are made.

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[8] *FGH v RST* [2018] NZEmpC 60 at [204].

Costs

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

[71] If they are not able to do so and an Authority determination on costs is needed, Auckland Transport may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Prasad would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[72] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[9] As the investigation meeting for this matter took two days, my preliminary view is that the notional daily rate for two days is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

[9] See https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf.